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# MICHIGAN DEFENSE QUARTERLY

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MDTTC

MICHIGAN DEFENSE TRIAL COUNSEL, INC.

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## President's Corner

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By: Timothy A. Diemer  
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# From the President



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### Honoring Our Volunteers

At DRI-affiliated meetings with non-Michigan lawyers, my revealing the fact that I do not practice in a mandatory CLE state is usually met with gasps. Once composure is regained, the conversation then typically turns to amazement at the success the Michigan Defense Trial Counsel enjoys despite functioning as a monolithically voluntary organization where no one is actually forced to participate.

At these meetings designed for the individual State and Local Defense Organizations to swap ideas and strategies, we Michigan representatives often lead by example. Other states praised our Respected Advocate Award program, where we honor a lawyer from the other side of the aisle who best exemplifies civility, professionalism and quality advocacy, and have themselves adopted it. We shared our strategy for fostering a strong commercial litigation presence while other states are just now getting their section off the ground. The same is true of our golf outing; we recently hosted our 16<sup>th</sup> annual outing while other states' outings are still in their infancy.

Needless to say, constantly adapting and trying new programs as opposed to merely repeating the same things again and again where participation is not mandatory requires a lot of work to get new initiatives off the ground. It does not seem as if a day passes where I do not reach out to volunteers asking for yet more assistance with spearheading a new program or with reaching out to membership to promote an upcoming event or member benefit. Other Past Presidents share similar stories of leaning on our Board Members and Section and Regional Chairs to make our organization thrive, a daunting task especially in these economically challenging times.

In this spirit, I am delighted to honor two dutiful volunteers at the upcoming Past President's Dinner in conjunction with the MDTC Winter Meeting, *Developments in Commercial Law that Every Litigator Should Know*, on November 3, 2012.

### MDTC President's Special Recognition Award: James Bodary

The highly publicized role of MDTC in the ongoing Tort Reform battles in Lansing was bolstered by MDTC Past President James Bodary, who twice made the trek to Lansing to offer testimony on the hotly debated medical malpractice proposals. As a Past President of MDTC and defense lawyer who has spent his career defending hospitals and doctors against medical malpractice claims, Jim was able to speak with an air of credibility and authority unsurpassed by others who offered testimony.

The bill causing the greatest firestorm at the hearings was a proposal to extend the "professional judgment rule" that currently exists in favor of lawyers to additionally cover medical professionals, in a legislative attempt to confer immunity when the doctor acts in good faith or subjectively believes her actions were in the best interest of the patient. The advisability of the professional judgment rule as framed by Senate Bill 1116<sup>1</sup> had been a main sticking point at the hearings, with speakers and legislators harping on the purported unfairness of lawyers receiving the benefits of professional discretion to the exclusion of medical professionals.

This seeming contradiction — why one group gets the benefit of professional judgment and another might not — was at the center of the debate. Legislators and

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members of the public in attendance were skeptical of lawyers fighting to protect a rule they themselves have enjoyed but offering reasons why it might not make good policy to extend a similar rule to others.

Jim Bodary's testimony encapsulated the differences between the exercise of judgment for a lawyer, whose practice is more instinctual art than science, and a medical professional whose standard of care more often has defined options based on scientific literature and exacting research. Drawing on his vast experience defending medical professionals, Jim used practical examples to explain how on-the-fly trial strategy does not lend itself to hard and fast, preconceived standards of conduct, where a gut-level choice of whether to call a witness, whether to place blame on a co-defendant, non-party or plaintiff adversary, or whether to ask a certain question of an expert at trial cannot be judged according to formulaic, paint-by-numbers, bright-line rules. As a testament to the clarity and persuasiveness of his presentation, at the end of the hearing, the Senate Committee on Insurance asked for a copy of Jim's remarks for inclusion in the record.

At this time, the Insurance Committee has not voted on these bills, but they viably remain under consideration. We will of course keep membership updated if the status quo should change. In the meantime, we are grateful for Jim Bodary's having agreed to be the voice of MDTC at these hearings.

### **MDTC Volunteer of the Year: Hilary Ballentine**

My other honoree at the Past President's Dinner is equally supportive of MDTC

but in a less visible way than Jim Bodary's very public role speaking on our behalf in Lansing. Hilary Ballentine's name does not appear as author on many of the MDTC *Amicus Curiae* Briefs filed in the Michigan Supreme Court and Court of Appeals and, as a result, other than those of us who rely upon her in her role as Chair of the Amicus Committee, Hilary's hard work can often go unnoticed. Anyone who has worked with Hilary's committee will tell you, however, that our success as an organization and our high profile growth as an active Amicus participant is due to the tireless volunteerism of Hilary and her co-chair, Jim Brenner.

The Amicus Committee has always been one of our more active groups and Hilary did not balk at leadership's request that her Committee become even more active by beginning to file even more Amicus Briefs. Now, instead of just considering the requests for Amicus support that come directly from our members, Hilary's Committee also identifies cases where MDTC ought to participate *sua sponte* or where the Court, itself, invites MDTC's participation. Before this policy change, MDTC was often unaware it had been invited to weigh in by the Supreme Court's Order Granting Leave in the case.

Our new policy is to treat requests from the Court in the same way we consider requests from defense lawyers and the result has been the increased amicus participation of MDTC and, of course, increased work for Hilary and her Committee. Hilary has adjusted swimmingly to the increased workload, having solicited a list of MDTC members to serve as authors of these briefs and she never struggles to find an author, yet

another testament to our group's spirit of volunteerism.

Having served behind the scenes as the Amicus Committee Chair for five years (and now we are proud to have her as a Board Member), this could in all honesty be viewed as a "Lifetime Achievement Award," but Hilary's volunteer work over this past year has really stood out. When MDTC Member Eric Conn made an urgent, last minute request for an Amicus Brief on a case of huge significance to our organization, facing a "do or die" motion deadline that literally expired in an hour and a half, Hilary had the motion on behalf of MDTC hand delivered in under an hour. This immediate act of precision is but one example of Hilary's voluntary dedication to MDTC.

We are able to accomplish so much because of our volunteers — **only** because of our volunteers. And it could certainly be argued that we innovate in ways other organizations do not because we have no other choice but to be creative since none of us actually have to be here.

I am delighted to be part of the celebration to honor both award winners for their dedication to MDTC and their immeasurable contributions to the success of our organization.

### **Endnotes**

1. In analyzing Senate Bill 1116, the MDTC Executive Committee expressed support for the medical judgment rule currently existing in Michigan law under the case of Rytkonen v Lojaco, 269 Mich 270, 275 (1934) ("Where there is an opportunity for choice, the doctor is not guilty of negligence in using a method so recognized. . . .") Our disagreement was not with the rule, itself, but the overly broad manner SB 1116 was drafted and the unintended consequences of de facto immunity if it were passed. A more detailed analysis of SB 1116 can be found at [http://www.mdctc.org/mdtc\\_member\\_update\\_june\\_2012](http://www.mdctc.org/mdtc_member_update_june_2012).