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A Magazine for the Civil Defense Trial Bar

Volume X, Issue III
Winter 2023

DRI Honors GDLA Past President Matt Moffett with Outstanding Defense Bar Leader Award

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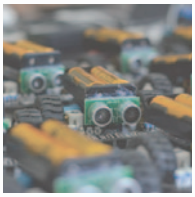
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President's Message


Pamela Lee

GDLA is proud to be one of DRI's State and Local Defense Organizations (SLDOs). I've been involved with DRI for many years on the committee side, most recently serving as Program Chair for the Premises Liability Annual Seminar. Now that I'm GDLA President, I've had the opportunity to see how the SLDO side operates and how valuable it is to the states.

GDLA is part of the Southeast Region with the Alabama Defense Lawyers Association and Florida Defense Lawyers Association. The group meets along with others from across the nation and Canada at the SLDO Conclave during the DRI Annual Meeting. Our Southeast Region meets one more time during the year, sometimes with other regions.

GDLA and DRI have been strong partners for many years. We were especially proud when our very own Douglas Burrell began climbing the DRI officer ladder and was sworn in as DRI President for 2021-2022. He just concluded his term on the DRI Board of Directors at the close of the DRI Annual Meeting held in October in San Antonio.

Notably, during that conference, GDLA Past President and outgoing DRI State Rep Matt Moffett was honored with the Fred Sievert Award, which recognizes an outstanding bar leader (see page 16). GDLA Past President Lynn Roberson won the Sievert Award in 2013, the year after she served simultaneously as GDLA President and Atlanta Bar President. I mentioned Lynn in my last column, as she was a mentor to me at Swift Currie and inspired my involvement with GDLA.

DRI presents a number of awards during its Annual Meeting. The Rudolph Janata Award honors an SLDO that has implemented an innovative program during the year. GDLA has received that award twice. In 2012, we were recognized for creating the very successful RecruitOne membership drive, which has since been replicated by other SLDOs. In 2021, we were honored for teaming up with GTLA to create Mask Up for Justice. That program raised funds from which GDLA and GTLA purchased and delivered masks to courthouses across the state, helping them to operate more safely during the pandemic.

In 2014, GDLA Past President Bubba Hughes was completing his three-year term as DRI State Rep. That year, he was honored with the Kevin Driskell Outstanding State Rep Award.

In 2015, DRI created an SLDO Executive Director Award, and our own Jennifer Davis Ward became the second recipient of that prestigious honor in 2016.

Also in 2016, Douglas received the DRI Richard H. Krochock Award, which honors an individual who has provided exemplary leadership to the DRI Young Lawyers Committee.

Long before these recent accolades, GDLA Past President Al Parnell was the first recipient of the Outstanding Program Chair Award for his work on the Asbestos Seminar. The award was later renamed the Albert H. Parnell Outstanding Program Chair Award. In 2017, GDLA member Laura Eschleman won that award for her work chairing the Medical Liability and Health Care Law Seminar. Al would later go on to receive the DRI Louis B. Potter Lifetime Professional Service Award.

We are committed to keeping our partnership with DRI and the SLDOs vibrant. We believe we are stronger together, working side-by-side to advance the civil defense bar across the nation.

For the Defense,

Pamela N. Lee
Swift Currie McGhee & Hiers
Atlanta

Member News & Case Wins

MEMBER NEWS

Waldon Adelman Castilla Hiestand & Prout announced the retirement of longtime partner and founding member, **Trevor Hiestand**, and the subsequent renaming of the firm to **Waldon Adelman Castilla McNamara & Prout**. The firm's new name recognizes the significant contributions made by partner **Kimberly McNamara** since she joined the firm in 2002. McNamara practices in the areas of insurance defense, insurance coverage, bad faith, motor vehicle liability, and civil litigation. All firm emails are now @waldonadelman.

J. Anderson "Andy" Davis announced the opening of a new firm, **Davis Lucas Carter**, in Rome. Davis was a partner with **Brinson Askew Berry** for over 30 years. He will continue to focus his practice in the areas of municipal law, complex litigation, and civil litigation.

J. Hilliard Burton, formerly with **Huff Powell & Bailey** in Atlanta, and **Seth Golden**, formerly with **Anderson Walker & Reichert** in Macon have joined **Weinberg Wheeler Hudgins Gunn & Dial** in its Atlanta office. Burton's practice includes the defense of hospitals, physicians, nurses, and long-term care facilities. He also defends individuals and businesses in premises liability, negligent security, and transportation cases with the potential for high damages exposure. Golden's practice focuses on civil litigation including, but not limited to, trucking accidents, premises liability, negligent security, and product liability.

Hawkins Parnell & Young announced the promotion of **Elliott Ream** to partner in its Atlanta office. Ream defends individuals and businesses in high-risk litigation involving catastrophic injury and wrongful death arising from transportation, premises, and product liability.

Troutman Pepper announced its newly-elected partners, including **Brett Tarver** in its Atlanta office. Tarver primarily defends pharmaceutical and medical device companies in litigation involving mass tort, personal injury, and wrongful death claims in state and federal courts nationwide. She has experience in all aspects of discovery, trial preparation, and trial practice, including taking and defending depositions, motions practice, witness preparation, trial strategy development, and witness examinations at trial. She also has experience serving as trial counsel for a global tobacco manufacturer in trials across the country, from Massachusetts to the U.S. Virgin Islands.

Hall Booth Smith announced the opening of an office in Augusta, its seventh location in Georgia. Leading the office is **Robin Daitch**, formerly with **Drew Eckl & Farnham**, who joins the firm as of counsel. Daitch focuses her practice on health care compliance, medical malpractice, and other complex litigation. She has tried numerous jury trials in federal, superior, and state courts in Georgia, and the circuit court for Maryland. She also worked as in-house counsel for a hospital system in Augusta. There, she ensured regulatory compliance of the hospital's policies and procedures, including investigating potential HIPAA and EMTALA violations, served on the hospital's Compliance Committee, and trained new employees on the hospital's Corporate Compliance Program.

CASE WINS

GDLA Past President **Grant Smith** of **Dennis Corry Smith & Dixon** in Atlanta obtained a defense verdict in an admitted liability, low speed trucking case in DeKalb County on August 18, 2023. The 45-year-old female plaintiff had neck surgery with plates and screws, a two-level back surgery, and claimed medical expenses totaling $275,000. Plaintiff testified she had seven out of 10 neck pain at the accident scene, but the investigating officer's body camera video showed otherwise. She went to the Emergency Room the day of the accident, then nine days later, and again 21 days later, but never said anything about neck pain. She did complain of back pain consistently at these ER visits. Opposing counsel called the treating orthopedic surgeon and a neurosurgery professor from Harvard and both were very strong on direct; however, they would not give Smith the time of day on cross. All experts, including Defendant's orthopedic surgeon, testified they did not know how much force the low speed bump put on Plaintiff's spine or if activities of daily living put more force on her spine than the low speed bump. Opposing counsel asked for $4.125 million and Smith asked the jury to ignore the experts and use their common sense. The jury returned a defense verdict in 20 minutes. The case is *Castleberry v. Steib*.

Weinberg Wheeler Hudgins Gunn & Dial's (WWHGD) Atlanta office notched a couple wins recently. **Stephen Mooney** obtained a favorable jury verdict after a Floyd County trial. The commercial vehicle collision case involved WWHGD client, Service Corporation International (SCI), and one of its employees. SCI's employee

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rear-ended Plaintiff on August 30, 2018, while driving a company vehicle. At the time, Plaintiff did not claim any specific injuries and no emergency vehicles were called. Plaintiff did consult with a chiropractor for treatment for neck, back, and hip pain.

Around six months later, she was involved in another accident where her car rolled over, EMTs were called, and she was taken to a hospital for evaluation. She never disclosed the second accident to any of her medical providers, claiming she was not injured. Nonetheless, Plaintiff thereafter underwent a battery of medical treatments and asserted she had suffered a herniated disc and also needed a neck fusion as a result of the August 2018 accident. Plaintiff also maintained that the initial August 2018 accident exacerbated her ongoing Parkinson's Disease.

At trial, Mooney pointed out that Plaintiff was treated prior to the August 2018 accident for the injuries of which she ultimately complained—neck, back, and hip pain. Additionally, Mooney was able to show the jury that Plaintiff's progress improved from the date of the original accident up to the date of the second accident. Through Plaintiff's medical records, Mooney demonstrated that her condition deteriorated after the second accident. WWHGD's expert witness testified Plaintiff did not have a herniated disc and, using demonstrative exhibits, showed the condition of her spine was no different after the first wreck than before.

At closing, Plaintiff's counsel asked for $800,000. The jury deliberated for two-and-a-half hours. While the jury found WWHGD's client was negligent with respect to the crash, they awarded the Plaintiff zero damages. Plaintiff thereafter filed a Motion for New Trial on the grounds that the verdict was inconsistent. The court rejected that argument and denied the motion.

In the next WWHGD case, **Jack Hawkins** and **Hilliard Burton** achieved a defense verdict for Weinberg Wheeler's client in Fulton County State Court. This case arose from a February 2019 car accident in Morrow, Ga., on I-75 North, with alleged traumatic brain injury and multiple fractures that required extensive surgery and implantation of rods and screws to address. Plaintiff was a passenger in a vehicle that had just been involved in an accident, leaving her vehicle incapacitated and facing the wrong way on the interstate. According to the data download on the defendant's vehicle, the defendant was traveling at 83.3 mph five seconds prior to impact. After a five-day trial and approximately two hours of deliberation, the jury found that the defendant could not have avoided the accident and they subsequently found for the defense. Of special note, Plaintiff blackboarded $54 million prior to the jury's deliberation and defense verdict.

Attorneys at **Waldon Adelman Castilla McNamara & Prout** in Atlanta have enjoyed a string of recent courtroom successes. **Alexandra Svoboda** secured a jury verdict under the last pre-trial offer on July 13, 2023, following a two-day trial in DeKalb County. This was a stipulated negligence rear-end case which totaled both vehicles. The plaintiff alleged neck, shoulder, back injuries, and concussion that caused severe dizziness and vertigo. Plaintiff treated with a neurologist and vestibular therapist for the vertigo. Plaintiff played the video-taped deposition of Dr. Peggy Marbach at trial. Medical bills and alleged lost wages totaled roughly $58,000. Plaintiff had also been in a collision about two months before the subject collision. The concussion treatment started after the second collision. Svoboda successfully argued to the jury that causation of the concussion had not been established, and that the cost of the concussion treatment should be split between the two collisions. Plaintiff asked the jury for $500,000. The jury deliberated for about an hour and returned a verdict for $40,386.79. The last offer given Plaintiff before trial was $50,000. There are no appealable issues for either party.

Justin Sanders obtained two defense verdicts in the late summer. The first was in Fayette County on July 18, 2023, following a two-day jury trial. The case involved a 2016 accident with minor property damage. Defendant admitted fault for the accident and the case was defended on the issues of causation and damages. Plaintiff alleged neck, back, and wrist injuries with medical expenses that amounted to $41,500. The treatment included chiropractic therapy, physical therapy, and a lumbar injection. Plaintiff acknowledged a prior neck injury that occurred about 10 years ago; however, he was unsure whether he had suffered a prior back injury from that same prior accident. Plaintiff also contended a prior left wrist injury was exacerbated due to the accident. In addition to Plaintiff's own testimony, he had one of his treating physician's testify by evidentiary deposition, who related Plaintiff's pain to the accident. Plaintiff was successfully impeached on the stand with his prior deposition testimony and the cross-examination of the treating physician showed her determination was made solely on Plaintiff's subjective complaints of pain and what he told her. Plaintiff asked the jury for an award between $75,000 and $100,000. After 30 minutes of deliberations, the jury returned a verdict in favor of the defendant.

Justin Sanders' second victory for the defense was in Cobb County following a one-day trial on August 21, 2023. The case involved a 2018 automobile accident where the defendant admitted to

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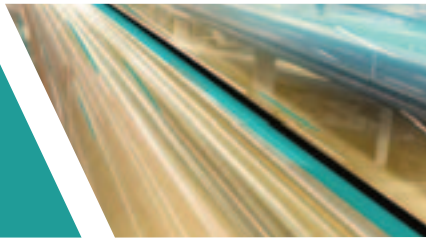


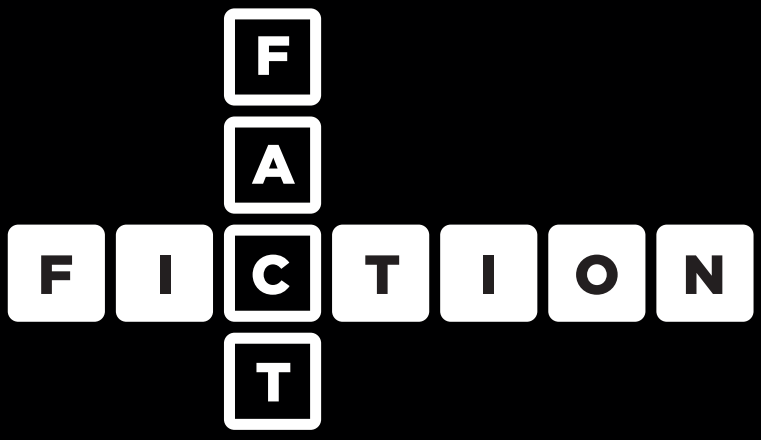
negligence after rear-ending Plaintiff's vehicle. Plaintiff alleged injuries to his neck and back; however, because he was a professional musician, his most significant injury was to his left pinky. Plaintiff's treatment following an MRI included chiropractic therapy for his neck and back, as well as physical therapy and a cortisone injection for his left pinky. Plaintiff's medical expenses amounted to just over $22,000. Plaintiff submitted to the jury two medical narratives relating the injuries to the accident: one from the chiropractor and one from his orthopedic doctor. The defense introduced pictures of the vehicles, showing minor damage, and crossed Plaintiff on the mechanism of his finger injury. Plaintiff was also impeached with his prior deposition testimony after failing to recall he was diagnosed with gout prior to the accident. As for the medical narratives, the defense argued the opinions were solely based on what Plaintiff told his providers. Plaintiff asked for an award that would be fair and reasonable with a suggestion of four times his medical expenses. After an hour of deliberations, the jury returned a defense verdict.

Waldon Adelman's Ben Harbin obtained a favorable result in Jackson County after two days of trial when a jury awarded only the $1,809 emergency room bill to Plaintiff. This was an admitted fault case with minimal damage. Plaintiff had around $34,000 in medical bills. Plaintiff had his doctor testify via video deposition about Plaintiff's soft tissue injuries and need for injections. Plaintiff asked the jury for $95,000. This was a situation where the jury was hung for most of its deliberations with one person being a holdout. The judge dismissed the holdout juror (who happened to be the foreperson) by consent of Plaintiff and Plaintiff's counsel and the jury then returned a favorable verdict within 15 minutes. Plaintiff last demanded the medical specials, and the last pretrial offer was $12,000.

On August 23, 2023, **Kevin Reardon** and **Andrew Panella** obtained a defense verdict in the Superior Court of Rabun County for their client who admitted fault for causing an accident. On the day of the accident, Plaintiff treated at the ER and was then transported to another medical center for surgery to repair an aortic tear allegedly caused by the accident. At trial, Plaintiff asserted injuries to his heart, as well as life-altering depression. Asserted medical specials were $370,000, all for treatment within three days of the accident. Plaintiff's counsel asked for a jury award of all of Plaintiff's medical specials, as well as an award for general damages. On cross-examination at trial, defense counsel successfully impeached Plaintiff numerous times by effectively utilizing Plaintiff's prior deposition testimony and pre-accident medical records. Further, the defense focused on the insufficiency of medical evidence presented by Plaintiff to meet the burden of proof as to causation of his asserted injuries. After deliberating for 40 minutes, the jury returned a verdict in favor of the defendant.

On August 25, 2023, a Cobb Superior Court jury returned a verdict in favor of GDLA Treasurer **Ashley Rice's** client after four days of trial. The lawsuit involved an admitted fault 2019 rear-end accident that resulted in very little property damage to the vehicles. Plaintiff reported no injury at the scene and proceeded to complete a full day of work at his physically demanding job. He admitted to a prior lumbar fusion over 20 years earlier but denied any significant lower back problems since that time. Nine days after the accident, Plaintiff began treating for lower back pain that was shooting into his legs. He underwent months of physical therapy and epidural steroid injections before undergoing an adjacent fusion surgery to L4-5. Plaintiff presented $305,000 in medical bills and sought over $40,000 in lost wages. Rice argued that Plaintiff had not been honest about his pre-accident lower back pain and treatment in the years since his initial fusion surgery, plus the charges for the healthcare services he received were far in excess of their reasonable value. Both parties presented testimony of multiple experts on the disputed issues of causation and damages. Plaintiff had declined a $50,000 offer of settlement pre-trial and requested the jury award $727,000. The jury found for the defense.

Ben Stahl obtained a favorable verdict in Forsyth County following a one-day trial on October 2, 2023. The case involved a 2018 automobile accident where Defendant admitted to negligence after rear-ending Plaintiff's vehicle. Plaintiff alleged injuries to his lower back. Plaintiff's treatment included chiropractic therapy for his lower back and one epidural steroid injection. Plaintiff's medical expenses amounted to $16,000.33; however, just two months before this accident, Plaintiff had been treating for identical injuries from a prior accident. Plaintiff submitted into evidence only the photographs of the accident, records from the chiropractor, and the bill for the injection. The defense was able to impeach and discredit Plaintiff using deposition testimony and refreshing his recollection of the prior similar accidents and identical claims of injury. The defense was also able to exclude causation narratives contained within Plaintiff's chiropractor records. Plaintiff asked for an award of medical specials plus an additional $40,000 for pain and suffering. Before trial, Plaintiff's last demand was for about $32,000, while the last offer was $16,000. After about two hours of deliberations, the jury returned a verdict for $16,000.33.



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Welcome, New GDLA Members!

The following were admitted to membership in GDLA since the last edition of the magazine:

Imaya Adris
Groth Makarenko Kaiser & Eidex, Duluth

Bailey Elyse Armstrong
Groth Makarenko Kaiser & Eidex, Duluth

Jarrett Babb
Savell & Williams, Atlanta

Sareena R. Beasley
Nall & Miller, Atlanta

Jason Britt
Textron Specialized Vehicles Inc., Augusta

Amanda Coop
Groth Makarenko Kaiser & Eidex, Duluth

Olivia de Quesada
Gower Wooten & Darneille, Atlanta

Jessica Devins
Groth Makarenko Kaiser & Eidex, Duluth

Nicholas E. Harof
Groth Makarenko Kaiser & Eidex, Duluth

John Hawkins
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

Arianna Hester
Groth Makarenko Kaiser & Eidex, Duluth

Ladasiah T. Jackson
Vernis & Bowling of Atlanta, Atlanta

William Joseph Keegan
Waldon Adelman Castilla McNamara & Prout, Atlanta

Asher Lipsett
Wicker Smith O'Hara McCoy & Ford, Atlanta

Andrew Panella
Waldon Adelman Castilla McNamara & Prout, Atlanta

Justin Sanders
Waldon Adelman Castilla McNamara & Prout, Atlanta

Damon M. Scott
Hawkins Parnell & Young, Atlanta

Benjamin Stahl
Waldon Adelman Castilla McNamara & Prout, Atlanta

Jaime Alexandra Steinhaus
Rutherford & Christie, Atlanta

Kiana Tymira Talton
Chambless Higdon Richardson Katz & Griggs, Macon

Alexander Taylor
Wicker Smith O'Hara McCoy & Ford, Atlanta

Taylor J. Westlake
Levy Sibley Foreman & Speir, Columbus

Keleigh Yvonne Williams Finley
Worsham Corsi Dobur & Berss, Marietta

Waldon Adelman's Alexandra Svoboda and **Jacob O'Malley** secured a defense verdict in DeKalb County following a three-day trial on October 24, 2023. The case involved a 2018 automobile accident where Defendant admitted to negligence after rear-ending Plaintiff's vehicle. Plaintiff alleged injuries to her head, neck, right shoulder, bilateral hips, and knees. She incurred $68,000 worth of past medical specials and presented a life care planner's estimate for a rotator cuff surgery in the amount of $71,000. Plaintiff admitted to a rear-end collision in 2017, after which she treated at all of the same providers and hired the same attorney as in the current similar case. Plaintiff submitted into evidence medical records, vehicle photos, the police report, the surgery estimate, and the 1946 actuarial table. Plaintiff also called a biomechanical expert and Plaintiff's treating orthopedist. The defense was able to impeach and discredit Plaintiff on not only her injuries, but also how the collision occurred. (Plaintiff just refused to agree to a straight-forward rear-end collision.) Plaintiff asked for an award of $1 million. Svoboda argued to the jury that they should award something more reasonable, such as Plaintiff's emergency room bill, some soft tissue care, and some pain and suffering to account for that care. After about 45 minutes of deliberation, the jury returned a defense verdict. Before trial, Plaintiff's last demand was for $200,000, The offer in response was $20,000, in the form of a statutory offer of judgment.

Partners **Carrie L. Christie** and **Courtney M. Norton**, along with associate **Tereza Kucerova** of **Rutherford & Christie's** Atlanta office secured summary judgment on negligence, voluntary undertaking, and nuisance claims case in the State Court of Fulton County. Plaintiff alleged she tripped and fell and broke her ankle as she walked across a narrow patch of grass adjacent to a shopping center and stepped into an open hole, which was due to a broken water meter cover owned and controlled by DeKalb County. The Court found that Defendant, a landscaping company, did not owe a duty to Plaintiff under the contract it had with DeKalb County and did not undertake such duty under the contract. As to Plaintiff's nuisance claim, the court agreed that Plaintiff is unable to recover as to Plaintiff's nuisance claim because Defendant was not the owner/occupier and did not exercise control over the nuisance creating instrumentality, the broken meter cover hole. The case is *Ashley Akbas v. Flex Landscaping, LLC.* ◆

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GDLA Files Amicus Brief in Emergency Room Statute Case

On October 13, 2023, GDLA filed an amicus brief in the Supreme Court of Georgia in *Angela D. Wilson, et al. v. Nirandr Inthachak, M.D. and Radiological Associates of South Georgia, P.C.*, Case No. S23A1095.

As amicus, GDLA argued in support of Appellees Nirandr Inthachak, M.D., and Radiological Associates of South Georgia, P.C., that the location requirement of O.C.G.A. § 51-1-29.5—commonly known as the Emergency Room (ER) Statute—should not be interpreted as requiring physicians to be physically present in the emergency room when providing emergency medical care to patients.

In *Wilson*, the patient presented to the Clinch Memorial Hospital emergency room with an acute head injury requiring immediate medical intervention. The clinician treating the patient in the emergency room ordered a head CT scan, which was interpreted by Dr. Inthachak in his office located in another county. Dr. Inthachak communicated the results of his interpretation to the Clinch Memorial Hospital emergency room, where it was received by the clinician in the emergency room and the clinician used Dr. Inthachak's interpretive findings to develop a plan of care for the patient, who remained in the emergency room.

The appellants argue that the ER Statute does not apply to Dr. Inthachak because (among other reasons) he was not physically present in the emergency room when he provided care to the patient and, thus, Dr. Inthachak was not entitled to enjoy the protections afforded by the ER Statute, including the heightened standard of care and burden of proof requirements.

As amicus, GDLA supported arguments advanced by Dr. Inthachak that the plain language of the ER Statute and legislative intent behind its passage did not require physicians to be present in the emergency room when providing care to patients in the ER, because the patient receives care, and thus a physician provides care, where the patient is located.

GDLA thanks Gregory G. Sewell of Bouhan Falligant in Savannah for his time in authoring our brief. GDLA's Amicus Committee is led by Co-chairs Elissa Haynes of Freeman Mathis & Gary in Atlanta and Philip Thompson of Ellis Painter in Savannah, as well as Vice-chair Patrick Silloway of Balch & Bingham in Atlanta.

This and other amicus briefs can be found online in the members only area under Amicus Policy & Briefs. ◆

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DRI Honors Matt Moffett with Outstanding Defense Bar Leader Award

GDLA Past President Matt Moffett was honored by DRI with its Fred Sievert Outstanding Defense Bar Leader Award during the closing gala at the 2023 DRI Annual Meeting in San Antonio, Texas, in October.

The honor annually recognizes a current or Past President of a State & Local Defense Organization (SLDO) who has made a significant contribution towards achieving the goals and objectives of the organized defense bar by initiating innovative projects for the betterment of the organization and exercising strong leadership.

Matt is pictured with DRI Immediate Past President Lana Olson (left) and DRI President Patrick Sweeney.

Below we have reprinted GDLA's nomination of Matt so every member can appreciate the hours of dedication he has poured into GDLA:

It is GDLA's honor to nominate our Past President, Matthew G. "Matt" Moffett, for the Fred H. Sievert Award. Matt truly embodies the award criteria: He is an outstanding defense bar leader, who has made significant contributions towards achieving the goals and objectives of the organized defense bar. He truly has exemplified strong leadership and initiated innovative projects that continue to benefit GDLA as well as, we believe, DRI, and our many fellow SLDOs.

Brace yourselves for a rather long story, but Matt's been at it for a while and he is just that extraordinarily (emphasis on "extra") outstanding; however, he would never accept that description or really any praise because he is so incredibly humble. Matt frequently shifts credit due to him to others who play a supporting role. He would say he doesn't deserve this award. (We disagree.)

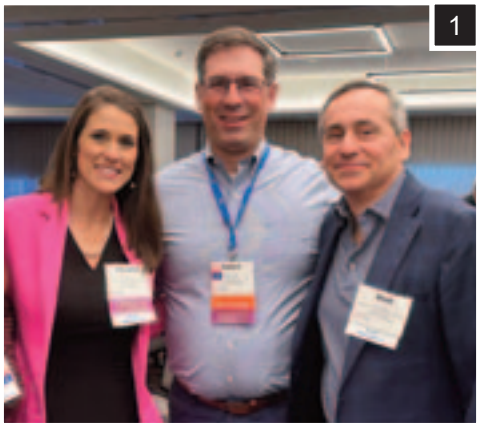
Matt is a lifelong resident of Atlanta, Ga., and a founding partner of Gray Rust St. Amand Moffett & Brieske. While he is an accomplished civil defense litigator, handling bet-the-company cases, and could be lauded for that alone, GDLA's esteem for Matt stems from his innumerable hours of service and, in particular, his vision and dedication to improving our association during his tenure as President from June 2015-2016. GDLA is still reaping the benefits from the seeds he sowed and continues to "water."

When Matt took the helm of GDLA, the *Daily Report*—the American Lawyer Media (ALM) outlet in our state—published an article about his goals, "New Defense Bar President to Focus on Image and Growth" (June 24, 2015). As he explained in the article, "I plan to focus on expanding the visibility of GDLA by actively dispelling the perception that we're just the insurance defense bar. We're the voice of the entire civil defense bar." He added, "Another misconception is that we're the criminal bar. So, we believe a concentrated effort to reach anyone defending businesses or individuals in civil cases will correct that."

Matt accomplished his goals and more. As the article also explained, Matt wanted to open the lines of communication with our adversaries in the courtroom. Matt also believed that by associating with GTLA through joint events that we would benefit from being understood to be the counterpart to the plaintiff's bar on the other side of the "v." That affiliation would accomplish another one of his goals—clearing up confusion that GDLA is the criminal defense bar, which back then was constant. GDLA suffered from a major identity crisis.

With that in mind, Matt had us team up with GTLA and the American Board of Trial Advocates' (ABOTA) Atlanta Chapter to hold the first-ever networking event on September 3, 2015. Billed as Rivalry Happy Hour, it took place on the first night of college football at a local sports bar. Judges from Georgia's Court of Appeals and Supreme Court were also invited to join the rivals for fun. Following that event, GDLA and GTLA's Executive Directors worked together to submit photos to the *Daily Report's* "After Hours" column, thereby accomplishing another of Matt's goals—expanding our visibility alongside GTLA.

With the success of the first GDLA-GTLA-ACTL networking reception, Matt encouraged us to plan another one. That was held on



1. President Pamela Lee and Georgia's new DRI State Rep Robert Luskin with Matt at the DRI Annual Meeting in San Antonio. 2. Also there, Matt visits with GDLA member and Immediate Past President of the Association of Defense Trial Attorneys, Evelyn Fletcher Davis. 3. Matt gets into the Texas spirit with GDLA Executive Director Jennifer Davis Ward. 4. Matt is pictured the week after accepting his award when he was a keynote speaker at the South Dakota Defense Lawyers Association's Annual Meeting.

April 7, 2016, at Ri Ra Irish Pub, and again included Georgia's appellate bench as special guests.

Later that spring, our Legislative Committee Chair crafted an idea to organize a forum for those running to fill three Fulton County (Atlanta) Superior Court seats; Matt embraced the idea, but also invited GTLA and the *Daily Report* to participate. Together, the three groups presented the Fulton Superior Court Judicial Candidates Forum on April 13, 2016, where Matt and then-GTLA President Darren Penn moderated the discussion. Again, Matt knew by teaming up with GTLA and the *Daily Report*, we would increase our marketing reach via publicity through GTLA's website and ours, plus six *Daily Report* print ads and online ads. Again, it would bolster our being recognized as GTLA's counterpart on the defense side. It resulted, too, in a front-page *Daily Report* article, once again expanding our visibility.

GDLA and GTLA next joined forces on May 13, 2016, presenting "Bridging the Divide: Plaintiff and Defense Counsel, Ethics, Civility & Mediation Summit" as part of the American Bar Association's Tort Trial & Insurance Practice Section (TIPS) Annual Conference, which was held in Atlanta. Matt was a key member of the panel that included mediators from two GDLA Platinum Sponsors, then-GTLA President and GTLA Immediate Past President, as well as several other GDLA members. Again, we submitted a photo to the *Daily Report* "After Hours" column, for all the previously stated reasons.

To actively combat the misperception that GDLA is only an insurance defense group, Matt focused on an effort that was approved during the prior administration. That program offered free one-year memberships to members of DRI, who had not been a GDLA member in the past five years. Since DRI did not seem to suffer as we did from the insurance defense bar misnomer, affiliating with DRI could only help. We began a pointed campaign to educate DRI members that our association is accomplishing at the state level what DRI does nationally, and membership in GDLA was an essential practice tool. Our membership grew exponentially.

Matt is also committed to training the next generation of litigators and truly enjoys mentoring young lawyers. For several years, during his climb to the top of the ladder, he chaired our CLE Planning Committee. He has been a longtime member of GDLA's Trial & Mediation Academy faculty, having volunteered since 2008 and served two years as vice-chair and two years as chair (2012-2015). In fact, it was Matt's innovative idea to add mediation to the long-standing curriculum (formerly known as Trial Academy) to meet the changes in today's practice. That also netted GDLA sponsorship monies from mediation firms

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Court of Appeals Rejects Pattern Instruction on Preponderance of the Evidence

By Karl Broder
Beck Owen & Murray, Griffin

On October 3, 2023, the Court of Appeals of Georgia affirmed a jury verdict in favor of two defendants, while declaring that the pattern jury instruction for the preponderance-of-the-evidence standard is an incorrect statement of law.

The case, *White v. Stanley, et al.*, 893 S.E.2d 466 (2023), arises from a May 4, 2017, automobile accident where Defendant Stanley was traveling on a two-lane road separated by a double yellow line. It was raining. As Stanley came around a curve, a bicyclist, Jason Cartee, suddenly entered the middle or lane of travel, causing her to slam on her brakes and swerve towards oncoming traffic to avoid killing the bicyclist. She glanced off a non-party's vehicle before hitting Plaintiff head on. The bicyclist was also named as a Defendant but did not appear at trial.

An eyewitness corroborated Defendant Stanley's testimony that the bicyclist swerved in front of her suddenly and that she would have hit him if she had not reacted. The investigating officer likewise testified that the bicyclist should not have been in the middle of the lane of travel and that he had no indication that Defendant Stanley was speeding.

The Plaintiff corroborated Defendant's witnesses by admitting that the bicyclist moved from the shoulder to the center of the travel lane when the bicyclist was just three feet away from Defendant Stanley. Narratives in the Plaintiff's medical records likewise pinned the blame on the bicyclist. Ultimately, when asked if she believed Defendant Stanely had done anything wrong, Plaintiff responded: I can't say she did anything wrong."

Plaintiff also testified that the bicyclist did not do anything wrong.

In closing, the parties argued comparative fault between the Defendants. The Defendant also challenged the reasonableness and necessity of Plaintiff's medical treatment. Plaintiff presented no medical testimony and provided no other witnesses to support her case.

The jury heard closing arguments, were charged, and returned a defense verdict in less than two-and-a-half hours.

Plaintiff did not object to the pattern jury instruction on preponderance of the evidence as it was issued in the trial court's preliminary instruction, but did object during the final charge conference. Plaintiff advocated for use of language taken from pattern instructions of the federal courts.

The two issues before the Court of Appeals were whether the pattern jury instruction for preponderance of the evidence was an incorrect or misleading statement of the law, and whether the charge was harmful. The trial court issued a charge that substantially tracked *Georgia Suggested Pattern Jury Instructions* Volume I, 02.020:

> The plaintiff has the burden of proof, which means the plaintiff must prove whatever it takes to make his case, except for any admissions in the pleadings by the defendant. The plaintiff must prove his case by what is known as preponderance of the evidence; that is, evidence upon the issues involved, *while not enough to wholly free the mind from a reasonable doubt*, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other.

The Court of Appeals found that the challenge was properly preserved because the objection was made prior to entry of the jury's verdict. From there, the Court conducted a de novo review of the instruction. The Court rejected the pattern instruction for three reasons.

First, the pattern instruction was based on a repealed statute and the correct standard should be taken from Federal Law as both a matter of implied and express legislative intent. The pattern instruction defined preponderance of the evidence according to former O.C.G.A. 24-1-1(5), as:

> that superior weight of evidence upon the issues in-

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Court of Appeals Preserves Privilege for Attorney Speech

By Ashley Rice
Waldon Adelman Castilla McNamara & Prout, Atlanta

The Court of Appeals of Georgia recently reversed a trial court's denial of an O.C.G.A. § 9-11-11.1 motion to strike the Complaint of Atlanta interventional spine physician, Armin Oskouei, M.D. In his Complaint, Dr. Oskouei claimed to have been defamed based upon statements defense attorney Zachary Matthews made in the course of representing clients in lawsuits brought by Dr. Oskouei's patients.

Matthews' alleged verbal and written statements centered around a cease-and-desist order the Georgia Department of Community Health issued that prohibited Dr. Oskouei's practice from operating an ambulatory surgery center. Matthews' statements were supposedly made to his opposing counsel in claims they had brought on behalf of Dr. Oskouei's patients. The statements allegedly suggested that Dr. Oskouei was performing illegal surgeries and issuing fraudulent bills for those procedures. While the content of the actual statements was in dispute, the Court of Appeals considered the facts as presented by Dr. Oskouei in making its decision.

Matthews maintained that the statements were conditionally privileged under O.C.G.A. § 51-5-7. The Court of Appeals agreed, finding that Matthews had met the two-part test for striking a claim under the anti-SLAPP statute. Specifically, the Court of Appeals noted that (1) Matthews' statements were protected for having been made in connection with an order of an executive agency, and (2) Dr. Oskouei had failed to establish a viable claim for defamation since the communication was conditionally privileged.

While the Court of Appeals acknowledged that "conditional privilege is typically a question for the jury," it noted that in clear and certain cases, courts may find that privilege applies as a matter of law. Pursuant to O.C.G.A. § 51-5-7(7), "[c]omments of counsel, fairly made, on the circumstances of a case in which he or she is involved and on the conduct of the parties in connection therewith" are privileged. Matthews' statements were deemed to fall within the statute insofar as they were made in the defense of pending litigation and concerned "the relative settlement values" of the claims Dr. Oskouei's patients had brought.

The Court of Appeals also noted that the statements were further made in good faith at the time, were in connection with an interest to be upheld, were properly limited in scope and occasion, and were made to the proper persons. Moreover, the Court of Appeals found that Dr. Oskouei had failed to meet his burden that the statements were made with actual malice in order to defeat Matthews' claim of privilege. Accordingly, the Court of Appeals ruled that the trial court should have granted Matthews' motion to strike. The case has been remanded to the trial court for a hearing on Matthews' O.C.G.A. § 9-11-11.1 attorney's fees.

The case is *Zachary Matthews v. Armin Oskouei,* Court of Appeals of Georgia (No. A23A0863). ◆

Ashley Rice is a partner with Waldon Adelman Castilla McNamara & Prout in Atlanta, where she has practiced since 2007. She focuses on motor vehicle and motor carrier defense, insurance fraud, construction litigation, and general civil litigation matters. She has been lead counsel in dozens of jury trials. Rice serves as GDLA Treasurer.

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Mr. Shryock has a wide breadth of experience in forensic accounting for insurance and construction-related matters. He has testified at arbitration, in Federal Court and in State Court. He has also been deposed on numerous occasions and has participated in multiple meditations and other claims settlement negotiations. He has been named as an expert in matters related to business interruption/lost profits, construction costs and related change order documentation, financial condition and motive in alleged arson claims, business valuation issues, and business inventory losses due to fire.

An Overview of the 2023 Amendments to the Federal Rules of Evidence

By Jacob E. "Jake" Daly
Freeman Mathis & Gary, Atlanta

On December 1, 2023, new amendments to Rules 106, 615, and 702 of the Federal Rules of Evidence ("FRE") took effect following their adoption by the federal judiciary's Advisory Committee on Evidence Rules, approval by the U.S. Supreme Court, and inaction by Congress. These amendments make important changes to the Rule of Completeness (Rule 106), the Rule of Sequestration (Rule 615), and the standard of admissibility for expert testimony (Rule 702) that all lawyers who practice in federal courts must know.

Rule 106 – Rule of Completeness

Rule 106 is the FRE version of the Rule of Completeness. Before December 1, 2023, it provided as follows:

> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.

This rule generally applies when a party misrepresents or distorts the meaning of a statement by offering evidence of only part of it.[1] For example, if a suspect in a murder investigation says to a police officer, "I did it, but it was in self-defense," at trial the prosecutor could ask the police officer if the defendant confessed to the murder.[2] If the police officer responds, "Yes, he said, 'I did it,'" this testimony would be misleading to anyone who was aware of the complete statement. Thus, Rule 106 allows the defendant's attorney to require the omitted part of the statement to be introduced immediately.

According to the 1972 Advisory Committee Notes that accompanied proposed Rule 106, there is a two-fold rationale for this rule. First, it is designed to prevent misleading impressions created by incomplete statements or statements that are taken out of context. Second, it recognizes that a misleading impression cannot always be remedied adequately by allowing the opposing party to introduce the completing statement later in the trial.

Over time, the federal circuit courts split over two important issues regarding the application of Rule 106. The first is whether Rule 106 applies to unwritten and unrecorded statements, such as oral statements and statements made through conduct or sign language.[3] The second is whether a completing statement is admissible if it would otherwise be inadmissible hearsay.[4]

On the first issue, the 1972 Advisory Committee Notes provide that "[f]or practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations." Some courts adhere to the textual exclusion of unwritten and unrecorded statements from the scope of the rule, but most courts circumvent this textual limitation by admitting unwritten and unrecorded statements under Rule 611(a) or the common-law Rule of Completeness.

On the second issue, some courts hold that Rule 106 merely governs the timing of the presentation of evidence and does not allow an otherwise inadmissible completing statement to be admitted, whereas other courts take the position that the fairness purpose of Rule 106 requires it to be broadly construed to allow an otherwise inadmissible completing statement to be admitted.

The 2023 amendments resolve these splits of authority by expanding the scope of Rule 106 to apply to unwritten and unrecorded statements and by allowing a completing statement to be admitted even if it is otherwise inadmissible hearsay. Thus, Rule 106 now provides:

> If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part—or any other ~~writing or recorded~~ statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

The Advisory Committee Notes identify two primary purposes of these amendments. First, new Rule 106 treats all issues of completeness in one place, thereby eliminating the need for judges to resort to Rule 611(a) or the common-law Rule of Completeness. This is important because completeness issues almost always arise during trial, when the time for reflection and research by judges and lawyers alike is limited because evidentiary objections and rulings must be made quickly, and so there is a benefit to having a single source that governs these issues.

Second, these amendments are intended to displace the common-law Rule of Completeness. Because the U.S. Supreme Court has characterized Rule 106 as a partial codification of the common-law rule, many courts have found that the common-law rule[5] still applies when Rule 106 does not or that the uncodified portion of the common-law rule is still in effect. Because no other rule in the FRE has been interpreted like this, the Advisory Committee wanted to eliminate the practical problem created by having a rule with a common-law supplement.

Rule 615 – Rule of Sequestration

The Rule of Sequestration, embodied in Rule 615, is designed to prevent a witness's testimony from being influenced by or tailored to the testimony of other witnesses, thereby increasing the likelihood of the witness testifying truthfully based on his or her own recollection.[6] The now former version of Rule 615 provided as follows:

> At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
> (a) a party who is a natural person;
> (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
> (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
> (d) a person authorized by statute to be present.

The federal circuit courts split on whether this version of Rule 615 should be interpreted narrowly according to its text or broadly according to its purpose.[7] A minority of federal circuit courts have applied a textual interpretation to this version of Rule 615, concluding that it requires only physical exclusion of witnesses from the courtroom and that, consequently, it does not prevent witnesses from talking to each other or from otherwise obtaining information about other witnesses' testimony as long as they do so outside the courtroom.[8] A majority of federal circuit courts, however, have applied a purposive interpretation to find that this version of Rule 615 also prohibits witnesses from collaborating or accessing other witnesses' testimony outside the courtroom.[9]

Both approaches have flaws. A textual interpretation defeats the purpose of the rule by allowing witnesses full access to the testimony of other witnesses, which in turn allows witnesses to collaborate and to coordinate their testimony with other witnesses.[10] The primary flaw with a purposive interpretation derives from the fact that most district court judges enter sequestration orders that are not detailed.[11] This causes witnesses to violate a sequestration order without having adequate notice that what they did was a violation.[12] Such orders could cause due process problems.[13]

The federal circuit courts also split over how many testifying witnesses were permitted to remain in the courtroom as designated representatives of an entity-party under subdivision (b) of the now former version of Rule 615.[14] Most allow only one, but some allow more than one.[15]

The 2023 amendments resolve these two splits among the federal circuit courts. These amendments reclassified the now former version of Rule 615 as subdivision (a), specified that an entity-party is entitled to have only one testifying witness who may remain in the courtroom as its representative, and added a new subdivision (b) that essentially codifies the purposive interpretation of the scope of the rule. The new version of Rule 615 provides as follows:

> **(a) Excluding Witnesses.** At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

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Beware the *Other* Mailbox Rule

By Jack D. Summer
Drew Eckl & Farnham, Atlanta

Imagine this scenario: Opposing counsel failed to serve a response to your dispositive motion within the 30-day deadline. Is it now time to notify the court of opposing counsel's inexplicable and egregious failure to timely respond to your dispositive motion? *Caveat lector* the *other* mailbox rule, O.C.G.A. § 9-11-6(e), which states, in pertinent part:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper, other than process, upon him or her, and the notice or paper is served upon the party by mail or e-mail, three days shall be added to the prescribed period.

But what of Georgia's Uniform Superior Court Rule 6.2? That Rule states, verbatim:

> Unless otherwise ordered by the judge or as provided by law, each party opposing a motion shall serve and file a response, reply memorandum, affidavits, or other responsive material not later than 30 days after service of the motion. Such response shall include or be accompanied by citations of supporting authorities and, where allegations of unstipulated facts are relied upon, supporting affidavits or citations to evidentiary materials of record.

Which applies? According to the Preamble to Georgia's Uniform Superior Court Rules:

> Pursuant to the inherent powers of the Court and Article VI, Section IX, Paragraph I of the Georgia Constitution of 1983, and in order to provide for the speedy, efficient and inexpensive resolution of disputes and prosecutions, these rules are promulgated. It is not the intention, nor shall it be the effect, of these rules to conflict with the Constitution or substantive law, either per se or in individual actions and these rules shall be so construed and in case of conflict shall yield to substantive law.

O.C.G.A. § 9-11-6(e), thus, supersedes Rule 6.2. Cf. *Wyse v. Potamkin Chrysler-Plymouth, Inc.*, 189 Ga. App. 64, 65 (1988).

But why? According to the Court of Appeals of Georgia, this "Code section is designed to maximize the probability that a party will have the full time period within which to take an action after he receives the notice." *Pyramid Const. Co. v. Star Mfg. Co.*, 195 Ga. App. 644, 644 (1990) (quoting Akins v. Magbee Bros. Lumber, etc., Co., 152 Ga. App. 904(1) (1980)). One can presume the historical rationale for this rule stems from the United State Postal Service's (USPS) rich history of failing to timely provide mail to its recipients. According to its website, USPS traces its roots to 1775 during the Second Continental Congress, when Benjamin Franklin was appointed the first postmaster general. Between 1860 and 1861, USPS delivered mail by horseback. Not much has been offered in the way of innovation since that time.

Is there a similar rule in federal court? Yes. Rule 6(d) of the Federal Rules of Civil Procedure states, "[w]hen a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a)." According to the Advisory Committee Notes regarding the 2016 Amendment to Rule 6(d):

> Rule 6(d) [was] amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served… Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking

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Biomechanical Reconstruction of a Motor Vehicle Collision

Nathan Carrington, PhD
ARCCA Inc.

We're all familiar with accidents and how they can happen in everyday life. Whether it's a trip and fall, a workplace mistake, or a motor vehicle collision, nearly everyone either experiences or witnesses events like these at some point in their life. Naturally, such accidents are often attributed as the cause of a variety of injuries. In order to scientifically understand and describe an adverse event and its relation to injury causation, one must be able to break that event down from an engineering perspective in order to quantify the forces and directions involved, as well determine the human body's response to those forces.

Biomechanical engineers, as the name would imply, study the human body from an engineering perspective. This is known as biomechanics, a sub-field of biomedical engineering. Biomechanical engineers understand human anatomy as both a mechanical and a biological system and strive to understand how the forces we experience can affect that system. If a body part experiences sufficient force in an appropriate direction, injury will occur. Much like how a bridge requires a certain magnitude of force in a given direction to suddenly collapse, bones and tissue also require a certain magnitude of force in a given direction in order to break or tear. For example, in football, a running back may plant his foot in order to quickly make a cut or change direction. As his weight shifts, this force travels through the knee, placing hundreds of pounds of "stretching" force through the anterior cruciate ligament, or ACL. If this stretching force is too great, the ACL can rupture, in an on-field tear and a finished season. This is known as an injury mechanism, a fundamental concept in injury biomechanics. Biomechanical engineers can apply their unique background and experience to investigate accidents and understand the forces a person or body part would experience during the event, thus allowing them to comprehensively describe the event in both biological and engineering terms in regard to injury causation.

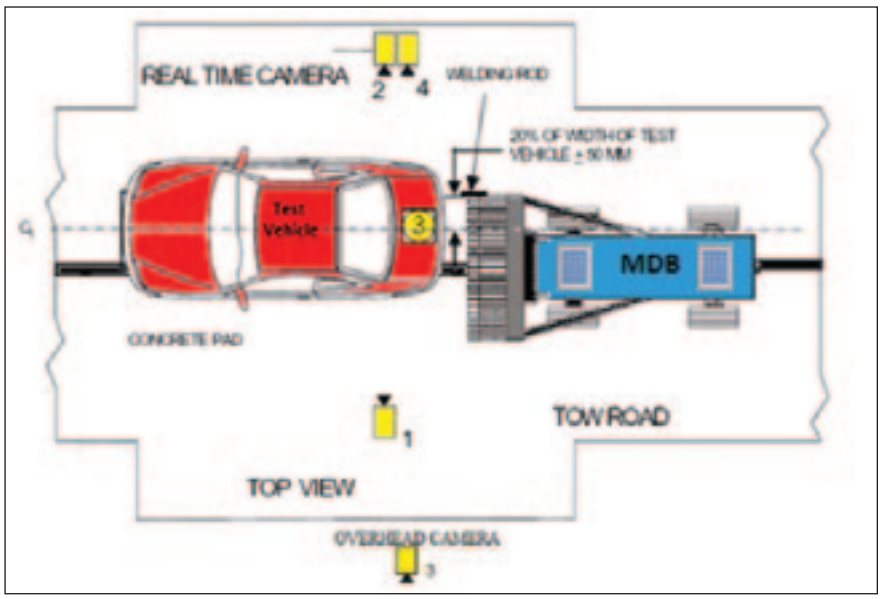
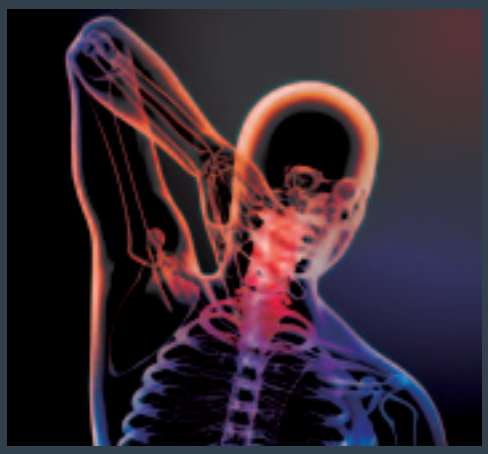


Figure 1: NHTSA 35-mph rear crash test of a 2015 Toyota Camry.

Motor vehicle accidents are commonly cited as injury-causing events, and they are often the subject of biomechanical investigation. Such an investigation should be conducted by using a peer-reviewed and generally accepted methodology that consists of the following steps:[1, 2, 3]

1. Identify the injuries attributed to the subject incident;
2. Quantify the incident severity in terms of the subject vehicle change in velocity and acceleration;
3. Determine the occupant response within the vehicle as a result of the subject incident;
4. Define the injury mechanisms known to cause the injuries and determine their presence or absence during the subject incident;
5. Evaluate personal tolerance in the context of relevant biomechanical attributes.

Continued on page 54



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Maximize Value for Your Clients by Engaging Damages Experts as Early as Possible

By Chris Frederick, CPA, CFF, and Austin Parris, CFE
Bennett Thrasher

When damages experts are engaged to provide a written report and testimony, the scheduling order has already been issued and expert witness deadlines (among others) have been set. As you will most likely be aware, the deadline for disclosing expert witnesses can and does often occur months ahead of the discovery deadline, which already puts a time constraint on acquiring information relevant to the damages expert assisting you with your case.

If you have ever hired a damages expert to write a report for you, you know that the best experts will have a lot of questions and thoughts for you and your client regarding available financial data, industry information, and conceptual ideas based on their own varied experiences that may not have been considered by you and your team prior to consulting with them. The best damages experts will have expertise and experience that can help you optimize your discovery requests and hone your damages approaches. Engaging your experts early in the process will empower you and your clients to maximize your value when using a damages expert.

When Is the Best Time to Engage a Damages Expert?

The best time to engage a damages expert is once you have a scheduling order in place and know your initial discovery deadline. On both sides of the litigation, the need for a damages expert was technically created the minute the complaint was filed and compensatory damages were claimed. For defendants, the scheduling order issue mentioned above becomes even more apparent

for rebuttal experts because that expert has much less time to rebut the plaintiff's expert report than the plaintiff may have had to prepare it. If you ever find yourself on the plaintiff's side, remember that opportunity is being left on the table by not maximizing this time advantage.

The Right Damages Expert Can Ease Discovery Complications for Counsel and Judges

Discovery is a challenging and often frustrating process. For damages experts, this frustration can be amplified when they are retained towards the end of a discovery deadline. Their specific expertise may have prevented headaches by refining requests and adding specificity to get better results. Many damages experts have seen cases weakened by having limited discovery to work with, finding out that a discovery request was denied for being too vague, or a "fishing expedition," or failing to properly justify the relevance to the court.

It is also of importance to you and your clients to get experts involved in helping you prepare the discovery requests. One area of value is experts can assist in providing more specific requests. We have seen requests denied for being too broad e.g. requesting a wide swath of financial information when maybe only a certain number of years, months, segments, etc. would be applicable to the expert's report strategy. This issue can be avoided by engaging experts earlier in the process, because it is far better to have the expert narrow your options based on their expertise and experience rather than the court's decisions narrowing your expert's options. One way that experts can help with this is by submitting an affidavit detailing the importance of the information requested.

Another way that damages experts can help with discovery, especially in difficult discovery disputes, is by providing an affidavit or declaration to the court that outlines their experience and why certain information is important to the discovery process and necessary for appropriately calculating damages. This strategy is often helpful to judges because it

Continued on page 58

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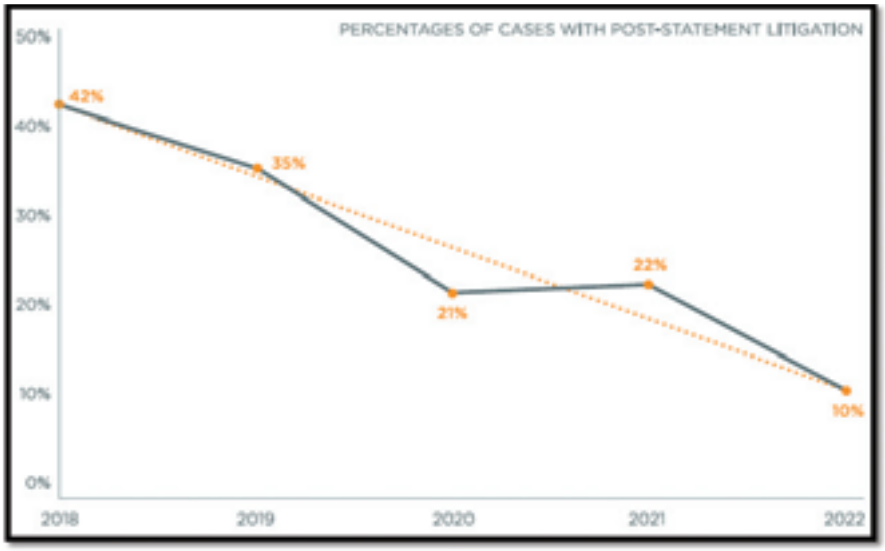
Solutions-Focused Claims Investigations: The Future of Claims

By Stephen Schultz
DigiStream Investigations

Recorded statements are a unique type of investigation. Most P.I. firms' core investigative work is covert, in which Surveillance Investigators and Desktop Analysts are operating without ever being perceived by the individuals investigated. In contrast, Claims Investigators meet with these same individuals face-to-face or over the phone to obtain their on-the-record account of the incident that resulted in the claim. Claims Investigators ask questions related to the claimant's background, medical history, and the details of the claim itself.



Out With the Old

The traditional approach to these interviews involves the Investigator taking an interrogatory stance because the claimant is suspected of committing fraud. In fact, interviews always begin with a "fraud admonishment," in which the claimant is specifically told that knowingly providing false information is a criminal offense. While it is the Investigator's job to obtain the claimant's narrative and ask pointed questions about the incident, this style of interviewing does very little to set the claimant's mind at ease; sadness, anger, humiliation, and despair are common feelings among injured workers following an injury. The interrogatory nature of the interview can create or amplify feelings of anger and anxiety within the claimant, as they may sense that they are being accused of doing something wrong, possibly criminal.[1]

Feelings of fear, anger, and confusion can lead to higher rates of litigation, as claimants may feel they require representation to guarantee fair treatment. Whenever a claimant obtains representation, the insurance carrier can expect the "life" of a claim to be dramatically extended. A 2018 study concluded that litigated claims take 195 percent longer than non-litigated claims to resolve and involve 284 percent more days of lost time from work.[2] The extended claims period has detrimental effects on the claimant's ability to recover and to return to work, as they are locked into a "disability mindset" while the claim is litigated. The longer a claim is open, the more expensive; the average cost of litigated workers' compensation claims are 388 percent more expensive than non-litigated claims. Furthermore, a litigated claim can severely hamper subsequent investigative endeavors. Represented claimants are more likely to be aware of surveillance efforts and their social media privacy due to the "coaching" they may receive from their lawyers.

While it's still important to actively detect and report fraud, it should be noted that a small percentage of claims actually display elements of fraud; estimates indicate that only one to two percent of workers' compensation claims filed across the country each year are fraudulent.[3] This means that many of the claims we deal with on a regular basis are from legitimately injured workers who are victims of unfortunate workplace accidents and are entitled to compensation/benefits while they recover. Therefore, claimants should be treated with respect and compassion to settle claims quickly.

In With the New

One of the latest developments in the claims industry is to approach claimants with an air of positivity and empathy. "Stakeholders" in the claims industry, which includes all individuals who "touch" a claim, such as claims and medical professionals, have been moving towards "advocacy-based" models of care. These models incorporate empathy, active listening, and counseling elements to put injured workers at ease and make them feel more comfortable with the claims process. Simply put, advocacy-based models strive to treat injured workers like humans. This is in stark contrast to traditional models that treat injured workers as suspected fraudsters.

Solutions-Focused Claims Investigations (SFCI) is a proprietary advocacy-based claims model,

Continued on page 60

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Six Strategies to Radically Impact Your Success with Medical Experts

By Burton Bentley II, MD, FAAEM
Elite Medical Experts

In legal practice, a medical expert is a person who, by virtue of education and/or experience, is qualified to guide a judge and jury in matters requiring special knowledge or learned expertise. In reality, a medical expert is a busy healthcare provider who is working on your case—and a whole lot of other things as well. Building constructive alliances with medical experts is mission-critical to case success, but dealing with physicians and surgeons can challenge the patience and restraint of even the savviest trial attorney. Here are six indispensable strategies to optimize your working relationship with medical experts:

1. **Searching for Unicorns—The Venn Diagram Approach:** Have you ever heard of Interventional Pulmonology or Cardio-Obstetrics? Well, you're not alone. There are nearly 300 medical specialties and subspecialties, and more are created every year. Picking the "right" expert is no longer as simple as finding an excellent internist or surgeon, and once that maze is navigated, what distinguishes one expert candidate from the next? The key is a Venn Diagram paradigm with a realistic differentiation between requirements and preferences. Requirements are immutable constraints such as medical specialty, ABMS board certification, active licensure, and ability to meet a deadline. Preferences are desired traits that are optimal but not mandatory. Preferences include geographic proximity, testimony experience, publications, personality, and reasonable rates. Since it is rare to find a unicorn—an expert who meets every requirement and preference—the key is to conceptualize your search as a Venn Diagram where immutable "requirements" like medical specialty, ABMS board certification, active licensure, and deadline adherence intersect with "preferences" such as geographical proximity or testimony experience. For example, if the "perfect" expert is 200 miles away but you had hoped for someone closer, relax the preference. If the ideal candidate charges $800 per hour and you had planned on $600, realize that the marginal cost increase may be what it takes to win the case. In other words, preferences should guide but not control your choices. By distilling the placement process to fixate on requirements while treating preferences as negotiable, the elusive unicorn becomes a more attainable quarry.
2. **Winning the Battle of the Experts:** Litigation is inherently adversarial, and as Sun Tzu noted in *The Art of War*, "The supreme art of war is to subdue the enemy without fighting." This wisdom manifests in the courtroom through a well-calibrated show of strength, and the weapon of choice in nearly every substantial case is an impeccably credentialed professor of medicine or surgery. At their core, university physicians and surgeons are board-certified specialists at the pinnacle of their profession, practicing at major universities, while training the next generation. Their ability to teach allows them to educate the jury, and their credentials, publications, and subject-matter expertise are an intrinsic show of strength that can psychologically impact opposing counsel, move the needle on negotiations, tamp down the bravado of opposing experts, and favorably affect litigation dynamics.

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The Individualized Life Care Plan

By Laura Davis, RN, CLCP
InQuis Global

The goal of a Life Care Plan is to restore or maintain the evaluee's optimal health, function, and autonomy. In the forensic setting, a properly developed Life Care Plan should educate both the evaluee (subject of the plan) and the trier of fact (the judge or jury) regarding future care and cost. The published definition of a Life Care Plan from the International Conference on Life Care Planning and the International Academy of Life Care Planners (IALCP), adopted April 1998, is as follows:

> The life care plan is a dynamic document based upon published standards of practice, comprehensive assessment, data analysis, and research, which provides an organized, concise plan for current and future needs with associated costs for individuals who have experienced catastrophic injury or have chronic health care needs.

Life Care Planners have gathered for professional summits since the year 2000 to address issues affecting Life Care Plans, Life Care Planning, and Life Care Planners. Results of these summits include *Consensus and Majority Statements* (2018), developed from a Delphi analysis, which is a process of achieving group consensus among subject matter experts. Applicable to all Life Care Planners, the Consensus Statements provide valid and reliable methodological guidance.

The guiding standards and requirements of Life Care Planning indicate plan development should be gathered from the evaluee interview, analysis of medical records, clinical practice guidelines, empirical research, and medical/health care collaboration. Relevant Consensus Statements regarding fundamental foundation for a Life Care Plan include:

- #64: "Life Care Plans shall rely on medical/allied health professional opinions."
- #67: "Life Care Plans shall utilize credible, evidence- based guidelines."
- #68: "Life Care Planners shall conduct an in-person interview whenever permitted."
- #79: "Life Care Planners shall understand and explain research used in a life care plan."

Also, the resulting plan should be individualized to the evaluee. As Consensus Statement #45 mandates, "Life care plans shall be individualized."

In addition to Consensus Statements, Life Care Planners also need to follow published and peer- reviewed professional standards. An example of such standards is published by the International Academy of Life Care Planners (IALCP), *Standards of Practice for Life Care Planners,* Fourth Edition. 2022.

IALCP Standard #10 provides, "The life care planner analyzes data using a consistent, valid, and reliable process." Per the Standards, factors such as the evaluee's age, sex, disability, and geographic location are considered in the analysis of data in the development of an individualized plan.

Moreover, according to Standard #11, "The life care planner uses a consistent, valid, and reliable approach to determining the evaluee's needs." The Life Care Planner's process for determining the needs of the evaluee should be similar and consistent for each case, although the content of each Life Care Plan will be different and specific to the evaluee's circumstance.

Although most Life Care Plans generally consist of the same categorical elements, such as projected evaluations, medication, and supply needs, to name a few, it is the content of each element that is individualized to the needs of the evaluee. For example, if the evaluee currently lives and plans to remain in an apartment, wherein yardwork and home maintenance services are not required, then such support services are not likely to be required for a Life Care Plan.

In general, the Life Care Planning assessment and development process should address the following:

- Is the care criteria centered on the evaluee?
- Is there input from the treating and/or evaluating healthcare providers, the evaluee, and family caregivers when applicable?

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Taking the Lid Off the Black Box: Common EDR Questions Answered

By Amber M. Bishop, JD, ACTAR
Weed Reconstruction & Expert Consulting (WREC)

Manufacturers began installing event data recorders ("EDRs") in passenger vehicles in the 1970s, aiming to collect data on how their vehicles performed during crashes in order to enhance safety features for future models. EDRs, colloquially referred to as "black boxes," evolved rapidly with the evolution of electronic sensors, allowing the data to become more robust. As the available data expanded, so did its use. Today, EDR data is regularly featured in litigation stemming from collisions because it offers unique and unparalleled insight into collision dynamics and driver behavior. Attorneys, adjusters, and drivers are often familiar with the general concept of an event data recorder, but still have specific questions.

Crash reconstruction experts are frequently asked: Does this vehicle have a black box? How do you get the data? What data is available? Will there be data if the airbags did not deploy? What if my client has been driving the vehicle since the crash? What if the crash happened years ago? What if the vehicle has already been repaired? Will an EDR show if the turn signal or lights were on? Do commercial vehicles have EDRs? Is there GPS data? This article seeks to answer these questions and highlight where nuance exists.

Does This Vehicle Have a Black Box?

If the passenger vehicle in question is newer than 2012 and manufactured by one of the big auto companies—think Ford, General Motors, Toyota— then yes, it probably has an EDR that can be imaged. Toyota and Ford began phasing in EDRs in the early 2000s. Chrysler, Jeep, and Dodge vehicles began making their vehicles' EDR data commercially available for models made starting in the mid-2000s. Honda, Acura, Infiniti, Mercedes, and a few other manufacturers did not begin making their vehicles' EDR data available until 2012 or later. Today, more than 90 percent of new cars and light trucks sold in the United States are equipped with EDRs.

Now you may be asking, what about older vehicles? Some manufacturers have made the data available for vehicles manufactured in the early 90s. For example, the 1994 Chevrolet Caprice, Pontiac Grand Prix, and Cadillac Seville all have accessible crash data. Do you have a 1995 Saturn or a 1996 Oldsmobile Cutlass Supreme? They have EDRs that can be imaged. Vehicles manufactured before 1994 are unlikely to have data that can be accessed by a commercially available tool but in 2023 the question is no longer "does this new vehicle have data," but rather, "what data does it capture?"

How Does a Crash Reconstructionist Access the Crash-Related Data?

Auto manufacturers installed EDRs and collected the data for their own use for years before the government mandated that manufacturers must make a tool/method commercially available for crash investigators and researchers to access the data for any EDR-equipped vehicle manufactured on or after September 1, 2012. The tool chosen by most auto manufacturers was the Bosch Corporation's Crash Data Retrieval (CDR) tool. The CDR tool is comprised of hardware and software. The hardware is a collection of components, primarily interface modules, cables, and adapters which act as an interface between a computer and the vehicle's module. The software translates the data to a readable format. Hyundai, Kia, and Tesla are examples of manufacturers that have elected to use tools other than the Bosch CDR.

EDR data is generally maintained in a passenger vehicle's airbag control module ("ACM"). Some vehicles have additional modules

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Shelly Weed is a former police officer with 18+ years of crash reconstruction experience. She worked thousands of crashes during her law enforcement career. Shelly has testified as a crash reconstruction expert in Courts across Georgia, but she has also been qualified as an expert in human factors and occupant kinematics as they relate to crash reconstruction. She is fully accredited as a Traffic Accident Reconstructionist (ACTAR #2528). Shelly's breadth of expertise translates into a more thoughtful, tailored, and thorough analysis of every crash.

Amber Bishop is an ACTAR accredited Traffic Accident Reconstructionist (ACTAR #3780) and a licensed attorney. Amber has a degree in physics, a masters from Emory, and extensive accident reconstruction training. Prior to joining WREC, Amber was a litigator at a highly respected law firm in Atlanta. She worked at the Centers for Disease Control and Prevention as a research scientist and epidemiologist before attending law school. Amber has worked hundreds of crashes in her years at WREC. Amber's scientific knowledge, legal experience, and attention to detail touch every case WREC handles.

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GDLA Co-Sponsors Gate City/ GABWA Judicial Reception

In an ongoing effort to promote diversity within our association and the bar generally, GDLA was again pleased to be among the bar associations co-sponsoring the Annual Judicial Reception of the Gate City Bar Association and Georgia Association of Black Women Attorneys (GABWA). The event was held on August 17, 2023, at King & Spalding's offices in Atlanta.

GDLA Vice President and Diversity Chair, Candis Jones Smith (photo 1), brought greetings from GDLA as each sponsoring association was given the opportunity to speak briefly. GDLA is especially proud of Smith, who served as 57th President of the Gate City Bar. She was also part of Gate City's commemorating its 75th Anniversary at a celebration gala. Smith is pictured in photo 2 (third from left) on stage with a legion of other leaders who have served as Gate City President. ◆

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Trial & Mediation Academy Continues to Train Leading Litigators

The Melburne D. "Mac" McLendon Trial & Mediation Academy was again held at Callaway Gardens Lodge & Spa from August 23-26, 2023.

This year, the conference kicked off on Wednesday with a reception and dinner featuring a keynote address on professionalism by Fulton State Court Judge Susan B. Edlein. After an evening of networking, the educational portion began on Thursday morning and lasted until mid-day on Saturday.

Students were guided through the two-and-a-half day experience by a distinguished faculty: Chair Anne D. Gower, Gower Wooten & Darneille, Atlanta; Vice-chair Brannon J. Arnold, Weinberg Wheeler Hudgins Gunn & Dial, Atlanta; Douglas K. Burrell, Chartwell Law, Atlanta; William T. "Bill" Casey, Jr., Swift Currie McGhee & Hiers, Atlanta; Karen Karabinos, Chartwell Law, Atlanta; C. Bradford "Brad" Marsh, Swift Currie McGhee & Hiers; GDLA President Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta; and Richard H. "Dick" Willis, Williams Mullen, Columbia, S.C.

Art Glaser with GDLA Platinum Sponsor Henning Mediation & Arbitration instructed students on best mediation practices. Maithilee Pathak with GDLA Platinum Sponsor R&D Strategic Solutions led a session on voir dire.

Trial & Mediation Academy employs a modified mock trial format to teach litigation skills. In advance of the program, students are given a case to study and begin preparing aspects of the trial. Following faculty instruction and demonstrations, students disperse into breakout groups to work on their skills from opening statements to cross and direct examinations to closing.

Trial & Mediation Academy is an exceptional learning opportunity not only for those early in their careers, but also for experienced attorneys who find themselves needing to brush up on their courtroom skills. Students could repeat the program each year and undoubtedly learn something new. Even the faculty professes to gain new trial tips and strategies every time—and some have been teaching for over 25 years. ◆

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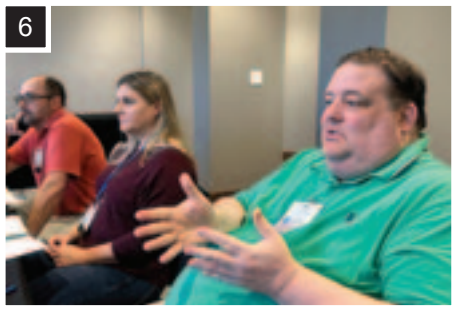
Pictured are: *1. Trial & Mediation Academy 2023's "class picture" of participating faculty and students. 2. Scott Gershkow, Nada Paisant, Fulton State Court Judge Susan Edlein, Cori Stevens, EJ Harrell, and Alex Pisciarino. 3. Douglas Burrell, Marriah Paige, Adam Wittenstein, and Brannon Arnold. 4. Jeremy Parker, Robert Brawner, Matt Moffett, and Dick Willis. 5. Bill Casey and Lance Stephens. 6. Ainsley Fagan and Academy Chair Anne Gower. 7. Emma Hamlet and Kelly Mason. 8. Art Glaser with GDLA Platinum Sponsor Henning Mediation & Arbitration Services. 9. Matt Moffett. 10. Tameika Jackson and Karen Karabinos. 11. Maithilee Pathak with R&D Strategic Solutions. 12. Dick Willis. 13. Brad Marsh. 14. Scott Greene and Jacob Wilson. 15. Lindsay Lee. 16. A series of breakout groups give students the opportunity to practice their skills.*

GDLA Board Holds Fall Meeting in Chattanooga

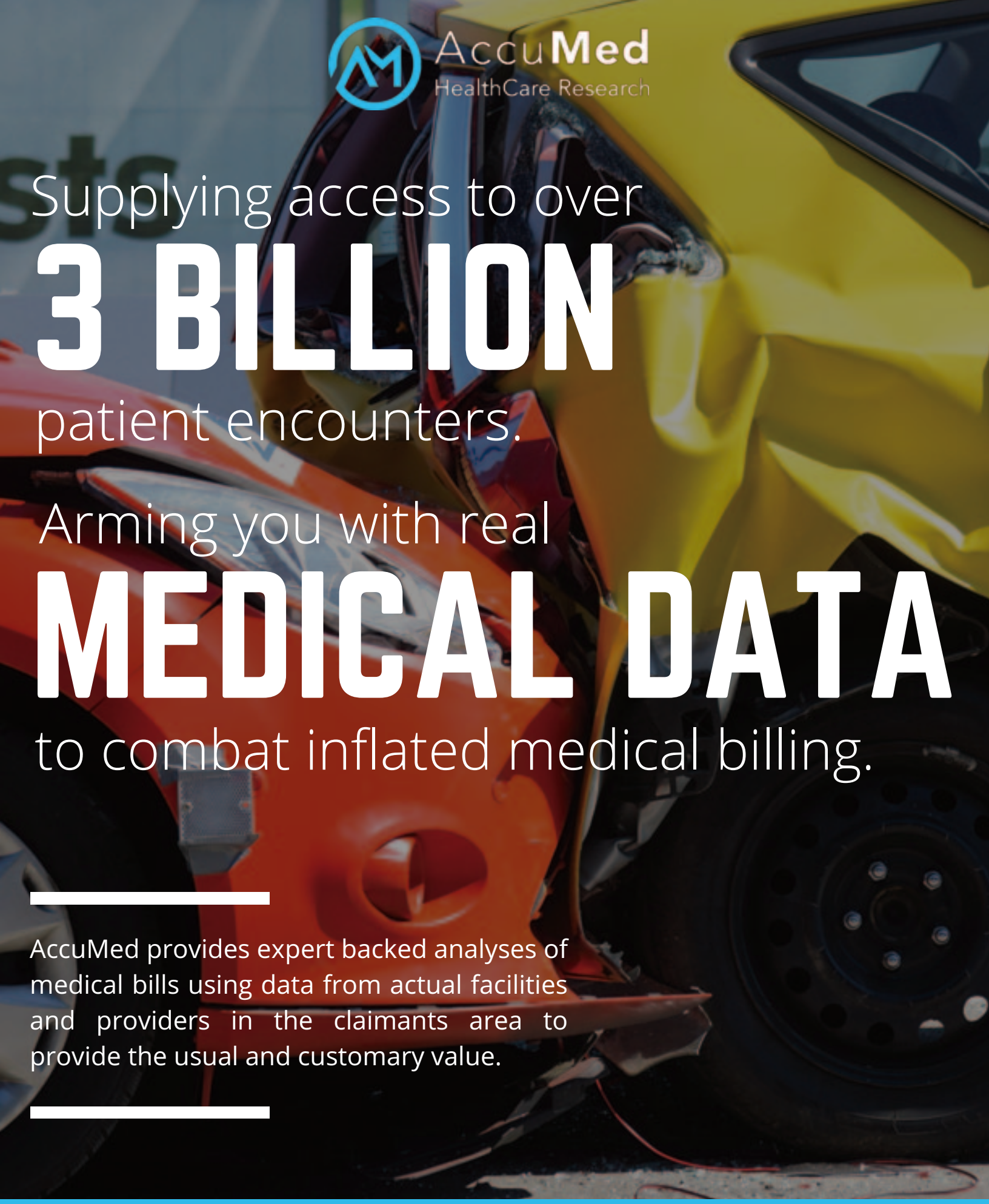
The GDLA Board of Directors traveled across the state line to neighboring Chattanooga, Tenn. for its Fall Meeting at the Marriott Convention Center downtown from October 20-22, 2023.

Board members, Past Presidents, and their families enjoyed crisp Fall weather on Friday with an outdoor reception followed by a group dinner. The Board meeting was held on Saturday morning, leaving the afternoon free for everyone to enjoy all that the Scenic City has to offer from Ruby Falls and the Incline Railway to the Tennessee Aquarium and more. Board members and their spouses and guests gathered again for drinks and appetizers on Saturday evening before dispersing to dinner on their own.

Those present were Executive Committee: President Pamela Lee, Swift Currie McGhee & Hiers, Atlanta; Treasurer Ashley Rice, Waldon Adelman Castilla McNamara & Prout, Atlanta; Secretary Martin A. "Marty" Levinson, Hawkins Parnell & Young, Atlanta. Board Members: Jason D. Lewis, Chambless Higdon Richardson Katz & Griggs, Macon; Zach Matthews, McMickle Kurey & Branch, Alpharetta; Erica L. Morton, Swift Currie McGhee & Hiers, Atlanta; Dallas Roper, James Bates Brannon Groover, Macon; and Joseph D. Stephens, Cowsert Heath, Athens. Past Presidents: N. Staten Bitting, Jr., Levy Sibley Foreman & Speir, Augusta; and Walter B. McClelland, Mabry & McClelland, Atlanta. Also present: GDLA Legislative Action Committee Chair Jacob "Jake" Daly, Freeman Mathis & Gary, Atlanta; and Executive Director Jennifer Davis Ward. ◆



Pictured are: *1. Past President Walter McClelland and his wife, Kathy; Jason and Annie Lewis; Cindy Bitting and her husband, Past President Staten Bitting. 2. Zach Matthews, Secretary Marty Levinson, and Past President Walter McClelland. 3. President Pamela Lee (seated) and Dallas Roper. 4. President Pamela Lee (right) with Treasurer Ashley Rice (second from right) with her sister, Allison, and daughters, Marielle and Olivia. 5. Joe Stephens. 6. Jason Lewis, Erica Morton, and Jake Daly.*



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GDLA Writes Letters to Soldiers: DRI International Day of Service

GDLA took part in the third International Day of Service, which was established by the DRI Foundation to motivate State & Local Defense Organizations (SLDOs) to host a service project during the Fall season.

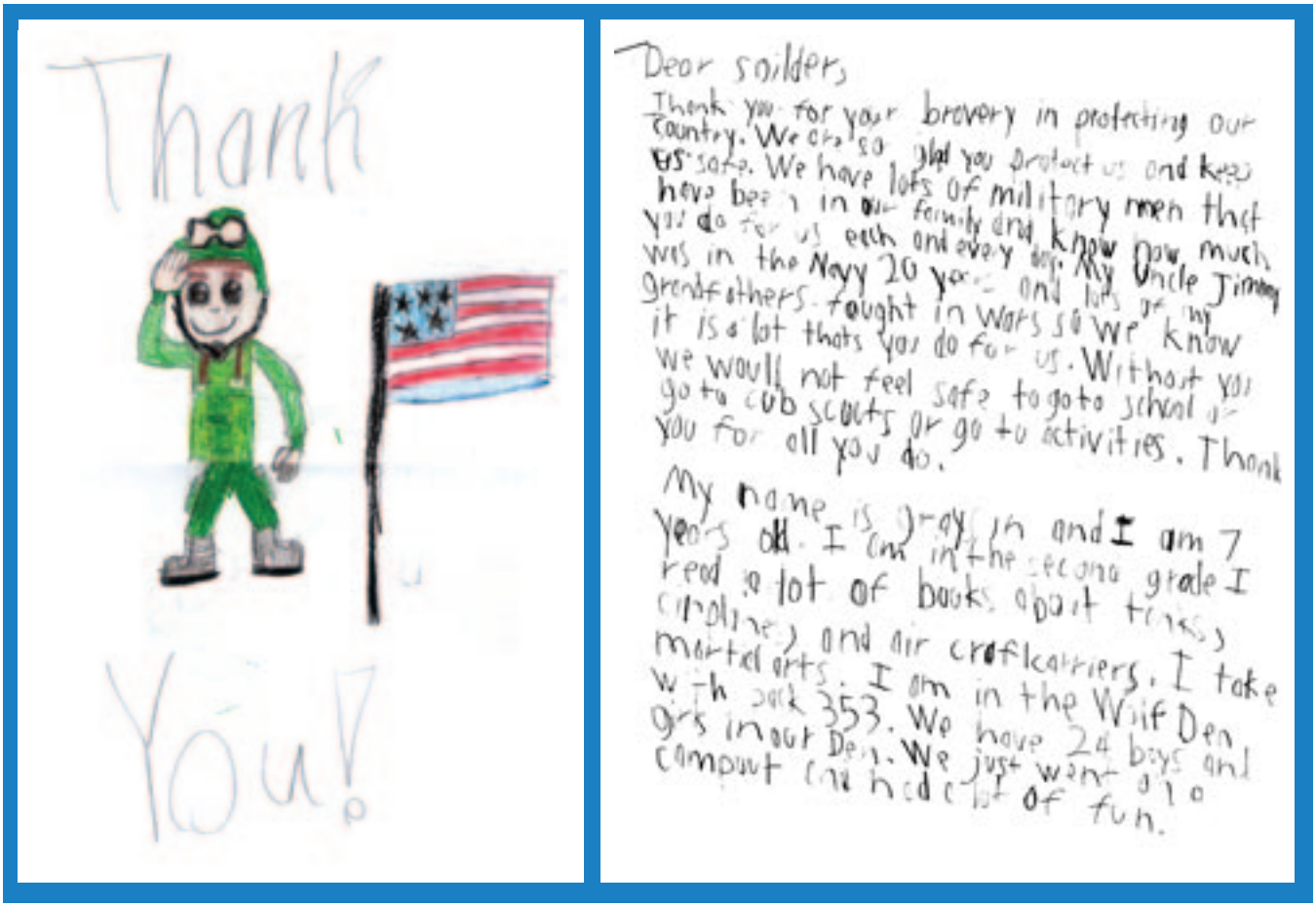
The DRI Foundation's goal is to better support and bring awareness to the wellness, philanthropic, and charitable efforts of defense lawyers across the country. The International Day of Service is one of the steps the DRI Foundation has taken to expand, better coordinate, and streamline the holistic betterment of the civil defense bar.

GDLA selected A Million Thanks, Inc. as its charity to support (amillionthanks.org). GDLA members were invited via eblast to pen a handwritten note of gratitude to a military service person, recognizing the soldier's selfless contributions and personal sacrifice to our country as a member of the armed forces.

GDLA members were encouraged to enlist their law firm colleagues and even their families, to write letters. Many members did just that, recruiting their kids to help, which (as you can see on these pages) netted some creative art and thoughtful notes that no doubt brightened a soldier's day!

GDLA Executive Director Jennifer Davis Ward collected the letters and sent them to the charity for distribution. GDLA also made a monetary donation to A Million Thanks, Inc. to offset the cost of postage and other expenses.

We look forward to participating in the DRI Foundation's International Day of Service next year Details will be shared via eblast. ◆


Thank
You!
Dear soilder,
Thank you for your brevery in protecting our
country. We are so glad you protect us and keep
us safe. We have lots of military men that
have been in our family and know how much
you do for us each and every day. My Uncle Jimmy
was in the Navy 20 years and lots of my
Grandfathers fought in wars so we know
it is a lot thats you do for us. Without you
we would not feel safe to go to school
go to cub scouts or go to activities. Thank
you for all you do.
My name is Gray Jin and I am 7
years old. I am in the second grade I
read a lot of books about trains
airplanes and air craftcarriers. I take
martial arts. I am in the Wolf Den
with pack 353. We have 24 boys and
girls in our Den. We just went to a
campout and had a lot of fun.

Matt Moffett Honored

Continued from page 17

wanting to participate. Matt was back at it, teaching again, when we convened the 2023 Academy at the end of August.

Not only is Matt a highly respected litigator within our state and association, but also he is a recognized expert at the national level. He is a frequent speaker at our Annual Meeting (most recently on apportionment in June 2022), DRI meetings, SLDO Annual Meetings, and sister organization Annual Meetings—often being invited back multiple times. He has been invited to speak by the following groups:

- Arkansas Association of Defense Counsel
- Canadian Defence Lawyers
- Connecticut Defense Lawyers Association
- Kentucky Defense Counsel
- Massachusetts Defense Lawyers Association
- Michigan Defense Trial Counsel
- Mississippi Defense Lawyers Association
- Montana Defense Trial Lawyers
- New Jersey Defense Association
- Defense Association of New York
- Ohio Association of Civil Trial Attorneys
- Oregon Association of Defense Counsel
- South Carolina Defense Trial Attorneys' Association
- South Dakota Defense Lawyers Association
- Utah Defense Lawyers Association
- Virginia Association of Defense Counsel
- Washington Defense Trial Lawyers
- Association of Defense Trial Attorneys
- Federation of Defense & Corporate Counsel
- DRI Annual Meeting
- DRI Retail & Hospitality Seminar
- DRI Trial Tactics Seminar
- DRI Young Lawyers Seminar
- DRI Trucking Seminar

As our 48th President, Matt felt it was important to recognize those leaders who had laid a foundation for our success over the past almost half-century. He established the inaugural GDLA Past Presidents Luncheon held on February 5, 2016, at the Capitol City Club in Atlanta, bringing together 15 former leaders and their spouses to be celebrated for their service. Matt felt it was important to honor the spouses, too, knowing from personal experience that their support was key to these leaders' spending many volunteer hours away from home. Again, to boost our visibility, we submitted a photo to the *Daily Report's* "After Hours" column. We have repeated that event since, and again enjoyed coverage in the newspaper—both online and in print.

While many outgoing leaders like to rest on their laurels, and enjoy the social part of Board involvement, Matt led an effort to establish an investment account in 2019 and developed a governing policy for it; he still serves as our Investment Committee Chair.

When Matt finished his term as GDLA President, Past President Ted Freeman was completing his three-year term as DRI State Representative. GDLA's policy had been to appoint our outgoing President to this important, and plum, position. Matt accepted the call of duty, but his three years did not end in 2020. The DRI Board granted our request to allow Matt to serve one more year, since the then-outgoing GDLA President (the late Jeff Ward) had transitioned to full-time mediating and was, therefore, ineligible. The plan was to wait for the then-incoming President George Hall to complete his term and take over for Matt. Unfortunately, tragedy struck when George died of a cardiac event during the swimming portion of an Ironman triathlon. Rather than rotating off duty, Matt kept on working for us as DRI State Rep. We have since revised our DRI State Rep selection policy so any GDLA member who otherwise meets DRI's criteria may be appointed, and Matt will be succeeded by Robert Luskin. We considered nominating Matt for the Kevin Driskell Outstanding State Rep Award, but we believe his accomplishments far outweigh his contributions as DRI State Rep.

We are tremendously proud of Matt's achievements on behalf of GDLA, DRI, and the organized civil defense bar as a whole. GDLA especially continues to be the beneficiary of his efforts, as we enjoy increased membership—we're closing in on the 1,200-member mark–and enhanced visibility within the legal community, as well as the bench.

It's no surprise that he was honored in 2017 by the *Daily Report* with a Distinguished Leaders Award for his outstanding leadership of our association. That, too, resulted in exposure for GDLA through an article focused on Matt's efforts. And, during that same year's *Daily Report* awards event, his law firm was named as the Litigation Department of the Year/General Practice, Small Firm.

Our nomination does not even address his record as an accomplished litigator or his dedication to community service. Matt has secured numerous defense verdicts in high risk and significant exposure cases, and his jury trial experience totals well over 100. He and his wife, Diane, his high school sweetheart of 33 years, are very active with their church, Peachtree Road United Methodist, where Matt has chaired the Administrative Board and teaches in the adult education program. They have two daughters: Kate, who earned her Masters of Social Work from the University of Tennessee at Chattanooga, and Megan, a 2023 University of Georgia graduate.

In summary, "outstanding" is only one word to describe the lawyer, mentor, friend, community leader, and family man who is Matt Moffett. He is a dedicated servant-leader who never stops working to innovate and improve the organized civil defense bar. And, if you're lucky enough to know Matt, then you know he is kind and funny and fun and loves only IPA beers.

We believe he is unequivocally deserving of DRI's Fred H. Sievert Award. We might close by adding that Matt has now shifted over to key volunteer roles with DRI's sister organization, the Association of Defense Trial Attorneys (ADTA)—he just can't help himself! ◆

Pattern Instruction

Continued from page 18

> volved, which, *while not enough to free the mind wholly from a reasonable doubt*, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.

Because the Legislature removed this definition and directed the courts to look to federal precedence to fill gaps in the evidentiary code, language tracking the prior definition was improper.

Second, the pattern instruction was deemed confusing because it does not clearly distinguish between preponderance of the evidence and the higher standard of proof—beyond a reasonable doubt. Indeed, the pattern instruction defines preponderance of the evidence as "that superior weight of the evidence ... which, "while not enough to free the mind wholly from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other." The Court of Appeals found that inclusion of this language regarding "reasonable doubt" would confuse a jury.

Third, the Court found an example of simpler language used to describe the preponderance of the evidence standard in a post-evidence code Georgia Supreme Court decision. While not dispositive to the holding in *White v. State,* 307 Ga. 601 (2020), the Georgia Supreme Court described the standard as follows: "proof by preponderance of the evidence simply requires that the evidence show that something is more likely true than not."

Despite finding the pattern instruction incorrect after over 10 years of use by every civil litigant (and some criminal litigants) in the State, the Court of Appeals still affirmed the verdict. The Court observed that even an erroneous charge, which is presumed to be prejudicial and harmful, can be overcome by a review of the record as a whole. In two paragraphs, the Court dispensed with the potential harm caused by the erroneous instruction by pointing out that the plaintiff testified under oath that neither Stanley nor Cartee "did anything wrong."

Going forward, the "safe language" for defining preponderance of the evidence appears to come from either *White v. State*, 307 Ga. 601 (2020): "proof by preponderance of the evidence simply requires that the evidence show that something is more likely true than not" or from the Eleventh Circuit Pattern Jury Instruction 3.7.1, which provides that "[a] 'preponderance of the evidence' simply means an amount of evidence that is enough to persuade you that [the plaintiff's] claim is more likely true than not true." ◆

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Rules of Evidence

Continued from page 23

~~(a)~~(1) a party who is a natural person;
~~(b)~~(2) ~~an~~ one officer or employee of a party that is not a natural person, ~~after being~~ if that officer or employee has been designated as the party's representative by its attorney;
~~(c)~~(3) ~~a~~ any person whose presence a party shows to be essential to presenting the party's claim or defense; or
~~(d)~~(4) a person authorized by statute to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:
(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and
(2) prohibit excluded witnesses from accessing trial testimony.

According to the Advisory Committee Notes, the most important change to Rule 615 is its extension of sequestration orders beyond the courtroom to prohibit testifying witnesses from learning about, obtaining, or being provided with trial testimony of other witnesses. This change was necessary to protect the core purpose of sequestration. An important question that the amendments do not address is whether sequestration orders may apply to lawyers when they prepare witnesses to testify. Prohibiting lawyers from disclosing testimony of other witnesses when preparing a witness to testify could raise ethical issues, but the Advisory Committee decided to leave such issues for district courts to address on a case-by-case basis.

Rule 702 – Admissibility of Expert Testimony

There were two significant amendments to Rule 702, which governs the admissibility of expert testimony. The first amendment relates to the evidentiary standard required for expert testimony to be admitted. The second amendment relates to the scope of the gatekeeping function that district court judges are required to perform. These amendments change Rule 702 as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

According to the Advisory Committee Notes, the first amendment is intended "to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule." Although this amendment represents only a clarification of how federal courts should have been interpreting and applying Rule 702, it was necessary because too many courts have held that the sufficiency of the basis for an expert's opinions, as well as the application of the expert's methodology, are questions of weight and not admissibility. These decisions are an incorrect application of Rule 702 and Rule 104(a), which requires courts to determine whether a witness is qualified and whether evidence is admissible.

A recent study conducted by Lawyers for Civil Justice ("LCJ") provides empirical support for the Advisory Committee's findings. LCJ reviewed every ruling on the admissibility of expert testimony by the federal district courts during 2020. Of the 1,059 decisions, only 373 (35 percent) correctly articulated the preponderance of the evidence as the proponent's burden of proof on the admissibility of expert testimony. The remaining 686 decisions (65%) did not mention the proponent's burden of proof or did not identify it as a preponderance of the evidence.

In 135 decisions (13 percent), the judge indicated (wrongly) that there is a presumption of admissibility of expert testimony under Rule 702. And in 61 decisions (six percent), the judge applied the preponderance of the evidence standard while also indicating that there is a presumption of admissibility. This is remarkable because the preponderance of the evidence standard and the presumption of admissibility are inconsistent. This study confirms the need for the first amendment to Rule 702.

The first amendment does not mean that the sufficiency of the basis for an expert's opinions is never a matter of weight and not admissibility. But nor is it always a matter of weight and not admissibility, as many courts have incorrectly held. A correct application of Rules 702 and 104(a) requires the

judge to determine whether it is more likely than not that the expert has a sufficient basis to support the opinion at issue. If the judge makes this finding of admissibility, any further attacks on the sufficiency of the basis for the expert's opinion go only to the weight of the evidence.

The second amendment to Rule 702 is designed, according to the Advisory Committee Notes, "to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." This necessarily requires district court judges to consider the substance of the expert's opinion when performing their gatekeeping function, especially because jurors generally are incapable of determining whether an opinion goes beyond what the expert's basis and methodology may reliably support. The point is that district court judges should not avoid their gatekeeping responsibility by deferring to jurors on this issue.

While the second amendment to Rule 702 requires district court judges to pass judgment on the expert's conclusion, the Advisory Committee Notes emphasize that "[t]he Rule 104(a) standard does not require perfection." Thus, district court judges should neither "nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support" nor require the proponent to prove that an expert's opinion is correct. But neither should district court judges admit opinions that are not supported by the expert's basis and methodology.

The clear import of the amendments to Rule 702 is that the standard for admissibility of an expert's opinion has not been applied or has been applied in a much too relaxed manner. There is no presumption of admissibility for an expert's opinion, and district court judges should more rigorously apply their gatekeeping function to keep unreliable opinions out of the courtroom. This suggests that expert opinions should be excluded more frequently than they have been, but of course there is no quota for the number of expert opinions that should be excluded in a given period of time. It is possible that only admissible expert opinions will be offered by their proponents, though experienced lawyers know that this will never happen outside a theoretical world. Thus, it is probably fair to say that the proper application of Rule 702 should result in expert opinions being excluded at a higher rate than recent experience shows.

A final consideration concerns the applicability of these amendments to O.C.G.A. § 24-7-702(b). These amendments do not apply explicitly to this statute, but Georgia's courts should apply this statute as if it includes these amendments. This is because the purpose of these amendments is to clarify what Rule 702 has always meant, at least since the 2000 amendments were adopted. Moreover, the current version of O.C.G.A. § 24-7-702(b) is identical to the now former version of Rule 702, and so if the now former version of Rule 702 should have been applied in the past in accordance with the 2023 amendments, it is reasonable for O.C.G.A. § 24-7-702(b) to be applied in the future in accordance with the 2023 amendments. Because the 2023 amendments are only clarifications, Georgia's courts should apply these amendments to O.C.G.A. § 24-7-702(b) even if the General Assembly does not enact them. ◆

Jacob E. "Jake" Daly is senior counsel in Freeman Mathis & Gary's Atlanta office. He has extensive experience in defending property owners, management companies, and security companies in premises liability lawsuits, and he defends private companies and their employees against other tort claims, including product liability claims, dram shop claims, motor vehicle accident claims, assault/battery/false imprisonment claims, and negligent hiring and retention claims. He also defends cities, counties, and local government officials in civil rights lawsuits and state-law tort lawsuits. Finally, he represents businesses in commercial disputes, such as lawsuits alleging fraud, breach of warranty, or violations of consumer protection laws. Daly chairs GDLA's Legislative Action Committee and serves as GDLA's representative to the State Bar of Georgia's Formal Advisory Opinion Board.

Endnotes

1. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988) ("[W]hen one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under Rules 401 and 402.").
2. This example is taken from Louisa M. A. Heiny & Emily Nuvan, *Toward a More Perfect Trial: Amending Federal Rules of Evidence 106 and 803 to Complete the Rule of Completeness*, 111 J. CRIM. L. & CRIMINOLOGY 839, 841 (2021).
3. *Id.* at 858-64; Daniel J. Capra & Liesa L. Richter, Evidentiary Irony and the Incom*plete Rule of Completeness: A Proposal to Amend Federal Rule of Evidence 106*, 105 MINN. L. REV. 901, 923-28 (2020).
4. Heiny & Nuvan, *supra* note 2, at 864-74; Capra & Richter, *supra* note 3, at 914-23.
5. *Beech Aircraft Corp.*, 488 U.S. at 172.
6. *Perry v. Leeke*, 488 U.S. 272, 281-82 (1989); *Geders v. United States*, 425 U.S. 80, 87-88 (1976).
7. Daniel J. Capra & Liesa L. Richter, *"The" Rule: Modernizing the Potent, but Overlooked, Rule of Witness Sequestration*, 63 WM. & MARY L. REV. 1, 15-24 (2021).
8. *Id.* at 15-19.
9. *Id.* at 19-24.
10. *Id.* at 8, 32-33.
11. *Id.* at 13, 15.
12. *Id.* at 8, 32-33.
13. *Id.* at 32.
14. *Id.* at 46-50.
15. *Id.* at 50-57.

Mailbox Rule

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> the provisions that apply when the last day is a Saturday, Sunday, or legal holiday."

Notwithstanding the above, the plain language of O.C.G.A. § 9-11-6(e) does not appear to contemplate an additional three days of response time when a responding party receives service through a court's electronic filing system, which is a proper mode of service pursuant to Rule 36.16(E) of Georgia's Uniform Superior Court Rules:

> Upon filing, an electronically filed document is deemed served on all parties and counsel who have waived any other form of service by registering with the electronic filing system to receive electronic service in the case and who receive notice via the system of the document's filing.

See also O.C.G.A. § 9-11-5(f) (describing parameters for service via electronic filing).

At least one Georgia court has agreed. *See Speckhals v. Golf & Tennis Pro Shop*, No. 20CV7320-1 (Ga. Super. Ct. Apr. 20, 2023). In *Speckhals*, the defendant filed a motion to strike the plaintiffs' response to the defendant's summary judgment motion. In their motion to strike, the defendant contended that the plaintiffs' response to their summary judgment motion—filed 31 days after service of the summary judgment motion—was untimely under Rule 6.2. The Speckhals court agreed and struck the plaintiffs' response, explaining:

> The "3-day rule" does under O.C.G.A. § 9-11-6(e) does not make Plaintiffs' filings timely … The 3-day rule applies to service by mail or e-mail, but not to service by electronic filing. Though the electronic filing system does send an e-mail alert to registrants after an electronic filing, the act of filing is a distinct method of service from e-mail service ... Courts have interpreted the "mail or e-mail" language of O.C.G.A. § 9-11-6(e) narrowly, making clear that the rule does not apply to other forms of service.

So, what should you, the learned attorney, do? Include, in your certificate of service, the following: "Today I served a copy of the foregoing document upon counsel of record via Statutory Electronic Service and through the Court's electronic filing system, which will automatically serve the following ... ." ◆

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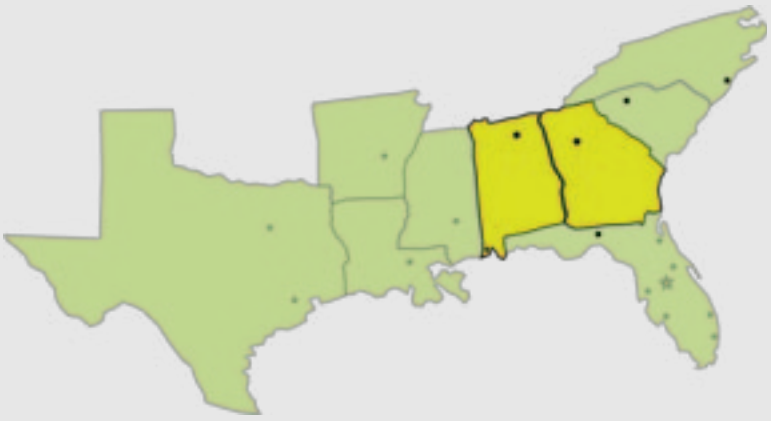

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Biomechanical Reconstruction

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A biomechanical investigation begins with the identification of the attributed injuries. This can be accomplished through a review of the associated medical records to identify the diagnoses provided by treating clinicians. In turn, a biomechanical engineer can then determine the injury mechanisms required to acutely cause, aggravate, and/or exacerbate the associated injuries. If the subject incident created the appropriate injury mechanisms, then a causal biomechanical relationship cannot be ruled out. If the subject incident did not create the appropriate injury mechanisms, then a causal biomechanical relationship cannot be established. It is important to note that a biomechanical investigation is not intended to offer any type of medical diagnosis and does not attempt to disprove existing diagnoses established by treating physicians.

The next step requires an engineering reconstruction of the subject incident. This process of accident reconstruction involves the application of engineering methods to determine the changes in speed experienced by the vehicle(s) (delta-V) and accelerations (g). Biomechanical engineers have access to a wide variety of tools they can use to objectively analyze and reconstruct motor vehicle collisions, depending on the available information. Photographs of the involved vehicle(s) can be used to quantify incident severity, provided that they depict the damage locations. Vehicle crash testing demonstrates that there is a relationship between the permanent residual crush sustained by a vehicle as the result of a collision and the energy that it absorbs (Figures 1 on page 26 and Figure 2). Photographs of a damaged vehicle can be compared to known un-crushed vehicle geometry. Energy-based crush analysis can be used to calculate the permanent residual crush that a vehicle would sustain during a given impact. This analysis can be further supported by real-world crash data. The National Highway Traffic Safety Administration (NHTSA) investigates and collects data from real-word automotive collisions, and this data is maintained within two publicly available online databases (Figure 3).

Figure 2: Insurance Institute for Highway Safety (IIHS) 6.5-mph rear crash test of a 2007 Toyota Camry.

Figure 3: Crash Investigation Sampling System (CISS) database photo of a 2018 Toyota Camry following a 9.5-mph delta-V rear collision, recorded by Event Data Recorder (EDR).

Accident reconstruction may still be accomplished if photographs and other information on the subject vehicle is limited or missing. The laws of physics dictate that for every action, there is an equal and opposite reaction. Thus, if a collision can be reconstructed from the perspective of the striking vehicle, then it can also be reconstructed from the perspective of the struck vehicle. These findings can be further corroborated with repair documentation, police accident reports, and witness testimony to reconstruct an incident, regardless of the physical availability of the involved vehicles.

If any of the involved vehicles are available, a physical inspection can offer additional information in regard to a reconstruction. Through an inspection, any un-repaired vehicle damage can be further quantified and a vehicle's Event Data Recorder (EDR) can be downloaded, provided that the vehicle is equipped with one. These are often more commonly known as "black boxes," and they are capable of continuously monitoring vehicle data and recording events that involve sudden accelerations such as crash events.

EDRs capture vehicle and occupant information during motor vehicle collisions, provided that the vehicle in question experiences a change in velocity (delta-V) greater five miles per hour over a brief time window. Though the exact categories of data recorded can vary from manufacturer to manufacturer, EDRs are capable of recording vehicle acceleration and velocity data, seat belt usage, accelerator and/or brake engagement, engine RPMs, steering wheel input, and much more. These systems have been scientifically tested and have demonstrated accuracy and

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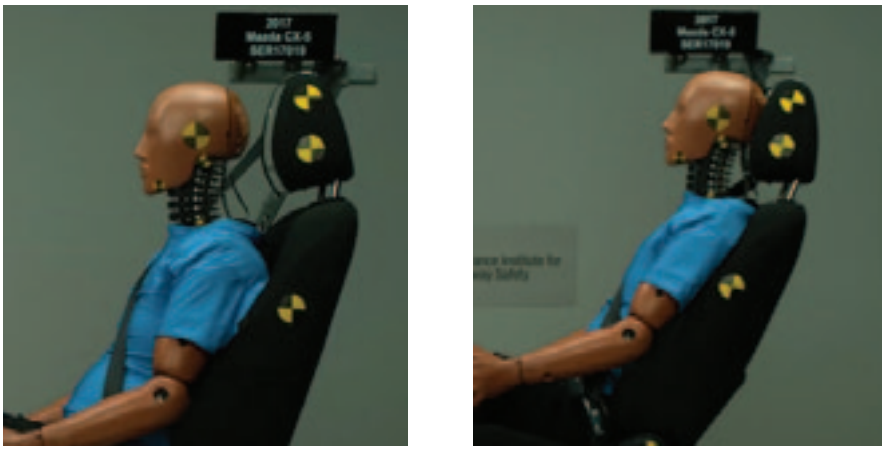

Figure 4: IIHS 10g acceleration rear-impact testing with an exemplar 2017 Mazda CX-5 showing pre-impact ATD position (left) and peak ATD rearward excursion (right).

reliability for determining the severity of vehicular impacts.

Once subject vehicle delta-V and acceleration have been quantified, the occupant response can be determined. Again, the laws of physics dictate that in a motor vehicle collision an occupant will move in the direction of the force acting upon their vehicle. For example, a rear-end motor vehicle collision would cause a struck vehicle to abruptly accelerate forward and the occupants to move rearward relative to the vehicle interior into their seatbacks and head restraints. The striking vehicle would likewise experience a frontal collision, which in turn would cause the occupants to move forward relative to the vehicle interior as a response.

Scientific studies and independent motor vehicle safety testing are continuously conducted to quantify how the human body responds in an automotive collision environment. For example, the Insurance Institute for Highway Safety (IIHS) regularly conducts rear-impact tests using anthropomorphic test dummies (ATDs) in various vehicle seating systems (Figure 4). These studies are used to assess vehicle safety design, and the recorded data provided by ATDs quantifies the forces experienced by the head and neck. Additional peer-reviewed and generally accepted studies from the scientific community involve testing ATDs, cadavers, or human volunteers in staged vehicle collisions. These studies provide peer-reviewed and generally accepted data characterizing the direction and magnitude of the forces an occupant is exposed to in various motor vehicle collision scenarios.

Lastly, once the occupant response to the subject incident is determined, a biomechanical engineer can determine the presence or absence of injury mechanisms for the attributed injuries. The occupant response can be further evaluated in the context of the forces experienced while performing everyday tasks, such as walking up a flight of stairs, sitting down in a chair, or lifting a gallon of milk.

Biomechanical engineers are uniquely qualified to apply their understanding of engineering principles and human biomechanics to investigate injury causation. They fulfill a distinct role from that of a medical doctor in situations that require injury causation assessments. This has long been recognized and accepted among the scientific and legal communities. A peer-reviewed and published scientific article authored by Walz and Muser comments:

> The multidisciplinary research of injury mechanisms and injury prevention requires the assessment of the technical and biomechanical circumstances of a collision; moreover, the causality assessment in the individual cases is facilitated by taking these aspects into account. In fact, only specially trained engineers and biomechanical experts are in a position to evaluate these relevant basic facts. In many crucial court cases, important technical factors such as collision angle, structural stiffness, extent of intrusion, and the vehicle's velocity change are often ignored. The purely medical causality assessment is often based only on a coincidence of time of the 'accident' and the onset of disorders.
>
> Therefore, if a causality assessment of a specific collision is required, the technical reconstruction leading to the crash severity for the car has to be taken into account as well as the resulting biomechanical loading of the occupant."

The Reference Manual on Scientific Evidence published by the Federal Judicial Center also offers relevant commentary. This publication is described as, "the leading reference source for federal judges for difficult issues involving scientific testimony." With respect to the role of medical doctors in assessing injury causation, this publication states:

The traditional role of the physician is the diagnosis (identification) of injuries and their treatment, not necessarily a detailed assessment of the physical forces and motions that created injuries during a specific event. The field of biomechanics (alternatively called biomedical engineering) involves the application of mechanical principles to biological systems, and is well suited to answering questions pertaining to injury mechanics.

As to the individual testifying to injury causation, the publication states that the individual:

> Would rely on medical records to obtain information regarding clinical diagnoses, and would rely on engineering and physics training to understand the mechanics of the specific event that created the injuries. A practitioner whose experience spans the interface between mechanics (i.e., engineering) and biology (i.e., science), considered in the context of the facts of the particular case, can be of significant assistance in answering questions pertaining to injury mechanism and causation.

In closing, biomechanical engineers have the qualifications and the expertise necessary to objectively quantify incident severity in situations that require injury causation assessment. Through the application of peer-reviewed and generally accepted methodologies, biomechanical engineers offer a scientific perspective regarding human interaction with real-world incidents. ◆

Nathan Carrington, PhD, is a senior biomechanist with ARCCA Inc., a GDLA Platinum Sponsor. Dr. Carrington continues to study injury biomechanics through various scientific test programs, including automotive sled tests and crash tests, as well as studies that implement advanced biomechanical tools such as instrumented anthropomorphic test devices. He has hands-on experience investigating the dynamic responses of individuals during inertial and impact environments, such as motor vehicle collisions or slip, trip, and fall events. This training and experience provide a unique understanding of physics and engineering in the context of human anatomy and physiology, enabling him to perform thorough scientific investigations of a wide range of circumstances.

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Damages Experts

Continued from page 28

provides additional validation beyond opposing sides requesting or denying the production of certain documents relevant to the case.

The result of this kind of proactive engagement is a more cohesive understanding of the claims for you and your client. A more sound report will be prepared by your experts as you reduce the risk of limitations on source documents available for your expert to rely on for their analyses.

Damages Experts Can Help You with Document Review

Once you have discovery flowing, litigation support and forensic accounting experts have the expertise and experience in document review that can help with this next step. Engaging your experts sooner in the case will allow you to gauge the kind of resources they may have available. This is helpful because if you provide the expert's team (limited if need be for sensitivity) access to relevant discovery databases, eDiscovery software, or other file setups, they can search for what they need, and possibly even find documents that would supplement their analysis that you may not have considered before. Allowing them this level of independent involvement in this aspect of the case can also free up some valuable time for your associates to work on other parts of the case (or other cases they are working on), rather than having to worry about responding to your damages expert's questions with regard to available documents.

Leveraging your expert's staff in this manner can also reduce the time lag between the expert being able to review documents, perform analyses, produce a draft, and ask you more substantive questions to further assist in discovery, additional document requests, case strategy, and upcoming depositions. The expert can more easily determine what their report needs to look like if they are confident that they have a clear picture of what is and is not available to them to rely upon. This results in a more defensible report to get your client an accurate and reliable damages number; or on the other side, the more information your rebuttal expert has to pick apart the plaintiff's expert, the better their report will be.

> *"By engaging a damages expert sooner, he or she can help you with getting the best content out of these depositions by asking the right questions based on their knowledge and experience."*

Damages Experts Can Help You With Depositions

Depositions are a fantastic way to discover additional information that can assist with discovery requests as well as getting testimony on the record that can supplement your expert's report conclusions. In cases involving financial disputes that require the engagement of a damages expert, often one or more witnesses will be deposed that have some level of financial involvement with the dispute. However, it is rare to get more than one deposition opportunity with these witnesses, so those hours have to be handled with care to get the best results.

In many cases, the damages expert you engage will have a level of familiarity with the types of roles these witnesses perform from a financial standpoint, maybe even holding those roles themselves or having someone on their team who may have held a similar role. That kind of specific experience and understanding can elevate the types of questions and focus areas you target when deposing the witness because there may be nuances to these roles that can inform the types of documentation and information that may be available in the form of reports, dashboards, key performance indicators and metrics, and operating procedures which affects how a damages expert substantiates their report.

By engaging a damages expert sooner, he or she can help you with getting the best content out of these depositions by asking the right questions based on their knowledge and experience.

Conclusion

To sum it all up, do not wait to start thinking about the damages portion of your case and how early on a damages expert can be of real value to you and your client by helping you get the right information and put it to use. Once you receive that scheduling order, it is time to start having conversations with damages experts and engage one to assist you in making sure your client receives the best service possible. ◆

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The Future of Claims

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which was developed in 2018-2019. SFCI is an interviewing style that focuses more on claimants' capabilities rather than their disabilities. SFCI techniques encourage claimants to talk about what they can do and, if they are unable to perform an activity due to an injury, how they can get back to doing activities they enjoy. SFCI tries to remove claimants from a "disability mindset" and reorient them towards recovery. SFCI techniques provide hope and support and promote positive attitudes about recovery; a claimant that feels supported and has a positive outlook on their recovery is less likely to litigate and more likely to return to work, thus reducing friction in the claims process and ultimately reducing the cost of the claim or our clients.

According to the 2021 Workers' Compensation Benchmarking Study performed by Rising Medical Solutions, the workers' compensation industry has only recently accepted the use of advocacy-based models of care. At the time of SFCI's initial development and implementation, less than 50 percent of major claims professionals knew about advocacy-based claims models; currently, 80 percent of those same professionals are now aware of the models and are currently implementing them. In a matter of a few years, advocacy-based models went from being a somewhat niche concept to becoming a "core operational strategy" among the highest-rated organizations.[4]

Research and Results

Internal research in 2021 examined the frequency of post-statement litigation year-over-year since 2018 to determine the effects of SFCI on claims outcomes. For the purposes of the study, claims were analyzed in which the claimant was interviewed. These claims were either "Not Litigated" or "Litigated Post-Statement." For the purpose of this study, "Litigated Post-Statement" means the claimant obtained representation after a statement was taken. Measuring the post-statement litigation rate was the primary focus, with results anticipated to reflect a year-over-year decline in post-statement litigation rates as SFCI became more refined and widespread.

In 2018, before the SFCI approach, 42 percent of the claimants interviewed litigated post-statement. This indicates that claimants obtained representation almost half of the time after a statement, which means a traditional approach to interviewing may have been causing claimants to feel uncomfortable or suspected of fraud. In 2019, the first year SFCI was implemented, post-statement litigation rates fell to 35 percent. While this represents a reduction in litigation, over a third of the claimants interviewed may still have felt uncomfortable to the point of seeking representation.

In 2020, a year marked by heightened anxiety and job insecurity due to the pandemic, post-statement litigation rates fell to 21 percent, a 40 percent decrease from the previous year. A slight uptick in claimant litigation in 2021 was observed; however, at the close of 2022, post-statement litigation rate fell 54.5 percent, the largest decrease since data was collected, to 10 percent. Between 2018 and 2022, a 73 percent decline in post-statement litigation rates occurred due to the SFCI approach. It's important to note that post-statement litigation rates may fluctuate over time, as claimants may pursue litigation months or years after our interviews were conducted. While it is unrealistic to expect the observed post-statement litigation rate to drop to 0 percent, it is believed that a continued investment in SFCI will reduce the rate into single digits.

Conclusion

At the onset of this internal research, post-statement litigation rates were expected to drop year-over-year as SFCI became more mature. It is understood that this research cannot be used to show definitive causation between post-statement litigation rates and the implementation of SFCI; however, an inverse correlation between SFCI usage maturity and post-statement litigation rates does not appear coincidental. Even if a particular claim does not call for a full implementation of SFCI tactics and questioning, elements of SFCI can be still applied; all types of cases can benefit from even a small amount of SFCI tactics. The data supports the notion that as investment in SFCI continues, fewer injured workers seek litigation for their workers' compensation claims. A robust SFCI program has the potential to make a large impact on litigation rates, return-on-investment, return-to-work rates, and overall client and worker satisfaction. ◆

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Medical Experts

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3. **The Cell Phone Test:** Even the best expert can derail a case if they can't be easily reached when needed. While the initial interview provides insight into personality and knowledge, the "cell phone test" gives direct insight into impromptu accessibility, and it's as simple as asking an expert for their cell number. All people, whether experts or not, communicate by phone and text. When experts provide a cell number, they offer a direct line of communication, and the ease with which they provide it is a strong indicator of their commitment and responsiveness. The willingness to provide a cell number can tip the selection when two candidates appear equally matched, and it can be a lifesaver for urgent communiqués and directives. Try asking for it on your next case!

4. **Managing Deadlines and Deliverables:** All attorneys have had it happen at least once. They send a medical record to an expert, never receive a reply, and then several months later receive a report they didn't request and an invoice that exceeded their wildest expectation. While the expert's actions were discourteous, it was the failure to set explicit deadlines and define clear deliverables that led to a strained relationship with the expert. All business undertakings begin with a Scope of Work (SOW) and establishing a detailed scope of work at the outset minimizes the risk of cost overruns, missed deadlines, and useless deliverables. The SOW, which is as simple as a few sentences in the cover letter to the expert, should reiterate the expert's role, list the records to be reviewed, explicitly state the exact deliverable (e.g., oral opinion, notarized report, etc.), specify any deadline, and instruct the expert how the deliverable should be executed (e.g., call my assistant to set up a call). what the expert is to do. Establishing an SOW at the outset minimizes risks, and aligning expectations for communication ensures that the engagement stays on track.

5. **Ending the Runaway Checkbook:** Extravagant billings torpedo not just your budget but also your relationship with the medical expert. Here's a secret: Even when medical records are hundreds or thousands of pages long, experts often identify critical documents and arrive at key opinions within the first hour (or hours) of reviewing a file. Although this may not be the case for unusually complex or lengthy matters, and while an opinion can change based on a single finding elsewhere in the records, most experts acknowledge that within the first 90 minutes of opening a medic record, they "have a pretty good idea" of how the case will develop. Given that the knowledge inflection point occurs at a surprisingly early juncture, it is reasonable to ask your expert to "please pause before exceeding three hours of case review so that we may discuss your preliminary findings and anticipated next steps." A discussion at that point allows the expert to share what they've learned and to align expectations for additional time and cost. Interestingly, when experts pause at three hours on straightforward cases, they often don't require more time or may just request a nominal amount. Either way, this checkpoint serves as a pause to assure that everything is proceeding smoothly, and it often ends the runaway checkbook.

6. **Roadmaps Save Frustration, Time, and Dollars:** Imagine opening a 2,600-page medical record and not knowing where to begin. Do the questions focus on the first or fourth surgery? Was it the hospitalist or the cardiologist whose care is under scrutiny? What about the 400 pages of physical therapy, outpatient visits, and billing that are also included? Sending an expert a random bankers box or digital data dump of PDFs is a quick way to erode trust, destroy

Imagine opening a 2,600-page medical record and not knowing where to begin. Do the questions focus on the first or fourth surgery? Was it the hospitalist or the cardiologist whose care is under scrutiny? What about the 400 pages of physical therapy, outpatient visits, and billing that are also included?

motivation, and run up costs at the same time. In other words, it is a proven recipe for disaster. The solution is to provide an organized chronology or index with a high-level summary of key dates, events, locations, and providers. The argument against this is the misguided notion that indexes and chronologies "put blinders on the expert, and the other side will tear the expert apart." Nothing could be farther from the truth. A global index and/or a bland chronology without editorialization simply highlights major "names, dates, and places" for the purpose of file organization, not restriction. The expert still takes possession of all records, and the roadmap—which is intended to be fully discoverable—simply facilitates an orientation to files. This simple step is valued by all experts and critical for gaining a foothold with large files. If you're still worried about an appearance of blinders, include this admonition in bold: "The following information is provided as a courtesy to facilitate your orientation to various names, dates, and events in the medical record. It is not a substitute for your full and independent review of all case materials."

The rapport between an attorney and expert is critical to case success, and like a well-forged blade, an expert's skills must be wielded with precision to effectively cut through the complexities of legal battle. Implementing these six strategies will mitigate friction while building a constructive partnership with your medical experts. ◆

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Life Care Plan

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- What long-term residential settings are appropriate and the least restrictive for the evaluee?
- What are indications and/or contraindications for current and/or future treatment?
- What are the goals and expected outcomes of any therapy programs?
- What is the duration and frequency of treatment and/or medical/clinical services?
- What is the purpose for each item in the Life Care Plan?
- Are services and treatments and/or equipment available to the evaluee? If available, will the evaluee use the services and/or equipment?
- Has the evaluee's growth and development and/or aging been considered?
- In a forensic setting, have pre-existing conditions and care been identified and appropriately offset within the Life Care Plan?
- Has the probability of a future treatment or service been considered?
- How will the evaluee's life expectancy be determined?

Standard life tables, such as those published by the U.S. National Center for Health Statistics, consider large demographic groups and cite average population values by race and gender. It may be the case that such life expectancy information is found outlined in a Life Care Plan; however, an individualized Life Care Plan must consider the evaluee's overall health and status which may not be reflected and consistent with average population findings. Therefore, direct input from a life expectancy expert is essential and necessary based upon consensus requirements.

In order to determine if principles and standards have been followed for an individualized Life Care Plan, a peer-reviewed and published checklist can be used. This checklist, found in Table 21.8 of the *Life Care Planning and Case Management Handbook* (4th ed.), includes, but is not limited to, the following matters for review:

- Review of medical records, depositions and/or other relevant records
- Published standards and procedures
- Treatment and/or services appropriate for evaluee's disability/injury
- In-home and/or facility care appropriate for the evaluee's needs
- Cost transparency and offset for costs incurred without disability
- Vocational considerations
- Plan confirmation with treatment team
- Congruent narrative report and plan

The same peer-reviewed checklist can be used to guide analysis of one's own Life Care Plan. As part of the litigation process, Life Care Planners should be prepared and expect to have their plans reviewed by qualified colleagues.

In conclusion, the guiding principles in Life Care Planning, including the Consensus Statements and Standards of Practice, direct Life Care Planners in creating individualized plans. Life Care Plans should be designed to reflect the personalized requirements of the evaluee and facilitate optimal functioning, as well as improve quality of life. ◆

Laura Davis is a Certified Life Care Planner (CLCP) and nurse researcher with GDLA Platinum Sponsor InQuis Global. She has clinical experience as a Registered Nurse (RN) in medical/surgical care, ambulatory care, community health, occupational health, and case management. Davis served as a medical resource to claim handlers, leadership, and defense counsel with State Farm Insurance for 18 years, and as a Senior Liability Nurse Consultant for Complex Commercial Liability with Liberty Mutual Insurance for four years. In addition to claim file-specific review and analysis, Davis developed and presented training on various medical issues commonly seen in claims. She immersed herself in the insurance industry by taking on a claims project specialist role in the Multi-Claim Special Investigative Unit and earned an Associate in Claims (AIC) and Chartered Property and Casualty Underwriters (CPCU) designations. She completed a 120-hour post-graduate training program in Life Care Planning through the Institute of Rehabilitation and Education Training. Davis is also a Board-Certified Occupational Health Nurse Specialist/Case Manager (COHN-S/CM) and a Board Certified Legal Nurse Consultant (LNCC).

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WHERE COMPASSION MEETS INNOVATION

Taking the Lid Off

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which may contain data, but it depends on the year, make, and model. For example, some older Fords have a powertrain control module ("PCM") and some newer GMCs have a front camera module ("FCM") and/or an active safety control module ("ASCM"). An expert can often image the module by connecting a tool to the vehicle's onboard diagnostic port, known as the OBD-II. This is the same port where a technician connects to see if a vehicle meets emissions standards. If the crash damage is severe, such that the port is damaged or the electrical system is compromised, the expert may be forced to connect the EDR imaging tool to the module itself. This methodology is referred to as going "direct to module" and requires a cable specific to that vehicle's module. The modules are commonly installed under the center console or center stack which means that accessing the module may be destructive to the vehicle's interior.

What Data is Available?

The data collected in modern passenger vehicles is regulated by 49 CFR § 563. Section 563 sets uniform national requirements for vehicles manufactured on or after September 1, 2012, to ensure that recorded data allows for effective crash investigations and analysis of vehicle safety equipment (e.g., airbags, occupant restraint devices). Section563 provides that if the qualifying vehicle has an EDR, information on 15 data elements must be recorded at the time of a crash. The 15 required variables are longitudinal delta-v, maximum longitudinal delta-v, time for the max delta-v, speed, engine throttle or accelerator pedal, service brake, ignition cycle for the crash, ignition cycle at download, safety belt status for the driver, frontal airbag warning lamp status, time to deploy frontal airbag for the driver and front passenger, multi-event, the time from event 1 to 2, and whether the complete file was recorded. Some manufacturers choose to collect EDR data elements beyond the 15 mandated by federal regulations. For example, some manufacturers record steering input, ABS activity, engine rpm, seat track positions, and even the weight classification of the driver and front passenger seat occupants.

Late model vehicle EDR data can be very robust, but it has limitations. Traditional EDRs do not collect GPS data, nor will they tell us whether a driver had their lights or turn signals activated. EDRs will not show whether a driver was on their cell phone at the time of the crash. Events are not time and date-stamped, but two of the required data elements—the key cycle at event and the key cycle at the time of download—do help link data to a particular crash.

Will There Be Data If …?

Attorneys and adjusters frequently ask whether data could be present in a variety of circumstances. The answer depends on many variables but let's start first with the dynamics of the crash. In order for data to be recorded, the impact must satisfy the recording algorithm threshold of a particular module. A crash does not need to be severe in order for data to be recorded. In fact, most passenger vehicle EDRs capture data related to two different types of events: deployment events and non-deployment events. The trigger threshold for vehicles manufactured on or after September 1, 2012 is a change in the vehicle's longitudinal velocity that equals or exceeds 5 mph within a 150-millisecond interval. Regardless of the type of event or severity of the crash, the same data elements are captured.

As a general rule, event-related data in passenger vehicles does not get erased with the passage of time. This means that if a client has been driving the vehicle, even if years have passed, useful data may remain in the module, capable of answering crash-related questions. However, if the vehicle continues to be driven and is involved in subsequent collisions, there is a risk that earlier crash data will be overwritten by data from later crash events. This is especially true for non-deployment events. Deployment events (events resulting in airbag deployment) on the other hand, are generally locked and will not be overwritten with the passage of time or subsequent events.

The algorithm that dictates when nondeployment crash event data will be overwritten varies by a vehicle's manufacture, model, and even year. Some modules can hold only one non-deployment event and it will remain in the module until another non-deployment event occurs. Other modules can hold two or even three nondeployment events. Even if a vehicle has been repaired, so long as the module has not been replaced, qualifying crash event data may remain in the module.

What if the crash damage is severe or the vehicle caught on fire? Manufacturers routinely place the modules near the vehicle's center of mass: under the center console or near the shifter. This means that the EDRs regularly survive crashes unscathed, even those with severe occupant intrusion. The metal enclosure and location of the module offer a significant amount of protection. Even in instances where a vehicle has been burnt to a crispy and unidentifiable shell, it may be possible to locate the module and access data. But if there is a loss of power during a crash, the event may never be recorded to the module. Even if the damage does not appear severe, there may not be any crash data.

Do Commercial Vehicles Have EDRs?

Electronic crash data is not limited to passenger vehicles. Commercial vehicles, including tractors and trailers, can capture and record crash-related data in some circumstances. The equipment needed to image the Engine Control Module ("ECM") data in a tractor truck, and the data available depends on the vehicle's engine model and year. Unlike passenger vehicles, there is not one commonly used interface. Each engine manufacturer requires specific equipment and software to extract ECM data. This makes imaging commercial vehicles more complicated, expensive, and time-consuming.

The mechanism by which commercial vehicle crash-data is triggered is also different than passenger vehicles. In passenger vehicles hard braking is not sufficient; there must be an impact and it must satisfy a trigger threshold. The recording function of a tractor's ECM on the other hand is usually triggered by hard braking—a loss of 7-9 mph in a second for example. Although hard braking is an action associated with an accident, this means that one may get ECM data for events that did not necessarily result in a collision. ECM crash-data is typically not as robust as passenger vehicle data. The type of data recorded varies by manufacturer but typically includes speed, brake application, engine RPM, percent throttle, and whether the cruise control was in use at the time of the event.

Summary

EDR data is valuable and often very robust evidence that can make significant contributions to a crash reconstruction and litigation strategy. Electronic data can be complex, nuanced, and is not intended to stand alone. It must always be considered in conjunction with available vehicle and roadway evidence. It is vital that attorneys and adjusters involve a trained, experienced crash reconstructionist as quickly as possible following a collision, to image the vehicle's electronic data and preserve vehicle and roadway evidence. ◆

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