The
MARYLAND LITIGATOR

MSBA LITIGATION SECTION JUNE 2018

Message from the Chair

By Mary Ellen Flynn
Andalman & Flynn, P.C.

Change is hard;
Change is disruptive;
Change is necessary.

These are the words of MSBA's Executive Director (ED) Victor "Vic" Velazquez during the May 2018 Board of Governors retreat. Vic has been MSBA's ED since December 2016, and compared to Paul Carlin, who served as ED for over 30 years, Vic is new to this position. Some people may disagree with some of MSBA's initiatives this year and the speed at which some changes were made, but I think most everyone agrees that change was and is necessary to keep MSBA relevant, to maintain its importance as a member resource, and to increase its membership.

We had a very challenging bar year with MSBA implementing both new technology and new procedures. MSBA members had trouble registering for programs and logging onto the new website, and information about many programs and events was released later than usual; however, the good news is that the new MSBA website is launched, members are learning how to log onto it, and MSBA staff is in the process of importing all the information that was on the old website onto our new website. If you haven't tried logging onto the website, I encourage you to do so now. You will need access to email to log onto the "Members Only" section, and firewalls on some offices' systems may initially interfere with your ability to do so. Please let MSBA staff know if you have difficulties.

To our hard-working and conscientious Section Council Members, we send a big "Thank You!" I very much enjoyed my year being Chair of the Litigation Section, and I'm happy that I was able to help steer our Section through the many changes and disruptions we experienced. The enthusiasm of our Section Council Members is contagious; whenever something needed to be done, a Section Council Member would always gladly volunteer and take on that task or project with a full-steam-ahead approach and get it done superbly. A good time was had by all during our meetings, events and while working on the tasks at hand.

This year, the Litigation Section should be particularly proud of Ryan Perlin and his accomplished project of a full report on technology procedures and idiosyncrasies of each Circuit Court and U.S. District Court in Maryland. To learn more about the report, see Ryan's summary in this newsletter. Also, you may access the entire the report (an excellent reason to test your log-in for the website) by going to the Litigation Section's page of the MSBA website. You'll find the very comprehensive "Overview of Courtroom Technology Equipment" under the tab "Links and Resources." (Yes, learning to navigate a new website will take a little time, but only because it is different, and remember "new" isn't a valid reason to avoid the new website.)

Our hallmark Judges' Dinner was once again a success. With this year being our "Circuit Court Year," we had circuit court judges and federal judges sharing their top tips, reflections, and words of wisdom in a warm and relaxed setting. Tracy Steedman is the creator of this much anticipated annual event, and, once again this year, Lydia Lawless and Erin Risch put together a great dinner and program. As Chair of our Section, I had the very special honor of presenting the Litigation Section's Harrell Award for Judicial Excellence to The Honorable Kathleen Gallogly Cox, Administrative Judge of the Third Judicial District in Baltimore County. Please read Ann Sheri-

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Report of the Litigation Section's 2018 Nominating Committee

The Nominating Committee recommends the following persons to serve as Section Officers and Council Members for the 2018/2019 term:

Officers (terms end 6/30/19):

Hon. Michael A. DiPietro:	Chair
Erin Risch:	Chair Elect
Andrew Baida:	Vice Chair
Robert Fiore:	Secretary
Michele McDonald:	Treasurer

Past Chairs: (terms end 6/30/19)

Mary Ellen Flynn:	2017/18 Chair
Hon. Kathryn Grill Graeff:	2016/17 Chair
Jonathan Paul Kagan:	2015/16 Chair

Council Members whose terms end in June 2019

Brian S. Kleinbord:	completing the unexpired 2nd term of Bob Fiore
Ann M. Sheridan:	2nd term
Richard A. DeTar:	1st term
Barron Stroud, Jr.:	completing the unexpired 1st term of previous member

Council Members whose terms end in June 2020

Hon. Theresa Adams:	2nd term
Steven M. Klepper:	2nd term
J. Bradford McCullough:	2nd term
Ryan Perlin:	completing the unexpired 2nd term of Michele McDonald

Council Members whose terms end in June 2021

Lydia Lawless	2nd term
Angela B. Grau	2nd term
Tracy L. Steedman	2nd term
Christine S. Britton**	1st term

Young Lawyers Section Liaison (term ends 6/30/19)

Meagan Borgeson**

** denotes new section council member

What Happens in Vegas... May be Reported to Bar Counsel: A Reminder of the Limitations of Zealous Advocacy

Erin A. Risch, Deputy Bar Counsel

The Maryland Attorneys' Rules of Professional Conduct (MARPC) prohibit an attorney from bringing or defending a proceeding unless there is a basis for doing so that is not frivolous[1]. The comment to MARPC 19-303.1 provides that "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure."[2] *Attorney Grievance Commission of Maryland v. Meier*[3] should serve to remind attorneys that frivolous claims determined to be an abuse of legal procedure may result in disciplinary action.

On November 29, 2016, the Virginia State Bar Disciplinary Board suspended Mike Meier's license to practice law for thirty days for violating professional rules that govern competence, meritorious claims and contentions, candor toward the tribunal, fairness to opposing party and counsel, truthfulness in statements to others, respect for rights of third persons, and bar admission and disciplinary matters.[4] On March 23, 2018, the Court of Appeals entered an Order imposing reciprocal discipline and suspending Mr. Meier for thirty days in Maryland. [5]

The disciplinary matter arose from Mr. Meier's representation of Oliver and Beatrice Preiss in a sexual harassment suit against Mr. Preiss's former employer, Roy Horn[6], a Las Vegas entertainer, and his company, S&R Production Company. The lawsuit alleged that Mr. Horn sexually harassed Mr. Preiss, who was his assistant at the time and claimed that Mr. Horn terminated Mr. Preiss when he refused Mr. Horn's advances.[7] The lawsuit also asserted a claim of Negligent Infliction of Emotional Distress on behalf of Ms. Preiss based upon her viewing of a video of the alleged sexual assault on her husband, after the fact. Mr. Meier also filed a Title VII employment claim, on behalf of Mr. Preiss, based upon the alleged sexual harassment.[8]

Specifically, Mr. Preiss alleged that he was one of many male employees hired to assist Mr. Horn with daily activities after he was injured by a tiger in 2003 during a "Siegfried and Roy" performance in Las Vegas.[9] Mr. Preiss alleged that Siegfried Fischbacher and Mr. Horn made sexual overtures to him; however, Fischbacher stopped after his requests were rejected.[10] Mr. Horn's sexual harassment and assaults allegedly continued despite Mr. Preiss's objection to this behavior.[11] Mr. Preiss claimed that during his employment, he learned that Mr. Horn regularly engaged in this unwanted conduct with many of his male employees.[12] Mr. Preiss claimed that this pattern of sexual harassment caused him stress, anxiety, emotional distress and affected his relationship with his wife.[13] At some point, Mr. Preiss obtained video footage of the conduct taking place in Mr. Horn's home and showed the footage to his wife, who also asserted that she suffered damages as a result of viewing the video footage.[14]

The lawsuit was originally filed in Nevada State Court in September 2010, and subsequently removed by Mr. Horn's attorneys to the United States District Court for the District of Nevada.[15] Since Mr. Meier was not licensed in Nevada, he obtained local counsel, Sharon Nelson, Esquire to represent the Preisses, and he appeared *pro hac vice* in the case.[16] Mr. Horn and his company filed a Motion to Dismiss the case alleging that Mr. Preiss took advantage of Mr. Horn's trust, age and medical condition in a scheme to extort money from him.[17] Specifically, defendants claimed that the company did not employ Mr. Preiss, that Mr. Preiss could not bring a Title VII claim directly against Mr. Horn, that Mr. Preiss's retaliation claim contradicted his prior sworn statement that he quit his job, and that the Preisses' claims for Negligent Infliction of Emotional Distress failed as a matter of law.[18]

Mr. Meier and Ms. Nelson filed an Opposition on behalf of their clients alleging that the facts set forth in the Complaint

[1] See, MARPC 19-303.1.
[2] *Id*., cmt. [1].
[3] *Attorney Grievance Comm'n of Maryland v. Mike Meier*, Court of Appeals of Maryland, Misc. Docket AG No. 59, September Term, 2017.
[4] See, Agreed Disposition Memorandum Order and Agreed Disposition, *In the Matter of Mike Meier*, Before the Virginia State Bar Disciplinary Board, VSB Docket No. 14-042-099357, November 29, 2016 and November 17, 2016, respectively.
[5] See, Court of Appeals' Order, *Attorney Grievance Comm'n of Maryland v. Mike Meier*, Misc. Docket AG No. 59, March 23, 2018.
[6] Horn performed regularly in Las Vegas with Siegfried Fishbacher as "Siegfried & Roy."
[7] Agreed Disposition at ¶ 2.
[8] *Id.*
[9] Complaint ¶¶ 17-19, *Oliver Preiss, et. al., v. S&R Production Company, et. al.*, D. Nev., Case No.: 2:10-cv-01795-RLH-RJJ, October 15, 2010, ECF 1-3.
[10] *Id.* at ¶ 38.
[11] *Id.* at ¶ 39.
[12] *Id.* at ¶ 40.
[13] *Id.* at ¶ 50.
[14] *Id.* at ¶¶ 55-57.
[15] Agreed Disposition ¶ 3.
[16] *Id.* at ¶ 1.
[17] Memorandum of Points and Authorities 3:12-15, *Preiss, et. al.*, October 22, 2010, ECF No.12.
[18] *Id.* at 3:25-5:19.

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Taking & Defending Corporate Representative Depositions: A Primer

By: John Bratt and Jessica Butkera

It is no surprise that corporations are frequently involved in legal actions, either as a party or a witness. Corporations, in the litigation context, are treated as "persons" from whom discovery may be obtained[1]. Included in this discovery is one of the most powerful tools available to an attorney: the corporate designee deposition. As discussed in this article, preparing for and defending a corporate designee deposition requires unique preparation and planning.

What is a corporate designee deposition?

A corporate designee deposition is the deposition of the company. A corporate designee is then the individual(s) selected by the corporation to attend the deposition and speak on its behalf. Obtaining deposition testimony from a corporation is governed by Md. Rule 2-412(d):

> *Designation of person to testify for an organization.* A party may in a notice and subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, managing agents, or other persons who will testify on its behalf regarding the matters described and may set forth the matters on which each person designated will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.

Omitted from this Rule is perhaps the most important aspect of what a corporate designee deposition is: a corporate designee deposition is binding on the corporation. The testimony given by the designee is the corporation's testimony and in fact binds the corporation, not just the individual who is deposed. This testimony may be used at trial for any purpose in the same way an individual's testimony can be utilized. Once a designee testifies, the corporation may not later contradict that testimony by affidavits or other evidence.

There are a variety of reasons to take a corporation's deposition. They may be such things as trying to make shortcuts to admissibility of evidence, covering up gaps in your own proof, laying the foundation to test a claimed privilege, or to set up an affirmative motion for summary judgment. Organizational representative depositions are particularly useful in the kinds of cases where evidence needed to meet the burden of proof is solely in the hands of the organizational defendant, such as actual/constructive notice/control, negligent hiring and retention, respondeat superior/agency/independent contractor issues; safety procedure, foreseeable dangers; and documents in the hands of the organization.

Requesting a corporation's deposition.

Unlike requesting the deposition of an individual, requesting the deposition of a corporation takes advance planning. Md. Rule 2-412(d) requires that the deposing party "describe with reasonable particularity the matters on which examination is requested." This is necessary from a practical perspective given that what a corporation knows "is often a conglomeration of information learned by its officers, directors, agents, employees, or others, as well as other knowledge residing in the company's records."[2] Without receiving advance notice of the areas of requested testimony, the corporation cannot select the most appropriate person to testify on the corporation's behalf. The Notice of Deposition notifies the corporation that it must begin to assemble its organizational knowledge.

In practice, organizational representative depositions are arranged by counsel. The process usually begins informally; the lawyer desiring the deposition provides a list of topics that are likely areas of inquiry so that the lawyer defending the deposition and his client can begin selecting the designee – or designees – who are knowledgeable in the areas presented by the topic list. Depending on the range of topics requested, a corporation may designate more than one person. Once counsel has selected the appropriate representative(s), the parties can agree on a deposition date and time.

The Notice.

Formally, a Notice of Deposition is then served on the organization to be deposed. In addition to the information required in every deposition notice, a Notice of Deposition to an entity must itemize with "reasonable particularity the matters on which examination is requested," as discussed above. Typically, this is done in the form of an attached schedule or exhibit to the Notice.

[1] Maryland Rule 1-202(t) defines "person" as any "individual, general or limited partnership, joint stock company, unincorporated association or society, municipal or other corporation, incorporated associations, limited liability partnership, limited liability company, the State, its agencies or political subdivisions, any court, or any other governmental entity." For example, just as a natural person who is a party may attend any depositions taken in the action, so may an organizational party, through a representative. Md. Rule 2-413.1 (d).

[2] Organizational Avatars: Preparing CRCP 30(b)(6) Deposition Witnesses, Martin D. Beier, 43 *The Colorado Lawyer* 39 (December 2014).

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Section Hosts Dinner Reception for Maryland's Circuit Court and U.S. District Court Judges, Presents the Harrell Award of Judicial Excellence to the Honorable Kathleen Gallogly Cox

By Ann M. Sheridan

On April 19, 2018, the Litigation Section hosted a dinner reception for Maryland's circuit court and U.S. district court judges at the Doubletree Hilton in Annapolis. The evening offered an opportunity for Section members to mingle and dine with esteemed jurists and to receive useful practice tips from them. Additionally, the festivities included the presentation of the Harrell Award of Judicial Excellence to the Honorable Kathleen Gallogly Cox, Administrative Judge for the Circuit Court for Baltimore County.

The criteria for the award are (1) knowledge of the law, (2) courtroom management skills, (3) reputation for fairness and civility, and (4) extra-curricular service to the judiciary, the bar and the community. Prior recipients of the award include Judge Patrice E. Lewis, Judge Alan Wilner, Judge Stuart Berger, Judge John Morrissey, Judge Daniel Long, and Judge Glenn Harrell. Mary Ellen Flynn, Section Council Chair, presented the award.

Judge Cox has served as judge for the Circuit Court for Baltimore County since 1999. Throughout her tenure, she has worked tirelessly to improve the court system through extensive committee work and leadership roles. She truly embodies all of the characteristics of judicial excellence.

After earning her Bachelor of Arts and J.D. from the University of Notre Dame, Judge Cox was admitted to the Maryland Bar in 1979. After serving as law clerk to the Honorable James R. Miller, Jr., of the U.S. District Court for the District of Maryland, Judge Cox began her career as an Assistant Federal Public Defender for the District of Maryland. She then entered private practice and was made partner at Venable, Baetjer and Howard. She is a Fellow of the Maryland Bar Foundation and a Fellow of the Women's Bar Foundation.

After her appointment to the bench, Judge Cox was instrumental in the establishment of drug treatment court in Baltimore County, and served for many years as Presiding Judge for the Family Recovery Court and Juvenile Drug Court, and as Judge-in-Charge for the Juvenile Court. Judge Cox has served as Administrative Judge for the 3rd Judicial Circuit (Baltimore County and Harford County) and as County Administrative Judge for Baltimore County since August 2013. She currently

serves as Chair for the Conference of Circuit Judges. In addition to all of her professional activities, Judge Cox is also a coach for a Mock Trial Advocacy Team, a board member of the Springdale community pool, and actively involved in the school system.

In her introductory remarks, Ms. Flynn shared a number of comments taken from the many nominations the Section Council received for Judge Cox: One nomination noted that, as administrative judge, "Judge Cox has streamlined and vastly improved the Family law and Civil Case Management." Another remarked that "Judge Cox demonstrates empathy and respect for litigants." One person observed that Judge Cox's list of accomplishments "speak for themselves. But those of us who know Judge Cox, know that they barely begin to describe the character and integrity and excellence that have been the hallmark of virtually everything to which she has devoted her time and her efforts." And as stated by a fellow judge: "Judge Cox's hands-on leadership has taken our bench and court

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Case Summary: Anne Geier, et al v. The Maryland Board of Physicians

By Matthew Cassilly
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

On April 25, 2018, the Circuit Court of Maryland for Montgomery County entered a final judgment in this case arising from the Maryland Board of Physicians' (the "Board") – the agency responsible for licensing physicians and other healthcare providers in the state – publication of the Geier family's confidential medical information. The court awarded Plaintiffs Mark Geier, David Geier, and the Estate of Anne Geier, $1.25 million in compensatory damages, $1.25 million in punitive damages, and an additional $2.48 million for attorney's fees and litigation costs. The compensatory award, attorneys' fees, and litigation costs were issued joint and severally against the Board, thirteen Board members, two Board staff members, and an Assistant Attorney General with the Health Occupation Prosecution and Litigation Division (collectively "the Defendants"). The Court's punitive award, however, was issued against each defendant individually in accordance with his/her culpability and ability to pay a damages award. The individual assessments of punitive damages ranged from $10,000 up to $200,000 – remarkable punishments for the actions arising out of their role on the board or staff of a state agency.

The award of punitive damages is also noteworthy because judgment on liability was entered against the Defendants by default due to persistent discovery violations. The Court acknowledged that no appellate court in Maryland has permitted punitive damages to be established solely by the entry of default. The assessment of punitive damages, therefore, required a finding that the Defendants acted with malice when they decided to publish the Geier's confidential medical information. Because there was little direct evidence of malice due to the Defendants' discovery violations and reliance on executive privilege, the Court's conclusion that the Defendants acted with malice seem largely supported by an adverse inference against the Defendants for their invocation of executive privilege.

The History

The award is just the latest development in the Board's more than decade-long strife with Dr. Geier. The Board's conflict with Dr. Geier began in 2006, when a complaint was filed with the Board against Dr. Geier for his use of the drug Lupron to treat autism. Dr. Geier was a chief proponent of a controversial hypothesis that autism is caused by mercury and that mercury binds to testosterone. Dr. Geier believed that Lupron was an effective treatment for autism because it lowered testosterone levels and thereby mercury levels. These theories were overwhelmingly debunked and even declared "junk science" by the Court of Appeals in 2009.[1]

In 2011, the Board summarily suspended Dr. Geier's right to practice medicine and formally charged him under the Medical Practice Act for his untested treatment methods. The Board also charged Dr. Geier's son, David Geier, who worked with his father, for practicing medicine without a license. The Board ultimately determined that Dr. Geier had diagnosed autistic children with precocious puberty as a basis for prescribing Lurpon and other drugs intended to remove heavy metals from the body. Dr. Grier would apparently prescribe treatment without physical examinations or testing sufficient to support his supposed diagnoses. The Board ultimately revoked Dr. Geier's license for violating multiple provisions of the Medical Practice Act and imposed a $10,000 fine against David Geier for practicing medicine without a license. These decisions were both upheld by the circuit court and Court of Special Appeals.

The Geiers' Confidential Medical Information

While the Geiers' disciplinary proceedings were pending, the Board issued a cease and desist order (the "Order") against Dr. Geier accusing him of continuing to practice medicine while his license was suspended. The Order was drafted for the Board by the Assistant Attorney General named as a defendant in this matter. The Order alleged that Dr. Geier had written prescriptions for himself, his son David, and his wife Anne, while his license was suspended. The Order detailed the family's confidential medical information, specified the medications that Dr. Geier had allegedly prescribed, and listed the conditions that each medication was designed to treat. On January 25, 2012, the Board voted to publish the Order, with the confidential medical information, on its website.

On February 6, 2012, an attorney for the Geiers sent a letter notifying the Board that the Order's publication violated Maryland and federal law and explicitly called into question the Board's motivation for publishing the Order. In response, the Board claimed that it had removed the Order from its website on February 10, 2012, and issued an Amended Order excluding the confidential medical information on February 22, 2012. The original Order, however, remained accessible on the Board's website through a Google search or a hyperlink, and was widely accessible over the internet. It was ultimately determined that Dr. Geier had not written the prescriptions,

[1] *Blackwell v. Wyeth,* 408 Md. 575, 591 (2009).

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An Overview of Courtroom Technology in Maryland Courts

By Ryan S. Perlin

This article relates to a Supplement titled, "An Overview of Courtroom Technology Equipment – Maryland Circuit Courts & the U.S. District Court." The Supplement can be accessed and downloaded at* **msba.org/CourtroomTechnology.

In the third of his famous "Clarke's Three Laws," science fiction author and futurist Arthur C. Clarke opined that "any sufficiently advanced technology is equivalent to magic."[1] While the merit of Clarke's Third Law can be debated, it cannot be disputed that the process of preparing computerized trial presentations for the courtroom, and having them work smoothly, can seem like magic.

Today, almost every trial requires the use of technology in one form or another. Slideshow presentations, animations, video simulations, and electronic document presentation, once magic, are now commonplace. Unfortunately, the procedures that govern the use of such technology in Maryland courts is not unified. The Circuit Courts are varied in terms of what technology is available and the rules and policies for using such technology differ widely.

As a resource for Maryland litigators, the MSBA Litigation Section has created a one-stop, easy-to-reference resource listing important information about the procedures for the use of technology in the Maryland Circuit Courts and the U.S. District Court for the District of Maryland.

Titled, "An Overview of Courtroom Technology Equipment," the spreadsheet contains the following information for each Circuit Court and the U.S. District Courts:

1. The Court's technology contact information;
2. A description of technological equipment available in each courtroom;
3. A list of technological equipment litigators can borrow for trial;
4. The type of presentation screen(s) available for use in the courtrooms;
5. Court-specific rules and procedures for bringing or borrowing technology equipment for use in trial; and
6. Resources (such as rental information) for each court.

As the Overview demonstrates, the technology available in the courts varies widely from one Circuit to another. While some Circuit Courts have no courtroom presentation equipment, others have comprehensive, fully integrated, built-in evidence presentation systems. The Overview will clarify what is available versus what you will need to bring if you need it.

Perhaps the most valuable details in the Overview are the court-specific procedures litigants must follow in order to utilize technology for courtroom presentation. Though many courts have lenient policies, other courts have strict, mandatory guidelines. In Howard County Circuit Court, for example, litigants who wish to bring trial presentation equipment such as screens, projectors, or document cameras must file a Motion with the Court at least three weeks prior to trial. In Prince George's County Circuit Court, parties may not bring their own presentation equipment (other than laptops or tablets), and must complete a mandatory two-and-a-half-hour training session in order to use the Court's equipment.

These variations are the reason the MSBA Litigation Section undertook this project in the first place. Trial itself presents endless challenges to litigants. We hope that by providing this resource, we can reduce trial pressure that comes with using technology in the courtroom. Bookmark it. Print it. Come back to it when you need it.

One final caveat is necessary. Technology is fluid, of course. What was "magic" a few years ago is routine today. The policies set forth in this resource will change. We will endeavor to update the Overview as new information becomes available, so check back before your next trial. The best way to ensure that you are prepared for a particular court's technology practices, though, is to contact the Court sufficiently in advance of trial. As in all trial-related matters, preparation beats even the best magic.

Mr. Perlin is a partner of Bekman, Marder & Adkins, L.L.C. He tries medical malpractice and other catastrophic injury cases in Circuit Courts throughout the state and in the U.S. District Court for the District of Maryland. *He wishes to extend a special thank you to Laurie Weeks of his firm who provided tremendous assistance in communicating with the various courts and compiling the information contained in the Supplement to this article.*

[1] "'Hazards of Prophecy: The Failure of Imagination'" in the collection Profiles of the Future: An Enquiry into the Limits of the Possible (1962, rev. 1973), p. 36

COSA Spotlight: Judge Andrea Leahy

By Steve Klepper and Diane Feuerherd

Continuing the Maryland Appellate Blog's series profiling members of the Court of Special Appeals, we interviewed Judge Andrea Leahy, one of the eight At-Large Judges of our intermediate appellate court, in her chambers on Rowe Boulevard in Annapolis.

Path to the Appellate Bench

As an only child who debated cases with her father (Vincent Leahy, Jr., Esq.) at the dinner table, one would think that Judge Leahy's path to the legal profession, and further to the bench, was inevitable. But her early interests were also in music, as a classically-trained pianist. At Catholic University, she pursued a double undergraduate major in politics and music – a "split personality," as she called it – that engaged her continued curiosity in the law but initially steered her to become a concert pianist and guest student at the Mozarteum Academy of Music in Salzburg, Austria after graduation.

Ultimately, she chose to step away from the piano full time, in favor of law school. She found that solo performances at the piano, unlike an orchestra, could be too isolating and not conducive to her collaborative personality. Still, her passion in music continued. During the summer after her first year at the American University, Washington College of Law, she decided to forego applying for the Law Review in favor of continued study with Bela Nagy and piano performances in Oregon and Washington D.C. After law school, Judge Leahy took the next year to raise her newborn daughter (who, along with a second daughter, inherited their mother's musical interests and play the violin and cello).

Judge Leahy then joined the Prince George's County Office of Law, starting in the Code Enforcement Division. She credits hard work and a drive to make a positive difference for leading her to advance in that office and beyond, by successfully arguing precedential zoning cases, such as *Prince George's County v. Sunrise Development Ltd. Partnership*, 330 Md. 297 (1993), being promoted to lead counsel of the County's Department of Environmental Resources and then being appointed Senior Legal Counsel and Director of the Office of Legal Counsel for Governor Paris Glendening. With Governor Glendening, she learned the policy side of the law, taking on a variety of issues, including smart growth, gun control and smoking legislation, along with revamping the judicial nominating process to promote greater diversity (for more on this, see her article, "How One State Enhanced Diversity on the Bench – The Merit Selection Process in Maryland," in the ABA's November 2009 *Judge's Journal*).

The depth and breadth of her experience continued to grow throughout her career, including service as an Assistant United States Attorney in the Civil Division of the U.S. Attorney's Office in Baltimore, private practice in a large law firm, and then opening her own small firm with a focus on intellectual property, construction and employment law. In 2014, Judge Leahy was appointed to the Court of Special Appeals by Governor Martin O'Malley.

Now that she sits on the Court of Special Appeals, Judge Leahy sometimes sits with senior judges sitting by designation. They include two of her mentors and dear friends, Senior Judges Irma Raker and Lynne Battaglia. Judge Leahy considers it a special occasion when she has an opportunity to serve on a panel with them.

Law Clerks and Chambers

Judge Leahy tackles the Court of Special Appeals's volume of work with a team approach in her chambers. She has 3 law clerks – a "senior" clerk who serves several years and two "term" clerks who serve for approximately one year – unlike some of her colleagues who have a judicial assistant and two law clerks. The judge involves all three law clerks in the preparation, review and finalization of each opinion. Judge Leahy and her clerks are a team, and even run together after work. She noted that her clerks are far better than she is at running and talking at the same time, meaning she does a lot of listening during her runs.

The term law clerks are hired annually. Rather than setting an application deadline, Judge Leahy collects applications throughout the year and interviews candidates as needed and time provides. Drawing from her own law school experience, she does not require her law clerks to be on Law Review, but her interview does include a timed writing sample exercise. It is important that her law clerks have enthusiasm and curiosity for the law, as well as organization in their writing.

When asked for a pointer for attorneys who practice before the Court of Special Appeals, Judge Leahy suggested more user-friendly record extracts. A table of contents is much more useful if, consistent with Rule 8-501(h)'s requirement that the table of contents "identify each document by a descriptive phrase including any exhibit number," parties provide more detail than the exhibit numbers.

In Judge Leahy's chambers, the furnishings compliment her background. Her bookshelves are stocked with music CDs, not just Maryland Reporters and Maryland Appellate Reporters. In an unusual office set up, Judge Leahy has a music keyboard where many attorneys or judges would have a credenza.

We thank Judge Leahy for providing us with her time and background. Stay tuned for more interviews in the future.

Chair...

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dan's article in this newsletter to learn about the many reasons why Judge Cox is highly deserving of this distinguished award.

Another award of the Litigation Section is the Litigator of the Year Award. This year's recipient is Bruce Marcus of the law firm MarcusBonsib, LLC in Greenbelt, Maryland. During the Section Council's deliberations of the various nominees for this year's award, Section Council Members noted Bruce's many successes in the courtroom and also shared their experiences and appreciation of Bruce's reliability and support when they or their clients needed advice and/or representation. Bruce is truly a lawyer's lawyer, and his professionalism is a constant both in and out of the courtroom. Bruce will be receiving the Litigator of the Year Award at our Annual Business Meeting on Friday, June 15 at 8:00 a.m. in Ocean City.

Thanks to the leadership and organizational talents of our Chair-Elect Judge Michael DiPietro and the Programs Committee, we had a year full of very informative and enjoyable programs. The Fall Civil Practice in Circuit Court program and reception and our Spring counterpart program – Criminal Practice in Circuit Court – were both well attended, and the speakers, most of whom were judges, provided all sorts of hot tips and information. We are also presenting a very timely program, thanks to the leadership of Bar Counsel and Section Council Member Lydia Lawless, on "Succession Planning for Litigation Law Practices" at the June Annual Meeting in Ocean City. Additionally, thanks to the work of Section Council Member Angela Grau, the Litigation Section is co-sponsoring a program with the ADR Section in Ocean City, "Can We Talk? Conversations between Litigators and Mediators."

Thanks to the dynamic-duo Co-Chairs of our Appellate Committee, Steve Klepper and Brad McCullough, we hosted a "Recent Impact Decisions of Maryland's Appellate Courts" program and reception in the Court of Appeals and successfully continued the Appellate Blog, which is open to our members. Steve and Brad have also arranged prestigious speakers for our annual Ocean City program, "Supreme Court Term in Review."

The Litigation Section this past year also co-sponsored a "One Day Boot Camp Trial Training for Legal Aid Lawyers" with the American College of Trial Lawyers, ABA Litigation Section, Maryland Chapter of the Federal Bar Association and Maryland Legal Aid. One of the highlights of my year as Litigation Section Chair was being a panelist for this program with some of our most talented trial attorneys and judges. The attendees have reported to me that they found the program to be not only educational but inspiring and energizing; and the same was true for me as well.

Finally, as I'm sure everyone appreciates, newsletters such as this one don't just happen. The Secretary of our Section, in addition to taking the Minutes of all our meetings, traditionally is the Editor of The Litigator and manages to successfully solicit an assortment of excellent articles and comments. This Bar Year's Secretary Andy Baida did not disappoint – Thank you to Andy and the Editorial Board. I also want to use this opportunity to thank our Treasurer Bob Fiore, for always ensuring that we had the budgeted funds for all our projects and events, and Erin Risch, who as Vice-Chair led us through the deliberations of our two awards this year.

Yes, change is hard and change is disruptive, but thanks to the teamwork and humor of our hardworking Section Council Members, our Litigation Section Council persevered. We now look forward to reaping the benefits of the changes by optimizing all the new features of the MSBA website and other innovations of the MSBA to make our Litigation Section even better.

Vegas...

(continued from page 3)

were sufficient to establish plausible claims.[19] Thereafter, Mr. Meier and Ms. Nelson voluntarily dismissed the Title VII claims, without prejudice, and filed a Motion to Remand the case to state court arguing that the voluntary dismissal of the federal claims divested the Court of jurisdiction.[20] The Court, without argument, granted the Motion to Dismiss and denied the Motion to Remand. [21]

After the case was dismissed, defendants filed a Motion for Attorneys' Fees alleging that they should be permitted to recover a portion of their attorneys' fees because the Preisses' counsel persisted in litigating the claims long after they knew that the claims were frivolous.[22] Defendants claimed that because Mr. Meier and Ms. Nelson "unnecessarily and vexatiously" multiplied the proceedings in the case, they should be required to personally satisfy the attorneys' fees caused by their own conduct in the amount of $109,217.75.[23] Mr. Meier and Ms. Nelson opposed the Motion claiming that they had a good faith basis for the legal arguments presented and that they zealously represented their clients[24]. Mr. Meier and Ms. Nelson further argued that to award attorneys' fees

[19] See, Plaintiffs' Opposition to Defendants' Motion to Dismiss, *Preiss et. al*., November 8, 2010, ECF No. 17.
[20] Notice of Voluntary Dismissal and Motion to Remand, February 14, 2011, ECF Nos. 31-32.
[21] Order, March 17, 2011, ECF No. 35.
[22] Defendants' Motion for Attorneys' Fees, April 8, 2011, ECF No. 36.
[23] *Id*. at 3:4-7; 15:28.
[24] Plaintiffs' Opposition to Defendants' Award of Attorneys' Fees, April 22, 2011, ECF 38.

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would "impinge upon the ethical duty of counsel to represent their clients zealously within the bounds of the law."[25]

In September 2011, the Court granted the Motion for Attorneys' fees and awarded fees in the amount of $37,415.00 against Mr. Meier and Ms. Nelson.[26] The Order sanctioning Mr. Meier and Ms. Nelson characterized their filing of the Opposition to the defendants' Motion to Dismiss and a Motion for Remand as reckless and in bad faith.[27] In its Order, the Court stated that Mr. Meier's and Ms. Nelson's actions in opposing the Motion to Dismiss "wasted this Court's and Defendants' time and resources." The Court specifically found that the Preisses' claims were "blatantly and undeniably" without merit. Ms. Priess's claim of Negligent Infliction of Emotional Distress was deemed "absurd" and the Court concluded that the prosecution of the claim demonstrated a "willingness to ignore the law and prolong these proceedings with baseless claims and frivolous arguments."[28]

With respect to Mr. Preiss's employment claim, the Court stated that "[a]ny competent attorney practicing employment law knows that an employment claim may only be brought against a plaintiff's employer."[29] Further, the Court stated that Mr. Meier's and Ms. Nelson's filing of a Motion to Remand the case to state court was "based on patent misinterpretations of fact or, worse, misrepresentations of the law."[30] It also noted that Mr. Meier and Ms. Nelson used "thinly veiled threats" such as tabloid media pressure to pressure Defendants.[31] In its Order, the Court acknowledged that sanctions could only be awarded if Mr. Meier and Ms. Nelson acted in bad faith or with knowing recklessness and stated that this standard had been met.[32]

The disciplinary case was initiated when the Virginia State Bar (the "Bar") received the Court's Order awarding attorneys' fees in the amount of $37,415.00 against Mr. Meier and Ms. Nelson.[33] During the Bar's investigation, Mr. Meier falsely stated that all responsibility for the sanctioned conduct rested with Ms. Nelson, that he had little contact with the clients in the case, that he had no involvement in contacting the National Enquirer regarding Mr. Preiss's case, and that he had minimal involvement in the prosecution of Mr. Preiss's case in either federal or state court.[34] Investigation revealed that after the imposition of the $37,415.00 sanction against Mr. Meier and Ms. Nelson, Mr. Meier suggested to Ms. Nelson that he was not responsible for the sanctions because Ms. Nelson signed all the pleadings, and that Ms. Nelson could discharge the matter by filing for bankruptcy.[35] When Ms. Nelson refused, Mr. Meier filed a Motion to Stay enforcement of the judgment in federal court which contained false allegations against Ms. Nelson.[36]

By order dated November 29, 2016, the Virginia State Bar Disciplinary Board suspended Mr. Meier from the practice of law for thirty (30) days. The Order was based upon an Agreed Disposition pursuant to the Virginia Supreme Court Rules of Court, which set forth the facts as described herein.[37] The Agreed Disposition also stipulated that Mr. Meier violated the following Virginia Rules of Professional Conduct: Rule 1.1 (competence), Rule 3.1 (meritorious claims and contentions), Rule 3.3 (candor toward the tribunal), Rule 3.4 (fairness to opposing party and counsel), Rule 4.1 (truthfulness in statements to others), Rule 4.4 (respect for rights of third persons), and Rule 8.1(a), (b) and (d) (bar admission and disciplinary matters).[38]

On January 24, 2018, Bar Counsel filed a Petition for Disciplinary or Remedial Action in the Court of Appeals based upon the facts set forth in the Agreed Disposition in Virginia.[39]On January 24, 2018, the Court of Appeals issued a Show Cause Order, pursuant to Maryland Rule 17-737, requiring Mr. Meier and Bar Counsel to show cause as to why reciprocal discipline should not be imposed in Maryland.[40] Bar Counsel argued that Mr. Meier's conduct warranted disbarment rather than a thirty suspension, because of certain exceptional circumstances including his pattern of misconduct, which was determined to be frivolous and in bad faith, his misrepresentations to the Court and Bar Counsel, as well as various other aggravating factors.[41] The Court of Appeals ultimately determined that reciprocal discipline was appropriate and suspended Mr. Meier from the practice of law for thirty days[42].

This case should serve to remind practitioners of the various duties that exist when bringing or defending a proceeding. While attorneys have a duty to use legal procedure to the client's benefit, attorneys must also be mindful not to abuse the legal process in the course of advancing their clients' interest.

[25] *Id*. at 3:15-17.
[26] Agreed Disposition at ¶ 4.
[27] *Id*. at ¶ 1.
[28] *Id*. at ¶¶ 5-6.
[29] *Id*. at ¶ 7.
[30] *Id*. at ¶ 8.
[31] *Id*. at ¶ 12.
[32] *Id*. at ¶ 9.
[33] *Id*. at ¶ 1.
[34] *Id*. at ¶¶ 11, 13, 18.
[35] *Id*. at ¶ 22.
[36] *Id*. at ¶ 23.
[37] *See*, Agreed Disposition Memorandum Order.
[38] *See*, Agreed Disposition.
[39] Petition for Disciplinary or Remedial Action, *Attorney Grievance Comm'n of Maryland v. Mike Meier*, Court of Appeals of Maryland, Misc. Docket AG No. 59, January 24, 2018.
[40] Show Cause Order, *Attorney Grievance Comm'n of Maryland v. Mike Meie*r, Misc. Docket AG No. 59, January 24, 2018.
[41] Petitioner's Response to Show Cause Order, *Attorney Grievance Comm'n of Maryland v. Mike Meier*, Misc. Docket AG No. 59, March 12, 2018.
[42] Court of Appeals' Order, *Attorney Grievance Comm'n of Maryland v. Mike Meier*, Misc. Docket AG No. 59, March 23, 2018.

Thank you

The Litigation Section extends sincere thanks to the contributors to this publication...

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Depositions...

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Selecting the designee(s).

After reviewing the requested areas of testimony, the corporation must select the most appropriate person(s) to answer questions about those topics. The person selected can range from an officer, director, manager, employee, or even in-house counsel. As such, counsel defending the designee should spend time interviewing the above individuals who have knowledge of the underlying event as well as any related policies or procedures. In addition, prior deposition experience and intangible factors – such as demeanor, temperament, nervousness, willingness to participate – should also be considered. Remember that you are literally choosing a face for the corporation.

In rare situations, sometimes a former employee may actually be the most appropriate person to testify. For example, the employee who responded to a particular incident may no longer work for the corporation but may have the most knowledge regarding the requested areas of testimony. In these situations, counsel must carefully consider whether that former employee has any motivations adverse to the corporation or is willing to spend the appropriate amount of time preparing for the actual deposition. If counsel determines that the former employee may jeopardize the corporation, a corporation may designate an individual with no personal knowledge of an incident. Rather, the individual can be knowledgeable about how internal documents and reports related to the incident are made and recorded and can defer to the factual information presented therein.

Regardless of who is ultimately selected, it is crucial that the selected designee understands that he will be required to invest time and effort preparing for the deposition.

Preparing the designee(s).

Once the designee is selected, the corporation is now "on notice to prepare its designee to be able to give responsive answers on its behalf" and the designee must be able to "testify as to matters known or reasonably available to the corporation."[3] This is akin to a corporate party's responsibility in answering interrogatories – the designee must make a good faith effort to investigate and review the information available to him, whether through documents or employee interviews.

[3] *Saxon Mort. Services, Inc. v. Harrison*, 186 Md.App. 228, 973 A.2d 841, 857 (2009).

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Depositions...

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In some ways, preparing a corporate designee is easier than preparing an individual. While discovery depositions are inherently broad testimony and almost any question is fair game, corporate designee depositions are generally limited to the areas described in the Notice. In this way, the element of surprise is limited if not removed. This gives a corporate designee an advantage not provided to an individual deponent. However, the designee should also be ready for questions beyond the scope of this list, which is often considered the floor, not the ceiling. The Rule is not intended to provide limitation or special protection to a designee asked a question that may arguably go outside the scope of the delineated list.

First and foremost, counsel should explain to the designee the difference between his personal knowledge and the corporation's knowledge. Knowledge in this sense includes interpretations, beliefs, and opinions. It is paramount that the witness leave his personal thoughts or opinions at the door and understand the only voice being expressed at the deposition is the company's itself.

Next, counsel should familiarize the designee with the deposition process in general. In the same way one would prepare an individual witness, it is always good practice to share the deposing attorney's style and demeanor with the witness. Conducting a mock deposition or, if the corporation is a party to the matter, having the designee attend another deposition in the case will help the witness best understand what to expect at her own deposition.

Third, the designee must be prepped on how to answer a question if he does not know the answer. Under some circumstances, even an "I don't know" can be binding on the corporation when said by its designee. As a rule, it is best to avoid a designee ever uttering those words. Not only does it invite the follow-up question "is there someone at X corporation that does know?", it can also negatively affect a juror's impression of the corporation. Rather, prepare the witness on how to deflect in those situations. Perhaps respond with "I can't recall at this time," or reference where the answer can be located and offer to submit support of the same in follow-up to the deposition.

Fourth, in addition to the obvious subject areas listed in the Notice, if the designee is a party to the matter he should be prepped with, at a minimum, relevant pleadings: complaint, answer, and discovery responses any attached documents. The designee should not only review the documents its corporation produced but should be comfortable referencing them at the deposition and feeling comfortable to ask for a moment to review the documents before responding to a question. Organizing and binding the documents for the deponent is helpful and will give the witness a better sense of confidence and comfort going into the deposition.

Finally, counsel should considering reviewing other litigation materials with the designee. A designee should never see a document for the first time in a deposition; even an experienced deponent can get flustered and feel pressured when asked to read something while a room full of people sit in silence waiting for him to finish. It may also be wise to have the designee view transcripts of other depositions in the case.

However, it is important to remember that sometimes less is more. Counsel must balance preparing the designee with not imparting too much additional knowledge on the designee that he may not need to know. This is often true when a corporation is not a party to the matter; it may be better to keep the designee in the dark about the underlying litigation and to limit his knowledge about the case.

Taking the corporate designee's deposition.

If done correctly, a corporate representative deposition is an excellent opportunity for counsel to: (1) get damaging concessions; (2) pin down any issues not in dispute; (3) identify and authenticate documents; and (4) obtain information possessed by the organization on the record, under oath.

From the perspective of a lawyer taking a corporate representative deposition, selection of corporate representatives not infrequently seems to have been under-considered at best, ignored at worst. Litigation creates drag for a business: it is an unwanted distraction. A corporate representative may not be selected for the ability to answer questions in a particular topic area; but is instead selected based on convenience, proximity, availability or expendability. You wind up with whoever will be missed the least.

Do not assume that opposing counsel has performed a thorough preparation of the corporate representative. Part of your inquiry will include the efforts undertaken to comply with the topic list and document schedule included in the Notice of Deposition, both in terms of making sure the witness has reviewed and is familiar with the topic areas, has sought out responsive information, if not already known, and has made a reasonably diligent search for documents or tangible things responsive to a subpoena request.

First, make sure that the deponent is aware that she is speaking not solely upon her own knowledge, but based upon all information known or available to the organization:

- You understand that you are here to testify as the corpo-

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rate designee of Early May Daydreams, Inc.?
- You understand that when I ask you a question, I am asking Early May Daydreams, Inc. that question and you are speaking on its behalf?
- You understand that you are not being asked to testify based solely upon your personal knowledge, but upon all of the information available to the corporation, correct?
- You understand that your answers will be binding on Early May Daydreams, Inc.?

The next thing to do is enter into the record the Subpoena, Notice of Deposition, topic list, and document schedule as "Exhibit 1." Then, ask the deponent whether she has reviewed the topic list and is prepared to give testimony regarding the topics:
- I am going to show you what has been marked as Exhibit 1, which is the notice for this deposition here today. Would you take a look at Exhibit 1, please?
- Have you seen Exhibit 1 before?
- Did you review Exhibit 1 in advance of this deposition?
- Looking at the exhibit, on the second page, continuing into the third page, there is a list of topics numbered one through 13. Have you reviewed that topic list in advance of the deposition today?
- Are you prepared to testify as to each of those topics today?
- Directing your attention to page three, you have been asked to bring certain categories of documents to this deposition today. There are 27 categories of documents listed, correct?
- Have you, in advance of this deposition, reviewed the 27 categories of documents requested?
- Have you made an effort to determine whether any documents responsive to those requests exist?

Next, for each of the categories of documents requested, verify what is being produced, what does not exist, what exists but is not being produced, and why. The goal is to determine (1) what exists, but is not being produced, (2) whether that is due to a claim of privilege, and if so, (3) what the facts supporting the claimed privilege are.
- Category one is [whatever Category One is]. Are there any documents responsive to Request No. 1?
- Do you have any documents to produce today that are responsive to Number 1?
- Why not?
- Can you please list for me each document that is responsive to Request No. 1 that is not being produced on the basis of privilege?

Obviously, at this point the required questioning will begin to vary. After documenting the deponent's efforts to comply with Md. Rule 2-419(d) and acquiring enough information to contest any claimed privilege, you can confidently proceed into the factual portion of your deposition.

Using the corporate designee's deposition.

If the organization that was deposed is a party, you can use the deposition of its corporate designee for any purpose. Md. Rule 2-419 states:

> (2) By adverse party. The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, managing agent, or a person designated under Rule 2-412(d) to testify on behalf of a public or private corporation, partnership, association, or governmental agency which is a party may be used by an adverse party for any purpose.

The deposition of an organizational representative designated by a party is considered just as if the deponent were a natural person. "One party may introduce deposition testimony of an opposing party for any purpose and at any time, even if the deponent is in the courtroom and even if the deponent has already testified live or is to testify." Paul V. Niemeyer, Linda M. Schuett, *Maryland Rules Commentary*, at p. 295.

> For purposes of this rule, when the adverse party called is a corporation, association or governmental agency, the deposition of one of its officers, directors, or managing agents, or of a person designated by it to testify under Rule 2-412(d), may be used by an opposing party for any purpose.

Id.

When the organization that was deposed is a non-party witness, it may be used in the same manner as the deposition of a third-party witness who is a natural person under Md. Rule 2-419(a).

Conclusion.

A deposition of a corporate representative is a very powerful discovery device that demands careful preparation by both the taking and defending lawyers, as well as by the individuals who serve as designees. While every deposition will be fact-specific, we hope that the procedural steps and practice considerations discussed in this article will provide a useful foundation for preparing to take or defend the deposition of a corporate representative.

John Bratt concentrates his practice in plaintiff's personal injury litigation and civil appeals of all types. Jessica P. Butkera is a Litigation Attorney in the Baltimore office of Goldberg Segalla, LLP.

Harrell Award...

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management to another level. What is most remarkable about Judge Cox is with all the administrative and teaching duties she takes on, she still manages to carry a full case load. She has a well-deserved reputation of fairness and manages her courtroom is such a way that both lawyers and litigants feel that they have been able to have their day in Court. Judge Cox is dedicated to judicial excellence. She works hard for our bench and all the judiciary in her many leadership roles. She truly is trying to improve the quality of the administration of justice and works tirelessly in all her roles as a trial judge, administrative judge, Chair of the conference of circuit judges and member of many judiciary committees including the Judicial Council." As one nomination summed up: "Judge Cox is always one of the first persons to volunteer and she epitomizes the saying, 'If you want something done, give it to the busiest person you know.'" "One wonders when Judge Cox might ever find the time to sleep or rest."

Over the years, Judge Cox also has cultivated a loyal following among her judicial law clerks. 16 of her 20 law clerks were in attendance. Also in attendance were her husband, John P. Cox, Deputy State's Attorney for Baltimore County, and their three adult children and their spouses.

After the presentation of the award, the program proceeded in its usual format wherein the judges took turns sharing practice tips for attorneys. Their comments were fast-paced, helpful, and often entertaining. Attendants then enjoyed more conversation with judges and fellow practitioners over dinner.

The Litigation Section typically offers these dinner receptions with judges on an annual basis, alternating from district court to circuit court to appellate court. This year's program came together through the skillful efforts of Lydia Lawless and Erin Risch. Be on the lookout next Spring so you can take advantage of this worthwhile program.

Case Summary...

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nor had he practiced medicine without a license as alleged and the Amended Order was dismissed. The Geiers filed a complaint in Montgomery County Circuit Court alleging that the Board intentionally published their private and confidential medical information on its website as part of a systematic effort to discredit and punish Dr. Geier for promoting medical views and treatments with which the Board disagreed.

The Board's Discovery Violations

The Court recognized that the Board (comprised mostly of physicians), its compliance officers, and the Assistant Attorney General who drafted the Order should have understood that publishing the Geiers' confidential medical information was illegal. During the course of litigation, the Defendants seemed aware that their intent for publishing the information would also have an impact on their defense of the Geiers' claims. The Defendants consistently withheld relevant information that could demonstrate their motivation for publishing the Order.[2] In particular, the Court found that the Defendants failed to provide a knowledgeable organizational representative for deposition, willfully permitted the spoliation of relevant email communications among the Board, asserted executive privilege to avoid disclosing audio recordings of the meeting where the Board voted to publish the Order, and suffered from a case of collective amnesia while testifying about facts relevant to the publication of the Geier's medical information. In total, the Geiers filed eight motions for sanctions due to the Board's various discovery violations.[3] The Court ultimately entered a default judgment on the issue of liability "due to the defendants' cumulative course of misconduct during discovery, which persisted throughout the entire case." Consequently, the trial in this matter proceeded exclusively on damages.

Punitive Damages

Although liability had been established, punitive damages cannot be sustained solely by the entry of default. The Court recognized that for the purposes of determining punitive damages, it was the Geiers' burden to establish clear and convincing evidence of actual malice. The Court reasoned that establishing actual malice required an individual finding that a defendant "had actual knowledge of the publication of the plaintiffs' private medical information and intended to disclose this information to the public in violation of

[2] The Circuit Court for Montgomery County ruled that the Board had waived its executive privilege by not asserting it in a timely fashion. The Board filed an interlocutory appeal and the Court of Appeals overturned the decision.

[3] The seventh and eighth motions were actually made after trial. It came to light at trial that the Board had allowed the hard drives with the Board's email correspondence to be destroyed despite knowledge of their relevance to the Geiers claims. Consequently, the Court's opinion included additional support for the default and concluded that "any sanction less than a default as to liability will not cure the prejudice the plaintiffs have suffered as the direct and proximate result of the intentional destruction of electronically stored information."

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the law." The extensive discovery violations, sparse testimony, spoliation, and Defendants' reliance on executive privilege likely made establishing malice more difficult.

An essential basis for the Court's finding of malice was its decision to draw an adverse inference in response to the defendants' invocation of executive privilege. The Court held that an adverse inference was permissible against a defendant for withholding relevant information by invoking executive privilege. In this case, every defendant asserted the Board's executive privilege[4] and was permitted to withhold audiotapes of or testimony about meetings where the Board discussed the Geiers. This evidence was relevant to determining the Board members' state of mind – a key factor for establishing malice – when deciding to publish the original Order. Consequently, the Court drew the adverse inference that the withheld information would support that the Defendants acted with malice. The Court also drew an adverse inference based upon each Defendant's refusal to testify about any Board meeting involving the Geiers. The Court held that when a party has thwarted the discovery of relevant facts by refusing to testify or asserting a privilege, that party may not testify about those undisclosed fact at trial and may not reasonably complain if an adverse inference is drawn.[5]

The Court's Decision

The court found that the Defendants knew that the original Order contained the Geiers' confidential medical information and that the Board purposefully authorized its publication on the internet. The court also determined that the Board members and staff effectively did nothing to ensure that the original Order was completely removed from the Board's website after receiving a letter from the Geiers' counsel and continued to do nothing despite information that the Order remained on the Board's website. The court found very little of the Defendants' testimony credible and noted that none of the Board members were willing to accept responsibility for publishing the Order. The court was not persuaded by the Board members' claims that they had simply relied on the Board's counsel and staff. The court concluded that the Defendants acted "intentionally to embarrass and humiliate the Geier family because [they] did not like the way Mark Geier practiced medicine and wanted to send a message and teach him (and David Geier, who worked hand and glove with his father) a lesson."

The Board's conflict with the Geiers, of course, has not ended. The Defendants have filed their notice of appeal. The assessment of punitive damages against individuals for acts arising out of their duties as members of a state agency and the circuit court's reliance on an adverse inference will be matters for the appellate court to address.

Matthew Cassilly is a litigation associate at the Baltimore office of the law firm Baker Donelson (formerly known as Ober|Kaler). Baker Donelson has an active practice assisting health care professionals, including representation before The Maryland Board of Physicians.

[4] *Hamilton v. Verdow*, 287 Md. 544, 564 (1980) ("The government is then left with the choice of either producing the information or having the issue to which the information relates resolved against it.").

[5] DiLeo v. Nugent, 88 Md. App. 59, 70 (1991).

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