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From the Chair

by Phillip J. DeRosier

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It seems that a lot has been written lately about civility in appellate briefing when it comes to personal attacks on an opposing party or their counsel. A recent decision from the United States Court of Appeals for the Fourth Circuit serves as a useful reminder to also be careful what you say about the trial court.

In *United States v Venable*,[1] the Fourth Circuit affirmed the district court's decision to deny the defendant's request for discovery in connection with his selective prosecution claim, but then went on to take the government to task for what the court found to be abusive language directed at the district court, which had expressed concerns about a federal-state law enforcement initiative in Virginia called "Project Exile." Under Project Exile, firearm-related crimes were referred to the United States Attorney's Office for review and federal prosecution whenever possible. While the district court rejected the defendant's claim of racial discrimination for lack of evidence, it expressed dismay at the government's refusal to provide "a fuller explanation about how generally cases were selected for inclusion in Project Exile," finding it to leave "a considerable distaste."[2] Apparently not content with explaining why the district court's decision should be affirmed, the government "insinuate[d] that the district court's concerns 'require[] a belief in the absurd that is similar in kind to embracing paranormal conspiracy theories,'" and "criticize[d] the district court's 'oblique language' on issue unrelated to th[e] appeal."[3] In response, the Fourth Circuit felt "compelled" to remind the government "that such disrespectful and uncivil language will not be tolerated by this court."[4]

While this decision is one of the more recent examples of an appellate court going out of its way to caution counsel about the use of invective and impugning the integrity of the trial court, it is certainly not alone. In *Big Dipper Entm't, LLC v City of Warren*,[5] the Sixth Court admonished the plaintiff's attorney for using "notably harsh terms" in arguing that the district court had used a flawed methodology in analyzing the plaintiff's zoning challenge:

> Big Dipper criticizes [the district court's] finding in notably harsh terms, asserting that the district court "made no pretense" of applying the proper summary-judgment standard, that the court's analysis of the issue (in a 32-page opinion) was "cursory," that the court "chose to disregard" the

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> "voluminous and detailed analysis" set forth in the report of Big Dipper's expert, Bruce McLaughlin, and so on.[6]

Finding "[a]rguments like these—which casually impugn the motives of the district court or, more commonly, opposing counsel" to be "regrettably common of late," the court thought it "worthwhile to comment on them":

> In our view, a party should think twice about questioning the district court's integrity or that of opposing counsel. That two persons disagree does not mean that one of them has bad motives.[7]

Some courts have even issued sanctions and stricken appellate filings containing insulting and unduly harsh criticism of the lower court. That was the case in *Ruston v Dallas County Tex*,[8] where the plaintiff filed a motion to disqualify the trial court judge and to expand the record on appeal.[9] Finding that the motions contained "abusive and disrespectful language" directed at the trial court, the Fifth Circuit struck them and sanctioned the plaintiff. In *Clark v Clark*, the Indiana Court of Appeals decided against striking the appellant's brief, but cautioned that "[f]or the use of impertinent, intemperate, scandalous, or vituperative language in briefs on appeal impugning or disparaging this court, the trial court, or opposing counsel, we have the plenary power to order a brief stricken from our files and to affirm the trial court without further ado."[10]

So how far is too far when it comes to arguing that the trial court erred in its decision? In *In re Maloney*, the Texas Court of Appeals noted that "[a] distinction must be drawn between respectful advocacy and judicial denigration."[11] As one appellate judge acknowledged, "[t]rial judges as well as appellate judges can make mistakes and misstate the law."[12] But no matter "how clearly wrong the ruling," "[a]ttorneys should limit their pleadings and briefs to addressing the legal errors."[13] The Sixth Circuit offered what may be the best advice when it observed that counsel should simply "lay out the facts and let the court reach its own conclusions."[14] Or consider this guidance from the Indiana Court of Appeals:

> Overheated rhetoric is unpersuasive and ill-advised. Righteous indignation is no substitute for a well-reasoned argument. We remind counsel that an advocate can present his cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.
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> . . . The mind, conscious of its own integrity, does not respond readily to the goad of insolent, offensive, and impertinent language. It must be made plain that the purpose of a brief is to present to the court in concise form the points and questions in controversy, and by fair argument on the facts and law of the case to assist the court in arriving at a just and proper conclusion.[15]

Although the line between zealous advocacy and showing disrespect to the trial court is perhaps not always clear, the desired result can probably be achieved, more often than not, by simply arguing that "the trial court erred."

Endnotes

1 *United States v Venable*, 666 F3d 893 (CA 4, 2012).

2 *Id.* at 900.

3 *Id*. at 904 n 4.

4 *Id*.

5 *Big Dipper Entm't, LLC v City of Warren*, 641 F3d 715 (CA 6, 2011).

6 *Id*. at 719.

7 *Id*.

8 *Ruston v Dallas County Tex*, 320 Fed Appx 262 (CA 5, 2009).

9 *Id*.

10 *Clark v Clark*, 578 NE2d 747, 748 (Ind App, 1999).

11 *In re Maloney*, 949 SW2d 385, 388 (Tex App, 1997).

12 *Shortes v Hill*, 860 So 2d 1, 4 (Fla App, 2003) (Sharp, J., concurring in denial of rehearing).

13 *Id*.

14 *Big Dipper Entm't,* 641 F3d at 719.

15 *B&L Appliances and Services, Inc v McFerran,* 712 NE2d 1033, 1038 (Ind App, 1999).

Analysis of Recent Michigan Patent Appeals

By Jason Newman[1]

The United States Court of Appeals for the Sixth Circuit generally has jurisdiction over appeals from federal courts in the State of Michigan. However, the United States Court of Appeals for Federal Circuit has jurisdiction over all cases relating to patent protection.[2] This article will discuss four recent cases decided by the Federal Circuit on appeals from federal courts in Michigan worthy of note. These cases are of particular importance to Michigan litigants with patent protection issues.

The first case addresses the limitations on a district court's authority when resolving an infringement action between a generic drug manufacturer, Caraco, and a branded drug manufacturer, Novo. *Novo Nordisk A/S v. Caraco Pharmaceutical Laboratories, LTD*, 688 F.3d 766 (Fed. Cir. 2012). In *Novo*, the Federal Circuit discussed 21 U.S.C. §355(j)(5)(C)(ii), which grants a district court authority to specify the language used to revise a "use code" filed with the Food and Drug Administration ("FDA"). A "use code" is drug manufacture's description of a method for using a particular drug, which must be submitted to the FDA as part of a New Drug Application. The Court ultimately ruled that the district court has the authority to compel the revision of a use code, it does not have the authority to make a determination regarding the final use code language. This ruling may interfere with parties' ability to quickly and efficiently resolve patent protection litigation in pharmaceutical cases.

It is commonly known that new pharmaceuticals are required to be approved by the FDA before they can be sold.[3] Although this ordinarily takes significant time, the FDA does have a procedure for abbreviated drug applications.[4] During the application process, the FDA is required to consider patents held by name-brand pharmaceutical manufacturer when evaluating a generic manufacturer's application to market a drug. However, the applicant is also allowed to bring a civil action against a patent owner or holder to obtain a declaratory judgment that the new drug described in the application will not infringe an existing patent or that an existing patent is invalid.[5] If sued by a patent holder, an applicant may assert a counterclaim seeking an order requiring the patent holder to correct or delete patent information previously submitted on the ground that the patent does not claim the drug for which the application was approved or an approved method of using the drug.[6] These procedures are important for allowing the patent process for pharmaceuticals to proceed in an orderly basis.

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In *Novo*, the Federal Circuit, in a 2-1 decision, affirmed the Eastern District of Michigan's issuance on an injunction to correct Novo's use code, but reversed the Eastern District's decision to specifically set forth the use code.[7] FDA regulations require the branded manufacturer of pharmaceuticals to draft and submit appropriate use codes, which cannot be broader than the manufacturer's patent.[8] It was undisputed that Novo's current *use code* covered all three FDA approved methods for using repaglinide, a diabetes drug.[9] However, Novo's *patent* only covered one of those methods.[10] The Eastern District entered an order that required Novo to reinstate its prior use code, pursuant to a counterclaim filed by Caraco under 21 U.S.C. §355(j)(5)(C)(ii).[11] The Federal Circuit stated that "[t]o be clear it is appropriate for district courts to construe the scope of the patent claims and provide clear limits on the appropriate scope of the corresponding use code. Within those limits, the branded company is given the opportunity to propose the specific language of the use code."[12] Thus, while a district court has the authority to mandate correction of a use code, a district court must nevertheless give the branded manufacturer the opportunity to correct its error.

The dissent argued that a district court should have the authority to issue an order specifically stating the language of the revised use code.[13] The dissent found the majority's approach unworkable because it stated Novo would likely file another over broad use code and stated "Novo should not be permitted to throw in a new wrench each time one is removed by offering new overbroad use codes and forcing Caraco to seek correction of each one."[14]

Indeed, the dissent's position reveals the practical implications of the ruling. A branded manufacturer that does not put forth its best effort to correct its use code can force the matter to be litigated and re-litigated. Even a branded manufacturer that is acting in good faith may not resolve the issue on its first attempt. It would certainly be more efficient for the first litigation to resolve the issue. The import of the Federal Circuit's ruling is that protracted litigation may arise out of the limited authority granted to district courts.

In a second case, the Federal Circuit reiterated an important evidentiary principle that patent licensing agreements, while at times extremely complex, are still governed by common-law contract principles and can be created by mutual assent less a formal written agreement. In *Radar Indus., Inc. v. Cleveland Die & Mfg. Co*., 424 Fed. Appx. 931 (Fed. Cir. 2011), Radar held two patents for clevis links, which "are used in a variety of manufacturing contexts."[15] Radar and Cleveland Die[16] were both awarded supply contracts with Standard Products, an automotive supplier.[17] Pursuant to the contracts, Radar and Cleveland Die were to supply tie bars and clevis links, respectively.[18] Radar informed Standard Products that its patents covered the clevis links supplied by Cleveland Die.[19] Standard Products responded by informing Radar that if it asserted its patent rights, "Radar would lose the more profitable tie bar business."[20] Radar and Standard Products entered into an oral agreement where Radar would retain the tie bar business and have the first opportunity to replace Cleveland Die as the supplier for the clevis links.[21] Sometime later another supplier won the contract to supply the clevis links, and Radar lost the tie bar business.[22] Radar then sued Cleveland Die for patent infringement.[23] The Federal Circuit found that it was "undisputed … that Radar licensed Standard Products to have another party manufacture the asserted clevis links."[24] The Federal Circuit upheld the standard that a patent license does not require a formal written agreement, set forth by the Supreme Court in *De Forest Radio Telephone & Telegraph Co. v. United States*, 273 U.S. 236 (1927), and affirmed the Eastern District's decision to grant summary judgment to Cleveland Die and Manufacturing in Radar's action for patent infringement based on the finding of a valid patent license agreement.[25]

Third, the Federal Circuit upheld an important principle regarding the limitations of judicial estoppel. The Court held that a challenge to an opposing party's change of position during the course of litigation will be unsuccessful unless the challenging party can show three specific criteria. In *Altair Eng'G v. Leddynamics, Inc*., 413 Fed. Appx. 251 (Fed. Cir. 2011), a *Markman* hearing was held to determine the proper claim construction of Altair's patent.[26] During the Markman hearing, Altair described the accused product as containing 36 LEDs.[27] The district court ruled against Altair and in favor of Leddynamics at the *Markman* hearing.[28] Leddynamics then moved for summary judgment.[29] In its briefing on the summary judgment motion, Altair for the first time asserted that each of the 36 LEDs in the accused product was actually a package of 6 LEDs; therefore, the accused product contained a total of 216 LEDs.[30] The district court ruled that Altair was judicially estopped from changing its position.[31] The Federal Circuit reversed the Eastern District's ruling that Altair was judicially estopped from changing its position regarding the nature of the allegedly infringing product.[32] In doing so, the panel restated the three factors that need to be evaluated to determine whether judicial estoppel should be applied: (1) whether the challenged position is clearly inconsistent with an earlier position; (2) whether the challenged position was successfully argued to the court; and (3) whether the challenged position would create an unfair advantage or impose an unfair detriment on the challenging party.[33]

The Federal Circuit found that Altair had not prevailed on any substantive positions it had previously taken in the case. Therefore, judicial estoppel did not apply.[34]

Finally, the Federal Circuit arguable broadened the reach of obviousness-type double patenting doctrine for compounds. When multiple patents claim the same compound, the Federal Circuit held that the specification of the prior patent can be used to determine the scope of the claims in the later filed patent. This may make some patent holders think twice before securing multiple patents compounds that have more than one use. The principles set forth are likely to stand for the foreseeable future as rehearing[35] and writ of certiorari[36] were denied. In *Sun Pharm. Indus. v. Eli Lilly & Co*., 611 F.3d 1381 (Fed. Cir. 2010), Eli Lilly filed a patent application for a drug with the active ingredient of gemcitabine[37]. The original application "described only gemcitabine's utility for antiviral purposes."[38] Eli Lilly then filed a second patent application as a continuation-in-part from the original application and "added a description of gemcitabine's anticancer utility to the specification."[39] Eli Lilly also filed a third application "directed to a method of treating cancer with an effective amount of a class of nucleosides, which includes gemcitabine."[40] Eli Lilly did not file a terminal disclaimer with respect to the third application.[41] All three applications resulted in issued patents. Sun later filed an Abbreviated New Drug Application with the FDA and filed a declaratory judgment against Eli Lilly claiming that Eli Lilly's third patent was invalid.[42] Eli Lilly filed a counterclaim against Sun for infringement of its second and third patents. The district court held that Eli Lilly's third patent was invalid.[43]

The Federal Circuit addressed the issue of obviousness-type double patenting, "which is a judicially created doctrine that prevents a later patent from covering a slight variation of an earlier patented invention."[44] Double patenting is reviewed without deference.[45] The panel stated that analysis for obviousness-type double patenting requires two steps: (1) the court compares the claims in the earlier patent and the challenged patent; and (2) the court, based on its comparison, evaluates whether the challenged patent is patentably distinct from the earlier patent by evaluating whether the challenged patent is obvious over or anticipated by the earlier patent.[46] The Federal Circuit agreed with the district court that for a compound, which is claimed in a previous patent application, it is proper to use the specification of the previously filed patent application to determine the scope of a claim in the later filed application for the same compound.[47] The dissent in the petition for rehearing argued that nly the claims should be considered and not the specification.[48]

Endnotes

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2 28 U.S.C. §1295(a)(1).

3 21 U.S.C. §355(a).

4 21 U.S.C. §355(j).

5 21 U.S.C. §355(j)(5)(C)(i).

6 21 U.S.C. §355(j)(5)(C)(ii).

7 *Novo Nordisk*, 688 F.3d at 767.

8 *Id*. at 768.

9 *Id*. at 767.

10 *Id*. at 767.

11 *Id*. at 768.

12 *Id*. at 768.

13 *Id*. at 769-70.

14 *Id*. at 770.

15 *Radar Indus., Inc.*, 424 Fed. Appx. at 932.

16 The name "Cleveland Die" refers to Cleveland Die and Cleveland Die's predecessor in interest.

17 *Radar Indus., Inc.*, 424 Fed. Appx. at 932.

18 *Id*.

19 *Id*.

20 *Id*.

21 *Id*.

22 *Id*.

23 *Id*. at 933.

24 *Id*. at 934.

25 *Id*. at 933-34.

26 *Altair Eng'G*, 413 Fed. Appx. at 253.

27 *Id*. at 253.

28 *Id*.

29 *Id*.

30 *Id*.

31 *Id*.

32 *Id*. at 257.

33 *Id.* at 256.

34 *Id*. at 257.

35 *Sun Pharm. Indus*. v. Eli Lilly & Co., 625 F.3d 719 (Fed. Cir 2010).

36 *Eli Lilly & Co. v. Sun Pharm. Indus*., 131 S. Ct. 2445 (2011).

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37 *Sun Pharm. Indus.,* 611 F.3d at 1383.

38 *Id*.

39 *Id*.

40 *Id*.

41 *Id*.

42 *Id*. at 1384.

43 *Id*.

44 *Id.*

45 *Id*.

46 *Id*. at 1384-85.

47 *Id*. at 1389.

48 *Sun Pharm. Indus*., 625 F.3d at 721-22.

Michigan's Changed Appellate Abuse of Discretion Standard

Part IV: The New Standard's Development and Impact

by Howard Yale Lederman

Welcome to this series, Part IV. In Part I, we began with the Michigan Supreme Court's adoption of the almost insurmountable *Spalding v Spalding* abuse of discretion standard:

> "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an `abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will[,] but perversity of will, not the exercise of judgment[,] but defiance thereof, not the exercise of reason[,] but rather of passion or bias.'" [1]

In creating this standard, the Court did not cite any supporting authorities.[2]

In Parts I and II, we focused on the Michigan Supreme Court's restriction of the *Spalding* standard to non-criminal cases, Michigan appellate courts' refusals and failures to apply the *Spalding* standard even to lower court civil decisions, challenges to the *Spalding* standard even in the Michigan Supreme Court and in the Michigan Court of Appeals, and the Michigan Supreme Court's apparent ironclad reaffirmation of the *Spalding* standard. In Part III, we traced the Michigan Supreme Court's adoption of the new *People v Babcock*[3] principled range of outcomes standard:

> "Therefore, the appropriate standard of review must be one that is more deferential than de novo, but less deferential than the *Spalding* abuse of discretion standard…..an abuse of discretion standard recognizes that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome."[4] "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion[,] and, thus," the appellate court should "defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes."[5]

In Part III, we saw that although the Court's two cited decisions, *Conoco, Inc v J M Huber Corp* and *US v Penny,*[6] did not illuminate the principled range of outcomes standard, an uncited decision, *US v Koen,*[7] did. The *Koen* Court explained:

> "Of course, an abuse of discretion standard does not mean no review at all. It simply means that we shall

> not second-guess the decision of a trial judge…in conformity with established legal principles[,] and, in terms of its application of those principles to the facts of the case, is within the range of options from which one could expect a reasonable trial judge to select."[8]

We summarized *Koen's* contributions to understanding the new standard as follows:

> First, *Koen* defined principled range of outcomes as including conformity to established legal principles. Though clear, that definition is open to challenge. In some cases, conformity to emerging or new legal principles is just as principled as conformity to established legal principles. Second, *Koen* separated the issue of whether a lower court's discretionary decision conforms to established legal principles from the issue of whether their application to the facts is within a reasonable trial court's range of options. So, in explaining the new standard, *Koen* gave reviewing courts a starting point and a framework for evaluation and decision. *Koen* enabled appellate courts to understand and use the new standard.

Thus, in *Babcock's* criminal sentencing context, the Michigan Supreme Court adopted a new abuse of discretion standard. Next, we asked: How different is the new standard from the old? If the difference is significant, how significant is it? Then, we asked: Would the Court extend the new standard to civil cases, extend it to other criminal cases alone, or restrict it to criminal sentencing cases, thus retaining *Spalding* for civil cases? In this Part IV, we will respond to these questions.

As I said in earlier parts, to almost all Michigan litigators, the abuse of discretion standard does matter. Michigan appellate courts review many different kinds of trial court decisions for abuse of discretion. Examples include whether to permit pleading amendments,[9] which discovery sanctions amounts to impose,[10] which case evaluation sanctions amounts to impose,[11] whether to uphold default entry or default judgment,[12] which hearing and trial evidence to admit or exclude,[13] whether to reconsider an order,[14] and whether to adjourn a motion or hearing.[15] If the abuse of discretion standard practically compels appellate courts to uphold lower court discretionary decisions, negative outcomes from appeals from such decisions are near certainties. But if the abuse of discretion standard permits appellate courts some latitude in reviewing and deciding these appeals, positive outcomes are likelier. So, the kind of abuse of discretion standard in place has great practical impacts.

Turning to the last question first, would the Michigan Supreme Court extend the new standard to civil cases, extend it to other criminal cases alone, or restrict it to criminal sentencing cases, thus retaining *Spalding* for civil cases? The Court did overrule *Spalding* and did extend the principled range of outcomes abuse of discretion standard to non-sentencing criminal cases and to civil cases.[16] The Court's original overruling decision, *Babcock,* was unanimous.[17] Therefore, the Michigan Supreme Court has made the principled range of outcomes standard the default abuse of discretion standard. As a result, unless a state statute, regulation, or court rule, or a state appellate court decision interpreting one of these compels a different abuse of discretion standard, the principled range of outcome standard governs appellate review of lower court discretionary decisions.[18]

The Court added the word "reasonable" to the standard: "A trial court abuses its discretion[,] when it selects an outcome that falls outside the range of reasonable and principled outcomes."[19] Then, the Court quoted the following two *Babcock* passages with approval:

> "`An abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.'"[20] "`W]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion[,] and thus, it is proper for the reviewing court to defer to the trial court's judgment.'"[21]

But just as the Court adopted *Spalding* as the default abuse of discretion standard without any explanation "out of the blue," the Court overruled *Spalding* without any explanation "out of the blue:" "While *Babcock* dealt with a criminal sentencing issue, we prefer the articulation of the abuse of discretion standard in *Babcock* to the *Spalding* test[,] and, thus, adopt it as the default abuse of discretion standard."[22] So, the Court buried *Spalding* without any funeral service. Just as the Court's adoption of *Spaulding* was arbitrary and capricious, so the Court's abandonment of *Spalding* was arbitrary and capricious. The Court never explained why it abandoned *Spalding* or extended *Babcock.*

In abandoning *Spalding* based on its institutional preference alone, the Court acted in the same arbitrary and capricious way that it aimed to discourage the trial courts from acting. In so doing, the Court implied that it should never have adopted *Spalding,* and that *Spalding* was outside the range of reasonable and principled default abuse of discretion review standards. Both were true.

The second and third questions, How different is the new standard from the old? If the difference is significant, how significant is it?, are harder to answer. But we have three beginning points for answering the second question. One beginning point is the Court's abandonment of *Spalding* itself. In abandoning *Spalding,* the Court signaled that it wanted a less

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deferential abuse of discretion standard. The second was the *Spalding* standard itself: It was a super-arbitrary and capricious standard. Again, in abandoning *Spalding,* the Court signaled that it wanted a less deferential abuse of discretion standard.

The third is the new standard's wording, compared to the old standard's wording. In recognizing alternative discretionary decisions as legitimate, the new standard, like the old, is deferential to trial court decisions. But otherwise, the new standard is less deferential than the old. To gain appellate court affirmance, trial court decisions must be measure up: They must be within certain boundaries. They must be principled. They must be reasonable. So, appellate abuse of discretion review is less deferential to trial court decisions. Under the new standard, fewer, but not far fewer, lower court decisions will survive appellate abuse of discretion review.

Beyond this, the Michigan appellate courts have not gone. The Michigan Supreme Court has not defined the abuse of discretion standard further.[23] The Court has not endorsed or rejected the *Koen* description of the new standard. As we saw in Part III, the *Koen* description reads:

> "Of course, an abuse of discretion standard does not mean no review at all. It simply means that we shall not second-guess the decision of a trial judge…in conformity with established legal principles[,] and, in terms of its application of those principles to the facts of the case, is within the range of options from which one could expect a reasonable trial judge to select."[24]

Moreover, unlike the US Court of Appeals for the Tenth Circuit, the Court has not defined the new standard as an arbitrary and capricious standard or a similar standard:

> "`We will not disturb the district court's ruling[,] unless it is arbitrary, capricious, whimsical or manifestly unreasonable[,] or when we are convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[25]

While the last phrase, exceeding the bounds of permissible choice in the circumstances, is similar to range of principled options, the latter phrase implies that the applicable law constrains the trial court's discretion more specifically and strongly.

Lastly, unlike the US Court of Appeals for the Ninth Circuit, the Court has not defined the new standard as an illogical or implausible standard:

> After determining that the district court has not made an error of law or applied the wrong law, "the second step of our abuse of discretion test is to determine whether the trial court's application of the correct legal standard was (1) `illogical,' (2) implausible,' or (3) without `support in inferences that may be drawn from the facts in the record.'"[26]

The Michigan Court of Appeals has declared the obvious: "A court `by definition abuses its discretion[,] when it makes an error of law.'"[27] But in the areas calling for abuse of discretion review, errors of law, meaning use of the wrong legal principles for evaluating and deciding the issues, while occurring, are relatively rare. Far more common are appellate courts' disagreements with trial courts over the right legal principles' application to the facts. One panel has declared the new abuse of discretion standard the same as the old de facto: "Ultimately, our role is not to second-guess the trial court[,] unless the trial court's decision clearly defies reason." [28] But most panels have recognized the change without explaining how the new standard differs from the old. One panel, citing *Maldonado,* has described the appellate courts' deference to the trial courts under the new standard as "broad."[29] Therefore, we can only answer this question from considering how the Michigan appellate courts have applied the new standard.

Brikho v Ulticare, [30] exemplifies the Michigan Court of Appeals' reaction to a trial court's use of wrong legal principles and failure to apply right legal principles amounting to abuse of discretion. There, the plaintiff, a doctor, sued the defendant, a health insurer, for breach of contract based on failure to pay for plaintiff-provided medical treatment to defendant-insured patients. On October 24, 2003, the plaintiff served requests for admissions and other discovery requests on the defendant. In the requests for admissions, the plaintiff asked the defendant to admit that based on the attached itemized statement, the defendant owed the plaintiff $28,591. On October 31, 2003, the plaintiff served another set of requests for admissions and discovery requests on the defendant.

"On November 21, 2003, defense counsel faxed to plaintiff's counsel a proposed stipulation and order to extend the…requests for admissions [response] deadline." [31]The plaintiff's counsel responded that with minor changes, he would sign the proposed stipulation. But the "[d]efense counsel did not respond." *Id.* On December 11, 2003, the plaintiff moved "`for order of admission'" under MCR 2.312 and "for summary disposition" under MCR 2.116(C)(9) and (10)…."[32]

On January 7, 2004, the defendant responded to the motion and the requests for admissions. Defense counsel explained that his failure to respond arose from his Novem-

ber 20, 2003 decision "to go to an out of state funeral on the following day," and from his father's November 19, 2003-December 23, 2003 hospitalization's impact on his work focus.[33] As a result, the defendant asked the trial court to "permit it to withdraw any admissions" arising from MCR 2.312 operation of law.[34] The defendant also asked the trial court to permit it to deny requests for admissions "`as are appropriate in the interests of justice.'"[35] On January 24, 2004, the trial court granted the motion to deem the requests admitted under MCR 2.312 and granted the motion for summary disposition. On March 5, 2004, the trial court entered judgment for the plaintiff. When the defendant moved for reconsideration, the trial court denied the motion. The trial "court cited foreign authority for the proposition that `[g]enerally, an attorney's personal affairs, unless the attorney is injured or dies, are not deemed `good cause' for amendment or withdrawal of matters admitted.'"[36]

The Court cited the MCR 2.312(D) good cause standard applicable to trial court decisions to permit a party to modify or withdraw an admission. Since the decision to permit a party to do so is a trial court discretionary decision, the abuse of discretion review standard applies.[37] The Court quoted the *Maldonado* abuse of discretion standard. The Court cited the three *Janczyk v Davis,* 125 Mich App 683, 692-693; 237 NW2d 272 (1983) factors for trial courts to weigh and balance in deciding whether to permit a party to respond to requests for admissions late. The first factor was whether denying the motion would eliminate any trial on the merits. The second factor was whether late responses would prejudice the other party. The third factor was whether the delay was inadvertent. The Court also cited *Janczyk's* requirement that the trial court balance temper the sanction's severity with consideration of the relevant equities.

Reversing, the Court held that in denying the motion, the trial court had abused its discretion. The Court implied that in failing to apply the three *Janczyk* factors, the trial court had erred. The Court applied the three factors. The Court found that the first factor supported permitting late responses, because barring them would eliminate any trial on the merits. The Court found that the second factor supported permitting late responses, because the plaintiff would remain free to prove the denied matters at trial, and if he does so, he can win attorney fees and costs for doing so. The Court found that the third factor supported permitting the late responses, because "the delay was inadvertent," arising from "the funeral attended by defense counsel, and the hospitalization of his father. Because all the factors weigh in favor of allowing the late answers…, the trial court's denial of leave to file late answers was outside the range of principled outcomes[,]" unreasonable, and an abuse of discretion.[38]

Lastly, the trial court's reliance on foreign law "for an overbroad rule that `[g]enerally, an attorney's personal affairs, unless the attorney is injured or dies, are not deemed `good cause' for amendment or withdrawal of matters admitted'" was "outside the range of principled outcomes" and thus an abuse of discretion.[39] Foreign law is not binding on Michigan courts.[40] "[T]he Michigan Court Rules and Michigan case law do not dictate that the death or illness of an attorney is the only `personal affairs' circumstance'" that a trial court can deem "good cause" for permitting modification or withdrawal of admissions.[41] The trial court did not temper the sanction's severity with consideration of the relevant equities, as Michigan law required. For all the above reasons, the Court concluded that the trial court had abused its discretion.

In *Bencheck v Estate of Paille,*[42] Paille's vehicle crossed a road's centerline and hit Bencheck's vehicle, injuring Bencheck. His uninsured motorist benefits insurer was National Insurance Company (Integon), and the benefits had a $50,000 maximum. Bencheck sued Paille's estate for vehicle negligence. Claiming that on the crash date, Paille was underinsured, Bencheck claimed uninsured motorist benefits from Integon. The trial court notified all parties of the May 19, 2009 settlement conference date and ordered: "`[A]ll parties with full authority to settle must be present.'"[43] Integon's representative, Clarkson, appeared with conditional authority to settle: "[O]nly after the primary insurer…had offered its policy limits" could Clarkson settle the uninsured motorist claim.[44] The trial court found that in sending Clarkson with such restricted authority, Integon had disobeyed the trial court's settlement appearance order. Thus, the trial court held Integon in contempt of court, fined Integon $500, adjourned the settlement conference for two days, and ordered Integon to send a representative with unrestricted authority to settle to the adjourned May 21, 2009 settlement conference on pain of a bench warrant for arrest.

On May 21, 2009, another Integon representative, Kasmer, appeared at the adjourned settlement conference with the same restricted authority as Clarkson. The trial court again held Integon in contempt, fined Integon $500 more, and sanctioned Integon $1,750. The trial court declared: "`[W]henever you get a settlement notice from this Court, that means somebody that has the full authority to settle the case'" must appear at the settlement conference.[45] When Integon moved for reconsideration, the trial court set the May 19, 2009 fine aside but retained the May 21, 2009 fine and sanctions. After resolving the case, the parties agreed to its dismissal. But Integon appealed from the contempt order.

The Court recognized that since whether to hold a party in contempt and whether to sanction a party were discretionary decisions, the abuse of discretion standard applied. Reversing, the Court concluded that in holding Integon in contempt, in fining Integon, and in sanctioning Integon, the

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trial court had abused its discretion. The Court explained: The trial court had authority to order the parties to appear for a settlement conference and to send representatives to the conference with full authority to settle.[46] The trial court had authority to hold any party not meeting these requirements in contempt of court.[47] However, the trial court went too far: "`[A] court cannot `force' settlements upon parties.'"[48] Further, the vehicle uninsured motorist provision restricted Integon's liability only to situations, where the primary insurer had paid or offered to pay the claim up to its policy limits. Accordingly, notwithstanding their restricted authority to settle, the Integon representatives had the required full authority to settle. Therefore, the trial court's contempt, fine, and sanctions decisions rested on enough wrong law and enough misapplication of right and wrong law to remove them from the principled range of outcomes and to constitute an abuse of discretion.

So, *Brikho* and *Bencheck* illustrate how the new abuse of discretion standard works in two fertile areas for finding an abuse of discretion: Use of the wrong law and failure to use the right law. As before *Babcock* and *Maldonado,* either is far likelier to lead to appellate court reversal for abuse of discretion than application of the right law to the facts. This is especially true, where more than one reasonable outcome is present. Harder to evaluate is whether the new standard makes any difference, where the trial court applies the right law to the facts. We will turn to that next time.

Endnotes

1 *Spalding v Spalding,* 355 Mich 382, 384-385; 94 NW2d 810 (1959).

2 *Spalding,* 355 Mich 382, 384-385.

3 *People v Babcock,* 469 Mich 247, 269; 666 NW2d 231 (2003).

4 *Babcock,* 469 Mich 247, 269 (citations omitted).

5 *Babcock,* 469 Mich 247, 269, citing *Conoco, Inc v J M Huber Corp,* 289 F3d 819, 826 (CA Fed 2002) ("`Under an abuse of discretion review, a range of reasonable outcomes would survive review.'"), *US v Penny,* 60 F3d 1257, 1265 (CA 7, 1995), *cert den* 516 US 1121; 116 S Ct 931; 133 L Ed 2d 858 (1996) ("`a court does not abuse its discretion[,] when its decision `is within the range of options from which one would expect a reasonable trial judge to select'") (citation omitted).

6 *Conoco,* 289 F3d 819, 826, and *Penny,* 60 F3d 1257, 1265.

7 *US v Koen,* 982 F2d 1101, 1114 (CA 7, 1992). *Accord, Cincinnati Insurance Co v Flanders Electric Motor Service,* 131 F3d 625, 628 (CA 7, 1997).

8 *Koen,* 982 F2d 1101, 1114. *Accord, Cincinnati Insurance Co,* 131 F3d 625, 628.

9 *Eg, Weymers v Khera,* 454 Mich 639, 655, 666-667; 563 NW2d 647 (1997).

10 *Eg, Dean v Tucker,* 182 Mich App 27, 82; 451 NW2d 571 (1990).

11 *Eg, Ivezaj v ACIA,* 275 Mich App 349, 356; 737 NW2d 807 (2007).

12 *Eg, Saffian v Simmons,* 477 Mich 8, 9; 727 NW2d 132 (2007).

13 *Eg, People v Gursky,* 486 Mich 596, 606; 786 NW2d 579 (2010).

14 *Eg, In Re Beglinger Trust,* 221 Mich App 273, 279; 561 NW2d 130 (1997).

15 *Eg, Tisbury v Armstrong,* 194 Mich App 19, 20; 486 NW2d 51 (1992).

16 *Eg, People v Buie,* 491 Mich 294, 320; 817 NW2d 33 (2012), *People v Lario-Munoz,* 483 Mich 1130, 11__; 767 NW2d 442 (2009) (non-sentencing criminal cases), *Maldanado v Ford Motor Co,* 476 Mich 372, 388; 719 NW2d 809 (2006), *cert den* 549 US 1206; 127 S Ct 1261; 167 L Ed 2d 76 (2007), *Woodard v Custer,* 476 Mich 545, 557; 719 NW2d 842 (2006), *Saffian,* 477 Mich 8, 9 (civil cases).

17 *Babcock,* 469 Mich 247, 274 (Cavanagh, J, concurring in part) *Id* (Corrigan, CJ & Young, J, concurring in part), *Id* at 279 (Cavanagh, J, concurring in part), *Id* at 280 (Weaver, J, concurring in part).

18 *See Fletcher v Fletcher,* 447 Mich 871, 880; 526 NW2d 889 (1994) (the Michigan Child Custody Act provision, MCL 722.28, shows the Michigan Legislatures' intent to adopt a standard similar to *Spalding* for trial court child custody decisions).

19 *Maldonado,* 476 Mich 372, 388. *Accord, Saffian v Simmons,* 477 Mich 8, 12; 727 NW2d 132 (2007), *Woodard v Custer,* 476 Mich 545, 557; 719 NW2d 842 (2006).

20 *Maldonado,* 476 Mich 372, 388, quoting *Babcock,* 469 Mich 247, 269.

21 *Maldonado,* 476 Mich 372, 388, quoting *Babcock,* 469 Mich 247, 269.

22 *Maldonado,* 476 Mich 372, 388.

23 *Eg, Maldonado,* 476 Mich 372, *Saffian,* 477 Mich 8, *Woodard,* 476 Mich 545.

24 *US v Koen,* 982 F2d 1101, 1114 (CA 7, 1992). *Accord, Cincinnati Insurance Co v Flanders Electric Motor Service,* 131 F3d 625, 628 (CA 7, 1997).

25 *North American Specialty Insurance Co v Britt Paulk Insurance Agency,* 579 F3d 1106, 1111 (CA 10, 2009), quoting *Dodge v Cotter Corp,* 328 F3d 1212, 1223 (CA 10, 2003).

26 *US v Hinkson,* 585 F3d 1247, 1262 (CA 9, 2009) (en banc), *modified on other grounds* 611 F3d 1098 (CA 9, 2010) (en banc), *cert den* ___ US ___; 131 S Ct 1096; 179 L Ed 2d 1090 (2011), quoting *Anderson v City of Bessemer City, North Carolina,* 470 US 564, 577; 105 S Ct 1504; 84 L Ed 2d 518 (1985).

27 *Kidder v Ptacin,* 284 Mich App 166, 169; 771 NW2d 806 (2009), quoting *Koon v US,* 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996) and citing *People v Lukity,* 460 Mich 484, 488; 596 NW2d 607 (1999). *Accord, People v Waterstone,* 296 Mich App 121, 132; 818 NW2d 432; Docket No 303268 (4/8/12), *People v Giovannini,* 271 Mich App 409, 417; 722 NW2d 237 (2006).

28 *People v Vandonkelaar,* Unpub Opin of the Michigan Court of Appeals, Docket No 265897, 2007 Mich App Lexis 23 (January 4, 2007) *6.

29 *Oram v Oram,* Unpub Opin of the Michigan Court of Appeals, Docket No 267077, 2007 Mich App Lexis 1322 (May 22, 2007) *28, citing *Maldonado,* 476 Mich 372, 388.

30 Unpub Opin of the Michigan Court of Appeals, Docket No 258649, 2007 Mich App Lexis 19 (January 4, 2007).

31 *Id* at *3.

32 *Id.*

33 *Id.*

34 *Id* at *4.

35 *Id.*

36 *Id.*

37 *Id* at *5, citing *Medbury v Walsh,* 190 Mich App 554, 556-557; 476 NW2d 470 (1991).

38 *Brikho,* 2007 Mich App Lexis 19 at *8.

39 *Id* at *9.

40 *Id,* citing *The Mable Cleary Trust v The Edward Marlah Muzyl Trust,* 262 Mich App 485, 494 FN5; 686 NW2d 770 (2004).

41 *Brikho,* 2007 Mich App Lexis 19 at *9.

42 Unpub Opin of the Michigan Court of Appeals, Docket No 298334, 2011 Mich App Lexis 1748 (October 6, 2011).

43 *Id* at *1.

44 *Id* at *3.

45 *Id* at *3.

46 *Id* at *4, citing MCR 2.401(A), MCR 2.401(F)(2), and *Henry v Prusak,* 229 Mich App 162, 168; 582 NW2d 193 (1998).

47 *Bencheck,* 2011 Mich App Lexis 1748 at *4, citing *Henry,* 229 Mich App 162, 196 FN4.

48 *Bencheck,* 2011 Mich App Lexis 1748 at *4, quoting *Henry,* 229 Mich App 162, 170.

Stu s Tech Talk

by Stuart Friedman

Ethics, Law, and Technology: Changes for 2013

Law, like every other profession, is evolving and changing with the times. It seems with every technological advance or change in the general way that society conducts business, lawyers invariably ask themselves: "Will the Canons of Ethics permit me to adopt that practice?" This month, I will focus on the ethical developments in three areas and tweaks that people can adopt to continue to use these tools. The first part of the article will focus on the developments in the ethics standards on the use of virtual or non-traditional offices as a place to meet with clients on a full or part time basis. The State Bar has formally approved the use of such facilities but there are certain restrictions which counsel will need to employ to be safe. The next section will focus the developments on the use of cloud based computing. The State Bar and the American Bar Association have now approved the use of cloud based computing, but again there are certain cautions that a lawyer should adopt to insure continuing compliance with legal ethics rules. Lastly, I will focus on new rules from the Internal Revenue Service which will force us to audit our credit card accounts to insure compliance with the new rules.

Virtual Offices

In 2011 I wrote about the use of virtual offices as a substitute or a supplement to the traditional law office. As I am using the term "virtual office" in this article, I am referring to the business centers which provide a place for lawyers or other business people to meet with clients and other individuals on an as needed basis. Day office is another popular term. I am not referring to the growing practice of attorneys who practice solely in cyberspace.

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At the time there were no Michigan ethics opinions on this growing trend.

I referred to various opinions from other jurisdictions and concluded that an attorney had a duty to make clear that nature of his relationship with the business center. If the attorney only rented conference rooms on an as needed basis, he/she needed to state that (s)he was only available by appointment. This follows a trend that I have observed in Ethics Opinions generally, e.g. that a lawyer who tries to make his office look larger than it actually is playing with fire.

In October of 2012 the State Bar issued its first ethics opinion on the subject.

My advice was close (but not identical) to the subcommittee's ethics opinion.

Informal Ethics Opinion 355 was sought by a lawyer who was planning on opening a virtual satellite office in a different community. The lawyer proposed renting mailbox and conference room services from a virtual office service in that community. The virtual office rented full time and part time to many different types of businesses. The attorney planned on getting a telephone number in the test market which would be answered by his home office. It sounds like the lawyer had done his research and had taken precautions to avoid the obvious problems:

- Mail sent to that office would be sorted by the virtual office and placed in the mailbox at the facility. The mail would not be opened unless the lawyer expressly requested that a particular piece of mail be handled differently. For instance, the attorney might ask that a single piece of mail be faxed or scanned and emailed to him;
- Any document that advertised the virtual location would state that it "was by appointment only;"
- The virtual office would not have any signs stating that this was the firm's office and the firm's stationary would not list the virtual office;

The Ethics panel conceptually approved the arrangement, but placed a variety of restrictions on such an arrangement. Some of them were overt and common sensical. What was more troubling was that the committee seemed to conflate the relationship with the situation of a lawyer sharing his/her space with a non-lawyer. In reciting the law that developed in that arena, the subcommittee opened a troubling ambiguity. More on that later.

The subcommittee stressed that a lawyer who uses this type of office has an ethical duty to insure that any documents stored on the premise are safeguarded from co-tenant's eyes. Since it is highly unlikely that a lawyer would leave files in an office which is rented by the day, this would be largely a non-issue. The more difficult issue would be if the lawyer had some small space in the shared office such as a cubicle or a mailbox/tray. There some protective measure such as locked drawer or mailbox would be advisable. If the staff of the business center handles any clerical task (e.g. opening mail) for the lawyer, the lawyer has a duty to insure that the staff are counseled on their duty to respect confidentiality.

In these arrangements, the Ethics Committee repeatedly hinted that the lawyer be candid about the nature of the relationship to make sure that the client did not think the lawyer had more resources or ties to the community than he/she actually did. While this concern was vaguely expressed, the safest response to this concern would be to include express language in the retainer agreement outlining the attorney's relationship with the business center.

For example, my main office is in Southfield Michigan, but I regularly meet clients at the Regus Business Center in Grand Rapids, Michigan. My website (*www.crimapp.com*) lists my main office. My reference to Grand Rapids states that "meetings are available in Grand Rapids at the Regus Business Center on a by appointment basis." Similarly language is included in my retainer agreement.

Since I have a genuine main office, the question is easy for me. The more complicated question comes for appellate lawyers who practice from their house and only need a place to

State Bar Offers Information on Apple Related Computing Resources

The State Bar now has a web page devoted to law related resources for practitioners using Apple computing devices (iPads, iPhones, and Macintosh computers).

This month s featured article is written by Tom Mighell (author of the *The iPad in One Hour for Lawyers*) on the effective use of iPads in meetings. For individuals looking to better integrate Apple products into their practice, this page is worth a look:
http://www.michbar.org/pmrc/applepractice.cfm

occasionally meet with someone. It would seem that a lawyer who primarily practices out of a shared suite should avoid using the term "Law Offices" on their stationary or marketing material. The Ethics Panel thinks that this denotation implies something more akin to a firm than simply the office of a lawyer.

One place where the opinion feels internally inconsistent is in the way it deals with signage dealing with non-lawyer co-tenants. It talks about keeping conference rooms neutral from signage and literature of the non-law businesses. The opinion also cites back to old ethics opinions for the proposition that an attorney should take pains to avoid steering people though the business area where these individuals work, and even suggests that the conference room should not be located in an area closer to their work area than yours, but then talks about how you need to take pains to avoid any confusion that the other individuals in the suite are in any way connected with you.

The danger of this misperception is greater if the putative client enters a busy generic office and sees a number of people passing in the hallways wearing business attire, walking into and out of individuals' offices which only have names on the door. The client is more likely to believe these individuals work together under these circumstances than seeing name plaques on the doors saying "Jane Doe, Pharmaceutical Representative, XYZ Pharmaceuticals," "Harry Roe, Roe Financial Planning," and "Mark Loe, Loe Architectural Services." The individual signage of the independent businesses would actually help clarify the situation rather than confuse the client. Unfortunately, the opinion can be fairly read to suggest the contrary. I hope the Ethics Subcommittee revisits this issue.

Until there is clarification of this ambiguity, prudent countermeasure would be to simply include language in the retainer agreement advising the client words such as:

> Counsel is involved in a shared office arrangement with others including non-lawyers. This lawyer is not affiliated with these individuals, your confidential information will not be shared with them, and they will have no knowledge of your case.

As a primary or secondary meeting place, virtual offices make financial sense for lawyers. The State Bar of Michigan appears to be following the national trend in accepting these arrangements, but there is a clearly some doubt about this arrangement with some members of Subcommittee. A lawyer considering this relationship should do a self-audit to insure that client confidentiality is protected and the lawyer should resolve doubts describe clearly the shared office relationship in his/her retainer agreement.

Cloud Based Computing

In 2010, I wrote about the value and ethics of cloud based computing.

When I first wrote about the issue, there was still some controversy as to whether it was ethical to store data in the clouds. I am pleased to say that this data appears resolved. The State Bar of Michigan and the American Bar Association have both answered the question in the affirmative. Additionally, thirteen other states have now said it is acceptable with no states (to the best of my knowledge) opining that it is improper.

Cloud computing is the practice of both using applications stored in data centers (rather than on the lawyer's computer) and storing data in such locations. I stated that while Michigan law had not addressed the issue, the majority rule seemed to be that this was acceptable and that an attorney had a duty to take reasonable steps to protect the security of the data. I am pleased to note that the State Bar of Michigan Ethic's subcommittee has embraced this review. In RI-355 (previously discussed in terms of virtual offices), the subcommittee favorably commented on cloud computing. They noted;

> A relatively recent development in file storage is called "cloud computing." The acronym for one such service presently available is SaaS, which stands for "Software as a Service." Rather than installing software on the lawyer's or law firm's server which is then used to store data, data is stored and accessed by connecting through a web browser to a vendor's data center. The lawyer pays a subscription fee to the service. This Committee believes that "cloud computing," like any other electronic data storage device may be used by lawyers. However, when using SaaS based technology, the lawyer must ensure that she retains ownership and has ability to access the file materials upon termination of the vendor relationship. In addition, the lawyer must exercise reasonable care, as required by MRPC 1.6(d), to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client.

The American Bar Association also recently addressed the ethics of cloud computing at its August Annual Meeting. The ABA House of Delegates approved resolutions that incorporated updates to the Model Rules of Professional Conduct relating to cloud computing.

At this meeting, the Delegates approved an amendment to Model Rule 1.6 (dealing with an attorney's duties when dealing with confidential information) to include a subsection (c), which requires attorneys to "make reasonable efforts

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to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

The commentary outlines a variety of factors that the attorney should consider in protecting against inadvertent disclosure of information. These considerations adopt a common sense approach that focuses on the sensitivity of the information. A lawyer should consider:

> the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

Between the State Bar's opinion and the ABA certification, I believe that lawyers now have a green light to use cloud computing providing that they use some common sense.

For example, if your file has valuable merger and acquisition information that would be worth millions if it fell into the wrong hands greater caution needs to be used than with a garden variety divorce file. While encryption is not expressly mentioned as part of the current ethics requirements, "reasonable care" is. Since some states are requiring encryption and the majority of cloud based providers do provide for encryption, this requirement is easily met.

Additionally, because some states require disclosure of the use of cloud based storage,
it would be a wise idea to include such a disclosure in the retainer agreement.

Several Bar Associations have also cautioned that the lawyer should maintain some way to access the files in the event that the relationship with the cloud provider terminates. In the event of cloud based storage, this is easy. Most cloud based providers are now providing syncing software which will store a copy of the files on one or more of the lawyer's hard drives.

Lastly, as I noted in 2010, a lawyer should review the terms and conditions of a particular cloud based storage system to determine whether the provider will take adequate measures to protect client confidentiality.

Credit Cards

Several charges have taken place dealing with the process of credit cards. While not an ethics issue per se, the Internal Revenue Services has created enhanced reporting requirements for all businesses which take credit cards including lawyers. This requirement is referred to as Section 6050W.

Section 3091(a) of the Housing Assistance Tax Act of 2008 (the "Act") added section 6050W to the Code requiring merchant acquiring entities and third party settlement organizations to file an informational return to the IRS for each calendar year reporting all payment card transactions and third party network transactions with participating payees (merchants and businesses) occurring in that calendar year.

It was created in an effort to further reduce the estimated $345 billion tax gap from the business sector by providing additional information to the IRS on aggregate credit card transactions. Effective January 2013, all credit card processors and 3rd party payment aggregators will be required to report gross card transactions to the IRS. This means the gross dollar amount of all transactions will be reported on a special 1099-K, regardless of returns or any processing fee deductions.

The Act originally went on line in January of 2012, but 2012 was effectively a "trial run." Starting in January of 2013, merchants with non-compliant accounts are looking at 28% withholding penalty on all credit card transactions if the merchant information on file is not an exact match. It is currently unclear whether the withheld funds will be rebated when the account is corrected.

Trust accounts are covered by this requirement. The new law does not make a distinction between credit card transaction deposits made to any trust account (IOLTA or other format) and an attorney's general operations account. The preamble to the final regulations makes clear that the amount reported is to be the total gross amount "without regard to any adjustments for credits, cash equivalents, discount amounts, fees, refunded amounts, or any other amounts."

This does not mean that the funds become income per se. The new 1099-K filed by the credit card processors is only intended to be "informational." The attorney's credit card processor should include a merchant industry code on the 1099-K identifying the credit card processor as a provider of legal services.

The reporting requirements under section 6050W require credit card processors to report to the IRS on Form 1099-K the total gross amount of payment card transactions for each "merchant" client over the calendar year, without reduction to account for amounts deposited into trust accounts. The Virginia Bar Association has reviewed the various IRS regulations and concluded that they do not believe that the IRS intends that all moneys paid into these accounts will be treated as income, but we should all expect a greater accounting onus as a result of this change.

Similarly, the Ohio Bar Association has noted:

> Commentators on the final regulations had suggested "defining 'gross amount' as net sales, taking into account credit transactions, chargebacks and other adjustments, on the ground that gross amount is not a true indicator of revenue." Id. The Treasury rejected these suggestions because "[t]he information reported on the return required under these regulations is not intended to be an exact match of the net, taxable, or even the gross income of a payee." Id

In addition to the gross volume reporting, Section 6050W also requires processors to verify and match your federal tax ID and legal name to IRS records. 6050W requires an *exact* match on both items for your credit card processors to file the 1099-K correctly. Many law firm names are truncated on credit cards and this could create a potential problem. Any firm which takes credit cards should scrutinize their transaction slips for this potential problem and contact their merchant account provider to correct any error. The penalties for violation of this provision could be stiff.

Conclusion

None of the changes outlined in this article are earth shattering or will be particularly difficult to prospectively implement. The key is to make the changes ahead of time rather than having to defend one's failure to change to the Michigan Attorney Grievance Commission.

Endnotes

1 Stuart G. Friedman, "The Ethics of the Virtual Law Office," *Michigan Appellate Practice Section Journal,* Spring 2011, 11.

2 For a description of this type of virtual practice, see Hope Viner Samborn, "Virtual Law Offices Are Blooming Everywhere," 20 *ABA Perspectives* 10 (Summer 2011) (outlining the number of lawyers who practice only in cyberspace). This trend will probably be further facilitated through the amendments to Rule 5 of the Rules of the Board of Law Examiners providing that attorneys seeking reciprocal admission in Michigan no longer need to have a have a good faith intent to maintain an office in this state. ADM No. 2010-31 (adopted June 13, 2012).

3 As to the growing trend, *see* Devika Kewarlarami, "Are Virtual Law Offices Here to Stay, "*New York Law Journal* (July 19, 2012) available at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1342369491002 (last visited January 7, 2013). The author also notes the growing trend of the state bar associations to approve of these arrangements.

4 For example, the State Bar has said that a group of very loosely affiliated attorneys (e.g. suitemates) cannot list their names together as "an association of counsel" because this would be confusing to potential clients. CI-536 (June 8, 1981). Similarly, the Ethics Subcommittee has had problems with the use of the term of "Law Offices" as applied to a solo practitioner who has no staff. RI-246 (December 6, 1995). The Subcommittee wrote:

> A corporate or firm agnomen like "law offices" is facially plural. While Webster's Third New International Dictionary (Unabridged, 1993) indicates that, in British usage specifically, "offices" has the connotation "the company whose place of business is an office," Michigan is not England or the British Commonwealth, and absent qualifying words of explanation, the plural does import more than one office among speakers of English in this State.
>
> While reasonable minds can debate the correctness of this position, it is clear that ethicists are concerned that there is full disclosure to the client about the true size, nature, and experience of the lawyer's or lawyers' practice.

5 Informal Opinion RI-355 (October 26, 2012) available at http://www.michbar.org/opinions/ethics/numbered_opinions/ri-355.cfm (last visited January 7, 2013).

6 Informal Ethics Opinions issued by the State Bar are not binding, but are instructive of an attorney's obligations under the Canon of Ethics. As the Court of Appeals explained:

> Attorneys have an obligation to follow the rules of professional conduct, which generally operate on ethical principles. MRPC 1.0(b). Attorneys are well-advised to be aware of the State Bar's ethics opinions in order to avoid breaching the rules of professional conduct and being forced to submit to a disciplinary proceeding. *Id.* However, "[a]n informal ethics opinion is prepared and issued by a subcommittee after it has been circulated to subcommittee members and the Chairperson has resolved any conflicting views. Informal ethics opinions generally deal with situations of limited and individual interest or application." State Bar of Michigan Ethics Opinion J-6 (September 20, 1996). These opinions, though instructive, are not binding on this Court. *Barkley v. Detroit,* 204 Mich.App. 194, 202, 514 N.W.2d 242 (1994)
>
> *Watts v Polaczyk*, 242 Mich App 600, 607; 619 NW2d 714, 718 (2000)

7 Stuart G. Friedman, "Practicing in the Clouds: Are the Ethical Concerns with Cloud-Based Computing Being Overhyped?" *Michigan Appellate Practice Journal*, (Summer 2010), 14.

8 The various state ethics opinions are collected at http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html (last visited January 7, 2013).

9 ABA Report to House of Delegates, Resolution 105A (August 2012) (available at http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2012_hod_annual_meeting_executive_summaries_index.authcheckdam.pdf). See also Nicole Black, Legal Loop: Tech Obligations Affected by ABA Model Rule Change, *The Daily Record* (August 17, 2012) (available at http://nydailyrecord.com/

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blog/2012/08/17/legal-loop-tech-obligations-affected-by-aba-model-rules-changes/) (noting passage of resolution).

10 *See e.g.* Mass. Bar Assoc. Ethics Op. 12-03 (noting that clients should be advised of the use of cloud based storage).

11 *New 1099-K Reporting Requirements for Payment Settlement Entities*, http://www.irs.gov/Businesses/New-1099-K-Reporting-Requirements-for-Payment-Settlement-Entities (last visited January 7, 2012).

12 *New IRS Requirements Affect Many Attorneys*, https://www.ohiobar.org/NewsAndPublications/News/OSBANews/Pages/New-IRS-requirement-affects-many-attorneys.aspx (last visited January 7, 2013).

13 75 FR 49821-01, 2010 WL 3207681 (Aug. 16, 2010).

14 *New IRS Credit Card Transactions Reporting Requirements*, http://www.vsb.org/site/news/item/new-irs-credit-card-requirements (last visited June 7, 2012).

Outcomes on Appeal: Phase One

By Barbara H. Goldman

Like most appellate practitioners, I have often had to answer the question of "What are my chances?" Clients, and trial attorneys, want to know how likely is it that the client can obtain a reversal of an adverse decision. Less often, their concern is the probability of sustaining a favorable one on appeal.

For years, I have answered the first question "about 15%," based on a figure I once saw in the distant past but which seemed consistent with my own experience. As for the second, I would say "it's rare for a verdict to be overturned" and leave it at that.

A few months ago, however, I decided to invest some effort in finding out how well these answers reflect the reality of appellate practice in the Michigan Court of Appeals. With that goal in mind, I did an analysis of all the Court of Appeals opinions released between October 1, 2011 and December 31, 2011; the time span and dates were arbitrary, but there is no reason to think they are not representative of the Court of Appeals' recent actions. A total of 1054 individual docket number/decision combinations were analyzed. What follows is some discussion of these data.

Method

To the extent possible, decisions were identified with docket numbers. This means that some opinions produced multiple data points. For example, where two or more parties appealed and the appeals were consolidated, each docket number contributed one data point even if the court's analysis was the same.

Where several docket numbers were assigned to a single appeal, the decisions were parsed out where it could be done, but it was not always possible to associate an action with a docket number. Consequently, some imprecision was unavoidable.

In addition, it was not always possible to be precise about what had happened. Consequently, it was necessary to group outcomes together that might have differing consequences depending on the type of case.

Cases types were identified first by the case-type code, but case-type codes are sometime an imperfect reflection of the nature of the case. Some cases do not have case-type codes at all and some cases of the same type can be assigned more than one case-type code. Therefore, I added a "comment" section to my record and used that to refine the analyses and discussion below. There is some overlap in the subgroups analyzed, so the total percentages reported will exceed 100%.

Please consider this a rough survey of a complex topic.

Results

All Cases	
Affirmed without modification	74.0%
Affirmed with modification	4.9%
Affirmed in part, reversed in part	4.9%
Reversed without qualification	11.2%
Remanded	0.7%
Vacated/vacated in part	3.5%
Dismissed	0.3%
TOTAL	100%*

* Rounded to one decimal place.

Criminal cases (FC/FH only; includes applications for leave)	
Affirmed without qualification	81.1%
Affirmed but remanded Includes correction of sentence (10); correction of PSIR; remand for evidentiary or other hearing; remand for resentencing (11)	4.5%
Affirmed in part, reversed or vacated in part	
In favor of defendant	0.0%
In favor of prosecution	4.0%
Reversed without qualification	
In favor of defendant	0.0%
In favor of prosecution	6.0%
Remanded without qualification	1.0%
Vacated/vacated in part/vacated and remanded	
In favor of defendant	<1.0%
In favor of prosecution	5.2%
Dismissed	<1.0%
TOTAL	~100.0%

Noncriminal cases, excluding parental rights termination	
Affirmed without modification	62.2%
Affirmed with modification Includes vacated in part; affirmed but remanded; modified	3.4%
Affirmed in part, reversed in part	10.3%
Remanded	0.6%
Reversed without modification	
In favor of appellant	13.5%
In favor of appellee	5.0%
Vacated; vacated and remanded	4.6%
Dismissed	0.4%
TOTAL	100.0%

Parental rights termination and related proceedings (nondivorce, noncustody)	
Affirmed without modification	94.0%
Affirmed in part; vacated in part; or remanded	3.3%
Reversed	2.0%
Dismissed	0.7%
TOTAL	100.0%

Tort and no-fault cases, excluding employment discrimination or wrongful discharge	
Affirmed without modification	62.9%
Affirmed in part, reversed or vacated in part	7.6%
Reversed without modification	
In favor of plaintiff or claimant	10.6%
In favor of defendant or insurer	12.9%
Vacated; remanded; vacated and remanded	6.1%
TOTAL	100.1%

Domestic relations (DC, DM, DO, DP, DS, DZ) *Caution: small sample size; results may not generalize*	
All cases	
Affirmed without modification	54.9%
Affirmed in part, reversed, vacated or remanded in part	31.4%
Reversed	13.7%
TOTAL	100.0%
Custody disputes only	
Affirmed without modification	47.6%
Affirmed in part, reversed, vacated or remanded in part	38.1%
Reversed	14.3%
TOTAL	100.0%

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Employment cases (all types) *Caution: small sample size; results may not generalize*	
Affirmed without modification	90.5%
Reversed	9.5%
TOTAL	100.0%

Insurance coverage (includes PIP, UM/UIM, homeowners, liability) *Caution: small sample size; results may not generalize*	
Affirmed in favor of insurer	63.3%
Reversed in favor or insurer	14.3%
Reversed in favor of insured (claimant)	4.1%
Affirmed in part, vacated, etc.	18.4%
TOTAL	100.1%

Discussion

If nothing else, this effort confirmed the common wisdom that most cases are affirmed on appeal. Criminal defendants, in particular, have little basis for optimism, either in appealing their convictions or in opposing applications by the government. The same is true for parents appealing from orders terminating parental rights.

In civil cases, if the appellant lost at the trial court level and hopes for relief, the chances are modest at best - unless it is an insurance company.

The number of family law decisions was small enough that it would be risky to generalize to all cases, but the data do suggest that overturning a custody decision is challenging but there is a better chance of some modification of the order.

Anyone interested in expanding the sample size or further refininement of the data analyses is welcome to contact the author at *bgoldman@michiganlegalresearch.com*.

Cases Pending Before the Supreme Court After Grant of Oral Argument on Application

*by Linda M. Garbarino**

This is an ongoing column which provides a list of cases pending before the Supreme Court by order directing oral argument on application. The descriptions are intended for informational purposes only and cannot and do not replace the need to review the cases.

***Addison Twp v Barnhart*, SC 145144, COA 301294**

Zoning: Whether the Court of Appeals erred in *Addison Twp v Barnhart*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2008 (Docket No. 272942) (*Barnhart I*), when it held that, "to the extent that there was testimony to suggest that defendant's operation of a shooting range was for business or commercial purposes, MCL 691.1542a(2)(c) does not provide freedom from compliance with local zoning controls."

***Admire v Auto-Owners Ins Co*, SC 142842, COA 289080**

No Fault: Whether the defendant insurer is obligated to pay personal protection insurance benefits under the No Fault Act, MCL 500.3101 *et seq* for handicap-accessible transportation.

***Cherryland Electric Coop v Blair Twp*, SC 145340, COA 296829**

Taxation: Whether these cases involve a mutual mistake of fact within the meaning of MCL 211.53a.

***Cummins v Lewis*, SC 145445, COA 303386**

Civil Rights/Governmental Immunity: Whether the plaintiff's no contest plea to resisting arrest bars her remaining claims pursuant to *Heck v Humphrey*, 512 US 477, 487 (1994); whether accepting the plaintiff's version of events, defendant Lewis nevertheless acted reasonably as a matter of law, under all the circumstances; and whether the defendant is entitled to governmental immunity.

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Recommended Reading for the Appellate Lawyer

By Mary Massaron Ross

Legal Spectator & More
Jacob A. Stein
(The Magazine Group 2003)

Michel de Montaigne said, "When I am attacked by gloomy thoughts, nothing helps me so much as running to my books. They quickly absorb me and banish the clouds from my mind." The author of this book of essays, Jacob A. Stein, explains that this book is the second volume of "transient essays" that were "scattered around in periodicals". And he predicts that "[o]ne of these days a tired lawyer, in retreat from the quickly running statute of limitations, and hiding out in a bookstore as I have done, will discover this book." He is right – or at least mostly right. I, a tired lawyer who sometimes likes to retreat from the legal problems of the day in a bookstore, have discovered his book. Epstein further predicts, "And it may just happen that one or two of the remarks that follow will remind the tired counselor that the ungrateful client, the unresponsive judge, the damnation of deadlines are all common to those of us who must extract a living from the contention of others."

The essays that follow do remind the reader of many aspects of the life of the law. One essay, "30 Golden Rules", discussed negotiations, the books purporting to teach how to negotiate, and the rules of the game. His rules are practical and offer guidance for handling negotiations based on his experience. Another essay reviews several biographies of Oliver Wendall Holmes, Jr. The essay quotes Mencken's view of Holmes, and mentions favorably a collection of letters by Holmes that I have previously reviewed. Mixed in with essays that are focused on legal matters are lively discussions of popular culture, with essays on vaudeville, Cole Porter, and Louis Armstrong. And Stein also discusses politics: one essay entitled "Clinton, Asquith, and Schopenhauer" is illustrative of the unique and imaginative twist the author provides to all of his topics of discussion. Dipping into the essays will surely give you a lift and serve as a reminder that life should involve more than work, and that we are each of us happier if we spend time engaged in a multiplicity of pursuits.

A Wilderness of Error: The Trials of Jeffrey MacDonald
Errol Morris
(Penguin Press 2012)

We have all read accounts in the press about various innocence projects – and their work to use modern forensic science to overturn wrongful convictions. And such accounts of numerous wrongly convicted individuals, particularly as to those on death row, raise serious questions about the justice system. Reading Erroll Morris's book will surely raise even more questions in the mind of any thoughtful reader. In a balanced historical account, Morris tells the story of Jeffrey MacDonald, a physician and former Green Beret, who was convicted of brutally murdering his wife and two daughters in what was a highly publicized trial. The first book discussing the trial, *Fatal Vision*, was written by Joe McGinnis, who was embedded as a journalist member of the defense team, sitting in on defense attorney meetings and spending huge amounts of time with MacDonald. The book, which came out while MacDonald's case was on appeal, painted an extremely negative picture of MacDonald, with McGinnis says of MacDonald that he "had about himself something of the aura of Robert Redford in *The Candidate* – with, perhaps, faint, distant echoes of Gatsby." McGinnis's depiction of the events showed the MacDonald presented by the prosecution during trial, not MacDonald as the defense saw him and not the MacDonald as seen in Morris's more recent book. In fact, the depiction was so negative (despite McGinnis's agreement with MacDonald) that MacDonald sued him for fraud because the book allegedly failed to show him in a manner that was essentially true. That lawsuit never went to trial, but the allegations were sufficiently well-founded to prompt McGinnis to settle the case. And Janet Malcolm explores this lawsuit in her book, *The Journalist and the Murderer*. Malcolm essentially ignores the question of whether MacDonald was innocent or guilty – focusing instead on questions of journalistic ethics. In Malcolm's view, "Every journalist who is not too stupid or too full of himself to notice what is going on knows that what is going on is indefensible." Malcolm believes that the journalist is essentially a con man "preying on people's vanity, ignorance, or loneliness, gaining their trust and betraying them without remorse." And she explores this view through the illustration of McGinnis's relationship with MacDonald. I think a better depiction of this seemingly intractable issue can be found in Pete Dexter's novel *The Paperboy***.** The novel follows a newspaper journalist and offers a dramatic depiction of how the stories that journalists write can bring disaster to those who have been willing to share information with them. But Dexter does not conclude that the process amounts only to a confidence game – he suggests that it can be justified only when the writer ends up telling a story that is true.

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***Hoffman v Barrett*, SC 144875, COA 289011**

Medical Malpractice: Whether the plaintiff's complaint should have been dismissed with prejudice because her notice of intent did not comply with MCL 600.2912b(4).

***Lefevers v State Farm Mutual Auto Ins Co*, SC 144781, COA 298216**

No Fault: Whether the tailgate on the plaintiff's dump trailer was "equipment permanently mounted on the vehicle" for purposes of MCL 500.3106(1)(b), and, if so, whether the plaintiff's injury was "a direct result of physical contact with" the tailgate.

***People v Harris*, SC 145833, COA 296631**

Criminal: Whether the defendant was prejudiced by the admission of the physician's diagnosis that the complainant was the victim of child sexual abuse and whether the defendant is entitled to a new trial.

***People v Kiyoshk*, SC 143469, COA 295552**

Criminal: Whether the defendant waived family court jurisdiction by pleading guilty to a specified juvenile violation under MCL 712A.2(a)(1).

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