THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

June 2018

2018 MDC Trial Academy

See page 7 for a full report.

Also Featured

President's Message
Message from the Executive Board
Intervening/Superseding Cause of Plaintiff's Injury
Canary in the Coal Mine?
Corporate Depositions
LEED Construction

President's Message

"The role of a leader is not to come up with all the great ideas. The role of a leader is to create an environment in which great ideas can happen."
— Simon Sinek, *Start with Why: How Great Leaders Inspire Everyone to Take Action*

Marisa A. Trasatti, Esquire
Wilson Elser Moskowitz Edelman & Dicker LLP

My Presidency year has come to a close, and I offer the following year in review as I proceed to hand the baton to John T. Sly, Esq., my successor, and slip into the immediate past president role. It is my hope, that during my tenure, an environment was created in which diverse ideas were fostered and came to fruition. I would like to take this opportunity to share a little of what we have accomplished and thank the Executive Board and Board at Large, who made it possible.

We lit a fire under the organization this year. Most significantly, we managed to cross the finish line amidst lots of change in the administration of this organization. We tripled the programming offerings this year from 6 to 18 — and all new programming instituted in my year turned a profit — some more than others, but we eeked it out.

We stuck to our budget and we are comfortably in the black now on finances; I might add, we were back in the black by September 2017! The amount of dues paid in 2016 – 2017 was $61,778.00. Dues so far for this year (May–Dec) total $66,000. We boast a membership of approximately 450 lawyers strong. We have $25,956.00 in our checking account as of May 9, 2018, as compared to $3,795.00 last year at the same time. This sizable jump in our coffers was accomplished mainly by amping up sponsorship and programming. We were committed to being an organization of YES, and found creative ways to accommodate our members and sponsors every way that we could! We sold out our sponsorship slots for event slates by December 2017, and began booking sponsors for John Sly's year thereafter. We are now ahead of the train! We also expanded our sponsorship offerings including selling single stand-alone ads in *Defense Line*, stand-alone sponsorships for Trial Academy, and sponsorships for the Awards dinner, just to name a few.

As far as programming, we have had quite a year! Let's break it down a little:

The success of this year really began with the 55th Anniversary Video of Past Presidents sponsored by DRI and shepherded by Immediate Past MDC President Chris Boucher, Esq. — as those participants rallied and really became the backbone for the faculty for all of the programming that we had this year. Board membership was doubled with an eye toward succession planning. We created a rung of vice chairs to succeed all of chairs of the various committees. A further step was taken toward succession planning with a strategic planning meeting lead by Steve Manekin of Ellin and Tucker and Past MDC President, Joe M. Jagielski, Esq.

This year, we had our first ever deposition bootcamp that sold out in less than 48 hours — 37 students, two (2) sponsors, and talent galore in our keynotes, presenters and coaches. That really turned out to be one of our signature events this year! Thank you to everyone who made the bootcamp a reality. Our MVPs were: Andrew Gaudreau, Esq., Chris C. Jeffries, Esq., James K. O'Connor, Esq., and Megan J. McGinnis. Esq. These folks are really the future of MDC. They were instrumental in steering the deposition bootcamp and many other programs that MDC put on this year!

With the retirement of Kathleen Shemer, our Executive Director, we went in search of a replacement. In the end, we decided to carry-on without an Executive Director, and I could not be more grateful to my law firm, Wilson Elser, for the incredible support they gave me, having only arrived at the firm in August 2017. Being President of MDC is a large commitment, and it rests on not only the lawyer in that role, but also his or her firm. Wilson Elser stepped up in a big way, especially for this new kid on the block who had only been at the firm a month before realizing that the executive director search would likely take longer than her year spanned! I could not have made it without help from Crystal Walk at Miles & Stockbridge and a team of admins at Wilson Elser — Leah Massicot, Stephanie Mizansky, and Kelcey Negus. So, thank you!

We also began some templates and memos that create institutional memory as far as MDC program ops go. We injected order and modernization into the administration of the organization that was in need of some polishing up. Brian Greenlee of Greenlee Graphics LLC offered us his assistance in doing so and also shared the division of labor on some of the executive director tasks. Team work got us through this year and proved very positive overall for the health and future of this organization!

We started an annual awards event for the Deans of the Bench and the Bar — Judges Deeley and Murphy; Bruce R. Parker, Esq., Bob E. Scott, Esq., Susan T. Preston, Esq., and F. Ford Loker, Esq. Congratulations again on your much deserved recognition. Thank you for your ongoing support of MDC and for being such great leaders in the community!

We published four (4) *Defense Lines* in which we had more articles and member participation than ever before! We also started what I hope will be a new tradition. Each member of the Executive Board published a leadership column, as opposed to just the President's column. My hope is that MDC will gravitate toward offering a Leadership Training Program in John's year. We certainly have many, many leaders in our ranks!

Our legislative committee showcased our lobbying prowess on med/mal bills and punitives, among others. Thanks to John Stierhoff, Chris Boucher, Gardner Duvall, Nikki Nesbitt, John Sly, and others for all that you did this year. We also participated in an amicus brief thanks to Ted Roberts of Venable, furthering our presence with the Bench and the Bar.

We have an active Linked In page, and our website, thanks to Brian Greenlee, has been spruced up! Connect with us and surf the website when you get a chance; I know you will enjoy watching the 55th Anniversary video and seeing all of the photos from the Lunch and Learns and other events this year!

We launched a monthly lunch and learn series, and had our first webinar lunch and learn in May 2018! Thanks to the loyalists, like Barry Goldstein, who attended nearly all of the events. Thanks to James R. Benjamin Jr., Esq. of Pessin Katz Law for expanding our venue for the Lunch and Learns to Baltimore County! You could not have been a better host! Thanks also goes to my alma mater, Semmes Bowen and Semmes, for host-

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What Type of Leader Are You?

Welcome to our newest edition of Maryland Defense Counsel's *The Defense Line*. On behalf of the MDC Board and Executive Committee, thank you for your continued engagement with our programs as we head into the summer. Since our last edition, we hosted the award-winning Trial Academy program on April 30, 2018 at Miles & Stockbridge in Baltimore. Congratulations to MDC's Programs and Membership Committee for the success of this year's event and thank you to all students, speakers, coaches, and sponsors who made the day happen! If you missed the event, check out the photos here:

www.mddefensecounsel.org/gallery/trial_18.html

We look forward to seeing you at the upcoming Crab Feast at Nick's Fish House on June 6, 2018.

Colleen K. O'Brien, Esquire

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP

As a member of the MDC Executive Committee, I have been asked to continue our series of essays in this publication on leadership. As I began to prepare this article, I set out on some self-reflection about my leadership style. How do I inspire colleagues and respond to problems? What makes me an effective leader? Do my practices and philosophies fit into any recognized category of leadership style?

Writing for the *Harvard Business Review*, Bill Taylor of *Fast Company* magazine identified four styles of leadership[1], which may be helpful to anyone making a similar self-assessment:

1. **The Classic Entrepreneur:** This leader is thrilled by competition and on a quest for success. What matters to this leader are metrics like costs, quality, profit margins, and making deals. While these leaders care about company values, it's the "dollars-and-cents value proposition that matters most." Finally, these opportunistic leaders revel in "the pitch" and "the deal."

2. **The Modern Missionary:** This leader aims for more than business success. She aspires for success and significance. Winning is less about beating the competition and more about building something original and meaningful. While economic value is important, human values are what drive this leader's passion to succeed.

3. **The Problem Solver:** This leader is concerned with concrete results rather than dramatic impact. She believes in the power of expertise and the value of experience. With disruptive technologies reshaping industries, this leader finds past success as a good predictor of future impact and will fall back on their personal experience to lead. This style is embodied by a top-down, take-charge, buck-stops-here leader who has risen through the ranks.

4. **The Solution Finder:** This leader is about making incremental results and concrete solutions. She believes that powerful contributions come from unexpected places and thus seeks out the collective genius of the organization and recognize that there are many unknowns. This leader is ambitious, but also seen as modest, humble, and self-effacing.

The author of this article offers a short quiz for anyone interested in seeing which of the four styles they fall into: williamctaylor.com/quiz/. So, what type of leader are you? See me at the Crab Feast and let's swap results.

[1] Bill Taylor, The 4 Leadership Styles, and How to Identify Yours, *Harvard Business Review* (August 3, 2016), https://hbr.org/2016/08/the-4-leadership-styles-and-how-to-identify-yours.

(PRESIDENT'S MESSAGE) *Continued from page 2*

ing the lionshare of the events in my presidency year.

We are considering expanding our membership ranks by adding a category for claims personnel to be sponsored by lawyers — so please send us your recommendations. Our law firm members also expanded and now include: Saul Ewing Arnstein & Lehr LLP and Pessin Katz Law. Let's continue to grow the organization.

Member congratulations go to Bob Klein for his first musical album and James R. Forrester for his participation in the Worker's Compensation Commission appointment process. We are so proud of you both!

We tapped our membership more than once for ideas. First, a letter from me and then a survey. You guys are great and please know that John Sly is going to implement the remaining ideas in the coming year.

And in that regard and by way of my closing, I want to give a hearty congratulations to John Sly, Dwight Stone, Colleen O'Brien, and Katherine Lawler as they ascend to their new positions on the Executive Board. I appreciated all of your effort, advice, and counsel this year, and I know you will continue to shepherd this organization to great levels. Keep this momentum rolling, Team!

See photos from past events at mddefensecounsel.org/gallery

MDC's 2018 Trial Academy

Andrew Gaudreau

MDC's 2018 Trial Academy took place on April 30th at Miles & Stockbridge, PC. The Trial Academy is an annual MDC event which provides a unique opportunity for lawyers to gain insight and learn from highly experienced members of the Bar and to develop trial skills through hands-on small-group workshops.

This year was a great success, with nearly 30 participants and outstanding morning presentations by **Bruce Parker** (Venable LLP), **John Penhallegon** (DeGeorge & Grove, P.A.), **Susan Preston** (Goodell, DeVries, Leach & Dann, LLP), **Christopher Dunn** (DeCaro Doran Siciliano Gallagher & DeBlasis, LLP), **Ford Loker** (Miles & Stockbridge, PC), **Jeanie Ismay** (Leder & Hale, PC) and **Dr. Rachel York Colangelo** (Magna Legal Services) on jury selection and voir dire, opening and closing statements and direct- and cross-examination.

The morning session was followed by a judicial panel (moderated by **Richard Karceski** of Silverman Thompson Slutkin & White and **Robert Scott** of Wilson Elser Moskowitz Edelman & Dicker LLP) featuring **Judge Joseph F. Murphy**, **Judge John P. Miller** and **Judge C. Carey Deeley**. The lively and informative discussion covered a range of topics including arguing motions *in limine*, case presentation, judgments notwithstanding the verdict and remittitur.

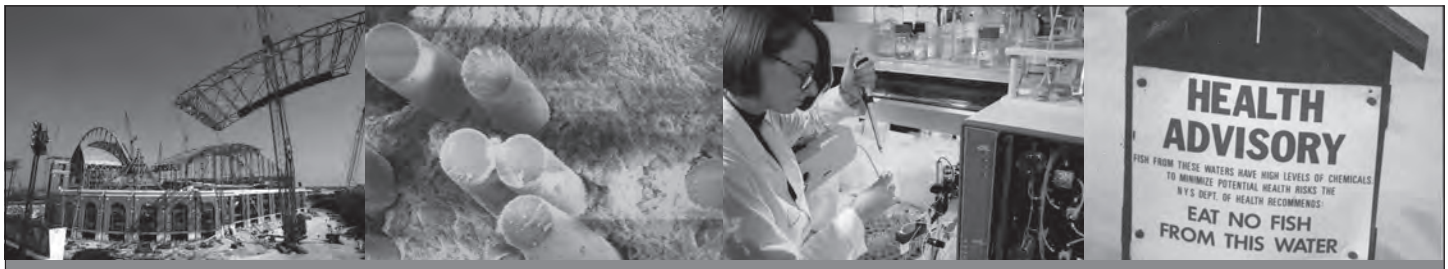
The afternoon featured small-group workshops in which the participants practiced a cross-examination of the plaintiff and closing argument, based on the 2012 NITA Tournament of Champions fictionalized problem pertaining to the death of Michael Jackson. The role of Joe Jackson was played by experts from **Rimkus Consulting Group**, **Inc.** These practice sessions were facilitated by attorney-coaches who provided personalized feedback to each participant.

The day was capped off with a great reception.

A huge thanks to our presenters, moderators, coaches and sponsors (**Exponent**, **Veritext Legal Solutions**, **The McCammon Group**, **Rimkus Consulting Group, Inc.**, **ION Medical Designs**, **Magna Legal Services** and **SEA Limited**.) Thank you also to **Miles & Stockbridge, PC** for hosting the event.

We look forward to next year's Trial Academy. Please mark your calendars for our **Annual Meeting & Crab Feast,** scheduled for June 6th at Nick's Fish House.

Andrew Gaudreau is an associate attorney at Leder & Hale, PC and the Chair of MDC's Programs and Membership Committee. His practice includes matters involving claims of toxic torts, premises liability and construction defects. He is a LEED Green Associate, a designation by the Green Building Certification Institute.



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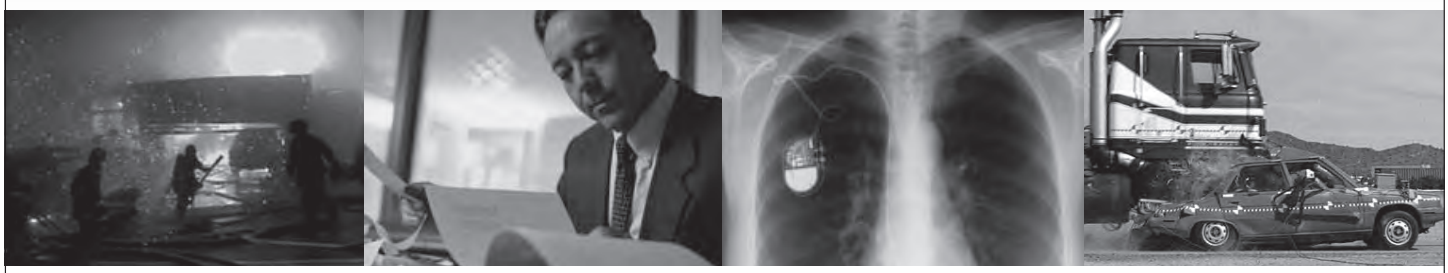

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Intervening/Superseding Cause of Plaintiff's Injury — A Viable Approach to Defending Medical Malpractice Cases at Trial?

Anthony J. Breschi and Kaitlan M. Skrainar

Your client, a physician, is sued along with a co-defendant for negligence in the care of a patient. It is alleged that your doctor's negligence occurred first, followed by the negligence of the co-defendant. Plaintiff claims both defendants caused the injury.

During the course of discovery, defense counsel agree to cooperate and not "point the finger" of blame. However, the co-defendant settles with the plaintiff, leaving your client as the sole defendant.

In evaluating the case law and the facts, you determine that your best defense is to assert that the former co-defendant's negligence was the sole proximate cause of the plaintiff's injury and superseded any negligence on the part of your client. The question is: are you in a position to prove this? Can you also deny liability while asserting this defense? Are you entitled to the intervening/superseding cause instruction in MPJI 19:11?

In a recent case we were able to utilize the Plaintiff's expert's video testimony to illustrate the superseding negligence of the dismissed defendant. The Court gave the pattern jury instruction as we requested and the jury found in favor of our client based on the superseding negligence of former party.

Development of the intervening/superseding cause defense.

The concepts of intervening and superseding cause have existed in Maryland jurisprudence for some time. Indeed, the defense has been utilized in medical malpractice cases for decades. *See e.g. Thomas v. Corso*, 265 Md, 84 (1972) (on-call doctor presented evidence of the nurses' subsequent negligence in attempt to prove he was not liable); *Mehlman v. Powell*, 281 Md. 269 (1977) (court upheld jury's verdict that co-defendant's negligence was not a superseding cause but did not preclude admission of evidence to support the defense).

A superseding cause may be found where an unusual and extraordinary independent intervening negligent act occurs that could not have been anticipated by the original tortfeasor. *Pittway Corp. v. Collins*, 409 Md. 218, 253 (2009). Maryland courts apply Section 442 of the Restatement (Second) of Torts to determine when an intervening negligent act rises to the level of a superseding cause using the following criteria:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.[1]

The Impact of *Martinez* and *Copsey*

To introduce evidence of an intervening act as a superseding cause of the plaintiff's injuries, a defendant must deny negligence altogether or concede negligence, for purposes of the argument, but deny causation, thereby opening the door for admission of evidence concerning a third party's negligence. Such evidence may relate to the negligent acts occurring before the defendant's own alleged negligence (*Martinez*), or after the defendant's claimed negligence (*Copsey*).

A defendant is responsible for all con-

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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** and click the red "Expert List" button in the left hand corner of the home page or access it from the directory menu.

[1] It should be noted that there is no strict requirement that the intervening act be that of a present or former defendant. The Restatement refers only to the intervening force being due to the act of a "third person."

(MEDICAL MALPRACTICE) *Continued from page 9*

sequences of his negligent acts. *Morgan v. Cohen*, 309 Md. 304, 310 (1987). Most courts, including Maryland's, have ruled that, in the absence of some prolonged period between the negligent act and injury, or a clearly unforeseeable action on the part of a third party, the defendant's negligence and proximate cause are jury questions. Therefore, prior to *Martinez* and *Copsey*, many Maryland courts would exclude evidence of the acts of a non-party as irrelevant to the negligence of the defendant.

In both *Martinez* and *Copsey* the defendant denied negligence and sought to bring in evidence of the settling defendant's negligence. In *Martinez v. The Johns Hopkins Hospital*, 212 Md. App. 634 (2013), the hospital sought to present evidence of the negligence of the nurse midwife that preceded the patient's admission to the hospital. The Court of Special Appeals explained why such evidence was relevant where the defendant asserts a complete denial of liability:

> Here, the Hospital was entitled to try to convince the jury that not only was it *not* negligent and *not* the cause of Martinez's injuries, but that Midwife Muhlhan *was* negligent and *did* cause the injuries. There was a void of evidence that left a logical hiatus in the story because the jury was not allowed to hear what role Midwife Muhlhan's conduct played…. Accordingly, because the Hospital was precluded from presenting any evidence that Midwife Muhlhan breached the standard of care and was therefore negligent, it follows that the jury was left to wonder whether anyone other than the Hospital — the sole defendant — *could* have caused Martinez's injuries.

Id. at 665-666 (emphasis in original). The Court concluded that the defendant at trial is entitled to present evidence that a non-party was at fault and was the sole, proximate cause of the plaintiff's injuries.

Copsey v. Park, 228 Md. App. 107 (2016), involved a wrongful death claim by plaintiffs who claimed that Dr. Park misread the patient's MRI six days before the patient suffered a massive and ultimately fatal stroke. They also claimed that the subsequent treating physicians were negligent in caring for the decedent. The Plaintiffs objected and moved *in limine* to exclude Dr. Park's introduction of evidence concerning the negligence of subsequent treating physicians who had settled or had been dismissed. The trial court overruled the objection and instructed the jury on superseding cause. Citing its earlier decision in *Martinez*, the Court of Special Appeals stated:

However, just like the defendant in *Martinez*, Dr. Park, in addition to claiming that Drs. Blum, Viswanathan, and Alkaitis were superseding causes, completely denied liability. Therefore, the reason why evidence of third-party negligence was admissible in *Martinez* applies here as well-because without it, "the jury [would have been] given a materially incomplete picture of the facts, which [would have] denied [Dr.

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Editors' Corner

The Editors are proud to publish the Summer edition of *The Defense Line*. Once again, a huge shout out goes to you, members of the MDC, who answered the call for articles, advice, resources, and spotlights. Since our last edition, MDC's Trial Academy proved to be a continued success. Thanks to **Andrew Gaudreau**, of Leder & Hale, PC, for providing a summary and highlights of this year's event. The articles in this edition deal with a variety of legal issues and are reflective of the diversity of practice areas within our membership. **Anthony J. Breschi** and **Kaitlan M. Skrainer**, of Waranch & Brown, LLC, share their insight on the viability of defending a medical malpractice case on the basis of an intervening or superseding cause. **Kambon Williams**, of Pessin Katz Law, provides an update on data breach suits against Equifax and the potential impact of Attorney General suits on attorney's fees. An article by **Patricia McHugh Lambert**, of Pessin Katz Law, provides very helpful advice on preparation for corporate depositions, a task often faced by defense counsel. Finally, **Andrew Gaudreau** and **Tom Hale**, of Leder & Hale, PC, explain the benefits, criticisms, and pitfalls of LEED construction.

You will notice a new section in this edition — Spotlights. We want to hear from you and showcase the success of our members! The next time you win a case or are recognized, let us know.

The Editors sincerely hope the members of the MDC enjoy this edition of *The Defense Line*. If you have any comments, suggestions, or would like to submit an article or spotlight for publication for a future edition, please contact one of the editors below. See you at the Crab Feast to celebrate a fantastic year for the MDC!

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Please Welcome MDC's New Members

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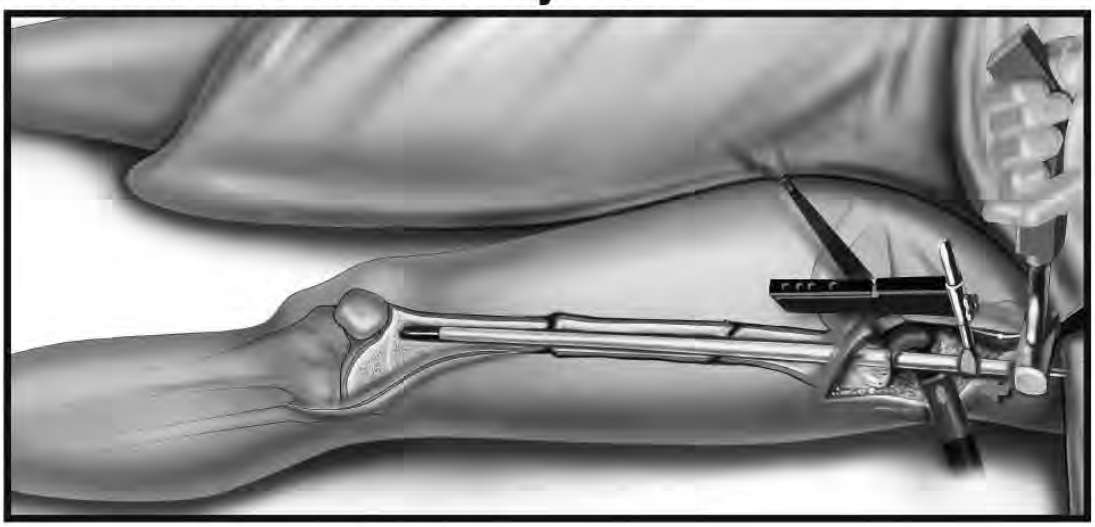

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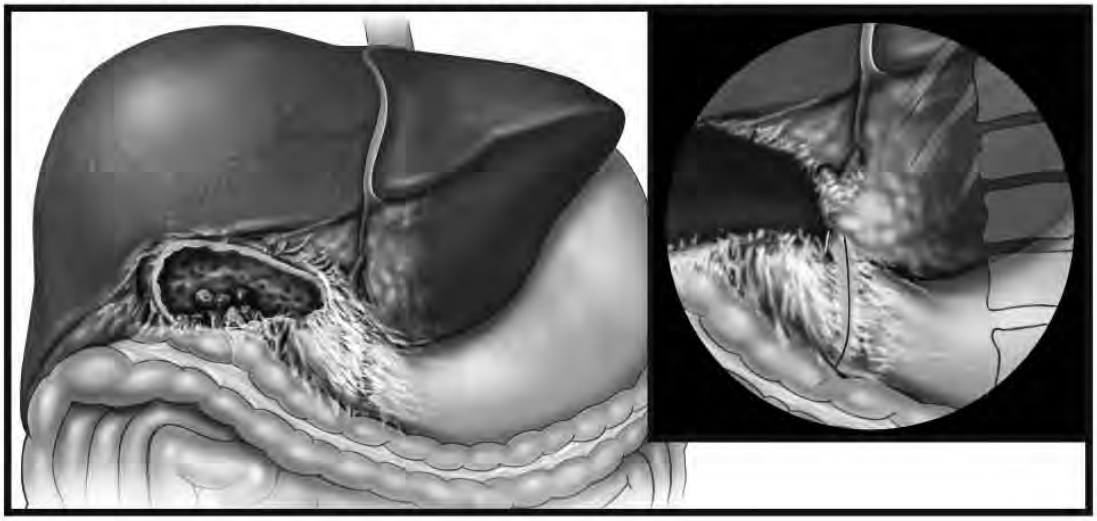

(MEDICAL MALPRACTICE) *Continued from page 11*

> Park] a fair trial." *Id.* at 666, 70 A.3d 397. Our holding in *Martinez* that "evidence of both negligence and causation attributable to a non-party is relevant where a defendant asserts a complete denial of liability," *id.* at 664, 70 A.3d 397, was unqualified.

Id. at 120-21. Recognizing that liability may be cut off by the subsequent negligence of another physician, the Court concluded that Dr. Park was also entitled to pursue the superseding cause defense and to present evidence of the negligence of the subsequent treating physicians in support of that defense. *Id.* at 121-23.

- How do you present evidence of the co-defendant's negligence?

  Since you had an agreement with the co-defendant not to criticize each other, how can you cooperate in the defense while preserving your ability to allege negligence on the part of the co-defendant after he has settled with the plaintiff? One solution is to take advantage of the plaintiff's expert witnesses. If the plaintiff calls an expert witness at trial who criticized the care of the settled, now non-party, *Martinez* and *Copsey* permit you to cross-designate the expert and elicit such testimony. Alternatively, when taking the deposition of the plaintiff's expert, ensure that you note the deposition for use at trial so that you can introduce the deposition testimony in your case. You would also have the right to introduce the plaintiff's answers to interrogatories which may contain admissible evidence of the former co-defendant's negligence.

  Be sure to have your own expert witness prepared to testify on causation issues. Despite the non-disparagement agreement with your co-defendant, you can legitimately have your expert negate any claimed negligence and the causal connection between your client's actions and the injury. If you have been successful in introducing evidence of the plaintiff's criticisms of your former co-defendant, such testimony will be even more persuasive.

- Will you be able to get the claim of intervening/superseding cause instruction?

  In *Copsey*, unlike *Martinez*, the negligence of the non-parties was after the negligence of the defendant at trial. In this circumstance the defendant is entitled to the Maryland Pattern Jury Instruction 19:11 on intervening/superseding cause.[2] This instruction recites that while there may be additional causes of an injury that occur after the defendant's conduct, the event or act must be so extraordinary that it was not reasonably foreseeable. To take advantage of this instruction, it is important to stress the circumstances that should lead a jury to find that the settled or non-party's negligence was the cause of the injury rather than your client's actions.

In the appropriate case, invoking a superseding/intervening causation defense may be a viable and effective approach to defending a medical malpractice case at trial.

Anthony (Tony) Breschi is a trial attorney and partner at Waranch & Brown, LLC. His practice focuses primarily on the defense of physicians and hospitals in medical malpractice cases. He is the Chair of Maryland Defense Counsel's Healthcare and Compliance Subcomittee.

Kaitlan M. Skrainar is an associate at Waranch & Brown, LLC. Her practice focuses on the defense of physicians and hospitals in medical malpractice cases as well as other complex civil litigation.

[2] Maryland Pattern Jury Instruction 19:11 provides:

> There can be additional causes for the injury that occur after the defendant's conduct. If a later event or act could have been reasonably foreseen, the defendant is not excused for responsibility for any injury caused by the defendant's negligence. But if any event or act is so extraordinary that it was not reasonably foreseeable, the defendant's conduct is not a legal cause of the injury

Canary in the Coal Mine? Do Emerging Attorney General Data Breach Suits Against Equifax Threaten the Handsome Attorney's Fees Anticipated by Plaintiffs' Counsel

Kambon Williams

Ever since the first news of Equifax's data breach broke, savvy plaintiff's lawyers around the country have wasted no time in filing a myriad of class action lawsuits. Following Equifax's disclosure on September 7, 2017 that it had been the target of a data security incident that resulted in the criminal unauthorized access of the personally identifiable information of approximately 143 million U.S. consumers, class action lawsuits, with the potential to earn plaintiffs' lawyers massive attorney's fees, have sprung up in every state. Over 340 class actions have been filed already. It is not difficult to understand why.

The playbook for such consumer class actions is fairly straight forward for the plaintiff's bar as all one need do is find a viable client to serve as a class representative for one's state and win the race to the courthouse. Once filed, the odds are high that the case will be removed to federal court, if not filed there already, and that the Judicial Panel on Multidistrict Litigation will determine that the many suits filed around the country should be centralized in one federal district court. The official basis of the transfer of the many suits to one federal court under 28 U.S.C. § 1407 is the need for "coordinated or consolidated pretrial proceedings" only, but very few cases are remanded back to their original federal courts for trial once multidistrict litigation (or MDL) commences, as global settlements are typically achieved.

Those global settlements promise handsome attorney's fees for plaintiff's lawyers (even if the awards to the consumers are sometimes less enviable), but the prospect of those fees for the Equifax MDL now pending before Judge Thomas Thrash in the U.S. District Court for the Northern District of Georgia may be in jeopardy if state attorney generals decide to jump into the fray to protect consumers themselves. Earlier this month, Suffolk County Superior Court Judge Kenneth Salinger denied a motion by Equifax to dismiss a lawsuit filed by Massachusetts Attorney General Maura Healy to recover for purported breaches of the state's data security regulations.

Rejecting the standard argument that data breach victims have no Article III standing unless they establish their stolen data was actually misused, Judge Salinger concluded that "[t]he Attorney General, unlike a private litigant…is required only to prove that unfair or deceptive acts or practices took place in trade or commerce; she is not require to prove or quantify resulting economic injury" and "is not required to allege or prove that any individual consumer was actually harmed." Judge Salinger's ruling is a vast departure from the ordinary requirement that an "injury in fact" that is "fairly traceable" to the data theft be demonstrated.

State regulators, unlike class action plaintiff's lawyers, can often claim statutory penalties for violation of state law and it may well be the case that state attorney generals, if truly immune to the Article III standing arguments, may offer consumers their best opportunity for relief. Equifax is already under investigation by at least 40 state attorney generals and, just last week, West Virginia Attorney General Patrick Morrisey also filed suit against Equifax on behalf of consumers in his state. Morrisey is seeking $150,000 for each security breach and $5,000 for each violation of the state's Consumer Credit and Protection Act, as well as reimbursement for all fees and costs related to the state's litigation.

It is doubtful that the Equifax MDL will be stayed in favor of the data breach suits being filed by state attorney generals now that the ball is already rolling, but it is likely that this heightened interest by regulators will weigh heavy on the final global settlement to be approved by Judge Thrash nonetheless. Under the Class Action Fairness Act (CAFA), 28 U.S.C. §1715, notice of "a proposed settlement of a class action" must be provided to the "appropriate State official of each State in which a class member resides" and the settlement cannot be approved by the court if the proper notice has not been issued. While it is certainly true

that not all settlements come under scrutiny from the recipients of CAFA notification, high profile cases often do, and, here, state attorney's generals will be paying particular attention to the scope of the liability releases, the payouts to class members in their state, and how those payouts fare in comparison to the attorney's fees earned by the class action plaintiffs' lawyers.

For a recent example of this dynamic in play, one need look no further than the dispute that erupted between Maryland Attorney General Brian Frosh and class action plaintiffs' lawyers over lead paint settlements in our neck of the woods just last July. Outraged by what amounted to an average payout of $7,500 for each lead-paint victim, Frosh intervened to demand a stay and a more equitable settlement that placed attorney's fees under a far brighter spotlight. While that outcome is not certain to repeat itself in the Equifax MDL, the likelihood appears to be far higher than it did just a month ago. Stewards of sensitive data and consumers alike should continue to watch as these cases playout across the country.

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Corporate Depositions: The Wrong Time to Answer in the Form of a Question

Patricia McHugh Lambert

Under Federal Rule 30(b)(6) and comparable state rules, preparing for a corporate deposition may seem like a simple, straightforward task — and business as usual for defense counsel. However, the scope of this mechanism far exceeds the rule. Rather, strategic norms employed by litigators and decisions by various courts have shaped corporate depositions into a significant undertaking. It is important to understand the interaction of these forces as you embark on choosing the right corporate designee and preparing that individual to speak for the company.

Choosing the Right Individual

Although a corporation is a "person" in the eyes of the law, there must be a human individual to speak for it during litigation, generally beginning with depositions. As with many things in the legal world, the corporate deposition process will begin with notice. Under the federal rule, when a party names a corporation in its notice, it must "describe with reasonable particularity the matters for examination."[1] From there, the corporation must then "designate one or more officers, directors, or managing agents…to testify on its behalf."[2] The corporate designee must "testify about information known or reasonable available to the organization."[3]

Thus, the corporation's search for the ideal corporate designee begins. At first glance, it may seem efficient to simply designate someone at the company with the most knowledge, in order to avoid the risk of deposing someone with too little knowledge or wasting time and resources deposing multiple people. However, there are a number of complications with this strategy. First, representatives with a wide array of knowledge can often reveal more information than the deposing party initially asks. This knowledge may then expose them to further questions outside the scope of the original topics listed in the notice. *(See Part III.A)*. Rather, it is frequently more effective to designate a person with only limited knowledge who can prepare adequately and give appropriate testimony. After all, the company's only obligation is to produce a representative with knowledge about those topics *listed in the notice*.[4] The designee need not have any personal knowledge at all — only the ability to familiarize themselves with the information.[5]

Moreover, sometimes the person who has the most knowledge does not make the best witness. Of course, calm, patient, and professional individuals are ideal representatives to give testimony. In combining the two objectives, some companies will even go as far as to hire articulate outsiders to be designated deponents for the company — thereby also limiting the knowledge the deponent will have. More commonly, however, corporations will choose a current employee as its designee and thoroughly prepare them within the scope of the notice. This, of course, presents additional challenges for which every corporation should anticipate.

Preparing for Deposition

Many attorneys will employ the "limited knowledge" strategy described above, but some have taken it one step further — producing witnesses who simply "cannot recall" any of the information asked of them. Courts have been emphatic in ruling that this tactic is strictly prohibited by the rule and often comes with consequences. *(See Part IV)*. Rather, thorough preparation is the best way control the flow of information and comply with the rule.

Because the deponent need not have personal knowledge, preparation is not only wise, it is required by the court. In *United States v. Taylor*, the court held that even when a corporation no longer employs any individuals who can recall a distant event, the duty to prepare a deponent with available resources is not discharged. Rather any materials that are reasonably available, such as documents or former employees, must be used to inform the deponent of the condition of the corporation.[6] This can seem like a momentous task — especially for companies that are large or have a long history. However, this duty exists only within the scope of information listed within the notice, which must be described with "reasonable particularity." Although these topics will limit the amount of information that the deponent must be prepared to discuss, it will not limit the scope of questions asked and will not insulate the deponent from being re-deposed in his individual capacity.

Scope of Questioning

The scope of the deposition is written in black and white on the notice, so the risk of disclosing too much is minimal, right? Not quite. As with any deposition, there is always a risk of the deponent answering far more than the question asks, but with regard to corporate depositions in particular, the topics identified on the notice are not always the "safety net" they may appear to be.

Federal courts have consistently held that the scope of questioning in corporate depositions is not confined by the notice.[7] This standard begs the question — if the topics listed in the notice cannot limit the scope of deposition questioning, why are they included at all? In *King v. Pratt & Whitney*, the court clarified the misconception, noting that the notice requirement language of "reasonable particularity" is not superfluous but rather simply *defines the corporation's obligations to produce a qualified designee*.[8]

Although "The deponent's answers to

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[1] *See* Fed. R. Civ. P. Rule 30(b)(6).
[2] *Id.*
[3] *Id.*
[4] *Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534 (D. Nev. 2008) (noting that a corporation has an obligation to make conscientious, good faith effort to produce thoroughly educated witness about noticed deposition topics).
[5] Reed v. Bennett, 193 F.R.D. 689 (D. Kan. 2000) (holding that the defendant corporation was not required to designate someone with "personal knowledge" to appear on its behalf).
[6] *See U.S. v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996).
[7] *See Crawford v. Franklin Credit Management Corp.*, 261 F.R.D. 34. (S.D.N.Y.2009) (noting that the deposition's scope is rather limited by the civil procedure rule governing the scope of discovery). Some state courts apply different standards when interpreting the applicable state rule. *See Hoechst Celanese Corp. v. Nat'l Union Fire Ins.* Co., 623 A.2d 1099 (Del. Super. Ct. 1991) (striking answers from the deposition transcript that were outside the scope of the notice).

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questions outside the scope of the notice will not bind the organization," the testimony can be admitted as the statement of the deponent in an individual capacity.[9] Because of this, it is often favorable that the deponent only have knowledge about the noticed topics, in order to mitigate the spread of information. As the court in *King*, frankly noted, "if the deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem."[10]

Nonetheless, when questions spread beyond the scope of the notice, counsel should object to the questioning under the rule 30(b)(6) duty to prepare the witness only for the topics on the notice. However, counsel should be hesitant to instruct the witness not to answer questions because sanctions may be imposed for employing this tactic unreasonably. As the court noted in *E.E.O.C. v. Freeman*, "Any instruction not to answer a deposition question in violation of Rule 30(c)(2) presumptively warrants sanctions, and the instances in which a court may choose not to levy them are 'few and far between.'"[11]

Deposing the Corporate Designee in an Individual Capacity

That an individual is designated to represent the company in a corporate deposition does not insulate him from being deposed in an individual capacity. In fact, statements made in a corporate deposition may nonetheless be attributed to the individual in the circumstances noted above. Depositions of corporate officers as individuals are rather governed by Federal Rule 26, which allows for the deposition of anyone regarding "any nonprivileged matter that is relevant to any party's claim or defense."[12] Many parties will argue that the individual's own personal statements are simply not relevant, and thus not permitted discovery. However, as the rule notes, "For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Thus, if the party seeking the deposition can show good cause for its relevance, the court will order it despite the objection. In the interest of efficiency, however, courts are hesitant to order needlessly cumulative discovery be conducted.

Consequences

Choosing the wrong designee or inadequately preparing that individual can be disastrous for your case. Most evidently, this poses a huge risk of exposing detrimental information or more information than required. However, lacking proper care in navigating this process can also result in significant court intervention. Most commonly, courts will compel the deposition of an appropriate corporate designee or impose sanctions for noncompliance.

Sanctions

Designating a representative who has no knowledge about the company may seem like an easy loophole, but as discussed above, it will not pass muster of the Federal Rule. The Rule 30 notice serves as an outline of the deponent's obligation to make himself familiar with the requested topics. Therefore, a deponent who is unable to answer questions within the scope has not complied with the rule. In fact, presenting a corporate designee unprepared to answer questions on those topics is tantamount to a failure to appear for the deposition.[13] When this occurs, there is a significant risk that a court will impose sanctions. [14]

However, every imperfect corporate deposition will not automatically warrant sanctions. For example, in *Booker v. Massachusetts Dept. of Public Health*, the Court refused to impose sanctions when the individual designated has sufficient knowledge but was merely not the deposing party's preferred deponent.[15] Additionally in Vopak USA, *Inc. v. Hallett Dock Co.*, the Court held that sanctions were not appropriate when counsel terminated the deposition due to confusion about its scope.[16] Courts leave room for varying circumstances and generally reserve sanctions for noncompliance that is particularly egregious.

Compelling a Different Corporate Designee

In addition to sanctions, the court may also have the power to compel a different corporate representative from the one designated. If the designated representative has inadequate knowledge, the deposing party may move to compel testimony from a qualified representative.[17]

The deposing party may not, however, move to compel testimony from another corporate designee simply because the first was not preferable.[18] In *McPherson v. Wells Fargo Bank*, the court held that the corporation has the sole authority to determine who will speak for it, so long as that person is adequately prepared.[19] In holding that the plaintiff could not compel the testimony if its preferred designee, the court emphasized "Certainly the Court will not interfere at this stage in the [corporation's] right to make that determination for itself."[20]

Conclusion

Choosing and preparing a corporate designee can be a significant undertaking. The first step is to contact a qualified law firm or attorney to assist you. The best resource to connect you with experienced attorneys is the Harmonie Group's online directory, which you can access at harmonie.org/directory.

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8 *King v. Pratt & Whitney, a Div. of United Technologies Corp.*, 161 F.R.D. 475 (S.D.Fla.1995).
9 *E.E.O.C. v. Freeman*, 288 F.R.D. 92 (D. Md. 2012); s*ee also Falchenberg v. New York State Dep't of Educ.*, 642 F.Supp.2d 156, 164 (S.D.N.Y.2008) ("Questions and answers exceeding the scope of the … notice will not bind the corporation, but are merely treated as the answers of the individual deponent.").
10 *Id.* at 476.
11 *E.E.O.C. v. Freeman*, 288 F.R.D. 92, 103 (D. Md. 2012) (citing *Boyd v. Univ. of Maryland Med. Sys.*, 173 F.R.D. 143, 147 (D.Md.1997)).
12 *See* Fed. R. Civ. P. Rule 26.
13 *United States v. Taylo*r, 166 F.R.D. 356, 363 (M.D.N.C. 1996).
14 *See QBE Ins. Corp. v. Jorda Enterprises, Inc.*, 277 F.R.D. 676 (S.D. Fla. 2012) (imposing sanctions on an insurer which failed to designate an adequate 30(b)(6) representative).
15 *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D. 387 (D.Mass.2007).
16 *Vopak USA, Inc. v. Hallett Dock Co.*, 210 F.R.D. 660 (D.Minn.2002).
17 *State Farm Mutual Auto. Ins. Co. v. New Horizont, Inc.*, 254 F.R.D. 227 (E.D.Pa.2008).
18 *McPherson v. Wells Fargo Bank, N.A.*, 292 F.R.D. 695 (S.D.Fla.2013).
19 *Id.*
20 *Id.* at 698.

A Window into the Benefits, Criticisms and Pitfalls of LEED Construction

Andrew Gaudreau and Tom Hale

Millions of rays of sunlight illuminating the high rise of transparency. Natural resource overload. An array of steel, glass and tall columns. Open staircases. Indoor bridges. Glass room partitions giving the feel of a completely open floor plan. These are just a few ways to describe the new University of Baltimore School of Law building. A modern-day mecca of LEED construction in Baltimore. This building was constructed with high expectations: to be one of the "greenest" buildings in Baltimore and in the metropolitan region. It has all the features you would expect from a LEED-certified building. This includes a rainwater harvesting system, a green roof, terraces and a sunken garden that contains native and adapted plants. It has a system dedicated to managing fresh air through automated windows throughout the building. Fifty percent of the construction materials were recycled. The only disappointment is that this building was constructed *after* our time attending this University.

"Green buildings" are the wave of the future. As a society, we have been growing increasingly aware of, and concerned about, preserving the environment for future generations. For example, the automotive industry is working to reduce carbon emissions. Consumers are encouraged to bring reusable bags to grocery stores rather than use the plastic or paper bags offered at the check-out line. Water conservation has become critical, particularly in drier climates. These steps are important for our planet as climate change manifests an increase in natural disasters.

The construction industry is no different and is following suit in the sustainability movement. We are in a global warming crisis, and buildings emit a substantial amount of greenhouse gas emissions. LEED, or Leadership in Energy and Environmental Design, was the construction industry's movement toward making changes. LEED was developed in 1994 by the U.S. Green Building Council ("USGBC") to raise awareness about green building, to promote green building practices, and to create a common standard for measurement.[1] Buildings all over the world have now become LEED-certified. In fact, many municipal jurisdictions now require that certain buildings be LEED-certified.

The good news is that LEED has increased awareness about sustainability and green buildings. The bad news is that it is complicated. The planning, design and building phases of a LEED project are more involved than traditional buildings. Here comes the blinking warning across your computer monitor: WARNING — design and building professionals need to be aware of what is involved in order to avoid pitfalls, potential legal ramifications and stressful relationships between contractors and their clients.

This article explores the LEED process and its potential pitfalls, the possible legal issues contractors may face, and how to deal with these issues to increase the chances of a successful build and a long-lasting client relationship. This starts with understanding how a project becomes eligible for LEED certification.

How does a project become eligible for LEED certification?

It's all about the ratings!

LEED has developed four (4) "rating systems" because many types of projects are eligible. These ratings include:

(1) LEED "Building Design and Construction," which applies to newly constructed buildings or buildings undergoing a major renovation;
(2) LEED "Interior Design and Construction," which applies to interior spaces that are a complete fit-out;
(3) LEED "Building Operations and Maintenance," which applies to existing buildings that are undergoing renovation; and
(4) LEED "Neighborhood Development," which applies to projects involving new land development or re-development projects.[2]

A single project is not limited to only one of these types of certifications — one project can actually receive multiple ratings.

Each of the LEED rating systems requires that certain basic standards be met. These standards are prerequisites. For example, a prerequisite for all LEED BC+C projects is that they do not use chlorofluorocarbon (CFC)-based refrigerants in HVAC and refrigeration systems because CFCs contribute to ozone layer depletion.[3] Another prerequisite for LEED BD+C projects is indoor and outdoor water use reduction.[4]

But, it's also about the points!

In addition to the prerequisites, a planning team can earn "points" through credits by satisfying other performance criteria. LEED performance criteria encompasses the following areas:

- **Location and transportation.** This category takes into consideration where a building is located. For instance, does the location of the building promote the use of public transit because it is located near a subway station? Does the building take advantage of existing infrastructure and reduce strain on the environment? Does the project include brownfield redevelopment, turning a contaminated site into a reused site?
- **Sustainable sites.** This category looks at whether the site selected for a project maximizes sustainability. For example, will the

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[1] *See* USGBC, *Guiding Principles*, http://communicate.usgbc.org/usgbc/2006/08.15.06_guiding_principles/guidingPrinciples.
[2] USGBC, *Better buildings are our legacy*, https://new.usgbc.org/leed.
[3] USGBC, *LEED v4 for Building Design and Construction*, https://www.usgbc.org/sites/default/files/LEED%20v4%20BDC_04.6.18_current.pdf; Reva Rubenstein, et al., The Treatment by LEED of the Environmental Impact of HVAC Refrigerants, Sept. 28, 2004, https://www.usgbc.org/sites/default/files/TSAC_Refrig_Report_Final-Approved.pdf.
[4] USGBC, *LEED v4 for Building Design and Construction*, https://www.usgbc.org/sites/default/files/LEED%20v4%20BDC_04.6.18_current.pdf.

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location promote rainwater management and heat island reduction? Will planted areas capture water to prevent erosion? Will landscape design assist in keeping the building cooler in warm months by incorporating trees that provide shade?

- **Water efficiency.** This category evaluates whether a building is designed to save on water use, including indoor water use, outdoor water use, and metering. Indoor water use includes capturing rainwater or graywater (water from bathtubs, showers, sinks and washing machines) to flush toilets or using waterless urinals or high efficiency toilets. Outdoor water use looks at landscape design and plant selection.
- **Energy and atmosphere.** This category is perhaps the most significant for achieving LEED certification. Considerations in this category include whether the building promotes energy performance. The focus here is on reducing energy needs, looking at factors such as building orientation, the building envelope, the use of high-efficiency HVAC systems and ventilation. Several credits and prerequisites in this category pertain to satisfying ASHRAE standards.
- **Materials and resources.** The issue in this category is whether the building materials are sustainable and how waste is dealt with. This category is based on the EPA's goals of source reduction, material reuse and recycling (the latter of which is a LEED requirement) and turning waste into energy. Does the building use salvaged materials? Note that LEED does not encourage the reuse of windows or window glazing because older windows tend to be energy-inefficient.
- **Indoor environmental quality.** The goal of this category is to protect the health of building occupants and to enhance productivity. Considerations include whether a building well is ventilated (per ASHRAE standards or other international standards as appropriate) and whether it is daylit. Additionally, does the building use green cleaning materials?
- **Innovation.** The innovation category is the category for the incorporation of building components and design ideas which are not encompassed by the others. The question is, does the building uniquely meet "green" goals that are not specifically covered in the LEED system?
- **Regional priority.** This category acknowledges that different areas of the world have different sustainability needs. Take, for example, the American southwest and water conservation. In other regions, brownfield redevelopment may be more of an issue.[5]

Judgment Day — how buildings are ultimately rated.

Buildings are rated under LEED by the number of points they earn when satisfying performance criteria (note that points are not awarded for prerequisites). Ultimately, a LEED-certified building can achieve one of four ratings levels:

- LEED Certified (40–49 points);
- LEED Silver (50–59 points);
- LEED Gold (60–79 points); or
- LEED Platinum (80+ points).[6]

A great example of a LEED Platinum building is the new University of Baltimore School of Law. This building is a far cry from the prior building, which was constructed decades ago and resembled a high school — complete with hallway lockers. The new LEED Platinum building is awe-inspiring. It is located at the busy intersection of Charles Street and Mount Royal Avenue, with Penn Station nearby, which is a hub for people traveling throughout the Eastern corridor. It is also located within blocks of the light-rail and many bus stops. There are outdoor, landscaped terraces. As reported in the Baltimore Brew, there is a 12-story atrium which is designed to siphon off rising hot air. The acoustics in the classrooms are improved by acoustical baffles. There is a double glass façade on the exterior of the building that deflects outdoor noise, yet the windows can also be opened. The roof harvests rainwater, which is stored in cisterns and then used to flush toilets. The building utilizes natural ventilation. The building is lit from the sides rather than top-lit. The concrete slab floors even contain 50 miles of plastic tubing for radiant heating and cooling. There is reportedly $400,000 in annual energy savings, even though the building cost approximately $5 million more than a traditional non-LEED-certified building.[7]

This is a far cry from the prior building, and frankly, the entire neighborhood has improved since the building was completed.

What's all the hype with LEED?

The idea is obvious: The higher-rated the building, the more environmentally friendly and efficient it will be. We save the environment; enough said — right? But wait: there's more.

There is also a significant marketing component. Buildings that achieve LEED certification tend to receive more publicity (and perhaps attract more tenants) than other more conventional buildings. LEED certification can increase a building's market value. In today's market, it is important and valuable to be "green" because people care about the environment and sustainability.

Other benefits include:

- **Energy efficiency.** LEED buildings are designed to be energy efficient and save resources, and they should help minimize waste. Needless to say, LEED-certified buildings can save money and operating costs over the long-term. Energy-efficient buildings also help reduce greenhouse gas emissions. For instance, the use of CFCs is prohibited in new construction, and renovations require the phase-out of CFCs.[8]
- **Healthier and more productive work environments.** LEED buildings help create positive and healthy work environments. Long-term exposure to products containing volatile organic compounds such as paints, adhesives and ceiling tiles can contribute to sick building syndrome.[9] By not using these materials, productivity of building occupants necessarily increases.[10] Use of better ventilation also helps decrease indoor contaminants.
- **The lifecycle approach.** LEED takes

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[5] *See generally* USGBC, *The LEED credit library*, https://www.usgbc.org/articles/leed-link-leed-credit-library (last visited May 4, 2018).

[6] USGBC, *Better buildings are our legacy*, https://new.usgbc.org/leed.

[7] James D. Dilts, *A law school building that's smart and stimulating*, Baltimore Brew (April 10, 2013), https://baltimorebrew.com/2013/04/10/a-law-school-building-thats-smart-and-stimulating/.

[8] USGBC, *LEED v4 for Building Design and Construction*, https://www.usgbc.org/sites/default/files/LEED%20v4%20BDC_04.6.18_current.pdf.

[9] *See, e.g.*, Sumedha M. Joshi, *The sick building syndrome*, Indian Journal of Occupational and Environmental Medicine, 2008; 12(2):61-64, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2796751/.

[10] *See, e.g.*, Niemelä, R. , Seppänen, O. , Korhonen, P. and Reijula, K., *Prevalence of building-related symptoms as an indicator of health and productivity*, American Journal of Industrial Medicine, 2006; 49: 819-825.

(LEED CONSTRUCTION) *Continued from page 23*

into consideration a building's lifecycle and not just the up-front costs.[11] The "lifecycle approach" refers to evaluating the operation and maintenance costs of the building and not just the construction costs. In other words, "the big picture." Traditional building only looks at the design and construction costs. The lifecycle approach helps the building owner understand and evaluate the actual costs of operating and maintaining the building. At the planning phase, adjustments can be made to help minimize long-term costs of building operation.

- **LEED-certified buildings can earn tax breaks.** In certain jurisdictions, including in Maryland, property tax credits may be awarded for "high performance buildings."[12] Given this benefit, as well as the other cost-saving and environmental benefits, why not "go green"?

What's the downside to LEED?

Despite the numerous benefits of the LEED system, make no mistake — people are critical of LEED. LEED certification can be time consuming and confusing. Achieving LEED certification will involve greater up-front costs that seem like an impediment to getting the project going. Additionally, once a building becomes LEED-certified, there is no guarantee that the building will be made to function in an environmentally-friendly way. Let's be clear — while the design of the building will *hopefully* lead to long-term savings, there are maintenance and operational costs to consider so that the building actually performs as intended. If you do not operate the building as intended, is the cost worth it? Not likely.

The Bank of America Tower at One Bryant Park in New York is one example of a building that has been criticized as not being environmentally-friendly. The building opened in 2010 after achieving LEED Platinum — the first skyscraper to achieve this rating. However, according to a 2013 article by Sam Roudman in The New Republic, based on New York City data, One Bryant Park produces more greenhouse gases and uses more energy per square foot than other comparably-sized skyscrapers in Manhattan.[13] Mr. Roudman reports that a third of the building's floors are trading floors whose computer workstations create a huge energy drain. In the same vein, heating, cooling and lighting the trading floors require enormous energy. While LEED criticized Mr. Roudman's article as ignoring how, for example, the building recovers waste heat from its operation, the article underscores that a building's LEED certification does not mean that it will be operated in an environmentally-friendly manner.

Another criticism is that LEED certification has become formulaic and non-innovative. Points are easily awarded for "low-hanging fruit" and certification can become a simple numbers game.[14] For example, building near public transit results in points, but it is not that difficult to earn those points if you are in a city. Less points are awarded for innovative design techniques which may actually have an important impact.

Avoiding Pitfalls in LEED Construction

LEED is generally a voluntary process, but sometimes it is required. Building professionals need to be aware of the jurisdictional building standards. For example, certain jurisdictions have codified the IGCC (International Green Construction Code), which establishes regulations for new and existing buildings related to energy, water conservation, and other domains. In Maryland, all new or significantly renovated fully-State funded buildings require a LEED Silver certification or other comparable rating.[15]

All of this is great background information, but why does it matter? The answer is that contractors involved in LEED projects need to understand the "big picture" so that they don't inadvertently drop the ball and are held responsible for the failure of a project to achieve the desired LEED rating. There are several issues that contractors should be aware of to avoid this pitfall.

From the get-go and before construction even begins, there is an intense planning phase in which the project team — which includes everyone from the owner, architects, engineers, design consultants, contractors — meets to strategize and develop goals and LEED credits for the project. Everyone needs to be on the same page, to collaborate and to understand the end-goals. Each player needs to understand his or her role. This

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[11] *See* GBCI, *Whole building life cycle assessment through LEED v4*, http://www.gbci.org/whole-building-life-cycle-assessment-through-leed-v4.

[12] *See, e.g.*, Md. Code, Tax-Property Article, § 9-242.

[13] Sam Roudman, *Bank of America's Toxic Tower: New York's Greenest Skyscraper is Actually Its Biggest Energy Hog*, The New Republic (July 28, 2013), https://newrepublic.com/article/113942/bank-america-tower-and-leed-ratings-racket.

[14] Kaid Benfield, *As Important As it Is, LEED Can Be So Embarrassing*, City Lab (Jan. 18, 2013), https://www.citylab.com/equity/2013/01/good-and-important-it-leed-can-be-so-embarrassing/4435/.

[15] *See* Md. Code, State Fin. & Proc. Article, § 3-602.1

(LEED CONSTRUCTION) *Continued from page 24*

type of collaboration and communication continues throughout the building process to ensure that the building plans are developing as anticipated or that necessary changes are recognized and corrected. The contractors benefit by early involvement in better understanding this process.

For each contractor, this requires a clear understanding of its scope of work. The scope of work needs to be clearly defined from the inception of the project and establish who is responsible for what — and not only with regard to actual construction. For each contractor, additional responsibilities may include collecting documentation and paperwork, such as receipts for building materials, which will lead to credit approval. A contractor may not have these types of responsibilities in the non-green building setting.

Contractors must also work closely with the architect and LEED consultant to carefully understand and follow the project specifications. This is because the specifications will be geared toward earning the planned LEED credits. For example, the specifications may provide that the building components must be purchased from within a certain radius of the project — because long-distance shipping is inefficient and has a negative environmental impact. The specifications may also include disposing of project materials on-site and recycling building waste. Contractors need to understand the specific purpose of the specifications so that they (and/or their subcontractors) are not doing something to jeopardize the status of the certification. They cannot make decisions on their own without consulting the project team, and they have to follow the specifications to a "T".

Procurement is another issue. If contractors are charged with overseeing the purchase of specified sustainable products, any material substitutions and/or change orders have to be consistent with the original so that they do not negatively impact the credits to be earned. If there are substitutions or change orders, the contractor, again, needs to consult with the project team to make sure that they are acceptable. To illustrate this point, to achieve credit points for the windows used in LEED BD+C: Homes, the windows need to have "ratings from the National Fenestration Rating Council [which] exceed the requirements in the ENERGY STAR for Homes, version 3, prescriptive pathway."[16] Any other type of window, no matter how new and/or environmentally savvy, will not suffice. As another example, as of 2016, the USGBC introduced a new credit (of up to 4 points) for using "legal wood" — wood that has been verified to be legal — to promote responsible wood sourcing and chain of custody.[17] If a project is seeking a credit in that category, using the wrong type of wood; for example, wood that does not satisfy ASTM D7612-10 and which does not come from a "responsible source" and/or "certified source" per ASTM D7612-10[18], can jeopardize the project. Design elements for a green building serve a unique purpose. There is not a lot of room for interpretation.

Contractors also need be aware of the issue of commissioning. LEED projects are heavily commissioned. The commissioning is often completed by an independent third-party, as opposed to a project team member, and it takes place during the construction and first year of occupancy phases of the project. If the third-party commissioner finds that a product, even though properly specified, was not installed correctly, it is likely the contractor's problem to fix. The final commissioning report will verify that all construction is in compliance with specifications and other contract documents.

Contractors should be wary of any type of form contract in the context of LEED construction. Form contracts do

Continued on page 26

16 USGBC, *LEED BD+C Homes — Windows*, https://www.usgbc.org/credits/homes/v4-draft/eac9.

17 USGBC, *USGBC Announces New LEED Pilot ACP Designed to Help Eliminate Irresponsibly Sourced Materials — Like Illegal Wood — From the Building Material Supply Chain*, https://www.usgbc.org/articles/usgbc-announces-new-leed-pilot-acp-designed-help-eliminate-irresponsibly-sourced-materials%E2%80%94.

18 *See* USGBC, *LEED BD+C Homes — Legal Wood*, https://www.usgbc.org/node/10147000.

(LEED CONSTRUCTION) *Continued from page 25*

not delineate the risks and responsibilities for achieving LEED certification. Shaw Development v. Southern Builders, commonly cited as the first LEED-related litigation, involved the use of an AIA industry-standard agreement. The Project Manual and Scope of Work generically provided that the "Project is designed to comply with a Silver Certification Level according to the U.S. Green Building Council's Leadership in Energy & Environmental Design (LEED) Rating System, as specified in Division 1 Section 'LEED Requirements.'"[19] There does not appear to have been another provision in the agreement as to who was ultimately responsible for achieving that level of certification. When the general contractor, Southern Builders, filed a mechanic's lien against the project (after it failed to achieve LEED Silver), Shaw Development filed a counter-claim, claiming $635,000 in lost tax credits. Although the case eventually settled and the building did achieve LEED certification, one take-away is that the form contract did not provide sufficient protection for the contractor because it failed to define who had ultimate responsibility.

Form contracts create other risks because they do not address the roles and responsibilities of each party in a LEED project. There is the risk that form contracts do not clearly define terms that are specific to LEED projects, including terms like "sustainability." Form contracts may not provide insurance coverage for failure to achieve certain green building standards. The warranty provisions of a form contract may not make sense. Force majeure provisions may not take into account the realities of delays such as certification approval. Provisions regarding "substantial completion" may not take into account the extra steps required to achieve a LEED rating. Significantly, make sure that the contract does not "guarantee" that a LEED certification will be obtained following your work. There are a lot of moving parts in a LEED project, and many have nothing to do with the work of the contractor. In other words, the responsibility for obtaining the rating does not squarely fall on your shoulders.

While delays are inevitable in many construction projects (and often litigated), they are particularly important to consider in LEED projects. In *Shaw Development*, one of issues was the delay in construction.[20] Delays can also result from a lack of materials. Remember that one of the criteria for obtaining LEED credits is the distance of the material to the project site. If the material you need at the time of construction is in short supply or not available, it may not be an option to get the material elsewhere, because doing so will risk obtaining that necessary credit. Keep this in mind during the contract process — is delay in obtaining the necessary materials considered excusable delay? Delays are also problematic because LEED projects attract tenants. If tenants are lined up at the door to move in by the proposed date of completion, and the building is not done, the owner can possibly make a claim for lost rent (in legal terms, consequential damages). How does the contract protect the interests of the contractor in this situation? This underscores the importance of drafting good contract terms at the outset of the project.

The Verdict — The Final "Punch-list" of LEED Certification

The moral of this story: LEED construction is the wave of the future. Like catalytic converters for cars, emission control systems for factors, LEED construction will likely be a requirement for our society rather than a preference utilized by those who are environmentally-conscious. Contractors will need to learn and understand how this process works to be effective and profitable.

The benefits of this type of construction are significant if the systems are regularly maintained. Just like the University of Baltimore School of Law building, one can have a building that is efficient, environmentally friendly, and still look fantastic. But, it does take work to keep it maintained and efficient.

As a contractor, the key in this type of construction is continuous communication. Understanding the planning, the process and each respective contractor's responsibilities is imperative. While there is plenty of planning in normal construction, it is even more important in LEED construction. Ensure the correct materials, as the correct construction process could make or break a LEED certification. Having clear documentation of the role of each party and the materials that are required on the job before the job starts will better the chances of a smooth and timely build and better the chances of achieving the desired LEED certification. It will also better the chances of avoiding a future dispute. Just like typical construction, it is all about clear contracts, meeting deadlines, and effective execution.

So, what happens when a job "goes south?" Well, that will have to wait for the next segment of a series of articles from Leder & Hale, PC.

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.

Thomas W. Hale, a founder of Leder & Hale, PC, has over 15 years of experience in construction disputes, toxic tort litigation, product liability litigation, and automotive-related disputes. He represents a wide variety of contractors, including small subcontractors to large developers and general contractors in disputes involving condominiums, townhouse communities, single family homes and commercial construction. He also represents a wide variety of defendants in cases involving lead paint, petroleum products, asbestos, chlorinated solvents, carbon monoxide, phosgene, arsenic, mold, and pesticides. Finally, he represents both car dealers and individuals involving disputes over automobiles, including sales of vehicles (also known as "lemon law cases") and disputes over repairs made on vehicles. He is a member of Maryland Defense Counsel, Defense Research Institute as well as the National Street Rod Association.

Andrew W. Gaudreau is an associate attorney at Leder & Hale, PC and the Chair of Maryland Defense Counsel's Programs and Membership Committee. His practice includes matters involving claims of toxic torts, premises liability and construction defects. He is a LEED Green Associate, a designation by the Green Building Certification Institute.

[19] *Southern Builders, Inc. v. Shaw Development, LLC*, In the Circuit Court of Maryland for Somerset County, Case No.: 19-C-07-011405.
[20] *Id*

Spotlights

Chambers USA 2018 Guide Names Goodell DeVries Top Ranking in Maryland & Nationwide

May 2018

Goodell DeVries is pleased to announce the firm has been ranked in the Chambers USA 2018 guide for Medical Malpractice, Insurance, Commercial Litigation, and Product Liability practice areas. The firm also has several attorneys ranked and recognized in the publication.

Chambers USA is an internationally distinguished ranking guide updated annually by 170 full time editors and researchers. The publication has been ranking law firms and individual lawyers since 1990 and covers 185 jurisdictions.

The following attorneys have been recognized in the Chambers USA 2018 guide:

Charles P. Goodell, Jr. — Product Liability & Mass Torts (USA-Nationwide), Senior Statesmen

Donald L. DeVries, Jr. — Healthcare: Medical Malpractice (Maryland), Band 1

Linda S. Woolf — Insurance (Maryland), Band 1

Kamil Ismail — Insurance (Maryland), Band 2

Kelly Hughes Iverson — Healthcare: Medical Malpractice (Maryland), Band 2

Thomas V. Monahan, Jr. — Healthcare: Medical Malpractice (Maryland), Band 2

Robert A. Limbacher — Product Liability & Mass Torts (USA-Nationwide), Recognized Practitioner

Marianne DePaulo Plant — Healthcare: Medical Malpractice (Maryland), Recognized Practitioner

Linda S. Woolf — Litigation: General Commercial (Maryland), Recognized Practitioner

Joseph B. Wolf — Insurance (Maryland), Associates to watch

Ted Dunlap, General Counsel for RTI Forensics, was elected to the Board of the Aviation Insurance Association as Director-Elect of the Attorney Division.

The Aviation Insurance Association (AIA) is an international, not-for-profit association dedicated to expanding the knowledge of and promoting the general welfare of the aviation insurance industry. AIA welcomes members of all facets of the aviation insurance industry, including such professionals as: agents/brokers, claims professionals, underwriters, and attorneys. https://aiaweb.org/Default.aspx

www.rtiforensics.com

GDLD Obtained Defense Verdict for Anne Arundel County OB/GYN Practice

April 2018

Craig B. Merkle and **Shannon M. Madden** obtained a defense verdict in the Circuit Court for Anne Arundel County on behalf of obstetrician Pablo Argeles, M.D., and Annapolis OB/GYN Associates. Plaintiffs alleged that the infant suffered a permanent brachial plexus injury in the setting of a shoulder dystocia. Mr. Merkle and Ms. Madden presented evidence that the delivering obstetrician did not apply traction at the time of delivery and that the maternal forces of labor likely caused the injury. The jury determined that the obstetrician did not breach the standard of care, and rendered a verdict for the defense.

Lengthy Inverse Condemnation Case Results in Verdict for the Town of Goldsboro

April 2018

In a case first filed in 2010 that had been to the Maryland Court of Appeals twice on preliminary matters, the Plaintiff, Gail Litz, alleged that the Town of Goldsboro and agencies of the State of Maryland had failed to address issues with septic systems in the Town in breach of a 1996 Consent Order resulting in contamination of Lake Bonnie, which was located on her Caroline County property. Plaintiff claimed that the devaluation of the property, and ultimately her loss of the property to foreclosure, constituted inverse condemnation and that she was entitled to be compensated for the loss. During a three-week trial in Caroline County Circuit Court, **K. Nichole Nesbitt** and **Joseph B. Wolf** demonstrated that although development of a solution to the septic issues in the Town was a long and arduous undertaking, the Town had complied with the 1996 Consent Order by continuously working with the State of Maryland and Caroline County to bring public sewer to the Town. A jury took less than three hours to return a verdict in favor of the Town, finding that the Town had not breached the 1996 Consent Order. The case is styled *Litz v. Maryland Department of the Environment, et al.* Caroline County Circuit Court Case No. 05-C-10-013616.

GDLD Obtains Writ of Certiorari in Appeal of Legal Malpractice Action

April 2018

On April 11, 2018, **Jeffrey J. Hines**, **Cheryl Zak Lardieri** and **Craig S. Brodsky** successfully petitioned the Supreme Court of Virginia for a writ of certiorari in a legal malpractice proceeding. In the legal malpractice case, the client alleged his former attorney committed malpractice while representing him during his Chapter 7 bankruptcy causing, among other items of damage, his discharge in bankruptcy to be denied. Both the United States District Court for the Eastern District of Virginia and the Circuit Court for the City of Alexandria held that the legal malpractice claim belonged solely to the bankruptcy trustee and that the client lacked standing to pursue his claim for legal malpractice. In addition, both trial courts denied the client's motion to amend his complaint in which he sought to clarify his allegations of negligence. In their Petition for Appeal, GDLD's team argued the cause of action accrued after the filing of the Chapter 7 Petition and, therefore, he had standing to pursue the claim. The team also argued the trial court deprived the client of his right to a jury trial when it held as a matter of law that the client lacked standing and that the trial courts abused their discretion when denying the motions to amend the complaint.

MDC 2017–2018 Programs

June 15, 2017, 12 pm — Lunch and Learn 1

"Don't Forget Causation"
Speakers: John T. Sly & Hon. Julie R. Rubin
Sponsors: Planet Depos, Social Detection, SEA Limited

July 20, 2017, 12 pm — Lunch and Learn 2

Social Media & Litigation
Speakers: Marisa Trasatti & Scott Catron
Sponsors: Social Detection, Gore/Veritext

August 24, 2017, 12 pm — Lunch and Learn 3

Data Security & Breach Response for Law Firms
Speakers: Veronica Jackson, Esq. & Mutungi Tumusiime
Sponosrs: Gore/Veritext, National Forensic Consultants

Sept. 12, 2017, 12 pm — Lunch and Learn 4

The Future of Autonomous Vehicles & the Impact on Litigation
Speakers: Erin Cancienne, Esq. & Tracie C. Eckstein
Sponsors: Gore/Veritext, Rimkus Consulting Group

Sept. 26, 2017, 5:30 pm — Past Presidents Reception

Miles & Stockbridge P.C.

Oct. 19, 2017, 12 pm — Lunch and Learn 5

New Concepts in Workers' Compensation
Speakers: Wendy Karpel, Esq. & Mike Dailey, Esq.
Sponsor: Exam Partners

Nov. 16, 2017, 12 pm — Lunch and Learn 6

The Importance of Forensic Engineering and Expert Witness Testimony in Admiralty and Maritime Law
Speakers: Walter Laird, PE, CMI, CFI & Steven E. Leder, Esq.
Sponsor: Forcon International

Dec. 14, 2017, 12 pm — Lunch and Learn 7

Errors in the Operating Room — human factors in medical litigation
Speaker: Lindsay O'Hara Long, Ph.D.
Sponsor: Exponent

Jan. 12, 2018 — THE FALL DEFENSE LINE

Jan. 25, 2018, 12 pm — Lunch and Learn 8

"It's Not the Knot... it's a function of the fundamental principles involved"
Speaker: Timothy W. Ott
Sponsors: Nelson Forensics, Irwin Reporting

Jan. 29, 2018, 8 am — Deposition Boot Camp

8 am – 6 pm
Location: Semmes Bowen & Semmes
Sponsors: Planet Depos, Rimkus Consulting

Feb. 22, 2018, 12 pm — Lunch and Learn 9

Hacking and Wire Fraud: 99.9% of all new information is stored digitally and information is the new currency.
Location: Pessin Katz
Speaker: Stephan Y. Brennan
**Minnesota Lawyers Mutual has arranged for 1.0 hour of CLE credit in VA and PA*
Sponsor: Minnesota Lawyers Mutual

March 19, 2018, 5:30 pm — Awards Dinner

5:30 pm – 7:30 pm
Location: Semmes Bowen & Semmes
Keynote Speaker: Bruce Elliott, WCBM Radio Personality
The Honorable Herbert F. Murray Lifetime Achievement Award and
The John H. Mudd Lifetime Achievement Award
Sponsor: rti

March 29, 2018, 12 pm — Lunch and Learn 10

In the Courtroom: Nuts & Bolts
Location: Semmes Bowen & Semmes
Speaker: Judge Matricciani (Ret.) — WTP
Sponsor: ADR of MD (Sustaining Member Benefit)

March 30, 2018 — THE WINTER DEFENSE LINE

April 2018 — Happy Hour

Organizer: Dwight Stone
Location: TBD

April 5, 2018, 12 pm — Lunch and Learn 11

Advocacy in Mediation
Location: Semmes Bowen & Semmes
Speakers: The Honorable Martin P. Welch (Ret.), The Honorable Gale E. Rasin (Ret.) and The Honorable Daniel M. Long (Ret.)
Sponsor: The McCammon Group

April 30, 2018, 8:00 am — Trial Academy

8:00 am – 6:00 pm
Location: Semmes Bowen & Semmes

April 30, 2018 — THE SPRING DEFENSE LINE

May 16, 2018, 9:00 am — Strategic Planning Session

9:00 am – 12:00 pm
Location: Ellin & Tucker
Facilitators: Steve Manekin (Ellin & Tucker) & Joseph Jagielski (MDC Historian)

May 17, 2018, 12 pm — Lunch and Learn 12

"Use of Computer Simulation in Litigation – with emphasis on Vehicles, Humans, and Structures"
Location: Semmes Bowen & Semmes
Speakers: John Zolock, PhD, PE and Sri Danthurthi
Sponsor: Exponent

June 1, 2018 — THE SUMMER DEFENSE LINE

June 6, 2018, 5:30 pm — Annual Meeting & Crab Feast

Location: Nick's Fish House

June 20, 2018, 12 pm — Lunch and Learn 13

Accident Reconstruction
Location: Semmes Bowen & Semmes
Speaker: Tracie Eckstein
Sponsor: Rimkus
(Beginning of John Sly's administration)

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