THE LITIGATION NEWSLETTER

WINTER 2009

WHAT'S INSIDE:

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2008 SUMMER CONFERENCE: LESSONS FROM THE COMPLETE NEGOTIATOR

by: ***Thomas F. Cavalier***
Barris, Sott, Denn & Driker, PLLC.

The 2008 Litigation Section Summer Conference was held on July 25 and 26 at the Shanty Creek Resort near Bellaire, Michigan. The conference kicked off with an evening outdoor reception. We sampled a wide variety of appetizers, treats and wine on a terrace overlooking picturesque Lake Bellaire, all in the good company of conference participants and their families.

The next day featured a seminar by Professor Gerald Williams on negotiation skills. The "Complete Negotiator" introduced us to fundamental concepts in the theory and practice of negotiation, based on Professor Williams' pioneering research. Gerald Williams, Professor of Law Emeritus at Brigham Young University, proved to be an engaging and enlightening guide.

We all have our own styles of negotiating, shaped by our personalities and experience, advice from our mentors and tips from our colleagues. Early in his career, Professor Williams studied these different styles and their effectiveness in reaching an agreement. His studies, conducted in the early 1970s in Denver and Phoenix, found that the negotiating patterns of experienced professionals broke down into two primary approaches: "cooperative" and "aggressive". The cooperative negotiator's objectives are (1) ethical conduct, (2) maximizing settlement for the client and (3) getting a fair settlement. The aggressive negotiator's top objective is to maximize the settlement for the client, followed by obtaining a profitable fee and outmaneuvering the opponent. The typical traits of the cooperative attorney are trustworthiness, ethical conduct and fairness; the aggressive type is characterized by dominating, forceful and attacking behavior.

Professor Williams found that most lawyers are cooperative negotiators, 63%, to be precise. The aggressive style is represented by 20% of the bar, and the remaining 17% are attorneys using a hodgepodge of different techniques or no technique at all.

So which type is likely to be the most effective negotiator? Professor Williams found that, among the cooperatives, 43% are effective, 44% are average and 13% are ineffective. The aggressive style proved to be much less likely to obtain a settlement. Fifteen percent of the aggressives were effective, 40% were average and 45% were ineffective. The aggressive approach fared even worse than the "other" approaches. Of those, 29% were effective, 47% were average and 24% were ineffective. These results have stood the test of time; the 1970s studies were replicated in the 1980s and 1990s with similar findings.

Whether a lawyer is cooperative or aggressive, he or she is bound to encounter the other type at the opposite side of the negotiation table. When this happens, there is the lowest probability of achievement. (In contrast, agreement is most likely when both attorneys are cooperative.) Nevertheless, Professor

Williams offered the negotiator some strategies for beating the odds.

First, try the "tit-for-tat" approach. The negotiator responds to every aggressive or cooperative move by the other side. She begins cooperatively. Aggressive moves are responded to aggressively (but appropriately) and cooperative moves are rewarded. Professor Williams' studies found that this technique is most effective if it is used with "softeners". A "softener" is a statement that shows no hostile intent, reduces tension, or invites cooperation. Recognizing your opponents' interests, needs, point of view and difficulties and being receptive to new ides and information are examples of "softeners".

If "tit-for-tat" doesn't work, try the "getting to yes" technique. This approach attempts to disarm an aggressive tactic by shifting the negotiation to a neutral, objective platform, utilizing the four principles in "Getting to Yes", the classic book by Roger Fisher, William Ury and Bruce Patton. These four principles are:

- "Separate the people from the problem."
- "Focus on interests, not positions."
- "Invent options for neutral gain."
- "Insist on using objective criteria."

If neither technique succeeds, Professor Williams advocates using the "Elegant Solution." This approach is employed when the opposition simply refuses to negotiate, relying more on bluster than reason, because he has failed to prepare, and, therefore, does not understand his case. Do not give in to your opponent's tactics. Be patient, and keep the lines of communication open. Beyond that, you should educate your opponent about the case. As the litigation moves forward, and the day of reckoning approaches, your opponent will see the light and settle at the last minute – at least that's how it should work.

The 2008 Summer Conference was a great opportunity to reconnect with old friends and colleagues and to expand and deepen our understanding of the negotiation process. If you missed it, we hope to see you at next year's conference, scheduled for July 31–August 1. It will feature a seminar by the team of Larry Pozner and Roger Dodd, celebrated for their revolutionary approach to cross-examination. Watch this newsletter for more details.

SAVE THE DATE!

MASTERS IN LITIGATION – TRIALS: TIPS, TACTICS & PRACTICAL TALES

TUESDAY, MARCH 24, 2009, 8:30 AM – 4:15 PM
THE INN AT ST. JOHN'S, PLYMOUTH
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OF THE STATE BAR OF MICHIGAN

Reach the next level of success in the courtroom using Michael Cash's proven techniques. In this fast-paced program rich with demonstration and real-life examples, you will hear from this master of timing and delivery how to enhance your performance at trial. Learn pretrial tips that will allow you to shut down your opponent at trial, how to give high impact openings and closing arguments that move the jury to action, techniques for conducting illuminating direct examinations that hold a jury's attention and decisive cross-examinations that will unravel a witness, and how to create and use show-stopping demonstrative evidence.

Presenter Michael P. Cash, a shareholder in the Houston office of Winstead PC, has been nationally recognized for his trial skills, including being named a Texas "Superlawyer" and one of the "Best Lawyers in Houston." He has served as a team leader and faculty member for numerous programs of the National Institute for Trial Advocacy. In addition, he has taught trial practice seminars nationwide for bar associations and CLE providers as well as in-house advocacy programs at major universities and at some of the largest firms in the U.S. and Canada.

NEW FEDERAL RULE OF EVIDENCE SEEKS TO PROTECT AND PRESERVE THE ATTORNEY-CLIENT PRIVILEGE IN THE AGE OF EDISCOVERY

by: *Marcella Stewart** and Brad Sysol**

On September 19, 2008, President Bush signed into law a bill enacting Federal Rule of Evidence 502 entitled "Attorney-Client Privilege and Work Product: Limitations on Waiver." This new rule standardizes the application of privilege waiver and subject matter waiver, and provides parties better predictability when entering into agreements regarding discovery.

WHY CREATE A NEW RULE?

The advent of e-discovery has increased both the costs and risks of discovery. The amount of stored electronic information is expanding exponentially and, with new software and technology, that information is becoming increasingly more accessible. In addition, new types of electronically stored information (ESI) are being requested in discovery, including instant messages, voice mail recordings, and voice over internet (VoIP) data. With a single case potentially involving hundreds of thousands or even millions of pages of discovery documents, privilege review can be daunting. Parties struggle to review large amounts of information at a reasonable cost, in a reasonable time, without disclosure of privileged information.

In a recent survey of the Fellows of the American College of Trial Lawyers, more than 87% responded that e-discovery increases the costs of litigation, and 75% that discovery costs have increased disproportionately due to e-discovery.[1] A major component of those costs relate to privilege review. In a 2007 survey of senior corporate counsel, 30% of respondents estimated that 6-10% of their total litigation costs related to privilege review and 16% that privilege review was 30-50% of their total litigation costs.[2]

The Federal Rules of Civil Procedure were updated in late 2006 to respond to the rising costs discovery and to address some of the particular challenges of e-discovery. The new procedural rules include provisions that require parties to meet and confer regarding discovery and to develop solutions together for handling e-discovery and related privilege issues. The new rules also include a "claw back" provision at Rule 26(b)(5)(B), which provides that if a party inadvertently discloses privileged information, it can request that the information be returned; information that has been "clawed" back cannot be used until the privilege claim is settled.

However, although the procedural rules were updated, the evidentiary implications of disclosing privileged information remained governed by common-law tests regarding privilege waiver, which were split across jurisdictions. Without assurance that joint agreements or federal procedure would protect the privilege, parties were hesitant to rely on them and felt compelled to continue comprehensive, document-by-document privilege reviews. This new rule of evidence is intended to standardize the application of privilege waiver across jurisdictions so that parties can make use of technology and claw back agreements to reduce the cost of e-discovery review.

WHAT DOES THE RULE PROVIDE?

The rule includes 3 major provisions. First, it codifies the common-law balancing test for determining when a disclosure of privileged information results in a waiver. Jurisdictions are split into three major camps regarding the appropriate test for waiver. A minority of jurisdictions apply a strict waiver approach, subscribing to the old adage that once the cow is out of the barn, closing the door will not get it back in. In those jurisdictions, waiver applies not only to information disclosed, but also to other information relating to the same subject. A slightly larger minority of jurisdictions are take a more lenient approach, and find no waiver at all if information is inadvertently disclosed.

The majority of jurisdictions land somewhere in the middle, protecting privilege if the disclosure, and the subsequent attempt to retrieve the information, are reasonable. In these jurisdictions, the court has discretion to determine reasonableness and will often consider factors such as the time taken to remedy the disclosure, precautions taken to prevent disclosures, and fairness. The court may also determine if the waiver should extend to information that was not disclosed (subject-matter waiver).[3] FRE 502 adopts this middle-ground balancing test. In order to maintain a claim of privilege

for inadvertently disclosed information, a party must demonstrate that it (a) took reasonable steps to prevent the disclosure, and (b) took reasonable steps to promptly remedy the disclosure.

Second, the rule limits subject-matter waiver (waiver of privilege beyond the information that was actually disclosed) to circumstances when privileged information is intentionally and selectively disclosed for some misleading purpose. The rule provides that if otherwise privileged information is intentionally disclosed, the disclosure may waive the privilege for other communications that "concern the same subject matter" and "ought in fairness" be considered together.

Finally, the rule specifies how it should be applied to state proceedings. If an inadvertent disclosure is made in a federal proceeding, any order regarding that information applying Rule 502 will be binding on subsequent state court proceedings. If information is inadvertently disclosed in a state-court proceeding, and is not the subject of a state court order, then a federal court subsequently reviewing the information will apply the standards of Rule 502 unless the state court rule offers more protection. The rule does not apply in a state-to-state situation where information disclosed in a state proceeding becomes an issue in a subsequent state proceeding.

WILL THE RULE BE EFFECTIVE?

Although the rule provides more predictability, it leaves several areas open for interpretation. In particular, the rule does not define the "reasonable steps" necessary to invoke its protections. The committee notes explain that the drafters purposely declined to name specific factors of reasonableness. They intended the rule to be flexible enough to accommodate factors established by the common law as well as case-specific considerations. They did, however, name a few of the factors they expect courts will consider, including the scope of discovery, the time frame in which the review had to be completed, the number of documents to be reviewed, precautions taken to prevent waiver, time taken to correct the disclosure, and general fairness. They also explain that use of advanced analytical software applications, linguistic tools, and even an efficient system of records management before litigation may also demonstrate reasonableness.

Whether the rule will be effective will depend on whether courts interpret reasonableness and fairness in a consistent way and support agreements negotiated by the parties. If the courts consistently back up claw back and other discovery agreements, parties will feel more comfortable to negotiate limited and automated privilege reviews to cut the costs of discovery.

HOW DO I TAKE ADVANTAGE OF THE PROTECTION OF THE RULE?

Document the reasonableness of your privilege review.

As you create a protocol for conducting a privilege review, expect that you will have to justify your decisions to the court or your opponent. Make sure your decisions are well-considered and well-documented. For an extra level of comfort, develop a dialog with opposing counsel and agree in principle on your protocol. Your opponent will find it much harder to challenge the reasonableness of your review if he has approved your methods in advance.

Get a court order.

If you enter into a clawback agreement or other discovery agreement with opposing counsel, get the court's approval. The protections of Rule 502 will only bind other parties and state jurisdictions if they are incorporated into a court order.

Follow up promptly if you suspect that privileged information has been disclosed.

Be sure you develop a process and appoint a responsible point person to follow up on any potential disclosures. Although the rule does not require a post-production review just to make sure nothing fell through the cracks, it does require parties to follow up promptly if they have reason to believe privileged information was disclosed.

* *Brad Sysol is a Principal with Miller, Canfield, Paddock and Stone, practicing exclusively in civil and commercial litigation. Mr. Sysol has extensive experience in large-scale e-discovery and complex discovery matters.*

***Marcella Stewart is an Attorney with Miller, Canfield, Paddock and Stone's Corporate Discovery Management Team, practicing exclusively in e-discovery and discovery management.*

ENDNOTES

1. *Interim Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System*, August 1, 2008.
2. *Fourth Annual Litigation Trends Survey Findings*, Fullbright & Jaworski, LLP, 2007
3. For an interesting discussion regarding standards for waiver, see Magistrate Judge Paul Grimm's opinion in *Victor Stanley v Creative Pipe*, 250 F.R.D. 251, 257-259 (D. Md. 2008)..

HOLD EVERYTHING: PROVIDING USEFUL ADVICE TO COMPANIES ON RULE 26 PRESERVATION OBLIGATIONS

by: *Ellen Padesky Maturen, Esq.* and Marla G. Zwas, Esq.***

Litigators, put yourselves in our shoes. You arrive fresh in the morning to your job as in-house counsel for a Fortune 500 company. Just as you grab that first cup of coffee, your assistant hands you a new complaint. You scan it quickly, and your cheery morning smile fades to a frown. It's a big one. Your head swims as you absorb the highlights. Class action. Nationwide. Millions of dollars.

Minutes later, emails start pouring into your mailbox. Forty-two law firms "saw this docket notice" and ask you to let them know if they "can do anything to help."[1] You contact the litigation firm that handled similar suits for you in the past. You know they always give great advice. Calm and collected, you are now ready to receive their words of wisdom.

The conference call goes along smoothly, until suddenly, the dreaded words come across the line:

By the way, for the electronic records? We need you **HOLD EVERYTHING** and send it to us for review as soon as possible.

Hold everything? Sweat forms. If only you could recall the location of the closest company defibrillator. Within minutes, panic morphs into anger. Hold everything?! What kind of legal advice is that? You are not even sure what the case involves yet! The business has to move forward! And what is "everything" anyway?

The next call with your litigators is more contentious. You start talking about your email system, your share drives and the limited staff you have available to collect data. You emphasize the interruptions to the business, and the expense. Yes, you agree the allegations are broad, but the facts relevant to the case aren't likely to be found in company email. Your counsel ignores your protests and counters. You need to notify everyone and collect it all – and right now. If you fail, you could be facing sanctions. You could lose the case, or worse, you could lose your license to practice law.

The New Battleground: Outside v. In-house Counsel. In the past, in-house counsel and their outside litigation firms had one common goal: win the case. Battles were waged only with opposing counsel. But with the new emphasis on broad and immediate preservation of records for potential discovery requests, company lawyers are finding themselves increasingly at odds with their outside counsel.

Outside counsel have very real concerns. "Hold everything" type advice insulates the firm from a later malpractice claim – and the litigator's own risk of sanctions. It also increases the likelihood that the firm can locate that killer document and win the case. Success! Right?

Not in the client's view. In-house counsel is under the gun to save money at every turn. Advice to "hold everything" presents in-house counsel with a task that is terribly costly, and likely impossible to execute without seriously impeding business operations.

Such overly-broad preservation can also have negative consequences for the company in future litigation. In the next lawsuit, the court will expect to see the same broad collection. And all those irrelevant records that would have been destroyed but for the overly broad preservation order? They live on, only to become fodder for preservation and discovery (and re-reviewed by more lawyers) in the next lawsuit.

It's a battle that in-house counsel cannot afford to lose. If outside counsel cannot be convinced to render more tailored advice, the prudent in-house lawyer may simply move on to another firm that better understands Rule 26. As outside litigation counsel, how can you avoid this disastrous outcome?

Understand your client's policies on records management and legal holds. Most legal departments have undertaken the task of setting retention periods for records and have in place policies regarding everything from deletion of e-mails to back-up tapes. Like any policy, it is crucial that the policy be applied consistently. This basic tenet is of particular concern in the context of records management, where a lack of consistency can mean the court disregards the policy and throws the company's electronic doors open to opposing counsel.

Therefore, the first step in any lawsuit is to understand your client's existing policies and processes. Questions to your client should include:

- Do you have a retention schedule?
- How do you apply the retention schedule to paper files?
- How do you apply the retention schedule to electronic records?
- Do you have a legal hold process?
- How do you notify and remind relevant employees about a legal hold?
- What is your process to preserve records that may be subject to a legal hold?
- If the suit extends over several years, what is the process to ensure preservation in the case of employee turnover?

Once you understand this information, it is incumbent upon you to help your client maintain consistency by using whatever form memos, record series names and numbers and notification systems they use. Perhaps you can help your client maintain consistency by emailing preservation reminder notices to key decision makers on a quarterly basis. Certainly, you can separately render advice if you believe their policies are insufficient. Such advice, however, must be treated separately as policy advice and may have to wait until the next lawsuit to be adopted.

Now and then, you may run across a client with no records management system at all. Or, the client might have a program but not actively enforce it. In those cases, you are certainly much freer to render advice regarding policy and processes related to executing a legal hold.

Take the time to learn about your client's electronic systems. Again, this is an opportunity for you to ask questions. Find out where electronic information is stored, so you can target your subsequent advice on preservation to those systems. Some good questions you might ask:

- How do you currently manage email?
- What databases might you have with data relating to the suit?
- Do you have scanning systems, or a document management system?
- What search capability do your systems have?
- What is your protocol regarding back-up tapes?
- What would be involved in pulling data out of these systems, from a time and cost perspective?
- Do you have the capability to preserve text messages, instant messaging (IM) or voice mail?
- Once you extract records and data, how do you store and produce that material for discovery?

The answers to these questions will help you in forming a legal opinion or legal hold memo that is tailored to the situation. No preservation advice should include records that would have already been destroyed pursuant to company policy and routine business operations. Nor should such advice randomly encompass electronic systems that bear no relevance to the matter at hand.

The cost and process questions are also crucial. As Fed.R.Civ.P. 26(b)(2) provides, records may be considered to be not "reasonably accessible" if producing them will result in "undue burden or cost." While this rule may not relieve the preservation obligation, this information will help you start formulating your legal strategy for protective orders or cost-shifting.

Draft carefully tailored advice that strikes a reasonable balance. You are now ready to review the substance of the allegations against the backdrop of your client's records program and their electronic systems. As you walk the familiar road of identifying key players, plotting timelines and determining relevant record types, bear one thing in mind: money. Simply stated, the more expansive the legal hold, the greater the cost. In no time, those numbers can reach into the millions.

Your client will be looking for you to help them limit the breadth of the hold as much as possible, without undue risk of sanction. That's a balancing act, and you and your client will have to talk it out extensively before reaching answers. Certainly, it is understood that this is a case-by-case analysis. In the Committee Notes to Fed.R.Civ.P. 26(b)(2), it is acknowledged that the breadth of the "common law or statutory" duty to preserve "depends on the circumstances of each case."

Both sides must listen and debate, and carefully consider how to be thorough and prepared without scorching the earth**. The key to a healthy debate is both parties' realization that: a) parameters are necessary and inevitable, and b) no matter where those parameters are set, there is always some risk that a court will disagree.** No in-house counsel would deny you the opportunity to set forth such a disclaimer in your written opinion.

When setting preservation parameters, consider the following:

- **Better sources of evidence.** In just about any matter, you could argue that email might contain some discussion of some sort that is somehow relevant to the case. But is that where the evidence is likely to be found? Assuming a relevant email can be located, will email shed additional light on the facts beyond witness testimony or reports from a database? Answers to these questions depend on your client's systems (see above) and the allegations in the case. Note that these concepts are supported by the federal rules.[2]
- **Possible misbehavior.** If the case involves issues like accounting fraud or other surreptitious behavior, preservation may warrant a deeper dive than usual. Deletion activity, or even deleted material, may be subject to preservation in preparation for painstaking discovery.
- **Going forward concerns.** While classic lawsuits pertain to past events, some government investigations and some lawsuits may make continued behavior relevant. On the other hand, collecting information on a continuous basis requires avid oversight and costly, redundant electronic systems. Is ongoing collection really warranted?
- **Minimization**. What can be done quickly and easily to minimize the breadth of collection? When you and your client are unsure whether certain employees have played a role, conduct preliminary interviews before deciding that you must capture their emails and desktop records. Such inexpensive steps can reduce long-term expenditures without compromising the integrity of preservation.

There are two other factors that do not affect your client's legal obligation, but will naturally enter into the company's analysis of your recommendations. Your final word to the client should address:

- **Risk level.** Is the case one involving high dollar liability, significant negative publicity or likely to lead to other, similar claims if not defeated? If so, you can more readily advocate for expenditures in preparation for discovery. If not, you may have to press harder on the "legal obligations" front. While you might think responsiveness to your plan is a given, never forget that in-house counsel must seek permission for expenditures! Budgets are key, and they will also prepare your litigation team for later advocacy.
- **Opposing counsel**. Certainly, opposing counsel's commitment to a particular case does not alter your client's preservation obligation. Yet, in reality, all litigation strategy involves a mix of business, legal and financial considerations. Courts do consider the weight of a case when issuing orders under Rule 26.[3] You should thread your advocacy for preservation parameters with the opposing counsel's likely tactics and track record.
- When you are finally ready to render your opinion or draft a hold memo, make sure your in-house counsel understands the planned content. In-house counsel may take your recommendation to the General Counsel to obtain a preservation plan budget approved. Certainly, no in-house attorney wants to be in the position of receiving a bad surprise. Even more so, no client wants to receive written legal advice they simply cannot follow.

Be prepared to defend your client's position on preservation and discovery up front. As with all trial practice, adequate preparation is the key to your client's success. The difference now is that you must gear up far more quickly on ever more complex issues.

Preservation obligations arise immediately, and your client will expect you to be prepared with the right questions. You will be expected to deftly analyze the allegations and your client's business systems, and to provide useful, tailored recommendations in short order. While your client must prepare itself with policies and systems in advance, your firm must similarly be prepared to execute its role promptly and efficiently.

You should also ready yourself to promptly stake your position with opposing counsel on preservation and production. As the Rules indicate you should initiate the 26(f) conference "as soon as practicable." While traditionally it may have been better to hold back on revealing discovery strategy, companies now want to find their way to the "safe harbor" of Rule 37(f) and would rather determine up front if they need to change course to get there.

Your client collaboration and follow-up work should have already informed you of what evidence is "reasonably accessible" and what the collection "burden" will be. Your arguments as to what is unduly burdensome should be ready, along with a detailed and organized description of what steps your client has taken to ensure proper preservation.

Finally, don't be shy. Talk to your client about stepping up meetings with opposing counsel, or the possibility of seeking an emergency protective order. In practice,

failure to take timely steps can dramatically impact the cost to your client. Just recently, the Eastern District of Michigan refused to shift costs for electronic discovery because the attorney waited until after records were produced to request a protective order. The Court denied the order partly because the requesting party "elected to martyr itself rather than to seek relief in a timely fashion." *Cason-Merenda v. Detroit Medical Center,* slip op. 2008 WL 2714239.

Clearly defined obligations are often elusive, and if you can obtain them via opposing counsel or the court, you will be able to tell your client the best news of all: Hey, you don't have to hold everything.

**Ellen Padesky Maturen is Associate General Counsel for Pulte Homes, Inc., overseeing labor and employment and HR compliance. Ellen is also the First Vice President and Secretary of the American Corporate Counsel - Michigan Chapter.*

***Marla G. Zwas recently became the General Counsel for Toyoda Gosei North America Corporation. Immediately prior, she was Associate General Counsel for Pulte Homes, Inc., where she oversaw the company's records management program, consumer protection compliance, standardized contracts and intellectual property.*

ENDNOTES

1. A word to the wise: legal departments detest docket notice emails. At best, you are just reminding them of bad news they already heard. At worst, you are providing date-stamped notice to the company that they are now under a preservation obligation. Some attorneys go so far as to detail a planned legal strategy – advice that is unsolicited and therefore may not be privileged.

2. In deciding a discovery matter, a court considers whether more reasonably accessible sources will suffice. Fed.R.Civ.P. 26(b)(2)(C)(i).

3. Fed.R.Civ.P. 26(b)(2)(C)(iii), citing the "the amount in controversy" and "importance of the issues at stake in the litigation" as factors in a court's analysis of costly electronic discovery matters.

RECENT AMENDMENTS TO M.C.R. 2.306 PROHIBIT SPEAKING OBJECTIONS AND CONFERRING WITH DEPONENTS WHILE A QUESTION IS PENDING

by: James D. VandeWyngearde

Effective September 1, 2008, M.C.R. 2.306 was amended so as to clearly prohibit instructive, "speaking objections." M.C.R. 2.306(C)(4)(b) now provides that: "An objection during a deposition must be stated concisely in a civil and nonsuggestive manner." Moreover, the amendment makes clear that conferring with a deponent while a question is pending is improper, unless it is to determine whether a privilege should be raised. M.C.R. 2.306(C)(5)(b) states: "A deponent may not confer with another person while a question is pending, except to confer with counsel to decide whether to assert a privilege or other legal protection." Finally, the amendment adds language that specifically allows courts to "impose an appropriate sanction – including the reasonable expenses and attorney fees incurred by any party – on a person who impedes, delays, or frustrates the fair examination of the deponent or otherwise violates this rule." M.C.R. 2.306(D)(2).

SIGN UP TODAY

Join your Litigation Section colleagues for the fun networking and education program of the summer! Bring your family and your golf clubs for a great weekend. It's our 2009 Litigation Section Summer Conference featuring the Killer Cross Examination of Pozner & Dodd. It should be an unforgettable experience – save the date now!

WHEN: Friday & Saturday, July 31 & August 1, 2009

WHERE: Garland Resort, Lewiston, Michigan

WHO: Larry S. Pozner of Reilly Pozner LLP, Denver, Colorado and Roger J. Dodd of Dodd & Burnham, Valdosta, Georgia

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Oakland County Courthouse, Pontiac

State Finals: March 28, 2009
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Expert witnesses have become increasingly necessary in many types of civil litigation. When facts or concepts are difficult to understand or require special knowledge, the court or jury may rely heavily on an expert's guidance. In some cases the outcome of the litigation hinges on which party's expert is the most impressive or the easiest to understand. Join us as top-notch faculty, including nationally-recognized experts, share their techniques for making the best use of expert witnesses to enhance your ability to win your case.

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General admission: $165, Litigation Section members: $145; ICLE Partners attend free.

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