

Detroit Legal News

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DAILY BRIEFS

Business manager to speak at SPARK

Miller Canfield Immigration Services Business Manager, Karen McAmmond, will speak on "Attracting, Hiring and Retaining Foreign National Talent" at the Ann Arbor SPARK Global Business Seminar on June 30, 2009. The seminar will run from 8:30-12 noon at SPARK Central (330 E. Liberty, Lower Level) in Ann Arbor.



Karen McAmmond

Key topics related to business success in a global environment will be discussed including:

- Successfully managing the business and social cultural transition
- Creating effective communication strategies with a global workforce
- Finding and retaining international customers

There is no charge to attend the Global Business Seminar. Register by contacting SPARK at 734.761.9317 or visit www.annarborsevents.org. A continental breakfast will be provided.

NALS of Detroit hosts 53rd annual banquet

NALS of Detroit, a 50-year plus legal professional support organization, provides quality continuing educational opportunities, certification and training for members and non-members alike. This local Detroit chapter will hold the 53rd Annual Awards and Installation Banquet Friday, July 17, at the Holiday Inn Express & Suites, 2nd Floor Washington Room, 1020 Washington Boulevard in Detroit. A meet and greet social begins at 6 p.m. A group photo will be taken at 7 p.m. Dinner will then follow.

NALS of Detroit will welcome Roxann Repasy as the scheduled guest speaker. Repasy, was recently installed as the newly elected state president of NALS of Michigan at the organization's annual meeting held in April 2009 in Grand Rapids. Repasy has been a member of NALS of Jackson County for more than 30 years. She is an administrative assistant at Comerica Bank, Charitable Services Group, in Ann Arbor.

In order to make a reservation or for any additional information about this upcoming event and dinner, contact Mary Tortomose at (313) 965-9725, ext. 319 or mtortomose@bsdd.com no later than Friday, July 10.

Public Notices

The **Third Circuit Court, Civil, Criminal and Family Divisions** will be closed on Friday, July 3, 2009, in observance of Independence Day.

The **Wayne County Probate Court** will be closed in observance of Independence Day on Friday, July 3, 2009, and will reopen on Monday, July 6, 2009, at 8 a.m.

All offices of the **United States District Court** and the **United States Bankruptcy Court for the Eastern District of Michigan** will be closed on Friday, July 3, in observance of Independence Day. In case of emergency, call (313) 234-5656.

The **Michigan Supreme Court, Court of Appeals, and State Court Administrative Office** will be closed on Friday, July 3, in observance of Independence Day.

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Switching gears

Seminar coaches lawyers on how to find jobs in tight economy

By CYNTHIA PRICE
Legal News

These are tough times, and challenges are spreading to those entering or transitioning in the legal profession.

That was the message of a seminar June 20, presented by the Wayne Law Alumni Association, the State of Michigan Young Lawyers Section, and New Lawyer Seminars' Lee Tilson.

But the seminar, "Getting Started -- Switching Gears: Practical Advice for Attorneys in Transition," went on to tell participants that they can turn these challenges to their own advantage.

A group of about 50 people gathered at Wayne State University Law School from noon to 4:30 p.m. on June 20 to hear from a wide variety of speakers on making their career options clearer and easier to attain.

Lee Tilson, an attorney who formerly practiced in a medical malpractice team at Sommers Schwartz Silver and Schwartz, is founder and organizer of several seminar series to help out new lawyers. (Though he received his degree from University of Michigan, he attended Wayne State graduate school as a philosophy student.) After taking a break to deal with family matters, Tilson saw that the employment climate had changed. Along with the Wayne Law Alumni Association, he decided to focus this session on coaching new lawyers, or those wanting to change positions, on how to negotiate the job market in difficult economic times.

Karen Maheu, vice president of Global Resourcing for Lumen Legal, talked about "Finding Work in an Evolving Marketplace;" and Krystal Gardner, Wayne Law Assistant Dean of Career Services, presented on rewriting and reworking resumes and cover letters,



Photo by John Meiu

Wayne State University Law School hosted a New Lawyer Seminar designed to assist both new and seasoned attorneys who find themselves in transition. Among those attending the event presented by the Wayne Law Alumni Association, the State Bar of Michigan Young Lawyers Section, and New Lawyer Seminars were (l-r) Mark Giangrande of DePaul University College of Law, Bloomfield Hills attorney Suzanne Johnson, Karen Mayhew of Lumen Legal, Arthur Neef Law Library Director Virginia Thomas, Farmington Hills attorney Jun Lee of the Wayne Law Alumni Association, and Detroit attorney Lee Tilson, founder of New Lawyer Seminars.

and transmitting them effectively to potential employers.

Following that Michael Murray of Lexis-Nexis talked about how best to reach clients with messages about the quality of your practice.

After Mark Giangrande, an author and legal research instructor at DePaul University School of Law talked about E-Filing and E-Discovery, Lee Tilson himself gave "30 Tips in 30 Minutes," followed by a panel consisting of David Robinson of Robinson and Associates, Paul C. Youngs, a general practice attorney, and — an impromptu addition — Judge Bill Callaghan answered questions.

Each participant was also given a CD with tips for establishing an effective Web site quickly, by legal rights blogger Justinian Lane, now working in Silicon Valley.

Karen Maheu's presentation was full of to-the-minute information and useful advice.

Lumen Legal offers contract legal staffing and legal placement services.

A dynamic but informal speaker, she began by being very specific about the bleak prospects in today's legal job market, and what went wrong. She blamed a number of factors, ranging from in-house counsel's dissatisfaction with the pricing offered by the large legal firms often used, to a lack of consumer confidence, reducing in several ways the legal situations requiring attorneys.

However, Maheu focused most on a problem she thought could be remedied: law schools continue to graduate increasing numbers of attorneys while the number already practicing does not decrease. She felt this was due primarily to fewer attorneys retiring or leaving the field because of current economic conditions. The solution she suggested, though she doubted it would happen, was for law

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ABA to develop next steps to encourage diversity

At the conclusion of the American Bar Association Presidential Summit on "Diversity in the Legal Profession: The Next Steps?" June 18-20 in National Harbor, Md., ABA president H. Thomas Wells Jr., pledged the association will compile ideas generated by 200 lawyers, judges and academics at the summit into an agenda for enhancing diversity in the legal profession.

"Diversity encompasses more than visible differences of gender and race, or more subtle differences of disability and sexual orientation, to include differences of perspective and viewpoint," said Wells. "The legal profession will achieve its greatest potential when it draws on all these differences of humankind, and serves the needs of all."

While more than 30 percent of U.S. population represents racial or ethnic minorities, fewer than 12 percent of lawyers do. Despite the fact that women now equal about half of law students, they remain underrepresented in all areas of practice. Figures are not available representing lawyers with disabilities, or lawyers with gender orientation or sexual identity differences.

A preliminary report will be in hand by the time the ABA convenes for its 2009 Annual Meeting July 30-Aug. 4 in Chicago. Ideas ranged from organized professional programs

of outreach to elementary schools to leveraging the purchasing power of such major legal clients as corporations and government to encourage legal employers to increase practical support for diverse young lawyers.

ABA President-Elect Carolyn B. Lamm of Washington, D.C., and President-Elect Nominee Stephen N. Zack of Miami joined Wells in promising a steady and firm commitment by the association to advancing diversity goals.

"Whatever the genesis of discrimination," the result "is marginalization," said Lamm. That marginalization "will not be tolerated going forward—it must be eliminated," she said. Lamm emphasized the importance of expanding the pipeline of education and reaching down into primary grades to encourage children from all corners of society to view law as a career opportunity accessible to them.

Zack, who immigrated to the U.S. from Cuba, cited his own nomination to become the association's first Hispanic president as a sign of progress. He cited ideas generated at the summit to advance diversity as encouraging, but said "unless we make legal education more affordable, we will not have diverse lawyers." Zack tied the need for a more diverse profession to societal needs for legal services.

"One out of every two phone calls to the

Legal Services Corporation [the federal agency funding civil legal aid to the nation's poor] goes unanswered," said Zack, adding "If you talk about a pipeline, that pipeline is closed."

The concept of diversity expanded during the summit to include diversity of perspective. U.S. Rep. G. K. Butterfield of North Carolina, among summit speakers, cited the still limited number of women and ethnic minorities serving as judges in state and federal courts. In decisions ranging from trial judges imposing sentences to supreme courts ruling on issues not directly addressed by statute, judges exercise tremendous discretion, and sometimes establish public policy, he said.

"It is a terrible mistake to make public policy without diverse viewpoints. Viewpoint diversity advances democracy," Butterfield said.

Wells convened the summit working through the ABA Center for Racial and Ethnic Diversity, Commission on Women in the Profession, Commission on Mental and Physical Disability Law and Commission on Sexual Orientation and Gender Identity. The summit's planning committee co-chairs Eduardo Rodriguez of Brownsville, Texas, and Judge James Wynn of the North Carolina Court of Appeals, Raleigh, will oversee production of the preliminary report.

Appeals court rules for Detroit DDA over American Atheists

Kotz, Sangster, Wysocki & Berg's commercial litigation team, led by Jeffrey M. Sangster and Frederick A. Berg, recently won an appeal in favor of the City of Detroit Downtown Development Authority (DDA) in an appellate action brought by American Atheists, Inc., a non-profit organization dedicated to the separation of church and state.

American Atheists challenged that tax-generated grant money awarded to three Detroit churches violated the First Amendment of the United States Constitution, and its counterpart in the Michigan Constitution. The DDA's Lower Woodward Facade Improvement Program

awarded grants to qualified property owners for work performed to improve the visual appearances of properties in downtown Detroit.

"The program allocated grants to a broad spectrum of entities on a neutral basis" said Frederick Berg, partner of Kotz, Sangster, Wysocki and Berg, P.C. "The DDA sought to provide aid to property owners willing to fix up their buildings in downtown Detroit, not to promote a religion."

Established in 2003, the Lower Woodward Facade Improvement Program was one of many initiatives by the City of Detroit to revitalize the downtown area prior to the national events

scheduled in Detroit, including the 2005 MLB All-Star Game, 2006 NFL Super Bowl and 2009 NCAA Men's Basketball Final Four.

During the program's two and a half years, the DDA approved 123 projects, of which 91 were completed at a cost of \$11.5 million. Qualified applicants were reimbursed for 50 percent of the costs of the renovations, subject to caps of \$150,000 per building and \$30,000 per parking lot. Nine projects involved renovations to buildings and parking lots owned by three downtown Detroit churches and totaled \$737,000, roughly 6.5 percent of the total reimbursements.

Local Voice

STEVEN M. GURSTEN

Why Johnson v. Wausau encourages adjusters to lie

I read with interest Daniel Bernard's recent Local Voice column in The Detroit Legal News. Mr. Bernard writes that my own previous letter about the *Johnson v. Wausau* Michigan Court of Appeals decision [Docket No. 281624], is factually incorrect, and more-over that I fail to



Steven M. Gursten

"advance the discourse over how to improve our legal system." I welcome this opportunity to respond, and to hopefully advance the discourse about this important case, because the rights of thousands of Michigan residents are immediately and dangerously affected by this decision.

Again, if we accept the plaintiff's version of the facts as true in *Johnson*, an insurance company lied to save money from paying attendant care insurance benefits to the caregivers of a 10-month-old girl with catastrophic traumatic brain injuries from a car accident for 16 years. Instead, she was only allotted \$20 per day in household replacement services.

That the claims adjuster did lie in the case is beyond dispute. The case stated: "...when plaintiff... inquired as to whether she was entitled to additional benefits, defendant told her that no additional benefits were available to her." And the insurance adjuster "admitted he never advised... plaintiff that (she) was entitled to attendant care benefits..."

However, Mr. Bernard would put the onus on the injured — and in the case of *Johnson*, the catastrophically injured — to determine their legal rights to attendant care insurance benefits; claiming that to do otherwise is to "jettison any concept of personal responsibility." I respectfully disagree.

How exactly would Mr. Bernard have had the plaintiff in *Johnson* exercise personal responsibility to learn of their legal rights? Mr. Bernard starts off his letter by stating that "I do not generally practice personal injury law, nor do I claim to be an expert on no-fault insurance..." Sadly, this lack of familiarity with our no-fault law shows through in the rest of his letter, and fatally undermines his arguments.

How exactly should the plaintiff in *Johnson* have exercised personal responsibility to learn about her legal right to attendant care, as Mr. Bernard demands?

Could she ask her insurance company? She tried that. The plaintiff in *Johnson* asked her adjuster. She questioned her adjuster on multiple occasions, directly and repeatedly, and the adjuster lied to her. The adjuster denied that there was any other type of to which benefit she — and the catastrophically brain-damaged infant child that she was caring for — was entitled. This created devastating financial hardship during the 16 years that this child required attendant care, both for the completely innocent brain injured child and for her caregivers.

Could the plaintiff check her insurance policy? No, she could not. I have read nearly every automobile insurance policy in Michigan at one time or another. These are long, complicated, difficult contracts to read and understand. And quite frankly, they are not written for the average person to understand. More specifically, however, almost none of the insurance policies in Michigan mention attendant care or similar nursing care services today. And I would wager that not a single insurance policy in Michigan specifically mentioned attendant care or nursing type services in their policies at the time this motor vehicle accident occurred or for years afterward. Therefore, the plaintiff in *Johnson* would not have known about this benefit by checking her insurance policy.

Could she check the law, perhaps even read the entire Michigan No-Fault Act? Let us now fictionally presume that the plaintiff in *Johnson* did have two years of law school training, can perform legal research, and looks through

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Official Newspaper: City of Detroit • Wayne Circuit Court • U.S. District Court • U.S. Bankruptcy Court



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Who's doing what and who's going where

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Legal View

PAULA A. BARRAN, THE DAILY RECORD NEWSWIRE

Disabled workers not exempt from ratings

Most employers are subject to federal or state laws prohibiting discrimination on the basis of disability. State law applies to employers of six or more employees and federal law applies to employers of 15 or more employees. Disabilities can affect how employees perform their jobs, and employers frequently are faced with making performance-based decisions. Given the recent amendments to the federal Americans with Disabilities Act, employers will be seeing more and more disability claims and finding that more and more of their employees are covered by this law.

Performance management isn't a bad thing, and employers can use it effectively to avoid discriminatory decisions. Setting expectations, identifying standards and metrics or measurements, providing employee feedback and doing it consistently and fairly are the characteristics of good performance management. Disability law, however, operates on the premise that employees with protected disabilities have legal rights to the removal of workplace barriers. There is considerable misunderstanding about whether that translates into rights to reduced performance standards.

As long as the performance standards are job-related and necessary to the effective performance of the job, employers have no responsibility to adjust them — even to accommodate a disability.

Before an employee with a disability has a legal right to an accommodation the employee must be qualified for the position. He or she must possess the needed skill set, education, experience or other job-related requirements, and be able to perform essential functions of the position (this part is evaluated with or without an accommodation). That principle helps show how performance management fits. An employer may apply the same quality and quantity standards to all employees when it evaluates performance.

Employees with disabilities and employees without disabilities can be required to meet the same production standards. Employers are not required to change them for employees with disabilities, although they may have a responsibility to change the manner in which employees with disabilities meet their standards. If the standard is to make 100 error-free widgets an hour, that's the standard and it can be applied across the board. If the employee cannot meet the stan-

dard, it's time to explore if there is an adjustment that will allow the employee to do so — something like removing marginal job functions, changing hours of employment, moving the work station, or obtaining and providing assistive tools. If that isn't possible or effective, the next step is to evaluate a job reassignment.

Conduct is harder to quantify, and employees engage in an infinite variety of misbehavior. Conduct is even more difficult because mental disabilities can contribute to on-the-job conduct problems. A two-step evaluation can be a smart move. First, look at the situation and evaluate whether the misconduct is intertwined with the disability. Is the problem insubordination? Is it a safety violation? Is it use of a racist term? Is it refusal to clock out when leaving for lunch? Those acts probably don't have anything to do with a disability, and employees in protected classes don't get a free pass for violating regular conduct standards.

Case law, however, has been developing out of situations where conduct violations are so closely related to the disability that employers may want to take a second look at the issue.

The EEOC, which is the federal agency responsible for interpretation and enforcement of federal civil rights laws, has formally taken the position that the law does not protect employees from the consequences of violating conduct standards even when the conduct is caused by the disability.

But some courts are struggling with the whole concept of misconduct caused by a disability, and it is hard to say when or if a standard might be developed. Employers may want to start progressive discipline early for misconduct, and make sure that early in the process they ask employees whether there are accommodations or adjustments that can help the employees meet the conduct standards. There's no harm, and can do a lot of good, in asking "why are you doing this?" and "how can we help you stop?" In fact, that's often an excellent practice to use with all employees.

Paula Barran, a founding partner at Barran Liebman LLP, has been practicing labor and employment law since 1980. In addition to regularly providing employer advice and solutions, she handles employment litigation in state and federal courts, labor disputes and employment arbitrations.

In the Courts

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ARIZONA

Two white supremacists indicted in diversity office bombing Indictment accuses brothers of trying to 'promote racial discord'

By AMANDA LEE MYERS
Associated Press Writer

PHOENIX (AP) — Two white supremacists from Illinois have been indicted in a 2004 mail bombing that injured the diversity director in the Phoenix suburb of Scottsdale, federal authorities said.

Twin brothers Dennis and Daniel Mahon are charged with conspiracy to damage buildings and property by means of explosive, according to an indictment unsealed last week and filed June 16 in federal court.

The indictment says the brothers intended to "promote racial discord" on behalf of the White Aryan Resistance, a decades-old group based in California.

The package detonated in the hands of Don Logan, who is black, on Feb. 26, 2004, in the city's Human Resources Complex.

The blast injured Logan's hand and arm, and a secretary also was injured; both required surgery and spent about a week in the hospital.

Authorities arrested the brothers Thursday in their Davis Junction, Ill., home and say they had assault weapons, hundreds of rounds of ammunition and white supremacist material.

Authorities didn't know if the brothers had attorneys. There are no telephone num-

bers listed for Mahon in Davis Junction.

A Missouri man's arrest Wednesday also arose from the bombing, according to the U.S. Attorney's Office in the Western District of Missouri. Robert Neil Joos, 56, was charged with being a felon in possession of firearms after a search of his property in rural southwest Missouri.

An undercover investigation found that people involved in white supremacist movements throughout the U.S. met at a retreat location in Missouri owned by Joos, according to prosecutors. And an affidavit filed supporting the arrest shows investigators found the first call Dennis Mahon made the morning of the bombing was to a cell phone registered to Joos.

Dennis Mahon also is charged with malicious damage of a building by means of explosive and distribution of information related to explosives, according to the indictment.

"We've waited five years to hear the news announced today," Logan said in a statement released Thursday. "Today's announcement was met with much enthusiasm and appreciation ... I remain convinced the judicial process will result in justice to me and my colleagues impacted by the blast."

The indictment says the brothers con-

spired to build and deliver the bomb to the diversity office, taught others how to build a package containing a pipe bomb, and sent training materials on the production and use of explosives, techniques to avoid detection by law enforcement, and methods to commit domestic terrorism.

The indictment says Dennis Mahon participated in the construction of the bomb, disguising it in a cardboard box that was delivered to the Scottsdale diversity office.

One month before the bombing, the indictment says, Dennis Mahon called the diversity office and left a message saying, "the White Aryan Resistance is growing in Scottsdale. There's a few white people who are standing up."

The package was addressed to Logan, who served as an ombudsman for city employees and citizens on diversity issues, including racial and sex discrimination. The bomb was sent through the post office to the city building, which is about a block from City Hall. The explosion forced the evacuation of 25 people in the building.

"This event really struck home," said Scottsdale police Sgt. Mark Clark. "It caused a lot of fear and grief, and it's been a long road in the investigation, and we're certainly glad it's moving forward."

Dennis Mahon also is accused of teach-

ing others how to blow up a vehicle and a house, how to build a package pipe bomb using a 9-volt battery, black powder, and an electric match, and how to avoid detection by law enforcement, according to the indictment.

The indictment also says he mailed various instructional books about building bombs to an individual in Wickenburg, Ariz. Among them were "Poor Man's James' Bond 2" and "A Manual of Urban Guerrilla Warfare, Fighting in the Streets."

The Missouri affidavit says the Mahons told an undercover federal agent that white supremacists used Joos's remote property in southwestern Missouri's McDonald County for survival training.

One of the Mahon brothers described Joos as "an expert on weapons, explosives, bomb making and general survival skills," the affidavit said.

Joos himself told undercover agents who visited his property of the importance of having firearms "in several locations" and said he used 18 caches to hide weapons, according to the affidavit.

Joos is expected to be appointed a federal public defender. There was no answer at that office Thursday night and there was no home telephone listed for Joos in southwest Missouri.

Court Round Up

KANSAS

Suspect in Kansas porn model slaying back in country

EL DORADO, KAN. (AP) — A man suspected of killing a Kansas college student who led a secret life as an Internet porn model is in custody in Kansas after his extradition from Mexico.

Israel Mireles is charged with capital murder, rape and aggravated criminal sodomy in the death of 18-year-old Emily Sander.

The disappearance of the Butler Community College student drew nationwide attention after the discovery that she also was an Internet pornography model who went by the name Zoey Zane.

UTAH

Trial pushed back for man charged with false bids

SALT LAKE CITY (AP) — A federal judge has delayed a trial for Tim DeChristopher, the college student charged with disrupting a federal lease auction for oil and gas drilling on public lands

near Utah's national parks.

The trial was initially set for July 6, but U.S. District Judge Dee Benson pushed it back to Sept. 14.

Benson approved the delay at the request of DeChristopher's lawyers, who are busy writing pre-trial motions and working up a response to the government's attempt to limit the scope of DeChristopher's defense.

Prosecutors are trying to block DeChristopher from arguing that he acted to protect wild lands from a December auction he considered illegitimate and was trying to block oil and gas drilling to focus attention on climate change.

WYOMING

Judges uphold Gillette paraphernalia convictions

CHEYENNE, Wyo. (AP) — A federal appeals court has upheld a drug paraphernalia conviction against a man who said smoking accessories he sold from his Gillette store weren't intended for smoking marijuana.

A federal jury found Jeffrey Wayne Doles guilty last year of three felony counts of selling drug paraphernalia. A judge sentenced

Doles to three years in prison.

Police raided Doles' store, Hip Hop Hobbies, soon after it opened in 2005 but a state jury acquitted Doles of drug paraphernalia charges.

In appealing his federal conviction, Doles argued that the federal jury should have been told about his earlier acquittal in state court. The 10th U.S. Court of Appeals in Denver disagreed, saying that wasn't necessary and would have been confusing.

SOUTH DAKOTA State's 2005 abortion law back in federal court

SIoux FALLS, S.D. (AP) — A federal judge will hear oral arguments next month in Sioux Falls over a lawsuit challenging a law that requires doctors to tell women seeking abortions that the procedure ends a human life.

The Legislature passed the measure in 2005 but Planned Parenthood appealed. It operates the state's only abortion clinic in Sioux Falls.

U.S. District Judge Karen Schreier temporarily prevented the law from taking effect. But the 8th

U.S. Circuit Court of Appeals overruled that order last July, so the state started enforcing the law.

Schreier must decide whether to grant motions for summary judgment and a request by Planned Parenthood to keep the state from imposing sanctions over the law's requirements. The hearing is July 17 in Sioux Falls.

MICHIGAN

NW Mich. man faces sentencing for child sex abuse

GRAND RAPIDS, Mich. (AP) — A northwest Michigan man convicted of molesting young girls faces at least 30 years in prison at his sentencing in federal court.

Forty-seven-year-old Clifford Francis Gould Jr. appeared Friday afternoon in U.S. District Court in Grand Rapids.

A jury found Gould guilty of four counts of aggravated child sexual abuse and one count of abusive sexual contact.

Prosecutors say Gould sexually assaulted three girls under the age of 12 at his home from April 2005 through May 2007.

Federal guidelines call for a life sentence. Defense attorney Helen Nieuwenhuis says in a court filing the mandatory minimum sentence of 30 years is more appropriate because the Suttons Bay man has health problems and no prior criminal record.

NETHERLANDS

Hells Angels win another Dutch legal battle

THE HAGUE, Netherlands (AP) — The Dutch Supreme Court refused Friday to outlaw a local branch of the Hells Angels in the motorcycle club's latest legal victory.

The country's highest judicial panel said prosecutors failed to prove their claim that the Harlingen Hells Angels chapter in the northern Netherlands is a threat to public order and should be disbanded.

The Supreme Court's ruling upheld two lower courts' decisions. It said the club may be involved in undesirable and possibly criminal activities, but they are not serious enough to merit a total ban.

A ban "is a serious infringement of the freedom to gather that is at the foundation of a democratic state," the court said in its written ruling.

Dutch Hells Angels have won a string of cases against prosecutors trying to ban them, but Friday's was the first in the country's highest court.

A parliamentary inquiry in 1995 found the Hells Angels was a criminal organization involved in the drug trade and smuggling women for prostitution, but no action was taken to ban the group.

VOICE:

The 'one-year-back rule' did not exist in its present form until four years ago

From Page 1

the entire Michigan No-Fault Act. She still would learn nothing about attendant care, because the words "attendant care" are not in the Act. She would not find anything that would suggest or resemble the attendant care benefits that she had repeatedly asked her adjuster about, on a first, second, third or more reading of the Act. Attendant care is never specifically mentioned. Instead, attendant care — or nursing services that require an "attendant" to provide "care" because of the extent and severity of injuries — is something that is derived by digging deeper and understanding the meaning of MCL 500.3107(1)(a), which states only that Personal Injury Protection (PIP) benefits are payable for "all reasonable charges incurred for reasonably necessary products, services and accommodations used for a person's care, recovery or rehabilitation." Throughout the years, and through much litigation about the exact meaning of the wording of the statute, attendant care has developed and evolved. No, she would not have learned about attendant care by reading the statute.

Could she ask a lawyer? This is, after all, what the Court in *Johnson* suggested she do, and as a result has now essentially destroyed any possible claim for fraud that can be made. I am not alone in this assessment. James L. Borin, a pre-emi-

nent authority on no-fault and widely respected defense insurance lawyer, openly wondered the same after his own reading of *Johnson* in a LawFax publication that goes out to thousands of insurance adjusters and defense lawyers in Michigan: "Since a person, presumably, always has the ability to consult with a lawyer, can a plaintiff ever establish a claim for fraud???"

The problem with asking a lawyer is that very few lawyers know anything about attendant care. Very few lawyers from other areas and specialties of law know anything about no-fault benefits or attendant care. Even within the sub-specialized field of personal injury law, most lawyers know nothing about this important benefit. Ask any lawyer who frequently handles no-fault cases how often we go to court for a case evaluation hearing on a catastrophic attendant care case and have to spend the beginning of our presentation educating the case evaluation panel on what attendant care is, and the differences between no-fault replacement services and attendant care benefits. So even if the plaintiff in *Johnson* had picked up the phone and scheduled and paid for a meeting with a lawyer for legal advice, the chances are very good she never would have learned about this important benefit to which everyone agrees the plaintiff was entitled.

And this is where the whole

argument calling for more "personal responsibility" runs smack into a wall. The whole idea of forcing someone to have to pay money to hire a lawyer in the first place, to essentially find out if their own insurance company is telling them the truth about anything and everything, as the Court in *Johnson* said the plaintiff should have done, is a toxic and absurd idea. I can't think of a reason the Court would protect insurance companies with such unclean hands, or punish those who are obviously in a vulnerable and unequal position by presuming they should know all of their legal rights — especially when these people have undergone horrible personal injuries that require attendant care. Why are we putting this burden on the plaintiff and requiring that people now assume that their own insurance company will lie to them, and then have to hire a lawyer to check the veracity of everything the claims adjuster is telling them?

In addition, there are no "long-standing" principles of Michigan law at issue here, as Mr. Bernard stated. In fact, quite the opposite is true. The "one-year back rule" that Mr. Bernard wrote about didn't exist in its present form until 2005, some 22 years after the car accident in *Johnson* occurred. This "long-standing" principle of Michigan law was judicially created in 2005, in a case called *Devillers v. Auto Club*, when a narrow, one-justice Republican majority (that has been

accused many times of judicial activism for political purposes) overturned almost 20 years of Michigan law; saying for the first time ever, that there was now only one year to file for benefits after a car accident — with no exceptions and no tolling. *Devillers* held that the one-year-back statute of limitations that prohibits recovery of Michigan PIP benefits for any portion of a loss incurred more than one year before commencement of a lawsuit filed by a Michigan attorney, is not subject to judicial tolling, overruling what was long-standing law in this state under *Lewis v. DAILE*. It is utter nonsense to say, 22 years before the fact, that the claim in *Johnson* was time-barred. So no, the claim in *Johnson* should not have been so summarily executed under the one-year back rule.

Mr. Bernard is right that we should have a dialogue about this important issue. I believe no recent

case affects the rights of more Michigan citizens than *Johnson v. Wausau*. I believe the public policy implications of this decision could not be worse, and I believe that the shield and immunity the case now gives insurance adjusters to lie and defraud their own policyholders is disastrous to protecting the public. I most certainly welcome dialogue on how we can protect innocent people and prevent insurance company adjusters from taking unfair advantage of them. This is why I wrote my open letter to begin with.

There must be a better solution than simply imposing a "caveat emptor" requirement on our law for any injured Michigan resident, which is really the "personal responsibility" that Mr. Bernard demands as the solution.

Steven M. Gursten is head of Michigan Auto Law, which specializes in insurance benefits and car accidents in Michigan. Contact him at www.michiganautolaw.com.

THIRD CIRCUIT COURT NOTICE – DETROIT, MI

Effective January 1, 2007, any voucher submitted for any services rendered more than sixty (60) days from the case disposition on criminal matters will be denied in accordance with the Local Administrative Order 2006-08, Plan for Assignment of Counsel in the Third Judicial Circuit. This includes payment requests for either regular or extraordinary services.

Ronald R. Ruffin
Executive Court Administrator
Third Judicial Circuit

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