MICHIGAN DEFENSE
QUARTERLY

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IN THIS ISSUE:

MDTC
MICHIGAN DEFENSE TRIAL COUNSEL, INC.

THE STATEWIDE ASSOCIATION OF ATTORNEYS REPRESENTING THE DEFENSE IN CIVIL LITIGATION

MDTC

Michigan Defense Trial Counsel, Inc
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Editor's Notes

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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
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MDTC's Sections and Their Services to Members

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Among its members, Michigan Defense Trial Counsel has attorneys who practice in very diverse areas of civil litigation. At the back of the *Quarterly* is a list of the ten specialty sections in MDTC, including the newly created Commercial Litigation Section. These sections provide a benefit to all members of MDTC through networking opportunities and access to research and materials pertaining to each area of interest. While all of these sections are active, I would like to spotlight a few sections, events and programs that were rapidly created to directly help MDTC members respond to emerging issues and provide quality representation to their clients.

MDTC's New Database Qualified Protective Orders

As many of you know, attorneys are fighting a continuous battle with our respected opposition over qualified protective orders (QPO) permitting attorneys to hold *ex parte* conferences with physicians in medical malpractice and personal injury cases. The outcome of the motions requesting qualified protective orders appears to be inconsistent.

Randy Hackney (*Hackney, Grover)* recently brought this important issue to the attention of our past president, Robert Schaffer, suggesting that it would be helpful to our membership if they had access to a database of protective orders entered in the various courts around the state. Members would be able to use the orders from other circuits as exhibits in cases in which the court is still reluctant to enter appropriate qualified protective orders granting full access to records and to the physicians.

In typical fashion, our past president jumped on the idea and enlisted the help of Richard Joppich *(Kitch, Drutchas*), our Professional Liability Section chair, and David Ottenwess (*Ottenwess & Assoc.),* our Trial Practice Section chair, and many others. In August an alert was sent to members, subsequent to which Robert Schaffer initiated a discussion of the QPO issue on Linked-in®. The discussion list contains very valuable information from our membership on how to counter the vigorous defenses we are seeing to motions seeking QPOs. Finally, through the efforts of Rik and Madelyne Lawry, our Executive Director, we have our databank of over 50 QPOs and briefs online available to our members at mdtc.org. Combined with our discussion list, I believe our membership will find the QPO database to be a very useful tool in their practice.

November 6 Seminar: Commercial Law Seminar –"Emerging Issues in Commercial Litigation"

On November 6th MDTC will hold a seminar on commercial litigation at the Troy Marriott. This outstanding program, which has been put together by our committee chaired by Richard Paul (*Dickinson, Wright*), is intended to appeal to veteran commercial litigators, as well as those who may have limited involvement in that area of the law but are interested in expanding their knowledge. We also hope it will encourage the growth of our new Commercial Law Section, chaired by Edward Perdue (*Dickinson, Wright).*

We have our databank of over 50 QPOs and briefs online available to our members at mdtc.org. Combined with our discussion list, I believe our membership will find the QPO database to be a very useful tool in their practice.

Among the speakers at the program are a number of members of the bench including the Hon. Edward Sosnick, the Hon. Richard L. Caretti and the Hon. Robert J. Colombo, Jr. Other seminar speakers are Ed Pappas *(Dickinson, Wright*), Carl von Ende *(Miller, Canfield)*, Mary Bedikian *(MSU College of Law)*, James Feeney *(Dykema, Gossett)* and Ed Kronk *(Butzel, Long)*. Financial experts scheduled to speak include Jim Papageorgiou (*Conway, MacKenzie),* Glenn Sheets *(Stout, Risius*) and Rod Crawford *(Crawford, Winiarski).* Our luncheon speaker will be Michigan Supreme Court Justice Robert P. Young, Jr. Please be on the lookout for more information on this interesting program, and plan to attend.

October 1 Program: "Risk Reduction & Medicare Liens from the Defense Perspective"

In response to the rapidly growing number of issues arising out of Medicare, Medicaid and other liens, MDTC Vice President Lori Ittner (*Garan, Lucow*), Board Member Richard Joppich, and Judicial Relations Chair Ray Morganti *(Siemion, Huckabay)* and others quickly put together a seminar to inform our membership about the evolving law and how to protect their clients' interests. This timely program will be held on October 1, 2009 at the Troy Marriott and will feature Lori, Rik and other speakers discussing such timely topics as **Section 111 Reporting and Discovery Issues, Set-Aside Trusts and Defending against Private Causes of Action** under the Medicare Secondary Payor Statute. The seminar will conclude with a panel discussion on the handling of Medicare liens in state court cases with the Hon. Donald E. Shelton, the Hon. James R. Redford and the Hon. Robert J. Colombo, Jr. participating.

Congratulations to Robert H S. Schaffer – 2009 DRI Sievert Award Recipient

Just before Labor Day, we learned that our immediate past president, Robert Schaffer, is to be honored by the DRI as this year's recipient of the Fred H. Sievert Award. The award will be presented to Robert during the awards luncheon on October 8th at the DRI's annual meeting in Chicago.

The award goes to an individual who has made " **…a significant contribution towards achieving the goals and objectives of the organized defense bar.**" After watching Robert work tirelessly during his presidency of the MDTC, I can say from first hand experience that he is truly deserving of this prestigious award. During his tenure, the MDTC held nine significant events including seminars and purely social functions. He helped launch the Commercial Litigation Section, the Judicial Relations Committee and many innovations such as our discussion lists on Linked-in and Facebook.

The number of phone calls he made and emails he authored to promote the MDTC, its programs and the interests of its members is countless. It is no wonder that the day after he turned over the president's gavel to me, Robert looked pretty tired. I am sure that was a combination of all of his efforts on behalf of the MDTC and the fact that his new daughter, Georgie, is keeping him hopping!

New Members

MDTC Welcomes These New Members

Kristin Bellar, *Clark Hill, PLC,* Lansing, kbellar@clarkhill.com

Joseph Furton, *Nemeth Burwell,* Detroit, jfurton@nemethburwell.com

Philip A. Sturtz, *Sturtz and Sturtz PC,* Saginaw, sturtzph@gmail.com

Does Age Produce Wisdom In Jurors?

By: Dan Farrell, Western Michigan University and Decision Research, Inc.; and Connor Farrell[1], University of Chicago

Executive Summary

Different generations have different attitudes toward social issues, and attorneys need to be aware of these in making a presentation to a jury. These differences are not limited to political issues such as the legalization of marijuana, but extend also to matters such as how jurors view financial institutions and the medical profession.

There are also significant differences in how the different generations receive and process information. The experience that Generation X has with computers and with digital media makes a conventional "stand and talk" presentation less effective than it would be with older generations.

Attorneys need to adjust their presentation to suit the needs of all of the members of the jury, and be prepared to bridge a generational divide to achieve the best result.

[1]The authors wish to thank the National Opinion Research Center (NORC) and Thomas Smith, both of the University of Chicago, for assistance with the data.

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Considering the influence of demographics in legal decision making is not confined to *Time* magazine's coverage of Supreme Court nominee Sonia Sotomayor.[1] The legal press has recently considered the changing sex composition of jury pools.[2] By far the most common consideration, however, is the effect age has on litigators' ability to persuade juries.

Famous litigators from Clarence Darrow to Melvin Belli have held forth on the predispositions of different demographic groups.[3] The effects of age on verdicts have been studied scientifically since the 1960s with decidedly mixed results.[4] The current focus on age appears to be driven by the fact that the group known as Generation X is now the largest identifiable segment of the jury pool.[5]

What is a "Generation"?

In point of fact the definition of a generation is the subject of some debate. Baby Boomers became a generation based on an unusually high birthrate following World War II and the Great Depression, and lasting into the early 1960s. Demographers tend to measure generations by the average mother's age at birth of the first child. Popular literature mostly follows the thinking of early sociologist Karl Manheim who focused on historical events shaping the thinking of a group early in their lives. Those born in the two decades before 1946 were shaped by the economic depression and world conflict. Those born in the high birth periods after the Second World War shared an unusual population phenomenon, a decade of political assassinations and unrest in their teens and 20s.

What is known as Generation X is the current focus of interest first because it has replaced boomers as the largest segment of the population. Gen Xers, that is those in their 20s and 30s, now comprise slightly over 40 percent of the population whereas boomers, those in their 40s, 50s and early 60s, now account for approximately 30 to 35 percent of the population.

The very name of the group – X – is a clue to their shared experiences. The attitude-shaping events of the prior generations have been well recorded, but X suggests unknown events. Generation X has been described as the MTV generation,[6] easily bored with oral argument. They have been seen as a cynical group encumbered by the belief that they cannot exceed their parents financially. They have been reported as less patient, less ambitious, more self-reliant, and less trusting with different beliefs and values from their forebearers.[7] All of these are sentiments that supposedly will come into play in their role as jurors.

Defense Bar Issues

Given the diversity of comment and what may be only partially written history, litigators may be wise to look at specific issues and current information. For over 35

years, the National Opinion Research Corporation (NORC) has annually conducted its General Social Survey (GSS), tracking social attitudes in the United States. It is second only to the U.S. Census as the most frequently analyzed source of information in the social sciences.

The attitude information obtained in the GSS has been recognized as a definitive source of information by the American Bar Association. The American Law Institute has published four books written or edited by sociologist Walter Abbott studying juror predispositions using the GSS database. Professor Abbott's pioneering work has repeatedly demonstrated that generally held social attitudes have an impact on verdicts.

Generations' Attitudes

Confidence in Medicine. The 2008 GSS asked 2353 respondents whether they had "a great deal of confidence," "only some confidence," or "hardly any confidence" in medicine. Table 1 shows the percentage of people in three different generational groups reporting "a great deal of confidence." These data suggest that Generation X has the greatest confidence in medicine. In related questions, the Generation X group also is the most willing to have government help pay for medical care (35.2%) and most likely to have strong positive (20.1%) feelings toward modern science.

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With regard to medicine, Generation X resembles the oldest group, the Great Generation, that is those shaped by the Depression and the Second World War. Understanding why baby boomers are less positively disposed toward the medical community may lie in their broader institutional experiences.

Confidence in Banks and Financial Institutions. While the GSS survey did not specifically name insurance companies, it does contain data regarding attitudes toward financial institutions. These data (see Table 2) suggest that few in the population have a great deal of confidence in banks but of the three generations, Generation X members exceed the others in positivity toward financial institutions – nearly 25 percent have a great deal of confidence. Adding those who responded "some confidence" gives an 81.8 percent total for Generation X's sentiments toward financial businesses.

Legal and Social Issues. The similarity of attitudes between Generation X and the Great Generation, possibly their grandparents, does not hold for other legal and moral concerns. Table 3 shows that Generation X and baby boomers have similar attitudes about legalizing marijuana. Over 40 percent of both groups favor legalization. The Great Generation, who were typically well into middle age before marijuana became commonplace in the United States, are substantially less favorably inclined toward the legalization of marijuana. Other analysis from the survey shows that Generation X also believes that courts are often too harsh when dealing with criminals (16.4%).

Further understanding of lifestyles, generations, and morality emerges from an examination of Table 4. The GSS asked respondents if they thought sex before marriage was "always wrong," "almost always wrong," "sometimes wrong," or "not at all wrong." Again Generation X and baby boomers have strong agreement on a social/moral issue. More than half of each group believes that sex before marriage is not at all wrong. Only about one-third (35.4%) of the Great Generation holds that opinion.

Issue differences and similarities in the generations provide texture to our understanding of the social fabric. For the youngest and the oldest group, there is a shared level of confidence in important social institutions. At the same time, there appears to have been real change on important social issues and among those in more direct contact with lifestyle issues, there are common attitudinal reactions.

Persuading Generation X

Where educators and other learned professionals have posited differences between generations other than attitudes

Generation X has been described as the MTV generation,[6] easily bored with oral argument. They have been seen as a cynical group encumbered by the belief that they cannot exceed their parents financially.

Generation X and baby boomers have similar attitudes about legalizing marijuana. Over 40 percent of both groups favor legalization.

Table 1
Confidence in Medicine

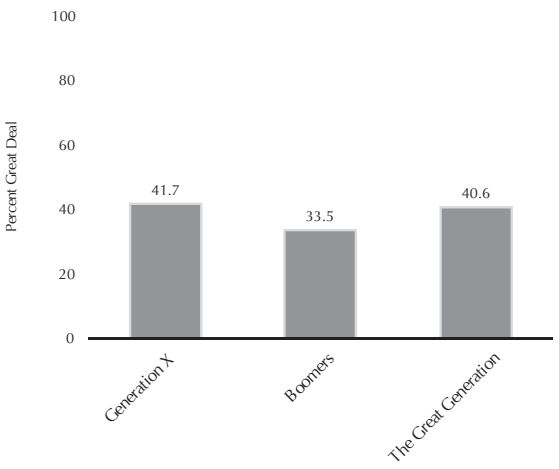


Table 2
Confidence in Banks and Financial Institutions

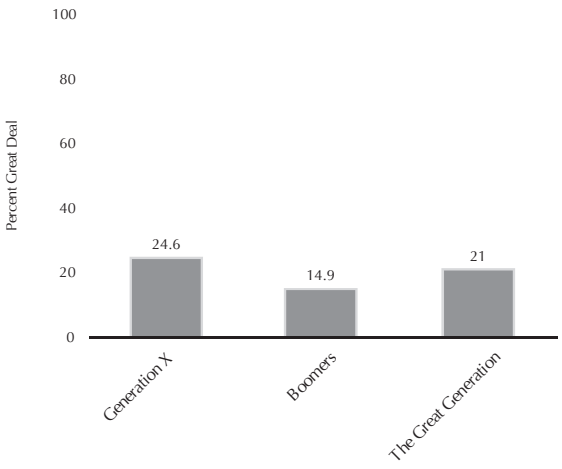


Table 3
Legalize Marijuana

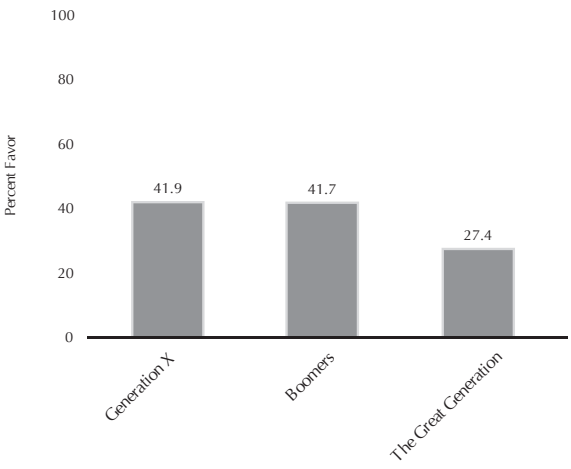
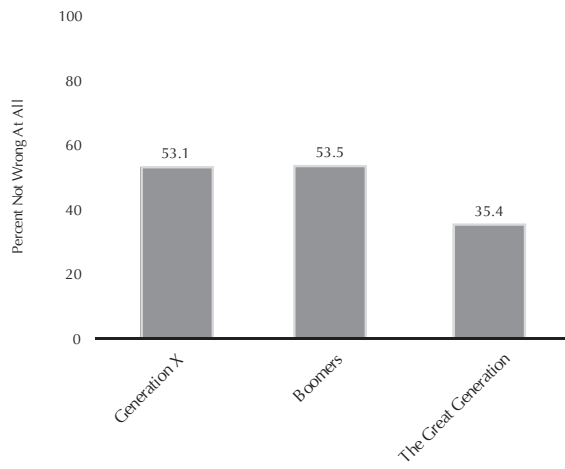


Table 4
Acceptance of Sex Before Marriage



toward legal issues, the most common theme has been to talk about differences in the methods of acquiring and using information.[8] An especially insightful distinction has been to separate the generations by those who are "digitally native" and those who are "digital immigrants."[9] One can tell the natives by the ease with which they multitask on more than one digital platform (*e.g.* text messaging, listening to an iPod, surfing the internet), whereas the immigrants reveal an attitude by their now archaic methods of accessing and traveling the digital world (*e.g.* including prefixes when citing URLs, having staff print e-mails). Not surprisingly, Generation X and those who come even later are digital natives, and the boomers and Great Generation normally are digital immigrants. The distinction results from the proliferation of computing, internet, wireless communication, MP3 players, smart phones, etc. occurring at the end of the 20th century. Not only are the means of communication different for Generation X, according to this logic, this generation may have brains that are physically different as the result of being raised in a digital culture.

Generation X and those who come even later are digital natives, and the boomers and Great Generation normally are digital immigrants.

This template originally called for changes in the methods of education. Successful courtroom advocacy often

mirrors the methods of education. First, the classic "stand and lecture" audible presentation suits boomers as they are practiced in absorbing by listening. Generation X members, expecting to Google and Wikipedia new concepts, are visually and multimedia oriented. PowerPoint presentations, with their 5 points by 8 words recommended message organization, present information in ways that match the neural pathways of the generation. Especially considering judicial admonitions to jurors not to be conducting their own searches, attorneys are well advised to respond to this learning mode.

Taking technology a step further, Generation Xers like manipulations. They expect to participate in the information gathering processes. Demonstrative aids and models, simulations, devices, and artifacts undoubtedly will become increasingly important for effective courtroom presentations. Not too far in the future exhibits and other evidence may be provided in electronic format for the use of jurors during deliberations. Considering neural pathways even further, attorneys might align presentations to digital natives by employing binary logics. Persuasive techniques such as counterfactuals and the use of statistical evidence to shift casual focus to another target should prove especially effective.

If the attorney is not a digital native, care should be taken to not be perceived as a digital tourist.

Conclusion

Do jurors become wiser as they age? Of course they would think so, but others might be skeptical based on these data. From the perspective of the defense trial lawyer, for cases of medical malpractice or other insurance defense, youth and seniority currently appear to be advantageous in prospective jurors. Should there be broader lifestyle issues, such as non-marital heirs, substance use or aggressive application of law enforcement, those currently over 65 have the most conservative outlook.

When preparing courtroom presentations the effective litigator should recognize the complex nature of assessments based on age. One hopes that these data reflect youthful confidence and mature reconciliation with fundamental institutions. It is reasonable to hope that the apparent cynicism of baby boomers will abate as medicine and financial institutions provide for them across the lifespan. It is certain, however, that Generation X is the new dominant age group and that the social changes that are forming their worldview will require informed and attentive work by members of the defense bar.

Endnotes

1. Time Magazine, June 8, 2009
2. Baldas, "The Female Factor," *The National Law Journal*, May 18, 2009
3. Lieberman & Sales, *Scientific Jury Selection* (Washington DC: American Psychological Association, 2007); Posey & Wrightsman, *Trial Consulting* (New York: Oxford University Press, 2005)
4. Lieberman & Sales, *Scientific Jury Selection* (Washington DC: American Psychological Association, 2007)
5. Brennan, "Pitching the Gen-X Jury," *The National Law Journal*, June 7, 2004; Lisko, "The Newer Generations in the Jury Box: Who Will Favor Your Cause?" 32 *Law Practice Magazine* 43 (2006); McEvoy & Shepherd, "What Does a Juror's Generation Mean to Trial Consultants?" 20 *The Jury Expert* 16-18 (2008); Trask, "Communicating to Gen X and Net Gen Jurors, Part II," 16 *The Jury Expert* 1-5 (2004)
6. Reske, "Generation X jurors a challenge: lawyer oratory may bore those raised with MTV and remote control," 81 *ABA Journal* 14 (1995)
7. Hansen, "Reaching Out To Jurors," 88 *ABA Journal* 33-35 (2002)
8. Brennan, "Pitching the Gen-X Jury," *The National Law Journal,* June 7, 2004
9. Prensky, "Digital Natives, Digital Immigrants," 9 *On the Horizon* 1-2 (2001)

In Consideration Of Non-Competes: Is Continued "At Will" Employment Enough?

By: Phillip Korovesis and Jessica Kalmewicki, *Butzel Long*

Executive Summary

Any non-compete agreement is only enforceable if it is supported by consideration. Some states require separate consideration to support a non-compete agreement, but Michigan's non-compete statute does not mention consideration, so there is no basis to require separate consideration.

If the agreement is signed at the beginning of employment, then consideration is always present. When a non-compete agreement is signed after employment has begun the consideration requirement is met where the employment is at-will.

The use of non-compete agreements has long been viewed as standard good practice among employers seeking to protect their valuable business interests.[1] Non-compete agreements are contractual agreements entered into between an employer and an employee, whereby the employee agrees not to pursue, or otherwise engage in, a similar line of work in competition against the employer during, and for a period of time following the termination of, the employment relationship. Because such agreements are contractual in nature, consideration is required to ensure their enforceability. Most often, employees are asked to sign non-compete agreements at the beginning of employment, when the sufficiency of consideration cannot legitimately be questioned.

Many times, however, employers are confronted with the issue of asking employees to sign non-compete agreements after employment has begun. These situations are fairly common, but are especially pointed during turbulent economic times, when vast restructuring may force a business to reassess its practices and implement new tools (such as non-competes) to protect its interests. Similarly, a business successor may be confronted with newly-acquired employees who had not signed non-compete agreements with the prior owner. Under these circumstances, and others, the issue of consideration is not inherently obvious. The relevant issue then becomes whether or not continued employment alone is sufficient to satisfy the consideration requirement to ensure the enforceability of non-compete contracts. An analysis of Michigan statutory and case law makes it clear that it is.

Michigan's Non-Compete Statute

Michigan is one of sixteen states that have enacted a statute governing the use of non-compete agreements.[2] In 1987, the Michigan legislature passed the Michigan Antitrust Reform Act, which (lifting a previous prohibition) allows the use of non-competition agreements between employers and employees,[3] provided such covenants serve to protect a legitimate business interest and are reasonable with respect to their duration, geographical scope and line of business restrictions.[4] More specifically, the statute provides:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.[5]

Phil Korovesis is a shareholder in the Detroit office of Butzel Long. He specializes in commercial disputes, with a primary focus in noncompete and trade secret litigation. He is the chair of Butzel Long's Noncompete and Trade Secret Practice Group. His email address is korovesis@butzel.com.

Jessica M. Kalmewicki is a former associate in the Detroit office of Butzel Long, who specialized in labor and employment law.

The relevant issue then becomes whether or not continued employment alone is sufficient to satisfy the consideration requirement to ensure the enforceability of non-compete contracts.

Michigan courts have found reasonable competitive business interests to include confidential information, trade secrets, customer relationships, customer lists, profit margins, and pricing schemes.[6] Reasonable duration and geographical areas are determined according to circumstances, but one-year covenants restricting competition within a former employer's market area have been readily upheld.[7] Because of the nature of trade restraints by such agreements, courts require that the restricted line of business be narrowly tailored. Accordingly, courts have found prohibitions against employment positions that would allow former employees to sell products similar or related to those that they sold on behalf of their former employers to be valid and reasonable.[8]

The Statute Does Not Require Separate Consideration

The language in MCL 445.774(a) is clear and unambiguous, and makes no mention of any specific consideration in the requirements for an enforceable non-compete agreement; therefore, it can reasonably be read to the conclusion that consideration in addition to continued employment—whether at its inception or after—is unnecessary. In other words, under the plain meaning of the statute, continued employment is sufficient consideration to enforce a non-compete agreement. Moreover, the legislature's omission of any reference to the issue of consideration evidences its intent not to shape its requirement, as it applies to non-compete agreements, in the way that it did with the contractual terms of duration, geographical location, and scope of business.

It is well-established that courts are bound to give effect to a statute's literal meaning when the statutory text is "plain" or "clear and unambiguous."[9] As the Michigan Court of Appeals stated in *Bristol Window and Door, Inc. v. Hoogenstyn*: "If the statutory language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted."[10]

On the other hand, where an ambiguity does exist, the rules of statutory construction require that "the intent of the legislature must be given effect," and that an interpreting court's obligation is to ascertain such intent from reasonable inferences made from the words expressed in the statute itself.[11] Legislative intent is not only found by examining the language used, but also by that which is omitted.[12] Moreover, courts have noted their inability to "enlarge the meaning of a statute by adding language aimed at correcting any supposed omission or defect."[13]

The legislature, in drafting the statutory language at issue, specifically addressed those requirements it deemed necessary for the enforcement of a non-compete agreement. Not only did the legislature clearly identify and address such requirements, but it did so at a time when it was consciously lifting the ban against such agreements, thereby engaging in particular scrutiny of the issues involved. As discussed above, the statutory language creates the need to implement reasonable parameters concerning the duration, geographical, and business scopes of non-compete agreements, but does not make any mention of consideration. Accordingly, a requirement of special or additional consideration should not be read into the statute.

Under the plain meaning of the statute, continued employment is sufficient consideration to enforce a non-compete agreement.

Had the legislature intended to require specific, additional consideration as a necessary element to enforceability of a non-compete agreement, it would have included language to that effect—or at least alluded to the issue.

Though no claim of ambiguity regarding the statute's language can be made, the legislature's intent not to include specific consideration as a prerequisite to a non-compete agreement is evidenced by its omission. Had the legislature intended to require specific, additional consideration as a necessary element to enforceability of a non-compete agreement, it would have included language to that effect—or at least alluded to the issue—in the statute, just as other states have.[14]

For example, Oregon's comparable statute emphasizes the necessity for additional consideration by including specific language:

> (a)(A)A noncompetition agreement entered into between an employer and employee is voidable and may not be enforced by a court of this state unless [t]he employer informs the employee in a written employment offer received by the employee at least two weeks before the first day of the employee's employment that a

> noncompetition agreement is required as a condition of employment; or (B) The noncompetition agreement is entered into upon a subsequent bona fide advancement of the employee by the employer.[15]

Similarly, the language in Texas's non-compete statute alludes to consideration by requiring that non-compete agreements either be entered "ancillary to, or part of an otherwise enforceable agreement at the time the agreement is made."[16] This language clearly illustrates a state legislature's intent to require special or additional consideration for employees who enter into non-compete agreements after commencement of their employment. In other words, such language implies that at-will employment, which may terminate at any time (for a legal reason), is insufficient consideration to enforce an employee's subsequent contractual obligation to refrain from competing. Michigan's legislation has no such language and, hence, no such requirement.

Continued At-Will Employment Is Sufficient Consideration

It is well-settled in Michigan that an employee's continued employment by a successor or new employer is sufficient consideration for a non-compete agreement.[17] In *Robert Half International, Inc v Van Steenis*, the Court stated that "as to lack of consideration, continued employment constitutes sufficient consideration [for the execution of a noncompetition agreement, where the] employment is otherwise 'at will.'"[18]

A distinction, in recent years, between "at will" and "just cause" employees confirms the sufficiency of continued employment as adequate consideration to enforce a non-compete agreement, provided that the privilege of employment is not already a contractual right at the time the non-compete is executed. In *QIS, Inc v Industrial Quality Control, Inc.*, the Michigan Court of Appeals upheld a trial court's decision to void a non-compete agreement, as unsupported by mutual consideration, where the employer threatened to withhold its employees' paychecks until they either signed newly-introduced non-compete agreements or refused to do so (at which time they would be terminated).[19]

There, the employees were unionized, and could only be discharged for just cause.[20] In its decision, the court reasoned: "Mere continuation of employment is sufficient consideration to support a noncompete agreement in an at-will employment setting (citing *Robert Half*). It follows that defendants also received sufficient consideration if continuation of their employment hinged on signing the agreement."[21] After emphasizing the unionized employees' status as "just cause" employees who could not be terminated for refusing "to enter into an agreement outside the collective bargaining agreement," the court concluded that "it follows that the noncompete agreement was not supported by mutual consideration."[22]

Conclusion

Non-compete agreements are essential tools for any company that is interested in protecting its valuable business interests —especially in light of the vast restructuring in response to the current economic forecast. Despite their effectiveness, implementation of such agreements is often overlooked, perhaps because of an ill-conceived notion that they are difficult to enforce. As discussed above, however, non-compete agreements—if drafted appropriately—can readily be put into place. Because they require no consideration in addition to (continued) employment, companies have no excuse for failing to take advantage of the business security they can provide.

Endnotes

1. While non-compete agreements recognized and enforced in many jurisdictions, California and North Dakota have outlawed them as against public policy *See, Edwards v Arthur Andersen, LLP,* 189 P3d 285 (Sup Ct 2008); ND Cent Code § 9-08-06.
2. Other states that have implemented such legislation are: Alabama, Colorado, Florida, Georgia, Hawaii, Louisiana, Missouri, Montana, Nevada, North Carolina, Oklahoma, Oregon, South Dakota, Texas, and Wisconsin.
3. The provision has been held to allow such agreements with independent contractors as well *Bristol Window & Door, Inc v Hoogenstyn,* 250 Mich App 478, 497-98; 650 NW2d 670, 680 (2002).
4. From 1905 to 1985, covenants not to compete were prohibited by MCL 445.761, which was repealed in 1985.
5. MCL 445.774(a) (2009).
6. *Lowry Computer Products, Inc v Head*, 984 F Supp 1111, 1116 (ED Mich 1997).
7. *Kelly Services, Inc v Noretto*, 495 F Supp2d 645, 657 (ED Mich 2007); *Kelly Services, Inc v Eidnes*, 530 F Supp2d 940, 952 (ED Mich 2008).
8. *Lowry Computer Products, Inc v Head,* 984 F Supp 1111, 1116 (ED Mich 1997).
9. Norman J Singer & JD Shambie Singer, *Sutherland Statutory Construction,* § 46:4 (7th ed 2008).
10. 250 Mich App 478, 484; 650 NW2d 670, 673 (2002).
11. *Central Advertising Co v Department of Transportation*, 162 Mich App 701, 706-07; 413 NW2d 479 (1987).
12. Norman J Singer & JD Shambie Singer, *Sutherland Statutory Construction,* § 46:5 (7th ed 2008).
13. Norman J Singer & JD Shambie Singer, *Sutherland Statutory Construction,* § 46:4 (7th ed 2008) (citing *In re Estate of Swiecicki*, 121 Ill App3d 705; 460 NE2d 91 (5th Dist 1984), judgment aff'd, 106 Ill 2d 111, 477 NE2d 488 (1985).
14. *See eg,* Tex Bus & Com Code §§ 1550-52, requiring that non-compete agreements be presented to employees "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made" *See also,* or Rev Stat § 653295, requiring advance notification (prior to the start of an incoming employee's employment) that a non-compete is a required condition to employment, and additional consideration if a non-compete is requested subsequent to employment.
15. Or Rev Stat § 653295 (amendment became effective on January 1, 2008).
16. Tex Bus & Com Code §§ 1550-52 (2008).
17. *Valley National Gas, Inc v Marihugh*, (unreported) 2007 WL 2852338 at *3 (ED Mich 2007); *Lowry Computer Products, Inc v Head,* 984 F Supp 1111, 1115 (ED Mich 1997).
18. 784 F Supp 1263, 1273 (ED Mich 1991).
19. 262 Mich App 592, 593; 686 NW2d 788, 789 (2004).
20. *Id.*
21. *Id.*
22. 262 Mich App 592, 594-95; 686 NW2d 788, 789-90 (2004).

Defending A Multi-Member Municipal Policy-Making Board Against Claims Under Section 1983

By: Heather M. Olson, Thomas D. Esordi, *Kitch Drutchas Wagner Valitutti & Sherbrook*

Executive Summary

Local governments have been held to be "persons" within the meaning of 42 USC §1983 and therefore potentially subject to liability for civil rights violations based on the implementation of a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body if the official action was "arbitrary and capricious." Where the official action is taken by a multi-member board, the Sixth Circuit applies a "but for test" that holds that liability exists only where the improperly motivated members supply the deciding margin.

Counsel defending a local government should explore various defenses, including whether the plaintiff has named a proper party defendant; whether the defendant was merely enforcing a law, as opposed to adopting a law or exercising discretion; whether the plaintiff will be able to show that an improper motive was the causative factor in the decision, and whether the board acted with deliberation as demonstrated, for example, by consulting with legal counsel.

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Due to their status as local governmental entities, municipal corporations and municipal officials and employees are subject to liability for civil rights violations. As municipal budgets become more constrained and instances of excessive jury awards and settlements increase, municipalities are faced with greater exposure to liability.

Section 1983 provides a cause of action against every person who, under color of state law, subjects or causes to be subjected, an individual to the deprivation of rights, privileges or immunities secured by the United States Constitution or federal law.[1] However, Section 1983 does not create substantive rights; it merely serves as a vehicle to enforce deprivations of "rights[,] privileges, or immunities secured by the Constitution and laws [of the United States]."[2] Therefore, a plaintiff pursuing a claim under Section 1983 must satisfy both the elements of Section 1983 and those of the underlying constitutional violation.[3]

Section 1983 and Municipalities

Section 1983 applies to local governments and governmental employees and officials, all of which are considered "persons" for the purposes of §1983 claims.[4] In *Monell v Dept of Social Services*,[5] the United States Supreme Court overruled *Monroe v Pape*[6] and held that local governments could be sued as "persons" under Section 1983. Thus, local government officials and employees and the local governmental body itself are subject to potential liability under §1983. However, as set forth by the court in *Monell*, a local government may only be liable under Section 1983 where the action alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.[7]

There are numerous ways in which a governmental body may expose itself to liability under §1983. These include, but are not limited to: contracting and otherwise dealing with private entities; decisions of municipal legislative bodies; and actions of individual government officials or employees with decision-making authority. Currently, most counties in Michigan are governed by a multi-member board of commissioners, rather than an individual government official. Michigan law defines the powers of a board of county commissioners, giving boards the power to establish policies and adopt ordinances and rules for the conduct of county business.[8] As a result, multi-member municipal boards are often charged with exercising their governmental function and making important decisions on behalf of the county.

Multi-Member Policy-Making Municipal Boards

Municipal liability under Section 1983 may be imposed for a single decision by a

A local government may only be liable under Section 1983 where the action alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

municipal legislative body, such as a board of commissioners, where a deliberate choice is made from among various alternatives by the policy-making body responsible for establishing final policy with respect to the subject matter in question.[9] Where an official action of a municipal body on its face evidences no improper motive, a plaintiff must prove that the public body acted out of a constitutionally impermissible motive.[10]

Where a plaintiff alleges that an action taken by a municipal board violated the plaintiff's constitutional rights under §1983, a plaintiff must prove both that the individual members of the board had the final authority to establish municipal policy and that the final decision was made with an improper motive.[11] Michigan law presumes that local officials act in good faith to perform their duty as government officials.[12] The Michigan Court of Appeals has previously held that the "judiciary will not interfere with discretionary actions of a legislative body such as defendant board of commissioners" and "[o]nly action which is so 'capricious or arbitrary as to evidence a total failure to exercise discretion' may be subject to [the] Court's review."[13] Therefore, it is only where a plaintiff can show that an official action of a board is "arbitrary and capricious," that the action will qualify for relief under §1983.

Where the action of a multi-member board is at issue, a plaintiff is tasked with the additional burden of proving an improper motive on behalf of the board itself, not only a few of its members. Although the circuits are split on a definitive test for proving improper motive on behalf of a municipal board, the Sixth Circuit has recently adopted a test that provides guidance as to a plaintiff's burden in a Section 1983 case against a multi-member municipal board. In *Scarbrough v Morgan County Board of Education*, the Sixth Circuit adopted a "but for test" that holds a governmental body liable "for actions that it would not have taken 'but for' members acting with improper motive" and determined that it is only where the improperly motivated members supply the deciding margin, that the board itself is liable under Section 1983.[14]

Defending a Multi-Member Municipal Board

While a municipal attorney defending against a Section 1983 claim must take many considerations into account when preparing its defense, the following are a few key points that warrant specific emphasis:

1. Proper Party Defendant

Who has the plaintiff named as a defendant? Where a plaintiff files suit for deprivation of a constitutional right under Section 1983, a plaintiff must name a party capable of being sued. Often naming only a municipal board or commission and not the municipality itself is not sufficient. For example,

Michigan law presumes that local officials act in good faith to perform their duty as government officials.

Michigan statutes and case law must be examined to determine if the entity named as a defendant by plaintiff is a legal entity capable of being sued.

under Michigan law many municipal departments are not entities capable of being sued. In *Sumner v Wayne County*,[15] the court held that the sheriff's department is merely a department within the jurisdictional authority of Wayne County, and is not legally separate from the county. Similarly in *Haverstick Enter v Fin Ed Credit, Inc*,[16] the court dismissed the plaintiff's claims against the city police department because it is not a legal entity against which suit can be directed. Michigan statutes and case law must be examined to determine if the entity named as a defendant by plaintiff is a legal entity capable of being sued. If not, defendant may move to dismiss plaintiff's claims on this basis.

2. Enforcing Existing Law

Is the municipal body enforcing a state or local law? It is important that the decision, policy statement, or ordinance be adopted or promulgated by the municipal body. A municipal body's mere enforcement of state law, as opposed to express incorporation or adoption of state law into local regulations, has been found to be insufficient to establish municipal liability under the *Monell* standard. Thus where a municipal body is merely enforcing state law the body is acting as an arm of the state and is not exercising any discretionary authority that could subject itself to liability under Section 1983.[17] Simply acting as an arm of the state, exercising no discretion, provides a municipal body with immu-

It is important to determine whether the municipal board at issue actually has official decision-making authority. Many municipal boards are boards of review only and have absolutely no authority to establish policies on behalf of the municipality.

nity from suit under the Eleventh Amendment.[18] However, where a municipal body has exercised discretion in the action at issue, the Eleventh Amendment will not provide the municipality with any protection.[19]

3. Decision-Making Authority

Does the board have official decision-making authority? It is important to determine whether the municipal board at issue actually has official decision-making authority. Many municipal boards are boards of review only and have absolutely no authority to establish policies on behalf of the municipality. State law defines what constitutes an official act of a municipality, thus it is necessary to examine applicable state statutes to determine the powers granted to the municipal body at issue.[20]

4. Qualified Immunity

Is an immunity defense available? It is important to remember that the defense of qualified immunity is not applicable to municipalities.[21] In *Owen v City of Independence*,[22] the supreme court held that a municipality has no immunity from liability under the Civil Rights Act flowing from its constitutional violations and may not assert the good faith of its officers as a defense to such liability. While these defenses may be available to individual defendants sued under Section 1983, they are not available to municipalities and thus provide no protection against a plaintiff's Section 1983 claim. However, while municipalities do not have qualified immunity from claims for compensatory damages, they do enjoy absolute immunity from claims for punitive damages.[23]

5. Causation – Motivating Factor

Has the plaintiff sufficiently demonstrated causation? Causation is an important element of a plaintiff's claim under Section 1983. A plaintiff must show that his or her protected conduct was a motivating factor in the board's decision as a whole and not just in the votes of its individual members. The plaintiff has the initial burden of showing that his or her protected conduct motivated the board's action that resulted in a deprivation of plaintiff's rights. Only after the plaintiff has established this will the burden shift to the defendant board, to show that it would have taken the same action absent the improper motive.[24] This standard is similar to the rational basis test for constitutional scrutiny. Thus, where the defendant board can show that it based its decision on anything but the defendant's protected conduct, dismissal of plaintiff's case is likely.

6. Board Members' Motives

Who are the board members and what were their individual motives? Cases involving multi-member policy-making boards are particularly unique and thus it is crucial that an attorney defending a municipality identify every individual member of the board at the time of the allegedly improper act or acts. Further, it is essential to question each member of the board to determine each individual's reason for his or her decision.

The plaintiff has the initial burden of showing that his or her protected conduct motivated the board's action that resulted in a deprivation of plaintiff's rights. Only after the plaintiff has established this will the burden shift to the defendant board.

A plaintiff will not be able to demonstrate a prima facie case under Section 1983 against a multi-member municipal board where the plaintiff has failed to even present evidence sufficient to show that the intent of at least a majority of the board that participated in the decision.

7. Causation – But For

Has plaintiff met the "but for test" threshold? Michigan law has currently adopted the "but for test" to determine whether a municipal board has acted with an improper motive.[25] Therefore, proper attention must be made to the plaintiff's presentation of its case at all stages. Where the plaintiff has failed to name enough board members in its complaint, or further failed to present evidence as to the intent of enough board members to satisfy the majority threshold, then it may be proper for the defendant municipality to move for dismissal of the case. A plaintiff will not be able to demonstrate a prima facie case under Section 1983 against a multi-member municipal board where the plaintiff has failed to even present evidence sufficient to show that the intent of at least a majority of the board that participated in the decision. For example, where the defendant at issue is a board comprised of ten (10) members

and all members voted in favor of the action that plaintiff alleges violated his/her rights, then plaintiff must demonstrate that at least six (6) members of the board were improperly, unconstitutionally motivated in making their decision. Similarly if the defendant board is comprised of ten (10) members and only six (6) voted in favor of the allegedly improper action, then plaintiff must prove that at least four (4) members of the board who voted in favor the action, were improperly motivated in making their decision, in order to present a prima facie case under Section 1983.

8. Consultation with Legal Counsel

Did the decision-making body consult an attorney before making its decision? One component of a plaintiff's case under Section 1983 is to establish an improper motive on behalf of the board, showing that the board's action was "arbitrary and capricious." Thus, where a board has consulted legal counsel, or shown reasonable deliberation in some other way, a defendant municipality may be able to defeat a plaintiff's claim, since a reasoned decision, as a result of meaningful contemplation or the seeking of learned advice is evidence that a decision was not "arbitrary and capricious" and thus plaintiff's ability to demonstrate a prima facie case under Section 1983 may be defeated.

9. Jury Instructions

Have specific and clear jury instructions been drafted? On the occasion that the case reaches trial, it is essential that the municipality's attorney ensures that the judge properly instructs the jury as to all elements of a Section 1983 claim and specifically the requirement of the number of board members required for plaintiff to prevail. The importance of jury instructions in this instance cannot be stressed enough. Ensuring that the jury is provided with clear and understandable guidelines may be very beneficial to the defendant municipality and will protect against any misapplication of legal standards.

Conclusion

Overall, while it is impossible to guard a municipality against any and all claims under Section 1983, it is possible to develop an awareness and understanding of Section 1983 within the municipality and specifically within municipal decision-making bodies, in order to diminish the potential for Section 1983 violations and thus limit a municipality's exposure to Section 1983 lawsuits. There are numerous ways in which a governmental body may expose itself to litigation under Section 1983. A municipality must be especially careful in its dealings with not only its own employees, but also private entities and individuals and the general public itself.

As municipalities expand and take on different roles including, employer, landlord, tenant and even business partner it is crucial that the municipality remains aware of its requirements under the Constitution and the scope of its potential liability under Section 1983. Establishing internal rules and programs designed to minimize the likelihood of infringements on constitutional rights is one way a municipality can position itself to help guard against potential liability for constitutional violations. Procedures implemented to guard against constitutional violations will benefit not only municipal decision-making bodies, but individual government officials and policymakers as well.[26] Adherence to applicable state laws, including the Open Meetings Act and the Freedom of Information Act, together with regular consultation with legal counsel and the establishment of internal procedures and guidelines are just a few ways that a municipality can help guard itself from exposure to liability under Section 1983.

Endnotes

1. 42 USC §1983.
2. *Johnson v City of Detroit*, 319 FSupp 2d 756, 760 (2004) (internal citations omitted).
3. Common sources of alleged constitutional violations are the 14th Amendment (deprivation of substantive and/or procedural due process, equal protection) and 1st Amendment (freedom of speech).
4. *Monell v NY City Dept of Social Services*, 436 US 658, 690 (1978).
5. 436 US 658, 690-691 (1978).
6. 365 US 167 (1961).
7. *Monell, supra* at 690-691.
8. MCL §45.556, Act 139 of 1973.
9. *Pembaur v Cincinnati*, 475 US 469 (1986).
10. *Scarbrough v Morgan County Board of Education*, 470 F3d 250, 262 (6th Cir 2006).
11. *Scarbrough, supra* at 262 (6th Cir 2006).
12. *Wayne County Sheriff v Wayne County Board of Commissioners,* 148 Mich App 702, 704-705; 385 NW2d 267 (1986).
13. *Wayne County Sheriff v Wayne County Board of Commissioners,* 148 Mich App 702, 704-705; 385 NW2d 267 (1986).
14. *Scarbrough, supra* at 262 (6th Cir 2006).
15. 94 FSupp 2d 822, 827 (ED Mich 2000).
16. 803 FSupp 1251, 1256 (ED Mich 1992), aff'd 32 F3d 989 (6th Cir 1994).
17. "Where county officials are sued simply for complying with state mandates that afford no discretion, they act as an arm of the State." *Brotherton v Cleveland*, 173 F3d 552, 556 (6th Cir 1999) (internal citations omitted).
18. *Gottfried v Medical Planning Services, Inc*, 280 F3d 684, 693 (6th Cir 2002).
19. *Monell, supra* at 690.
20. MCL 45. 1, et seq.
21. *Owen v City of Independence*, 445 US 622, 638 (1980).
22. 445 US 622, 638 (1980).
23. *Owen v City of Independence*, 445 US 622, 650-658 (1980).
24. *Scarbrough, supra* at 262.
25. *Scarbrough, supra* at 262.
26. *Owen v City of Independence,* 445 US 622, 652 (1980).

Young Lawyers Section

VI. Trial Tips, Techniques & Strategies Part 2: Opening, Direct and Cross Examination, and Closing

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

Executive Summary

This article is the seventh 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. Part one of this two-part article provided tips, techniques, and strategies for trial advocacy. Part two walks through the basics of each stage of trial.

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I. OPENING STATEMENT

Cut to the Chase

Surprisingly, many trial attorneys regularly break a common rule when speaking to a jury: do not waste time thanking jurors for their service. Attorneys sometimes spend up to three minutes discussing the commitment a jury makes, the difficulty of serving, and the appreciation he or she has for each and every juror.

Those who study and teach trial advocacy will tell you that research indicates jurors are not swayed by these comments and that the time is much better spent diving straight into your opening or closing. People have a tendency to remember the first and last things you say, so do not waste these precious opportunities. It's fine to thank them at the end of your comments if you wish, but it should never take more than five words: "Thank you for your service."

The Roadmap

The opening statement is ideally used as an outline or "roadmap" for your case presentation. As a result, it takes its form quite easily by simply taking each part of the trial and providing a brief summary of it. As you become more experienced, you will undoubtedly develop your own style for giving an opening statement. For now, just follow this simple roadmap.

Start by stating your theme and giving a brief introduction of your version of the facts of the case. Follow that by naming each witness you will present and identifying the one or two key points each will testify to. After you have discussed the witnesses, proceed to a small closing where you inform the jury of what you think the verdict will be after all the evidence is considered. This brief closing should relate back to your theme if possible as it is important to reiterate it often. (For the basics of creating a theme for your case, see Part One of this article in the previous issue of the *Quarterly).*

Remember, the opening statement is not a time to **argue** your case, it is a time to tell the jury what the evidence will show. As a result, you can avoid possible objections and, even worse, admonishments from the judge, by beginning most statements with, "The evidence will show . . . ." It's a simple trick and may not always work, but it is usually enough to deter the opposing counsel from objecting. Just be sure that you have the evidence you are referring to and that it will be entered in trial (a

You can avoid possible objections and, even worse, admonishments from the judge, by beginning most statements with, "The evidence will show . . . ."

"good-faith" belief is all that is necessary), otherwise, your opposing counsel will point out your broken promise to the jury.

What to Avoid

Avoid discussing your opponent's case if you can. It is always presumptuous to make assumptions about what evidence and theories they may present, but as a defense attorney, you have the luxury of hearing their opening statement before giving yours. If you feel you must address the plaintiff's case, stick to the basic theory and disputed facts. Avoid discrediting their witnesses' testimony. At this point they have yet to testify and you are treading on thin ice when you begin suggesting that you know what your opponent's witnesses will say (even if you are relatively certain).

What Not to Do

Never, under any circumstances, promise to prove or provide something you are not absolutely certain you can honor. Attorneys around the world shuddered at one famous attorney's bold proclamation during his opening statement in defense of accused wife murderer Scott Peterson, "The evidence is going to show clearly, beyond any doubt, that not only was Scott not guilty, but stone-cold innocent." Just over five months later, both legal analysts and the jury agreed that quite the opposite was proven.

The opening statement is a powerful introduction to your case, and the statements you make should carry through to your closing argument. For this reason, you do not want to put yourself in the position of having to explain why you failed to meet your self-imposed obligation. If, by luck, the jury does not remember your unfulfilled promise, rest assured that your opposing counsel will bring it to their attention. One of the best techniques to use in your closing argument is to remind the jury of each of the promises you made in your opening statement and how the evidence and testimony presented during trial have supported them. Successfully employing this technique, however, starts with your opening statement.

Overall

Keep in mind that this is your first of only two opportunities to speak directly to the jury. Do not overlook it. Consider it as a five to thirty minute summary of your case and why the jury should ultimately decide in your client's favor.

II. DIRECT EXAMINATION

Know your Witness

Begin preparing for direct examinations by understanding who your witness is and what factual points he or she must establish. Write those points on a sheet of paper and list the foundational information under them that must be testified to in order to reach each of the points. This will help avoid annoying, embarrassing, and sometimes confidence shattering speed bumps (a/k/a objections) at trial. There really is no excuse for a sustained foundational objection on direct examination because sufficient

Never, under any circumstances, promise to prove or provide something you are not absolutely certain you can honor.

Direct the witness to look at you when being questioned but to turn towards the jury when answering. Eye contact is important in establishing credibility.

preparation should alert you to any inadequacies.

Preparation

Prepare your witness by discussing the topics you will question him or her about and even by practicing a mock examination. An excellent way to do this is to go over the background information which typically introduces your witness to the jury (e.g. name, education, employment, etc.). This will familiarize the witness with the flow of the questioning and give you an opportunity to discuss the adequacy of the responses. Are they too short? Too long? Too wordy? Too loud? Too quiet? Rushed? Non-responsive?

Also, take this opportunity to examine how the witness appears while testifying. Notice the body language (slouching? stiff? eye contact?) and direct the witness to look at you when being questioned but to turn towards the jury when answering. Eye contact is important in establishing credibility. Practice the questioning multiple times to get a feel for whether the witness will remember to maintain eye contact with the jury. If not, develop discreet signals you can give that will remind him when answering.

It is also crucial for your witness to remember to maintain eye contact during cross-examination. The confrontational nature of this type of questioning makes it difficult for many witnesses to keep focused on the jury. Because you should not be signaling your witness during cross, make sure he or she

remembers that the primary duty of a witness is to tell the story to the **jury**, not the **attorneys**.

Organization

Presenting a clear and understandable story from each witness is as much about your organization of the information as it is about the witness' ability to convey it. Break the examination up into what are called "chapters." Each chapter should represent a significant and distinct part of the story. As you proceed from one chapter to the next, note this transition to the jury by leading with, "Now, Mrs. Jones, let's turn to what you did after the accident." Or, "I now want to discuss any actions you may have taken after receiving Mr. Stewart's complaints."

Headers such as these keep the story organized in the minds of the jurors as they are bombarded with information. Remember, you have likely lived your case for up to two years by the time it goes to trial while your jurors likely became aware of it during voir dire just hours before your witnesses' testimony. No matter how simple you think the story is, it is still an abundance of information which needs to be heard, remembered, and considered in a very short time. Organization is your best technique for assuring a smooth transition from your witnesses' mouth to the jurors' deliberation.

Another technique for assuring both understandable and memorable testimony is to repeat key statements from your witness in the form of a subsequent question. An example is, "Mrs. Brown, after you saw the plaintiff pull out into the street without looking both ways, what happened next?" Note that this is not the same as simply repeating witnesses' answers (which is a bad habit that takes practice to eliminate). Use this technique only with key facts. Be careful not to abuse this technique or you will certainly draw an objection from opposing counsel. However, you may also attract an unsolicited admonition from the judge and strange looks from the jury. But used properly, it is an excellent way to reiterate your witnesses' key testimony.

Another technique for assuring both understandable and memorable testimony is to repeat key statements from your witness in the form of a subsequent question.

Most attorneys take direct examination witnesses through their testimony chronologically. It is not a rule that will apply in all circumstances, but generally provides for the clearest and simplest presentation. As with all other stages of the trial, maintain a checklist for each witness detailing the specific information you must elicit before concluding your examination. Mark these off as each is testified to during your questioning. Again, remember your theme and try to incorporate similar language into your questions.

III. CROSS-EXAMINATION

Although immortalized in books, film, and television, the cross-examination is rarely the case-cracking turning point in the trial. Without proper preparation, you are more likely to recreate the glove fiasco from the O.J. Simpson trial than the prideful admission from *A Few Good Men*. A good cross-examination is based more on drawing out the essential facts you need from that witness. These facts come out not due to fancy lawyer tricks, but rather due to carefully worded questioning which backs the witness into a corner – a corner where he or she can only truthfully respond with the key answer you want the jury to hear.

Cross-examination experts typically rely on the "chapter method" of organizing the questioning.

Organization

Cross-examination experts typically rely on the "chapter method" of organizing the questioning. As discussed earlier, this method generally breaks the questioning down into separate and distinct "chapters" which are designed to elicit one key part of your case per chapter. Although also used in direct examination, cross-examination is where this method is particularly important. Many resources can be found in books and online which examine this method in great detail, so it will not be discussed in this article other than it is an excellent technique and is recommended for you to learn and use.

Key Pointers

The most widely recognized rule for cross-examination is (say it aloud): **Never ask a question you do not know the answer to.** The reason for this is because you obviously have no idea what the witness will say. If you do not know what the witness will say, then you likely will have no support to impeach the witness's credibility or point out weaknesses in his answer if he or she offers damaging testimony.

Know when to stop. Many attorneys are caught off guard when the witness provides an answer they were seeking before they were expecting it. When this happens, move on! Check this fact off in your notes and move on to the next topic. It is common to feel the need to bolster the answer when it surprises you. Resist this urge, a fact is a fact and you risk the witness qualifying or contradicting it if you continue to press it.

Knowing when to stop also applies when the witness has responded with damaging or un-anticipated testimony. In this situation, do not end your examination! Even if you have no other ques-

tions or topics to discuss, find a safe question to ask that will distract attention from the witness' previous harmful answer. This rule also applies to sustained objections on your final questions. Make sure you do not sit back down without getting at least one safe question to the witness. The appearance of defeat when ending the examination immediately after a damaging answer can actually be worse than the answer itself.

The other stone-etched rule of cross-examination is to **always ask leading questions.** You know the answer you want, so phrase the question so that answer is the only possible one they can give. Also, ask "one-fact questions." In other words, do not try to pack more than one important fact into each question. Cross-examination should be a very paced and methodic question and answer setting. If you try to establish multiple facts in each question, you are welcoming confusion by the witness and jury, as well as objections from opposing counsel.

Avoid at all costs asking questions that start with, "Wouldn't you agree…?" or "Isn't it fair to say…?" Many witnesses, especially well prepared or experienced witnesses, would gladly sit in silence for as long as it takes to think of a way to disagree with you rather than give you the answer you are expecting. The basic adversarial nature of a cross-examination is usually enough to put witnesses in the mindset that they should not agree with the opposing attorney. So, do not give them this opportunity.

Stick to the "Yes or No" questions. It is much safer, simpler, and will give you the same result you are seeking. Finally, under no circumstances should you be asking a question that starts with "Why…" Again, even if you know why the witness did or said something, even if she already admitted to it in a deposition, do not give her the opportunity to give inconsistent testimony or to soften or explain her answer.

Even if you have no other questions or topics to discuss, find a safe question to ask that will distract attention from the witness' previous harmful answer.

IV. CLOSING

Now for the fun part. The closing is when the leash is taken off. No longer bound by many of the formal rules of the opening statement and direct and cross examinations, you now have the opportunity to *argue* your case directly to the fact finder. Barring any rare objections, it is your turn to take center stage.

Begin with a clever reminder or even just a word-for-word repeating of your theme from your opening statement. A simple yet effective way to do this is to simply say, "At the beginning of this trial I stood here and told you that this case was about broken promises [or failing to look both ways before you cross]. Now, after six hours [or six days or six months] of testimony and evidence, we are left with just that: broken promises."

As a defense attorney, one method of arguing your case in the closing is to simply discuss each of the claims raised in the complaint. By this time, you should have referred to your checklist prior to your closing to verify that you established all the key facts and elements necessary to your case. Also, identify any (hopefully many) facts and elements your opponent has failed to establish. Proceed through the claims and make reference to each of these elements. Remind the jury how the testimony and evidence presented proved or disproved individual elements, thus establishing or negating each claim.

The closing is when the leash is taken off. No longer bound by many of the formal rules of the opening statement and direct and cross examinations, you now have the opportunity to *argue* your case directly to the fact finder.

There are many methods for making a closing argument. Much of it comes down to organization and comfort in the presentation. Practice is really the only way for you to determine if your method works for you. Recruit friends, family, or co-workers to listen to your closing and offer advice.

The Verdict Form

Finally, do not overlook the verdict form in preparing for your closing argument. Many verdict forms are confusing to jurors (and even attorneys!) and can lead to unintended or inconsistent verdicts. No matter how simple or complex you think it is, trial advocacy instructors will tell you that spending just thirty seconds explaining the form can prevent confusion and errors in filling it out. An excellent way to accomplish this is to make an easily readable poster-sized board of the verdict form. Show it to the jury and go through each question telling them exactly what you want them to do when they fill out the verdict form. Tell them explicitly, "for question number one, XYZ Company wants you to mark 'No'," or "for question number twelve, the plaintiff John Smith wants you to write $40,000." Once you have done this, you can rest assured that the jurors have no doubt what they need to do if they agree with your client's position.

GOOD LUCK AT TRIAL!

Remember to check back in the next issue of the Michigan Defense Quarterly for the final installment of our series where we will offer tips and strategies for the post-trial process.

By: Susan Leigh Brown, *Schwartz Law Firm P.C.*
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No Fault Report — October 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

Reversal of Fortunes? The newly constituted Supreme Court has now twice reversed the "old" Supreme Court's decisions from the last quarter of 2008 on No Fault cases which had been decided in favor of insurance companies. There is no real doubt that the decisions are based on the new composition of the Court. Throw open the proverbial floodgates of new litigation on serious impairment at least.

***Kreiner* revisited.** Supreme Court reverses its December 2008 denial of leave to appeal a serious impairment victory for the defendant and grants leave to appeal on the issue of the continued viability of the *Kreiner* standard.

House of Representatives passes House Bill No. 4680 (April 2, 2009) with yet another version of amendments to MCL 500.3135 defining the scope of continued tort liability for auto accidents with **new definitions of serious impairment** which, if adopted, would be applicable to any cases pending in the trial or appellate courts on the effective date of the amendatory act. This is another in a series of more than 10 bills presented in the House and/or Senate proposing changes to the No Fault Act since the *Kreiner* decision in 2004.

Almost any connection between an auto accident and later health condition will do to trigger PIP benefits. Supreme Court reverses its October 2008 order eliminating the use of the "almost any connection will do" language from the Court of Appeals opinion.

Michigan Supreme Court: Kreiner Standard To Be Reconsidered *McCormick v Carrier,* 2009 WL 2579444 (August 20, 2009)

- Trial court granted summary disposition to defendant on the serious impairment threshold where Plaintiff had a fractured ankle requiring two surgeries. He returned to work without restrictions a year after the accident and resumed his hobbies of fishing, golfing and was able to take care of himself despite continued pain which will probably not improve over time. The Court found that there was an objectively manifested serious injury which impacted an important body function but that the injury did not affect his ability to lead his normal life.
- The Court of Appeals, in an unpublished decision, affirmed.
- The Supreme Court, in October, 2008 denied the Plaintiff's application for leave to appeal on a 4-3 decision.
- The newly constituted Supreme Court, in August, 2009, granted reconsideration and vacated the order denying leave and granted leave to appeal.

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 Court found that there was an objectively manifested serious injury which impacted an important body function but that the injury did not affect his ability to lead his normal life.

Causal Connection Between Injury and Motor Vehicle Accident *Scott v State Farm*, 483 Mich 1032 (June 5, 2009)

- Plaintiff suffered skeletal and brain injuries in an auto accident. She also claimed that her increase in cholesterol levels, hyperlypidemia, was caused by her inability to lead an active life as a result of those injuries and she sought PIP benefits for the treatment of her high cholesterol.
- The Court of Appeals affirmed the trial court's denial of defendant's dispositive motion finding that a genuine issue of material fact existed regarding causation citing *Bradley v DAIIE* and noting that "almost any causal connection or relationship will do."
- The Supreme Court originally vacated that portion of the Court of Appeals opinion which included the "almost any causal connection or relationship will do" language in December, 2008. See No Fault Report April, 2009.
- The newly constituted Supreme Court granted a motion for reconsideration which was based mostly on the new composition of the Court and vacated its own earlier order and reinstated the language noting:

  The Court of Appeals did not err in relying on these cases to interpret the causal nexus required in a no-fault case involving injury. Precedent makes clear that an injury requires more than a fortuitous, incidental, or "but for" causal connection, but does not require proximate causation. As *Bradley* states, "almost any causal connection will do." Nothing suggests that these two standards are in opposition or cannot be applied together. They logically build on one another and stand for the same basic proposition. Taken together, they mean that evidence establishing almost any causal connection will suffice when it is more than merely fortuitous, incidental, or but for. But it need not be much more; almost any causal connection or relationship will do…

Member News

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

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

MDTC members **Thomas Branigan** and **Fred Fresard**, who are both Detroit-based partners in Bowman and Brooke, were named to a list of "outstanding lawyers [that] provide excellent legal service" prepared by The Legal 500. In addition, Bowman and Brooke has again been named number one in the country for Product Liability and Mass Tort Defense in Automotive/Transport for 2009.

MDTC's immediate past president, **Robert Schaffer**, is to be honored by the DRI as this year's recipient of the Fred H. Sievert Award. The award will be presented to Robert during the awards luncheon on October 8th at the DRI's annual meeting in Chicago. The award goes to an individual who has made "a significant contribution towards achieving the goals and objectives of the organized defense bar."

These MDTC members, all partners in Plunkett Cooney, have been named as among the 2010 roster of top practitioners by nominated by The Best Lawyers in America®, one of the nation's oldest and most trusted peer-to-peer rating services: **Michael S. Bogren, William D. Booth, Charles W. Browning, Jerome A. Galante, James R. Geroux, Robert G. Kamenec, Christine D. Oldani,** and **Mary Massaron Ross**.

MDTC

Submit an Article

Michigan Defense Quarterly welcomes articles on topics of interest to its members and readers.

The *Quarterly* is sent to all of MDTC's members and also goes to Michigan's state and federal appellate judges, trial court judges, selected legislators, and members of the executive branch.

The *Quarterly* is an excellent way to reach colleagues and decision-makers in the State of Michigan, and make your expertise known.

Contact Hal Carroll, Editor or Jenny Zavadil, Assistant Editor, for Author's Guidelines. hcarroll@VGpcLAW.com; jenny.zavadil@bowmanandbrooke.com.

By: Hal O. Carroll, Vandeveer Garzia
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Indemnity Law

Hal O. Carroll is a founder and the former chair 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.

Practice tip. If you are the plaintiff, or if you are the principal defendant and you have an indemnity clause, pay close attention to how you resolve the case. The argument in favor of settlement over trial just got stronger. This is a situation in which restructuring the way the case is resolved can restructure the actual exposure of the parities.

The recent decision in *Zahn v Kroger Company,* 483 Mich 34; 764 NW2d 207 (2009) suggests that in some situations what the indemnity obligation requires may change according to whether a case is tried or settled.

Resolution by trial. Assume that a subcontractor has agreed to indemnify the general contractor for any liability "to the extent that" the liability results from the subcontractor's "act or omission." In other words, the sub's indemnity obligation is triggered and proportionate to its fault.

A worker is injured and sues the general and the sub. It goes to trial and the jury sets damages of $100,000 and assigns fault at 20% to the general and 80% to the sub. The plaintiff collects from each of them in proportion to fault. What happens when the general invokes the indemnity clause and tries to get its $20,000 back? The sub cites the abolition of joint liability (MCL 600.2956) and two cases that hold that indemnity is not owed because the general cannot be liable for the sub's fault.

One case is *MSI Construction v Corvo Iron,* 208 Mich App 340; 527 NW2d 79 (1995), in which the Court of Appeals held that "This language limits the extent of Corvo's [indemnitor's] liability. . . . Corvo is liable to MSI to the extent of its own negligence but is not required to indemnify MSI for MSI's negligence." *Id.* at 344. The other case is *Ormsby v Capital Welding, Inc,* 255 Mich App 165; 660 NW2d 730 (2003), where the court held that the indemnitee "cannot be found liable . . . for any damages that exceeded its own fault," and upheld the trial court's grant of summary disposition. *Ormsby* at 193.

Result: each party pays its own way.

What if the sub is the plaintiff's employer, and the liability was assessed to it as a non-party? Then the plaintiff gets nothing from the sub and recovers only $20,000. The general also recovers nothing from the sub on the indemnity contract.

Resolution by settlement. But what if we change the scenario? The plaintiff knows he can't sue the sub, so he sues the general only. The general settles with the plaintiff and pays the same $100,000. Now the general turns to the sub to enforce the contract. *Zahn* says that the sub — even if it is the employer, owes contractual indemnity. The indemnity is still in proportion to fault (the "to the extent" language), so the sub owes $80,000 (80% of the settlement). *Zahn* at 38-39. The reasoning in *Zahn* is that the tort reform statute deals with torts, and the indemnity obligation is governed by contract principles.

And *Zahn* makes it clear that the subcontractor still pays even though it is the employer. The exclusive remedy protection doesn't bar enforcement of the contract.

The distinction between tort law and contract law may be a little too simplistic for the real world. After all, an indemnity contract is a contract that relates to tort liability, so it is hardly far-fetched to suggest that a change in tort law may affect how that particular kind of contract operates. It is not that the tort reform acts modify contract law at all, but that any particular contract, depending on how it is written, may operate differently when the underlying facts (the extent of tort liability) change.

Still, the opinion that counts is the Supreme Court's opinion, and *Zahn* was unanimous.

By: Richard J. Joppich

New! MDTC Databank Now On-Line!

Richard J. Joppich, The Kitch Firm, richard.joppich@kitch.com, former chair of MDTC's Professional Liability and Health Care Section, current MDTC Board member.

Orders And Briefs On Ex-Parte Physician Meetings Under HIPAA

Thanks to many of our members who have been sharing their excellent briefs and qualified protective orders, MDTC is proud to announce that its databank containing these briefs and protective orders pertaining to defense counsel's right to meet with healthcare providers ex-parte in personal injury matters under HIPAA, is now available on-line at the mdtc.org.

The materials in the databank will assist our members in developing the very finest defenses and arguments available to preserve defense counsel's rights under longstanding Michigan jurisprudence to continue meeting with treating physicians in the investigation and preparation of our cases on behalf of our clients.

Thank you again to everyone for your help and participation in making this resource a success. It is one of the reasons that make MDTC the premier defense organization across the state and what keeps you, as a member, ahead of the rest in terms of defense litigators!

As always, if you have any briefs or orders you would feel comfortable sharing with other members, please send them to info@mdtc.org at the MDTC offices for inclusion in the databank. It is through working together for the common good of all of our clients that we can provide you with this service. We hope you will make it a habit to send us copies of any new orders or briefs you may prepare or obtain on this key issue so we can keep this databank current for everyone's benefit.

Legal Malpractice 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.

U. S. District Court (E. D. Michigan)

FEDERAL COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S PATENT MALPRACTICE ACTION

Warrior Sports, Inc v Dickinson Wright, PLLC

2009 U.S. Dist. LEXIS 59036 (July 10, 2009)

Facts. Plaintiff claims that defendant's attorneys (1) failed to pay a maintenance fee, resulting in the lapse of plaintiff's patent, (2) forced plaintiff to settle previous litigation on terms plaintiff considers unfavorable, and (3) failed to timely effectuate the reinstatement of plaintiff's patent. As a result, plaintiff claims it has suffered damages in the form of a diminished settlement with its competitor, lost royalties for the period in which the patent was lapsed, and lost profits.

The action was originally filed in Michigan state court, but, believing that recent case law established exclusive federal jurisdiction over patent malpractice cases, defendants moved for summary disposition for lack of subject matter jurisdiction in state court. Plaintiff re-filed its case in federal court and voluntarily dismissed the state court case. The district court issued an order to show cause why the action should not be dismissed without prejudice for lack of subject matter jurisdiction. Both plaintiff and defendant filed answers to the order, arguing that federal subject matter jurisdiction is proper under 28 U.S.C. § 1338. They asserted that while the legal malpractice claim was a state law cause of action, its resolution necessarily requires the court to address questions of federal patent law.

Ruling. The court agreed that federal district courts have original jurisdiction of civil actions arising under any federal statute relating to patents. 28 U.S.C. § 1338. However, district court jurisdiction under § 1338(a) extends only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, such that patent law is a necessary element of one of the well-pleaded claims. The court ruled that although it may have to consider underlying matters related to federal patent law, these issues did not appear actually disputed and substantial to plaintiff's claims. The court held that it did not have subject matter jurisdiction.

New Professional Liability & Health Care Section Chair

Terence Durkin is an associate principal with the firm. His practice focuses on defense of hospitals and healthcare providers in professional malpractice litigation. He joined the firm in 2002, after clerking for the Honorable Thomas S. Eveland of the 56th Circuit Court. Mr. Durkin received his B.A. in political science from Millikin University and his J.D. from Thomas M. Cooley Law School where he was Article Editor of the Journal of Practical and Clinical Law. Mr. Durkin is licensed to practice law in Michigan as well as the U.S. District Court of Eastern Michigan.

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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 or MDTC at info@mdtc.org

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Rules Update

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

See http://michcourts.blogspot.com for more information and additional proposals. Some of the entries at that site are mirrored at http://www.mdtc.org

Michigan Court Rule Amendments
Michigan Evidence Rule Amendments

ADOPTED:
Conduct Of Jurors During Trial
Court rule affected – MCR 2.511
Admin no. – 2008-33
Issued – June 30, 2009
Effective – September 1, 2009

The court has announced an amendment to Rule 2.511, "Impanelling the Jury", which adds a new subsection (H)(2) requiring instructions to jurors about their conduct during the course of trial, including use of electronic equipment:

(2) The court shall instruct the jurors that until their jury service is concluded, they shall not
(a) discuss the case with others, including other jurors, except as otherwise authorized by the court;
(b) read or listen to any news reports about the case;
(c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose information prohibited in subsection (d) below;
(d) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:
(i) information about a party, witness, attorney, or court officer;
(ii) news accounts of the case;
(iii) information collected through juror research on any topics raised or testimony offered by any witness;
(iv) information collected through juror research on any other topic the juror might think would be helpful in deciding the case.

The court's staff comment notes that some of these rules do not apply to the courts which are participating in the jury reform pilot project, where jurors are permitted to discuss the case while the proofs are under way. The comment appears to relate to subrule 2(a) only.

ADOPTED:
Appearance Of Witnesses
Court rule affected – MRE 611
Admin no. – 2007-13
Issued – August 25. 2009
Effective – September 1, 2009

A new subsection (b) is added, providing:

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 factfinder and (2) ensure the accurate identification of such persons."

This new subrule arose as a result of a civil rights lawsuit filed by a Muslim woman who wished to testify in her small claims case while wearing a niqab (a garment covering her entire face, leaving only a slit for her eyes). Her case was dismissed by the district judge when she declined to remove it for cited religious reasons. She filed a federal civil rights case, but the federal court declined to exercise jurisdiction and dismissed the case — *Muhammad v Paruk*, 553 F Supp 2d 893 (ED Mich, 2008). The federal district court noted that state court review "would have avoided many of the federalism concerns" that it had cited, which prompted consideration of this proposal by the Michigan Supreme Court.

The court's order runs to 19 pages, with a number of concurring and dissenting opinions, including several references to U.S. Supreme Court decisions dealing with religious-based exemptions from otherwise generally-applicable requirements.

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.

Supreme Court

By: Joshua K. Richardson
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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.

The Michigan Catastrophic Claims Association May *Not* Refuse To Indemnify No-Fault Insurers For Unreasonable Personal Protection Insurance Charges

On July 21, 2009, the Michigan Supreme Court expressly reversed its prior opinion of December 29, 2008, in this matter and held that the Michigan Catastrophic Claims Association ("MCCA") may not refuse to indemnify no-fault insurers for unreasonable no-fault personal protection insurance benefits its member insurers choose to pay. *United States Fid Ins & Guar Co v Michigan Catastrophic Claims Ass'n, and Hartford Ins Co of the Midwest v Michigan Catastrophic Claims Ass'n*, __ Mich __; __ NW2d __ (2009).

Facts: In these consolidated cases, the plaintiffs, United States Fidelity & Guaranty Company and Hartford Insurance Company of the Midwest, provided no-fault insurance benefits to two insureds that were injured in unrelated automobile accidents. Both insureds required 24-hour attendant care services as a result of their accidents. By 2003, the plaintiffs were paying approximately $54.84 and $30 per hour to their insureds for such services. When the overall benefits exceeded $250,000, the threshold amount under MCL 500.3104(2) for policies issued or renewed before July 1, 2002, the plaintiffs sought indemnification from the MCCA. Under MCL 500.3104(2)(a), the MCCA is required to indemnify its members for "100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of … $250,000." Despite the clear language of MCL 500.3104(2), the MCCA contested the reasonableness of the insureds' attendant care charges. As a result, each plaintiff filed a complaint for declaratory judgment, requesting that the trial courts order the MCCA to reimburse the plaintiffs for the full amount of the attendant care benefits they paid to their insureds. The trial courts entered conflicting judgments. One found in favor of the plaintiff and the other found in favor of the MCCA. On appeal, the Court of Appeals consolidated the cases and found in favor of the plaintiffs, holding that "the MCCA is statutorily required to reimburse an insurer for 100 percent of the amount that the insurer paid in PIP benefits to an insured in excess of the statutory threshold … regardless of the reasonableness of these payments." The MCCA appealed.

On December 29, 2008, a split Michigan Supreme Court reversed the Court of Appeals ruling and held that since no-fault insurers in Michigan are obligated only to pay those personal protection insurance benefits that are "reasonable," the MCCA may refuse to indemnity no-fault insurers for any unreasonable charges the insurers' elect to pay. The court also held that, although MCL 500.3104(2)(a) expressly requires the MCCA to indemnify insurers for 100% of the amount of loss above $250,000, MCL 500.3104(8)(g) provides the MCCA with broad authority to "[p]erform other acts … that are necessary or proper to accomplish the purposes of the association," including the power to decline to indemnify unreasonable payments.

On March 27, 2009, the Michigan Supreme Court granted rehearing and resubmitted the case for decision without further briefing or oral argument.

Holding: On rehearing, the Michigan Supreme Court reversed its December 29, 2008, opinion and affirmed the Court of Appeals, holding that the plain and unambiguous language of MCL 500.3104(2) requires the MCCA to reimburse member insurers for the full amount of the ultimate loss exceeding the statutory no-fault threshold, without regard to the reasonableness of the insurer's payments. The court further held that "the power granted to the MCCA under MCL 500.3104(8)(g) is limited to furthering the purposes of the MCCA and that determining reasonableness is not one of its purposes." Because the MCCA is not a no-fault insurer of its members, it is not subject to the reasonableness requirements under MCL 500.3107.

Finally, the court noted that the MCCA is not without protection since, under MCL 500.3104(7), it may enact "procedures and practices" requiring its member insurers to submit proposed settlements for approval whenever the insurers anticipate needing indemnification from the MCCA. Thus, the MCCA has the power to "step in before

This holding illustrates the transformation that occurred in the Michigan Supreme Court's ideological makeup as a result of the court's most recent election, and is but one of many reversals and overrulings we can expect to see from the court in the not-too-distant future.

a settlement has been reached," but has no power to adjust an amount after a settlement has been reached.

Significance: This holding illustrates the transformation that occurred in the Michigan Supreme Court's ideological makeup as a result of the court's most recent election, and is but one of many reversals and overrulings we can expect to see from the court in the not-too-distant future.

Local Anti-Smoking Regulations Deemed Valid Despite Imposing Stricter Standards Than Existing State Law

On July 21, 2009, the Michigan Supreme Court held that a local health department's implementation of a smoking regulation affecting both public and private employment places, and requiring stricter standards than those in the Michigan Clean Indoor Air Act ("MCIAA"), was a valid exercise of authority. *McNeil v Charlevoix County*, __ Mich __; __ NW2d __ (2009).

Facts: The Northwest Michigan Community Health Agency ("NMCHA"), a multi-county district health department, enacted the "Public Health Indoor Air Regulation" in 2005 to "protect the public health and welfare." The regulation in relevant part: 1) prohibits smoking in all public places; 2) requires employers who do not wholly prohibit smoking to designate a separate, enclosed smoking area with separate ventilation; and 3) creates a private cause of action against employers who discharge, refuse to hire, or otherwise retaliate against an employee for exercising their rights as provided under the regulation. The regulation was ultimately approved by each of the four counties represented by the NMCHA.

Shortly after the regulation's implementation, the plaintiffs, a group of residents and business owners, sued the County and NMCHA for declaratory judgment. They argued that 1) the NMCHA lacked authority to enact the regulation; 2) the regulation conflicts with and is preempted by the MCIAA because the regulation requires far stricter standards than the MCIAA; and 3) the private cause of action created by the regulation violates public policy by infringing on the common-law right of an employer to discharge an employee at will. The plaintiffs moved for summary disposition on those grounds, but the trial court denied the motion. The Court of Appeals affirmed.

Holding: The Michigan Supreme Court affirmed and upheld the regulation. The court first explained that the NMCHA had authority to enact the regulation because the Public Health Code expressly allows local health departments to "[a]dopt regulations to properly safeguard the public health," including those regulations that "are necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department." The court further held that the regulation's stricter standards in no way conflict with state law, since "the only limitation placed by the Legislature on the promulgation and adoption of such regulations is that they 'be at least as stringent as the standard established by state law.'"

The court finally held that the regulation's private cause of action did not violate public policy or infringed on employers' rights under the employment at-will doctrine. Though employment is usually terminable at-will absent a contractual agreement to the contrary, employers may not discharge an employee at will when "the reason for the discharge contravenes public policy." The court concluded, therefore, that since the regulation at issue was properly enacted under authority granted by law, the public policy exception to the at-will employment doctrine precludes employers from terminating employees for exercising their rights under the regulation.

Significance: By upholding and affirming the authority by which local governments may enact their own, perhaps more stringent, public health regulations, this holding not only emboldens certain local governments to enact and enforce strict anti-smoking regulations, it may also empower those governments to create strict regulations in any of the many other areas relating to the "public health."

Breach Of Contract Actions To Obtain Unpaid Legal Fees Accrue Upon Termination Of The Attorney-Client Relationship

On July 17, 2009, the Michigan Supreme Court held, in *Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, PC v Bakshi*, 483 Mich 345; __ NW2d __ (2009), that a law firm's breach of contract action to recover unpaid legal fees was barred by the six-year statute of limitations because an attorney's claim against a client for unpaid legal fees accrues on the date the attorney-client relationship is terminated, not when the law firm sends its final invoice.

Facts: The defendant, Kirit Bakshi, retained the law firm of Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, P.C., in

1989 to represent him and his two corporations in multiple legal matters. Bakshi ceased paying the law firm's legal bills in 1992, while one of the legal matters was pending on appeal. By that point, Bakshi had already paid the law firm approximately $92,000, but refused to pay the remaining balance of $50,603. On July 30, 1993, the law firm moved to withdraw as Bakshi's counsel. The Court of Appeals granted the law firm's motion on September 30, 1993. Thereafter, in October 1993, Bakshi requested his legal file from the law firm, which complied. The law firm sent its final invoice, including fees and costs relating to copying and returning Bakshi's legal file and showing a total unpaid balance of $55,723, to Bakshi on November 12, 1993.

On October 8, 1999, the law firm filed suit against Bakshi to recover the unpaid legal fees. Bakshi moved for summary disposition, arguing that the law firm's breach of contract action was barred by the six-year statute of limitations under MCL 600.5807(7) (now MCL 600.5807(8)), since the law firm's claim accrued in November 1992, when Bakshi last paid for legal services. The trial court granted Bakshi's motion, holding that the action accrued in 1992, when Bakshi stopped paying the law firm's invoices.

On appeal, the Court of Appeals reversed the trial court's decision and held that the law firm's "action was timely filed because its claim accrued on October 12, 1993, the last date it performed a properly billable service," namely the copying and returning of Bakshi's legal file. Bakshi appealed and the Michigan Supreme Court, in lieu of granting leave to appeal, vacated the Court of Appeals decision and remanded to the trial court. On remand, the trial court determined that the law firm's breach of contract action properly accrued in October 1993, when the law firm last performed billable work for the client. The trial court, therefore, found that the action was not time barred and that Bakshi was liable to the law firm for the full outstanding balance plus interest as of August 16, 2006, for a total of $573,168.07. The Court of Appeals reversed, holding that the law firm's action accrued on September 30, 1992, when the Court of Appeals terminated the underlying attorney-client relationship, and was, therefore, untimely under MCL 600.5807(8).

Holding: On appeal, the Michigan Supreme Court affirmed in part, reversed in part, and remanded to the trial court. The court held that a traditional breach of contract claim accrues "when one party fails to perform its portion of the contract," but in the context of litigation, since the attorney cannot simply discontinue services without the court's permission, a breach of contract claim to recover attorney fees accrues "on the date that the attorney-client relationship was terminated" by the court; in this case, September 30, 1993. The court further held that tasks of reviewing, copying, and returning a client's legal file will not extend this date of accrual. Because the law firm filed its cause of action on October 8, 1999, its claim for unpaid attorney fees was generally barred by the six-year statute of limitations.

According to the court, however, although "the plaintiff's acts of reviewing, copying, and returning the file to defendant do not extend the accrual date of the claim regarding the earlier unpaid legal fees," those additional services rendered after the termination of the attorney-client relationship "equate to a separate contract apart from the parties' original contract." Thus, the law firm's claim to recover the costs associated with those services was timely, and those costs, amounting to approximately $442, were recoverable.

Significance: Though hopefully avoidable, in the event a lawyer or law firm withdraws from a case in litigation and is required to file suit against a former client to obtain unpaid legal fees incurred during the course of that litigation, this holding clarifies that the action must be filed within six years after the court grants the lawyer or law firm's motion to withdraw as counsel.

Statute Of Limitations Tolled In Medical Malpractice Action Upon Timely Filing Of Otherwise Defective Notice Of Intent

On July 29, 2009, the Michigan Supreme Court held that a defective notice of intent in a medical malpractice action will toll the statute of limitations if the plaintiff makes a good faith attempt to comply with statutory content requirements. The court also held that a medical malpractice plaintiff may take advantage of the shortened 154-day waiting period whenever a defendant fails to make a good faith attempt to properly respond to the plaintiff's notice of intent. *Bush v Shabahang*, __ Mich __; __ NW2d __ (2009).

Facts: The plaintiff, Gary Bush, underwent surgery to repair an aortic aneurysm at Spectrum Health's Butterworth Campus in Grand Rapids, Michigan. During the surgery, the plaintiff's aneurysm was allegedly severed, rendering the plaintiff "unable to lead an independent life." Just days before the applicable statute of limitations expired, the plaintiff filed a notice of intent ("NOI") to file a medical malpractice lawsuit against the surgeons, the hospital, and two other entities with which the surgeons were affiliated. All but three of the defendants properly responded to the plaintiff's NOI as required under MCL 600.2912b(7). The plaintiff waited just 175 days after filing his NOI and then filed his complaint against all defendants.

Shortly thereafter, several of the defendants moved for summary disposition, arguing that the plaintiff failed to file a proper NOI and failed to wait the required 182 days before filing his complaint. The trial court ultimately found that the NOI was, in fact, deficient with respect to certain of the defendants and granted summary disposition in their favor. The trial denied summary disposition with respect to the remaining defendants, however, finding that the NOI was sufficient as to them and that the plaintiff's complaint was not prematurely filed.

On appeal, the Court of Appeals held that, when taken as a whole, the plaintiff's NOI generally complied with the requirements of MCL 600.2912b(4) and the plaintiff properly availed himself of the shortened 154-day waiting period because the defendants' response to the NOI was deficient. The defendants appealed.

Holding: The Michigan Supreme Court affirmed in part, reversed in part, and remanded. In expressly overruling both *Roberts v Mecosta County General Hospital*, 466 Mich 57; 642 NW2d 663 (2002) and *Boodt v Borgess Medical Center*, 481 Mich 561; 751 NW2d 44 (2008), the court held that a timely, but defective, NOI will not preclude tolling of the applicable limitations period, since the 2004 amendments to MCL 600.5856(d) (now MCL 600.5856(c)) "significantly clarified the proper role of an NOI" and required only that the NOI be timely filed. Thus, "pursuant to the clear language of § 2912b and § 5856(c), if a plaintiff files a timely NOI before commencing a medical malpractice action, the statute of limitations is tolled despite the presence of defects in the NOI." Relying on MCL 600.2301, the court further held that the trial court should have allowed the plaintiff to cure his defective NOI because the plaintiff made a good faith attempt to comply with the content requirements of MCL 600.2912b and the defect did not affect a substantial right of the parties.

With respect to the timeliness of the plaintiff's complaint, the court held that MCL 600.2912b(7) clearly requires a defendant to provide the plaintiff with a written response within 154 days of receiving the plaintiff's NOI. The defendant's written response must comply with MCL 600.2912b(7) and must "include a statement of the factual basis for the defense, the standard of care that the health professional claims applies, the manner in which it is claimed that the health professional complied with the standard of care, and the manner in which the health professional contends that the alleged negligence was not the proximate cause of the plaintiff's injuries." According to the court, if the defendant fails to make a good faith attempt to comply with the requirements of MCL 600.2912b(7), the plaintiff may file the medical malpractice action at any time after the 154-day period.

Significance: In overruling *Roberts* and *Broodt*, this holding clarifies the proper standards, as required by statute and supported by legislative intent, that courts should follow when faced with defective NOIs in medical malpractice actions.

Trial By Battle

From the website, LanguageandLaw.org,
maintained by Peter Tiersma

Trials In The Good Old Days

Editor's Note: *Litigation in the 21st century is sometimes described as "civilized combat." The same was true in centuries past, though the concept of civilization has evolved. For those with an unrequited sense of nostalgia, here is Blackstone's description of trial by battle, which was abolished in England in 1819. The Quarterly's editor has inserted some headers and a few comments in italics, but otherwise left the text unedited.*

§ 391.3. Trial by battle. The trial by battle, duel or single man, combat, which was another species of presumptuous appeals to Providence, under an expectation that Heaven would unquestionably give the victory to the innocent or injured party.

Limitation – No Champions – Litigants Only. The nature of this trial in cases of civil injury, upon, issue joined in a writ of nor a right, was fully discussed in the preceding book, to which I have only to add, that the trial by battle may be demanded at the election of the appellee, in either an appeal or an approvement; and that it is carried on with equal solemnity as that on a writ of right: but with this difference, that there each party might hire a champion, but here they must fight in their proper persons. And therefore, if the appellant or approver be a woman, a priest, an infant or of the age of sixty, or lame or blind, he or she may counterplead and refuse the wager of battle, and compel the appellee to put himself upon the country (*i.e., have a jury trial*).

Limitation – Commoner Cannot Challenge a Noble or a Citizen of London. Also peers of the realm, bringing an appeal, shall not be challenged to wage battle, on account of the dignity of their persons, nor the citizens of London, by special charter, because fighting seems foreign to their education and employment.

Limitation – Not Available to a Notorious Criminal. So, likewise, if the crime be notorious; as if the thief be taken with the mainour (*i.e., caught with the loot*), or the murderer in the room with a bloody knife, the appellant may refuse the tender of battle from the appellee; for it is unreasonable that an innocent man should stake his life against one who is already half convicted.

§ 392. Procedure in trial by battle.-The form and manner of waging battle upon appeals are much the same as upon a writ of right; only the oaths of the two combatants are vastly more striking and solemn.

The Oaths. The appellee, when appealed of felony, pleads not guilty, and throws down his glove, and declares he will defend the same by his body: the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the Book in his right hand, and in his left the right hand of his antagonist, swears to this effect.

> "Hoc audi, homo, quem per manum teneo," etc., "Hear this, O man, whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor am any way guilty of the said felony. So help me God, and the saints; and this I will defend against thee by my body, as this court shall award."

To which the appellant replies, holding the Bible and his antagonist's hand in the same manner as the other:

> "Hear this, O man, whom I hold by the hand, who callest thyself Thomas by the name of baptism, that thou art perjured; and therefore perjured, because that thou feloniously didst murder my father, William by name. So help me God and the saints; and this I will prove against thee by my body, as this court shall award."

The Battle. The battle is then to be fought with the same weapons, viz., batons, the same solemnity, and the same oath against amulets and sorcery, that are used in the civil combat; and if the appellee (*defendant*) be so far vanquished that he cannot or will not fight any longer, he shall be adjudged to be hanged immediately, and then, as well as if he be killed in battle, Providence is deemed to have determined in favor of the truth, and his blood shall be attainted.

But if he kills the appellant (*plaintiff*), or can maintain the fight from sunrising till the stars appear in the evening, he shall be acquitted. So, also, if the appellant becomes recreant, and pronounces the horrible word of craven, he shall lose his liberam legem (free law), and become infamous; and the appellee shall recover his damages, and also be forever quit, not only of the appeal, but of all indictments likewise for the same offense.

*Source: 4 William Blackstone, Commentaries *347-9.*

Practice Tip

By: Hal O. Carroll
Vandeveer Garzia

Third Party Defendant Can Answer Plaintiff's Motion Against Principal Defendant

One of the less attractive things about being a third party defendant is being at the mercy of the principal defendant and third party plaintiff. If the principal defendant gets out of the case, so does your client. But if the plaintiff files a motion for summary disposition and the principal defendant does a bad job of answering it, then may you're your best shot at getting out of the case.

But you do not have to be a passive spectator. MCR 2.204(A)(2) provides that "[t]he third party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim." The rule refers directly to third party practice, *i.e.*, complaints and answers, but the logic of it is broad enough to embrace motion responses. This makes sense because the third party defendant has a real interest in the outcome, so it would be unfair to make it a passive spectator of the primary duel. If you think it is necessary to file a response, it is a good idea to cite the rule both in the answer and in the brief, because some plaintiffs may object and some judges may not be familiar with it.

Practice Tip

By: Mike Malloy

Effective Briefs

I asked a friend of mine who recently left the bench after 2 decades of service what he had found to be the most effective way of presenting motions. He explained to me that he preferred to read motions at home, often on weekends. It can be a time consuming activity and he felt that the most successful motions had the same pattern.

As he reminded me, there's an old saying about legal briefs, "Tell them what you going to tell them, tell them, then tell them what you told them." The most important part of the brief is the **short** introductory section. Here is where you tell the judge what you want and why you should win. It helps refresh the judge's memory of what the motion is about and in some cases; it might be the only section that the judge gets an opportunity to read.

His second suggestion was to attach **the** case that supports your position. Do not attach copies of every case you cite but give the court the one you know carries the day for you. Even if the judge hasn't had much time to prepare to hear your motion he or she can quickly catch on reading your pithy summary and one authoritative case.

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.

Unfortunately, the economy continues to take a toll on Michigan. While I have not heard of any mass layoffs at Michigan firms, I know that many are struggling to keep lawyers busy. In past articles I have discussed several new initiatives that DRI is undertaking to help law firms cope with the changes in the economy. However, many of DRI's longstanding events are the best places to learn more about your trade and network.

If you are reading this before October 7, you still have time to register for the DRI Annual Meeting in Chicago, October 7–11. All of you have received at least one email form me about this event and the activities available to you. This year should be particularly interesting because it is a celebration of DRI's 50th anniversary and it is being held in Chicago. If you have never attended, now is the time. You will be presently surprised at the fun times, friends and networking opportunities.

Throughout the year, DRI puts on numerous substantive law seminars across the country. I have attended several of these seminars and they are the best that I have seen. Regardless of your practice area, you can find a seminar that would be useful for you. I have also found these seminars to be particularly useful if you are looking to expand or transition into another area of law. The following is a partial list of upcoming seminars that you might want to attend. To obtain a full list, and register for a seminar, just visit www.dri.org and click on the seminar tab at the top of the page.

- Construction Law
- Nursing Home/ALF Litigation
- Strictly Automotive
- Appellate Advocacy
- Asbestos Medicine
- Insurance Coverage and Practice
- Best Practices for Law Firm Profitability
- Civil Rights and Governmental Tort Liability
- Trucking Law
- Medical Liability and Health Care
- Strictly Retail
- Damages
- Toxic Torts and Environmental Law
- Sharing Success: A Seminar for Women Lawyers
- Product Liability

These are just a few of the upcoming seminars to be put on by DRI committees. I encourage you to consider attending if one fits your practice. If it does not, drop DRI an email and suggest a topic. DRI is always looking for feedback.

By: Hilary Ballentine & Mary Massaron Ross

Amicus Committee Report

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

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

On July 31, 2009, the Michigan Supreme Court issued a favorable opinion in *Henry v Dow Chemical Company*. *Henry* was a class-action case in which the Supreme Court was called upon to clarify class certification standards in Michigan. The amicus brief filed on behalf of the MDTC maintained that the court needed to adopt a rule that properly balances the need for a procedural mechanism to efficiently resolve collective claims where common questions of law predominate, with the dangers the class-action mechanism creates for litigants when classes are imprudently certified. In remanding the case to the trial court, the court held that a party seeking class certification must "provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A)(1) is in fact satisfied."

In other matters, the Michigan Supreme Court issued an order denying leave to appeal in *Allied Property and Casualty Insurance co v Michigan Catastrophic Claims Association*, a case involving the MCCA's obligation to indemnify Allied for personal protection insurance benefits paid to its insured. Justice Hathaway dissented from the Supreme Court majority, opining that leave should have been granted. A subsequent order denying reconsideration was issued on August 6, 2009.

The Michigan Supreme Court has also denied leave in *Slaughter v Blarney Castle Oil Co*. The issue presented in *Slaughter* was whether black ice alone, without the presence of snow, presents an open and obvious condition. The court stated that the issue did not warrant review.

Annual Respected Advocate Award Dinner

September 16, 2009 • State Bar of Michigan Annual Awards Banquet

(left): Robert Schaffer, Immediate Past President, MDTC, Tim Diemer, MDTC Secretary, Phil Korovesis, MDTC Treasurer, Steve Johnston, MDTC President. (right): Robert Schaffer, Immediate Past President, MDTC, and 2009 Recipient: William W. Jack Jr., Smith, Haughey, Rice & Roegge PC

(left): Jane Bailey, MAJ Executive Director, Judy Susskind, Immediate Past President, MAJ, William W. Jack Jr & Madelyne Lawry, Executive Director MDTC. (right): Robert Schaffer, Immediate Past President, MDTC and 2009 Recipient, William F. Mills, Gruel Mills Nims & Pylman LLP

13th Annual MDTC Open Golf Tournament

Friday, September 11, 2009 • Mystic Creek Golf Club & Banquet Center

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Mark Holowicki

Close to the pin:
Allison Reuter • Brian Pearson

Longest drive:
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Dr. Chandler Veenhuis

Grand Prize Recipient (custom clubs):
Linda Foster-Wells

Tournament Winners

Jana Berger & Allison Reuter

Mark Hypnar & Mark Holowicki

Judge Christopher Murray & Mike Rinkel

Robert Schaffer, Pete Dunlap & Terry Miglio

MDTC Golf 2009 – Prize List — The following individuals and companies donated prizes: Walter Herndon, Legal Copy Services, Robert Schaffer, ProAssurance, David Ottenwess, Exponet, Steve Johnston, Butzel Long, Legal Copy Services, Lori Ittner, Conway MacKenzie, Paul Goebel Group, Robert Siemion. **The following companies/firms Sponsored a Hole:** Butzel Long, Conway MacKenzie, Inc., Gross & Nemeth PLC, Herndon & Associates, Keller Thoma PC, L Squared Insurance Agency LLC, Ottenwess & Associates PLC, Siemion Huckabay, PC

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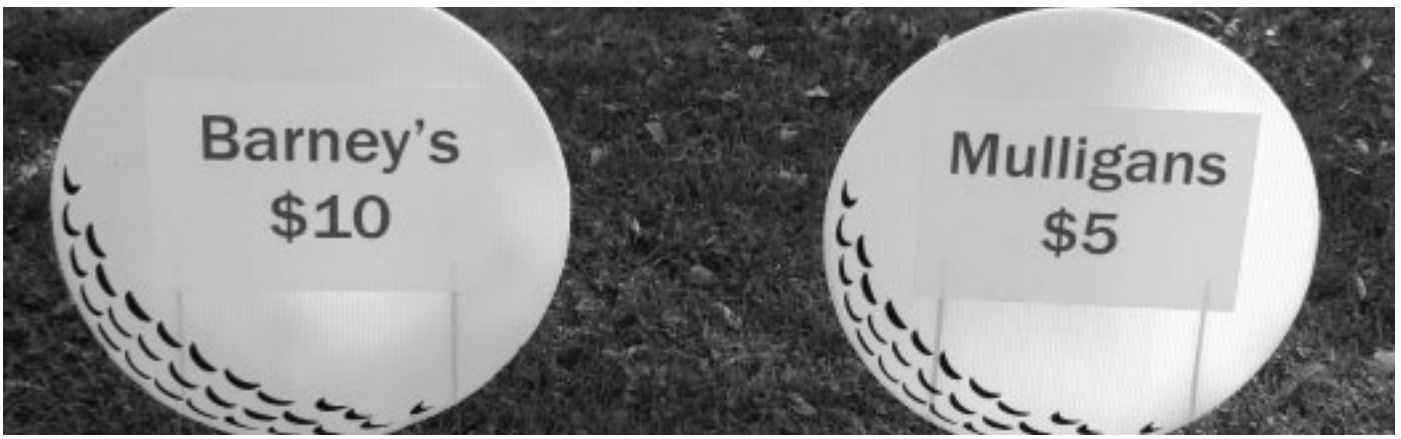
Lots of Prizes



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Schedule of Events

2009–2010

2009

November 5	Board Meeting, Troy Marriott
November 5	Past Presidents' Dinner, Troy Marriott
November 6	Winter Meeting, Troy Marriott "Emerging Issues in Commercial Litigation"

2010

January 11	Excellence in Defense Nomination Deadline
January 11	Young Lawyers Golden Gavel Award Nomination Deadline
January 22	Future Planning Meeting – Soaring Eagle Casino, Mt. Pleasant
January 23	Board Meeting – Soaring Eagle Casino, Mt. Pleasant
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.