



# Tri-State Defense Lawyers Association

Vermont · New Hampshire · Maine



## Newsletter

Fall 2007

### Here We Come Portsmouth, NH!

The leadership of the Tri-State Defense Lawyers Association has been very busy since we sent out our last newsletter. At long last, we have completed updating and revising our by-laws and will be presenting them to all of you for ratification at the Business Meeting on Saturday, September 22, during the Annual Meeting in Portsmouth. I want to extend a special thanks to Past NNEDCA President David Herzer of Norman, Hanson & Detroy for taking the laboring oar on updating the by-laws. Having completed this task, the hiring of Peggy Schultz as Executive Director and the updating of our membership and finances, the TDLA is poised to move forward as a more businesslike, vibrant and useful organization. As I stated in our Winter Newsletter, our goal is to provide a forum within which lawyers from Maine, New Hampshire and Vermont can share professional development and networking opportunities and socialize together. I firmly believe that the lawyers in the Tri-State region share unique and salutary characteristics and values that will be enhanced when shared with each other.

Your leadership team all recently attended a DRI Northeast Regional Meeting in Manchester, VT on May 4-5. Matt Cairns, the outgoing DRI Regional Director, led us through a series of thoughtful discussions and presentations on what DRI can do for the SLDOs (state and local defense organizations) and what we as an SLDO can do for DRI. John Martin, of Thompson & Knight in Dallas, Texas, the President-Elect of DRI came to the meeting and offered us his thoughts on the direction in which the defense bar is headed and what he hopes to accomplish as President of DRI. It was a very enjoyable and useful meeting, and we all came away from it with an intensified desire to work hard to make the TDLA a better and more relevant organization for its members.

### Mary Ann Dempsey Takes Home the Trophy!

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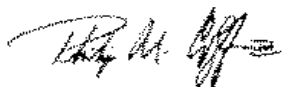
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**Phil Coffin—contd.**

In an effort to be more relevant, we changed the date of the Annual Meeting to September so that it would better line up with our fiscal year and hopefully improve attendance. As you know, our Annual Meeting is scheduled to take place Friday evening and Saturday morning September 21 and 22 in historic Portsmouth, NH. We have a terrific agenda starting with a social hour on Friday evening followed by dinner and a speaker. We are very pleased to have Charlie Bass, President of the Maine Street Republican Partnership speak on the upcoming New Hampshire primary and the challenge of running a national presidential campaign. Given the fervor with which prospective candidates have been running their campaigns already, Charlie's address should be especially interesting and germane. On Saturday morning, after a continental breakfast, we have four terrific CLE programs lined up. First, Jim McCrystal, a nationally recognized expert on electronic discovery, will discuss "Electronic Discovery: Surviving to Live in a New Reality." Second, we have a panel consisting of trial judges from Maine (Hon. G. Arthur Brennan), New Hampshire (TBA) and Vermont (Hon. Mary Miles Teachout) speaking on "Tips on Preparing for Your First Jury Trial – A Perspective from the Bench." This program should be especially interesting to younger lawyers and we encourage you to attend.

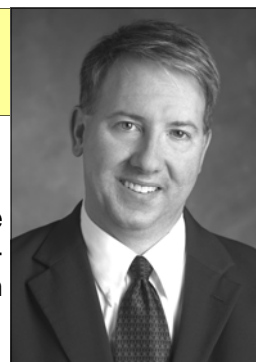
Third, Adam Rosen, a lawyer, psychologist and jury consultant will speak on "Managing Juror Emotions and Winning Cases – with a Technological Assist." If you have not heard of Adam's new internet based case evaluation and strategy development tool, you need to attend this presentation. Finally, Peter Beeson and Mitchell Simon of Devine, Millimet & Branch, PA will speak about "The Ethics of Cross Border Practice in the Tri-State and The Advice of Counsel Defense: Does it Exist for Lawyers?" All in all, this is a great CLE line-up and should be both thought provoking and professionally rewarding. I sincerely hope you will be able to join us.



TDLA Chairman  
Maine President  
Lambert Coffin

## **New Hampshire President Chris Poulin**

*Devine, Millimet & Branch, P.A.*



Greetings to New Hampshire Defense Counsel

I am honored to announce that New Hampshire will be the host State for the first annual meeting of the Tri State Defense Lawyers Association-September 21 and 22, 2007 at the Hilton Garden Inn, downtown Portsmouth, New Hampshire.

I am personally proud that three of my distinguished colleagues at Devine Millimet will be featured speakers at our inaugural event. Former New Hampshire Congressman, Charlie Bass will be our keynote speaker on Friday evening, September 21.

*Chris Poulin—contd.*

Congressman Bass will discuss the role of New Hampshire's first in the nation primary and the unique challenges that face presidential candidates mounting a national campaign.

On Saturday, September 22, Attorneys Peter Beeson and Mitch Simon will provide an ethics presentation on the most recent ethics rule changes in both the Federal and State Courts. ( A great way to get those much needed CLE ethics credits!)

Fall is a great time of year to visit the New Hampshire Seacoast! Portsmouth is a very pedestrian friendly city with many great shops, tourist attractions and ocean side restaurants on "the decks" to enjoy ! If you haven't signed up for this great event, please do so now! Encourage your New Hampshire defense colleagues to attend TDLA's annual meeting as well!

***See you in Portsmouth September 21 and 22 !***



## **Vermont President Charity Clark**

*Downs, Rachlin & Martin, PLLC*

Vermont's defense bar has been presented with a compelling issue never before addressed by Vermont's highest court: Are punitive damages available under Vermont's wrongful death statute? Judge Sessions presented the Vermont Supreme Court with a certified question on that topic in the case of *Jensen v. Cashin*. As one of Ms. Jensen's attorneys, I have been given the opportunity to advocate that Vermont's wrongful death statute does not provide for punitive damages. Among a myriad of supporting arguments is the obvious one: On its face the statute provides only for pecuniary damages. We anticipate that DRI may be filing an amicus brief in support of this position.

In addition to this development, the local defense bar was recently involved in advocating for increased judicial compensation for federal judges. The three presidents of Tri-State Defense Lawyers Association (TDLA) submitted a letter to our respective U.S. Senators, including Vermont Sen. Patrick Leahy, Chair of the Judiciary Committee, expressing support for increased judicial compensation to ensure the continued quality of our esteemed federal courts. Shortly after our letter was sent, Sen. Leahy and others introduced a bill to increase federal judicial salaries.

Finally, on behalf of the Vermont defense bar, I would like to take the opportunity to recognize and thank attorney John Webber of Rutland. John, as the last officer of the dormant Vermont Defense Lawyers Association, cleared out the funds remaining in an old VDLA bank account and graciously donated them to the TDLA. John is a long-serving and revered member of Vermont's civil defense bar. We thank John for his wonderful gift and hope to see him at our Annual Meeting in Portsmouth. In closing, I hope that you all will join me and our fellow members of the defense bar at the TDLA's Annual Meeting in Portsmouth, NH on September 21-22. The conference will feature several interesting presenters and an opportunity to socialize in an historic and lively setting.

***See you there!***



## ***Hello and Farewell***

*Matt Cairns, DRI Regional Director  
Ransmeier and Spellman, P.C.*

I write my second and final column for the Tri-State Defense Lawyers Association Newsletter with just 46 days left in my term as your Regional Director. Since time is short, I thought I would take a moment to write about DRI Leadership instead of simply reporting on the excellent Regional meeting held at the Equinox in Manchester, Vermont in May or the successful NFJE conference in June or the fact that DRI revenue from paid memberships is up since 2005 or that the Women in the Courtroom project is set to release a new best practices manual for law firms at the 2007 Annual Meeting or that the 2007 Annual Meeting looks like one of the best ever (and everyone reading this should plan on attending!).

DRI is led by an Executive Committee consisting of the Immediate Past President, President, President Elect, First Vice President, Second Vice President and Secretary-Treasurer. There is also a Board of Directors made up of 12 Regional Directors and 12 Directors Elected Nationally, four of each elected each year for 3 year terms. Each State has a State Representative elected for 3 years. There is a Law Institute that oversees our outstanding seminars and each substantive committee has a Chair, Vice Chair and its own leadership structure. All of these leadership opportunities unfortunately take some time to advance into, but the important thing is that the leadership door is open to anyone who wants to roll up their sleeves and work hard. The two best ways to do this are by getting involved with a DRI Substantive Law Committee or by getting involved in a local organization like the TDLA. If you are interested, I encourage you to attend meetings, offer ideas, volunteer for projects and meet fellow leaders. I can also assure you that if you take these steps, DRI leaders will take notice and you will find yourself being asked to serve on special projects or committees. You need look no further than me, or Beth Stouder who got appointed to the Membership Committee, Walter Judge who helped organize a successful Commercial Litigation seminar, and Mary Ann Dempsey who serves on the Women in the Courtroom project, heads up Annual Meeting recruiting for New England and most recently won the 2007 Outstanding State Representative Award. I can also assure you that if you choose this path, you will have to work hard, but will also find great personal reward from your new friendships and professional reward from working with America's best attorneys.

In the past 3 years, so much has happened to me and DRI, but one of the things that I am most proud of is the small part I played in rejuvenating this fantastic organization. The real credit goes to Beth Stouder, Dave Herzer, Walter Judge, Phil Coffin, Mary Ann Dempsey, Chris Poulin, Charlie Bauer, Charity Clark, Carrie Legus, Phil Bixby, Eric Poehlman, and, of course, Peggy Schultz, all of whom stepped to the plate in the spring of 2006 to begin the process of creating a new, dynamic and effective "Voice of the Defense Bar" for northern New England. I may no longer have the title "Regional Director" after my name come October 13th, but I will continue to proudly declare myself a member of the TDLA for the balance of my career and look forward to working with all of you on issues of import to our practices and society. Thank you for the opportunity to have served and I look forward to seeing all of you soon.

## Don't Miss It!

*Phil Bixby, Maine DRI Rep  
Friedman, Gauthwaite, Wolfe & Leavitt*



As Maine's Representative to DRI, I would like to encourage all Maine civil defense counsel to attend the upcoming 2007 Annual Meeting of TDLA in Portsmouth, New Hampshire on September 21 and 22. The Friday evening reception and dinner will give TDLA members a chance to network, both socially and professionally, and will be followed by a presentation by Charlie Bass, President of the Main Street Republican Partnership. While Maine is not one of the early primary states, Mr. Bass is a well-known political figure, and his thoughts on the challenges of running a presidential campaign nationally will appeal to Mainers as well as prospective voters in the New Hampshire Primaries. Saturday morning will include several valuable CLE sessions which will appeal to Maine attorneys, including discussions about electronic discovery, managing juror emotions, cross-border practicing, and a Judicial panel with judges from all three northern New England States discussing preparation for trial.

On top of all of the above, the meeting is being held in the scenic and cozy coastal town of Portsmouth, which is less than one hour's drive from most locations in southern Maine. The Hilton Garden Inn in Portsmouth is filling up fast so, if you haven't already reserved your hotel room and signed up for the annual meeting, I urge you do so as soon as possible.

DRI is committed to the success of TDLA, which is expected to become a valuable resource to defense counsel throughout the northern New England area. For those Maine defense counsel interested in more information about TDLA and/or DRI, or who would like to become members of TDLA and/or DRI, please feel free to contact me at (207) 761-0900.



## New Hampshire Full of Activity

*Mary Ann Dempsey, Vermont DRI Rep  
Wiggin-Nourie, P.A.*

Fall is already looking to be a busy season and we hope you take time to get involved with TDLA. All of you should have received the Agenda and Registration Form for the Annual Meeting of the Tri-State Defense Lawyers' Association to be held in Portsmouth, New Hampshire on September 21-22<sup>nd</sup>. The meeting consists of a networking reception and dinner on Friday night followed by a half day CLE program on Saturday. As you know, this year has been one of rebuilding for our local organization and our hope is that, in addition to your membership in TDLA, you will attend the Annual Meeting and show your support for the organization and its intended growth. The feedback from TDLA's first newsletter was very positive. It also confirmed that we, as defense lawyers in Northern New England, have common issues in our respective practices and can benefit by having an organization that is dedicated to fostering levels of communication amongst defense lawyers throughout the three states. I encourage anyone who is interested in contributing to TDLA's newsletters to contact Peggy Schultz and we promise to get you involved.

As for DRI, we are also getting busy in preparation for DRI's Annual Meeting in Washington, D.C. this October. If you have not been to a DRI Annual Meeting, please consider doing so. It is a great networking opportunity with lawyers and insurance representatives throughout the country. It also provides a program with substantial CLE credit and nationally recognized speakers such as Bob Woodward and Brit Hume.

*New Hampshire—contd.*

Locally in New Hampshire, DRI and TDLA joined with the Women's Bar Association and the Trial Lawyers' Association in hosting a breakfast seminar this past spring in Manchester, New Hampshire for new lawyers on Surviving Law Firm Life. It was a great chance to meet younger members of the defense bar and encourage them to become involved in various organizations that support their practices such as DRI and TDLA. DRI has worked to host a local seminar each spring on different topics, such as Women in the Courtroom, to bring DRI's networking opportunities and resources to a more local level. Next year, we hope to organize a seminar on the judiciary and difficulties facing this branch of government.

I hope to see many of you at TDLA's meeting in September and DRI's meeting in October



### **Message from the Executive Director**

I want to take this opportunity to mention that our own outgoing Regional Representative, Matt Cairns, is running to serve as DRI's Second Vice President. Matt, with the Ransmeier Spellman firm in Concord, New Hampshire, has served for the last three years as our DRI Regional Representative. He has worked tirelessly to grow and improve DRI and TDLA. If you agree, please attend the DRI Annual Meeting and reserve time with the Nominating Committee to voice your support for Matt. It takes only a view minutes. If you cannot attend, you may still express your written support of Matt's candidacy to Sheryl Willert, Esq., c/o DRI, 150 North Michigan Avenue, Suite 300, Chicago, IL 60601. Please be sure to mail your comments well before the Annual Meeting.

The Tri-State Defense Lawyers Association is very different from other defense associations for obvious reasons - it is made up of three states. Ensuring that each state and its membership receives the respective training and networking they desire has its challenges but we are determined to bring this organization to a level that will provide elements needed to give value to the performance of your defense practice. I welcome your suggestions and any support you might offer...especially with the Newsletter. **See you in Portsmouth!**

*Peggy*

**Statements made in court and recorded by court reporters. Source: Disorder in the American Courts.**

ATTORNEY: Now doctor, isn't it true that when a person dies in his sleep, he doesn't know about it until the next morning?

WITNESS: Did you actually pass the bar exam?

ATTORNEY: How was your first marriage terminated?

WITNESS: By death.

ATTORNEY: And by whose death was it terminated?

WITNESS: Now whose death do you suppose terminated it?

ATTORNEY: Doctor, how many of your autopsies have you performed on dead people?

WITNESS: All my autopsies

ATTORNEY: Are you qualified to give a urine sample?

WITNESS: Huh....Would you like to rephrase that?





## The New Federal Rules and Privilege “Clawback” In the Electronic Age

*Gregory A. Weimer, Esq.  
Hoff Curtis*

What is electronically stored information (“ESI”) and why should it concern us? It certainly has become an increasingly hot button litigation topic and with good reason. Today even the simplest of computer programs can create embedded data showing when a document was created, who created it, and what edits were made by whom. The fact of the matter is that computers today enable both individuals and businesses to store massive amounts of data. It is estimated that 70% of corporate records are kept in electronic format and upwards of 30% of corporate records are only ever generated in electronic format.

This raises many interesting issues surrounding document production in discovery and what constitutes a waiver of privilege. As the amount of information increases the risk of inadvertently producing a privileged document in discovery weighs heavily on the practitioner. In response the Advisory Committee on the Rules of Federal Civil Procedure proposed changes to Rules 16 and 26 to provide a frame work for addressing issues of inadvertent waiver of privilege. In December of 2006 the Federal Rules of Civil Procedure were amended to reflect these proposed changes. So we as litigators need to start paying attention to these issues and how they will impact the conduct of discovery.

### I. The New Rules

Rules 16(b)(5) and (6) have been amended to provide that the Scheduling Order may include any agreements the parties reach to minimize the risk of waiving privilege or work-product protection. The new Rule 26(f) has added several items for the parties to discuss at the meet and confer session. Those items include issues relating to preservation of discoverable ESI, the forms in which ESI will be produced, and how the parties may assert claims of privilege or work-product protection in the event of inadvertent disclosure of such information.

In recognition that the amount of ESI can be staggering, the amendment to Rule 26(b)(5) provides a process for asserting privilege after the information has been produced. In short, the amendment basically codifies the “clawback” process which many litigants have utilized in confidentiality stipulations governing the production of sensitive documents in discovery. Under the new Rule the party producing documents can notify the party receiving the documents of an inadvertent production and the basis for the claimed privilege. Once notified the receiving party must promptly destroy, return or sequester the information until the claim of privilege is resolved. These provisions apply even in the absence of a written agreement between the parties. Moreover, the Rule provides a means by which the dispute over the inadvertent production can be resolved. Rule 26(b)(5)(B) allows the receiving party to “promptly” present the information to the court under seal for a determination of the claim.

### II. The Three Headed Law of Inadvertent Waiver

It is noteworthy that the new Rule does not address whether the inadvertent production constitutes a waiver of any applicable privilege. Whether or not a waiver has taken place is still governed by the law of waiver in the jurisdiction the suit is pending in. The issue of waiver breaks down into three basic camps: strict waiver jurisdictions; middle of the road jurisdictions; and forgiving jurisdictions.

In strict waiver jurisdictions the mere inadvertent production of privileged information constitutes a waiver of the privilege on the Wigmore theory that once produced the privilege vanishes. The U.S. District Court for the District of Maine has adopted this strict approach. In jurisdictions that employ the middle of the road approach the courts balance several factors in determining whether a waiver has

**“Clawback” - contd.**

occurred. These factors include the total volume of documents produced versus the number of privileged documents produced, whether the producing party had any process in place for reviewing and stamping documents as privileged, and how promptly the party acted to correct its mistake. In the more forgiving jurisdictions courts look to the intent of the producing party. If the production was truly “inadvertent” in that the party did not intend to produce it, than waiver is usually not found. These courts reason that if they are serious about the client’s welfare, more than mere negligence should be required to find a waiver of the privilege. The Maine State courts adhere to this standard.

III. Help May Be On the Way

Recognizing the difficult issues facing parties in light of producing ESI and inadvertent waiver, the Advisory Committee on the Federal Rules of Evidence proposed amendments to F.R.E. 502 in 2005. This proposed Rule would make all “clawback”/ non-waiver agreements which are incorporated into a federal court discovery order binding on all third parties in all state or federal proceedings. If enacted, proposed Rule 502 would provide some much needed certainty on this important question.

IV. Tips

Until such time as proposed Rule 502 is actually adopted, counsel should become familiar with the law of waiver in the particular jurisdiction they practice in. Counsel who routinely represent institutional clients should also become familiar with their computer systems and how the client stores and retrieves its electronic information. Familiarity with the systems can help minimize any inadvertent production issues. Early on in cases counsel should prepare and agree on carefully crafted “clawback” agreements and have them included in the Court’s scheduling orders. Lastly, counsel will want to consider whether removal of cases to federal court may affect which law of waiver may be applied in a case. Under F.R.E. 501 in federal court the attorney-client privilege is a question of federal common law when a federal question is being litigated. However, when a claim or defense is governed by state law, as in most diversity actions, state privilege law is applicable. As noted above, in jurisdictions like Maine this can have a very telling impact on how the question of waiver will be addressed.

Conclusion

The changes to the Federal Rules will go a long way in helping practitioners grapple with the issues surrounding ESI. However, the old adage that “an ounce of prevention is worth a pound of cure” should be kept in mind when dealing with productions of ESI.

*The Sedona Principles for Electronic Document Production*, pg. 3, the Sedona Conference 2004.

Federal Rules of Civil Procedure 33, 34, 37 and 45 were also amended to account for ESI related issues.

See The Advisory Committee Notes to Rule 26 (b)(5).

See *Federal Deposit Ins. Corp. v. Singh*, 140 F.R.D. 252, 252 (D. Me. 1992)(Once a third party to the privilege has access to that information, that knowledge cannot be undone. “One cannot ‘un-ring’ a bell”).

See *Gray v. Bicknell*, 86 F.R.D. 1472, 1483-84 (8<sup>th</sup> Cir. 1996)

See *Corey v. Norman Hanson & DeTroy*, 1999 ME 196, 742 A.2d 933

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## In Vermont - The Defense Wins

*Submitted by Tom Hayes, Hayes and Windish*

In October of 2000 Deandra Flourucci, a troubled 15 year old sophomore at Spaulding High School in Barre, Vermont, was out of school for the morning for a doctor's appointment. When she returned, an acquaintance was waiting for her with a message to meet with Dana Martin, a local drug dealer who had promised her money and a car for her silence about having had sex with him. Deandra was told by the Vice Principal to return to class and the messenger was directed to leave the school. Instead, she snuck out the back door and went to Dana Martin's house. Mr. Martin's true interest in her that day was to recover a large quantity of heroin which he believed she had taken. When she did not produce the heroin, Martin raped and murdered her.

Deandra's mother, Janice Edson, brought suit in her own name for wrongful death. Her allegations were that the school did not have a proper attendance policy which would have reported her absence in time for a search to have been initiated which would have prevented her death. Although there were many factual defenses which would have been developed at trial, the school moved for summary judgment on the premise that the applicable statute does not impose on the school a duty of constant supervision of its students and the intervening criminal acts of Dana Martin were an unforeseeable harm, which the school had no duty to anticipate.

Summary judgment was granted and affirmed on those bases.

Bonnie B. Shappy, Hayes and Windish also participated in the case.

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<b>Mary Ann Dempsey</b>
<b>DRI State Rep of the Year!!!!</b>

If you know Mary Ann, you know that her enthusiasm is infectious. DRI evidently thinks that is true as she has won DRI State Representative of the Year! This award honors a current or immediate past DRI State Representative who has made significant contributions toward promoting DRI membership within his/her state, who has been instrumental in implementing a significant, unique program to foster the relationship between DRI and the SLDO to enhance DRI's stature and/or enhance the public's view of the role of the defense lawyer in the broader society. The award will be presented at the DRI Annual Meeting in Washington, DC in October. There are numerous others nominated for this coveted award but our own TDLA Mary Ann is the well-deserving winner. **Congratulations Mary Ann!!**

Some of the events that supported her nomination and selection were the organization of the 2006 program addressing the needs of women litigators and attorneys in New Hampshire, in 2007 organizing a joint program on transitioning from associate to partner in terms of developing business and growing practice areas, implementing a process of direct personal contact with every new attorney at a defense firm to help them learn more about DRI, taking the lead in organizing and motivating the leadership of the Northern New England Defense Counsel Association to develop a plan for change, and becoming involved in the Best Practices effort for the Women in the Courtroom Committee. All of these programs assisted in promoting DRI and its efforts to help improve education and knowledge for the defense attorney.

## New Hampshire Governor Lynch Vetoes House Bill 143 Regarding Apportionment of Damages

*Mary Ann Dempsey, Wiggin Nourie, P.A.*

On July 2, 2007, Governor Lynch vetoed House Bill 143 which sought to amend RSA 507:7-e regarding the apportionment of damages.

RSA 507:7-e requires the finder of fact to apportion fault among all of the “parties.” In *Nilsson v. Bierman*, 150 N.H. 393 (2003), the New Hampshire Supreme Court held that RSA 507:7-e provides that the finder of fact is required to apportion fault among all persons or entities who, at the time the verdict was returned, was an active litigant as well as anyone who had been an active litigant and had settled out of the case prior to trial. In *DeBenedetto v. CLD Consulting Engineers, Inc.*, 153 N.H. 793 (2006), the Supreme Court interpreted the statute more expansively and held that the finder of fact was to apportion fault “to all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court.”

The New Hampshire Legislature sought to overrule the Supreme Court’s decisions in *Nilsson* and *DeBenedetto* by amending RSA 507:7-e to define the term “party” as meaning “only those individuals or entities who are plaintiffs or defendants in the lawsuit when the jury or the court is determining the proper apportionment of fault. Any individual or entity who was a plaintiff or defendant, but who has settled or been dismissed prior to the apportionment of fault, shall not be considered a ‘party.’” The proposed legislation passed both the House and Senate.

In setting forth his reason for vetoing the legislation, Governor Lynch stated:

[t]he change in the law would prohibit the jury from apportioning fault to certain individuals or entities who carry significant degrees of fault for the plaintiff’s injuries, but who either settled claims prior to conclusion of the lawsuit, or who are not parties to a particular lawsuit for other reasons. I cannot support this change in the law because it is unfair for a defendant with a low degree of fault to have to pay a disproportionately large share of the damage.

The attorney general has testified that the passage of House Bill 143 will result in increased litigation costs and higher judgments borne by the taxpayers of the State of New Hampshire. I believe these concerns warrant further study.

## Brooks R. Magratten Incoming DRI Regional Director

**Brooks Margarten with Vetter & Vetter, Inc** of Providence, Rhode Island will be taking over as DRI Regional Director once Matt Cairns steps down. Brooks is Vice President of the Defense Counsel of Rhode Island, chair of the Federal/Bench Bar Committee of the Rhode Island Bar Association and secretary of the Rhode Island Chapter of the Federal Bar Association. He is a trial lawyer with focus on insurance, commercial and products liability litigation. **Congratulations Brooks!** We look forward to hearing more from Brooks after the DRI Annual Meeting.

## RECENT LAW COURT DECISION EXPANDS INSURED'S ABILITY TO RECOVER ATTORNEY'S FEES IN COVERAGE ACTIONS

*Teresa Cloutier, Lambert Coffin*



In its recent decision in *Foremost Insurance Company v. Levesque*, 2007 ME 96, the Maine Law Court held that an insured who successfully defends a declaratory judgment action concerning an insurer's duty to indemnify is entitled to recover attorney's fees. This decision, which expands the situations in which insureds can recover fees in coverage actions, should be reviewed by all counsel and clients handling such matters in the state as it will likely have a palpable effect on decision-making and negotiations.

The coverage litigation in *Levesque* involved the interpretation of a homeowner's policy issued by Foremost Insurance Company ("Foremost"). The father of Foremost's insured tripped and fell while carrying a washing machine into a shed on the insured's property, causing personal injuries when the washing machine landed on top of him. The washing machine had just been unloaded from the insured's pickup truck. Coverage under the Foremost policy extended to "the home and adjacent structures" including "tool sheds," "driveways," and "other structures usual and incidental to your use of the home as a family dwelling". It excluded coverage for "bodily injury 'arising out of the ownership, maintenance, use, *loading or unloading of . . . [a] land motor vehicle designed for use on public roads, owned or operated by or rented or loaned to you.*" Foremost provided a defense to the father's personal injury suit and filed a declaratory judgment action concerning coverage. Foremost then filed a summary judgment motion seeking a declaration concerning both its duties to defend and indemnify.

The trial court found that Foremost had a duty to indemnify the insured and the Law Court affirmed. *Foremost Insurance Co. v. Levesque*, 2005 ME 34, 868 A.2d 244. The Court held that the exclusion was ambiguous as applied to the fact situation before the Court and relied on the doctrines requiring the Court to construe exclusions and ambiguous language against the insurer to find for the insured.

On remand, the trial court ordered Foremost to pay the insured's legal fees in the declaratory judgment action. The Law Court affirmed. The Court began its analysis by noting the common law rule that an insurer may be liable for an insured's attorney fees in a declaratory judgment action concerning the duty to defend. It reasoned that the burden placed on an insured when it is forced to defend an action concerning the duty to indemnify is similar to the burden created in the duty to defend context. It noted, disapprovingly, that Foremost's declaratory judgment action was filed while the underlying claim was in litigation, noting the rule in Maine that declarations on the duty to indemnify must wait until after conclusion of the underlying litigation. Had the insured failed to defend the declaratory judgment action, the Court reasoned, the insurer would have obtained a default judgment against the insured and avoided its duty to indemnify despite its obligations pursuant to the policy:

<sup>1</sup> The Court also noted that the common law rule has been codified, to some extent, by the Maine Legislature, *see* 24-A M.R.S.A. § 2436-B(2), but that this statutory provision does not extend to actions concerning the duty to indemnify. *Levesque*, 2007 ME 96, ¶ 9.

<sup>2</sup>After the Law Court affirmed the coverage decision in the declaratory judgment action, the underlying case settled.

Although the insurance policy required Foremost to pay the personal injury claim, Levesque incurred a substantial attorney fee to obtain this result and through no fault of his own. Unless we extend the common law exception to the American Rule that we developed in *Gibson* and *Union Mutual* to include duty to indemnify actions, Levesque's contractual right is substantially diminished.

*Levesque*, 2007 ME 96, ¶ 11. The Law Court recognized that it was adopting a minority rule, but was persuaded that, for policy reasons, it should “extend the rule announced in *Union Mutual* and *Gibson* to declaratory judgment actions by an insurer seeking a declaration that it has no duty to indemnify.” *Id.* ¶ 17. This decision provoked a strong dissent. *Id.* ¶¶ 19-26.

The Court's decision in *Levesque* raises several issues. First, the majority specifically says it is extending the rule announced in *Union Mutual Fire Ins. Co. v. Town of Topsham*, 441 A.2d 1012, 1017 (Me. 1982) and *Gibson v. Farm Family Mut. Ins. Co.*, 673 A.2d 1350, 1354 (Me. 1996). The opinion fails to mention that the common law rule discussed in those cases applies only when an insurer refuses to defend in the face of a clear obligation to do so pursuant to Maine law. See *Maine Mut. Fire Ins. Co. v. Gervais*, 1999 ME 134, ¶ 6 (“The insured can recover attorney fees incurred to defend a declaratory judgment action brought by the insurer only ‘when the duty to defend is clear from the policy and the pleadings’ . . . . To determine whether a duty to defend is ‘clear’ for purposes of awarding attorney fees, a court must evaluate state law regarding an insurer's duty to defend as it existed at the time the insurer initiated the declaratory judgment action.”) (citing *Gibson* and *Union Mutual*). In fact, the trial court deciding the *Levesque* case engaged in the analysis required by *Gibson* and *Union Mutual*, concluding that coverage was clear before awarding fees. This all raises the question of whether the rule articulated in *Levesque* applies to all cases when the insured prevails or only those cases where the insurer's liability was “clear”. Furthermore, the opinion does not address whether fees would be awarded when the declaratory judgment action is brought by the insured rather than the insurer, see *Levesque*, 2007 ME 96, ¶ 14 n. 3. There is also a question as to whether it would make a difference if the declaratory judgment action had been filed after the conclusion of the underlying suit. *Id.* ¶ 13; see also *id.* ¶ 21, 25 (dissenting opinion). It will be interesting to see how the case is interpreted at the trial court levels in the months to come.

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The dissent appears to assume that the majority rule will apply in all cases where the insured prevails. *Foremost*, 2007 ME 96, ¶ 26 (“However, in cases where there is a meritorious question of coverage to be decided, as in the instant matter (pointing out that two Justices dissented from the Law Court opinion on coverage in the first *Foremost* case), I would not automatically impute a nefarious motive to the insurer thereby justifying an award of attorney fees – even where the insurer has technically pre-

## Thank you Vermont!

**John Webber, Past President** of the now dormant Vermont Defense Council Association has graciously delivered a check to the Tri-State Defense Lawyers Association. These dollars were the remaining funds in the Vermont account and John felt they could probably be put to good use by TDLA to help new organization. We are very thankful that John thought of us. The funds will definitely be put to good use in the building of our organization.

Thank you John!

# Tri State Defense Lawyers Association (TDLA)

Maine • New Hampshire • Vermont

## 2007 Annual Meeting

September 21 & 22, 2007

Hilton Garden Inn  
Portsmouth, NH

## Agenda

### Friday, September 21, 2007

- 6:00 p.m. Reception
- 7:00 p.m. Dinner
- 7:45 p.m. Welcome and Introductions
- 8:30 p.m. Charlie Bass, President of the Main Street Republican Partnership  
**New Hampshire Primary – The Challenges of Running a  
Presidential Campaign Nationally**

### Saturday, September 22, 2007

- 7:00 a.m. Continental Breakfast
- 8:00 - 8:10 a.m. Introductions
- 8:10 - 9:10 a.m. Jim McCrystal, *Quick & McCrystal, LLC*, Cleveland, OH  
**Electronic Discovery: Surviving to Live in a New Realty**
- 9:10 -10:00 a.m. **Honorable G. Arthur Brennan, ME  
VT and NH - TBA  
Tips on Preparing for Your First Jury Trial—A Perspective from the Bench**
- 10:05 -11:00 a.m. Adam Rosen, J.D., Ph.D., Jury Associates, Boston MA  
**Managing Juror Emotions and Winning Cases –with a Technological Assist**
- 11:00 – 11:55 a.m. Peter G. Beeson, Devine Millimet & Branch, P.A., New Hampshire  
Mitchell M. Simon, Devine Millimet & Branch, P.A., New Hampshire  
**The Ethics of Cross-Border Practice in the Tri State and The Advice  
of Counsel Defense: Does it Exist for Lawyers?**
- 11:55 - 12:10 p.m. **Business Meeting**

Total minutes – 225, including 60 Ethics  
CLE approval pending in ME, NH, & VT

# Tri State Defense Lawyers Association (TDLA)

2007 Annual Meeting  
September 21 & 22, 2007  
Hilton Garden Inn  
Portsmouth, NH

## Registration Form

Registration fee includes reception, dinner and CLE program.

Member: \$150 \_\_\_\_\_ Non-Member Attorney: \$200 \_\_\_\_\_ Spouse/Guest: \$ 40 \_\_\_\_\_ **Check Total:** \_\_\_\_\_

**Name:** \_\_\_\_\_

**Spouse/Guest** \_\_\_\_\_

**Firm:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**City/State/Zip** \_\_\_\_\_

**Phone:** \_\_\_\_\_ **Email:** \_\_\_\_\_

A friendly game of golf will be played after the meeting ends on Saturday, starting around 1:00.

Please let us know if you would like to play so that enough time slots can be reserved.

I will play\_\_\_\_\_. Spouse/Guest will play\_\_\_\_\_.

Return this form by **September 15, 2007** along with your check made payable to TDLA and mail with registration form to:

Mark Filler  
P. O. Box 4177  
\_\_\_\_\_  
Portland, ME 04101-0377

A block of rooms has been reserved at the Hilton Garden Inn under the name of TDLA at the rate of \$189+ taxes. Reservations can be made by calling the Hilton at 603-431-1499. Their website is

<http://hiltongardeninn.com>

For more information please contact:  
Peggy L. Schultz, Executive Director , TDLA  
304-344-1611 or [www.pschultz@psmarket4u.com](mailto:www.pschultz@psmarket4u.com)

## **Name Recognition Is Hard to Come By**

*Mary Ann Dempsey, Wiggin & Nourie, P.A.*

One of the toughest challenges a young defense lawyer faces when beginning his or her practice is earning name recognition. This can be especially true when you work as an associate with some well known partners in the insurance industry. Getting involved in a local or national defense organization and meeting people in the defense bar is the best way to start this process.

On May 22, 2007, TDLA co-hosted a seminar in Manchester, New Hampshire that was designed for new lawyers. The seminar was called Surviving Law Firm Life and it was a two-hour breakfast presentation which discussed issues facing all new lawyers such as billable hours, dealing with different personalities within a firm, getting involved in organizations, and getting involved in community service. The panel consisted of lawyers who practice in both small and large firms and who practice both plaintiff and defense work. Kevin Leach, a former associate at a large firm in New Hampshire and presently in private practice for himself, discussed learning the ropes as a new lawyer in a large firm and finding ways to get into the courtroom and get experience. Kevin encouraged young lawyers to take pro bono cases because it not only helps the court system by providing legal assistance to those who cannot afford to hire attorneys but it also benefits a young lawyer's legal career by providing access into court at an early stage to argue motions and perform trial work. Heather Burns, a partner at Upton & Hatfield and President of the Trial Lawyers Association, discussed finding a balance as a young lawyer between meeting billable requirement and getting involved in organizations that advance your career. Darla Sedwick, a shareholder at Wiggin & Nourie, discussed marketing events to target as a young lawyer and finding ways to create client contacts early in a career. Finally, TDLA's New Hampshire President, Chris Poulin, discussed practice in a large firm and how to begin thinking about the partnership track and ways to help cross the line from associate to partner.

The seminar provided newer members of the bar an introduction into various organizations such as TDLA, DRI, Trial Lawyers Association, and the Women's Bar. It also provided the opportunity to ask questions that arise only after you have been practicing a number of months such as how to best fill out timesheets so clients understand and approve of the work you have been doing. TDLA and DRI are incredibly grateful to the panel members who generously gave their time and insight to make the seminar a success.

As a young lawyer, if you would like to get actively involved with either organization, we encourage you to do so by contacting Peggy Schultz at [pschultz@tristatedefenselawyers.org](mailto:pschultz@tristatedefenselawyers.org) or Mary Ann Dempsey at [mdempsey@wiggin-nourie.com](mailto:mdempsey@wiggin-nourie.com).

## **Did You See Your Name in the Newsletter?**

If not, it's because I did not hear from you. I am looking for articles, member news and firm news, and most of all, an Editor. This is what makes any Newsletter interesting and worth reading. If you would like to contribute, please don't be shy and step up. You can make a difference in TDLA Newsletter. Any suggestions for a name? I am waiting to hear from you!!:

**[pschultz@tridstateefenselawyers.org](mailto:pschultz@tridstateefenselawyers.org)**

## Calendar of Events

**TDLA Annual Meeting**  
**September 21 – 22, 2007**

**Hilton Garden Inn, Portsmouth, IL**  
**For more information: 304-344-1411**

DRI—Complex Commercial Litigation—Smart Strategies  
for Hard Cases  
JW Marriott Desert Ridge—Phoenix, AZ  
For more information: 312-795-1102

DRI – Preeminent Lawyer – Superstars of Trial  
September 27 – 29, 2007  
Westin Michigan Avenue – Chicago, IL  
For more information: 312-795-1101

DRI – Fire and Casualty  
November 1 – 2, 2007  
Westin Chicago River North – Chicago, IL  
For more information: 312-795-1101

USLAW NETWORK Fall 2007 Membership Meeting &  
Client Conference  
October 3 – 6, 2007  
Mandarin Oriental – Washington, D.C.  
For more information: 800-231-9110

DRI – Asbestos Medicine  
November 8 – 9, 2007  
San Diego Marriott Hotel & Marina – San Diego, CA  
For more information: 312-795-1101

**DRI Annual Meeting**  
**October 10 – 14, 2007**  
**Marriott Wardman Park – Washington, D.C.**  
**For more information: 312-795-1101**

DRI – Insurance Coverage and Practice Symposium  
December 13 – 14, 2007  
Sheraton New York Hotel & Towers – New York, NY-  
For more information: 312-795-1101

## DRI Membership

If you are member of TDLA and wish to join DRI, you can receive one-year free membership. If you are a Young Lawyer with five years or less of practice, you will also receive a certificate for FREE attendance at a future DRI seminar which is good for two years from the date you join DRI.

Go to DRI's website at [www.dri.org](http://www.dri.org) to complete the membership application.

## 2007 TDLA Officers

**Phil Coffin, TDLA Chairperson**

**Peggy L. Schultz, Executive Director**

**Phil Coffin, Maine President**

**Christopher Poulin, New Hampshire President**

**Charity Clark, Vermont President**

**DRI Regional Director: Matt Cairns**

**Phil Bixby, DRI State Representative**

**Mary Ann Dempsey, NH DRI State Representative**

**Carrie Legus, DRI State Representative**

**Michael Goldman, Maine Young Lawyer Rep**

**Brian Moushegian, NH Young Lawyer Rep**

*Tri-State Defense Lawyers Association*

304-344-1611 • [www.tristatedefenselawyers.org](http://www.tristatedefenselawyers.org)

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