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QUARTERLY

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MDTC
MICHIGAN DEFENSE TRIAL COUNSEL, INC.

THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

MDTC

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

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 and opinions 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 emphasizes 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 or the assistant editor.

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President's Corner

By: J. Steven Johnston
Berry, Johnston, Stzykiel & Hunt, PC
President, MDTC

Camaraderie, Collegiality and MDTC

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

Did you ever look at those old composite bar association photos that used to hang in court house hallways. The photos, especially those from the 1920's and 30's, show the somber or smiling faces of the entire membership of the local bar, all 15 of them. The tradition of these photos appear to have come to an end in the '70's when the local bars grew to large to accommodate the membership in one photo. When coming across one of these photos, I wonder what it would have been like to practice in a place and time when you knew all of the local attorneys very well.

In the biography of Abraham Lincoln, *Team of Rivals*, the presidential historian Doris Kearns Goodwin describes the practice of law in Illinois during the 1850's. Abraham Lincoln was among a roving band of attorneys, riding the circuit from town to town arguing and trying their cases before the circuit judge who traveled along with the bar. At the end of the day, the traveling bar would dine together, play cards, discuss politics and even sleep in the same boarding houses. Many of these attorneys became Lincoln's friends and biggest supporters in his run for the U. S. Senate and later the Presidency.

While that type of camaraderie may have been a lot of fun, in this day and age it is neither practical nor politically correct. I would hate to argue a case in front of judge who I beat at poker the night before drawing a fourth ace to beat a full house.

We do not have quite the same opportunities as our predecessors to engage with other attorneys. In age when the number of attorneys practicing in some of our urban areas probably exceeds the population of the counties in which Lincoln and his peers traveled, it is all too easy to lose touch with colleagues. We now communicate by email, pdf's, faxes and conference calls.

Fortunately, our state and local bar associations provide an antidote to this problem of detachment from our other members of our profession. The local bar associations provide a means to stay in touch with the attorneys and judges in our locale. Participating in the specialty sections of the State Bar of Michigan, such as the Negligence Section, is an excellent way to interact with our adversaries and discuss matters of mutual interest.

The MDTC, however, is the best opportunity for attorneys to interact with those in similar practices from across the State of Michigan. No other bar organization draws its membership from such a broad geographic area with the same legal and business interests.

MDTC's Summer Conference

During the weekend of June 12th to 14th, the MDTC held its **Summer Conference at Boyne Highlands**. Those in attendance participated in an excellent seminar "Thinking Outside the Jury Box" chaired by Alan Couture, Allison Reuter and Terry Miglio. We had many outstanding speakers including Susan N. Reiter, Ph.D., Kim Sands and John D. Gilleland, Ph.D.

The center piece of this year's event was the dinner on Saturday **honoring Jim Lozier** of Dickinson Wright and the presentation of the **Excellence in Defense award**. For those of you who know Jim, you know first hand why he is on obvious

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choice for the award. Jim works tirelessly to represent his clients while meeting the highest professional and ethical standards.

Throughout the seminar we had the opportunity to mix and mingle with our friends while attending the lectures, playing golf, participating in the fun run, shopping and at the dinner. Of course, I can not omit a reference to the famous MDTC hospitality suite.

After I attend one of our conferences, I always come away with new ideas to help me improve my practice and the manner in which I represent my clients. As do many others, I always meet a new friend from another part of the state who I would probably never have met but for the conference. Out of these contacts you have the opportunity to build new business relationships, share ideas and build networks.

By the way, we also take pictures, or rather Madelyne Lawry, our Executive Director, takes pictures, many of which you see published in the *Michigan Defense Quarterly*. Although we may appear a little stiff as we pose for our photos, behind those poses is a lot of fun and camaraderie.

MDTC's Fall Conference

If you missed the summer conference, do not miss the next opportunity which will be coming up in November. We are presenting our first **seminar on commercial litigation** at the Marriott, in Troy, on **November 6th**. The topic will appeal to both the experienced commercial litigator as well as the general defense practitioner who would like to learn more about this area of the law.

Please plan to attend, learn something, network and maybe have your picture taken.

The Michigan "Lemon" Law: A 2009 Practice Guide

By: Ronald C. Wernette, Jr. & Nicole L. DiNardo, *Bowman and Brooke LLP*

Executive Summary

Michigan's automobile "Lemon Law" has been the source of some ambiguity and confusion, but a recent published decision of the Court of Appeals has resolved many of the ambiguities by adhering more closely to the language of the statute. To meet the "30-day" test, the consumer must show that the vehicle was out of service for a total of 30 days for a particular condition; different conditions cannot be aggregated to make up the thirty days. The opinion also requires more faithful compliance with the specific statutory reporting requirements under the "four or more" test, and that the four service episodes be for the same condition. Defense counsel should be prepared to require the consumer to comply strictly with the statute's requirements.

Ronald C. Wernette, Jr. is a partner in the Troy, Michigan, office of national trial law firm Bowman and Brooke LLP. He is a seasoned trial lawyer on the defense side, and has personally tried Michigan Lemon Law cases to verdict for a number of manufacturers. His email address is rwernett@bowman-brooke.com.

Nicole L. DiNardo is an associate in the Troy, Michigan, office of Bowman and Brooke LLP and has been involved in the defense of numerous manufacturers in consumer and product litigation. Her email address is nicole.dinardo@bowmanandbrooke.com.

The New Motor Vehicle Warranty Act,[1] often referred to as Michigan's Lemon Law, provides relief to consumers that have purchased or leased not-so-perfect vehicles. Over the past several years, articles about the Michigan Lemon Law have been written by practitioners aimed to educate other practitioners and consumers on the application and nuisances of Michigan's Lemon Law.[2] Since the publication of these articles, the Michigan Court of Appeals in *Hines v Volkswagen*,[3] cured the ambiguity in the interpretation of Michigan's Lemon Law created by practitioners who represent the consumer and flatly rejected some of the arguments typically made by those practitioners. *Hines* does not change the existing statutory requirements. It simply enforces the statute as written.

Michigan's Lemon Law applies to the consumer whose new motor vehicle has a defect or condition that substantially impairs the use, market value, or safety of the vehicle to him or her, and which has not been repaired after a reasonable time.[4] If the substantial defect continues to exist after a reasonable number of repair attempts, and all other statutory requirements are otherwise met, the consumer's recourse is a refund or replacement of the vehicle.[5]

Definition of a Lemon

A bright-line test has been established to determine when a manufacturer must repurchase or replace an alleged "lemon" motor vehicle. A vehicle is deemed a lemon and a manufacturer must repurchase or replace a vehicle only if *all* of the following requirements are met:

(1) The vehicle has one or more defects or conditions that impair the use or value of the vehicle to the consumer or that prevent the vehicle from conforming to the manufacturer's express warranty;[6]

(2) The defect or condition is reported to the manufacture within the period of the manufacturer's express warranty or one year from the date of delivery to the original consumer, whichever is earlier;[7] and,

(3) The defect or condition continues to exist after the motor vehicle was subjected to a reasonable number of repair attempts.[8]

A new motor vehicle is presumed to have had a "reasonable number" of repair attempts when either of the following occurs:

(a) The same defect or condition that substantially impairs the use or value of the new motor vehicle to the consumer has been subject to repair a total of 4 or

more times by the manufacturer or new motor vehicle dealer *and the defect or condition continues to exist*;[9] or

(b) The new motor vehicle is out of service because of repairs for a total of 30 or more days or parts of days during the term of the manufacturer's express warranty, or within 1 year from the date of delivery to the original consumer, whichever is earlier.[10]

The 30-Day Test

It is the interpretation of these presumptions that has caused considerable controversy among practitioners. Prior to *Hines*, practitioners for the consumer have argued that recovery under Michigan's Lemon Law is warranted merely by showing that the vehicle was out of service for repairs for 30 or more days during the term of the manufacturer's warranty or the consumer's first year of ownership. However, the Michigan Supreme Court of Appeals in *Hines* flatly rejected this position.

In *Hines,* an action was brought in the Wayne County Circuit Court against Volkswagen of America, Inc. and Livonia Volkswagen, Inc. seeking relief under Michigan's Lemon Law for repeat mechanical problems Ms. Hines was having with her vehicle. The trial court granted summary disposition to the plaintiff on the basis that her vehicle had been out of service for over 30 days. On appeal before the Michigan Court of Appeals, the defendants successfully argued that the trial court erred in granting summary disposition for Ms. Hines on the sole basis that her vehicle was out of service for 30 or more days during her first year of ownership.[11]

> A consumer may not recover under the lemon law merely by showing that the new vehicle in question was out of service for repairs for thirty or more days during the term of the manufacturer's warranty of plaintiff's first year of ownership. Rather, a consumer is entitled to relief . . . only when the consumer shows *each of the following:* (1) *the* defect or condition was reported to the manufacturer, (2) *the* defect or condition continued to exist after it was reported to the manufacturer, *and* (3) the vehicle has been subjected to a reasonable number of repairs . . ..[12]

The holding in *Hines* is clear. Recovery is not warranted under Michigan's Lemon Law where there is only a showing that the vehicle was out of service for 30 or more days. Rather, there must also be a showing that the vehicle was down *for the same defect or condition* and that the defect or condition did not *continue to exist after it was reported to the manufacturer*.[13]

Prior to *Hines*, practitioners for the consumer have argued that recovery under Michigan's Lemon Law is warranted merely by showing that the vehicle was out of service for repairs for 30 or more days during the term of the manufacturer's warranty or the consumer's first year of ownership. However, the Michigan Supreme Court of Appeals in *Hines* flatly rejected this position.

Michigan's Lemon Law applies to the consumer whose new motor vehicle has a defect or condition that substantially impairs the use, market value, or safety of the vehicle to him or her, and which has not been repaired after a reasonable time.

The "Four-or-More" Test

The *Hines* Court also put to rest the oft-used argument that under the "4 or more" theory, a mere report of a defect or condition is sufficient. Pursuant to *Hines*, the vehicle must be *subject to repair*s four or more times for the same defect or condition in order to take advantage of the presumption.[14] The *reporting* of a defect or condition alone is not enough. Rather, the defect or condition must be reported *and* a repair attempt must be made.[15] Further, the *Hines* Court elucidated that a consumer is *not* entitled to the "4 or more" presumption when he or she relies on the repair of *different* alleged defects or conditions combined to exceed four repairs.[16] The repair must be for the same defect or condition.

The argument that an "irrebuttable" presumption is created when the vehicle repairs fall under either the "4 or more" or "30 day or more" theories was flatly rejected by the *Hines* Court. "Either presumption accorded…is not irrebuttable; in other words, the presumption does not rise to the level of determinations as a matter of law that there have been a reasonable number of repair attempts and that recovery under the statute is required. Rather, the presumption may be rebutted by the admission of substantial evidence to the contrary on one or more of the statutory requirements."[17]

Recovery is not warranted under Michigan's Lemon Law where there is only a showing that the vehicle was out of service for 30 or more days.

The argument that an "irrebuttable" presumption is created when the vehicle repairs fall under either the "4 or more" or "30 day or more" theories was flatly rejected by the *Hines* Court.

It has been argued that the *Hines* opinion "gutted" Michigan's Lemon Law and that the Michigan Court of Appeals "just flat out got it wrong."[18] However, a clear reading of Michigan's Lemon Law in its entirety (abiding by the rules of statutory interpretation) reveals that the Hines Court got it right. On the basis of the holding in *Hines*, the "30 or more day" standard requires that the vehicle is in for repair 30 or more days for same defect or condition and the same defect or condition continues to exist. It no longer provides a remedy for simply showing that the vehicle was out of service for an aggregate of 30 days or parts of days within the first year. Further, not only does the defect or condition have to continue to exist, but it must be the same defect or condition. This considerably curtails the latitude consumers once enjoyed under this provision.

On the basis of the holding in *Hines*, it is clear that the "4 or more" standard requires (a) four or more identifiable, verifiable, defects or conditions. Gone are the days that the consumer can rely on his or her "complaints" of a defect or condition in arriving at the "4 or more." In totaling up the number of repair attempts for the "4 or more" presumption, a repair record that indicates that the defect or complaint "could not be verified" is insufficient. Each of the repair attempts must be for the same defect or condition, and a consumer cannot rely on the repair of different alleged defects or conditions combined to meet four repairs. Also, as with the "30 or more day" standard, there must be a showing that the same defect or *condition continues to exist*.

Practice Tip – Counting to 30

As a result of *Hines*, defense counsel must pay close attention to the analysis used to determine the number of days that the vehicle was in the shop for a particular repair, to make sure that it was the defect or condition at issue that kept the vehicle in the shop for 30 days. For example, if the vehicle was in the shop on March 10, 2006, for 30 days for a transmission repair, replacement of the wiring harness and rotation of tires and thereafter the vehicle was in the shop on May 15, 2006, for 15 days for only the transmission, a determination will need to made as to how many days the vehicle was in the shop for the transmission only on March 10 (assuming that both transmission repairs were for the same defect or condition). If it is determined that the vehicle was in the shop for less than 15 days (the additional time in the shop was attributable to the other repairs), then the 30 day presumption is not met. Of equal importance is to ensure that the same defect or condition continues to exist.

Written Notification – the "Last Chance" Letter

Before a consumer can avail him or herself of a remedy under Michigan's Lemon Law, he or she must give written notification to the manufacturer of the need for repair of the specific defect or condition to allow the manufacturer an opportunity to cure the alleged defect or condition.[19] This is often referred to as the "last chance letter." The statue is specific that the notice must be provided in writing by return receipt service.[20] Upon receipt of the notification, the manufacturer must notify the consumer as soon as reasonably possible of a reasonably accessible repair facility and repair the defect or condition within five (5) business days after the consumer delivers the vehicle to the designated repair facility.[21] Pursuant to statute, the letter must be sent after the third repair attempt under the "4 or more repairs" theory.[22] The letter must be sent after the vehicle has been out of service for at 25 days under the "30 or more days" theory.[23] Failure to abide by these statutory requirements can be fatal to the consumer's claim.

The "30 or more day" standard requires that the vehicle is in for repair 30 or more days for same defect or condition and the same defect or condition continues to exist.

Each of the repair attempts must be for the same defect or condition, and a consumer cannot rely on the repair of different alleged defects or conditions combined to meet four repairs.

There is continuous debate as to whether the consumer's failure to abide by the statutory notice requirements is fatal to his or her lemon law case. To date, there have been inconsistent results in the trial courts. Some courts have construed the statute literally and dismissed lemon law claims where the consumer failed to provide notice as specifically set forth in the statute. Other courts accepted remedial-type arguments and allowed the consumer's lemon law claim to survive, despite noncompliance. While the Michigan Court of Appeals

has not dealt with this issue head on, the *Hines* decision has taught us that the Michigan Court of Appeals will likely construe and apply the statute as written. As written, the statute sets forth very a specific mode of delivery in which the written notification must be made and specifically states that the identification of the specific defect or condition in need of repair must be identified.

Practice Tip – Attack the Notice

In instances where the consumer fails to abide by the strict letter of the law, it is worthwhile to file a motion for summary disposition of the lemon law claim based on the consumer's failure to provide proper notice. The authors have been successful in getting lemon law claims dismissed on this issue. Be prepared for the consumer to argue that the remedial nature of Michigan's Lemon Law should allow for a consumer to notify the manufacturer through alternative means, such as by email, regular mail or even by the filing of the complaint. This especially occurs in cases in which it is undisputable that the manufacturer received the notification. However, the statute does not provide for any alternative mode of notice. While the trial court may not provide the relief requested, the chance of prevailing increases at the appellate court where it has been made clear the statute will be enforced as written.

Remedy – Replacement or Refund

If a consumer prevails under the Michigan Lemon Law, in the case of a purchased vehicle, he or she is entitled either a comparable replacement or a return of the vehicle and refund of the purchase price.[24] On the other had, if the vehicle was leased, the consumer is only entitled to a refund of the lease price paid by the consumer or a comparable replacement vehicle for the remainder of the lease.[25] The consumer is also entitled to "the cost of any options or other modifications installed or made by or for the manufacturer, and the amount of all other charges made by or for the manufacturer," towing costs and certain rental fees.[26] However, the statute does not articulate whether a refund includes finance charges. Consumers will often argue that the finance changes are damages recoverable under the Uniform Commercial Code; however, the authors have successfully argued that finance changes are not recoverable by statute.

Any refund is subject to a reasonable allowance for the consumer's use of the vehicle, otherwise known as a "mileage setoff."[27] The mileage setoff is based on a theoretical vehicle life of 100,000 miles and is computed by determining the amount of miles directly attributable to use before the first report of a defect or condition that substantially impairs the use or value of the vehicle, plus all the miles beyond 25,000, divided by 100,000 times the purchase of lease price of the vehicle.[28]

There is continuous debate as to whether the consumer's failure to abide by the statutory notice requirements is fatal to his or her lemon law case. To date, there have been inconsistent results in the trial courts.

Be prepared for the consumer to argue that the remedial nature of Michigan's Lemon Law should allow for a consumer to notify the manufacturer through alternative means, such as by email, regular mail or even by the filing of the complaint. This especially occurs in cases in which it is undisputable that the manufacturer received the notification.

Practice Tip – Lease Price Paid

It is often argued in the case of a leased vehicle that the consumer is entitled to a refund of the lease price, including the total of lease amounts paid, as well as the remaining balance of the lease agreement. However, the statute clearly states that the refund comprises the lease price paid, not the unpaid portion of the lease price.[29] Thus, the consumer's refund is limited to the amount the consumer has paid in lease payments, not the outstanding lease loan balance.

Practice Tip – the Mileage Deduction

In calculating the mileage deduction, the statute sets forth a formula that multiplies the purchase or lease price of the vehicle by a fraction having as the denominator 100,000 miles and having as the numerator the miles directly attributable to use by the consumer (or any previous consumer) that impairs the use or value of the vehicle. Determining the numerator (the mileage the use or value of the vehicle is impaired), is a slippery slope. Generally, in calculating this amount, it is reasonable to look at the first time that a repair attempt was made for the particular defect or condition at issue in the case.

For example, if the customer took the vehicle in for repair on three occasions, but only on the fourth occasion at 10,000 miles did he or she complain of the defect or condition at issue in the case, it a reasonable to use 10,000 as the numerator. If the vehicle purchase price was $32,000, the manufacturer would be entitled to a mileage deduction of $3,200 (32,000 × 10,000/100,000).

However, that is not the only mileage deduction that the manufacturer may be able to recover.

The statute also allows for a deduction for mileage directly attributable to use by a consumer beyond 25,000 miles. This additional mileage deduction; however, is in the discretion of the court and allows the consumer to proffer evidence in support of reducing the mileage deduction by showing that "the vehicle did not provide reliable transportation for ordinary personal or household use for any period beyond the first 25,000 mileage usage period."[30] The consumer will often argue that the vehicle usage deduction for mileage beyond 25,000 should be reduced if the vehicle did not provide reliable transportation for any significant amount of time.

Logically, it appears that if the vehicle is driven beyond 25,000 miles, the consumer is provided with at least some reliable transportation. An argument should be made that only the number of miles in which the vehicle did not provide reasonable transportation should be reduced. That is, if, after 25,000 miles the vehicle is not functioning properly for 200 miles, the argument should be made that the deduction should only be reduced by 200 miles. Of course, it is in the court's discretion by what amount, if any, to reduce the award.

Attorney Fees

The Michigan Lemon Law provides for the cost or fee-shifting of attorneys fees; however, the recovery is in the discretion of the court. "A consumer who prevails . . . *may be allowed* by the court to recover . . . costs and expenses, including attorneys' fees based on actual time expended by the attorney, determined by the court to have been reasonably incurred by the consumer . . ., unless the court in its discretion shall determine that such as award of attorneys' fees would be inappropriate."[31] The absence of obligatory fees results in the consumer pleading additional claims in which the recovery of attorney fees is not in the court's discretion, such as a claim under the Michigan Consumer Protection Act.

Practice Tip

Be aware of settlements without an agreement on attorneys' fees and/or costs!

Endnotes

1. MCL 257.1401, *et seq.*
2. Steve Lehto, "Michigan's New Lemon Law," *Michigan Bar Journal* (1999); Dani Liblang, "A Practice Guide to New Car Warranty Cases," *Michigan Bar Journal* (1999); Dani Liblang, "Lemon Law 101 Putting the Squeeze on Road Lemons," *Michigan Defense Quarterly,* Vol 19, no 2, September 2002
3. *Hines v Volkswagen,* 265 Mich App 432; 695 NW2d 84 (2005), lv app denied, 474 Mich 956, 706 NW2d 740 (2005). Co-author Wernette was counsel for Volkswagen of America, Inc.
4. MCL 257.1401, *et seq.*
5. MCL 257.1403.
6. MCL 257.1402.
7. *Id.*
8. MCL 257.1403(1).
9. MCL 257.1403(5)(a).
10. MCL 257.1403(5)(b).
11. *Hines,* 265 Mich App at 438.
12. *Id.* at 441. *(emphasis in original)*
13. *Id.* at 443.
14. *Id.* at 442.
15. *Id.*
16. *Id.*
17. *Id.* at 441-442.
18. Denise G. Callahan, "Attorney Finds Nothing Sour In Lemon Law Practice," *Michigan Lawyers Weekly,* June 13, 2005, at 1.
19. MCL 257.1403(5).
20. *Id.*
21. *Id.*
22. MCL 257.1403(5)(a).
23. MCL 257.1403(5)(b).
24. MCL 257.1403(1)(a).
25. MCL 257.1403(1)(b) (emphasis added).
26. MCL 257.1403(1).
27. MCL 257.1403(2).
28. *Id.*
29. MCL 257.1403(1)(b).
30. MCL 257.1403(2).
31. MCL 257.1407(2).

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).

"Super Lawyer" Members of MDTC
Only five percent of the lawyers in the state are named by *Super Lawyers*. Each year S*uper Lawyers*, undertakes a rigorous multi-phase selection process that includes a statewide survey of lawyers, independent evaluation of candidates by Law & Politics' attorney-led research staff, a peer review of candidates by practice area, and a good-standing and disciplinary check.

Byron "Pat" Gallagher of the Gallagher Law Firm with offices in Lansing and Detroit has been named by Michigan S*uper Lawyers* magazine as one of the top attorneys in Michigan for Real Estate and Business Law.

James K. Thome of Vandeveer Garzia, PC, located in Troy, has been listed in *Super Lawyers* in the area of construction litigation every year since 2006, the year that program started in Michigan. This year, he has also been recognized for the for the same specialty in the Corporate Counsel Edition of *Super Lawyers*.

Distress, Uncertainty, And Consequence Why Causation Is Becoming Center Stage In Damages Assessments

By: Neil Steinkamp, CCIFP, AVA & Jacob Reed, *Stout Risius Ross, Inc.*

Executive Summary

Causation is always a point of contention between the parties whether the case involves contract or tort. Causation in relation to consequential damages, specifically in "lost profit" cases, is likely to get even more contentious in today's economy. To recover damages in such a commercial case, the plaintiff must prove that first the damages, then the amount of the damages, are reasonably certain in fact and amount. While the concept of consequential damages and causation dates back to the mid-1800's, technology and complex business relationships provide both opportunity and challenges to plaintiffs and defendants in modern litigation.

Neil Steinkamp is a director in the Dispute Advisory & Forensic Services Group at Stout Risius Ross, Inc. His experience includes providing of business and financial advice to attorneys, including matters involving breach of contract, tortious interference, disputes related to business transactions, post-merger and acquisition disputes, employment and compensation disputes, personal economic damages, bankruptcy, eminent domain, divorce, shareholder disputes and construction claims.

Jacob M. Reed is an analyst in the Dispute Advisory & Forensic Services Group at Stout Risius Ross, Inc. Mr. Reed has experience in providing analytical support forming the basis of business and financial advice for attorneys, including matters involving breach of contract, warranty and recall disputes, preference claims, employment disputes, and fraud and forensic investigations.

A Spotlight on Causation

In environments of significant economic and political change, companies may experience a host of challenges and changes to the structure of their business operations. Many of these challenges can lead to detrimental effects on profitability and operational well-being. Currently the United States, along with the rest of the world, is enduring a global economic crisis. As causation assessments can quickly become a convoluted and complex endeavor amidst such an uncertain and ever-changing economic environment, it is now more important than ever to develop awareness of the processes for evaluating causation and the issues typically encountered.

The Concepts of Causation and Damages

Damages Events. A "damages event" can be defined as an event that gives rise to the financial detriment of the plaintiff. Such damages can take the form of lost revenues or profits, or can be based more generally on claims such as diminution of business value, for example. When an event occurs that causes damages, a fundamental issue often arises regarding whether another party's action caused the event which gave rise to damages. While this appears to be a simple question, there are often multiple factors that courts consider in evaluating causation.

One common example of damages is claims relating to lost profits in commercial cases, often defined as "the profit that would have been made on [sales] if the buyer had not breached."[1] Lost profits can be either direct or consequential in nature. Direct damages refer to damages directly resulting from the defendant's action, such as a contract breach. For example, direct damages may include incremental costs that an automotive supplier may bear as a result of having to resource a part after the contract breach of a previous supplier. Consequential damages relate to profits that might be gained collaterally as a result of performing the contract. Subsequent to a supplier's breach of contract, if profits are lost due to the late completion of production of engine components which utilized parts originally obtained from the breaching supplier, consequential damages may result.

Claims relating to consequential damages frequently appear in case law due to the difficulties in proving that such damages were reasonably certain to occur in fact and in amount. The courts developed a "two prong test" to address this difficulty.[2] The first prong relates to proving that damages are reasonably certain in fact, and involves proof of actual cause and legal cause. The second prong relates to certainty of amount.

Actual Cause — *Substantial Factor and But-For Tests.* Both actual cause and legal cause must be assessed in determining damages. Actual cause is commonly established by considering whether the defendant's action was a *substantial* factor in the plaintiff's damages.[3] Amidst simultaneous or subsequent events, the substantial factor test may establish whether the defendant's action was a significant contributing factor to the damages event rather than simply being correlated with that event. Courts have identified multiple considerations for the substantial factor test including:

- The number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
- Whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and
- Lapse of time.[4]

Courts also commonly utilize the *sine qua non* test to determine if the damages event would have occurred "but-for" the defendant's action. The defendant's conduct is a cause of the event if the event would not have occurred absent of that conduct; similarly, the defendant's action is not a cause of the event if the event would have occurred without it.[5]

Reasonable Certainty. Causation must also be proven with "reasonable certainty." In *Ashland Management Inc v Janien*[6], the court analyzed this rule, stating that this requirement "does not require absolute certainty… It requires only the damages be capable of measurement based upon known reliable factors." Further, in *Welch v US Bancorp Realty & Mortgage Trust*,[7] a case involving damage claims relating to lost profits, the court offered additional observations of the rule:

> Claims relating to consequential damages frequently appear in case law due to the difficulties in proving that such damages were reasonably certain to occur in fact and in amount.

> The court should intervene only when it can say that the evidence is clearly insufficient to establish the claim of lost profits. This does not mean that the court should withdraw the question just because the court might not be convinced of the evidence. If reasonable men could be persuaded of the validity of the claim on the evidence presented, the jury must be allowed to make the decision.[8]

The Uniform Commercial Code, which governs transactions between commercial buyers and sellers, also gives consideration to the "reasonable certainty" rule. As evidenced below, the UCC states that proof of causation with "reasonable certainty" depends on case-specific circumstances, and requires only a logical and sound approach given the facts and circumstances of the case. The UCC states:

> The burden of proving the extent of loss incurred by way of consequential damage is on the buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances.[9]

> Courts also commonly utilize the *sine qua non* test to determine if the damages event would have occurred "but-for" the defendant's action.

Legal Cause. Causation can often be proven in fact using common approaches such as "but-for" assessments and substantial factor tests. However, proof of actual cause is generally not sufficient to establish the defendant's liability for negligence. Therefore, causation assessments to establish legal cause also must be done to prove the defendant's action was close enough in the chain of events leading to damages to be the ultimate proximate and legal cause of such damages. While less strictly defined than actual cause, legal cause is based on the concept of foreseeability.

Foreseeability. Foreseeability is one of the most commonly utilized theories for establishing legal cause. Courts often consider whether a "reasonable person" would have foreseen the plaintiff's damages resulting from the act, or whether the plaintiff's injury is a "natural and probable consequence" of the defendant's conduct. Other courts more broadly ask whether the plaintiff's damages could have been reasonably foreseen in the light of all the circumstances and simultaneous events.[10]

To recover damages in commercial cases relating to breaches of contract, damages must have been foreseeable as the "natural and probable result" of the breach of contract at the time the contract was made.[11] Only damages that were foreseeable at the time of "contracting" are recoverable as consequential damages.[12]

The concept of foreseeability of damages in breach of contract cases dates back to *Hadley v Baxendale,* which is still applied today in determining legal causation.[13] In *Hadley*, the plaintiff mill owner, hired the defendant, a common carrier, to transport a broken iron mill

The concept of foreseeability of damages in breach of contract cases dates back to *Hadley v Baxendale,* which is still applied today in determining legal causation.

shaft for replacement. The defendant unreasonably delayed in getting the item to its destination and the mill was inoperative during the delay, which allegedly resulted in the plaintiff's lost profits. The court held that those lost profits were not recoverable, as they were not within the contemplation of the parties. While the ultimate decision of the case may be different than it would be today, it offers key observations relating to foreseeability:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of the injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.[14]

Intervening and Alternate Causes. Intervening causes also must be considered if the occurrence of an event subsequent to the defendant's action has impacted the damages event. While a defendant's actions may have created the circumstances for the damages event, the defendant is not automatically liable for the damages to the plaintiff. A subsequent event that more directly causes damages will supersede the defendant's conduct as the legal cause, meaning that the defendant will not be held liable. In other words, an intervening cause may trigger "a legal metamorphosis [of the defendant's conduct] into a remote cause or 'mere condition'" of the damages event.[15]

Plaintiffs, as well as their legal counsel and financial experts, must also consider alternate causes to financial damages. In *Wyndham Int'l, Inc v Ace American Ins Co*,[16] Wyndham sought lost profits under business interruption claims relating to fear and travel restrictions imposed following the terrorist attacks of September 11, 2001. The financial expert valuing such damages was excluded for his failure to consider other factors of the decline in profitability, including the general state of the economy. The court stated that the expert's failure to consider other factors "rendered his opinion little more than speculation."[17]

Reasonable Certainty of Amount. Even if liability is established, there may not always be damages. The liability event may not have given rise to the claimed amount of damages. Therefore, reasonable certainty also must be established relating to the amount of damages. However, reasonable certainty relating to the damage amount does not require mathematical certainty. It requires that the claimant come forward with "some objective facts, figures and data from which [damages] may be ascertained."[18] Further, the more the defendant has caused the uncertainty, the more likely the court is to credit the claimant's view.[19]

During economic recessions, businesses struggling for survival may look to wind down operations, engage in business transactions to buy or sell portions of companies, or transform their operational focus to niche markets or other industries.

Distressed industries such as the automotive, construction, and financial industries have experienced the effects of broad-sweeping contractions and reduced profitability. Declines in consumer spending and highly volatile commodity, securities, and housing markets have played a large role in significant sales declines, decreases in business activity, and overall financial turmoil.

Specific Challenges in Times of Great Change

Assessing and considering causation can become increasingly difficult in times of economic and industry transformation. During economic recessions, businesses struggling for survival may look to wind down operations, engage in business transactions to buy or sell portions of companies, or transform their operational focus to niche markets or other industries.

High degrees of activity relating to these transformations can have various effects throughout industry supply chains and between customers and their suppliers. To the extent such actions

effect changes to a business' outstanding contracts with suppliers and customers, or are otherwise tied to the detriment of other parties, damage claims may be possible. Due to the many transformations being witnessed in these industries however, proving causation when calculating damages can become a challenge.

Certain industries have been especially impacted by the recent period of economic and political transformation. Distressed industries such as the automotive, construction, and financial industries have experienced the effects of broad-sweeping contractions and reduced profitability. Declines in consumer spending and highly volatile commodity, securities, and housing markets have played a large role in significant sales declines, decreases in business activity, and overall financial turmoil. Consequently, significant operational restructuring, bankruptcies, divestitures, and other business transactions have been especially high.

In these highly active industries, multiple events may play a role in the occurrence of a damages event, such as the business failure of a supplier or a customer, declines in customer volume, or failed bank financing. Simultaneous events such as these can complicate causation assessments, and make proving proximate and legal cause with "reasonable certainty" a much more arduous task than certain previous court opinions have indicated. Rather than diminishing the impact of causation, these circumstances spotlight the importance of a careful investigation of causation in damage assessments.

Overcoming the Causation Challenge

Despite the existence of an environment of great change and uncertainty, there are many useful approaches to assessing causation. Although this is not an exhaustive discussion of causation techniques, below are certain of the more common approaches used in assessing causation:

In some instances, a detailed "backwards" analysis of a stream of events occurring after a damages event can yield results.

Contemporaneous Documentation. Identifying documentation that ties the defendant or other party more closely to the damages event can be a valuable piece of causation analysis. For example, if documentation is discovered indicating damages were foreseen by the defendant, it may be possible to prove the defendant knowingly committed an act detrimental to the plaintiff. Potential financial documentation to review may include emails prior to the act, budgets prepared by the defendants or other parties, financial forecasts, management presentations and third-party consultant reports.

Financial Analysis. In some instances, a detailed "backwards" analysis of a stream of events occurring after a damages event can yield results. For example, by tracking cash flows, revenue receipts, or other measures of financial performance occurring subsequent to a damages event it may be possible to gain an understanding of the factors impacting changes in financial results over time. This analysis, combined with an evaluation of documentation related to these cash flows, can help identify probable and substantial causes of damages events. This "backwards approach" is the general method used in forensic customer tracking, which is described in the case example later in this article.

Evaluating causation may also involve a "forward" analysis of events. This approach may involve an attempt to recreate and understand the circumstances that originally existed surrounding the damages event. After hypothetically placing the parties back in this original position, it then may be possible to discern the reasonably likely causes of the stream of events subsequent to the damages date. The concept of foreseeability is consistent with this approach, as the question of whether an event would have been reasonably foreseeable in light of the given circumstances is often analyzed. If the plaintiff's damages could have been foreseen to be a "natural and probable" effect of the defendant's action, causation based on such reasoning may be established.

A Case Study – *Clark Automotive*[20]

Recognizing the inherent challenges in assessing causation of damages events, especially amidst complex and dynamic economic and political environments, it is necessary to develop and maintain a basic framework and strategy to simplify causation analysis. As demonstrated by the methodologies and strategies outlined above, there are several basic approaches that can assist in determining causation in most any scenario.

The following case study relates to customer loss in the Automotive Dealership Industry. This case demonstrates how streams of events and ensuing damages can be evaluated using various basic causation methodologies.

Background. Larry O'Brien left his sales job at Clark Automotive in August 2008. Prior to his departure, he had worked at the dealership since September of 1991. In his approximate 17 years with the company, he had built numerous business relationships and had worked with a significant listing of clients in his role as a salesman at the dealership.

As dealership sales historically consisted of approximately 45% lease sales, many customers would return to the dealership to renew or extend their lease in the years following their original purchase. Therefore, salesmen such as O'Brien utilized a customer contract listing maintained by the dealership,

which detailed past sales and corresponding lease end dates for each customer. Using such data, salesmen would contact past customers to encourage them to renew their lease with the dealership. The information was also commonly used to distribute marketing materials detailing incentives and other programs designed to increase new sales.

Upon departing from the company, Larry O'Brien accepted a senior management position at Bauer Automotive. Bauer was established in 2004, and thus did not yet have an extensive customer contact list to utilize for new and repeat sales. Recognizing that Bauer sold many of the same vehicle models as Clark, O'Brien knew that Clark customers would likely be interested in Bauer's vehicle offerings.

In the 18 months immediately following O'Brien's departure from Clark Automotive, Clark experienced a 25% decrease in repeat sales and a 20% decrease in new sales. It has since sued O'Brien and Bauer Automotive for damages, claiming that O'Brien utilized information obtained from his prior employment with Clark to contact and sell vehicles to Clark's established customer base. Clark filed a damage claim of approximately $1 million related to customer theft and unjust enrichment.

The current economic environment in the region is grim. Unemployment has increased to 11%, while home foreclosures have also risen significantly. Loan originations by banks have also declined due to concerns relating to borrowers' ability to repay the loans. Consequently, many consumers have been unable to secure financing for vehicle purchases, and all-cash transactions for certain classes of vehicles are at an all-time high.

Assessing the Ultimate Cause of Customer Loss. As described throughout this article, prior to assessing damages, determining that the actions of Larry O'Brien did in fact lead to the damages being claimed by Clark Automotive is often one of the first concerns. Following are several detailed approaches available to Clark Automotive to establish causation relating to customer loss and decreases in new and repeat vehicle sales.

Forensic Analysis. As described previously, dealerships typically maintain detailed customer contract lists for the purposes of making repeat and new sales. Such lists also typically detail a contact history indicating which salesperson has contacted each customer and the customer responses resulting from such contact.

In the discovery process for this case, Clark Automotive could start by requesting the customer contracts listing of Bauer Automotive. By analyzing Bauer's customer contract list, it may be possible to tie Clark's customer loss to an increase in vehicle sales at Bauer Automotive. A detailed analysis could be performed to attempt to match customer names of Bauer's new sales transactions to the customer names of previous sales transactions at Clark Automotive.

In the discovery process for this case, Clark Automotive could start by requesting the customer contracts listing of Bauer Automotive. By analyzing Bauer's customer contract list, it may be possible to tie Clark's customer loss to an increase in vehicle sales at Bauer Automotive. A detailed analysis could be performed to attempt to match customer names of Bauer's new sales transactions to the customer names of previous sales transactions at Clark Automotive. Oftentimes, such analyses can be performed with the assistance of experts in computer forensics.

Upon identifying such matches, an evaluation of the contact and communication history with such customers could be performed. If it is found that much of Clark's customer loss pertained to customers who had been in contact with O'Brien at Clark Automotive and were subsequently in contact with O'Brien at Bauer Automotive, this may be an indication that O'Brien's actions played a role in Clark's customer loss.

In addition to a detailed analysis of customer contract lists, it may be possible to evaluate other contemporaneous documentation to establish causation related to the customer loss. Such documentation may include internal Bauer emails, letters, or analyses performed which indicate O'Brien or Bauer made attempts to steal customers from Clark using information obtained unjustly. An obvious example would be an email from O'Brien to a Bauer colleague indicating he had been in contact with a customer, and he had obtained their information from a contract list held on his personal computer from the time of his employment at Clark. Alternatively, if an internal Bauer spreadsheet detailed lease end dates for customers of Clark Automotive, this may support Clark's position that O'Brien utilized stolen information to make vehicle sales at Bauer.

Reasonability Testing. Oftentimes, a forensic analysis may not yield reasonable certainty regarding causation. This may be the case if there is a lack of adequate documentation or there is a possibility that multiple factors may have had an impact on Clark's customer loss. In such cases, it is still possible to develop reasonable proof of causation utilizing a multi-faceted approach and by compiling various factual pieces of information.

An evaluation of each of the dealerships' incentive programs prior to and throughout the damages period may help to determine if other factors impacted Clark's decrease in new and repeat customer sales. If Clark's customer incentives became less favorable prior to or during the damages period, such decreases in incentives may have played a role in the decline in vehicle sales. Other business changes occurring at each of the dealerships could be evaluated in much the same way. The evaluation of these other factors may help to develop reasonable certainty of the ultimate cause of the customer loss experienced by Clark.

Additionally, a general evaluation of the characteristics of customers allegedly lost could be performed. For example, Clark may estimate based on historical sales information that 60% of customers that purchase a vehicle will ultimately become repeat customers. If only 25% of the customers that had Larry O'Brien as their primary contact at Clark prior to his departure return for future sales, this may be an additional piece of information to help support a reasonability argument. Finally, methods as simple as customer surveys may be utilized to determine why customers ultimately chose not to purchase their new vehicle at Clark Automotive.

In addition to issues specific to each of the dealerships, Clark should also consider macroeconomic causes of their sales decline. As the economic condition in the region has been bleak, it may be the case that external factors have played a large role in Clark's decrease in vehicle sales. A decrease in consumer spending commonly occurs during periods of high unemployment and economic turmoil, and this may have an impact on vehicle purchases. Further, as banks in the region have reduced financing for new vehicle purchases, an assessment of financing options available to customers of each of the dealerships may reveal other factors impacting the dealerships' comparative vehicle sales.

It should be noted that even with evidence establishing that the customer list was stolen, customers were contacted, and sales were made, lost *profits* may still be minimal. As vehicle margins (incremental revenues less incremental costs) are often low for dealerships, it may be possible that lost sales do not correlate with high levels of lost profits. All factors would need to be considered and evaluated in the actual and "but-for" scenarios in order to calculate incremental lost profits.

Case Conclusion. The above-outlined case is an example of how a detailed investigation of causation in damages assessments becomes increasingly important during period of economic transformation. The automotive industry has been especially impacted by the recent economic downturn due to its susceptibly to weakening credit markets and decreased consumer spending. It therefore becomes necessary to consider multiple potential internal and external causes of damages experienced by industry participants such as Clark Automotive. By considering all possible factors, Clark will develop a more sound and credible case for damages.

Conclusion

As the general economy and many individual industries are experiencing transformations of historic magnitude, assessing causation relating to financial damages can become a complicated undertaking. This stems from the fact that in complicated economic environments, multiple events and external factors may make establishing a defendant's liability with "reasonable certainty" very difficult. It therefore is necessary to develop a fundamental understanding of common strategies and techniques used in causation analysis, ranging from but-for analysis to substantial factor and foreseeability tests. By utilizing such techniques, organizations such as Clark Automotive can be one step closer to completing the crucial analysis necessary to assess causation.

Endnotes

1. BVR's Guide to Lost Profits Damages Case Law, Chapter 1
2. BVR's Guide to Lost Profits Damages Case Law, Chapter 1
3. Litigation Services Handbook, 4th Edition 2007, Weil, Frank, Hughes, and Wagner, pg 2.3
4. Litigation Services Handbook, 4th Edition 2007, Weil, Frank, Hughes, and Wagner, pg 2.3
5. Litigation Services Handbook, 4th Edition 2007, Weil, Frank, Hughes, and Wagner, pg 2.3
6. Recovery of Damages for Lost Profits, July 2005. Volume 1, Chapter 1.7 (citing *Ashland Management Inc v Janien,* 82 NY2d 395, 403; 604 NYS2d 912, 915 (1993))
7. Recovery of Damages for Lost Profits, July 2005. Volume 1, Chapter 1.7 (citing *Welch v US Bancorp Realty & Mortgage Trust,* 286 Or 673, 704-05; 596 P2d 947, 963 (1979))
8. *Id.*
9. Uniform Commercial Code, Section 2-715
10. Litigation Services Handbook, 4th Edition 2007, Weil, Frank, Hughes, and Wagner, pg 2.4
11. Recovery of Damages for Lost Profits, Volume 1, Chapter 1.10
12. Business and Commercial Litigation in Federal Courts, Chapter 86:42
13. Recovery of Damages for Lost Profits, Volume 1, Chapter 1.10 (citing *Hadley v Baxendale*, 9 Exch 341, 156 Eng Rep 145 (1854))
14. Recovery of Damages for Lost profits, Volume 1, Chapter 1.11 (quoting *Hadley v Baxendale,* 9 Exch. 341, 156 Eng Rep 145 (1854))
15. Litigation Services Handbook, 4th Edition 2007, Weil, Frank, Hughes, and Wagner, pg 2.4-2.5
16. *Wyndham Int'l, Inc v Ace American Ins Co,* 186 SW3d 682 (Tex App 2006).
17. BVR's Guide to Lost Profits Damages Case Law, Chapter 1 (quoting *Wyndham Int'l, Inc,* 186 SW3d 682 (Tex App 2006))
18. BVR's Guide to Lost Profits Damages Case Law, Chapter 1, quoting *Hicks Oil & Butan Co v Garza,* No. 04-05-00836-CV (Tex App 4 Dist 2006) (citing *Helena Chem Co v Wilkins,* 47 SW3d 483, 504 (Tex 2001))
19. BVR's Guide to Lost Profits Damages Case Law, Chapter 1, discussion of *GAI Audio of New York, Inc v Columbia Broadcasting System, Inc,* 340 A2d 736, 753 (Md App 1975).
20. While this case study is loosely based on an actual case, all parties' names and pertinent facts have been changed.

Biomechanical Analysis: Counter-Intuitive Insights

By: Jeffrey A. Pike, *Forcon International* Copyright © 2009 Jeffrey A. Pike

Executive Summary

Biomechanical analysis is a valuable tool in the forensic analysis of injuries. A careful analysis of the details of the injury, in connection with the underlying medical data, will permit the biomechanical expert to provide a coherent and defensible explanation of the extent and nature of the causal connection — or lack of it — between an event and an injury. It is often the case that what might seem to be an obvious connection between an accident and an injury is not supported by the physical evidence. For this reason, biomechanical analysis, which is commonly used by clinicians, safety researchers and others to evaluate risks, can also be of significant assistance to the attorney who is defending a personal injury action.

Jeffrey A. Pike's s professional credentials include: Senior Technical Specialist, Ford Motor Company (retired after 32 years); Adjunct Professor, Wayne State University, Biomedical Engineering Department; Fellow, Society of Automotive Engineers (SAE); Principal Lecturer & Organizer, SAE Seminars on Automotive Safety (24 Years), and invited speaker at conferences in the US (including two White House Conferences), Europe, China, India, Korea and Australia. He has served as a consultant to various agencies, including the Centers for Disease Control (CDC,) National Academy of Sciences, NHTSA and state and local governments. His publications include technical papers, book chapters and three textbooks — *Automotive Safety, Neck Injury,* and Forensic Biomechanics. A fourth book, *Neck Injury Biomechanics* (in press) is the first in a series focused on specific body regions. His additional teaching experience includes guest lectures at MIT, Medical College of Wisconsin, University of Virginia and Harvard Medical School. His educational background includes studies at Polytechnic Institute of New York, New York University and the University of Michigan. His email address is jp@bciconsult.com.

Forensic biomechanics can provide triers of fact, as well as clinicians, government regulators, product developers and safety researchers with an additional methodology for applying reasoned discourse to their decision-making process.[1] The following examples provide instances where the insight provided by biomechanics may be counter-intuitive and therefore, all the more valuable.

Case Study 1: Pre-Existing Condition

The first case study presents a rather straight-forward analysis. The case studies that follow will generally tend to be more complex. The basic scenario involves a 68-year old male driver involved in a frontal motor vehicle impact. He has been diagnosed with a hiatal hernia and the question the expert has been asked to address is "Did the accident cause the hiatal hernia and if not, what was the cause?" A hiatal hernia occurs when abdominal contents migrate upward from the abdomen through the diaphragm into the chest cavity.

The medical records indicate that the driver had no complaints at the scene, but three days afterward he went to an emergency room as a walk-in, complaining of neck and abdominal pain. Upon examination, he was found to have no abdominal bruising. Ultrasound imaging revealed a hiatal hernia.

Biomechanical Analysis. Photographs of the vehicle showed minor frontal damage, no steering wheel rim deformation and no airbag deployment. The consultant concluded that biomechanically, the hernia did not appear to be causally related to the accident. Furthermore, the consultant cited a statistic that hiatal hernia is present in 60% of males who are 60 years old and older[2] and therefore concluded that to a reasonable degree of biomechanical certainty, the hernia was pre-existing and not attributable to the subject accident.

Case Study 2: Three Vehicle Chain Impact

As the name implies this case study involves three vehicles that are lined-up and facing in the same direction. The front-most vehicle is vehicle 1 (V1), the middle vehicle is vehicle 2 and the rear-most vehicle is vehicle 3. There is general agreement that there was at least one impact involving the front of V3 and the rear of V2 and at least one impact involving the front of V2 and the rear of V1 (*i.e.* V3 rear-ended V2 and V2 rear-ended V1) [Figure 1].

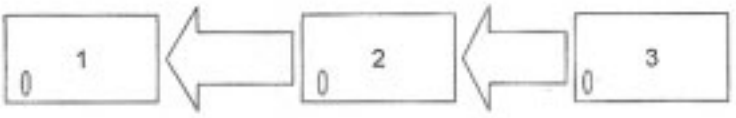

Figure 1. Three-Vehicle Chain Impact

Head injury may be produced by a contrecoup mechanism, that is, an impact to the rear of the head may produce an injury to the front of the brain.

The medicals indicate that the driver of Vehicle 2 (D2) was examined in the emergency room found to have forehead bruising and closed head injury consisting of minor contusions to the frontal poles of the brain. There are differing accounts regarding which vehicle impact occurred first. According to the driver of V3, V2 hit V1 and then V3 hit V2; whereas according to the driver of V2, V3 hit V2 and then knocked V2 into V1. The driver of V1 reports that he was parked (and unbelted) and does not know if V3 hit V2 before or after V2 hit V1. His statement contains the quotation that "all he knows is that V2 hit his vehicle while he was stopped" and that he was injured. The experts were asked to address which impact caused the closed head injury sustained by D2.

Biomechanical Analysis – Expert A. Expert A (consulted by D3) opined as follows: The medical records report bruising to the front of the head and contusion to the front of the brain, so the CHI was caused by forward head motion and impact involving the front of the head and this in turn was produced by an impact involving the front of the vehicle (V2 into V1). Thus the impact of V2 into V1 was the significant impact regarding D2's brain injury, and the impact of V3 into V2 was insignificant regarding D2's brain injury. Furthermore, with regard to injury causation, the sequence of the impacts (*i.e.* did V2 into V1 occur before V3 into V2) does not matter.

Biomechanical Analysis – Expert B. Expert B (consulted by D2) provided an opinion that was not only quite different form Expert A, but also appeared at first to be counter-intuitive. Photographs of vehicle damage showed that the V3/V2 impact was much more severe than the V2/V1 impact. There was considerably more vehicle damage to the front of V3 and the rear of V2 than to the front of V2 and the rear of V1. This more severe impact would be expected to produce the more abrupt head motion and to move the head of D2 rearward.

Head injury may be produced by a contrecoup mechanism, that is, an impact to the rear of the head may produce an injury to the front of the brain. [Figure 2] This is especially true for the frontal poles of the brain [Figure 3], which overlie some jagged bony surfaces of the skull interior [Figure 4]. Thus, it was the V3 into V2 impact that caused the brain injury for D2 and the V2 into V1 impact was insignificant with regard to the brain injury.

No bruising to the back of the head was reported in the medical records, either because it was covered by the driver's hair or because the head impacted with the padded head restraint. In any event, the rearward motion was sufficient to abrade the frontal poles. In this instance, the forehead bruise was incidental and the significant impact was to the rear of the head.

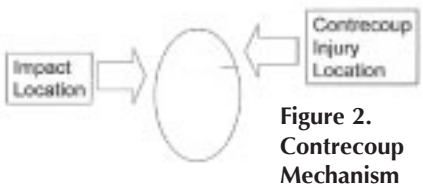

Figure 2. Contrecoup Mechanism

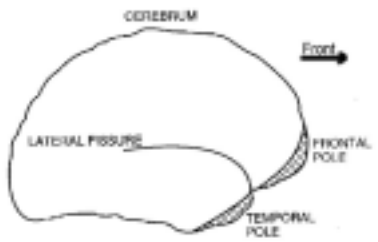

Figure 3. Frequent Brain Laceration and Contusion Sites[3]

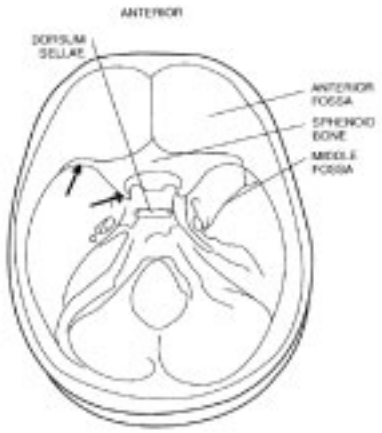

Figure 4. Interior of the Skull[4]

Case Study 3: "Slip and Fall"

This case involves a man who slipped and fell from a height of about 3 feet and landed on his head. He sustained brain and spine injury. He was hospitalized, but only survived for about one day. The consultant was asked to address whether the fall would have been survivable if the floor had been softer (conformed to an optional guideline that specified a flooring surface that was about ¼ less stiff).

Biomechanical Analysis. The initial approach might be along the lines of a common sense view that the softer the impact surface, the better. However, biomechanical analysis may lead to a different conclusion in a particular case. The medical record from the treating neurosurgeon [Figure 5] makes the assessment that the patient had chronic spinal stenosis, a chronic — and hence pre-existing — narrowing of the bony canal in which the spinal cord resides. This in turn would make the cord susceptible to compression injury, which in turn would compromise its function. The neurosurgeon noted stenosis from C2 down to C5 — this includes the region of the

ASSESSMENT:
At this point, I believe this patient had some type of injury to the brain and possibly the upper cervical spinal cord. Again, he had chronic stenosis essentially from C2 down through C5 or so. Apparently, he was relatively asymptomatic prior to this injury except for some neck aching pain. I believe at the scene, he probably was apneic for a period of time and probably suffered a hypoxic/anoxic brain injury. I think the prognosis is poor. There is certainly not an obvious surgical lesion with regards to the brain.

Figure 5. Neurosurgical Report

spinal cord that regulates breathing and so this is a reasonable mechanism for the man's breathing to have been compromised and for this in turn to diminish blood supply to the brain, or in the neurosurgeon's words, "he probably was apneic for a period of time and probably suffered a hypoxic/anoxic brain injury." He also noted that he did not find any "surgical lesion" (thereby ruling out such head impact injuries as skull fracture or hematoma).

In another note (not shown) the neurosurgeon also described a fracture of C5 and this would be consistent with a so-called diving-type injury, i.e. the type of neck injury that is sometimes produced when a swimmer dives into shallow water.[5] A CT of this injury is provided [Figure 6]. Note that the injury includes a vertebral body which is fractured essentially in half (arrow).

Based on the above discussion, the biomechanical expert concluded that the brain was not directly injured by the force of the mechanical impact with the ground; rather, the ground merely served to stop the motion of the head. It was the momentum of the "falling" torso and limbs that fractured the cervical spine and thereby injured the region of the spinal cord that controls breathing and this in turn disrupted the brain's oxygen supply. Thus, the tissue of the brain was not injured by the impact force per se and so, a somewhat softer flooring surface would not be expected to affect this injury mechanism or to mitigate the outcome.

Case Study 4: "Impact Speed vs. Injury."

This case study is entitled "Impact Speed v. Injury." In this example, the expert is asked to address a question with a seemingly-obvious answer: If an impact between two vehicles had occurred at a lower speed, how would that have affected the injury severity?

According to the police report, this was a two-vehicle impact with Vehicle 1 stopped in a cross-walk and facing North and Vehicle 2 heading east and impacting the driver side of Vehicle 1. The driver of Vehicle 2 (D2) suffered severely comminuted pelvic fracture and died shortly after arriving by EMS at the emergency room. Two accident reconstructionists studied the case. Their calculations produced two very close values for the impact speed, ranging from 55 to 58 mph. The biomechanic was asked to address the effect on D2's injury if the impact speed had been 54 mph.

AIS	SEVERITY
0	NONE
1	MINOR
2	MODERATE
3	SERIOUS
4	SEVERE
5	CRITICAL
6	MAXIMUM INJURY (VIRTUALLY UNSURVIVABLE)

Figure 7. AIS Levels[7]

AIS	Approx. Fatality Rate
1	.0
2	.1
3	1.
4	10.
5	50.

Figure 8. AIS vs. Approximate Fatality Rate

The Abbreviated Injury Scale (AIS) is a well-established, widely used methodology for assigning a relative ranking or severity to different injuries. It is based on the likelihood that a given injury will be survivable and in fact, aggregates injuries into one of 6 levels, designated AIS1

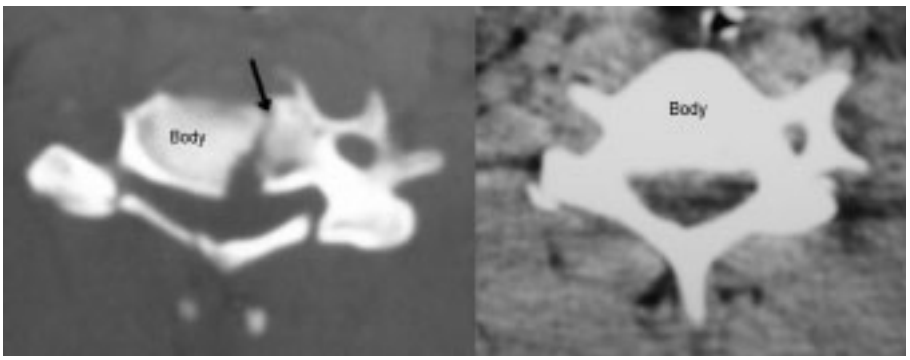

Figure 6. CT showing vertebral fracture (left) and no fracture (right)

through AIS6, which correspond to increasing severity [figure 7] and decreasing likelihood of survival[6] [figure 8].

Biomechanical Analysis. The expert discusses that the fracture was not a hairline or minimal fracture, but rather a severely comminuted fracture. Therefore, even if the speed (and hence the energy) of the impact were somewhat reduced, the resulting injury would still be expected to be a comminuted fracture (although somewhat less comminuted than the original fracture.) Thus, the AIS rating, which does not specify degree of comminution, would stay the same and so the fractures in the two scenarios — original and lower speed, would have the same AIS and hence the same probability of fatality.

Thus, if the impact speed were lowered to 54 mph (and hence the vehicle was traveling within the 55mph speed limit) the outcome would not have changed. This analysis can also be quantified as follows: the AIS specifies six levels of injury and so, on the average, about 55mph/6 = 9.2 mph/injury level. Thus, a change of less than about 9 mph would be expected to stay within the same injury severity. Again, this is not to say that there would be no change in the impact and the injury, but rather, that the change would not be clinically significant with regard to the likelihood of survival.

Conclusion

Biomechanical injury analysis can apply an established, well-regarded methodology, used by professionals in a variety of fields including product development, health care and safety regulations, to address such issues as: did an injury occur, was it caused by a particular event and if not, what was the cause? In some instances, the answers to these questions are not the same as might be initially thought.

Endnotes

1. Pike JA (2008): Forensic Biomechanics: using medical records to study injury mechanisms, SAE, Warrendale.
2. Braunwald E (1987): Harrison's Principles of Internal Medicine, 11 Ed., McGraw-Hill, p.1238.
3. Pike JA (1990): Automotive Safety: anatomy, injury, testing & regulation (SAE, 1990).
4. Note 3.
5. Pike JA (2002): Neck Injury: the use of x-rays, CT's and MRI's to study crash-related injury mechanisms, SAE, Warrendale.
6. Ulman MS (1986): Evaluation of the AIS as a measure of probability of death, Proc. 1986 IRCOBI Conf, Zurich.
7. The Abbreviated Injury Scale (1990): Association for the Advancement of Automotive Medicine, Des Plaines.

Young Lawyers Section

VI. Trial Tips, Techniques & Strategies Part 1: Basic Training

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

Executive Summary

This article is the sixth 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 fourth article focused on dispositive motions while the fifth article outlined trial preparation. This two-part article will provide tips, techniques, and strategies for trial advocacy.

Part one of this article covers a broad range of the basics of trial advocacy. There are countless resources which examine the many details and possibilities involved in trial practice. You are encouraged to seek out these resources as you become more experienced and comfortable with the basics of trial advocacy. Part Two of this article will appear in the next issue of Michigan Defense Quarterly*, where each stage of the trial will be covered in detail from opening statements through closing arguments.*

Scott Homes is an associate in Foley & Mansfield, LLP. His email address is sholmes@foleymansfield.com

The author wishes to recognize and thank Professor J. Alexander Tanford of the Indiana University School of Law – Bloomington and the Honorable Thomas L. Ludington of the United States District Court for the Eastern District of Michigan for their extensive knowledge, experience, and commitment to his development as a young attorney.

Creating a Theme

Before stepping into the courtroom, you must develop a theme for your case that represents your client's position. Most trial attorneys will agree that having a trial "theme" is essential to capturing a jury's attention and delivering your theory of the case. A good theme can be applied throughout the trial and will link all the stages together. That is why creating a theme is an important part of pre-trial preparation. A theme is an opportunity to be creative with your presentation and it must be short, relatable, and memorable.

Short: One sentence can often be too long. A few words are usually sufficient and most effective.

Relatable: It must create a link in each juror's mind between your case theory and arguments.

Memorable: Your theme must be catchy enough to stick in each juror's mind throughout the trial and deliberations.

Take, for example, a breach of contract case between a business developer and a construction contractor. You represent the business developer and your case theory is that the contractor continually failed to meet construction deadlines, resulting in damages to your client. A good theme for your case could be described to the jury as follows, "this is a case about *broken promises*." The "promises" are the construction deadlines outlined in the construction contract and specifically agreed to by the contractor.

Another example: consider a negligence lawsuit by an automobile driver who you contend pulled out in front of your client's truck, which was hauling products for delivery. An example of a theme for this case would start with, "Ladies and gentlemen of the jury, do you remember the first thing your parents told you before crossing the street as a child? They told you to 'look both ways before you cross.' Well, the case you will hear today is about what happens when you don't follow that important advice. This case is about *failing to look both ways before you cross*."

Creating a good theme should be one of the first things you do when preparing for trial because it will need to be woven into your opening statement, direct and cross examinations, and closing argument. At the very least, it will help you tie these stages of the trial into one uniform presentation.

Learning to Ride — Part One: Entering an Exhibit

One procedure that many young attorneys stumble over is how to properly enter a piece of evidence. It really is a simple process and is as unforgettable as riding a bike — once you have practiced it enough, you will never have to think about it again.

Creating a good theme should be one of the first things you do when preparing for trial because it will need to be woven into your opening statement, direct and cross examinations, and closing argument.

Let's assume we need to enter a letter that the witness wrote to one of the parties. Naturally, your examination of the witness (regardless of whether it is on direct or cross) will at some point lead him to mention that he wrote a letter. At this time, your witness and everyone else in the courtroom is expecting to see that letter. Here is the procedure:

Step 1. Walk over to opposing counsel and show her the document. She will give it a brief look over and either object to it or give some indication that she does not oppose its use (a nod, an "Okay," or nothing at all). Make sure it does not have any writing, notes, or other markings (including highlighting) that were not on the original.

Step 2. Ask the judge, "May I approach the witness?" The judge will allow it and you should now take the document over to the witness. *Note*: Many attorneys will have their exhibits marked prior to use (in fact, some courts require it). If your document has not been previously marked, just take it over to the court reporter prior to giving it to the witness and ask for it to be marked. *Note*: Asking for permission to approach the witness usually is necessary only once per witness. Once permission is granted, most judges do not expect you to ask for it again with the same witness.

Step 3. As you are walking toward the witness, say the following, "I am now showing you what has been marked for identification purposes as Defense Exhibit 1." ***Note***: The distinction that the document is marked "for identification purposes" is a formality based on procedure. The document is obviously not an exhibit simply because it has been marked. As a result, it is important to note for the record that its designation as "Defense Exhibit 1" is simply for identification purposes, not because it represents an actual exhibit admitted into evidence. This is important for situations where a document is ultimately not admitted into evidence for one reason or another. When reading a transcript of the trial, it would be confusing to see "Defense Exhibit 1" twice, where it refers to two different pieces of evidence (one entered and one not entered).

Step 4. Hand the document to the witness and ask him, "Do you recognize this document?" When he answers "Yes," ask him "What is it?" He will respond with something to the effect of "This is the letter I wrote to Mr. Jones." It would probably be best to also ask him what the date of the letter is or, if there is no date, to ask him to identify generally when he sent it. *Note*: At this point, most judges and opposing counsel would accept that proper foundation has been laid as to this potential piece of evidence. However, it may also be necessary to ask him how he knows this is his letter (he wrote it and it has his signature). *Note*: Remember that this document is not an admitted exhibit yet. Do not allow the witness to read or discuss any of the *substance* of the document. It is improper and objectionable. This step is merely to *identify* the document.

Step 5. Now that you have laid the foundation for the document, ask the judge, "Your Honor, the Defense moves to have this document admitted as Defense Exhibit 1." The judge will ask opposing counsel if there are any objections and, barring any, will state that the document has been admitted into evidence.

Step 6. Proceed with examination. At this point, you are free to discuss the substance of the exhibit and proceed as you usually would with questioning. *Note*: Once the witness has an understanding of the exhibit and you no longer need him to refer to it, it is best to take it from him so he is not distracted or left to hold it throughout the remainder of the examination. Remember to place the exhibit in the proper area once you are done using it.

Learning to Ride – Part Two: Impeaching a Witness

Another common courtroom procedure that young attorneys have difficulty with is the proper method for impeachment on cross-examination. For those who did not take a trial advocacy class in law school, "impeachment" or "impeaching the witness" is the method for discrediting a witness' testimony based on prior inconsistent statements. It is one of the most important — and satisfying — parts of trial practice.

Let's assume you are questioning a witness who denies receiving a phone call from your client. The fact that he received this phone call is important to your case and he indeed admitted to this fact during his deposition six months ago. Because this is an important fact, you no doubt have prepared a copy of his deposition transcript in advance with the page and line marked where he admitted to receiving the call. The following is the impeachment procedure starting from the moment the witness denies receiving the call:

Step 1. Repeat the question a second time to force the witness to commit to his inconsistent statement. For example, "So, you are denying that you received a call from Mr. Jones on May 5th, 2005?" *Note*: If he now backs off his denial, then take a moment to

criticize his credibility based on his back-to-back contradictory statements. Do not belabor the point, just make the witness uncomfortable enough to think twice about offering inconsistent statements in the future. It is usually enough to say something to the effect of, "Well, you've now responded both 'Yes' and 'No' to the same question. Which is the truthful answer?"

Step 2. Establish with the witness that he testified previously at a deposition. Ask the witness the following questions:

a. "Do you remember sitting for a deposition back in August?"

b. "Do you remember being asked all sorts of questions by both myself and your attorney?"

c. "Do you remember being placed under oath and agreeing to tell the truth?"

d. "Did you, in fact, tell the truth that day?"

Step 3. Find the transcript with his admission and tell opposing counsel what page and line number you will be referring to. The moment you mention the witness' deposition, opposing counsel will know you are going to impeach the witness. *Note*: Although you may end up giving the witness a copy of the transcript that you are using for impeachment, there is no need to follow the formalities of entering an exhibit. The use of a transcript during impeachment is not meant to result in the entering of the transcript as an exhibit.

Step 4. Establish the prior inconsistent statement. There is minor disagreement over which is the best way to accomplish this.

Method A: Some attorneys at this point read the question and subsequent response from the transcript to the witness (e.g. "I asked you, 'Did you receive Mr. Jones' call?' and you responded 'Yes.'")

It is usually enough to say something to the effect of, "Well, you've now responded both 'Yes' and 'No' to the same question. Which is the truthful answer?"

After doing this, they ask if the witness remembers giving that response and follow it by pointing out the inconsistency between the deposition response and courtroom response ("You've now responded both 'Yes' and 'No' …). The witness is finally asked to identify which response is the truthful one (almost universally followed by a sarcastic, "Are you sure?").

Method B: Other attorneys, including this author, prefer to read only the deposition question and not the response. Instead, after reading the question, the witness is handed a copy of the transcript and asked to read the relevant lines and/or pages to himself. Once the witness is done, the attorney asks, "Now, having read your previous, sworn deposition testimony, I'll ask you again: Did you receive a call from Mr. Jones on May 5th, 2005?" One of the most satisfying and powerful parts of the impeachment process is letting the jury watch the witness quietly read his or her deposition testimony and then embarrassingly state the opposite of his or her original courtroom testimony. The jury is not told his deposition response, but they do not need to be told. The witness's reaction to it is more indicative of the response than hearing the words would ever be.

One of the most satisfying and powerful parts of the impeachment process is letting the jury watch the witness quietly read his or her deposition testimony and then embarrassingly state the opposite of his or her original courtroom testimony.

Regardless of which method you prefer, a proper impeachment is a powerful and impressive experience for everyone in the courtroom, especially the jury. *Note*: There is always the possibility that the witness will stick with his or her courtroom testimony in direct contradiction of his deposition testimony. In this situation, you should emphasize the inconsistent testimony by pointing out the witness's failure to tell the truth. Do not spend too much time on it, just make sure it is a moment the jurors will not forget, and remember to mention it in your closing. Obviously, for *Method B* followers, you should make sure the deposition question and answer is read for the jury before proceeding.

The Basics

Housekeeping. If you are unfamiliar with the judge presiding over your case, ask him or her some basic "housekeeping" questions prior to trial. The questions may include whether the judge allows attorneys to roam freely around the courtroom during their presentations, where to place exhibits that have been admitted into evidence, how much time is allotted for opening statements and closing arguments, etc.

Do not read from a script. Whether it is your opening, closing, direct or cross-examinations, you should know the information you want to say. A rough outline is ok, but there is nothing less persuasive than an attorney who simply reads to the jury. When you truly know and understand what it is you want and

need to say, you will be amazed at how easy it is to improve it and make changes "on the fly." This ability is critical since trial cannot be scripted. You will frequently find that what you planned to say no longer applies because certain evidence was not admitted or other uncertainties became realities. Aside from this, some of your best material will come from your mind the moment before you say it, not from a script you wrote weeks, days, or even hours ahead of time.

Distractions. A simple rule is do not hold a pen, notebook, or other item when talking to the jury. It is a distraction that keeps jurors from focusing on what you are saying.

Pacing. When speaking to the jury, it is common for attorneys to either stand in one place or pace uncontrollably. Both are a distraction to the jury and are difficult habits to break. Trial advocacy experts will tell you to practice what is called "purposeful" walking, which means to time your movements with important and transitional points within what you are saying. For example, during your opening, move from one side of the jury box to the other while introducing your witnesses, but stop when you discuss what they will be testifying about. Practicing your opening or closing is crucial to eliminating any pacing problems since most people are unaware they have a problem until someone else points it out to them. Try putting a few X's on the floor with tape to mark stopping points for you to use. If you are not on one of the X's, do not stop walking and time your traveling between them to coincide with what you are saying.

Trial advocacy experts will tell you to practice what is called "purposeful" walking, which means to time your movements with important and transitional points within what you are saying.

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Lecterns. Many people will tell you that using a lectern is fine if that is what you are comfortable with. However, others will tell you that standing behind a lectern creates a psychological "barrier" between you and the jury and that if you are comfortable with your case you will naturally avoid using it, which is something the jury will recognize. If you can present to the jury without being "tied" to a lectern, you should do it. It will always be more stimulating to listen to someone who moves around rather than someone who speaks from behind a lectern. That said, you should practice what is most comfortable for you, since any effort to project false confidence will likely be transparent to the jury.

Use common language. As everyone knows, being an attorney changes the way we speak. "After" becomes "subsequently," "agree" becomes "stipulate," and, in Michigan, "summary judgment" becomes "summary disposition." Do not assume jurors know that a handwritten sheet of paper can be referred to as a "document." Studies show that most jurors you will encounter have a high school education at best. But even highly educated people can be lost when bombarded with the amount of information typically thrown at them during a trial. For these reasons, it is best to use common, conversational language as much as possible.

Note: remember to "translate" this sort of language when your witness uses it. Expert witnesses in particular will use language that many people simply do not know. There is obviously a benefit to having your expert *sound* like an expert, but balance this against the fundamental requirement that the jury must actually *understand* what the expert is saying to be capable of evaluating it. Decide what language is essential and what language the expert should make more common. For the language that is essential, it is important for you, as the attorney, to help translate it to the jury once it is spoken by your expert. It is usually enough to say, "And, Dr. Taylor, when you say 'deoxyribonucleic acid,' you're simply saying 'DNA,' right?"

Avoid pronoun confusion. Although common language is important for a clear presentation, other conversational habits must be avoided at all costs. One habit to avoid is the tendency of people to litter their statements with pronouns. There's no quicker way to confuse a jury than to use "he," "she," "him," her," or "they" multiple times in one sentence. Make sure to refer to people by name, title, or some other unique identifier as much as possible to avoid conclusion. This advice

If you can present to the jury without being "tied" to a lectern, you should do it. It will always be more stimulating to listen to someone who moves around rather than someone who speaks from behind a lectern.

also comes as a responsibility when you are conducting direct examination if you notice your witness is using too many pronouns. Simply interrupt the testimony to establish who "they" are or "he" is.

Sidebars. Sidebars are used frequently in court to discuss all sorts of topics outside of the jury's hearing, including admissibility of evidence, timing considerations, objections, concerns, or most anything the attorneys or the judge do not want heard in open court. Sidebar conversations with the judge and opposing counsel can easily be the most "colorful" of all discussions you will hear in court. Do not be afraid to ask for a sidebar. Nearly all judges will gladly invite you up to the bench upon request. Also, most sidebars clear up confusion, speed up the pace of trial, or simply make the process run more smoothly – all three of which are welcomed by judges universally. So, do not feel uncomfortable to ask for a sidebar. On this note, always participate in a sidebar if the judge or opposing counsel requests one. Even when you know the topic does not require your input, it is your right and responsibility to hear what is said.

Pay attention to the effect of sustained objections on all stages of the trial. Most trial preparation assumes many future outcomes during the trial, like the admission of a particular piece of evidence. It is important to recognize when these assumptions turn out to be wrong. The arguments you make in your closing are the most subject to change when a crucial piece of evidence is denied admission. Pay attention to these factors and change your strategy and presentation accordingly.

Two basic rules for objections: Know *how* to use them and know when *not* to use them. During the course of trial, there will be many instances that are worthy of objecting to, but choose your battles. Objections to matters of form, such as leading, foundation, or compound questions should be used wisely. Use objections in situations where the information sought is critical or you wish to "break up" the flow of your opponent's presentation. However, be aware that at some point the jury may become annoyed at your constant interruptions or, even worse, believe you are trying to keep them from hearing important information. Remember, just because you *could* doesn't mean that you *should*.

Never read content from documents that have not been admitted into evidence. When a document is not yet admitted into evidence, it is improper, objectionable, and possibly grounds for a mistrial if you read or allow the content of the potential evidence to be presented to the jury. This is especially important when you hand such a document to your witness and ask him to identify it. Carefully word your foundational questions and pay close attention to his answers. Maintain this vigilance when your opponent is doing the questioning.

Do not argue on cross. Anyone who has performed a cross-examination will tell you that arguing with a witness is a futile effort to attain an unnecessary result. You will never convince an adversarial witness to agree with you. If you try, you will frustrate and embarrass yourself in front of the jury. The beauty of a well-prepared and executed cross is that you should never need to argue. Your questions should all be designed to elicit a "Yes" or "No" answer. If the witness refuses to give the answer you know is the truthful one, either impeach him or prove him wrong with evidence.

Be ready to control witnesses. On direct, control starts with your preparation of your witness before trial. Practice questioning your witness and pointing out when an answer is non-responsive or a narrative. Agree on the visual signs you will give when you want your witness to stop talking (raising a hand is the most natural). When in trial, a simple, polite, but firm "let me stop you there" or "we'll get to that in a moment" is usually enough to regain control of a witness who is giving you more than you asked for. Although sometimes more difficult, the same technique can be used during cross-examination. You must be tough when trying to control an adversarial witness. Do not be afraid to raise your voice and make a stern request that the witness answer your questions with a "Yes" or "No." Only if the witness continually ignores your instructions should you request an admonishment from the judge.

Maintain control of the presentation and use of your exhibits. Avoid distributing packets of pictures, multiple documents, or other materials to the jury at a time when you want them to focus on the witness who is making use of the exhibit. Studies have shown that people will browse and read over an entire document despite the fact that the witness is only testifying about a portion of it. Also, if opposing counsel made use of a chart, diagram, or other visual aid prior to your questioning or opening/closing, make sure that she takes it down or that you turn it away from the jury so they are not distracted.

Law clerks are your friends. Finally, when you are too uncomfortable or uncertain to ask the judge a question, find the judge's law clerk. The clerk will know the answer to almost any question you could ask and are an excellent resource when working with judges.

Remember to check back in the next issue of the Michigan Defense Quarterly for Part Two of this article, where we will discuss tips, techniques, and strategies in detail for each stage of trial from opening statements through closing arguments!

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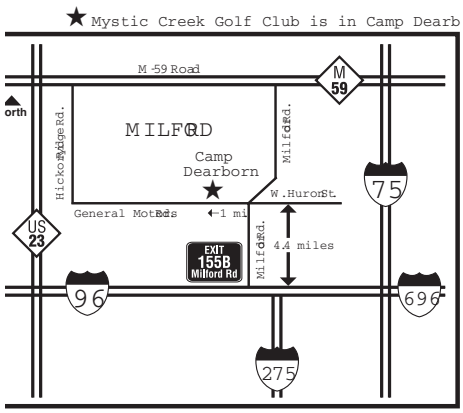

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By: Susan Leigh Brown, *Schwartz Law Firm P.C.*
sbrown@schwartzlawfirmpc.com

No Fault Report — July 2009

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

Quick Notes

Reconciling IMEs. The last no fault opinion out of the Supreme Court while Justice Taylor was still there is, not surprisingly, very favorable to no fault insurers reversing the prior jurisprudence which required no fault carriers to "reconcile" the conflicting opinions of independent medical examiners (who are referred to by the Plaintiff's bar as defense medical examiners) and treating physicians or consulting physicians retained on behalf of claimants. While the case, *Moore v Secura*, does not entirely insulate insurers from penalty interest and attorney fees when benefits are denied based on an IME, it relieves insurers from the obligation to attempt to reconcile contrary medical opinions.

Out of State Insurer Responsible for Motorcyclist's PIP. Court of Appeals rules that a non-Michigan insurer who has filed its certificate in Michigan per MCL 500.3163, is primary for motorcyclist's PIP benefits over the insurer for the parents of the motorcyclist with whom he resided.

Machine falling from employer's parked truck does not trigger PIP benefits. Because the tractor-trailer from which the deadly machine fell was parked, the accident did not "arise from the use of a motor vehicle as a motor vehicle" so PIP benefits are not available.

One-year-back. The courts are still not allowing no fault claimants to escape the one year back rule by alleging that insurers commit fraud in handling PIP claims, a tack which presumably is intended to replace the de facto stay until a formal denial was issued which was abolished in *DeVillers* and *Cameron*.

Michigan Supreme Court

No fault insurer has no duty to reconcile IME report that conflicts with treating physician's opinions

***Moore v Secura Insurance,* 482 Mich 507 (December 30, 2008)**

- Defendant, after paying PIP benefits for about a year, including paying for a knee surgery, terminated benefits after 2nd defense IME reported that Plaintiff's problems were related to pre-accident osteoarthritis.
- At trial, jury awarded Plaintiff $42,000+ in lost wages and $78,000 in penalty interest and attorney fees for unreasonable denial of benefits based on IME which was affirmed by the Court of Appeals.
- Supreme Court reversed, **overruling *Liddell v DAIIE*** and holding that insurers have no absolute duty to reconcile conflicting medical opinions or seek a "tie-breaker" when there are conflicting medical opinions but still act at their own risk in terminating benefits.
- Supreme Court also held that fact-specific inquiry to determine whether insurer unreasonably refused to pay benefits is required of the court before attorney fees can be assessed.

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.

The courts are still not allowing no fault claimants to escape the one year back rule by alleging that insurers commit fraud in handling PIP claims, a tack which presumably is intended to replace the de facto stay until a formal denial was issued which was abolished in DeVillers and Cameron.

Michigan Court of Appeals

Machine falling from a parked trailer does not "arise from the use of a motor vehicle as a motor vehicle"

Neill v Meemic Insurance, et al.
(Unpublished Ct of Appeals, April, 2009), Docket # 281293

- A large machine fell from a trailer during the course of insured's employment and struck decedent in head, killing him.
- Insurance companies for decedent and his wife refused to pay PIP benefits, arguing that decedent was engaged in unloading a parked vehicle, and was thus not entitled to PIP benefits pursuant to MCL 500.3106(2)(a).
- Trial court sided with defense and Court of Appeals affirmed.
- Ruled vehicle and trailer only incidentally involved in death and not engaged in transportational function at time of death — was being used in a storage function not as a motor vehicle.

Priority: Out of state insurer of motorcyclist

Tevis v Amex Assurance Company, et al.
(Unpublished MI Ct of Appeals, March 19, 2009), Docket # 282412

- Car & motorcycle accident in Michigan.
- Motorcycle operator had no insurance, but his parents, with whom he resided had a Michigan no fault policy with Geico.
- Driver of the car involved in the accident (whose insurer would normally be primary in an accident with a motorcycle) lived in Washington State and had a Washington insurance policy through Amex which had filed its certificate per MCL 500.3163 in Michigan for accidental bodily injury coverage but which did not issue Michigan No Fault policies.
- Both Geico and Amex denied benefits claiming the other was primary.
- Court of Appeals ruled Amex was primary because it had filed a certificate, and because pursuant to MCL 500.3114 insurer of the owner of the vehicle in a car/motorcycle accident is first in priority.

Fraud allegations against insurer fails to avoid one year back limitation

Johnson v Wausau Insurance Company et al.
(Unpublished MI Ct of Appeals, March 24, 2009), Docket # 281624

- 10 month old baby suffered severe brain injuries in car accident.
- Legal Guardian was never paid for attendant care over the course of many years. Insurance company did not advise guardian that he would be entitled to attendant care payment.
- Court noted that per the Michigan Supreme Court's holding in *Cooper v. Auto Club Insurance Association*, (see April's *Michigan Defense Quarterly*) a common law action for fraud was not subject to one year back rule.
- However, court heeded the warning from *Cooper* that plaintiffs would try to use fraud claims to circumvent one year back rule, so courts would have to strictly enforce 6 elements of fraud action — particularly that plaintiff acted in reasonable reliance on a material misrepresentation by the insurance company — before permitting fraud claim to proceed and found that plaintiff could not establish reasonable reliance noting that, typically, insurance company and claimant are in an adversarial relationship — not a fiduciary one.

Case Report

By: Brian McDonough, Esq.
Morrison Mahoney, LLP

Developments In Legal Malpractice Law

Brian McDonough, of Morrison Mahoney LLP, is co-Chairperson of the Membership Subcommittee of the Professional Liability Litigation Committee of the ABA Section on Litigation and is a member of its Attorney Liability Subcommittee. He also is a member of DRI's Professional Liability Committee and the Association of Professional Responsibility Lawyers. He is a contributor to the Newsletter of the ABA Standing Committee On Lawyers' Professional Liability. His email address is bmcdonough@morrisonmahoney.com.

Michigan Court of Appeals: Application Of Judgment Rule Reversed: *Shannon v Foster Swift Collins & Smith*

Unpublished, January 20, 2009
2009 Westlaw 127622
2009 Mich App LEXIS 378

Facts: Plaintiffs retained defendants to represent them regarding their purchase of real estate. Defendants disclosed two potential conflicts of interest. Plaintiffs waived in writing one conflict but maintained that defendant never addressed the second conflict. The sale fell through at the closing to the detriment of plaintiffs. The plaintiffs sued for, *inter alia*, a non-waivable conflict of interest. Plaintiff presented expert evidence that defendants breached the standard of care. Defendants moved for summary disposition because of, *inter alia*, the attorney judgment rule. The trial court granted the motion, holding that defendants in good faith gave legal advice well-founded in the law, notwithstanding that the advice ultimately was not correct.

Ruling: Plaintiff appealed, and the Court of Appeals reversed, holding that the case was replete with questions of fact regarding whether defendants, prior to the closing, should have attempted to determine whether their seller had complied with the requirements of the purchase agreement; and whether defendants failed to fully advise and counsel plaintiffs. The standard of care obligated defendants to provide plaintiffs both with legal arguments and counter arguments that could support and benefit plaintiffs' position, and to counsel plaintiffs regarding all realistic legal options. There were questions of fact on these issues.

Michigan Court Of Appeals: Judgment Rule Precludes Action

Messenger v James T Heos & Church
Unpublished, December 9, 2008
2008 Mich App LEXIS 2428

Facts: Plaintiffs hired a previous law firm to bring a complaint which sounded in medical malpractice and a claim for wrongful resuscitation. Plaintiffs then hired the defendant law firm. The underlying case went to a jury trial, and near the end of the jury trial, defendants abandoned the wrongful resuscitation claim. The verdict was for the underlying defendants. Plaintiffs brought a malpractice action against defendants, which moved for summary judgment based on, *inter alia*, the attorney judgment rule. The trial court granted summary judgment, and plaintiff appealed. Plaintiff argued that defendants advanced a theory of wrongful resuscitation consistently throughout the litigation and trial, but defendants unexpectedly withdrew it just before the end of trial. Plaintiffs also alleged that defendants failed to consult with plaintiffs before taking such a drastic step and wrongfully compromised their case without specific authority. Defendants argued that it was plaintiffs' prior attorney who pled wrongful resuscitation, and they believed it to be neither legally nor factually viable and a possible impediment for the remaining causes of action before the jury.

Ruling: The appellate court ruled that where an attorney acts in good faith regarding litigation strategy and trial tactic and in an honest belief that his or her acts are well founded in law and are in the best interest of the client, the attorney is not answerable for errors in professional judgment. The court held that defendants' choice to abandon the wrongful resuscitation claim was a strategic decision and an exercise of professional judgment in good faith 1) to excise an issue from the jury's consideration that defendants felt was both legally and factually implausible and in fact a detriment to the case as a whole, and 2) to refocus the case on those claims on which defendants believed they could prevail. Therefore, the alleged acts of malpractice fall within the attorney judgment rule, and the court affirmed the trial court's summary judgment.

Michigan Court Of Appeals: Statute Of Limitations Precludes Action; Discovery Rule Does Not Apply: *Gould v Huck*

Unpublished, September 9, 2008
2008 Mich App LEXIS 1785

The appellate court ruled that where an attorney acts in good faith regarding litigation strategy and trial tactic and in an honest belief that his or her acts are well founded in law and are in the best interest of the client, the attorney is not answerable for errors in professional judgment.

Facts: Plaintiff and her husband (now deceased) retained defendant for estate planning. Defendant prepared and plaintiff and her husband signed a joint trust and wills on 7/19/99. After the husband's death, there was a dispute between plaintiff and her husband's son-in-law regarding the trust. The son-in law's lawyer asked defendant to provide an affidavit, which he did on 7/13/04, and he was deposed on 7/28/04. Plaintiff sued defendant for malpractice on 3/13/06. Defendant moved for summary judgment because plaintiff did not bring her cause of action within two years of defendant's last service or within six months after the plaintiff discovered or should have discovered the existence of her claim, MCL 600.5805(6), MCL 600.5838(2). Plaintiff claimed that defendant's last service was when he provided his 7/13/04 affidavit. The trial court granted summary judgment, and plaintiff appealed.

Ruling: The appellate court affirmed, holding that the attorney-client relationship ended on 7/19/99 when the joint trust and wills were executed; and defendant's 7/13/04 affidavit was not an extension of the professional relationship because defendant prepared it at the request of the son-in law's attorney, not plaintiff. Plaintiff also sought application of the 6 month discovery rule, MCL 600.5838(2), claiming that she could not have discovered her cause of action until 7/06 when the probate court ruled on her petition for interpretation and construction of the trust. Defendant claimed that plaintiff could have discovered her cause of action when the trust problems started shortly after her husband's 2/10/04 death or after her 7/28/04 deposition. The appellate court held that the discovery rule started on the day of her deposition, which was more than 6 months before her action against defendant.

Michigan Court Of Appeals: Statute Of Limitations Precludes Action: *Mauro v Hosbein*

Unpublished, May 15, 2008
2008 Mich App LEXIS 1026

Facts: Defendant represented plaintiff in a criminal matter until October 1995. In 2007, plaintiff brought a legal malpractice lawsuit, alleging, *inter alia*, that defendant pressured plaintiff into entering a *nolo contendere* plea agreement; and that defendant inaccurately counseled that the plea agreement would not endanger his psychology and teaching licenses. Michigan has a two year statute of limitations for malpractice actions. However, an action may be commenced within six months after the plaintiff discovers or should have discovered the existence of the claim, if such discovery occurs after the two-year limitation period. Plaintiff claimed that he only first discovered defendant's malpractice on August 4, 2006, when he requested that his present attorney review his files and advise him regarding a reversal of the plea agreement. In March 1996, the Michigan Department of Education suspended plaintiff's teaching certificate. Six months later, the Michigan Board of Psychology suspended plaintiff's psychology license.

Ruling: The appellate court concluded that, within the general two-year malpractice statute of limitations period, the suspension of plaintiff's licenses put him on notice that, contrary to the advice allegedly provided by defendant, the *nolo contendere* plea did not shield him from negative or damaging professional ramifications of his prosecution. Thus, plaintiff knew or should have known of each element of a potential legal malpractice claim within that time, and his action was time barred.

U.S. District Court (E.D. Michigan): Underlying FTCA Action Does Not Provide Federal Jurisdiction For Malpractice Action: *Hertz v H Bruce*, T Hillyer, September 19, 2008

2008 U.S. Dist. LEXIS 73106

Facts: Plaintiff's Federal Tort Claims Act (FTCA) action was dismissed because it was filed after the statute of limitations expired. Plaintiff sued defendant for malpractice in federal court, and defendant moved for dismissal for lack of subject matter jurisdiction.

Ruling: The court held that although the FTCA action is a factual allegation in plaintiff's action, and although FTCA actions are brought in federal court, the FTCA claim is not the legal claim being made in the legal malpractice action. Since there were no federal questions and because the parties lacked diversity for the purposes of subject matter jurisdiction, the court did not have subject matter jurisdiction.

JOIN AN MDTC SECTION

MDTC has revised its practice sections, effective immediately. At right 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	Alan J. Couture acouture@sondeeracine.com Scott S. Holmes sholmes@foleymansfield.com
General Liability	David Couch dcouch@garanlucow.com
Commercial Litigation	Edward Perdue eperdue@dickinson-wright.com

By: Richard J. Joppich,
The Kitch Firm

Medical Experts Must Devote More Than 50% Of Their Practice To The Specialty At Issue

Richard J. Joppich, The Kitch Firm, richard.joppich@kitch.com, Chairperson of MDTC's Professional Liability and Health Care Section

Kiefer v Markley

___ Mich App ___; ___ NW2d ___ (April 28, 2009)

In a published opinion, the Michigan Court of Appeals has issued its published opinion that an expert under MCL 600.2169 (1)(b), over the year preceding the alleged professional negligence at issue, must have devoted more than 50% of his or her time to practice or teaching in the specialty the defendant was practicing at the time of the event in question.

The Decision

Michigan's Court of Appeals has affirmed a trial court's ruling that the plaintiff's expert on standard of care in a medical malpractice case was not qualified to testify against the defendant since although practicing in the same specialty as the defendant, the expert did not devote a "majority" of his time to the specialty.

The specialty being practiced by the defendant, Dr. Markley, at the time of the alleged malpractice, was hand surgery. The plaintiff's proposed expert had three specialties, hand surgery being one of them. The percentage of his practice devoted to hand surgery was 30 to 40 percent, which was his highest percentage practice area. The Court of Appeals held that this was not a sufficient percentage to qualify the witness as an expert in the practice area.

The Court of Appeals reviewed the statutory mandates of MCL 600.2169 on expert qualification:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, ***devoted a majority of his or her professional time*** to either or both of the following: (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty. [Emphasis added]

The Court of Appeals found this language unambiguous. Citing to Webster's New World Dictionary, 2nd College Edition for a definition of "majority," the court ruled that the time spent by in the specialty area must exceed 50% to qualify as an expert under the statute.

The court mentioned its disagreement with this outcome but said it was constrained to rule in this manner because the statute was not ambiguous or subject to judicial construction. The court pointed out that both the proposed expert and the defendant doctor were both board certified plastic surgeons with qualifications in hand surgery. The court also indicated that when the hand surgery percentage was combined with his practice in reconstructive surgery of extremities the proposed expert would reach the greater than 50% threshold. However, the court refused to apply these considerations, finding that the trial court had not abused its discretion.

The court mentioned its disagreement with this outcome but said it was constrained to rule in this manner because the statute was not ambiguous or subject to judicial construction.

The Effect of the Decision

While this ruling reinforces the statutory requirements on qualification of medical experts on standard of care, it is the first decision to verbalize the greater than 50% threshold test for measuring the expert's practice for sufficiency. Behind or between the lines is a lingering suggestion that in the correct situation it may not be outside the discretion of the trial court to consider aggregating specialty areas to reach a decision that a particular expert might meet this threshold percentage. It certainly appears to this reader that the Court of Appeals would have ruled in plaintiff's favor but for its hesitancy to rule that the trial court had abused discretion under the circumstances.

This hesitancy seems to suggest an element of discretion in the trial court's evidentiary decision-making on whether to 1) aggregate percentages of practice areas and 2) the determination of which practice areas are sufficiently "related" to the specialty being practiced by the defendant physician at the time of the alleged negligence. It should be noted that nowhere in the Court of Appeals decision did the court clarify expressly that such decisions are to be made. Perhaps again the court is looking for the correct issue to come before it to address this potential more directly.

Practice Tips

1. When evaluating plaintiff's expert, do not look at just the specialty of the expert professed but the actual percentage of professional time spent in that specialty in comparison to the expert's entire professional services. If it is 50% or less in the area at issue, there is serious concern with qualifications.
2. If the plaintiff's experts percentage in the actual area of specialty at issue is 50% or less of the total professional time, evaluate whether the plaintiff's expert has other related specialties, or specialties which may be deemed related and consider the possibility that they may aggregate to meet the qualification threshold.
3. Ensure that the defense expert meets the greater than 50% threshold test.
4. Although every effort should be made to avoid relying upon an argument for aggregation of specialties to qualify a defense expert, if it is unavoidable, ensure that such argument of relationships of specialties is as strong as can be so that if appeal is necessary from any adverse decision, it provides a very high level of relation for the appellate courts to evaluate rather than some attenuated relation which might weaken the strict expert qualification guidelines legislatively endorsed by Michigan statutes.

Possible Implications

We have recently seen efforts proposed in the Michigan legislature to ease the strict requirements for expert qualifications. The *Keifer* decision upholds the strict statutory interpretation as requiring an expert be able to demonstrate practice in the relevant specialty as more than 50% of such expert's practice. However, the dicta carries with it an implication that there may be some appellate interest in the issue of whether particular types of specialty services may be so closely related that they should be aggregated to reach the 51% threshold. If there is appellate interest in this direction, the determination of qualifications will most assuredly become an increasingly grey area as to what may constitute a "related specialty," hindering the trial courts' ability to consistently apply a rule in a predictable manner across the state and between jurisdictions so as to assist the parties, both plaintiff and defense, in expert selection. A too vague or attenuated rule would likely create increased appellate issues, litigation, delays in determinations and increases in expenses for all.

Legislative Report

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

MDTC Legislative Report

Send Us Your Comments and Suggestions

Before we get into the details of what is happening (or not happening) in the legislature, as I've mentioned before, the MDTC Board regularly discusses pending legislation and positions to be taken on Bills and Resolutions of interest. Your comments and suggestions are appreciated, and may be submitted to the Board through any Officer, Board Member, Regional Chairperson or Committee Chair.

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

With state revenues falling woefully short of projections, the Legislature has a very important and difficult job ahead as it struggles to craft a budget for the next fiscal year. And making the necessary adjustments for the current fiscal year hasn't been a lot of fun either. Figuring out how much to cut, and where, has taken up a great deal of the Legislature's time since my last report in March, but a few other topics have been addressed along the way.

Foreclosures. As of this writing (June 10th), there are 30 Public Acts of 2009. There are three, forming a single legislative package, which may be of interest to civil litigators – 2009 P.A. 29 – HB 4453 (Jackson – D); 2009 P.A. 30 – HB 4454 (Coulouris – D); and 2009 P.A. 31 – HB 4455 (Johnson – D). This legislation, enacted to give homeowners some **relief from the threat of foreclosure,** will amend Chapter 32 of Revised Judicature Act to limit and establish new procedures for use of foreclosure by advertisement.

Under the new provisions, which will take effect July 5, 2009, a mortgage lender will not be permitted to initiate a foreclosure of a mortgage on a principal residence by advertisement under Chapter 32 unless the borrower has first been offered and allowed an opportunity to consult with a housing counselor, and to meet with a representative of the lender, to attempt to negotiate a loan modification. Initiation of foreclosure proceedings will be suspended pending completion of this process, and if the borrower qualifies for a loan modification under criteria identified in the new section MCL 600.3205c, the lender will be required to pursue foreclosure in judicial proceedings under Chapter 31 unless the borrower has been offered, and declined acceptance of, a loan modification satisfying the statutory criteria. These new provisions are temporary measures, intended to provide relief from the current housing crisis. Thus, they will be repealed on July 5, 2011.

New Legislation

There have been a few noteworthy new initiatives. They include:

Expert witnesses. House Bill 4571 (Meadows – D) would greatly relax the **qualifications for expert witnesses** and the requirements for filing of **notices of intent** and **affidavits of merit** in medical malpractice cases. The requirements for an affidavit of meritorious defense would become somewhat more stringent to the extent that the defense would no longer be permitted to submit an affidavit of meritorious defense signed by the defendant physician. Any defects in a notice of intent or response thereto, an affidavit of merit, or an affidavit of meritorious defense, would have to be raised promptly or be considered waived, and the trial court would be required to allow the filing of an amended notice, response, or affidavit, which would relate back to the filing of the original notice, response, or affidavit. In other words, the bill goes about as far as one can imagine to diminish the significance of these requirements without eliminating them entirely. The relaxed qualifications for experts would greatly expand the pool of experts available to plaintiffs and defendants alike.

Insurance – No-Fault Benefits. HB 4845 (Scripps – D) would amend the Insurance Code of 1956, sections 500.3141 and 500.3145, to extend the periods of limitation for actions seeking collection of first-party no-fault benefits. Most notably, the proposed amendment of section 3145 would **suspend the "one-year-back" limitation** on recovery of PIP benefits from the date that a claim is made until the date that a no-fault insurer provides a written denial of the claim. The bill would also effect a legislative "cure" for the Supreme Court's somewhat unpopular decision in *Cameron v Auto Club Insurance Association*, 476 Mich 55 (2006), by separately incorporating the tolling provisions of MCL 600.5851(1) and 600.5852 into section 3145, thereby ensuring that the **"one-year-back" limitation would be tolled** in accordance with those provisions. On

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

June 2, 2009, the House Judiciary Committee reported a Bill Substitute (H-1), with the recommendation that the bill be re-referred to the Committee on Insurance. The bill now awaits consideration by that committee.

Tolling – Minority and Insanity. HB 5033 (Scripps – D) would amend the Revised Judicature Act, section MCL 600.5851(1), to clarify that its **tolling provisions for minority and insanity are applicable to all civil actions**, and are not limited to actions "arising under" the RJA. This is intended to eliminate confusion which has resulted from the Legislature's 1993 amendment of subsection 5851(1), which changed its statutory reference to persons entitled to "bring an action" to those entitled to "bring an action *under this act*" – a change which had no apparent relevance to any of the purposes of the legislation discussed in the legislative proceedings and analyses. In *Cameron v Auto Club Insurance Association*, 263 Mich App 95 (2004), the Court of Appeals relied upon this change as support for its holding that the tolling provisions of § 5851(1) applied only to actions commenced under the Revised Judicature Act, and thus, did not apply to actions commenced under the No-Fault Act. In its subsequent decision, the Supreme Court held, on other grounds, that section 5851(1) did not toll the "one year back" rule of MCL 500.3145(1), and vacated the Court of Appeals' reliance upon the change effected by the 1993 legislation. This bill would reverse the change made – probably unintentionally – by the 1993 legislation. It was passed by the House on June 9, 2009, and has now been assigned to the Senate Committee on Economic Development and Economic Reform.

Notary Public – Record of Acts. House Bill 4640 (Johnson – D) would amend the Michigan Notary Public Act, MCL 55.285, to require notaries to make and maintain a detailed record reflecting the date, time, and description of each notarial act performed, and the evidence relied upon to establish the identity of the signing party.

Old Business

Kreiner Fix. Senate Bill 83 (Whitmer – D), the Senate's new "*Kreiner* fix" bill, **continues to languish in the Senate**. Like similar bills introduced last session, it proposes amendments to the Insurance Code of 1956, MCL 500.3135, to substantially broaden the statutory definition of "serious impairment of body function." But a House version (House Bill 4680 – Meadows) was passed by the House on April 2, 2009, and has now been referred to the Senate Committee on Government Operations and Reform.

Product Liability – Immunity for Drugs. As I mentioned last time, legislation has been introduced in the House proposing the 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) and House Bill 4317 (Kennedy – D). And as I predicted in my last report, these bills were promptly passed by the House on March 26, 2009, only to languish, for a while at least, in the Senate Committee on Government Operations and Reform. Two efforts have been made since that time to discharge these bills from committee for a vote on the Senate floor, but both efforts have failed. Further consideration of the motions to discharge have now been deferred until October 2, 2009.

"Reform Michigan Government Now" –Legacy, Continued. In my last report, I listed several Bills and Joint Resolutions inspired by last year's failed "Reform Michigan Government Now!" ballot initiative. Only one of these has been taken up so far. House Bill 4367 (Stanley – D, which proposes **elimination of the current restrictions on absentee voting,** was passed by the House on April 30, 2009, and has now been referred to the Senate Committee on Government Operations and Reform. I will continue to keep an eye on the rest, and report any movement.

Other Proposed "Reforms"

There are a couple of new proposals falling within the general category of remedies for simmering outrage against the government. They include:

Property Taxes. SJR H (Pappageorge – R). This Senate Joint Resolution proposes an amendment to Article IX, Section 3 of the Michigan Constitution, which would require, for property taxes assessed after 2009, that **taxable value be adjusted for decreases in assessed value.** This Joint Resolution was passed by the Senate on March 18, 2009, and now awaits consideration by the House Committee on Tax Policy.

Unicameral Legislature. HJR U (Lemmons – D). This House Resolution proposes the creation of a unicameral Legislature.

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

PROPOSED AMENDMENTS

Date	Rules	Number	Subject	Description
5-20-09	2.112(K) 2.118	2009-13	Notices of intent and affidavits in medical malpractice cases	Would put time limits on challenges to sufficiency of notice and affidavit, and provide for relation back of amended affidavits. Comments open to 9-1-09.
3-18-09	2.003	2009-04	Disqualification of Supreme Court justice	Three alternatives are proposed to deal with the issue that has been vexing the Court for the last three years. Comments open to 8-1-09.
1-14-09	8.115	2008-35	Cell phone use	Two alternatives proposed.
12-9-08	MRE 611	2007-13	Attire by witnesses	See below

The proposed amendment of MRE 611 would add a new subsection (b):

(b) Appearance of Parties and Witnesses. The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder, and (2) to ensure the accurate identification of such persons.

The court's staff comment states that this proposal originated from the federal case of *Muhammad v Paruk*, 553 F Supp 2d 893 (ED Mich 2008) in which a Muslim woman claimed that her civil rights were violated when a state district court judge would not allow her to testify while wearing a hijab, and dismissed her small claims case. The federal court dismissed the claim and suggested state rulemaking on the issue.

Since the proposed rule affects procedure, not evidence, it probably does not belong in the Rules of Evidence.

Supreme Court

By: Joshua K. Richardson
Foster, Swift, Collins & Smith, P.C.
jrichardson@fosterswift.com

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.

Duty Is Required Before Assessing Nonparty Fault

Romain v Frankenmuth Mut Ins, Co, 483 Mich 18; 762 NW2d 911 (2009)

On March 31, 2009, the Michigan Supreme Court held that fault cannot be apportioned to a nonparty under the comparative fault statutes unless the non-party owed a duty to the plaintiff..

Facts: Plaintiffs, David and Joann Romain, filed a claim with their homeowners insurer, Frankenmuth Mutual Insurance Company ("Frankenmuth"), for water and mold damage to their home. Frankenmuth hired Insurance Services Construction Company ("ISC") for remodeling and mold remediation services, and hired IAQ Management, Inc. ("IAQ") to certify that the mold remediation was successful. Shortly after ISC and IAQ completed work at plaintiffs' home, plaintiffs began suffering from illnesses related to mold and filed suit against Frankenmuth, ISC and IAQ. The trial court dismissed plaintiffs' claims against IAQ, finding that IAQ did not owe plaintiffs a duty. Thereafter, ISC filed a notice naming IAQ as a nonparty at fault under MCR 2.112(K). Plaintiffs filed a motion to strike the notice of nonparty at fault because, arguing that because of the trial court's earlier ruling that IAQ owed plaintiffs no duty, IAQ could not be a "proximate cause" of plaintiffs' claimed damage. The trial court agreed and granted plaintiffs' motion, holding that, under *Jones v Enertel, Inc*, 254 Mich App 432; 656 NW2d 870 (2002), a duty must first be proved before proximate causation may be considered.

Holding: The Supreme Court affirmed the Court of Appeals decision and held that comparative fault cannot be apportioned to a nonparty unless the nonparty owed a duty to the plaintiff. The court also held that proof of a duty is a required element of negligence that must be showed before proximate cause can be determined. The decision eliminated a conflict between *Kopp v Zigich*, 268 Mich App 258; 707 NW2d 601 (2005) and *Jones*, by expressly overruling *Kopp*, which had held that "a plain reading of the comparative fault statutes does not require proof of a duty before fault can be apportioned and liability allocated." Under the "first out" rule of MCR 7.215(J)(1), *Kopp* should have followed *Jones* or declared a conflict. Because *Kopp* did not declare a conflict, *Jones* is controlling and a duty must be proved before comparative fault may be apportioned to a nonparty.

Significance: In expressly overruling *Kopp*, the Michigan Supreme Court both clarified the standard required for nonparty fault to be apportioned and highlighted the importance of the "first out" rule under MCR 7.215(J).

MCL 600.2956 Does Not Restrict The Enforceability Of Otherwise Valid Indemnification Agreements

Zahn v Kroger Co of Michigan, 483 Mich 34; 764 NW2d 207 (2009).

On April 1, 2009, the Supreme Court held that MCL 600.2956 does not apply to contracts and therefore, does not limit contractual indemnification clauses.

Facts: Plaintiff, Timothy Zahn ("Zahn"), filed suit against Kroger Company of Michigan ("Kroger") and F.H. Martin Construction Company ("Martin") for injuries he sustained while installing drywall during the renovation of a Kroger store. Kroger then filed a third-party action seeking indemnification from the general contractor of the renovation project, Martin. In turn, Martin filed a third-party action against Cimarron Services, Inc. ("Cimarron"), the subcontractor that employed Zahn. Martin ultimately settled with Zahn for $225,000 and paid Kroger approximately $12,500 to resolve the indemnification claim against Martin. The trial court conducted a bench trial on the remaining issue, whether Cimarron was required to indemnify Martin under the parties' indemnification clause. Cimarron argued that MCL 600.2956, rather than the parties' contract, controlled.

MCL 600.2956 provides that "in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint." Cimarron asserted that, by abolishing joint and several liability, MCL 600.2956 effectively limits the application of express indemnification clauses. The trial court disagreed and held that the contract controlled and Cimarron was required to indemnify Martin for a portion of the amount Martin paid to settle the case. On appeal, the Court of Appeals

The Supreme Court affirmed the Court of Appeals decision and held that comparative fault cannot be apportioned to a nonparty unless the nonparty owed a duty to the plaintiff.

affirmed the trial court's decision and clarified that MCL 600.2956 e considered.

Holding: The Michigan Supreme Court affirmed, holding that MCL 600.2956, by its own language, is limited to actions "based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death." Although the primary action instituted by Zahn was a tort action seeking damages for personal injury, the action between Martin and Cimarron was based on the parties' contractual indemnification agreement. Because neither party asserted that the indemnification clause was ambiguous, the terms of that clause applied and Cimarron was required to indemnify Martin for a portion of the settlement.

Significance: This holding demonstrates that, despite the abolition of joint and several liability, parties remain free to enter into otherwise valid indemnification agreements.

State Deprived Respondent Of His Procedural Due Process Rights By Failing To Provide Adequate Notice Of Proceedings Affecting His Constitutional Parental Rights

On April 2, 2009, the Supreme Court held that procedural due process is violated where the Department of Human Services fails to adequately notify a respondent of proceedings that affect the respondent's constitutional parental rights. *In Re Rood*, 483 Mich 73; 763 NW2d 587 (2009).

Facts: Respondent, Dorroll Rood, had limited contact with his daughter, A, until December of 2005, when he and A's mother, Ms. Kops, had an argument that resulted in a domestic assault charge against respondent. While respondent was incarcerated for the domestic assault conviction, A was removed from her mother's care based on allegations of neglect. Once released, respondent was informed by Ms. Kops that the Mason County Department of Human Services ("DHS") took protective custody of A. The DHS did not attempt to contact respondent while he was incarcerated. Rather, respondent initiated contact with the DHS to seek custody of A.

The DHS informed respondent that A would likely be placed back in Ms. Kops' care, but that respondent could set up visitations through DHS. At that time, respondent provided the DHS with his telephone number and address. On March 29, 2006, the court mailed a preliminary hearing notice to respondent at an incorrect address. Because he never received the notice, respondent did not participate in the preliminary hearing, during which it was determined that A would remain in the care of the DHS. An additional hearing was held on June 8, 2006, relating to the neglect allegations against Ms. Kops. Notice of this hearing was sent to respondent's correct address.

Though respondent attended the hearing and provided the court with his correct address, he later testified that he had no prior knowledge of the neglect allegations and believed that Ms. Kops had already regained custody of A. Several subsequent hearings were held, but notices of those hearings were again improperly sent to respondent at an incorrect address. Because respondent had no notice of the hearings, he did not participate. As a result, the DHS filed a petition to terminate the parental rights of both Ms. Kops and respondent, alleging that respondent contributed to A's unsafe and neglectful environment.

The trial court found that termination of respondent's parental rights was appropriate based on respondent's prior domestic assault convictions and his lack of contact with the DHS and the court. On appeal, the Court of Appeals reversed the termination of parental rights and held that, although respondent may have been a "less than ideal parent," the breakdown in communication was mostly attributable to the state.

Holding: The Supreme Court affirmed the Court of Appeals decision, holding that the state deprived respondent "of even minimal procedural due process by failing to adequately notify him of proceedings affecting his parental rights and then terminating his rights on the basis of his lack of participation without attempting to remedy the failure of notice." The court further held that the trial court clearly erred by ruling that respondent, and not the DHS, was responsible for his lack of participation in the proceedings and for failing to adjourn the proceedings so that respondent could meaningfully participate. Ultimately, the court noted that "although the state may again seek to terminate [respondent's] parental rights, it may not do so until [respondent] has been afforded a meaningful opportunity to participate."

Significance: This opinion supports respondents' rights to procedural due process in parental rights cases, by requiring the state to undertake additional efforts to provide notice of proceedings affecting parental rights and to provide respondents the opportunity to meaningfully participate in those proceedings.

Practice Tip

By: James Bodary
Siemion Huckaby PC

Dueling Requests To Admit

James W. Bodary was a founding member of Siemion Huckaby PC, and is a member of the Michigan bar. He acquired his undergraduate degree in 1969 from the University of Notre Dame and graduated cum laude from Wayne State University Law School in 1974. James has specialized in the defense of legal malpractice and medical malpractice lawsuits. He has contributed articles to the Michigan Defense Quarterly Journal and to "Legal Rounds" in the journal Emergency Medicine. He is a past lecturer at St. Joseph Mercy Hospital Risk Management, MICOA Insurance Company, the Franklin Eye Institute, American Arbitration Association, and Michigan Defense Trial Counsel seminars. James has served as a mediator in Oakland, Wayne, and Macomb Counties. He is a master of the bench for the American Inns of Court XI. James has served as a director and is now president-elect of the Michigan Defense Trial Counsel.

Some plaintiff's attorneys (often young attorneys) use multiple requests to admit to pin the defense down on issues of negligence, cause of death, causation, etc. With such attorneys, the case can become a "war of requests." The following guidelines may be helpful in deterring the excessive use of requests to admit:

1. On the day you receive requests to admit, send requests to admit to the plaintiff's attorney of the exact number. (It is actually my practice to send the same number of requests plus one until the plaintiff's lawyer gets the message.)
2. Once you dictate requests to admit, read them again to make sure that a failure to respond works adversely to the opposing party.
3. Use the same words that are in the plaintiff's request or put your request in the negative using plaintiff's phrases.
4. Since defendants generally have greater financial resources to use experts, requests to admit dealing with expert opinions are generally more of a problem for the plaintiff than the defendant. However, be certain that professional defendants and retained experts see and approve the exact language you use in answering the requests.
5. All of us routinely include interrogatories concerning answers to requests that ask the detailed factual basis and the witness and/or documents supporting an answer that is anything but an unqualified admission. If plaintiff evades answering your requests or interrogatories, he will be unlikely to file motions to compel more complete answers.

Anecdotally, an experienced plaintiff's attorney sent my partner extensive requests on causation in a medical malpractice wrongful death claim that were not returned to the plaintiff's attorney. A year later, the plaintiff's attorney decided to change his theories of malpractice and causation and would probably have been obstructed from doing so if he had admitted the same requests he had sent the defendants.

Finally, I don't keep secret my strategy from the plaintiff's lawyer. I tell him that he will find the exchange of requests to admit uncomfortable and that we should allow witnesses to fully explain expert testimony at depositions, rather than in detailed requests to admit.

Remember that requests to admit have to be filed with the court within a reasonable time of their service on the opposing party. If you missed the time frame in which to respond, check the court file and if plaintiff has failed to file, submit the late response and seek court acknowledgment that plaintiff's failure to file makes your response timely. Be sure to file your response.

New Members

MDTC

MDTC Welcomes These New Members

Jennifer Andreou, *Plunkett Cooney*, Mount Clemens

Emily Ballenberger, *Plunkett Cooney*, Mt. Clemens

John F. Clark, *Jacobs & Diemer*, Detroit

Darrell Grams, *The Grams Law Firm*, Addison, Texas

Michael D. Wade, *Garan Lucow*, Grand Rapids

Practice Tip

By: Hal O. Carroll
Vandeveer Garzia

Making A Late Brief Timely And Preserving Oral Argument

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.

If you are appellant or appellee, and your brief is late, the court will accept it, but you will lose the right to oral argument. What do you do then? You can file a motion for oral argument immediately on receipt of the notice and again when the appeal is assigned to a panel and you get notice of oral argument. Sometimes this works, sometimes it doesn't.

But if you are within the permitted time for an extension, the better tack is to get the extension. This makes the brief timely and restores your right to oral argument. Keep in mind that:

1. You are entitled to a total extension of 56 days for the appellant or appellee's brief. The court rule says you can get 28 days by stipulation and another 28 by motion, but the IOPs (Internal Operating Procedures) state that "by policy an extension of 56 days is possible. The extension can e achieved by motion alone or by stipulation of the parties followed by a motion." IOP 7.212(A)(1)-2 (for appellants) and IOP 7.212(A)(2)-2 (for appellees).

2. There is no requirement that the motion be filed before the original due date. Some attorneys prefer to file the motion for the extension before they file the brief. Another approach is to file it with the brief, note in the motion itself that the brief has been filed, and ask for an extension of the exact number of days to and including the date of filing.

3. For the appellant's reply brief, an extension of 14 days can be obtained by motion only. If there is no motion, the reply brief will be returned. IOP 7.212(G)-1.

The Internal Operating Procedures are available at the Court of Appeals website, which is in the directory issue of the Bar Journal.

Save the Date: MDTC 2009 Winter Conference

MDTC

Michigan Defense Trial Counsel
2009 Winter Conference

When: Friday, November 6, 2009

Time: 8:30 a.m.–3:00 p.m.

Where: Troy Marriott
200 West Big Beaver Rd.
Troy, Michigan 48084
248-680-9797

Theme: "Emerging Issues In Commercial Litigation"
Featuring Panelists of Noted Commercial Litigators, Arbitrators, Consultants and State and Federal Court Judges.

Keynote Speaker: Michigan Supreme Court Justice Robert P. Young, Jr.

Presentation of Respected Advocates Awards

Panels:
Hot Topics in Arbitration
E-Discovery and Michigan's New Discovery Rules
Contractual Issues in Commercial Litigation
Use of Financial Experts in Commercial Litigation
Trends in Commercial Litigation — A View From the Bench

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.

With over 22,000 members, DRI is continually working to help its members improve their law practices. I would like to discuss three things that DRI is doing to now help its members. As always, you can find out more about these items and more by visiting the DRI website at www.dri.org.

2009 Annual Meeting in Chicago

Join fellow MDTC members, DRI members and friends in Chicago October 7–11, for DRI's 14th Annual Meeting. Help us celebrate DRI's 50th anniversary, Lincoln's 200th birthday, and lawyers' important role in the civil justice system. Chicago has unparalleled sophistication, class and style. Enjoy gorgeous fall days in a city with fine dining, world famous museums, legendary entertainment, shopping and much more. Discover why so many visitors fall in love with the city every year. In the heart of the Midwest's Great Lakes region, Chicago boasts one of the world's most magnificent skylines and is the birthplace of modern urban architecture where some of the first skyscrapers were built. Take the words of visionary Chicago architect Daniel Burnham to heart as you think about making your plans to attend the annual meeting in this world-class city: "Make no little plans. They have no magic to stir men's blood." Don't miss this opportunity to attend outstanding education programs and networking events as you visit with friends and colleagues, new and old. MDTC's own Mary Massaron Ross is the Annual Meeting Chair.

DRI Commissioned Report on the Future of Litigation

DRI commissioned Smock-Sterling to interview litigation leaders and report on the future of litigation. The full report can be found on DRI's website. In short, the report concludes that the future of litigation in the United States is robust – based on both the secondary literature review and the primary research conducted for this report. However, there are challenges and concerns for those planning to practice as trial lawyers in the future. Factors contributing to future growth in litigation include:

- Anticipated growth of litigation into the future — both commercial litigation and torts. Many anticipate that growth to accelerate in the context of the unfolding recession and financial crisis.
- A widespread commitment within the profession to ensure that electronic discovery rules and other challenges to an efficient and effective civil justice system are addressed professionally and systematically.
- A strong commitment to developing the next generation of trial lawyers and litigators — including a commitment to developing fundamental skills (e.g., writing, argument, discovery, deposition, etc.) and higher order capabilities (e.g., trial and ADR capabilities).
- An emerging backlash against arbitration and a predicted decline in the adoption of mandatory arbitration clauses in commercial contracts – pushing disputes back toward the civil justice system over time.
- Emergence of sophisticated technologies enabling defense counsel to manage large scale document production and document review, as well as to present highly effective and persuasive cases at trial.
- Reasonable and creative approaches to the economics of litigation — suggesting solid financial prospects for most members of the defense bar.
- Growing opportunities in international arbitration and global dispute resolutions — for those firms and practitioners interested in developing capabilities in these areas.

I would encourage you to print off the report and share it with your firm's leadership as litigation will likely play a strong role in many firms strategic planning.

Strategies for Promoting Participation in the Civil Justice System

Many elements of jury service have changed since Harper Lee published *To Kill a Mockingbird*. For one, women and minorities now serve on juries. In the past, women, African Americans and members of other racial and ethnic groups were excluded from jury service. A series of Supreme Court cases man-

While the task of reversing hundreds of years of misperceptions is beyond our reach, the DRI Jury Service Task Force set out to inquire about the state of jury service in this country and the prospects for improvement.

dated otherwise, and today's jury pools are more inclusive. However, other factors present continuous challenges to the jury system. In recent years the rate of civil jury trials has steadily declined in favor of alternative dispositions such as summary judgments and settlements. While the causes of the decline in jury trials are many, the role of the jury itself cannot be overlooked. To the extent that jury service is undervalued or misunderstood by participants and the public, undervaluation or misunderstanding can serve as both a cause and a symptom of the decline in jury trials and devaluation of jury service.

While the task of reversing hundreds of years of misperceptions is beyond our reach, the DRI Jury Service Task Force set out to inquire about the state of jury service in this country and the prospects for improvement. Happily, the task force found that many organizations have studied and researched jury service issues and that innovations likely to increase understanding of the value of jury service are underway. DRI embraces the proposition that maintaining a well-functioning jury system is vital to preserving public confidence in the civil justice system as a means of resolving intractable disputes. It behooves defense lawyers to address the stresses on the jury system.

As most aspects of jury service are based on state law, innovation and reform to increase jury service begins mainly at that level. DRI's Jury Service Task Force encourages defense attorneys, through state and local defense organizations such at MDTC, to promote jury service across jurisdictions, by offering concrete recommendations to increase jury service participation and foster value of the jury system. In its published paper, found at www.dri.org, the task force offers suggestions for projects that state and local defense organizations can undertake to increase public understanding of the importance of the jury to the American legal system. Such projects can improve the response rate of those summoned to serve and highlight the value placed on their service. The paper also collects information about resources available to further examine the uniquely legal and uniquely human issues surrounding jury service.

Save the Date: Risk Reduction & Medicare Liens From the Defense Perspective

MDTC

Michigan Defense Trial Counsel Medicare Lien Seminar


Lori A. Ittner


Richard J. Joppich

When: Thursday, October 1, 2009

Where: Troy Marriott, 200 West Big Beaver Road, Troy, MI 48084

Time: 9:00–3:00 pm

Presenters: Lori A. Ittner, Garan Lucow Miller PC & Richard J. Joppich, Kitch Drutchas Wagner Valitutti & Serbrook

Registration form will be posted on the MDTC web site soon.

Cost: Members — $165.00
Non-members — $190.00

Call 517.627.3745 with any questions about the Medicare Lien Seminar.

MDTC Annual Meeting & Awards Banquet

June 12 & 13, 2009 • Boyne Highlands, Harbor Springs, MI

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This section is reserved for the use of MDTC members who wish to make services available to other members.
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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.

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Author of numerous articles on indemnity and coverage issues and chapter in ICLE book *Insurance Law in Michigan*, veteran of many declaratory judgment actions, is available to consult on cases involving complex issues of insurance and indemnity or to serve as mediator or facilitator.

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Robert H. S. Schaffer
2312 Stonebridge
Flint, MI 48532
(810) 496-4465
schafferlaw@comcast.net

New Regional Chair & Section

Edward P. Perdue
Commercial Litigation
Dickinson Wright PLLC
200 Ottawa Avenue, N.W.
Suite 1000
Ph: 616-458-1300
Fax: 616.458.6753
Grand Rapids, MI 49503
eperdue@dickinsonwright.com

Michael D. Wade
Grand Rapids
Garan Lucow Miller, P.C.
300 Ottawa Avenue, NW
Avenue, Flr 8
Grand Rapids, MI 49503
Ph: 616-742-5500
Fax: 616-772-5566
mwade@garanlucow.com

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MDTC Commercial Litigation Mission Statement

Members of MDTC's Commercial Litigation Section defend the interests of their clients in civil litigation, mediation, and arbitration not only throughout the State of Michigan, but nationally as well. They understand that resolution of commercial disputes can be an expensive and exhausting process that can drain the resources of almost any business. This section strives to build a skill set in its members that includes the ability to provide issue spotting, counseling, negotiation, mediation/arbitration, and litigation services, all in a timely and cost effective manner. The MDTC Commercial Litigation Section is the gold standard by which lawyers litigating the interests of their clients across Michigan shall be judged. This will be accomplished in the following manner:

1. Holding regular meetings at which members can learn about new and better practices from various industry leaders.
2. Offering networking and other marketing opportunities not only between members but also with other organizations and businesses.
3. Regularly contributing articles and case law updates to the MDTC Quarterly that pertain to section membership and potential clients.
4. Utilizing the MDTC web site to educate potential clients and referral sources about the quality skill of the lawyers in MDTC.
5. Fostering communication and collegiality between members.

MDTC REGIONAL CHAIR

Michigan Defense Trial Counsel has established Regional Chairpersons to best serve the membership by providing a local presence around the State. The goals of the Regional Chairpersons are to:

1. Attend at least one MDTC board meeting annually.
2. Provide articles for the Michigan Defense Quarterly by calling upon members within each local area.
3. Provide at least three (3) new members per year to MDTC from your area.
4. Make recommendations to the board regarding promotion of MDTC/events within each local area
5. Assist in generating advertising for Michigan Defense Quarterly by providing staff with contacts.
6. Serve on the promotions committee by assisting with increasing attendance at the Winter & Summer Conferences.
7. Attend annual orientation session scheduled during the MDTC Summer Conference.

The Board Liaison for these chairpersons will be the Secretary of MDTC.

MDTC New Officers 2009–2010

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Berry, Johnston, Sztykiel & Hunt, P.C.
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Troy, MI 48098
248-641-1800 • 248-641-3845
sjohnston@berryjohnstonlaw.com

Vice President: Lori A. Ittner
Garan Lucow Miller, PC
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Grand Rapids, MI 49503
616-742-5500 • 616-742-5566
littner@garanlucow.com

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Butzel Long
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500 Griswold St. Ste 2825
The Guardian Building
Detroit, MI 48226
313-965-1900 • 313-965-1919
tad@jacobsdiemer.com

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Richard J. Joppich
Kitch Drutchas Wagner Valitutti & Sherbrook
303 Detroit Street Ste 400, P.O. Box 8610
Ann Arbor, MI 48107
734-994-7600 • 734-994-7626
richard.joppich@kitch.com

Diana Lee Khachaturian
Dickinson Wright PLLC
500 Woodward Ave., Ste 4000
Detroit, MI 48226
313-223-3475 • 313-223-3598
dkhachaturian@dickinsonwright.com

MDTC
MICHIGAN DEFENSE TRIAL COUNSEL, INC.

2009 Respected Advocate Award

The Michigan Association for Justice (MAJ) is proud to announce the recipient of the 2009 Respected Advocate Award as William W. Jack, Jr., of Smith Haughey, Grand Rapids, and the Michigan Defense Trial Counsel (MDTC) has also named William F. Mills of Gruel Mills Nims & Pylman LLP, Grand Rapids as the recipient of the 2009 Respected Advocate Award. The annual Respected Advocate Awards, presented each year by MAJ and MDTC, are bestowed to an attorney from opposite sides of the courtroom who have a "history of success in civil litigation matters, unfailing adherence to the highest standards of ethics and candor in dealing with the court and with counsel, and the respect and admiration of counsel on the opposing side of the bar".Both candidates for the mutual Respected Advocate Awards are selected "in recognition of their superb skills as courtroom adversaries, whose civility and decorum distinguishes them as outstanding advocates on behalf of their clients".The Respected Advocate Awards will be conferred at the 2009 State Bar of Michigan Annual Meeting Award Banquet on September 16, 2009 at the Hyatt Regency in Dearborn.

William W. Jack, Jr.

William W. Jack, Jr. joined Smith, Haughey, Rice & Roegge, PC Grand Rapids, in 1975, practicing in the areas of health law, medical malpractice defense, general litigation, and the defense of professional liability actions.

He served as CEO of the firm from 1991 to 1997 and is current President of the Board of Directors. He is also Chair of the firm's Diversity Committee.

Bill has trained lawyers in advocacy skills for individual law firms in several states and has also trained litigation counsel for a number of national insurance carriers. In addition, he is very active in both his industry and community, having held a number of elected positions and memberships in legal and community organizations.

In the past 10 years, Bill has transitioned his practice and built a highly successful mediation/alternative dispute resolution practice on his solid reputation as a seasoned trial attorney and devotion to the legal community. A certified facilitative mediator by the U.S. District Court, Western District of Michigan, he has served as mediator and case evaluator for more than 300 cases in the state and federal courts throughout Michigan. Representative cases include catastrophic personal injury, complex multi-party commercial litigation, and complex trademark and intellectual property matters.

Admitted to Practice: State Bar of Michigan, 1973

Education: Denison University (B.A., 1969) University of Denver. George Washington University (J.D., with honors, 1973)

Noteworthy

- AV Peer Review Rated, Martindale-Hubbell
- Listed in "Best Lawyers in America"
- Listed as a "Michigan Super Lawyer"
- Winner of 2002 'Excellence in Defense Award' from MDTC
- Recipient, Service and Mentoring Award, presented by the Young Lawyers Section of the Grand Rapids Bar Association, 1998
- Recipient, Boss of the Year Award, presented by the Grand Rapids Association of Legal Support Professionals
- Professional Affiliations
- American Bar Association (Member, Sections on: Tort and Insurance Practice; Litigation)
- Federal Bar Association (President, West Michigan Chapter, 1991)
- State Bar of Michigan (Member, Sections on: Negligence Law; Law Practice Management)
- Grand Rapids Bar Association (President, 1998-1999)
- Member, American Board of Trial Advocates
- American Health Lawyers Association
- Fellow: American Bar Foundation
- Fellow: Michigan State Bar Foundation
- Michigan Defense Trial Counsel (President, 1987-1988; Member, Board of Directors, 1986--)
- Team Leader, University of Michigan Law School Trial Advocacy Course, 1986-1996
- Faculty, National Institute for Trial Advocacy, 1985—
- Community Affiliations
- Vice President, Kent Medical Foundation
- Planned Parenthood Centers of West Michigan, Board of Directors, 1995–2000

William F. Mills

William F. Mills has specialized knowledge in the areas of personal injury law, product liability law, civil rights, medical malpractice, construction site negligence, complex commercial litigation and automotive liability.

Education: Hope College (B.A. 1968) University of Michigan Law School (J.D. 1974)

Professional Affiliations: Grand Rapids Bar Association (former Trustee); State Bar of Michigan (Fellow, served on numerous committees); elected member of the International Academy of Trial Lawyers (limited to 500 attorneys in the U.S.); American College of Trial Lawyers; American Board of Trial Advocates (Secretary and Treasurer); American Bar Association; Association of Trial Lawyers of America; and the Michigan Trial Lawyers Association. Has lectured in the field of trial tactics and procedures.

Awards And Achievements: Several of the area's largest jury verdicts in cases involving civil rights, premises liability, product liability and commercial litigation, including the largest product liability verdict in Kent County, Michigan ($8.2 million); one of the largest commercial verdicts in Kent County, Michigan ($3.3 million). Listed in the Woodward & White's Best Lawyers in America. Listed as one of the top 100 "Super Lawyers" in Michigan.

Military Service: Artillery Officer in Vietnam, where he served as a Forward Observer and Firing Battery Executive Officer (Awarded two Purple Hearts).

Community Involvement: Hope Network, Board of Trustees (1984–1995, past President and member of the Executive Committee); Holland Home Executive Board; Active in the community and served on the boards of his church, Heartside Ministries and the school district.

MDTC LEADER CONTACT INFORMATION

Board

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

Lori A. Ittner
Vice President
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
korovesis@butzel.com

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

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

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

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

Richard J Joppich
richard.joppich@kitch.com
734-994-7600 • 734-994-7626
Kitch Drutchas Wagner Valitutti & Sherbrook
303 Detroit Street Ste 400, P.O. Box 8610
Ann Arbor, MI 48107

Diana Lee Khachaturian
dkhachaturian@dickinsonwright.com
313-223-3475 • 313-223-3598
Dickinson Wright PLLC
500 Woodward Ave., Ste 4000
Detroit, MI 48226

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 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

Commercial Litigation: Edward P. Perdue
eperdue@dickinsonwright.com
616-458-1300 • 616.458.6753
Dickinson Wright PLLC
200 Ottawa Avenue, N.W. Suite 1000
Grand Rapids, MI 49503

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 x 211 • 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: Michael D. Wade
Garan Lucow Miller, P.C.
300 Ottawa Avenue, NW Avenue, Flr 8
Grand Rapids, MI 49503
616-742-5500 • 616-772-5566
mwade@garanlucow.com

Kalamazoo: Tyren R. Cudney
Lennon, Miller, O'Connor & 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 Morganti &
Bowerman P.C
One Towne Square Ste 1400
Southfield MI 48076
248-357-1400 • 248-357-3343
rmorganti@siemion-huckabay.com

MAJ Liaison: 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 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@jacobsdiemer.com

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

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

Schedule of Events

2009–2010

2009

September 11	Open Golf Outing, Mystic Creek
September 16	State Bar Annual Meeting – Respected Advocate Award Hyatt Regency, Dearborn
September 24	Board Meeting, Okemos, Holiday Inn Express
October 1	Lien Seminar, Troy Marriott
November 5	Past Presidents' Dinner, Troy Marriott
November 6	Winter Meeting, Troy Marriott

2010

January 11	Excellence in Defense Nomination Deadline
January 11	Young Lawyer Golden Gavel Award Nomination Deadline
January 22	Future Planning, TBA
May 14–15	Annual 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.