

The Mentor

THE NEWSLETTER OF THE STATE BAR OF MICHIGAN'S
MASTER LAWYERS SECTION



"The voice of trust through experience."

Fall 2018

Message from the Chair

Table of Contents

Message from the Chair.....	1
Notes from the Editor	2
Photos from Our Annual Meeting and Program	3
New Limited Scope Rules Benefit Underemployed Attorneys and Overburdened Courts	4
Reflections on Teaching Contracts	8
Concussion—Traumatic Brain Injury	10

It has been eight years since I became actively involved with the MLS and its council and for the 2018-2019 Bar year I humbly take over as its new chair. I am excited about working with the new council as we continue to focus on some very important initiatives begun by my predecessor, past Chair Ronald Keefe. One of those most important priorities was partnering with other SBM substantive law sections.



Kathleen Williams Newell, Chair

Last year was an exciting year for the council. We convened a strategic planning session, reviewed and revised our section's bylaws, made some significant changes to our council structure, and conducted a survey of our membership to obtain feedback and input.

We also compiled our "Words of Wisdom" in 2018 which provides a glimpse of the wisdom and experience that we remain ready to share with the section membership and the State Bar. The SBM recently shared this compilation with the leadership of all sections at a Section Leadership Orientation sponsored by SBM at its headquarters in Lansing on October 16, 2018.

On September 28, 2018, the MLS ended its year with the election of new officers and council members at the annual meeting held in Grand Rapids. At the NEXT Conference we partnered with the Young Lawyers Section to put on the educational program, "Limited Scope Representation: a Primer." We hope to foster more collaborations of this nature in the future and will be focusing on establishing such opportunities this Bar year.

The MLS Council acknowledges that with almost 20,000 members, we have the largest membership of any SBM section. If we had more participation of the membership, especially the retiree portion (30 percent) it would be awesome.

If you have suggestions on topics that you would want featured in a seminar sponsored by MLS, please contact any member of the council. The section's bylaws are posted on the SBM MLS website under the Council tab. Please visit the website and familiarize yourself with the committees and council members. I invite your participation and ask that you please contact me. The council and I actively seek and want your input and involvement with the planning process.

Kathleen Williams Newell
Chair Cell: 310.740.0421

2017-2018

**MASTER LAWYERS SECTION
SECTION COUNCIL**

CHAIR

Kathleen Williams Newell
25140 Lahser Rd Ste 261
Southfield MI 48033-6311
Phone: (313) 766-6311
Fax: (313) 766-6311
e-mail: knewell1187@comcast.net

CHAIR-ELECT

Charles A. Fleck, Lansing

SECRETARY

Vincent A. Romano,
Grosse Pointe Woods

TREASURER

James H. Loree, Northville

COUNCIL MEMBERS*Term Expires 9/30/2019*

Curt A. Benson, Grand Rapids
Michael Hayes Dettmer,
Traverse City
Edward Sosnick, Bloomfield Hills

Term Expires 9/30/2020

David A. Kallman, Lansing
Norman Otto Stockmeyer, Haslett

Term Ending: 9/30/2021

Paula L. Cole, Grosse Pointe Woods
Julie L. Granthen, Rochester Hills
Roberta M. Gubbins, Mason

IMMEDIATE PAST CHAIR

Ronald D. Keefe, Marquette

NEWSLETTER EDITOR

Roberta M. Gubbins, Mason
(734) 255-9119

The Mentor is published by the
Master Lawyers Section of the
State Bar of Michigan,
306 Townsend Street,
Lansing, Michigan
48933-2012

The views expressed in this
newsletter do not necessarily
reflect those of the publisher.
Send correspondence and
material for publication to:

Roberta M. Gubbins
rmgubbins@yahoo.com

Notes from the Editor

It's fall—time for football, color tours of our beautiful state, Halloween candy, being lost in a corn maze, and the *Mentor*, your quarterly newsletter. We have a great issue. You can read about a new client service model, Limited Scope Representation (LSR) by Darin Day. LSR or unbundling of legal services was the topic of the program presented by the Master Lawyers and the Young Lawyers sections at the SBM NEXT Conference. It is a new way of lawyering that could benefit clients while providing work for new lawyers and those winding down their practice.



Roberta M. Gubbins, Editor

Otto Stockmeyer agrees with the “Words of Wisdom,” “I hope you paid attention in Contracts, because it all comes down to whether there was a meeting of the minds,” when he writes “Reflections on Teaching Contracts.” Noting that while the law school curriculum nationally has undergone much revision, Contracts is still a required two-semester course.

James Johnson’s article on concussions informs those involved in football of the risks and symptoms of concussion in football. A timely article as the National Football League and colleges try to protect the players while preserving the athleticism of the game.

And finally, our new chair, Kathleen Williams Newell, reports on plans for our future.

—Roberta



Photos from Our Annual Meeting and Program



☉ Chair Kathleen Williams Newell and past Chair Ron Keefe



Officers, past Chair Ron Keefe, Chair-elect Charles Fleck, Chair Kathleen Williams Newell, and Secretary Vince Romano



🕒 Limited Scope Representation Panel. Kimberly Jones, full-time faculty member at Washtenaw Community College. She founded the non-profit law firm, Collaborative Legal Services, which serves low-income and indigent clients in need of counsel, and provides community legal education. Kimberly earned her JD from WMU Cooley Law School and a Ph.D. in educational leadership from Oakland University.



Attendees Dick Ruhala and Jim Loree



Kari Thrush and Amy Castner



(l to r) Master Lawyers Board Members: back row: Charles Fleck, Paula Cole, David Kallman, Front row: Kathleen Williams Newell, Roberta Gubbins, Vince Romano and Ron Keefe.

Chris Hastings teaches Civil Procedure at WMU Cooley Law School's Grand Rapids campus. He has been active in the State Bar in a number of ways, including work on the subcommittee of the 21st Century Task Force charged with writing the LSR rules.

Erika Butler is a solo practitioner based in the city of Detroit. Erika earned her JD from the University of Michigan and her BA, magna cum laude, from Amherst College. She participated in the State Bar of Michigan's 21st Century Task Force and advocated before the Representative Assembly for the adoption of our state's Limited Scope Representation Rules.

New Limited Scope Rules Benefit Underemployed Attorneys and Overburdened Courts

By Darin Day

Attorneys looking to expand their practices, courts looking for improved efficiencies, and pro se civil litigants simply looking for help should look to the new limited scope representation (LSR) rules that became effective January 1, 2018.¹ Michigan lawyers have enjoyed success with LSR for decades: think of the commercial or real estate attorney hired to review a single contract with no expectation of further engagement in the transaction, or the traditional litigator who provides an initial case assessment and consultation for a flat fee to a potential civil plaintiff or an appellant in a criminal matter.²

Today, LSR usually involves an attorney providing a self-represented party with advice and coaching, mapping out an overall legal strategy to resolve the entire matter, and performing one or more discrete tasks. These often include preparing pleadings, conducting discovery, attending a hearing, or negotiating a settlement. Not every type of legal matter nor every client is a good fit. LSR, also known as unbundling, has proven most effective in settings such as landlord-tenant disputes, simple divorces and other family law concerns, expungements, and noncomplex consumer or tax matters.³ In all cases, unbundling requires education and training—of lawyers, clients, and judges and court staff. It also requires quality control mechanisms and deliberate attention to ethical questions.

Fortunately, ethicists have carefully considered LSR and have been instrumental in developing Michigan's new rules and helping the State Bar of Michigan aid members who choose to engage in LSR. The American Bar Association Standing Committee on Ethics and Professional Responsibility issued a formal opinion in 2015 endorsing LSR under appropriate circumstances and when it complies with all related laws and rules of professional conduct.⁴ Here in Michigan, Ethics Opinion RI-347 (April 23, 2010) explains that “a lawyer is permitted to provide unbundled legal services

[including assistance drafting documents] to a properly informed client, but he or she retains all of the professional responsibility that would exist in the case of ordinary services.”

Michigan joins the more than 30 states that have formally adopted court and ethics rules specific to the provision of unbundled legal services.⁵ Experience in these jurisdictions is encouraging: courts benefit from better prepared litigants, fewer delays, and a more efficient docket; parties benefit from attorney expertise and skill that can be supported by a limited budget; and lawyers benefit from gaining access to a previously untapped market of self-represented clients, increasing revenues and growing their practices.

History of LSR in Michigan

Michigan has been moving toward more formal LSR since at least 2010, with the creation of the Solutions on Self-help Task Force,⁶ and especially since the launch of Michigan Legal Help (MLH) in 2012. MLH's online portal and self-help centers provide access to information on a variety of law-related topics. MLH also facilitates comprehensive triage procedures that help isolate and define legal problems and then identify the best starting point for resolving them. For example, MLH provides a much-used pipeline to the State Bar's new online legal services portal, the backbone of which is the enhanced profile directory and lawyer referral service, which now includes a modest means panel.⁷

Formalized LSR in Michigan advanced again in 2016 with the publication of the State Bar's *Twenty-First Century Practice Task Force Report*, which recommended:

- Implementing a high-quality, comprehensive, limited scope representation system, including guidelines, attorney and client education, rules and commentary, and court forms focusing on civil cases.

- Incorporating a certified limited scope representation referral component into both the SBM online directory and MLH, and ultimately into the unified online legal services platform.
- Continuous review of the rules of professional conduct and regulations to eliminate unnecessary barriers to innovation, consistent with the highest standards of ethical obligations to clients and the public.
- Educating State Bar members regarding new and proven innovative law practice business models . . . to improve economic viability of solo and small firm practices, while expanding service to underserved areas and populations.⁸

These recommendations are currently being implemented thanks to the collaborative efforts of the State Bar LSR Implementation Work Group, MLH, the State Court Administrative Office, the Institute for Continuing Legal Education, the Michigan Judicial Institute, and other partners.⁹ In September 2017, Michigan took a critical step when the State Bar Representative Assembly recommended a set of LSR-related rules revisions to the Michigan Supreme Court. The Court adopted the proposal and the new rules became effective January 1 of this year. The revised rules are MCR 2.107, 2.117, and 6.001 and MRPC 1.0, 1.2, 4.2, and 4.3.¹⁰

Essentially, the new rules facilitate the use of two tools in a lawyer's LSR toolbox: (1) ghostwriting without entering an appearance, or even necessarily disclosing the attorney's identity; and (2) the ability, with the client's informed consent, to define the scope of a limited appearance and both enter and withdraw that appearance by simply filing proper notice and serving all parties of record.

Ghostwriting

The revised rules provide attorneys with clear guidance on how to help a client draft pleadings without being forced into a more extensive representation. To start, MCR 2.117(D) sets forth that an "attorney who assists in the preparation of pleadings or other papers without signing them. . .has not filed an appearance and shall not be deemed to have done so." MRPC 1.2(b) (1) allows a lawyer to "draft or partially draft pleadings,

briefs, and other papers to be filed with the court [and this] does not require the signature or identification of the lawyer, but does require the following statement on the document: "This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to MRPC 1.2(b)." And MRPC 1.2(b)(2) provides that the "filing of such documents is not and shall not be deemed an appearance by the lawyer in the case."

From a court's perspective, the new rules provide greater transparency by requiring the pleading to contain notice that it was drafted with the help of an attorney. In addition, MCR 2.117(D) confirms the court's authority to "investigat[e] issues concerning the preparation of such a paper." With these changes, courts can expect better-drafted documents and increased scrutiny over papers filed by some self-represented parties. MRPC 1.2(b)(2) provides attorneys with additional protections by allowing them to "rely on the client's representation of the facts, unless the lawyer has reason to believe that such representation" is materially insufficient, false, seeks objectives that are inconsistent with the lawyer's obligations under the MRPC, or asserts claims or defenses that, if signed by the lawyer, would violate MCR 2.114. In sum, the new ghostwriting rules open exciting new avenues for pro se parties to gain much-needed assistance drafting legal documents while providing clear guidance to attorneys and increased transparency for courts.

Making a limited appearance

In cases where ghostwriting may not provide adequate assistance, a "lawyer licensed to practice in the State of Michigan may. . .file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing."¹¹ In parallel, MCR 2.117(B)(2)(c) allows "a party to a civil action [to] appear through an attorney for limited purposes . . . including, but not limited to, depositions, hearings, discovery, and motion practice. . ."

Reasonable under the circumstances

MRPC 1.2(b) permits an attorney to enter a limited appearance under two conditions. The first is where "the

limitation is reasonable under the circumstances . . .” In almost all cases, parties are better off with some representation rather than none. Nevertheless, LSR is not always a reasonable alternative. For example, a party seeking LSR may be agitated, pressed for time, or disorganized for myriad reasons, including the stress of attempting to address legal issues pro se. Some parties may struggle with literacy, mental or emotional challenges, or poor communication skills. A lawyer considering LSR should explore other alternatives when it is not clear the client understands or agrees to the objectives or limits of the proposed representation or has the capacity for effective self-representation.¹² In addition, it is seldom, if ever, appropriate for an attorney to attempt to divide what the client wishes to be a general representation into a series of LSRs, with each ensuing representation conditioned on the replenishment of a retainer. Under these circumstances, the attorney should file a general appearance.

Informed consent

The second condition for entering a limited appearance under MRPC 1.2(b) is the client’s “informed consent, preferably in writing.” MRPC 1.0 defines informed consent as “agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of the proposed course of conduct, and reasonably available alternatives to the proposed course of conduct,” which points the way to the first step in any successful LSR engagement—the initial consultation. This introductory meeting should involve a wide-ranging and probing conversation that includes accurately diagnosing the legal issues presented; determining whether *any* LSR services are appropriate, including the ethical obligation to assess the client’s capacity for self-representation; identifying which tasks the client could perform and which should be performed by an attorney; discussing the client’s ability to pay; and sketching out a rough-draft budget.

Only after such a comprehensive consultation is it possible to determine with confidence whether to engage the client at all, and whether the client actually needs full representation by a lawyer, ongoing support via LSR as a self-represented litigant, or little more than some advice and a game plan to proceed with self-representation. A written letter of engagement is appropriate

in all of these scenarios, outlining the specific tasks to be performed by the attorney, perhaps the specific tasks to be performed by the client, and clarifying costs and fee arrangements. The purpose is to engage the client up front in a deliberate discussion leading to informed consent, a clear definition of the scope of representation, and a written document that can evolve, if needed, into a notice of limited appearance in the event of litigation.

Notice of limited appearance

An entry of limited appearance must be accompanied by notice served on all parties of record.¹³ Such notice must identify the scope of the limited appearance by date, time period, or subject matter.¹⁴ In addition, the attorney’s activities must be restricted to accord with the notice. If an attorney exceeds the scope of the notice, the court (by order to show cause) or opposing counsel (by motion) may set a hearing to establish the actual scope of the representation.¹⁵ Just as with the LSR engagement letter, care must be taken to thoughtfully consider and precisely draft any notice of limited appearance. Following this, additional care must be taken to act in accordance with the notice or, when changes in scope are anticipated, to make timely prospective amendments to the notice of appearance.

Withdrawal of limited appearance

Under MCR 2.117(C)(3), to terminate a limited appearance, a lawyer is required only to file a simple notice of withdrawal and serve it on all parties of record. With the client’s signature, a notice of withdrawal takes immediate effect. Without the client’s signature, it becomes effective after 14 days unless the client files and serves a written objection on the grounds that the attorney did not complete the agreed-upon services.¹⁶ Here is yet another reason to be careful and precise in obtaining informed consent and in drafting engagement letters and notices of limited appearance. When communication with the client is thorough, understanding clear, and writing precise, getting in and out of a limited appearance is a comparatively quick and simple task. When sufficient care is not taken, whether in obtaining informed consent, defining the scope of representation, or complying with the terms of the notice of limited appearance, complications may abound. Diligence is key.

Two more considerations regarding professional conduct in LSR

MCR 2.107(B)(1)(e)—Service in the Limited Scope Context

Once an attorney has made a limited appearance, every paper filed in the matter must continue to be served on the party and the LSR attorney for the duration of the limited appearance unless the LSR attorney requests, or the court orders, that service be made only on the party.

MRPC 4.2—Communication with a Person Represented by Counsel

Once notice of limited appearance is filed and served, and until written communication of withdrawal of that appearance is provided to the opposing party, all oral communication must begin with LSR counsel. However, after consultation with the client, counsel may authorize oral communication directly with the client.¹⁷ For the duration of any limited appearance, all written communication—both court filings and otherwise—must be served on both the party and LSR counsel.¹⁸

Conclusion

The new LSR rules authorizing ghostwriting and streamlined limited appearances create tremendous opportunities for Michigan's self-represented civil litigants, lawyers, judges, and court administrators. They expand access to justice; open business opportunities, especially for solo practitioners and smaller firms; and help ease docket congestion. As with virtually every aspect of the law, not paying careful attention to what the new rules require creates risk. With the exercise of proper care and diligence, the new LSR rules offer Michigan a truly winning combination.

This article originally appeared in the June 2018 issue of the Michigan Bar Journal.



Darin Day

About the Author

Darin Day is director of outreach at the State Bar of Michigan.

Endnotes

- 1 Administrative Order 2016-41 (September 20, 2017) <http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Administrative%20Orders/2016-41_2017-09-20_FormattedOrder_AmendOfMRPC1.0-1.2-4.2-4.3-MCR2.107-2.117-6.001.pdf>. See also State Bar of Michigan, *Limited Scope Representation* <<https://www.michbar.org/news/newsdetail/nid/5507>>. All websites cited in this article were accessed May 5, 2018.
- 2 Vauter, *Unbundling: Filling the Gap*, 79 Mich B J 1688, 1689 (December 2000)
- 3 *Limited scope representation helps lawyers expand practice* <<https://www.americanbar.org/publications/youraba/2015/april-2015/limited-scoperepresentation-helps-lawyers-expand-practice.html>>.
- 4 ABA Standing Comm on Ethics and Prof Responsibility, Formal Op 472 (November 30, 2015) (Communication with Person Receiving Limited-Scope Legal Services) <<https://www.americanbar.org/content/dam/aba/images/abanews/FormalOpinion472FINAL.pdf>>.
- 5 Buiteweg, *Limited Scope Representation: A Possible Panacea for Reducing Pro Per Court Congestion, Attorney Underemployment, and a Frustrated Public*, 95 Mich B J 10 (2016).
- 6 Toy, *Justice for Whom?*, 89 Mich B J 18 (2010) <<https://www.michbar.org/file/barjournal/article/documents/pdf4article1680.pdf>>.
- 7 Michigan Legal Help <<https://michiganlegalthelp.org/news>>.
- 8 State Bar of Michigan 21st Century Practice Task Force, *Envisioning a New Future Today* (July 18, 2016) <https://www.michbar.org/file/future/21c_WorkProduct.pdf>.
- 9 State Bar of Michigan, *Limited Scope Representation Rules Adopted by Michigan Supreme Court* <<https://www.michbar.org/News/NewsDetail/nid/5494>>.
- 10 Administrative Order 2016-41.
- 11 MRPC 1.2(b).
- 12 Michigan Ethics Opinion RI-347 (April 23, 2010).
- 13 MCR 2.117(B)(2)(c)(i).
- 14 MCR 2.117(B)(2)(c)(ii).
- 15 MCR 2.117(B)(2)(d).
- 16 MCR 2.117(C)(3).
- 17 MRPC 4.2(b).
- 18 MRPC 4.2(c).

Reflections on Teaching Contracts

By Otto Stockmeyer

The Importance of the first year of law school

I began teaching Contracts in 1977, and it has been a joy to teach the course to first-year students. I agree with the dean of Harvard Law School, who told 1L Scott Turow that “almost all attorneys regard the first year of law school as the most challenging year of their legal lives.”

Turow went on to explain: “It is during the first year that you learn to read a case, to frame a legal argument, to distinguish between seemingly indistinguishable ideas; that you begin to absorb the mysterious language of the law . . . that you learn to think like a lawyer, to develop the habits of mind and world perspective that will stay with you throughout your career.”

I enjoyed guiding beginning students along that journey. And I enjoyed the excitement of working with beginning students. What they initially may lack in focus (what Professor Kingsfield called the “skull full of mush” stage—see sidebar), they more than make up for in enthusiasm, although we Contracts teachers know that few students arrive thinking “Contracts, now *that* will be interesting!”

During my career, the law school curriculum nationally has undergone much revision. Although the number of credit hours needed to graduate has not changed, fewer courses are now required, and even courses that are still required have been allotted fewer credit hours.

Courses in the all-important first year are not immune from this trend. The most recent national survey of law school curricula reported that at the typical law school today, Property, Torts, and Constitutional Law have been reduced to four-credit, one-semester courses. Only Contracts, among substantive first-year courses, continues to be offered for five or six credits and, at a majority of law schools, over two semesters.

The Significance of the Contracts course

And with good reason. Contracts is the quintessential first-year course. One reason is that it presents an excellent introduction to the common law. The common law is based on the inherent power of the courts to declare law where no statute or constitutional provision controls (which is most of the time). U.S. District Court Judge Avern Cohn was right in saying, at a lecture at the University of Michigan Law School, that “the vast majority of the law that governs us is the common law, judge-made law.”

Regardless of the current dispute whether we have a “living” Constitution, there can be no doubt that the common law remains alive and evolutionary. And there is general recognition that the law of contracts is the most important contribution to jurisprudence made by the common law. “Rule-of-law” candidates for appellate judgeships who maintain that “the judicial branch should interpret the law and not make the law” evidently slept through their Contracts course.

Contract Law is fundamental

Another reason that Contracts is the quintessential first-year course is that it is fundamental to several second- and third-year courses. This may explain why an internal Cooley Law School study found that a student’s grade in Contracts is the best predictor of overall law school success. And a 2018 study at another law school found that a student’s grade in first-semester Contracts better predicts bar exam success than all pre-law variables, including SAT score, college major, college GPA, and LSAT score. There is also the fact that, in an American Bar Foundation survey, lawyers reported that they used Contracts in their practice almost twice as much as any other law school subject.

When our law school newspaper polled students as to their favorite course some years back, Contracts was #1. This would not surprise Georgetown Law Professor Randy Barnett, who has written, “[M]any students find that Contracts is indeed the most intellectually challenging and engaging subject of their first year of law school.” Ohio Northern Law Professor Scott Gerber calls Contracts “the consummate law school course; rich in history, doctrine, and theory.”

The subject of Contracts is also favored with the richest source material. Yale Law Professor Grant Gilmore called Arthur Corbin’s multi-volume treatise on Contracts the “greatest law book ever written.” Professor Gilmore also regarded the *Restatement of Contracts* as “not only the best of the Restatements [but also] one of the great legal accomplishments of all time.”

Thus it should also come as no surprise that the aforesaid Professor Kingsfield, a central character in John J. Osborn, Jr.’s classic law school novel and movie, *The Paper Chase*, taught Contracts. In a 2003 interview, Osborn (a Harvard-trained lawyer) denied patterning Kingsfield after any particular professor, but admitted contract law was by far his favorite course.

Mine, too. I regard myself as extremely fortunate to have been assigned to teach Contracts when I hired on at Cooley Law School 40 years ago.

About the Author



Otto Stockmeyer

Otto Stockmeyer is an emeritus professor at WMU Cooley Law School in Lansing. He can be contacted at stockmen@cooley.edu. This article is adapted from his publication “Reflections on Teaching the First Day of Contracts Class” in Michigan Academician,

available through the Social Science Research Network at <https://ssrn.com/abstract=2927249>

Website bio: www.cooley.edu/faculty/norman-stockmeyer

Articles: <https://ssrn.com/author=80303>

“We do brain surgery here”

Professor Kingsfield explains the Socratic Method

“The study of law is something new and unfamiliar to most of you; unlike any schooling you’ve ever been through before.

“We use the Socratic method here; I call on you, ask you a question and you answer.

“Why don’t I just give you an lecture? Because through my questions you learn to teach yourselves.

“Through this method of questioning, answering, questioning, answering, we seek to develop in you the ability to analyze that vast complex of facts that constitute the relationships of members within a given society.

“Questioning and answering.

“At times you may feel that you have found the correct answer. I assure you that this is a total delusion on your part; you will never find the correct absolute and final answer. In my classroom there is always another question; another question that follows your answer.

“You are on a treadmill; my little questions spin the tumblers of your mind. You’re on an operating table; my little questions are the fingers probing your brain.

“We do brain surgery here. You teach yourselves the law but I train your mind.

“You come in here with a skull full of mush and you leave thinking like a lawyer.”

Note: This scene, a highlight of the movie, appears nowhere in the book. Kudos to Director James Bridges, who is credited with the screenplay, for adding it.

Concussion—Traumatic Brain Injury

By James A. Johnson ©2018

Concussions, also known as traumatic brain injuries, occur when your brain violently impacts the inside of your skull. Concussions can permanently damage your ability to think or work. These injuries lead to tort claims and product liability lawsuits against the NFL, high schools, colleges, helmet manufacturers and others involved in the sport of football.

Football

Football is a game of violence engendering results like retired players who can't get out of bed without help, migraine headaches, quarterbacks and linemen who can't raise their arms or tie their shoes. This game has caused suicides, namely Aaron Hernandez, Jovan Belcher, Junior Seau, O.J. Murdock, Kurt Crain, Mike Current, Dave Duerson and Ray Easterling. There was an avalanche of litigation against the NFL, NFL Properties, Riddell Sports Group and others. Approximately 2,500 former players and surviving family members sued the NFL for allegedly distorting and hiding data about concussions.

On April 15, 2013, a Denver, Colorado jury found Riddell Inc., liable for failing to warn about concussion dangers. The jury awarded \$11.5 million to Rhett Ridolfi and found Riddell 27 percent at fault. Ridolfi, a high school football player in Colorado, suffered serious brain injuries and partial paralysis. The jury assessed \$3.1 million in damages against Riddell.

In 2010 the NFL gave Boston University's Center for the Study of Traumatic Encephalopathy \$1 million to study the brains of 60 deceased football players.¹ Many showed signs of chronic traumatic encephalopathy (CTE). CTE is a neurodegenerative disease caused by repeated blows to the head. The symptoms of CTE are slurred speech, headaches, psychosis and depression.

National Center for Injury Prevention

According to the National Center for Injury Prevention, it is estimated that as many as 47 percent of all high school football players suffer a concussion each year. Football players who suffer multiple concussions are at risk of suffering permanent brain damage. A few years ago, not one state required that high school and middle school athletes who suffered concussion symptoms receive medical clearance to return to play. According to USA Football, all 50 states now have some form of student athlete concussion law in place.²

The purpose of this article is to inform coaches, players, parents, athletic directors and general counsel the seriousness of the risks of concussions to young people whose brains have not yet fully developed. *Every concussion is a brain injury.* The effects of this damage range from behavioral and emotional disorders to full body paralysis.

An excellent resource for comprehensive facts and laws covering youth sports is Law Atlas—The Policy Surveillance Program; Select Youth Sports Traumatic Brain Injury Map Laws—Injury and Violence Prevention. For example, it states:

“Every year as many as 300,000 young people suffer concussions or traumatic brain injuries (TBIs), from playing sports. These injuries can have serious and long-term effects, and all states have adopted laws aimed at reducing TBIs occurring at sports activities. This map identifies and displays key features of such laws across all 50 states and the District of Columbia and over time, from 2009 to 2017.”³

Michigan High Schools

The Michigan High School Athletic Association provides a bevy of information on health and safety including insurance benefits. As of August 2017 the association provides its members a catastrophic accident medical insurance policy. It pays up to \$500,000 for medical expenses left unpaid by other insurance subject

to a \$25,000 deductible per claim. Visit the MHSAA website⁴ that provides:

- Concussion Insurance Benefits Information and Forms
- 2017-18 Return to Activity & Post Concussion Consent Form
- Concussion Education Materials Acknowledge Form
- Concussion Resources
- Student Athlete Screening Guidance

The return to activity form is to be used after an athlete is removed from and not returned to activity after exhibiting concussion symptoms. MHSAA rules require (1) Unconditional written authorization from a physician or nurse practitioner and (2) Consent from the student and parent/guardian. The clearance must be in writing. The medical examiner is the only person to approve the student's return to unrestricted activity.

Brainscope

Brainscope is a medical neuro-technology company located in Bethesda, Maryland. It is pioneering the assessment of brain injury including concussion. BrainScope One is a mobile brain injury assessment device that can diagnose traumatic brain injury (TBI). A medical technician or nurse places electrodes on a patient's forehead, temples, and around the ears. The device records an electroencephalogram in about five minutes. Software then calculates the likelihood of structural brain damage or functional impairment. This is based on patterns of deviation from a database of healthy brain signals. It combines smartphone software with a disposable electrode headpiece.

Clinical trials have demonstrated that BrainScope One can indicate the presence or absence of brain injury with 98 percent accuracy. It is not intended as a standalone diagnostic or as a replacement for a CT scan.⁵ Michael Singer, chief executive officer, says that BrainScope will be cheaper and more widely available next year and in the future may be able to diagnose conditions such as stroke.

Show Me the Money

U.S. District Judge Anita Brody in Philadelphia approved a \$1 billion settlement for NFL players and

family members that became effective on July 7, 2017. The settlement award covers amyotrophic lateral sclerosis, Parkinson's disease, death with chronic traumatic encephalopathy (CTE), Alzheimer's and dementia. Currently CTE can only be diagnosed with an autopsy. The settlement does not currently cover future cases of CTE. Judge Brody has urged the parties to revisit the issue with scientific advancements. The revised settlement approved by Judge Brody covers more than 22,000 NFL retirees and is designed to last at least 65 years. It also provides up to \$5 million to individual retirees who develop Lou Gehrig's disease and other profound problems.⁶

Conclusion

The purpose of this article is not to deter participation in football but rather to educate and inform attorneys, athletic directors, coaches, parents and players of the risks and symptoms of concussion. Participation in sports by young people can engender mental and physical toughness, discipline, sportsmanship and leadership qualities. These individual attributes collectively can also provide an advantage in the game of life.

About the Author

James A. Johnson of James A. Johnson, Esq. in Southfield is an accomplished Trial Lawyer. He concentrates on sports & entertainment law, serious personal injury, insurance coverage under the commercial general liability policy, and federal crimes. Jim is an active member of the Michigan, Massachusetts, Texas and Federal Court bars. He can be reached at www.JamesAJohnsonEsq.com

Endnotes

- 1 Rich Barlow at www.bu.edu/today/2010/nfl-gives-1m-to-bu-center-for-athlete-brain-study/ (last visited 9-24-18).
- 2 <http://usafootball.com> -National Center for Injury Protection-Brain Injury Basics (last visited 9-24-18).
- 3 www.lawatlas.org; [Select Choose a Topic; Injury & Violence—Youth Sports Traumatic Brain Injury Laws.](#)
- 4 <https://www.mhsaa.com/schools/health-safety-resources/> (last visited 9-24-18).
- 5 <https://www.brainscope.com>; [Bloomberg Businessweek, July 23, 2018 at P. 25](#)
- 6 <https://nflconcussionsettlement.com> (last visited 9-24-18).