THE LITIGATION NEWSLETTER

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

Catherine M. Mish
Newsletter Chair
800 Calder Plaza Building
Grand Rapids, MI 49503

CHAIR'S LETTER

John Mucha III

In the short time since the Litigation Section was founded by Abraham Singer in 1995 it has experienced remarkable growth and success. From only a few hundred members in its first year, we now boast over 1,600 members. The Litigation Section Council and its committees have responded to this growth with additional programs (of ever increasing quality) and a consistently fine quarterly newsletter. Yet, despite our numbers, relatively few members have become personally involved in the Section's programs or its quarterly publication.

Well, why bother getting involved in the Litigation Section? For one thing, it is a tremendous opportunity to meet and network with other practitioners who share the same concerns and wrestle with the same issues as you do every day. It is also an opportunity to let others know that you are serious enough about your profession to truly treat it as a profession, and not just an occupation. And it can be fun. Our Summer Conferences, for example, held each year at a different northern Michigan resort, have been especially entertaining weekend getaways that my whole family has enjoyed. Simply put, there are a lot of good people in our ranks who know how to tend to their professional development while not forgetting how to have a good time.

I suspect that part of the reason why some members do not become more actively involved is that they do not know where to start. The answer is simple: just call any one of the Council members listed on the top of this newsletter, and he or she will put you in touch with the right Committee chair. We are always in need of persons willing to commit a small amount of time to help plan and coordinate programs, or to prepare an article for publication.

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ANNOUNCING THE LITIGATION SECTION MASTERS IN LITIGATION SERIES

A Series of Half-Day Seminars
Sponsored by the Litigation Section of the State Bar of Michigan
and the Institute for Continuing Legal Education

The Litigation Section of the State Bar of Michigan proudly announces a new Masters in Litigation series of half-day programs, sponsored in cooperation with the Institute for Continuing Legal Education (ICLE). These programs have been designed to feature top speakers addressing issues of interest to more advanced litigators. Mark your calendars for the first three Wednesday afternoon programs, which have been scheduled as follows:

February 17, 1999: ***Winning Settlement: The Art of Successful Negotiation in Litigation***

Featuring: Professor Charles Craver
George Washington University Law Center
Washington, D.C.

March 31, 1999: ***Winning Discovery in the Information Age: Discovery and Analysis of Electronic Data***

Featuring: Joan Feldman
President, Computer Forensics, Inc.
Seattle, Washington

April 21, 1999: ***Winning the Jury: The Secrets of Effective Courtroom Advocacy***

Featuring: Professor Michael E. Tigar
Washington School of Law, American University
Washington, D.C.

Each program will run from 2:00 p.m. to 6:00 p.m., with a reception following, at the MSU Management Education Center in Troy. Litigation Section members enjoy a discount of $20 from the fee for each program. Register by calling ICLE at (734) 764-0533 or sending the registration form found on the following page of this Newsletter to ICLE at 1020 Greene Street, Ann Arbor, MI 48109-1444.

Chair's Letter

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Or, if you simply have some suggestions and good ideas to share, please do not hesitate. Best of all, no matter how you wish to participate, the time commitment need not be large, and is often as little as an hour a month.

As we close out 1998 and move forward into 1999, the goal of the Litigation Section Council and its officers is to make greater use of the abundance of talent and experience among our membership by increasing participation of litigators like yourself. I am extremely proud to be the Chair of the Litigation Section for the 1998-1999 term, and look forward to working with you and all of my colleagues on the Litigation Section Council to make the upcoming year a success.

RESERVE THE DATE!!

Litigation Section
1999 Summer Conference

August 13 - 15

at Treetops Resort

IT'S GETTING HARDER TO DEFEND SEXUAL HARASSMENT CASES

Brent D. Rector and Jennifer L. Jordan, Miller, Johnson, Snell & Cummiskey, P.L.C.

Two new U.S. Supreme Court decisions, *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998), will generally make it easier for employees to hold their employers liable for a supervisor's sexual harassment. These new cases blur the distinction between hostile environment and quid pro quo, and define when an employer will be liable for either type of sexual harassment by a supervisor.

If a supervisor carries out threats of job action against the victim, the employer is "vicariously" liable even if it did not know of the harassment and had policies prohibiting it. But what if the supervisor took no "tangible employment action" against the employee (that is, there were only threats or sexually demeaning conduct)? Many courts of appeals have held that it is the victimized employee's burden to show the employer's negligence in a hostile environment claim. But under these new Supreme Court rulings, if the hostile environment was created by a supervisor, the employer can avoid liability only if it can prove two things: first, that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; second, that the victimized employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. It will be the employer's burden to show it acted prudently, as an affirmative defense.

The new cases do not change the rule established by a Supreme Court decision earlier this year, *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998), defining what conduct is and is not unlawful under Title VII. The Court repeated that sexual harassment is unlawful only when it is "severe or pervasive" or when job action is taken, so that Title VII does not become a "general civility code."

In holding an employer vicariously liable for a supervisor's harassment of a subordinate, the Court reasoned that only a supervisor (or someone, like a manager, who is acting with the authority of the employer) can make employment decisions that adversely affect their victims, and that an employer who gives authority to a supervisor should be liable if the supervisor misuses it. Where no supervisory authority (no tangible employment action) is carried out, the employer can avoid liability if it made and followed policies to prevent sexual harassment on the job.

Employers who have been lax with preventive measures should take note: they are still at risk, and the steps they should take have not changed. All employers should promulgate policies prohibiting sexual harassment, provide a complaint procedure, make sure all employees are aware of these policies, promptly investigate complaints, and take effective remedial action when necessary. Drafting a policy and then forgetting about it is not good enough. Employers should periodically remind employees of the policy and retrain supervisors on their obligations. And above all, supervisors should be chosen with care. Now more than before, their misdeeds can be the employer's responsibility.

SCREENING CASES IN EMPLOYMENT LITIGATION

Bradley K. Glazier, Bos & Glazier, P.C.

The success or failure of a plaintiff attorney's employment practice is largely determined by the cases he or she chooses to handle. There is rarely a shortage of potential clients; most people who have had their employment terminated believe that the termination was unfair or wrongful. The process of screening potential clients is therefore paramount. It is necessary to have a full understanding of the law, a good grasp of human nature and policies in place to assure that the good cases do not slip away and the bad cases do not take up too much of your time.

Basic Damage Considerations

A preliminary damages analysis should be conducted from the time of the first contact with a potential client. The following questions need to be answered in the first meeting or telephone call:

- Has the potential client been fired or demoted?
- What was he or she earning at the time of the termination or demotion?
- Is he or she unemployed or has she found a new job?
- What is he or she earning now?
- How long was he or she unemployed?
- What is the potential for finding a comparable position?

Depending on the answers to these questions, many potential clients should be rejected despite having sufficient proof of underlying liability. For instance, clients who have merely been suspended or who have lost a promotion will usually be unable to prove sufficient damages to justify a lawsuit.

Factors in Evaluating Potential Damages

The most important factor in evaluating damages is the salary and benefits the prospective plaintiff was earning at the time of the adverse employment action. Regardless of the theory of recovery, the judge or jury will begin the calculation of damages with that sum, extend it to the trial date or some date in the future and reduce the sum by the employee's earnings in subsequent employment. See, e.g, 42 U.S.C. ə 2000e-5(g) (Under Title VII "interim earnings" and "amounts earned with reasonable diligence" must be deducted from the back pay award). High wage earners therefore have the highest potential damages. They have the most to lose. And they face a greater prospect of being unable to replace the income stream from the prior position.

Attorneys should also consider the length of unemployment or likely length of unemployment. In general, it takes more time to locate higher skilled and higher paid positions. Low paid positions are abundant in many areas. Age, disability and the reasons that were offered by the ex-employer for the termination may also influence the period of unemployment and the ease with which your potential client may transition to another occupation. For example, an employee accused of theft will have a harder time finding a comparable position than an employee who was laid off for economic reasons.

Work life expectancy should also be considered. An employee may have a great age discrimination case, but if he or she had already announced the intention to retire within a year or two, the case may not be worth pursuing. On the flip side, most judges and juries will be reluctant

to continue paying wage differential to a younger employee indefinitely.

Seniority should also be considered. Many employers will cap or limit wage ranges for positions. This will result in an employee receiving large wage increases early in his career which will taper off in later years. It may be difficult for an employee to achieve the same level of compensation if he is forced to leave a position where he has substantial seniority for a comparable position with an employer for whom he will have no seniority.

It is also easy to overlook the impact of fringe benefits. But economists estimate that fringe benefits cost an employer an additional 15% to 20% of an average employee's salary. Benefits vary greatly by employer, however, and a potential client may be forced to accept a new position with substantially inferior benefits. The loss in potential benefits should be considered along with an estimate of lost salary and the expected salary differential.

Finally, the employee's long term wage earning potential must be considered. Does he or she work in an industry that is growing, i.e., computer programming, or is he or she in a position that is oversupplied with workers? Impermissible or illegal factors, such as age, handicap, race and sex may also make it more difficult for a potential client to find a comparable position. The same factors may cause the jury to be more forgiving of an employee who has been unsuccessful in mitigating damages. It may be useful to hold off on filing or even accepting a new case until such time as the long term prognosis of your client's employment situation is settled. Often, a potential client's success or failure in mitigating his damages will be known by the time the EEOC completes its investigation and issues a right to sue letter. In those states where filing with the state agency is not mandatory, it may still be worthwhile to have your client file with the agency and receive the benefit of its investigation while awaiting the results of your client's attempts to mitigate damages.

Understanding the Relationship Between Conduct and Damages in Employment Cases.

Potential damages will also be influenced by the theory of recovery and the circumstances surrounding the dismissal or demotion. Attorney fees are available under most federal and state statutes prohibiting discrimination. On the other hand, such damages are generally unavailable under a contract theory of recovery. Liquidated damages may also be available under some state and federal statutes. These provisions were included in the statutes, in part, to encourage private attorneys to prosecute cases they might not otherwise accept. See, Newman v. Piggie Park Enterprizes, 390 U.S. 400 (1968). The availability of such relief and the frequency with which courts actually award such relief should be considered in evaluating each case.

The circumstances surrounding the termination may also significantly impact the availability of damages and the likelihood of successful mitigation of damages. Non compete agreements, for instance, may prevent a terminated employee from exploring employment with companies that compete with his former employer. Since such jobs are likely to be "comparable" positions, they reduce the number of positions potentially available and may make it more likely that an employee must accept a lower paying position in mitigation of his damages. As discussed earlier, the reason offered for termination may also impact the employee's ability to successfully mitigate damages Plaintiff attorneys should consider the ease or difficulty

each potential client will have in finding comparable employment before accepting a case.

Format of Initial Client Interview

Plaintiff employment lawyers should conduct a series of interviews with potential clients before accepting a new case. The first contact is likely to be by phone. At this stage, it is important to find out the basic liability and damages issues that will arise if the case is accepted. Many firms use a pre-printed form for recording the basic information regarding each caller. Name, address, telephone number, source of the referral and a brief description of the circumstances surrounding the case should be recorded. The same form can be used to reflect whether the case is rejected, referred or a new file opened.

It is also useful to send potential clients a client intake form to record the support for their claim if further investigation seems justified. The following questions, from a damages perspective, should be included:

- What salary or wage rate were you being paid prior to your termination?
- What were your W-2 wages for the last tax year?
- Describe the fringe benefits you were receiving, e.g., health insurance, pension, etc.
- Do you expect to be able to find a job making a comparable salary? If not, explain why.

A cover letter explaining the form and asking that it be returned with the other documents you will need to evaluate the claim is also helpful. One group of documents necessary to review is the employee's personnel file. In addition to information on the liability aspects of the case, the personnel file should confirm the wage rate, show an earnings history and may reflect the benefit package that the employee was receiving before termination. Tax returns from previous years will also be helpful.

Armed with the information from the initial telephone contact, the completed client intake form and the documents supplied by the potential client, the attorney should conduct a face to face interview if he remains interested in taking the case. At this point, discrepancies in the documents can be discussed and the mitigation of damages doctrine discussed. If the case is accepted, a form can be provided for the employee to record his efforts at finding a new job. The form can include the date each potential employer is contacted, the identity of the company, the method of contact (e.g., resume sent, application filled out) and the result. The form can then be attached to your client's answers to the defendant's interrogatories about mitigation efforts.

Assessing Plaintiff's Credibility

One of the intangibles that will help determine the success or failure of any case is the credibility of the plaintiff. The importance of credibility is magnified in employment litigation because the jury must empathize with the unfairness of the decision to terminate your client's employment and must understand why your client has been unable to find a comparable new job. And unlike a disfigured or crippled personal injury victim, it may be easier to say no to an unlikeable or unbelievable victim of discrimination.

As a threshold matter, the potential client must be someone you like and whom you believe was treated unfairly. If you like the client, it will be that much easier to explain the injustice that was done to her by the defendant. If the person is a whiner or complainer or someone whose personality clashes with yours, both of you are probably better off if you reject the case. For confirmation of the impression your client is likely to make to a jury, it is helpful to ask a junior lawyer or legal assistant to sit in on the initial meeting. Talking with co-workers and former co-workers can also give you clues into his or her personality.

Use of Experts in the Screening Process

Experts can be useful in determining whether to accept or reject a case. For instance, a psychologist may be helpful to confirm whether your potential client is being truthful about incidents relating to the termination of employment. The version your client or potential client relates during your interview may be diametrically opposed to that offered by the company. This seems to occur more frequently with sexual harassment claims, but any employment claim may involve a "he said - she said" issue. A psychologist's use of the Minnesota Multiphasic Personality Inventory (MMPI) or other tests may provide some insight into your client's version of critical facts.

A polygraph examination may be useful as well. The polygraph can be completed before you take the case and, if successful, may be helpful in negotiations. A handwriting analysis may also be in order. For instance, if the employee's boss denies that he was the source of the love letters left on your client's desk, an expert's comparison of the love letters to his hand writing on a performance evaluation can be very helpful in determining who to believe.

Collecting Data as Part of the Evaluation

As discussed above, the client intake process should include a review of all relevant documents. Some of those documents, including tax returns or W-2's may be in your client's possession. But most of the documents will reside with the former employer. Many states require personnel files to be provided to an employee or former employee on request. In Michigan, the Bullard-Plawecki Employee Right to Know Act, MCLA ∋423.501, gives employees the right to review and copy their personnel files. The statute also creates a cause of action if the employer fails to provide a copy of the file.

Personnel policies and employee handbooks are also the source of information which may be critical to deciding whether to take a case. Since it is common for employers to escort terminated employees off the premises and restrict the items that may be removed from the plant or office, your potential client may not have taken the handbook or the critical policy or polices when he was fired. Co-workers may be willing to provide a copy of handbook or policies. Alternatively, the company or its lawyer may volunteer the documents since you will receive them during the discovery process anyway. It may be helpful to tell the company that you need the documents to assist you in deciding to take the case and that you will be forced to file suit without the documents if they will not provide them voluntarily.

A narrative report from the client supplementing the client intake form discussed above is also helpful. One drawback to the narrative is that the client may not know the information that you need to make the evaluation. The narrative may, however, provide useful information about what the client thinks is significant and it does provide more insight into your prospective client's personality and credibility.

Spotting Problem Plaintiffs

It is easy to spot and reject some problem plaintiffs. The person may be a low wage earner who should find a comparable job quickly or who thinks his or her termination was wrongful, but lacks a viable theory to avoid the at-will employment rule.

A second group of problem plaintiffs have

good cases, but will not hold up to the rigors of a lawsuit. They may not be good historians. They may have something in their past which they do not want to reveal but will be discovered and exploited by your opposing counsel. They may be unwilling to do the work of being a plaintiff. If a potential client is unwilling to fill out a client intake form, secure his or her personnel file and write a narrative explaining why they have a case, they probably won't hold up over the length of the case. Potential clients who are willing to do the preliminary work necessary to help you decide whether they have a case should be more likely to follow through when it comes time to prepare the draft set of interrogatory answers and learn how to give a good deposition.

Beware also of the prospective client who has moved from job to job. His job history will be discovered and his prior employers may have a different explanation for his reason for leaving than the reason given to you in your initial interview. The after acquired evidence rule requires that lawyers also be vigilant when reviewing their potential client's application or resume. What they may see as "puffing" may be read by the judge to be a falsehood which eliminates the right to recover economic damages.

Finally, perhaps the most difficult "problem plaintiff" is the person who appears to have a good case, but whose past or future conduct will torpedo the case. You may only have a "gut feeling" that there is something not quite right about your client's story. Maybe he has an answer for every potential pitfall in the case, but you just don't feel right about him. For your own sanity, choose people whom you will enjoy spending time with and who have been seriously wronged.

Koester v City of Novi

Litigation Implications for Pregnancy Discrimination Claims Under The Michigan Handicapper's Civil Rights Act

Delmar S. Thomas, Law Student, University of Michigan Law School

Koester v City of Novi, 458 Mich 1, 580 NW2d 835 (1998) presents a significant discussion on pregnancy, both as sex and disability discrimination. *Koester* also renders important implications on the future of employment litigation in Michigan. Michigan courts are mindful of the excessive number of employment discrimination cases on the dockets of Michigan state courts. Presumably, one of the goals of the Michigan judiciary is to reduce the number of cases on the state court docket. In this regard, *Koester* may pose major consequences for Michigan courts and litigators.

The purpose of this essay is to briefly highlight the potential impact that *Koester v City of Novi* will have on pregnancy as disability discrimination in Michigan. Contrary to its narrow holding, *Koester* may precipitate more claims of pregnancy discrimination under the Michigan Handicappers' Civil Rights Act.

FACTS

The City of Novi (the City) hired plaintiff Karen Koester in 1981 as a road patrol officer. In 1984, the city implemented a "no-light-duty policy" that prohibited disabled workers from returning to work until able to perform their regular duties. Under this policy, disabled employees unable to perform their regular duties were allowed to use sick time, vacation, and other time to remain employed with the City; after such time, disabled city employees who were still unable of perform their regular duties were terminated.

The Litigation Section
is proud to announce
the winner of its
First Annual Essay Contest
for Law Students in Michigan.

Delmar S. Thomas, of The University of Michigan Law School, was awarded first prize in the Section's first annual essay contest.

Delmar has won **$500** for his first place essay, along with this publication of his essay in the Litigation Section Newsletter.

The Litigation Section is proud to support the development and education of law students throughout the State of Michigan.

In 1988, Koester became pregnant and experienced resulting medical problems. She alleges that several inappropriate and

discriminatory comments were made by supervisors regarding her pregnancy. Koester acknowledged that she was incapable of performing the regular duties of a road patrol officer because of lifting restrictions imposed by her doctor. Koester's supervisor explained to her that the no-light-duty policy applied to all city employees and that no exceptions would be made for pregnant employees. After using all possible sick leave, vacation time, and unpaid leave, Koester realized that her job was in jeopardy under the no-light-duty policy. She applied to be transferred to the less onerous position of crime prevention officer. However, for cost reasons, the City decided not to transfer Koester to the alternate position and hired someone else.

After her pregnancy, Koester returned to work as a road patrol officer. Upon her return, Koester was reprimanded for incidents of poor job performance, including failure to write enough moving violations, using improper restroom facilities, failing to have her badge number on her uniform pants, and violating a direct order to work a certain shift. Koester asserted that she had never been disciplined prior to her pregnancy and that she had been singled out as a pregnant woman. The City maintains that Koester was disciplined according to normal policies and that she was not singled out as a pregnant woman.

Koester's problems persisted into her second pregnancy in 1990. Koester again alleged inappropriate comments regarding her pregnancy. In addition, Koester requested to be issued a special elastic uniform to accommodate her pregnancy. Her supervisor denied her specific request for safety reasons but nonetheless issued Koester over-sized men's uniforms to accommodate her pregnancy. Koester's doctor again restricted her activities during pregnancy, and Koester again admitted that such restrictions rendered her incapable of performing the regular duties of road patrol officer. Koester again applied for a transfer to another position where she could perform the regular duties while pregnant. Koester was told by her supervisor that the position was not open. Koester was forced to leave work without pay for the remainder of her second pregnancy.

Koester subsequently sued for sex and pregnancy discrimination under the Michigan Civil Rights Act, MCL ə 37.2101 et seq., (MCRA), and disability discrimination under the Handicapper's Civil Rights Act, MCL ə 37.1101 et seq. (MHCRA). The Michigan Supreme Court addressed very controversial legal questions regarding employer liability against pregnant employees. The Court concluded that Koester had no claim under the Michigan Handicapper's Civil Rights Act because pregnancy is not a disability. Conversely, the Court ruled that Koester did have a claim for sexual harassment or discrimination on the basis of her pregnancy.

DISCUSSION

The Court in *Koester* concluded implicitly that normal pregnancy, standing alone, is not a disability under MHCRA. In reaching this conclusion, the Michigan Supreme Court relied mainly on the legislative history of MHCRA. MHCRA defines a disability as "a determinable physical or mental characteristic of an individual [that] ... substantially limits 1 or more major life activities ... with or without accommodation." MCL 37.1103(e). Based on this language, the Court ruled that "the restriction limiting plaintiff's lifting abilities to twenty-five pounds is not a substantial impairment of a major life activity." At first glance, the holding in *Koester* seems advantageous for employers, however, a closer reading reveals important implications for both plaintiff and employer-side litigators.

While normal pregnancy is not a disability

under the MHCRA, plaintiff-side litigators now have discretion to argue that a given pregnancy is *abnormal* and is therefore disabling. The Court in *Koester* mentioned the following in dictum:

> We recognize that at times, certain conditions associated with pregnancy may rise to the level of a substantial limitation of a major life activity. Therefore, in order to determine whether a pregnant person is "handicapped" according to the definition contained in the MHCRA, a reviewing court must examine the particular facts and circumstances of the pregnancy to determine whether it substantially limits one or more major life activities of the employee.

Id. at 9.

Based on this reasoning, plaintiff-side litigators are no longer able to assert, *sua sponte* that a normal pregnancy is disabling. However, attorneys may now have authority to argue that an *abnormal* pregnancy is disabling. As a result, the number of pregnancy claims under the MHCRA will likely increase. In MHCRA claims of disability discrimination based on pregnancy, the legal analysis may now shift to the issue of substantial limitations during a pregnancy rather than a threshold determination of pregnancy as a disability.

CONCLUSION

The Michigan Supreme Court was correct in holding that normal pregnancy, standing alone, is not a disability under the language of MHCRA. However, the Court failed to fully explicate the various contours of its holding and has essentially opened the door to more pregnancy discrimination claims under both MHCRA and the ADA. *Koester's* narrow holding, coupled with its failure to provide a standard for determining abnormal pregnancies, opens the floodgates for plaintiff-side litigators to continue to bring pregnancy claims under the MHCRA. Given medical advances today, and the increasing ability of doctors to find "complications" associated with pregnancy, plaintiff-side litigators have considerable leeway in defining certain abnormal pregnancies as disabilities.

If the goal of the Michigan judiciary is to reduce the number of employment discrimination cases, *Koester* is a step in the wrong direction.

DEMONSTRATIVE EVIDENCE 101

Thomas J. Murray and Stephen W. King

Introduction

Demonstrative evidence, when used properly, can have a dramatic impact upon a trial and ultimately play a critical role in the decision process of a jury. There are many forms in which demonstrative evidence can be used, some of which will be discussed in the following paragraphs. However, before a practitioner may present demonstrative evidence to a jury, he or she must first meet the foundational requirements set forth in the applicable rules of evidence. This article will address the foundational prerequisites in Michigan for presenting demonstrative evidence as well as touch upon some of the more effective uses of demonstrative evidence.

Foundational Requirements

In order for demonstrative evidence to be used at the time of trial, it must first pass certain prerequisites. These prerequisites, or foundational requirements, are embodied in the Michigan Rules of Evidence (MRE) and the corresponding Michigan case law. The burden of establishing a proper foundation generally rests with the party seeking its admission. However, the determination as to whether sufficient foundation has been laid for the admission of evidence is in the trial court's discretion. People v Schwab, 173 Mich App 101 (1988). It is interesting to note that demonstrative aides are generally not admissible as evidence, but are used merely to illustrate and highlight admissible evidence.

First and foremost, demonstrative evidence must meet the relevancy test. MRE 401 holds that relevant evidence is evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. MRE 402 holds that all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, the Michigan Rules of Evidence or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible. MRE 403 holds that demonstrative evidence must overcome grounds of exclusion such as prejudice, confusion or waste of time. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, and waste of time or needless presentation of cumulative evidence.

Finally, MRE 901 holds that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims it to be. For example, a witness testifying that a photograph is an accurate depiction of the accident scene is sufficient to authenticate a photograph. There is no need to call the photographer to the stand to testify. The aforementioned prerequisites are essential to relevancy.

One problem with admissibility that invariably manifests itself at the time of trial is that of prejudice, specifically the failure to properly disclose a piece of demonstrative evidence. The key to overcoming this problem is early disclosure. Early disclosure severely diminishes opposing counsel's chance of precluding otherwise admissible, demonstrative evidence under MRE 403. Early disclosure is so important that FRE 803(24) requires the proponent of the demonstrative evidence to make it known to opposing counsel sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the proposed evidence. There is no similar rule in Michigan, however, as a general rule it is always prudent to disclose demonstrative evidence early.

Finally, if the trial court fails to allow the proffered demonstrative evidence, do not hesitate to make an offer of proof. This can be as simple as describing to the court, outside of the jury's presence, the nature of the demonstrative evidence and its intended purpose. Failure to take such action may preclude any potential appellate relief.

Effective Uses Of Demonstrative Evidence

A. Illustration of Factual Evidence

One of the more common forms of demonstrative evidence is the photograph. The introduction of the photograph into evidence is a matter of discretion left to the trial judge. Kolcon v Smewing, 28 Mich App 237, 242 (1970). As stated earlier, the photograph must first meet the requirements of MRE 401, 403 & 901 regarding relevance and authentication. Once these barriers have been cleared, a photograph can forcefully convey to a jury important factual evidence.

A good example of effective use of the photograph came in Ferguson v Delaware Int'l Speedway, 161 Mich App 283 (1987). In Ferguson, the plaintiff sued the defendant race track owner over a slip and fall that occurred in defendant's parking lot. At issue was the condition of the hill on which plaintiff fell after parking her vehicle. Plaintiff testified the hill had an approximately forty-five degree angle, and was grassy and patchy in spots. Defendant introduced photographs of the hill to depict that there were less steep areas on the hill. The trial court admitted the photographs over plaintiff's relevancy objection because the plaintiff testified that the photographs accurately depicted the area where the accident occurred and because the photographs, in showing the accident scene, were not inflammatory. Id. at 291. The jury, in finding for the defendant, found that there were other areas less steep upon which plaintiff could have traversed.

As is obvious, this is a much different case without defendant's use of the photograph. Certainly, defendant could have asked plaintiff if there were less steep areas upon which to traverse, and could have called the caretaker of the parking lot to testify similarly. However, neither of these persons would have been able to as effectively convey to the jury the condition (i.e., steepness) of the hill at the time of the accident. The photograph allowed the jury to view the factual conditions and make the decision as to whether the path that plaintiff chose was reasonable.

B. Impeachment purposes

Demonstrative evidence can also be very effective when used to impeach a witness. A classic example of this is when videotape of a private investigator is used to contradict the

testimony of a witness regarding his or her physical condition. In Butt v. Giammariner, 173 Mich App 319 (1989), plaintiff brought suit over alleged injuries sustained in a slip and fall at defendant's apartment building. Plaintiff testified that she could not walk without a limp and the aid of a cane, wear heels beyond a certain length nor perform certain household chores. Id. at 320.

Defendant introduced the videotape of plaintiff walking in high heels without the use of a cane, going grocery shopping and unloading groceries from her car. The jury found in favor of defendant. Without the videotape, defendant would not have had as effective a means of impeaching plaintiff, and the videotape discredited plaintiff in front of the jury.

C. Expert Aide

Another common use of demonstrative evidence is for the purpose of assisting an expert witness in further explaining his or her testimony. The case of Green v General Motors, 104 Mich App 447 (1981), illustrates a situation where an expert witness used a movie to graphically illustrate his expert testimony. Green involved a one car accident in which plaintiff hit a tree. The officer at the scene noted that the left rear axle had been fractured, and that the rear axle was projecting outward from the wheel to some degree. Plaintiff brought suit claiming that the axle was defective and that this defect caused the axle to fracture and subsequently caused plaintiff to lose control of the vehicle. Defendant's theory was that the fracture of the axle came after the impact with the tree through the force of the drive train of the vehicle.

Defendant's expert presented, over plaintiff's repeated objections, a motion picture and related photographs which demonstrated the effect of a frontal impact upon the rear axles of several vehicles. None of the vehicles were the same as that driven by the plaintiff, and defendant's expert repeatedly explained that his purpose in introducing the movie and photographs was not to reenact the accident, but to graphically illustrate the effect of a front end impact on the rear axle of a typical rear-wheel drive automobile. Plaintiff argued that the vehicles in the movie were significantly different in their makes and sizes, and that the speed and angle of the impact were different in the movies.

The jury returned a verdict in favor of defendant and plaintiff appealed. The appellate court found that the movies were properly admitted because they were not admitted to re-create the accident, but were introduced to demonstrate a physical principle. The movie was used by the expert as a visual aid in illustrating his testimony regarding the forces which transmit frontal impact to the rear axle of a typical automobile. The decision to admit this evidence was within the discretion of the trial judge and was properly admitted.

Conclusion

The above stated illustrations are only some examples of how a practitioner can use demonstrative evidence at trial. While a lawyer must always be cautious not to overwhelm a jury with numerous exhibits and photographs, the efficient use of demonstrative evidence can be a powerful factor in a jury's decision. However, a lawyer must first know the foundational prerequisites he or she must meet in order to introduce demonstrative evidence.

REFLECTIONS ON DIRECT EXAMINATION

Charles N. Simkins, Simkins & Simkins, P.C.

Having now been a trial lawyer for over 20 years, I can say that a smooth and well flowing direct examination is an absolutely critical part of a successful trial. Having been a student of trials for over 20 years, which has involved actually sitting in court watching other lawyers, watching various parts of trials on television, including the O.J. Simpson and Walter Budzyn trials, I cannot think of anything that would be more painful for a juror than listening to a lawyer hem and haw their way through a direct examination.

If the direct examination is well prepared, smooth and flowing, it will leave a good impression on the jury, and the jurors will realize that the lawyer is not wasting their time. Giving the jury the perception that the lawyer is wasting time because of lack of preparedness is fatal to even the best of cases.

Despite having taken several courses on trial strategy and techniques while in law school, law school did very little to help me prepare or really understand the concept of a direct examination. Over the first several years of my career as a trial lawyer, I somehow had the concept that direct examination would take care of itself. I was an unknowing disciple of the following quote from Goldstein's Trial Techniques, p. 251 (1935) where he stated:

> Now the best thing the advocate can do under these circumstances (direct examination) is to remember that the witness has something to tell, and that but for him, the advocate, would probably tell it very well "in his own way." The fewer interruptions therefore the better; and the fewer the questions, the less questions will be needed. *Watching should be the chief work*; especially to see that the story be not confused with extraneous and irrelevant matter . . .
> *(emphasis added)*

Early in my career, I was doing my absolute best to become the "premier" watcher envisioned in the above quote from Mr. Goldstein. At the same time, I had the fortune gift of some of the late Professor Irving Younger's lectures, and Professor Younger was a great advocate of being so well-prepared for trial that the great trial lawyers would not need any notes or outlines to be used during the trial. This concept fit in very well with my goal to become a great "watcher" during direct examination.

Between the concept of becoming a great watcher during direct examination, and Professor Younger's no notes or outlines approach, I was quite busy memorizing as much as I could about my cases, while trying to figure out the one question that I could ask on direct examination that would elicit from the witness their name, address, qualifications and everything that they knew about the case, and worrying that I would leave something out during the trial.

About fifteen or so years ago, I had the great fortune and privilege to attend a lecture on direct examination by Mr. Herbert J. Stern of the New Jersey law firm of Stern & Greenberg. During that eight hour lecture on direct examination, Mr. Stern very much lived up to his reputation as being a skilled trial lawyer and one of the nation's finest teachers on issues related to trial techniques and strategies. During that eight hour lecture, Mr. Stern opened my eyes to the reality of the fact that the trial attorney must work just as hard, with just as much thinking and preparation, to do a proper direct examination, as for cross-examination.

In fact, over the years since first learning from Mr. Stern, it has become apparent that much work and preparation is needed to prepare a proper direct examination, which allows the witness the freedom to explain for the jury what they know and how they know it in an interesting and straightforward manner.

After Mr. Stern woke me up about the role of a direct examination, a number of books and chapters on direct examination have been studied and consulted, but most dealt with strategy and philosophy without giving the straight questions. I have always been a sole practitioner, and to me the ideal law book, for which I am still searching, would be one that says on the cover, Look in here and find out how to do it, and the exact direct examination would be laid out question by question. I have not yet found such a book, but anyone who has ever seen me in trial knows that contrary to Mr. Goldstein and Professor Younger, I actually prepare and write out all of my questions for direct examination of all of our witnesses. To me, there is a certain amount of freedom to go where the witness goes, but at the same time, I have the knowledge and confidence that everything has been written out, reviewed and added to, and this is a source of relaxation for me during trial because I am not worrying that I have missed something.

In preparing the exact questions and order of a direct examination in advance, to me, there is a better opportunity to keep it orderly, flowing, educational and interesting for the court and the jury. As trial lawyers, we have a strong obligation to the courts and jurors to be prepared, to keep the case moving along, and to keep the testimony orderly and clear and I believe that the use of prepared direct examinations serves that purpose.

In the book Fundamentals of Trial Techniques by Thomas A. Mauet, there is a chapter entitled Direct Examination, which states at pages 85-86, the following:

> Experienced trial lawyers recognize that most trials are won on the strengths of your case in chief, not on the weaknesses of your opponent's case. Consequently, effective direct examinations that clearly, logically, and forcefully present the facts of your case will usually have a decisive effect on the outcome of the trial. As the party having the burden of proof on any cause of action, your direct examinations, with any exhibits and stipulations, must meet the required burden on each element of the causes of action.
>
> The purpose of a direct examination must be kept in mind. It should elicit from the witness, in a clear and logical progression, the observations and activities of the witness so that each of the jurors understands, accepts and remembers his or her testimony.
>
> Consequently, direct examinations should usually let the witness be the center of attention. The lawyer should conduct the examination so that he does not distract and detract from his or her witness. After all, a witness will be believed and remembered because of the manner and content of his or her testimony, not because the questions asked were so brilliant. Witness' credibility is to be determined by who the witness is (background), what she says (content) and how she says it (demeanor). If during their deliberations the jurors remember one of your witnesses as being particularly convincing, but aren't sure who conducted the direct examination, you have done your job well.

I understand and appreciate that in his excellent book, Trying Cases to Win--Direct Examination, Mr. Herbert J. Stern strongly recommends against the use of pre-written questions for direct examination. However, I also know me, and I know from experience that standing out there, all alone in the middle of a courtroom, I am just not smart enough or cool enough to be able to formulate clear, concise and direct questions in the heat of battle. My experience is that with prepared direct examinations, I can move and flow with the answers, not with my face and voice welded to the questions, and no matter what happens, I know the direction that we are going in and where we are going to end in terms of each direct examination. In this way, I am able to accomplish, in my own style, the depth of what Mr. Stern has taught me, while trying to live up to the teaching of Mr. Mauet quoted above.

Over the years, I have continued to learn and realize that what I do not know about trial strategy and jury thinking far, far exceeds anything that I think I know.

I hope that this article helps you with your cases, stimulates your thinking on better ways to conduct a direct examination and helps achieve great verdicts for your clients.

Three Types Of Evidentiary Summaries

The Sixth Circuit's decision in United States v Bray, 139 F3d 1104 (6th Cir 1998) sets forth a good explanation of the various types and uses of evidentiary summaries:

1. Primary-Evidence Summaries:

When documents are so voluminous that they cannot be conveniently examined in court, FRE 1006 permits a summary to be admitted into evidence. (The underlying documents need not be in evidence, and generally, no limiting instruction is appropriate.)

2. Pedagogical-Device Summaries:

When an illustrative aid would facilitate the presentation of testimony or argument, FRE 611(a) permits the summary to be used to summarize, clarify or simplify other evidence admitted in the case. (The underlying documents or testimony must be in evidence, the summary is not admitted, and a limiting instruction is appropriate to inform the jury of the summary's purpose.)

3. Secondary-Evidence Summaries:

When the summary is a combination of numbers 1 and 2 above (not quite a Rule 1006 summary yet more than a mere illustrative aid), the summary may be admitted into evidence in addition to the underlying documents and testimony. The summary must materially assist the jurors in better understanding the evidence by accurately and reliably summarizing complex or difficult evidence. (A limiting instruction is appropriate to explain that the summary is only as valid and reliable as the underlying evidence it summarizes.)

Proposals To Amend Fre 701-703

Proposals for amending Rules 701-703 are being published for comment. The text is available on the internet at www.uscourts.gov.

FRE 701: The rule would be amended to prevent experts from testifying under the cloak of lay opinion. Expert testimony could not circumvent Rule 702 (or the discovery disclosure requirements of FRCP 26).

FRE 702: The language would add: "provided that (1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case"

The third item, pre-admission analysis of the expert's conclusions, would resolve a major source of disagreement between trial courts. In addition, the gate-keeping function would apply to testimony by any expert (though the relevant factors would vary depending upon the nature of the testimony).

FRE 703: The change would create a presumption against disclosure of inadmissible data "reasonably relied upon" by the expert. The standard for admissibility of the expert's opinion would not change, but the proponent could not disclose the inadmissible information underlying the opinion unless the probative value outweighed the prejudicial effect. If admitted, a limiting instruction would be appropriate.

Comment Period

The proposed changes would be open for public comment for 6 months. If the rule amendments were to be approved by the Supreme Court, Congress would have until the following December 1 to modify them before they became law (1999 at the earliest).

Brian Balow and **Michael Meeusen** addressed Litigation Section members at the State Bar Annual Meeting. The speakers, both currently serving as in-house corporate counsel, addressed the working relationship between in-house and outside counsel and offered tips on how to promote and maintain that working relationship.

Litigation Section
State Bar of Michigan
306 Townsend Street
Lansing, Michigan 48933-2083

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