THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

March 2019

The Workers' Compensation Issue

Featured

Also Included

President's Message

"Perfection is not attainable, but if we chase perfection we can catch excellence."
— Vince Lombardi, *Hall of Fame NFL Coach*

Welcome to 2019 and a New Year full of exciting events for MDC. Before we get into the meat of it, let me first thank our Publications Chair, Sheryl Tirocchi, and her team who work tirelessly to make this a great magazine for you. Also, let me thank Brian Greenlee. Brian has worked with MDC for more than a decade making sure our publications and website are top quality.

John T. Sly, Esquire
Waranch & Brown, LLC

Our members have told us that they look to MDC to provide quality programming to hone their litigation skills. Our Trial Academy and Deposition Bootcamp have been very successful over the years. In fact, our Trial Academy has been nationally recognized by the Defense Research Institute ("DRI"). However, we have also heard that our members are looking for training in leadership, marketing and professional development. That is why MDC is proud to be partnering with Wendy Merrill of Strategy Horse to bring you a four-module leadership course. The first two modules received great reviews! Our partnership with Strategy Horse means MDC members will be able to take advantage of this highly sought-after programming for a fraction of the usual price. Each participant will be designated an "MDC Fellow" and after completing the four-part series, will be recognized at the Annual Crab Feast.

January has also brought us a new Maryland General Assembly session. MDC legislative leaders have met with key members of the Maryland State Senate Judicial Proceedings Committee and the House of Delegates Judiciary Committee to discuss our priorities. Over a third of the Maryland Legislature is new this Session so the development of personal relationships with those who formulate the rules within which we must practice has never been more important.

MDC has also provided oral and written testimony on bills being considered in the Maryland Legislature, as well as the Federal Rules Committee. From workers' compensation, to general liability, to medical malpractice, MDC is working hard to ensure your voice is heard.

MDC continues to look forward to playing an integral role in the judicial process by interviewing all willing applicants to the circuit courts, the Court of Special Appeals and the Court of Appeals. As always, you are welcome to join in these interviews. Simply contact either James Benjamin with Gordon/Feinblatt or Winn Friedel with Bodie Law, the Co-Chairs of MDC's Judicial Selections Committee, and they will be happy to get you involved.

We are looking forward to upcoming lunch and learns, a new volunteer opportunity and — of course — our annual Crab Feast! The goal is to make MDC the place for you to turn for great technical programming, assistance in developing your practice and fun social events. Please let us know if there is anything you would like to see MDC doing. Welcome to Spring!

Get Involved With MDC Committees

To volunteer, contact the chairs at

www.mddefensecounsel.org/leadership.html.

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THE DEFENSE LINE

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1962 57 Years of Service to Our Members 2019

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from the Maryland Defense Counsel, Inc.

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MDC and StrategyHorse present: "Rising Leader Academy"

StrategyHorse Consulting Group

The Challenge

Firms all over the state are struggling with recruiting, retaining and developing future leaders within their ranks. In addition to strong technical ability, associates need to develop their *executive presence* to both deliver value to current clients, as well as attract future ones. By 2020, around half of the workforce will be comprised of Millennial attorneys that view their legal careers in a different way than their predecessors, and over the next 5-10 years, statistics show that most firms will lose around 40% of their partners. Younger lawyers are dedicated to professional excellence but require the right investment in professional development to empower them to contribute significantly to the sustainability of their firms.

What does *executive* presence look like?

Business development acumen
Growth strategy planning ability
Leadership skills
Client retention/relationship management skills
Recruiting ability

The Solution

StrategyHorse has created an innovative curriculum designed to engage and inspire the confidence and competency younger professionals need to lead their firms into the future. The curriculum has been applied to a series of interactive workshops designed specifically for promising lawyers between 26-46, those that are expected to secure the legacy of their firms. Each workshop has been carefully created with an understanding that real progress cannot happen without first revealing-and addressing-the motivation (cares, fears, wants) behind the behavior of the next generation of law firm leadership.

Who Should Participate?

Associate and junior partner attorneys with at least 3 years' experience that have demonstrated an interest in firm leadership and growth.

The Outcome

Other training platforms focus on delivering conventional advice and step-by-step directives that are disconnected from the unique challenges facing the future partners of law firms. The StrategyHorse program is committed to facilitating the success of ambitious Rising Leaders in an individualized and personalized manner, a critical approach to helping these attorneys to "get out of their own way"— the most common reason for failure. These workshops are engineered to provide firms with an effective and affordable means to invest in the stewards of their legacies.

The program will be broken down into 4 modules:

1) Confidence
2) Growth Strategy & Business Development Best Practices for Attorneys
3) Networking Strategy & Skills for Those that Dislike Networking
4) Vision & Accountability

Module 1: Confidence

This workshop will provide participants with the means to identify, understand and promote one's individual value proposition, an essential component for effective leadership and business development. We will address the importance of self-advocacy as well as how each Rising Leader can both position themselves and others to be ambassadors for their personal brand and the brand of their firm. We will discuss the

creation of stakeholders in the community, including peers and referral sources, and establish criteria for qualifying and cultivating "best clients". Towards the end of the session the attorneys will understand how to apply what they've learned to their role in the recruitment and development of other younger lawyers.

Module 2: Growth Strategy & Business Development Best Practices

This workshop will cover all aspects of personal branding. Participants will learn how to position themselves as either a *Thought Leader* or *Center of Impact*. We will discuss how to become a *lawyer for the future* by being relatable and articulating/addressing the needs of younger clients. The greatest opportunity for growth for any attorney is to become a Trusted Advisor to their clients and the community. We will delve into what this looks like and how to develop this reputation.

Module 3: Networking Strategy and Skills for Those Who Dislike Networking

Most lawyers are uncomfortable in traditional networking settings for a variety of reasons. Introverted personalities, time management concerns and a variety of other things pose a challenge to those who feel the pressure to network but struggle with embracing it. This workshop will provide attendees with tailored guidance designed to identify creative, effective and enjoyable approaches to networking. We will demonstrate how effective networking practices will yield career-long business development dividends. Participants will learn how to design and execute a strategic and effective networking plan to improve origination, complement recruitment efforts and build brand.

Module 4: Vision & Accountability

To become an effective practice group leader and/or equity partner of a firm, attorneys must be vision-oriented and possess the ability to approach growth in a strategic manner. Many younger lawyers are conditioned to think in a silo, only focusing on their immediate tasks and growing their own practice. For those who wish to enter the leadership queue, it is essential to be able to project, plan for, executive on and measure individual/practice group/firm goals, ensuring that all are properly aligned.

Each workshop will be approximately 2 hours in duration and be interactive in nature. Participants will receive a brief pre-workshop summary to help prepare them to get the most out of their participation.

The cost of each workshop is $225 a person and $750 for a package of all 4 workshops.

Managing Opioid Risk in Workers' Compensation Claims

Ashlee K. Smith

The United States is in the midst of an opioid epidemic. According to the Health Resources & Services Administration, approximately 116 people die each day in the United States from opioid-related overdoses.[1] The opioid crisis has had a tremendous impact on the entire Maryland workers' compensation community considering that 35% of the opioid prescriptions in the state are related to workers' compensation.

In addition to the serious health risks presented to individuals, the research on the impact of opioid medication on claims is nothing short of staggering. For example, a study by the Hopkins-Accident Research Fund in 2012 found that the average total claim costs for injured workers who received *just one* opioid was more than three times greater than workers with similar claims who did not receive any opioid medications.[2]

All stakeholders in the workers' compensation community have struggled with responding to the effects of the opioid crisis. The Commission and both sides of the bar must constantly balance the treatment needs of injured workers who are seeking pain relief while trying to also protect workers from the serious risks associated with opioid use. This article will focus on how to identify and address opioid-related risks in workers' compensation claims.

First Step: Understand the Best-Practices

The first step in managing opioid-related risks is to understand the best-practices for prescribing opioid medications for chronic pain. In March 2016 the Centers for Disease Control ("CDC") issued a Guideline for Prescribing Opioids for Chronic Pain.[3] The Guideline was published in an effort to reduce the number of people who misuse, abuse, or overdose from opiate drugs. The CDC's recommendations focus on clinical practice and provide guidance to practitioners to improve how opioids are prescribed. Below is a summary of the CDC's recommendations that most impact the workers' compensation community:

- **Opioids are Not First-Line Therapy.** Non-pharmacologic therapy (*i.e.*, physical therapy, TENS units) and non-opioid medications (*i.e.*, NSAIDs, anti-depressants) are the preferred treatment methods for chronic pain instead of opioids.
- **Lowest Effective Dose.** Clinicians should prescribe the lowest effective dosage of opioid medications. Clinicians should use caution when considering increasing a patient's dosage in excess of 50 morphine milligram equivalents per day (MME/day). Clinicians should avoid increasing dosages greater than 90 MME/day and only do so when the decision is carefully justified.
- **Consider Naloxone.** Clinicians should consider offering naloxone to patients when there are factors that increase risk for opioid overdose, such as history of overdose, history of substance use disorder, higher opioid dosages (≥50 MME/day), or concurrent benzodiazepine use.
- **Review prescription drug monitoring program ("PDMP") data.** In Maryland the PDMP is known as CRISP. The CDC recommends that clinicians review PDMP data before prescribing opioids and periodically thereafter. The CDC also recommends re-checking the data with every prescription or *at least* every 3 months.
- **Urine Drug Screens.** Clinicians should screen a patient's urine before starting opioid therapy and *at least* annually to check for the prescribed medication as well as other drugs.
- **Avoid Benzodiazepines.** Clinicians should avoid prescribing opioid medication concurrently with benzodiazepine due to the increased risk of overdose. Examples of benzodiazepines are Xanax, Klonopin, and Valium.

Second Step: Review the Claimant's Treatment

Once you understand the CDC's recommendations for prescribing opioids, the next step is to apply those recommendations to the claims you are handling. In order to do so, you will need to gather the claimant's prescription medication log from the carrier as well the claimant's pain management and other medical records for the previous six months to one year. Below is a list of things to consider when you are reviewing a claimant's records:

- **Frequency of Visits.** The CDC recommends that doctors meet with patients *at least* once every three months. The 3-month requirement generally applies to low-risk, long-term patients without a history of overdose or prior inconsistent urine drug screens. For new patients and higher risk patients, doctors should be seeing patients on a monthly basis.

  Red Flag: If a pain management provider is seeing a patient less than 4 times per year, but is consistently prescribing opioids for the entire year.
- **Frequency of urine drug monitoring ("UDM").** Per the CDC Guidelines, UDM should be performed at least once per year for lower-risk patients and more frequently for higher-risk patients. The doctor's records should state whether UDM was performed each visit and it should state the results of prior screenings.

  Red Flag: If UDM is not being performed on at least a yearly basis.
- **Benzodiazepines.** Review the records to determine if the claimant is receiving benzodiazepines at the same time as opioid medications. Bear in mind that the mediations may be prescribed by different doctors.
- **Morphine Equivalence.** In order to calculate the claimant's morphine equivalence, you will need to review

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[1] https://www.hrsa.gov/opioids

[2] See White JA, Tao X, Tairefa M, Tower J, Bernacki E, The Effect of Opioid Use on Workers' Compensation Claim Cost in the State of Michigan (August 2012) Journal of Occupational Environmental Medicine Vol. 54, Issue 8.

[3] To view the entire guidelines, click here. CDC Guideline for Prescribing Opioids for Chronic Pain (https://www.cdc.gov/mmwr/volumes/65/rr/rr6501e1er.htm)

(OPIOID RISK) *Continued from page 5*

the claimant's prescription log and medical records. From these records, you will be able to determine the claimant's opioid medication(s) each month as well as the strength in milligrams (mg), the daily dosage, and the total number of pills dispensed.[4] Below is a sample of a one-month supply for an opioid prescription that you will need to calculate the morphine equivalence:

Rx	Strength	Dosage	Total Pills
Oxycodone	20 mg	Every 4–6 hrs as needed	180 pills

After obtaining this information, you can calculate the total number of milligrams the claimant is consuming per day. The claimant in the example above is being prescribed 120 mg of Oxycodone per day. Once you have determined the total daily milligrams, you can calculate the claimant's morphine equivalence. We recommend using an online calculator, such as the online calculator provided by the State of Washington's Agency Medical Directors' Group.[5] Below is a screen shot of the sample-claimant's dosage using the Washington calculator:

Opioid (oral or transdermal):	mg per day:*	Morphine equivalents:
Codeine		0
Fentanyl transdermal (in mcg/hr)		0
Hydrocodone		0
Hydromorphone		0
Methadone†		0
Morphine		0
Oxycodone	120	180
Oxymorphone		0
Tapentadol		0
Tramadol		0
	Total	**180**

Per the calculator, the claimant's daily morphine equivalence is 180 ME. This is a significant red flag because the claimant's morphine equivalence is double the CDC's recommended daily maximum morphine equivalence.

Red Flag: Claimant's morphine equivalence is greater than 90 ME/day.

If the claimant's treatment does not comply with one or more of the CDC recommendations described above, then you should discuss the claim with your client to determine their priorities and then formulate a plan of action.

Third Step: Obtain a Medical Opinion

If your client wants to further evaluate the claimant's treatment to assess whether weaning or other Commission intervention is necessary, the next step is to obtain an opinion from a doctor that specializes in pain medicine regarding the reasonableness and necessity of the claimant's treatment. This can be performed through a peer-review, which is where the doctor reviews the available treatment records and provides a written opinion based only on the records. Alternatively, this can be performed through an Independent Medical Evaluation ("IME"), which is where the doctor performs a physical examination of the claimant in addition to reviewing the records before generating a written report. Generally, IMEs are preferred because they involve a physical exam and because they allow the doctor to interview the claimant regarding the claimant's symptoms/complaints as well as the effectiveness of the treatment received.

In order to maximize the value of the IME report, it is a good idea to send the doctor a complete copy of the claimant's treatment records as well as a cover letter. The cover letter should describe the history of the claim, including significant prior orders from the Commission that address permanency and causal relationship of injuries/medical conditions. The letter should also identify the topics to be addressed in the report. Here is a list of sample questions to include in your cover letter for the doctor to answer (depending on the issues presented in the claim):

- Whether the Claimant's pain management program is reasonable and medically appropriate;
- Whether the Claimant's pain management program is consistent with CDC guidelines for chronic pain in non-cancer patients? If not, whether Claimant's circumstances justify deviation from the guidelines?
- What is the Claimant's current morphine equivalence?
- Is the Claimant's concurrent usage of an opioid and a benzodiazepine reasonable and medically appropriate? If not, please describe your recommendations for this aspect of the Claimant's treatment.
- How often is the Claimant's doctor performing urine drug monitoring and is this reasonable and medically appropriate?
- What recommendations, if any, you would make for the Claimant's pain management care going forward?

If the IME doctor concludes that the claimant's treatment is reasonable, then further action is not needed. However, if the doctor identifies problems with the claimant's treatment program, then it's time for the next step.

Fourth Step: Requesting a Hearing

The Commission has broad authority to regulate a claimant's treatment. Therefore, issues can be filed on almost all aspects of a claimant's pain management program. For example, if the claimant's doctor is not performing urine drug screens or is seeing the claimant less than four times per year, you can file issues with the Commission seeking an order compelling the claimant's doctor to comply.

Therefore, if you receive an IME opinion finding that the claimant's current pain management program is inappropriate, it is important that thoroughly evaluate the findings in order to plan your response. Depending on the recommendations in the IME, implementation may actually increase the claimant's medical treatment costs. For example, if the IME recommends decreasing the claimant's morphine equivalence while increasing adjuvant treatment options, such as non-opioid medications or physical therapy, the carrier's exposure for ongo-

[4] If you aren't familiar with the medication names and/or you aren't sure whether a medication is an opioid, don't be afraid to research the medication online. An online search can also help you determine the formulation of a brand name. For example, Vicodin is a brand name for a medication that combines acetaminophen and hydrocodone.

[5] It located at http://agencymeddirectors.wa.gov/Calculator/DoseCalculator.htm. There are also free apps that you can download to your smart phone.

(OPIOID RISK) *Continued from page 6*

ing treatment expenses may increase substantially. Despite this potential exposure increase, many carriers nonetheless want to implement the IME doctor's recommendations because it is in the best of interest of the claimant to protect them from opiate abuse or overdose.

Should you wish to obtain an order from the Commission compelling weaning or some other modification of the claimant's pain management treatment, it is important to understand the anticipated outcome and the timeline. First, it is important to note that the Commission does not take a one-size fits all approach to pain management. Each claim is considered carefully by the Commission on a case-by-case basis. A failure to abide by the CDC Guidelines alone will not necessarily result in an order requiring compliance. The Commission's decision will consider the Guidelines in the context of the Claimant's overall treatment in order to determine whether the Claimant's pain management regimen is reasonable and medically appropriate.

Next, understand that resolution of the issue will likely take time. In the interim, it is essential that the carrier continue to authorize the claimant's pain management treatment until you receive an order from the Commission regarding claimant's ongoing treatment. Even though there is a dispute regarding the propriety of claimant's treatment, the claimant's treatment *cannot* be abruptly terminated without potentially endangering the claimant and substantially increasing the carrier's risk. Individuals who have been using opiate medication over a long-term period will likely experience symptoms of withdrawal if their access to medication is abruptly terminated. The symptoms can range from mild to severe, which can result in hospitalization or even death if the symptoms are not addressed. Therefore, the claimant's treatment must be maintained while the parties work to resolve the treatment issue.

Before filing issues with the Commission to request a hearing, you should first try to resolve the treatment issue informally with the doctor and/or the claimant's attorney. For example, if the IME recommends that the claimant's ME be gradually reduced from 180 ME/day to 90 ME/day, then you should notify both the claimant's attorney and the treating doctor in writing of the recommendation and request voluntary compliance with the recommendation. If the claimant and/or claimant's doctor refuse to comply with the recommendation, then it is appropriate to file issues with the Commission seeking an order compelling the claimant's doctor to wean the claimant's dosage.

After issues are filed, the Commission will generally schedule a hearing within the next three months depending on docket congestion. It is possible to obtain an expedited hearing through an emergency hearing request; however, such requests should be limited to truly critical issues that affect the claimant's health and safety. A doctor's failure to perform urine drug screens standing alone would likely not be sufficient to support an emergency hearing request. However, a claimant's concurrent usage of benzodiazepines and opiates may be sufficient to support an emergency request given that it creates an increased risk of overdose or death.

Fifth Step: Preparing for & Attending the Hearing

In order to increase the chances of success at the upcoming hearing, the following documents should be considered for inclusion in your exhibit packet depending on the issue presented:

- IME report addressing pain management issue
- Claimant's updated prescription history log, which includes the claimant's most recent prescription refills
- A calculation of the claimant's current morphine equivalence
- Claimant's pain management doctor's reports for the prior 6-12 months
- The letter sent to the claimant's doctor and attorney requesting compliance with the IME recommendations, including any response to the letter

These documents will help the Commission better understand the claimant's current treatment regimen. It will also provide necessary context for the IME report.

Note: Commission regulations require the production of exhibits to opposing counsel three business days prior to the hearing. Failure to abide by this requirement can result in a continuance of the hearing.

With respect to the hearing itself, you should plan to submit your exhibit packet for the Commissioner to read after the hearing. You should also plan to provide the Commissioner with a brief explanation of the claimant's current treatment plan and the request for an order. It is important to focus your arguments on the claimant's safety and best interests.

As far as questioning the claimant, you should focus on the following areas: (1) whether the claimant wants to abide by the IME recommendation and why, (2) the effectiveness of the claimant's current pain management program in controlling their pain and improving their functionality, and (3) the effectiveness of non-opioid medications and other modalities that the claimant has previously tried and/or is currently using, such as NSAID medication, physical therapy, or injections.

Following the hearing, the Commission will mail a copy of its decision to all parties.

Sixth Step: Enforcing the Commission's Order

Assuming that you have received a favorable order from the Commission requiring weaning or otherwise modifying the claimant's current pain management program, the final step is to enforce the order. Upon receipt of the Order, notify all relevant parties of the Order so that implementation can begin in a timely fashion. First, send a letter to the claimant's doctor (with a copy to claimant's counsel) providing the doctor with a copy of the Order and the IME report and asking the doctor to begin implementation at the claimant's next appointment. Next, send a letter to the claimant's attorney requesting that the claimant discuss the Order with his doctor at his next appointment and requesting that claimant take a copy of the Order and the IME report with him so the doctor for review both documents.

In order to further maximize the chances of obtaining compliance with the Commission's order, consider retaining the services of a nurse case manager ("NCM"), preferably one that is certified in pain management. The NCM will communicate directly with the doctor on a weaning program, if needed, and ensure appropriate management of claimant's care.

Once you have communicated the Commission's order to all interested parties, the final step is to monitor the claimant's treatment to see whether the Order has been followed. For example, if the Commission's order requires weaning, you would check to see the claimant's morphine equivalence as prescribed by the doctor. If the dosage has not been reduced to begin the titration process, then you should consider again filing issues with the Commission seeking enforcement of the prior order.

Ashlee K. Smith is a partner at GodwinTirocchi. She concentrates her practice on defending employers and insurance carriers in workers' compensation and general liability matters in Maryland and the District of Columbia.

Legislative Meeting

Maryland Defense Counsel ("MDC") has been actively engaged in the Maryland Legislature for a number of years. MDC regularly leads the charge on bills that will impact the interests of our members and clients.

Working with members of the **Senate Judicial Proceedings Committee**, MDC worked to develop three bills that address our practices. The first would expand the offer of judgment tool to all litigation in Maryland. Currently it is limited only to medical malpractice cases. The second would prohibit depositions in medical malpractice cases until a plaintiff files a CQE. The third would require a plaintiff in medical malpractice cases to provide 90-day notice before filing in Health Claims Arbitration. These bills were heard in the Senate Judicial Proceedings Committee on February 14th with MDC providing supporting testimony. Not surprisingly, MAJ opposed these bills. Additional bills are likely to be considered, including amendment to the 20% Rule in medical malpractice matters. MDC will continue to be engaged on all of these issues.

Further, MDC's **Workers' Compensation Committee** has done great work developing legislative proposals and priorities. As you know, workers' compensation is closely defined by legislative action and MDC is dedicated to ensuring the rules remain fair to our clients.

Big thanks go out to **Nikki Nesbit** of Goodell/DeVries who serves as Co-Chair of MDC's Legislative Committee and is a former President of MDC, **John Stierhoff** of Venable who is retained as MDC's Legislative Consultant, **Chris Boucher** who served as former President of MDC and works closely with the Legislative Committee, **Gardner Duvall** of Whiteford/Taylor who is a former President of MDC and has worked regularly on legislative issues, **Michelle Mitchell** of Wharton/Levin who currently serves as MDC's PAC Treasurer, and **Chris Jeffries** of Kramon & Graham who is Chair of MDC's PAC, and **Ileen Greene**, **Julie Murray**, and **Wendy Karpel** are the Chairs of MDC's Worker's Compensation Committee. Their collective efforts continue to advance your interests in the Maryland Legislature.

StrategyHorse Leadership Program: First Module

On January 23rd MDC held the first of four modules of its highly regarded Leadership Program led by **Wendy Merrill** of **Strategy Horse**. All four modules are being hosted by MDC at Miles & Stockbridge's Baltimore Offices.

The first module provided participants with the means to identify, understand and promote one's individual value proposition, an essential component for effective leadership and business development. Wendy addressed the importance of self-advocacy as well as how each Rising Leader can both position themselves and others to be ambassadors for their personal brand and the brand of their firm. Together they discussed the creation of stakeholders in the community, including peers and referral sources, and establish criteria for qualifying and cultivating "best clients". Towards the end of the session the attorneys explored how to apply what they had learned to their role in the recruitment and development of other younger lawyers.

The second module addressed growth strategy and business development and future modules will address networking skills (Module #3), and vision and accountability (Module #4). There is still time to register for the remaining modules. Simply go to **www.mddefensecounsel.org** to find the sign-up page.

Wendy Merrill of StrategyHorse Consulting Group

Exclusivity of Compensation Under the Workers' Compensation Act

Danielle E. Marone

On October 21, 2013, a hotel's restaurant manager ran to the aid of a coworker and was shot and killed by an assailant who was in the process of robbing the hotel. Rather than filing a claim for benefits under the Maryland Workers' Compensation Act ("Act"), his parents, individually, and as his personal representatives, filed a claims against the hotel, alleging negligence, negligent supervision, intentional infliction of emotional distress, wrongful death, and a survival action. They claimed that the hotel was in a dangerous neighborhood and had it implemented heightened security measures, similar to those adopted by other hotels in the area, the death could have been prevented.[1] The trial court and Court of Special Appeals agreed, the claims were barred by the § 9-509 of the Labor and Employment Article, commonly referred to as the exclusivity provision under the Act.[2]

Worker's compensation legislation has been part of Maryland law since 1914, when the legislature determined that the common law tort system was inadequate to compensate workers who were injured in the course of their employment.[3] In enacting worker's compensation legislation, workers lost their right to sue their employers for negligence, but gained the right to quick and certain compensation for injuries sustained during the course of their employment, regardless of fault.[4] Therefore, under Maryland law, the exclusive remedy for an employee who is injured during the course and scope of his employment is to file a claim under the provisions of the Workers' Compensation Law.[5] The only exceptions are (1) where an employer fails to secure workers' compensation insurance; or, (2) where an employer deliberately intends to injure or kill an employee.[6] Under those circumstances, the covered employee, or in the case of death, a surviving spouse, child, or dependent, may make a claim for compensation under the Act, or bring an action for damages against the employer.[7]

In an attempt to combat the exclusivity provisions, the parents attempted some novel arguments. First, they contended that the hotel was not their son's "employer" because the hotel had undergone a conversion from a limited partnership ("LP") to a limited liability company ("LLC") and their son was paid by the LP and they sued the LLC. They claimed that the LLC was a separate legal entity that was not the employer and, therefore, the LLC could be sued without infringing on the exclusivity provision under the Act.

An LLC is an entity created by state statute and the IRS has not created a new tax classification for the LLC. The IRS uses the tax entity classifications of "corporation," "partnership" or disregarded as an entity separate from its owner, referred to as a "disregarded entity." An LLC is always classified by the IRS as one of these types of taxable entities. After the conversion, the IRS did not (nor was it required to) provide a new or different EIN number to an LP converted

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[1] *Vivian K. Chavez, et al. v. Capitol View, LL, LLC, et al.*, Sept. Term 2016 No. 2026 (Md. Ct. Spec. App., March 5, 2018).
[2] Md. Code Ann. Lab. & Empl. § 9-509 (2013).
[3] *See Johnson v. Mountaire Farms of Delmarva, Inc.*, 305 Md. 246, 249, 503 A.2d 708 (1986).
[4] *Id.* at 250, citing Wood v. Aetna Cas. & Sur. Co., 260 Md. 651, 660–61, 273 A.2d 125 (1971).
[5] *Johnson*, 305 Md. at 253.
[6] Md. Code Ann., Lab. & Emp. § 9-509(c), (d) (2013).
[7] *Id.*

Editors' Corner

This edition of *The Defense Line* would have not have been possible but for the congeniality among the defense bar. One of the strengths of this organization, highlighted quarterly in this publication, is the willingness amongst our members to share their knowledge, expertise, and experiences to assist others in their practice. I want to personally thank my colleagues and fellow members of the workers' compensation community for their contributions to this edition. Thank you to **Ileen M. Ticer** of the Law Office of Ileen M. Ticer and **Julie D. Murray** of Semmes, Bowen & Semmes, co-chairs of the MDC Workers' Compensation Subcommittee, for their assistance with this publication. Additionally, the editors would like to thank the following individuals for their substantive contributions to this edition: **Ashlee K. Smith** of GodwinTirocchi, **Danielle E. Marone** of Schmidt, Dailey & O'Neill, **Megan Anderson** of Pessin Katz, **Sara S. Lemmert** of Franklin & Prokopik, **Patricia McHugh Lambert** of Pessin Katz, **James A. Turner** of GodwinTirocchi, and **Christopher M. Balaba**n of Semmes, Bowen & Semmes.

We hope that you enjoy this edition of *The Defense Line*. If you have any comments, suggestions, or would like to submit material for a future publication, please contact one of the editors below. We look forward to hearing from you.

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to an LLC.

The undisputed evidence showed that the conversion occurred at least 14 years before the death and since that time, the entities were effectively one and the same, doing business as the LLC. Therefore, even though the W-2 identified the son's employer as the LP for IRS purposes, it did not change the son's status as an employee of the LLC.

The parents then argued that their son's death was not an accidental work injury suffered "in the course of his employment", and therefore his death is not covered under the Act. They contended that their son was not injured in his workspace of the restaurant, kitchen, or bar area and that he left on a personal mission to run to the aid of his screaming coworker in the lobby of the hotel.

An "accidental personal injury" under § 9-101(b)(2) of the Act includes "an injury caused by a willful or negligent act of a third person directed against a covered employee in the course of the employment of the covered employee."[8] Since this provision does not mention that such injuries must arise "out of" the employment, the Maryland courts have held that, in this special area, the only requirement is that the injury arise "in the course of employment."[9] Thus, an injury resulting from an assault by any third party is compensable as long as it occurs on the employer's premises or elsewhere in the course of employment, even if it arose from an entirely personal dispute unrelated to work.

The courts agreed, the son's injury occurred "in the course of his employment" because he was on his employer's premises and working his scheduled shift at the time of the robbery and shooting. Because the death was compensable under the Act, the parent's tort claims were deemed barred by the Act's exclusivity provision.

Finally, the parents contended that their son did not have any dependents at the time of his death and denying recovery for the survivorship and wrongful death claims violated the guarantee of a remedy found in Article 19 of the Maryland Declaration of Rights. Article 19 provides that "every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land."[10]

Workers' Compensation death benefits does not include payment to survivors for pain and suffering. In event that there are no dependents, recovery under the Act is limited to the expenses of last sickness and funeral expenses not to exceed $7,000.[11] The courts agreed that even though the parents could not recover payment directly for their son's conscious pain and suffering prior to his death, because the general provisions of the Act still provided a remedy for the accidental work injury—his death—the Act, as applied, did not deny them a remedy in violation of Article 19. Further, the fact that the benefits afforded under the Act were substantially less than those available under tort, did not establish a violation of Article 19.

Thereafter, the parents petitioned for certiorari. Their chief argument was that the Act violated Article 19 because the estate was denied any recovery for the survival action for their son's conscious pain and suffering. The petition was denied; there was nothing cert-worthy about the issue. A "survival action" is nothing more than an employee's personal injury claim that he or she would have had against their employer, *but for* the exclusivity provisions of the Act.[12] There is nothing novel about the exclusivity provision of the Act, as the Court has frequently re-affirmed its constitutionality and its applicability to a covered employee's personal injury claim.[13]

The exclusivity provision under the Act can be a powerful shield for employers and, in appropriate circumstances, can extend to statutory employers under § 9-508.[14] This is because whether an employee-employer relationship exists in the context of workers' compensation depends typically on the common law rules of the "master" and "servant" relationship.[15] When certain conditions are met, the Act broadens the definition of employer to cover principal contractors that ordinarily would not be considered the worker's employer under the common law rules of "master" and "servant."[16] This statutorily created employment imposes the absolute liability of an employer upon the principle contractor, when he was not in law the employer of the injured workman.[17] The result then is that where the prescribed conditions exist,[18] the principal contractor becomes by the Act the statutory employer of any workman employed in the execution of the work.[19]

Accordingly, if you are faced with negligence, wrongful death or survival action claims with any party that could be considered an employer, whether as a direct "master/servant" situation or as a statutory employer, then consider a dispositive motion based upon the exclusivity provision under the Act.

Danielle E. Marone, Esquire is an associate attorney at Schmidt, Dailey & O'Neill, L.L.C. Her practice areas include defending clients in commercial liability, employment discrimination, and workers' compensation claims, with a focus on Medicare set-asides.

8 Md. Code Ann., Lab. & Empl. § 9-101(b)(2).

9 *Doe v. Buccini Pollin Group*, 201 Md. App. 409, 29 A.3d 999 (2011); *Bd. of Educ. v. Spradlin*, 161 Md. App. 155, 867 A.2d 370 (2005); *Smith v. Gen. Motors Assembly Div.*, 18 Md. App. 478, 307 A.2d 725 (1973); *Giant Foods v. Gooch*, 245 Md. 160, 225 A.2d 431 (1967).

10 MD. CONST., DECL. OF RIGHTS, Art. 19.

11 *See* Md. Code Ann., Lab. & Empl. § 9-689.

12 *See Stewart v. United Elec. Light & Power Co.*, 104 Md. 332, 343, 65 A. 49, 53 (1906) ("[U]nder the survival statute[,] the damages are limited to compensation for the pain and suffering endured by the deceased, his loss of time and his expenses between the time of his injury and his death.").

13 *See*, *Victory Sparkler & Specialty Co. v. Francks*, 147 Md. 368, 128 A. 635, 637 (1925) ("whenever this court has spoken on any phase of this subject, it has uniformly said that, aside from the exceptions created by the [A]ct itself, the operation of the law is exclusive of all other remedy and liability, with respect to both the employer and employee…in regard to all injury arising out of and in the course of the employment."); *Baltimore Transit Co. v. State, to Use of Schriefer*, 183 Md. 674, 677, 39 A.2d 858, 859 (1944) ("[t]here is no doubt that the Workmen's Compensation Act substituted for the common law liability of an employer for negligence, subject to the corresponding common law defenses, an absolute, but limited, liability regardless of fault, and made that liability exclusive, in the case of a conforming employer."); *Wood v. Aetna Cas. & Sur. Co.*, 260 Md. 651, 661, 273 A.2d 125, 131 (1971) (the remedy provided by the Act is exclusive as juxtaposed to a common law action at law.); *Brady v. Ralph Parsons Co.*, 308 Md. 486, 498, 520 A.2d 717, 723 (1987), ("an injured employee may not maintain an action at law for damages against his employer…[s]ince the worker's sole remedy against the employer is a claim under the Act…".).

14 Md. Code Ann., Lab. & Empl. § 9-508.

15 *Rodrigues-Novo v. Recchi Am., Inc.*, 381 Md. 49, 57, 846 A.2d 1048 (2004) (citations omitted).

16 *Id.*

17 *State v. Benjamin F. Bennett Bldg. Co.*, 154 Md. 159, 162, 140 A. 52 (1928).

18 In order to determine whether one qualifies as a statutory employer under the Act, Maryland courts have separated the requirements of § 9-508 into four elements; namely, (1) a principal contractor; (2) who has contracted to perform work; (3) which is a part of his trade, business or occupation; and (4) who has contracted with any other party as a subcontractor for the execution by or under the subcontractor of the whole or any part of such work. *See Honaker v. W. C. & A. N. Miller Dev. Co.*, 278 Md. 453, 459–60, 365 A.2d 287 (1976).

19 *Id.*

A New Form of Opioid Liability: Will Big Pharma Be The Next Tobacco Industry

Liability of Healthcare Providers in the Wake of Maryland's Opioid Crisis

Megan Anderson

Effective October 1, 2018, amendments to Md. Code Ann. Health Occupations §1-223 mandate additional requirements for healthcare providers pertaining to the prescription of opioids and co-prescribed benzodiazepine. Specifically, the amended statute requires health care providers, in addition to the already required guidelines, to advise patients of the benefits and risks associated with the opioid being prescribed and, in the event opioids and benzodiazepines are prescribed together, advise of the benefits and risks associated with the benzodiazepine and the benzodiazepine with the opioid. The amended language makes clear that violation of section (b) of the statute, which relates to limitations on prescribing opioids, or the new advising requirements, is grounds for disciplinary action by the health occupation boards.

The amendments do not give practitioners guidance on what precise information needs to be communicated. However, guidance may be found in the draft bill. Reasons why the prescription is necessary, addiction and overdose even when taken as prescribed, developing physical or psychological dependence on the opioid, the risks of taking opioids with alcohol, and alternative treatments that may be available, were listed as required points of discussion in the draft. While not included in the final amendments, they may nonetheless provide some insight into the required discussion. In addition, the Maryland Board of Physicians contains a link for the Center for Disease Control (CDC)'s guidelines for prescribing opioids for chronic pain. They contain guidelines on when to initiate or continue opioids for chronic pain; opioid selection, dosage, duration, follow up and discontinuation; and assessing risk and addressing harm of opioid use. The guidance does not provide steadfast rules, but may be helpful. As is crucial in any situation where the failure to act in a certain manner may result in liability or board licensing proceedings, documentation is key. It is imperative for prescribing healthcare providers to incorporate the careful and detailed description of the required discussion with their patients in their medical records.

As focus on the opioid crisis continues to brighten, so too will the scrutiny on healthcare providers and others who are the gatekeepers to access. We will continue to provide updates on the latest statutes, case law and trends related to the crisis.

Megan Anderson is an Associate in PK Law's Medical Malpractice Defense Group. Megan Anderson is an Associate in the Firm's Medical Malpractice Defense Group where she focuses her practice on the defense of individual health care providers and the defense of health care institutions. Prior to joining PK Law Megan practiced for several years at a regional civil litigation firm where she focused her practice on the defense of professionals, including medical professionals. Megan has extensive civil litigation experience in the areas of insurance defense, malpractice defense and general liability defense.

MDC Unsung Heroes

Running a non-profit legal association takes the work of many unsung heroes. I'd like to highlight two of those hard-working people who help to make MDC successful:

Winn Friedel of Bodie Law and **James Benjamin** of Gordon/Feinblatt serve as Co-Chairs of MDC's Judicial Selections Committee. They help interview every willing judicial candidate for the circuit courts, Court of Special Appeals and Court of Appeals. As you can imagine, this takes time and serious consideration.

One of the innovate steps Winn and James have taken is to have more of the interviews occur in the relevant jurisdictions. By doing so, they have engaged more of our members in the process and the judicial candidates appreciate not having to travel as far. They have also revamped MDC's interview criteria and streamlined MDC's communication with the Maryland Judicial Nominating Commissions.

Winn is Vice President and Co-Managing Partner of Bodie, Dolina, Hobbs, Friddell & Grenzer, P.C. He concentrates his practice in civil defense litigation. He has been litigating for over 25 years in Maryland District and Circuit Courts and in the Federal District Court. He has defended claims in the areas of construction disputes and defects, product liability, personal injury, toxic torts, transportation, workers' compensation, property subrogation, lead paint defense, and insurance coverage.

James is a member of Gordon/Feinblatt's Business, Litigation and EMERGE Teams. He has litigated complex environmental and administrative matters and regularly counsels clients with regard to regulatory issues involving real property. James has substantial bench and jury trial experience representing insurers and business entities in general litigation, personal injury and premises liability matters.

— John T. Sly, *President MDC*

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OSHA Clarifies Position on Post-Accident Drug Testing

Sarah S. Lemmert

On October 11, 2018, the Occupational Safety and Health Administration ("OSHA") issued a memorandum clarifying its stance on post-accident drug testing under the May 12, 2016 final rule, which significantly limited employers' ability to conduct post-accident drug testing and utilize workplace safety incentive programs. Pursuant to the more recent guidance, OSHA is now taking the position that "most instances of workplace drug testing are permissible."

The recent memorandum considerably rolls back the May 12, 2016 Improve Tracking of Workplace Injuries and Illnesses final rule regarding accident reporting procedures and anti-retaliation efforts. The purpose of that rule was to promote the prompt, detailed, and accurate reporting of workplace injuries in order to improve the ability to identify and mitigate workplace hazards and prevent workplace injuries and illnesses. The May 12, 2016 final rule also amended 29 C.F.R § 1904.35 to add a provision prohibiting employers from retaliating against employees for reporting work-related injuries or illnesses. This provision also strengthened OSHA's enforcement powers in prohibiting employers from retaliating against employees for reporting work-related injuries or illnesses and expanded its reach to encompass almost any employment practice, policy, or procedure, whether active or passive, that could be construed as deterring employees from reporting injuries and illnesses.

The May 12, 2016 final rule and post-promulgation interpretive documents prohibited many instances of post-accident drug testing in its requirement that employers develop reasonable procedures for reporting work-related injuries or illnesses. Under the rule, employers were prohibited from using drug testing or the threat of a drug test to discourage workers from reporting work-related injuries and illnesses. OSHA specifically set forth that employers should not conduct blanket post-accident drug testing in situations when drug use was not the likely cause of an accident or injury. The final rule also limited employer's use of safety-related incentive programs, which OSHA found had "the potential to discourage reporting of work-related injuries and illnesses without improving workplace safety." Following the issuance of the rule, many employers faced confusion as to how to both uphold necessary safety programs and protocols and not run afoul of OSHA's requirements.

The October 11, 2018 memorandum softened OSHA's prior stance regarding post-accident drug testing and clarified the instances in which employers may properly test employees for drugs and alcohol. OSHA set forth the following examples of permissible workplace drug testing:

- Random drug testing.
- Drug testing unrelated to the reporting of a work-related injury or illness.
- Drug testing under a state workers' compensation law.
- Drug testing under other federal law, such as a U.S. Department of Transportation rule.
- Drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees.

In the October 11, 2018 memorandum, the agency specifically stated that many employers that conduct post-accident drug testing likely do so to promote workplace safety. Under the updated guidance, post-accident drug testing would only violate the law if it was conducted to "penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health." In order to avoid charges of retaliation for the use of drug testing to investigate a workplace incident, OSHA sets forth that an employer should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries. OSHA further clarified that incentive programs such as those that reward workers for reporting hazards, encourage involvement in safety and health management systems and even rate-based programs that focus on reducing the number of reported injuries and illnesses are all permissible as long as they are not implemented in a manner that discourages reporting. Employers must also have adequate precautions in place to ensure that employees feel free to report workplace injuries and illnesses. It is critical for employers to communicate to employees that they are encouraged to report all on-the-job injuries and illnesses and will not face retaliation for reporting. In the October 11, 2018 memorandum, OSHA advised that an employer may avoid any inadvertent deterrent effects of safety-related incentive programs by creating a workplace culture that emphasizes overall safety rather than just reduced rates of accidents and injuries.

The takeaway for Maryland employers is to maintain all necessary safety-related drug and alcohol testing protocols consistent with the law, but to carefully evaluate and amend any post-accident drug testing policies that could be interpreted as retaliatory. Do not single out for testing only those employees who reported injuries or accidents, but ensure to test all employees who could have contributed to the occurrence of a workplace accident or injury. Employers should clearly and effectively communicate that all employees are encouraged to report workplace injuries and illnesses and will not face retaliation for reporting.

Sarah S. Lemmert is Counsel with Franklin & Prokopik and focuses her practice on the representation of employers and insurers in workers' compensation claims in both Maryland and the District of Columbia. In addition to defending employers and insurers in workers' compensation matters, she represents employers in labor and employment litigation in court and before state and federal administrative agencies and regulatory bodies. She also provides advice and guidance to companies on employment and labor law compliance and assists in drafting effective handbooks and workplace policies.

The MDC Expert List

The MDC expert list is designed to be used as a contact list for informational purposes only. It provides names of experts sorted by area of expertise with corresponding contact names and email addresses of MDC members who have information about each expert as a result of experience with the expert either as a proponent or as an opponent of the expert in litigation. A member seeking information about an expert will be required to contact the listed MDC member(s) for details. The fact that an expert's name appears on the list is not an endorsement or an indictment of that expert by MDC; it simply means that the listed MDC members may have useful information about that expert. MDC takes no position with regard to the licensure, qualifications, or suitability of any expert on the list.

Named Perils Coverage For Mass Shootings

Patricia McHugh Lambert

Too many.

There are too many.

There are simply too many mass shootings in this country. We have all seen the heart-breaking pictures of the aftermath of these shootings — shootings at concert venues, at nightclubs, at houses of worship, and at schools. While we may have the victims of these shootings "in our thoughts and prayers," the personal toll of such events is wide-spread, horrific, and lasting. This article does not intend to minimize that personal pain or loss. Rather, its purpose is to discuss the potential risks that businesses face in the aftermath of large scale violent events and to discuss the new insurance market products that can be used to moderate these risks.

While there is no universally accepted definition of "mass shooting," the general understanding of the concept seems to be a combination of two sub-categories of violent events, "mass killings" and "active shooters." The Investigative Assistance for Violent Crimes Act of 2012 passed by Congress defines "mass killing" as "3 or more killings in a single incident" regardless of weapon. This definition, however, does not account for those injured, but who ultimately survived the incident. "Active shooter," by contrast, is defined by the FBI as an individual or individuals actively engaged in killing or trying to kill people in a populated area.

Another term often thought to be synonymous with mass shootings is workplace violence. Astoundingly, more than 2 million Americans report being victims of violence in the workplace each year. Unfortunately, workplace violence is neither new nor unusual. But workplace violence is not necessarily the same as mass shootings. The term encompasses all violence or threats of violence against workers, even without gun violence or the scope of a mass killing.

The lack of a generally accepted definition for mass shooting as well as the varying descriptions of large scale incidents of violence and the common conflation of different terms for these incidents should raise concerns for those whose job it is to quantify risk, those who seek coverage to limit their exposure to these risks, and for those who may litigate issues stemming from these incidents of violence.

To understand the risks, one must start with the numbers. The FBI has, itself, reported that there were 20 "mass killings" incidents, with a 30 additional active shooter incidents, in 2016 and 2017. Other active and mass shooter threats have been aborted or prevented by good police work and, at times, reports of vigilant and concerned individuals close to the would-be shooters. An FBI study has noted that approximately 70 percent of active shooter incidents took place in "a commerce/business or educational environment."

Following an active shooter or mass killing incident, like other mass casualty incidents, lawsuits can be quickly filed against the business or educational venue where the tragic event occurred. The thrust of each of these lawsuits is that the venue did not do enough to anticipate or prevent the incident.

According to some reports, more than seventy-five percent of the perpetrators of mass violence had, before the attack, made concerning statements or exhibited risky behavior. As a result, a cottage industry has arisen to train personnel to identity potential threats. Once a threat is identified, prevention or risk reduction protocols can be employed. If the venue does not have identification or prevention protocols in place, there is potential that the venue will be held liable for its failure to protect people from injuries that were "reasonably foreseeable."

Because of this potential risk exposure, some insurers are seeing an increased demand for active and mass shooter policies. This specialized kind of named peril insurance policy is being underwritten by some insurers. Depending on the coverage, these policies provide not only liability protection but also provide trauma recovery resources. These named peril policies can provide coverage for:

- Crisis management.
- Counseling and support resources.
- Medical, disability, funeral expenses and death benefits.
- Revenue loss/extra expenses caused by the shooting.
- Property damage and tear down expenses.
- Required post event security upgrades.
- Litigation expense.
- Liability coverage.

See photos from past events at mddefensecounsel.org/gallery

Of course, such named peril policies have exclusions which should be reviewed carefully. Some policies exclude coverage for employees (presumably because there is worker's compensation coverage elsewhere) and exclude coverage for injuries caused by vehicles. Other policies limit coverage to damage caused by firearms so that harm caused by explosive devices are not covered. These named perils policies are also specific in terms of the triggers for coverage, such as limiting coverage to where four or more individuals are attacked. As the threats increase, the named peril policy forms are evolving as for coverage, exclusions, conditions and limitations.

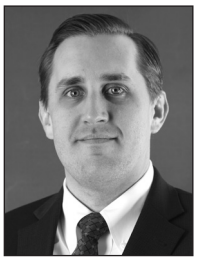
Certainly, where there is a risk, there needs to be policies that can help limit risk exposure. Until we can find a way to reduce the prevalence of active shooters and other perpetrators of violence against large groups of people, this is our new normal. All businesses and business venues need to consider what they can do to limit and militate against this active shooter risk.

Note: This article appeared previously at pklaw.com on December 17, 2018.

Ms. Lambert has over 35 years of experience in handling complex commercial litigation and insurance matters. Ms. Lambert has worked on national class actions, significant litigation and regulatory matters for Fortune 500 companies. She has also assisted small and mid-sized companies and business executives with contract, real estate and commercial disputes that needed to be resolved quickly and efficiently. Ms. Lambert is best known as an attorney who knows the field of insurance. She has represented insurers, policyholders, and insurance producers in disputes both in court and before the Maryland Insurance Administration.

Third-Party Litigation in Maryland Workers' Compensation Claims

James A. Turner



Typically, when an employee is injured at work in Maryland, his only recourse is through the workers' compensation system. The employer's liability is limited to workers' compensation benefits due to the "Exclusivity of Compensation" provision in the Maryland Workers' Compensation Act.[1] However, when a third-party causes the employee's injuries, the employee (or the employer) may sue the third-party for a recovery in tort. In such a situation, the workers' compensation system reduces the employee's recovery either against the employer or the third-party to prevent a "double recovery" of benefits.

A common situation where third-party liability and subrogation issues arise is when an employee is involved in a car accident while working. For the purposes of this article, we will consider the following example:

> *John Claimant was an attorney working for the firm of Employer's Defense. Mr. Claimant was driving to meet with a client on March 1, 2017 to discuss an upcoming case. On the way to the meeting, while stopped at a red traffic light, Mr. Claimant's vehicle was struck by a vehicle operated by Thomas Doe. Mr. Doe was looking at his cell phone and not paying attention to the road ahead of him. Mr. Claimant injured his neck in the accident and was taken to the emergency room. He participated 6 weeks of physical therapy and received an injection to the neck. He also missed 6 weeks of work while he was treating. Mr. Claimant continues to complain of pain and stiffness in his neck as well as numbness and tingling in his right arm.*
>
> *Mr. Claimant filed a workers' compensation claim against Employer and its insurance carrier. The insurer accepted the claim and paid Mr. Claimant's medical bills as well as temporary total disability benefits while Mr. Claimant was out of work. On June 15, 2017, the Workers' Compensation Commission issued a Compensation Deferred and Average Weekly Wage Award. Mr. Claimant now wants to sue Mr. Doe in the Circuit Court for Baltimore City for the injuries sustained in the accident.*

Initiating a Claim or Litigation (or Both)

Under the Act, the employee has the initial option of deciding whether to file a workers' compensation claim or sue the third-party.[2] If the employee decides to file a workers' compensation claim, the employer and its insurer have the exclusive right to pursue an action against the third party for a two-month period after the Workers' Compensation Commission issues an award.[3] If that two-month period passes without an action filed by the employer or its insurer, the employee may file suit.[4] Both the employer and the employee have an obligation to protect the interests of the other if they decide to initiate a third-party action.

In third-party litigation, the statutory limitations period for the underlying action applies. For example, the general statute of limitations for a tort action in Maryland is three years from the date of the accident.[5] However, the limitations period does not begin to run for the employee until two months after the first award from the Workers' Compensation Commission.[6]

Finally, there are certain limitations on the employee's right to pursue a third-party claim. In some circumstances, the employee may pursue a third-party claim against another employee with the same employer. However, the employee may not pursue a third-party claim against a supervisory co-employee.[7]

> *Mr. Claimant elected to file a workers' compensation claim and the Commission issued an award on June 15, 2017. Based on his election, Employer and its insurance carrier have an exclusive right to file a suit against Mr. Doe for two months after June 15, 2017. By the end of August, 2017, nothing has been filed. Mr. Claimant is now able to file a third-party suit in the Circuit Court for Baltimore City. He has until August 15, 2020 to do so. Employer and its insurance carrier also retain the right to file suit; however, their right is no longer exclusive.*

Workers' Compensation Benefits Before and During Litigation

Assuming that the employee has elected to receive workers' compensation benefits, the employer and its insurer are responsible for compensation as well as medical expenses and costs as they would be under any other compensable workers' compensation claim. Compensation includes temporary total, temporary partial, permanent total, and permanent partial disability benefits as well as vocational rehabilitation benefits. Medical expenses and costs include medical benefits, travel reimbursements, vocational rehabilitation services, and funeral benefits. When there is potential third-party liability, the employer and its insurer accrue a monetary lien against any recovery made in the third-party action brought by the employee. The lien is equal to the compensation and medical expenses and costs paid and/or incurred by the employer and its insurer.

If the employee recovers damages in the third-party case, either through settlement or judgment, the damages must be distributed in accordance with the lien.[8] The Act provides a specific order of priority for distribution of damages in third-party cases.

[1] Md. Code Ann. Lab. & Empl. § 9-509
[2] Md. Code Ann. Lab. & Empl. § 9-901
[3] Md. Code Ann. Lab. & Empl. § 9-902(a)-(c)
[4] Md. Code Ann. Lab. & Empl. § 9-902(c)
[5] Md. Code Ann. Cts. & Jud. Proc. § 5-101.
[6] Md. Code Ann. Lab. & Empl. § 9-902(d)
[7] *Bd. of Educ., et al. v. Marks-Sloan*, 428 Md. 1 (2012).
[8] Md. Code Ann. Lab. & Empl. § 9-902(e)

(THIRD PARTY LITIGATION) *Continued from page 21*

First, the costs and expenses for the action are deducted. Second, the employer and its insurer are reimbursed for compensation paid or awarded as well as medical expenses and costs. Finally, the employee keeps the balance of any remaining damages.[9]

Typically, in order to pursue the third-party case, the employee will often pay court costs and retain an attorney on a contingency basis. If so, the employer and its insurer are responsible for a portion of the court costs and attorneys' fees. That portion is calculated based upon their share of the damages recovered when the recovery is distributed. The employer and its insurer pay a percentage of the court costs and attorneys' fees equal to the percentage of the judgment they received in reimbursement.

Following the accident, Employer paid Mr. Claimant temporary total disability benefits while he was unable to work. The temporary total disability benefits paid amounted to $10,000.00. Employer also paid Mr. Claimant's medical expenses for treatment resulting from the accident. The medical expenses cost a total of $39,500.00. In addition to the treatment costs, Employer reimbursed Mr. Claimant for his mileage and his parking costs for a total of $500.00. As a result of his injury, Mr. Claimant could not return to work for Employer. Employer provided vocational rehabilitation services and paid ongoing benefits while Mr. Claimant participated in vocational rehabilitation. Employer paid a total of $20,000.00 for vocational rehabilitation benefits and $5,000.00 for vocational rehabilitation services. Finally, through vocational rehabilitation, Mr. Claimant found a new job with a different company. Mr. Claimant filed issues with the Commission for permanent partial disability due to the accidental injury. The Commission issued a permanency award worth a total of $25,000.00 in permanent partial disability benefits. The total lien accrued by the Employer and its insurance carrier equals $100,000.00.

On February 15, 2020, Mr. Claimant's lawyer filed suit against Mr. Doe in the Circuit Court for Baltimore City. Court costs for filing suit were $250.00. Following discovery and a pretrial settlement conference, Mr. Doe agreed to pay $250,000.00 to settle the third-party case arising out of the March 1, 2017 accident. Because the case settled before going to trial, Mr. Claimant's lawyer was entitled to 33.3% of the recovery per their contingency agreement. The attorneys' fee was $83,250.00.

Once the third-party case settled, the proceeds were held in escrow while Mr. Claimant and Employer determined the payment breakdown pursuant to the lien. The parties agreed to the following breakdown of the recovery:

- *Total third-party recovery: $250,000.00*
  - *— Employer's lien (percentage of total recovery): $100,000.00 (40%)*
- *Total attorney's fee: $83,250.00*
  - *— Employer's portion of attorneys' fee (40%): $33,300.00*
  - *— Mr. Claimant's portion of attorneys' fee (60%): $49,950.00*
- *Total court costs: $250.00*
  - *— Employer's portion of court costs (40%): $100.00*
  - *— Mr. Claimant's portion of court costs (60%): $250.00*
- *Total to Employer: $66,600.00*
- *Total to Mr. Claimant: $99,900.00*

Workers' Compensation Benefits After Litigation

Once an employee recovers in a third-party action, his workers' compensation claim is closed unless and until the workers' compensation benefits payable exceed the damages recovered.[10] From a practical standpoint, this provision has two effects. First, if the employee receives **less** through the third-party action than he would receive under the Workers' Compensation Act, he is entitled to the difference between the total damages received and the subsequent workers' compensation benefits. In other words, the employee may pursue additional compensation or benefits under the Workers' Compensation Act after resolution of the third-party case. Second, if the employee receives **more** through the third-party action than through the workers' compensation claim, the employer is exempt from paying compensation and/or benefits until the total compensation payable under the Act exceeds the third-party recovery. Simply put, the employer and its insurer have a credit against future payments equal to the amount received by the employee — also known as a "holiday."

Three years later, Mr. Claimant's neck pain increases and he returns to his doctor who recommends neck surgery. Following the surgery, the Claimant cannot return to work full time and has to take a part-time job making significantly less than he did before the injury. Mr. Claimant files issues with the Workers' Compensation Commission seeking re-opening of his claim. He asks the Commission to direct Employer and its insurance carrier to pay his medical expenses, including the cost of surgery and post-operative physical therapy. The Commission agreed and directed Employer to pay for the additional treatment worth a total of $100,000.00. A few months later, upon discharge, Mr. Claimant asks the Commission to find an increase in his permanent disability due to the accidental injury. The Commission agrees and issues an award worth $50,000.00 in additional benefits.

In light of the prior third-party recovery, Employer asserts its credit against future benefits. Specifically, Employer is entitled to a credit or holiday for the balance of the third-party recovery received by Mr. Claimant. Since the additional medical expenses arose first, those were considered before the additional permanent partial disability benefits. Therefore, payment was made as follows:

- Em*ployer's credit (balance received by Mr. Claimant): $99,900.00*
  - *— Employer's liability for medical expenses: $100,000.00*
    - *— Employer's liability for additional* permanency: $50,000.00

After Employer asserts its credit for the $99,900.00 recovered by the Claimant, the claim proceeds like any other workers' compensation matter and the Claimant is entitled to pursue additional medical expenses and compensation against Employer and its insurer.

Unique Circumstances

Resolution without consent of Employee/Employer — The Act contemplates cooperation between the employee and the employer/insurer in pursuing third-party litigation.

[9] Md. Code Ann. Lab. & Empl. § 9-902(f)
[10] Md. Code Ann. Lab. & Empl. § 9-903

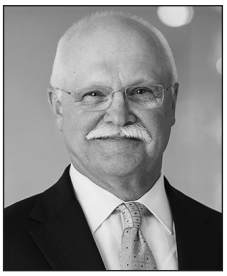
MDC Takes a Strong Stand Against Plaintiff Interference in the Selection of a Corporate Representative

Selecting a representative for a 30(b)(6) deposition is one of the most important decisions in litigation involving a corporate entity. Much goes into the vetting, consideration and ultimate selection. It has always been understood to be solely the defendant's choice regarding who the corporate representative will be. After all, defendants do not get to choose who the plaintiff is.

Despite what seems to be common sense, a proposal has been made to permit plaintiff attorneys to interject themselves into the corporate representative selection process. In fact, proposed amendments to Rule 30(b)(6) would require plaintiff lawyers to meet and confer with defense attorneys about the selection process.

MDC and DRI strongly oppose the proposed amendments. **Bruce Parker** of Venable provided oral testimony against the amendments. Bruce reminded the Committee that not only does the selection of the corporate representative constitute work-product, it necessarily involves attorney-client communications. Additionally, **Toyja Kelley** of Saul/Ewing, and current President of DRI, provided oral testimony against the proposal.

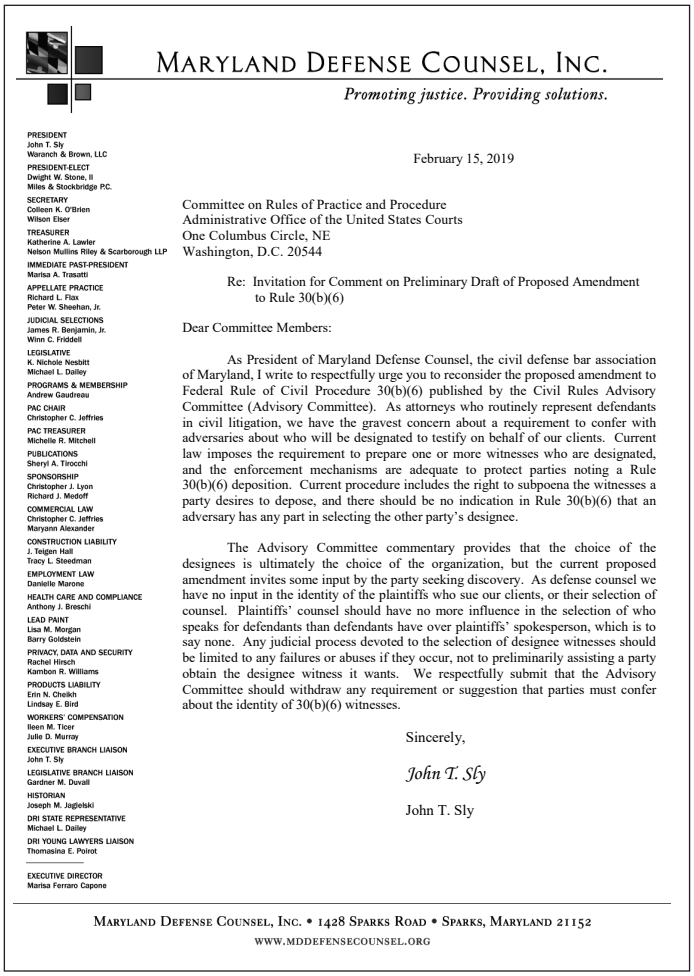
MDC further provided written opposition to the amendments through the formal comment process (a copy of the letter is included in this Defense Line). MDC sincerely thanks **Gardner Duvall** of Whiteford, Taylor & Preston for spearheading that effort.



Bruce Parker
Venable LLP

Toyja Kelley
Saul Ewing Arnstein & Lehr LLP

Gardner Duvall
Whiteford Taylor Preston LLP



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February 15, 2019

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Invitation for Comment on Preliminary Draft of Proposed Amendment to Rule 30(b)(6)

Dear Committee Members:

As President of Maryland Defense Counsel, the civil defense bar association of Maryland, I write to respectfully urge you to reconsider the proposed amendment to Federal Rule of Civil Procedure 30(b)(6) published by the Civil Rules Advisory Committee (Advisory Committee). As attorneys who routinely represent defendants in civil litigation, we have the gravest concern about a requirement to confer with adversaries about who will be designated to testify on behalf of our clients. Current law imposes the requirement to prepare one or more witnesses who are designated, and the enforcement mechanisms are adequate to protect parties noting a Rule 30(b)(6) deposition. Current procedure includes the right to subpoena the witnesses a party desires to depose, and there should be no indication in Rule 30(b)(6) that an adversary has any part in selecting the other party's designee.

The Advisory Committee commentary provides that the choice of the designees is ultimately the choice of the organization, but the current proposed amendment invites some input by the party seeking discovery. As defense counsel we have no input in the identity of the plaintiffs who sue our clients, or their selection of counsel. Plaintiffs' counsel should have no more influence in the selection of who speaks for defendants than defendants have over plaintiffs' spokesperson, which is to say none. Any judicial process devoted to the selection of designee witnesses should be limited to any failures or abuses if they occur, not to preliminarily assisting a party obtain the designee witness it wants. We respectfully submit that the Advisory Committee should withdraw any requirement or suggestion that parties must confer about the identity of 30(b)(6) witnesses.

Sincerely,

John T. Sly

John T. Sly

MARYLAND DEFENSE COUNSEL, INC. • 1428 SPARKS ROAD • SPARKS, MARYLAND 21152
WWW.MDDEFENSECOUNSEL.ORG

MDC's letter in opposition to Rule 30(b)(6) amendments

(THIRD PARTY LITIGATION) *Continued from page 22*

If the employee settles his third-party case without the consent of the employer/insurer and to the detriment of the employer/insurer, the employer/insurer are entitled to a credit equal to the amount of the settlement and the employee is barred from receipt of future workers' compensation benefits. The employer/insurer have the burden of proving that they were prejudiced as a result of the settlement without their consent.

Lien Exceptions — Benefits paid pursuant to uninsured motorist insurance coverage are not subject to the third-party subrogation provisions in the Workers' Compensation Act.[11] Instead, if an employee receives uninsured motorist insurance benefits as a result of a work injury, the benefits will be reduced by the amount of workers' compensation benefits arising out of the claim.[12] This rule also applies to underinsured motorist insurance benefits and personal injury protection benefits paid as a result of a work injury.

Lien waiver — The Act also contemplates the right of the employer/insurer to waive some or all of its lien.[13] From a practical standpoint, an employer or its insurer may waive the lien or prospective lien at any time. This is often a useful tool for both parties in negotiating full and final settlement of the workers' compensation claim before, during, or after the initiation of the third-party suit.

James A. Turner is a partner at GodwinTirocchi. He concentrates his practice on defending employers and insurance carriers in workers' compensation and general liability matters in Maryland and the District of Columbia.

[11] Md. Code Ann. Ins. § 19-509.
[12] *Travco Ins. Co. v. Williams*, 430 Md. 396 (2013)
[13] Md. Code Ann. Lab. & Empl. § 9-902(g)

The Compensability of Degenerative Joint Disease

Christopher M. Balaban

The Maryland Court of Special Appeals in *Baltimore County v. Quinlan*, 238 Md. App. 486 (2018) (*cert granted* 461 Md. 611, November 7, 2018) held that degenerative joint diseases can be compensable occupational diseases if it can be shown through expert testimony that the nature of the employee's employment contributed to the onset of the degenerative disease.

In *Quinlan*, the Claimant, a paramedic/firefighter for Baltimore County, filed a Claim for occupational disease based on his development of meniscal tears in his right knee and related osteoarthritis. Claimant presented evidence at the Maryland Workers' Compensation Commission (the "Commission") that repetitive kneeling and squatting is a regular part of Claimant's job duties and is also a risk factor for meniscal tears and osteoarthritis. The Commission, after a hearing on the County's contesting issues, found that the Claimant did not sustain a compensable occupational disease and disallowed the Claim. Claimant noted a timely Petition for Judicial Review to the Circuit Court for Baltimore County.

In the Circuit Court, Claimant, who is 5'9" and weighs between 230–240 pounds, testified that he frequently, as part of his job duties, kneels and squats while treating patients. Claimant's expert, Dr. Barbara Cochran, testified that the job duties of a paramedic/firefighter, which require frequent kneeling and squatting, have been related to early-onset osteoarthritis in medical studies. Dr. Cochran further noted a study in which it was found that firefighters have a "significant" relative risk of osteoarthritis. While Dr. Cochran did admit that age and weight are also factors in development of osteoarthritis, repetitive kneeling and squatting are also known causal factors. Dr. Hinton, the County's expert, opined that Claimant's age and weight were the likely causative factors of his osteoarthritis and not his work as a paramedic/firefighter. However, Dr. Hinton did concede that repetitive use is a causative factor of osteoarthritis. The jury overturned the decision of the Commission finding that the Claimant suffered a compensable occupational disease. The County noted a timely appeal to the Court of Special Appeals.

After reviewing relevant Maryland case law, the Court of Special Appeals found that an occupational disease must be one that arises out of the unique nature of the job duties of the employment, yet it does not have to be the sole possible causative factor. The Court primarily relied upon prior mental health cases for the proposition that the specific nature of the employment must be a causative factor of the disease. Specifically the Court noted that alleged mental illness of a computer programmer due to workplace harassment from coworkers was not compensable because workplace harassment is not inherent in computer programming. *See Davis v. Dyncorp*, 336 Md. 226 (1994). However, PTSD suffered by a paramedic due, at least in part, to working at scenes of "gruesome motor vehicle accidents" was compensable because such was in the nature of employment as a paramedic. *See Means v. Baltimore County*, 344 Md. 661 (1997). Upon review of the record, the Court of Special Appeals determined that the testimony set forth by the Claimant and Dr. Cochran was sufficient to support the jury's verdict. Accordingly, the Court upheld the jury's decision finding that Claimant's degenerative joint issues were a compensable occupational disease.

As a result of *Quinlan*, Maryland employer liability defense practitioners can anticipate an influx of similar cases in which degenerative and/repetitive use injuries are alleged to be a result of occupational disease. However, it is important to note that the Claimant bears the burden of proof that the nature of the employment (i.e. job responsibilities) made the Claimant more susceptible than the average person to develop the claimed degenerative disease. It is further imperative, as with all occupational disease cases, to identify and highlight any and all other possible non-job-related causes of the claimed disease that are applicable to the claimant (i.e. weight, age, exercise, extracurricular activities, other employment, prior employment, prior injury, heredity, disease, etc.). It should also be noted that the Court of Appeals of Maryland granted *certiorari* of the case on November 7, 2018.

Christopher M. Balaban is an Associate at Semmes, Bowen & Semmes in the Workers' Compensation and Employers' Liability Practice. He represents employers and insurance companies in the defense of workers' compensation claims.

MDC at DRI

Marisa A. Trasatti,
Wilson Elser
DRI State Representative

DRI is the leading national organization of defense attorneys and in-house counsel, supporting over 22,000 members through advocacy, education, member services and legal resources. **Marisa A. Trasatti**, Partner at Wilson Elser, serves as the DRI State Representative for Maryland. Marisa recently attended the DRI Leadership Conference in Chicago. The Conference was designed to assist in developing skills necessary to move DRI and MDC forward.

DRI is host to 29 substantive committees whose focus is to develop ongoing and critical dialogue about areas of practice. DRI has served the defense bar for more than 50 years and focuses on five main goals:

- **Education:** To teach and educate and to improve the skills of the defense law practitioner
- **Justice:** To strive for improvement in the civil justice system
- **Balance:** To be a counterpoint to the plaintiff's bar and seek balance in the justice system in the minds of potential jurors and on all fields where disputes are resolved
- **Economics:** To assist members in dealing with the economic realities of the defense law practice, including the competitive legal marketplace
- **Professionalism and Service:** To urge members to practice ethically and responsibly, keeping in mind the lawyer's responsibilities that go beyond the interest of the client to the good of American society as a whole

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Publishing and Speaking Opportunities	×	×	×		X		×	×
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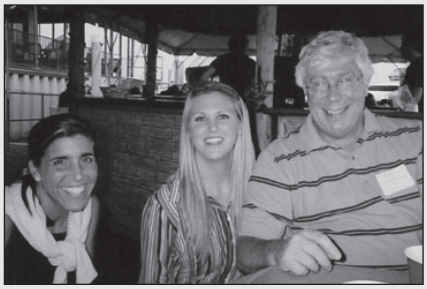
DRI's membership benefits include networking/leadership opportunities, client connections, publication in *For The Defense*, CLE credits, member only communities, and a DRI career center! The ROI on this investment is unquestionable. Returning members who decide to rejoin DRI are also eligible for a $500.00 CLE credit. See below the chart for the full list of benefits.

Emily G. Coughlin, Second Vice President of DRI, published an article in *For The Defense* answering the question of why she devotes so much time to DRI. Her answer was simple enough, she couldn't afford not to. If an individual wants to be a lawyer in today's society, it is all about collaborative learning, and as Emily puts it, "no organization other than DRI is as trusted a living and dynamic community of shared learning." DRI continuously evolves through the years providing cutting edge resources, programming, networking and communities for the members to become leaders in their field and firms, proving the DRI is the powerhouse of the legal field.

Please see the link below to her article:

http://tinyurl.com/yymqgwe2

See photos from past events at mddefensecounsel.org/gallery



MDC 2018–2019 Programs

June 20, 2018, Noon — **Lunch and Learn**

Accident Reconstruction
Location: Semmes Bowen & Semmes
Speaker: Tracie Eckstein
Sponsor: Rimkus

July 18, 2018, Noon — **Lunch & Learn**

Social Media & Record Canvassing
Location: Semmes Bowen & Semmes
Sponsors: American Legal Records and Social Detection

Sept. 25, 2018, 5:30pm — **Past President's Reception**

Location: Miles & Stockbridge

Oct. 25, 2018, Noon — **Lunch & Learn**

Expert Retention and Assessment
Location: Miles & Stockbridge
Sponsor: RTI

OCT. 23, 2018 — **1st DEFENSE LINE ISSUE**

Nov. 26, 2018
8:30am – 5pm — **Deposition Bootcamp**

Focused on Experts
Location: Miles & Stockbridge

12/11/18 — **2nd DEFENSE LINE ISSUE**

Jan. 22, 2019, 5pm — **MDC Legislative Dinner**

Location: Ruth's Chris

Jan. 23, 2019, 5:30pm — **MDC/Strategy Horse 1st Module**

Location: Miles & Stockbridge

Jan. 24, 2019 — **MDC/VA/DC (DRI) social event**

Location: Silver Spring area

Feb. 20, 2019, 5:30pm — **MDC/Strategy Horse 2nd Module**

Location: Miles & Stockbridge

Feb. 27, 2019, Noon — **Lunch & Learn**

Opoids: What Lawyers Need to Know
Location: Goodell/Devries

MARCH 19, 2019 — **3rd DEFENSE LINE ISSUE**

March 20, 2019, 5:30pm — **MDC/Strategy Horse 3rd Module**

Location: Miles & Stockbridge

April 20, 2019, 11:30am – 1:30pm

Happy Helpers for the Homeless (Volunteer opportunity)
Location: 1550 Catons Center Drive, Halethorpe, MD

May 1, 2019 — **MDC/Strategy Horse 4th and final module**

Location: Miles & Stockbridge

June 5, 2019, 5:30pm — **MDC Crab Feast**

Location: Nick's

JUNE 18, 2019 — **4th DEFENSE LINE ISSUE**

Visit www.MDdefensecounsel.org/events.html for more details

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Maryland Defense Counsel, Inc. Presents

Annual Meeting and Crab Feast

June 5, 2019
5:30 p.m. – 7:30 p.m.

Nick's Fish House
2600 Insulator Drive
Baltimore MD 21230

For More Information:

ED@mddefensecounsel.org

Learn more at www.mddefensecounsel.org