



# THE DEFENSE LINE



A Publication From The Maryland Defense Counsel, Inc.

Fall 2017

## Yoga with a Hairdryer and Other Confessions of a Chronic Trial Attorney

Jeanie S. Ismay



### Also Featured

*Rochkind v. Stevenson* —  
The End of *Frye-Reed* in Maryland?

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Noteworthy Bills to Be Heard  
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## MESSAGE FROM THE EXECUTIVE BOARD

Welcome to all of our new and sustaining members! A new year brings new ideas and a fresh approach to this column which traditionally has been populated with messages from the MDC President! Instead, I am kicking off the column with a softer topic that I hope will encourage our members to read the column, first and foremost, but also inspire and empower them — the topic of my column. We have planned four editions of our tried and true *Defense Line*, and in an attempt to introduce you to the executive board, John Sly, President-elect, and Dwight Stone, Treasurer, each will select another leadership related-topic and will populate the next two columns — which is newly named Message from the Executive Board. Change is good and I have certainly had my fair share of it this past summer. We celebrated our Executive Director Kathleen Shemer's exodus after twenty-seven years at the close of the Past President's Reception in September (READ: You will be missed!).

By changing the approach to this column, we hope to provide copy on the softer topics integral to the practice of law, and thus further provide value to our members, especially associates. The Executive Board hopes to roll-out during the next administration a Leadership Academy for members — the seeds of which are being sown in these 2018 *Defense Line* columns. It goes without saying that I am eternally grateful for the Past Presidents of MDC who have embraced the new programming and provided guidance to me during these first four (4) months on EVERYTHING from budgeting, to sponsorship, to member involvement, and more. A special thanks to Steve Manekin of Ellin and Tucker who took time out of his busy schedule to meet me in Starbucks one afternoon in May 2017, and “school me” on how to do this! Mr. Manekin, I am eternally grateful to your candor, kindness, and tutelage. Members, thank YOU for all you are doing to enliven the organization and attend the programming. We NEED you, and I challenge you to get involved! The Board is working hard to create lots of new offerings. Without my executive team the 2017–18 program offerings could not exist. We hope you find the new programming helpful and educational, and equally as important, we hope that the many opportunities that 2018 brings to gather, are rejuvenating the organization's sense of collegiality and civility.

Without further ado, I present to you Part I of III of our leadership series, inspiration versus empowerment:

### Empower versus Inspire... kind of like the difference between Mentor versus Promote

In the course of finding my way in private practice, I watched many a Ted Talk™, e.g., Simon Sinek's “Start with Why;” read many an article and book (from the *One Minute Manager*, to *The Nightingale's Song*, to Dale Carnegie's *How to Win Friends and Influence People*, and Jack Welch's *Winning*); and observed many alpha leaders within the firm, within my many professional associations, and in academia. What became clear was that “empowerment” and “inspiration” are strong words that real leaders embrace and live.

In preparing this column, I looked for quotes that best summarized my penchant to lead inspired teams. I think this one sums it up best: “Give a man a fish and he eats for a day, but

teach a man to fish and he eats for a lifetime.”

I also looked at the definitions of empower versus inspire. By definition “empower” means:

#### **empower**

VERB [WITH OBJECT]

**1 Give (someone) the authority or power to do something.**

‘members are empowered to audit the accounts of limited companies’

**1.1 [with object]** Make (someone) stronger and more confident, especially in controlling their life and claiming their rights.

‘movements to empower the poor’

<https://en.oxforddictionaries.com/definition/empowerment>, last visited October 31, 2016.

It's a great word, but the word implies that, “I have the power, and you do not.” This is why I strive to inspire, as opposed to empower, my teams. I start from the premise that we are all on the same team and rowing the boat in the same direction, I just need to find the approach that turns the key in each one of my teammates to unleash their best potential. Sometimes, that is achieved by creating something as simple as a litigation plan, and letting each team member assign himself or herself the task from the litigation plan that he or she believes plays to his or her strength... the old toolbox selection game. Some of the teammates will gravitate to motions writing; some will gravitate to the deposition and field work; others will take on research and investigation. By letting each team member pick his or her task(s), he or she has confidence in himself/herself which generates a sense of inspiration. Leadership of my team begins with my assessing everyone's strong suits and playing on those skills. That provides the building block(s) to inspire more and more excellence. Having worked in sales during college, I recognize that everyone is wired differently, so I have to morph to my audience in order to motivate them and “make the sale,” if you will. That's part of the challenge of leadership, but also becomes a reward when you see your teammates achieve.

The word “inspire” means in pertinent part:

#### **inspire**

VERB

[WITH OBJECT]

**1 Fill (someone) with the urge or ability to do or feel something, especially to do something creative.**

‘his philosophy inspired a later generation of environmentalists’  
[with object and infinitive] ‘his passion for literature inspired him to begin writing’

**1.1** Create (a feeling, especially a positive one) in a person.  
‘their past record does not inspire confidence’

**1.2** Animate someone with (a feeling)  
‘he inspired his students with a vision of freedom’

**1.3** Give rise to.  
‘the film was successful enough to inspire a sequel’

<https://en.oxforddictionaries.com/definition/inspire>, last visited October 31, 2016.

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# THE DEFENSE LINE

Fall 2017



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# Yoga with a Hairdryer and Other Confessions of a Chronic Trial Attorney

Jeanie S. Ismay



The harp music sounds on my iPhone. It's 3 A.M. Not that I was asleep anyway. I have been in trial for the past 6 months. Leaning over a mound of blankets, I search in the dark to locate and hug my 7 year-old who demands to sleep with me because it is the only quality time we spend together lately. As I tiptoe to the kitchen and press BREW on the coffee machine, I check my e-mail to confirm that my expert witnesses received my 2 A.M. e-mail attaching the daily transcript from yesterday's testimony. "Do you ever sleep?" one witness has e-mailed me. "No, and neither do you!" I respond. By 4 A.M., I have literally suited-up in heels, make up, and hairspray, reworked my cross-examination of the plaintiff's mother, sent instructions to my assistant on my other cases, provided an update on the anticipated witness order to our witnesses, confirmed with my co-counsel that we are still planning to call "X" witness and does he have the exhibits we discussed last night, folded a load of laundry, swept the floor, ordered groceries from Peapod, left a detailed note for the nanny about where my daughters need to be and when, written a check for my daughter's field trip, and have done 10 minutes of yoga while drying my hair in the only soundproof room in my house: the basement. It's time to kiss my sleeping family goodbye and head to the office to load my car before driving to the courthouse. This is just another morning in the life of a chronic trial attorney. Perhaps you can relate or perhaps you hope you never will.

For reasons I cannot disclose here, I began nine jury trials in one year. Six went to verdict. Some of those trials lasted beyond two weeks. While I went to law school because I wanted to be a trial lawyer, and I am thrilled to be part of the 3% of cases that actually proceed to trial, some days even I ask why anyone would do this by choice. Who would willingly function on three hours of sleep (on a good night), eat Luna bars for breakfast and lunch, wear stockings for 20 hours a day, and then when it's all over, do it all again, sometimes with only a week in between. Would I be lying if I said I love

every moment? Oh, yes. There are some days when I feel utterly exhausted and fear my children will learn to live without their mother. But we survive and my children still need and love me. Many people ask me: how do you do it? I have learned how to do it, and I want to share my experience with you, whether you are just starting out and have yet to try your first case, or whether you, too, are a chronic trial attorney who loves her work.

In addition to strong coffee, there are six rules for chronic trial survival that I have identified through years of trial and error. It is nothing you will learn in law school, or even at a CLE. It only comes from trying and failing, and trying again. I have been told by associates that these rules have been more helpful than books and lectures on trial tactics perhaps because so few people are willing to confess that trial/life balance is hard. To me, there is nothing shameful in admitting that every day, trial attorneys will struggle with the most precious commodity we have: time. These Rules are meant to help guide you as you navigate your way through life as a busy trial attorney and develop your own, personal method to the organized madness of trial.

## 1. Prepare Like You Will be Kidnapped.

Plan for your non-trial commitments just as you would for trial. John Lennon said, "Life is what happens when you're busy making other plans." As trial lawyers, we know that preparation is everything. Planning is what keeps surprises to a minimum, and the likelihood of success strong. Your trial planning skills must be applied to your personal life as well. Luckily, we 21st century trial attorneys have help. 64% of all U.S. households have Amazon Prime membership. I submit that 100% of trial attorney households should have Amazon Prime membership. Thanks to this service, I have been known to order everything from legal pads to paper towels to a suit from my phone. Place items on automatic weekly delivery so when you come home at 11 P.M. you do not find yourself hesitating to eat the last apple and using the last few sheets of printer paper. Is there anything as satisfying as coming home to the box of new pumps when the shoes you were wearing at trial yesterday lost a heel as you walked to a bench conference? True story, folks. Is there any bigger hero than the

parent who has a year's worth of juice boxes and toilet paper in the basement? I dare say; no there is not. Thank you, online grocery delivery gods. On the "professional side" of preparing, may I remind you that dry cleaning services will pick up and deliver your dry cleaning to your door. While you are busy researching jury instructions and a very specific question from your client, you will not remember that this morning at 3 A.M. you took the last clean shirt from your closet. If you are anything like I used to be, you may have a hard time spending the extra \$10-\$20 for delivery services and \$99 a year for Prime. Truth be told, someone else can and should replace you as the household shopper. It's worth it, and after the first delivery, you will wonder why you did not do this sooner. You do not have time to sweat all the small stuff.

**2. Find your Function Key.** There are some trial attorneys who will willingly give up sleep to exercise. Either they stay up extra late or get up extra early to go to the gym, run, or do push-ups. Good for them! I am not one such attorney, yet I admire those who can push themselves to exercise while exhausted and will sacrifice sleep to fit in the workout. At the end of a long day in trial, and after I've prepared for the next day, I simply want to collapse. Period. Consequently, the only "cardio" I achieve during the trial week is the walk to and from the parking garage and courthouse in heels (perhaps while carting trial boxes, in the rain). But on the weekends, I do walk or "run." I have developed the unique talent of doing yoga while drying my hair. If you think it cannot be done, I challenge you to try. The idea is, find what you need to function and find a way to fit it into your day. Do you need the sleep? Or do you feel better if you forego sleep and get in a quick run? Whatever will recharge your batteries, do it and stick to it. Otherwise, jurors will sense that you are fading, and will make judgments accordingly. I am fairly sure no deliberating juror forgot the moment at one of my nine trials when opposing counsel requested a trash can in open court (and on the record) because he was up all night and was about to vomit. Don't be that guy. Recharge yourself.

**3. Real Food.** Promise yourself one real meal a day. When we have adjourned for the day,

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(YOGA WITH A HAIRDRYER) *Continued from page 5*

I eat dinner, even if it is a sandwich I pick up from Atwater's on the way back to the office. I usually work through lunch or do not have the ability to stomach lunch. That being said, I recognize the human body needs nourishment beyond the contents of a Clif Bar, water from the courtroom water cooler, and candy from a sympathetic judge. (Thank you, Judge Tanner.) Even if you order dinner on the way from the courthouse and eat at your desk as you prepare for the next day, do yourself a favor and eat a real dinner. A hot dog from 7-11 does not count. Nice try.

**4. Treat Yourself.** During trial is the time when you are most prone to sacrificing your own needs. When you are giving so much of your energy and time to your clients, it is easy to fall into the trap of putting yourself last. This is a mistake and does not help your clients in the end. You must do something good for yourself because this is when you need it most. There may not be time for champagne, football, or a massage in the midst of trial, but there is enough time for your favorite coffee in the morning (see *infra*. — planning), your favorite music in the car, or a luxurious down pillow that you can look forward to enjoying at the end of the day. You deserve it, so identify that little “extra” you can give yourself and stock up beforehand.

**5. Work Hard, Play Hard.** Take off at least one day a week, and book a post-trial vacation you protect with your life. One of the key reasons I was able to survive my series of nine trials over the last year is because I had a family vacation booked for June that could not, and would not, be taken away from me. That light at the end of the tunnel will get you through those long days and texts from your family and friends asking if they will ever see you again. If you are so busy and important that you cannot possibly justify taking a break from trial prep on Saturday or Sunday, take a half-day. If you have a significant other and/or children, they really do need you and you need them. Spend the day outside if you can. Be present. Turn off the phone, or better yet, leave it behind entirely. There is nothing more humbling and gratifying during trial than having your daughter outrace you on a soccer field or thanking you for the homemade blueberry pancakes you took the time to make with her. You may not have work/life balance during trial, but you can have an unbalanced day full of non-work with the people who love you. After all, those are the people

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## Editors' Corner

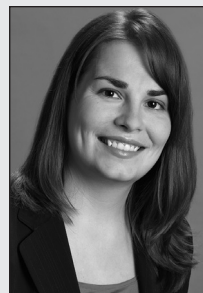
The Editors are pleased to bring you this edition of *The Defense Line*, which features a new **Message from the Executive Board** corner and case spotlights from our members. The lead article submitted by **Jeanie Ismay** of Leder & Hale, PC shares some great “rules” on how to excel as a successful trial lawyer. As demonstrated, keeping your sense of humor is “Rule One.” An article by **Mary Malloy Dimaio** of Crosswhite, Limbrick & Sinclair, LLP explains the ramifications of *Rochkind v Stevenson*, 454 Md. 277 (2017), and its impact on expert testimony analysis in Maryland.

Our year started off with the **Past Presidents Reception** in our new location at Miles & Stockbridge, P.C., which was a resounding success. Our new “**Lunch and Learn**” classes have been a hit, as we continue to try and offer our membership opportunities to learn and grow in the law. Our upcoming **Deposition Bootcamp** is already sold out and should prove to be a good learning opportunity for our younger members who can hone their deposition skills with guidance from our more senior members.

The Editors sincerely hope that the members of the Maryland Defense Counsel enjoy this issue of *The Defense Line*. In that regard, if you have any comments or suggestions or would like to submit an article or case spotlight for a future edition, please feel free to contact the members of the Editorial Staff.



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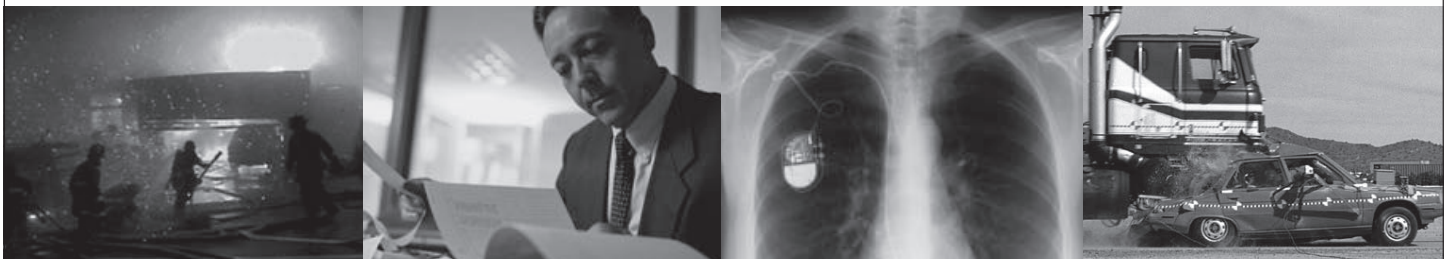
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## *Rochkind v. Stevenson* — The End of *Frye-Reed* in Maryland?

Mary Malloy Dimaio

Maryland's Court of Appeals issued a new opinion dealing with the hurdles expert opinion must clear before it will be admitted in evidence at trial in *Rochkind v. Stevenson*, 454 Md. 277 (2017), and in doing so, may have marginalized the way the state's courts have been analyzing expert testimony for nearly 40 years.

A little background is in order. In 1978, the Court of Appeals decided in *Reed v. State*, 283 Md. 374 (1978) to adopt the standard for admissibility enunciated by the U.S. Court of Appeals for the D.C. Circuit in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Thus, Maryland's standard for admissibility of expert testimony became known as the "*Frye-Reed*" standard. It stated that in the event a party wished to introduce expert testimony based on a novel scientific method, the court must first determine whether the method is "generally accepted" within the relevant scientific community. Many other states also adopted the *Frye* rule.

Fifteen years later, the U.S. Supreme Court decided in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) that, rather than general acceptance, the appropriate standard for the admissibility of expert testimony is "whether the reasoning or methodology underlying the testimony is scientifically valid and [ ] whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. Reliability is its hallmark; the conclusions drawn must be "reliable," which is to say, they must have been replicated by multiple studies conducted by multiple scientists in various settings, all coming to the same conclusion. This was a distinctly different way to analyze expert testimony and reflected the concept of the evolving nature of human understanding of science itself.

In response, the Federal Rules of Evidence were amended in 2000 and again in 2011, including Rule 702, which contains language requiring that expert testimony be based on "sufficient facts or data; ... is the product of reliable principles and methods; and ... the expert has reliably applied the principles and methods to the facts of the case." *Id.* These are clearly *Daubert* concepts.

Over the years, many states adopted *Daubert* as its standard, but Maryland was not one of them. It is now one of just 13 states which still, officially or ostensibly, adheres to *Frye*.<sup>1</sup> However, Maryland did model its evidentiary rule concerning the admissibility of expert testimony on the Federal Rule, as it has done with most of its rules of evidence and procedure, while specifically stating that it was "not intended" to overrule *Frye-Reed*. Committee Note, 2017 ed. Maryland Rule 5-702 states:

Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making this determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

*Id.* That third prong articulates the *Daubert* concept of the required sufficiency of data, and is the focus of the *Rochkind* court's opinion.

In *Rochkind*, the plaintiff, asserting that her minor child had been injured by ingesting lead paint in a rental property in Baltimore, proffered an opinion of a pediatrician that the child's lead paint exposure caused her diagnosed ADHD, relying on epidemiological studies compiled by the EPA. Defendant requested a *Frye-Reed* hearing before trial on this issue, i.e., it asked the court to rule on the admissibility of the plaintiff's expert opinion before trial. The court denied the request, the case went to trial, the expert testimony was admitted over objection, and plaintiff was awarded \$829,000 in economic damages, and \$534,000 in non-economic damages. Defendant moved for a new trial, and the court granted it with respect to damages only. Defendant again requested a *Frye-Reed* hearing on the expert opinion on causation of ADHD and the court again refused to

conduct such a hearing before trial. Plaintiff again prevailed the second time and the court reduced the verdict to roughly \$1.1 million after the application of Maryland's cap on non-economic damages. On defendant's appeal, the Court of Special Appeals upheld both the verdict and the decision to deny the *Frye-Reed* hearings, stating that the science on which the doctor relied was not novel and was generally accepted in the scientific community. Defendant appealed to the Court of Appeals, which reversed, finding that the trial court erred in admitting the expert testimony. It did not reach the issue of whether the trial court erred in refusing to conduct the requested *Frye-Reed* hearings.

The court began its analysis with the statement that Maryland's Rule 5-702 governs the admission of all expert testimony; *Frye-Reed* is only applied as an additional requirement when the scientific method relied upon by the expert is novel (leaving aside the question of how new is new enough to qualify) to determine if, apparently despite its novelty, it is nevertheless generally accepted within the relevant scientific community. The court then observed that the case law has developed in Maryland in such a way that in order to meet the requirements of subsection (3) of Rule 5-702 (whether a sufficient factual basis exists to support the expert testimony), the expert must satisfy two subfactors: she must have relied on (a) an adequate supply of data; and (b) a reliable methodology.

The court looked to how other jurisdictions handle the use of epidemiological studies to support causation opinions by experts and found that many observed an "analytical gap" between what the studies seemed to suggest and definite causality. It is the difference between a connection and causation. The court found that the plaintiff's pediatrician did the same thing in that case: she relied on many studies which concluded that children exposed to lead *can have* attention problems, impulsivity, hyperactivity, and learning disabilities, all of which are symptoms of ADHD, but neither the studies nor the EPA concluded that lead exposure *caused* ADHD. The doctor, however, said just that.

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<sup>1</sup> Interestingly, just this year, Florida's highest court turned back again from *Daubert* in 2013 to *Frye*, while D.C.'s highest court just adopted the *Daubert* standard in 2016.

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**(EXECUTIVE BOARD MESSAGE)** *Continued from page 2*

I seek to inspire in everything I do. It's a way of life. It's ingrained in who I am. It is me. Applied to my team, and generally speaking, I inspire by trying to instill the same love of the law that I have, the same loyalty and protection of the client that I have, and the same tithing responsibility that I have in terms of bettering the profession. I urge legal assistants, paralegals, law clerks, and associates to think outside the box, and to understand that we all must lift while we rise, a quote that I first heard from a United States District Court of Maryland Judge who was presiding over a swearing in ceremony for new admittees. I was attending as a sponsor for my then-teammate. I never forgot that great statement. By managing down, everyone feels a piece of inspiration and hopefully, feels integral to the final work product.

That's the "why" we should inspire as opposed to empower... now let's talk about how one can inspire? Every moment is a teachable moment. Everyone's approach is different. But below is a top ten list of ways that I inspire my team (at least, I think, this is a recipe of sorts):

**1. Live Inspired:** We inspire by living an inspired life ourselves which comes from inside the firm through professional achievement, but also may be derived from family and friends. Maybe it comes from spending time with your spouse, your children, your godchild, your friends, or just from knowing you are caught up with your work and your clients are pleased. While I lead by example and never ask my team to do any more than I give, there is at least one (1) key realization here: Not everyone will love the law as much as I do and in our multi-generational law firms, this can be challenging as everyone has different priorities. If you accept people for who they are, limitations as well as their excellence, you maximize their contribution regardless of their billable hour commitment. By breeding loyalty, you retain the keepers. It can't be just about the billable hour, if you expect to retain your team and inspire them. I try to set an example for my team by showing them that I do not rest on my laurels, but am continually striving to achieve more and more for myself personally and professionally.

**2. Inspire by Leading:** Inspiration comes from doing what you love and loving what you do. As a leader, you must exhibit that daily and be prepared for the distraction from those who live in professional F-E-A-R. We all know them... F-E-A-R, false evidence appearing real, attempts to block

the light of inspiration in the dark room. The penultimate compliment anyone ever gave me was calling me the light in the dark room and it came from the most quiet, reserved, bystander in the firm. But, I never forgot it. I strive to make my team that light. Because you are inspired and confident, you will rise above the less inspired, and the team will blossom together. It is natural to be attracted to, and want to spend time around, inspired people, i.e., people who are passionate about their work, creative, engaged, and fully present. An inspired leader exudes energy and is a force. By surrounding yourself with people who are genuine, and who love what they do, you will be energized and inspired. Steer clear of the uninspired, as they will only slow your roll.

Think about the feeling you get after returning from a professional organization event. When I am with like-minded people, I am better and I bring that learning back to my team. In those environments, it's not about stratification or delivering power to the unempowered. Instead, it is about a mutually beneficial exchange of ideas from equals, who love what they do, and genuinely want to be better lawyers, leaders, and create a better profession.

**3. Executing an Inspiration Plan Requires T-I-M-E (Things-I-Must-Earn):** Building an inspired team takes time. You are building relationships which are earned. Just as Rome was not built in a day, neither was an inspired team. It takes energy and patience—and lots of it. There will be many trials and tribulations along the way, where your manager skills, advocacy skills, knowledge of the human condition will come in handy, sometimes all at once. If you know, however, that your team has tried hard to deliver, and given you their best work product at that time, inspiring them to forge ahead is easier. And, by all means, remember to say, "Thank you." Something as simple as those two words, can inspire your team.

I will not say inspiration is easy, because it's not, but with a sufficient amount of caffeine, cardio, and love of what you do, you can inspire. The more you see your team succeed, the more inspired you will feel, and the cycle will continue. Inspiration is contagious. Do not let-up on the high standards you set for yourself. Your team members will see how much one can achieve and may gain inspiration to follow your lead.

**4. Create Inspiration That Lasts a Lifetime:** Empower is to inspire what mentoring is to promoting. I mentor, sure. But, I really promote. I empower, but I really strive to inspire. I want my associates to succeed

## The MDC Expert List

The MDC expert list is designed to be used as a contact list for informational purposes only. It provides names of experts sorted by area of expertise with corresponding contact names and email addresses of MDC members who have information about each expert as a result of experience with the expert either as a proponent or as an opponent of the expert in litigation. A member seeking information about an expert will be required to contact the listed MDC member(s) for details. The fact that an expert's name appears on the list is not an endorsement or an indictment of that expert by MDC; it simply means that the listed MDC members may have useful information about that expert. MDC takes no position with regard to the licensure, qualifications, or suitability of any expert on the list.



To check out the **MDC Expert List**, visit [www.mddefensecounsel.org](http://www.mddefensecounsel.org) and click the red "Expert List" button in the left hand corner of the home page or access it from the directory menu.

and be independent. I want them to build a book of business, and rack up the defense verdicts and favorable settlements, because that is satisfaction to me and inspires them to do more, achieve higher, and continue to excel throughout their career. No one was a better promoter in this regard than my former partner. He knows how to provide just enough guidance on client development without overmanaging.

Your teammates cannot develop their skills if leaders hover and prevent them from spreading their wings. You have to have confidence in your team, trust in their loyalty, and instill in them a drive to succeed and meet or exceed your standards. With that, you are a promoter, not just a mentor, and you inspire, not just empower. You have to open doors to them, but let them walk

*Continued on page 13*



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(EXECUTIVE BOARD MESSAGE) *Continued from page 11*

through the door. That creates accountability and when they achieve, they own that success and want more. My mantra in life is, “If you are looking for a helping hand, look at your own.” I try to nurture my team by giving them the confidence to try and test the waters. I do not spoon feed – that would be doing a disservice to my team’s potential growth.

### 5. The Ability to Inspire Can Be Learned and Perfected:

Are inspirers born or are they groomed? Both! We are products of our environment, and I am the fortunate byproduct of several alpha male leaders who taught me how to lead, how to argue and write persuasively and practically, how to build a book of business, how to handle difficult personalities inside and outside of the firm, and how to make positive change for the greatest good. By way of anecdote, I began my career the same day that the partners in the firm (where I was beginning my first associate position) split up and started their own separate offices. I had law clerked for them through law school and picking which partner I would follow seemed like the hardest decision I would ever make. Thus began my journey of learning how to inspire myself and ultimately others. This event shaped my career path and exposed me to one of my best teachers who taught me a much needed lesson in loyalty, leadership, and resilience. This particular promoter had lots of interesting quips, but told me point blank, “Your head may go under water, but I will never let you drown.” He taught me tenacity in the face of intemperate judges and the value of a team environment in a profession filled with diverse personality types and mindsets. [Incidentally and by way of a sidenote, I also telemarketed in college and earned the nickname, “The Hammer” for good reason. I learned to fourth, fifth, and sixth effort potential customers until they agreed to try out the credit card or magazine subscription that I was hawking that day. Those real life experiences helped me to instill in my team

a “can do” mentality.]

My first mentor also taught me that the best writing is rewriting, and my approach to grooming associate writing mirrors his approach with me. It was through his tutelage that I became a stronger writer and better advocate, as the red ink dwindled on my draft motions. He instilled in me the requirement of producing exceptional work product and never to settle for mediocrity. He taught me to share the credit and when we co-wrote articles and/or motions, he always promoted me and the work product to other partners and staff. That’s such an important lesson to learn if you want to inspire.

With respect to client development, my latest promoter shaped my approach with my team in this regard. Again, he opened every door possible, and then stepped aside to let me learn and develop those skills. He was never protective of his client base, and as a result we built a book of business together over time that was premised on trust and mutual respect. Inspirers trust their team and respect their decisions... eventually.

### 6. The Skill of Inspiration Begins at Home:

Obviously, as one of four (4) children (I am number three in the line-up and the youngest of the daughters), I was never going to be too big for my britches. And that is still true. So, I don’t want to leave out how inspiration was first learned at home for me. As the daughter of an immigrant Dad and a stay-at-home Mom, it was pretty amazing what Dante and Rosemarie accomplished with their four (4) children — two (2) of whom are in the legal profession, one (1) of whom is a doctor, and one (1) of whom is in sales. My Dad is a clothing designer, and definitely demanded the most out of his children, and especially his daughters. My Mom managed the home front, and raised responsible, inspired, well-rounded children. There were no boundaries, limits, or stereotypes acceptable in the Trasatti household. You learned to reach beyond your grasp, and you never quit. Never!

That kind of parenting profoundly shapes your view of the world and how you run your team. I am fortunate to have two (2) very engaged parents who created a driven personality in me, while also teaching inspiration. Their parenting was not one size fits all, nor can leadership and inspiration be. I have cherry picked the best skills from them and apply them based on my audience and the climate. So, too, must you, if you want to succeed in inspiring others. Without my parents’ guidance and inspiration, I would not be the person who I am. I am eternally grateful for the confidence they gave me to stand for what I believe in, and to dispense with limitations.

### 7. Inspiration is a Two Way Street:

Be prepared to learn from your team, as that is yet another source of inspiration to you and them. I applaud my team’s work-life balance...something I have yet to achieve. They are Gen Y’s and Millennials and definitely have mastered that aspect of the practice of law. If you expect to retain them and build loyalty, you must protect their personal time. Recognize that irrespective of personalities and life situations, you share certain commonalities— to generate the best work product for a client, to client develop, to personally develop one’s legal skills, and to team build for posterity. Wisdom can come from a seasoned employee or a rookie. Everyone has something to offer if you keep an open mind.

### 8. Take a Holistic Approach to Inspiration:

You will need to inspire on many levels. It does not end at teaching the law. You have to teach management, building a practice, time management, business acumen, prioritization, etc. All are necessary survival skills in our day-to-day responsibilities. Our colleagues are complex creatures. They will bring to you their family matters, personal matters, legal matters, financial matters, health issues, etc. Inspirers listen and are problem solvers. You must be a life coach at times in order for your team to

*Continued on page 15*

## Get Involved With MDC Committees

To volunteer, contact the chairs at

[www.mddefensecounsel.org/  
leadership.html](http://www.mddefensecounsel.org/leadership.html)

### Committees

- Appellate Practice
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- Legislative
- Programs & Membership
- Publications
- Sponsorship
- Young Lawyers

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(EXECUTIVE BOARD MESSAGE) *Continued from page 13*

move forward and restore and/or maintain a healthy level of inspiration. It's just part of being an inspirer. Be flattered when someone brings you their personal problems, not annoyed, and be in it to win it with them. You will breed loyal and inspired workers. Recognize that life happens — be sympathetic and show empathy when needed, but on the same token, let your team know the expectations of a good performer.

**9. Inspiration Envisions Mobility:** Be prepared to let your team leave the nest. It is the highest compliment to a leader to have a colleague move on to bigger and better. Don't stop them, but welcome them back if they have second thoughts. Be cognizant that everyone has a personal and professional agenda, and respect and be pleased when those who you promote move on to

bigger and better challenges.

**10. Inspiration Sometimes Requires a Rebel Mentality:** Be prepared to take the less traveled road and be somewhat of a rebel if it means long term gain and improvement. It's not all about being popular and most liked. Sometimes you have to challenge the status quo, whether that is hirings, firings, diversity, anachronistic thinking, procedures that stifle positive changes, complacency, inequities, etc. You won't always succeed, but some of the most spontaneous and telling discussions with my team occurred during times where I challenged the establishment for the greater good or just to protect my team. Always have a vision for your team and make sure the larger firm culture is conducive to that vision. Be a catalyst for positive change for those who you wish to inspire. Don't ever

let anyone stifle who you are or tell you that you have to be anything other than genuine. When that happens, your ability to inspire plummets. Do not assume past ways of doing things are necessarily correct. Situations may require new thinking of ways to improve procedures. Inspirers are not shy about voicing their thoughts, but use their rebel ways wisely.

At the end of the day, inspiration comes from knowing who you are, having a vision, and putting that vision into focus through your actions and those of your team. When done correctly, inspired teams are productive, efficient, happy, and loyal. Inspired teams lead to next generation firms and make succession planning easy.



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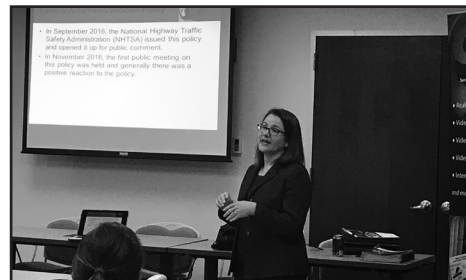
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# Lunch & Learn with the Maryland Defense Counsel

## What You Missed: Fall Edition



### Data Security for Law Firms; Presented by Veronica Jackson, Esq. and Mutungi Tumusiime

There are several key steps a company should take upon discovery of a data breach. While these steps are numbered, many of them must happen both immediately and simultaneously.

First, immediately contact your company's incident response team pursuant to your Written Information Security Plan (or "WISP"). Second, contact law enforcement and any relevant insurance carriers to assist with coverage of costs for the data breach response effort and to prevent waiver of potential coverage for tardy notice. Third, quickly assess the scope of the breach (*i.e.*, whether the breach is ongoing, whether data was acquired or simply accessed by the hacker, who suffered a breach of their personal information, and what type of information was exposed). Fourth, stop the breach, if possible, through remedial data security measures, possibly with the assistance of a forensic IT consultant to bolster your company's security systems. Organizations that have already suffered from a breach especially must consider what additional safeguards (including employee training) should be implemented to avoid another breach in the future. Fifth, analyze data breach compliance requirements by identifying the jurisdictions of residence for the affected population and assessing what notification requirements are triggered by each applicable statute.

Data breach compliance requirements also may be triggered by the regulatory framework covering the type of information that was exposed (*i.e.*, HI-TECH and HIPAA compliance for personal health information). For affected persons residing in Maryland, for example, notification is not required if, after an investigation, the entity determines that personal information has not been or is not likely to be misused. (Documentation of that conclusion, however, must be retained by the entity for three years.) In instances where notification is required, even for just one Maryland resident, notice must first be sent to the Maryland Attorney General's data breach notification department. In the District of Columbia, on the other hand, there is no "likely harm" exception to notification, and notice to the Attorney General is not required. In instances where 1,000 or more residents are receiving notice at a single time, both Maryland and the District of Columbia require that notice be sent to all nationwide consumer reporting agencies regarding the timing, distribution and content of the notices.

Finally, prepare a data breach response plan that attempts to mitigate potential harm to the affected population and complies with applicable data breach requirement statutes and regulations.

Since the Supreme Court's decision in *Spokeo v. Robins* attempted (but failed) to clarify the legal standard for what constitutes sufficient harm to a person affected in a data breach for legal standing purposes, a Circuit split has emerged. Because it remains unclear what level of risk for future harm or actual harm is required (short of actual identity theft), efforts to minimize the risk of identity theft and other subsequent harm, as well as providing free preventative services to affected people, are valuable tools that may provide a defense against subsequent litigation stemming from the data breach. Many organizations elect to provide an affected population with identity theft prevention services that monitor their credit and also aid them in any credit repair efforts they may need should they fall victim to identity theft. Many state attorneys general also look at whether an organization is providing such services to its residents when reviewing data breach response notifications.

### Upcoming Seminars:

**January 25, 2018**

"It's Not the Knot... its a function of the fundamental principles involved"

**January 29, 2018**

Deposition Bootcamp

**February 22, 2018**

Cyber Security (Approved for 1 hour CLE credit in Virginia)

**March 29, 2018**

In the Courtroom: Nuts & Bolts

**April 5, 2018**

Advocacy in Mediation

### Future of Autonomous Vehicles and the Impact on Litigation; Presented by Tracie Eckstein and Erin Cancienne, Esq.

On September 12, 2017, MDC hosted a Lunch and Learn on the topic of The Future of Autonomous Vehicles & the Impact on Litigation. Tracie Eckstein, a Senior Consultant at Rimkus Consulting Group, Inc. presented information about the technology needed for autonomous vehicles, including technology that is already being widely used. Her portion of the presentation covered single feature autonomy, such as adaptive cruise control, as well as full autonomy, such as a Tesla or the Otto. Erin Cancienne, Partner at DeCaro, Doran, Siciliano, Gallagher and DeBlasis, LLP presented potential legal implications of fully autonomous cars. Her portion of the presentation included where data may be collected, who may be considered the driver of the vehicle, the division of authority between state and federal governments, and how autonomous vehicles could change the insurance industry. As vehicles become more autonomous legislation and the bar will need to adapt to face this new technology. It will be of utmost importance for the members of the bar to both understand the technology and the laws governing that technology going forward.

(YOGA WITH A HAIRDRYER) *Continued from page 7*

who will be waiting for you at the finish line, greeting you with open arms whether you hit a home run or not.

**6. Enjoy It.** Last but certainly not least, enjoy the wins at trial, big or small. That great cross-examination of an expert, a well-argued objection at the bench, a knowing nod from a juror, and maybe, just maybe, a verdict in your client's favor. It is easy to get so caught up in the moment that we forget to enjoy the art of trial. As Judge Murdock remarked during one of my trials, it is a beautiful thing when it is done well. Once a person reaches a level of mastery after years of training and practice the "act of doing" occurs in an almost ethereal state, without thought. This phenomenon is known as "muscle memory." My wish for each trial attorney is to experience the euphoria of

doing something so well during trial that you forget that it is a job and that you are getting paid for your work (hopefully).

I cannot conclude without mentioning the obvious: our wonderful families and support staff. May all trial attorneys be blessed with a patient significant other who picks up your dry cleaning, pours you a glass of wine when you crawl home, fields the e-mails from teachers, and tucks the kids into bed at night while you are burning the midnight oil at the office. Likewise, if not alternatively, I hope you enjoy the benefit of paralegals who race to the courthouse with documents and track down wandering witnesses; law clerks who do fast-paced research with only a text message of direction, and assistants who hold it all together. If you do not have excellent support staff, consider making

the changes so that you have that critical advantage. Return favors when your trial run ends and celebrate with that cocktail on the beach with your loved ones, without your phone and laptop... for its only 15 days until the next trial. Lucky for you, you are a unique, strong breed. While all attorneys enjoy the privilege of being an officer of the court, only trial attorneys enjoy that privilege at center stage. Enjoy the spotlight, counselor. See you in court.

*Jeanie S. Ismay is a trial attorney and partner at Leder & Hale, PC in Baltimore, Maryland. She has extensive experience handling complex litigation, including toxic poisoning, brain injury, and products liability. Interweaving her trial experience with her negotiation and interpersonal skills, she obtains top results for her clients, including successful verdicts and winning settlements in both state and federal courts.*

## Noteworthy Bills to Be Heard By Senate Judicial Proceedings Committee

Christine Hogan



**T**he Maryland General Assembly opens on Wednesday, January 10, 2018 for its annual 90-day session. With a number of bills scheduled for hearing before the Senate

Judicial Proceedings Committee on Tuesday, January 16, 2018, we wanted to provide an overview of some of the bills which would likely be of interest to MDC members:

### Senate Bill 5 — Civil Actions — Punitive Damage Awards

SB 5 provides that punitive damages may only be awarded in a civil action where the plaintiff proves by clear and convincing evidence that the defendant acted with wantonness, fraud, or malice. The proposal requires a trier of fact to consider a defendant's liability for punitive damages concurrently with all other issues presented in the action, and to determine the amount of punitive damages to be awarded based on specifically enumerated factors. The bill also provides that punitive damages may be awarded in a jury trial only if the jury reaches a unanimous decision regarding the defendant's liability for punitive damages and the amount of punitive damages to be awarded.

### Senate Bill 30 — Health Care Malpractice Qualified Expert —

### Limitation on Testimony in Personal Injury Claims — Repeal

SB 30 repeals the requirement that a health care provider who either: (1) attests in a certificate of a qualified expert; or (2) testifies in relation to a proceeding before an arbitration panel or a court concerning standards of care, devote no more than 20 percent of the expert's professional activities to those directly involving testimony in personal injury claims.

### Senate Bill 35 — Labor and Employment — Lien for Unpaid Wages — District Court Jurisdiction

SB 35 would give the District Court concurrent jurisdiction with the Circuit Court under Labor and Employment Article §3-1102 – 1105 regarding liens for unpaid wages and give them equitable powers over such disputes. In addition, it would permit qualifying employers to dispute a lien for unpaid wages by filing a complaint in the appropriate District Court.

### Senate Bill 36 — Civil Actions — Noneconomic Damages

SB 36 would repeal and reenact, with amendments, Courts and Judicial Proceedings §§ 3-2A-09(a) and 11-108, and repeal and reenact, without amendments, Courts and Judicial Proceedings § 3-2A-09(b). Under SB 36, there would be an increase in the maximum amount of noneconomic damages that

may be recovered in certain wrongful death actions or survival actions.

### Senate Bill 56 — Civil Actions and Procedures — Garnishments — Spousal Property

SB 56 provides that a garnishment against property held jointly by spouses in a bank, trust company, credit union, savings bank, or savings and loan association is not valid unless both owners of the property are judgment debtors. In order for this to apply: (1) the property must be held in an account that was established as a joint account prior to the date of entry of judgment giving rise to the garnishment; and (2) the persons named on the account must be married prior to the date of entry of judgment. A garnishment against property jointly held by spouses is presumed to be valid unless, within 30 days after service of the writ of garnishment on the garnishee, either spouse: (1) files a motion objecting to the garnishment; and (2) serves a copy of said motion on the judgment creditor, the garnishee, and any other person named on the account.

*Christine Hogan joined Wilson Elser Moskowitz Edelman & Dicker LLP in November 2017. Her practice focuses on civil litigation and pharmaceutical/medical device law. She is a member of the Executive Counsel of the Young Lawyers' Division of the Bar Association for Baltimore City and co-chair of the YLD Mentoring Committee.*

(ROCHKIND V. STEVENSON) Continued from page 9

The court observed symptoms of ADHD can also be caused by other disorders and that practitioners are required to rule out those other disorders before reaching a clinical diagnosis of ADHD, which the expert pediatrician at issue did not do. It also found that she ignored possible confounding factors, such as family history and the quality of care the child received. It ultimately agreed with the defendant that the expert failed to rule out other potential causes of ADHD or to demonstrate another reliable methodology for her opinion, and that her causation opinion was simply unsupported. Because it did not meet the Rule 5-702 threshold, the court did not then subject the opinion to a *Frye-Reed* analysis.

It was the right result, but the contention that *Frye-Reed* is still the standard for admitting expert testimony in any way may be called into question by this holding. The *Rochkind* court's insistence that *Frye-Reed* still applies in the event of a novel scientific con-

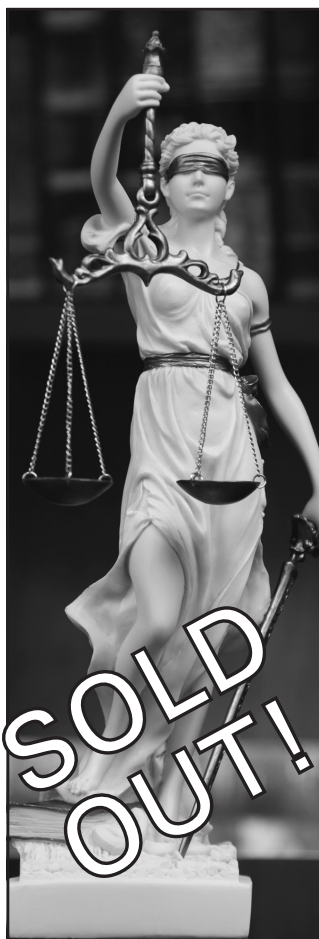
cept fails to consider that, in order to satisfy Rule 5-702(3)'s requirement of an "adequate supply of data," the concept probably is not that "new," and that in order to satisfy the Rule's requirement of reliable methodology, i.e., that it follows the scientific method, controls for variables, uses double-blind studies, has been used by many other scientists, and makes sense, it would then already be "generally accepted" within the relevant scientific community. Having adopted the Federal Rule of Evidence 702, which is itself derived from *Daubert*, it appears clear that there is no need for *Frye-Reed* because an expert opinion could not pass a 5-702(3) analysis and then fail to satisfy *Frye-Reed*. Having chosen the sufficiency of data and reliability as the lynchpins of admissibility, we are clearly now a *Daubert* state. We have evolved.

A recent edition of the ABA's *Litigation News* contained an article quoting a criminal defense lawyer who surmised that, in the 13 states that have not adopted *Daubert*, the

vibrant activism of the plaintiffs' bar and its influence with political leaders were likely the reason because the stricter requirements for expert opinion admissibility under *Daubert* are unpopular with those folks. Summer 2017, Vol. 42, No. 4, p. 5. In Maryland, such influence is well known, but that only accounts for changing the law through the legislative branch, and *Frye's* holding was adopted judicially, not legislatively, so that does not appear to be the obstacle here. As it stands, our judicial branch has just pronounced that it is unwilling to state the obvious.

*Disclaimer — This article is the opinion of the author and does not necessarily represent the views of MDC.*

*Mary Malloy Dimaio is a partner at Crosswhite, Limbrick and Sinclair, LLP in Baltimore. She is a former president of MDC.*



## DEPOSITION BOOTCAMP SCHEDULE

January 29, 2018 | 8:00 A.M. – 6:00 P.M. (RECEPTION TO FOLLOW)

8:00 A.M. – 8:45 A.M. — **Bruce R. Parker**

*Preparing for and taking plaintiff's expert deposition*

8:45 A.M. – 9:30 A.M. — **Diane V. D'Aiutolo**

*Preparing for and defending defendant's deposition/non-corporation defendant*

9:30 A.M. – 10:00 A.M. — **Susan T. Preston**

*Preparing for and defending the defense expert deposition*

10:00 A.M. – 10:30 A.M. — **Robert E. Scott, Jr.**

*Preparing for and taking plaintiff's deposition*

10:30 A.M. – 10:45 A.M. — **Break**

10:45 A.M. – 11:15 A.M. — **Geoffrey H. Genth**

*Preparing for and taking the fact witness/non-expert/non-corporate designee deposition*

11:15 A.M. – 12:00 P.M. — **Gardner M. Duvall**

*Preparing for and defending the corporate designee deposition*

12:00 P.M. – 1:00 P.M. — **Three jurists who have served on three levels of the Maryland Court System**

*Lunch and Keynote Speakers - War stories and lessons learned*

1:00 P.M. – 6:00 P.M.

**Barry C. Goldstein** — *Police officer's deposition (Officer Brad Smith)*

**F. Ford Loker** — *Plaintiff deposition (Albert Smith, driver, personal injury and consortium claims)*

**Harry S. Johnson** — *Plaintiff's treating medical witness deposition (Mark Bates, M.D., neurosurgeon)*

**J. Michael Sloneker** — *Plaintiff's accident reconstructionist deposition (John Creel)*

**M. Natalie McSherry** — *Fact witness deposition (Tommy Murphy, using witness statement)*

5 – 10 minutes — **Wrap Up**

6:15/6:30 P.M. – 7:00 P.M. — **Social Hour**

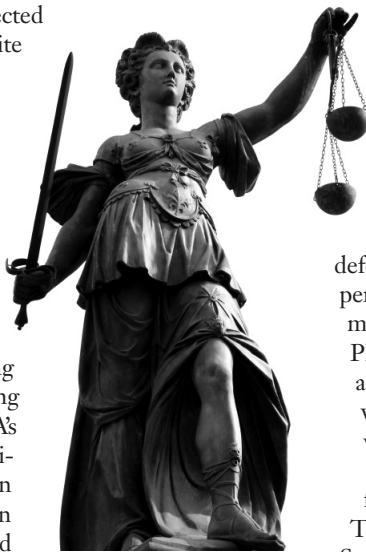
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## SPOTLIGHTS

**Miles & Stockbridge, PC** was lead trial counsel in a trial against the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Justice in the United States District Court for the District of Rhode Island challenging the remedy selected by U.S. EPA for the Centredale Manor Superfund Site in North Providence, Rhode Island. This trial also required defense of an enforcement claim and a claim for over \$40 million in fines and penalties for the client's refusal to comply with an EPA Unilateral Administrative Order requiring the implementation of the challenged remedy. The trial involved EPA and client fact witnesses and experts on both sides in the areas of human health and ecological risk assessment, environmental engineering, construction and chemical fate and transport. After 13 bench trial days spanning six months, extensive briefing, and a full day of closing argument, the court found certain aspects of EPA's remedy selection process to be arbitrary and capricious, remanded remedy to EPA, retained jurisdiction over the case through remedial design in connection with other issues, stayed enforcement of the UAO, and found objective good faith "sufficient cause" for the client to refuse to comply with that order, awarding none of the over \$40 million in fines and civil penalties sought by the EPA. (*Emhart Industries, Inc. v. United States Department of the Air Force v. Black & Decker, Inc.* (C.A. No. 11-023 S))



### *Owens v. MGH*

MDC members, **John Sly** and **Tony Breschi**, successfully defended an infectious disease physician in a Circuit Court for Baltimore City wrongful death action. The Plaintiffs claimed that the physician failed to obtain a CAT scan which allegedly would have revealed evidence of a deep infection, requiring a longer course of antibiotics and continued hospitalization. The patient was treated over the course of several days and released to go home on oral antibiotics. Two weeks later the patient presented to another hospital emergency department with complaints of vaginal swelling. She was evaluated, provided with oral antibiotics and discharged to home. The following day she was readmitted to the hospital where she was diagnosed with sepsis and died after a brief hospitalization. On autopsy, she was found to have necrotizing fasciitis. The defense focused on the patient's improvement on antibiotics, the lack of any evidence of ongoing infection and the onset of new complaints following her hospitalization. The case was tried before the Honorable Barry Williams in the Circuit Court for Baltimore City. No appeal has been filed as to the infectious disease physician's care.

### *Lowman v. Dinc*

**John Sly** and **Tony Breschi** obtained a defense verdict on behalf of an OB/GYN who was alleged to have negligently placed his Trocar at the beginning of a laparoscopic pelvic surgery. The patient developed hypotension indicating bleeding and the physician quickly converted to an open procedure and obtained an intraoperative consultation from a vascular surgeon. The vascular injury was repaired and the

original pelvic surgery was completed. The patient had a prolonged course in the hospital after developing an ileus and pancreatitis. John and Tony argued that their client reasonably chose an entry location based on the patient's previous surgical history. This matter was tried before the Honorable Wanda Heard in the Circuit Court for Baltimore City. No appeal has been filed.

### *Bresnahan v. Daly*

**John Sly** and **Tony Breschi** also successfully defended an ENT who was alleged to have negligently performed a sinus surgery, resulting in injury to the medial rectus muscle of the patient's left eye. The Plaintiffs contended that the surgeon failed to take appropriate care to avoid penetrating the orbital wall and severed the muscle. As a result, the patient was left with permanent double vision. Following a four day jury trial, the jury in the Circuit Court for Montgomery County returned a defense verdict. This matter was tried before the Honorable Karla N. Smith.

### *Marceline Mbako v. Wei Cui, M.D.*

**Trial Date:** August 14–18, 2017

**PK Law Attorneys:** Catherine Steiner First Chair and Brian Cathell Second Chair

**Type of Case:** Medical negligence matter in which the Plaintiff alleged a negligent dictation error caused the plaintiff to sustain a severe drug toxicity as a result of the overdosing of the drug. The PK Law attorneys argued there was a superseding intervening cause and obtained a defense verdict.

**Court/Judge:** Circuit Court of Maryland for Montgomery County

**Verdict:** Defense verdict

### Tydings Attorneys Obtain Defense Verdict in Age Discrimination Case

On July 19, 2017, MDC members **Jaime Walker Luse** and **Courtney Amelung** obtained a defense verdict on behalf of an employer in *Eichen v. Jackson* and Tull Chartered Engineers, following a three-day jury trial in the Circuit Court for Prince George's County, Maryland. The primary issue was whether the employer's decision to terminate the plaintiff was motivated by an intent to discriminate against him on the basis of age. The plaintiff also claimed that the employer failed to pay him overtime for work he performed at home in violation of Maryland wage laws. The circuit court granted summary judgment in favor of the employer on the plaintiff's overtime claim, and the case proceeded to trial on the age discrimination claim.

The plaintiff, who was 66 years old at the time of termination, alleged that the employer's reason for his termination — unprofessional workplace conduct — was pretextual. The employer, a government sub-contractor, based its decision to terminate the plaintiff in large part on information that it received from the government prime contractor. The employer was informed that the plaintiff yelled at a

(SPOTLIGHTS) Continued from page 20

co-worker in front of a customer, engaged in behavior that made a female co-worker feel uncomfortable, was removed from a project at the request of the customer, and refused to share information with his co-workers. The plaintiff's supervisor met with him to discuss these incidents and, because the plaintiff refused to acknowledge his inappropriate behavior and continued to demonstrate that he was not a team player after the meeting, he was fired shortly thereafter.

The plaintiff based his pretext argument on the employer's (1) failure to investigate the incidents reported by the prime contractor, and (2) failure to progressively discipline him. The defense presented evidence that it was reasonable for the employer to rely upon information received from the prime contractor without investigation because the plaintiff worked on-site with the prime contractor and it was the prime contractor that observed and managed the plaintiff's daily work. The defense also presented evidence that the employer did not have a written progressive discipline policy and filed a motion in limine to exclude evidence that the employer had progressively disciplined two other employees. The circuit court granted the motion, holding that the other employees were not similarly situated to the plaintiff and that the evidence would be unfairly prejudicial. After deliberating for less than twenty minutes, the jury returned a unanimous verdict in favor of the employer. The plaintiff has noted an appeal.

**Ms. Luse** is a partner at **Tydings** in Baltimore, Maryland, and former chair of MDC's Employment Law Committee. **Ms. Amelung** is an associate at the firm.

On September 20, 2017 a defense verdict was entered in favor of Home Depot in the U.S. District Court for Maryland in Greenbelt, MD after a two day trial on liability only before Judge George Hazel. Home Depot was represented by MDC member **Rachel L. Stewart** of **Kalbaugh, Pfund & Messersmith, P.C.** in Fairfax,

VA. Plaintiff claimed that she was struck in the head by a bracket that fell from a display of a ClosetMaid shelf installed above other ClosetMaid merchandise set out for purchase in a Home Depot store in Waldorf, MD. Plaintiff claimed that as she was removing a six foot pantry shelf from the store racking without looking up, it struck something above her and the next thing she saw was a bracket falling toward her. She claimed the bracket struck her on the head, face and shoulder and that she sustained a concussion and injuries to her neck which required a two level cervical fusion as a result of the incident.

Despite having recurring neck symptoms for a year prior to the trial date, Plaintiff waited until a few days before trial to investigate the symptoms and obtain a supplemental medical expert opinion that she would require additional surgery to her neck related to the incident and initial surgery. Plaintiff requested a continuance of the trial date or bifurcation less than a week before trial based on the unsettled damages and Judge Hazel granted bifurcation. A trial on liability only ensued. At trial, Plaintiff was permitted to enter some evidence of injury including where the bracket struck her and her feelings and actions in the store but was not permitted to testify to any medical treatment or her actions or injuries once she departed the store on the day of the incident.

Home Depot's defenses included lack of notice and the reasonableness of its inspection. Plaintiff argued that Home Depot was negligent in that its inspections were not sufficient and the merchandise/display configuration was negligent/dangerous. Plaintiff was also permitted a *res ipsa loquitur* instruction to the jury. No expert testimony was presented by either party. Judge Hazel granted Home Depot's motion to bar Plaintiff's liability expert, J. Terrence Grism, several months prior to trial. The jury verdict in favor of Home Depot was returned in a short time. Favorable testimony by former employees regarding safety as well as Plaintiff's lack of evidence are believed to have been factors in the jury's verdict.



## ANNUAL MEETING & CRAB FEAST

June 6, 2018

5:30 P.M. – 7:30 P.M.

NICK'S FISH HOUSE

2600 INSULATOR DRIVE

BALTIMORE, MD 21230

