# The Defense Line

THE MARYLAND DEFENSE COUNSEL, INC. Fall 2000

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## Why Mediate?

**by Richard T. Boyette[1]**

As trial lawyers, we are hired to help parties resolve disputes. We are trained and skilled in the classic mode of dispute resolution - trial by jury. Yet we all know that most litigated disputes will be resolved by negotiated settlement, which occurs at some point after the parties are sufficiently knowledgeable about the relevant facts and applicable law to intelligently evaluate the case and predict a range of outcomes.

Mediation is a form of settlement negotiations, facilitated by a neutral party. Mediation is gaining popularity in many parts of the country, in many cases spurred, at least initially, by court mandate. Even in those jurisdictions which do not mandate mediation, there are many reasons why mediation may be appropriate in a given case, both from the client's perspective, and from the perspective of a lawyer who is quite willing and able to take the case to trial if it doesn't settle on a reasonable basis. The following are some of the reasons that mediation may be appropriate in a given case.

### The Client's Perspective [2]

Often it is the client that is the impetus for mediation, for one or more of the following reasons:

a. The client wants to settle promptly.

b. The client wants to minimize costs, including indemnity costs, legal fees and other transactional costs, and costs of diverting employee time and resources to litigation.[3]

c. The courts do not provide the relief the client is seeking.

d. The client wants to avoid establishing precedent or judgment with preclusive effect.

e. The parties and/or attorneys have difficulty initiating negotiations, or lack negotiating skills.

f. The parties have differing appraisals of the facts or of the law.

g. The parties have a continuing relationship.

h. The client wants the matter settled confidentially.

i. Resolution requires complex trade-offs.

j. The client wants to avoid exposure to extraordinary damages.

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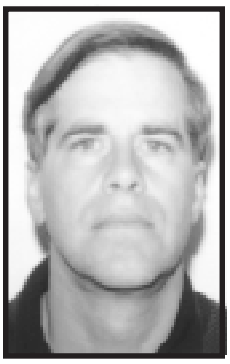
[1] Richard Boyette is a shareholder in the North Carolina law firm of Crantill, Sumner & Hardzog, L.L.P. He is a member of Defense Research Institute's Board of Directors, Chairperson of DRI's ADR Committee, and a former president of the North Carolina Association of Defense Attorneys. Richard spends the majority of his professional time as a mediator and advocate in facilitated mediation.

[2] Extracted from Chapter 3, "Referring a Client to Mediation: Some Working Guidelines," *A Student's Guide to Mediation and the Law*, Matthew Bender & Co., Inc. (1987).

[3] At DRI's Mediation and Arbitration Seminar in June, 1998, Jim Seifert, Assistant General Counsel of the Toro Company, described Toro's aggressive early mediation program. Toro has mediated 325 cases since 1990. All but one settled. Seifert recited some startling conclusions that Toro has attributed in large part to its mediation program: indemnity and transaction cost savings of 75%; a decrease in insurance premiums by 40% while coverage was increased; claims are down and the number of claims closed without payment are up. At the same seminar, Dave Wilbricht, Litigation Manager, John Deere Insurance Company, indicated that over the past five years, his company paid on average $6,000 less per case by settlement through mediation, and saved $1 million in legal expenses.

# President's Message

**Jack L. Harvey — Wharton Levin Ehrmantraut Klein & Nash**



It was with great pleasure that I officially became President of the Maryland Defense Counsel (MDC) at the predictably enthusiastic gathering for the annual Crab Feast at Bo Brooks on Belair Road. The crowd was enthusiastic, unfortunately not because of my induction, but because of those wonderfully tasty blue crustaceans everybody was washing down with foaming pitchers of beer. The Crab Feast, as usual, provided a fitting conclusion to the MDC year. It is a relaxing social event during which our members gather together for a few hours of fun without any pomp, circumstance or speakers.

The Crab Feast is only one of many activities for which the MDC is responsible. It happens to be the best attended and most popular. However, there are also the *Defense Line*, the "brown bag" lunches, occasional seminars, judicial interviews, the Past Presidents' Reception, guest speaker dinners and interacting with legislators. Certainly one of the most important roles of the MDC is monitoring legislative activity in Annapolis. I believe that in recent years the MDC has made great strides in gaining respect, credibility and visibility in Annapolis. Many legislators in Annapolis not only now know who we are but also look to the MDC to provide expertise and advice concerning legislation that impacts different aspects of the practice of law. This perhaps is best illustrated by the very active and regular engagement of legislators in Annapolis by certain MDC members concerning proposed workers' compensation legislation. It is also illustrated by MDC's continued efforts to fend off certain ill-advised and technically deficient proposals by the Maryland Trial Lawyers Association, such as proposals to adopt comparative negligence and to liberalize standards for awarding punitive damages.

It has taken a name change (from Maryland Association of Defense Trial Counsel to Maryland Defense Counsel), a talented and long-term MDC lobbyist (Maxine Adler), and lots of hard work from various MDC members to get where we now are in Annapolis. In the future, we must continue to increase our presence and voice in Annapolis. The MDC is the only State-wide voice for defense lawyers. It not only regularly is facing off in the legislative hallways and hearing rooms against a more visible and far better funded Maryland Trial Lawyers Association, but unfortunately it often sees its own umbrella association, the Maryland State Bar Association, taking positions directly contrary to those of the MDC and the clients it serves.

It is important for the MDC to continue to increase its visibility, and enhance its presence, in Annapolis. It is also important for the MDC to expand and diversify the functions it fulfills on behalf of its members. However, to do so, I believe the MDC must grow its membership - both in absolute numbers and in geographical representation throughout Maryland. Toward this end, the MDC has launched an initiative to dramatically increase membership in the organization.

The MDC has written to every law firm, company or governmental entity with members in the MDC to explain this membership initiative. The new policy is designed to allow additional memberships at dramatically discounted rates. For one to three additional lawyers from a firm, company or entity who join MDC, the additional cost will be only $125, as opposed to the normal charge of $125 for each additional member. If four to six additional lawyers join MDC, the additional cost will be only $250. If seven or more lawyers join, the additional cost is capped at $375, regardless of the number who join. For those companies that, in the past, have sponsored multiple memberships in the MDC, now there is the opportunity to double or triple existing membership at a small additional cost.

Accordingly, for each of you reading this, I hope that your firm's membership has been renewed or will be renewed soon. In addition, I urge you to encourage your colleagues at work to become designated members. We want and welcome new members. We believe that increased membership will make the MDC a stronger and more vibrant organization, capable of delivering more and better services for its membership. ■

# Why Mediate?

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### The Lawyer's Perspective [4]

To the extent that counsel are interested in negotiating a favorable settlement and avoiding the risks inherent in a trial, the mediation conference affords the opportunity to negotiate in a controlled setting with the benefit of a neutral, third party negotiator (the mediator). Mediation often works for one or more of the following reasons.

a. It can open communications where previous hostilities have made direct negotiations impossible.

b. It permits parties to explore options without disclosing confidential information or tactics or a willingness to compromise a position previously taken.

c. It permits the exploration of the underlying interest of each party in order to develop options.

d. It can take assessment of fault out of the dispute and focus on solutions.

e. It enables parties to assess their positions objectively rather than from an adversarial posture.

f. It allows clients to directly participate and directly approve settlement, resulting in a settlement that is more satisfactory to the client.

g. It assures parties that a trial is truly necessary when settlement is not reached.

Even unsuccessful mediations may prove beneficial. Partial settlements may be achieved. Issues or parties may be eliminated. Issues may be clarified, and emotions reduced. Agreements may be reached to simplify the exchange of information, and eliminate useless discovery. Often, the ranges of settlement are established, along with the opportunity for continuing settlement negotiations.

In short, there are many reasons why clients and lawyers alike view mediation as a valuable means of exploring dispute resolution, without giving up the right to have the dispute resolved by a jury if the parties are unable to reach a settlement. ■

[4] Extracted from a paper entitled *Alternative Dispute Resolution - An Advocate's Perspective*, by Cary R. Singletary of the Florida Bar, published as part of the course materials for the Mediator Training Course taught by Dispute Management, Inc., January 1992.

# Some Thoughts on How to Choose a Mediator

**by John Trimble[5]**

As mediation has become a more common occurrence for lawyers in trial practice, the subject of how to choose a mediator is a frequent topic of discussion when lawyers gather. Because of the cost of mediation and the amount of time that must be committed to prepare for and attend a mediation session, lawyers need to spend more time choosing the right mediator for their case. Furthermore, lawyers who seek to become mediators need to have a better understanding of how parties choose mediators so that they can better market themselves in an area of law that has room for more participants.

### Do You Need a Mediator With Experience in a Particular Substantive Area of Law?

The most commonly asked question is whether it is necessary to choose a mediator who has particular knowledge or experience in the area of law that is the subject of the case. For example, in a tax dispute, do you need a lawyer with tax experience, or in a patent dispute, do you need a lawyer with patent experience? The not so simple answer to the question is: "It depends." Highly experienced mediators will tell you that a person does not need a great deal of specific experience in a particular field of law if the parties are represented by counsel who are experienced in that area. Because judges and juries rarely have experience in a particular subject of the law, it is always the lawyers' task to educate the uninformed on the cases, statutes and practical considerations that affect a case. Thus, doing so for a mediator is not considerably different. Finding a mediator with specific experience in a particular field of law may only be important when the parties involved are so sophisticated that they may refuse to embrace the mediation process unless they are impressed by the qualifications and experience of the mediator.

The mediator's qualification in the field of law is also of greater importance depending upon the role that the lawyers wish for the mediator to play. Mediation purists who simply wish to have a mediator act as a facilitator will need a mediator who is competent to articulate each party's position as the negotiation takes place. However, many litigants prefer an aggressive mediator who attacks each party's position and attempts to persuade parties to change their positions. That type of mediator will be more successful if he or she has some substantive knowledge in the area of law. However, experienced mediators will tell you that experience in the art of mediation is still more important than substantive legal knowledge.

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[5] John C. Trimble is a defense trial lawyer and a managing partner at the Indianapolis, Indiana law firm of Lewis & Wagner. He currently serves as President of the Defense Trial Counsel of Indiana, and is a member of the DRI Committee on ADR. He devotes a small percentage of his practice to service as a mediator in civil cases.

## Some Thoughts on How to Choose a Mediator

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### The Qualities Often Sought in a Mediator

In choosing a mediator for the average bodily injury, breach of contract, employment dispute, business transaction or corporate dispute case, lawyers must first weigh the temperament, knowledge, age, experience, and personality of their client, the opposing attorney, and the other party. They should choose a mediator whose own age, experience, knowledge and personality will be best suited to articulate their litigation posture to the opposing party in the confidential break-out sessions. On the whole, attorneys should seek to choose mediators who have a reputation for being patient, a good listener, tactful, articulate, and knowledgeable in the psychology, mechanics and law of settlement. Experience has shown that the lawyers who possess these characteristics in combination with a few years of litigation experience are the ones who are most likely to be chosen and most likely to be effective. Experience has also shown that the average litigation practitioner prefers an aggressive mediator over a facilitator.

### How Do Lawyers Break Into The Mediation Practice?

In attempting to develop a practice in mediation, there is no substitute for experience. Attorneys simply will not pick mediators they don't know. Attorneys who wish to become mediators need to take the appropriate training and then invest the time in calling their friends in the bar to request the chance to do some mediation. As they get started, they need to emphasize to their friends and acquaintances in the bar that they are readily available to schedule mediations on short notice, and that they will charge extra competitive rates on an introductory basis in order to develop a track record. If they are able to obtain some mediation business in that manner, they can then market themselves to a wider community of prospects by using the attorneys in the early mediations as references. They can also encourage the persons who have used them to use them again and to recommend them to others.

The act of choosing a mediator is, at best, an imprecise science. It is always wise to look at your client, the opposing party, the opposing attorney, and the issues in the case to determine whether a special strength or personality may be necessary to increase the chances of a successful outcome. ■

[6] James E. Lozier is a partner in the Michigan law firm of Dickinson Wright PLLC. He received his undergraduate degree from Boston College and his law degree from Fordham University Law School. Jim is the chairman elect of the Defense Research Institute's ADR Committee; a former State of Michigan DRI Representative; and a former Michigan Defense Trial Counsel President. Over the past twelve years, he has served as an advocate in numerous catastrophic injury, employment litigation, and contract dispute facilitated mediations. His practice entails representation of railroads, product manufacturers, service industry providers, financial institutions, and insurance carriers.

## The Facilitated Mediation Process

**by James E. Lozier[6]**

Facilitated mediation is a process in which a neutral third party (commonly known as a mediator or facilitator) assists those parties involved in a dispute to reach a negotiated resolution. It has become one of the most popular forms of alternative dispute resolution and has, due to voluntary implementation and court mandated programs, expanded enormously over the past five years throughout the United States.

This process does not involve the issuance of any judgment, award, or determination. Rather, a facilitator attempts to assist the parties in working out their differences and/or otherwise reaching a settlement by what some might describe as "shuttle diplomacy." The process involves the parties initially agreeing upon a neutral third party to serve as a facilitator.

A facilitation agreement is then entered into which may:

1. describe the procedure to be followed;
2. indicate the necessity (if any) for submitting written memoranda, briefs or summaries that may be kept confidential and disclosed only to the facilitator or in the alternative to the facilitator and/or parties;
3. provide the facilitator's fee schedule;
4. reflect the parties' agreement for the division and payment of the facilitator's fees and costs; and
5. confirm the confidential and nonevidentiary nature of this process; with it usually being explicitly provided that the facilitator will not be called as witness at any trial, arbitration, or other proceeding if the matter cannot otherwise be resolved.[7]

A joint meeting with all the parties and the facilitator is typically held at the outset of the facilitated mediation. At that time, introductions are made and the facilitator explains the process and procedure that will be followed. Each party's counsel and the parties themselves are then given an opportunity to outline their positions in an attempt to persuade not the facilitator but the other party or parties of

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[7] A significant advantage of facilitated mediation is that it is left to the parties to formulate the process and procedure best suited to effectuate a resolution of a case. Oftentimes, this depends upon the personalities of the parties, their counsel, the factual circumstances, and the nature of the dispute. In some mediations the parties do not submit any written brief, memorandum or other documentation to the facilitator or parties prior to the time of the mediation but merely outline verbally their positions at the joint meeting held at the outset of the process. On other occasions, the parties treat the process as if they are providing a fairly elaborate closing argument to jurors using visual aids but addressing their argument not to the facilitated mediator (who is not charged with rendering any type of a judgment) but rather to the adverse party and its counsel so as to try and convince them of the viability and persuasiveness of their position. Under unusual emotional circumstances, the parties may not have a joint meeting and in some situations dual facilitators are utilized.

## The Facilitated Mediation Process

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the viability of their positions.[8] Often, this is the first and only chance that an adverse party gets the opportunity to hear first-hand his adversary's position. It is at this time that a well prepared and skilled advocate and knowledgeable party representative can, as a team, make significant impressions on an actual adversary as opposed to merely that adversary's attorney.

After the opening joint meeting, the parties divide up into separate rooms and the mediator engages in shuttle diplomacy, involving his/her going from one party to the other attempting to bring the parties closer together to reach common ground sufficient to permit a resolution of their dispute. This process entails the facilitator attempting to separate the interests or needs of the parties from their positions or desires and assist them in making a realistic evaluation of their positions. It sometimes tests the creativity of a facilitator in the development of options for the meeting of each party's differing needs.[9] Efforts by the facilitator to resolve a dispute often entails settling portions of it in the hope that the entire dispute will eventually be resolved before the process terminates.

A facilitator's shuttle diplomacy typically continues until an "impasse" is reached or the matter is resolved. Effective mediators earn their keep by their exercise of patience in overcoming an impasse. In order to do so, it is critical that the facilitator develop the trust and confidence of the parties as the matter proceeds forward.[10] At the point that an impasse is reached, a good facilitator often has to bring home to one or both sides the realities of the situation, i.e., the consequences of a failure to agree such as delay, expense, and an uncertainty of a trial. It also most often requires a facilitator to advise a party whose position is so extreme that it is not attainable that there is no sense in any effort to continue to pursue that position since the other side will definitely not agree to it.[11] Often, the reaching of an "impasse" results in a joint meeting or series of joint meetings to effectuate a resolution.[12]

If a settlement is eventually reached, then a joint meeting is held to ensure that the parties understand and agree upon the terms, and usually a written agreement is then entered into immediately. If a multifaceted, complex dispute is being mediated, the agreement should address all facets of the dispute by addressing all of the claims and issues raised by each of the parties. As with any agreement, it is important to reflect the consideration given and received by the parties; if a more formal release and indemnification agreement is to be entered into at a later time; the time by which the consideration is to be provided; and the time when any additional settlement document must be executed.[13] Before terminating the process the written agreement usually is executed by the parties and their counsel.

Although frustrating, the failure of a facilitated mediation to generate an immediate resolution of a lawsuit does not mean that all is for naught. To the contrary, the inability to overcome an impasse and termination of a mediation frequently results in the parties getting together at a later time to continue the mediation or communicating with the facilitator by phone, with the matter eventually being resolved, after the parties have had more of an opportunity to reflect on the consequences of their failure to have reached a settlement. Even where facilitated mediations do not bring a complete resolution of a matter, they still frequently serve to resolve critical issues. ■

[8] It is extremely important that the parties themselves and/or representatives of the parties who have decision-making power and are most intricately involved in the dispute be present so that closure on any potential resolution of a dispute can be immediately achieved and so that they can hear firsthand the other side's position. Such attendance significantly enhances the chances of a settlement occurring.

[9] For example, in the case where an employee was denied a promotion because of poor writing skills, the employer may agree to pay for a writing course to assist the employee in improving those skills and consider the employee at a later time for a similar position. In addition, in an employment dispute, sometimes new job assignments may resolve other employment issues leading to disputes.

[10] While most facilitators strive for a fair resolution, a facilitator is not acting on behalf of either side and their primary mission is not to accomplish a fair resolution but to accomplish a settlement that is acceptable to both sides.

[11] At the outset of a mediation, a good facilitator normally is much less assertive and after he/she builds the trust of the parties becomes more assertive until the end of the process when the mediator is oftentimes required to become very assertive in order to make the parties face the realities of their different positions and the consequences of any failure to reach a settlement.

[12] It has been the author's experience in catastrophic injury and other complex litigation matters, that the longer the facilitator can keep the parties together talking and reflecting on their positions, the greater chance that an impasse will be overcome and a settlement reached. A skillful facilitator knows when to take lunch or dinner breaks; knows how hard and long he or she can work the parties; has the patience and work ethic to keep the parties together all night and into the next day if need be; and avoids by humor, personality and the development of a trusting relationship with parties a total breakdown of the process. It has not been unusual for the author to have participated in facilitated mediations that have gone 15 to 20 hours with short lunch and dinner breaks or have the mediation adjourned late in the evening on one day or early in the morning the next day only to resume 6 or 7 hours later after parties are somewhat more refreshed.

[13] If feasible, all settlement documentation should be executed before the facilitated mediation adjourns or is terminated. By doing so, the parties and other counsel as well as the mediator avoid any future potential dispute as to the settlement terms and an adverse party's "settlement remorse" involving later efforts to avoid what was agreed upon.

# Recent Decisions

## WORKERS MUST SHOW HARM RELATED TO OCCUPATION

In *King v. Board of Education*, 354 Md. 369 (1999), the Court of Appeals reaffirmed that the Maryland Workers' Compensation Act limits recovery to occupational diseases that can be reasonably characterized as due to the general character of the particular employment. The Court held that recovery under the Act requires proof that the harm suffered is inherent in the occupation and not simply specific to the plaintiff's particular job. In this case, the plaintiff failed to establish the necessary correlation between her occupation and her injury.

In *King*, the plaintiff claimed that she suffered a "nervous breakdown" as a result of the excessive responsibility thrust upon her by her employer, the Board of Education. She contended that as a result of her twelve-year tenure, during which she received numerous promotions, she suffered a "stress-induced mental injury." The Court rejected the notion that her injuries qualified as a compensable occupational disease, concluding that plaintiff's injuries resulted from poor management by her supervisors and not anything inherent to her occupation.

The Court declined to address whether such a claim requires an analytical framework different from that which is used for physical occupational disease claims but found that "mental disease claims must, at a minimum, satisfy those standards applicable to physical claims." The Court concluded that the plaintiff failed to establish two threshold requirements necessary under the Act. First, she presented no evidence that the stress-related illnesses were inherent in the nature of her position. Second, she offered no proof that the illness suffered did not occur with equal frequency in any other occupation in which employees are overworked. Thus, she failed to establish that she suffered from an occupational disease under the Maryland Workers' Compensation Act.

## CLERGY-PATIENT RELATIONSHIP NOT 'OFFICIALLY SANCTIONED' FOR PURPOSE OF EMOTIONAL DISTRESS CLAIM

In *Borchers v. Hyrchuk*, 126 Md. App. 10 (1999), the Court of Special Appeals held that absent an officially sanctioned treatment relationship (*e.g.*, psychiatrist and patient), a person who seeks counseling is not permitted to recover for intentional infliction of emotional distress for certain conduct arising out of that relationship. The case arose out of a sexual relationship between Dale Borchers, who was then an employee at a camp operated by Potomac Conference, and Ronald Hyrchuk, who was the camp's pastor. During the summer of 1994, Borchers approached Hyrchuk for counseling in regard to her marital problems. Rather than advising her on how she might improve her marriage, Hyrchuk persuaded Borchers to have sex with him. Borchers sued Hyrchuk for, among other things, intentional infliction of emotional distress ("IIED"), marital counseling malpractice, and clergy malpractice.

In addressing the IIED claim, the Court focused on the extreme and outrageous element of the tort. The Court referred to the Court of Appeals' decision in *Figueiredo-Torres v. Nickel,* 321 Md. 642 (1991), which held that, although conduct such as Hyrchuk's may not be outrageous coming from a stranger or a friend, such behavior by a psychologist in treating a patient warrants a different conclusion. In addition, the Court referenced its own opinion in *Homer v. Long,* 90 Md. App. 1 (1992), in which the plaintiff sued a psychiatrist who allegedly began an affair with the plaintiff's wife while he was treating her. The Court noted that the psychiatrist's conduct would be extreme and outrageous to the wife.

The Court ruled, however, that Hyrchuk's behavior did not reach the extreme and outrageous level. In holding that an officially sanctioned relationship is necessary for such behavior to be considered extreme and outrageous, the Court distinguished *Borchers* on the grounds that the absence of the special relationship made the case more like one between friends. As such, Hyrchuk's behavior was "not quite extreme enough to meet the tort's stringent standard."

In addition, the Court refused to overturn the lower court's dismissal of Borcher's claim for marital counseling malpractice because it found that the allegations in the complaint were insufficient to establish a professional counselor-patient relationship between Hyrchuk and Borchers. Finally, the Court declined to recognize clergy malpractice as a tort in Maryland, stating that "as the state's intermediate appellate court, [its] primary function is to correct error, and not to pronounce new substantive legal rules."

## RULE ENUMERATING AFFIRMATIVE DEFENSES IS EXCLUSIVE

In *Ben Lewis Plumbing, Heating & Air Cond., Inc. v. Liberty Mut. Ins. Co.,* 354 Md. 452 (1999), the Court of Appeals held that negligent misrepresentation is not an affirmative defense that must be raised when answering a complaint.

Lewis had used Liberty Mutual as an insurance carrier for several years. Liberty Mutual provided Lewis with a workers' compensation policy proposal. Lewis signed a confirmation letter accepting the clear terms of the proposal. Lewis claimed that it agreed to the policy only after Liberty's

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representatives allegedly assured it that the contract remained unchanged from past years.

In reality, the proposal included a change in the way dividends and premiums would be determined. The change led to a dispute between the companies, and Liberty filed a complaint alleging breach of contract. Lewis filed a "boilerplate" answer containing thirteen numbered defenses, including a general denial under Maryland Rule 2-323(d). Another of the defenses named thirteen of the twenty-one affirmative defenses that are listed in Rule 2-323(g). The answer did not mention negligent misrepresentation. Lewis subsequently filed a counterclaim.

When the case went to trial, Lewis's defense was that the statements made by Liberty's representatives constituted fraudulent or negligent misrepresentations which induced Lewis to accept the policy. The jury found that Lewis was liable to Liberty for premiums under the contract and it found that Lewis had proven negligent misrepresentation on the part of Liberty by a preponderance of the evidence. The circuit court struck the verdict in favor of Liberty and entered judgment for Lewis on the counterclaim. The Court of Special Appeals reversed, holding that Lewis could not assert its defense of negligent misrepresentation because it had not been pled in the answer.

The Court of Appeals held that the intermediate court erred in holding that Lewis could not assert negligent misrepresentation as a defense because it had not been affirmatively pleaded. The Court focused on the language of Rule 2-323(g) which specifically enumerates the affirmative defenses that *"shall be set forth separately."* The Court noted that negligent misrepresentation is not among the twenty-one enumerated defenses. The Court held that section (g) of Rule 2-323, which enumerates the affirmative defenses that must be set forth separately, is exclusive and Lewis did not waive its defense of negligent misrepresentation by not pleading it specially.

Notwithstanding its holding, the Court did not reverse the judgment of the Court of Special Appeals, concluding that there was no negligent misrepresentation as a matter of law because Lewis' alleged "reliance" was unjustified.

### FAILURE TO SPECIFY GROUND FOR OBJECTION RESULTS IN WAIVER

In *Mayor and City Council of Baltimore v. Theiss,* 354 Md. 234 (1999), the Court of Appeals held that appellant waived its right to object to the admission of deposition answers at trial because it failed to specify the grounds for objection made during the deposition.

Appellee sued the City after she fell and broke her ankle while walking in the Brooklyn area of Baltimore. One of her treating physicians, Dr. Mark S. Myerson, M.D., was deposed. Appellee's counsel, during deposition, at times failed to ask Myerson if his opinion was based on reasonable medical probability. Appellant's counsel objected to these questions, but failed to state the reason for the objection.

Appellant's counsel sought to have the deponent's testimony excluded on the grounds that questions asked of Dr. Myerson were not in the proper form. The trial judge found that the appellant had waived the objection, based on *Davis v. Goodman,* 117 Md. App. 383 (1997), which held that to preserve an objection counsel must state the grounds for the objection before the end of the deposition so that opposing counsel may cure it.

The Court of Appeals held that when objecting during a deposition to errors that may be cured at the deposition, the objecting party must state the grounds for the objection or the objection is waived. The Court cited Maryland Rule 2-415(b), which provides that the grounds for the objection must be stated if an error "might be obviated or removed at the time of its occurrence."

### MOTION IN LIMINE INSUFFICIENT TO PRESERVE OBJECTION; CONTEMPORANEOUS OBJECTION IS REQUIRED

In *Reed v. State,* 353 Md. 628 (1999), the Court of Appeals held that an unsuccessful motion in limine to exclude evidence does not preserve a party's objection to the admission of evidence at trial. Instead, if a motion in limine is denied, a party opposing the admissibility of evidence must make a contemporaneous objection when the evidence is offered at trial. In *Reed*, the defendant was arrested and charged with intent to distribute and possession of cocaine. One of the arresting officers took a statement after the defendant had been advised of his rights and waived those rights. Prior to trial, the defense filed a motion in limine to exclude portions of that statement, which was denied. At trial, the detective who took the statement testified to the contents of the statement, without objection from the defense. However, when the written statement was offered by the State, defense counsel said "Your Honor, the objection has been litigated. We would ask to preserve that."

The Court of Appeals affirmed the intermediate appellate court's holding that the defendant had not preserved his objection. In doing so, the Court declined to extend its ruling in *Prout v. State,* 311 Md. 348 (1988). *Prout* involved a motion in limine filed by the defense to obtain permission to cross-examine a state's witness about prior

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criminal convictions in order to impeach her testimony. The court ruled that the convictions were not admissible. Thus, the moving party in *Prout* preserved the objection when the motion in limine was denied, and no objection at trial was necessary to preserve the issue for appeal. In *Reed*, however, the defense waived the objection by not renewing it when the evidence was offered at trial, pursuant to Maryland Rule 4-323(a), which provides that an objection to the admission of evidence shall be made at the time of the evidence is offered or as soon thereafter as grounds for objection become apparent, or it is waived.

## COURT CONSIDERS MEANING OF 'WHOLLY DEPENDENT' IN CONNECTION WITH CONTINUING RECEIPT OF DEATH BENEFITS

In *Martin v. Beverage Capital Corp.,* 353 Md. 388 (1999), the Court of Appeals considered at what point, after the initial maximum of $45,000 has been paid out, is a surviving spouse no longer "wholly dependent" and therefore not eligible for continuing workers' compensation death benefits. The Court concluded that such a determination must be based on the particular facts of each case. Specifically, the Court focused on whether "the phrase 'continues to be wholly dependent' refers to an ongoing dependency on the salary of the deceased worker at the time of his . . . fatal injury . . . or on the generally lesser worker's compensation death benefits." The Court held that in making ongoing dependency determinations, the amount earned by the deceased employee at the time of death must be compared with the amount the claimant is earning after the initial $45,000 has been paid.

In *Martin*, the deceased spouse earned $200,000 per year prior to the fatal accident. In contrast, the surviving spouse and benefit recipient earned an average income of only $15,000 per year. The Court held that the recipient's income of $15,000 did not preclude her from receiving continued death benefits. Because the issue is the recipient's dependency on the deceased's income, the Court deemed irrelevant the fact that the plaintiff's salary represented more than fifty percent of her worker's compensation benefits.

While the plaintiff naturally expects a reduction in income following her husband's death, the Court concluded that the diminution should not be so great that she would be surviving on less than ten percent of the previous family income. Refusing to adopt a specific percentage under which a dependent can earn income relative to the deceased worker's salary and still be found "wholly dependent," the Court held that each determination must be based on the particular facts of the case.

## CORPORATE OFFICER HELD PERSONALLY LIABLE FOR CORPORATION'S UNPAID SALES TAXES

In *Fox v. Comptroller of the Treasury,* 126 Md. App. 279 (1999), the Court of Special Appeals held that an officer wielding "considerable corporate fiscal powers" was personally liable for the corporation's unpaid sales taxes even though the officer did not technically possess any fiscal control over the corporation.

Fox was sued in a complaint alleging that, as the Crib N' Cradle corporation's vice president, Fox was personally liable for the corporation's $72,332.49 in collected, but unremitted sales and use taxes. Specifically, the Comptroller claimed that under the Tax–General Article §11-601(d)(1)(i), Fox was personally liable because he was a vice president who directly or indirectly owned more than 20 percent of the stock of the corporation. The Comptroller also noted that Fox was aware of Crib N' Cradle's financial affairs and maintained that he was personally liable for the start-up debts of two Crib N' Cradle stores.

In turn, Fox argued that the taxes should not have been assessed against him personally, as he owned only 17 percent of the stock and "had no de jure control over the collection and remittance of sales tax." Fox stated that although he was in charge of collecting sales and sales tax receipts from the store he managed, he had never prepared or filed any tax forms for any of the Crib N' Cradle stores. Moreover, Fox argued, the corporation's president did not fully disclose to him the extent of the corporation's tax delinquency until May 1994, a month before the last of the Crib N' Cradle stores closed.

The Court, agreeing with the Comptroller, relied heavily on *Rucker v. Comptroller of the Treasury,* 315 Md. 559 (1989), in which the Court of Appeals recognized that "the government object to be obtained – 'the collection of taxes due and owing which might otherwise go unpaid' — was a rational basis for imposing liability for taxes on the person 'who holds themselves out as responsible for corporate conduct and management.'" *Rucker,* 315 Md. at 567. The Court analyzed the statute's legislative history, noting that the General Assembly's intent "is unambiguous; it clearly imposes liability on certain specified officers without regard to their ability to control the fiscal management of the corporation." The Court noted that "if Fox [were] correct, a corporation could merely assign the responsibility for paying taxes to someone other than an officer, and the statute imposing liability on the officers would thus be a nullity, as well as unconstitutional."

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## Recent Decisions

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### NO JURY RIGHT FOR PROCEEDING IN EQUITY

In *Calabi v. Government Employees Insurance Co.*, 353 Md. 649 (1999), the Court of Appeals reaffirmed that there is no constitutional right to a jury trial for proceedings in equity. In *Calabi* the plaintiff sued her homeowner's insurance carrier for failing to reimburse her under her policy for losses resulting from theft and water damage. The parties entered into a settlement. Thereafter, the plaintiff moved to void the settlement, claiming she entered into it under duress. The defendant filed a motion to enforce the settlement. The trial court denied the plaintiff's demand for a jury trial and enforced the settlement. The Court of Special Appeals affirmed.

The Court of Appeals, affirming the decision of the Court of Special Appeals and the circuit court, noted that the plaintiff, in seeking to void the agreement on the basis of duress, and the defendant, in seeking to enforce it, were both seeking equitable relief, namely specific performance and recission. Thus, the hearing on the motion to enforce the agreement invoked the court's equitable powers and, thus, the plaintiff was not entitled to a jury trial on the issue of duress. ■

## Comments Sought on Local Rules Revisions

The United States District Court for the District of Maryland is currently considering revisions to its local rules and, in connection with this process, the Court invites comments from the Bar. The Court will consider all written suggestions or comments submitted prior to December 15, 2000. Submit comments or suggestions to

Felicia Cannon, Clerk
U.S. District Court
for the District of Maryland
101 West Lombard St.
Baltimore, MD 21201.

# Spotlights ★ ★ ★

**SCOTT PATRICK BURNS** of TYDINGS & ROSENBERG, LLP won dismissal of two cases involving claims against a manufacturer for damage to houses allegedly caused by water that infiltrated through EIFS, or synthetic stucco. In *Matz v. Weibking*, in the Circuit Court for Baltimore County, the Honorable Dana M. Levitz dismissed non-intentional tort claims based on the economic loss rule, holding that all water damage constituted economic loss recoverable in contract only. The Honorable Philip T. Caroom, of the Circuit Court for Anne Arundel County, reached the same conclusion in *Cirksena v. Dryvit Systems, Inc*. Judge Caroom also dismissed a fraud count because of the absence of any direct communications between the manufacturer and the plaintiffs.

★ ★ ★

**GEOFFREY TOBIAS**, of OBER/KALER represented Moran Towing in *Marshall v. Moran Towing Co.*, which was tried to a jury in the Circuit Court of Baltimore City. At the conclusion of a three-day trial, the jury returned a defendant's verdict after forty-five minutes of deliberation, finding the tug seaworthy under the General Maritime Law and Moran not negligent pursuant to the Jones Act.

★ ★ ★

**STEPHEN S. MCCLOSKEY** of GREBER & SIMMS obtained a defense verdict in the case of *Jenkins Automotive, Inc. v. Peninsula Insurance Co.* in the Circuit Court for Allegany County. The plaintiff sustained extensive property damage as a result of a landslide. Peninsula's policy contained an earth movement exclusion. The court denied Peninsula's motion for summary judgment, concluding that the policy was ambiguous. After a three-day trial, a jury returned a defense verdict for Peninsula, finding no coverage under the policy for the occurrence.

★ ★ ★

**PEGGY FONSHELL WARD**, of SEMMES, BOWEN & SEMMES, recently won summary judgment in *Lawson v. Knight*, a case in the Circuit Court for Anne Arundel County. The defendant was a homeowner with an above ground swimming pool. The plaintiff and her 2 -year-old son were guests at his home when the toddler wandered off and was drowned in the pool. The trial court ruled that the homeowner had no duty to warn of the pool's existence or to protect the child from the pool.

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# The Defense Line

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