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THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

Michigan Defense Trial Counsel, Inc
The Statewide Association of Attorneys Representing the Defense in Civil Litigation

P.O. Box 66 • Grand Ledge, Michigan 48837
Phone: 517-627-3745 • Fax: 517-627-3950
www.mdtc.org • info@mdtc.org

MICHIGAN DEFENSE
QUARTERLY

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Editor's Notes

Editor:
Hal O. Carroll
hcarroll@VGpcLAW.com

Assistant Editor: Jenny Zavadil
jenny.zavadil@bowmanandbrooke.com

Articles: All articles published in the *Quarterly* reflect the views of the individual authors. We always welcome articles on any topic that will be of interest to our members in their practices. Although we are an association of lawyers who primarily practice on the defense side, the *Quarterly* always tries to emphasize analysis over advocacy, and favors the expression of a broad range of views, so articles from a plaintiff's perspective are always welcome. Author's Guidelines are available from the editor (hcarroll@VGpcLAW.com) or the assistant editor, Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

In this issue, we cover a broad range of topics. **D. Lee Khachaturian** of *Dickinson Wright,* explains the intricacies of Michigan's peculiar theory of exemplary damages. **Erin O'Callaghan** and **Nancy Huizenga,** of *Genex Services,* who are both certified life care planners, discuss the techniques and uses of life care planning in litigation. **Gouri G. Sashital** of *Keller Thoma* explores the new requirements that healthcare workers be subjected by employers to background checks. **Michael Wade** of *Garan Lucow Miller* considers whether third persons should be allowed to attend neuropsychological examinations.

And our **Young Lawyers Series** continues with a piece by **Scott Holmes** of Foley & Mansfield on preparing for trial.

New in this issue: The newly revised practice sections within MDTC are beginning to bear fruit in the form of a regular report. Starting with this issue, **Susan Leigh Brown of** *Schwartz Law Firm,* will provide regular reports on developments in the area of no-fault law, on behalf of MDTC's Insurance Law Section. In the future, we hope to have other similar reports from other sections.

David Marvin of *Fraser, Trebilcock, Davis & Dunlap,* shares 50 tips on how to get more clients, a topic near to the heart of every lawyer in these times.

Be sure to check the **Schedule of Events** to keep up to date with what MDTC and DRI are up to.

Opinion: The *Quarterly* is a forum for the exchange of views and we welcome opinion pieces on topics of interest to our readers, from all perspectives — both sides of the "v.". A length of about 1000 to 2000 words would be ideal.

President's Corner

By: Robert H S. Schaffer
President, MDTC

MDTC – On A Roll

Robert H S. Schaffer, P.C. &
Chief Legal Officer for Radiology Business Solutions, LLC
2325 Stonebridge Drive
Building C
Flint, MI 48532
Phone: 810-486-4966
Fax: 810-230-9225
Email: schafferlaw@comcast.net

Change is inevitable … and sometimes it is also predictable. MDTC is continuously looking ahead, planning and considering how it can evolve to best serve the members. The platform for MDTC's long-term planning is a yearly comprehensive evaluation of how MDTC's infrastructure and volunteers best support the membership. The beauty of the process, as I see it, is continuity. The successes, goals and shortfalls of the organization are analyzed year to year. Strengths from one year are enhanced the next. Failures, or goals not met, can become a point of emphasis the following year. As I write my last President's Corner for this issue of the *Quarterly*, I am pleased with the changes MDTC has embraced over the last few years, the progress planned in the short-term, and the goals yet to be achieved.

The emphasis for MDTC's leadership from this date through the reminder of my term as President, which ends in June, is to enhance member services. This includes upgrades for our programming, publications and web site and developing more opportunities to access decision makers. Over the next few weeks and months, through June, the leadership is hoping to personally contact as many of our members as possible. Already, the Board has started making these "member satisfaction calls." The response has proven to be incredible. Our members are volunteers for MDTC and believe in our evolving mission. Those I have spoken with asked how to become more involved with our substantive law sections and programming. As a result of member interest, MDTC leadership is committed to advancing the profile of our group.

How do you describe your membership in MDTC? If you are not a member, how do you perceive the group? Our Vice President, **Steve Johnston** (*Berry Johnston*), has expressed a desire to brand MDTC as the gold standard or key membership for those who litigate, appeal and go to trial with civil cases. Some people still associate MDTC with "insurance defense;" although that has not been the hallmark of our membership for years. Our "mission on a matchbook" or "elevator speech" is:

> **MDTC is an association of the leading lawyers in the State of Michigan dedicated to representing individuals and corporations in civil litigation. As the State's premier organization of civil litigators, the impact of MDTC Members is felt through its Amicus Briefs, often filed by express invitation of the Supreme Court, through its far reaching and well respected Quarterly publication and through its timely and well received seminars.**
>
> **Membership in MDTC also provides exceptional opportunities for networking with fellow lawyers, but also with potential clients and members of the judiciary.**

Do you see yourself as a premiere litigator? Do your clients recognize you for your accomplishments and MDTC group affiliation? The point is that MDTC is striving to become the must-have group affiliation for quality litigators in Michigan. This is the public persona we are developing. By the way, if you are a subscriber to Facebook

I am pleased with the changes MDTC has embraced over the last few years, the progress planned in the short-term, and the goals yet to be achieved.

or LinkedIn you will see this elevator message. Look for Michigan Defense Trial Counsel (MDTC) on facebook.com and LinkedIn.com. Join these affiliations on-line so your clients and contemporaries will understand what it means to be a member of MDTC. Encourage your colleagues to be active on these valuable social and business networking sites; specifically by joining MDTC and displaying our logo.

It is precisely this "must have MDTC membership status" and brand that future MDTC President Johnston will focus his energy toward next year. I envision Steve Johnston raising the bar for MDTC's reputation by enhancing the quality representation we deliver for our clients. Since this is my last President's Corner, I do want to express a few comments regarding Steve Johnston. I would like to publicly thank him for his reliability as a leader within MDTC. Steve has positively impacted all of our events, educational programming and executive decisions. He is also a litigator and therefore truly sees the issues facing our current MDTC members and those drawn to our unique organization. Expect the best from Steve.

With regard to new members, I am delighted to announce the infrastructure is now in place for MDTC's ***Commercial Litigation Section***. **Ed Purdue** (*Dickinson Wright*), an enthusiastic MDTC volunteer will Chair this new section. Supporting Ed in the development of this section are **Todd Millar** (*Smith Haughey*) and **Larry Campbell** (*Dickinson Wright*). Collectively Ed, Todd, and Larry bring decades of commercial litigation expertise to MDTC. I fully expect to see the development of new educational programming and valuable articles in the *Michigan Defense Quarterly* dedicated to commercial litigation best practices. With the assistance of **Mark Gilchrist** (*Smith Haughey*), **D. Lee Khachaturian** (*Dickinson Wright*) and **Rick Paul** (*Dickinson Wright*), MDTC's fall meeting will have a commercial litigation theme. Plan to attend!

Are you trying cases? Are you providing cutting edge representation from the date you are retained through appeals? One way to guarantee that you remain on top of your craft is to attend the 2009 MDTC Summer Meeting June 12 and 13. This seminar was coordinated by **Terry Miglio** (*Keller Thoma*), **Alison Router** (*The Hope Network*) and **Alan Couture** (*Sondee Racine*). Using mock jury deliberations and focus groups, the entire program is designed to have you: **Thinking Outside the (Jury) Box** — *Using Jury Selection Strategies To Evaluate and Prepare Your Case from Answer Through Trial*. This program also presents a great chance to develop young lawyer skills. We are pleased to announce that MDTC members with five years experience or less can attend for $75. Opportunities such as this, to train young trial lawyers with dynamic experts, are rare. Again, plan on attending the MDTC Summer Conference at Boyne Highlands and bring several of your firm's associate litigators. The planning committee has delivered a DRI level training session in a beautiful Northern Michigan setting at a reasonable cost. I am looking forward to seeing you in person.

Many of MDTC's departing presidents have used their last opportunity to write the President's Corner to support a profound message or inspiration for defense litigators. I wish I had such a special theme. My observation is relevant to mentoring, leadership and honor as trial counsel. This past "MDTC Year" was dedicated to the Past Presidents of the organization. I have personally been influenced and energized by so many of our leaders. Collectively they inspire me to be the best lawyer I can be at all times and to represent clients with dignity.

In closing this Year of the Past President, I think it is only appropriate to recognize the immediate Past President, **Peter Dunlap** (*Fraser Trebilcock*) for certain special contributions to MDTC. Pete is a long time member of the organization. His pedigree is like many of those involved in leadership; the draft. Once he interacted with the people dedicated to the group, he became a committed volunteer. He attended all of MDTC's events this past year and helped coordinate one of the largest gatherings for young lawyer training in the fall Civil Defense Basic Training program. Pete continues to be a guiding force and mentor for me. I cannot thank him enough.

Every MDTC volunteer quickly develops the understanding that our organization exists only due to the dedication of Executive Director Madelyne Lawry. It has been a privilege to work with Madelyne. She deeply cares for our organization and makes it a success. I am grateful for everything she has done to support me and MDTC.

Clearing the Mist Surrounding Exemplary Damages (Sort Of)

By: D. Lee Khachaturian, *Dickinson Wright PLLC*

Executive Summary

Michigan's common law does not permit punitive damages, and exemplary damages are expressly described as compensatory in nature. Because exemplary damages are based on injury to the plaintiff's feelings, and mental anguish is always compensable as a result of physical injury, it is not easy to separate and distinguish exemplary damages from ordinary mental suffering damages. In fact, courts often do not. Still, exemplary damages may be available where the plaintiff can show that the defendant's malicious and egregious conduct caused additional mental distress. This can arise in tort actions; in contract actions, if there is separate tortious conduct or if the contract is of a personal nature; and in some statutorily-based actions. It is essential for the plaintiff who seeks exemplary damages to plead the appropriate factual basis for them.

When a plaintiff seeks exemplary damages, defense counsel should closely examine the nature of the action and the precise factual allegations of the complaint to ensure they properly defend against the possibility of an unwarranted award of exemplary damages or a double recovery for mental distress.

D. Lee Khachaturian is a member of Dickinson Wright PLLC. She specializes in commercial, product liability, and employment defense litigation, with a focus on non-compete litigation. She can be reached via email at DKhachaturian@dickinson-wright.com or via phone at 313-223-3475.

Exemplary damages have been a part of Michigan jurisprudence since the 1800s. Since Justice Cooley's opinions in *Watson v Watson*[1] and *Stilson v Gibbs*[2] in 1884, they repeatedly have been characterized as "a class of compensatory damages"[3] that are not punitive in nature, and that consequently, are not recoverable "as punishment of the defendant."[4]

One of the first, most colorful, and most cited descriptions of exemplary damages is set forth in the 1922 Michigan Supreme Court case of *Wise v Daniel*:[5]

> If a cow kicks a man in the face the consequent physical hurt may equal that from a kick in the face with a hob-nailed boot, but the "cussedness" of the cow raises no sense of outrage, while the malicious motive back of the boot kick adds materially to the victim's sense of outrage. If a man employs spite and venom in administering a physical hurt he must not expect his maliciousness to escape consideration when he is cast to make compensation for his wrong.[6]

In other words, exemplary damages for mental distress are appropriate when the defendant acts maliciously and thereby increases the victim's indignation and humiliation attendant to the injury suffered. *Wise* defined exemplary damages as "mental suffering consisting in a sense of insult, indignity, humiliation or injury to the feelings,"[7] and held that the jury's award of exemplary damages for defendant's shooting of plaintiff was not excessive.[8]

Thus, exemplary damages generally constitute damages relating to mental distress, anguish, humiliation, and any other type of emotionally-based damages that stem from malicious and willful tortious conduct on the part of a defendant.[9] Yet, distinguishing exemplary damages from damages generally recoverable for mental distress, and determining when exemplary damages are available, can prove a bit more complicated. A relevant factor in this analysis is the nature of the cause of action at issue—that is, does it sound in tort, contract, or is it statutorily based?

Personal and Business Tort Actions

Time and again Michigan courts have affirmed the principle that an award of exemplary damages "involve[s] tortious conduct on the part of the defendant."[10] Yet it is not always clear what a court means when it refers to exemplary damages in this context—that is, does it mean ordinary mental distress damages, or a separate category of mental distress damages distinct from ordinary mental distress damages? The answer is, it may be either.

Veselenak v Smith is an instructive case in Michigan jurisprudence. In *Veselenak*, the Michigan Supreme Court observed that in early case law, exemplary damages supplied

a remedy for mental injury that was not otherwise recoverable.[11] By 1982, when *Veselenak* was decided, actual damages did include mental distress and anguish.[12] The court observed that in order to be able to recover exemplary damages, the act or conduct at issue has to be voluntary; that voluntary act "must inspire feelings of humiliation, outrage, and indignity"; and the "conduct must be malicious or so willful and wanton as to demonstrate a reckless disregard of plaintiff's rights."[13] Mere negligence is insufficient.[14]

The *Veselenak* court then went on to analyze the award of exemplary damages in the medical malpractice case before it. In particular, plaintiff alleged that defendant doctor's concealment of a 6½ inch hemostat in her body was "the sort of grievous act which will support an award of exemplary damages."[15] The court, however, held that the jury instructions at issue made it clear that the mental injury for which plaintiff sought to be compensated through two categories of mental distress damages, exemplary and ordinary, were the same. As a result, they improperly permitted plaintiff to be doubly compensated.[16] The court dismissed the idea that ordinary and exemplary mental distress damages were two separate categories of damages. In fact, it expressly rejected the premise that originated from *Wise v Daniel*, that ordinary mental distress damages were intrinsic to the injury itself, while exemplary mental distress damages stemmed from the manner in which the injury occurred:[17] "[I]f the plaintiff is being compensated for *all* mental distress and anguish, it matters not whether the source of the mental distress and anguish is the injury itself or the way in which the injury occurred."[18] Thus, the court reversed and remanded "for a new trial limited to the question of the amount of ordinary [mental distress and anguish] damages plaintiff suffered due to defendant's malpractice."[19]

The court dismissed the idea that ordinary and exemplary mental distress damages were two separate categories of damages.

Exemplary damages generally constitute damages relating to mental distress, anguish, humiliation, and any other type of emotionally-based damages that stem from malicious and willful tortious conduct on the part of a defendant.

Veselenak arguably holds that exemplary damages are the same as ordinary mental distress damages, and that mental distress damages as a whole encompass mental distress damages arising from the injury itself ***and*** the manner in which the injury occurred. Although it appears no subsequent opinion has expressly applied this principle, courts have affirmed the *Veselenak* principle that a party cannot recover mental distress damages via exemplary damages if that party is "fully compensated for mental distress through an award of actual or 'compensatory' damages."[20] Still, cases post-*Veselenak* provide little certainty regarding whether what have been characterized as exemplary damages are merely a subset of ordinary mental distress damages.

In *Rinaldi v Rinaldi*,[21] the Michigan Court of Appeals observed that in general, "exemplary damages are recoverable in all damage actions which are based upon tortious acts involving malice, fraud, insult, or wanton and reckless disregard of plaintiff's rights."[22] *Rinaldi* characterized exemplary damages as a subset of actual damages.[23]

Tennant v State Farm Mutual Automobile Ins Co[24] treated exemplary damages in a similar fashion. In *Tennant*, the Michigan Court of Appeals held that because plaintiff failed to plead or prove a tort separate from the no-fault insurance contract at issue, plaintiff was not entitled to mental anguish damages.[25] The court characterized these mental anguish damages as exemplary damages.[26] In so doing, the court implied that exemplary damages are nothing more than ordinary mental distress damages.[27]

In contrast, in *White v City of Vassar*,[28] the Michigan Court of Appeals held that an award of actual damages that included mental anguish did not overlap with an award of exemplary damages, when the jury instruction relating to exemplary damages characterized exemplary damages as flowing from malicious, willful and wanton injuries:

> Exemplary damages are compensatory in nature and compensate for humiliation, sense of outrage and indignity from injuries that are maliciously, willfully and wantonly inflicted. The reprehensibility of Defendant's conduct gives birth to ***additional*** damages for harm done to Plaintiff's feelings. Exemplary damages are justifiable only where it has been shown that the Defendant's conduct was malicious or so willful and wanton

The Michigan Court of Appeals held that an award of actual damages that included mental anguish did not overlap with an award of exemplary damages.

as to demonstrate a reckless disregard of Plaintiff's rights.[29]

That is, the *White* court held that ordinary and actual mental distress damages are, in fact, separate and distinct from exemplary damages. In reaching this decision, the court acknowledged that in *Veselenak v Smith*,[30] the Michigan Supreme Court held that in a medical malpractice case, actual mental distress damages and exemplary damages overlapped.[31] Yet, the court found *Veselenak* distinguishable because unlike *Veselenak*, *White* was a case of assault and battery, not negligence, and the jury instructions did not overlap such that there would be double recovery.

A discussion of exemplary damages in the context of tort actions cannot be complete without addressing torts that arise in the commercial context. In *Joba Construction Co, Inc v Burns & Roe, Inc*,[32] the Michigan Court of Appeals held that a corporation can recover exemplary damages on a claim for "tortious interference with prospective advantageous economic relations."[33] Naturally, a corporation does not have feelings and therefore, logically speaking, cannot suffer any mental distress damages. The *Joba Construction* court side-stepped this issue by holding that exemplary damages "are awarded not only to compensate for injured feelings but also to compensate for injuries not capable of precise computation resulting from malicious conduct."[34]

While *Joba Construction* has not been overruled, it is unlikely it would survive if challenged. It does not comport with well-settled principles underlying mental distress damages; one of the two cases upon which the court relied was overruled;[35] and the other case upon which the court relied did not expressly address the issue of whether a corporation was entitled to exemplary damages.[36] Furthermore, a year later the Michigan Court of Appeals held that exemplary damages are generally ***not*** recoverable against a party liable for tortious interference with business relations in the commercial context. Rather, that party is liable for pecuniary damages.[37]

In short, it is arguable that under *Veselenak*, exemplary damages are not recoverable as a separate and distinct category of mental distress damages. Nonetheless, *White* does provide authority to the contrary. Yet irrespective of how mental distress damages are characterized, it is important to understand the precise nature of the mental distress damages a plaintiff seeks and to carefully craft applicable jury instructions. A defendant should not be put in a position where a plaintiff has the opportunity to recover a duplicative award of mental distress damages.

In cases involving personal, as opposed to commercial contracts, mental distress damages may be recoverable. This was explained in detail in *Stewart v Rudner*.

Commercial Contract Actions

In *Stewart v Rudner*, the Michigan Supreme Court acknowledged that damages for mental suffering are not recoverable in contract actions.[38] This repeatedly has been affirmed by Michigan appellate courts,[39] the theory being that "in breach of contract cases… the plaintiff is adequately compensated when damages are awarded by reference only to the terms of the contract."[40]

Irrespective of how mental distress damages are characterized, it is important to understand the precise nature of the mental distress damages.

For example, in *Kewin v Massachusetts Mutual Life Ins Co*, the court held that the breach of a disability income protection insurance policy contract did not give rise to mental distress damages and therefore, did not permit an award of exemplary damages.[41] The court also specifically held that "absent allegation and proof of ***tortious*** conduct existing ***independent*** of the breach . . . exemplary damages may not be awarded in common-law actions brought for breach of a commercial contract."[42] *Kewin*, which was decided before *Veselenak v Smith*,[43] recognized a distinction between ordinary mental distress damages and exemplary damages.[44]

Similarly, *Hajciar v Crawford and Co*[45] held that damages for mental distress were not recoverable in a case involving the alleged breach of a contract for worker's compensation insurance.[46]

In addition, in *Valentine v General American Credit, Inc*,[47] the Michigan Supreme Court held that plaintiff could not recover "mental distress damages for breach of [an] employment contract,"[48] finding that the "rule barring recovery of mental distress damages [in breach of contract actions]. . . is fully applicable to an action for breach of an employment contract."[49] While the *Valentine* court acknowledged that employment is an important part of most people's lives, and "the breach of an employment contract may result in emotional distress,"[50] the court held that mental distress damages could not be recovered because "an employment contract is not entered into primarily to secure the protection of personal interests and pecuniary damages can be estimated with reasonable certainty."[51] *Valentine* then separately held, without discussion, that plaintiff could not recover exemplary damages because she failed to "plead the requisite purposeful tortious conduct."[52]

Personal Contract Actions

Of course, every rule has its exceptions, and the one precluding mental distress damages in a breach of contract action is no different. In cases involving personal, as opposed to commercial contracts, mental distress damages may be recoverable. This was explained in detail in *Stewart v Rudner*.[53]

In *Stewart*, the court observed that there were some contracts pursuant to which mental anguish was an integral part of the damages contemplated by the parties:

> When we have a contract concerned not with trade and commerce but with life and death, not with profit but with elements of personality, not with pecuniary aggrandizement but with matters of mental concern and solitude, then a breach of duty with respect to such contracts will inevitably and necessarily result in mental anguish, pain and suffering. In such cases, the parties may reasonably be said to have contracted with reference to the payment of damages therefor in event of breach.[54]

After observing that there "was not an iota of the commercial in" the contract at issue—pursuant to which the defendant surgeon agreed to perform a caesarian section on the plaintiff but did not and plaintiff lost her child—the *Stewart* court upheld an award of mental distress damages for pain and mental suffering.[55]

Mental distress damages also have been permitted in the breach of contract context when there was a breach of a promise to marry.[56] Similarly, "a contract to care for one's child is a matter of 'mental concern and solicitude,' rather than 'pecuniary aggrandizement.'"[57] As such, a breach of a child-care contract permits an award of mental distress damages.[58] In addition, in *Miholevich v Mid-West Mutual Auto Ins Co*, a plaintiff was entitled to mental distress damages from an insurer when the insurer willfully failed to pay a judgment against the plaintiff, in violation of an insurance contract, which resulted in plaintiff being jailed for six days.[59]

In each of these cases, the court did not specifically characterize the mental distress damages as exemplary damages. It merely permitted the recovery of mental distress damages in the context of a contract action. Nevertheless, this willingness to permit mental distress damages in certain limited contractual situations suggests that to the extent exemplary damages are characterized as a separate category of mental distress damages, a court might find exemplary damages recoverable in a breach of contract action as well. Still, the cases that fall within this exception are few and far between.

Certain statutory provisions expressly provide for an award of "exemplary" damages.

Statutory Actions

Certain statutory provisions expressly provide for an award of "exemplary" damages. These types of exemplary damages can be either compensatory or punitive in nature. For example, the payment of wages act provides for "exemplary damages of not more than twice the amount of the wages and fringe benefits which were due," for flagrant or repeated violations.[60] Michigan's environmental statutes also provide for exemplary damages that are punitive in nature.[61] In contrast, the Michigan Supreme Court interpreted "exemplary and punitive" damages, as provided for in Michigan's libel statute, as compensatory damages. The court's analysis of this statute is instructive.

In *Peisner v The Detroit Free Press, Inc*,[62] the Michigan Supreme Court was called upon to address the following issue: "whether an award of 'exemplary and punitive' damages under Michigan's libel statute impermissibly duplicated an award of actual damages for injury to feelings arising from the libel."[63] The statute at issue permitted recovery for actual damages, which included damages relating to "feelings."[64] It also provided for "exemplary and punitive" damages, provided plaintiff gave notice to defendant to publish a retraction prior to filing suit and defendant failed to do so.[65] The statute, however, did not define "exemplary and punitive" damages.

The *Peisner* court first held that the legislature intended that these statutory "exemplary and punitive" damages be compensatory in nature, not punitive.[66] The court then held that these two categories of damages—"actual" versus "exemplary and punitive"—were independent of one another. In so holding, the court relied on *Wise v Daniel*,[67] and specifically noted the distinction between a cow kicking a person and a person kicking another person. The court then stated the following:

> In the libel context, actual damages for injured feelings are comparable to those attributable to the kick by the cow, *i.e.*, the plaintiff is compensated for injured feelings attributable simply to the *fact* and *effect* of the libel. Exemplary and punitive damages, however, compensate for the incremental injury to feelings attributable to the sense of indignation and outrage experienced by the plaintiff due to the defendant's bad faith or ill will in publishing the libel—i.e.,

the "malicious motive back of the boot kick."[68]

Thus, according to the court, "exemplary and punitive damages pick up where actual damages leave off by in effect compensating the plaintiff for injured feelings attributable solely to the egregiousness of defendant's conduct."[69]

In reaching this decision, the court acknowledged its decision in *Veselenak v Smith*, pursuant to which it had held that "compensatory-type exemplary damages are merely a component of actual damages attributable to defendant's conduct and hence should not be separately awarded."[70] The court, however, distinguished *Veselenak* because contrary to *Veselenak*, there was an actual statute at issue in *Peisner* providing for exemplary damages separate and distinct from damages to "feelings."[71]

The *Peisner* court also held that these exemplary and punitive damages should "be measured by plaintiff's outrage rather than by defendant's maliciousness," so as to avoid them being characterized as punitive in nature.[72] Finally, the court held that in order to recover exemplary and punitive damages under the libel statute, a plaintiff had to prove that he complied with the "statute's retraction request procedure" and that defendant engaged in common-law malice when it published the libel.[73]

Notably, if an action is statutory in nature but does not provide for exemplary damages, courts have found that no exemplary damages may be awarded. In *Eide v Kelsey-Hayes Co*,[74] the Michigan Supreme Court held that plaintiff was entitled to compensatory damages for mental anguish under the Civil Rights Act, but not exemplary damages.[75] *Eide* characterized exemplary damages as "damages for 'added injury to [plaintiff's] feelings' resulting from alleged egregious conduct on the part of the defendant."[76] The court relied on the fact that the act, unlike the libel statute, does not include an express "legislative prescription" for exemplary damages.[77] The court observed the following: "whether exemplary damages should be allowed is essentially a policy question, and particularly where, as in this case, the underlying cause of action is a legislative product, we deem it appropriate to leave such a policy determination to the Legislature."[78]

Thus, according to the court, "exemplary and punitive damages pick up where actual damages leave off by in effect compensating the plaintiff for injured feelings attributable solely to the egregiousness of defendant's conduct."

Similarly, in *Fellows v Superior Products Co*,[79] the Michigan Court of Appeals held that exemplary damages were not expressly available under Michigan's wrongful death statute, and as a result, exemplary damages were not recoverable in a wrongful death action.[80]

On the occasions when courts do distinguish between the two, they characterize exemplary damages as those mental distress damages that result from egregious conduct on the part of a defendant. At first blush, this type of distinction makes sense. A more careful analysis, however, reveals a meaningless distinction.

Exemplary Damages vis-à-vis Ordinary Mental Distress Damages

As discussed above, Michigan case law often refers to exemplary damages and ordinary mental distress damages interchangeably (outside the situations in which exemplary damages are specifically provided for by statute). On the occasions when courts do distinguish between the two, they characterize exemplary damages as those mental distress damages that result from egregious conduct on the part of a defendant. At first blush, this type of distinction makes sense. A more careful analysis, however, reveals a meaningless distinction.

If ordinary mental distress damages compensate a plaintiff for the mental distress he or she allegedly suffers as a result of tortious conduct, those mental distress damages should, by their very nature, encompass whatever mental distress was suffered as a result of any particularly egregious conduct on the part of defendant. After all, as a practical matter, how can a plaintiff truly distinguish between mental distress he experiences as a result of an injury itself, and mental distress he suffers as a result of the egregiousness of a defendant's conduct? People normally feel mental distress as an overall sense of emotional pain (that may or may not manifest itself physically). Their minds normally do not separately distinguish and categorize the pain they feel as a result of experiencing tortious conduct from the pain they feel as a result of willful and wanton misconduct. As a result, how can a court ask a jury to make such a distinction for the purpose of awarding monetary damages?

The Michigan Supreme Court's decision in *Peisner v The Detroit Free Press, Inc*,[81] arguably provides some guidance. The *Peisner* court distinguished exemplary damages as those that "pick up where actual damages leave off by in effect compensating the plaintiff for

injured feelings attributable solely to the egregiousness of defendant's conduct."[82] It also held that these damages should "be measured by plaintiff's outrage rather than by defendant's maliciousness."[83] Facially, this has some appeal. In theory, a plaintiff could testify about his outrage at a defendant intentionally and maliciously taking some sort of tortious action against him, distinct from his general mental distress at having some tortious action taken against him. Yet the premise underlying *Peisner* is that exemplary damages are different from actual damages. That might be true as it relates to the libel statute, which separately identified "actual" and "exemplary and punitive" damages. But it directly conflicts with the well-established common-law principle that exemplary damages are "a class of compensatory damages."[84]

At the end of the day, the outrage a plaintiff may feel as a result of a defendant's maliciousness is merely one component of the overall mental distress the plaintiff suffers at having been subjected to tortious conduct. And this one component cannot easily be parsed out for the purpose of splitting a monetary mental distress award. If mental distress damages are truly meant to be compensatory in nature, they should be premised on the actual mental distress a plaintiff has suffered, including whatever distress emanates from the willfulness or egregiousness of a defendant's conduct. In other words, if a party is entitled to mental distress damages, those damages should, by their very nature, include damages for what *Wise v Daniel*[85] characterized as exemplary damages. By creating a separate category of mental distress damages, that also are meant to be compensatory in nature, the focus of the inquiry unfairly centers on a defendant's egregious conduct and not on how a plaintiff has been damaged mentally, if at all.

Given the practical difficulties involved in separately quantifying categories of mental distress damages, permitting exemplary damages in common-law actions creates a danger that notwithstanding jury instructions to the contrary, juries will use exemplary damages to punish a defendant. This is particularly so because juries may improperly be drawn to, and therefore focus on, the alleged egregiousness of the defendant's conduct without regard to plaintiff's actual alleged mental injury. There is no need to expose defendants to this possibility when mental distress damages already seek to compensate a party for any alleged mental distress damage that party has suffered. This necessarily must include distress that allegedly arises from the allegedly egregious nature of the actions at issue.

If mental distress damages are truly meant to be compensatory in nature, they should be premised on the actual mental distress a plaintiff has suffered, including whatever distress emanates from the willfulness or egregiousness of a defendant's conduct.

Pleading and Proving Exemplary Damages

Notwithstanding the history and ambiguity surrounding the nature of exemplary damages, Michigan courts have set forth certain principles applicable to these types of mental distress damages.

To begin, specifically pleading exemplary damages may be important. In *Stockler v Rose*,[86] the court upheld the trial court's decision to preclude the admission of proofs on exemplary damages when plaintiffs did not "specifically plead the items of exemplary damage."[87] In particular, the plaintiffs alleged no injury to their feelings and there had been no finding of recklessness in the lower court.[88] Likewise, in *Valentine v General American Credit, Inc*, the court held that plaintiff could not recover exemplary damages because she failed to "plead the requisite purposeful tortious conduct."[89] In *Sherrard v Stevens*,[90] however, plaintiffs were permitted to amend their complaint shortly before trial to add claims of willful and wanton misconduct in a prayer for exemplary damages.[91] Plaintiffs were allowed to do this in this legal malpractice case because the amendment did not raise new factual allegations. Instead, it claimed a new type of damage arising from the same set of facts.[92] The *Sherrard* court did not make it clear whether the award of exemplary damages was in any way different from ordinary mental distress damages.

In addition, pursuant to *Green v Evans*, direct "evidence of an injury to the plaintiff's feelings is not essential"[93] to prove exemplary damages. Instead, "the question is whether the mental suffering and injury to feelings are natural and proximate in view of the nature of the defendant's conduct."[94] The *Green* court acknowledged the distinction between ordinary mental distress damages and exemplary mental distress damages.[95]

An award of exemplary damages constituting mental anguish does not require a physical injury.[96] Further, as set forth above, exemplary "damages will not be awarded to compensate a purely pecuniary grievance susceptible to full and definite monetary compensation."[97] Or, put another way, exemplary damages cannot be awarded when compensatory damages can make a party whole.[98] Finally, exemplary damages can be recovered in equitable actions, as well as legal ones.[99]

Conclusion

By their very nature, mental distress damages should include damages for what *Wise v Daniel* characterized as exemplary damages. As such, there should only be

one category of mental distress damages, not two (ordinary and exemplary). Nonetheless, Michigan case law may support the award of this separate category of mental distress damages in certain circumstances.

When a court determines they are appropriate, exemplary damages are those that (1) stem from plaintiff suffering ***additional*** mental distress as a result of defendant acting maliciously, or so willfully and wantonly as to demonstrate a reckless disregard of a plaintiff's rights; and (2) are above and beyond that which a plaintiff has suffered as a result of the mere fact and effect of the injury. In defending against a claim for exemplary damages, it is important to examine the nature of the action plaintiff brings and to understand exactly what damages the plaintiff seeks. An analysis of these factors will allow a defendant to ensure a plaintiff is not improperly awarded exemplary damages and to preclude a plaintiff from obtaining double recovery for mental distress damages.

Endnotes

1. 53 Mich 168; 18 NW 605 (1884).
2. 53 Mich 280; 18 NW 815 (1884).
3. *Veselenak v Smith*, 414 Mich 567, 573; 327 NW2d 261 (1982).
4. *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980).
5. 221 Mich 229; 190 NW 746 (1922).
6. *Id.* at 233.
7. *Id.* at 234.
8. *Id.*
9. *Kewin*, 409 Mich at 419 (holding that an "award of exemplary damages is considered proper if it compensates a plaintiff for the 'humiliation, sense of outrage, and indignity' resulting from injuries 'maliciously, willfully and wantonly' inflicted by the defendant," quoting *McFadden v Tate* 350 Mich 84, 89; 85 NW2d 181 (1957)).
10. *Kewin*, 409 Mich at 419.
11. *Veselenak v Smith*, 414 Mich 567, 573; 327 NW2d 261 (1982).
12. *Id.* at 574.
13. *Id.* at 574-575.
14. *Id.* at 575.
15. *Id.*
16. *Id.* at 576.
17. *Id.*
18. *Id.* at 576-577.
19. *Id.* at 577.
20. *Eide v Kelsey-Hayes* Co, 431 Mich 26, 52; 427 NW2d 488 (1988); see also *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 187; 364 NW2d 600 (1984) ("When compensatory damages can make the injured party whole, this Court has denied exemplary damages.").
21. 122 Mich App 391; 333 NW2d 61 (1983).
22. *Id.* at 396 (holding that plaintiff was entitled to exemplary damages when she alleged malicious conduct on the part of defendants).
23. *Id.* ("Exemplary damages are compensatory in nature, not punitive, since they are actually an element of actual damages.").
24. 143 Mich App 419; 372 NW2d 582 (1985).
25. *Id.* at 425 ("absent allegation and proof of tortious conduct existing independent of the breach,…exemplary damages may not be awarded in common-law actions brought for breach of a commercial contract").
26. *Id.* at 424-425.
27. *Id.*
28. 157 Mich App 282; 403 NW2d 124 (1987).
29. *Id.* at 290-291 (emphasis added).
30. 414 Mich 567; 327 NW2d 261 (1982).
31. *White*, 157 Mich App at 291.
32. 121 Mich App 615; 329 NW2d 760 (1982).
33. *Id.* at 624, 642-643.
34. *Id.* at 643; see also *Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 341; 425 NW2d 791 (1988).
35. *Hayes-Albion Corp v Kuberski*, 108 Mich App 642; 311 NW2d 122 (1981), rev'd in part, 421 Mich 170, 187-188; 364 NW2d 600 (1984) (holding that plaintiff corporation was not entitled to exemplary damages).
36. *Shwayder Chemical Metallurgy Corp v Baum*, 45 Mich App 220, 225; 206 NW2d 484 (1973) (reversing the damage award finding no record support for it, and perfunctorily stating that "plaintiff shall be afforded the opportunity to establish its damages, actual and exemplary").
37. *Getman v Mathews*, 125 Mich App 245, 249; 335 NW2d 671 (1983).
38. 349 Mich 459, 471; 84 NW2d 816 (1957).
39. *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 419-420; 295 NW2d 50 (1980) ("In cases involving only a breach of contract, however, the general rule is that exemplary damages are not recoverable.").
40. *Kewin*, 409 Mich at 420.
41. *Id.* at 419.
42. *Id.* at 420-421 (emphasis added).
43. 414 Mich 567; 327 NW2d 261 (1982).
44. *Kewin*, 409 Mich at 420; see also *McFadden v Tate*, 350 Mich 84, 88-91; 85 NW2d 181 (1957) (acknowledging a distinction between mental distress damages and exemplary damages).
45. 142 Mich App 632; 369 NW2d 860 (1985)
46. *Id.* at 638.
47. 420 Mich 256; 362 NW2d 628 (1984).
48. *Id.* at 259.
49. *Id.* at 260-261.
50. *Id.*
51. *Id.* at 263.
52. *Id.* at 263-264.
53. 349 Mich 459; 84 NW2d 816 (1957).
54. *Id.* at 471.
55. *Id.* at 475-476.
56. *Vanderpool v Richardson*, 52 Mich 336; 17 NW 936 (1883).
57. *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 694; 588 NW2d 715 (1998) (quoting *Stewart*, 349 Mich at 471).
58. *Id.*
59. 261 Mich 495; 246 NW2d 202 (1933).
60. MCL 408.488(2).
61. MCL 324.20119 (permitting "[e]xemplary damages in an amount at least equal to the amount of any costs of response activity incurred by the state as a result of a failure to comply with an administrative order but not more than 3 times the amount of these costs"); MCL 324.21319a (same).
62. 421 Mich 125; 364 NW2d 600 (1984).
63. *Id.* at 127.
64. MCL 600.2911(a).
65. MCL 600.2911(2)(b).
66. *Peisner*, 421 Mich at 132-133 ("Because the Legislature, cognizant of this long-standing judicial gloss limiting exemplary and punitive damages to a compensatory role, has on several occasions through the years reenacted the libel state without change, we conclude the Legislature intended that any award of 'exemplary and punitive' damages comport with the established common-law gloss on those terms.").
67. 221 Mich 229; 190 NW 746 (1922).
68. *Peisner*, 421 Mich at 134, quoting *Wise v Daniel* 221 Mich at 233.
69. *Id.* at 135.
70. *Id.* at 135 n10.
71. *Id.*
72. *Id.* at 135 n11.
73. *Id.* at 137.
74. 431 Mich 26; 427 NW2d 488 (1988).
75. *Id.* at 40.
76. *Id.* at 40.
77. *Id.* at 38, 55-57.
78. *Id.* at 57.
79. 201 Mich App 155; 506 NW2d 534 (1993).
80. *Id.* at 158.
81. 421 Mich 125; 364 NW2d 600 (1984).
82. *Id.* at 135.
83. *Id.* at 135 n11.
84. *Veselenak v Smith*, 414 Mich 567, 573; 327 NW2d 261 (1982); see also Black's Law Dictionary 394 (7th ed. 1999) (defining "actual damages" as "[a]n amount awarded to a complainant to compensate for a proven injury or loss…Also termed *compensatory damages*").
85. 221 Mich 229; 190 NW 746 (1922).
86. 174 Mich App 14; 436 NW2d 70 (1989).
87. *Id.* at 45.
88. *Id.*; see also *Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 342; 425 NW2d 791 (1988) (holding that exemplary damages were inappropriate when plaintiff did not allege that "its feelings were hurt by a malicious, wilful, and wanton act of defendant").
89. *Valentine v General American Credit, Inc*, 420 Mich 256, 263-264; 362 NW2d 628 (1984).
90. 176 Mich App 650; 440 NW2d 2 (1988).
91. *Id.* at 654-655.
92. *Id.* at 655.
93. 156 Mich App 145, 153; 401 NW2d 250 (1985); see also *McPeak v McPeak*, 233 Mich App 483, 490; 593 NW2d 180 (1999).
94. *Green*, 156 Mich App at 153.
95. *Id.*
96. *Id.*
97. *Jackson Printing Co, Inc v Mitan*, 169 Mich App 334, 341; 425 NW2d 791 (1988).
98. *Id.*
99. *McPeak v McPeak*, 233 Mich App 483, 489; 593 NW2d 180 (1999).

Life Care Planning — Providing Clarity to Medical and Vocational Needs with Associated Costs

By: Erin O'Callaghan, MA, CLCP, CRC, NCC, LPC, and Nancy Huizenga, MA, CLCP, CRC, LPC, *of Genex Services*

Executive Summary

When a plaintiff in a personal injury case has suffered a catastrophic injury, a Life Care Plan is an important part of the defense because of its effect on the damages that may be awarded. A well drawn Life Care Plan will gather information from various sources into a single document that provides a coherent and detailed description of the care that will be needed and the costs associated with that care. For cases that involve serious injury, a certified Life Care Planner can be an important part of the defense team.

Erin O'Callaghan is a Rehabilitation Consultant and Life Care Planner at GENEX Services, Inc. in Troy, Michigan. She holds a Masters Degree in Counseling, and is a Certified Life Care Planner, a Certified Rehabilitation Counselor, a National Certified Counselor and is a Licensed Professional Counselor. Ms. O'Callaghan may be contacted at erin.ocallaghan@genexservices.com.

Nancy Huizenga is a Rehabilitation Supervisor and Life Care Planner at GENEX Services, Inc. in Troy, Michigan. She holds a Masters Degree in Vocational Rehabilitation, a Certification in Life Care Planning, a Certified Rehabilitation Counselor and is a Licensed Professional Counselor. Ms Huizenga may be contacted at nancy.huizenga@genexservices.com.

Introduction

"Life Care Planning" is a process that can mean different things to different people. For rehabilitation professionals, Life Care Planning is understood as a useful tool for managing medical treatment and long term care. However, it is often overlooked as a component in the resolution of litigation.

Life Care Planners are trained to follow a specific process that delineates aspects of care, resulting in measured elements that reflect an injured individual's needs. The field of Life Care Planning addresses the needs of the whole person. Training to prepare an individual to become a Certified Life Care Planner requires a commitment to learning and embracing specific review and research methods. The result of the Life Care Planning process is a stand alone document reflecting the life needs of a catastrophically injured individual, and enumerating costs to provide the economic impact of required treatment.

Definition

The International Association of Life Care Planners has defined a Life Care Plan as:

> A dynamic document based upon published standard of practice, comprehensive assessment, data analysis, and research, which provides an organized, concise plan for current and future needs with associated costs for individual who have experienced catastrophic injury or have chronic health care needs.[1]

This definition provides a clear statement of the purpose of a Life Care Plan, and also structures the procedure of file review and plan development. The production of a plan that is informative and easily understood, and that details the specific care that the person requires, begins with the training implications set forth within the context of the definition.

Methodology

The methodology used to create a Life Care Plan is drawn from the framework derived from the purpose of the plan as described in the definition. This methodology, as outlined by Deutsch and Sawyer[2] and Weed,[3] provides the theoretical framework used in many Life Care Planning training programs. By following a specific outline, the Life Care Planner brings an integrated product to the table with specific procedures identified and followed. Many components are considered to evaluate

their relevance to the particular plan that is being prepared.

- Future Routine Medical Care
- Procedures/Hospitalizations/ Surgeries
- Diagnostic Tests
- Projected Evaluations
- Projected Therapies
- Orthotics/Prosthetics
- Aids for Independent Living
- Orthopedic Equipment
- Wheelchairs/Mobility & Maintenance
- Wheelchair Accessories
- Medications
- Supplies
- Equipment
- Home Care/Facility Care
- Home Furnishings
- Architectural Renovations
- Transportation
- Health & Strength Maintenance
- Case Management
- Transportation
- Vocational Evaluation/ Rehabilitation
- Education
- Potential Complications

It is important to note that each of these components will be analyzed separately. For example, home care may represent a component that requires separation for the purpose of a specific discussion. A systematic calculation is required for purposes of evaluating annual needs.

A Life Care Plan will accurately define attendant care needs and costs for a specific patient and life expectancy on a case by case basis. As the example at right illustrates, it doesn't make sense to apply a generic formula to calculating attendant care needs and costs. A generic formula would not accurately represent the actual care requirements of the individual patient, and related costs.

Let's take a look at an example:

Patient "X" has been prescribed 24 hours of attendant care 365 days a year after suffering a cervical spinal cord injury and rendering the patient with quadriplegia. The patient's spouse works full time outside of the home. At first glance, it might make sense to calculate the following for annual attendant care:

Attendant Care (Scenario A)

Item/ Service	*Duration*	*Frequency/ Replacement*	*Cost*	*Annual Cost*	*Recommended by*
Attendant Care	Year 1 – Life	24 hours per day of attendant care	$20.00 per hour	$175,200.00	Physician

Total Annual Costs for Attendant Care = $175,200.00

We know, from Patient X's physician as well as the level of injury, that the patient will require 24 hours of attendant care. However, Scenario A does not represent a systematic approach to evaluating attendant care needs as defined in the Life Care Planning methodology. Has the above calculation accounted for the skill level of attendant care required? What about the potential for an inpatient stay at a hospital for a comprehensive body function system review and/or evaluation of body function recovery? Is there consideration for costs in attendant care for weekends, nights or holidays? These questions represent the many care dynamics that impact the multidimensional approach of a Life Care Plan.

Let's look at it again:

By using the Life Care Plan methodology, the Life Care Planner can determine the level of attendant care and obtain real costs from local organizations providing services, equipment, etc.

Attendant Care (Scenario B)[4]

Item/ Service	*Duration*	*Frequency/ Replacement*	*Cost*	*Annual Cost*	*Recommended by*
Unskilled Attendant Care	Year 1 – Life	24 hours per day of attendant care (364)	$14.00 per/hr	$122,304.00	Physician

Prices obtained from ABC Home Care. Annual cost is based on 364 days per year due to 1 day inpatient stay at Rehabilitation Facility (Physician recommendation for body system review and functional evaluation).

**The below costs are for additional hourly fees for premium shifts or holidays.*

Item/ Service	*Duration*	*Frequency/ Replacement*	*Cost*	*Annual Cost*	*Recommended by*
Unskilled Attendant Care	Year 1 – Life	8 hours per day/364 days per year	$2.00 per/hr	$5,824.00	Physician

$2.00 per hour additional for 8 hours per day (overnight shift) per ABC Rehabilitation for 364 days per year

Item/ Service	*Duration*	*Frequency/ Replacement*	*Cost*	*Annual Cost*	*Recommended by*
Unskilled Attendant Care	Year 1 – Life	16 hours/5 days per year	$2.00 per/hr	$160.00	Physician

$2.00 per day additional for 16 hours per day, five days per year for holidays per ABC Rehabilitation.

Total Annual Costs for Attendant Care = $128,288.00

In another scenario:

Patient "Y" was involved in a motor vehicle accident, rendering the individual blind in both eyes as well as a lumbar spine injury. After conservative treatment for a spinal injury, the patient underwent a lumbar fusion with instrumentation approximately 10 months prior to the date of referral for a Life Care Plan. The patient has made great functional improvements, but continues to take the following medications for pain related to lumbar spine pain:

OxyContin 40 mg bid (twice per day) 180 units refilled every 3 months
Skelaxin 800 mg PRN (as needed) 60 units refilled every 3 months

It might make sense to calculate the following for Patient "Y":

Medication (Scenario A)

Item/ Service	*Duration*	*Frequency/ Replacement*	*Cost*	*Annual Cost*	*Recommended by*
OxyContin 40 mg bid	Year 1 – Life	Two units per day/180 units refilled every 3 months	$6.89 per unit	$4,960.80	Physician
Skelaxin 800 mg	Year 1 – Life	One unit as needed/60 units refilled every 3 months	$3.48 per unit	$835.20	Physician

Annual Costs for medication: $5,796.00

Let's look at it again:

The Life Care Planner considers consultation with the treatment team regarding Patient "Y" and future needs for these medications. In this example, the Life Care Planner sends a letter to the physician asking about the patient's medication needs (see facing page), and gets a response (shown in italics at the bottom of the letter).

As a result of this physician feedback, a Life Care Planner can apply the methodology and accurately calculate future needs for pain management medication:

Medication (Scenario B)

Item/ Service	*Duration*	*Frequency/ Replacement*	*Cost*	*Annual Cost*	*Recommended by*
OxyContin 40 mg bid	Year 1	Two units per day/180 units refilled twice	$6.89 per unit	$2,480.40	Physician
Skelaxin 800 mg	Year 1	One unit as needed /60 units refilled twice	$3.48 per unit	$417.60	Physician
Vicodin 500 mg	Year 1	One unit as needed /60 units refilled twice	$1.16	$139.20	Physician
Vicodin 500 mg	Year 2 – Life	One unit as needed /60 units refilled every 3 months	$1.16	$278.40	Physician

Annual Cost for pain medication:

Year 1 = $3,037.20

Year 2 – Life = $278.40

The accuracy of future needs and associated costs is essential. The systematic approach identified and outlined in "Scenario B" calculations clearly identifies an accurate case specific understanding of needs and results in the calculation of real costs.

Loss of Wage Earning Capacity

Life Care Planners who are qualified to do so, may also provide analysis of loss of wage earning capacity. This requires a careful evaluation of education, jobs performed, family occupations, interests, aptitudes and labor market access, to form a picture of employability and wage potential. This process is further defined by applying a five step method known by the acronym "RAPEL," taken from the names of the five steps, as outlined by Roger Weed.[5]

The RAPEL Method: A Commonsense Approach to Life Care Planning and Earnings Capacity Analysis.

Rehabilitation Plan: Determine the rehabilitation plan based on the client's vocational and functional limitations, vocational strengths, emotional functioning, and cognitive capabilities. This may include testing, counseling, training fees, rehabilitation technology, job analysis, job coaching, placement, and other needs for increasing employment potential. Also consider reasonable accommodation. A life care plan may be needed for catastrophic injuries.

Access to the Labor Market: Determine the client's access to the labor market. Methods include the LMA92 computer program, transferability of skills (or worker trait) analysis, disability statistics, and experience. This may represent the client's loss of choice and is particularly relevant if earnings potential is based on very few positions.

Placeability: This represents the likelihood that the client could be successfully placed in a job. This is where the "rubber meets the

road." Consider the employment statistics for people with disabilities, employment data for the specific medical condition (if available), economic situation of the community (may include a labor market survey), availability (not just existence) of jobs in chosen occupations. Note that the client's attitude, personality, and other factors will influence the ultimate outcome.

Earnings Capacity: Based on the above, what is the pre-incident capacity to earn compared to the post-incident capacity to earn? Methods include analysis of the specific job titles or class of jobs that a person could have engaged in pre- vs. post-incident, the ability to be educated (sometimes useful for people with acquired brain injury), family history for pediatric injuries, and LMA92 computer analysis based on the individual's worker traits.

Special consideration applies to children, women with limited or no work history, people who choose to work below their capacity (e.g., highly educated who are farmers), and military trained.

Labor Force Participation: This represents the client's work life expectancy. Determine the amount of time that is lost, if any, from the labor force as a result of the disability. Issues include longer time to find employment, part-time vs. full-time employment, medical treatment or follow-up, earlier retirement, etc. Display data using specific dates or percentages. For example, an average of four hours a day may represent a 50% loss.

Letter to physician asking about patient's medication needs:

February 23, 20__

Physician ABC
123 Medical Street

RE: Patient "Y"

Dear Doctor,

I have been requested to complete a life care plan for Patient "Y" in regard to his/her future medical and rehabilitation needs.

The purpose of the life care plan is to provide a comprehensive outline for current and future needs with associated costs. I have interviewed Patient "Y" as well as reviewed medical records. As part of his/her current present medical needs, I understand you are prescribing medications for pain management and I feel your recommendations are important and necessary in formulating a foundation for the development of a Life Care Plan for Patient "Y".

Could you please use the area below to comment on the need for continued use of OxyContin and Skelaxin for pain management? Will the use of these medications increase or decease over the course of the patient's life expectancy?

Please see the enclosed authorization to release medical information.

Thank you,

Certified Life Care Planner

[Physician Response]

Discontinue use of OxyContin and Skelaxin after 6 months. Physical therapy program will be completed at that time and pain is expected to decrease. Will consider use of Vicodin 500 mg at that time for periodic exacerbation of pain.

Physician Signature

Conclusion

The process of preparing a Life Care Plan applies the expertise of the life care planner to use a seamless approach to bring together information from a variety of sources, and organize in a way that provides a comprehensive description of the care that a particular patient will need, and the costs of that care, with supporting documentation. Supporting peer reviewed research is also referenced when needed to further substantiate the care requirements. Through a review of records, and by identifying treatment benchmarks, analyzing costs and considering life expectancy, the plan represents a studied picture of the patient's needs and associated economic impact. Peer reviewed research is included to educate the reader and support Plan recommendations.

Because the Life Care Planner may testify in detailing a patient's (and plaintiff's) needs and their associated costs, it is important for the attorney to understand the scope and intricacies of the process of developing a Life Care Plan. In a case where a plaintiff has suffered a serious injury, the qualified Life Care Planning expert is an essential part of the defense team.

Endnotes

1. Established during the 2000 Life Care Planning Summit.
2. Deutsch, Paul M., Sawyer, Horace W., A Guide to Rehabilitation: AHAB Press, 2002.
3. Weed, Roger O., Life Care Planning and Case Management Handbook, CRC Press, Boca Raton, London, New York, Washington D.C., 1999 revised in 2004 (pages 6/7).
4. These costs are estimates, and are used for illustration only.
5. Weed, Roger, supra, note 3.

Criminal History Checks and Fingerprinting Requirements for Healthcare Workers: What Employers Need to Know

By: Gouri G. Sashital, *Keller Thoma, P.C.*

Executive Summary

Health care facilities are not allowed to hire persons who have been convicted of certain offenses, and are required to fingerprint prospective employees or perform background checks to determine if the person has been convicted of any of the offenses. The failure to do so may result in criminal penalties being imposed on the employer. In general, the requirements extend to persons who have access to patients or their property, and apply without regard to whether the person is an employee or an independent contractor, or a physician with staff privileges. The requirements and their exceptions and limitations are extremely detailed, and it is important that covered healthcare facilities work closely with counsel in determining which employees are subject to criminal history checks, and which employees are subject to fingerprinting, in order to ensure that the facility is always in compliance with the law.

Gouri G. Sashital is an associate with the firm of Keller Thoma, P.C. Ms. Sashital concentrates her practice in the area of employment law, including advising and defending employers with regard to claimed civil rights violations, wrongful discharge, unlawful retaliation, and Family Medical Leave Act violations. Ms. Sashital may be contacted at gsr@kellerthoma.com.

The Michigan Public Health Code prohibits covered healthcare facilities from employing individuals who have been convicted of certain enumerated offenses relating to crimes of violence, abuse, neglect, or fraud.[1] Until recently, there has been no system in place for healthcare employers to verify a prospective employee's criminal history, and employers were required to take applicants at their word. However, the Michigan Department of Community Health, in conjunction with the Michigan State Police and the federal government, are in the process of creating and implementing a statewide fingerprint database for healthcare professionals, which will both aid healthcare employers in screening out ineligible candidates, and provide employers with automatic notification if a current employee is arrested.[2]

Michigan is one of seven states chosen for a pilot program authorized by Congress in 2003.[3] Under this program, Michigan received $3.5 million in federal funding to set up a fingerprinting and criminal background check system for healthcare facilities to utilize in the hiring of their employees.[4] On April 1, 2006, the Michigan legislature enacted amendments to two sections of the Public Health Code,[5] which require that covered healthcare facilities obtain criminal history checks and fingerprints for covered healthcare professionals. Given the complexities of these amendments, and the fact that non-compliance can result in criminal penalties, it is important for healthcare employers and their counsel to familiarize themselves with the statutory requirements.[6]

Covered Healthcare Facilities

Not all healthcare facilities are required to perform the criminal history checks or obtain fingerprints.[7] Only the following "covered healthcare facilities" must do so:

- Nursing homes
- County medical care facilities
- Hospices[8]
- Hospitals providing swing bed services[9]
- Homes for the aged
- Home health agencies
- Psychiatric care facilities
- Intermediate care facilities for people with mental retardation
- Adult foster care facilities

On April 1, 2006, the Michigan legislature enacted amendments to two sections of the Public Health Code,[5] which require that covered healthcare facilities obtain criminal history checks and fingerprints for covered healthcare professionals.

Covered Healthcare Professionals

Similarly, not all healthcare employees are subject to the statutory requirements. Covered healthcare facilities need only obtain fingerprints or criminal history checks for individuals who regularly have direct access, or provide direct services, to patients.[10] The statutes define "direct access" and/or "direct services" as follows:

- Individuals who provide professional services to the patient or resident
- Individuals with access to the patient or residents
- Individuals with access to the patient or resident's property, financial information, medical records, treatment information, or any other identifying information[11]

It is important to note that the statutes make no distinction regarding the individual's employment relationship with the covered healthcare facility. Thus, the background check and fingerprinting requirements apply to the facility's direct employees, as well as independent contractors and physicians with staff privileges, provided these individuals fall within the definition of covered healthcare professionals.[12] Healthcare employers must therefore consider each employee closely, to determine whether the employee is subject to the statutes' requirements.

Individuals Exempt from the Criminal History Check Requirements

Certain individuals are exempt from the criminal history check requirement, even though they meet the statutory definition for covered healthcare professionals described above. However, these individuals are subject to fingerprinting, as described further below.

First, individuals who were already working at a covered healthcare facility as of April 1, 2006 are not subject to a criminal history check.[13] This exemption includes individuals who transfer between agencies owned by the same covered healthcare facility after April 1, 2006, *e.g.* a registered nurse transferring between a nursing home and a hospice owned by the same facility is not required to undergo a criminal history check.[14] Of course, once the individual leaves the employ of the facility to work at another covered healthcare facility, the new facility must comply with the statute and perform a check.[15]

Second, certain independent contractors are exempted as well. This includes independent contractors who do not directly provide services to patients, or who have direct access to patients only on a limited basis.[16] The statutes specifically exclude criminal history checks for individuals contracted to perform utility, maintenance, construction or communications services.[17]

Although these exempt employees need not undergo a criminal history check,

Certain individuals are exempt from the criminal history check requirement, even though they meet the statutory definition for covered healthcare professionals described above.

Although these exempt employees need not undergo a criminal history check, they must, as a condition of continued employment, agree in writing to report to their employer if they are arraigned or convicted of one or more of the enumerated offenses.

they must, as a condition of continued employment, agree in writing to report to their employer if they are arraigned or convicted of one or more of the enumerated offenses.[18] In addition, they must report if they are found not guilty of *any* crime by reason of insanity; or if they are the subject of a substantiated finding of neglect, abuse or misappropriation of property pursuant to federal law.[19]

Procedural Requirements

There are several procedural requirements a covered healthcare facility must follow to obtain a criminal history check from a covered healthcare professional.

The facility must first obtain appropriate identification from the covered healthcare professional and written consent to obtain the check.[20] These items are then provided to the Department of State Police, together with a request that a criminal history check be conducted at both the state and federal level.[21] After obtaining the healthcare professional's fingerprints, the Department of State Police will then conduct the check.[22] A written report detailing the findings will be provided to the healthcare facility.[23]

Any information provided in the criminal history check is confidential, and may only be used for the purpose of evaluating a healthcare professional's qualifications for employment or staff privileges.[24] While the employee may

authorize, in writing, release of information pertaining to the criminal history check, the intentional dissemination of an employee's criminal history for purposes other than the foregoing is a misdemeanor, punishable by up to 93 days in prison, a $1000 fine, or both.[25]

Recently, the legislature approved a bill requiring that the cost of obtaining criminal history checks be borne by the healthcare facility requesting the check.[26] Previously, federal funds had paid for the checks, but with the expiration of the three-year pilot program, these funds are no longer available. Although the legislature has ordered the Department of Community Health, the agency responsible for implementing the criminal history check requirement, to submit a written report outlining a new funding scheme by April 1, 2009, it is unclear when, and if, funds will become available again.[27] Until that time, it is the healthcare employer's responsibility to obtain the criminal history check for covered employees, and pay the associated costs, as well.[28]

Fingerprinting of Exempt Healthcare Professionals

As noted above, exempt healthcare professionals are not subject to the criminal history check, but they are required to submit a copy of their fingerprints to the Department of State Police, for insertion in a state-wide automated fingerprint identification database of healthcare workers.[29] The database will be used to provide automatic notification to the employer if the employee is subsequently arrested for a criminal offense.[30] Eventually, all covered healthcare workers who have direct access to patients, or who directly provide services to patients, will have their fingerprints stored in the state-wide database.

The deadline for submission of fingerprints has been extended by the legislature several times, including as recently as January 2009. Currently, exempt employees must submit their fingerprints to the Michigan State Police beginning April 1, 2011.[31] As with the criminal history checks, it is the responsibility of the healthcare employer to fund the cost of fingerprinting covered employees, at least for the foreseeable future.[32]

> Any information provided in the criminal history check is confidential, and may only be used for the purpose of evaluating a healthcare professional's qualifications for employment or staff privileges.

Conclusion

The criminal history check and fingerprinting requirements found in the Public Health Code present unique practical challenges to both the healthcare employer and the defense practitioner. It is important that covered healthcare facilities work closely with counsel in determining which employees are subject to criminal history checks, and which employees are subject to fingerprinting, in order to ensure that the facility is always in compliance with the law.

> Eventually, all covered healthcare workers who have direct access to patients, or who directly provide services to patients, will have their fingerprints stored in the state-wide database.

Endnotes

1. The list of enumerated offenses may be found at MCL 333.1134a(1) and MCL 330.20173a(1).
2. MCL 333.1134a(12) and MCL 330.20173a(12).
3. 42 USC § 1395aa.
4. December 9, 2008 Senate Fiscal Analysis Report of House Bills 6056, 6057, 6058
5. MCL 333.1134a and MCL 330.20173a.
6. Failure to perform the criminal history checks subjects the "licensee, owner, administrator, or operator" to criminal and monetary sanctions, including being guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $5000, or both. MCL 330.1134a(11) and MCL 333.20173a(11).
7. MCL 330.1134a(2) and MCL 333.20173a(2).
8. Federal regulations regarding Medicare/Medicaid also require that hospice employees undergo a criminal history check. 42 CFR § 418.114(d).
9. A swing bed hospital is one that participates in Medicare, and provides either acute care or skilled nursing care, depending upon the needs of its patients. 42 CFR § 413.114(B)(iii).
10. MCL 333.1134a(2) and MCL 333.20173a(2).
11. MCL 333.1134a(15)(b) and MCL 333.20173a(15)(b).
12. MCL 333.1134a(2) and MCL 333.20173a(2).
13. MCL 333.1134a(2)(a) and MCL 333.20173a(2)(a).
14. Id.
15. Id.
16. MCL 333.1134a(2)(b) and MCL 333.20173a(2)(b).
17. Id.
18. MCL 333.1134a(10)(a) and MCL 330.20173a(10)(a).
19. Id.
20. MCL 333.1134a(4) and MCL 330.20173a(4).
21. Id.
22. Id.
23. Id.
24. MCL 333.1134a(9) and MCL 330.20173a(9).
25. Id.
26. This requirement does not apply to homes for the aged. These facilities will be compensated by the state for the costs associated with obtaining a criminal history check. MCL 330.20173a(4).
27. MCL 333.1134a(13) and MCL 330.20173a(13).
28. MCL 333.1134a(4) and MCL 330.20173a(4).
29. MCL 333.1134a(2)(a) and (12) and MCL 330.20173a(2)(a) and (12).
30. Id.
31. Id.
32. MCL 333.1134a(4) and MCL 330.20173a(4).

Rule 35 Neuropsychological Exams — Should Third Persons Attend?

By: Michael D. Wade, *Garan Lucow Miller*

Executive Summary

The question whether third persons should be permitted to attend a neuropsychological independent medical examination of the plaintiff presents special considerations, because of the nature of the examination. Plaintiffs have argued that the examination s essentially adversarial anyway, so that the plaintiff should have the protection of counsel, as in a deposition. In addition, plaintiff have argued that the personal nature of the questions that might be asked justify having some present for additional support. It has also been argued that it is necessary to have a third person present to guard against unprofessional behavior.

The courts have not found these arguments persuasive. For one thing, the nature of the procedure requires one-to-one communication. In addition, if plaintiff's counsel were to attend on the basis that the procedure is adversarial, then the defense counsel should attend as well. An attorney who attends also runs the risk of being called as a witness to how the procedure was conducted, and thus being required to withdraw as counsel. There are sufficient procedural protections in place, anyway, since plaintiff's counsel will receive a report, can debrief his or her client, and can consult with plaintiff's own experts on the methodology and conduct a Daubert inquiry if necessary.

Michael D. Wade is a partner in the Grand Rapids office of Garan Lucow Miller, P.C. and litigates commercial and complex cases. He is co-author of Wade & Kolenda, *Michigan Courtroom Evidence 3d Ed.* (ICLE). His email address is mwade@garanlucow.com.

When a neuropsychological examination is to be conducted under the rule providing for independent medical examinations (IMEs), the question whether third persons may attend raises issues that are different from those that arise in other IMEs.

The federal rule that governs these examinations reads as follows:

> When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner to produce for examination the person in the parties custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.[1]

The third parties who might attend a neuropsychological IME may include plaintiff's attorney, defense attorneys, other experts such as plaintiff's neuropsychologists, spouses, family members, friends, court reporters, video operators; a tape recorder might also be used. Several federal court decisions have discussed the policies for and against permitting these third persons to attend neuropsychological IMEs. The better reasoned case law ineluctably leads to the conclusion that third person should not attend a neuropsychological IME under Rule 35 or its state equivalent.

Plaintiffs' arguments

Plaintiffs' attorneys make a number of arguments in favor of permitting a third party to attend a neuropsychological IME. Among these the principal arguments are that the examination is akin to a deposition, which is inherently an adversarial situation, that it deals with personal subject matter and that the emotional support of a friend or relative is important, and that the methodology used to conduct the IME needs to be monitored to assure scientific credibility and avoid improper or hurtful techniques.

Deposition-like adversarial situation

Those seeking to have the presence of third parties at a Rule 35 examination assert that the examination, particularly in the hands of an experienced examiner, may be nothing less than a deposition, designed to undermine the examinee's case. The examinee may make admissions which the defense may then use to defeat the plaintiff's damage claim, or even may make admissions relative to the liability aspect of the case. To

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prevent the deposition-like atmosphere of the examination, an attorney is needed to object to the questions asked or to assist the examinee in answering such questions.[2]

Certainly part of any Rule 35 exam is a history taking, including medical history, family history and social history, including questions regarding the etiology of the present problem. A savvy examiner indeed can ask detailed questions and of course answers to those questions when helpful to the defense will be detailed in the experts' reports.

On the other hand there is no bright line test for what constitutes inappropriate inquiry into matters not relevant to an IME. Certainly questions relating to fault for an accident are probably never needed medically. But details relating to how an incident occurred may be needed medically because the mechanism of injury is frequently important to the examiner.

In *DiBari v Incaica Cia Armadora SA,*[3] the court recognized that an IME is "in reality adversarial in nature." Apparently, based on plaintiff's lack of education and difficulty with the English language a psychiatric exam was permitted to go forward with a court reporter present, but not an attorney. The reporter was to be unobtrusive and could not impede the exam. The court observed:

> The presence of attorneys at psychiatric examinations has been denied in the federal courts because of the special nature of such an examination "which relies ... upon unimpeded one-on-one communication between doctor and patient"... However, more fundamental is the view in these cases that, far from being adversarial in nature, those examinations should be divested as far as possible of any adversary character.[4]

The court in *Dziwanoski v Ocean Carrier Corp,*[5] answered the argument that the attorney's presence is necessary or permitted by Rule 35. Two IMEs were to be conducted, one by an orthopod and another by a neurosurgeon. The court averred:

> The presence of the lawyer for the party to be examined is not ordinarily either necessary or proper; it should be permitted only on application to the court showing good reason therefor. If the attorney desires to be present in order to control the examination, that would invade the province of the physician; if he desires his observations to be the basis of cross-examination or possible contradiction of the doctor, he is making himself in effect a witness, with the difficulties which are likely to arise when an attorney asks questions on cross-examination based upon his own observations, and the possibility that he may wish to take the stand and thereby disqualify himself from completing the trial as the attorney.[6]

There is no bright line test for what constitutes inappropriate inquiry into matters not relevant to an IME

No proper motive of protecting the client in an adversarial proceeding puts the plaintiff's attorney in the examining room, and the process in fact becomes adversarial when the attorney is present.

Dziwonski answers effectively the argument that an IME is merely an adversarial quasi-deposition. No proper motive of protecting the client in an adversarial proceeding puts the plaintiff's attorney in the examining room, and the process in fact becomes adversarial when the attorney is present. The attorney's presence is neither necessary nor proper.

Private subject matter

Plaintiff attorneys also argue that a mental examination may well deal with private or sensitive subject matter. Intimate topics may be discussed, especially in sexual harassment cases. A third-party, friend, relative or counselor, could provide moral support and reduce embarrassment. An attorney can prevent intrusive questioning by the examiner on private matters. In *Sanden v Mayo Clinic,*[7] the court in part discussed this argument, but obliquely. During trial, the court permitted a neurological IME but refused to permit plaintiff's own physician to attend. The court first observed the discretionary nature of a court ordered IME, especially as to manner and conditions. Then the court stated that no argument was made that plaintiff's physician was needed to protect plaintiff's privacy or to shield her from embarrassment, "and properly so" as plaintiff was an R.N. who was also

examined privately by her own physician. Thus, the circuit court relied upon plaintiff's occupation and experience at the hand of her own examining doctor to find no need for privacy or protection from embarrassment.

The neuropsychological IME must address emotional issues. Issues relating to privacy and embarrassment are precisely the reason for the IME, as plaintiff is making a damage claim for emotional injuries. The safeguard in this instance consists of the training, professionalism, and ethics of the examining physician. The examiner will be licensed by the state and will belong to professional organizations with codes of professionalism. The practice of both medicine and psychology, regulated by all states, require acceptable moral character and appropriate educational background and are subject to regulatory and disciplinary procedures.[8]

In *Schempp v Reniker,*[9] a claim was made of sexual abuse of a child by her father. The mother refused an IME by a psychologist unless the mother were present. It appears that the five year old girl's guardian ad litem argued that without the mother the exam would be mentally harmful. The trial court had ordered that the examination be conducted in accordance with accepted professional procedures and standards. The appellate court added:

> A court should not undertake to second-guess the professional judgment of the doctors. In any event it seems obvious, even to a legal mind, that under the circumstances a proper examination for purposes of dealing with the issues in the case at bar could not be conducted in the presence of, and subject to the influence or subtle or overt coercion of, Jana's mother during the course of the examination.[10]

The examining professional must be given some deference to conduct the IME in a professional manner.

Questionable methodology

A third reason is advanced for permitting a third-party at an IME, namely, that the examiner may use unscientific, questionable or even hurtful techniques. This argument might be used to permit the presence of the examinee's own physician or healthcare provider.[11]

The argument that the examiner might use unscientific, questionable or hurtful techniques assumes that an IME examiner would use unreliable methods in an IME. This assumption is probably unwarranted due to the ethics of the professional. The ethics of a health professional are not set aside during an IME but remain in full force. In the neuropsychological context, tests are standard and frequently are computer scored. While interpretation of the results may differ, the scoring of the tests is usually not susceptible to improper methodology. The raw data on a given test are available to plaintiff's experts, so any misinterpretation can be quickly detected. Therefore, this third argument asserted in favor of having third parties present at an IME is found wanting.

The argument that the examiner might use unscientific, questionable or hurtful techniques assumes that an IME examiner would use unreliable methods in an IME.

Arguments against third-party attendance

Several reasons are advanced against having a third party or any recording device present at an IME: (1) the neuropsychologist is in effect an officer of the court, (2) if plaintiff's counsel attends then defense counsel must also be there, (3) the nature of the examination requires a non-to-one communication, and (4) if an attorney did attend then he or she might become a witness. The federal courts have addressed these arguments as well.

Officer of the court

In *Warrick v Brode,*[12] the court observed that the examining physician at a Rule 35 exam was "in effect, an 'officer of the court' performing a non-adversarial duty." Having an attorney present would "invade the province of the physician."[13] The court did not permit an attorney to be present so as not to inject "a partisan character into what should otherwise be a wholly objective inquiry."

In *Wheat v Biesecker,*[14] the court placed the burden of persuasion on plaintiff to show that the IME physician would conduct an improper exam.

Reciprocity

Cases have advanced the argument that plaintiff normally will undergo examinations by treaters or retained experts and without the presence of defense counsel and so plaintiff's attorney should not be present during a defense IME. This idea of symmetrical examinations was addressed in *Tirado v Erosa,*[15] wherein defendant sought a psychiatric examination in a civil rights action. Plaintiff's attorney asserted a right to be present during the IME because the exam was essentially a deposition by the adverse party. The case contains both the magistrate judge's decision as well as the decision by the district judge affirming. The magistrate judge observed:

> ...if medical examinations were to be conducted like depositions, the "adversarial" process would of

> course have to be symmetrical: if plaintiff intends to offer at trial the expert testimony of an examining psychiatrist selected by her counsel, defendants would be entitled to the same safeguards, to be sure that the expert's report accurately reflected what plaintiff said during the examination and did not omit material unfavorable to plaintiff's case.[16]

The preparation of a case for trial requires that some matters are accomplished outside the purview of adverse counsel and one such matter is medical preparation in an injury case.

One-to-one interview

Tirado confirmed that the principal method of psychiatric examinations is the one-to-one interview.[17] In *Brandenberg v El Al Israel Airlines,*[18] the defendant sought a psychiatric exam of plaintiff, who insisted that her attorney attend. The court found that plaintiff's insistence that her attorney attend the examination was "frivolous" in light of existing case law. The court found that a psychiatric exam "relies . . . upon unimpeded, one-to-one communication between doctor and patient."

Attorney as witness

When the person attending a Rule 35 exam is counsel for a party, the attorney could become a witness at trial and thus become disqualified. One court has expressed this concern as follows:

> A plaintiff's attorney should be reluctant to involve himself in the physical examination. If a question arises concerning the responses made by the plaintiff, the attorney may final himself in the unenviable position of being a witness during trial. Disciplinary Rule 5-102 of the Code of Professional Responsibility prohibits an attorney from acting as both a lawyer and a witness during a trial. Therefore, by attending the medical examination, the attorney may be placing himself in the position of having to choose between participating in the trial as a litigator or as a witness.[19]

The court found that plaintiff's insistence that her attorney attend the examination was "frivolous" in light of existing case law.

The ethical obligation mandates withdrawal as counsel for the party when the attorney becomes a witness. It seems prudent for counsel, when seeking to attend a Rule 35 examination, to advise the client of this possible scenario. In the federal courts the disqualification scenario will usually not arise, as most federal courts will deny the request of the attorney to attend a Rule 35 exam.

Procedural protections

The court has several means of protecting the examinee from possible overreaching or abuse by the examining physician. First, the rule requires the production of a report which must be provided to the examinee's counsel. This report, more or less detailed, may reveal a problematic examination, either in terms of methodology or in terms of content. The attorney can debrief his or her client concerning the exam and compare the client's recollections with the report. Second, the examinee's attorney can take the discovery deposition of the examiner in preparation for the trial cross-examination of the IME physician. Third, counsel can retain an expert to evaluate the report and the client's recollection of the exam. The deposition of the examiner can be provided to the retained expert. In this way, both invalid methodology and improper or counter-factual conclusions are brought to light for use during cross-examination at trial.

Fourth, counsel may seek to disqualify the examining physicians for improper methodology. The court has the power to conduct a *Daubert*[20] hearing regarding the validity of the expert's methodology and techniques. The court can exclude information that was improperly obtained, such as statements made in response to improper questioning by the examiner. Thus, by limiting the testimony of the examiner or disqualifying the examiner altogether, the court protects the examinee from abuse and the process from misuse.

The court can exclude information that was improperly obtained, such as statements made in response to improper questioning by the examiner.

Conclusion

The reasons for precluding any third party attendance or the use of any recording device, audio or video, in the neuropsychological testing environment are compelling. Although a minority of decisions permit stenographic, audio or video recording of IMEs, recent federal case law decided under Rule 35 uniformly precludes attorneys. Defense counsel should seek appropriate protective orders when counsel for plaintiffs seek to intrude on the defense neuropsychological IME.

Endnotes

1. FRCivP 35.
2. Wyatt & Bales, "The Presence of Third Parties at Rule 35 Examinations," 71 Temp.L.Rev. 103 (Spring 1998). See Zabkowicz v West Bend

Co, 585 F Supp 635 (ED Wisc 1984) and Wheat v Biesecker, 125 FRD 479 (ND In 1989).
3. 126 FRD 12 (ED NY 1989); see also, Favale v Roman Catholic Diocese of Bridgeport, 235 FRD 553 (D Conn 2006).
4. Id. at 13, quoting Brandenberg v El Al Israel Airlines, 79 FRD 543, 546 (SD NY 1978).
5. 26 FRD 595 (D Md 1960).
6. Id. at 598.
7. 495 F2d 221 (8th Cir. 1974).
8. See Massey v Manitowac Co Inc, 101 FRD 304 (ED Pa 1983).
9. 809 F2d 541 (8th Cir. 1987).
10. Id. at 543-44.
11. Wright & Miller, Federal Practice & Procedure, Civil 2d, §2236.
12. 46 FRD 427 (D Del 1969); see also, McDaniel v Toledo, Peoria & Western RR Co, 97 FRD 525 (CD Ill 1983).
13. Id.
14. Supra.
15. 158 FRD 294 (SD NY 1994).
16. Id. at 300.
17. See DiBari v Incaica Cia Amadora SA, 126 FRD 12 (ED NY 1989); Neumerski v Califano, 513 F Supp 1011 (ED Pa 1981).
18. Supra.
19. Wheat v Biesecker, 125 FRD 479, 480 (ND Ind 1989). Accord, Warrick v Brode, 46 FRD 427, 428 (D Del 1969); Dziwonski v Ocean Carriers Corp, 26 FRD 595, 598 (D Md 1960).
20. 509 US 597 (1993).

Member News

Work, Life, and All that Matters
Member News is a member-to member exchange of news of **work** (a good verdict, a promotion, or a move to a new firm), **life** (a new member of the family, an engagement, or a death) and **all that matters** (a ski trip to Colorado, a hole in one, or excellent food at a local restaurant).

Send your member news item to the editor, Hal Carroll (hcarroll@VGpcLAW.com) or the Assistant Editor, Jenny Zavadil (Jenny.Zavadil@det.bowmanandbrooke.com).

MDTC Board Member and Technology Chairperson makes our news for two happy occasions: Tim and his wife, Molly, are pleased to announce the birth of their first child, Henry William Diemer, born January 28, 2009. Tim is also pleased to announce that he has been elected shareholder at John P. Jacobs, P.C. and that the firm is now known as Jacobs and Diemer, P.C.

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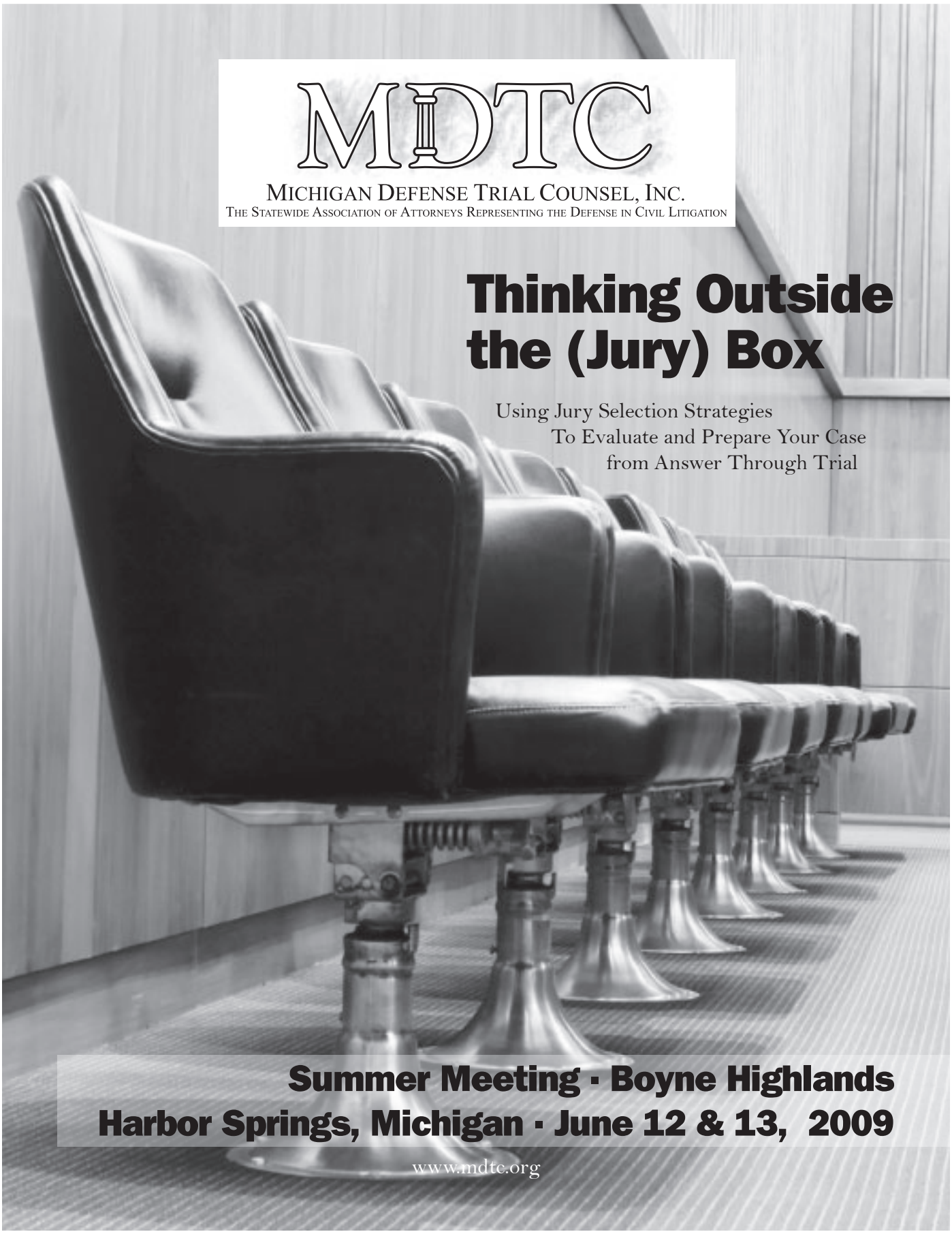
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Thinking Outside the (Jury) Box

Using Jury Selection Strategies To Evaluate and Prepare Your Case from Answer Through Trial

Summer Meeting · Boyne Highlands · June 12 & 13, 2009

Trial attorneys have long used mock juries to evaluate jury reactions to their evidence and arguments before a case goes to trial. But, what if we could tap into the minds of jurors during discovery and even before mediation or case evaluation?

According to a joint survey released in September 2008 by the American College of Trial Lawyers and the Institute for Advancement of the American Legal System, 83 percent of the nearly 1,500 lawyers who responded found that costs, not merits, were the deciding factor in settling a case. Wouldn't it be nice to know whether a case is worth the cost of trial early on?

At the MDTC Summer Meeting, you can:

- Learn what biases might creep into a juror
- View mock deliberations
- Learn how to obtain juror feedback on witness credibility
- Learn how to prepare witnesses based on juror perceptions
- Learn how to use jury selection techniques

. . . all at the **pre-trial stage** *so you can adequately prepare for mediation or case evaluation in addition to trial.*

Schedule of Events

Friday, June 12, 2009

9:00 a.m. to Noon.....Board Meeting
1:00 p.m. to 5:00 p.m.....Education Session
6:00 p.m. to 7:00 p.m.....Reception -- Exhibit Area; Dinner on your own
9:00 p.m.....Hospitality Suite

Saturday, June 13, 2009

7:00 a.m. to 8:00 a.m. .....Annual Meeting
8:00 a.m. to Noon.....Education Session
12:30 p.m.....18 hole, Scramble Format Golf Outing
1:00 p.m.....5k Fun Run Event
6:00 p.m. to 7:00 p.m.....Reception
7:00 p.m. to 10:00 p.m.....Awards Banquet
10:00 p.m.....Hospitality Suite

Sunday, June 14, 2009

9:00 a.m. to Noon..... Board Meeting

Education Sessions

Friday 1:00 p.m. to 5:00 p.m.
"How Mock Trials and Focus Groups Can Improve the Bottom Line–The Earlier, The Better"

View actual mock trials/focus groups in action; obtain jury feedback on witness credibility; view sample reports and learn how the reports can affect settlement and case evaluation; learn how mock trials/focus groups can assist you in assessing damages.

Susan N. Reiter, Ph.D., is President and co-founder of InFocus Research Group, Inc. (www.infocusresearch.com). Susan earned her doctorate in Higher Education from the University of Michigan. She also holds a Masters degree from the University of Minnesota and a Bachelors degree from the University of Michigan. In her role at InFocus Research Group, Susan has conducted countless focus groups and mock trials with highly effective results for her clients.

For many years, Susan served as a researcher at a national center for research on human cognition and motivation. Working with leading psychologists, she worked to develop theories of how people's motivations affect what they hear, how they learn, and ultimately what they think. As a skilled interviewer and trained data analyst, she puts these skills to work for her clients. A sound research design and proven research principles and methods are the hallmarks of each focus group and mock trial that she conducts.

Susan is a member of the American Society of Trial Consultants. Her husband, Jesse, is a practicing medical malpractice attorney.

Kim K. Sands, Vice President and co-founder of InFocus Research Group, Inc.**,** (www.infocusresearch.com) holds a Bachelors degree in Marketing from Oakland University. She has an extensive background in corporate and project-based strategy development with her most recent position leading the global corporate strategy department for a Fortune 500 company. For many years, Kim has worked in cross-functional team leadership roles. She has trained and studied group dynamics, issues resolution processes in the group environment and motivations of individuals in cross-functional group settings. She is also experienced in utilizing psychological and personality inventory results to understand and predict individuals' interaction styles within group environments.

Kim is skilled in issue and theme analysis and is an accomplished writer. Throughout her career, she has conducted many highly successful focus groups, individual interviews, and strategic analyses across many different business and service-based industries. She is a member of the American Society of Trial Consultants.

Saturday 8:00 a.m. to Noon
"Inside the Jury Box – How Juror Perceptions Drive Decision-Making"

View juror deliberations; learn about biases that creep into jurors' minds; learn how to use juror perceptions to prep witnesses, select juries, and develop a successful theory of the case; learn how to use jury selection techniques throughout litigation.

John D. Gilleland, Ph.D. is Senior Trial Consultant for TrialGraphix, a national litigation consulting firm that specializes in exhibits, technologies, and trial consulting strategies. TrialGraphix offers expertise in the design and implementation of social science research, analysis of group dynamics and persuasion, and the evaluation of juror reactions to case, facts, witnesses, and trial strategies.

As one of the top trial consultants in the country, Dr. Gilleland has spent more than twenty-two years studying jury psychology, seventeen of which have been dedicated to conducting empirical jury research exclusively. As such, he has extensive knowledge of jury behavior, including attitude change and persuasion techniques, attributional reasoning, and group decision-making processes. Dr. Gilleland began his career at Williams College as a Visiting Assistant Professor of Psychology. His professional experience has encompassed the fields of jury research and trial consulting, and he has held positions at the Director level at FTI, Litigation Sciences, and most recently, as the Director of Research for DecisionQuest.

Dr. Gilleland has spoken about jury research and behavior in numerous academic settings, and is a frequent presenter at both NITA and CLE seminars. He has consulted on several hundred civil and criminal cases in both federal and state courts across the U.S. and has presented before the American Conference Institute, the Defense Research Institute, various Inns of Court across the country, and several state bar associations. He has been widely published on a variety of topics relating to jurors and jury research and is an active member of the American Psychological Association, the American Bar Association, and the American Society of Trial Consultants (ASTC). He holds a Ph.D. in Social Psychology from the University of California, Santa Barbara, as well as a B.A. in Psychology from the University of California, San Diego, and a B.A. in Sociology from the University of Minnesota, Minneapolis.

MDTC **Thinking Outside the (Jury) Box · Boyne Highlands · June 12 & 13, 2009**

Special Events Registration Form

Saturday, June 13, 2009 Golf Scramble Tournament

Golf Notes: Individuals are responsible for paying to participate in the Scramble Tournament directly to the Pro-Shop. Fee includes: 18 hole greens fees, cart, lunch. Prizes will be awarded at the Saturday evening banquet. In addition to the traveling trophy, prizes will be awarded for 1st place team, individuals closest to the pin, and longest drive (men & women). In addition to the traditional $5.00 Mulligan, we will again have a special $10.00 Mulligan called the "Barney" that participants can use on the greens. Each player is limited to two Mulligans, and one "Barney."

Tee Times Start at 12:30 p.m., Donald Ross Course; Price per person is $89.00

Name of Golfer:_____ Handicap:_____

List the individuals you prefer to golf with. All golfers must register separately.
Name of golfer(s) if known: _____
_____
_____

Dress code enforced, must wear shirt with collar.
NOTE: SOFT SPIKES REQUIRED ON COURSES.

Fun/Run/Talk/Walk
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Saturday, June 13, 2009
Starting Time 1:00 p.m. (Sharp!)

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T-shirts sponsored by GENEX Services Inc.

Name of Participant(s): _____
_____
_____

Adult T-shirt Size (circle one): M L XL

Signature (each entrant must sign)

_____ date _____
_____ date _____
_____ date _____

Waiver

For and in consideration of my participation in the Fun/Run/Talk/Walk, I hereby agree, on behalf of myself, my heirs, my executor, administrators, and assigns to indemnify the Michigan Defense Trial Counsel and all officials of the race, and hold and save them harmless from and against any an all actions, claims, demands, liabilities, loss, damage or expense of whatever kind and nature which may at any time be incurred by reason of my participation in or my preparation for aforesaid race. Further, in the event of any injury, I do hereby give my permission and consent to authorize such first aid and/or medical and/or hospital care or treatment as deemed appropriate. I attest and verify that I have full knowledge of the risks involved in this event and am physically fit and sufficiently trained to participate in this event.

MDTC **Thinking Outside the (Jury) Box · Boyne Highlands · June 12 & 13, 2009**

Optional Activities

Golf Scramble Tournament
Saturday, June 13, 2009
Donald Ross Course
Tee times start at 12:30 p.m.

Golf Notes: Individuals are responsible for paying to participate in the Scramble Tournament directly to the Pro-Shop. Fee includes: 18 hole greens fees, cart. Prizes will be awarded at the Saturday evening banquet. In addition to the traveling trophy, prizes will be awarded for 1st place team, individuals closest to the pin, and longest drive (men & women).

Awards Banquet
Saturday, June 13, 2009
7 p.m. - 10 p.m.
Coat and tie suggested.

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Saturday, June 13, 2009
1:00 p.m.
A 5k course through a scenic walkway. Please join us by running or walking. This event is designed for the entire family. Register to attend this event by indicating your interest on the form on page 4. T-shirts awarded to the first 50 registrants.

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6 p.m. - 7 p.m.

Saturday, June 13, 2009
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MDTC Thinking Outside the (Jury) Box · Boyne Highlands · June 12 & 13, 2009

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YOUNG LAWYERS SECTION

V. Motions in Limine and Preparing for Trial

By: Scott S. Holmes, *Foley & Mansfield, P.L.L.P.*

This article is the fifth installment in our series providing an introduction to the basics of litigation from a defense perspective. In the first article, we discussed pleading and responding to a cause of action. In the second article, we offered tips and tricks for raising cross claims, third party claims, and pursuing indemnity. In the third article, we addressed seeking discovery and responding to discovery related issues. The last article focused on dispositive motions. This article will outline the basic information you need to know to prepare for trial.

I once heard that all trial lawyers dream of being actors. It makes sense when you consider the true talent it takes to present a persuasive case in a courtroom. However, given that less than 5% of cases are tried today, if we really do dream of the stage and screen, nearly all of us fall into that category of "starving" actors and actresses. The simple reality is, very few cases end up in trial.

This leads to a "catch 22" where a young attorney needs experience to become talented at trial, but when that rare opportunity comes along at a law firm, it is much too precious and critical to trust any significant courtroom responsibility to an inexperienced associate. This is why the young associate's best opportunity for showing his or her promise for trial success is to prove he or she understands and is competent in preparing the case for trial. Whether you are preparing as the lead attorney at trial, the second or third chair, or the lowly associate (confined to your office) who will be on call for research and reference throughout the trial, this article will examine the essential steps necessary to prepare a case for trial.

The File

If you are beginning preparation for trial, you undoubtedly know your case inside and out from the months and sometimes years it takes to end up at trial…or do you? Now is the time to review the entire file for the facts and evidence you may have forgotten. Evaluate the importance of the contents of the file and create one concentrated trial folder that excludes all the unnecessary documents and materials. This will save you time and frustration as you are surrounded by only the documents you need for trial.

Witnesses

Examine your witness list and that of your opponent (now is also the time to decide if there are any additional witnesses who you believe may end up on the stand). Then, prepare a folder which contains only the documents you will discuss with each witness or introduce into evidence through them.

Outline your rough order of when you will call each witness and begin preparing your examinations. Re-read deposition transcripts and reports and make clear, memorable notations of key information. Creating a master evidence list is extremely helpful in keeping track of each piece of evidence and what information within it is important.

Pay careful attention to any conceivable objection that may be raised in your examinations. There is no excuse for poorly worded questions that do not comply

Stay tuned for our next installment in this series where we will offer tips and strategies for trial advocacy.

The author would like to acknowledge and thank Howard Wallach for his advice, experience, and extensive assistance in the creation of this article.

Scott Homes is an associate in Foley & Mansfield, LLP. He can be reached at sholmes@foleymansfield.com or 248-721-4200.

V. MOTIONS IN LIMINE AND PREPARING FOR TRIAL

Now is the time to review the entire file for the facts and evidence you may have forgotten.

with the rules of evidence or being unprepared for foreseeable objections. There are only two times to address potential objections and evidentiary issues: 1) in your office, or 2) in the courtroom. Take the time now to consider potential objections and craft your questions and evidentiary arguments accordingly. It will not guarantee a ruling in your favor, but it will guarantee that your best argument is considered and, if necessary, preserved for appeal.

Preparing Witnesses

"Prepping" your witness is obviously an essential component of success at trial. However, it is also an important part of the attorney-client relationship. Prepping keeps your witness informed and puts him or her at ease before their testimony at trial. Let your witness know exactly what to do and expect by telling her all the seemingly "minor" details such as what to wear, what the courtroom will look like, how many people will be there, how much time it should take, and the likely demeanor or personalities of opposing counsel and the judge. When you are dealing with a witness, particularly one who has never participated in a trial before, no detail is too insignificant to discuss. Proper preparation puts your witness at ease which will likely lead to successful trial testimony (and an extremely grateful witness!).

Motions in Limine

If trial is the main event, consider your motions in limine as the undercard. The rulings made on motions in limine can set the tone for the big fight and can be just as important. A motion in limine is a motion made prior to trial ("in limine" is Latin for "at the threshold") which determines the scope of the trial based on the admissibility of evidence. These motions are filed to prevent certain inadmissible evidence from even being mentioned in trial. The purpose for this type of motion is because this evidence is so highly prejudicial or inflammatory that no limiting instruction from the court can effectively remedy the jury's exposure to the evidence.

When preparing for trial, pay attention to whether the court sets a deadline for motions in limine. In reviewing the file, consider whether there is any information detrimental to your case that might be appropriate for filing a motion in limine. Even if you decide not to file or you lose the motion, you will be much better prepared for addressing it at trial.

Jury Selection

Choosing a jury begins before the morning of trial. All courts maintain jury questionnaires for the pool that your jury will be chosen from. These questionnaires are available for review prior to trial, sometimes weeks in advance, other times only on the day of trial. Make sure you obtain the jury questionnaires as early as possible so that you can begin to evaluate each person as a potential juror and develop bases for challenges for cause.

Pay careful attention to any conceivable objection that may be raised in your examinations. There is no excuse for poorly worded questions that do not comply with the rules of evidence or being unprepared for foreseeable objections.

If trial is the main event, consider your motions in limine as the undercard. The rulings made on motions in limine can set the tone for the big fight and can be just as important.

If time permits, the jury questionnaires should be used to create a brief profile of each potential juror. Based on the profiles, a list of favored and disfavored persons can be created to aid the trial attorney in selecting the jurors most beneficial to the client's position. Make sure to craft voir dire questions appropriately so that your case theory is recognizable based on your questions.

Consider a breach of contract case based on an oral agreement. Many attorneys become so focused on questioning potential jurors about the breach that they fail to consider jurors' pre-conceived notions of what a contract even is. Start with the basics by asking questions such as, "is there anyone here who believes that you cannot enforce a contract or agreement if it has not been written on a piece of paper?" The responses you hear may surprise you. In doing this, you are beginning to lay the foundation for your client's case minutes, hours, days, or sometimes even longer in advance of your opening statement.

Exhibits

One of the easiest and most beneficial methods of exhibit management in preparation for trial is to address the admissibility of important and controversial exhibits prior to trial in the form of a motion in limine. Aside from saving the trouble and distraction of dealing with the admissibility of an exhibit at trial, this method ensures that there will be no

V. MOTIONS IN LIMINE AND PREPARING FOR TRIAL

Make sure to craft voir dire questions appropriately so that your case theory is recognizable based on your questions.

surprises at trial which may severely impact the likelihood of success. If a key exhibit is ruled inadmissible prior to trial, your settlement or trial strategy may change dramatically. It is far better to deal with this at a time when you are still in a position to negotiate settlement.

A smooth flow is essential to an understandable, effective, and persuasive presentation. The simplest way (at least in theory) to maintain a flowing presentation in your case in chief is to utilize your exhibits properly. As mentioned earlier, the admissibility of many important and contested exhibits can and should be addressed prior to trial in a motion in limine. However, once at trial, your preparation and organization of each and every exhibit is crucial.

Copies: Make enough copies of each exhibit for the court, opposing counsel, the witness, and the jury.

Organize: Whether it is electronic or on paper, maintain a master list which includes the exhibit number, description, and the witness it will be admitted through — and keep it handy during trial. When creating this list, it is also a good time to evaluate and note any potential objections to the admissibility of each exhibit.

Substance: Verify that there are no marks on the exhibit that are not a part of its original form. In the preparation for trial, it is easy to end up with exhibits which have been highlighted or written on. Showing the witness or jury these marked documents is obviously improper and should be objected to. Finally, pay attention to two sided copies and make sure these exhibits are properly prepared.

Jury Instructions ("The Missing Link")

One of the most important and overlooked parts of trial preparation is the use of the Michigan Standard Civil Jury Instructions. Regardless of how knowledgeable or experienced you are with a particular cause of action, the jury instructions are what link the law to the jury. Knowing these instructions is your key to eliciting the information you need from each witness. Also, when preparing your closing argument, point out the few instructions that are the most important to winning your case. Read them to the jury and explain how the evidence presented during trial leaves the jury with only one reasonable verdict (yours, naturally!). An attorney's application of the facts and evidence to each instruction is what the jury will remember in the jury room.

Bingham Farms attorney Howard Wallach emphasizes also giving careful consideration to *non-standard* instructions which are supported by case law. Wallach explains, "this helps frame questions, remind you of the burden of proof and elements of various claims, as well as focus on the documentary evidence you may have in your file to help prove a particular point."

The Michigan Standard Civil Jury Instructions can be found online at http://courts.mi.gov/mcji/MCJI.htm. These instructions also frequently include case law or comments interpreting the instruction. However, remember to check for any revisions or updates to these instructions as this website may not always contain the newest changes.

The admissibility of many important and contested exhibits can and should be addressed prior to trial in a motion in limine.

The most important part of preparing for trial is to be organized. The advice offered in this article begins with a strong foundation of understanding the information available for your case and being able to effectively make use of it. So, grab your files and get to work!

By: Susan Leigh Brown
Schwartz Law Firm P.C.

No Fault Report — April 2009

Editors' Note: *As part of its contribution to MDTC, the Insurance Law Section plans top provide regular reports on developments and issues in No-Fault Law. This is the inaugural No-Fault Report.*

Welcome to the "series premiere" of the new regular no-fault column in the *Quarterly***.** As those of us who have chosen (or otherwise been relegated) to the specialty of No Fault litigation have been discussing for the past several years, there has been an unusual amount of fluctuation in the field. During this period, auto insurance law in general has received more attention from the Michigan Supreme Court than it had at any time since its inception. Until the most recent election, the composition of the Court was viewed as being very much on the side of the insurance industry — to the point of being accused of usurping the role of the Legislature and judicially re-writing the No Fault Act. Since 2004, numerous bills have been proposed to once again amend (some would say overhaul) the No Fault Act. None have passed. Moreover, while there have been significant changes in the way the Supreme Court has directed lower courts to apply its own view of the strict letter of the law; most of those changes have been favorable to the insurance industry. Consequently, third party cases have all but disappeared in the wake of *Kreiner.*[1]

Since the November 2008 general election, there has been rampant speculation about whether *Kreiner* will survive the loss of its author, former Justice Clifford Taylor, and what new changes we can expect. This column is intended not only to track those inevitable changes, but also to highlight and clarify some of the more abstruse issues which arise less frequently in no fault litigation. We hope you find it helpful and, with luck, even interesting. Although the debut of this feature is a full length article, future editions will be briefer.

SUPREME COURT OPINIONS

MCCA Can Refuse Indemnity Where Payments Were Not Reasonable

Despite the reputation of the last iteration of the majority of the Michigan Supreme Court, at least one of the decisions rendered in December, 2008, favored the Michigan Catastrophic Claims Association over the individual insurance company. The decision reversed the historical practice that the payment decisions made by the no fault carrier would not be second guessed by the MCCA.[2] The Court, in a typical 4-3 decision authored by Justice Young, held that the MCCA was *not* required to reimburse a no-fault carrier for benefits paid which, in the MCCA's opinion, were not reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation.[3] Prior to the decision, the MCCA could not substitute its opinion for that of the insurer which had paid benefits it deemed reasonable. The dissent argued that granting such discretion to the MCCA would discourage insurance companies from promptly paying first party benefits — one of the stated and oft-touted goals of the No Fault Act. The net effect of the ruling is that insurers who pay on catastrophic claims now run that risk that they will not be reimbursed by the MCCA.

Susan Leigh Brown is an associate at Schwartz Law Firm P.C. in Farmington Hills. She has 19 years of experience in the No Fault arena as well as an active practice in insurance law in general, employment law counseling and litigation, commercial litigation and appellate law. She is a member of the Michigan Defense Trial Counsel, and the Labor and Employment and Insurance and Indemnity Law Sections of the State Bar of Michigan as well as the Oakland County Bar Association. She can be contacted at 248-553-9400 or by email at sbrown@schwartzlawfirmpc.com. Ms. Brown was ably assisted in the preparation and writing of this column by Schwartz Law Firm associate Miles Uhlar who can be contacted at muhlar@schwartzlawfirmpc.com.

Third party cases have all but disappeared in the wake of *Kreiner.*

"Causal Connection" Delineated

In another December 2008 decision, the Supreme Court "clarified" the degree of causal connection required between the use of a motor vehicle and the injury to one seeking no fault benefits are sought. The Court of Appeals had affirmed the trial court's decision that the no fault insurer was required to pay for plaintiff's high blood pressure treatment because "Plaintiffs presented testimony indicating that the accident caused brain and skeletal injuries, which make it difficult for plaintiff to exercise, and which contribute to poor judgment regarding diet. Plaintiffs also presented evidence that this difficulty in exercising and the poor diet contribute to hyperlipidemia." The Court of Appeals found that the proper standard for determining causation in the PIP setting was that "almost any causal connection will do."[4] The Supreme Court disagreed explicitly, overruling *Shinabarger v Citizens*[5] and *Bradley v Auto Insurance Exchange*[6] to the extent of the use of that standard in favor of the test set forth in *Putkamer v Transamerica*[7] *Thornton v Allstate*[8] and *Kochoian v Allstate*[9] — which held that the causal connection between the injury and the use of the motor vehicle must be "more than incidental, fortuitous or but for."

COURT OF APPEALS OPINIONS

People Behaving Badly—Unlawful Taking and Using of a Vehicle

The Court of Appeals has issued three new opinions in February 2009 which are sure to make some waves regarding just how far an insurance company can go in refusing to pay benefits to wrongdoers. In *Amerisure v Plumb*,[10] the Court addressed the question of whether a plaintiff, who could not legally operate a motor vehicle due to both intoxication and a suspended operator's license, was eligible for no fault benefits. The Court found that the plaintiff could not have had a "reasonable belief that she was entitled to take and use the vehicle" as required by MCL 500.3113. To date, that phrase has most frequently been applied to the question of whether the operator had the permission of the owner of the vehicle to take and use the vehicle, not whether the use itself was unlawful despite permission of the owner. Presumably, the plaintiffs' bar will argue, as had a prior panel of the Court of Appeals, that if the car was not stolen or taken unlawfully, the legality of the *operation* is not relevant. Considering that the earlier judicial "spin" on this section of the No Fault Act was to afford coverage to underage, unlicensed teenagers who, against the express prohibitions of their parents, took and wrecked the family car, the debate which will likely be sparked by the *Plumb* decision promises to be interesting and lively.

The "joyriding" exception to unlawful use was taken to a new level of attenuation in the February 5, 2009 decision in *Roberts ex rel Irwin v Titan Insurance Company.*[11] There, the unlicensed minor driver/injured person, was driving a car titled to his mother's landlord but which his mother had used for 6 weeks with the permission of the owner (who had two other vehicles). The evidence showed that the plaintiff's mother used the vehicle exclusively for the 6 week period though it unquestionably was legally owned by the landlord, who could have revoked permission to use the vehicle or used it himself at any time. The court found, nonetheless, that the mother was an "owner" of the vehicle under MCL 500.3101(2) as a person who had use of the vehicle for more than 30 days. Because the mother was a constructive owner, the joyriding exception saved the minor from the "unlawful taking" provision despite the fact that he was neither related to the titled owner of the vehicle nor did he have the titled owner's permission to use the vehicle. The mother's insurer, Titan, was ordered to pay benefits to the minor plaintiff.

Insurers who pay on catastrophic claims now run that risk that they will not be reimbursed by the MCCA

The Court of Appeals has issued three new opinions in February 2009 which are sure to make some waves regarding just how far an insurance company can go in refusing to pay benefits to wrongdoers.

The *Roberts* opinion also reiterated that fraud in the application for insurance does not allow the defrauded insurance company to avoid payment of PIP benefits to an injured person who is not the person who committed the fraud. It further specified that a person who has no ownership interest in a vehicle may, nonetheless, have a valid insurable interest so as to prevent the insurance company from voiding a no fault policy. In short, Titan was ordered to pay PIP benefits to a child of a person who had an insurance policy obtained by fraud on a

vehicle she did not own when the child took a car, not insured by Titan, which the titled owner had not authorized the child to drive.

Reimbursement: Uninsured Motorist and Wrongful Conduct

I'll close out this column with a very recent, for publication, decision of the Court of Appeals which requires insurers to file suit to obtain reimbursement from an owner of an uninsured vehicle. In *Cooper v Jenkins,*[12] the plaintiff was driving his girlfriend's uninsured motor vehicle when he was injured. He sought no fault benefits to pay the uninsured girlfriend for providing attendant care to him. Farm Bureau, which was assigned the claim through the Assigned Claims Facility, argued that it was "illogical" to require it to pay the very person whom it would then immediately sue for reimbursement of all benefits Farm Bureau had paid, including those paid for her own services. Farm Bureau argued that it should be permitted to simply withhold payment to the uninsured person thereby "reimbursing" itself, at least in part, without the need to file suit under MCL 500.3177.[13] The court disagreed, echoing the Supreme Court's recent mantra that the courts are to enforce the letter of the law and leave the "logic" to the legislature. Surely, some will take veiled pleasure in the court's hoisting of an insurance company on the petard of the pro-insurance company stance developed by Justices Taylor, Young, Markman and Corrigan.

The *Cooper* case also poked a hole in the recent attempts to invoke the "wrongful conduct" doctrine to justify refusal to pay no fault benefits. Farm Bureau argued that the uninsured owner should not benefit from invocation of the no fault scheme when she herself violated the law. Farm Bureau noted that this policy is embodied in MCL 500.3157, which permits insurers to refuse to pay for treatment rendered by unlicensed physicians, and is also reflected in MCL 500.3113, which precludes an injured operator of his or her own uninsured vehicle from obtaining no fault benefits. The *Cooper* panel ruled on the question although it was raised for the first time on appeal. Perhaps this was done to put the issue squarely in play after the Supreme Court first invited briefing, *sua sponte*, on the invocation of the wrongful conduct doctrine to deny no fault benefits in *Matthews v Republic Western Insurance Company.*[14], but then vacated the order leaving the issue undecided.

> The *Roberts* opinion also reiterated that fraud in the application for insurance does not allow the defrauded insurance company to avoid payment of PIP benefits to an injured person who is not the person who committed the fraud.

Whatever its reason for addressing the issue, the *Cooper* panel held that, because there was nothing illegal about the girlfriend providing attendant care, her violation of MCL 500.3102(2) did not prohibit her from making money from the no fault system stating: "It is the responsibility of the legal system, not the insurance industry, to enforce this statute." *Vive la Guerre!*

Endnotes

1. *Kreiner v. Fischer*, 471 Mich 109 (2004)
2. The MCCA is a statutorily created association of licensed Michigan no fault insurers described by the Supreme Court as having been created "in 1978 in response to concerns that Michigan's no-fault law provision for unlimited personal injury protection benefits placed too great a burden on insurers, particularly small insurers, in the event of "catastrophic" injury claims. Its primary purpose is to indemnify member insurers for losses sustained as a result of the payment of personal protection insurance benefits beyond the "catastrophic" level, which has been set at $250,000 for a single claimant. * * * In practice, the [MCCA] acts as a kind of "reinsurer" for its member insurers. *** The Legislature recognized that while such claims might be rare, they are also unpredictable, and equally as likely to strike a small or medium-sized insurer as they are a large insurer. The obvious problem is that the small or medium-sized companies have substantially fewer cars over which to spread the costs of potential losses, which means that the costs of providing unlimited medical and other benefits is higher per car for such companies, putting them at a competitive disadvantage in the state's insurance market. In addition to this competitive disadvantage, the Legislature considered the practical "business difficulties" confronting all insurers as a result of such possible catastrophic claims, such as the difficulty in determining the amount of reserves to keep on hand. It was thought that the creation of such an association of insurers would alleviate the competitive inequity of these catastrophic claims by spreading their cost throughout the industry, and also increase the statistical basis for prediction of the overall cost of such claims, making the management of these liabilities easier. See House Legislative Analysis, SB 306, March 13, 1978. *In re Certified Question Preferred Risk Mutual Insurance Company v Michigan Catastrophic Claims Association,* 433 Mich 710, 714 (1989)
3. *United States Fidelity Insurance & Guaranty Company v Michigan Catastrophic Claims Association* 482 Mich 414 (2008)
4. *Scott v State Farm Mut. Automobile Insurance Company* 278 Mich App 578, 586 (2008)
5. 90 Mich App 307, 313-314 (1979)
6. 130 Mich App 34, 42 (1983)
7. 454 Mich 626,634 (1997)
8. 425 Mich 643, 659 (1986)
9. 168 Mich App 1 (1988)
10. ____ Mich App ___ 2009 WL 330241 February 10, 2009; Docket No. 276384
11. ____ Mich App ___ 2009 WL 291044 February 4, 2009; Docket No. 280776
12. ____ Mich App ___ 2009 WL 465827 February 24, 2009; Docket No. 283506
13. MCL 500.3177 (1) actually does not state that reimbursement can only be sought via a lawsuit. It provides: "An insurer obligated to pay personal protection insurance benefits for accidental bodily injury to a person arising out of the ownership, maintenance, or use of an uninsured motor vehicle as a motor vehicle may recover such benefits paid and appropriate loss adjustment costs incurred from the owner or registrant of the uninsured motor vehicle or from his or her estate."
14. Leave granted in 477 Mich 986 (January 12, 2007) and order vacated 478 Mich 864 (May 25, 2007) in which the wrongful conduct consisted of a person driving with a suspended license.

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By: David E. S. Marvin
Fraser, Trebilcock, Davis & Dunlap

50 Business Development Techniques

In these troubled economic times, many attorneys are looking for ways to develop additional business. Obviously, each person is unique and each situation is different, so there is no single "right way" to develop business. Nevertheless, the following list should provide some helpful ideas to enhance your practice. Please note that this list is not intended to be exclusive and the entries are not listed in any particular order. Also, always remember that the practice of law is a service profession, dedicated to helping people solve problems. The essence of effective business development is gaining the trust of prospective clients and letting them know that you are ready, willing, and able to help them solve their problems in an effective and efficient manner. Keep that thought in mind as you review the following list of techniques that you can use to enhance your practice and help your firm to grow and prosper.

1. Provide top-quality legal service.
2. Be prompt and responsive.
3. Make informal social contacts; the law is a people business, so get out and meet people.
4. Hold meetings of outside groups in your office; if you are on a board, invite the group to meet in one of your conference rooms.
5. Become active in various community groups where you share common interests.
6. Give speeches to groups of prospective clients.
7. Publish articles in trade publications.
8. Maximize usage of firm letterhead stationery.
9. Get involved in politics.
10. Serve on boards, commissions and committees.
11. Give office tours to friends and clients.
12. Tell interesting "war stories" that highlight your firm's successes and/or your commitment to clients (avoid anything confidential).
13. Make existing clients feel important.
14. Take clients or prospective clients to lunch, dinner, athletic events, etc.
15. Deal honestly and effectively with other bar members who, in turn, may refer new business to you in conflict of interest situations.
16. Trumpet the specialties of others within your firm. It is easier than blowing your own horn and it reflects well on you.

David E. S. Marvin is a shareholder in the Lansing office of Fraser Trebilcock Davis & Dunlap, P.C. where he chairs the firm's Energy, Utilities and Telecommunications Law Department. A recipient of numerous professional and civic honors, Mr. Marvin has successfully developed a national client base of major corporations and associations. In over 30 years of practice, Mr. Marvin has built one of the state's largest groups of attorneys devoted to the representation of non-utility clients in utility-related transactions, administrative proceedings, litigation, and appeals.

Business Development

17. Follow-up on contacts made through spouses and friends.
18. Maintain contacts with law school classmates who may refer business.
19. Develop a specialty practice.
20. Make contacts with accountants or other professionals who may refer work in your practice area.
21. Advise single-issue clients of your firm's full range of services (i.e., cross-sell). Caveat: never "steal" another firm's client who was referred to you because of a temporary conflict or because of your practice area specialty.
22. Maximize distribution of business cards.
23. Announce all elections, appointments, etc., in alumni newsletters, local newspapers, bar journals, etc.
24. Cut out newspaper articles regarding friends and acquaintances and send the articles to them along with a congratulatory letter on firm letterhead, or a note on a firm "informal" or just an "FYI" card.
25. With respect to administrative agencies, attempt to discover who answers telephone inquiries from members of the public seeking referrals to competent attorneys. Then make certain that they know about your firm and its expertise in that area.
26. Watch the Business Section of the local newspaper for business development opportunities and act accordingly.
27. Refer conflicts of interest and specialty projects to qualified friends who will return the favor (and the client).
28. Send copies of appropriate legal articles or case decisions to clients or prospective clients who may be interested.
29. Send congratulatory letters to all new officers whenever an association client has an election.
30. Maintain active role in bar association activities; serve on their specialized committees and councils.
31. In connection with insurance defense files, treat insureds as prospective clients.
32. Keep public areas in your office looking neat and professional.
33. Entertain government officials.
34. Plan seminars for clients.
35. Give free advice in appropriate circumstances.
36. Send gifts, flowers, and greeting cards to clients.
37. Attend Chamber of Commerce events.
38. Return phone calls the same day — have secretary or paralegal return call, but make sure somebody returns the call that day!
39. Stay in touch with clients after their matters have been closed.
40. Take time to learn about a client's business; show an active and genuine interest in the client's industry.
41. Acknowledge business referrals with a personal note of thanks.
42. Develop personal relationships with clients.
43. Do business with clients.
44. Refer matters to members of the Michigan Defense Trial Counsel and other specialized groups – they will be motivated to return the favor.
45. Provide detailed bills and show any "NO CHARGE" time.
46. Inform clients of new developments that may involve a need for legal work.
47. Mention firm successes when people ask you, "What's new?"
48. Create associations or coalitions of clients with common interests.
49. Publish your credentials on internet networking sites.
50. Demonstrate that you identify with a client's position and care about them.

Report to Members

By: D. Lee Khachaturian
Dickinson Wright, PLLC

MDTC's Future Planning Meeting: Planning For 2009

D. Lee Khachaturian is a member of Dickinson Wright PLLC. She specializes in commercial, product liability, and employment defense litigation, with a focus on non-compete litigation. She can be reached via email at DKhachaturian@dickinson-wright.com or via phone at 313-223-3475.

MDTC leaders met in January for a couple of days of strategizing, planning, and socializing in what has become a treasured MDTC tradition. This year's event started with a bang on the evening of January 22, 2009, with cocktails and dinner at the Lakeview Hotel, at Shanty Creek Resorts, in Bellaire, Michigan. With ten new attendees, this provided a fantastic opportunity for new MDTC leaders to spend some quality time getting to better know loyal, long-term MDTC leaders.

The following day, everyone met for MDTC's Future Planning meeting hosted by Vice President Steve Johnston. John Straus, a Client Services Manager at Exponent, led the group in a discussion on **the seven Ps of service marketing**: product, price, placement, promotion, physical evidence, process, and people. Everyone participated in a lively brainstorming session that identified the strengths and future objectives of the MDTC in an effort to better develop and promote the MDTC brand. Through that process, as well as the MDTC Board Meeting the following morning, the group generated a number of goals for 2009, the highlights of which are discussed below.

In recognition of its successes to date, the MDTC will continue to maintain the high quality of its **website** (www.mdtc.org), which provides a valuable resource to members, as well as its quarterly publication, the *Michigan Defense Quarterly*, which provides important updates on the law and interesting articles addressing issues relevant to civil defense lawyers in Michigan.

As MDTC President Robert Schaffer mentioned in the *Quarterly's* January 2009 issue, the MDTC also is very excited about launching its **new Commercial Litigation Section**. Creating this section specifically acknowledges the diversity of MDTC's practice specialties and will provide an avenue through which MDTC attorneys who try commercial disputes can network and broaden their professional skills. Through June 30, 2009, the MDTC is offering a discounted membership for attorneys new to the MDTC who practice commercial litigation. Larry Campbell (Dickinson Wright) and Todd Millar (Smith Haughey) are spearheading this effort.

In addition, while the MDTC has a strong and vibrant membership, it has plans to **expand its member base.** For instance, the MDTC would like to encourage non-member attorneys who work for the government to become a part of the MDTC. The MDTC also would like to broaden the number of participating members who work in in-house positions and for law firms that recently have not had a presence in the organization. The MDTC will be reaching out to attorneys who practice in each of these areas both to determine how best to serve them and to demonstrate the benefits and value of MDTC membership. In addition, the MDTC wants to maximize the opportunities that arise from getting law students involved in organizations early in their careers. As a result, the MDTC will be connecting with Michigan law schools to foster relationships that might develop into long-term commitments to the MDTC.

In an effort to better serve the interests of its members outside the metro Detroit tri-county area, the MDTC plans to increase regional chair events and in particular, to create opportunities for those outside the metro Detroit tri-county area to meet with local judges.

And, to enhance the MDTC's presence in the Michigan bar, the MDTC has created a **Judicial Relations Committee** to serve as a liaison between the defense bar and the judiciary. As Chairman of the Committee, Ray Morganti (Siemion Huckabay) plans to implement programs that provide MDTC members with the opportunity to interface with the judiciary.

Finally, in a nod to the explosion of online networking, Tim Diemer (John P. Jacobs P.C.) is leading MDTC's effort to create **networking and informational groups on LinkedIn and Facebook**. If you are currently on Facebook or a member of LinkedIn, keep your eyes open for opportunities to connect with the MDTC and its members!

MDTC's leadership is excited about the opportunities it has to build on MDTC's strong foundation in the coming year. If you are interested in being a part of this effort, or have any suggestions that might help advance any of the objectives discussed above or otherwise, please email the MDTC at info@mdtc.org. We'd love to hear from you!

JOIN AN MDTC SECTION

MDTC has revised its practice sections, effective immediately. Below is a list of the section, with the names of their chairpersons.

All MDTC members are invited to join one or more sections. If you are interested in joining a section, just contact the section chair.

Appellate and Amicus Curiae	Mary Massaron Ross, Hilary Dullinger mmassaron@plunkettcooney.com hdullinger@plunkettcooney.com
Labor and Employment	Linda M. Foster-Wells lmf@kellerthoma.com
Professional Liability & Health Care	Richard Joppich richard.joppitch@kitch.com
Young Lawyers	David L. Campbell david.campbell@bowmanandbrooke.com
Insurance Law	Hal O. Carroll hcarroll@VGpcLAW.com
Municipal and Government Liability	Kari Boylan kboylan@co.wayne.mi.us
Law Practice Management	Thaddeus E. Morgan tmorgan@fraserlawfirm.com
Trial Practice	David Ottenwess dottenwess@om-law.com
Technology	Timothy Diemer ad@jpjpc.com
General Liability	David Couch dcouch@garanlucow.com
Commercial Litigation	Edward Perdue eperdue@dickinson-wright.com

By: Joshua K. Richardson
Foster, Swift, Collins & Smith, P.C.

Supreme Court Update

Joshua K. Richardson graduated from Indiana University School of Law, 2007. His areas of practice include; Commercial Litigation, Construction Law, IT, Insurance Defense and Litigation. He can be reached at jrichardson@fosterswift.com or 517-371-8303.

Governmental Immunity for Intentional Torts Remains Governed by Common Law as Set Forth in *Ross v Consumers Power*

On December 30, 2008, in *Odom v Wayne County*, 482 Mich 459; __ NW2d __ (2008), the Michigan Supreme Court held that MCL 691.1407(3) grants immunity to governmental employees from intentional tort liability only to the extent allowed by the common law before July 7, 1986, as set forth in *Ross v Consumers Power Co.*

Facts: Defendant, Wayne County Sheriff's Deputy Christine Kelly, was conducting prostitution surveillance in the city of Detroit when she observed Plaintiff, Amanda Jean Odom, walking back and forth along Woodward Avenue and making eye contact with passing drivers. Plaintiff approached the driver's side window of a stopped vehicle and entered the back seat. Shortly thereafter, Defendant stopped the vehicle and issued Plaintiff a criminal citation for "Disorderly Conduct (Flagging) Impeding the Flow of Vehicular and Pedestrian Traffic," an offense typically associated with prostitution. Plaintiff maintained her innocence and, eventually, the prosecution dismissed the charges against Plaintiff due to insufficient evidence. Plaintiff then filed suit against Wayne County, the City of Detroit, and Deputy Kelly for false imprisonment and malicious prosecution. The parties stipulated to dismissing the City of Detroit from the action and the trial judge granted Wayne County's motion for summary disposition based on governmental immunity.

The trial court, however, denied the deputy's motion for summary disposition, holding that, under the gross negligence standard, a question of fact existed as to whether Defendant had probable cause to arrest and prosecute Plaintiff. The Court of Appeals affirmed, but held that gross negligence was not the appropriate standard because Plaintiff had alleged intentional torts. Rather, a question of fact existed as to whether he Deputy's conduct was "justified" or "objectively reasonable under the circumstances."

Holding: The Supreme Court reversed and held that neither the Court of Appeals nor the trial court had applied the proper test for determining governmental immunity for intentional torts under MCL 691.1407(3). Specifically, the trial court erred by applying the gross negligence standard despite the fact that Plaintiff raised intentional tort claims, and the Court of Appeals erred by applying an "objectively reasonable" standard where the appropriate standard called for subjective good faith.

The Supreme Court clarified that MCL 691.1407 expressly maintains "the law of intentional torts as it existed before July 7, 1986," and grants immunity to governmental employees who commit intentional torts only to the extent set forth by *Ross v Consumers Power Co*, 420 Mich 567; 363 NW2d 641 (1984). Under *Ross*, to be immune from liability for intentional torts, lower-level governmental officials and employees must first establish that: 1) their challenged conduct was done in the course of employment and that the official or employee believed they were acting within the scope of their authority; 2) their conduct was done in good faith; and 3) the conduct was discretionary, rather than ministerial, in nature.

The Supreme Court remanded the case to the trial court, instructing the court to reconsider the deputy's motion for summary disposition in light of *Ross*, and to determine whether the deputy had a good faith belief that she possessed probable cause to detain Plaintiff.

Significance: Though many courts have simply applied MCL 691.1407(2) to all tort claims raised against individual governmental officers and employees, this holding clarifies that *Ross* is the appropriate standard when the tort claims being raised are intentional.

No-Fault Insurers Need Not Reconcile Conflicting Medical Opinions Before Denying Benefits, So Long As Denials Are Otherwise Reasonable Under the Circumstances

On December 30, 2008, in *Moore v Secura Ins*, 482 Mich 507; 759 NW2d 833 (2008), the Supreme Court held that a no-fault insurer's denial of benefits was not unreasonable when based on the conflicting medical opinions of Plaintiff's treating physician and the insurer's own Independent Medical Examination ("IME") physician.

Facts: Plaintiff, Hattie Moore, was involved in an automobile accident, in which she suffered a fractured right

The Supreme Court reversed and held that neither the Court of Appeals nor the trial court had applied the proper test for determining governmental immunity for intentional torts under MCL 691.1407(3).

knee. Prior to the accident, Plaintiff had suffered from osteoarthritis in both knees that may have required knee replacement surgery and injection treatments. Due to the accident, Plaintiff was unable to return to work and Defendant, Secura Insurance, began paying Plaintiff work loss and other no-fault benefits. Plaintiff's treating orthopedic surgeon recommended that Plaintiff have surgery to repair the injured knee and Defendant's own IME physician agreed. After surgery, Plaintiff's physician determined that Plaintiff would never be able to return to work. Several months later, however, Defendant's IME physician again examined Plaintiff and determined she no longer needed treatment for the accident-related injury and that she could return to work with restrictions. Based on this determination, Defendant discontinued no-fault benefits. Plaintiff then filed suit against Defendant seeking approximately $96,000 in work loss benefits, $21,000 for household or replacement services, and more than $11,000 in penalty interest. At the conclusion of trial, the jury awarded Plaintiff $42,775 in work loss benefits, no damages for household or replacement services, and only $98.71 in penalty interest. Plaintiff's counsel then moved for attorney fees and costs, which the trial court granted in the amount of $79,415. Defendant appealed this award. In a divided opinion, the Court of Appeals affirmed the trial court's award of attorney fees and costs, holding that, under *Liddell v Detroit Automobile Inter-ins Exch.*, 102 Mich App 636; 302 NW2d 260 (1981), Defendant's denial of benefits was "unreasonable where [D] efendant made no inquiry beyond the opinion of its own IME doctor."

Holding: The Supreme Court reversed the Court of Appeals, and held that Defendant's reliance on its IME physician's determination was not unreasonable under MCL 500.3148(1) because Defendant had no obligation to reconcile the conflicting medical opinions of its IME physician and Plaintiff's treating physician. The Supreme Court further held that attorney fees and costs are warranted only on "overdue" benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying. "[T]he determinative factor … is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable." Because Defendant's initial denial of benefits was not unreasonable, Plaintiff was not entitled to attorney fees and costs.

Significance: In expressly overruling *Liddell* and holding that nothing in the plain language of MCL 500.3148(1) requires an insurer to reconcile conflicting medical opinions before denying benefits, the Supreme Court limited a no-fault insurer's obligations to those that are statutorily mandated.

Michigan's Land Use Act Does Not Provide Courts With Authority to Alter Substantive Property Rights

On December 30, 2008, the Michigan Supreme Court held, in *Tomecek v Bavas*, 482 Mich 484; 759 NW2d 178 (2008), that Michigan's Land Use Act ("LDA") does not grant courts authority to alter substantive property rights, but rather only allows courts to "order a recorded plat or any part of it to be vacated, corrected, or revised."

Facts: Plaintiffs, Frank and Janis Tomecek, owned landlocked property in a subdivision along Lake Michigan. When the subdivision was originally platted, two "drive easements" were granted over neighboring properties for the purpose of accessing Plaintiffs' property. Plaintiffs sought to construct a house on their property and obtained a variance from the Township Board of Appeals to do so. Once the variance was granted, however, Plaintiffs' neighbors appealed the decision and argued that the restrictive covenant that runs with Plaintiffs' property precluded Plaintiffs from constructing a house because the property did not have sewer access. The trial court found in favor of Plaintiffs and held that the original grantors of the Plaintiffs' and their neighbors' property intended that Plaintiffs be able to construct a house on their property. The trial court further held that because Plaintiffs had the right to construct a house on their property, they also had an implicit right to use the drive easements for sewer access. On appeal, the Court of Appeals affirmed the trial court and held that the LDA provided the trial court with authority to alter the Plaintiffs' and their neighbors' substantive property rights. The Court of Appeals also held that, regardless of the authority provided by the LDA, Plaintiffs were entitled to have sewer access by way of an easement by necessity.

Holding: The Supreme Court affirmed the Court of Appeals opinion in part, reversed it in part, and vacated it in part. Specifically, the Supreme Court held that it was clear that the original grantors had "envisioned that a house would be built" on Plaintiffs' property

and that, by extension, the drive easement could be used for sewer access. The Supreme Court further held that the Court of Appeals wrongly stated the LDA granted authority to the courts to alter substantive property rights. Rather, the LDA simply allows courts to vacate, correct, or revise a recorded plat to properly reflect existing property rights. Because the existing property rights in the present case allowed for Plaintiffs to construct a house with sewer access over the easement, the trial court merely used the LDA to validate those existing rights and did not attempt to alter them. Additionally, because the issue was resolved by determining the intent of the original grantors, the Supreme Court vacated the Court of Appeals holding that Plaintiffs were entitled to an easement by necessity.

Significance: This holding clarified that the LDA allows courts only to vacate, correct, or revise plat maps, and does not empower courts to alter substantive property rights that are depicted by the plats.

The Michigan Catastrophic Claims Association May Refuse to Indemnify No-Fault Insurers for Unreasonable Personal Protection Insurance Charges

On December 29, 2008, in *United States Fid Ins & Guar Co v Michigan Catastrophic Claims Ass'n*, and *Hartford Ins Co of the Midwest v Michigan Catastrophic Claims Ass'n*, 482 Mich 414; 759 NW2d 154 (2008), the Michigan Supreme Court held that because no-fault insurers in Michigan are obligated to pay only "reasonable" personal protection insurance charges, the Michigan Catastrophic Claims Association ("MCCA") may refuse to indemnify the insurer for any unreasonable charges it chooses to pay.

Facts: In these consolidated cases, Plaintiffs, United States Fidelity & Guaranty Company and Hartford Insurance Company of the Midwest, provided no-fault insurance coverage to two insureds who were injured in unrelated automobile accidents occurring before July 1, 2001. As a result of the accidents, both insureds required 24-hour attendant care services. By 2003, Plaintiffs were paying approximately $54.84 and $30 per hour to their insureds for attendant care benefits. When the overall benefits exceeded $250,000, the threshold amount under MCL 500.3104(2), Plaintiffs sought indemnification from the MCCA. Under MCL 500.3104(2)(a), the MCCA "shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of … $250,000." Despite the clear language of MCL 500.3104(2), that the MCCA pay "100% of the amount of ultimate loss," the MCCA contested the reasonableness of the attendant care charges. As a result, each Plaintiff filed a complaint for declaratory judgment, requesting that the circuit court order the MCCA to reimburse each Plaintiff for the full amount of the attendant care benefits it paid. The circuit courts entered conflicting judgments; one finding in favor of the Plaintiff and the other finding in favor of the MCCA. On appeal, the Court of Appeals consolidated the cases and found in favor of Plaintiffs, holding that "the MCCA is statutorily required to reimburse an insurer for 100 percent of the amount that the insurer paid in PIP benefits to an insured in excess of the statutory threshold … regardless of the reasonableness of these payments." The MCCA appealed.

Holding: The Supreme Court reversed the Court of Appeals, holding that because no-fault insurers in Michigan are obligated to pay only "reasonable" personal protection insurance charges, the MCCA may refuse to indemnity insurers for any unreasonable charges they elect to pay. The court noted that, although MCL 500.3104 does not expressly authorize the MCCA to review claims submitted by member insurers, MCL 500.3104(8)(g) provides the MCCA with broad authority to "[p]erform other acts … that are necessary or proper to accomplish the purposes of the association …" Because the MCCA may refuse to indemnify unreasonable charges, the Supreme Court remanded the cases back to the trial courts to determine the reasonableness of the particular attendant care charges at issue.

Significance: By upholding the MCCA's ability to contest the indemnification of unreasonable personal protection insurance charges, insurers may be more cautious and conservative when entering into agreements that require them to pay such charges.

Rules Update

By: M. Sean Fosmire
Garan Lucow Miller, P.C., Marquette, Michigan

Michigan Court Rules Amendments and Proposed Amendments

Sean is a 1976 graduate of Michigan State University's James Madison College and received his J.D. from American University, Washington College of Law in 1980. He is a partner with Garan Lucow Miller, P.C., manning its Upper Peninsula office.

NOTE: To track these changes and proposed changes on a daily basis, and for more information and additional proposals, log on to http://michcourts.blogspot.com.

Portions of the entries at that site are also mirrored at http://www.mdtc.org

ADOPTED

Date	Rules	Number	Subject	Description
1-1-09	Several	2007-24	Electronic Discovery	A number of new sections added to address issues regarding electronic information. They essentially adopt many of the 2006 amendments to the Federal Rules of Civil Procedure.
5-12-09	2.614	2008-24	Stay of proceedings to enforce judgment	Adds authority to the trial court to extend the 21-day period for stays pending appeals or post-trial motions

PROPOSED

Date	Rules	Number	Subject	Description
11-25-08	Several	2005-05 2006-20	Case evaluation and mediation	Several wide-ranging changes. Comments closed as of 3-1-09.
12-9-08	2.112(l)	2006-43 2007-47	Affidavits of merit — medical malpractice	Would provide for an across-the-board rule that a complaint accompanied by an affidavit of merit tolls the statute of limitations.
1-14–09	2.516	2008-33	Instructions to Jury	Would provide more specific instructions prohibiting online research by jurors during trial

Practice Tip

By: Daniel P. Steele
Vandeveer Garzia, P.C.

Verdict Form: Long vs. Short

The long verdict form has been around since 1986. The long verdict form is required in personal injury actions involving a claim for future damages. MCL 600.6305. By stipulation the parties can agree to use of the short form of verdict. *Weiss v Hodge*, 223 Mich App 620 (1997).

When it comes time to decide on verdict form, the plaintiff's request to stipulate to the short form often seems appealing to the defendant. A verdict form with only one spot for the jury to fill in damages has got to be better than a form with 20, 30, 40, or more spots for the jury to fill in a dollar amount. Be cautious, because you will be giving up a number of significant potential verdict reducers if you agree to the short form.

Present Value Reduction

The primary purpose of the change in the statute that brought about the long verdict form was to reduce awards of future damages to present value. Before you waive this reduction to present value by agreeing to the short form, do an analysis of the potential future damages award. If future damages are limited to the near future, the present value reduction might not be significant. However, if there is a potential for future damages to be awarded many years off, the reduction to present value will be quite dramatic. For example, let's say that despite your eloquent liability arguments the jury gets to the damage portion of the verdict form and decides that they are going to give the middle-age plaintiff damages for the pain and suffering he will endure for the rest of his life expectancy of 30 years. They put a value on this pain and suffering of $10,000 per year. If you have agreed to the short form, this item of damages will cost your client $300,000. If you used the long form, the reduction to present value turns this 30 year stream of $10,000 payments into a judgment amount of $178,170.

Interest

Under MCL 600.6013(1), there is no interest allowed on "future damages" from the date of filing of the complaint to the date of entry of the judgment. Using the same $300,000 verdict example in the prior paragraph, and assuming the complaint was filed two years before the date of judgment, if you use the short form, which makes no distinction as to "future damages," your client owes over $12,000 in interest on top of the verdict amount. If you use the long form, the interest is zero.

Collateral Sources

The reduction of damages as a result of collateral source benefits is provided for in MCL 600.6303. This statute assumes that the long verdict form has been used, since it requires the court to determine if a portion of the judgment amount has been paid or is payable by a collateral source. Any time you are considering agreeing to a short form, you must consider whether or not you are waiving a right to assert a setoff for any collateral source benefits that the plaintiff has already received.

Despite the appeal of the brevity and simplicity of the short verdict form, give careful consideration to what you might be giving up by agreeing to waive the required long verdict form.

New Members

MDTC

MDTC Welcomes These New Members

Richard Koefod, Rochester Hills
Robert Powell, *Dickinson Wright, PLLC,* Detroit
Prerana Bacon, *LeClairRyan,* Dearborn
Gail Storck, *Law Office of Gail L. Storck*
Brian Pearson,
Smith, Haughey Rice & Roegge, Grand Rapids
Laura Garlinghouse,
Foster, Swift, Collins & Smith, Grand Rapids
Stephanie Ottenwess,
Ottenwess & Associates, PC, Detroit
Melissa Graves,
Ottenwess & Associates, PC, Detroit
Lara Kapalla,
Miller Canfield Paddock & Stone, PLC

Practice Tip

By: Hal O. Carroll
Vandeveer Garzia

Appeals: Speeding Up The Interlocutory Appeal

Hal O. Carroll is a founder and the chairperson of the Insurance and Indemnity Law Section of the State Bar of Michigan. He is a chapter author of Michigan Insurance Law and Practice. Contact him at hcarroll@VGpcLAW.com or hcarroll@chartermi.net, or (248) 312-2909.

Often when a party seeks an interlocutory appeal, there is some urgency. Once leave is granted, the appeal will still take the normal amount of time, but at least there is something you can do to speed up a decision on whether leave will be granted.

The focus here is getting the transcript as quickly as possible. If you order a transcript in the normal way, the reporter will file a certificate and put it in line with other transcript requests. This can take up to 90 days. Officially, the court is considering the application, but in practice, the application may sit and wait, especially if the transcript is important.

Usually an interlocutory appeal follows the grant or denial of a motion. A motion transcript is not very long, so the trick is to get it quickly. Here's one way. When you order it, say that it is not for an appeal but for a motion for reconsideration, so that you need it quickly. Offer to pay more for an expedited transcript.

That way, you can file the transcript as an exhibit to the application. Apart from saving time, this will also help make for a better application because you will be able to cite to the specific pages of the transcript where the trial court has given the reasons for the ruling.

One thing to remember is that if leave is granted, you must still comply with the formal requirements for filing the transcript in the trial court. This means that you must keep the original in your file, in pristine condition, and return it to the trial court for filing if leave is granted.

Defense Research Institute

By: Todd W. Millar
Smith Haughey Rice & Roegge

DRI Report

Todd W. Millar is a shareholder in the Traverse City office of Smith, Haughey, Rice & Roegge. Mr. Millar graduated from Purdue University with a Bachelors of Science in agricultural education in 1988 and an Masters of Science in agricultural economics in 1990. He earned his Doctor of Jurisprudence from Indiana State University in 1993, earning the Order of the Barrister. His areas of practice include insurance defense, commercial and general civil litigation. He can be reached at tmillar@shrr.com, or 231-929-4878.

Everywhere we turn, particularly in Michigan, we are inundated with information about the bad economy. When the economy is in decline, we often times try to tighten our belt and stretch our money. It is not surprising then to hear of professional organizations struggling to keep members. Fortunately, MDTC and DRI are weathering the storm. Since the downturn in the economy, MDTC has experienced only a slight drop in membership while DRI has actually increased membership. How can this be?

I think it is due to the excellent membership benefits provided by both organizations. Both have recently improved their web sites to make navigation easier and to provide more information to their members. Both have recently started blogs that members can use to post questions and carry on discussions. Both continue to offer top notch seminars and networking opportunities. Both are expanding and increasing their focus on particular practice areas.

Hopefully you are taking advantage of these opportunities. If not, now is the time. Visit the web sites at www.mdtc.org and www.dri.org to find out how these two great organizations can benefit your practice. I would also encourage you to invite your friends and colleges to join. The lifeblood of any organization is its membership. Increasing membership increases the knowledge pool, networking opportunities and the funds available to add even more membership services and education. Just think of the opportunities that would exist if each of us got one new person to join. Get involved today and help keep these organizations flourishing.

By: Graham K. Crabtree
Fraser, Trebilcock, Davis & Dunlap

MDTC Legislative Report

In my last report, I shared my enthusiasm for the bi-annual "lame duck" session as a phenomenon of interest to political junkies like myself, and provided some speculation about what last fall's lame duck session might produce. I had hoped, with a few misgivings, that my discussion would be of some interest to those less fascinated with the political drama in Lansing, but now that the dust has settled and the journals of the 94th Legislature are finally closed, it seems that the work of the anxiously-awaited lame duck session was probably even less interesting than my predictions. Our legislators returned from deer season as expected, stayed for respectable period, and passed a slew of Bills, producing a total of 586 Public Acts for the year. But only a few of these will be of any great interest to civil litigators, as such, and most of the controversial issues were deferred for further consideration by the incoming 95th Legislature.

Mr. Crabtree is a shareholder and appellate specialist at Fraser Trebilcock Davis & Dunlap, P.C. -- before joining the Fraser firm, Crabtree was the Majority Counsel and Policy Advisor to the Judiciary Committee of the Michigan Senate from 1991 until 1996. Crabtree is a registered Lobbyist since 1997, a board member for the Michigan Defense Trial Counsel, chairs the Civil Defense Basic Training Series and updates the Board and Members on current legislative issues. Mr. Crabtree can be contacted at gcrabtree@fraserlawfirm.com. or 517-517-377-0895.

New Public Acts

The few interesting Public Acts of 2008 produced by the lame duck session include the following:

Practicing Without a License. 2008 PA 319 This act has amended the Occupational Code, MCL 339.601, to create enhanced criminal penalties for those who dare to practice as architects, professional engineers or professional land surveyors without a license. The act also adds a new section MCL 339.2006, which will preclude any action for recovery of compensation for services performed by such persons without proper licensure and allow a party contracting for such work to recover a refund of any amount paid for the work, after deducting the value of the goods or services retained.

UCC – Fraudulent Financing Statements. 2008 PA 381 This act amends the Uniform Commercial Code to add a new section MCL 440.9501a, which will provide new procedures for challenging fraudulently-filed financing statements. A companion act, **2008 PA 381** amends the Code to add new provisions allowing the Secretary of State to refuse records presented for filing under certain circumstances, including cases where the record is being filed for a purpose outside the scope of Article 9; where the Secretary of State has reasonable cause to believe that the record is materially false or fraudulent; and where the record asserts a claim against a current or former governmental employee relating to the performance of the employee's public duties, and for which the filer does not hold a properly executed security agreement or court judgment.

Vehicle Code Amendments – Drunk and Reckless Driving. 2008 PA 461; 2008 PA 462; and **2008 PA 463.** This package of amendatory acts will amend several sections of the Vehicle Code, effective October 31, 2010. Among other changes, these acts will establish enhanced penalties for "very drunk" driving offenses (operating a vehicle with blood-alcohol content of .17% or more) and require use of ignition interlock devices in conjunction with other penalties for drunk driving convictions in certain circumstances. This legislation will also create new criminal penalties for reckless driving and moving violations causing death or a serious impairment of body function to replace existing sections of the Vehicle Code and Penal Code providing penalties for felonious driving and negligent homicide.

It should be noted that these acts must be carefully compared because some sections of the Vehicle Code (§§ 303, 319, 625 and 904d) are amended by more than one of these acts, with slight differences in language. In a case such as this, where a single section of the law is amended in different ways by different acts enacted at the same time, the amendatory act filed later in time will govern, and the prior act or acts will be a nullity to the extent of any conflict. Thus, §§ 303, 319, 625 and 904d will be amended to read as provided in Public Act 463, with any inconsistent language in Acts 461 and 462 rendered ineffective.

New Uniform Securities Act. 2008 PA 551. This act will create a new Uniform Securities Act (2002), which will replace the current Uniform Securities Act (1964 PA 265 – MCL 451.501 to 451.818), effective October 1, 2009.

The new Legislature will have the same balance of power as the last one, although the Democrats will enjoy a more solid majority in the House

Small Claims Court. There was one notable pocket veto – **Senate Bill 786 (Kuipers – R),** which would have amended MCL 600.8401 to increase the jurisdictional limit for small claims courts from $3,000 to $5,000 over the next three years.

New Legislation

As I've mentioned before, the new Legislature will have the same balance of power as the last one, although the Democrats will enjoy a more solid majority in the House and there will be a significant number of new members in that body to learn the ropes. The Senate was not up for election last year, so the same Republican majority will continue to call the shots there for the next two years. As usual, many of the Bills that died at the end of the last session have been re-introduced as new Bills in the new session. As of this writing (March 9, 2009) there are 346 Senate Bills in the hopper, and 525 House Bills. Because it is still very early in the game, we have not yet seen the first Public Act of 2009, and only a handful of Bills have been passed by the originating body.

New "*Kreiner* Fix" Bill. The newly re-introduced Bills include several of the policy initiatives that we were watching with interest last year. These include, most notably, a new "*Kreiner* fix" Bill – **Senate Bill 83 (Whitmer – D)** – proposing amendments to the Insurance Code of 1956, MCL 500.3135, to substantially broaden the statutory definition of "serious impairment of body function," and new legislation proposing elimination of the product liability immunity for drugs approved by the U.S. Food and Drug Administration created by the 1995 tort reform legislation. **House Bill 4316 (Brown – D), House Bill 4317 (Kennedy – D)** and **Senate Bill 19 (Gleason – D)**

Drug Immunity. Calls for action on the drug immunity bills have been generated by the United States Supreme Court's recent decision in *Wyeth v Levine*, ___ US ____ (No. 06-1249 *rel'd* 3-4-09), holding that the plaintiff's state law failure to warn product liability claim was not pre-empted by the FDA's approval of the warnings for the drug in question under the federal Food Drug and Cosmetic Act. I'll go out on a limb here to predict that this legislation will be promptly passed by the House to languish in the Senate, as it did last session. It appears, however, that there is some very considerable popular support for this Bill, which may ultimately bring about a sufficient number of Republican defections to secure its final passage. If that support continues to grow in the next two years, this Bill may become a candidate for action in next year's lame duck session.

The Legacy of "Reform Michigan Government Now"

Our legislators are keenly aware of the public's disappointment with the last Legislature's performance and the desire for reform manifested by last year's failed Reform Michigan Government Now! ballot initiative. Although this crudely-fashioned "stealth" proposal was kept off of the ballot by its numerous deficiencies, the lessons learned have not been forgotten. Thus, there are a now a number of Bills and Joint Resolutions proposing a variety of reforms, and a few others designed to prevent the success of future "stealth" campaigns. These include:

Term Limits and Part-Time Legislature. SJR A (Bishop – R). This Senate Joint Resolution proposes amendments to Article IV of the Michigan Constitution which would eliminate the term limits for legislators taking office on or after January 1, 2011, and make the Legislature part-time. **HJR L (Cushingberry – D)** also proposes the elimination of the current legislator term limits.

Appropriation Bills and Referenda. SJR C (McManus – R) proposes an amendment to Article II of the Michigan Constitution which would limit the exemption of appropriation Bills from the power of referendum. The exemption would be limited to Bills that substantially fund one or more state departments or make appropriations to meet deficiencies in state funds. This limitation would prevent the popular ploy of including an insignificant appropriation in a Bill effecting a substantive change in the law in order to immunize the legislation from the referendum process. This Joint Resolution also proposes an amendment which would require a geographically broad base of support for initiative and referendum petitions by requiring that such petitions be signed by at least 100 registered electors in at least 42 counties, and at least one elector in each county.

Committee Term Limits. SJR G (McManus – R) proposes an amendment to Article IV of the

Legislative Report

Michigan Constitution which would prohibit any legislator from serving as chair of the same legislative committee for more than four years.

Legislators' Pay. HJR A (Opsommer – R) This House Joint Resolution proposes that salary increases for state legislators be tied to the average increase for other state employees or the increase in the consumer price increase. It also proposes that legislators' pay be docked for unexcused absences, or if work on the budget has not been completed by Labor Day. Reductions of legislators' pay for unexcused absences are also proposed by **HJR F (Rogers – R)** and **HJR N (Brown – D). HJR D (Knollenberg – R)** proposes a pro-rata reduction of legislators' pay for any absence from session.

Legislative Election Districts. SJR F (Anderson – D) proposes amendments to Article IV of the Michigan Constitution creating a new system of apportionment for legislative election districts.

Approval of Ballot Questions. Senate Bill 7 (Gleason – D) would amend the Michigan Election Law to require supporters of a ballot question proposing amendment of the Constitution, an initiated law or a referendum to submit their proposed petition to the Board of State Canvassers for review and approval before circulating the ballot question petition for signatures. The Bill would also require the Board of State Canvassers to check submitted petitions for duplicate signatures, require circulators to certify that signatures were not knowingly obtained through fraud, deceit or misrepresentation, and provide new criminal penalties for petition circulators who obtain signatures by fraud, deceit or misrepresentation.

Absentee Voting. House Bill 4097 (Griffin – D) would amend the Michigan Election Law to eliminate the current restrictions on absentee voting. Other Bills proposing the same include **House Bill 4367 (Stanley – D)** and **Senate Bill 97 (Brater – D)**

Public Funding of Supreme Court Campaigns. Senate Bill 53 (Cherry – D) would amend the Michigan Campaign Finance Act to establish a system for public funding of Supreme Court elections. The Bill proposes that the public funds to be used for this purpose would be derived primarily from the income tax – $3.00 for each individual filer (or each spouse filing jointly) who does not exercise the option not to have that amount of his or her taxes credited to the fund.

Your Voice

The MDTC Board will be discussing pending legislation and positions to be taken on Bills and Resolutions of interest at its future meetings. Your comments and suggestions are appreciated, and may be submitted to the Board through any Officer, Board Member, Regional Chairperson or Committee Chair.

By: Hilary Dullinger & Mary Massaron Ross
Plunkett Cooney, PC

Amicus Committee Report

Hilary A. Dullinger is a member of the firm's Detroit office who specializes in appellate law. Her practice includes general liability and municipal appeals focusing on claims involving the Michigan Consumer Protection Act, the Open Meetings Act, Section 1983 Civil Rights litigation, among others. She can be reached at hdullinger@plunkettcooney.com or 313-983-4419.

Mary Massaron Ross is a member of the Plunkett & Cooney, P.C. Board of Directors, Ms. Massaron Ross, is the managing shareholder of the firm's Appellate Practice Group. A former law clerk to Associate Justice Patricia J. Boyle of the Michigan Supreme Court, she has over 40 published opinions to her credit. She can be reached at mmassaron@plunkettcooney.com or 313-983-4801.

Class Certification. On February 17, 2009, MDTC filed an amicus brief in *Henry v Dow Chemical Company*. *Henry* is a class-action case in which the Supreme Court was called upon to clarify class certification standards in Michigan. The amicus brief, written by **Plunkett Cooney** attorneys **Mary Massaron Ross** and **Hilary A. Dullinger,** maintains that the Court needs to adopt a rule that properly balances the need for a procedural mechanism to efficiently resolve collective claims where common questions of law predominate with the dangers the class-action mechanism creates for litigants when classes are imprudently certified. The Supreme Court entertained oral argument in *Henry* on March 3, 2009. The decision is currently pending.

Catastrophic Claims. On February 25, 2009, MDTC filed an amicus brief with the Michigan Supreme Court in *Allied Property and Casualty Insurance co v Michigan Catastrophic Claims Association*. The issue presented in *Allied* is whether the Court of Appeals erred in determining that the MCCA was not obligated to indemnify Allied for personal protection insurance benefits paid to its insured. Under the Court of Appeals' decision, an insurance carrier that is obligated under the No-Fault Act to pay personal protection insurance benefits to a resident relative of a named insured under a PIP policy that is involved in an out-of-state accident while not operating a motor vehicle covered under the PIP policy is not entitled to reimbursement from the MCCA for those PIP benefits. This is true even though the PIP benefits were paid under a compulsory policy of insurance and an assessment was paid to the MCCA on that policy. The amicus brief, authored by **Sandra J. Lake** of **Hackney, Grover, Hoover & Bean, PLC**, urges the Supreme Court to accept Allied's application for leave to appeal.

The MDTC has also filed an amicus brief in support of the defendant's application for leave to appeal in *Slaughter v Blarney Castle Oil Co*.

Black Ice — Open and Obvious. The MDTC has also filed an amicus brief in support of the defendant's application for leave to appeal in *Slaughter v Blarney Castle Oil Co*. *Slaughter* is a premises liability action in which the issue presented is whether black ice alone, without the presence of snow, presents an open and obvious condition. The Court of Appeals affirmed the trial court's denial of the defendant's motion for summary disposition where a fact question existed as to whether an average person of ordinary intelligence would have been able to discover the danger upon casual inspection. **Mary Massaron Ross** and **Hilary A. Dullinger** authored the amicus brief. In urging the Supreme Court to grant leave to reverse this decision, the amicus brief points out for the Court that prior precedent, including *Kaseta v Binkowski*, supports summary disposition in favor of the defendant.

In other matters, the Michigan Supreme Court issued an order denying leave to appeal in *Department of Environmental Quality v Waterous Company* on February 6, 2009. The Court of Appeals in *Waterous* determined that Michigan's Natural Resources and Environmental Protection Act, Part 201, MCL 324.20120a, holds a prior owner of property to environmental cleanup responsibilities that go beyond that owner's historical use of the site. The MDTC urged the court to grant the defendant's application for leave to appeal on the basis that the Court of Appeals' ruling was not supported by the language of MCL 324.20120a or interpretive case law. A divided Supreme Court denied leave, saying it was not persuaded that the questions should be reviewed by the court. Justices Markman and Corrigan dissented, stating that the question presented in *Waterous* was sufficient to warrant the Court's involvement.

By: Raymond Morganti
Siemion Huckabay Bodary Padilla Morganti & Bowerman P.C.

Welcome The Newest Members Of The Michigan Appellate Courts

Raymond W. Morganti is a senior shareholder in Siemion Huckabay. In addition to his trial court practice, Mr. Morganti has particular expertise in appellate practice in the state courts of Michigan, as well as federal court. Mr. Morganti is a member of the Michigan bar, and is admitted to practice in the United States District Courts for the Western and Eastern Districts of Michigan, and the United States Court of Appeals for the Sixth Circuit. He is a past member of the Board of Directors of Michigan Defense Trial Counsel. Mr. Morganti is listed in The Best Lawyers in America under Appellate Law. He can be reached at rmorganti@siemion-huckabay.com or 248-357-1400.

MDTC welcomes the newest members of the Michigan Supreme Court and Court of Appeals. Justice Diane Hathaway was elected to the Michigan Supreme Court last November, and on January 8, 2009 was sworn in as the newest member of the Court. Judge Michael J. Kelly was elected to the Court of Appeals last November. On December 23, 2008, Governor Granholm announced the appointments of Judges Cynthia Stephens and Douglas Shapiro to the Michigan Court of Appeals.

Before joining the Supreme Court, **Justice Hathaway** served as a judge of the Wayne County Circuit Court for 16 years. She was first elected to the circuit court in 1992 and re-elected in 1998 and 2004. She also served as a visiting judge of the Michigan Court of Appeals.

Following her graduation from high school, Justice Hathaway earned a degree in Radiological Technology from Henry Ford Hospital. Justice Hathaway continued her education at Wayne State University and at Madonna College, where she graduated with honors with a B.S. in Allied Health. She earned her law degree from the Detroit College of Law, graduating in 1987. While in law school, she served as a research clerk for the Wayne County Circuit Court and Detroit Recorder's Court, and also as an instructor in real estate law.

Judge Kelly has been elected to the 4th Appellate District, for a term expiring January 1, 2015. After serving as a judicial advisory assistant to a circuit court judge, he worked as a trial lawyer in private practice for twenty years. He attended Michigan State University and earned his B.A. from the University of Michigan – Flint in 1984. Following his enrollment at the Detroit College of Law, he was accepted as a participant in the London Law Program at Regents College in London, England in 1987 and received his J.D. from the Detroit College of Law in 1988.

Judge Shapiro, formerly of the law firm of Muth & Shapiro P.C., was appointed judge of the Court of Appeals for the 3rd Appellate District, for a term expiring January 1, 2011. Judge Shapiro replaces Judge Michael Smolenski who has resigned. Judge Shapiro earned his law degree from the University of Michigan Law School and his bachelor's degree from the University of Michigan.

Judge Stephens, formerly judge of the Wayne County Circuit Court, was appointed as judge of the Court of Appeals for the 1st Appellate District, for a term expiring January 1, 2011. She replaces Judge Helene White who was recently appointed and confirmed to the United States Court of Appeals for the Sixth Circuit. Judge Stephens earned her law degree from Emory University and her bachelor's degree from the

Thanks and Best Wishes to Former Chief Justice Clifford Taylor

MDTC thanks former Chief Justice Clifford Taylor for his many years of dedicated and exemplary service on the Michigan Supreme Court and Court of Appeals. Clifford Taylor was appointed to the Court of Appeals in 1992. On August 21, 1997 he was appointed to the Michigan Supreme Court, filling the seat vacated by retired Justice Dorothy Comstock Riley. He successfully ran for election to the Supreme Court in 1998, and was reelected in 2000. He was chosen twice by his fellow justices to be the Chief Justice, in 2005 and 2007.

Congratulations to Chief Justice Marilyn Kelly

Every two years, the justices of the Michigan Supreme Court elect a member of the Court to serve as Chief Justice. We congratulate recently elected Chief Justice Marilyn Kelly. She is the fifth woman, since the Court was first established in 1805, to serve as the Court's Chief Justice. We wish her the best of success in her new role as the Court's leader. Chief Justice Kelly earned her undergraduate degree from Eastern Michigan University. After a year's graduate study at La Sorbonne, University of Paris, France, she received her master's degree from Middlebury College in Vermont. She taught French language and literature in the Grosse Pointe Public Schools, at Albion College and Eastern Michigan University before attending law school at Wayne State University, where she graduated with honors. She practiced law for 17 years in Michigan courts until her 1988 election to the Michigan Court of Appeals. She was re-elected to the Court of Appeals in 1994. Chief Justice Kelly was elected to the Michigan Supreme Court for an eight-year term in 1996, and reelected in 2004 for an eight-year term which expires January 1, 2013.

Annual Future Planning Meeting

January 23, 2009 at Shanty Creek, Bellair Michigan

Jenny Zavadil & David Campbell

Steve Johnston & John Straus

Hal Carroll & Ty Cudney

David Campbell, Jana Berger & Esther Campbell

Pete & Mary Margaret Dunlap

Laura & Georgie Kaye Schaffer

Tom Boylan, Lori Ittner & Kari Boylan

MDTC Board Meeting

March 4, 2009, Okemos Michigan

Ray Morganti, Judge Michael Kelly, Michigan Court of Appeals and John P. Jacobs

President Robert Schaffer and Judge Michael Kelly, Michigan Court of Appeals

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This section is reserved for the use of MDTC members who wish to make services available to other members.
The cost is $75 for one entry or $200 for four entries. **To advertise, call (517) 627-3745 or email hcarroll@VGpcLAW.com.**

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Fraser Trebilcock Davis & Dunlap, P.C.
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(248) 312-2800
jlynch@vandeveergarzia.com

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I am one of eight Michigan members of the American Academy of Appellate Lawyers, and have litigated 400-500 appeals. I am available to consult (formally or informally) or to participate in appeals in Michigan and federal courts.

James G. Gross
Gross & Nemeth, P.L.C.
615 Griswold, Suite 1305
Detroit, MI 48226
(313) 963-8200
jgross@gnsappeals.com

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Hal O. Carroll
Vandeveer Garzia, P.C.
1450 West Long Lake Road
Troy, MI 48098
(248) 312-2909
hcarroll@VGpcLAW.com

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Robert H S. Schaffer
2325 Stonebridge
Flint, MI 48532
(810) 496-4465
schafferlaw@comcast.net

17th Annual Excellence in Defense Award

James E. Lozier

James E. Lozier
Dickinson Wright PLLC
215 S. Washington Sq. Ste 200
Lansing MI 48933
Phone – 517-487-4775
Fax – 517-487-4700
JLozier@dickinson-wright.com

The Michigan Defense Trial Counsel (MDTC) has announced that Lansing attorney James E. Lozier has been selected to receive the Seventeenth Annual Excellence in Defense Award. He will be honored Saturday, June 13, 2009 at the annual award banquet as a highlight of MDTC's Annual Meeting and Conference that is being held at Boyne Highlands in Harbor Springs, Michigan.
The award was established by MDTC to honor the most prominent of civil defense counsel who have throughout their careers demonstrated superior professionalism and advocacy skills, and have contributed significantly to his or her communities and the defense trial bar. MDTC President, Robert H S. Schaffer reflected upon the Board's selection of Jim Lozier by saying "The fact that Jim Lozier has been an outstanding volunteer for our organization is well known to our leadership and largely recognized to the members. The fact that Jim Lozier is an outstanding lawyer deserves independent recognition. Jim Lozier truly deserves the distinction of excellence in his craft."

Jim is a native of Jackson, Michigan; a 1971 magna cum laude graduate of Boston College; a 1975 graduate of Fordham Law School; and an Equity Member in the law firm of Dickinson Wright PLLC. Upon his law school graduation, he returned to Michigan where he served as a Michigan Court of Appeals' prehearing attorney from 1975 until 1976; an Associate and Shareholder with the law firm of Foster, Swift, Collins & Coey from 1977 until 1989; a Shareholder with the law firm of Howard & Howard Attorneys, PC from 1989 until 1998; and ever since then as an Equity Member at Dickinson Wright PLLC in its Commercial Litigation and Civil Defense Practice Groups. His practice includes in part commercial, employment, product liability, personal injury, transportation, environmental, gaming, food contamination, physician privileges, insurance defense, and insurance coverage litigation.

Jim has been a member of the MDTC since the time of its inception. He has served as its President, a member of its Officer's Executive Committee, Board Member, and Regional Chairperson. He is also a long time member of the Defense Research Institute (DRI), where he served as a Board Member, Michigan State Representative, and ADR Committee Chairperson. Jim has also been a member of the Michigan State Bar Association's Ethics Committee and is a long time member of the Federation of Defense & Corporate Counsel (FDCC), International Association of Defense Counsel (IADC), and the National Association of Railroad Trial Counsel (NARTC).
Jim has been acknowledged as a State of Michigan Super Lawyer, one of the Best Lawyers in America, and one of Michigan Lawyers Weekly's Leaders in the Law. He is a recipient of MDTC's Past President Award, DRI's Outstanding State Representative Award, and multiple DRI leadership awards. He and his wife Renee are long time residents of Okemos, Michigan, where they raised their two sons, Jim Jr. and Andy. They are also the very proud grandparents of Jim Jr. and his wife Amanda's one-year old daughter, Grace.

MDTC LEADER CONTACT INFORMATION

Board

Robert H S. Schaffer
President
Robert H S. Schaffer P.C.
2325 Stonebridge Drive
Building C
Flint, MI 48532
810-496-4465 • 810-230-9225
schafferlaw@comcast.net

J. Steven Johnston
Vice President
Berry, Johnston, Sztykiel, Hunt & McCandless, P.C.
1301 West Long Lake Rd Ste 250
Troy, MI 48098
248-641-1800 • 248-641-3845
sjohnston@berryjohnstonlaw.com

Lori A. Ittner
Secretary
Garan Lucow Miller, PC
300 Ottawa Ave., NW, 8th Floor
Grand Rapids, MI 49503
616-742-5500 • 616-742-5566
littner@garanlucow.com

Phillip C. Korovesis
Treasurer
Butzel Long
150 W. Jefferson Ste 900
Detroit, MI 48226
313-983-7458 • 313-225-7080
korovesi@butzel.com

Peter L. Dunlap
Immediate Past President
Fraser, Trebilcock, Davis & Dunlap, P.C.
124 West Allegan, Suite 1000
Lansing, MI 48933
517-482-5800 • 517-482-0887
pdunlap@fraserlawfirm.com

Jana M. Berger
jberger@foleymansfield.com
248-721-4200 • 248-721-4201
Foley & Mansfield PLLP
130 East Nine Mile Road
Ferndale, MI 48220

Karie H. Boylan
tkboylan@comcast.net
313-224-8577 • 313-967-3532
Wayne County Corporate Counsel
600 Randolph 2nd Floor
Detroit, MI 48226

Lawrence G. Campbell
lcampbell@dickinsonwright.com
313-223-3703 • 313-223-3598
Dickinson Wright P.L.L.C.
500 Woodward Ave., Ste 4000
Detroit, MI 48226

Hal O. Carroll
HCarroll@VGpcLAW.com
248-312-2800 • 248-267-1242
Vandeveer Garzia, P.C.
1450 W Long Lake Rd, Ste 100
Troy, MI 48098

Alan J. Couture
acouture@sondeeracine.com
989-732-1152 • 989-732-4843
Sondee, Racine & Doren, P.L.C.
440 W. Main, Ste. A
Gaylord, MI 49735

Timothy A. Diemer
tad@jpjpc.com
313-965-1900 • 313-965-1919
Jacobs & Diemer P.C.
The Guardian Building
500 Griswold St., Ste 2825
Detroit, MI 48226

Mark A. Gilchrist
mgilchrist@shrr.com
616-774-8000 • 616-774-2461
Smith Haughey Rice & Roegge
205 Monroe Ave., NW
Grand Rapids, MI 49503

Catherine D. Jasinski
cdj@runningwise.com
231-946-2700 • 231-946-0857
Running Wise & Ford PLC
326 E. State Street
Traverse City, MI 49684

Scott L. Mandel
smandel@fosterswift.com
517-371-8185 • 517-371-8200
Foster Swift Collins & Smith PC
313 South Washington Square
Lansing, MI 48933

Dean F. Pacific
dpacific@wnj.com
616-752-2424 • 616-752-2500
Warner, Norcross & Judd LLP
111 Lyon St NW Ste 900
Grand Rapids, MI 49503

Allison C. Reuter
areuter@hopenetwork.org
616-301-8000 • 616-301-8010
General Counsel, Hope Network
P.O. Box 890, 755 36th St., SE
Grand Rapids, MI 49518-0890

Michael J. Rinkel
mrinkel@siemion-huckabay.com
248-357-1400 • 248-357-3343
Siemion Huckabay Bodary Padilla Morganti & Bowerman PC
One Towne Square Ste 1400
Southfield, MI 48086

MDTC LEADER CONTACT INFORMATION

Section Chairs

Appellate & Amicus Curiae:
Hilary A. Dullinger, Co-Chair
hdullinger@plunkettcooney.com
313-983-4419
Plunkett Cooney
535 Griswold Ste 2400
Detroit, MI 48226

Mary Massaron Ross, Co-Chair
mmassaron@plunkettcooney.com
313-983-4801 • 313-983-4350
Plunkett Cooney
535 Griswold Ste 2400
Detroit, MI 48226

General Liability: David A. Couch
dcouch@garanlucow.com
616-742-5500 • 616-742-5566
Garan Lucow Miller PC
300 Ottawa Ave NW, 8th Floor
Grand Rapids, MI 49503

Insurance: Hal O. Carroll
HCarroll@VGpcLAW.com
248-312-2800 • 248-267-1242
Vandeveer Garzia, P.C.
1450 W Long Lake Rd, Ste 100
Troy, MI 48098

Labor & Employment:
Linda M. Foster-Wells
lmf@kellerthoma.com
313-965-7610 • 313-965-4480
Keller Thoma PC
440 East Congress, 5th Floor
Detroit, MI 48226

Law Practice Management:
Thaddeus E. Morgan
tmorgan@fraserlawfirm.com
517-482-5800 • 517-482-0887
Fraser, Trebilcock, Davis & Dunlap PC
124 W. Allegan, Ste 1000
Lansing, MI 48933

Municipal & Governmental Liability:
Karie H. Boylan
kboylan@co.wayne.mi.us
313-224-8577 • 313-967-3532
Wayne County Corporation Counsel
600 Randolph 2nd Floor
Detroit, MI 48226

Professional Liability & Health Care:
Richard J. Joppich
richard.joppich@kitch.com
734-994-7600 • 743-994-7626
Kitch, Drutchas, Wagner, Valitutti & Sherbrook
303 Detroit, Ste 400
Ann Arbor, MI 48107

Trial Practice: David M. Ottenwess
dottenwess@om-law.com
313-965-2121 • 313-965-7680
Ottenwess & Morgan P.L.C.
535 Griswold St., Ste 850
Detroit, MI 48226

Young Lawyers: David L. Campbell
david.campbell@det.bowmanandbrooke.com
248-687-5300 • 248-743-0422
Bowman and Brooke LLP
50 W. Big Beaver Rd., Ste 600
Troy, MI 48084

Regional Chairs

Flint: Ridley S. Nimmo, II
Plunkett Cooney
111 E. Court St. Ste 1B
Flint, MI 48502
810-342-7010 • 810-232-3159
rnimmo@plunkettcooney.com

Grand Rapids: Edward P. Perdue
Dickinson Wright P.L.L.C.
200 Ottawa Ave NW Ste 900
Grand Rapids, MI 49503
616-458-1300 • 616-458-6753
eperdue@dickinsonwright.com

Kalamazoo: Tyren R. Cudney
Early, Lennon, Crocker, & Bartosiewicz PLC
900 Comerica Bldg.
Kalamazoo, MI 49007
269-381-8844 • 269-381-8822
tcudney@earlylennon.com

Lansing: Dean Altobelli
Miller Canfield
One Michigan Ave Suite 900
Lansing MI 48933
517-487-2070 • 517-374-6304
altobelli@millercanfield.com

Marquette: Keith E. Swanson
Swanson & Dettmann, P.C.
148 West Washington Street,
Marquette, MI 49855
906-228-7355 • 906-228-7357
keswanson@chartermi.net

Saginaw / Bay City: Jeffrey C. Collison
Collison & Collison P.C.
5811 Colony Drive North, PO Box 6010
Saginaw, MI 48638
989-799-3033 • 989-799-2969
jcc@saginaw-law.com

Southeast Michigan: Scott S. Holmes
Foley & Mansfield PLLP
130 East Nine Mile Road
Ferndale, MI 48220
248-721-4200 • 248-721-4201
sholmes@foleymansfield.com

Traverse City / Petoskey: John Patrick Deegan
Plunkett Conney
303 Howard Street
Petosky, MI 49770
231-348-6435 • 231-348-6435
jdeegan@plunkettcooney.com

General Committee Chairs

DRI State Representative: Todd W. Millar
Smith Haughey Rice & Roegge PC
202 E. State St, PO Box 848
Traverse City, MI 49685
231-929-4878 • 231-929-4182
tmillar@shrr.com

DRI Diversity Representative: D. Lee Khachaturian
Dickinson Wright P.L.L.C.
500 Woodward Ave., Ste 4000
Detroit, MI 48226
313-223-3475 • 313-223-3598
DKhachaturian@dickinson-wright.com

Editor, *MDTC Quarterly:* Hal O. Carroll
Vandeveer Garzia, P.C.
1450 W Long Lake Rd, Ste 100
Troy, MI 48098
248-312-2800 • 248-267-1242
HCarroll@VGpcLAW.com

Asst. Editor, *MDTC Quarterly:* Jenny Zavadil
Bowman and Brooke L.L.P.
50 W. Big Beaver Rd., Ste 600
Troy, MI 48084
248-687-5300 • 248-743-0422
jenny.zavadil@bowmanandbrooke.com

Government Affairs Chair: Graham K. Crabtree
Fraser Trebilcock Davis & Dunlap PC
124 W. Allegan, Ste 1000
Lansing, MI 48933
517-377-0895 • 517-482-0887
gcrabtree@fraserlawfirm.com

Judicial Relations Chair: Raymond Morganti
Siemion Huckabay Bodary Padilla Morganti & Bowerman P.C
One Towne Square Ste 1400
Southfield MI 48076
248-357-1400 • 248-357-3343
rmorganti@siemion-huckabay.com

MAJ Liasion: Terry Miglio
Keller Thoma PC
440 East Congress, 5th Floor
Detroit, MI 48226
313-965-7610 • 313-965-4480
tjm@kellerthoma.com

Ministers of Fun: James G. Gross
Gross & Nemeth P.L.C.
615 Griswold Ste 1305
Detroit, MI 48226
313-963-8200 • 313-963-9169
jgross@gnsappeals.com

Michael J. Rinkel
Siemion Huckabay Bodary Padilla Morganti & Bowerman P.C.
One Towne Square Ste 1400
Southfield, MI 48086
248-357-1400 • 248-357-3343
mrinkel@siemion-huckabay.com

Past Presidents Committee: John P. Jacobs
Jacobs & Diemer P.C.
The Dime Building Ste 600, 719 Griswold Street
Detroit, MI 48232
313-965-1900 • 313-965-1919
jpj@jpjpc.com

Technology Chair: Timothy A. Diemer
Jacobs & Diemer P.C.
The Guardian Building
500 Griswold St., Ste 2825
Detroit, MI 48226
313-965-1900 • 313-965-1919
tad@jpjpc.com

Michigan Defense Trial Counsel, Inc.
P.O. Box 66
Grand Ledge, MI 48837

Schedule of Events

2009–2010

March 31	Young Lawyers Golden Gavel Award Nomination Deadline
May 1–2	DRI Central Region Meeting, Greenbrier, West Virginia
June 12–13	Summer Meeting, Boyne Highlands
September 11	Open Golf Outing, Mystic Creek
September 16–18	State Bar Annual Meeting – Respected Advocate Award Hyatt Regency, Dearborn
October 1	Civil Defense Basic Training, Troy Marriott
November 4	Board Meeting, Troy Marriott
November 4	Past Presidents' Dinner, Troy Marriott
November 5	Winter Meeting, Troy Marriott

2010

January 11, 2010	Excellence in Defense Nomination Deadline
January 22, 2010	Future Planning, TBA
May 14–15, 2010	Summer Meeting, Double Tree, Bay City

MDTC is an association of the leading lawyers in the State of Michigan dedicated to representing individuals and corporations in civil litigation. As the State's premier organization of civil litigators, the impact of MDTC Members is felt through its Amicus Briefs, often filed by express invitation of the Supreme Court, through its far reaching and well respected Quarterly publication and through its timely and well received seminars. Membership in MDTC also provides exceptional opportunities for networking with fellow lawyers, but also with potential clients and members of the judiciary.