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New Jersey Defense

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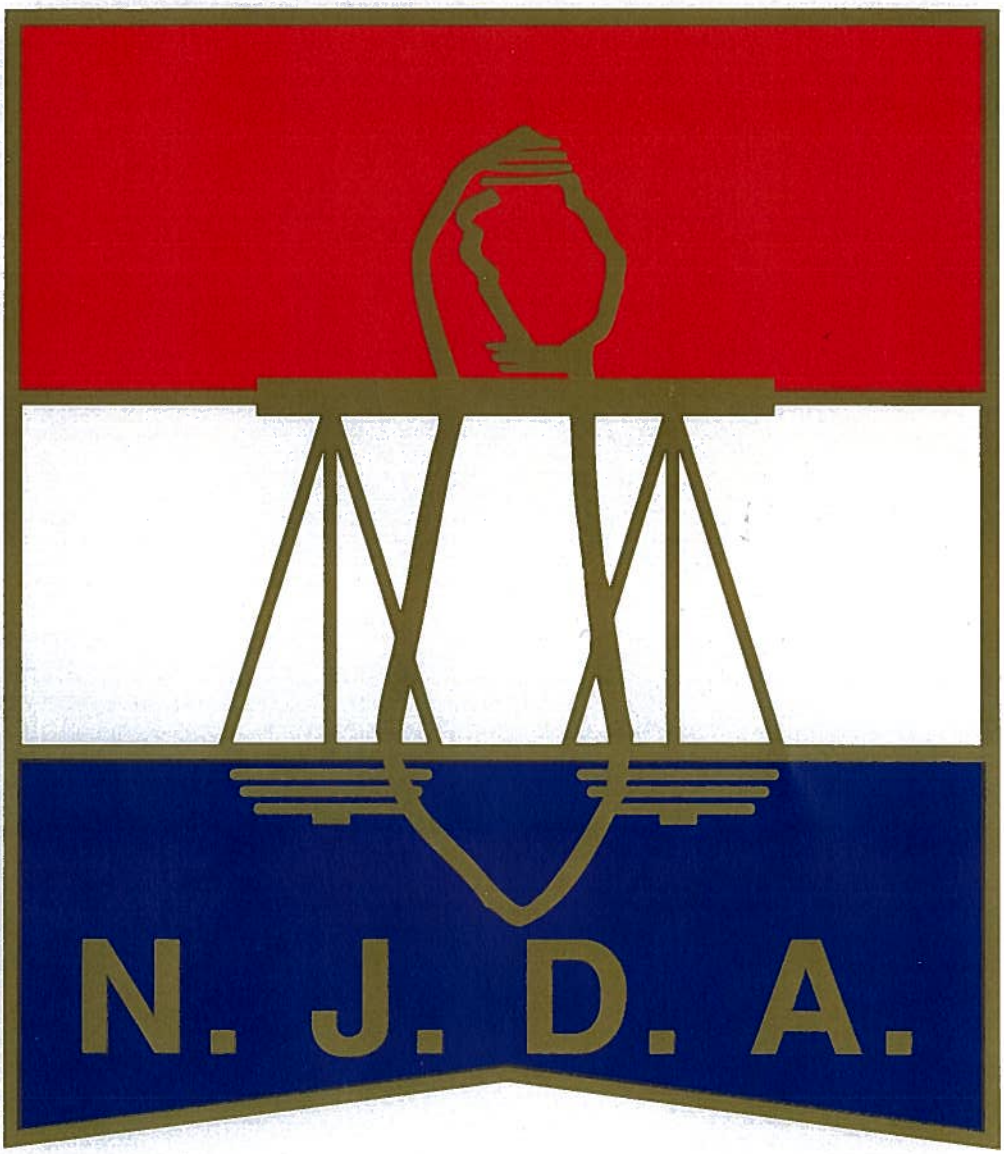

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PRESIDENT'S MESSAGE

Kevin J. DeCoursey, Esq.

As President of the New Jersey Defense Association for the 2008/2009 term, I gladly accept the challenges that we will face in the upcoming year.

I use the term "we" for a specific reason. I will need our members' help to ensure that our organization continues to grow and prosper in our changing legal times. Every organization has a leader. Organizations that are truly successful, however, gather their strength from their membership, not their President.

We, as members of the New Jersey Defense Bar, must ensure that our message is transmitted effectively to our clients and to the legal community in general. I pledge as President of our organization to continue our sponsorship of seminars in order to achieve this goal. In addition, we must continue to provide effective and quality legal educational opportunities to our membership. We are scheduled for our traditional Thanksgiving seminar on November 25, 2008. Our topic will be effective use of medical testimony at trial

Once again we will be hosting our annual Trial College, which will take place in February 2009 at the Union County Court House. The College allows aspiring Trial Attorneys to obtain tips on trial tactics from experienced Trial Attorneys in a Courtroom setting. All teaching instructors are Certified Civil Trial Attorneys. The Trial College is run by our distinguished past President and highly experienced Civil Trial Attorney, Ms. Marie Carey. In the spring, we are planning our annual Insurance Seminar given by Mr. Gerard Hanson.

On a somber note, we as members of the New Jersey Defense Association extend our sympathies to the family of Keith Jones and the Hill Wallack family. Keith passed away in June. Keith was a great attorney, a regular speaker at our annual Convention and an avid supporter of the New Jersey Defense Association. We will miss him greatly.

One of my goals for the upcoming year is to increase the frequency of our New Jersey Defense Association Publication. Our magazine is a tremendous opportunity for our members to submit articles for publication in an area of the Law in which they specialize. Our first issue will be coming out in the Fall. I have discussed changes in our publication with our current editor, Stephen Foley. One of the changes will add a co-editor for each publication. With that in mind, I am pleased that Michael Leegan, Past President and current Chairman of the Board, has agreed to help Mr. Foley with the Fall publication. I encourage any member wishing to submit an article to contact either Steve or Mike directly or through our Executive Director, Ms. Maryanne Steedle. Keeping in mind the theme of greater communication with our members, I am initiating a monthly President's update that will be available on our website.

I wish to thank Michael Leegan for an outstanding Presidency, which culminated in a successful convention in Cooperstown, New York in June 2008. Further, additional thanks must be extended to our Convention speakers, which included Ms. Joanne Vos; Ms. Natalie S. Watson; Mr. Mark A. Soloman; Mr. Brian J. Chabarek; Ms. Michelle Hou; Mr. Gregory F. McGroarty; Mr. Joseph M. Aronds; Ms. Michele Haas and last but not least Past President Mr. Stephen J. Foley, Jr. Additional thanks go to our sponsors who helped make the Convention a success and to our Executive Director Ms. Maryanne Steedle whose work behind the scenes at each Convention ensures success.

I look forward to a challenging year. With your help I know it will be a successful year. I am always available, so do not be a stranger, get involved and please give me a call.

Finally, I encourage our members to attend our 2009 Convention, which will be returning after a 9-year absence to the Hotel Hershey, Hershey, PA. I look forward to seeing you.

Kevin J. DeCoursey

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HAPPY RECAP OF 42nd ANNUAL CONVENTION

Michael J. Leegan, Esq., Chairman of the Board

Our 42nd Annual Convention was held in Cooperstown, New York from June 26 through 29, 2008. The setting could not have been more perfect with the beautiful landscape of the historic Otesaga Resort Hotel on Lake Otsego and of course, the quaintness of Cooperstown itself. The town is right out of a Norman Rockwell painting of Main Street USA, with the centerpiece being the Baseball Hall of Fame.

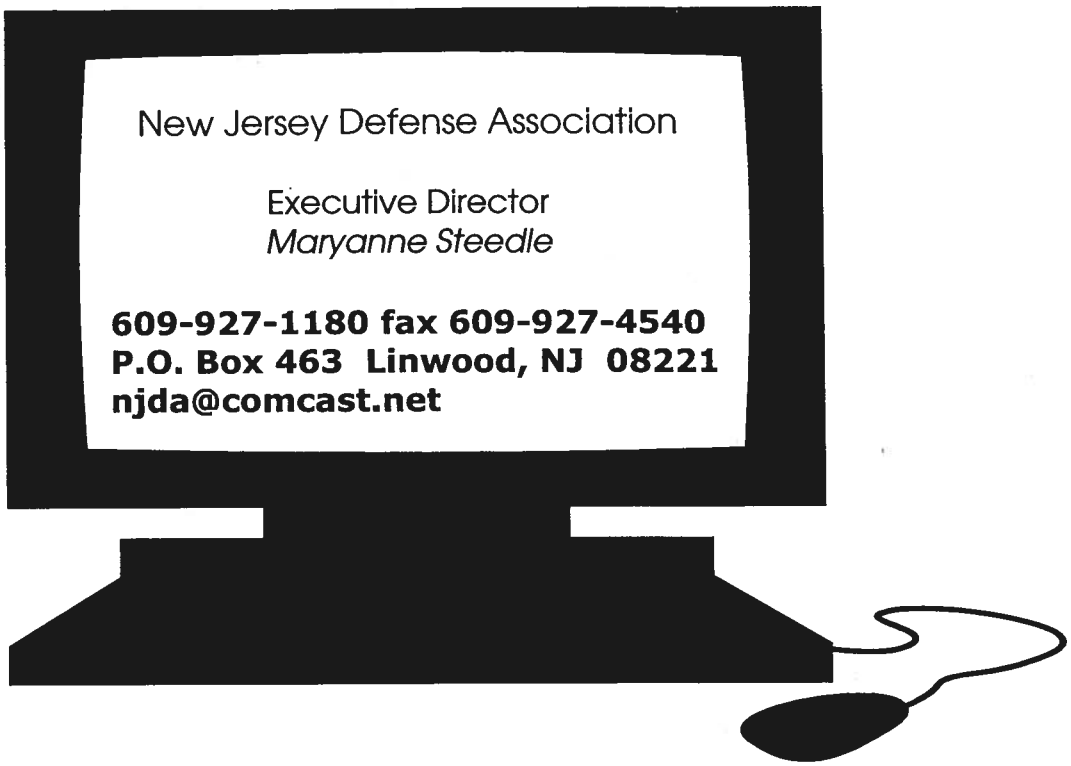
The Convention afforded members an opportunity to better themselves intellectually through our legal seminars, build upon existing friendships and form new ones at our social events, but most importantly, have an opportunity to take a deep breath and relax. Thanks to the professions we have chosen, we are too often deprived of leisure time with our family and friends. For this very reason, Cooperstown was chosen as the location for our Convention.

On Friday morning during our Business Meeting, the following members were approved for the slate of Officers and Directors 2008 – 2009: Chairman of the Board, Michael J. Leegan; President, Kevin J. DeCoursey; President-Elect, Joanne Vos; Secretary/Treasurer Joseph J. Garvey; Vice President/Northern Region, Michelle Hou; Vice President/Central Region, Michele Haas; Vice President/Southern Region Eleanore Rogalski; Director 2008-2009 Edward Fanning, Jr.; Directors 2008-2011 John M. Cinti and Gerald Strachan; and D.R.I. State Representative Natalie S. Watson.

Following our Business Meeting, the Young Lawyers Committee presented our legal program with the following speakers and topics: *Environmental Case Law Update* by Joanne Vos; *Social Networking: How to Use MySpace and Facebook to Undermine a Plaintiff's Claims* by Natalie S. Watson; *Annual New Jersey Employment Law Update* by Mark A. Saloman and Brian J. Chabarek; *Annual Insurance Coverage Law Update* by Michelle Hou; *Nuts and Bolts of Special Civil Division Practice* by Gregory F. McGroarty; and *The Intersection between Workers' Compensation and Liability Practice* by Michele Haas. Our legal program continued on Saturday morning with our *Annual Case Law Update* presented by Stephen J. Foley, Jr. and Joseph M. Aronds. The varied topics provided attendees with a current and comprehensive legal overview of the civil defense practice in New Jersey. Each presenter is to be commended for their excellent work.

On Saturday evening the President's Reception and Annual Banquet were held. The evening was overseen by Chairman of the Board Michael J. Leegan. Our new Officers and Directors were formally introduced to the membership and installed. Chairman Leegan thanked the membership, Officers and Directors for their support and dedication during his term as President. Chairman Leegan also formally passed the gavel to the N.J.D.A.'s current President, Kevin J. DeCoursey.

The 2008 NJDA Convention was a home-run. Please give every consideration to attending the 43d Annual Convention at The Hotel Hershey, June 25 – 28, 2009. You will not regret it.



NJDA SUBSTANTIVE COMMITTEE CHAIRS/VICE CHAIRS

Products Liability
Anne Patterson

Employment Law
Mark A. Saloman
Brian Chabarek

Workers Compensation
Steven Banks
Michele Haas

Automobile Liability
Jeffrey J. Czuba

Diversity
Natalie Watson

Employment Law
Mark A. Salomon
Brian J. Chabarek

Professional Liability
Herbert Kruttschnitt, III

ADR
Joseph Maddoloni, Jr.

Insurance Law
Gerald Strachan

Public Entity Law
Jeffrey L. Shanaberger
Nicholas F. Pellitta

Construction Law & Surety Law
Thomas M. Madden

Environmental Law
Joanne Vos
Jacob Grouser

THE APPELLATE DIVISION DENIES ATTEMPT BY PLAINTIFF'S BAR TO EXPAND THE ROVA FARMS DOCTRINE TO FIRST PARTY CLAIMS BUT LEAVES THE DOOR OPEN TO FIRST PARTY BAD FAITH CLAIMS

Jeffrey Czuba, Esq.

In two recent decisions, Taddei v. State Farm Indemnity Co., 2008 N.J. Super. Lexis 141, A-3806-06T2 and Accisano v. Allstate Insurance Company, A-0156-06T2, the Appellate Division rejected Plaintiff's attempts to expand the Rova Farms doctrine. In both cases, the Appellate Division affirmed the trial court's ruling that molded excess verdicts to the respective UM/UIM policy limits. The Court, however, did not foreclose the pursuit of future first party bad faith claims.

In Taddei, the plaintiff was injured in a motor vehicle accident allegedly caused by a phantom driver. Plaintiff was insured by State Farm with uninsured motorist coverage of $100,000 per person and $300,000 per accident. Independent medical examination revealed that Plaintiff's injuries were related to the accident, but State Farm contended that Plaintiff was at fault for the accident. Plaintiff demanded UM arbitration and a panel of three arbitrators found the unknown driver to be 100% at fault and awarded the plaintiff $92,500 for his injuries. State Farm rejected the arbitrators' decision and voluntarily paid Plaintiff $50,000. State Farm further advised plaintiff that if he wanted to pursue the matter further he would need to file a Superior Court action.

Plaintiff filed the Complaint seeking compensatory damages for his injuries and his wife's loss of consortium. Plaintiff did not include a bad faith count in his Complaint. Mandatory non-binding arbitration resulted in a decision that found the unknown driver to be 100% at fault and awarded Plaintiff $87,500. State Farm once again rejected the award and demanded a trial de novo.

The case proceeded to trial in January 2007. Prior to trial Plaintiff expressed a willingness to settle for $87,500. State Farm offered $25,000 in addition to the $50,000 already paid for a total of $75,000. In pretrial motions, Plaintiff's attorney mentioned that he had a potential bad faith claim. At trial, a jury awarded Plaintiff $2,500,000 and $100,000 to his wife on her *per quod* claim. State Farm's counsel requested the judge mold the verdict to reflect the coverage limits and enter judgment for $100,000. Counsel for the Plaintiff objected and submitted a proposed form of judgment with awards of $2,500,000 for Plaintiff and $100,000 for his wife, plus prejudgment interest on the full amount. Counsel again reiterated his belief that State Farm was acting in bad faith. The trial judge signed the order for judgment submitted by State Farm, thus molding the verdict to reflect the limits of the State Farm policy. The trial judge also stated the Court did not intend to form an opinion on the bad faith claim because the issue had not been squarely presented to the Court. Plaintiff appealed, arguing that because State Farm acted in bad faith by delaying resolution of the UM claim and refusing to pay the full policy limits to settle, it should be liable for the full $2,600,000 awarded by the jury.

In the companion Accisano case, plaintiff was injured in a motor vehicle accident and pursuant to Longworth v. Van Houton, 223 N.J. Super.

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APPELLATE DIVISION

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174 (App. Div. 1988) settled her claim with the tortfeasor for the full $15,000 policy limits. Plaintiff then pursued a claim for underinsured motorist benefits (UIM) against her insurance carrier, Allstate. Plaintiff had $100,000 in UIM coverage. After efforts to settle the UIM claim were unsuccessful, Plaintiff filed suit against Allstate. The complaint did not contain and never was amended to include any allegations of bad faith, nor did it seek damages caused by any bad faith.

Prior to trial, Plaintiff offered to settle the claim for $50,000. Allstate rejected the demand. No offer of judgment was filed with the court. Although acknowledged by a physician retained by Allstate, plaintiff's injuries were described as stable. At trial, a jury awarded damages in the amount of $250,000. The judge molded the verdict to conform to the remaining UIM coverage limits of $85,000.

Plaintiff appealed arguing the trial court erred in executing a conformed order which did not reflect the jury's verdict; that New Jersey insurance law requires a carrier to make a good faith effort to resolve first party benefit claims for which an intentional policy of failing to do so should carry a policy of exposure similar to that imposed upon carriers in 3rd party actions; and Pre-judgment interest should have been included in the order of judgment.

In Taddei, Plaintiff asked the court to create a cause of action providing a remedy in the UM context similar to that provided on third-party claims in Rova Farms Resort v. Investors Insurance Co. of America, 65 N.J. 474 (1974). The Court, however, reasoned that the Rova Farms model did not apply in the first party coverage context. The Court explained that the remedy in Rova Farms was based on a unique fiduciary relationship that arose out of a general liability insurance policy. The policy prohibited the insured from participating in settlement of the third party claim against it. This gave rise to a fiduciary duty on the part of the insurer to act in good faith in settling the claim. The court reasoned that, because the insured was personally liable for any damages in excess of the policy coverage, the insurer should not be permitted to gamble with the insured's money. The Court in Taddei held that the Rova Farms rationale did not carry over to a first party claim, because the insured's assets are not placed at risk for failure to settle within the policy limits.

Plaintiff also relied upon the holding of Pickett v. Lloyd, 131 N.J. 457, (1992) which allowed a first party claim against a carrier for breaching the policy's implied covenant of good faith and fair dealing. Plaintiff argued that the jury's excess verdict established bad faith or at least a prima facie case of bad faith. In rejecting Plaintiff's arguments, the Taddei Court noted that Pickett was a "property damage claim, the amount of which was susceptible of objective determination." Id. at 18. By contrast, the Taddei UM claim dealt with "an unliquidated bodily injury claim, which, by its nature, is subjective" and for which "the sustainable amount of potential recovery for such a claim typically covers a broad range." Id. at 18. In addition, the Appellate Division in Taddei pointed out that Pickett adopted a "fairly debatable" standard to establish bad faith, which would require that a "claimant who could not have established as a matter of law a right to summary judgment on the substantive claim would not be entitled to assert a claim for an insurer's bad-faith refusal to pay the claim." *Ibid.* Furthermore, the Taddei Court explained that the recoverable damages in Pickett were limited to consequential economic losses that were fairly within the contemplation of the insurer. Ultimately, the appellate division in Taddei, agreed with Plaintiff that Pickett stood for the proposition that he has a right to assert a claim against his UM carrier for bad faith. The measure of damages, if bad faith was proven, however, would be limited to foreseeable consequential damages, which might include, costs of litigation including expert expenses, counsel fees and prejudgment interest. The court stated that such damages are not measured by the amount of damages determined by the jury for Plaintiff's injuries. Thus, the Court affirmed the trial court's ruling that molded the excess verdict to the UM/UIM policy limits.

In addressing the trial court's deferral of ruling on the bad faith claim the Appellate Division

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pointed out that bad faith was never pled, and plaintiff never moved to amend his pleadings to include such a claim. The pleadings never requested consequential damages resulting from any alleged bad faith. Thus, the Appellate Division found the trial judge did not err in declining to rule upon plaintiff's belated bad faith assertions.

In sum, the Taddei court refused to expand the Rova Farms doctrine to first party claims in order to create a cause of action in the UM/UIM context as sought by the Plaintiff's bar. The Court, however, did not foreclose the possibility that an insured can bring a bad faith claim in a first party action if the insured is able to meet the "fairly debatable" standard of Pickett, which effectively requires that a Plaintiff establish as a matter of law a right to summary judgment on the substantive claim. Nevertheless, in such an action, the measure of damages, if bad faith was proven, would be limited to foreseeable consequential damages, which might include costs of litigation by way of expert expenses, counsel fees and prejudgment interest and not the amount of damages determined by the jury for Plaintiff's injuries.

ENVIRONMENTAL LAW COMMITTEE FORMED

The New Jersey Defense Association is pleased to announce the new Environmental Law Committee. This committee was created in response to the needs of the New Jersey defense bar and the ever-expanding practice areas of our members. Environmental laws, rules, and regulations are subject to a wide breadth of interpretation and as such, it is playing a significant role in the ways in which we, as defense counsel, represent our clients, now more than ever. Whether you represent a homeowner, a carrier, a real estate developer, environmental professional, or a small business owner, you now need to have a working knowledge of New Jersey's environmental rules and regulations to adequately protect your client's interests. The NJDA Environmental Law Committee is looking for a few good men and women to identify the pertinent issues, educate the membership, and participate in amicus considerations when appropriate. If you are interested in becoming a member of the committee or obtaining information about the committee, please contact the Chair, Joanne Vos of Greenbaum, Rowe, Smith & Davis in Woodbridge.

YOUNG LAWYER'S COMMITTEE

Gregory McGroarty, Esq.

As chair of the Young Lawyers Committee, I am looking forward to an exciting year, which is already off to a great start. Before I discuss the events and goals of the Young Lawyers, I must thank last year's Chair, Michelle Hou, who provided outstanding leadership and prepared me for my year as Chair. In addition, I am looking forward to working with my Vice-Chair Jessie Basner.

On June 17, 2008, the Young Lawyers organized the 2008 Summer Associate Luncheon at the Grasshopper in Morristown. Over twenty-two participants attended from various firms in the area. I would like to take a moment to thank Michael Leegan and Kevin DeCoursey for taking time out of their busy schedules to educate the participants to the benefits of NJDA membership.

Ms. Joanne Vos, Ms. Natalie S. Watson, Mr. Mark A. Soloman, Mr. Brian J. Chabarek, Ms. Michelle Hou, Ms. Michele Haas and myself all spoke at the NJDA convention this year in Cooperstown. Through out the years the young lawyers have been speakers at the annual convention, and we will continue that tradition at this year's convention in Hershey.

Our next project is to host this year's NJDA Holiday Party. Jessie Basner and myself are in the process of selecting a date and charity for this years party. In the near future you will receive an email with the date and charity for this year's Holiday party. I look forward to seeing you all at this event.

Please feel free to contact me at gmcgroarty@lcbf.com for all inquiries in participating with the Young Lawyers.

PENDING WORKERS' COMPENSATION LEGISLATION

There are currently six (6) Workers' Compensation reform Bills that were passed by the Legislature and are currently waiting for Governor Corzine's signature. These Bills were introduced in response to a series of Star-Ledger articles regarding New Jersey's Workers' Compensation system to The Bills include:

1. S1913: Increases the authority of Workers' Compensation Judges in imposing penalities on any party, including interest and fines not exceeding $5,000.00 for failure to comply with a Court's order or regulations.

2. S-1914: Provides stronger sanctions against employers for failure to provide and maintain workers' compensation coverage.

3. S-1915: Requires proof of workers' compensation coverage when filing required annual reports of employers.

4. S-1916: In a case of "emergent" medical care, a hearing shall be held five (5) days after the filing of the Motion for medical treatment. Moreover, all carriers and self-insured employers will be required to designate a contact person to the Division responsible for responding to the Motion.

5. S-1917: Clarifies membership in the Compensation Rating & Inspection Bureau (CRIB) and clarifies its authority.

6. S-1918: Dealing with the prosecution of fraudulent workers' compensation cases requiring the Insurance Fraud Prosecutor to establish a liason with the Department of Labor and Workforce Development and authorizes its investigation of cases of failure to provide workers' compensation coverage and other issues.

The Workers' Compensation Committee of NJDA presented a seminar on September 25, 2008 for its members discussing these Bills with specials guests from the Workers' Compensation Committee from the New Jersey State Bar Association. Dr. Kenneth Peacock of Qualmed Evaluations, L.L.C. also presented on Motions for Medical Treatment from a doctor's perspective and an update on occupational exposure hand claims.

New Jersey Defense Wants You!

New Jersey Defense is the now quarterly publication of the New Jersey Defense Association. It is distributed to each of the association's seven-hundred-fifty members as well as to all Judges of New Jersey's State and Federal Courts. The Editorial Board welcomes the submission for publication of articles and news items of interest to the civil trial bar.

For information on publishing schedules, contact Editor-In-Chief Steve Foley at (732) 775-6520 or through his electronic caretaker rschick@campbellfoley.com

NJDA CONVENTION HIGHLIGHTS

Chairman of the Board Michael Leegan presenting the gavel to incoming President Kevin DeCoursey

Michael Leegan receiving the NJDA Distinguished Service Award from Past President Linda Pissott Reig

Chairman of the Board Michael Leegan, President Kevin DeCoursey, President-Elect Joanne Vos, Secretary-Treasurer Joseph Garvey

DRI Representative Joseph Garvey presenting Michael Leegan with the DRI Outstanding Service Award

Past Presidents Brian O'Toole, Philip Lezenby, Jr., Marie Carey, Stephen Foley, Jr., Michael Leegan, Linda Pissott Reig, Roger Steedle

Kevin Couch, Kevin DeCoursey, Brian O'Toole

NJDA CONVENTION HIGHLIGHTS

Edward Fanning, Jr., Mary Fanning, Kim Leegan, Mike Leegan, Mary Madden, Tom Madden

Skip Roach, Marie Carey, Steve Foley, Betsy Kaplan

Loius Pintaro, Bob Ballou, Pete Van Dyke, Kathy Van Dyke, Suzanne Ballou, Eleanor Rogalski, Joe Garvey, Linda Garvey

Brian Chabarek, E.J. Kilpatrick, Joanne Vos, Mark Saloman, Laurie Saloman

Michelle Hou, Joe Aronds, Mary Aronds

1st Row – Brian O'Toole, Sunny O'Toole, Greg McGroarty, Debbie Della Rovere, Mike Della Rovere
2nd Row – Kevin DeCoursey, Kevin O'Leary, Katie O'Leary, Kevin Couch, Patti Couch, Charleen Conrad, Alan Conrad, Shannon Ferguson

N.J.R.E. 703: ROAD BLOCK TO BOOTSTRAPPING

Herbert Kruttschnitt, Esq.

Every trial lawyer is cognizant of the impact that medical testimony has upon a jury at trial, hence the routine engagement of the "battle of the experts." Physicians command a unique reverence and respect that is not afforded to any other profession, presumably because every juror has placed his life or the life of a loved one in the hands of a doctor at one time or another. A medical expert's opinions are an integral part of every trial in which he is utilized as a vehicle of persuasion. However, if a medical expert is not professionally qualified to arrive at a given opinion, he is likewise not qualified to testify to that opinion. He is only permitted to testify to his own opinions; he is not a conduit for the blanket introduction of opinions beyond his own specialty. The concept may appear simplistic in theory, but it is nonetheless routinely misunderstood by attorneys, judges and by the expert himself.

The advancement of modern medicine has contributed to an increase in specialization by physicians, the logical outcome of which should provoke trial courts to engage in impeccable scrutiny of qualifications prior to allowing medical opinions into evidence. Unfortunately this is seldom the case, and the consequence of such rulings can be very significant to the outcome of a trial.

The significance of the concept is particularly misunderstood in the context of "verbal threshold" cases. Pursuant to N.J.S.A. 39:6A-8, in order to overcome the verbal threshold at the time of trial, the plaintiff must prove a permanent injury and that permanent injury must be proven by credible objective evidence. First and foremost, however, that credible objective evidence must be admissible before the jury. Such evidence must be substantively admissible and it must be admissible to prove the truth of that assertion. Plaintiff (and Defendant as well) cannot reach the issue of admissibility if the witness is not professionally qualified during the voir dire process to proffer the testimony.

It goes without saying that not all evidence is admissible; but it also goes without saying that not all admissible evidence is admissible without reservation. Not all evidence is capable of proving the truth of the assertion. These are hornbook concepts which are frequently misapplied because the hearsay nature of medical expert opinions is often not appreciated.

The cornerstone of the argument begins with the case of Nowacki v. Community Medical Center, 279 NJ Super. 276 (App. Div. 1995). In that case, plaintiff suffered a fracture. Plaintiff's expert witness testified that it was a traumatic fracture. Defendant contended that it was a pathological fracture. The hospital records contained radiology reports referring to pathological fractures which plaintiff had sustained both before and after the incident in question. In that case, the defense argued that the hospital records (which contained those radiology reports) should have been admitted under the Business Records exception to the hearsay rules. The court, while allowing the records, did not allow the 'conclusions' of the radiologists regarding the "pathologic" nature of the fractures.

In the Nowacki case, the defense did not call a witness who had read the x-ray films and who had independently concluded that plaintiff had suffered a pathologic fracture. Defendant's expert intended to simply rely upon the reports of the radiologists who had read those films in the course of plaintiff's care and treatment. The court ruled that defendant's expert, who held no independent opinion regarding the x-ray films, could not testify to the opinions of the radiologists who had read them. The appellate division sustained.

The essential holding in Nowacki is that N.J.R.E. 703 does not permit one expert to "rely upon" the opinions of another expert unless the

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testifying expert is qualified to reach those opinions. In Nowacki, the court concluded that the pathologic nature of a fracture must be the independently held conclusion of an expert who is in court and available to be cross-examined as to that conclusion. The radiology reports could not serve as substantive proof of the pathologic nature of the fractures. They could be introduced as support for the testifying expert's own conclusions, but only to the extent that the testifying expert was qualified to, and in fact **had** independently arrived at those conclusions. It is mandatory that the trial lawyer of the verbal threshold case understand this distinction.

In order to prove "permanency", Plaintiff must introduce objective proof of permanency and it must be introduced by and through a witness who has reached that conclusion. The opinion cannot be introduced through a witness who is not qualified to make that conclusion, under the guise of relying upon the conclusion of someone who is not in court and not available for cross-examination. The ability to cross-examine that key conclusion is the pivotal distinction in the Nowacki analysis. Recent cases articulate this issue well.

In the case of Brun v. Cardoso, 390 NJ Super. 409 (App. Div. 2006) the court also held that a medical expert who is not qualified to arrive at a particular opinion cannot testify to that opinion by claiming that it is a Rule 703 "fact" typically relied upon by experts. A conclusion contained in the medical record must be confirmed by either that witness, or by one who is also qualified to arrive at that opinion. This is the issue that was squarely before the court in Brun.

In Brun, plaintiff was involved in a motor vehicle accident and received treatment by a chiropractor. In connection with that treatment, the chiropractor referred the plaintiff for an MRI. The radiologist who interpreted the MRI issued a report that found "a defuse disc bulge at L4-L5 with a small annular tear" and "a L5-S1 right paracentral herniation." The same chiropractor also referred the plaintiff to a neurologist, who performed an EMG and found evidence of left S1 nerve root irritation.

Pursuant to a motion in limine the trial court ruled that the chiropractor would not be permitted to testify to the findings of either the MRI or the EMG in order to establish that plaintiff had an objectively demonstrable permanent injury. The appellate court, citing Nowacki, held that the reports of the radiologist and the neurologist were not admissible through the testimony of the chiropractor. They were inadmissible because they represented the conclusions of medical witnesses who were not in court to be cross- examined, and because the chiropractor was not qualified to have reached those conclusions.

The Brun court held that the chiropractor could not testify as to the reports even though they contained findings customarily relied upon in providing chiropractic care. One must appreciate the distinction between NJRE 703 and "objective proof of permanent injury" in order to understand the Brun decision.

N.J.R.E. 703 permits a medical expert to rely not only upon facts in evidence at trial but also "facts" which are contained in the medical records of non-testifying doctors. Under the guise of Rule 703, however, an expert may not introduce "opinions or conclusions" of non-testifying medical witnesses. Rule 703 is not a vehicle for the wholesale introduction of medical opinions or medical conclusions of non-testifying witnesses, simply because they may have been taken into consideration by a testifying expert in arriving at his own opinions.

Brun stands for the proposition that there is a key distinction between "a straight forward observation of a (non-testifying) treating physician" and the "medical opinion" of a doctor who was not in court to be cross-examined. "The ability of the opposing side to cross-examine the author of such a report must be assured." See: Brun at page 421 (citing Nowacki at page 282). As distinguished from "straightforward facts" contained in medical records, "medical opinions in hospital records should not be admitted." In Brun, the chiropractor was not permitted to testify that the radiologist had found a herniation or that the neurologist had found nerve

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BOOTSTRAPPING

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root irritation.

This issue was further defined by the court in Fortunato v. Villafane, (unpublished appellate division opinion, 2008). Plaintiff, in that case, also brought suit following a motor vehicle accident and also sought treatment by a chiropractor, who referred the plaintiff for a CAT scan and an EMG. At trial, the treating doctor was not permitted to testify "that the CAT scan showed bulging discs or that the EMG showed radiculopathy." On appeal, the court affirmed and "based that determination upon the distinction between an expert explaining the (factual) basis for his or her own opinion and an expert repeating the opinion of another expert to establish the facts asserted therein." See: Fortunato at page 2.

The court reasoned that if one expert were permitted to repeat the opinions of another expert, "defendant would be unable to cross examine" that expert's opinions. There is "a distinction between hearsay information offered for the limited purpose of explaining the basis for an expert's opinion and the use of the same hearsay as evidence of the facts asserted. ... Hearsay statements upon which an expert relies are admissible, not for the purpose of establishing the truth of their contents, but to apprise the jury of the basis of the opinion reached." See: Fortunato at page 3. Accordingly, "where an expert has relied upon hearsay that is presented to the jury to establish the foundation for the expert's opinion, the judge must advise the jury that it should not consider the hearsay statement as substantive evidence...but only as evidence tending to support the ultimate expert conclusion of the (testifying) witness." See: Fortunato at page 3.

"Reasoning that admission of an MRI report without calling the author as a witness would deprive defendants of the ability to cross-examine the central issue in that case, namely plaintiff's herniation, (the court) concluded that an MRI report authored by one who was not called as a witness was, on objection, inadmissible hearsay." See: Brun at page 422. "A witness *not qualified to interpret a CAT scan* who repeats the results reported by a qualified expert cannot be cross examined about those results." See: Fortunato at page 4. (emphasis added)

A similar situation was before the court in Agha v. Feiner (unpublished appellate division opinion, 2007). That court, citing Brun, provided further instructive language on the issue. In that case, plaintiff called a treating physician who specialized in pain management. On cross-examination, the expert agreed that he had not read the MRI films and "would defer to a neuroradiologist's reading of an MRI." This was after the expert had explained the difference between subjective and objective evidence of an injury, and agreed that an MRI and an EMG would represent objective evidence.

Plaintiffs also called a treating chiropractor who "testified that he relies upon reports such as MRIs and EMGs from other physicians to determine his appropriate course of treatment". The chiropractor also agreed on cross examination that he would "defer to a neuroradiologist's opinion of the films" and that "if a patient does not have a diagnosis of herniation, then there is no permanent injury to a disc." In Agha, the trial court permitted the introduction of the MRI and EMG. The appellate court reversed.

In reversing, the appellate court stated "that although the experts were allowed to base their opinions on the reports, they should not have been allowed to testify about whether the films showed a disc herniation, or, in other words, whether the films established the truth of the matter asserted." See: Agha at page 6. The court ruled that N.J.R.E. 703 may permit an expert to "base their opinion on facts or data that are not otherwise admissible in evidence, so long as the facts or data are of the type reasonably relied upon by experts in the field." That, however, does not "provide an independent basis for admitting otherwise inadmissible hearsay. Such evidence is not admissible substantively as establishing the truth of the statement." See: Agha at page 6.

"Medical records containing findings as to

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BOOTSTRAPPING

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complex procedures should not be admitted under the Business Records exception unless opposing counsel has the opportunity to cross examine the author of the report. An MRI is considered such a complex medical procedure; therefore it is not admissible under the Business Records exception or any other hearsay exception." "Interpretation of an MRI may be made only by a *physician qualified to read such films*, and the MRI report cannot be bootstrapped into evidence" under the guise of NJRE 703. See: Agha at page 6. (emphasis added). To the extent that the testifying expert's opinions of plaintiff's injuries would have been reliant on the conclusions of nontestifying experts (radiologists and neurologists), the opinions, said the appellate court, should not have been allowed.

Another recent appellate division decision, Holland v. Wagenblast (unpublished appellate division, 2008) provides additional guiding language. In dealing with a similar situation, the court held that "medical opinions in hospital records should not be admitted under the Business Records exception where the opponent will be deprived of an opportunity to cross examine the declarent on a critical issue such as the basis for the diagnosis or the cause of the condition in question." See: Holland at page 5 citing Nowacki at page 282. "Treatment records containing complex medical diagnoses must be redacted before the court would permit the jury to consider portions of the records that merely described plaintiff's complaints and symptoms." See: Holland at page 6.

The sum and substance of the above referenced appellate division decisions is that an expert who is not qualified to render an opinion is not permitted to testify to that opinion. Further, pursuant to Rule 703, if an expert does testify to an opinion which he is competent to render, he is not permitted to testify to the opinions of nontestifying witnesses, to bolster his opinion. This would still constitute the hearsay medical conclusions of non testifying medical witnesses. The testifying expert may be permitted to testify that certain records support his conclusions, but he is not permitted to testify to the conclusions that are contained in those records.

Moreover, when an expert chooses to rely upon facts which are not in evidence, but which are contained in medical records of the type typically relied upon by such experts, the court must not admit those facts in evidence as proof of the truth of those facts. Those facts, not in evidence but contained in records relied upon by the expert, must be admitted with a limiting instruction that they are not substantive proof of the matters asserted. And, if medical records are introduced, opinions contained within those medical records must be redacted.

Finally, in the matter of Cantello v. Wask (unpublished appellate division, 2007) the court discussed Rule 703 and plaintiff's argument that "it would be unjust to require a plaintiff to bring in every treating and diagnostic physician in order to meet his or her burden of proof." The court gave short shrift to the argument. The court held that the right of the defendant to cross-examine the author of an opinion, or at the very least an expert who is competent to render such an opinion, is paramount. The court held "a litigant need not produce every professional who has rendered treatment or done diagnostic testing. Our cases simply require a litigant who intends to rely upon a diagnosis that is complex to present a witness who is competent to render (that) opinion." See: Cantello at page 2. Said simply, an opinion must be "cross-examinable"; and for the opinion to be "cross-examinable" it must come from a witness who is competent to have arrived at that opinion, and who did, in fact, arrive at that opinion on his own.

Rule 703 does not permit a medical expert to introduce substantive proof of the truth of a fact, by testifying that it is contained in a medical record which he/she has relied upon. N.J.R.E. 703 does not anoint an expert as a conduit through which inadmissible hearsay be admitted into evidence at trial.

WHAT IS THE NEXT STEP AFTER OLKUSZ?

Jerald J. Howarth, Esq.

Keeping pace with the constant strides by our courts and legislature on the viability of step-down clauses for UM/UIM benefits in commercial and personal auto policies can be challenging. Following the steps of Aubrey, French, Magnifico, Macchi, Botti, Pinto, and N.J.S.A.17:28-1.1(f) is now Olkusz. After this latest ruling by the Appellate Division, one can only question whether the step-down litigation trail is finally at an end. Remarkably, it appears the legislation and/or litigation is far from complete, as several pitfalls and obstacles still lie ahead for insurers and claimants alike.

When Justice Pollock wrote about the viability of step-down clauses in 1995 in Aubrey v. Harleysville, 140 N.J. 397 (1995), he provided the high court's first validation of a step-down clause in an auto policy. A step-down clause permits a carrier to reduce limits of certain types of coverage based upon the status of the insured. In the context of UM/UIM coverage, such clauses permit carriers to reduce their first party benefits (coverage limits) to insureds other than "named insureds," under the policy. Such clauses, which permit the stepping down of first party coverage limits, are viewed as being consistent with the concept that an individual's personal choice, as expressed in their personal auto policy, should define the applicable UM/UIM coverage limits as opposed to the fortuity of the policy limits, applicable to the vehicle a claimant is occupying. The amount of UM/UIM coverage, therefore, is linked by the step-down to the person rather than the vehicle.

This notion was again embraced by our Supreme Court in French in 1997 and again in Magnifico in 1998. Then, despite this clear direction provided by our highest court and about four years of uneventful litigation, Macchi v. Conn. General, 354 N.J. Super. 64 (2002) provided the first detour in the enforceability of UM/UIM step-down clauses. There, based largely upon findings in the declarations page and notions of illusory coverage, the appellate division refused to enforce a step-down clause for determining UIM coverage limits. Not long thereafter, Botti v. CNA, 361 N.J. Super. 217 (2003) found essentially the same step-down clause to be enforceable and non-illusory for determining an employee's applicable UM coverage limits.

With the need to provide direction, given the apparent conflict in the appellate division, the New Jersey Supreme Court in 2005 decided Pinto v. NJM, 183 N.J. 405 (2005) and again reaffirmed the enforceability of step-down clauses in the UM/UIM context. Then, with the road ahead seemingly settled, the legislature in September of 2007 passed N.J.S.A.17:28-1.1(f). This amendment specifically precluded step-down clauses for UM/UIM benefits in commercial automobile policies, as opposed to personal policies. The legislative history clearly presented an intent to change the law as enunciated in Pinto. The amendment essentially transforms employees into named insureds for UM/UIM coverage under commercial auto policies. It provides employees heightened UM/UIM coverage limits commensurate with those provided to the named insured.

Yet, even with this September 2007 legislative decree regarding the unenforceability of commercial auto step-down clauses in place, the debate began to rage almost immediately on the prospective or retroactive application of this amendment. Despite a lack of unequivocal expression for retroactive application by the legislature, plaintiffs' attorneys spoke of retroactive application of this amendment in Lazarus type proportions.

On July 22, 2008, the appellate division decided Olkusz v. Federal Insurance Company. There, the appellate division held that the amendment precluding UM/UIM step-down clauses in commercial policies should be applied prospectively only. The court held that all accidents which predate N.J.S.A. 17:28-1.1(f) are to be governed by Pinto. Yet, the court was silent on whether the prospective application of the amendment was for all accidents occur-

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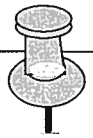
ring after the statute's effective date or whether the amendment is to be applied only to auto policies written or renewed after the amendment's September 12, 2007 effective date. While it would logically follow that the prospective application of the amendment would involve only policies written or renewed after Septemberÿ12, 2007, especially given this particular statutory scheme, it appears foreordained that this aspect of application of the amendment will be the next stop on the step-down litigation journey.

But, the journey will not end there. Given the drafting of this amendment and the anticipated requests for revisions of UM/UIM endorsements by commercial carriers to the New Jersey Commissioner of Insurance, the enforceability of step-down clauses will be litigated again and again. For example, future controversies almost certainly will arise when a commercial auto carrier with a newly adopted and approved UM/UIM endorsement limits "named insured" status to full-time employees or limits that status to employees operating their employer owned during regular working hours or limits coverage to those employees to accidents occurring within the scope of their employment. Despite a clear legislative intent and an equally unambiguous provision in the commercial auto policy's UM/UIM endorsement, claimants undoubtedly will maintain that the amendment creates "named insured" status on an around-the-clock basis for employees extending far beyond the workplace. Thus, plaintiffs will argue for "named insured" status and its heightened UM/UIM coverage under their employer's commercial auto policies for accidents which occur while walking to church on Sunday or returning to their parked car in the Giants Stadium parking lot. The legislative intent of the amendment supports continued enforcement of step-down clauses in those situations. The courts, however, will have their say.

The amendment will certainly spawn more litigation. Plaintiffs' attorneys' coverage attacks will not cease, and Olkusz will not be the last step in this long winding step-down journey.



Dates to remember …

Tuesday, November 25, 2008 9:00 am–1:00 pm
Educational Seminar at the Woodbridge Hilton
I. Utilizing Neuropsychological Test Data to Address Stress Disorder (including PTSD) and Mild Brain Injury Claims
II. Understanding Brain Injury Cases
III. Ethical Considerations of the Tripartite Relationship

Thursday, February 12, 2009
Trial College at the Union County Courthouse

IN MEMORIAM

By: Gerard Hanson, Esq.

The New Jersey Defense Association lost a valued member and a great friend when Keith Jones died this past summer at age 51, after a long battle with ampullary cancer. There is truth in the saying that the "good die young."

Born in Jersey City, Keith moved with his family to Keyport. As a result of his basketball prowess, as well as his other commitments to his high school, Keith was inducted into the Keyport High School Hall of Fame in 2000.

Keith graduated from the United States Military Academy at West Point in 1978, with a Bachelor of Science degree. He proceeded to dedicate 16 years of service to the United States Army, where he initially served as an officer with the Army Corps. of Engineers. Keith also served with the Seventh Special Forces Group and the First Special Operations Command. While in the Army, Keith attended and graduated from the University of Texas at Austin Law School. He thereafter served as a member of the Judge Advocate General's Corps. At the time Keith was honorably discharged from the United States Army in 1991, he served as Chief of Claims for the New York area command.

Keith entered private practice with Hill Wallack in 1991. Due to his skills as an attorney, he quickly became a partner with the firm. However, it was more than Keith's skills as an attorney handling difficult and complex product liability, construction defect claims, and insurance coverage matters that made Keith so valuable to the Bar. He was at all times the consummate professional. Keith was respected not only by the judiciary and the defense bar, but by his adversaries as well. Keith had a gift which will be missed by all.

As a productive member of the NJDA, Keith was well known for his intense preparation which resulted in articulate presentations of the "Case Law Update" at the annual convention. As with all other aspects of his life, Keith was always "giving" to the NJDA.

Keith's lifetime of giving stayed with him to the very end. Knowing that he had little time to live, Keith stayed with the practice of law. He worked with his colleagues, providing advice and counsel on behalf of his clients. Despite the obvious pain, he never complained. Keith was a lawyer's lawyer, and a man's man.

Keith leaves behind his wife Lisa and 12 year old son Andy. Donations may be made to the "Andrew Jones Educational Trust," and mailed to Lisa Jones, 5 Anthony Court, Bordentown, NJ 08505.

AN ATTORNEY'S BEST FRIEND

Brian O'Toole, Esq.

Many years ago when I first started to practice law, I appeared at a law office for a deposition and was greeted at the door by a friendly Bassett Hound whose name was Roscoe. Of course, I have no recollection of the name of the attorney owner, so obviously you can guess who made the biggest impression on me. The one impression that stayed with me, however, was how relaxed the atmosphere was at that deposition, all because of Roscoe. Since that time, I have come into contact with other K-9 paralegals and my reaction is always the same, dogs relieve tension and lighten everyone up. I guess it is not surprising that when O'Toole & Couch came into existence 20 years ago, we always had a position for a four-legged assistant.

After our Siberian Husky of almost 20 years, Tanya, died, our first hire was a black pooch of Poodle and Bichon Frise mix by the name of Perry Mason, who was obviously named after the greatest criminal trial lawyer who ever lived, courtesy of Earl Stanley Gardner. Perry was living at a shelter after having spent a couple of years on the street. Our son, Michael, called on a Sunday night just before Christmas to ask if we wanted to meet Perry. My wife, Sunny, wasn't home so I told Mike to call back Monday morning. Mike advised me that Perry had overstayed his allotted time and was scheduled to be executed at 8:00 a.m. Monday morning, unless a home had been obtained for him. Needless to say, I made the executive decision and Perry became a welcome guest at our Christmas dinner table. Incidentally, Sunny went with what she thought was the lesser of two evils by accepting the name Perry Mason, the other choice being John Wayne! In any event, Perry joined me on my legal travels, although I must confess that I have never been able to convince an Assignment Judge that he was actually my second chair.

Perry was a particular favorite in the office, and all of our staff delighted in stuffing him full of treats. Not surprisingly, Perry needed to accompany me to the gym to keep his weight down. He also developed a rather unique way of greeting people. Perry would roll over on his back with his four legs sticking up and invite you to rub his belly. Few people were able to resist this because Perry was just a delight. I attempted this maneuver myself without success.

When Perry crossed the Rainbow Bridge (the prayer of all animal lovers) we had loved him so, we had to find a successor. We were fortunate to find Shamus, a Schnauzer and Brussels Griffon mix, waiting for us at a St. Hubert's Shelter in Plainfield. Shamus was born on St. Patrick's Day, March 17th, and had that name from birth, preventing me from renaming him Hamilton Burger, Gardner's world's worst prosecutor. In Shamus' first two years he had had four different homes, including several shelters. I am proud to say in the last three years, Shamus has developed into a top flight legal assistant and is a smashing success with my secretary, Linda, and our whole staff. There's little doubt, although they deny it, that they're happier to see Shamus than they are to see me.

Shamus is such a fast study that he has literally developed a nose for the truth. At depositions, I regularly advise the witness that if they don't tell the truth, Shamus will bark. One witness was so unnerved that he requested Shamus be removed from the room. Since our conference room has glass panels beside the door, Shamus was able to continue his surveillance; a fact that I literally pointed out to the witness. Needless to say, we won that case.

Shamus continues to thrive and has recently become proficient in filing as long as you don't mind a couple bite marks in your brief. He has also taken up the cause of some of his brethren and is now engaged in attempting to have his colleague, Harley, a bulldog who works for Bob Gold, reinstated back into his office. Harley was evicted by the Landlord. Shamus recently advised that the case is currently in limbo since Bob Gold has failed to send in Shamus' retainer.

I hope the message is clear that man's best friend is also an attorney's best friend. You can throw out your blood pressure medication and loosen your tie the minute you walk into a legal setting that contains one of our furry friends. While you won't get rich on their earnings, they still bill out at $85.00 per hour. Perhaps before you order that designer puppy you'll give a shelter dog a second chance. Maybe you'll get lucky and get a Perry or a Shamus.

P.S. – Shamus is looking forward to meeting you and only requests you have a bowl of cold water waiting for him!

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