

## THE PRESIDENT'S MESSAGE

BY: STEVEN J. KYLE

**D**ear members:

For the past 30 years, I have specialized in insurance defense. I am proud to be known as an insurance defense lawyer. I am deeply honored to serve as your President for the 1998-1999 term. I anticipate and expect this undertaking will involve a great deal of work and I pledge to each of you that I will spend whatever hours are necessary to represent the Association to the best of my ability.

Our specialization is facing some very unique challenges, one of which is the ever present, intrusive and pervasive cancer of auditing of bills. I have asked Hank Scrudder to chair a task force to formulate suggestions on how to cope, adapt and, if necessary, challenge the unscrupulous strategies of several of these auditing companies. I have spoken to Bill Smith, General Counsel for the State Bar of Georgia, and Bill has agreed to attend our initial conference to offer suggestions from a perspective of what is ethical and what is professional.

Your Board of Directors is in close communication with the officers of the Defense Research Institute. On October 7-10, 1998, I along with your Executive Vice President and Secretary-Treasurer will be attending meetings with the DRI National organization and offices of other state insurance defense associations to address this and other issues.

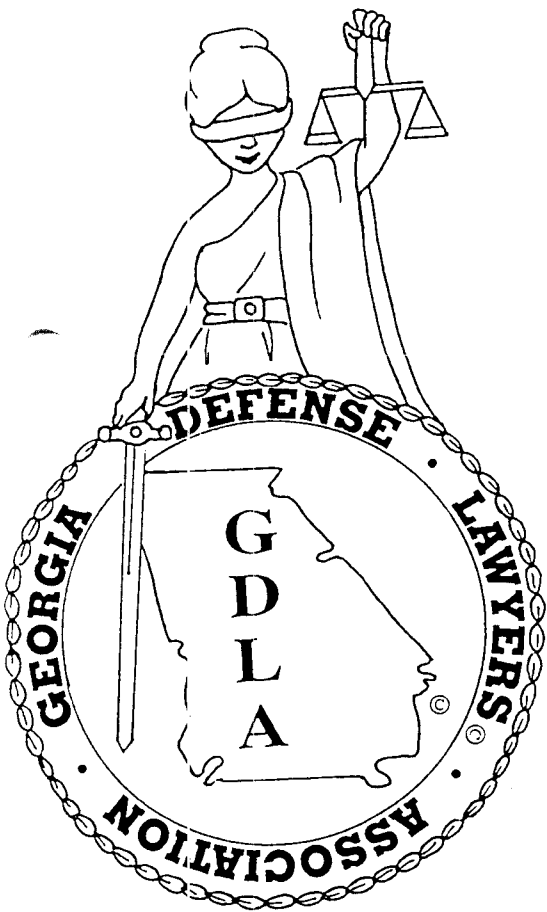
If you would like to participate in this task force, call, write or e-mail me. Also, don't hesitate to make your thoughts known to Hank Scrudder as he and his

committee will be preparing a position paper on this subject.

Secondly, the age of computers, e-mail, Y2K, voicemail and the Internet are upon us. On the informational sheet sent to each of you, I asked you to include your e-mail address. I was astounded at the number of members who can now be reached through this new electronic medium. Within the next sixty days, we should have the GDLA web page on the Internet. This effort is being spearheaded by one of our Vice Presidents, Jerry Buchanan. It is my goal to get our association on the cutting edge of this electronic technology. I want to be able to announce a meeting on the Internet. I want to set up a electronic bulletin board where members can read about new decisions, amicus briefs being filed, or the availability of experts. Perhaps we can even set up "chat rooms" where common insurance defense issues can be discussed among our members. The possibilities are endless.

I would like to see our entire membership on-line by the end of my term. If you have not already given me your e-mail address, please do so at [kyle@boviskyle.com](mailto:kyle@boviskyle.com).

My final goal as President is to increase the involvement of our membership. Your Board of Directors has voted to institute an exciting change. For the past 31 years, the Annual Convention has been held the last week in April. We have been that the inevitability of court calendars have precluded your attendance at the annual meeting. Members whose spouses work outside the home sometimes



during April. Our younger members, frankly, cannot afford a visit at a resort venue as well as a summer vacation with the children.

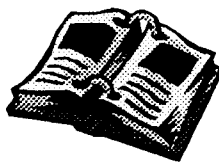
It was suggested that perhaps we could address all these challenges by moving our convention date to the month of June. In 1999, our Annual Convention will be held at the beautiful Ponte Vedra Resort (Jacksonville, Florida) on June 17-19. You are invited to bring your children and grandchildren. Your Executive Vice-President George Duncan has already scheduled our keynote speaker and will have his program completed within the next ninety days. We want you, your spouse and perhaps your children to attend, have a good time, learn something and network with some of the greatest lawyers in Georgia.

We have again held our GDLA Trial Academy at Callaway Gardens December of 1998. The Winter CLE Program will be held in Atlanta. The Substantive Law Committees will be meeting throughout the year. Our Law Journal Editor already has twelve commitments for next year's edition. The Amicus Curiae Committee has already filed two briefs with the appellate courts.

The Association is hard at work.

I look forward to a challenging term. Your suggestions and comments are welcomed and will be acted upon.

Yours Truly,  
Steven J. Kyle



## CALENDAR OF EVENTS

### 1999 Events

**June 17 - 20** Annual Meeting at Ponte Vedra  
**February 20** Winter Board Meeting



## MINUTES OF THE 1998 FALL BOARD MEETING, ASHEVILLE, N.C.

The GDLA Fall Board of Directors meeting was held at the Richmond Hill Inn in Asheville, North Carolina, October 30-31, 1998. The business meeting convened at 9:30 A.M. on Saturday, October 31, 1998 and adjourned at 12:00 Noon. The meeting was called to order by President Kyle. Officers in attendance were executive vice president Duncan and secretary-treasurer Melton. Past presidents Richardson, Painter, Welch, Chambless, Forbes and Whitworth were in attendance. Directors Clark, McMlelland, Foster, Griggs, Brown, Edwards, Rominger and Smith were in attendance. Directors Pinson, Hill, Buchanan, Scudder, Travis, Young, Wasden and Deming were unable to attend. The minutes of the 1997 annual meeting were approved.

Mr. Melton delivered the

treasurer's report. The organization had a positive bank balance as of October 26, 1998 in the amount of \$71,118.62.

Mr. Kyle announced the following chair appointments for standing committees:

Amicus Curiae  
Tom Alexander

Bylaws  
David Whitworth

Membership  
Dick Richardson

Winter CLE Seminar  
Jimmy Singer

Newsletter  
Salty Forbes

Law Journal  
Jerry Buchanan

Long Range Planning  
Hank Scudder

Ethics and Professionalism  
Rick Rominger

Expert Data Fax  
Steve Kyle

Legislative  
John Edwards

Trial Academy  
Kaye Deming

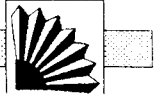
Web Page and Electronic Media  
Jerry Buchanan

Young Lawyers  
Stewart Duggan

Chair appointments for the substantive law committees are as follows:

Employment  
Clay Ratterree

Workers' Compensation



Staten Bitting

Professional Malpractice

Art Glazer

Motor Vehicle

Grant Smith

Premises Liability

Lance Green

Products Liability

Art Glazer

Toxic Torts

Bill Harvard

Anyone desiring a list of committee memberships should contact Executive Secretary Al Shurley at 912-755-9813.

Mr. Duncan reported on the DRI annual meeting. The meeting was attended by Messrs. Kyle, Duncan and Melton. The primary topics of discussion were the national problems of litigation guidelines, frozen rates and fee bill audits plaguing traditional insurance defense practice. There were a number of very informative state and local defense organization (SLDO) breakout meetings. A written summary was provided to the Board.

Mr. Melton reported on the status of the 1998 at Callaway Gardens. The faculty is set, arrangements have been made and application forms and brochures have been mailed to the membership. Based on 45 students, the 1997 trial academy had a budget shortfall of \$2,101.63. Because of an increase for CLE professionalism credit, it was proposed and approved that individual registration cost be increased to \$315.00 per student. Based on an expected enrollment of 50 students, the 1998 trial academy budget is \$18,097.83 with an expected shortfall of \$2,347.83. A motion to approve the 1998 trial academy budget by Mr. Melton and seconded by Mr. Rominger unanimously passed.

Mr. Kyle announced that details were not yet available for the winter CLE seminar but, will be provided to the membership in the Newsletter.

A discussion was held with regard to whether the organization should establish a younger lawyers section or, a younger lawyers committee. It was the consensus of those in attendance that a younger lawyers committee should be appointed.

Mr. Kyle advised that Mr. Buchanan is in charge of the 1999 Law Journal and further advised that Mr. Buchanan had secured the services of all contributing authors. Mr. Kyle directed that Mr. Melton obtain a cost breakdown for the journal and report to the Board at the winter meeting.

Mr. Forbes reported that contributions for the Newsletter have been dismally underwhelming. In fact, he received no contributions prior to the Fall meeting and, accordingly, no Newsletter was published. All members are urged to send any items of potential significance to Mr. Forbes for inclusion in future newsletters.

Mr. Kyle advised that Mr. Buchanan has established a GDLA Website at WWW.GDLA-ADDR.COM. Discussion ensued concerning issues of advertising, advertising liability, censorship and tax liability. Mr. Kyle appointed Mr. Forbes, Mr. McClelland, Mr. Rominger and Mr. Welch to an advertising feasibility committee. It is expected that the committee will report to the Board at the Winter meeting.

Mr. Kyle advised that the organization would no longer pursue maintenance of an active expert witness database but, would utilize a date-fax instead. Members are encouraged to seek information regarding expert witnesses by date-fax, e-mail or the new website.

Mr. Kyle reported that the organization had experienced some problems in making timely requests of the amicus curiae committee. Any member desirous of amicus curiae assistance from the

organization is urged to contact committee chair Tom Alexander as soon as the need is perceived.

Mr. Edwards reported for the Legislative Committee. A discussion ensued and a suggestion was made that this committee consider providing an annual report on the activities of the Georgia Legislature, such as a synopsis of the legislative handbook published at the conclusion of each annual session.

Mr. Duncan reported that there had been no activity from the Ethics and Professionalism Committee. He advised he would follow up with Prof. Tim Terrell regarding suggestions arising from the successful joint GDLA\GTLA seminar.

Mr. Duncan reported that plans for the 1998 annual meeting (June 17-20, 1998 at Ponte Vedra, Florida) were on schedule. The keynote speaker is nationally prominent jury consultant JoEllen Demetrius.

Mr. Richardson and Mr. Melton presented the membership report. Officially, we have 413 members. Form that number, 14 have not paid dues in 1997 or 1998. It was discussed and agreed that members failing to pay dues for two consecutive years be dropped from the active membership roll after 30 days written notice. Wilbur D. Owens, III, Dennis J. Webb and Sydney F. Wheeler have resigned from the organization. On a more positive note, Mr. Richardson advised that he had preliminarily approved the highest number of new applicants for membership in the history of the organization. On motion by Mr. Richardson as seconded by Mr. McLellan, the Board unanimously approved 24 new members. The membership roster will be published in the 1998 Law Journal.

Mr. Kyle advised that there was significant interest in serving on the long range planning committee. He expected an announcement very shortly from chairman Scudder of a meeting with general counsel for the State Bar of Georgia concerning the ethical propriety

of outside auditing of fee bills.

Secretary/Treasure  
Gregory Melton

On motion by Mr. Welch and second by Mr. Chambless, the Board approved Charleston, S.C. as the site for the 1999 Winter Board of Directors meeting. The meeting will be held at an announced date in February or March.

On motion by Mr. Chambless and second by Mr. Duncan, the Board unanimously approved the San Destin Hilton as the site for the 2000 annual convention.

Under old business, a discussion ensued on the question of whether captive counsel should be member of our organization. It was noted that we currently have at least one member who fits within this category. The question was posed as to whether our bylaws permitted this class of member. Mr. Kyle requested that Mr. Whitworth research the question and report to the Board at the Winter meeting.

Under new business, Mr. Forbes, in his capacity as DRI representative, proposed cross-solicitation for new members between our organization and the DRI. After discussion, his motion as seconded by Mr. Melton, unanimously passed. The Board agreed there should be no dues concession for new members obtained during the cross-solicitation drive. On motion by Mr. Melton as seconded by Mr. Rominger, the Board approved funding the attendance of our organization's DRI representative at the DRI annual meeting

It was discussed and approved without motion that the secretary/treasurer prepare a proposed annual budget for the organization and submit same to the Board of Directors for its approval at the first board meeting after the annual meeting. Mr. Melton was directed to prepare such a proposed budget and submit it to the Board at the Winter meeting.

There being no other business, the meeting was adjourned.

## SOUTHEASTERN REGIONAL MEETING

Historic Savannah, Georgia played host to the Southeastern Regional Meeting on May 15-16, 1998. Attending the meeting on behalf of DRI was President Bob Scott, who gave a presentation on current topics of interest to the association as well as an update on the upcoming annual convention. Lloyd Milliken, president-elect, as well as Board members Jack McEwan and Dick Collins also were in attendance. Sandie Schmidt, DRI Staff member, and Jack McEwan gave a report on membership growth and development in the region.

The highlight of the meeting was the unanimous nomination of Morton "Salty" Forbes as Regional Director to succeed Jack McEwan on the Board at the conclusion of his term. The Southeastern Region early on decided upon a cooperative rotation of the Regional Director slot every three years. Florida led the way with the nomination of McEwan and Georgia now follows. Alabama will fill out the rotation at the end of Forbes term, assuming his election by members of the Region.

Also attending the meeting were the following: Ollie Blan, Alabama State Rep., Carol Smith, President of the Alabama Association; Ed Livingston, Alabama's Executive Director; George Vaka, President of the Florida Defense Lawyers Association and Jim Dixon, the Florida Association's Executive Director.

On Friday night the group met for cocktails and dinner at the downtown Chatham Club. This is one of the finest downtown clubs in the South. On Saturday evening the group met at Lee and Salty's cabin on the Moon River for a "Low County Boil!" The food was outstanding and was only rivaled by the music provided by the Pinpoint Gospel Singers. These men even out-sung Lloyd Milliken.

The Alabama Association will host the next Regional meeting and they have a hard act to follow. This meeting will probably be in conjunction with the Association's summer meeting at San Destin, Florida.

By: Richard B. "Dick" Collins,  
DRI Board Member



**To All Members,  
Georgia Defense  
Lawyers Association:**

**RE: GDLA Web Site**

Dear members:

Welcome to the 21st Century. Beginning right now, GDLA has moved boldly into the information age with the introduction of its web site, [gdla.org](http://gdla.org). Please visit the web site and let us know what you think. To reach the site, just go the [www.gdla.org](http://www.gdla.org).

As you will see, the site has a number of features which we hope will be useful to you. There is a roster of members arranged both alphabetically and geographically, a list of officers and directors, and a message from the President. We have a calendar of events, and there are also a number of legal research links and links to other useful or fun sites.

We believe and hope that one of the most useful features of the web site is that it will allow us to communicate with each other and with the entire membership almost instantly on matters of importance or concern to the GDLA membership. We have a bulleting board area for general matters, and for each of the substantive law committees, where the committee moderator can post messages to the members, and where the members likewise have access to post messages. Thus, for example, if the chairman wishes to alert the members of the premises



liability committee about an important decision such as Robinson v. Kroger, he or she could post the message on that bulletin board, or on the general information bulletin board (or both), and everyone who checked the board would get the message immediately. Or, if any member of the GDLA knows of some important development, he or she can post a message. This method of communicating will require you to check the bulletin boards on a regular basis, which we hope that you will do. (NOTE: You will need to enter a user name and password for this area. See the instructions below).

We also will be able to send emails to individual members of the organization, or to the entire membership at once. For example, in the event of an important new development in the law, such as the Robinson case, the first person to learn of it could send one short email to the entire membership with a single click of the mouse, and everyone on line would get instant notification. Or if one of our members is about to depose an expert, he or she could email the entire membership and ask for information on the expert. Hopefully, everyone familiar with that expert would reply, and perhaps even send in electronic format copies of depositions previously taken of the expert.

Therefore, we need for each of you to send your email address to Al Shirley. You can email her at [gdlashrley@mindspring.com](mailto:gdlashrley@mindspring.com), or mail it to her at the address shown on the web site or in your GDLA handbook. The email system will not work unless everyone with email capabilities sends your email address to Al. **PLEASE SEND YOUR EMAIL ADDRESS NOW!!!** If you have a web site for your firm, please include that as well, and we will be able to have links directly to you or your web site everywhere your name appears on the GDLA web site. For example, if you give us your email address and/or web address, that will be listed as a link in the membership roster, and anyone looking up your name on the roster can then hyperlink directly to your web page, or

send you email by simply clicking on your email address.

#### **DIRECTIONS FOR USE OF THE GDLA WEB SITE:**

To begin, simply go to [www.gdla.org](http://www.gdla.org). From there, you can jump around from link to link, and explore what the site has to offer.

To enter the **Members Area**, you will be asked for a user name and a password. The user name for everyone is simply "gdla", and the password for everyone at this time is "goodguys." Please note that the use of this user name and password provides us with a **minimal** level of security, since only those who know these two words can access these areas. However, no one is sworn to secrecy, and there may be some members who will either accidentally or intentionally reveal these words to others not members of GDLA. Therefore, you should proceed with appropriate discretion, as **we cannot guarantee security or confidentiality of messages posted**. In order to increase security, we may change the password from time to time, but security will still be minimal. If any of you have suggestions for better security, please let me know.

In order to post a message, you will need to register as a user of the bulletin boards. Please go to the Members Area, click on the "Message Forums" link and then on the "Register" link. You will be asked to register with your name, address, email address, and web site if you have one. You will also be asked to assign yourself a sign-on name and individual password for these bulletin boards. **We ask that you use your own real name as the sign-on name here**, so that we can tell who messages are being posted by and assign the messages proper priorities of importance. As you might imagine, a message from SteveKyle would be given much more weight than a message from TheEasterBunny, Goldilocks, or the like. In any event, even if some clown does decide to register under an assumed name, your identity will be available to everyone, since everyone can see your profile. Thus,

I have signed up with a log-on name of JerryBuchanan, and I ask that each of you use your name (without spaces or punctuation) as your log-on name.

You will also be asked to select a password unique to yourself in order to get to the bulletin board areas. The password will not be available to anyone but you.

Thus, to summarize, you will need to remember two user names and two passwords to use the bulletin boards. To reach the member area at all, you must sign in with the user name "gdla" and the password "goodguys", and to access the bulletin boards, your own individually selected signing name and password.

We are not yet fully operational as far as sending email to all the members, but as soon as we get everyone's email address, we will have that feature up and running in a matter of days. Therefore, in order to make this feature available and as useful as possible, get those email addresses to Al Shirley as soon as possible.

We also solicit your feedback and suggestions on ways to improve the GDLA web site. If you know of any great links, please let us know and we will add them to the links we already have.

I hope that you all will use the web site often, and that you will let us know what you think.

With kindest regards, I remain

Very truly yours,  
Jerry A. Buchanan



#### **THIS MONTH IN TRIAL...**

Compiled by Rebecca G. MacLean  
DRI Manager of Committee Services

This month is TRIAL..." offers a concise synopsis of articles published in ATLA's monthly magazine that may be of interest to you. Like the articles themselves, the summaries are generally

written from the perspective of a plaintiffs' attorney. "This month in TRIAL..." is distributed to DRI's Board of Directors, Committee Chairs and State Representatives.

## DESIGN DEFECT CASES AND THE NEW RESTATEMENT

By: Larry S. Stewart (TRIAL, Nov. 1998)

The most significant changes proposed by the *Restatement of the Law Third, Torts: Product Liability* are related to design defect cases. The new restatement would abolish *Restatement (Second) of Torts §402A* strict liability and the consumer expectation test, adopting instead a risk-utility standard that would require, for most cases, proof of a reasonable alternative design to establish a defective design. Additionally, the new restatement would restrict plaintiffs to a single claim for relief.

### Consumer expectations test

The reporters argue that the consumer expectations test is unworkable because the product was generally made as intended, although perhaps defectively designed, and, without the objective standard of an alternative design, a jury cannot determine defectiveness. In other words, the subjective expectation of consumers is too vague a standard. The reporters' position is contradicted by the fact that they used the consumer expectation test for food products under §7, as one of the tests for determining defectiveness of used products under §8 and as one factor in the risk-utility balancing under §2(b), comment g.

### Single claim for relief

The new restatement would limit plaintiffs to a single claim for relief, regardless of whether is labeled negligence, breach of warranty or strict liability. The rationale for this is that the claims are "factually identical." This fails to comprehend the conceptual difference between such claims. Negligence claims focus on the conduct of the defendant;

implied warranty claims on the fitness of the product; and strict liability claims on the safety of design.

### Evidence of alternative design

Under §2(b), a product design is defective if the foreseeable risks of harm could have been reduced or eliminated by a safer reasonable alternative design. The plaintiff does not have to produce a prototype of the design; qualified expert testimony is sufficient. The alternative design must not lessen the overall safety of the product. When a safer design can reasonably be implemented, a warning is not a substitute for the safer design. If the risk cannot be reasonably eliminated by a safer design, then adequate warning must be provided. The fact that a risk might be open and obvious does not prevent a finding that the design is defective. Compliance with a safety statute, administrative regulation, or industry standard does not preclude a finding that the design was defective.

## THE ROLE OF FDA APPROVAL IN DRUG CASES

By: Patrick A. Malone (TRIAL, Nov. 1998)

In any products case where the product has complied with regulatory standards the defendant can effectively use government agencies as out-of-court experts. This tactic is especially effective as the agency cannot be cross-examined. Countering this type of argument requires careful planning at every stage of litigation from discovery through closing. Always keep in mind that the manufacturer is the defendant and the product, not the regulatory agency and its decisions, is trial.

### Understand the argument

The jury must understand the basic reality of the FDA. The FDA does no testing of drugs. Rather, it relies on each manufacturer to submit truthful data about its drugs both before and after approval. The FDA studies the manufacturer's information and holds nonadversarial

meetings, sometimes with outside experts in attendance, which are aimed at reaching a consensus rather than an adjudicative-styled decision. The FDA Modernization Act of 1997 speeds up the time for approval of a new drug and requires less proof of a new drug's efficacy. Try to show that the FDA's approval of the drug was not fully informed. Argue that whatever the facts were when the drug was approved, experience with the drug since that time argues for withdrawal of approval or more restrictive labeling.

### Consider a motion in limine to limit evidence

A motion in limine to bar or limit evidence of the FDA's approval of the product can effectively frustrate some of the defense's efforts to hide behind a government agency. Possible arguments include:

- 1) Federal Rule of Evidence 403. Allowing such evidence would improperly shift the focus of the case away from the product to the regulatory process and the FDA's role.
- 2) The defendant is trying to use the FDA as an expert that has endorsed the product's safety. The FDA cannot be cross-examined in court on what information it did or did not consider in the approval process and plaintiff counsel cannot take full discovery from the FDA to learn why it acted as it did.
- 3) The passage of time between the approval and the plaintiff's injury and the intervening circumstances make the approval irrelevant, especially where there is evidence of post-approval injuries.
- 4) An agency's failure to take regulatory action against an alleged safety hazard does not mean that the agency has adequately investigated the issue or approves of the status quo.
- 5) The evidence of regulatory compliance is just a backdoor way for the defendant to try to win a



preemption argument before the jury that it could not win before the court.

### Use jury instructions aggressively

Jury instructions should make it clear that the plaintiff is claiming violations of state law. A manufacturer must comply with state law as well as with any federal regulations, not simply one or the other. Include an instruction based on the *Restatement (Second) of Torts* to the effect that compliance with federal regulation does not necessarily prove that the product was not defective.

## CLASS ACTIONS AGAINST INSURANCE COMPANIES

By Diane Acker Nygaard (TRIAL, Oct. 1998)

The sales practices of many major insurers have been the subject of class action lawsuits and widescale regulatory investigation. Class actions are currently the favored method for compensation the victims of insurance sales fraud because many policyholders cannot afford to pursue claims on their own.

### Filing the case

Usually, parallel cases are filed in federal and state court. This allows discovery as to state law claims as well as nationwide service of process and expanded discovery available in federal court. Plaintiffs typically seek injunctive relief and damages for breach of contract, fraud, violation of state insurance law, deceptive practices, constructive fraud, unjust enrichment and negligent misrepresentation and supervision. Plaintiffs should also seek attorney's fees, costs and disbursements. According to Federal Rule of Civil Procedure 23, the complaint must allege company sponsored misconduct, rather than wrongful actions by rogue agents.

### Discovery

Some critical documents are available only through discovery. These documents

include actuarial records, copies of complaints made to state regulators about the insurance company and internal and external audit reports. Other important documents to obtain include sales brochures for the product, marketing guides for agents, company bulletins and monthly magazines to agents.

### Class action settlements

Courts often are asked to certify the class and approve the settlement at the same time. Most settlements have a two-tier structure. The first tier allows for general policy relief which typically gives policyholders discounts on additional payments to the insurance company. The second tier provides for alternative dispute resolution. Policyholders who have written evidence of fraud or who seek more than the general policy relief can arbitrate their individual cases. Policyholders who do not opt out of the settlement must choose between these two alternatives. There is usually no cap on the aggregate amount of restitution that the insurer may pay. Class action settlements typically include a waiver of any statute of limitations defense.

### Future class actions

Any practitioner in this area should be aware of the new Insurance Marketplace Standards Association. In April of 1998, it publicly gave its seal of approval to companies that could certify they had procedures to meet certain sales and marketing conduct standards. In future cases, these standards will become the basis for arguing breach of the standard of care.

## ELECTRONIC DISCOVERY

By Jay E. Grenig (TRIAL, Sept. 1998)

Every discovery plan should address the search, retrieval, form of production, inspection and preservation of information that is stored in mainframe or personal computers.

### Discovery of electronically stored or generated material

The same discovery rules that apply to paper documents generally apply to computer-generated or stored materials. Computerized data include not only conventional information, but also operating systems, applications, computer-generated models and other sets of instructions residing in computer memory.

### Planning electronic discovery

At the first threat of litigation, the opposing party should be put on notice to preserve two complete and verified copies of all possibly related data on backup tape or other appropriate media. Preservation orders may be sought to ensure that no files are deleted pending discovery. Specific reference should be made to all copies and versions of databases and spreadsheet-generated files, word-processing files, e-mail, diaries, schedule organizers, and financial and commercial data compilation.

### Disclosing electronic information


The disclosure provisions of Federal Rule of Civil Procedure 26(a) apply to computer-generated reports. Opposing counsel should be asked to specify all pertinent electronic file names and locations in their initial disclosure documents under Rule 26(a)(1).

### Producing electronic documents

Computerized data is subject to production, inspection and copying under Rule 34. Rule 34(a) requires that information be produced in a reasonably usable form. The party seeking discovery should seek direct access to the responding party's computer. With direct access, an expert may be able to uncover deleted files, file and directory information about the dates of revisions, information regarding who accessed the files and when, and similar information not generally available through discovery of the documents alone.

### E-mail messages

E-mail messages are a good source of potentially discoverable information. E-mails tend to be written informally and contain information that would not normally appear in written memoranda.



The federal government is required to preserve its e-mail messages under the Federal Records Act. If they fall within the scope of discovery, these e-mail messages may be obtained through a Freedom of Information Act request. It is unclear whether confidential attorney-client communications by e-mail are protected by the attorney-client privilege. The few state ethics boards that have considered this issue are in disagreement. Clients should develop and enforce policies regarding the creation, retention, organization and destruction of e-mail. Where the responding party can no longer access e-mail records through normal use or systems maintenance, it may be necessary to seek disclosure from a nonparty network provider. This requires a subpoena and may be limited by the Electronic Communications Privacy Act.

#### **Denying Discovery**

Protected work product is the claim usually asserted to protect computer-based litigation support systems from discovery. A litigation support system that reflects the attorney's mental impressions or thought process will be precluded from discovery. Allowing a testifying expert access to a computer litigation system may waive the work product privilege.