

The MARYLAND LITIGATOR



MSBA LITIGATION SECTION

JANUARY 2011

COURT OF APPEALS TO STUDY COMPARATIVE FAULT

On November 8, 2010, Chief Judge Bell, on behalf of the Court, sent a memorandum to Judge Wilner, Chair of the Court's Standing Committee on Rules of Practice and Procedure, requesting that the Committee undertake to study and formulate responses, for the Court's consideration, to a series of queries regarding comparative fault. In pertinent part, the memorandum explained:

[T]he Court requests that the Committee undertake a comprehensive and objective study of how other States and Federal territories or enclaves treat currently the doctrines of contributory negligence, comparative fault, and any legal principles associated or affected by those doctrines, such as joint and several liability, and report to the Court the results of that study.

As part of the Committee's Report, the Court requests that the Committee advise:

(1) To the extent that other states or Federal jurisdictions replaced contributory negligence with comparative fault:

- (a) how the change was effected;
- (b) the form, aspects, and structure of comparative fault they chose as the alternative; and
- (c) any significant judicial and economic consequences that resulted from the replacement; and

(2) If the Court were to consider replacing the doctrine of contributory negligence, a common law doctrine in Maryland, with some form of comparative fault:

(a) whether, in the Committee's view, the Court could effect that change by Rule, as opposed to judicial decision;

(b) if the Court were to consider the adoption of such a Rule, what the form and content of the rule should be; and

(c) what related legal principles, such as joint and several liability, would need to be considered concurrently.

The study must be an objective one that invites and considers the views of individuals and groups that have exhibited an interest in the matter....

Following the Committee's November 2010 meeting, Judge Wilner appointed a special subcommittee consisting of Al Brault and Bob Klein (defense lawyers), Bob Michael and Deborah Potter (plaintiff's lawyers), Tim Maloney, and himself to make the necessary investigation and prepare a draft response for Committee consideration. The first meeting of the subcommittee is scheduled for January 18, 2011. Judge Wilner invited the MSBA, Maryland Association for Justice, Maryland Defense Counsel, Maryland Association of Counties (MACO), Maryland Municipal League (MML), and others (Paul Tiburzi and Bob Enter) who have indicated interest to attend all subcommittee and Committee meetings on the topic. The process in the Rules Committee will be as transparent as possible. Everyone who wants to weigh-in on the issues will have a reasonable opportunity to do so, with two caveats. First, because the January 18 meeting is an organi-

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THE MARYLAND LITIGATOR

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MESSAGE FROM THE SECTION CHAIR

By MARY V. MURPHY

- DEPUTY STATE'S ATTORNEY FOR HOWARD COUNTY -

In beginning the New Year I find myself reflecting back on 2009 and the wonderful work done by the members of the Litigation Section's committees which have provided our section members with two wonderful programs and this informative Newsletter. I would like to acknowledge those leaders in our section that have worked tirelessly on behalf of our members. First, I'd like to thank the Program Committee and those who volunteered their time at our District Court Program: Robert Fiore, Gwen D'Souza, Jodi Foss, Ginina Stevenson, Judge Joan Gordon, Mary Keating, Shawn Cavenee, Jake Weddle, Regina Andrew, Joel Newport, Steven Freeman and M. Natalie McSherry. Of course, I would also like to recognize the work of Andrea Terry from the MSBA continuing legal education program who also provided invaluable assistance to this program. The District Court program was sold out and we received rave reviews from the attorneys who attended and participated in this hands-on practical program held in October at the Wabash Avenue District Court.

I would also like to acknowledge those who organized the marvelous reception at the Supreme Court with the scintillating presentation about Maryland's connection with the Supreme Court. The Appellate Subcommittee members who worked to produce such a wonderful program were Alan Sternstein, Judge Glenn Harrell and Andrew Baida.

Last, but hardly least, I would like to extend my heartiest thanks to Judge Harrell and his wonderful committee for the tremendous work put forth in bringing to all

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THE NECESSITY OF FACTUAL SUPPORT WHEN PLEADING AFFIRMATIVE DEFENSES IN MARYLAND FEDERAL DISTRICT COURT

BY KATHLEEN A. MCGINLEY, ESQ.

The June 2010 edition of *The Litigator* summarized the Supreme Court decision *Ashcroft v. Iqbal*, 566 U.S. ___, 129 S. Ct. 1937 (2009), which imposed on federal plaintiffs a higher standard of pleading in civil complaints. Since that edition, the U.S. District Court for the District of Maryland has issued two orders applying the heightened standards of *Iqbal*, and its predecessor *Twombly*, to civil affirmative defenses plead by defendants.

To review, in *Iqbal*, the Supreme Court extended its prior decision in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), which held a complaint must “state a claim to relief that is plausible on its face,” not just conceivable and must avoid conclusory statements, otherwise, it will not survive a motion to dismiss. *Iqbal* extended *Twombly*, which applied only to bankruptcy complaints, to all federal civil complaints. The Court held that to determine if a complaint meets the heighten standard, a court must follow the below test, which first examines the factual sufficiency of the complaint, followed by an analysis of its legal sufficiency:

1. If the claim is entitled to an assumption of truth because it states a plausible claim; and, if so;
2. Whether the allegations plausibly entitle the plaintiff to relief.

The recent orders of the U.S. District Court for the District of Maryland, described below, extend the *Iqbal* and *Twombly* standards from civil complaints to civil answers, specifically affirmative defenses.

In a July 27, 2010, order, Chief Judge Benson E. Legg, in *Topline Solutions, Inc. v. Sandler Sys., Inc.*, No. L-09-3102 (D. Md. July 27, 2010), struck the affirmative defenses of defendant Sandler Systems, Inc., because all “contain[ed] no facts and [were] too conclusory.” The first affirmative defense stated, for example, “[t]he Complaint fails to state a claim upon which relief can be granted.” Judge Legg, quoting a fellow Fourth Circuit district court in *Palmer v. Oakland, Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, *5 (W.D. Va. June 24, 2010), stated that “[a]fter *Twombly* and *Iqbal*, an affirmative defense must be pled in a way that is ‘intelligible, gives fair notice and is plausibly suggested by the facts.’” In *Topline*, the defendant presented no facts to support its affirmative defenses. Judge Legg opined that factual support

includes, for example, stating the operative dates or statute when claiming a statute of limitations defense, or specifying the exact failure when claiming failure to mitigate damages or perform as plaintiff represented.

Similarly, in an August 12, 2010, memorandum opinion, and accompanying order, Judge Richard D. Bennett, in *Bradshaw v. Hilco Receivables, LLC*, No. RDB-10-113 (D. Md. Aug. 12, 2010), struck five challenged affirmative defenses of the seventeen in the defendant’s answer. The motion challenging the defenses filed by the plaintiff was treated by the court as a Federal Rule of Civil Procedure Rule 12(f) Motion to Strike, rather than a Motion for Judgment on the Pleadings under Rule 12(c), since not all the defenses were questioned. Judge Legg allowed a 12(f) Motion by plaintiff in *Topline* though all the defendants affirmative defenses were challenged.

In his memorandum, Judge Bennett stated that the standards of *Iqbal* and *Twombly* reasonably apply to answers as well as complaints because of the similarity in the respective requirements for pleadings in Rule 8(b)(1)(A) and (a)(2). Further, requiring factual support assists in court efficiency as plaintiffs will not need to spend time conducting unnecessary discovery, a point Judge Legg also mentioned in his order. Further, any omitted defense that cannot be supported by facts early in litigation can be added by the defendant in an amendment under Rule 15(a) once discovered. Judge Bennett opined that the Court has broad discretion to strike affirmative defenses that do not meet the pleading standards of Rules 8 and 9, and also have the ability to liberally grant leave to amend answers under Rule 15(a). In *Bradshaw*, the Judge Bennett granted Hilco Receivables, LLC, thirty days to amend its answer from the date of entry of his order striking the defenses.

The Maryland Court of Appeals has yet to adopt the *Iqbal* and *Twombly* standards for Maryland civil pleadings. However, given the recent orders above, federal defendants should be wary when pasting boilerplate defenses in an answer and should now conduct at least minimal internal fact discovery with clients when preparing an initial response.



NEW RULES ON ELECTRONIC DEVICES IN MARYLAND COURTHOUSES

~ Took Effect on January 1, 2011 ~

Perceiving the need to fashion a unified approach applicable across Maryland's courthouses (to replace differing regulations put in place under a "local option" approach), the Court of Appeals, after conducting a public hearing on October 19, 2010, enacted a new Rule 16-110, to become effective on January 1, 2011, governing the possession and use of cell phones, cameras, computers, and other electronic devices in all court facilities.

Electronic devices such as cell phones, cameras, personal computers, and other such devices may be brought into a court facility, but may be used only in accordance with the Rule and the appropriate orders of the local courts.

- **All electronic devices may be inspected by court security personnel.**
- **Security or other court personnel may confiscate an electronic device for misuse.** As described below, personnel may also collect electronic devices from persons in certain designated areas of the court facility.
- **All electronic devices must remain OFF AND INOPERABLE inside courtroom** unless the presiding judge has given express permission in a specific instance
- **The taking, recording, or transmitting of photographs, videos, or other visual images by cell phone**

or any other device is prohibited in a court facility at all times, unless the court expressly grants permission in a specific instance.

- An electronic device **may not** be used in a manner that interferes with court proceedings or the work of court personnel or that violates any court order.
- **The court may decide to limit or prohibit the possession of electronic devices in designated areas, including courtrooms.** In that event, the court will designate the restricted area and provide for the collection of devices from persons entering that area and the return of the devices to those persons when they leave the area.
- **An electronic device may not be brought into a jury deliberation room.**
- **Security and other court personnel are not liable for any damage, misplacement, or loss to electronic devices confiscated or collected under the Rule or a court order.**

Any individual who willfully violates Maryland Rule 16-110 or any reasonable limitation imposed by the local administrative judge or the presiding judge may be found in contempt of court and may be subject to sanctions in accordance with the Rules in Title 15, Chapter 200.

WHAT JUDGES WANT: THE ESSENTIALS OF WRITING FOR A COURT

By ANDREW J. MORRIS, Esq.

If you are a new lawyer, you soon will notice one of the profession's puzzles: Everyone believes it is important to write well, and all advocates believe they do just that—yet judges continually grumble about the state of legal writing. What is the explanation?

The explanation is simple, if awkward for the legal profession: A fundamental split in views about legal writing. To many advocates, especially newer ones, good legal writing means technical writing in a lawyer's specialized idiom. It

also means a slightly formal tone, which provides the gravitas they consider appropriate to the work of a juris doctor.

Judges disagree. They read stacks of papers, and they share a strong consensus that good legal writing should be like any other good writing: direct, interesting, and above all, clear. Judges want plain English.

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BAR COUNSEL'S MUSINGS

BY GLENN GROSSMAN

- BAR COUNSEL, ATTORNEY GRIEVANCE COMMISSION -

As I write this, Christmas is but a few days away. In West Virginia, as almost everywhere else, stockings hang by hearths, ready to accept the wonderful gifts of the season. In one lawyer's stocking, however, no gift worthy of the name will be found; Douglas Smoot, Esquire, it appears, received but a lump of coal. He thought he had been good, he thought he had been nice. He even convinced the Hearing Panel Subcommittee of the Lawyer Disciplinary Board that he had been good, for goodness sake. But, he was found to have been naughty; not by Santa, but by the West Virginia Supreme Court of Appeals.

Mr. Smoot and his firm, Jackson Kelly, PLLC, represented the Westmoreland Coal Company in defense of a federal Black Lung claim brought by one of Westmoreland's employees, Elmer Daugherty. Mr. Daugherty represented himself at the outset of the claim in May 2000. Mr. Smoot notified Mr. Daugherty of the employer's right to have him examined by a physician of its choosing and the examination was conducted by Dr. George L. Zaldivar in February 2001. Mr. Smoot received Dr. Zaldivar's report, which contained a number of comprehensive test results including studies of arterial blood gas, pulmonary function, hemoglobin and carbon monoxide levels and most significantly, a finding, in the doctor's narrative summary, that Mr. Daugherty suffered from complicated pneumoconiosis. Such a finding, pursuant to C.F.R. sec. 718.304, creates an irrebuttable presumption that a miner found to have this illness is totally disabled thereby.

In November 2001, Mr. Smoot submitted to the presiding administrative law judge, copied to Mr. Daugherty, various documents that he intended to submit into evidence at a hearing scheduled for January 25, 2002.¹ The documents included the examination report of Dr. Zaldivar, a report of another doctor interpreting a CT scan and the curricula vitae of both doctors. Unfortunately for Mr. Smoot and his expectation of an uninterrupted career at the Bar, he removed the five page narrative summary from Dr. Zaldivar's examination report. There was no hearing on January 25, and, because of six continuances sought and obtained by Mr. Daugherty, the case lingered for three and a half years. By 2004, Mr. Daugherty retained counsel, who determined that Mr. Smoot had disassembled the doctor's report. Westmoreland, now represented by other attorneys in Mr. Smoot's firm, conceded the award of benefits to Mr. Daugherty.

The United States District Court referred the case file to the West Virginia Office of Disciplinary Counsel and it opined that Jackson Kelly's "excuses and arguments" about Mr.

Smoot's conduct were "flimsy at best." In early 2009, the Office of Disciplinary Counsel charged Mr. Smoot with several violations of the Rules of Professional Conduct. It said that because Respondent disassembled the report of his client's own expert, Dr. Zaldivar, before providing the same to Mr. Daugherty during the course of the underlying Black Lung proceedings, Smoot violated Rule 3.4(a) of the Rules of Professional Conduct² and, because he improperly withheld material having evidentiary value and the conduct had a significant effect on a legal proceeding, he also violated Rules 8.4(c) and 8.4(d) of the Rules of Professional Conduct.³

The Hearing Panel Subcommittee of the Disciplinary Board limited its analysis to the factual allegation that Mr. Smoot had altered Dr. Zaldivar's examination report by removing the narrative summary. The Subcommittee determined that the Disciplinary Counsel had to establish by clear and convincing evidence that the act of withholding the doctor's narrative report was a violation of some rule or statute, that is, that it was unlawful, in order to establish that Mr. Smoot violated Rule 3.4(a). Under the applicable Black Lung regulations, the Panel observed, Mr. Smoot was not required to turn over the report once the case was under the jurisdiction of the Administrative Law Judge. Furthermore, because no discovery request had been made of Mr. Smoot, he had no duty to turn over the report. It also determined that, because Mr. Smoot did not violate any Black Lung regulation by withholding a portion of Dr. Zaldivar's report, he did not violate Rule 3.4(a). The Subcommittee rejected the argument of Disciplinary Counsel that Mr. Smoot had acted deceitfully (in violation of Rules 8.4 (c) and (d)) by misleading the Court and claimant that he had provided the en-

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¹ Pursuant to the relevant version of 20 C.F.R. § 725.456(b)(1), when a case is pending before the Office of Administrative Law Judges, "documentary material, including medical reports...may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties at least 20 days before a hearing is held in connection with the claim."

² Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

³ It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.

THE OVERLAP OF PROFESSIONALISM AND ETHICS

BY MICHAEL WEIN, ESQ.

After passing July's Bar Exam, the recent December Admittees, can now start practicing law immediately with the rest of the Maryland Bar. Some are working for law firms (large and small), others are clerking for judges, a very few have struck out on their own, and the rest are looking for a legal job or do not plan to practice law regularly. On one issue, though, the New Admittees start on an 'even keel' and may be able to even quickly outpace the 'learned' attorneys who have been practicing for decades—the topic of “professionalism.” That is because as part of recent changes to the Maryland Rules, a carefully crafted “Ideals of Professionalism” is now ostensibly part of the Maryland Lawyers' Rules of Professional Conduct (MLRPC). Longtime lawyers may be set in their ways on how to conduct themselves in a professional matter, (and like people in general, there is a large diversity in how attorneys conduct themselves in the practice of law), but newer attorneys at least have guidelines starting out, to assist them in their initial legal forays, even as the ‘professionalism guidelines’ are still a work in progress.

Professionalism concentrates on attorneys dealing with one another, judges, and third parties with a presumption of working together to achieve justice through fair play and mutual respect. With a few exceptions of particularly egregious unprofessional behavior rising to the level of misconduct under the MLRPC, unprofessional litigation conduct is not apparently circumscribed at all by the Maryland Rules of Professional Conduct, or the recently added “Ideals of Professionalism.” See Attorney Grievance Commission (AGC) v. Rand, 411 Md. 83, 103 (2009) (dismissing Grievance Petition while noting that “[r]espondent may be fortunate that we have not yet considered enactment of the recommendations of the Maryland Judicial Commission on Professionalism... that the Court [of Appeals] adopt Standards of Professionalism as an Appendix to the Rules of Professional Conduct and impose sanctions...”).

That does not mean that Professionalism is not an ideal and practice that has many practical, logistical, and reputational aspects which would and should greatly improve the practice of law. Instead, the overlap between “Professionalism” and “Professional Ethics” is one to which very few situations, viewed by themselves and in isolation, are prohibited under both. One such example would be if an attorney in a profes-

sional capacity were to begin disparaging attorneys or any third parties with comments that are based upon racial, ethnic, or sexual slurs. See MLRPC Rule 8.4 (e). Another example, would be the use of profanities in a courtroom (except perhaps those rare cases where the profanities themselves are evidence in the court case.) See AGC v. Alison, 317 Md. 523 (1989) (Rule 8.4 violation and 90 day suspension for repeated use of profanities to Court Clerks); but see AGC v. Link, 380 Md. 405 (2004) (dismissing Grievance petition for Attorney's demeaning and unnecessary questions during deposition).

The lack of mandatory requirements in the recent Professionalism Ideals adopted, is traceable and foreshadowed by the Court of Appeals decisions in Attorney Grievance cases discussed supra. It should therefore be unsurprising that a reading of the recently adopted “Ideals of Professionalism” finds few uses of the word ‘must,’ numerous uses of the word

“should,” while noting that “failure to observe these Ideals is not of itself a basis for disciplinary sanctions, but the conduct that constitutes the failure may be a basis for disciplinary sanctions if it violates a provision of the MLRPC or other relevant law.” [Emphasis Added] This is because professional ethics, for lack of a better description, presently revolves around only those standards and rules that are outlined and described in the “Maryland Rules for Professional Conduct.” See Editor's Note to Maryland Lawyers' Rules of Professional Conduct, that these Rules “shall govern the conduct of attorneys from and after said date [of enactment]”; but see Preamble to Code, noting that “[a] lawyer's conduct should...demonstrate respect for the legal system and for those who serve it.”

However, Professionalism violations have traditionally been given a pass from being a ‘prohibition’ under the Maryland Rules of Professional Conduct, largely for two reasons. The first is that the First Amendment of the Constitution allows great freedom for every citizen to express a diversity of point of views, be it for speech, religion, or seeking governmental redress, even for reasons that are in a distinct minority of the population at large. In other words, most people can make a myriad of arguments in court (particularly on criminal matters) and similarly, attorneys can then ethically advance those arguments in court and out of court, barring some exceptions such as making knowing

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REPORT ON THE ACTIVITIES OF THE SECTION'S PROGRAM COMMITTEE

By M. NATALIE McSHERRY, Esq.

The Litigation Section sponsored two highly successful programs in the Fall. The first, held October 11, was part of our focus this year on practice in the District Courts of Maryland and was a practical, interactive program on civil practice in the District Court. It was held in the Borgerding District Court Building on Wabash Avenue in Baltimore City, and was sold out with 65 attendees. The second was a presentation on Maryland and the Supreme Court, held at the United States Supreme Court on October 13, co-sponsored by the Maryland Chapter of the Federal Bar Association.

Thanks to our presenters at the District Court: Bob Fiore, Gwen D'Souza, and Jodi Foss, and logistical coordinator Ginina Stevenson, as well as our volunteer District Court Judge Hon. Joan Gordon, and volunteers Steven Freeman, and Joel Newport – who got to play the role of District Court judge for the day. Thanks also to Alan Sternstein, chair of the Supreme Court event.

Programs for the remainder of the year will include:

- 10 March 2011 Program on Rule 5-702 and Frye/Reed in Howard County, with Judge Stuart Berger of the Circuit Court for Baltimore City, and Judge Ronald Rubin of the Circuit Court for Montgomery County, as the featured presenters. Both are ASTAR (Advanced Science & Technology Adjudication Resource)–trained judges, and each has a special interest in the topic. The presentation will include discussion of the legal principles and the practical issues relating to pre-trial evidentiary hearings. This is a topic of growing interest to both civil and criminal litigators, as questions of scientific opinions play an increasing role in trials.
- 14 April 2011 Dinner in Annapolis with District Court judges. While there will be a charge to help cover the cost of this event, it will be an opportunity to have dinner with a District Court judge from the area. We hope

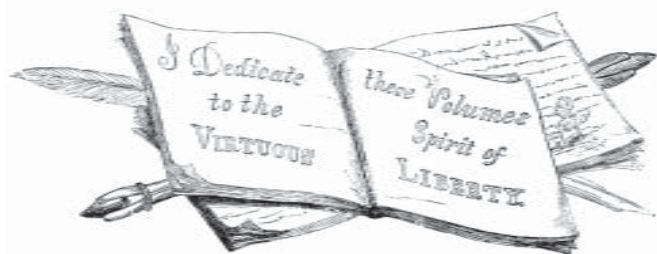
to have at least six judges, three from the Eastern Shore and three from the Western side of the Bay Bridge. This is an opportunity to have discussion with the judges about the practicalities of District Court practice, pointers on local issues, etc.

- June 2011 MSBA Annual Meeting in Ocean City. At the Annual Meeting, the Litigation Section Programs will be focused on Technology and Litigation.

o “Nuts & Bolts of E-Discovery”. After numerous CLE presentations on the legal issues of E-discovery, this is your chance to learn from those who truly understand it, the practicalities of E-discovery. Practicing experts will discuss topics including: 1) common law duty to preserve; 2) preservation letter; 3) litigation hold notice; 4) scope of duty to preserve; 5) Cooperation Proclamation; 6) Conference of Parties; 7) differences between duty to preserve and duty to produce; and, 8) jargon and buzz words like native v. static forms, metadata, mirror image, active capture, document management policy, computer usage policy, and backup tape rotation policy. The intention is that attendees will learn their duties in the arena of E-discovery, be able to prepare for and participate in a meaningful Conference of Parties, and know enough about the subject matter as well as the process to communicate with IT and forensic experts.

o There will also be shorter programs on social media in litigation and use of technology at trial. Should you search social media sites for information about jurors? How do you stop jurors from doing the same about topics in the trial (or the lawyers or witnesses!)? What are the pros and cons of websites for trial? How can you use technology to keep the jury interested in an era of 20-30 second sound bites and visuals? Come share your ideas and learn others.

The hope is to present programs that provide both substantive and practical information in a fashion that is interesting, stimulating and useful to our members. If you have suggestions for other programs, or have an interest in participating in a program, please contact Natalie McSherry. We have a good sized Program Committee that is hard at work, and always interested in new ideas for more and better programs.



LITIGATION SECTION'S SECOND WEDNESDAY IN OCTOBER, SUPREME COURT STYLE

BY ALAN B. STERNSTEIN, ESQ.

Not long after the Supreme Court's first Monday in October, 53 members of the MSBA's Litigation Section and their guests convened at the Court for an evening to learn about some of Maryland's history with the Court. The Appellate Practice Committee of the Litigation Section organized the event, which the Maryland Chapter of the Federal Bar Association co-sponsored.

The warm, early fall evening of Wednesday, October 13, commenced in the Court's northwest courtyard, one of four such courtyards, which, in warmer weather, are often lunchtime congregating places for law clerks to the Justices. No current law clerks were present that evening, though, through windows opening onto the courtyard, a few could be glimpsed walking the Court's halls and working into the evening. With water quietly coursing over the courtyard's large circular white marble fountain setting the mood, attendees enjoyed catered hors d'oeuvres, which included Artisan Tenderloin Crostini and Shitake Mushroom Spring Rolls, and an opportunity to mingle.

After an hour or so, the evening progressed to the Court's West Ceremonial Conference Room, immediately adjacent to the courtyard. Seated beneath original oil portraits of Oliver Wendell Holmes and other judicial luminaries of the Court's history, the attendees heard presentations by two noted Supreme Court historians, introduced by Linda Thatcher, president of the Federal Bar's Maryland Chapter.

First, Dr. Maeva Marcus, Director of the Institute for Constitutional History of the New York Historical Society and George Washington University, convincingly revealed to most that the principle of judicial review did not spring *sua sponte* from Chief Justice Marshall's pen in *Marbury v. Madison*. Before *Marbury*, Dr. Marcus explained, Maryland's own Justice Samuel Chase had noted, in several instances, that, although the Court had never decided whether it and, more generally, the judiciary had the authority to declare legislation unconstitutional and, therefore, invalid, general opinion, the Supreme Court bar, and other Supreme Court Justices had acknowledged this authority.¹ Judicial review actually existed as a principle at least as far back as colonial American practice, so Marshall, in *Marbury*, simply recommitted the law to a practice that was four centuries old, albeit at a time and in a context that, as history has also shown, assured its vital-

ity for generations to come. Justice Chase's successful resistance to Thomas Jefferson's attempt to impeach him for partisan, non-criminal conduct, by the way, also strengthened the judiciary's place in the federal government.

Following Dr. Marcus, Dr. Michael Ross, Associate Professor of History at the University of Maryland and a member of the editorial board of the *Journal of Supreme Court History*, introduced the audience to an often unappreciated side of a more infamous Justice that Maryland also contributed to the Supreme Court, Roger Brooke Taney. Taney, who perhaps better deserves infamy for bad judgment than for his *Dred Scott* decision's treatment of race², was, nevertheless, according to Dr. Ross, an early and insightful judicial observer about government's role in economic matters. In his *Charles River Bridge* decision³, Taney, rejecting Charles River's claim that its charter from Massachusetts to build a bridge gave it the exclusive privilege of having a bridge, noted that:

[T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established And in a country like ours, free, active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience and prosperity of the people. A State ought never to be presumed to surrender this power While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and wellbeing of every citizen depends on their faithful preservation.⁴

Following Dr. Ross's presentation, the Appellate Committee's Alan Sternstein (who organized the event) moderated a live-question and answer period, after which attendees had an opportunity to speak directly with Dr. Marcus and Dr. Ross, before exiting the Law's marble palace into a by then crisp October evening.

¹ *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 19 (1800) (opinion of Chase, J.).

² *Dred Scott v. Sandford*, 60 U.S. 393 (1859). Taney actually freed his own slaves and had hoped that the effect of his decision in *Dred Scott* would be to silence the slavery issue and end civil strife within the country.

³ *Charles River Bridge Co. v. Warren Bridge Co.*, 36 U.S. 420 (1837).

⁴ *Id.* at 547-48.

COMPARATIVE FAULT...

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zational one, for the subcommittee to decide how it wishes to proceed, Judge Wilner advised the various organizations that, although they may attend and observe, the subcommittee will not be soliciting their views on the substantive issues at that meeting. Second, he has advised also that, as the Court has not requested the Committee's advice on whether the Court should adopt some form of comparative fault by Rule, but only whether it could do so and, if it did, what such a Rule might look like, the "should" issue is not before the subcommittee and it will not be soliciting the organization's views with regard to it. The Committee has collected a great deal of relevant information and material already, and is hopeful that it can have a report to the Court by late Spring 2011.

As to other matters, the Committee is in the final stages, hopefully, of approving two Rules for the Court's consideration -- one for the circuit courts and one for the District Court -- on attorney fee-shifting. The District Court Rule, as presently drafted, might require the Court to reconsider slightly something it said in the recently decided *Monmouth Meadows v. Hamilton* case. The Committee is also well along in developing Rules for ADR in the District Court and revising the ADR Rules for the circuit courts. It is working with the Court of Special Appeals to develop Rules for its ADR program and is in the initial stages of considering ADR Rules for the orphans' courts, some of which already are conducting court-annexed ADR.

A "special consultant" to the Committee, attorney Chris Dunn, agreed to sift through materials collected by the Committee from other States and the Federal courts regarding a possible Rule to preclude certain identifying information from being placed in court records and figuring out how to block some of that information from remote public access if it gets into the records (either inadvertently or because, for some reason particular to a case, it needs to be there).

The Litigation Section should have an interest in what the Committee (and the Court) do on this, as lawyers will be primarily responsible for implementing the Rules (and may be held to account for violating them).

Finally, about a year or so ago, Judge Wilner appointed a special sub-committee to develop Rules permitting non-evidentiary proceedings (and possibly some evidentiary ones as well) to be conducted by remote electronic means. Progress on that has been deliberate. An infusion of additional participants may be needed to accelerate the subcommittee's efforts. Volunteers?

AN INFUSION

*of additional participants may
be needed to accelerate the
subcommittee's efforts.*

MESSAGE FROM THE CHAIR...

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of our section members this wonderful Newsletter. The amount of work and time that is involved in producing this newsletter cannot be underestimated. Thanks to all of you for your great service to this section.

Looking forward to the New Year, we continue our tradition of offering interesting and practical education programs. On March 10, 2011, the Litigation Section will be offering an evening program in the Columbia area on Frye/Reed hearings. The panel presentation will include Judge Stuart R. Berger and Judge Ruben who will provide invaluable and practical insights on Frye/Reed hearings. In April we are planning to dine and learn from District Court judges as they provide insights from the bench. The April program will take place in the Annapolis area. Lastly, the Technology and the Appellate Practice committees have been hard at work planning some very timely and interesting programs for the MSBA Annual Convention in Ocean City in June. The technology subcommittee will be providing a program on the nuts and bolts of e-dis-

covery in addition to a social media program. Thanks to all working on these exciting programs.

On a sadder note, I would like to take a moment to honor Leslie Russo for her service on the Litigation Section Council. Many of us will remember Leslie's dedication to the law, her clients, and her family and to life. We will miss you Leslie.

As we enter the second half of our bar year, we are looking forward and planning for the end of this year into the next. We would like to encourage anyone who has an interest in becoming more active in the Litigation Section to consider participating on one of our committees. If you have such an interest, please contact me at mmurphy@howardcountymd.gov and I will help you find a place on a committee. Additionally, if you would like to nominate someone for the Litigation Council, please contact me with the nominee's information.

I wish all a very happy, healthy and prosperous New Year.

ESSENTIALS OF WRITING FOR A COURT...

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Good advocates should give judges what they want. So new lawyers need to learn what that is. Thus the following list of fundamentals, which I first wrote as a guide for new associates.

1. Before you start typing, decide exactly what you want to say. Literally articulate each of your points in the fewest words possible.
2. Examine the relationship among your points by making some kind of outline. This can be as short as a few points typed out so you can see how they fit together. Even an informal list will improve your paper's coherence. It also will minimize rewriting.
3. Abandon the idea that you are doing something called "legal" writing. Your goal is good writing, period. Write for the reader of a good, general-circulation newspaper or magazine. Or picture yourself standing in court, explaining your case to a judge.
4. Show your structure to the reader by using substantive headings and sub-headings.
5. Do not waste your first sentence by repeating the paper's title. Take a lesson from journalists, who work hard to craft strong leads. If you are writing for a trial court, begin by telling the court, in plain English, exactly what you want it to do. If you are writing an appellate brief, begin with a strong sentence that stakes out your theme.
6. Judges want overview. Give them a road-map sentence or paragraph.
7. Use real names, not party titles. Do not use acronyms, unless they are part of the vernacular, like IBM. And do not capitalize words unless you would see them capitalized in a newspaper.
8. Be direct. For each topic, get to the point. When you have made your point, stop. Most papers are too long.
9. Make one point per sentence. Long sentences often betray vagueness in the writer's own mind. Much like long briefs.
10. Pay attention to the precise meaning of words. Do not misuse the verbs that lawyers commonly get wrong. Don't write "claimed" when you mean "contended." Don't write "advised" when you mean "told." Don't ever use "utilize." And describe judicial opinions accurately. When a court "holds," say so. If it only "explains" or

"observes," say that as well. To the surprise of many new associates, courts never "think."

11. Google "legalese" and you will see lists of words and phrases that only lawyers use. The best writers use legalese the least, and you should not use it at all. This includes verbal tics that are peculiar to lawyers. So never write "said" contract, "such" document, "the subject" transaction, or "pursuant to" anything. Don't use a clump of words where one word will do: "in regard to" instead of "about," or "at present" instead of "now." Don't delete articles ("a" or "the") or the word "that." Do beware the much-overused "regarding." And don't ever use "as such;" it almost never has a specific antecedent and is, therefore, vague and confusing.

12. Do not build your paper with block quotes. Break quotations into pieces and walk the reader through them. If you absolutely must use a block quotation, lead up to it by telling the reader the point: "Section 1 specifically requires Jones to give notice: . . ." Writing this transition forces you to explain why you thought the quotation was important in the first place. It also ensures that the reader will not skip over your point.

13. Pay careful attention to the use of authorities. Here are some basics.

- a. The judge wants to see your best case, so normally you need only one citation for each point. It often suffices to state a generalized rule, cite an authority for it, then apply the rule to your case. If appropriate, briefly explain how the facts of your case parallel the facts of the authority you cite. Try to show that your facts are stronger.
- b. Look for a case that supports your substantive position and grants the procedural relief that you want. So, if you are moving for summary judgment, try to cite a case that affirms a grant of summary judgment.
- c. Do not bury the point of a case in a parenthetical.
- d. If you have not referred to a case in a page or two, say more than "Jones, supra." Your readers can't remember what that means. Don't force them to interrupt their reading and shuffle pages to look for an earlier discussion of Jones.

14. When you think your paper is finished, read through your topic sentences. They should connect the paragraphs, each topic sentence linking in some way to the

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BAR COUNSEL'S MUSINGS...

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ture report. The Panel heard testimony that in Black Lung cases, the opinions of experts are withheld and not disclosed until required by rule or regulation. Mr. Smoot's witnesses testified that his actions were consistent with Black Lung practice.

The West Virginia Supreme Court of Appeals found that Mr. Smoot had, indeed, violated the Rules of Professional Conduct.⁴ There was no dispute that the document in question had been altered. It was clear that the narrative had evidentiary value since its conclusion triggered an irrebuttable presumption of disability. Mr. Smoot contended that because he did not desire to have the narrative report received in evidence, he properly excluded it from his disclosure of the remainder of the report. The Court, noted however, that Mr. Smoot did not simply decline to furnish the medical report and forego having it received into evidence, which, under 20 C.F.R. § 725.456(b)(1), was within his right to do. Instead, he provided the Administrative Law Judge and Mr. Daugherty with only part of the document provided to him by Dr. Zaldivar, with no indication to them that any portion of the report had been withheld.

The Court found that the purpose for providing medical re-

⁴ *West Virginia Disciplinary Board v. Smoot, W.Va., No. 34724, 11/17/10, 2010 W.Va. LEXIS 134*

ESSENTIALS OF WRITING FOR A COURT...

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preceding paragraph. (This may require you do more than type "Moreover" or "Also" at the beginning of each paragraph; all too often these words are fancy substitutes for "And another thing . . .") This step is important because it provides a check of your structure: If writing clean transitions is a struggle, your points probably are in the wrong order.

15. Recheck for errors in format, spelling, grammar, and citation form. Make sure that citations to the record are accurate. Judges consider good citation form a minimum requirement for a good attorney, and accuracy of record cites essential. These matters of detail can make or break a paper's basic credibility.

* * *

These rules are only a starting point; they will not make you a polished stylist. And experienced writers might sometimes, judiciously, depart from one or two. If you follow all of these rules, however, you will not go wrong. Your work will be well-received, even appreciated, by every judge who reads it.

ports to the opposing party in an adversarial setting is to allow that party to contest the evidence. Providing only a partial version of a medical report to the opposing party seriously impedes that party's ability to contest the same. This is especially true, where, as here, the opposing party was not represented by counsel at the time of the partial disclosure. The Court held that although the Regulations do not require that medical reports be voluntarily provided to the opposing party, when such a report is provided, it must be the entire report.

The Supreme Court rejected the conclusion that Mr. Smoot's conduct was common practice. It noted the Administrative Law Judge's shock and dismay with respect to Mr. Smoot's conduct and the law firm's "ludicrous" defense of the Mr. Smoot's practice. The ALJ said that he had not "encountered an attorney tampering with evidence, in this case a medical exhibit, not as an Administrative Law Judge and not during my years of practicing law. Thus, to my knowledge this is not common practice, not by attorneys who appear before me and not by the law firm Jackson Kelly."

The Court found the evidence was sufficient to prove that Mr. Smoot violated Rule 3.4 of the West Virginia Rules of Professional Conduct by unlawfully removing Dr. Zaldivar's narrative from the medical report provided to the ALJ and Mr. Daugherty. Based upon the same evidence, the Court had "little difficulty" in finding that Mr. Smoot had violated Rules 8.4 (c) and (d) as Mr. Smoot conceded that he purposefully removed the narrative portion of Dr. Zaldivar's report before providing the report to the ALJ and Mr. Daugherty. Thus, the absence of the narrative report in the document was not caused by inadvertence or mistake. As the withheld portion of the report had evidentiary value, Mr. Smoot's conduct was found to be deceitful, dishonest, a misrepresentation, and prejudicial to the administration of justice.

The Court took into account Mr. Smoot's substantial experience in the practice of law, his lack of remorse, his refusal to acknowledge the wrongfulness of his conduct, the vulnerability of the victim, and his dishonest or selfish motive. It also took into account his absence of prior sanctions and his good reputation. Then it suspended him for a year and required him to take nine hours of continuing legal education in ethics.

The case certainly makes clear that even when the submission of a document is not mandated, if an attorney chooses to provide such document, purposeful alteration of the document, without notice, will not be tolerated. If the document is misleading after the alteration and the alteration was not the result of inadvertence or mistake, the lawyer can expect to be sanctioned. Douglas Smoot, Esquire, can so attest.

PROFESSIONALISM AND ETHICS...

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false statements to the Court, or assisting with a fraud on the Court.

The second main reason is the apparent requirement that an attorney “zealously” represent the interests of his/her client, particularly in conjunction with the right to criminal legal counsel afforded by the Sixth Amendment. See Preamble to Maryland Rules of Professional Conduct (Adopted in Md. Rule 16-812(2)) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”) Zealously, at least amongst many attorneys, is not a word that connotes a general advocacy of the client, but to do everything conceivable within very wide ethical limitations, to ‘win’ the client’s case, if that’s what the client demands their attorney do.

This long-simmering and apparent contradiction on the exact meaning of the word ‘zeal,’ (the word ‘zealously’ was removed from the MLRPC in the 1980’s, but is still found in the Preamble), is in fact rightly addressed in the “Ideals of Professionalism” by noting that “zeal requires only that the client’s interests are paramount” and discouraging underhanded tactics by lawyers in the name of ‘zealously.’ This ‘tension’ on the use of the word zealously will probably not be resolved itself by the Professionalism Ideal guidelines that were recently made part of the Rules of Professional Conduct. It is probably fair to say that these new Ideals, at least give license for some attorneys, particularly recent attorneys, who may feel pressure from peers or a supervising partner to engage in an underhanded legal manner or maneuver, to know at the outset that it is not unethical to give proper credence to these Professionalism goals in choosing a different route. This is an important improvement to the practice of law, particularly for recent Bar Admittees.

Should Professionalism be more easily embraced and better understood by the legal profession, particularly recent Admittees who have the advantage of these ‘Professionalism Ideals’ to begin with, eventually this could lead to a greater number of; (1) settlement of cases through agreements, mediation and arbitration, (2) reduction in discovery disputes, (3) better overall litigation experience amongst parties, attorneys, and judge, (4) more efficient cases with reduced litigation costs, (5) more enjoyment among attorneys in the practice of law,

and (6) a better overall view by the public of the legal profession. Still, while Professionalism has many worthwhile and wide-ranging objectives that would benefit most of the legal profession, except for perhaps extreme misconduct rising to the level of an existing violation of the Rules of Professional Conduct, the recently enacted ‘Professionalism Ideals’ do not apparently affect change to the actual Rules of Professional Conduct by making Professionalism violations, to also be Rule Violations. Thus, an accurate and a fair reading of the Rules, at least at the present and until the ‘Ideals’ are more fully incorporated and of a more mandatory nature, should not prematurely claim that ‘Professionalism’ is designed to also prevent breaches of “Professional ethics” that were not previously breaches of the MLRPC.

That may actually be the point, however, of the Professionalism Committee and Court of Appeals’ determination to start with the ‘Ideals’ being enacted first. Judge Lynne Battaglia of the Court of Appeals, chair of the Professionalism Committee, has proposed mandating 2 hours of professionalism be taught yearly as part of 10 hours mandatory CLE in Maryland, a proposal which should be publicly debated in 2011. Still, the ‘social mores’ and educational requirements of professionalism are a work in progress. It seems unlikely that professionalism requirements will become mandatory, prior to an acclimation period of perhaps years for lawyers. Even though in my opinion most attorneys are inherently professional (operative word being ‘most’ as the AGC cases make clear), objectively speaking, Maryland attorneys have been practicing for decades without the benefit of any rules, regulations, or guidelines on professionalism, and it is not unreasonable to give some time for these rules to first permeate the profession. Only time will tell, however, if the “Professionalism ideals” is a first step towards an ethical system where violations of Professionalism will now usually be characterized and considered to also be a violation of “Professional ethics” from the Maryland Lawyers’ Rules of Professional Conduct.

Michael Wein, Chairs the Appellate Practice Committee for the Prince George's County Bar Association, and whose Greenbelt practice concentrates in appellate, civil and criminal litigation. He can be reached at weinlaw@hotmail.com. This article is edited, with permission, from a previous article published in the Prince George's County Bar Journal.