

THE LITIGATION NEWSLETTER

Fall

1999

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CHAIR'S LETTER

John Mucha III

In our competitive world, where building and maintaining a healthy law practice can be so demanding, it is easy to lose sight of the role we as lawyers play in building and maintaining healthy communities and a healthy society. Certainly, if one listens to the many demeaning lawyer's jokes circulating all around us, one cannot help but feel that just about the last things that most people associate with lawyers are generosity and a concern for others. These jokes reflect and reinforce the popular cultural perception that lawyers are only out for themselves, and will do just about anything to come out on top. Sadly, this grotesque perception of attorneys can only have a corrosive effect on the public's respect for the legal system.

We simply cannot allow the public to stop putting trust in the courts or in us as officers of the courts if we want to maintain public faith in the fairness of our system, which is so essential to a cohesive society. While few lawyers think of themselves in the same way that the general population feels, and while relatively few lawyers deserve the negative tag, we as a whole do not do enough in an overtly positive way to dispel this negative image. Even though most of us are not causing damage to our profession, too many of us are not deliberately seeking to enhance it either.

To overcome this cynical and degrading attitude toward our profession, it is critical for us as attorneys to actively support programs which allow us to give back to our communities. One such program which the Litigation Section proudly supports is the Access to Justice Program, administered by the State Bar of

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PROFESSIONAL DESIGNATIONS AND APPROPRIATE METHODOLOGIES: ITEMS TO CONSIDER WHEN NAMING AN ECONOMIC EXPERT

Glenn C. Sheets, CPA

*Managing Director of the Litigation Consulting Services Group
for Stout Risius Ross, Inc.**

“So far, so good” you say to yourself as you review the file on a rather complex breach of contract matter. Your client has been very cooperative and appears to understand your desire to advocate the best possible case – while being fiscally responsible of course! You notice on your calendar that the deadline is nearing for the naming of experts. Reviewing the pleadings, you take careful note of the claims for damages; out-of-pocket costs, lost profits, diminution of value, lost opportunity, and why not – a claim for consequential damages (as you scribble the word

“foreseeable?” next to this claim). Yes, you sigh, it does appear necessary to name an economic expert to opine on the reasonableness of the monetary damages. With that decision, you resort to your trusty “experts” file, which contains the promotional literature you have received over the years, as well as notes to yourself on several experts that you have encountered in the past. As you read the names of the experts, you come across those dreaded three-letter designations after each

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Michigan. This program seeks to make legal services available to all persons regardless of wealth by supporting low income legal aid and pro bono programs, and it serves as an important financial resource for the community based organizations out on the front lines that are providing legal services to persons who cannot otherwise afford them.

I encourage all members of the Litigation Section to take stock of their own measure of community awareness and involvement. Support your local legal aid and pro bono program, or donate to the Access to Justice Program. Don’t know how to get involved? Call the State Bar and

ask for a copy of the Pro Bono Reference Manual. Give a little of your time, skills and resources toward helping someone less fortunate, and let others know that attorneys in the state of Michigan care. As the ads say: just do it.

JM

Postscript

This is my last column as Chair of the Litigation Section. It has been a tremendous honor and pleasure serving in this capacity, and I thank you all for the privilege. I look forward to another exciting year of growth of the Section under the guiding hand of our new Chair, Ted Farmer.

JM

Professional Designations and Appropriate Methodologies –

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name – CPA, ASA, MAI, CFA, CFE, CVA, CBA, CMA, CMC. “So far, so good!” you mumble to yourself.

In the last issue of this newsletter (Summer, 1999), Bob June wrote about the admissibility of expert testimony under *Kumho Tire*¹ and Michigan Law. Coincidentally, I wrote a brief article for *The Leaders’ Edge*, the newsletter published by the Michigan Association of Certified Public Accountants (August/September, 1999), on the impact *Kumho Tire* may have on economic experts. In that article, I reported that this recent decision by the United States Supreme Court reinforced the need for an economic expert to convince two parties, the “gatekeeper” and the trier of fact, that his opinions are relevant and reliable. In *Kumho Tire*, the Court held that “the *Daubert*² ‘gatekeeping’ obligation, requiring an inquiry into both relevance and reliability, applies not only to ‘scientific’ testimony, but all expert testimony.” Economic experts should expect increased challenges to the admissibility of their testimony in federal and state courts.

Economic experts frequently offer opinions based upon technical or specialized knowledge. Whether or not this knowledge is deemed “scientific” no longer appears to be relevant, when the trial court considers the admissibility of the expert’s testimony. Rather, the courts will seek to determine the appropriateness of the methodology used, the substance of the information relied upon, and the applicability of the expert’s experience, skill, and training to the case at hand. As a result, economic experts should be prepared to defend their methodology, as well as information gathered and relied upon.

When measuring economic damages, financial experts often employ methodologies that incorpo-

rate numerous underlying practices found in the accounting, financial, and economic communities. Accounting, the language of business, continues to evolve through the development of generally accepted accounting principles (GAAP). These principles are a result of the accounting, business, investment, and regulatory communities’ desire to have a consistent and reliable practice of reporting financial information. The financial community interprets financial information to determine if stakeholder value is maximized. Economics involves the study of the production, distribution, and allocation of scarce resources. All of the above areas are continually being developed and are relied on by experts in the quantification of economic damages.

As the methodologies utilized by economic experts come under more intense scrutiny by the “gatekeeper,” attorneys should evaluate the relevance and reliability of the methods proffered by an economic expert prior to naming them as an expert witness. One way of gaining comfort that your economic expert is not about to employ “junk science” in reaching their opinions is to inquire as to what designations they maintain. Most professional organizations that grant a designation or certification have minimum standards that must be met and maintained by the member in order to “wear” the designation. Inquiries made to these professional organizations will give you a better understanding of the standards and accepted methodologies that its members must adhere to when opining on economic damages. Interviews with a potential expert should answer the following questions:

What designations does the expert maintain?

What was required to obtain the expert’s designation?

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Professional Designations and Appropriate Methodologies –

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What is required to maintain the expert's designation?

Does the expert actively participate in the professional organization?

Why did the expert choose that particular designation?

What minimum standards are required to be followed when opining on economic damages?

What literature, published or recognized by the professional organization, is available to confirm the appropriateness of the methods to be employed by the expert?

Has the methodology utilized by this expert been accepted by the court previously?

Has the expert ever had their opinions denied or limited by the court due to the methodology employed?

Are there other appropriate methods that can be utilized to reach a conclusion on economic damages?

Why is one method preferred over another?

Does the expert have a sample or example of how their methodology was used in a similar matter?

Does the expert have a reference that you can contact to discuss the appropriateness of the expert's methodology?

With this information in hand, an attorney should be able to make an appropriate decision when naming an expert witness. Although an economic expert must convince two parties (the "gatekeeper" and the trier of fact) that their opinions are relevant and reliable, there is actually a third party – you! Stepping into the shoes of the "gatekeeper", *at the time you name your economic expert*, is one way to prevent the loss of expert testimony when you need it the most – *assisting the trier of fact*. Additionally, involving your expert early in the dispute process will enhance your advocacy of your client's position, as well as allowing you to develop a cost-effective discovery approach. Doing so will ensure that both relevant and reliable information is gathered to substantiate your expert's opinions.

The following tables present a compilation of the most common designations and professional organizations that you may encounter when evaluating an economic expert.

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Professional Designations and Appropriate Methodologies –*Continued from page 4***ASA****Accredited Senior Appraiser**

American Society of Appraisers

International Headquarters

P.O. Box 17265

Washington D.C. 20041-0265

Telephone 703-478-2228

Facsimile 703-742-8471

E-mail – asainfo@appraisers.orgWebsite – www.appraisers.org

Referral Service

Telephone (800) ASA-Valu

Website – “Find an Appraisal Expert”

The American Society of Appraisers is an organization of appraisal professionals interested in the appraisal profession. The Society is committed to fostering professional excellence in its membership through education, accreditation, publication and other services.

Members – over 6,500

Requirements – To receive the accreditation the appraiser must pass examinations, submit representative appraisal reports for peer review, and be screened for his or her ethical behavior. ASA has a mandatory reaccreditation process whereby designated members must regularly submit evidence of professional growth through participation in professional activities and continuing education.

Classes – **Accredited Member** designation (AM), an individual must have at least two years of full-time equivalent appraisal experience and a college degree or its equivalent.

– **Accredited Senior Appraiser** designation (ASA), an individual must have a minimum of 5 years of full-time equivalent appraisal experience and a college degree or its equivalent.

CBA**Certified Business Appraiser**

Institute of Business Appraisers (IBA)

P.O. Box 1447

Boynton Beach, Florida 33425

Telephone 561-732-3202

Facsimile 561-732-4304

E-mail – iba@instbusapp.orgWebsite – www.instbusapp.org

Referral Service

Website – “Find an Appraiser”

The Institute of Business Appraisers is a pioneer in business appraisal education and certification. IBA is the original professional society devoted exclusively to the appraisal of closely held businesses.

Members – over 3,000

Requirements – To receive the accreditation the accountant must meet certain educational requirements, pass examinations, and submit for review two formal/comprehensive business appraisal reports.

Classes – none

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Professional Designations and Appropriate Methodologies –*Continued from page 5***CFA*****Chartered Financial Analyst***

Association for Investment Management and Research (AIMR)

P.O. Box 3668

560 Ray C. Hunt Dr.

Charlottesville, Virginia 22903-0668

Telephone 800-247-8132

Facsimile 804-951-5262

E-mail – info@aimr.org

Website – www.aimr.org

Referral Service – none available

The Association for Investment Management provides knowledge to financial and investment professionals while promoting a high level of standards, ethics, and professionalism within the investment industry. The Chartered Financial Analyst (CFA) Program is a globally recognized standard for measuring the competence and integrity of financial analysts. Its curriculum develops and reinforces a fundamental knowledge of investment principles.

Members – over 36,000**Requirements** – To receive the accreditation, the appraiser must pass three sequential examinations and meet certain educational and work experience requirements.**Classes** – *Regular***Classes** – *Affiliate***CFE*****Certified Fraud Examiner***

Association of Certified Fraud Examiners

The Gregor Building

716 West Avenue

Austin, Texas 78701

Telephone 800-245-3321 (USA & Canada only)

512-478-9070

Facsimile 512-478-9297

E-mail – info@cfenet.com

Website – www.cfenet.com

Referral Service

Website – “Find a Fraud Examiner”

The Association of Certified Fraud Examiners is an international, professional organization dedicated to fighting fraud and white-collar crime. The professional organization is dedicated to educating qualified individuals (Certified Fraud Examiners), who are trained in the highly specialized aspects of detecting, investigating, and deterring fraud and white-collar crime.

Members – over 25,000**Requirements** – Each member of the Association designated a Certified Fraud Examiner (CFE) has earned certification after an extensive application process and upon passing the uniform CFE Examination.**Classes** – *Certified Fraud Examiner (CFE)**Associate**Student Associate**Continued on page 7*

Professional Designations and Appropriate Methodologies –*Continued from page 6***CMA*****Certified Management Accountant***

Institute of Management Accountants (IMA)

10 Paragon Drive

Montvale, New Jersey 07645-1759

Telephone 800-638-4427

Facsimile 201-573-8438

E-mail – ima@imanet.orgWebsite – www.imanet.org

Referral Service – none available

The Institute of Management Accountants is the leading professional organization devoted exclusively to management accounting and financial management professionals. The goal of the CMA Program is to foster the development of management accountants who have a strong technical background in accounting and finance.

Members – approximately 80,000

Requirements – To receive the accreditation the accountant must meet certain experience requirements and pass an examination. CMAs must continue to meet professional requirements necessary to retain their certificates in good standing.

Classes – *Regular Members*

Associate Membership

Student Membership

International Member-at-Large

Full Time Educators

CMC***Certified Management Consultant***

Institute of Management Consultants (IMC)

1200 19th Street, N.W., Ste 300

Washington D.C. 20036-2422

Telephone 800-221-2557

Facsimile 202-857-1891

E-mail – office@imcusa.orgWebsite – www.imcusa.org

Referral Service

Website – “Find a Consultant”

The primary purpose of the Institute of Management Consultants is to serve as a voice for those in the field and to establish professional and ethical standards for management consultants.

Members – over 20,000

Requirements – A Certified Management Consultant must have at least three years of experience in the full-time practice of management consulting with major responsibility for client projects during at least one of those years. The CMC is examined to confirm understanding of the Code of Ethics and attests annually to abide by it.

Classes – *Regular Member*

Certified Member

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Professional Designations and Appropriate Methodologies –

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CPA

Certified Public Accountant

American Institute of Certified Public Accountants
(AICPA)

1211 Avenue of the Americas

New York, New York 10036-8775

Telephone 212-596-6200

Facsimile 212-596-6213

E-mail – memfat@aicpa.org

Website – www.aicpa.org

Referral Service –

Inquiries should be made to the state society
(Michigan Association of CPAs).

The American Institute of Certified Public Accountants is the national, professional organization for all Certified Public Accountants. Its mission is to provide members with the resources, information, and leadership that enable them to provide valuable services in the highest professional manner to benefit the public as well as employers and clients. The AICPA establishes professional standards; assists members in continually improving their professional conduct, performance and expertise; and monitors such performance to enforce current standards and requirements.
Members – over 330,000

Requirements – To receive the accreditation, the accountant must possess a CPA certificate, pass an examination, and meet continuing education requirements.

Classes – *Members*
Associates

Accreditation in Business Valuation – CPA / ABV

*Certified Public Accountant /
Accredited in Business Valuation*

Requirements – To receive the accreditation the accountant must meet the CPA designation requirements and pass an additional examination.

CVA

Certified Valuation Analyst

The National Association of Certified Valuation Analysts
(NACVA)

1245 East Brickyard Road

Suite 110

Salt Lake City, Utah 84106

Telephone 801-486-0600

Facsimile 801-486-7500

E-mail – nacva@nacva.com

Website – www.nacva.com

Referral Service

Website – “Find a CVA”

“Business Valuation Referral Request Form”

The National Association of Certified Valuation Analysts is an organization of professionals providing business valuation services. The Association supports its members by providing them with a variety of products, services and technical training. In addition, they offer an accreditation program to members who are Certified Public Accountants and government-employed valuers who meet the rigorous qualifications and standards of professional excellence in business valuations, as established by the Association’s Executive Advisory Board.

Members – over 4,000

Requirements – To receive the accreditation, the practicing professional must be a Certified Public Accountant (CPA) licensed in his or her state and be a member of the local CPA society or the American Institute of Certified Public Accountant (AICPA). Continuing education requirements are needed for continuation of designation.

Classes – *Practitioner Membership*
Professional Membership

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Professional Designations and Appropriate Methodologies –*Concluded from page 8***MAI****Member, Appraisal Institute**

American Institute of Real Estate Appraisers

875 North Michigan Avenue, Suite 2400

Chicago, Illinois 60611

Telephone 312-235-4100

Facsimile 312-222-0752

E-mail – jgroff@appraisalinstitute.orgWebsite – www.appraisalinstitute.org

Referral Service

Website – “Find an Appraiser”

The MAI membership designation is held by appraisers who are experienced in the valuation and evaluation of commercial, industrial, residential, and other types of properties, and who advise clients on real estate investment decisions.

Members – over 19,000

Requirements – Appraisal Institute professional membership designations are conferred on individuals who have met stringent educational requirements and have demonstrated appraisal experience. Once designated, members participate in a program of continuing education.

Classes – *Active Member**Honorary Member**Inactive Member**Life Member**Semi-Retired Member**Retired Member***Endnotes**

- * *Glenn C. Sheets, CPA* is Managing Director of the Litigation Consulting Services Group for *Stout Risius Ross, Inc.* and is vice-chairman of the Litigation and Business Valuation Committee for the Michigan Association of Certified Public Accountants.

Stout Risius Ross, Inc. is a financial advisory services firm that provides litigation consulting, and economic damage quantification, business valuation, real estate and machinery & equipment appraisal, turn-around management, and corporate finance services. The firm's website address is www.gosrr.com.

The author gratefully acknowledges the contributions of Ann S. Planck for her compilation of professional designations and related professional organizations.

1. *Kumho Tire Co, Ltd v Carmichael*, ___ U.S. ___, 119 S.Ct. 1167; 143 L.Ed.2d 238 (1999).
2. *Daubert v Merrell Dow Pharmaceuticals*, 509 U.S. 579, 586-89; 113 S.Ct. 2786; 125 L.Ed.2d 469 (1993).

THE JUROR EXPERIENCE

By: *Ted Farmer*

Active Chair of the Litigation Section

Just this August, for the first time, I was a juror! I know some of you also have sat as jurors, but I have to share my experience with you. I decided to thoroughly enjoy this life experience and to learn from it. I also decided to note and remember my reactions to things so that I would remember them when next I was the lawyer instead of the juror. I intend here to be somewhat hyperbolic because it's a more entertaining "fish story" that way. I figure, however, my reactions are nonetheless worth noting; if I reacted this way probably many other jurors do too.

Upon arrival my first morning, the jury clerk was nice enough and we saw a slow movie about Court. I'm sure the Court Staff meant well and it was a friendly place. Still, I felt somewhat unimportant and unappreciated. I really didn't expect a hearty welcome and continental breakfast. When we were eventually herded to the courtroom, I again hoped for the grand welcome and continental breakfast. Instead, I was sworn in and asked unimportant questions like: do you have relatives in law enforcement? (We were trying a third-party auto negligence case with civilian witnesses.) I really wanted the lawyers to gush over me, not treat me like the \$15/day royalty that I was. After all, us jurors are getting peanuts to come in here, be inconvenienced, and to help you guys resolve your petty dispute while the work at our offices gets neglected!

Were the attorneys nervous at first? I couldn't tell; I was too busy being nervous myself! Once called into the jury box, the gravity of actually having to sit in judgment of someone's dispute befell me. I would probably really like an attorney who acknowledged my probable nervousness and thanked me for taking on this responsibility.

Instead, at that time, while I'm being nervous, these guys started asking unimportant questions of off written outlines. That's not what I needed. I needed them to try to establish rapport with me, to make me feel like part of the club. I needed them to open up and begin persuading me about their case. I hoped they would display such confidence and rapport-building skills that we could bond, and so that I could be won over by their obvious skill in assessing cases, and in their conviction in this particular fine and meritorious case they were presenting. Boy, is *voir dire* an important first meeting!

About those opening statements. We saw a movie. The judge told us about opening statements. We were listening both times. Why do attorneys insist on telling us a third time what the opening statement is for? Even without the movie or judge, we all watch TV. We know what the opening statement is for. This was when I hoped the attorneys would speak earnestly and honestly with conviction about their case. Please do that and skip the preliminaries.

After not trying to build rapport with me, the attorneys in opening statements then spoke of unimportant, unrelated stuff. They could have won me over right then by telling me in straightforward fashion, without attitude, about their case. I realized that because of its position early in the case, opening statement may be the time when an attorney's most effective public speaking is critical. Be brief. Say what you mean to say simply and clearly with well chosen words. I know attorneys are supposed to repeat important stuff, but don't

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be nervous and repeat stuff while you think of what to say next. We were listening the first time. We know what you are doing. Be still a second, and think and we will respect you.

Next came live witnesses who danced with the attorneys. I felt like a wallflower. Now I know that despite witness preparation, many witnesses will forget your instruction to face the jury and they will follow their natural tendency to respond turned to the questioner. As a juror, however, I got a little miffed at the attorneys and witnesses. The witnesses were only a few feet from us, but they turned their backs to us. It was like excluding us from a conversation group at a cocktail party. I wanted to yell, "HELLOOOOO!!! WE'RE OVER HERE!!!" Attorneys, please impress upon your witnesses who it is they are really there to impress.

As for closing arguments, three points. Again, this is critical public speaking. This is the time to:

1. Tell us what you're going to tell us;
2. Tell it to us;
3. Tell us what you told us.

Again, don't repeat while you think. Believe in what you say. This is easy if you talk about what

is good in your case. The simple, pertinent lesson I have learned as a lawyer is that it is easy to speak with conviction if you believe in what you are saying.

One final point, and many may disagree with this. When an opponent makes a really good point, I acknowledge that point and respond to it. Obviously there are two sides; that's why you are trying the case. If the other guy makes a good point, you can be sure that the jury heard it. If you deal with it and they like you and trust you, you've given them a way to rationalize it.

I hope some of this rings true and helps you in your next trial. I may in my next column take you into the jury deliberations, which was a gratifying, consensus-building process to participate in. I chose to avoid being the foreperson so I could just be one of the gang. Having done that, and having reached a verdict, I'm not quite ready yet to tell about our process. I would somehow feel that I was breaking my secret promise to my new friends. Perhaps in my next column, I will get over that reticence, and I'll share with you at least what I remember about what impressed and convinced us, and how we reached decisions. I invite you to write in and share your similar experiences.

WHAT YOU MISSED AT THE LITIGATION SECTION'S SUMMER CONFERENCE

*Brad H. Sysol * Miller, Johnson, Snell & Cumiskey, P.L.C.*

The Litigation Section held its Fourth Annual Summer Conference at Treetops Sylvan Resort in Gaylord, Michigan, on August 13 & 14. Participants enjoyed beautiful scenery, incredible golf, and of course, an insightful panel of speakers which included Professor Arthur R. Miller, Honorable Virginia Morgan, Honorable Philip D. Schaefer, and Honorable Alton T. Davis. The topic of discussion was "Winning Before Trial."

Arthur R. Miller, the renowned professor from Harvard Law School, is nationally known for his work on court-procedure, and his appearances on ABC's Good Morning America as the program's legal editor. Professor Miller spoke about personal jurisdiction, and proposed amendments to the Federal Rules of Civil Procedure. The key points of his presentation are discussed below.

Honorable Virginia M. Morgan, a United States Magistrate Judge, spoke about trends in federal court jurisdiction. An outline provided by Judge Morgan is reprinted at pages 14 to 17.

Honorable Philip D. Schaefer, the Chief Judge of the Kalamazoo County Circuit Court, spoke about successful motion practice in state court. An outline provided by Judge Schaefer is reprinted at pages 18 to 19. Honorable Alton T. Davis, the Chief Judge of the 46th Circuit, also added judicial perspective on state motion practice.

Personal Jurisdiction – A Refresher Course and a Look Ahead:

In what felt like a drive down memory lane, Professor Miller began his presentation with a lecture on a constitutional classic – personal jurisdiction. With his trademark cadence, and a command of facts not found in the opinions, Professor Miller explained the holdings of several key U.S. Supreme Court decisions regarding personal jurisdiction, including *International Shoe*, *Hanson*, *World-Wide Volkswagen*, *Asahi Metal*, and many more. The only thing missing was the "Socratic" method.

Professor Miller provided a two-pronged analysis for any personal jurisdiction problem. First, it must be decided whether the defendant fits within the state's long-arm statute. This analysis is done even if in federal court under diversity jurisdiction. If in federal court under federal question jurisdiction, then apply the federal long-arm statute or FRCP 4(K).

Second, it must be decided whether application of the state's long-arm statute is constitutional. As stated in *International Shoe*, does the defendant have certain minimal contacts with the forum so that it is fair play and substantial justice to require defendant to be hauled into that forum's court. Professor Miller divided "contacts" into four categories:

- (1) Defendant has continuous contact with the forum, and the cause of action arises from the contact – the forum state has personal jurisdiction over defendant;

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- (2) Defendant has continuous contact with the forum, but the cause of action does not arise from the contact - the forum state still has personal jurisdiction over defendant (i.e., general jurisdiction);
- (3) Defendant's contacts are isolated and sporadic, and the cause of action arises from that contact - the forum state has personal jurisdiction over the defendant sometimes (i.e., specific jurisdiction or long-arm jurisdiction)(*See Hanson and Worldwide Volkswagen* for cases explaining when such contacts are not enough for personal jurisdiction); and
- (4) Defendant's contacts are isolated and sporadic, but the cause of action does not arise from that contact – the forum state does not have personal jurisdiction over defendant.

Professor Miller then discussed the unresolved “stream of commerce” problem, and applied it to issues being raised with e-commerce. In *Asahi Metal*, the Supreme Court considered how far from the place of production the stream of commerce would extend personal jurisdiction. The Supreme Court failed to reach a majority on the issue. Four of the justices sided with Justice O'Connor, who wrote that placing a product in the stream of commerce alone was not enough, and that additional contact with the forum was necessary for personal jurisdiction. Four other justices, however, sided with Justice Brennan, who wrote that merely placing a product into the stream of commerce is enough for personal jurisdiction. A majority of states follow the Justice O'Connor wing of the Supreme Court.

Next, Professor Miller took a look ahead at e-commerce, the current hot issue in personal jurisdiction. The issues presented by e-commerce are essentially stream of commerce issues. Professor Miller opined that whether a forum state has personal jurisdiction over an entity on the Internet probably depended on the type of website. He then divided websites into three categories:

- (1) Informational websites – no personal jurisdiction in stream of commerce;
- (2) Website selling products – gray area; may be personal jurisdiction in stream of commerce (really *Volkswagen* problem); and
- (3) Interactive Website – probably will be personal jurisdiction within the stream of commerce.

Proposed Changes to the Federal Rules of Civil Procedure

Professor Miller, who is well known for his extensive work on court-procedure, also discussed proposed amendments to the Federal Rules of Civil Procedure. In particular, the proposed amendments directed at preventing, or at least limiting, “discovery abuse,” which Professor Miller defined as “what your opponent is doing to you.”

The first proposed amendments concern FRCP 26(a)(i.e, initial disclosures). The amended rule would eliminate the opt-out provision, making initial disclosures mandatory throughout the nation, except in limited proceedings such as habeas corpus proceedings. The amended rule, however, would also narrow the scope of initial disclosures. Instead of being required to disclose all information “relevant to the disputed facts alleged,” parties will only be required to provide “discoverable

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information supporting its claims or defenses.” In other words, parties will only be required to disclose information that supports the party’s position, not information that hurts the party’s position.

The second proposed amendment Professor Miller discussed concerned FRCP 26(b) (i.e., the scope of discovery). This controversial proposal would change the scope of discovery from “any matter, not privileged, which is relevant to the

subject matter involved in the pending action” to simply “any matter, not privileged, that is relevant to the claim or defense of any party.” According to Professor Miller, this change will limit discovery to matters actually set forth in the pleadings, and nothing more. Professor Miller believes this change will: (1) compel plaintiff’s attorneys to bring every conceivable claim in the complaint so as to broaden the scope of discovery, and (2) compel defense attorneys to object more often to discovery requests, thus increasing motion practice. Certainly, the meaning of any amendments to the scope of discovery will be thoroughly litigated.

**State Bar of Michigan
Civil Litigation • Summer Litigation Conference
August 13-14, 1999**

TRENDS IN FEDERAL COURT JURISDICTION AS REPRESENTED BY RECENT SUPREME COURT DECISIONS

by: Honorable Virginia M. Morgan

Acknowledgement is given to Professor Chemerinsky for his work in identifying and highlighting these opinions for the benefit of the federal judiciary.

I. Eleventh Amendment and
State Sovereignty Immunity

A. Availability of Form

Alden v. Maine, 119 S. Ct. ____ (June 23, 1999). Because of state sovereign immunity, a state government may not be sued in the state courts of Maine for violating the Fair Labor Standards Act unless it consented; compare with *Seminole Tribe v. Florida*.

B. Power of Congress under § 5 of the
Fourteenth Amendment

Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank, 119 S. Ct. ____ (June 23, 1999). The Eleventh Amendment bars a claim against a state for violating patents. The Patent and Plant Protection Remedy Clarification Act is an unconstitutional exercise of congressional authority under § 5 of the Fourteenth Amendment in authorizing federal court jurisdiction for such claims against state governments.

College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board, 119 S. Ct.

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Trends in Federal Court Jurisdiction –
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____ (June 23, 1999). The Eleventh Amendment bars a claim against a state for violating the Lanham Act. The Trademark Remedy Clarification Act is an unconstitutional exercise of Congress's authority under § 5 of the Fourteenth Amendment in authorizing federal court jurisdiction for such claims against state governments.

II. Civil Rights

A. Title VII

Kolstad v. The American Dental Association, 119 S. Ct. ____ (June 22, 1999). An employer's conduct need not be egregious in order to justify a punitive damage award. Egregious behavior may provide a valuable means by which an employee can show the "malice" or "reckless indifference" needed to qualify for such an award. Employer may not be held vicariously liable for punitive damages the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith effort to comply with Title VII.

B. Title IX

Davis v. Monroe County Board of Education, 119 S.Ct. ____ (May 24, 1999). A school board may be liable under Title IX for responding with deliberate indifference to a student's repeated complaints about sexual harassment perpetrated by another student if actual knowledge and the harassment is severe and pervasively sufficient to interfere with educational opportunities.

C. Americans with Disabilities Act (ADA)

Olmstead v. L.C., 119 S.Ct. ____ (June 22, 1999). The public service portion of ADA compels states

to provide treatment and habilitation for mentally disabled in community placement if that is medically advisable and reasonable in terms of costs.

Sutton v. United Airlines, Inc., 119 S.Ct. ____ (June 22, 1999). Individuals whose vision has been corrected so that it does not interfere with major life activities do not have a disability within the meaning of the Americans with Disabilities Act. Therefore, the failure to hire them based on their impaired vision does not violate that Act.

Albertson's Inc. v. Kirkenberg, 119 S.Ct. ____ (June 22, 1999). Individual who has a condition that does not interfere with the major life activities is not disabled within the meaning of the ADA. Certification by the Dept. of Transportation does not create a duty for the employer to hire the individual.

Murphy v. UPS, 119 S.Ct. ____ (June 22, 1999). Mechanic with hypertension who functions normally with medication is not deemed disabled under the ADA. His impairment should be evaluated taking into account any mitigating or corrective measures.

III. Federal Court Procedure

Murphy Bros. Inc. v. Michetti Pipe Stringing Inc., 119 S.Ct. 1322 (1999). The 30 day removal period begins to run when defendant is formally served with copy of complaint by certified mail not when the defendant received a faxed file-stamped copy of the complaint; emphasizes importance of formal service of process.

Ruhrgas v. Marathon Oil Co., 119 S.Ct. 1563 (1999). A federal district court may dismiss a removed case for want of personal jurisdiction without first deciding that it has subject matter jurisdiction. Both are threshold requirements and can be decided in either order.

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Trends in Federal Court Jurisdiction –
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Cunningham v. Hamilton County, 119 S.Ct. 1915 (1999). Order imposing discovery sanction on attorney under Fed. R. Civ. P. 37(a)(4) is not an “immediately appealable” final decision under 28 U.S.C. §1291, under either the final judgment rule or collateral order doctrine, even if the attorney has been disqualified from representing the party in the case.

Jefferson County, Ala. v. Acker, 119 S.Ct. ____ (June 21, 1999). The Tax Injunction Act does not prevent a federal court from considering a county’s occupational tax levied upon the pay of an Article III judge. The county’s occupational tax does not violate the Supremacy Clause.

Reno v. American-Arab Anti-Discrimination Committee, 119 S.Ct. 936 (1999). Federal law precluding judicial review of deportation orders does not violate due process. Deciding an issue not raised or briefed, the court held that undocumented aliens cannot raise claim of selective prosecution.

IV. Individual Rights

A. Due Process

City of West Covina v. Perkins, 119 S.Ct. 678 (1999). When the police seize property for a criminal investigation, due process does not require them to provide the owner with notice of state law remedies which are established by published, generally available state statutes and case law.

Conn. v. Gabbert, 119 S.Ct. 1292 (1999). The execution of a search warrant on an attorney at the time the attorney’s client is appearing before a grand jury does not violate the attorney’s Fourteenth Amendment right to practice law, even if the search prevents the attorney from advising his client regarding her Fifth amendment privilege against self-incrimination.

American Manufacturers Mutual Insurance Co. v. Sullivan, 119 S.Ct. 977 (1999). Issue of what constitutes state action so as to implicate requirement of due process. Injured employees do not have a due process right to notice and hearing before their private worker’s compensation insurer suspends its payment of disputed medical bills pending a review of the reasonableness and necessity of the employees’ medical treatment. Because there is no state action, the Constitution does not apply.

Seanz v. Roe, 119 S.Ct. 1518 (1999). A state statute that limits welfare benefits for first year residents to the amount that they would have received from the state they moved from is an unconstitutional burden on their right to travel to establish residence and citizenship in their new state.

City of Chicago v. Morales, 119 S.Ct. ____ (June 10, 1999). Chicago gang loitering ordinance, which requires gang members to disperse when ordered to do so by police, is unconstitutionally vague and a violation of due process and the First Amendment.

B. First Amendment

Buckley v. American Constitutional Law Foundation, 119 S.Ct. 636 (1999). State law regulating gathering of signatures on initiative petitions violates the First Amendment in requiring that initiative petition circulators be registered voters, wear name badge identification, and have proponents of an initiative report names and addresses of all paid circulators and the amount paid to each circulator.

Greater New Orleans Broadcasting Assn. v. United States, 119 S.Ct. ____ (June 14, 1999). The federal statute prohibiting the broadcast of radio and television advertisement for casino gambling is unconstitutional as violating the First Amendment’s protection of commercial speech.

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*Trends in Federal Court Jurisdiction –
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Trends in Federal Court Civil Litigation from Observation

I. Mass Tort/Class Actions in Federal Court

A. Preliminary Issues

Efficiency, consistency, participation

B. Risks of Legal Error

Settlement pressure, issue separation considerations, choice of law issues

C. Authority of Court to Consolidate

Notice, predomination of common issues, limit on state court jurisdiction

See also Weber, Mark: *Mass Jury Trials in Mass Tort Cases: Some Preliminary Issues*, 48 DePaul L. Rev. 463 (Winter, 1998)

II. Federal Preemption

A. ERISA

B. HMO Litigation

See also, Patton, David: *Achieving Managed Care Accountability by Ending the ERISA Preemption Defenses*, 59 Ohio St. L.J. 1423 (1998)

III. Alternatives/Additives to Federal Court Litigation

A. Private Mediation

B. Court Annexed Mediation

C. Arbitration in Lieu of Trial

IV. Criminal Procedure

A. Fifth Amendment-Self Incrimination

Mitchell v. United States, 119 S. Ct. 1307 (1999). Guilty plea does not constitute a waiver of the right to remain silent at sentencing. An adverse inference cannot be drawn from a defendant's invocation of the right to remain silent at sentencing.

B. Fourth Amendment

Minnesota v. Carter, 119 S.Ct. 469 (1998). In narrow opinion authored by the Chief Justice, the Court held that defendants who were in another person's apartment for a short time solely for the purpose of packaging cocaine had no legitimate expectation of privacy in the apartment and thus any search which may have occurred did not violate their Fourth Amendment rights. Note: Supreme Court no longer using standing analysis in the context of Fourth Amendment.

Knowles v. Iowa, 119 S.Ct. 484 (1999). A full search of an automobile pursuant to issuance of a citation for speeding, as authorized by an Iowa statute violated the Fourth Amendment.

Wyoming v. Houghton, 119 S.Ct. 1297 (1999). Police officers with probable cause to search a car may search passengers' belongings that are capable of concealing the objects of the search.

Wilson v. Layne, 119 S.Ct. 1692 (1999). The Fourth Amendment is violated when police, executing a warrant, invite the media to enter the premises. However, officers in this case have qualified immunity because the law was not previously clearly established. Note methodology: the court first decided the constitutional issue and then determined qualified immunity.

State Bar of Michigan
Litigation Section
Summer Litigation Conference
August 13-14, 1999

MOTION PRACTICE

by: Honorable Philip D. Schaefer

MOTIONS IN LIMINE

I. INTRODUCTION

- A. Good comprehensive article: Obtaining the Upper Hand with Motions in *Limine*, pp. 330-334, *Michigan Bar Journal*, March, 1997.
- B. Developed in the common law; no specific Court Rule applies.
- C. Definition: "A motion, held in advance of jury selection, which asks the court to instruct (a party), its counsel and witnesses not to mention certain facts unless and until permission of the court is first obtained outside the presence and hearing of the jury." *Lapasinskas v Quick*, 17 Mich App 733 (1969).

II. ADVANTAGES - THERE ARE MANY

A. EVIDENTIARY

- 1. Irrelevant or prejudicial evidence. MRE 401 and 403
- 2. Character evidence to prove conduct. MRE 404
- 3. Prior convictions. MRE 609
- 4. Subsequent remedial efforts. MRE 407
- 5. Offers to settle. MRE 408
- 6. Existence of insurance. MRE 411

7. Privilege. MRE 501

8. Estoppel issues from prior litigation.

9. Witness qualification.

B. TRIAL STRATEGY

- 1. Educate the court about the case.
- 2. Builds counsel credibility by avoiding constant "evidence wrangling" in front of the jury and avoids trial disruption.
- 3. Can act as Motion for Summary Disposition.
- 4. Aids in settlement possibilities.
- 5. "Oops" factor. *People v Harris*, 86 Mich App 301 (1978).

III. WHAT A JUDGE SEES (OR LOOKS AT).

- A. May not be bound by ruling. *Terhaar v Hoekwater*, 182 Mich App 747 (1990).
- B. Timeliness, by pre-trial order or Court Rule.
- C. Timeliness, as a strategy.
- D. Complex motions may be taken under advisement.

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Motions In Limine –*Concluded from page 18*

- E. Use discretion in number of requests and volume of supportive material.
- F. Why is this motion being filed?

MOTIONS FOR SUMMARY DISPOSITION

I. MCR 2.116 – GENERAL CONSIDERATIONS

- A. **MUST** specify the grounds. MCR 2.116(C).
- B. **TIME** for filing. MCR 2.116(D).
 - 1. Subsections 1-3. Must be filed in first motion or responsive pleading, whichever is filed first, **or they are waived.**
 - 2. Subsections 5-7. Must be raised in a party's responsive pleading unless raised in a motion filed before that pleading.
 - 3. Remaining Subsections (4, 8, 9 & 10). Anytime.
- C. Possible dispositions. MCR 2.116(I). Includes judgment for moving party, judgment for non-moving party, immediate trial or **mandatory** opportunity to amend pleadings, if justified, and if granted under Subs. 8-10.

II. Most Frequently Used (And Confused) Subsections under MCR 2.116(C).

- A. Subsection (C)(8).
 - 1. Tests whether a cause of action is stated.

- 2. Based **solely** on the pleadings. Documentary evidence is **NOT** necessary or considered.
- 3. Court accepts all well-pled facts and inferences. "Clearly unenforceable" standard applies.

B. Subsection (C)(10).

- 1. Tests the existence of a genuine issue of material fact.
- 2. Based on all forms of documentary evidence.
- 3. **Movant required to identify facts to which there is no dispute. Frequently overlooked!**
- 4. "Reasonable minds" standard.
- 5. Should not be filed (or at least argued) until close of discovery. *Kassab v Michigan Basic Property Ins Ass'n*, 185 Mich app 206 (1990).

C. Other considerations.

- 1. MCR 2.116(G)(1)(c). Include Judge's copy of the brief.
- 2. Time deadlines:
 - a. Filed 21 days before hearing.
 - b. Answered 7 days before hearing.
- 3. Response to (C)(10) motion provide affidavits or other; cannot rest on pleadings.
- 4. Court may suspend oral arguments. MCR 2.119(E)(3).

Judge Philip D. Schaefer
Kalamazoo County Circuit Court
227 West Michigan Avenue
Kalamazoo, Michigan 49007

Congratulations to the Litigation Section's Newly Elected Officers and Council Members!

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MARK YOUR CALENDAR!

Dear Litigation Section Members and Friends,

Please get out your calendars and block off these three dates:

February 23, 2000

March 15, 2000

April 5, 2000

Every so often, we all have the REALLY BIG CASE looming over us. These three dates will fully prepare you to handle it. They are our 2000 Masters in Litigation series, done with ICLE.

On February 23, Courtroom Performance, Inc. will teach you to be persuasive. Their three hour presentation on "using your voice and language to persuade," focuses on audio presentation skills for the lawyer, how to create "vocal thunder" in the courtroom, how vocal inflection affects the jury, your physical presence affects your legal arguments, and controlling the visual focus of the courtroom. This group trains attorneys in using specific theater and stage technique to achieve a commanding presence in the courtroom.

On March 15, a distinguished panel led by Sheldon Stark will show you the keys to Facilitation. This seminar will include demonstrations and commentary by some of the Michigan Facilitators most in demand. Facilitation is a growing and important step in the litigation process, and you need to know how to prepare yourselves and your clients.

Third, if Facilitation does not succeed in your big case, on April 5, Herbert Stern will teach a full day trial practice seminar. I am told that this will be the best trial skills seminar you can attend. His course is entitled, "Litigating at the Masters Level," and "challenges the traditional wisdom about how to conduct a trial and the role of opening statement, direct and cross examination, burden of proof, and the theme relative to the facts of the case."

I hope to see you at these great programs and I hope to hear from you during the next year.

LITIGATION SECTION'S TIGER BASEBALL GAME OUTING ...



From left to right: Rich Hewlett, Gordon Gold and Ken Adamczyk.



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