THE LITIGATION NEWSLETTER

Fall 1997

OFFICERS:
Wallace R. Haley
Chair
John Mucha III
Chair-Elect
Ted C. Farmer
Secretary
David C. Sarnacki
Treasurer

COUNCIL MEMBERS 9/98:
Anne Warren Bagno
Larry K. Griffis
Mark W. McInerney
Jerome P. Pesick
C. Robert Wartell

COUNCIL MEMBERS 9/99:
David R. Brake
Elizabeth K. Bransdorfer
Gordon S. Gold
J. Russell Hughes, Jr.
Catherine M. Mish

COUNCIL MEMBERS 9/00:
Kenneth S. Adamcyk
Kevin S. Hendrick
Richard T. Hewlett
Robert June
George G. Kemsley
Richard W. Paul

EX-OFFICIO
Abraham Singer

COMMITTEE CHAIRS:
John Mucha III and Richard W. Paul,
Summer Programs
Robert June,
Programs
Abraham Singer,
Liason Committee
Ted C. Farmer,
Trial Practices
David C. Sarnacki and
Catherine M. Mish,
Newsletter
Open,
Marketing and Membership
Open,
Law Student Section

Address correspondence and items for publication (hard copy and disk if possible) to:

Catherine M. Mish
Assistant Newsletter Chair
800 Calder Plaza Building
Grand Rapids, MI 49503
Fax: (616) 831-1701
Internet: mishc@mjsc.com

Unless otherwise noted, all articles and items are Copyright 1997, All Rights Reserved, by the author.

CHAIR'S LETTER

Wallace R. Haley

As I look out my window at the changing fall panorama I cannot help but draw a parallel between our Section and the changing Michigan seasons. Like our Michigan weather, the Litigation Section has begun its natural cycle with its first change in leadership. Before we chart our new directions, I think it only appropriate that we take a quick breath together and look over our shoulder. Think about it. This time two years ago, we had no members, had never conducted a seminar or annual meeting and had never published a newsletter. As I sit here writing my first column for our newsletter, our membership has grown to over1,300 members, we have held highly entertaining and educational seminars with speakers of national reputation, and regularly published an informative newsletter. The Section's deepest thanks go to every member who joined and to those who participated in accomplishing these milestones. Special thanks go to our "founding father" and first Chairman Abe Singer. Abe's vision and hard work provided the solid foundation that we enjoy today and which will serve as the cornerstone for all our future efforts. As the first "ex officio" member of the Section, we look forward to Abe's continued input as the Section grows and matures. I would also be remiss without specifically thanking John Mucha and members of his Program Committee for their hard work and dedication to provide quality programs to deliver to our members. Last and definitely not least, I would like to thank Dave Sarnacki for publishing the Newsletter. Extensive hours are devoted to the task of publishing, but even more hours are unfortunately devoted to arm twisting our author contributors. Thanks to everybody and all deserve a rousing round of applause.

Cognizant of our past, we must now embrace our future. My banker friends tell me that 75% of new commercial businesses fail within their first three years. As we stand at the threshold of our Section's third year, this sobering statistic should remind us that we cannot let ourselves be complacent or content with past results. As I view this year, I feel our primary challenge must be to provide high quality "deliverables" of a mix of educational and social programs which encourage more members to participate. To that end, I have asked Rich Hewlett to chair a strategic planning committee to provide a blue print and suggestions for the Section's future direction. As they say, if you don't know where you are going, it doesn't matter how you get there.

Continued on Page 10

PAGE 2 THE LITIGATION NEWSLETTER

BEHIND THE BENCH

Art Rogers, Research Attorney . 44th Circuit, Livingston County

In a recent discussion with a friend and local attorney, I was asked what I thought were some of the more displeasing aspects of litigation, and what would be some good practice pointers for litigators. I had to admit that I was somewhat disillusioned and disheartened by the lack of professional courtesy and the win at all costs attitude exhibited by so many of the attorneys. As a research attorney for a circuit judge, I have had the opportunity to witness the best and worst of our judicial system. This once respected and honorable profession, of which I was so excited to become a part, is often maligned, criticized and the brunt of jokes. While ours is an adversarial system of justice, many attorneys, apparently unaware of their tone and tenor, are often disrespectful, arrogant and rude to opposing counsel, and at times, disrespectful towards the judge and the judge's staff. Civility and common courtesy are traits that appear to be on the decline but are something that every attorney should possess.

"This once respected and honorable profession, of which I was so excited to become a part, is often maligned, criticized and the brunt of jokes."

In a time where the battle cry is "just win baby," often the result is that attorneys compromise their personal morals and ethics to meet the rigorous demands of practice, appease out-of-control clients, and advance their own personal and financial interests.

Litigation, by its adversarial nature, tends to exacerbate flaws in the human character. Attorneys often undermine themselves, and ultimately their client, when the issue before the court involves credibility and the attorney has a poor reputation for honesty and candor. Frequently, in an effort to survive a motion for summary disposition, an affidavit is submitted that is somewhat less than accurate and somewhat less than truthful. Since a judge is not allowed to consider the credibility of an affiant, the claim or case often survives unless the affiant has been deposed and his current testimony conflicts his earlier testimony. In such a case, the judge may rule that an affidavit may not be used to create a question of fact. While dishonesty may win the battle, it may lose the war for the offending attorney. What so many attorneys fail to realize is that their own reputation for truthfulness and honestly greatly assists them in the practice of law. Zealously

"Litigation, by its adversarial nature, tends to exacerbate flaws in the human character."

advocating your client's position need not compromise your personal reputation. A reputation for honest and integrity assists attorneys in every aspect of litigation from discovery to the settlement of the case. As a practical matter, honesty and integrity also help to reduce a litigant's burden of proof. Briefs reviewed by the court from attorneys whose reputation for candor is suspect get a much greater level of scrutiny of their arguments and factual assertions. So remember, next time you submit that brief or affidavit, take the time to ask yourself, how it will affect your long-term reputation with the court and staff?

UPCOMING EVENT

Reserve this date on your calendar:

Elizabeth Loftus, Professor of Psychology and Adjunct Professor of Law, University of Washington, will address issues concerning eyewitness testimony. Professor Loftus is a nationally renowned expert on the reliability of eyewitnesses.

Date:	April 3, 1998
Topic:	Eyewitness Testimony
Time:	1:30 - 4:30 p.m.
Location:	The Michigan League in Ann Arbor.

Details to Follow in Future Newsletters

EXPERT ETHICS

David C. Sarnacki , Miller, Johnson, Snell & Cummiskey, P.L.C.

In dealing with expert witnesses, trial attorneys must be wary of two ethical considerations with special application. The first concerns fees, and the second, influencing testimony. Each arises from the same rule of professional conduct: "A lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." MRPC 3.4(b). Previously, DR 7-102(A)(6) prohibited attorneys from participating "in the creation or preservation of evidence when he knows or it is obvious that the evidence is false."

Fees

Most witnesses are entitled to only limited expense reimbursement. It is the expert who may charge and receive a fee for preparing and testifying in court.

> "[I]t is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law. It is, however, improper to pay an occurrence witness any fee for testifying beyond that authorized by law, and it is improper to pay an expert witness a contingent fee."

MRPC 3.4 comment.

While the text of Rule 3.4(b) does not explicitly incorporate the reasonableness requirement in the prior DR 7-109(c)(3), there is no express rejection of the reasonableness requirement, and an unreasonable fee should give rise to a presumption that the compensation influenced testimony.

Under the ethical code in effect prior to October 1988, the disciplinary rules explicitly prohibited fees contingent upon the content of testimony or outcome of the case, but permitted payment of:

1. Expenses reasonably incurred by a witness in attending or testifying.
2. Reasonable compensation to a witness for his loss of time in attending or testifying.
3. A reasonable fee for the professional services of an expert witness. *See also*, C-240 (ABA Op 87-354).

The express prohibition on contingent fees to experts is premised upon the concept of improper influencing of testimony. EC 7-28 stated that witnesses "should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise." If the expert's compensation is tied directly to the outcome of the matter, the expert will have a strong incentive to fashion his or her opinion to ensure victory (as opposed to promoting the search for truth). *See* In Re Schapiro, 144 AD 1; 128 NYS 852 (1911) (attorney disbarred for agreeing to split share of recovery with physician in exchange for physician's testimony). *But see*, e.g., United States v Cervantes-Pacheco, 826 F2d 310 (5th Cir. 1987) (approving of payment to an informant in a criminal case of a fee that is contingent on the quality of testimonial performance).

Experts are supposed to be independent of the party, and their testimony should be objective.

Influencing Testimony

Rule 3.4(b) applies equally to fact witnesses and expert witnesses. Just as attorneys cannot persuade fact witnesses to alter their recollection of the facts, attorneys cannot ethically persuade experts to change their opinions or to abandon independent analysis. *See also*, RI-56 (lawyer has affirmative obligation to disclose any modification of evidence and may not permit expert witness to testify under circumstances suggesting the condition of the evidence had not changed). Experts cannot testify truthfully if their testimony is based not upon an objective analysis of the facts, but rather upon personal compensation or the ultimate outcome of the matter.

While trial attorneys should have a good working relationship with their experts, they should not dictate the content of the opinions themselves. State v McCormick, 298 NC 788; 259 SE2d 880 (1979) (lawyer may coach witness in preparation of testimony, but may not suggest what witness should say or advise witness to give perjured testimony).

The adversary system is premised upon the notion that the truth will emerge from each party's efforts to marshal relevant evidence. Rule 3.4 limits the attorney's freedom to promote a client's interests in order to preserve freedom of competition for evidence. The rule's application to experts means that the attorney must avoid any improper influencing of testimony, including any unlawful inducements for shaping testimony.

COMPARISON OF EXPERT DISCOVERY IN FEDERAL AND STATE COURTS IN MICHIGAN

Andrea D. Crumback . Assistant City Attorney, Grand Rapids

SUBJECT	STATE COURT -- MCR 2.302 (B)	FEDERAL COURT -- RULE 26
Limitations	Virtually no limits on the number of interrogatories and depositions.	Court can limit the number and even the length of depositions, and can limit the number of interrogatories. Rule 26(b)(2).
Ex Parte Interviews	Ex parte interviews with physician allowed, absent privilege. Domako v Rowe, 438 Mich 347 (1991).	Ex parte interviews with physicians are neither permitted nor prohibited. Schwarz v U.S., 1995 WL 871136 (E.D. Mich).
Written Reports	Opinions from experts who will testify at trial are discoverable by way of deposition or interrogatory, but the written reports of an expert are not absent substantial need and undue hardship. Backiel v Sinai Hospital Of Detroit, 163 Mich App 774 (1987).	Written reports prepared by experts are required as specified by Rule 26(a)(2) and depositions shall not be conducted until after the report is provided as specified in Rule 26(b)(4).
Disclosure	Expert witness disclosure is governed by the scheduling order. Failure to disclose the substance of an expert's testimony at mediation will result in the preclusion of the expert's testimony at trial. (This is the Kent County Circuit Court's position.)	A party without waiting for a discovery request shall provide to other parties the information specified in Rule 26(a)(2) relative to experts who may be used at trial as directed by the court.
Consulting Experts	Information regarding opinions of experts informally consulted who will not testify at trial are not discoverable unless manifest injustice would result. Their identity may, however, be discoverable. Sucoe v Oakwood Hosp. Corp., 185 Mich App 774 (1987), vacated in part 439 Mich 919 (1992).	The federal courts take the same position. Rule 26(b)(4)(A).
Fee-Shifting	Experts must be paid a reasonable fee for deposition time, but not for preparation time, by party seeking discovery. The court may order fees be paid to obtain facts and opinions of the expert through other methods of discovery.	Experts must be paid a reasonable fee and/or fair portion by party seeking discovery for time spent responding to discovery, including costs incurred in obtaining facts and opinions of expert. Rule 26(b)(4)

DAUBERT IN THE SIXTH CIRCUIT:

A FEW CASES TO KNOW

Janice Kittel Mann . U.S. Attorney's Office, Western District of Michigan
David C. Sarnacki . Miller, Johnson, Snell & Cummiskey, P.L.C.

The Supreme Court's decision in Daubert v Merrell Dow Pharmaceuticals, 509 U.S. 579; 113 S Ct 2786 (1993), replaced the Frye test for scientific evidence with a reliability analysis under Rule 702 of the Federal Rules of Evidence. The decision is so critical to an understanding of the admissibility of expert testimony in federal court that there is no substitute for reading it.

In essence, the Court articulated the following reliability analysis:

1. Can the theory or technique be tested? Has it been tested?
2. Has the theory or technique been subjected to peer review? Has it been published?
3. What is the known or potential rate of error of the technique? Are there standards controlling the technique's operation? What are they? Are the standards maintained?
4. Has the reasoning and methodology gained general acceptance in the relevant scientific community?

Since the Daubert decision, courts have struggled with numerous issues. The Supreme Court will address a few issues later this term in General Electric Co. v Joiner. Until then, here are a few of the decisions coming out of our very own Sixth Circuit:

Reliability & Sufficiency:

Conde v Velsicol Chemical Corp., 24 F 3d 809 (6th Cir. 1994)--Summary judgment affirmed because the testimony of plaintiffs' experts was insufficient to permit a jury to conclude by a preponderance of the evidence that chemical exposure caused their injuries. The experts could state only that the injuries were consistent with plaintiffs' symptoms. They could not exclude alternative causes. Their conclusions were inconsistent with physical evidence (tests of body tissue) and the scientific literature.

Standard of Review:

United States v Thomas, 74 F 3d 676 (6th Cir. 1996)--Setting forth the three standards of review. The clear error standard applies to Rule 104(a) findings. The de novo standard applies to determinations of whether the testimony is properly the subject of scientific, technical or other specialized knowledge. The abuse of discretion standard applies to determinations of whether the testimony will assist the trier of fact.

Peer-Reviewed Studies:

Glaser v Thompson Medical Co., 32 F 3d 969 (6th Cir. 1994)--Summary judgment reversed because a conclusion of 80% likelihood of causation created material issues of fact. The conclusion was supported by clinical studies (not prepared in anticipation of litigation) showing a significant connection between ingestion and the medical condition. The studies were peer-reviewed and published in reputable medical journals. The expert distinguished scientific disagreement found in other studies and pointed out flaws in the techniques employed.

Standard Protocol:

American & Foreign Ins. Co. v General Electric Co., 45 F 3d 135 (6th Cir. 1995)--No error in exclusion of testimony under Frye terminology because the trial judge's reasoning was equally sound under Daubert. The expert's theory was not generally accepted. He also failed to follow standard testing protocol, to preserve raw test data, or to calibrate his instruments.

Anecdotal Evidence:

Cantrell v GAF Corp., 999 F 2d 1007 (6th Cir. 1993)--No error in admission of testimony based on anecdotal evidence (from diagnosis of patients exposed to asbestos at the workplace) which confirmed medical literature. The expert's clinical experience, though not dispositive, was confirmatory of the medical literature.

DNA Testing:

United States v Bonds, 12 F 3d 540 (6th Cir. 1993)--No error in admission of RFLP identification testimony under Frye terminology. General acceptance remains a factor under Daubert. Flaws in methodology, disputes concerning reliability of methodology, criticisms of the application of protocols in the specific case, and disputes over accuracy of probability results go to the weight of testimony. Absence of proof of one factor, rate of error, did not mandate exclusion of the testimony.

"The Soft Sciences":

Berry v City of Detroit, 25 F 3d 1342 (6th Cir. 1994)--Reversible error in admission of testimony of police-practices expert. The Daubert principles apply to all expert testimony, not only scientific evidence. The expert's theory had not been tested, published subjected to peer review, or accepted by other experts.

SNAPSHOTS CAPTURE SUMMER CONFERENCE

Above: John W. Reed of the University of Michigan Law School addresses the Litigation Section Summer Conference at Boyne Highlands.

Below: Litigation Section Secretary Ted Farmer, Council Member Anne Warren Bagno, Gary Favier, Council Member Richard W. Paul and their spouses enjoy the Summer Conference.

Intentionally blank.

MICHIGAN MOVES TOWARD DAUBERT STANDARD?

Catherine M. Mish . Miller, Johnson, Snell & Cummiskey, P.L.C.

Will Michigan soon join the growing number of states adopting the Daubert standard for expert testimony? *The Michigan Lawyers Weekly* recently spotted indications that Michigan courts may be moving towards the federal standard set by the United States Supreme Court in Daubert v Merrell Dow Pharmaceuticals, Inc., 509 US 579, 113 SCt 2786 (1993). Other state courts have already made the move.

For many years, the decision in Frye v United States, 293 F 1013 (DC Cir. 1923) set the standard for admissibility of scientific expert testimony, in both the federal courts and in Michigan. Seventy years after the decision in Frye, the United States Supreme Court opinion ruled in Daubert that adoption of the Federal Rules of Evidence superseded the Frye rule. While Frye conditioned the admissibility of expert scientific testimony on "general acceptance" in the scientific community, Daubert held that "general acceptance" was merely one factor to be weighed by the trial judge in determining the testimony's scientific validity. The Supreme Court held that reliability of the proffered evidence was the touchstone of admissibility, as required by Rule 702 of the Federal Rules of Evidence.

Because Daubert is precedentially binding only on the federal courts, many state courts have refused to adopt the new standard, preferring instead to retain the old Frye test or distinguishing the test utilized under their own state rules of evidence. However, the tide is beginning to turn, as several states have recently moved to adopt the new federal standard for admission of scientific expert testimony set out in Daubert.

Several states have adopted the Daubert standard outright. See State v Porter, 698 A2d 739 (Conn 1997) petition for cert. filed; State v Fukusaku, 1997 WL 570980 (Hawaii 1997); Taylor v State, 889 P2d 319 (Okla Crim App 1995); State v Streich, 658 A2d 38 (Vt 1995); Gentry v Magnum, 466 SE2d 171 (WVa 1995); Commonwealth v Lanigan, 641 NE2d 1342 (Mass 1994); State v Foret, 628 SO2d 1116 (La 1993).

Other states have been less eager to adopt the federal standard, preferring instead to simply draw guidance from the Supreme Court analysis. See McDaniel v CSX Transp., Inc., 1997 WL 594750 (Tenn 1997) (Daubert "useful" in applying Tennessee rules of evidence); State v Hungerford, 697 A2d 916 (NH 1997) (Daubert "helpful" in making determination); State v Cline, 909 P2d 1171 (Mont 1996) (applying Daubert only to novel scientific evidence); State v Anderson, 881 P2d 29 (NM 1994) (looking to Daubert for guidance when interpreting state rule of evidence).

Like her sister states, Michigan may be moving toward adoption of the Daubert standard. In Nelson v American Sterilizer Co., the Michigan courts addressed the admissibility of a plaintiff's expert testimony linking inhalation of ethylene oxide (a fumigant used to sterilize medical equipment) to human liver disorders. The trial court originally excluded the testimony, ruling that the experts' opinions were not "generally accepted" in the scientific community. The Court of Appeals reversed, but omitted any discussion or application of Rule 702 of the Michigan Rules of Evidence in relation to the testimony's admissibility.

The Michigan Supreme Court vacated and remanded for application of that rule. As *The Michigan Lawyers Weekly* reported, speculation that Michigan may be moving towards adoption of the Daubert standard arose when the Supreme Court failed to mention the "general acceptance" test in its opinion. That speculation was fueled even further when the Court of Appeals decided Nelson on remand. There, the court applied Daubert in defining the terms "scientific" and "knowledge" within MRE 702. The court upheld exclusion of the testimony on the grounds that it failed to satisfy the general reliability standard imposed by MRE 702.

Will Michigan soon join the growing number of states adopting Daubert? No clear answer has appeared as yet, but the decision in Nelson may be one indication that it will.

SUMMER CONFERENCE

The 1997 Litigation Section Summer Conference has been scheduled for the weekend of August 7-8.

This year, the Section Summer Conference is tentatively set for beautiful **Mackinac Island**.

The Summer Conference will present a great opportunity for a family outing, while also keeping you abreast of current issues of interest to litigation attorneys. Mark this date on your calendar now!

Details to Follow in Future Newsletters

NOTES ON THE EXAMINATION OF EXPERTS

David C. Sarnacki . Miller, Johnson, Snell & Cummiskey, P.L.C.

The battle of the experts can determine the outcome of some disputes. While important, the expert=s intellectual qualifications are simply not enough. It is the expert=s ability to communicate credibility that often makes the difference between winning and losing.

Effective trial advocacy requires that expert testimony be convincing as well as "correct." Experts must convey the relevance of their work, the reliability of their approach, and the reasonableness of their professional opinions. To effectively communicate your expert's three R's:

X Select an expert with knowledge, independence and good communication skills.

X Define the scope of engagement, get the needed legal and factual information, and let the expert exercise independent judgement.

X Focus on proving the relevance, reliability and reasonableness of the expert's theory.

X Present your expert as the jury's teacher, not another advocate.

X Use demonstrative evidence that complements the examination.

Direct Examination. And now the story unfolds . . . . While it does, focus on involving the jury in the attorney-witness conversation. You are in control, but the jury is your silent partner. Let the jury taste in your questions and presentation the seasoned credibility of you and your case.

You want the testimony to be clear, persuasive and insulated from cross examination. So use the KISS method: Keep It Simple Stupid. Know why the witness is important to your theory. Identify the areas to be developed. Then carry on a conversation with the person. Why make it any more complicated than that?

Ask the qualifying questions that matter, those which show the jury that the opinion to flow from this person=s lips is worth accepting. Moving to the opinion, let the expert become the teacher, talking directly to the jury and handling exhibits and demonstrative evidence as appropriate. Be sure to ask your expert *why*: Why did you choose that methodology in this case? Why did you review that information? Why is your approach reliable? Why was it important to do that? Why is the opposing party=s expert wrong in this case? Why is your theory correct?

NITA=s Modern Trial Advocacy:
STEVEN LUBET=S OUTLINE FOR EXPERT DIRECT

1. Introduction and foreshadowing.
2. Qualifications.
3. Opinion and theory: opinion; principles supporting opinion; what did to reach final conclusion..
4. Explanation and support: data; assumptions.
5. Theory differentiation.
6. Conclusion.

Effective trial advocacy requires an appreciation of the art of conversation. To communicate an effective direct examination:

X Keep in mind your basic objectives in calling the witness.

X Ask simple questions and listen to the answers.

X Articulate the significance of the witness's testimony with your first questions and the significance for each important fact and opinion with your later questions.

X Focus the conversation on what the jury needs and wants to know.

X Build a mood in the courtroom which is consistent with your theme.

Cross Examination. While we always dream about absolutely crushing cross examinations, the courtrooms rarely deliver them. Most of the time, we are well-served by making our best points, putting the testimony into proper context, and sitting down. Nevertheless, cross examination is your time to lead the jury to the truth and deliver it.

Once again, keep it simple. Know why the witness is important to your theory and identify the areas to be developed. Then carry on a conversation with *yourself*. This time, the spotlight is on you. You decide the topics, the

Continued on Page 10

EXAMINATION OF EXPERTS - Continued from Page 9

words and the overall message. Since you make the statements, your single most important piece of evidence--you--is on the stand. Be sure that your personal integrity doesn't start bleeding from making assertions you will not prove.

NITA's Modern Trial Advocacy:
STEVEN LUBET'S OUTLINE FOR EXPERT CROSS

1. Challenge the witness's credentials.
2. Obtain favorable information. Affirm your own expert. Elicit Areas of Agreement. Criticize the opposing party's conduct.
3. Use learned treatises.
4. Challenge the witness's impartiality: fees; relationship with party or counsel; positional bias.
5. Point out omissions.
6. Substitute information: change assumptions; vary the facts; degree of certainty; dependence on other testimony.
7. Challenge technique or theory.

Effective trial advocacy requires trust. You want the jury to trust your evidence and to feel how unreliable your opponent's evidence is. To conduct an effective cross-examination:

Keep in mind your basic objectives in crossing the witness.

X Get to the point and get out.

X Ask short, leading questions with plain words and listen to the answers.

X Don't let the witness repeat his or her story.

X Create an impression of unreliability that will linger with the jury.

IRVING YOUNGER'S
10 COMMANDMENTS OF CROSS EXAMINATION

1. Be brief.
2. Short questions, plain words.
3. Never ask anything but a leading question.
4. Ask only questions to which you already know the answers.
5. Listen to the answer.
6. Do not quarrel with the witness.
7. Do not permit a witness on cross-examination to simply repeat what the witness said on direct examination.
8. Never permit the witness to explain anything.
9. Avoid one question too many.
10. Save it for summation.

We want your article for The Litigation Newsletter! Send your ideas to the Newsletter Chair Become involved in the Litigation Section!

CHAIR'S LETTER - Continued from Page 1

[A side note from the chair – I still think Rich was a better quarterback at Michigan than John Wangler]. The Committee includes chair-elect John Mucha, Secretary Ted Farmer, Bob Wartell, Jerry Pesick and me. The Committee's members have committed to a full day for a planning session and we eagerly await their report. I would also encourage each individual member to contact any officer or council member to offer suggestions on programs, newsletter articles or any other matter regarding the Section.

One of the key areas to be explored in the upcoming planning process is our Section's Committee organization. By the time you read this Newsletter, I hope to have in place a new Committee structure which will provide additional opportunities for our members to be involved with the Section. In conjunction with the new structure, I am looking for strong committee chairs willing to invest the time and effort to make each individual committee a success. In the next few weeks, you will receive in the mail a letter asking for your participation in one of the Section's Committees. I encourage you to join a committee and become an active participant.

In closing, I am reminded of a story about the difference between the chicken and its eggs and a pig and its bacon. In giving the eggs, the chicken became "involved," however, in producing the bacon, the pig became "committed." Our Section is still in its infancy and may "grow up" to be molded in any form desired by our membership. However, those desires are not those of just a few -- but the wishes of all who "commit" to making our section successful. As we proceed forward during the coming year, I would ask that each of you not only be involved, but be committed. I look forward to working with you.

THE TEMPORARY LAWYER BOOM

Jonathan P. Bricker, Esq. . AmeriClerk Temporary Legal Staffing

When AmeriClerk Temporary Legal Staffing was founded in 1993, the concept of temporary lawyers was virtually unheard of in Michigan. Fast forward to 1997: a significant number of Michigan's leading corporations and law firms utilize the Troy-based company to provide them with temporary lawyers on a regular basis as part of their overall staffing strategy. Moreover, The National Law Journal recently reported that 64 of the largest 250 law firms in the country employ a total of 547 temporary lawyers.

Historical Perspective

Why the dramatic change? First, a highly qualified pool of temporary lawyers emerged when law firms and corporate legal departments drastically reduced their staffing levels during the 1980's and early 90's. An ever-increasing number of highly-motivated law school graduates seeking alternatives to traditional legal careers, practicing lawyers who are questioning the demands of a full-time legal career, and experienced lawyers who want to reduce their workload without leaving the practice of law altogether contribute to this pool. Second, clients are scrutinizing legal expenditures more closely than ever before. Firm clients are seeking alternative billing arrangements and corporations are determined to reduce the expense of in-house counsel in order to improve the bottom line. Third, law firms of every size face increased competition and must embrace strategies that reduce costs without compromising service to clients.

Innovative Uses

The advent of the temporary lawyer has significantly altered the legal employment landscape. Employers can now maintain a lean permanent staff supplemented by temporary lawyers on an as-needed basis. One Houston litigation firm, Glidden Partners ("Glidden"), does not employ any permanent associates. Rather, associate-level temporary lawyers staff the firm on a case-by-case basis. Only permanent lawyers appear in court and at depositions. In its nearly two years of existence, Glidden has amassed a list of blue-chip clients that are as enamored with how Glidden has enabled them to reduce litigation costs as they are with its enviable record in court: this Spring, Dow Chemical employed Glidden as defense counsel in a class-action lawsuit over Texas natural-gas contracts. In the course of winning Dow a dismissal from the class action, Glidden saved the company at least $1 million that had been budgeted for the case.

Glidden is not the only law firm in the country that is using temporary lawyers to gain a competitive edge. Miller, Dunham & Doering ("Miller, Dunham"), an 11-attorney Philadelphia litigation firm, has arranged to have up to 18 temporary lawyers available to handle large-scale litigation cases. Miller Dunham includes the temporary lawyers in the firm's RFP and passes the cost savings on to the client. Clients are extremely pleased because they get more experienced lawyers at a significantly lower rate.

The Glidden and Miller Dunham examples are just two of the many ways that law firms and corporate legal departments have integrated temporary lawyers into their overall business strategy. With proper planning and analysis, your law firm or corporate legal department can also utilize temporary lawyers to gain a competitive edge.

Document Review & Due Diligence

There really is no typical way that a law firm or corporate legal department utilizes a temporary lawyer. Experienced temporary lawyers are routinely used at the highest levels, even as interim general counsel at Fortune 500 companies or as a senior associate in discrete practice areas such as immigration and commercial real estate. However, the greatest numbers of temporary lawyers are used in conjunction with lower level, time-intensive tasks such as document review. In both transactional and litigation settings, document review can be easily handled by a team of temporary lawyers, including a legal professional with supervisory experience to oversee the project. The next time that you encounter a document-intensive litigation case or are handling a due diligence review in a major transaction, take the time to consider how you can effectively utilize temporary lawyers to meet the needs of your clients and reduce the extra burden placed on your permanent staff.

Benefits

Temporary lawyers benefit law firms and corporate legal departments in a number of ways. Most notably, there are significant cost advantages. The all-inclusive hourly bill rate for

Continued on Page 12

THE TEMPORARY LAWYER BOOM
Continued from Page 11

a temporary lawyer employed through AmeriClerk is about half what a law firm would normally bill for a like individual. In other words, a lawyer who would be billed by a law firm at $160 per hour would most likely be billed by AmeriClerk at $80 per hour. For a law firm using temporary lawyers, this translates into an opportunity for the law firm to meet the cost-reduction demands of a client or create an additional profit center with no long-term commitment to the employee or to payroll funding. For a corporate legal department using temporary lawyers, this means a 50% reduction in cost for like services. With temporary lawyers, there are no "hidden" costs, and because of the nature of the project, every hour billed to the AmeriClerk client should be a billable hour for the law firm

client. Moreover, any financial commitment that a client makes to a temporary lawyer is close-ended. When a litigation settles or an acquisition is complete, the legal employer is not burdened by excess permanent personnel.

Other advantages

The benefit of using AmeriClerk temporary lawyers is not limited solely to cost reduction. Legal employers are able to spend more time focusing on their core business of practicing law by reducing the amount of time spent handling human resource management issues. They do not have to address the painful employment separation issues that accompany lost clients or slower times, because temporary lawyers come into an assignment with the full understanding that it will be temporary in nature. Legal employers are also able to more exactly staff projects with people who have experience in specific areas. By using temporary lawyers, a law firm can take on a broader range of projects without having to add additional permanent staff to handle them. Because the temporary lawyers chosen to staff a project will have prior experience in the given area, they will be able to more efficiently handle the project. Law firms are also able to confidently accept more work that might otherwise be passed up for fear that it would overburden existing permanent personnel, thus leading to increased billing opportunities. Corporations can also maintain more control over selected projects by handling more projects in-house that, by virtue of their demands on permanent staff, would otherwise have to be sent to outside firms. As demonstrated above, the use of temporary lawyers results in increased options and flexibility for both corporations and law firms when deciding how to handle their projects.

Conclusion

Without a doubt, the temporary lawyer is here to stay and is clearly the way of the future. Legal employers that take the time today to develop innovative strategies to utilize temporary lawyers are going to be the legal employers that survive and thrive for the long-term in the increasingly competitive legal marketplace.

Litigation Section
State Bar of Michigan
306 Townsend Street
Lansing, Michigan 48933