# The General Practitioner

**Newsletter of the State Bar of Michigan Solo and Small Firm Section**

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Readers are invited to submit their own articles, comments and opinions to Maury Klein, Editor, PO Box 871567, Canton, Michigan 48187. Publication and editing are at the discretion of the editor.


This newsletter will be published six (6) times per year by the General Practice Section of the State Bar of Michigan to inform members of the section activities and other matters of particular interest to general practitioners.

# PowerPoint and the Law

By William L. Cataldo

To keep abreast of current trends in criminal law, subscribe to The Marshall Project (*www.the marshallproject.org*). It is a daily newsletter available by email or on Facebook. I learned about it while perusing my favorite website, Reddit. The Marshall Project is a nonprofit news organization that covers the US criminal justice system. The editors of The Marshall Project surf the Internet looking for interesting and cutting edge stories that impact criminal law.

While looking at a recent newsletter, a story by Ken Armstrong on PowerPoint presentations during criminal trials stood out. Rulings and comments by appellate courts are directly and indirectly affecting trial strategy and tactics, which, if you have read any of my prior articles, is something that keenly interests me. Though it appears the thrust of the article, and maybe The Marshall Project newsletter, is as a watchdog over the activities of law enforcement and prosecutors, the information was interesting and informative. I will summarize it in this article.

It appears appellate courts have recently begun taking a careful look at how PowerPoint is used in trials, and, more specifically, criminal trials. Are graphics and images that relate information that wouldn't normally be allowed to be stated giving prosecutors a subconscious edge? I was unaware that criminal convictions have recently been reversed when the evidence was not overwhelming and the prosecutor's use of graphics went too far.

At least 10 times in the last two years, US courts have reversed a criminal conviction because prosecutors violated the rules of fair argument with PowerPoint. In a number of cases where the convictions were not overturned, mainly because evidence of guilt was overwhelming, prosecutors were taken to task by the higher courts for their perceived unfair use of graphics during the trial, especially during closing argument.

During a criminal trial in the state of Washington earlier this year, the prosecutor, during closing argument, apparently used animation and sound effects to make her point. The effects included concentric rings of a target on the booking photo of the defendant, footprints materializing on the screen, and the defendant's name in a bulls-eye. According to Armstrong, the final slide opened up with a header in 96-point type that said "GUILTY of Murder 2." While the word GUILTY continuously flashed across the screen, the prosecutor stated "The defendant is guilty, guilty, guilty." The court reversed the conviction on "other grounds", i.e. defense counsel was incompetent, but took the opportunity to chastise the prosecutor's use of these graphics. Prosecution by PowerPoint is the new hot topic.

What are the rules? Are there boundaries in place to limit how far a party, whether civil or criminal, can go with graphics? Probably not. I am not aware of any cases from Michigan's courts that have looked at this issue. As practicing attorneys, we all know the law is always several steps behind technology. This appears to be the case in this area. As Eric Broman, a Seattle attorney stated: "Until the court says where the boundaries are, prosecutors will continue to test the boundaries." Though I find that a somewhat unfair painting of most prosecutors, it is fair to say until the courts rule, tech-savvy attorneys (having watched a number of civil cases, it seems to me they have the means to and routinely do hire outside consultants and experts to run their technical presentations) will do whatever it takes to win their case.

According to the article in The Marshall Project, the most common misuse of what it termed "visual advocacy," was emblazoning the word "GUILTY" across a mug shot or booking photo of the defendant. It seems the letters are almost always in red and the type font is unusually large. The courts sense the color red is used because it is "the color of blood and the color to denote losses." Recently, the appellate courts in Missouri have started to provide a framework for what is acceptable. In a drug prosecution, the word "Guilty" was emblazoned in red across the defendant's booking picture, where he was dressed in jail garb. The court noted a defendant cannot appear in front of a jury in jail clothing, for obvious reasons, and the prosecutor's use of photos of this type it introduces a prejudice the rules disallow. The court stated it defies logic that a prosecutor would tempt a mistrial through such an "egregious" tactic. The court did not reverse the conviction because of it, finding the defense failed to object at the time of trial and the evidence was overwhelming. But the court was clearly concerned about the tactic.

In December 2012, the Washington Supreme Court threw out the conviction of a man when the prosecutor used the tactic just described. In her closing, the prosecutor used a series of three slides with the word "Guilty" emblazoned across a defendant's mug shot. The prosecutor

first made a point; then a graphic with the word "Guilty" running across the middle of the defendant's mug shot appeared. After she made a second and third point, the photo would reappear with "Guilty" running diagonally. The court threw out the conviction based on the "highly inflammatory" slides. The court reiterated the long-held principle that a prosecutor's personal opinion of innocence or guilt should not be stated to a jury. Their opinion is supposed to be couched in terms of what the evidence shows. The court stated plastering the term "Guilty" on a slide, not once, not twice, but three times, was a "flagrant and ill intentioned" violation of this principle. The superimposed captions on a photo were "the equivalent of unadmitted evidence."

**No longer do we ask jurors to simply use their imagination to fully understand what a witness describes; high definition screens with proper tech photos put them there.**

One justice, Tom Chambers, wrote in a concurring opinion that he was stunned at the state's contention that there was nothing wrong with digitally altering the booking photo. He stated: "Under the state's logic in a shooting case, there would be nothing improper with the state altering an image of the accused by photoshopping a gun into his hand." Some courts have called these slides "a calculated device employed by the prosecutor to manipulate the jury's reasoned deliberation and impair its fact-finding function." Many of the courts' complaints centered on inflammatory images or in cases which prosecutors used slides that mischaracterized the beyond-a-reasonable doubt standard or infringed upon a defendant's right to remain silent.

Author Scott Armstrong did point out prosecutors acknowledge that they need to take the same care with their visual aids as they do with spoken words. Pierce County Prosecutor Mark Lindquist, (Washington), stated "Visuals are a part of any modern trial. We use PowerPoint now instead of a chalkboard. But, basic ideas remain the same. New tools, old rules."

I am always amazed by tactics I see used by prosecutors across the state that cross the line of good taste, professionalism and ethics. If a prosecutor has to resort to those low-level tactics, it tells me something about him. It tells me he is inexperienced, scared and insecure. It is one thing to be aggressive and hard-nosed during trial, but it is another thing to tempt a mistrial. No matter how much we believe in our case, it should never be personal. Trial tactics should never be about cheating, hiding evidence or obfuscating the facts. A trial is supposed to be a forum where fairness dictates. It is up to six (civil) or twelve (criminal) strangers, citizens of the community, to decide based on a set of facts. Nothing prevents a hard fight. It just has to be fair. The last thing I want is a judge during a directed verdict motion or a motion JNOV to review what I did and publically state I cheated and reverse the verdict.

Moreover, I am an employee of the Macomb County Prosecutor's Office. I represent my boss, County Prosecutor Eric Smith, every time I appear in court. Not only am I judged by what I say and do, so is he. It harms his reputation and the reputation of our office if a case is reversed by prosecutorial misconduct. I understand as rules and boundaries evolve, both sides will push the limits until a set of rules is in place. But, those types of tactics differ from overt and unimaginative actions. A trial attorney has to trust his case. He has to trust he has properly presented the correct witnesses and the right facts and properly framed his argument. Believe it or not, you must trust that jurors get it. They understand. They do not need to be browbeaten with bully tactics. These tactics, more often than not, backfire. If you have done your job correctly, the jury likes you and trusts what you present. You lose that trust when you resort to these types of tactics. Sometimes we just don't have strong cases. You know that intrinsically before you even start the trial. The kind of tricks discussed by this article will not change the outcome. They are simply lowbrow efforts that play to sympathy, not the law, not to the facts and not to the art of persuasion. If you need them, in my opinion, you weren't persuasive enough during your case.

There is a large role for technology in trial. Displaying crime scene photos on large high definition screens gets the jury to experience a scene as the witness describes it. No longer do we ask jurors to simply use their imagination to fully understand what a witness describes; high definition screens with proper tech photos put them there. I usually ask the witness to step down from the witness stand and use a pointer to reflect the location of evidence or actions. (Never use a laser pointer on a high definition screen. The laser beam bounces off at odd angles and directly into the eyes of jurors. I learned this through experience). It keeps the jurors' minds active and keeps them, for lack of a better word, entertained or engaged. Studies show our attention spans are shorter with the advent of technology. So, be creative and use it to your advantage. During closings, I don't make up slides with information or evidence not introduced at trial. I don't try to amaze them with movement.

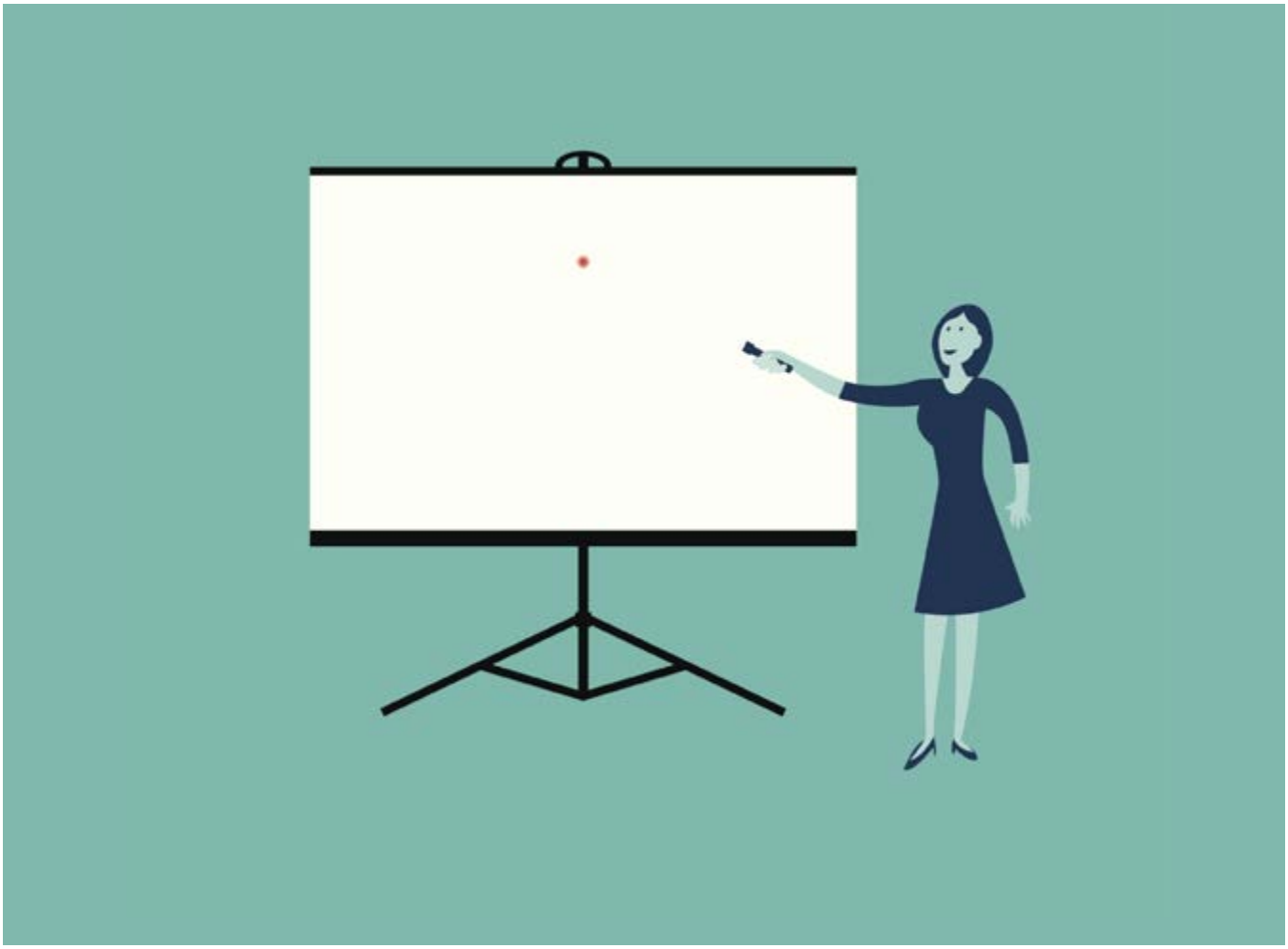
The use of sophisticated visuals in the courtroom has boomed in recent years. Author Armstrong points to data provided by DecisionQuest, a trial consulting firm, on their

research on the power of show and tell. According to their studies, when lawyers present evidence orally, only 10 percent of jurors retain the information three days later. But, if lawyers present that information visually as well, juror retention rises to 65 percent. DecisionQuest advocates both civil and criminal trial lawyers seize upon this advantage by integrating visuals ranging from simple slides to animated graphics into their presentation.

Studies show jurors love lists. I make lists. Lots of them. Numbered lists. Side-by-side lists. Actions lists. Lists detailing my theme. I don't resort to tricks. I don't need to. I trust what I have done and the force of my personality to carry the day. I have a rule: No opening statement should be longer than 45 minutes and no closing argument should be longer than one hour, even in trials that go several weeks. Why? Because I believe jurors get it. They understand what is being shown. According to studies, the majority have already made up their mind. And, they know the facts as well as the attorneys. Droning on doesn't make your case better. Hit your highlights, hit your theme, present the law and why you believe you case sits squarely within it, and sit down. I have spoken to enough jurors to be confident in that statement. NONE were impressed with long closing arguments. Short and concise usually win the day.

Also, I take the critical photo exhibits I used to make my case and make a montage or place them side by side for jurors to draw their own conclusions. I never alter them. I don't need to. By re-showing photos and exhibits in a context and light that supports my theory and stating my reasons while exhibiting the photos, I ask them to see it my way. In certain cases, especially with somewhat fuzzy security photos, I often enlarge an area of the photo to show specific information that helps me make my case.

I think it is more important to present the evidence as experienced at the scene instead of replacing or enhancing it with rhetoric. Paul Harvey and James Mason could carry a listener with just their voice. Using technology as an enhancement aid to your voice makes sense. I actually love the creative process. Each case is different. Each case requires a different use of technology. It is like making a movie. There are new challenges in presenting each case. I accept the challenge.



# Genuine Issues of Material Fact

By Howard Yale Lederman

Knowing how to respond to MCR 2.116(C)(10) summary disposition motions is more essential than ever. As trials become more expensive and time-consuming, civil action parties see themselves in the driver's seat and move for summary disposition on any available bases earlier and earlier and sometimes repeatedly. If the nonmoving party's attorney does not understand the motion, his or her response will be ineffective or off the mark. He or she may well lose an otherwise winnable summary disposition motion and case.

This article focuses on the most common and well-known kind of summary disposition motion, the MCR 2.116(C)(10) motion. The current MCR 2.116(C)(10) version reads:

> "(C) Grounds. The [summary disposition] motion may be based on one or more of these grounds, and must specify the grounds on which it is based: * * * *
>
> "(10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

In understanding the above sub-rule, the first step is to understand the crucial second clause, "no genuine issue as to any material fact." Courts and attorneys have shortened this clause to read "no genuine issue(s) of material fact." Many attorneys plunge into responding without understanding this key clause or even trying to understand it. Many attorneys assume that "genuine issues of material fact" means "issues of fact."

These attorneys are not alone. Courts and judges have also treated "genuine issues of material fact" as if it means "issues of fact." Here are some examples: *Douglas v Allstate Insurance Co,* 492 Mich 241, 265; 821 NW2d 472 (2012) ("We agree with the Court of Appeals that questions of fact precluded summary disposition on this issue."); *O'Neal v St John Hospital & Medical Center,* 487 Mich 485, 507; 791 NW2d 853 (2010) ("it [expert testimony] is sufficient to raise a question of fact to defeat a motion for summary disposition…."); *Lytle v Malady,* 458 Mich 153, 187; (Cavanagh, J, dissenting) ("I would hold that a question of fact existed precluding summary disposition [for the] defendants."); *McCart v J Walter Thompson USA, Inc,* 437 Mich 109, 115; 469 NW2d 284 (1991) ("Under MCR 2.116(G)(4), a party opposing a motion for summary disposition is required to respond with affidavits or other evidentiary materials to show the existence of a factual dispute…."); *Jones v Daimler Chrysler Corp,* 288 Mich App 99, 110; 792 NW2d 425 (2010), *rev'd in part on other grounds* 488 Mich 1036; 793 NW2d 492 (2011) ("[P]laintiffs have shown an outstanding question of fact on this issue, which precludes summary disposition.").

What is the practical impact of not understanding "genuine issues of material fact"? The responding attorney begins in the wrong place. He or she looks for "issues of fact." He or she may find them. But often, he or she does not "connect them up" to respond effectively.

If reading this article, a responding attorney might see the solution as looking in a legal dictionary. Let's try it. According to *Black's Law Dictionary,* a genuine issue of material fact is: "In the law of summary judgment, a triable, substantial, or real question of fact supported by substantial evidence." *Black's Law Dictionary* (10th ed Thomson Reuters 2014), p 801. According to the same dictionary, a material fact is "[a] fact…significant or essential to the matter at hand, a fact that makes a difference in the result to be reached in a given case." *Black's Law Dictionary, supra,* p 801 (our emphasis).

The above genuine issue of material fact definition would confirm the responding attorney in thinking that the first response task is to find and present "issues of fact," as long as these issues involve "triable, substantial, or real" issues of fact. Likewise, the above material fact definition's first part would confirm the responding attorney in thinking that the first response task includes finding facts, as long as they are "significant or essential" enough "to the issue or matter at hand[.]" So far, almost the entire focus is on facts.

But the above material fact definition introduces something else: The need for a fact to make a difference in the case's result. What characteristics must a fact have to make a difference? The dictionary definitions have no answer.

Now, let's see if Michigan appellate decisions define or describe "genuine issues of material fact." Almost all such decisions use the phrase without defining or describing it,

thus assuming that the attorneys reading the phrase know and understand its meaning. Since almost no such decisions have defined or described the phrase, this assumption is unwarranted. Instead, the assumption that the attorneys reading these decisions do not know or understand the phrase's meaning is warranted. How can anyone know a word's or a phrase's meaning, if he or she has never seen a definition?

So, we have to look really hard. In doing so, we might find this description: "'The material fact to which reference is made in the rule is the ultimate fact issue upon which a jury's verdict must be based.'" *Partrich v Muscat,* 84 Mich App 724, 730 FN3; 270 NW2d 506 (1978), quoting *Simerka v Pridemore,* 380 Mich 250, 275; 156 NW2d 509 (1968) (opin of Souris, J). *Accord, Belmont v Forest Hills Public Schools,* 114 Mich App 692, 696; 319 NW2d 386 (1982), *lv den* 422 Mich 891 (1985), (quoting *Partrich* & *Simerka* above) (our emphasis).

So, we have only the foggy phrase, "'the ultimate fact issue upon which a jury's verdict must be based.'" For most responding attorneys, this phrase would be confusing enough. A responding attorney might conclude: "I need to go through my factual issues and pick one." But doing so would not get him or her anywhere. He or she would not have any standard for distinguishing "issues of fact" from "the ultimate fact issue." He or she would not have any standard for knowing whether his or her picks are right or wrong.

Later cases use the phrase, "[T]he disputed factual issue must be material to the dispositive legal claim." *ACIA v State Auto Mutual Insurance Co,* 258 Mich App 328, 333; 671 NW2d 132 (2003), *Kostello v Rockwell International Corp,* 189 Mich App 241, 243; 472 NW2d 71 (1991), *Westman v Kiell,* 183 Mich App 489, 493; 455 NW2d 45 (1990), *lv den* 437 Mich 880 (1990). But this description is little better than the above dictionary definition.

So, let's try the dictionary again. According to *Black's Law Dictionary,* an ultimate fact is: "A fact essential to the claim or defense….A fact that is found by making an inference or induction from findings of other facts….a factual conclusion derived from immediate facts." *Black's Law Dictionary, supra,* p 711. This definition's first part includes the above material fact definition and thus is similar to that definition. But the ultimate fact definition's second part is hard to handle. The responding party must specify all his or her facts and infer factual conclusions from all these facts according to an unknown, undefined inference standard. Otherwise, the responding attorney might miss an ultimate fact and thus misrespond to the summary disposition motion. Thus, the dictionary path leads to another dead end.

Fortunately, the *Partrich-Simerka* description continues: "` For example, in a contract case, the material fact, or ultimate fact, as distinguished from the evidentiary fact, is the meeting of the minds, rather than merely that the parties conferred; the payment and receipt of consideration, not just that money passed hands; the breach of a material condition, rather than just that the defendant delivered the goods on a day after the date promised….the difference between evidentiary fact and material fact…is the difference between the raw data admissible in evidence and the inferences or conclusions of facts essential to the claim or defense[,] which properly may be drawn or reached by a jury from such data.'" *Partrich,* 84 Mich App 724, 730 FN3, quoting *Simerka,* 380 Mich 250, 275 (opin of Souris, J) (my emphasis).

Now, we are getting somewhere. We learn that "genuine issues of material fact" differ from "evidentiary facts." So, "issues of fact" must differ from "genuine issues of material fact." However, while the "evidentiary facts" description is clear, the "genuine issues of material fact" description remains unclear. We are stuck with the phrase, "'the inferences or conclusions of facts essential to the claim or defense[,] which properly may be drawn or reached by a jury from such data.'" *Partrich,* 84 Mich App 724, 730 FN3, quoting *Simerka,* 380 Mich 250, 275 (opin of Souris, J).

Let's put what we have together. We have "'the ultimate fact issue upon which a jury's verdict must be based.'" We have "[a] fact essential to the claim or defense[.]" We have "'the inferences or conclusions of facts essential to the claim or defense[,] which properly may be drawn or reached by a jury from such data.'" We have "[a] fact…significant or essential to the matter at hand, a fact that makes a difference in the result to be reached in a given case." Based on these phrases, we can conclude that a genuine issue of material fact is different from and more than a question of fact. We can also see the need to connect issues of fact with claims and defenses. Finally, we can see a relation between issues of fact, genuine issues of material fact, and the jury's decision-making role.

Let's look at the jury's decision-making role. We all know that the trial court instructs the jury on the applicable law. At trial, the trial court instructs the jury on each claim's and each fact-based defense's required proof elements.

In reaching a verdict on a breach of contract, conversion, defamation, fraud, negligence, wrongful discharge, or other common law claim or on a statutory Michigan Consumer Protection Act, Michigan Elliott-Larsen Civil Rights Act, Michigan Franchise Investment Law, Michigan Persons with Disabilities Act, Michigan Whistleblowers' Protection Act, or other statutory claim, the jury must evaluate and decide whether the plaintiff has presented enough evidence and the right kind of evidence to meet each claim's required

proof elements for recovery. The jury must do the same for each fact-based defense's proof elements. On each particular proof element, the jury must evaluate and decide whether the plaintiff has presented enough evidence and the right kind of evidence to meet each individual claim proof element's recovery requirements or whether the defendant has done so to meet each individual fact-based defense's proof elements.

With our above understanding of the difference between evidentiary facts and ultimate facts and of the jury's specific decision-making role, we can "connect it up." We have "[a] fact…significant or essential to the matter at hand, a fact that makes a difference in the result to be reached in a given case." We have "'the ultimate fact issue upon which a jury's verdict must be based.'" We have "'the inferences or conclusions of facts essential to the claim or defense[,] which properly may be drawn or reached by a jury from such data.'" Let's narrow these phrases.

From all these phrases, we can conclude that our raw evidentiary facts must be significant enough to make a difference in the case and thus in the summary disposition motion's decision. Also, we can conclude that the essential inferences or conclusions of facts are not the evidentiary facts themselves. Further, we can conclude that these inferences or conclusions of facts are not the claims or defenses themselves. These conclusions leave only one other possibility: The essential inferences or conclusions of facts refer to:

- whether or not the plaintiff has proven each claim's required proof elements and to whether or not the plaintiff has met each such element's recovery requirements and
- whether or not the defendant has proven each fact-based defense's required proof elements and to whether or not the defendant has met each such element's recovery requirements.

As a result, we can conclude that the ultimate fact issues on which jury verdicts must be based are not "issues of fact." We can also conclude that the ultimate fact issues are not whether the plaintiff has proven his/her claims or whether the defendant has proven his/her fact-based defenses. Those issues are legal issues, because whether a plaintiff or defendant is liable or not is a legal issue. Rather, the ultimate fact issues are whether or not the plaintiff has proven each claim's required proof elements and whether or not the plaintiff has met each such element's recovery requirements and whether or not the defendant has proven each fact-based defense's required proof elements and whether or not the defendant has met each such element's recovery requirements. Thus, the ultimate fact issues are above "issues of fact" but below liability issues.

Therefore, under MCR 2.116(C)(10), a genuine issue of material fact is an issue of whether the proponent has proven a claim's or fact-based defense's non-damages proof element. Accordingly, in responding to an MCR 2.116(C)(10) summary disposition motion, the first step is to identify each relevant claim's or fact-based defense's non-damages proof elements. The second step is to review the evidence and facts supporting your position and determine which proof element(s) the evidence and facts support. The third step is to connect them with the above elements, explaining how your supporting evidence and facts help prove the elements. In my next article, we will look at how to accomplish these steps.

### About the Author

***Howard Yale Lederman*** *has been a Michigan appellate lawyer since 1984 representing civil plaintiffs and defendants and criminal defendants and a State Bar of Michigan Appellate Practice Section charter member since 1996. He has written over 10 appellate law and practice articles and has co-written an ICLE appellate law book section. He is a Cooley Law School adjunct professor. He has just opened his new law firm, Ledermanlaw, PC, to do appeals and legal writing projects for other lawyers and the general public.*

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# Announcements

**HOWARD YALE LEDERMAN: YOUR SOURCE FOR APPEALS AND LEGAL RESEARCH AND WRITING PROJECTS**

1. He has over 30 years of appeals and legal research and writing experience.
2. In those 30 years, many law firms and attorneys have depended on him to produce high quality, effective work under tight deadlines or in unfavorable situations, and he has delivered.
3. He has worked in complex commercial, constitutional, employment, and intellectual property substantive law areas and complex procedural law areas.
4. He does not believe in or give you canned briefs. Rather, he customizes his work to meet your needs.
5. He teams with you to discuss the best possible strategy and means to succeed on your case.
6. He has written over 12 articles on appellate practice and procedure.
7. He is a Cooley Law School adjunct professor.
8. He is an Appellate Practice Section Charter Member and has remained a section member for 19 years.
9. As you enjoy doing what you do a lot, he enjoys doing what he does a lot.
10. To learn more, you can visit his LinkedIn pages. His web site is under construction and will be in operation shortly.

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# LEGAL ADVICE FOR INJURED PEOPLE

I've represented seriously injured people throughout Michigan for more than 30 years. The main focus has been First and Third Party Auto, Truck, Motorcycle and Dog Bite Cases. Please take a look at "**REAL PEOPLE REAL - RESULTS**" on my website at: www.lawrencedaylaw.com Also please see my recent article in the JAN.-FEB. issue.

Referral fees are confirmed in writing.

Thank you,
Larry

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Nominations are now open for major State Bar of Michigan awards that will be presented at the October 2015 Annual Meeting in Novi.

- The Roberts P. Hudson Award
- The Frank J. Kelley Distinguished Public Service Award
- The Champion of Justice Award
- The Kimberly M. Cahill Bar Leadership Award
- The John W. Cummiskey Pro Bono Award
- The John W. Reed Michigan Lawyer Legacy Award

Any SBM member can nominate candidates for awards. Apply online or download application forms.

# Alimony Principles

By Maury Klein

The following is the most recent brief I have on the issue of a request for alimony. The readership, as always, is invited to submit articles either more exhaustive or geared from the perspective of a husband seeking to deny alimony or claim that only alimony in gross is warranted. In any event, I hope that this inclusion is helpful to our members.

**BRIEF IN SUPPORT OF MOTION FOR PERMANENT ALIMONY**

NOW COMES , Plaintiff herein, by and through her attorney, Maury Klein, and in support of her Motion respectfully states to this Honorable Court as follows:

Alimony is an incident of marriage and is based on the underlying principle that it is the duty of the husband to support his wife, not necessarily to endow her. *Johnson v. Johnson*, 346 Mich 418, 78 NW2d 216 (1956).

The Husband has the duty to provide suitable support for his wife, considering the ability of the husband and character and situation of the parties and all other circumstances of the case and alimony is based on that principle. *Hoffman v. Hoffman*, 9 Mich App 715, 158 NW 2d 78 (1968).

The following principles are respectfully relied upon from the case of *Kurz v. Kurz*, 178 Mich App 284, 443 NW2d 782 (1989):

"Grant or denial of alimony lies within the sound discretion of the Trial Court..." and

"In computing an award of alimony, the Trial Court must consider the duration of the marriage, contribution of the parties to the joint estate, the ages of the parties, their health, their stations in life, the necessities and circumstances of the parties and the earning abilities of the parties."

The greatest specificity of the factors involved in a determination of alimony found by Plaintiff is respectfully cited from the case of *Berger v. Berger*, 277 Mich App 700 (2008) *lv den* 482 Mich ___ (#136348, 7/29/08). There the Court stated:

The award of spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case. *Moore v. Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Factors trial courts should consider include: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the abilities of the parties to work; (4) the source and amount of property awarded to the parties; (5) the parties' ages; (6) the abilities of the parties to pay alimony; (7) the present situation of the parties; (8) the needs of the parties; (9) the parties' health; (10) the standard of living of the parties and whether either is responsible for the support of others; (11) contributions of the parties to the joint estate; (12) a party's fault in causing the divorce; (13) the effect of cohabitation on a party's financial status; and (14) general principles of equity. *Olson v. Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).

APPLICATION OF LAW TO FACTS

At this juncture, the 14 factors will be explored one by one in the enumerated subsections which follow.

1. The past relations and conduct of the parties from marriage on.

2. The Parties married _____ making this a _____year marriage at the time of the divorce filing.

3. Ability of the parties to work.

4. Property: Listing of whatever property has accrued as a result of the marriage.

5. Ages Plaintiff born _____

Defendant born_____

6. Ability of the parties to pay alimony, presuming opposing party earns wages.

7. Present situation—how the parties are now living.

8. Needs of the parties—some judges are using a worksheet to detail the income and expenses of the respective parties. (Exhibit C—worksheet.)

9-14 Self explanatory...

CONCLUSION AND ADDITIONAL ANALYSIS

The case of *Wiley v. Wiley*, 214 Mich App 614 (1995) held that reviewing an alimony award for findings of fact is grounded in whether the reviewing court would be left with a firm conviction that an award of alimony-in-gross was inequitable. The factors in *Wiley*, found at page 615 of that case, were as follows: marriage length of 30 years; wife was in her 50s and had a history of part-time employment and was capable of continuing to work.

The reasoning of the *Wiley* court hinged (at least in part) on the belief that full-time employment would not always be obtainable for individuals in their 50s. How much more pressing would that argument be in the instant fact scenario in which...(Facts specific to your case.)

ADDITIONAL AUTHORITY, ANALYSIS AND CONCLUSION

The case of *Sparks v. Sparks*, 440 Mich 141 (1992) held that although adultery and misconduct were to be considered in dividing the marital estate, they were not the only factors. In the case at bar, every factor without exception and without looking at defendant's transgressions compels a finding that plaintiff is entitled to such portion of defendant's earnings as will equalize their situation during the remainder of defendant's working life. A copy of this Honorable Court's Worksheet is Exhibit C. (The details of the petitioning party's request were spelled out here.)

WHEREFORE, Plaintiff respectfully prays this Honorable Court grant her Permanent Alimony as sought and make same retroactive to the Motion filing date.

## Save the Date

This roster of upcoming seminars will be held at Andiamo's at Maple and Telegraph from 5:00 - 7:30 p.m. Appetizers, dinner, soft drinks are included. A cash bar will also be available. Tickets are $45.00 in advance for Section members and $50.00 for non-Section Members and at the door. (Watch for registration details.)

- **How to Get Clients, Make Money and Not Lose Your Law License - March 26**
- **Technology - How to Work Better, Faster and Make More Money - April 30**
- **Criminal Law and Procedure Basics - May 28**
- **Residential Real Estate and Landlord/Tenant Law - June 25**