

THE ADVOCATE

YOUNG LAWYERS SECTION—MARYLAND STATE BAR ASSOCIATION

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Certificates of Qualified Experts— What Must be Included to Comply with *Carroll v. Konits*

By Benjamin S. Salsbury, Esquire and Katharine O. Porwick, Esquire

There is no greater fear for a young lawyer than the thought of having to look your managing partner—or infinitely worse—your client, in the eyes and explain that the client's claim has been dismissed or, if the statute of limitations has run, extinguished, because you failed to follow procedure properly. In *Carroll v. Konits*, 400 Md. 167, 929 A.2d 19 (2007), the Court of Appeals of Maryland created precedent that may turn this fear into a reality for many plaintiff's medical negligence attorneys. In *Konits*, the Court reiterated, and arguably redefined, the necessary requirements for a Certificate of Qualified Expert ("Certificate")—a condition precedent to filing a medical negligence claim in Maryland. This article is dedicated to help young lawyers comply with the requirements set forth in *Konits* and avoid the potential disaster that can occur if a qualifying expert's certificate or report is incomplete.

A brief history of the Health Care Malpractice Claims Act ("Act") is necessary to understand the importance of *Konits*. In 1976, the Maryland General Assembly enacted legislation that established procedures for filing a claim against a health care provider. The Act requires that medical negligence claims over a certain amount (now \$30,000) be filed with the Health Claims Alternative Dispute Resolution Office ("HC Office") before filing suit with the judicial courts. Ten years later in 1986, the Act was amended to require a plaintiff to also file a Certificate and an attesting expert's report ("Report") with the HC Office before filing suit.

Over the next 20 years, this legislation was relatively unchanged. As a result, many plaintiff's attorneys got in the habit of filing a Certificate under their own signature and a Report signed by the attesting expert (often times the Certificate and the Report utilized the very same language, but one was executed by the attorney and the other was executed by the expert). Then in *Walzer v. Osborne*, 395 Md. 563, 893 A.2d 654 (2006), the Court held that the failure to file a Report in compliance with the Act may result in the penalty of dismissal without prejudice. For the first time, the Court required the Report to contain information that supplemented the information in the Certificate. Moreover, the Court concluded that the Report must explain in detail how the health care provider failed to meet the standard of care.

In seeming response, the Maryland General Assembly enacted Senate Bill 309 (2007 Laws of Maryland, Chapter 324 now codified at Cts. & Jud. Proc. § 5-118) to provide a savings clause for untimely filed Reports. Not to be outdone, the Court of Appeals responded in kind with a new interpretation of the legislative scheme of its own – *Konits*.

This article is dedicated to help young lawyers comply with the requirements set forth in Konits and avoid the potential disaster that can occur if a qualifying expert's certificate or report is incomplete.

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From the Chair

What is the true value of the Maryland State Bar Association to a young lawyer? In addition to getting your yearly copy of the Maryland Lawyers' Manual and monthly publications, how does being active in the MSBA assist your legal career? Ultimately, the answer to these questions depends on you and your individual aspirations.

Our profession rewards us with long hours, demanding clients with lofty expectations, and critical deadlines. For those of us at law firms, our only promotion occurs when we make partner, usually at least seven years after we have begun practicing. At the same time, in our non-professional lives, weddings will be planned, babies born, and lives to live. So how does the MSBA fit into what is already an overburdened way of life?

From a professional level, the MSBA provides an opportunity to network with other attorneys and judges. As you are already aware, Maryland has a small and close knit legal community. The attorneys that you work with on different MSBA committees may also be opposing counsel in your next case or your next referral source. You may meet a legal expert in an area of law that is the central issue of a case you are handling. The MSBA also provides a host of educational seminars on the practice of law and law firm management. The value is endless, but participation is key.

The MSBA also provides you with the opportunity to give back to the community, in both legal and non-legal ways. In December, the Public Service Committee of the Young Lawyers Section organized a "Toys for Tots" Drive for children in the Baltimore-area. Our Activities Committee hosted the 17th Annual MSBA Charity Event to support the Maryland Mentoring Program on March 7, 2008 and the Pro Bono Committee is in the process of organizing its annual "Play for Pro Bono" event in conjunction with the Pro Bono Resource Center. The MSBA helps its members participate in activities that benefit those in need in Maryland.



Our society demands immediate gratification and rewards, but being a part of the MSBA is a long-term investment that will assist you in your legal career and personally. Time is valuable, but as we become more seasoned and experienced attorneys, the relationships that we cultivate early in our career will pay dividends later in our career.

The MSBA YLS is in the process of planning for the 2008-2009 Bar year and if you are interested in being on Section Council, please contact me at siri@bowie-jensen.com. I look forward to hearing from you.

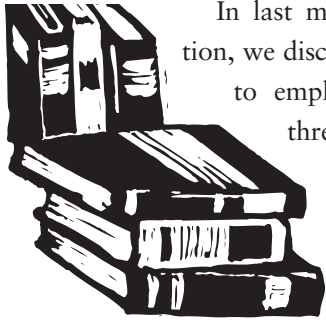
Sincerely,

Michael W. Siri

Michael W. Siri is an associate with Bowie & Jensen.

Organizing Your Pretrial Binders

By Christian C. Mester, Esquire



In last month's publication, we discussed strategies to employ during the three months preceding trial. In this article, we address ways to organize your pretrial binders when your case is placed into suit. If you effectively organize your case from the outset, you can make the final 90 days of trial preparation more manageable. You, in turn, will be more productive. The suggestions that follow can easily be turned into checklist format and placed in each of your file folders. Once the lawsuit is about to be filed, pull out the checklist and create the necessary folders. The main purpose of the trial folders is to keep you organized from the beginning of the litigation through trial preparation. These folders should not include originals of any documents, but instead should include copies that you can write on or otherwise work with during the litigation.

Once the complaint is completed, create a redwell file (or 3-ring binder) with 11 folders: (1) to do's; (2) motions in limine; (3) client, witness, court, defense counsel and expert contact information; (4) complaint; (5) pretrial matters; (6) voir dire; (7) jury instructions; (8) client; (9) hot correspondence; (10) opening; and (11) closing.

In the "to do" folder, place your working list of assignments. When a new issue arises, place it in this folder. In so doing, all case assignments are contained in one location when you review

the file to decide what needs to get done. As an aside, if you have a case-management system on your computer, your "to do's" should be entered there, with appropriate alarms set to remind you about impending deadlines.

In the "motions in limine" folder, place potential in limine issues as they are identified in the case. For example, suppose your client testifies at her deposition that she was arrested for underage drinking. You should place a note in this folder to file an in limine motion to

The main purpose of the trial folders is to keep you organized from the beginning of the litigation through trial preparation.

exclude this irrelevant and unfairly prejudicial information. Then, when it is time to file the motions, you merely look in this folder for the issues you need to address.

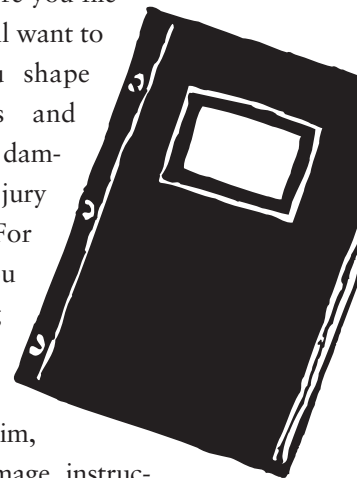
In the "contact information" folder, place the information you have on the witnesses, your clients, defense counsel, the court, and your expert witnesses. You will want the best numbers to reach them, cell phone numbers, e-mail addresses and mailing addresses. Also place in this folder the names of all witnesses as they are learned through interviews, depositions, discovery responses, or otherwise. This will allow you to have all names in one location when you prepare your pretrial memoranda.

In the "pretrial matters" folder, place information you want to raise on

the first day of trial, issues you want to bring out in any filed pretrial statements, or any logistical concerns. You can also include preferred methods of trial procedure of the particular judge you are in front of, the layout of the courtroom, requirements for use of computers in the courtroom/court-house, or other similar information.

In the "voir dire" folder, place notes of those issues you want to raise during the juror selection process that are outside of your regular form voir dire. For instance, if your case involves a delay in delivery leading to brain damage in a baby, the prospective jurors should be queried on any pregnancies they had and whether there were problems.

In the "jury instructions" folder, print out the main pattern jury instructions you will need in your case. Do not wait until you are preparing for trial to look at the jury instruction for the first time – do it before you file the case. You will want to make sure you shape your pleadings and proof, especially damages, to those jury instructions. For instance, if you are representing the estate and beneficiaries in a negligence claim, identify the damage instructions on wrongful death and survival actions. This will ensure that you have testimony and/or records to support all of the elements of available damages. If you do not have the necessary testimony



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Find Your Calling in the Profession

By T. Reed Stephens, Esquire

Recently, I had the honor of addressing a group of current students and alumnae of the Black Law Students Association (BLSA) chapter of the Washington College of Law at the American University. My audience was comprised of a group of hopeful and ambitious future attorneys looking for insights as to how to carve out space for themselves in a very crowded profession. I passed along what I believe are useful considerations on how to lay out a plan for a satisfying career in the legal profession. The plan's success hinges on each aspiring attorney finding his or her calling in the legal profession.

The legal profession is a demanding one in that individual success is measured in how well we serve our clients, their causes and objectives. We are measured in many ways primarily through the eyes of others—clients, judges, colleagues, adversaries—rather than through our own eyes. Many leave the profession because of a lack of fulfillment, but this is not an inevitable result as demonstrated by the thousands who make a lifetime avocation of serving the legal needs of others. How does one achieve this longevity and fulfillment? One way is to find your calling: carve

out your own space of fulfillment in the profession.

To find your calling, however, you must understand both your own professional needs as well as the needs of the

profession. Your needs are those aspirations representing what you want to draw from the profession in order to maintain an interesting and fulfilling career. These needs might be intellectual stimulation, political activism, financial success, or civic devotion. Conversely, the profession needs certain contributions from you in order for you to remain relevant to employers and clients with legal service needs that must be addressed. Ideally, your calling can be matched with professional opportunities that are made available by employers and potential clients.

You should engage fully in the self-examination process early on so that you devote your years of service as a legal professional to fulfilling your calling primarily rather than servicing your financial debt.

Have a calling. Have a purpose for your pursuit of a career in the legal profession. By this, I mean simply: know why you aspired to become a practicing attorney and be content with the emotional satisfaction that you gain from coming to work every day. As I survey the career paths of my law school classmates, I note with admiration the various long-time law school professors, graduate school academics, and the federal prosecutors among them. Each of these individuals knew how he or she would find satisfaction in the law and found the pathway to claiming that personal space in the profession.

Compared to, for example, the two classmates with whom I shared the responsibility of steering our Stanford BLSA chapter many years ago, I may appear to be a professional vagabond wandering the legal landscape. Not so upon closer examination. In retrospect, I believe that each of my career changes – from judicial clerk to law firm associate to Department of Justice trial attorney to law firm partner -- represents a coherent step in a long-term journey that continues to this day. None of the steps of the journey, however, marked a deviation from what I recognize as my professional calling.

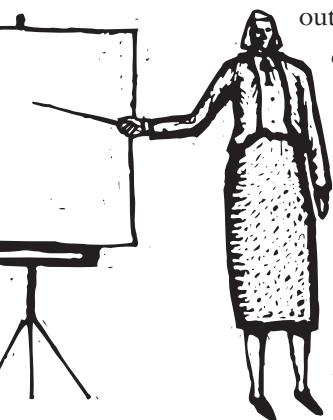
But how does one find the pathway that best serves your calling? Whether you are a law student or already practicing, I recommend you begin by asking yourself the most obvious question: "Why am I here?"

That is not an existential question. Recent graduates know the reality of the weight of the financial obligation represented by that debt. You should engage fully in the self-examination process early on so that you devote your years of service as a legal professional to fulfilling your calling primarily rather than servicing your financial debt.

Once you have a purpose or calling in the profession, how do you follow it? First, know that you will go farther, much faster, if you do not attempt to do it alone.

A recurring myth in popular legal culture is of the stern law professor lecturing the new crop of first year law students to "look to your left, then look to your right" as though to rein-

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force a sense of cutthroat competition among the incoming class. My experience has been that, while the myth was predictive of the rise of 21st century “reality tv” competitions, this adage poorly represents the way we interact as a legal community. Young law students will do far better to value classmates as future lifelines in a relationship driven profession rather than isolated competitors to be exploited and discarded. Make sure that you internalize that the legal profession is a relationship-driven one. You will be remembered for how you treat everyone whom you meet – Your reputation can follow you like a halo or like a shroud. It is your choice.

Let’s drill down on your calling. Practicing law is a privilege. Once you have passed the bar, what next? How do you carve out a career in the law and pursue your calling? What are your career goals? It is not sufficient answer to say “I want to work at a law firm.” Employment at a law firm is not a true career goal. It is a short term objective. The decision to join a private law firm must be a purposeful one as much as any decision to serve in the government or in a public interest capacity. A law firm is nothing more than an empty vessel until it is filled by the flesh and blood attorneys who populate it with their intellect, commitment, empathy, and ambition. You should identify the sort of work you want to be doing and know why it is you enjoy doing it.

How do you accomplish this? Begin by educating yourself to the professional possibilities and understand how the business of law operates so that you can match your path with the trends of the profession.

One important trend influencing opportunities in large firm private practice is the “commoditization” of cer-

tain practice areas served by private law firms on behalf of corporate clients. “Commoditization” in this context is the result of corporate clients’ sharp analysis of the nature of the legal work. The result of this analysis has been the diminution of the economic value of some practice areas traditionally served by private law firms. By

Find your calling then work to understand how you can fulfill your calling on a daily basis.

this, I do not mean that work is no longer available or that it is not intellectually challenging. Commoditization means that the legal work has been economically devalued as a result of external pressure applied by clients.

As a practical matter, the legal work continues but that clients have placed limitations on the amount that they will pay for these cases to be handled. If you want to work in a large, highly leveraged private law firm with the goal of achieving long-term job security, you should consider developing skills that will allow you to work in a practice area that has not been “commoditized.” To do otherwise is to take on the risk of eventual job dislocation.

Such risks are less prevalent when the government is your client. Due to the government’s broader policy responsibilities, commoditization is less a matter of strict economic analysis. There, love of the process of practicing law and development of the necessary skills can earn you job security and a career goal to do a certain type of legal work for years on end if that’s your choice.

Similarly, public interest work legal work (issue oriented or politically ori-

ented work) is less vulnerable to the danger of commoditization of a particular practice area of litigation. Unlike government legal positions, however, public interest legal careers are not necessarily underwritten by the public’s tax dollars.

Corporate legal departments are places to gain valuable experience, but the economic pressures are intense as employers are constantly under pressure to cut costs including costs incurred for employees who do not generate revenue or profit (e.g., lawyers)

A long-term, fulfilling career in the law is dependent on many things. I suggest you choose your own personal commitment to practicing law in a mode that you enjoy is the foremost of these. Find your calling then work to understand how you can fulfill your calling on a daily basis. To do this, you must devote substantial time to identifying your career goals rather than you short-term objectives (e.g., debt service). Understand why you want to practice law. Make sure you internalize that this is a relationship-driven profession. Stay connected to your law school and your classmates. You have the potential to be lifetime sources of career support to one another. ♦

T. Reed Stephens is a Partner in both the Trial and Health Law Departments of the Washington, D.C. Office of the law firm of McDermott Will & Emery LLP. In the 15 plus year since obtaining his law degree from Stanford Law School, Mr. Stephens has been a clerk to a federal district court judge, an associate at a large law firm, a trial attorney for the United States Department of Justice, and now a partner in a global law firm.



Certificates of Qualified Experts

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In *Konits*, the plaintiff, Mary Carroll, complained that her treating physicians, Doctors Imoke and Konits, were negligent in failing to communicate that a catheter should be removed from her chest upon completion of chemotherapy. As a result, the catheter unnecessarily remained in Ms. Carroll for almost a year causing her pain, discomfort, and other medical complications. Ms. Carroll filed a Complaint with the HC Office, and four months later she filed a letter signed by her expert that purported to serve as a Certificate. The letter contained a brief chronology of Ms. Carroll's medical treatments and identified the aspects of medical care that the expert determined to be inappropriate.

The Defendant doctors filed a Motion to Dismiss on the grounds that Ms. Carroll had failed to file a Certificate in compliance with the Act. The Director of the HC Office granted Ms. Carroll an extension to file a Certificate, which she did. Ms. Carroll filed a document that included a substantially similar summary of her medical treatments and concluded that she had suffered injury from "having a catheter in place for longer than what is standard treatment[.]" *Konits*, 400 Md. At 175, 929 A.2d at 24. The Amended Certificate also included a statement that the expert did not devote more than 20 percent of her time to activities that directly involve personal injury claims.

The case was transferred to the Circuit Court for Baltimore City and Doctor Konits renewed his Motion to Dismiss on the grounds that the Certificate failed to comply with the statutory requirements. The Circuit Court agreed and dismissed the case against Dr. Konits. The Court of

Appeals issued a writ of certiorari prior to consideration by the intermediate appellate court.

In its consideration of the case, the Court first held that filing a valid Certificate is a "condition precedent" to maintaining a claim for medical negligence. The Court concluded that filing a Certificate is an "indispensable step" in the arbitration process. Therefore, if a "proper" Certificate is not filed within the 90 days of filing the Complaint with the HC Office, dismissal of the case is the proper remedy.

Next, the Court turned to the language and substance of the Certificate itself and determined that it was

Without saying it explicitly, the Court made very clear that the attesting expert must be exacting with their language in describing what the standard of care requires and what the specific departures in the standard of care were.

invalid. The Court concluded that the Act clearly and unambiguously requires a Certificate to contain an expert's affirmation that: (1) the health care provider departed from the standard of care, and (2) the departure was the proximate cause of the plaintiff's injuries. Because Ms. Carroll's Certificate did not state with clarity that the treatment she received or failed to receive was the "proximate cause" of her injuries, the Court concluded that the Certificate was insufficient. The Court held that because the Certificate failed to use the exact words "proximate cause" it failed to satisfy the Act's requirements and dismissal of the entire case was proper.

The Court went onto explain that additional elements must be included in

the Certificate. It must: identify, with specificity, the identity of the health care professional(s) who allegedly breached the standard of care; outline the standard of care; and summarize how the health care professional(s) allegedly departed from that standard. It is interesting to note, that the Court ultimately determined that Ms. Carroll "may" have properly identified the departures in the standard of care because the attesting expert stated that the catheter was in place for "longer than what is standard treatment" and such treatment was "below the standard of care." Without saying it explicitly, the Court made very clear that the attesting expert must be exacting with their language in describing what the standard of care requires and what the specific departures in the standard of care were.

Although the Court in *Konits* attempts to define in black and white what must be included in the Certificate for it to be proper, the medical negligence practitioner is left with a lot of uncertainty when the facts of his case do not fit into the perfectly defined categories. For example, what if the medical records are unclear about the identity of the health care professional that committed the alleged negligence? What if the health care professional is a member of a medical institution that would prefer to assume any negligence instead of having its individual physicians and nurses named? What if it is unclear how the standard of care was breached, even though it is clear that there was, in fact, a departure? These questions will go unanswered until the Court or the legislature answers. ❖

Benjamin S. Salsbury and Katharine O. Porwick are both associates at the law firm of Salsbury, Clements, Bekman, Marder and Adkins, L.L.C. They practice in the areas of medical negligence and personal injury and either can be reached at (410) 539-6633.

MEMBERSHIP COMMITTEE

*Co-Chairs: Sedica Sawez &
Wm. Carl Isler, II
Vice Chair: Mitch Rothenberg*

The Membership Committee is excited about the upcoming 2008 events. We started the year off with a fun-filled February Filibuster in Prince George's County and we had a great time. We followed up with a pre-party happy hour for the Mardi Gras for Mentoring Fundraiser at Louisiana Restaurant in Fells Point, Baltimore. The happy hour and the fundraiser were immensely successful, the YLS Spring Fling definitely is the premiere YLS event each year. If you didn't make it this year, plan to be there next year.

We have more Thirsty Thursdays planned for the rest of the year, so mark your calendars as the reminders are sent and plan to be in attendance. We promise you will have a wonderful time learning about the incentives for joining the MSBA Young Lawyers Section, and networking with other exciting young lawyers, judges and other professionals.

Be sure to check out the MSBA Young Lawyers website www.msba.org for upcoming events.

TECHNOLOGY COMMITTEE

Chair: Meredith Blake Martin

Your YLS Technology Committee is hard at work to ensure that the Young Lawyers Section website—http://www.msba.org/sec_comm/sections/yls/—is up-to-date and accurate. Please take a look at the website to see how you can become involved in the Section! You will be able to check out *The Advocate* online beginning with this issue. If you have any information which you would like posted to our website, please contact Meredith Martin via email: mmartin@agtlawyers.com.

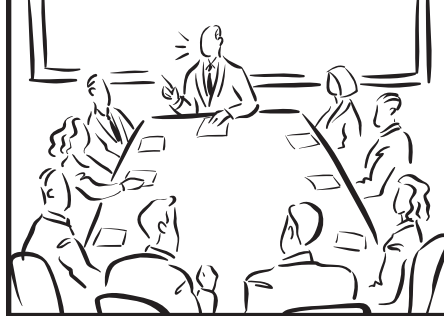
RESOLUTIONS COMMITTEE

*Co-Chairs: Matthew S. Tidball
and Chad G. Spenser*

Every Fall and Spring the Young

What We Do, And How to Join Us

Get Connected with the Committees of the Young Lawyers Section



Lawyers Section holds an "Open Meeting" open to all members of the bar. The Resolutions Committee is planning the Spring 2008 Open Meeting for March 20, 2008 in Annapolis. The topic will be the recent statute that went into effect on October 1, 2007 concerning first-party insurance "lack of good faith." Speakers and location are TBD, but light food/appetizers will be provided.

PUBLIC SERVICE COMMITTEE

*Co-Chairs: Thomas M. Weschler
and Joseph Howard*

Two of the main goals of the Young Lawyer Section are to create awareness of the MSBA and to represent the MSBA in the Maryland Community. The Public Service Committee of the Young Lawyer Section furthered these goals in early 2008 by raising money for the Special Olympics of Maryland through participation in The Polar Bear Plunge. "The Plunge", as it is sometimes referred to, is an annual event held in January, at Sandy Point State Park, which brings together the Maryland community in support of a worthy local cause while offering participants the opportunity to jump in the icy cold waters of the Chesapeake Bay! This is the second year the YLS has been involved in The Plunge

and with everyone's help we look forward to making this one of our annual events. Each year we hope to enlist more brave "Plungers" and raise more money for the Maryland Special Olympics.

The Polar Bear Plunge is an exciting event where the whole family can come out to support this great cause. There was music, food and drinks, even pig racing, and, of course, swimsuit-clad young lawyers taking a wintry dip in the Chesapeake. All the participants, from those who plunged just a toe to those who plunged from head to toe, had a great time and didn't mind getting a little chilly for charity. The YLS wishes to thank all of our friends and family who supported us at this event and we hope many of you will take the plunge with us next year.

To continue fostering the Young Lawyer Section goals during 2008 the Public Service committee will be organizing a blood drive, a book drive for local elementary schools, and other worthwhile events. Please look to the YLS calendar where more information will be made public as it becomes available so that you may be a part of these upcoming events.

DIVERSITY COMMITTEE

Chair: Arielle Harry-Bess

The Diversity Committee joined with the Alliance of Black Women Attorneys to co-sponsor a program titled "How To Make Your Net Work: Finding the Time and Passion to Build Power and Financial Wealth Inside and Outside Your Organization." The program was held on January 29, 2008 in Baltimore City to a large roomful of attorneys and provided tips on developing and maximizing one's networking skills to achieve one's goals. The speaker for the event was Janice P. Brown, Esq., the founder of Brown Law Group, a seven-lawyer law firm focused on business and employment litigation. ♦

Organizing Your Pretrial Binders

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ny/records relating to a certain element, then you know on which area you need to work during litigation to get them done in a timely fashion.

In the “client” folder, keep notes from your conversations with the client and your thoughts on areas to work on with the client. How will your clients need to change their demeanor to make them more presentable than they were at the deposition? These notes, which should be compiled immediately after the deposition, will help refresh your memory in the long interval between the time of their deposition and the day they are scheduled to testify in court. This folder keeps that information within one easily-accessible file, and allows for quicker recollection.

In the “hot correspondence” folder, place correspondence on important issues, which may include additional insurance coverage information, names of additional witnesses, or letters to attach as exhibits to motions, for example. This folder should contain copies of those representations made by counsel, particularly as to matters of proof. You can include not only letters written to you by opposing counsel, but those letters confirming correspondence you sent to counsel to memorialize representations they may have made to you orally.

In the “opening” and “closing” folders, place notes on areas that you want to address in opening and/or closing. Maybe those notes refer to a phrase that a witness used in deposition, or a theme that arose during the deposition of the defendant.

The next redwell or binder should contain the following information: (1) Plaintiff’s discovery responses (answers to interrogatories and responses to

request for production of documents); (2) Defendant’s discovery responses (answers to interrogatories and responses to request for production of documents); (3) Plaintiff’s expert witnesses; (4) Defendant’s expert witnesses; (5) requests for admissions; (6) articles; (7) important case law; and (8) corporate designee issues.

The first two folders are relatively self-explanatory. Maintaining these folders permits you to focus on those questions that were not properly answered and to make sure you follow up for clarification and proper responses. Some counsel object to much discovery knowing that many lawyers are too busy to file motions to compel. Having this section will help you identify delinquent answers and serve as a reminder to press hard against improper discovery responses. This information is also important for identifying new areas of inquiry that have arisen during the litigation so that you can propound additional discovery questions or supplement your client’s answers.

In the “plaintiff’s expert witness” and “defendant’s expert witness” folders, you should include the name and specialty of the experts, along with your notes of conversations with them. These folders should be broken down by individual expert so that notes of conversations, opinions, designations, etc., can be placed into the appropriate one. Also, if there are dates when your expert cannot testify, those dates need to be noted to facilitate appropriate trial scheduling.

In the “requests for admissions” folder, place areas and questions, as they arise during the litigation, that you may want to submit as formal requests for admissions. Make sure you follow the rules on these as to timing and response time.

In the “articles” and “case law” folders, place medical articles and important case law for your easy reference. Having these materials easily accessible also serves as a reminder of the “hot” issues in the case.

In the “corporate designee” folder, keep notes as to those items that require a response from a corporate representative. For example, those matters that require the identification of policies and procedures, electronic data storage, organizational structure, or the whereabouts of missing records, are often good topics for 30(B)(6) depositions. A section of your discovery binder dedicated to those issues will help you separate ordinary discovery from that which requires an admission or answer from a corporate official.

In the end, the form of the information placed in these folders/binders—scrap paper, airplane napkin, post-it note, back of a receipt, torn piece of paper—does not matter. All that matters is that it is in the correct folder or binder section. Once you get to the trial-preparation time period, the information in these folders serves as an automatic reminder, and as the framework for creation of your actual trial binders. Further, periodically reviewing these folders allows you to keep organized, enabling you to represent your client most effectively.

Christian C. Mester is a partner in the Silver Spring-based law firm of Goldberg, Finnegan & Mester, LLC. His practice consists exclusively of representing victims of medical negligence. He is a graduate of Brown University (B.A. Political Science) and the University of Baltimore School of Law (J.D. cum laude).

Business Insurance in the Age of E-Commerce

By Meredith Blake Martin, Esquire

Does your company use the Internet during the course of your business operations? Do you accept orders or emails from your website, or emails through your company's website? Do your employees use email to communicate internally or externally? Does your company provide IT services? If you answered "yes" to any of these questions, you are at risk for a computer virus which may destroy business data and/or equipment, such as PCs, hard drives, and disk drives. If your business involves providing computer programming or other IT services to customers, you are at risk for infecting customers with a computer virus and may, consequently, become liable for their loss of data and/or equipment. Importantly, you may not be insured for this risk under either a first party or third party business insurance policy.

In 2001, the Insurance Services Office, Inc. ("ISO") changed the language of the standard form commercial general liability policy to expressly exclude electronic data from "property damage" coverage. The majority of business liability insurance policies currently being written, therefore, either expressly exclude losses of electronic data, or deny coverage for losses caused by a computer virus on the basis of a narrow definition of "physical loss or damage" or "property damage." In other words, a general business insurance policy likely will not

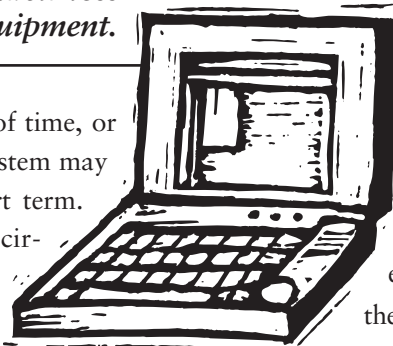
cover losses caused by malicious code unless hardware, or physical computer components, is damaged in addition to data corruption. This type of physical damage may be difficult to prove, and courts have generally been unwilling to extend coverage on this basis, as the distinction between data corruption and physical damage to computer equipment appears to be an illusory one. The bottom line: most insurers never intend to cover computer virus loss under property insurance policies, and will routinely deny coverage for this type of claim.

At first blush, a computer virus may appear to be a minor inconvenience. Your website may become

If your business involves providing computer programming or other IT services to customers, you are at risk for infecting customers with a computer virus and may, consequently, become liable for their loss of data and/or equipment.

inoperable for a period of time, or your company's email system may not function in the short term. Consider, however, a circumstance in which the computer virus renders numerous PCs or other hardware components inoperable; repair can easily cost hundreds of thousands of dollars. Consider loss of income, costs to repair and restore damaged systems, public relations costs (particularly if you are an IT company), loss of information or data not properly stored, and stolen or corrupted data due to unauthorized access. Specific claims have included the following:

- An employee dials into the company network remotely, introducing a virus into the company's network, which virus was ultimately transmitted to software being installed on products sold by the company; by the time the virus was discovered, the insured had to shut down the assembly line, remediate the problem, and address the infected products at a total loss of approximately \$15 million.
- A hacker steals and publishes customer credit card information from an online retailer, causing approximately \$2 million in loss of income and third party damages.
- A hacker overwhelms websites with seemingly legitimate requests for data, causing loss of income of approximately \$1 million.
- A disgruntled employee downloads malicious code onto firm's network, publishing confidential client information and destroying applications.
- A third party seeks damages from the developer of an application for an error or omission in the code which causes third party to sustain losses.



While virtually all businesses have some exposure to this type of loss by virtue of simple use of the Internet and/or email during the normal course of business operations, the companies most at risk are those which transact business online or provide computer-related services.

Insurance coverage issues aside, every business should have certain pre-

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3RD CIRCUIT

Baltimore County

*Wendy Sare,
Circuit Representative*

December 2007's "Young Lawyers Committee & Circuit Court Law Library Party 13th Annual Open House to Benefit Literacy" went off without a hitch. This year's party brought in a record number of books (310 to be exact) and \$1,003.00 in cash donations. Dave Luby, our chairperson, made sure that there was plentiful food and refreshments.

The Annual Bull & Oyster Roast was on Sunday, March 2, 2008 from 1:00–5:00 p.m. at the Towson American Legion. A good time was had by all at this wonderfully popular event that is held each year. Now that we have the Bull Roast under our belts, we will be busy planning our first ever 5K, which we hope will be on October 18, 2008.

6TH CIRCUIT

Montgomery County

*Lade R. Akinbolaji,
Circuit Representative*

New Admittee Courthouse Tour & Reception

The Annual New Admittee Courthouse Tour & Reception was held on Tuesday, March 18, 2008. On that date we welcomed attorneys recently admitted to the Maryland State Bar and took them on a tour of the District and Circuit Courts in Montgomery County. Following the tour, new admittees were invited to a free reception in the Circuit Court atrium.

Friend Raiser

Save the date for the Spring "Friendraiser" (a.k.a. Happy Hour!) which will be on Thursday, April 24, 2008 at 5:30 p.m. in Bethesda, Maryland—exact location to be determined. Please see Montgomery County's future newsletters for more information.

Chamber Chats

The Chamber Chats are an opportunity for practitioners to have lunch with the judiciary. It is a brown bag lunch format. Participants are encouraged to bring their questions to the event. No topic is off limits. The January Chat was hosted by the Honorable Mary Beth McCormick on January 23, 2008. The February chat was hosted by the Honorable Marielsa Bernard on February 21, 2008 at 12:30 in her chambers located on the 7th Floor of the Circuit Court. Another Chamber Chat was held in March. For future Chamber Chats, please remember to bring your lunch, your colleagues and your questions for our judges. Contact Ms. Harms at

(301) 838-3230 or mharms@steinsperling.com for more information.

Mentor/Mentee Committee

The Bar Association of Montgomery County has a Mentor Program for New Practitioners. The mentoring program purpose is to foster professionalism and improve the practice of law in Montgomery County by having experienced practitioners known for their high degree of professionalism and commitment to excellence impart their knowledge to new practitioners. We are looking for mentors in all practice areas and she would appreciate your time and assistance in volunteering to be mentors. The committee is still hard at work pairing newly admitted attorneys with mentors. If you are willing to serve as mentor for 2007 -2008 bar year please contact Heather Collier at 301-340-9090 or hcollier@draggacallahan.com.

7TH CIRCUIT

Prince George's County

*LaKeecia Allen,
Circuit Representative*

J. Franklyn Bourne

In observance of Black History Month, the J. Franklyn Bourne Bar Association held its seventh Annual Bi-County Oratorical Contest on Saturday, February 23, 2008. The topic for this year's contest was "Who Should the Next U.S. President Be and Why?" Eleventh and Twelfth grade students in Prince George's and Montgomery Counties presented their orations on this topic and competed for \$1,750 in college scholarships and other prizes donated by various sponsors.

The contest was held on Saturday, February 23, 2008 from 10:00 am to

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1:00 pm in the Prince George's County Administration Building, 14741 Governor Oden Bowie Drive, Upper Marlboro, Maryland 20772. The event was free to the public.

Judicial Appointments

Congratulations to the Honorable Peter B. Krauser on his appointment by Governor O'Malley as Chief Judge, Court of Special Appeals. Judge Krauser was first appointed to the Court of Special Appeals in January, 2000.

Congratulations to

The Honorable Beverly J. Woodard on her appointment by Governor O'Malley as Associate Judge, Circuit Court for Prince George's County. Judge Woodard was most recently an Associate Judge, District Court of Maryland for Prince George's County.

The Honorable Crystal D. Mittelstaedt on her appointment by Governor O'Malley as Associate Judge, Circuit Court for Prince George's County. Judge Mittelstaedt was most recently as Associate Judge, District Court of Maryland for Prince George's County and prior to that she was an Associate County Attorney in the Office of the County Attorney for Prince George's County, Maryland. ♦



*The 17th Annual MSBA Charity Event presented
by the Young Lawyers Section*

MARDI GRAS FOR MENTORING

*On Behalf of the
Maryland Mentoring Partnership*

**We would like to thank our Sponsors and Donors
For making this event a success!
We could not have done it without you!**

Look for a full recap in the next issue of *The Advocate*
And check out the photos online at
www.msba.org/sec_comm/sections/yls

Business Insurance in the Age of E-Commerce

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cautions in place, including installation of anti-virus software, firewalls and intrusion detection software, and implementation of security policies. Companies should also consider allocating this type of risk by contract, as appropriate.

In assessing how to insure your company's e-business risk, there are several choices: self-insurance; a general business liability insurance policy (possibly with an endorsement covering electronic data losses); and/or a stand-alone e-business or cyber liability policy (which may provide the added benefit of an insurer's duty to defend). Consider carefully which of your company's operations depends on computer programs, the

volume and importance of the company's transactions via the Internet, what company data is stored electronically, and whether the business involves providing software or related services to customers. Be sure to understand the scope of coverage and exclusions afforded by your current business policy, and consider the availability of stand-alone policies to address your specific e-commerce insurance needs. An ounce of prevention now is worth a pound of cure; the frequency and severity of this type of claim only continues to increase with the growth of electronic commerce and communication. ♦

Meredith Blake Martin, Esq. is an attorney with the law firm Astrachan Gunst & Thomas, P.C. Her practice focuses on representing small businesses and their owners in a variety of corporate and estate planning/business succession matters.

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