MICHIGAN COUNTY ROAD COMMISSION
SELF-INSURANCE POOL

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POOLCUE

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A quarterly publication of the Michigan County Road Commission Self-Insurance Pool. Visit www.mcrcsip.org for past issues.

Upcoming Events:

- **Feb. 17 | All Day**
  Board Meeting
  Treetops Resort, Gaylord
- **May 13 | All Day**
  Board Meeting
  The Atheneum, Detroit

Can you fire an employee for that?

Wendy Hardt
Michael R. Kluck & Associates

Imagine it is January 6th, and you are watching the news about the storming of the U.S. Capitol. Suddenly, you see one of your employees on video breaking out a window of the building.

The employee had taken an approved vacation that week. He had not told anyone of his planned trip to Washington D.C., and now there he is, clearly depicted in the video engaging in an apparent act of vandalism, if not worse. What can you do about it?

For governmental employees, the decision whether to discipline or discharge employees for off-duty conduct should never be made lightly or haphazardly. There are many things a governmental employer must take into consideration before giving discipline for off-duty conduct. First, it must keep in mind that public sector employees are entitled to certain constitutional rights with regard to a governmental employment. Among these are the right to freedom of speech and freedom of association. A public employer generally cannot discipline an employee for off-duty speech on a matter of public concern, unless it can show that its interest in efficiently fulfilling its public services outweighs the employee's interest in speaking freely.

Additionally, public employees in Michigan are protected by the Political Activities by Public Employees Act, MCL §15.401, et seq. Specifically, MCL §15.402 provides that a public employee may:

(a) Become a member of a political party committee formed or authorized under election laws of this State.

(b) Be a delegate to a State convention, or a district or county convention held by a political party in this State.

(c) Become a candidate for nomination and election to any state elective office, or any district, county, city, village, township, school district, or other local elective office without first obtaining a leave of absence.

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In This Issue

THE Intersection Where News & Ideas Connect

This month's bulletin is provided by MCRCSIP Administrator Gayle Cummings

As I look at the view from my window in Lansing this morning, I see a few inches of snow. There's not a ton of it, but enough that the trucks are out working. Drivers are being a little more careful. People on the sidewalks are watching their steps.

This is a great metaphor for how we all begin 2021 together. Conscious. Mindful. Watching our steps.

We're all still doing crisis, yet now it's time to focus on business as usual.

At MCRCSIP, business as usual is typically anything but. We have our eyes on the markets, the courts, and the legislature.

All of it can change on a dime, and we've got to constantly adapt. Fortunately, our strong partnerships help us get it right.

The services we deliver as an organization have been developed because you, our members, have asked for them. The issues we manage are thoughtfully chosen and prioritized based on the needs you've expressed. We are deeply honored to be part of your work.

As we look forward to the many ordinary but valuable things we'll do together in 2021, we see many issues emerging on the horizon. From possible changes to available coverage limits in the land of auto no-fault to high water issues, and from coming out of a pandemic issues to training and travel issues, we're doing the conscious, mindful walk needed to ensure there are no slips on the issues that matter most.

Of course, I must not be remiss in thanking the extraordinary partners that support MCRCSIP members every step of the way. From attorneys and investment advisors to our partners in education and outreach, we're leaving nothing to chance.

You'll be hearing from some of our members and partners in this quarterly edition of the *Pool Cue*. And, down the road, we anticipate this Intersection space will be filled with their musings—and maybe even yours!—as we walk together throughout all the concerns the coming year is sure to bring.

Finally, I want to invite you, our readers, to reach out with your feedback. If you have questions or ideas for future articles, please connect with our team.

Take care, and happy 2021!

The Hidden Legal Hazards Lurking Inside Your Cell Phone

Ali Fardoun
Smith Haughey Rice & Roegge

Electronic devices are in widespread use nowadays. About 96% of adults in America own cellphones, for example, and at least 81% own a smartphone. We use mobile devices to conveniently communicate with one another, get our work done, and browse the web from just about anywhere. Mobile electronic devices have come to play an even more important role as a result of the pandemic and the requirements that we distance from one another and work from home.

Convenience should come with caution, however.

Aside from the obvious, e.g. that we shouldn't talk or text while driving and be cautious about what we say in our text messages and emails, we must be mindful of the fact that our devices are constantly creating data in many forms, including call logs, contact information, SMS and MMS messages, emails, web history and searches, application data, and location data.

Continued on next page

Cell Phone Hazards

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In the unfortunate event that one finds him or herself involved in a lawsuit, the opposing party would likely be entitled to this data as long as it is relevant.

The data stored on our mobile electronic devices is an increasingly valuable resource in lawsuits—the statements we make over text and email can be deemed admissions when offered against us; driving speeds can be derived from our GPS and location data; and our call logs can show whether we were talking on the phone while driving. All of this data and information fits within the definition of Electronically Stored Information, or "ESI," under the Michigan Court Rules. See MCR 2.310(A)(2) ("'ESI' means electronically stored information, regardless of format, system, or properties").

The increasing importance of ESI is reflected in the recent amendments to the Michigan Court Rules which require parties to disclose and preserve ESI or face consequences. For example, the court rules require parties to disclose ESI that may be used to support their case without waiting for a request from the other party(ies) very early in the case. Failure to do so may result in loss of the party's ability to use that information.

The court rules also require parties to preserve of ESI whenever they anticipate a lawsuit. The consequences of failing to preserve ESI differ depending on whether the failure was accidental or intentional. The consequences of an intentional deletion of ESI can be grave and can even result in a default judgment being entered against the party who failed to preserve the information.

In short, the growing importance and widespread use of electronic devices has made its way into our court rules, and the consequences of not acknowledging this importance can have substantial consequences on both plaintiffs and defendants. The solution is to have a plan. So, when a lawsuit is looming on your horizon, please let the Pool know right away. Its army of legal and technical professionals will spring into action on your behalf. The sooner the Pool knows what's facing you, the sooner it can ensure you're on the right side of the developments in this cutting-edge area of the law.

What can I do to help myself?

1. **Keep your work email professional**. Don't send personal email from your work email address. And, if you can't help doing so, don't write anything you wouldn't mind reading out loud in a deposition. Profanity, sarcasm, and personal insults make for a rough transcript.
2. **If you're driving a plow truck (or some other piece of equipment), stay off your cell phone**. No exceptions. The data that can be pulled off your cell phone is too sophisticated. Call logs, text messages, and even your web browsing history are all time-stamped. Simply put: if you're using your phone in any capacity and something bad happens, the other side will find out about it.
3. **If you use a personal cell phone for work, please mind your text conversations**. The same rules that govern emails apply to text messages. So, whenever possible, don't mix work and personal business in the same text thread. And don't send messages or photos that might seem lewd, crude, or socially unacceptable.

Hold the Right of Way Line: A Cautionary Tale of Compromise

Bill Henn & Andrew Spica
Henn Lesperance PLC

At one time or another, every Road Commission is likely to encounter a disgruntled, demanding property owner whose land abuts an infrequently used, largely unimproved right-of-way. While these disputes can certainly lead to lengthy, burdensome litigation, a recent case brought against a Michigan County Road Commission serves as an important reminder of the dangers of compromising with property owners who demand changes to, or ownership of, the right-of-way boundary. The case teaches that if given an inch, this type of property owner will almost invariably return to take – or, more accurately, attempt to take – a mile.

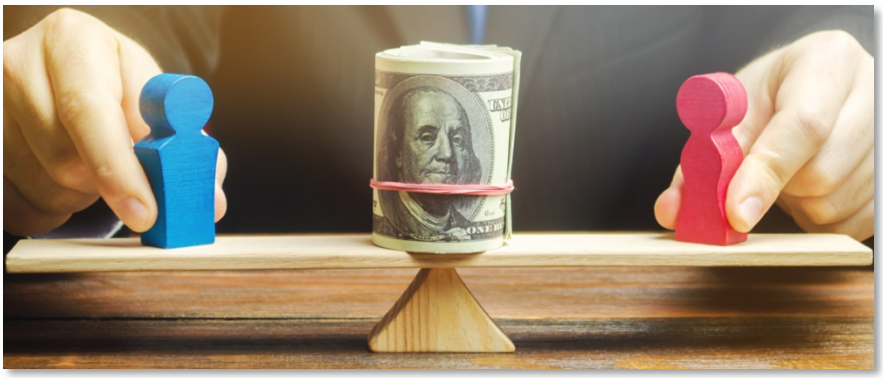
The issues underlying the case began in 2000, when a property owner abutting a longstanding county road filed suit in federal court seeking a declaration that he owned much of the improved portion of the right-of-way running over his property. After four years of litigation in that case, the Road Commission entered a consent decree granting the plaintiff ownership of all areas abutting his property and located outside the improved portion of the right-of-way "as presently maintained." The idea that this agreement would resolve the dispute and end litigation against the relentless property owner, however, was mistaken.

Sixteen years later, in connection with a project to improve a road intersecting the previously disputed road, the litigation reared its head once again. This time, the property owner joined his daughter – who owned a nearby property – in his suit against the Road Commission and each Board member in their individual capacities. To make matters worse, he attempted to leverage the 2004 Consent Decree into a myriad of constitutional and intentional tort claims alleging uncompensated taking of property, illegal seizure of property, slander of title, trespassing, and other similar claims based solely on the fear that the limestone gravel project would result in encroachments onto his property abutting the previously disputed road.

Even after the Federal District Court granted summary disposition to the Road Commission on each of the property owner's claims, he continued his fight for the right-of-way in the Sixth Circuit Court of Appeals. Though the Sixth Circuit recently affirmed the District Court and affirmed its order dismissing the claims, the case stands as an example of how compromising with a litigious, combatant individual, while perhaps effective at ending one lawsuit, can beget more lawsuits in the future. In essence, the Road Commission's good faith compromise in the 2004 Consent Decree enabled and emboldened the property owner to become a serial litigant.

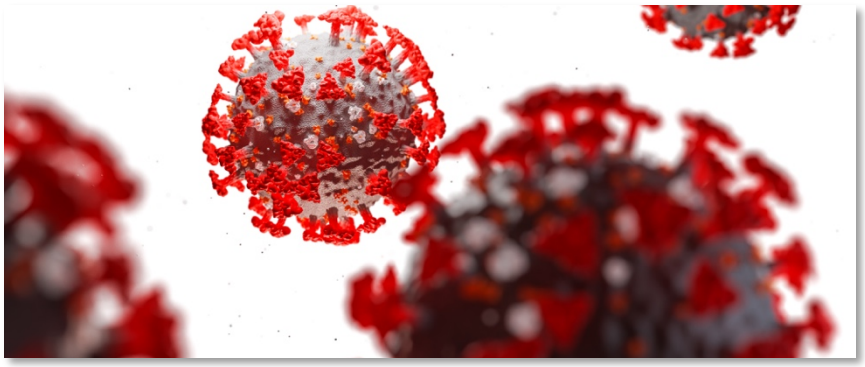
Each case is different, for certain, and this article is not critical of the compromise that was struck in that particular case. But it stands as a reminder that with some claimants, no matter how drawn out or frustrating litigation may become, an early compromise may only open the door to future, and increasingly complex, litigation.

In the event your Road Commission faces complaints from property owners claiming a stake in any portion of a county road right-of-way, please do not hesitate to reach out to the Pool to ensure the issue is promptly and appropriately resolved. By contacting the Pool, your Road Commission not only saves itself the time and frustration of dealing with the harassing demands of the property owner, it also protects itself against a pandora's box of potential, future litigation. And, for a more detailed discussion about this particular case and others, tune in to MCRCSIP's next series of video seminars, appropriately titled, "What the Heck?"



COVID Confusion: Limitation Periods & the Pandemic

Bill Henn & Andrea Nester
Henn Lesperance PLC



It's an understatement to say that much has changed since the Governor first declared a state of emergency due to the COVID-19 pandemic last March. Between March 10, 2020, and October 2, 2020, well over 100 separate executive orders were issued in Michigan regarding COVID-19. And, after the Michigan Supreme Court held that most of these executive orders were invalid in October, dozens of additional orders have been issued by the Department of Health. However, because the Governor was not the only one issuing pandemic related orders in the early stages, some of the very first executive orders still may ultimately have a long-term impact on the calculation of statutes of limitations—including those involving tort claims under the GTLA or contract litigation—for years to come.

An order issued by the Governor is referred to as an "Executive Order." The Michigan Supreme Court likewise issues "Administrative Orders" regarding court procedural matters. And, in response to the first state of emergency Executive Order, the Michigan Supreme Court issued Administrative Order 2020-03 on March 23, 2020. In pertinent part, AO 2020-03 provides:

> For all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or a motion raising a defense or an objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1).

The Administrative Order further provides that it "is intended to extend all deadlines pertaining to case initiation and the filing of initial responsive pleadings in civil and probate matters during the state of emergency declared by the Governor related to COVID-19."

On June 12, 2020, the Supreme Court issued Administrative Order 2020-18, rescinding the previous AO effective June 20, 2020. That Order also directed:

> For time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020. For filings with time periods that did not begin to run because of the exclusion period, the filers shall have the full periods for filing beginning on June 20, 2020.

So, while the Executive Orders related to the "state of emergency declared by the Governor related to COVID-19" have long since been rescinded or found invalid, the most recent Supreme Court Administrative Order remains in place, and at least for now, the original Supreme Court Administrative Order, AO 2020-3, has some continued relevance because it is addressed in the most recent Order.

Not surprisingly, some Plaintiffs are now interpreting the Administrative Orders as adding up to 102 days (over three months) onto any statute of limitations (i.e., "deadline") that was already running between March 10, 2020 and June 19, 2020, or that began to run during that period. Although no appellate court has yet interpreted these Supreme Court orders or determined their continued validity in light of the overturning of the Governor's Executive Orders, this would effectively mean that some claimants would continue to benefit from "COVID tolling" years into the future.

For example, if a three-year statute of limitations began to run on January 1, 2020, it would ordinarily expire January 1, 2023. However, some plaintiffs are now claiming that it would now not actually expire until April 13, 2023. The uncertainty surrounding this issue makes it all the more important that all Members diligently save and report any claims materials to MCRCSIP—even where it appears that the statute of limitations may have passed.

We will continue to keep an eye on this important and developing issue. In the meantime, and as always, please do not hesitate to reach out to the Pool with any questions.

Preventing Rust Inside Fire Protection System Piping

Jack Hill
MCRCSIP Loss Control Representative

When properly maintained, fire sprinkler systems stand ready to respond 24/7, 365 days a year without any of your staff having to lift a finger. One of the key components to a sprinkler system maintenance program is preventing corrosion from forming inside the pipes.

It may seem like having water inside steel pipes, as there is in a traditional wet pipe sprinkler system, would be a surefire recipe for rapid corrosion, but the reality is that with proper installation and maintenance, rust won't be able to form because the oxidation reaction requires iron, water, and oxygen to take place. Keeping the oxygen in the pipes to an absolute minimum allows for decades of service life before pipes begin to rust and leak.

When air is trapped in the pipes of a wet pipe system, it collects in high spots and forms pits in the metal where rust begins to eat away at the inner walls. Over time, the buildup of rust can impede the flow of water through pipes and create pinhole leaks. The combination of leaky pipes and built-up rust can severely impair the system's ability to deliver water when needed.

Air is most commonly introduced into the pipes by modification, repairs, and during code mandated system tests. Unfortunately, repairing leaks caused by air in the system usually results in more air getting into the system. The most cost-effective solution for keeping air out of your sprinkler system is by installing an automatic air venting device.

The addition of these simple components allows air to escape from the pipes while the system is filling, resulting in lower accumulations of air at high points in the piping.

In these systems, the pressure in the pipes is maintained by air, and water only enters in small quantities due to compressor condensation or when a sprinkler head is activated. In these systems the installation is important. You'll need properly sloped pipes and drain points to keep water to a minimum during annual maintenance.

> ***The most cost-effective solution for keeping air out of your sprinkler system is by installing an automatic air venting device.***

Automatic air vents can't completely eliminate air in the pipes, but by limiting it they help to reduce the cumulative damage air causes over the life of a sprinkler system. As of 2016, NFPA 13, the Standard for Sprinkler System Installation, requires the use of an automatic air venting device in all wet pipe systems.

The other situation when rust can happen is in dry pipe systems, such as in parking facilities that may be subject to freezing temperatures.

Additionally, in the event of a system activation, the service company should evacuate the pipes of as much remaining water as possible before returning it to operation.

Keeping absolutely all water out of a dry pipe system is virtually impossible so the other option is to maintain system pressure with inert nitrogen gas. This has the same effect as eliminating oxygen in a wet pipe system.

Can you fire an employee for that?

Continued from page 1

If the person becomes a candidate for elective office within the unit of government in which he is employed, unless contrary to a collective bargaining agreement the employer may require the person to request and take a leave of absence without pay when he complies with the candidacy filing requirements, or sixty (60) days before any election relating to that position, whichever date is closer to the election.

(d) Engage in other political activities on behalf of a candidate or issue in connection with partisan or nonpartisan elections.

It is this last provision that comes into play when, for instance, a public employee attends a political rally. The fact that the employee did so would generally be considered a protected activity. However, the aforementioned statute also prohibits such activities during those hours when the public employee is being compensated for the performance of that person's duties as a public employee.

So what about when the employee is engaging in criminal conduct which is not protected by the U.S. Constitution or any statute? A public employer should proceed with caution, keeping in mind that there is a presumption of innocence until proven guilty. The employer should ask itself:

1. Does the alleged off-duty conduct negatively impact the employee's ability to perform his/her job?
2. Does the alleged off-duty conduct harm the reputation of the employer?
3. Does the alleged off-duty conduct affect the morale of other employees, such that the workplace will be adversely impacted?

If there is a significant nexus between the employee's off-duty conduct and the workplace, then the employer may have just cause to take action against the employee.

This becomes an easier call to make if the employee involved is an at-will employee.

The easiest way to discipline an employee for off-duty conduct is to focus on the job-related consequences of the behavior, rather than the behavior itself. For instance, in the above-stated example, the employee involved in storming the U.S. Capitol would likely be required to miss a significant amount of time from work if charges were brought against him, particularly if he were convicted and sentenced to jail for a period of time. In that event, the absences from work might themselves provide sufficient cause for termination.

It is rarely easy to terminate a public employee for off-duty conduct, given the various legal considerations involved. In all such situations, public employers would be well-advised to consult with legal counsel before doing so.

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