MICHIGAN LAWYERS WEEKLY
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Tuesday, April 26, 2005 Lawyers Weekly, Inc.

Lawyer Of The Year 2004

John P. Jacobs - Detroit

By Kelly A. McCauley

This lawyer helped define admissibility of expert testimony, getting Michigan's standards more closely aligned with 'Daubert.'

Born: 1945
Education: University of Detroit School of Law (1970); University of Detroit (1967)
Admitted to Bar: 1970 (Michigan); 1974 (U.S. Court of Appeals, Sixth Circuit); 1978 (U.S. Supreme Court); 1988 (U.S. Court of Appeals for the District of Columbia)
Experience: John P. Jacobs P.C.
Legal Affiliations: Catholic Lawyers Society of the Archdiocese of Detroit (president, 1994-95; various officerships and board of directors, 1988-present); Defense Research Institute (state representative, 1997-98; Appellate Steering Committee); member, Federation of Insurance and Corporate Counsel (FICC); International Association of Defense Counsel (vice chair, Amicus Curiae Committee); Supreme Court of the United States Bar; Bar of the Sixth, Fourth and District of Columbia Circuits; Federal Bar Association; Oakland County Bar Association; Detroit Metropolitan Bar Association; Arab American Bar Association; Irish-American Bar Association; American Bar Association (ABA Section on Litigation, Appellate Subcommittee; Tort and Insurance Practice Section, Appellate Subcommittee); member, Attorney Discipline Board Hearing (1984-87; 1994-present)

Some have dubbed John P. Jacobs a "lawyers' lawyer" for his professional, civil and methodical approach to the practice of law.

Underneath that calm exterior, however, is an utterly tenacious practitioner who takes his role as one of Michigan's leading defense attorneys quite seriously indeed.

In a career spanning more than three decades, this Detroit attorney could have been nominated for Lawyer of the Year in, perhaps, just about all of them. In 2004, however, the Michigan Supreme Court handed down its ruling in Craig v. Oakwood Hospital. *Jacobs represented defendant Dr. Elias Gennaoui in the case, which changed the rules regarding expert testimony and Davis-Frye hearings.*

Jacobs argued — and the court agreed — that the plaintiff's expert was not qualified and, even if he was, his testimony failed to prove causation.

Thus, the Oakwood *ruling helps to ensure that expert testimony is reliable before it is presented to the jury, and has the positive effect of making lawyers and judges more sensitive to the issues surrounding the admissibility of expert testimony.*

Jacobs noted that judges have to be on their guard — if there's a request for a Davis-Frye *hearing now and it's turned down, then the case is probably tainted.*

"I think one of the things attorneys are going to have to do is put a judgment filter over big, cutting-edge radical cases because if the plaintiff's expert is articulating or espousing a theory that doesn't exist in the scientific literature, that doesn't exist as commonly accepted by peer review, that is not something that is widely regarded in the professional field as likely to be accepted as anything other than expert testimony witchcraft then it's probably not a good idea to put hundreds of thousands of dollars into litigation costs on a gamble that it's going to sell," he explained. "Even if it sells in front of a jury, like poor Antonio Craig's case, then what happens is there's disappointment upstairs."

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Q. Let's talk about Craig v. Oakwood*, which changed — or rather, clarified — the rules for getting expert testimony admitted.*

A. The doctor I represented — Dr. Elias Gennaoui — is a wonderful doctor. Instead of going after the "carriage trade" in Birmingham and Grosse Pointe, he specialized in high-risk babies among Medicaid moms. When you're in that field, you're going to have results that aren't necessarily your professional fault. They just happen. I think that's what happened to poor Antonio Craig.

The point the Michigan Supreme Court affirmed in Oakwood was that there simply wasn't any proof that Dr. Gennaoui caused the mental retardation. There was a substantial lack of proof that cerebral palsy was caused by the birth trauma in the case.

The Michigan Supreme Court obliterated the liability, saving a couple of hospitals and a doctor in the process. That's why I can feel good about my job.

Q. So what is the state now of expert testimony and Davis-Frye *hearings?*

A. I think the Michigan Supreme Court did everything but formally adopt *Daubert*. The big news in the case was the necessity for a *Davis-Frye* hearing, which I think trial judges have incorrectly presumed they have discretion to avoid. I don't think they do. I think once there's an attack on the substance of an expert's testimony on grounds that it's novel or under-represented in the literature or just too "out there" to be widely or commonly accepted, they have a legal obligation and it's arrogant if they don't choose to have a *Davis-Frye* hearing. I think the next step is a formal acceptance of *Daubert*, although I don't see how much more we need under MCL 600.2955, or 702 and 703 since it's practically the same standard.

Q. What hoops are attorneys going to have to navigate after Oakwood*?*

A. I think one of the things attorneys are going to have to do is put a judgment filter over big, cutting-edge radical cases because if the plaintiff's expert is articulating or espousing a theory that doesn't exist in the scientific literature, that doesn't exist as commonly accepted by peer review, that is not something that is widely regarded in the professional field as likely to be accepted as anything other than expert testimony witchcraft then it's probably not a good idea to put hundreds of thousands of dollars into litigation costs on a gamble that it's going to sell. Even if it sells in front of a jury, like poor Antonio Craig's case, then what happens is there's disappointment upstairs.

Q. But some may look at Oakwood and wonder how you could represent the doctor in such a case.

A. Here's a side I think people never see. It's true that there were disastrous legal effects for the plaintiff. But how about the tens of thousands of people who wouldn't receive medical treatment if Dr. Gennaoui went out of business or the hospital had solvency problems as a result of this enormous verdict? There are two sides to every question.

I realize some members of the plaintiffs' bar think this kind of reaction is very harsh. But there's enormous harshness when an unproven case results in a judgment that's sustained and the medical defendants are threatened by an unfair verdict. There's another side of this entirely. Dr Gennaoui is a very fine doctor and I was highly motivated for him. There are fewer and fewer doctors taking high-

risk birth, lower-income mothers as patients. If you're doing obstetrical high-wire work you're not exactly economically motivated to take the cases. Dr. Gennaoui takes those cases and usually has superb results. Sometimes there are results that aren't good that just aren't his fault, and I think Antonio Craig was one of those.

Q. Some may say that, of course you won because of the current defense-friendly stance of the courts.

A. There's one thing that always surprises plaintiffs' lawyers — I say I lose all the time. The complaint by some in the plaintiffs' bar is that the courts are so defense-oriented that they can't win. But I lose all the time, and frequently in front of so-called defense-oriented judges. I don't say that the system has gotten so skewered that anything is guaranteed anymore by any means.

Q. Your practice also includes the interesting concept of "second-chairing" for a lot of your clients. Tell me a bit about that.

A. I've been doing the second-chair practice for more than 30 years. Some of my clients have retained me to sit in while the case is in pre-trial mode and at the trial itself as a kind of "second chair" of the trial lawyer. This helps make sure the legal issues are clearer, the objections are crystal clear on preserving important points of law for error. I also wade through the directed verdict motions and summary disposition motions, and do the jury instructions to make sure that everything is legally perfect before the trial and at the trial. Then I take over completely at the point of post-trial motions.

I have a lot of clients that actually retain me to sit there to monitor their trial lawyer, which I call "kicking the lawyer's chair." I say, "Get up and say this" or "Get up and do that." Because I'm not trying the case, I have the freedom to go back to my office or have one of my associates email or fax me the case I'm thinking of. When we're making a record at the trial court and we're presenting the judge with law it's a whale of a lot more persuasive that way.

Q. Is "second chairing" a common practice in Michigan?

A. It's regarded as very unusual in Michigan, but it's not so at all in a couple of the other states where I practice. This came up during one of the national conventions of the American Academy of Appellate Lawyers — I'm a life fellow there — and apparently this is widely done all over the country.

Most clients don't want to pay for more than one lawyer, but some don't mind it at all. Second-chairing is like watching the play you want to act in. It has its own frustrations. I can sympathize with the trial lawyers — could you imagine having me hanging over your shoulder? What a pain in the neck I could be.

Q. Can you give me an example of a case you "second-chaired?"

A. The most significant case I ever second-chaired was an enormous regulatory case with a wildly large damage amount. I worked with a wonderful trial team day and night, and I often made the objections myself at the administrative hearing. But the liability amount was staggering.

On the basis of that joint participation though, while we lost the case in front of the administrative law judge, we won at the Court of Appeals. The trial lasted seven or eight months, and while I wasn't there every single day, I was there two or three days a week. When there was something significant, I'd pop up on the scene and give the judge a rash. In the meantime, I'm managing my practice at night.

Q. You won the Excellence in Defense Award from Michigan Defense Trial Counsel. In speaking with many in the MDTC, you were regarded as the mentor and godfather for young attorneys in the field.

A. I love the law and I love the system. I love the importance of having personal injury and tort damages suits, anti-trust cases and product liability cases, civil rights cases — these keep the

corporate establishment in check. I've seen jurisdictions where there isn't much that keeps the corporate side, the defense side, in check. I know what people think here in Michigan is that the courts are defense-oriented and that's not the case at all. Things get skewered then too.

The truth is that due process is a two-sided coin. For every recognizable claim that a plaintiff may make, there has to be a decent, equally poised side for the defense. In that forging of the two ideals, justice comes out, and I wouldn't have any other system.

For people who think that I'd like to abolish all plaintiffs' cases, that's nonsense. The plaintiffs' side of cases keeps the corporate side honest. By the same token, I don't want the corporate side, the defense side, overrun either. Therein lies the forging or the testing of the mettle that makes the justice right. Putting things right in the middle at the fulcrum point is just what the system needs.

Granted, I am on the defense side, but I see plaintiffs' lawyers and I'm amazed at the breadth and scope of their excellence. I see them all the time. There are lawyers who are so good that they don't ever do anything wrong. They get a big verdict and I tell the clients on those guys, "Just get the checkbook out." They get good results and they do it in a civil, gentlemanly or gentlewomanly way with a lot of savoir faire. They're not trying to assassinate anyone in the process. That's the kind of lawyer who has my respect, and I see a lot of them. They are the unsung heroes of the plaintiffs' bar.

Q. The MDTC and MTLA give out awards for this don't they?

A. It's the Respected Advocate Award, and I helped to create that. The MDTC awards it to a good lawyer who does things the right way. That's the kind of thing there should be more of in this state.

Q. Yet the popular press and the general public rarely hear of these attorneys.

A. If you go through the list of lawyers that MDTC has given the Respected Advocate Award to, it's the "Who's Who" of superb plaintiffs' lawyers. George Googasian was the first one — he was the one I picked. He'll hammer you into the ground, but he does it as a total gentleman. When you've lost to George Googasian, you probably deserved it.