THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

Winter 2004

Important Announcement

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Mediation/Settlement Conferences

Reducing the Pain and Suffering in Tort Litigation

By The Honorable Howard S. Chasanow

The use of alternative dispute resolution as a substitute for court or jury trails may be the most civilized improvement to the way we resolve tort claims since court and jury trials became a substitute for trial by combat. Although there are many forms of alternative dispute resolution that are used in all varieties of legal disputes, this discussion will focus on the use of settlement conferences and mediation in resolving tort cases. My enthusiasm for settlement conferences stems from the fact that, going back over the 30 years I was a judge, I have difficulty recalling a single trial where both sides left the courtroom satisfied with the verdict, but with settlement conferences it happens in almost every case. Contrary to a popular saying, a successful settlement is not one where both parties are equally unhappy with the settlement. A successful settlement conference is one where both sides recognize they have reached a reasonable compromise and, even if they did not get the result they hoped for, they are satisfied with the result because they have closure and have avoided the uncertainty, the anxiety, and the expense of a trial and potential appeal. Most litigants also derive some satisfaction from playing an active part in reaching the decision that resolves their case rather than entrusting the decision to six people whose primary qualifications are that they are licensed to drive a car.

Mediation vs. Settlement Conference

When we use the term "mediation" we often include both mediation and settlement conferences, but technically, at least in the Maryland Rules, there is a difference. Mediation is defined in Rule 170-102 (d) and Settlement Conferences are defined in 17-102 (h). The primary differences between the two are that a settlement conference facilitator may take a more active role, may give a case evaluation,

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A is for Arbitration—a Primer

By The Honorable William C. Miller

Arbitration has been with us for a long, long time. As Martin Domke notes in his *Brief History of Arbitration*, Domke on Commercial Arbitration, we even had arbitration in ancient mythology when the three goddesses asked Paris to award the golden apple to the most beautiful among them. Only in the last two decades, however, have lawyers and judges generally accepted the fact that arbitration and the other forms of alternative dispute resolution are not only practical methods of deciding cases but are necessary to prevent courts from collapsing under the weight of steadily increasing caseloads.

Arbitration is "the process whereby parties voluntarily agree to substitute a private tribunal for the public tribunal otherwise available to them." It offers parties an inexpensive and expedited process by which to resolve their dispute, conserve judicial resources and offers the parties an opportunity to submit the dispute to an arbitrator who is experienced in the parties' field of business and thus sensitive to the parties' individual needs. See M.L.E., "Alternative Dispute Resolutions," Section 2, p. 242; *Snyder v. Berliner Const. Co., Inc.*, 79 Md. App. 29, 555 A.2d 523 (1989).

In 1973, the Maryland Legislature adopted the Maryland Uniform Arbitration Act (MUAA), which is found at MD. Code, Courts and Judicial Proceedings, §§ 3-201, *et. seq.* This Act is the analogue of the Federal Arbitration Act and establishes a policy favoring the settlement of disputes through arbitrations.

Chief Justice Warren E. Burger made the following observation:

> *"The notion that most people want black-robed judges, well-dressed Lawyers and fine paneled cowl rooms as the settings to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible."*

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President's Message

We are about halfway through MDC's year and just at the beginning of another certain-to-be-exciting legislative session. I hope you have all had the opportunity to see and appreciate the improvements that the Board is actively trying to make to serve the interests of MDC's members. At the beginning of my tenure, I identified four goals for this year and I think we are a long way toward meeting those. I will say now and will repeat again later that response and participation from every one of our members can only enhance and speed our progress toward meeting these goals.

Margaret Fonshell Ward, Esquire

Moore & Jackson, LLC

First, my most significant goal was to offer more tangible and valuable services to our members. I want MDC to be an organization for which no member ever has to ask, "what's in it for me?" I want those benefits to be at the forefront of your mind and at your fingertips. To do this, in addition to continuing our excellent programs and seminars, the Board has approved several steps to take advantage of the technology available to us and to you. We have encouraged a much wider use of the expert inquiry service through our e-mail distribution list. Each week, I see more and more members using this service and I completely encourage everyone to do so. You have all recently received the form to add considerable helpful information to our website, so that you will have resources in other members across the state. We'll also make it easier for clients and lawyers across the country to find you, identify your specialties, and be in touch with you through the website. The website is also going to contain useful links for several practice areas, including employment and labor law, workers compensation, professional liability, and others.

We have a new and improved *Defense Line* in your hands right now. Alex Wright and Matt Wagman have been committed to getting out several issues of *Defense Line* every year and we mean for this to be a valuable source of new information on cases and goings on in the defense community. Contributions of articles, commentary, or suggestions for *Defense Line* material are welcome. Got an issue about which you are itching to get published? Send it on for our review. All of this will also be packaged with a new look and a strong message of who and what MDC is to the entire defense community.

Second, it was my intention to increase our voice in judicial selections throughout the state. Our Judicial Selection Chairs, John Sweeney and Tony Taddeo, have gone to great lengths to organize and streamline the process of interviewing candidates for the circuit and appellate courts' open seats. This is a huge task and they have marshaled efforts to interview as many candidates who wished to participate and to gather our members across the state to participate in those interviews. The MDC voice is being heard loudly and strongly by the Ehrlich administration in our efforts to get the most competent judges appointed to the bench. The effort here is not yet done, though, and an Ad Hoc Committee on our judicial selections process is getting underway, not only to address issues of how we can improve our process, but how MDC can also focus on the grassroots process of identifying appropriate lawyers across the state who ought to be considering a judgeship as their next career move. If you are interested in participating in that process, please let me know.

Third, I want to continue our significant presence in the General Assembly's consideration of bills important to our constituent members and clients. Hal MacLaughlin made great strides in raising MDC's profile before the General Assembly last year, along with the able assistance of our Lobbyist, John Stierhoff. These two, along with Dan Moylan and David Godwin, Co-Chairs of our Legislative Committee, have been very active in already identifying the hot topics and crucial legislators with whom MDC will need to be working in the coming year. If you or your clients have issues before the Legislature on which you would like MDC to consider taking a position, let any of us know and we will bring the matter before the Board for consideration. In addition, if you have a particular interest in any bill pending before the Legislature and wish to offer to testify regarding that bill, please also let us know that.

Fourth, it has been my goal to expand the membership of MDC across the state. Some of you may know that MDC started out as an organization of Baltimore defense lawyers. We have been known for many years, however, as the statewide organization of the civil defense bar. Unfortunately, we don't have the voice that we need from lawyers in the western part of the state, the Eastern Shore, and some of the DC Metro and Southern Maryland counties. We need to reach those defense lawyers, too, so that we can assist in furthering their interests and those of their clients in those regions. If you know someone practicing defense law in any of those areas and you suspect he or she may not be a MDC member, please let us know. We'll get to them and make sure they get involved.

We have some terrific new programs to come. Keep an eye on your emails and mail for information about, among other things, a jury training program that will be offered jointly with the Maryland Trial Lawyers Association and will be aimed toward both judges and lawyers. On this and other events, we will undoubtedly be calling out for volunteers. If you have any interest in becoming involved in Maryland Defense Counsel, please be in touch with me. I have a rule, to which I try to adhere as much as possible, that if anyone asks for a job, they'll get one. Let me know what you would like to do, what kind of time commitment you have, and I'll make sure you get involved. Please visit our website so that you can see some of the substantive areas in which we are working, if you are not already aware of those. In order for MDC to remain a vital and growing organization, we need to keep getting new, committed people involved. I hope that you will be one of them.

HIPAA: The Basics

By Kathleen D. Leslie and Mary Malloy Dimaio

The Health Insurance Portability and Accountability Act ("HIPAA") is not new, but it is new to most practicing attorneys. HIPAA was passed in 1996, and its purpose was to address the need for portability of health benefits and information, among other things. In defending cases, attorneys need to be concerned with the Privacy Rule of HIPAA. Compliance with the Privacy Rule was required by April 14, 2003 for most covered entities ("CEs"), although smaller health plans have an additional year to comply. HIPAA privacy regulations directly apply to CEs, defined as health care providers conducting any standard transactions electronically, as well as healthcare clearinghouses and health plans. It is likely that nearly every healthcare provider is a CE under this definition. For instance, physicians and hospitals that receive lab results electronically would fall under this definition. The Privacy Rule requires that CEs ensure the privacy of Protected Health Information ("PHI"), which is any information that is individually identifiable, is created or received by a CE, and relates to a medical condition, treatment or payment for health care. This definition includes medical records and notes that are traditionally the subject of discovery in litigation, including images, samples, specimens and lab slides.

N.B.: This article is intended as an alert to the practicing litigator, not a thorough analysis of the HIPAA regulations. Further study of the regulations, at 45 C.F.R. Sec. 164-501, et seq., as they pertain to individual cases is highly recommended.

I. Are you a Business Associate?

HIPAA requires that CEs enter into contracts with business associates who use or disclose PHI. This includes attorneys providing legal services to or for the CE where the provision of legal services involves disclosure of PHI. Many attorneys have already entered into business associate agreements with health care provider clients. All business associate agreements (BAAs) *require* the following:

- Use or disclosure of PHI only as permitted by the regulations and the contract.
- "Agents" and "contractors" (undefined) to which the attorney discloses PHI must agree to the same conditions that apply to the attorney.
- Maintaining a record of disclosures of PHI provided by CEs.
- Only "minimum necessary disclosures" of PHI to accomplish the intended purpose of the disclosure.
- Implementation of policies to comply, taking into account the size of the law firm. These policies must be maintained in writing (paper or electronic) and retained for 6 years from the date of creation or when they were last in effect, whichever is longer.
- Report to CEs any use or disclosure not provided for under the contract or which breaches the contract.
- Availability of PHI to CEs.
- Availability of internal practices, books and records on disclosures to the Secretary of HHS.
- At the termination of the agreement, all copies of the PHI must be destroyed or returned to the CE.

N.B.: Indemnification provisions for violation of the statute are not required.

These restrictions on a law firm's disclosure of PHI apply only to PHI obtained from the CE, not medical information from other sources with whom the attorney does not have or need a BAA.

The most perplexing question arising from these BAAs is what constitutes an agent or contractor. These terms are not

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Editor's Corner

This edition of *The Defense Line* features lead articles from two distinguished members of the bench concentrating on alternative dispute resolution. One of the lead articles written by The Honorable William C. Miller provides us with a primer on conducting arbitrations in Maryland. The other lead article written by The Honorable Howard S. Chasanow analyzes the use of settlement conferences and mediation in resolving tort cases. We also are fortunate to have three additional articles written by our MDC colleagues. Specifically, Toyja E. Kelley, of Tydings & Rosenberg, LLP examines the case of *Porterfield v. Mascari II, Inc.*, where the Maryland Court of Appeals held that an employer did not violate public policy when it terminated the employment of an at-will employee after the employee stated that she was going to seek the advice of legal counsel in connection with an unfavorable work evaluation. Meanwhile, Kathleen D. Leslie of Whitney & Bogris, LLP and Mary Malloy Dimaio of Maher & Associates in Towson, Maryland provide a brief review of the Health Insurance Portability and Accountability Act. Finally, Donna P. Sturtz and John T. Sly of Miles & Stockbridge P.C. analyze the case *Rankin v. Umms, et al.*, involving a medical malpractice case in Baltimore City Circuit Court where Plaintiffs' claims were dismissed because they failed to establish the element of causation in their negligence claims.

The Editors sincerely hope that the members of Maryland Defense Counsel enjoy both the new look and the new features of *The Defense Line*. In this regard, if you have any comments or suggestions or would like to submit an article for a future edition of *The Defense Line*, please feel free to contact the Editors, Alexander Wright, Jr. (410) 823-8250 or Matthew T. Wagman (410) 385-3859.

(HIPAA) *Continued from page 3*

defined by the regulations. Some commentators suggest that if the agent/contractor would be considered a business associate of the CE directly, then the law firm must require the agent/contractor to abide by the law firm's agreement with the CE. Under this suggestion, expert witnesses, copying services, medical records summary services and even court reporters receiving PHI would be agents/contractors.

II. Use in Litigation

The applicability of the regulations depend upon one's role in a given situation:

1. If you represent a health care provider, you are a BA to that CE, and therefore need a BAA. Your use of the patient's PHI will then be governed by that contract, including restrictions on your redisclosure to other parties, your client, carrier, and experts.

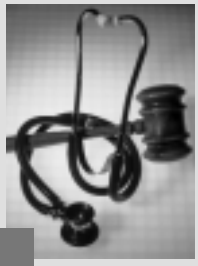
2. If you represent a non-CE defendant in a case in which there is a CE co-defendant, that CE and its BA will need to comply with their BAA and the regulations before sharing PHI with you. That means that they will need either an authorization from the patient or a request for production or subpoena (which provides notice to the patient through his or her attorney) before they will be able to furnish the requested medical records.

3. In ordinary personal injury litigation, in which you represent a non-CE defendant and you seek the medical records of the plaintiff, things have not changed. You are not a CE or a BA, but the CE who has the records will need an authorization or subpoena from you, as always, before he or she may send copies of the records. This affords the CE reasonable assurance that the patient has notice of the pending request and an opportunity to object or to seek a protective order, which is all the regulations require. At this point, the regulations no longer apply. Subsequent redisclosure of the medical records to your client, carrier and experts is then permitted, as before.

III. Authorizations

The subpoenas, requests for production and notices of deposition we have been using have been sufficient to comply with the Maryland Confidentiality of Medical Records Act (Md. Health Gen. Code Ann. Sec. 4-301, et seq. (1991), and are sufficient to comply with HIPAA, as they provide notice to the patient and an opportunity to object to the disclosure.[1]

IN DEFENDING CASES, ATTORNEYS NEED TO COMPLY WITH THE PRIVACY RULE OF HIPAA.



The requirements of the authorization under the new federal statute, however, are a bit more demanding. HIPAA requires that the authorization contain not only a written, signed and dated document with the name of the disclosing health care provider, the party to whom the information is to be disclosed, and an expiration date, as the state statute does, but also the purpose of the disclosure, a statement that the authorization may be revoked, and a warning that it may lead to the release of information beyond the protection of HIPAA.

IV. Oral Discussions with Patients' Physicians: A Thing of the Past?

Because Maryland has no common law doctor-patient privilege, and a statute governing the confidentiality of medical records only, it has been permissible under Maryland law to interview a party's treating physicians without the party's written authorization. However, HIPAA regulations apply to oral, written and electronic PHI. Any physician who is a CE is prohibited by these regulations from disclosing PHI absent a HIPAA-compliant authorization (or appropriate subpoena or court order). The question arises whether attorneys can now request informal interviews with physicians when the physicians are not educated about HIPAA and its implications.

Maryland Rule of Professional Conduct 4.4 and its Comment prohibit using the legal process in a way known to violate a person's rights. Since HIPAA creates protections for privacy in an individual's PHI, interviewing a patient's physician without authorization would appear to violate the patient's privacy rights, and thereby run afoul of Rule 4.4.

In addition, Rule 4.1(a)(1) prohibits a lawyer from making a false statement of law or fact when dealing with third persons. The Comment indicates that a misstatement can occur by a failure to act, which may be construed as an affirmative duty to inform a physician that speaking about a patient's PHI without authorization is a violation of HIPAA. *See also* Rule 8.4 (professional misconduct to engage in conduct involving misrepresentation or deceit).

In light of the Privacy Rule, it is advisable to avoid informal interviews of treating physicians on the subject of a patient's PHI absent the appropriate written authorization.

Ms. Leslie is a partner in the Towson, Maryland firm of Whitney & Bogris, LLP. She concentrates her practice in the defense of general products liability, medical device, pharmaceutical, and medical malpractice matters.

Mary Malloy Dimaio of Maher & Associates in Towson, Maryland focuses her practice on the defense of professional, product, premises and auto liability claims.

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[1] *While it appears that the current use and form of subpoenas in Maryland is sufficient to allow covered entities to produce PHI and comply with the HIPAA requirements, some health care providers may take the position that because Maryland, unlike other states, does not have a specified objection period prior to the production of PHI by a health care provider, there is insufficient assurance of consent to the release of PHI and therefore either a court order or a HIPAA compliant authorization is required in addition to a subpoena. That is to say, resistance to the use of the existing discovery tools is expected.*

General Right to Legal Counsel Is Not A Clear Mandate of Public Policy Sufficient to Abrogate Maryland's Employment At-Will Doctrine

By Toyja E. Kelly

In *Porterfield v. Mascari II, Inc.*, 374 Md. 402 (2003), a closely divided Court of Appeals (J. Harrell) held that an employer did not violate a "sufficiently clear mandate of public policy" when it discharged an at-will employee for stating an intent to seek advice from legal counsel regarding an unfavorable work evaluation. Although Maryland law may favor access to counsel, the Court affirmed that there was no sufficiently clear mandate of public policy violated in this case.

The employee in this case was Deborah Porterfield, an administrative assistant with Home Instead Senior Care. Home Instead hired Porterfield in1997 as a full time Staff Coordinator. Her duties primarily consisted of administrative matters. In March 1999, Home Instead hired Julie Elseroad to perform clerical and administrative work. Conflicts between Porterfield and Elseroad ensued. In response to these conflicts, Patricia Mascari, Home Instead's owner and operator, performed a formal review of Porterfield's work. Porterfield received "above average" ratings in all categories. Mascari also described Porterfield as a "tremendous asset" to Home Instead.

In May 1999, Mascari confronted Porterfield about rumors that Porterfield had been complaining about Home Instead to another Home Instead franchisee. Porterfield denied making these statements and stated that she was happy working with her employment.

In June 1999, however, new problems surfaced. Mascari reprimanded Porterfield in response to Home Instead's new recruiting policy for potential caregivers. On August 30, 1999, Mascari presented Porterfield with a written "Employee Warning Report." The Report advised Porterfield that she would be terminated if her employment performance did not improve at the end of the next four weeks. The Report also included allegations that Porterfield alleged were false and defamatory.

Mascari asked Porterfield to sign the Report. Porterfield asked to take the document home so that she could review it more carefully. Although the following day was a scheduled day off for Porterfield, she called the office and spoke with Elseroad about the Report. She allegedly stated, "due to the seriousness of the libel contained in the document, I have been advised to seek counsel before formally responding."

Later that same day, Mascari called Porterfield to advise that she was being terminated immediately. Porterfield filed a complaint in the Circuit Court for Montgomery County alleging, among other things, wrongful discharge.

The Circuit Court granted the employer's Motion to Dismiss the wrongful discharge count, which was affirmed by the Court of Special Appeals. The Court of Appeals granted certiorari to decide the issue of whether the general right to consult legal counsel is a clear mandate of public policy sufficient to support a wrongful discharge cause of action.

Porterfield argued that the Court should adopt the approach taken by Ohio and Iowa courts and rule that the general right to consult legal counsel is a clear mandate of Maryland public policy. *Simonelli v. Anderson Concrete Co.*, 650 N.E.2d 488 (Ohio 1994); *Thompto v. Coburn's Inc.*, 871 F. Supp. 1097 (N.D. Iowa 1994). In further support of her position, Porterfield asserted that Article 24 of the Maryland Declarations of Rights mandates access to counsel in civil and criminal cases. She also directed the Court to a series of Maryland cases that apparently recognized the right to legal counsel as an important public policy. *Zetty v. Piatt*, 365 Md. 141 (2001); *Rutherford v. Rutherford*, 296 Md. 347 (1983); *Helferstay v. Creamer*, 58 Md. App. 263 (1984); *Wadman v. McBirney*, 51 Md. App. 385 (1982); *Trupp v. Wolff*, 24 Md. App. 588 (1975). Finally, Porterfield claimed that the Maryland Legal Services Corporation Act, codified at Md. Code (1957, 2001 Repl. Vol.), Art. 10 § 45A, formed the basis for this public policy.

A majority of the Court of Appeals soundly rejected all of Porterfield's arguments. The Court reiterated the strong presumption against the judicial creation of public policy. *Wholey v. Sears, Roebuck and Co.*, 370 Md. 38, 54 (2002). Furthermore, it affirmed Maryland's well-settled law that an action for wrongful discharge of an at-will employee lies only when the discharge contravenes some clear mandate of public policy. *Adler v. American Standard Corp.*, 291 Md. 31, 47 (1981). A terminated employee must allege with particularity the source of public policy that was violated by the discharge. *Watson v. Peoples Sec. Life Ins. Co.*, 322 Md. 467, 477 (1991).

> In Maryland, an employer may be liable for wrongful discharge when it terminates an employee because he or she (1) refuses to commit an unlawful act, (2) performs an important public function, or (3) exercises a legal right or privilege.

In rejecting Porterfield's statutory basis for recognizing the general right to legal counsel as a public policy, the Court stated that she was "wrong to conflate any public policy generally favoring access to counsel with a policy that is violated by the mere suggestion by an employee that he or she may want to seek advice of counsel." It further held that the possibility that an assumed right to counsel may be exercised is not the same as the actual act of exercising that right. The Court specifically disregarded Porterfield's claim that the Maryland Legal Services Corporation Act constituted a public policy mandating a right to consult legal counsel. Instead, it declared that the Act merely addressed a need to provide access to legal counsel to those who were unable to afford it.

Toyja E. Kelley is an associate in the Litigation Department at Tydings & Rosenberg, LLP. Mr. Kelley handles litigation matters involving commercial claims, insurance coverage, and real estate.

Don't Forget Causation—It Can Save You.

By Donna P. Sturtz and John T. Sly

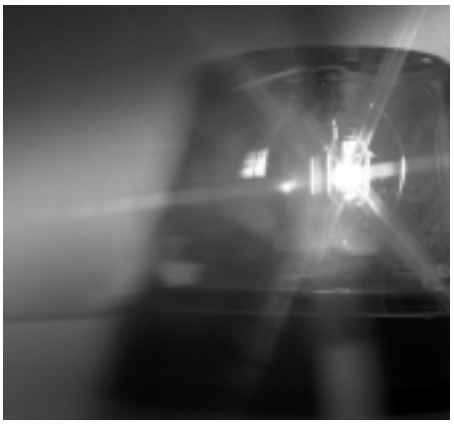
On October 10, 1997, Sarah Rankin, then age seventeen, suffered a severe traumatic brain injury as the result of a motor vehicle accident in Carroll County during which a truck broad-sided the car in which she was riding. She was one of four young women in the car. They were leaving high school for home on a beautiful autumn afternoon.

Witnesses testified that the car was thrown approximately forty feet from the accident scene into the meridian that separated the lanes of traffic. Because of the extensive damage to the car, emergency personnel could not open the door next to Ms. Rankin and, fearing head and neck injuries, did not want to remove her through the opposite door. Instead, they cut the roof off of the car, placed her on a backboard, and rushed her to an awaiting helicopter.

Ms. Rankin suffered head and arm lacerations and was rendered unconscious by the accident. She was found at the scene to have a Glasgow Coma Scale score of three (3).[1] Once moved to the helicopter, she was air-lifted from the accident scene to the Shock Trauma Center at the University of Maryland in Baltimore. She experienced pulse oxygen levels of below 90% at the scene of the accident and during her transport to Shock Trauma. She was bagged in an effort to assist her breathing. Ms. Rankin was thereafter admitted to Shock Trauma and noted to be apneic. She was placed on a ventilator after a pressure bolt was inserted into her skull. The trauma surgeons performed surgery to stabilize Ms. Rankin and to repair her lacerations. Additionally, radiographic studies confirmed that she had suffered a severe traumatic brain injury and axonal sheer injury. Axonal sheer injury is the tearing of tissues within the brain due to the force of traumatic impact. It can result in short and long-term memory loss, mobility issues, and death.

While still at Shock Trauma, and while still in a coma, a tracheostomy was performed on Ms. Rankin on October 16th. On October 28th, the day of her discharge from Shock Trauma, Ms. Rankin's tracheostomy tube was downsized.

By the time of her discharge, Ms. Rankin had only progressed to a Glasgow Coma Scale score of 10 and a Rancho Los Amigos Scale score of II-III.[2] These scores indicated that while Ms. Rankin was beginning to track movement with her eyes and to respond to stimuli, she was still in a coma. A case manager at Shock Trauma coordinated Ms. Rankin's discharge planning and insurance coverage.



Upon discharge from Shock Trauma, Ms. Rankin was transferred to Frederick Health Care Center ("FHCC") in Frederick, Maryland for sub-acute care and rehabilitation. While at FHCC, Ms. Rankin experienced three (3) discreet respiratory events that necessitated her transport to Frederick Memorial Hospital. Ms. Rankin was returned to FHCC after each of these incidents with Ms. Rankin's parents' consent. The health care providers at Shock Trauma were not concurrently notified that these respiratory events had occurred. At the end of December of 1997, Ms. Rankin was admitted to the acute rehabilitation program at Kennedy Krieger Institute. She then progressed through Kennedy Krieger's outpatient program, attended and graduated high school, and attended modified courses at Carroll County Community College.

Plaintiffs and Defendants agreed that Ms. Rankin's ongoing disabilities were centered on short-term memory deficits. However, she also suffered from mobility problems and issues of emotional control that are hallmarks of traumatic brain injury. Plaintiffs claimed that Ms. Rankin's short-term memory deficits were the sole result of an anoxic injury arising from the three respiratory events at FHCC. Defendants disputed this contention and attributed Plaintiff's deficits to the traumatic brain injury itself and from the reduction in oxygen flow to her brain immediately following the motor vehicle accident. All parties agreed that Ms. Rankin is unlikely to be able to live and/or work independently due to her deficits.

The lawsuit sought recovery based on the injuries allegedly sustained by Ms. Rankin secondary to the breathing issues. Plaintiffs sued the University of Maryland Hospital, Shock Trauma, the physicians and nurses at Shock Trauma and the nurse that coordinated Ms. Rankin's transfer from Shock Trauma to FHCC. They also sued Plaintiffs' health insurer, FHCC, her personal physician at FHCC, and its medical director. Finally, they sued one of the emergency room physicians who had cared for Ms. Rankin at Frederick Memorial Hospital.

Among other things, Plaintiffs alleged that the downsizing of Ms. Rankin's tracheostomy tube mandated careful monitoring of her ability to maintain airway clearance of secretions for a period of one week. Plaintiffs further alleged that the medical records from Shock Trauma indicated that Ms. Rankin was to be admitted to facility with a Traumatic Brain Injury Unit such as Kernan Hospital. As noted, Ms. Rankin was instead transferred to FHCC. To support their claims, Plaintiffs alleged that the University of Maryland or Shock Trauma permitted Plaintiffs' health insurer, Mid-Atlantic Medical Services, Inc. ("MAMSI/OCI"), to have unrestricted access to Ms. Rankin and her medical records and that these agents regularly communicated with the transfer coordinator at Shock Trauma regarding Ms. Rankin's proposed treatment. Plaintiffs claimed that the decision to transfer Ms. Rankin to FHCC instead of to Kernan Hospital was mandated by MAMSI/OCI. Plaintiffs alleged that

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[1] *The Glasgow Coma Scale runs from 3 to 15 with a score of 3 being the lowest state of consciousness of a live individual.*

the decision to transfer Ms. Rankin to FHCC was due to policies and protocols of MAMSI/OCI that allegedly encourage or mandate cost savings over "appropriate" medical care.

Plaintiffs alleged that Defendants agreed to carry out MAMSI/OCI's alleged directives due to the policies, protocols, and course of conduct of Defendants that, because of economic motivation, allegedly allowed non-health care providers such as insurance companies to make treatment decisions. Finally, Plaintiffs alleged that FHCC did not possess the skills, training, expertise, staffing or equipment to provide the care required for a traumatic brain-injured patient with a tracheostomy and that Ms. Rankin's physician at FHCC failed to provide appropriate care.

In addition to claims of negligence, throughout the various permutations of their Complaint, Plaintiffs consistently alleged that Defendants had committed fraud in their dealings with them. In particular, they alleged that Defendants and MAMSI/OCI "induce[d] Charles G. Rankin and Rose E. Rankin [Ms. Rankin's parents] to consent to Sarah Rankin's transfer out of the University of Maryland and/or Shock Trauma and/or to transfer her to FHCC for economic reasons."

Early in this matter, judgment was entered on behalf of MAMSI/OCI with regard to all tort claims pending against it. Pursuant to a Motion for Partial Summary Judgment, the Court also entered judgment in Defendants' favor with regard to Plaintiffs' claim of conspiracy. Plaintiffs had alleged that Defendants and MAMSI/OCI had conspired to discharge Sarah Rankin to Frederick Health Care Center because "it would cost less to admit Sarah Rankin to FHCC than if she were admitted to Kernan Hospital or a comparable facility with a Traumatic Brain Injury Unit/Coma Emergence Program." Finally, the Court entered judgment in favor of Defendants with regard to all intentional tort and punitive damages claims.

Despite there being no intentional tort claims, Plaintiffs sought to introduce substantive information regarding Plaintiffs' insurance company at trial. Defendants moved in limine to preclude such evidence because they argued that motive was inadmissible in negligence cases. To support their position, Defendants noted that the Maryland Court of Appeals has succinctly stated that, "[i]n civil cases involving negligence there can be no question of motive or intent[.]" *Nesbit v. Cumberland Contracting Co.*, 196 Md. 36, 42, 75 A.2d 339, 342 (1950). In doing so, the Court of Appeals was simply stating the obvious, i.e., that motive and intent are antithetical to the concept of negligence which envisions actions taken without motive or intent but which nevertheless are unreasonable. The Court agreed and precluded evidence of insurance from trial.

> In civil cases involving negligence there can be no question of motive or intent i.e. motive or intent are antithetical to the concept of negligence, which envisions actions taken without motive or intent but which nevertheless are unreasonable.

Trial of this matter commenced on April 1, 2003 and was presided over by the Honorable M. Brooke Murdock in the Circuit Court for Baltimore City. While numerous witnesses were called regarding the various standards of care and regarding causation issues, Plaintiffs called only one witness, Jonathan Fellus, M.D. ("Dr. Fellus"), to establish alleged breaches in the standard of care by Shock Trauma's transfer nurse. Dr. Fellus is a neurologist by training and has no experience as a case manager or as a discharge planner. Specifically, Dr. Fellus testified that the transfer nurse breached the standard of care by coordinating the transfer of Ms. Rankin to a subacute facility such as FHCC, as opposed to an acute rehabilitation facility such as Kernan Rehabilitation Hospital ("Kernan"), and that he allegedly did so without obtaining a written "physician order."

There was absolutely no expert testimony at trial that FHCC breached the standard of care in accepting Ms. Rankin as a patient. This is because FHCC had settled prior to trial. Indeed, it was undisputed at trial that FHCC was licensed by the State of Maryland and certified by the Federal Government to provide rehabilitation and respiratory care to patients like Ms. Rankin. Specifically, FHCC had a subacute rehabilitation unit and a specially designed pulmonary unit for patients with tracheotomies and for patients requiring ventilator support. It was also undisputed that FHCC reviewed Ms. Rankin's medical records and represented to Shock Trauma's transfer nurse that it was appropriately equipped and staffed to care for Ms. Rankin and, in fact, accepted Ms. Rankin as a patient on October 28, 1997. Similarly, another of Plaintiffs' experts, Albert Weihl, M.D. ("Dr. Weihl"), testified that he had no criticisms of FHCC's decision to admit Ms. Rankin on October 28, 1997. Dr. Weihl also testified that the nurses and therapists at FHCC were qualified to care for Ms. Rankin.

At the close of all the evidence, Defendants moved for judgment. The Court granted judgment for the trauma surgeon at Shock Trauma because Plaintiffs had based their theory against him on the "Captain of the Ship" theory of liability that has been rejected in Maryland. Likewise, the Court entered judgment for the emergency room physician at Frederick Memorial Hospital. Thus, the only Defendants to appear on the verdict sheet were the University of Maryland, the Shock Trauma transfer nurse, and Ms. Rankin's primary care physician at FHCC. The jury returned a verdict in favor of the University of Maryland but against the transfer nurse and Ms. Rankin's primary care physician at FHCC. The authors, who were counsel for the transfer nurse and the various University of Maryland defendants, promptly filed post trial motions. Counsel for Ms. Rankin's primary care physician did the same.

In the motion for JNOV filed on behalf of the transfer nurse, it was argued that notwithstanding Dr. Fellus' testimony regarding the transfer nurse's alleged breaches of the standard of care, he wholly failed to establish any causal link between the alleged breaches and the injuries allegedly sustained by Ms. Rankin at

Continued on page 8

[2]*The Glasgow Coma Scale is regularly used to assess patients immediately after a traumatic event while the Rancho Los Amigos Scale is designed to more accurately assess progress during rehabilitation. The Rancho Scale runs from I to VIII with VIII being the most alert and active.*

EXECUTIVE DIRECTOR'S REPORT

Exciting new electronic features are now available. I look forward to hearing your comments about these new member services!

1) The MDC member directory has gone high tech. You can now search the member directory for information about practice areas, retrieve a list of members by county, and identify former law clerks. We've also provided direct e-mail links and links to your firm's website.

If you have not sent us your areas of concentration, please select three (3) from the box and email them to **kshemer@mddefensecounsel.org**, so that we can get the most information available to you and the business community.

2) We'll poll the membership for you for information on expert witnesses and deposition transcripts. Recent e-mail alerts included a request for an expert in the design and manufacture of fire sprinkler heads, an endocrinologist for a records review/IME regarding alleged trauma induced thyroiditis and deposition transcripts of Dr. Jane Doe where her ability to read MRI's or film studies was an issue.

Requests for transcripts of particular experts also will be forwarded to the Defense Research Institute, a national and international membership association of lawyers and others concerned with the defense of civil actions. DRI will conduct a search of its extensive expert witness database and will contact you only if it has compact disks or transcripts of that expert's testimony. The charge is normally $10 per CD and a flat $50 per transcript, but the DRI will offer members of MDC a 15% discount off of that price. If you (or someone at your firm) is not a DRI member, the DRI will offer a free 12 month membership (the DRI database is only available to DRI members). There is no obligation to use the service.

If you do not receive periodic member alerts from MDC and would like to be added to the list, please send your e-mail address to **kshemer@mddefensecounsel.org**.

http://www.mddefensecounsel.org

Areas of Concentration (select three)

- Admiralty and Maritime
- Alternative Dispute Resolution
- Antitrust & Trade Regulation
- Appellate Litigation
- Bankruptcy
- Business and Commercial Litigation
- Complex Litigation
- Criminal Defense
- Environmental Law
- First Party Property Insurance
- Funeral Law
- General Counsel
- General Liability Practice
- Hospital/Managed Care/Medicare Law
- Housing Discrimination
- Insurance Coverage and Bad Faith Litigation
- Insurance Regulation
- Intellectual Property Litigation
- Lobbying/Government Relations
- Management Labor & Employment Law
- Medical Liability
- Non-Competition Litigation
- Personal Injury Defense
- Products Liability
- Professional Liability
- Subrogation
- Surety and Construction Litigation
- Telecommunications Law
- Toxic Torts
- Transportation/Trucking Defense
- Workers' Compensation
- Other

(DON'T FORGET CAUSATION) *Continued from page 7*

FHCC. Indeed, Dr. Fellus abjectly failed to address the causation issue in relation to the transfer nurse's care and Plaintiffs' attorney failed to inquire of Dr. Fellus in this regard. As a consequence, the jury was not provided with the requisite expert causation testimony that would have permitted it to consider a causal link between Nurse Bauman and Ms. Rankin's injuries.

Additionally, Defendants argued that Dr. Fellus failed to present sufficient foundation for his opinion that Ms. Rankin suffered injury from the events on November 2 and November 6, 1997. Defendants asserted that no evidence or methodology existed or exists to determine the extent of Ms. Rankin's injury from the car accident on October 10, 1997. Thus, any testimony regarding whether Ms. Rankin suffered further injury on either November 2 or November 6, 1997 constituted rank speculation.

With regard to whether Dr. Fellus had provided sufficient causation testimony, Plaintiffs' counsel essentially conceded that he had failed to elicit specific testimony to that effect. Instead, Plaintiffs argued that causation could be established by reliance on the theory that the transfer nurse at Shock Trauma had placed Ms. Rankin in "the field of danger"—presumably, FHCC. Defendants responded by noting that no medical malpractice case in Maryland has ever relied upon "the field of danger" theory to establish causation. The Court agreed and entered JNOV on behalf of the transfer nurse. Alternatively, the Court granted the transfer nurse a new trial. The Court denied the dispositive post-trial motions filed by Ms. Rankin's primary care physician at FHCC. The Court determined that Plaintiffs' experts had offered admissible opinions that a reasonable jury could rely upon to find that Ms. Rankin's injuries were caused by the post-accident breathing issues at FHCC.

This matter is being appealed by Plaintiffs and Ms. Rankin's primary care physician at FHCC.

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Mr. Sly is an associate in the Baltimore office of Miles & Stockbridge specializing in medical malpractice and product liability defense. He is an honors graduate of Albany Law School where he served as Associate Editor of the Albany Law Review.

(MEDIATION/SETTLEMENT) *Continued from page 1*

and may make a recommendation. Both forms of dispute resolution can be equally effective. Mediation is perhaps the preferred alternative where the parties have an ongoing relationship and need to enhance their own abilities to work out existing and potential disputes. A settlement conference may be the preferred alternative where a litigant has unrealistic expectations about the probable outcome or needs an assessment of the case by an experienced neutral. Often retired judges and senior members of the bar conduct settlement conferences because their experience and stature may add credibility to their evaluations and recommendations. Mediation requires the same ability to communicate and listen as well as good people skills, but legal expertise and experience are less important. As might be expected, the retired judges and senior members of the bar who conduct settlement conferences often charge more for their services than many mediators. Careful thought should be given to whether to select mediation or a settlement conference and cost should be a consideration, especially in smaller claims and cases where the parties are close to resolution. Also keep in mind that FREE mediation and settlement conferences by highly qualified people are available in the federal courts and in many circuit and district courts.

When to Hold a Settlement Conference or Mediation

The decision when to hold a settlement conference or mediation should balance the need to know more about the opponent's case against the relative cost of discovery. When the basic facts or contentions concerning liability and the economic damages are apparent, there is little benefit in extensive and expensive discovery prior to scheduling mediation or a settlement conference. The money saved on discovery can be put to better use as part of the Plaintiff's recovery. In some cases, as for example a claim against a hospital for a fairly obvious breach of the standard of care, mediation or settlement conferences should be considered before suit is filed and before expensive experts are retained to render opinions on undisputable issues. In other types of cases where full discovery is necessary, my experience has been that the mediation or settlement conference should be scheduled to take place approximately a month before trial. That way there is still time to call off an expert witness and the looming trial enhances the motivation to resolve the case.

Mediation and settlement conferences are similar, except that the facilitator takes a more active role in the settlement conference. Since I am technically not a mediator, but am more comfortable in the role of settlement facilitator, I would like to focus on preparation for and the conduct of settlement conferences.

The decision when to hold a settlement conference or mediation should balance the need to know more about the opponent's case against the relative cost of discovery.

Preparation for a Settlement Conference

Prior to a settlement conference, the attorney should prepare a confidential settlement conference statement as well as prepare the client. The statement should concisely but fully explain the case. It is helpful both to emphasize the strengths as well as to note the weaknesses. Supporting documentation on contested issues should be included. Preparing the client is equally important. The client should be encouraged to keep an open mind, listen and be flexible. The client should also be emotionally prepared to make a decision and understand that, although the attorney and perhaps the settlement facilitator may give some advice and guidance, the ultimate decision must be made by the client. It is also helpful to explain the steps in the process and to make sure that the client has confidence in the settlement facilitator. Two final cautions in preparing for a settlement conference: do not go into the conference with the idea that it is a form of discovery or a step in the preparation for trial—it is not. And do not go into the settlement conference thinking that, after the conference, you will get a better settlement offer at the court house on the day of trial. If the settlement facilitator does his or her job properly, each party will go as far as it will ever go in attempting to reach a settlement. Everyone's expectation should be that, if the case does not settle at the settlement conference, it will go to trial and all offers and demands are withdrawn. No attorney or insurance carrier wants to get a reputation for caving in on the eve of trial.

Conduct of a Settlement Conference

Clients know they must make the final decision about settlement so most clients want to and should participate in every phase of the settlement conference. The rare exception is where the attorney needs to make the settlement facilitator aware of something that should not be said in the client's presence. Any discussion with the attorney outside the presence of the client should be handled discreetly so as not to offend the client.

The attorney's opening statement is an important part of a settlement conference. Clients see the settlement conference as a substitute for their trial so they want to be sure that the settlement facilitator and their opponents fully appreciate their case. There is also a cathartic benefit in hearing their cause championed in front of the adversary and an impartial observer. A good opening statement will also demonstrate to the opposition the attorney's enthusiasm for and sincere belief in the strength of the case. Therefore, even though there has been a pre-conference written statement provided, and even though the settlement facilitator and everyone else present understands the issue, it is still beneficial for both sides to make an opening statement highlighting their case.

After the opening statements the settlement facilitator usually will caucus with each side separately. Generally, in an attempt to bring both sides to a mutually acceptable compromise, a settlement facilitator will act as a "devil's advocate" pointing out the risks, uncertainties, and expense involved in a trial and potential appeal. Sometimes the process of conveying offers and demands back and forth may seem more like a tort auction than a tort action, but as awkward and artificial as the process seems, it works. The parties need to move gradually and have time to understand and accept each step toward the final mutually acceptable compromise.

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(A is for Arbitration) *Continued from page 1*

For over a decade there have been dire predictions that without the adoption of court sponsored ADR programs the courts will collapse under the weight of thousands of mass tort and product liability claims, as well as steadily increasing filings in other civil, domestic, and criminal cases. *See 50 Md Bar Review 71 (1991)*. It is not my intention in this article to preach to you that ADR, and arbitration in particular, is the panacea for all of the court system's ills. Furthermore, having been a judge for the past twenty-two and one-half years, I certainly would not urge you to rule out presenting your client's dispute to a judge or jury. Don't waive your client's jury and court trial rights and arbitrate simply to lighten the burden of the court. Do it only after you have considered all of the means by which your client's case can be resolved, and you then conclude that arbitration is in his, her or their interest.

The Decision to Arbitrate

If there is a relatively small amount of money involved, you may want to consider filing your client's case in the District Court. There you can get a speedy, cost effective determination of the case, unless, of course, there is an appeal *de novo* if it's a small claim or an appeal on the record if it's not. You may conclude that your client's case has more jury appeal than arbitrator appeal. Even though differentiated case management and early judicial intervention has done much to streamline our court systems and to speed a case through the Circuit Court, it can still be time consuming and expensive. Furthermore, if you get a big win, almost as certainly as there is a commercial after a punt in a television NFL football game, there will be post trial motions and, more probably than not, an appeal to the Court of Special Appeals.

If you decide that a trial is not in your client's best interest, use your creativity to fashion a process that will best resolve your client's dispute. There are a variety of weapons in the alternative dispute resolution (ADR) arsenal, such as mediation, facilitation and neutral fact finding. You should at least consider whether using one of these non-lethal, small arms types of ADR will resolve your client's conflict before unlimbering the heavy artillery of binding arbitration. You may, of course, have no choice—you may be contractually required to arbitrate.

Arbitration generally provides a cheaper and quicker resolution of your client's case than a trial. It also offers a confidentiality that a public trial cannot provide. For example, physicians and attorneys in malpractice cases, even if they don't believe they did anything wrong, can avoid the notoriety of unhappy patients and clients for whom they obtained bad results.

The Selection of an Arbitrator or Arbitrators

There is an old saying that getting the right judge is more important than getting the right lawyer. Picking the right jury can often mean the difference between winning and losing your case. In arbitration, selecting the right decision maker is critical. You and your client in all probability are going to be stuck with the arbitrator's award. Your choices of the arbitrator or arbitrators may be limited. It may be pre-determined by a mandatory provision in the contract. Under the MUAA, § 3-211, "if the arbitration agreement provides a method of selection of the arbitrator, this method shall be followed." Under § 3-211, *supra*, if the mandatory arbitration provision fails to provide a method for the appointment of arbitrators, a party may petition the court for the appointment of an arbitrator or arbitrators. Even if there is a pre-determined method for the selection of the arbitrator, the litigants can by agreement waive such provision and decide upon a different method of selection.

I have never been privy as to why I have been selected or rejected as an arbitrator. Many of you may therefore have better insight than I in selecting an arbitrator. It seems fundamental, however, that you should make an investigation of the proposed arbitrator or arbitrators before agreeing to him, her or them. Don't be too shy to ask for a resume. Feel free to make inquiries of judges and your fellow lawyers as to the proposed arbitrator's proclivities and biases. Depending upon the nature of the case, there may be databases that are maintained by insurance companies and various organizations that may help you in this regard. It is vitally important that you find out whether the proposed arbitrator has a predisposition that might adversely affect your client's case. Does the potential arbitrator seem to routinely give more weight to the opinions of particular examining physicians? Does he or she determine the non-economic damages simply by multiplying the special damages by three? A panel of arbitrators, usually three, can help insure neutrality and a balanced award, but this is often too expensive for the average case.

Generally speaking, you should find an arbitrator that has some technical knowledge of the subject matter of the dispute. Arbitration associations do provide lists of arbitrators in specialized fields. There may, however, be a case where you don't want someone who has just enough knowledge about the subject matter in dispute to want to second-guess your expert's opinion.

In the final analysis, I would suggest that before agreeing to an arbitrator or arbitrators for your client's dispute, ask yourself the following question, "Would I be comfortable allowing this person or persons to make an important decision in my own business or personal affairs?"

The Arbitration Agreement

Once you have agreed upon an arbitrator, or even before, you should prepare a written

(MEDIATION/SETTLEMENT) *Continued from page 9*

Once a mutually acceptable settlement is achieved, it is important to get closure, to have all parties come together and make sure that everyone understands the settlement, agrees to the settlement, and is satisfied that the compromise reached is fair and reasonable.

Some disputes must be resolved by trial, but a constantly growing percentage of tort claims are being resolved by a mutually agreeable compromise brought about through the participation of the clients in a far less agonizing, less expensive, and less risky form of dispute resolution.

Judge Chasanow has retired from Maryland Court of Appeals and now acts as an arbitrator and mediator for private alternative dispute resolution cases.

This article was also published by the MTLA.

arbitration agreement. Bear in mind that Title 17 of the Maryland Rules provides that arbitration is not binding "unless the parties otherwise agree in writing." Since arbitration is a creature of contract, you should be careful to set forth all of its terms and conditions in the agreement. Section 3-214 of the MUAA provides that a party at an arbitration hearing has the right to be heard, to present evidence material to the controversy, and to cross examine witnesses. If these rights or any of them are to be waived or limited, you must express this in your agreement. Minimally the parties should agree on the number of live witnesses that will testify, what reports and other documents will be submitted and when they will be submitted. Most arbitrators like to get these submissions in advance of the hearing. I personally prefer to have counsel bring any such documents to the arbitration hearing and have them offered at that time. This insures that each side is aware of everything that the other side is submitting. The arbitration agreement may also take the form of a multi-page document, spelling out in detail the conduct of the proceeding and containing a plethora of "whereases."

One of the advantages of arbitration over trial is its flexibility. You can tailor your arbitration proceeding to fit the dispute to be resolved. In the form that we most commonly see, the automobile accident case, where liability is admitted, live testimony is generally limited to the plaintiff and one or two other witnesses, and medical, hospital and other reports and documents are submitted to the arbitrator. The agreement in this type of arbitration is usually a high/low letter from defendant's counsel, signed by plaintiff's counsel, with a stipulation of dismissal upon receipt of the arbitrator's award. The parties agree upon a minimum and maximum amount that the plaintiff will recover if the arbitration award is under or over those amounts and to be bound by any award within the minimum/maximum range. To avoid any temptation for the arbitrator to split the difference, he or she should not be privy to the high/low. If the parties wanted to split the difference, presumably they would have settled the case. On the other hand, the arbitration may take the form of an actual court proceeding, with the designation of experts, discovery, pretrial motions and finally a full-blown trial before the arbitrator. Whatever form it takes, it is important to spell out the ground rules in the arbitration agreement.

A Timetable for the Arbitration

As the stand-up comic says—timing is everything! The promise of arbitration for your client is that it is a cost- effective alternative to expensive, drawn-out litigation. To fulfill this promise, it is important that time restraints be agreed upon. To this end, if the arbitration involves a complex dispute, arbitration hearing dates should be agreed upon, as well as dates for the naming of experts, discovery deadlines and any pre-hearing motions. A scheduling order signed by the parties is helpful in moving the process along.

Presenting Your Case to the Arbitrator

What kind of presentation should you make to an arbitrator? The most important ingredient to any presentation, whether it is to a jury, a judge or an arbitrator, is preparation. There is no substitute for it. Don't feel that you have to leave behind any photograph, diagram or other visual aid just because it's an arbitration proceeding and not a trial. On the other hand, don't bury the arbitrator with a truckload of paper. There is a 17th Century French philosopher who began a letter to a friend with the following: "Forgive me for writing such a long letter. I had not time to write a short one." If, for example, the arbitration involves a personal injury claim where the plaintiff has had a long hospital stay, it's alright to submit the entire hospital record, but you should in your presentation reference the parts of that record that you feel are important. In fact, a written summary of your client's claim or defense consisting of not more than ten pages can be very helpful to the arbitrator. Such a submission should not, however, be made unless it is provided for in the agreement or has the prior approval of opposing counsel.

Appellate Review

One of the most attractive features to arbitration is its finality. This is also to some its shortcoming. It is practically impossible to get a bad arbitration award vacated. It is interesting to note that Titles 7 and 8 of the Maryland Rules deal with appeals from the

One of the advantages of arbitration over trial is its flexibility. You can tailor your arbitration proceeding to fit the dispute to be resolved.

District Court, Judicial Review of Administrative Agency Decisions, and appeals to the Court of Special Appeals and the Court of Appeals. Where are the rules for appeals from arbitration findings and awards? Does that tell you anything? MUAA Section 3-222 does provide that a party may apply to the arbitrator to modify or correct an award within 20 days after the delivery of the award. The Court may only correct or modify an award (1) if there was a miscalculation of the figures or an evident mistake in the description of the person, thing or property referred to in an award; (2) the arbitrator made an award on a matter not submitted to him or her; (3) the award is imperfect in form affecting the merits of the controversy. MUAA Section 3-224 provides that an award may be vacated: (1) if procured by fraud or undue influence; (2) if it is evident that the arbitrator was not impartial; (3) the arbitrator exceeded his or her power; (4) the refusal to postpone a hearing, refusal to hear evidence or conducting the hearing contrary to the agreement; and (5) there was no arbitration agreement. The courts have added another: "if the arbitrator has made a completely irrational interpretation of the contract."

An Arbitration Checklist

Before committing your client to binding arbitration, you may wish to go over a checklist with him or her. In doing so, you should consider the following:

1. ***The arbitrator or arbitrators.*** Who is to hear the case? How much will he or she charge? Who is to pay the arbitrator? Should the arbitrator be paid in advance or should you escrow money from your client to pay him or her? Bear in mind a client is not eager to pay the arbitrator that decides the case against him or her.

2. **A timetable.** When will the arbitration hearing be held? In the meantime, what cut-off should there be with respect to the designation of experts and discovery? Should

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the parties agree to a scheduling order?

3. ***The forum.*** Where shall the hearing take place. Since the plaintiff ordinarily has the most live witnesses, his or her counsel's office is often the most convenient location. If the parties desire a neutral playing field, the arbitrator or arbitration association may be able to find an appropriate facility. Many county courthouses have conference rooms available. Several summers ago, I was involved in an eight day arbitration trial in which we rented a courtroom classroom in one of the local law schools.

4. ***Confidentiality***. Do the parties agree not to disclose what takes place at the hearing and not to disclose the amount of any award? Are there parts of the arbitration agreement, such as a high/low or insurance coverage to which the arbitrator should not be privy?

5. ***The evidence.*** What live witnesses will each side present? Should they be sworn? Is cross-examination to be limited in any way? How long will the hearing take? What documents, reports, photographs and physician evidence are to be submitted? Is there to be any extension of time after the hearing when such evidence may be submitted to the arbitrator?

6. ***The award.*** Is the award to be binding? What, if any, post-hearing rights should the parties have for a re-consideration of the award?

Conclusion: Bill Miller's Ten Best Reasons to Arbitrate

(with apologies to David Letterman)

10. Allow trial lawyers to play judge.
9. Provide travel money for retired judges.
8. Easier to get a continuance from an arbitrator than an administrative judge.
7. Better flexibility in scheduling.
6. More relaxed forum; flexibility with rules and evidence.
5. Save expert witness fees.
4. Preserve confidentiality of your client's case.
3. Avoid costly appeals.
2. Ability to select the decision maker.
1. Get a quick resolution of the case.

Please bear in mind there may be some equally good reasons not to arbitrate, so let's not dismantle the court system just yet.

Judge Miller has retired from the Circuit Court of Montgomery County and focuses his time as an arbitrator and mediator for private disputes.

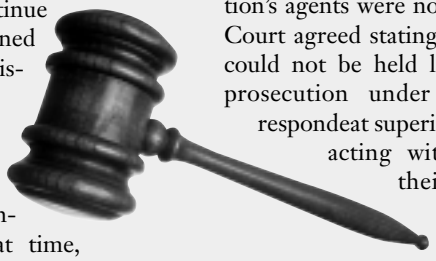
This article was also published by the MTLA.

Recent Decisions

"Not Guilty" Verdict for Employees Precludes Employer Liability Under Doctrine of Respondeat Superior

In *Southern Management Corporation v. Taha*, 378 Md. 461 (2003), the Court of Appeals reversed a $200,000 jury verdict against Southern Management Corp., holding that the verdicts were irreconcilably inconsistent with the theory of respondeat superior. Taha, a former employee of Southern Management Corp., sued SMC and two individual defendants, inter alia, for malicious prosecution after he was arrested for burglary.

Taha who worked for SMC as a Maintenance Technician was terminated for poor work performance, insubordination, and abusive behavior after an altercation with his supervisor regarding his request to discontinue job duties he was assigned after returning from disability leave.



Shortly after his termination, items were reported missing from a locked maintenance area. At that time, Taha's former supervisor received reports that Taha was seen in the area "shaking and pulling on the lock." After the supervisor called the police to report the missing items, and in response to the officer's inquiry as to names, if any, of recently terminated employees, Taha's name was given.

After interviewing several SMC employees, as well as Taha, the police observed he "acted suspiciously and seemed nervous" and concluded that he was the only suspect. Consequently, Taha was arrested.

At trial, Taha argued that SMC and its named agents "falsely and maliciously" called the police and told them that it was he who had committed the burglary. After the Court denied a Rule 2-519 Motion for Judgment regarding the malicious prosecution claim, SMC requested that there be a separate finding of liability as to each of the named defendants. The Circuit Court granted the request after Taha's counsel did not object to the form of the questions on the special verdict sheet.

After deliberating, the jury determined that the SMC's agents were not liable to Taha, but found SMC liable for $25,000 in economic damages, $75,000 in non-economic damages and $100,000 in punitive damages.

SMC filed a Motion for Judgment Notwithstanding the Verdict, a Motion for Remittitur and a Motion to Strike the Punitive Damages Award. After a hearing, the trial court denied these motions and SMC filed an appeal.

On appeal, SMC successfully argued that a verdict against the corporation could not stand if the corporation's agents were not found liable. The Court agreed stating that a corporation could not be held liable for malicious prosecution under the doctrine of respondeat superior if the employees, acting within the scope of their employment, were not found liable. The Court based their decision, in part, on the fact that the jury instructions clearly indicated that the individual defendants were considered employees. Court was further persuaded that, at trial, Taha failed to assert that the individual defendants' actions were so outrageous as to fall outside of the scope of their duties.

Additionally, Taha attempted to argue that SMC was liable based on the conduct of unnamed employees. The Court rejected this argument, noting that the record contained "scant reference" to additional employees beside the named defendants.

Finally, the Court noted that other jurisdictions have considered and rejected verdicts that exonerated an employee while holding the employer responsible based on the doctrine of respondeat superior.

Judge Raker wrote a dissenting opinion, which Chief Justice Bell joined in part.

Recent Decisions

Employer's Reservation of Right to Unilaterally Modify Arbitration Agreement Renders Agreement Unenforceable

In *Cheek v. United Healthcare*, 378 Md. 139 (2003), the Court of Appeals reversed a trial court's decision to compel arbitration after holding the arbitration agreement's promise to arbitrate was illusory and therefore, unenforceable.

On November 17, 2000 United extended Cheek an offer of employment as a senior sales executive. A two-page letter memorializing the offer and defining conditions of employment, including Cheek's acceptance of United's "Employment Arbitration Policy" was mailed to Cheek. Cheek accepted United's employment offer of via a letter wherein he stated not only was he accepting the offer, but "[a]ll of the terms in your employment letter are amenable to me."

During his first day of employment, Cheek received United's Employee Handbook, which included summaries of United's dispute resolution policies wherein arbitration was to be "the final, exclusive and required forum for the resolution of all employment related disputes…" Further, the summary stated, inter alia, that United "reserves the right to alter, amend, modify, or revoke the [Arbitration] Policy at its sole and absolute discretion at any time with or without notice."

In January 2001, Cheek signed an acknowledgement that he had "received and reviewed" a copy of United's dispute resolution policies and that he agreed to submit all disputes arising out of his employment to arbitration.

In August of that year, United terminated Cheek after eliminating his position. Four months later, Cheeks filed a lawsuit against United in the Circuit Court for Baltimore City alleging breach of contract, negligent misrepresentation and violations of the Maryland wage payment statute.

In May 2002, the Circuit Court dismissed Cheek's complaint and ordered him to submit his claims to arbitration. Cheek filed a timely appeal to the Court of Special Appeals. Before any proceedings commenced, the Court of Appeals issued a writ of certiorari to determine whether United's reservation to "alter, amend, modify, or revoke" its arbitration agreement with Cheek in its "sole and absolute discretion" rendered the promise to arbitrate illusory, therefore, rendering the arbitration agreement unenforceable.

Cheek attacked United's Arbitration Policy on many fronts. First, he argued that United's ability to change or revoke the Arbitration Policy in its sole discretion called into question the "mutuality" of the policy and, therefore, it was "void as against public policy." Second, Cheek argued that because he had already entered into an oral binding employment contract when he agreed to the Arbitration Policy, he did not receive the consideration necessary for the arbitration agreement to be enforceable. Third, Cheek argued the Policy lacked enforceability because United's promise to arbitrate was "illusory."

United countered and argued that they both had "entered into a valid and enforceable arbitration agreement." United further argued that its employment offer, Cheek's acceptance, and his agreement to abide by the terms of the Arbitration Policy were sufficient to prove "mutuality of obligation." United argued that the Policy was supported by consideration because there was a "mutual promise to arbitrate," and Cheek's continued employment was evidence that he received something for his consideration. Additionally, United argued that agreeing to the terms in the Arbitration Policy was a condition of employment entered into before Cheek's employment began. Finally, United argued that the reservation of its right to unilaterally modify the Arbitration Policy did not render the promise illusory.

In holding that the arbitration agreement was illusory and, therefore, unenforceable, the Court held that "an agreement to arbitrate…depends on contract principles since arbitration is a matter of contract." Consequently, inasmuch as *Corbin* defines an "illusory promise" as "words in a promissory form that promise nothing," the Court held that the language contained in the Arbitration Policy, specifically United's reservation of its rights to at its "sole and absolute discretion" elect to "alter, amend, modify, or revoke" the Arbitration Policy at any time "with or without notice", created the illusion of a promise—resulting in "insufficient consideration" to enforce the agreement to arbitrate.

Judge Harrell wrote a dissenting opinion.

The Association Welcomes its New Members

Nathan D. Adler
Thomas J. Althauser
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SPOTLIGHTS

Scott Goetsch, of MOORE & JACKSON, won a motion for summary judgment in the Circuit Court for Baltimore City on behalf of a store whose employee was accused of assaulting a customer. The basis of the store's defense was that the employee had acted outside of the scope of employment and that the store lacked prior notice of violent tendencies by the employee. *Cummings v. Bear Creek Corporation*, Circuit Court for Baltimore City—the case continues against individual defendant.

John Parker Sweeney, T. Sky Woodward, Laura A. Cellucci and Jennifer M. Schwartzott, of MILES & STOCKBRIDGE P.C., successfully transferred from the Circuit Court for Baltimore City to the Circuit Court for Baltimore County two toxic tort cases in which the plaintiffs alleged that they developed serious personal injuries as a result of their exposure to mold and other contaminants at a Towson office building. *Andrea Anderson, et al. v. CB Richard Ellis, Inc., et al. (Murdock, J.)* and *Carol Antonini, et al. v. CB Richard Ellis, Inc., et al. (Matricciani, J.)*. Plaintiffs, represented by the Law Offices of Peter T. Nicholl and Law Offices of M. Thomas Myers, respectively, appealed the orders transferring venue to the Court of Special Appeals. *Anderson* resolved two days before oral argument; the *Antonini* appeal is still pending.

Tara Kelly v. Archdiocese of Washington, et al. Kevin M. Murphy with assistance from Mariana D. Bravo, obtained summary judgement for the Archdiocese of Washington and two Catholic churches, in a case alleging that plaintiff suffered leg and ankle fractures in a softball game sponsored by the Catholic youth Organization of Washington, D.C. Plaintiff alleged negligence in training plaintiff regarding how to play the game, negligence in moving her after the injury, and negligence in the training of the coaches. The judge decided the summary judgment motion on several grounds, primarily assumption of risk. The case is on appeal.

J. Mark Coulson, of MILES & STOCKBRIDGE, P.C. in Baltimore obtained a defense verdict in the Circuit Court for Baltimore City in a birth injury case on behalf of the University of Maryland Medical System Corporation. Plaintiff Teonna Boyce sued on behalf of a brain-damaged minor, claiming that the minor's mother had been neglected in the University of Maryland Emergency Room for several hours prior to recognizing that she was having a placental abruption, at which point she underwent emergency c-section. The plaintiff parties had stipulated ahead of time to try the liability phase first and to an award of $7 million in damages if the hospital were found liable.

Joseph W. Hovermill, Angela N. Whittaker-Pion, and John C. Celeste, of MILES & STOCKBRIDGE P.C., obtained a victory on behalf of a client in the Court of Common Pleas, Cuyahoga County, Ohio, in which they successfully argued against class certification. *Perotti v. Black & Decker Corp.*, No. CV-01-445020 (C.P. Cuyahoga Oct. 20, 2003). Miles & Stockbridge defended Black & Decker in the lawsuit purportedly brought on behalf of 640,000 purchasers of a Black & Decker jigsaw. The lawsuit sought compensatory and punitive damages, claiming that Black & Decker mislead its customers and committed fraud in its representations on the jigsaw's packaging. The judge found that the plaintiff was unable to meet his burden of establishing numerosity and that he could not demonstrate that common issues of fact predominated. As a result, the judge denied the plaintiff's motion for class certification.

John T. Sly, of MILES & STOCKBRIDGE P.C., set a precedent in the Maryland Appellate Courts while obtaining summary judgment for all defendants in the medical malpractice case *Bonner v. Fedder, et. al*. He represented a general surgeon who was assisting in a complicated anterior interbody spinal fusion. During surgery, she sustained a laceration of a major vein and required the placement of a graft. Subsequent to surgery, Plaintiff claimed a wide array of damages including the requirement that she take a blood-thinner for the remainder of her life, ongoing back pain, and she claimed that she was unable to complete a medical fellowship at Johns Hopkins and was totally disabled. A two-year effort to secure the plaintiff's prior medical history revealed that she had multiple prior suits in which she had alleged similar injuries—and had obtained compensation. Up to that time, Maryland courts had not determined whether settlements could preclude a later claim for similar injuries.

In an opinion authored by Judge Greene, recently appointed to the Court of Appeals, the Maryland Court of Special Appeals affirmed the summary judgment decision of the trial court, and the Maryland Court of Appeals rejected the plaintiff's Petition for Writ of Certiorari. This was the first time a Maryland Appellate Court had found that the prior settlement of a claim involving similar injuries could result in preclusion of future suits involving the same injuries.

Thomas Anthony Jr. v. Archdiocese of Baltimore et al. Kevin M. Murphy, with assistance from Jean Marie Sylla, and in coordination with counsel for co-defendants, obtained summary judgement for the Archdiocese of Baltimore in a case alleging sexual abuse of plaintiff in the 1970's by a priest. The court decided the motion in favor of defendants based upon the statute of limitations issue. The case is on appeal.

Peggy Fonshell Ward of MOORE & JACKSON, LLC, recently won a motion for summary judgment in the Circuit Court for Allegheny County in a case involving a dog bite to a 3 year old child. The parents of the child asserted that the dog viciously bit the child after previously growling at other children and being encouraged to attack another child by the owner's children. The defense contended that the dog had no previous history of aggression toward anyone and that there was no notice to the owners of a vicious disposition. The court agreed that the plaintiffs had no sufficient evidence of dangerous propensities.

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THE DEFENSE LINE

A Publication from The Maryland Defense Counsel
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