

## COA Opinion: Prosecutor's final report of investigation subject to deliberative-process privilege

16. December 2010 By Julie Lam

In *Truel v. City of Dearborn*, No. 290600, the Court of Appeals held that Michigan's investigative subpoena statute, MCL 767 *et seq.*, prevents a party involved in an action under the Whistleblowers' Protection Act (WPA) from gaining access to statements and investigative reports derived from investigative subpoenas issued by a prosecutor.

In *Truel*, plaintiff was a police officer dispatched to investigate a bar fight. Plaintiff allegedly noticed other police officers leaving the bar as he arrived, and discovered a badly beaten individual upon entering the bar. Plaintiff cooperated with the Wayne County Prosecutor Office (WCPO) investigating the incident, answering an investigative subpoena and testifying under oath. Plaintiff alleges that due to his cooperation, he was harassed at work and was unable to work due to depression stemming from the harassment. Plaintiff then sued defendants under the WPA. In the WPA action, both parties requested the investigative file of the incident through discovery and the Freedom of Information Act (FOIA) from WCPO, which WCPO provided, except for statements given pursuant to investigative subpoenas and a final report of the investigation. WCPO claimed the statements and report were exempt from discovery and FOIA under the investigative subpoena statute and the deliberative process privilege, respectively. Defendants subsequently filed a motion to compel discovery in plaintiff's action, which the trial court granted. WCPO appealed.

The Court of Appeals reversed and remanded, holding that the investigative subpoena statute exempted the statements of the testifying witnesses from discovery and FOIA requests made by plaintiff and defendant. With respect to the WCPO report, the Court held that the deliberative-process privilege as defined in *Ostoin v. Waterford Township Police Department*, 189 Mich. App. 334, 337 (1991), exempted production of the report during the discovery process. The Court noted that WCPO satisfied the burden of establishing the privilege, and defendant failed to overcome the privilege by demonstrating sufficient need to justify access to the report. Specifically, the Court noted that under the WPA, the mere act of participating in WCPO investigations is a protected activity, and therefore, the substance of the investigation was irrelevant for purposes of the WPA action.