Using Body Language to Win at Mediation

Health Care Claim Forms: What They Are and How They Can Help

Social Influence in the Courtroom: What It Is and What to Do About It

DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

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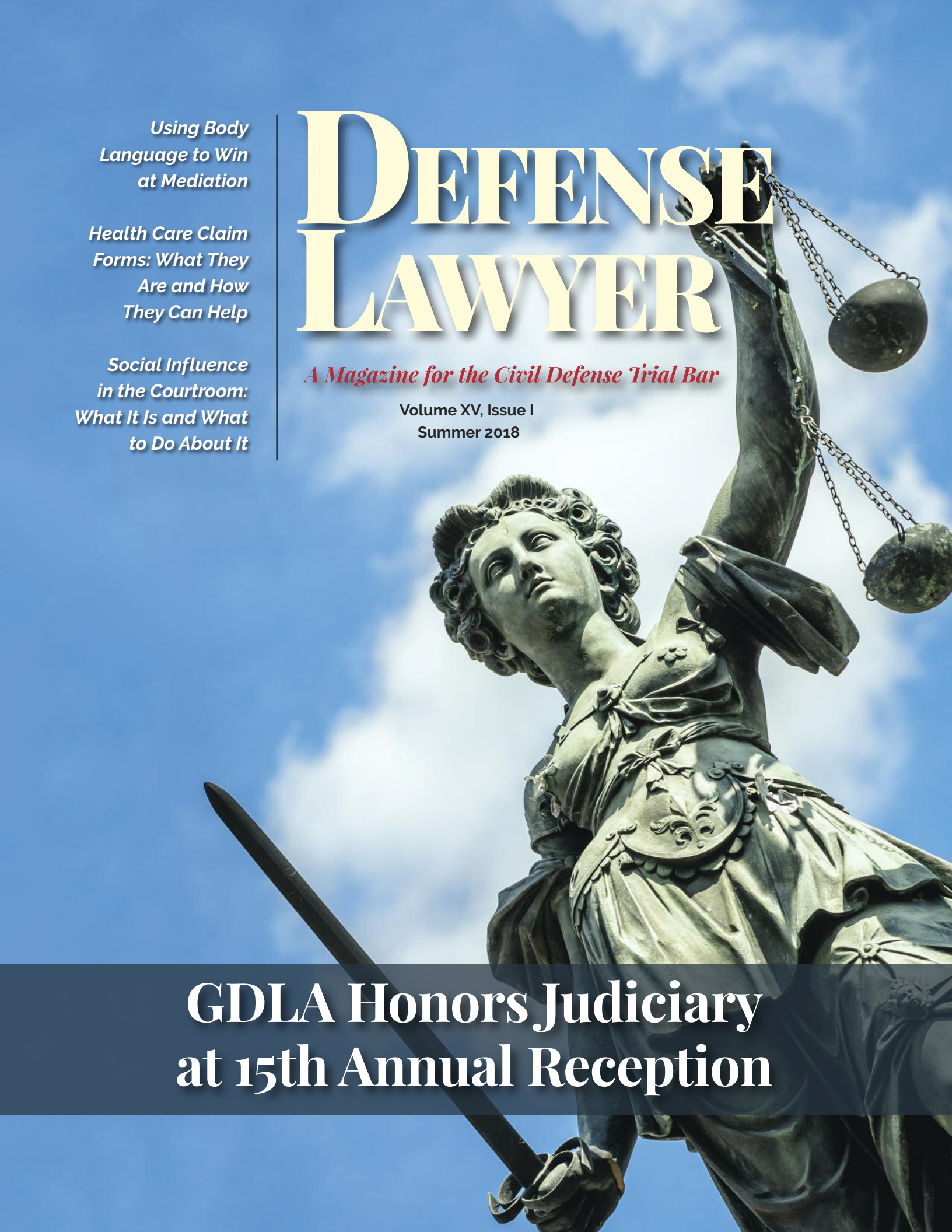

GDLA Honors Judiciary at 15th Annual Reception

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GEORGIA DEFENSE LAWYER
Volume XV, Issue I

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President's Message

Editor's Note: While compiling GDLA's history for the 50th Anniversary, we realized the President's Message in the Law Journal *before 2008 had been a recap of the accomplishments during each leader's year of service. President Sally Akins decided to rekindle the tradition for her message in the* Law Journal*, and we decided to rerun it here, as well, in its entirety.*

It has been an honor, a pleasure and a privilege to serve as the Association's President during 2017-2018. It was especially meaningful for me, as we lost my law partner and mentor, Paul Painter, who served as GDLA President from 1986-1987, in May 2017. In addition, the year was incredibly memorable as 2017 marked the 50th Anniversary of the Association's founding.

GDLA celebrated its Golden Anniversary in style, holding the 50th Annual Meeting at The Breakers in West Palm Beach, Florida. We had a record turnout of attendees and all enjoyed the legendary oceanfront resort. There we presented the inaugural GDLA Distinguished Service Award to Past President Salty Forbes, Forbes Foster & Pool, Savannah, who truly was the most fitting first recipient. President Peter Muller, Goodman McGuffey, Savannah, also presented President's Awards to our hard-working Amicus Committee leaders: Chair Marty Levinson, Hawkins Parnell Thackston & Young, Atlanta, and Vice-Chair Garret Meader, Drew Eckl & Farnham, Brunswick. Fulton State Court Judge Susan Edlein was on-hand to swear-in the new officers.

In commemoration of our 50th anniversary, Salty Forbes penned an historical overview chronicling important events since our founding. Together with that history, each living past president contributed personal memories from their years of involvement. The compilation was bound into a magazine that attendees received in a gift bag with a frame and rocks glass, each bearing our 50th anniversary logo.

The Trial and Mediation Academy was scheduled for January at Callaway Gardens, but unfortunately, a snow storm got in the way and it will now take place in August. The Academy is chaired by Carrie Christie, Rutherford & Christie, Atlanta and co-chaired by Brad Marsh, Swift Currie McGhee & Hiers, Atlanta. The talented and very dedicated faculty is Jerry Buchanan, The Buchanan Law Firm, Columbus; Bill Casey, Swift Currie McGhee & Hiers, Atlanta; Anne Gower, Gower Wooten & Darneille, Atlanta; Philippa Ellis, Owen Gleaton Egan Jones & Sweeney, Atlanta; Billy Harrison, Mozley Finlayson & Loggins, Atlanta; Matt Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta; Jeff Ward, Drew Eckl & Farnham, Brunswick; and Dick Willis, Bowman and Brooke, Columbia, SC. These lawyers devote untold hours of time and their rich experience to the Academy. We should all send our young associates to the Academy early in their careers.

The 15th Annual Judicial Reception was held in early February 2018 at State Bar Headquarters. This event is hugely popular with the bench and the

Continued on page 56

GDLA Leadership Changes

This edition of the magazine is traditionally in the works before our Annual Meeting takes place each June. As such, our leadership will have changed by the time you receive this and can be found on our website. The next issue will include coverage of our 51st Annual Meeting held at Hammock Beach Resort in Palm Coast, Fla., plus an update on the 2018-2019 Board of Directors and officers, including our 51st President Hall McKinley of Drew Eckl & Farnham in Atlanta.

Member News & Case Wins

MEMBER NEWS

Past President **Jerry A. Buchanan** of Columbus announced the renaming of his firm from **Buchanan & Land** to **The Buchanan Law Firm**, following his partner Ben Land's appointment to the Muscogee County Superior Court bench. His new email address is jab@thebuchananlawfirm.com; all other information remains the same.

Past President **Lynn M. Roberson** was honored during the **Atlanta Bar Association's** Annual Meeting on May 22, 2018 with the Charles E. Watkins, Jr. Award. This award gives public recognition to a member who has demonstrated distinctive and sustained service to the Atlanta Bar Association. It is the highest honor the Atlanta Bar can bestow. Ms. Roberson notably served as President of GDLA and the Atlanta Bar during the same timeframe in 2012-2013.

Bridgette E. Eckerson was recently named a partner at **Mozley Finlayson & Loggins** after six years at the firm as an associate. She practices in the areas of trucking, premises liability, products liability, insurance defense, and insurance coverage litigation.

Miller & Martin announced **Christine H. Lee** has joined the firm as a litigation associate in the Atlanta office. Licensed in both Georgia and Florida, her civil litigation practice focuses on representing companies in business and commercial litigation, business torts, trademark disputes, as well as general litigation. Away from the courtroom, Ms. Lee has served as outside counsel for emerging businesses and national companies involved in the design, financial, medical and hospitality industries providing advice on issues including trademark registration or infringement, nondisclosure agreements, corporate structure and purchase and sale agreements.

Michael J. Moore, formerly with **The Law Offices of Kenneth Sisco**, has joined the civil litigation defense firm **Strickland & Schwartz i**n Atlanta. He will maintain a general civil defense practice focusing on the areas of general liability, insurance coverage, premises liability, and property loss.

Danielle C. Le Jeune, formerly with **Rutherford & Christie**, has joined **Cozen O'Connor** as an associate in the firm's Atlanta office. She will focus her practice on insurance coverage, trucking, premises liability, and contract litigation.

Adam C. Joffe has been named CEO and Managing Partner of **Goodman McGuffey**. He practices mainly in Georgia and the firm has offices in Atlanta, Savannah, Orlando, Sarasota, Charlotte, Raleigh, Columbia, and Charleston.

James-Bates-Brannan-Groover in Macon announced that **Caitlyn Clark** has joined the firm as an associate focusing on general civil litigation and insurance litigation. Ms. Clark, a native of Macon, earned her B.S. in Architecture with honors from Georgia Tech in 2013 and earned her J.D. with honors from Mercer University's Walter F. George School of Law in 2017.

Rahul Sheth, formerly with **Hawkins Parnell Thackston & Young**, has joined the litigation defense group at **Bovis Kyle Burch & Medlin** in the Atlanta office. His practice will be in civil litigation with a primary focus on workers' compensation defense.

CASE WINS

Mark Johnson and **Jad Dial**, partners at **Weinberg Wheeler Hudgins & Dial** in Atlanta, received an unprecedented premises liability/negligent security verdict for their clients, the owners and manager of the Bradford Gwinnett Townhomes and Apartments in Norcross. On April 13, 2014, Kevin Pierre, a resident, was shot and killed following a fight involving four non-parties. Pierre was not a direct party to the fight and is believed to have been accidentally shot by a bullet intended for one of the persons involved. Pierre lived for up to five minutes after being shot before eventually succumbing to his injuries. Plaintiffs, Pierre's parents and sister, the administrator of his estate, alleged that in the years prior to the shooting, there was a rampant crime problem at the Bradford Gwinnett Townhomes and Apartments and that the shooting was foreseeable. They further alleged that the defendants negligently failed to provide adequate security at the properties to protect tenants and their guests from criminal activity. They also alleged the defendants acted in bad faith and were liable for punitive damages and expenses of litigation.

During a 10-day trial, the defense focused on the facts of the shooting rather than the properties' prior crime issues and security patrols. During closing arguments, plaintiffs requested $30 million for the value of Pierre's life and an unspecified amount for his pain and suffering. On the third day of deliberations, the jury awarded $3.3 million for the value of Pierre's life and $700,00 for pain and suffering. However, with respect to liability, only one percent of the fault was apportioned to the defendants. 75 percent fault was apportioned to the assailant who shot Pierre while the remaining 24 percent was apportioned to the three other individuals involved in the fight immediately preceding the shooting. Accordingly, their client is only liable for $40,000.

Upon information and belief, this verdict represents the first of its kind in similar Georgia cases. Since Georgia's apportionment statute was enacted in 2005, non-parties (including criminal assailants) in premises liabil-

ity/negligent security cases have been apportioned relatively low percentages of fault, and sometimes have been apportioned zero percent fault. The apportionment of fault to the non-parties in this case is believed to be the largest in Georgia since the enactment of the apportionment statute.

After a three-day jury trial in the State Court of Spalding County in December, **Jonathan M. Adelman** and **Benjamin H. Harbin** of **Walden Adelman Castilla Hiestand & Prout** obtained a very favorable verdict for their tractor-trailer driver and trucking company clients. This was a hotly contested case stemming from a 2005 accident. The truck driver, who rear-ended Plaintiff's vehicle when traffic stopped for a school bus, was arrested at the scene for driving with a suspended license. Prior to trial, the trial court granted summary judgment to the defendants on Plaintiff's direct negligence claims against the trucking company, Plaintiff's punitive damages claim, and Plaintiff's spoliation claims. The trial court also agreed that the jury should not be made aware of the driver's suspended license. Plaintiff claimed "career-ending" neck and back injuries. Plaintiff's treating orthopedist determined that low back surgery was needed. Plaintiff had been employed as a mechanic at AGL Resources and had not worked since the day of the accident. He claimed lost wages alone in the amount of $700,000. In the middle of trial, plaintiff reduced his settlement demand to $175,000. Defendants' longstanding settlement offer had been $75,000. The jury returned with a verdict in the amount of $4,500.

John Lowery and **Janine Willis** of **Mozley Finlayson & Loggins** in Atlanta obtained summary judgment in favor of MARTA and its Chief and Assistant Chief of Police in the successful defense of a civil rights complaint brought in March in the U.S. District Court, Northern District of Georgia. The case involved claims of race and gender discrimination, retaliation, hostile work environment, and state law claims, including defamation and negligence brought by two former employee police officers. The federal district court dismissed all claims.

Jay O'Brien of **Carlock Copeland & Stair** in Atlanta obtained a defense verdict in a heavily contested premises liability case on behalf of his two clients, a condominium association and property management company. Plaintiff alleged that as she was walking through the parking lot at the condominium, she fell into a large hole in front of a storm drain, all the way down to the middle of her chest. As a result, Plaintiff claimed injuries to her knee and a shoulder rotator cuff tear that ultimately required surgery. Plaintiff's medical bills were in excess of $100,000. Plaintiff asked the jury for her medical bills and an additional $485,000 for pain and suffering. The jury deliberated for less than an hour before returning a defense verdict.

Christopher B. Freeman of **Carlton Fields'** Atlanta office obtained a jury defense verdict for Kindred Healthcare in a long-running medical malpractice case. A former patient, Robert Coker, was alleged to have swallowed his upper dental bridge at some time during his three-day stay at a long-term care facility affiliated with Kindred, and he was alleged to have gone into respiratory distress. His children later sued Kindred Healthcare and others, alleging that the staff failed to diagnose the problem and transfer him to the emergency room in a timely fashion. Following the jury's finding in favor of defendants after a six-day trial in Fulton State Court, the trial court dismissed charges of medical malpractice and loss of consortium against the plaintiffs' $13 million claim.

Elissa B. Haynes and **Robert A. Luskin** of **Goodman McGuffey** in Atlanta obtained summary judgment on behalf of property owner Golden Business, Inc. in a negligent security case. Plaintiff's Estate filed suit against Golden Business and Rikaz Food, Inc., the tenant who operated the Atlanta gas station, after Plaintiff was shot and killed in the parking lot. Plaintiff's claims against Golden Business included negligent failure to inspect and maintain the premises, failure to provide adequate security, failure to warn, and maintenance of a nuisance. Plaintiff also sought punitive damages and attorneys' fees. During the hearing on Golden Business's motion, which was argued by Ms. Haynes, Plaintiff alleged that Golden Business had actual or constructive knowledge of criminal activity in the parking lot and that Golden Business had a duty to conduct inspections which would have uncovered a history of crime on the premises. DeKalb County State Court Judge Stacey Hydrick sided with the defense on all counts, despite Plaintiff's Post-Hearing Brief, and found that Plaintiff failed to present any evidence from which a jury could determine that Golden Business had knowledge of prior substantially similar incidents at the subject premises. Judge Hydrick further noted that there is no duty under Georgia law for a property owner to investigate police files to determine whether criminal activity had occurred on its premises. A Notice of Appeal was recently filed by Plaintiff. The case is *Shirley Bolton, et al. v. Rikaz Food, Inc., et al.*, case number 16A60394, in the State Court of DeKalb County.

Swift Currie McGhee & Hiers partner **Pamela Lee** and associate **Jennifer Nichols** obtained a Court of Appeals decision upholding a defense verdict following a three-and-a-half-day jury trial in Fulton County State Court before Judge John R. Mather in July 2016. The duo represented South Atlanta Urgent Care Clinic, LLC. Plaintiff Jane Doe alleged she was sexually assaulted by a male nurse practitioner in a patient exam room and argued the clinic was negligent in its retention and supervision of the nurse practitioner. There had been prior allegations of inappropriate conduct by the nurse practitioner, but the credibility of the alleged victims was challenged during trial, and the clinic owner testified he understood those allegations had been investigated and recanted.

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Dr. Fuentes is a founding partner of R&D Strategic Solutions, LLC. He has specialized in jury behavior and decision-making and the evaluation of complex evidence for more than 25 years.

At trial, the jury heard two conflicting versions of the sexual encounter. Plaintiff Jane Doe's version described a sexual assault, while the nurse practitioner's version described a consensual sexual act. The nurse practitioner's version was strengthened by Plaintiff's own testimony that the two previously flirted and exchanged numbers, and that she thought they might date. The jury heard testimony that a rape kit was performed, and that DNA was found on Plaintiff. However, Judge Mather excluded the rape kit report from evidence since it was not identified in the pre-trial order and was first disclosed during the course of trial, the day after the jury was selected and several witnesses had already testified. Judge Mather also believed the report was likely cumulative evidence.

Plaintiff Jane Doe asked the jury to award $5,000,000. After deliberating for an hour and a half, the jury returned its verdict in favor of South Atlanta Urgent Care Clinic, LLC, and Judge Mather entered a judgment based upon the jury's finding of no liability. Plaintiff filed a Motion for new trial, asserting the verdict was contrary to the evidence and justice, and the exclusion of the rape kit report was improper. Among Plaintiff's many arguments was that the report should have been admissible to impeach the nurse practitioner, to show the location of the DNA on Plaintiff's body could only be supported by her version of events. The defense argued the report was not proper impeachment evidence, since it did not even indicate a match to the nurse practitioner's DNA and, even if it had, he offered a completely rational explanation to the jury for how DNA could get on the location identified.

Following oral argument, Judge Mather denied Plaintiff's motion for new trial. On February 21, 2018, the Georgia Court of Appeals affirmed, finding the evidence supported the judgment and there was no reversible error of law. Jane Doe has filed a Notice of Intent to Apply for Certiorari in the Supreme Court of Georgia.

The Atlanta-based firm of **Weathington McGrew** has enjoyed several recent successes. On March 9, 2018, **Paul Weathington** and **David Hanson** obtained a defense verdict following a week-long trial in Fulton County State Court. The plaintiff in the case underwent total abdominal hysterectomy during which the surgeons improperly stitched shut the plaintiff's ureter. Following surgery, the defendant nephrologist was consulted regarding abnormal laboratory values, which could possibly suggest an intra-surgical injury. The defendant nephrologist followed the lab values for two days, then recommended the surgeon follow-up with the lab values when the plaintiff returned for her post-operative visits. This follow-up never happened and the plaintiff ended up losing a kidney. The defense team argued their client was correct in suggesting the surgeon should follow-up on labs when the plaintiff returned to the surgeon's office, and that the nephrologist should not be held responsible for the surgeon's failure to have the labs run. After two hours of deliberation, a Fulton County jury agreed, returning a defense verdict in favor of the defendant nephrologist.

Gabi Klaes obtained summary judgment in a personal injuries claim brought against her water park client. Plaintiff alleged that she fell due to a dangerous condition existing on the surface of an attraction. Ms. Klaes argued that the plaintiff assumed the risk of injury when she entered the attraction and that the water park took a number of steps to prevent injuries in and around the attraction. Gwinnett State Court Judge Joseph Iannazzone agreed and granted summary judgment.

Dan McGrew and **Sam Britt** obtained summary judgment for their physician client in a case brought by an inmate alleging that the physician violated the inmate's constitutional rights by withholding necessary medical treatment. The Weathington McGrew defense duo was able to show that there was no evidence to support the plaintiff's allegation that the physician was deliberately indifferent to the plaintiff's serious medical needs. To the contrary, the evidence showed that the physician appropriately treated the inmate during each visit. U.S. District Court Judge (Middle District of Georgia) Marc Treadwell agreed and granted the defendant's motion for summary judgment.

Doug Smith and **Claire Sumner** of **Carlock Copeland & Stair's** Atlanta office obtained a defense verdict in a chiropractic malpractice case in Cobb County. Plaintiff alleged she suffered a cervical spine injury following multiple chiropractic adjustments in 2012 and sought to hold multiple chiropractors liable for professional negligence and via respondeat superior. She sought pain and suffering damages in the amount of $1 million. The defense argued that Plaintiff failed to prove causation, and after less than an hour of deliberation, the jury agreed and returned a defense verdict.

Zach Matthews of **McMickle Kurey & Branch** in Alpharetta successfully argued a sanctions motion against Spine Center Atlanta in the U.S. Northern District in April. This order was the culmination of a months-long discovery battle in which Spine Center Atlanta was revealed to be concealing from discovery its records of communications with plaintiff counsel, as well as its extensive marketing efforts to plaintiffs' lawyers. There was also evidence that it had altered Plaintiff's bill using its Centricity electronic medical records software. Spine Center's counsel Richard Merritt surrendered his license for professional malfeasance during the pending dispute. The case, *Shure v. GS Rockledge*, remains pending at CAFN: 1:16-cv-00650-RWS.

In another case, Mr. Matthews, along with his partner **Scott McMickle**, secured an opinion from the Georgia Supreme Court holding that foreign risk retention groups are immune from the Georgia Direct Action Statutes. Georgia has traditionally allowed direct actions against the insurers of motor carriers. However, risk

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Member News & Case Wins

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retention groups are a special category of insurer created by the U.S. Congress through the Liability Risk Retention Act of 1986 (LRRA). A modern risk retention group is akin to a coop, entitled to special protections to promote insurance market competition. Because the LRRA limits the rights of "foreign" states to regulate non-domiciliary risk retention groups, the Georgia Supreme Court agreed the Direct Action Statutes cannot "regulate" those entities by subjecting them to direct action in Georgia. OOIDA, a Vermont risk retention group, was thus held to be immune to direct action in this state. Dan Jason of Jason & Bradley in Stone Mountain represented the plaintiff/appellants. The case is *Reis v. OOIDA Risk Retention Group, Inc.*

Sun S. Choy and **Jacob E. "Jake" Daly** of **Freeman Mathis & Gary** in Atlanta successfully defended the owner of an apartment complex in a premises liability case based on a provision in the plaintiff's lease that shortened the limitations period to one year.

The case, *Langley v. MP Spring Lake, LLC*, No. A18A0193, involved an alleged trip and fall on a crumbling portion of the curb in the parking lot of the apartment complex where the plaintiff lived. The incident occurred on March 3, 2014, and the plaintiff filed the lawsuit on March 3, 2016. Under the statute of limitations for personal injuries, the lawsuit would have been timely filed. However, the lease contained a provision that required any lawsuit against the owner and/or manager to be filed within one year of the occurrence giving rise to the claim. Based on this contractual limitations provision, the Superior Court of Clayton County granted summary judgment for the defendant.

The plaintiff appealed to the Georgia Court of Appeals, which affirmed the trial court's decision on May 1, 2018. The plaintiff argued that a contractual limitations provision should not apply to claims that do not arise out of the contract. Because the plaintiff's claim was based on O.C.G.A. § 51-3-1, not the lease, she contended that her claim was subject to the statutory limitations period of two years. The Court of Appeals disagreed, holding that the absence of a relationship between the lease and the claim was irrelevant because the contractual limitations provision in the lease applied by its own terms to "any legal action." There being no statute or public policy prohibiting the shortening of a statutory limitations provision in a contract, the Court of Appeals concluded that the contractual limitations provision in the lease was valid and enforceable and that, therefore, the plaintiff's claim was time-barred.

Duke R. Groover, a partner at **James-Bates-Brannan-Groover** in Macon, and associate **Christopher R. Conley** recently obtained summary judgment on behalf of a consolidated government, which was sued by a bicyclist after he injured himself riding his bike on a public recreational trail. The defendants argued that plaintiff's claims were barred by sovereign immunity and the Georgia Recreational Property Act (RPA). The superior court granted summary judgment to the consolidated government, holding that sovereign immunity and the RPA barred all plaintiff's claims, despite evidence that the consolidated government had an inspection policy, because there was no evidence the consolidated government had actual knowledge of the defect in the trail.

Lee M. Gillis, Jr. and **Duke R. Groover**, partners at **James-Bates-Brannan-Groover** in Macon, and associate, **Rachel R. Turnbull**, recently obtained summary judgment on behalf of the father of a driver of a car involved in a wreck. The plaintiff and the defendant driver were involved in a motor vehicle accident in which the plaintiff was seriously injured. The plaintiff brought suit against the driver and his father, suing the father on the grounds of negligent entrustment and the family purpose doctrine because the father was the owner of the vehicle and was paying for the insurance on the vehicle. The defense moved for summary judgment on behalf of the father, which the superior court granted. The court held that the father did not have the requisite control over the vehicle to implicate the family purpose doctrine. Further, the court held that actual knowledge of his son's several speeding tickets did not put the father on notice of his son's propensity for dangerous driving. ◆

Welcome, New GDLA Members!

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

Ellis Alexander Allen, II
Brennan Wasden & Painter Savannah

Germaine Anthony Austin
Hawkins Parnell Thackston & Young, Atlanta

Kayla Bell
Waldon Adelman Castilla Hiestand & Prout, Atlanta

John David Blair
Levy Sibley Foreman & Speir, Columbus

Jennifer Brinkman
Flannery Jones Day, Atlanta

Jay Brown
Cowsert Heath, Athens

Morgan P. Carrin
Brennan Wasden & Painter, Augusta

Christopher Conley
James Bates Brannan Groover, Macon

Shellea Diane Crochet
Lewis Brisbois Bisgaard & Smith, Atlanta

I. William Drought, III
Oliver Maner, Savannah

Jesse Elison
Smith Moore Leatherwood, Atlanta

Suneel Gupta
Baker Donelson Bearman Caldwell & Berkowitz, Atlanta

Austin Mark Hammock
Levy Sibley Foreman & Speir, Columbus

Ashley Hatchett
Groth & Makarenko Suwanee

Samuel Wilson Hughes
Carlock Copeland & Stair, Atlanta

Lauren Hogan
Insley & Race, Atlanta

Blake Howell Joiner
Hawkins Parnell Thackston & Young, Atlanta

Eleanor Jolley
Swift Currie McGhee & Hiers, Atlanta

Virginia Candace Josey
Noland Law Firm, Macon

Joseph A. Kaiser
Groth & Makarenko, Suwanee

Madison Hunter Kitchens
King & Spalding , Atlanta

Adebola Lamikanra
Insley & Race, Atlanta

Christine H. Lee
Miller & Martin, Atlanta

Lindsay Mayo
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Paige McKinney
Bendin Sumrall & Ladner, Atlanta

Jennifer Mills
Gray Rust St. Amand Moffett & Brieske, Atlanta

Garrett Murphy
Brennan Wasden & Painter, Augusta

Stephanie Parker
Jones Day, Atlanta

William B. Pate
Cruser & Mitchell Norcross

Amanda Dawn Proctor
Carlton Fields Jorden Burt, Atlanta

Jordan Raymond
McAngus Goudelock & Courie, Atlanta

Kimberly Roeder
Scrudder Bass Quillian Horlock Taylor & Lazarus, Atlanta

Hector Rojas
Rutherford & Christie, Atlanta

Dana Schwartzenfeld
Drew Eckl & Farnham, Atlanta

Katherine Dale Sheriff
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Brandee Lattimore Strothers
Worsham Corsi Scott & Dobur, Atlanta

Rachel Turnbull
James Bates Brannan Groover, Macon

Patricia-Anne Upson
Constangy Brooks Smith & Prophete Macon

All members are encouraged to recruit their colleagues to join the GDLA!

We have crossed the 900-member mark and continue to expand the voice of the defense bar in Georgia.

Our membership application is now online; prospects can visit the Membership tab at **www.gdla.org**.

Click on the **Find a Defense Lawyer** tab to see if someone is already a member.

Supreme Court Sides with GDLA Amicus Brief on Failure to Settle Suit Against Insurer

On June 4, 2018, the Supreme Court of Georgia granted a petition for certiorari in a failure to settle case in which GDLA filed an amicus brief in support of the petition (*First Acceptance Insurance Company of Georgia v. Hughes,* Supreme Court of Georgia, Case No. S18C0517).

First Acceptance Insurance Company of Georgia filed a petition for certiorari, asking the Court to overturn a decision by the Georgia Court of Appeals and affirm a decision by the State Court of DeKalb County granting summary judgment to the insurer in a bad faith/negligent failure to settle case. In its opinion reversing the State Court, the Court of Appeals held that a jury question existed as to whether two letters from the plaintiff's attorney conveyed a settlement offer and whether such an offer included a deadline for a response.

In its brief, GDLA argued that the Court of Appeals' decision is contrary to well-established Georgia precedent that (1) the interpretation of a settlement offer—like any contract—is a question of law, and (2) the question of whether a legal duty exists is likewise a question of law to be decided by a court and not a jury. For that reason, GDLA urged the Supreme Court to grant certiorari to review the erroneous decision by the Court of Appeals.

The Respondent filed a motion to strike GDLA's amicus brief, claiming it sought "to interject additional legal issues into this proceeding that were not raised by Petitioner, First Acceptance Insurance Company, in its Petition for Writ of Certiorari." In response, GDLA noted, among other things, that the issues raised in its amicus brief were not new issues, but simply a different way to argue the issues raised by Petitioner. The Supreme Court of Georgia denied the motion to strike GDLA's amicus curiae brief and subsequently granted the petition for certiorari.

In its order granting certiorari, the Supreme Court identified two key questions in which it is primarily interested:

1. Did the Court of Appeals err in reversing the grant of summary judgment to the insurer on the insured's failure-to-settle claim, on the basis that questions of fact existed for the jury to determine as to whether the injured party offered to settle her claims within the policy limits, and established a 30-day deadline to accept the offer?
2. Does an insurer's duty to settle arise when it knows or reasonably should know settlement within the insured's policy limits is possible with an injured party or only when the injured party presents a valid offer to settle within the insured's policy limits?

GDLA thanks the authors, David Atkinson and Jonathan Kandel of Swift Currie McGhee & Hiers in Atlanta, for their work on this. The Amicus Committee is led by Co-Chairs Marty Levinson of Hawkins Parnell Thackston & Young in Atlanta and Garret Meader of Drew Eckl & Farnham in Brunswick. ◆

GDLA Law School Award Recipients Honored

Anna Usry (center) was presented the GDLA Rusty Gunn Award during the Mercer Law School Student Dinner on May 10, 2018. This annual award, established by GDLA, honors the memory of long-time Board of Directors member Robert R. "Rusty" Gunn. It recognizes a student whose professionalism is his/her badge of honor, and who quietly leads with strength, intelligence and good humor. This year's recipient was particularly special, since she was a summer clerk at Rusty's firm, Martin Snow, and will begin working there after graduation. She is pictured with firm lawyers Cubbedge Snow III (left) and Bill Larsen.

Hallie Willis (left) was this year's recipient of the Willis J. "Dick" Richardson Jr. Student Award for Outstanding Trial Advocacy at the University of Georgia School of Law. This annual award, sponsored by GDLA, honors the memory of one of GDLA's founding members. It was presented on April 11, 2018; the recipient is pictured with Dean Peter B. Rutledge.

Court of Appeals Agrees with GDLA Amicus Brief: Evidence of Financial Interest of Plaintiff's Treating Physician Should Have Been Admitted

On March 28, 2018, GDLA filed an amicus curiae brief in the Georgia Court of Appeals regarding the exclusion of evidence at trial concerning a plaintiff's treating physician.

The primary issues addressed concerned the trial court's exclusion of evidence that the plaintiff's own attorney referred her to seek medical treatment from a particular treating physician-as opposed to referral from another medical provider in the normal course of the practice of medicine. Also addressed was the trial court's exclusion from evidence of the same treating physician's lien on the plaintiff's medical bills and the potential bias it created concerning his care and treatment of the plaintiff. GDLA filed its brief to argue that the trial court incorrectly excluded both pieces of evidence from jury consideration at the trial of the case.

On May 29, 2018, the Court of Appeals issued its opinion, agreeing with Appellant, and the GDLA amicus brief, that evidence of Dr. Chappuis' financial interest in the case should have been admitted at trial. The Court dismissed Appellee and GTLA's argument that a lien was a collateral source, and thus was properly excluded.

The Court of Appeals declined to find error in the trial court refusing to uphold the settlement agreement, finding that the strongest argument in support of an enforceable settlement agreement was waived in the trial court below, and thus not properly presented for appeal. The Court also did not find error in the trial court's exclusion of the evidence that Castano's attorney referred her to Dr. Chappuis, the treating physician and expert witness. The Court was careful to note, however, that this was only their ruling for the facts of this case, and could not be used as precedent that evidence of referral by an attorney was never admissible. A petition for certiorari is pending.

The case is *Stephens v. Castano-Castano*, Georgia Court of Appeals Case No. A18A0100.

We thank the brief's authors, Kristin Pierson and Paige McKinney of Bendin Sumrall & Ladner in Atlanta for their service to GDLA. You can find this brief, and all other privious ones, under Amicus Policy & Briefs in the members only area of our website. ◆

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Using Body Language to Win at Mediation

By Lee Tarte Wallace
BAY Mediation & Arbitration Services

Before a mediation, most lawyers give a great deal of thought to the words they will say. They craft persuasive briefs for the mediator and outline their opening remarks.

But very few think about how they can harness body language to make the mediation successful, even though anthropologist Ray Birdwhistell estimated that "no more than 30 to 35 percent of the social meaning of a conversation or an interaction is carried by the words."[1] Body language experts Allan and Barbara Pease reviewed thousands of videotapes of sales interviews and negotiations, concluding that "body language accounts for between 60 and 80 percent of the impact made around a negotiating table."[2]

Using a basic understanding of body language, mediators and lawyers can create an atmosphere that will encourage parties to settle, can read what the participants are thinking, and ultimately can help steer the mediation toward settlement.

Creating an Atmosphere That Encourages Settlement

To make the most of mediation, the atmosphere needs to encourage the parties and their lawyers to settle. By picking a mediation service that handles the basics, like comfortable chairs and conference rooms, snacks and meals, the lawyer is free to focus on how the parties interact.

Beyond the Firm Handshake

Attorneys have been schooled to give a firm handshake, but the way they offer that firm handshake conveys a message to the person they are greeting.

A person who offers his hand with his palm turned at least partially downward is forcing the other person to assume a submissive position with the palm facing up. Being dominant types, most attorneys instinctively offer their hands in the dominant position, without giving any thought to whether it helps or hurts the cause. But in a mediation, where the goal is to get the case concluded, it might make more sense to create a cooperative atmosphere by offering a handshake of equality, where both people's palms are facing to the side. If the goal is to apologize, it might be worth offering a submissive handshake.

Seating Arrangements

At mediation, typically the mediator sits at the end of the table and the lawyers sit directly next to the mediator and across from each other, leaving the clients to sit further from the mediator and across from each other. Occasionally a mediator will ask the two clients to sit next to him or her. But in most cases, neither approach creates the best atmosphere for resolving the case.

According to research by body language experts Allan and Barbara Pease, people sitting directly beside one another become more cooperative, and the feeling also spills into the relationship between the person sitting at one end of the table and the person sitting next to him, but along one side of the table. People sitting directly opposite each other, however, tend to become more competitive, defensive, and entrenched in their views, as the table reinforces the barrier between them. People sitting cattycornered away from each other tend to be somewhat neutral or indifferent to one another.

The mediator should sit at the end of the table, since the mediator needs to gain the confidence of every participant. But putting the lawyers across from each other, and the clients in the same confrontational position, usually will not be the best solution. The parties likely have some history, and the feelings between them may fall anywhere from tense to outright hostile. Frequently the lawyers also have developed friction between them, having gone through a fractious and competitive litigation process.

With a few exceptions (such as when both clients are new to the mediation experience), it usually will make sense to put the client with the least mediation experience next to the mediator, since that client will need the most encouragement to engage in the mediation process. But instead of seating the other client directly beside the mediator, the lawyer for the other side should be seated directly by the mediator. The lawyers and the clients will

Continued on page 46

What Are Medical Bills Really Worth?

CPT Code	Description	Provider Charge	Medicaid Allowable	Medicare Allowable	Insurance Allowable	Work Comp Allowable
70450-26	CT Scan/Head	190.00	37.64	46.08	69.12	104.28
70450-TC	CT Scan/Head	1386.00	126.47	126.47	164.41	199.00
71020-26	Xray - Chest	43.00	10.03	11.81	17.12	33.45
71020-TC	Xray - Chest	180.00	57.35	57.35	58.65	95.59
72125-26	CT Scan/Body	220.00	51.75	57.89	86.84	131.22
72125-TC	CT Scan/Body	1386.00	126.47	126.47	202.35	347.60
72141-26	MRI - Spinal cord	315.00	71.21	79.99	99.99	184.23
72141-TC	MRI - Spinal cord	2256.00	294.78	294.78	383.21	411.90
73030-26	Diagnostic Radiology	40.00	8.15	10.60	14.84	29.68
73030-TC	Diagnostic Radiology	240.00	57.35	57.35	80.29	99.36
	Total	**$6,256.00**	**$841.20**	**$868.79**	**$1,176.82**	**$1,636.31**

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Health Care Claim Forms: What They Are and How They Can Help

By Will Ronning
Coastal Medical Billing

Every time a request is made for medical records and bills it amazes me to see the kind of information that is provided. Often times the provided information includes various statements, bills, copies of ledgers and receipts requiring the recipient to put together a puzzle to understand what was done, why it was done and for how much. This hodgepodge of information makes the process of trying to determine what services were billed very confusing and time consuming. Many times what is provided lacks the information needed to determine who provided the services, what services were provided, where the services were provided and why the services were provided. One of the reasons for this is that each healthcare provider has a customized billing system.

The invoicing and ledger systems have minimum information and are only user friendly to those who have spent years looking at the information and understand the codes and descriptions involved. However, there is a simple solution to this problem. When requesting medical records and bills, it is suggested that the request include language to obtain in addition to what is normally requested, all charge and claim information on standardized health care claim forms known as either the UB-04 (Institutional Provider) or CMS 1500 (Physicians). These two standardized forms are well recognized by healthcare providers. Even though most claims are submitted electronically these days, it should be very easy for healthcare providers to generate a paper healthcare claim form. The information provided on the forms will help summarize the services the patient received in a clean and consistent manner.

UB-04: Institutional Provider Form

The UB-04 was created by The Centers for Medicare and Medicaid (CMS), and has developed and evolved into one of the most commonly used forms for billing a medical or mental health claim. The American Hospital Association and the National Uniform Billing Committee are in charge of designing and modifying the UB-04 form and its guidelines. The National Uniform Billing Committee (NUBC) is the governing body for forms and codes used in medical claims billing in the United States for institutional providers like hospitals, hospital owned surgery centers, nursing homes and home health agencies. The UB-04 is the standard form for paper billing institutional medical claims in the United States and the UB-04 form is the form that any institutional provider, to include hospitals and surgery centers, should be able to easily generate.

Fields of the UB-04 Form

At first impression, the UB-04 form looks rather innocuous. But closer inspection reveals that each box has a specific purpose. There are lots of fields on a UB-04 and each field has a unique purpose so that the information can be communicated in a consistent manner. The UB-04 form is designed differently than a CMS-1500 due to the need by hospitals to include more descriptive information on a claim.

There are several areas of the UB-04 form that can help with understanding the who, where, when and why the services were provided by the institutional provider.

- Field 4 –Type of Bill: This field is a four-digit code which identifies the type of facility and the type of care. The first digit is always zero. For example, 011X would indicate a hospital inpatient care.
- Field 14 – Type of Admission: This field is for inpatient services. The single-digit code in this field indicates the basic type of care provided. For instance, a 1 indicates an emergency visit and 3 represents an elective, scheduled visit.
- Field 18 – FL 28 – Condition Codes: These 10 spaces are reserved for condition codes that apply to the bill. For example, 02 is the code for an employment-related condition.
- Field 42 – Revenue Code: This field should include all charges incurred, even those that are not covered. Revenue codes are divided into categories for easier identification. For example, codes in the 011X category indicate the patient stayed in a single-bed room. The final digit identifies the service received. For example, 0115 would indicate hospice care in a private room.
- Field 67 – Principal Diagnosis Code: Here's where ICD codes come into play. In this field, DRG codes are entered. In FL 66, the person filling out the form must indicate which revision of ICD they are using. Prior to October 1, 2015 ICD-9 codes were used. After October 1, 2015, ICD-10 codes were used universally.

CMS-1500 Form: Physician Claim Form

The Centers for Medicare & Medicaid Services (CMS), previously known as the Health Care Financing Administration (HCFA), is a federal agency within the United States Department of Health and Human Services (HHS). The Form CMS-1500 is the basic form for physician claims and suppliers. With the transition of the medical community to electronic data interchange, it became essential that an organization be established to maintain uniformity and standardization. The NUCC (National Uniform Claim Committee) is responsible for maintaining the integrity of and physical layout of the hard copy 1500 claim form. The CMS-1500 is the universal claim form used by non-institutional healthcare providers (physicians, private practices, etc.) to bill for services rendered.

When a physician has a private practice but performs services at an institutional facility such as a hospital, outpatient facility or their office, the CMS-1500 form would be used to bill for their services. Form CMS-1500 contains all the basic information needed to submit an accurate claim. This includes fields for the patient's demographic information, boxes in which to provide medical codes and correspon-

ding dates of service. It's much easier to think of the form as containing sections of data, each of which combine together tell the patient's demographics, procedures and diagnoses along with the provider's information. It is the second half of the CMS 1500 claim form in the section labeled Physician and Supplier Information that has helpful information to include: diagnosis codes, procedure codes, charges and provider information.

Fields of the CMS-1500 Form

There are several areas of the CMS-1500 form that can help with understanding who, where, when and why the services were provided by the healthcare provider.

- Field 24A – Dates of Service: Individual dates of when services where provided.
- Field 24B – Place of Service Code: This is a two digit code to signify where the service was provided such as a hospital, surgery center or physician's office.
- Field 24D- Procedures Code: Where CPT codes are entered along with a modifier if necessary. Modifiers provide additional information such as if the provider is a surgical assistant or in the case of radiology if the service was for the professional component only.
- Field 24E – Diagnosis pointers: This is where the appropriate ICD code is entered and explains the reason for each procedure performed.
- Field 24F – Charge: Where the total charge for each line of service is entered.
- Field 24G – Units. This is where the number of units is entered. It should include the total number of units provided. For example physical therapy services are often provided in 15 minute units. This number should include all units for the date of service.
- Field 24J – Rendering provider ID: This shows the individual who provided the service.
- Field 32 – Service Facility Location: Is the actual location where the services were provided. This could be the hospital address or the surgery center location.
- Field 33 – Billing Provider: The billing provider field designates who is billing for the service. This could be either an individual provider or a group.

As previously mentioned, even though most healthcare providers submit their claims electronically, there are many situations where they still need to print off a hard copy claim. Therefore, it should be very easy for the healthcare providers to produce the claim information on a UB-04 and/or CMS-1500 form. These forms will then provide the claim information in a standardized format making it easier for all parties to understand who provided the services, what services were provided, where the services were provided, why the services were provided and for how much. ◆

Will Ronning is the President and Owner of Coastal Medical Billing, Inc., a GDLA Platinum Sponsor. As a 20- person regional medical billing service located in Savannah, they handle medical billing duties for 22 different practices, including 75 providers of various specialties. Prior to founding CMB in 2011, he was a partner with the Savannah law firm of Bouhan Williams & Levy. Mr. Ronning has been designated by the Healthcare Billing and Management Association as a Certified Healthcare Billing and Management Executive (CHBME).

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Understanding the Value of Structured Settlements

By William J. Wright
Ringler Associates

Understanding all the tools that are available during the settlement process is critical to delivering a win to clients. One of those tools can be the use of a structured settlement, but to be able to properly use a structured settlement, it's important to understand it. In this article we will briefly explore the legislative foundations of structured settlements, the advantages of structured settlements as a technique for more holistic settlement planning, and some mechanics and practice tips for the consideration and use of structured settlements.

It is important to note there are many areas of comprehensive settlement planning not addressed here that are also worthy of time and attention such as integrating structures with trusts and other settlement vehicles, attorney fee deferrals, use of index-based annuities, factoring, the current legislative environment to protect annuitants, and more. Attorneys who would like to learn more about these are encouraged to work with an experienced settlement consultant with a strong educational and financial background.

What is a Structured Settlement?

A structured settlement is a voluntary agreement to pay damages to an injured party in the form of a defined stream of future periodic payments tailored to meet the specific needs of the injured party. Most structured settlements are established through the use of a specialty annuity product or reinsurance contract underwritten by one or more highly-rated life insurance companies. When used for settlement of personal physical injury claims (including workers compensation), structured settlement payments, both return of principal and accumulated interest, are income tax-free to the annuitant.

The use of a structured settlement annuity protects the injured party from much more than taxes. Prior to structured settlements, damages paid because of an injury lawsuit came in the form of a single lump sum. This kind of payment, especially in catastrophic injury cases, often placed the injury victim or family in a difficult financial position as most are not adequately equipped to manage large sums of money. The use of guaranteed periodic payments, either over a determined period or a lifetime, provides future income free of investment risk.

Structured settlements can be a unique and innovative method of tailoring settlement compensation using streams of payments to meet a plaintiff's future medical expenses and living needs.

A Brief Legislative History

Since 1954, the Internal Revenue Service Code Section 104(a)(1) and (a)(2) has ensured settlements of personal injury cases, including workers' compensation, are exempt from gross income consideration; that is, settlements are income tax-free. In 1982, a bipartisan coalition of legislators in Congress came together to pass the Periodic Payment Settlement Act of 1982 (Public Law 97-473) which amended the federal tax code to codify prior Revenue Rulings. This action formally recognized and encouraged the use of structured settlements in physical injury cases. As a result, payments received by a claimant in a personal injury case, whether received as a lump sum or as periodic payments, would be exempt from federal income tax, assuming specific requirements were met.

In order to provide a tax-free benefit to the injured party, such periodic payments were now required to be fixed and determinable as to amount and time of payment, and the periodic payments cannot be accelerated, deferred, increased, or decreased by the injured party. Importantly, through the addition of IRC Section 130, the Periodic Payment Settlement Act allowed defendants / insurers to assign the obligations to make future periodic payments to a third party, without retaining a future obligation to the injured party. This Section enabled the use of 'Qualified Assignments', pursuant to adherence to the requirements discussed shortly. Section 130 of the Code was amended effective August 5, 1997 to permit qualified assignment of workers' compensation structured settlements.

Early Use of Structured Settlements

The early use of periodic payments to settle physical injury claims is tied to the Thalidomide-related severe birth defect cases in the 1960s where the drug was approved and prescribed for easing early-pregnancy morning sickness. The ensuing litigation resulted in more claims than the manufacturers had insurance coverage for or could pay from the corporate entity. Periodic payments to the plaintiffs, made over long periods of time, and first made by means of a trust, compensated the injured to a much greater degree over time than would have been possible had the insurer paid lump sum cash settlements.

In the early and middle 1970s, California experienced a period of rapidly

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Social Influence in the Courtroom: What It Is and What to Do About It

By Steve M. Wood, Ph.D. & Lorie Sicafuse, Ph.D.
Courtroom Sciences, Inc.

Aristotle once said, "Man is by very nature a social animal … Anyone who either cannot lead the common life or is so self-sufficient as not to need to, and therefore does not partake of society, is either a beast or a god." Few places epitomize the idea of partaking in society quite like a courtroom. In the courtroom, members of society convene to hear arguments and make decisions that impact the lives of others. Sometimes these decision makers are judges and other times they are jurors.

All the time, however, parties with a vested interest in the case outcomes are trying to persuade the decision makers to side with their perspective.

Because the courtroom is predicated on the notion of persuasion, social influence can play a pivotal role in the decision-making process of attorneys, judges, and jurors. This influence can occur at any time throughout the case, can manifest itself in many forms, and can originate from various sources. However, if attorneys do not know the who, what, where, when, why, and how of social influence, how can they confidently value their clients' cases? Moreover, how can they provide their clients with an accurate recommended settlement amount or evaluate the level of exposure if the case were to go to trial? Not knowing the answers to these questions (or receiving the wrong answers because of improper research) could lead to recommended settlement amounts that are too high, costing the client thousands, if not millions, of dollars. It could also lead to winnable cases being settled and cases that should have been settled going to trial; once again, causing clients to pay unnecessary amounts of money.

This article provides answers to the who, what, when, where, why, and how questions to help attorneys feel more confident in their decisions to settle or take cases to trial. First, we identify the various types of social influence that operate over the course of a trial. Second, we provide suggestions for the ways in which counsel and clients can strategically use social influence to their advantage.

Majority Influence

As social beings, individuals want to be included and feel like valued members of society. This often means going with the status quo. As social psychologists have found, individuals in a group setting often conform to the majority, even when the majority is incorrect.[1] In mock jury settings, we have often seen lone jurors cave to the rest of the group after minutes, sometimes hours, of resistance to the majority. We possess similar evidence of group pressure from jurors during thousands of post-trial interviews.

This majority influence, or conformity, occurs as a result of two distinct processes. The first process, normative influence, occurs when individuals conform to other group members in order to be liked and accepted by them.[2] This reflects the group's power to punish or reward its members—follow along with the group and get rewarded by the positive feeling of inclusion; go against the group and experience the unpleasantness of ostracism.

The second process, informational influence, occurs when individuals turn to other group members to help obtain information and aid in the decision-making process. This type of behavior is common when individuals are concerned with providing accurate responses[3] —a scenario akin to the courtroom. We have especially noticed that informational influence occurs during jury deliberations in mock trials containing highly complex information (e.g., patent cases) because individuals who lack confidence in their thoughts will rely on others to help them make what they believe to be a correct decision.[4] This can be extremely dangerous to either side's case if there is one "expert" juror on the panel. We have seen jurors with "specialized knowledge" dominate deliberations in mock trials and persuade other group members to side with the dominant juror's perspective.

Minority Influence

There are times, however, when a small few can influence the larger group. The quintessential example is the movie "12 Angry Men." In the film, Juror #8 begins deliberations by voting "not guilty" in the face of 11 other jurors who voted "guilty." Over the course of the film, Juror #8 convinces the other jurors to change their votes to "not guilty," ultimately ending up in an acquittal for the defendant. Although this is a Hollywood movie, there are times when a small group of individuals can be influential. In approximately 1 out of 10 jury trials, the

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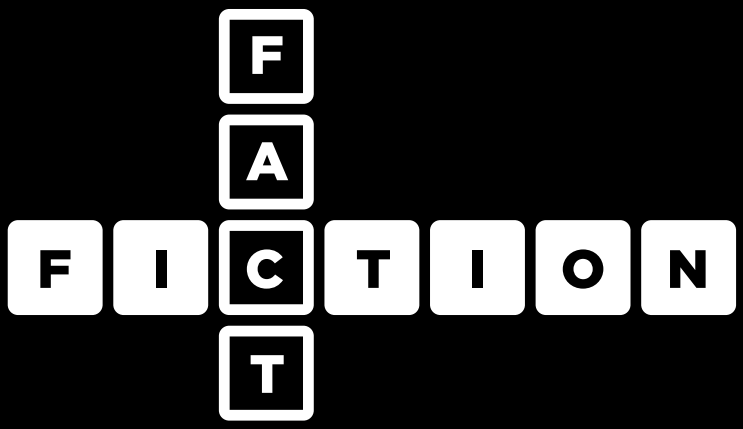

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Office Ergonomics: Computer Work Need Not be Such a Pain in the …

By Mitch Garber
Engineering Systems, Inc. (ESI)

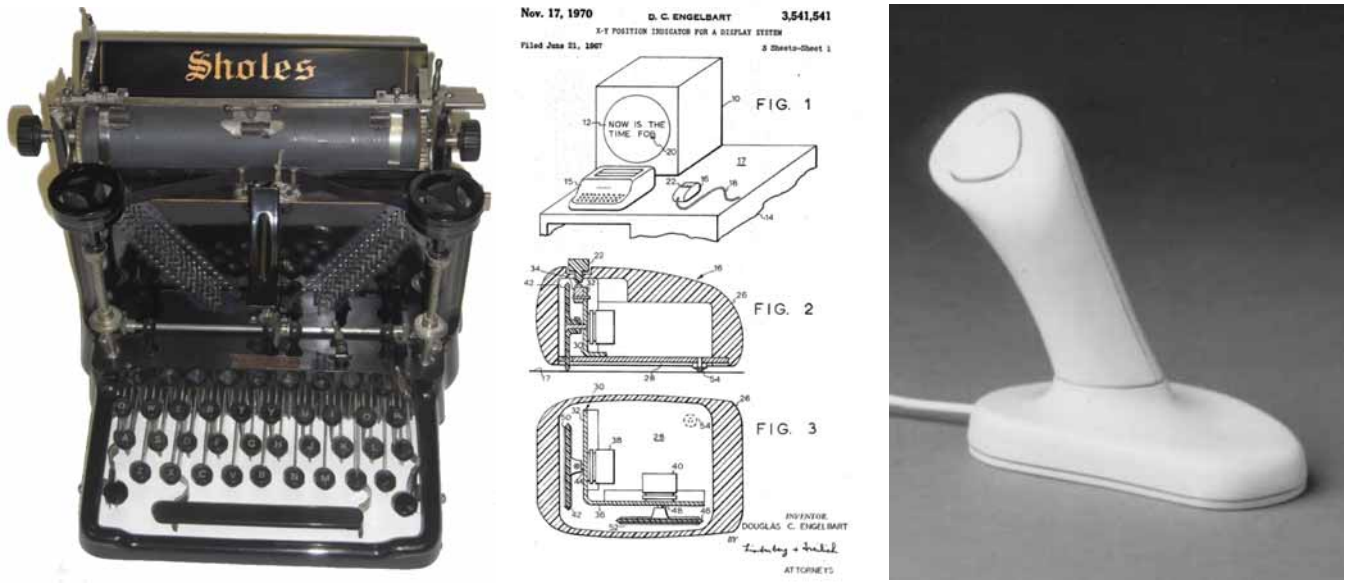

Figure 1. 1891 typewriter (left), 1970 mouse patent (center), ergonomic mouse (right)

Since you are reading this, chances are good that a substantial portion of your workday is spent in front of a computer. Chances are even better that there was more thought put into the arrangement of the furniture in your office lobby than the arrangement of your computer workstation.

Office ergonomics applies engineering principles to the interaction of humans and their office workspaces, and the appropriate application of these principles can have substantial positive effects on the comfort and usability of today's workspaces.

Background

We have all heard of medical conditions such as carpal tunnel syndrome and degenerative disc disease, but it is important to understand the physiology behind these disorders to assess how proper office ergonomics can help prevent them from occurring or keep them from worsening. As an example, the pressure in an intervertebral disc is highest in a sitting position,[1] which is why individuals with back and/or leg pain from disc disease often find their pain exacerbated when sitting in a traditional desk chair.

It is also important to understand the scientific foundation (or lack thereof) for current guidance regarding computer workstation layout. One example of a situation where research may not be consistent with existing recommendations is monitor distance guidelines. The U.S. Occupational Safety and Health Administration (OSHA) recommends that a monitor be placed at a distance of 20 to 40 inches from the user.[2] However, this guidance is based on studies that primarily focused on individual preference in position when looking at early video display terminals (VDTs).[3] More recent findings indicate that even 33 inches is too far away and resulted in users leaning forward.[4] Shorter distances resulted in less irritated eyes, less headache, less blurriness, and quicker vision recovery.

While many keyboards and other workstation control devices are labelled "ergonomic," the basic arrangement of the keyboard has not changed in over 150 years (see Figure 1). The computer mouse is still recognizable from the original patent application nearly 50 years ago (see Figure 1, center image). Neither were developed with today's digitally powered workforce in mind, or designed to ensure that prolonged use would not result in discomfort. Only a few designs developed since that time have been tested to determine whether they could benefit users with musculoskeletal issues (see Figure 1).[5]

Recommendations

So how should the average person set up their computer workstation? Wrong question. A computer workstation set up for the "average" person is unlikely to be optimal for a specific user. There are, however, some principles that are supported by (or at least

Continued on page 59

Appellate Case Law Update

By Mark Wortham, Section Chair
Hall Booth Smith, Atlanta

COLLATERAL SOURCE RULE: In this slip and fall case the Eleventh Circuit found that the District Court's admission of evidence did not run afoul of Georgia's collateral source rule where the payment of medical bills was made by a third-party company that referred the plaintiff to treating physicians and purchased the plaintiff's medical debt at a discounted rate. The Court reasoned that evidence could show bias of the treating physicians.

***ML Healthcare Services, LLC v. Publix Super Markets, Inc.*, 881 F.3d 1293 (2018).**

Appellant-Plaintiff Houston, a shopper at a Publix grocery store, fell in the dairy aisle. She sued Publix in state court, alleging that she had slipped on liquid that had been left in the aisle, and that her fall caused serious injuries. Publix removed the case to federal court on the ground of diversity jurisdiction. After an eight-day trial, the jury returned a verdict in favor of Publix. The Eleventh Circuit, Carnes, J., affirmed an order of District Court, Thrash, J., denying the shopper's motion in limine to exclude evidence related to a third-party company, ML Healthcare. Interested-Appellant, ML Healthcare, referred Plaintiff to treating physicians and purchased her medical debt at discounted rate.

During the discovery period, Publix learned that ML Healthcare is a "litigation investment" company that contracts with doctors to provide medical care for patients who lack medical insurance. ML Healthcare purchases, at a discounted rate, from these physicians the medical debt that the plaintiffs incur during their treatment. The contract also allows ML Healthcare the right to later recover the full cost of the medical care provided out of any subsequent tort settlement or judgment. Publix's discovery showed that ML Healthcare had entered into agreements with Appellant Houston and the treating doctors who would testify at her trial.

The appellate court discussed the collateral source rule and the reasons for it, and also the reasons where there are exceptions. One of those exceptions is that, "Georgia appellate courts have recognized that evidence of collateral benefits received by the plaintiff may be admissible for impeachment purposes when a witness gives false evidence relating to a material issue in the case." (Citations omitted). In the appellate court, Plaintiff Houston and ML Healthcare argued the collateral source rule was violated as a result of the district court's orders requiring ML Healthcare to produce and admitting at trial the payments made by ML Healthcare to the treating doctors.

As the appellate court explained, "ML Healthcare matches injured, uninsured plaintiffs who have viable tort claims with treating doctors. It then purchases at a discounted rate the medical bills these doctors generate. To recoup its investment and make a profit, its contract with the plaintiffs permits ML Healthcare to recover the full amount of these bills from any tort damages recovered by the plaintiffs." The way this works is, "In short, the contract allows ML Healthcare to recover the difference between the discounted bills it pays treating doctors and what those doctors say is the full value of those medical services: either from the plaintiffs themselves or from any tort recovery the plaintiffs receive." The court then stated that a plaintiff who recovers insufficient damages to pay back ML Healthcare may be unable or unwilling to repay their debt, meaning that without a recovery ML Healthcare will be out of its investment and profit. "Thus, for its business model to flourish, ML Healthcare needs the plaintiffs whom it subsidizes to win their lawsuits." Adopting the defendant's argument the court found that this could create the basis of bias and held the District Court did not err in allowing this evidence for the limited purpose of showing bias on the part of the doctors who testified in this case.

The appellate court also discussed the District Court's decision to allow the defendant to attack the reasonableness of plaintiff's claimed medical expenses. Defendant argued that the doctors inflated their bills to help ML Healthcare and themselves. These bills were the basis for Plaintiff's damages. Publix argued the higher the billed price the greater the benefit to ML Healthcare. Like the bias argument, the defendant contended the unreasonable expenses were based on the assumption that the doctors provided this benefit in an effort to ensure that they continued to receive referrals from ML Healthcare. However the defendant did not use that argument and because they did not, the appellate court did not decide that issue, stating "we do not have to determine whether admissibility of the evidence to challenge the reasonability of the expenses was proper."

OFFICIAL IMMUNITY: The Court of Appeals held that factual issues precluded summary judgment for employee based on official immunity.

***Roberts et al. v. Mulkey et al.*, 343 Ga.App. 685 (2017).**

Continued on page 61

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Auto Liability Case Law Update

By Kayla Bell
Waldon Adelman Castilla Hiestand & Prout

COLLATERAL SOURCE; DISCOVERY.

***Wellstar Kennestone Hospital v. Roman*, 2018 WL 617035 (Ga. Ct. App. 2018).**

Autumn McKinney allegedly sustained injuries in an automobile accident caused by Mario Roman. On the day of the accident, McKinney treated at an emergency room at WellStar Kennestone Hospital, where she incurred $15,919 in bills. She later filed suit seeking damages related to her injuries.

Roman sought to depose WellStar regarding its "rates or charges for those services ... if provided to uninsured patients; to insured patients; to patients under workers compensation plans; to patients under Medicare or Medicaid plans; and to litigant and non-litigant patients[.]" WellStar filed a motion to modify Roman's subpoena to exclude questioning regarding how much the hospital was willing to "write off" its bills, arguing that such questioning was "not reasonably calculated to lead to the discovery of admissible evidence" because "write-offs" were considered collateral source information. Roman responded by arguing that he believed McKinney did not have health insurance at the time of the collision, and WellStar's charges to McKinney exceeded by $13,125 what WellStar typically received in payment for the same services.

The trial court denied WellStar's motion, finding that Georgia law does not support WellStar's "contention that the collateral source rule bars the *discovery* of the medical rates and charges of *third parties* that are not involved in this case." (emphasis added). Rather, the collateral source rule bars defendants from *presenting* evidence that the *involved party* herself received payment from a third party. WellStar had further argued that the collateral source rule precluded Roman from using such "write-off" evidence to attack the reasonableness and necessity of McKinney's hospital bill, as the issue before a jury should be the reasonableness and necessity of her treatment.

The Court of Appeals found no abuse of discretion in the trial court's denial of WellStar's motion to modify the subpoena. In its holding, the Court emphasized the wide latitude given to make complete discovery possible and the burden on WellStar "to show more than that the materials would not themselves be admissible at trial."

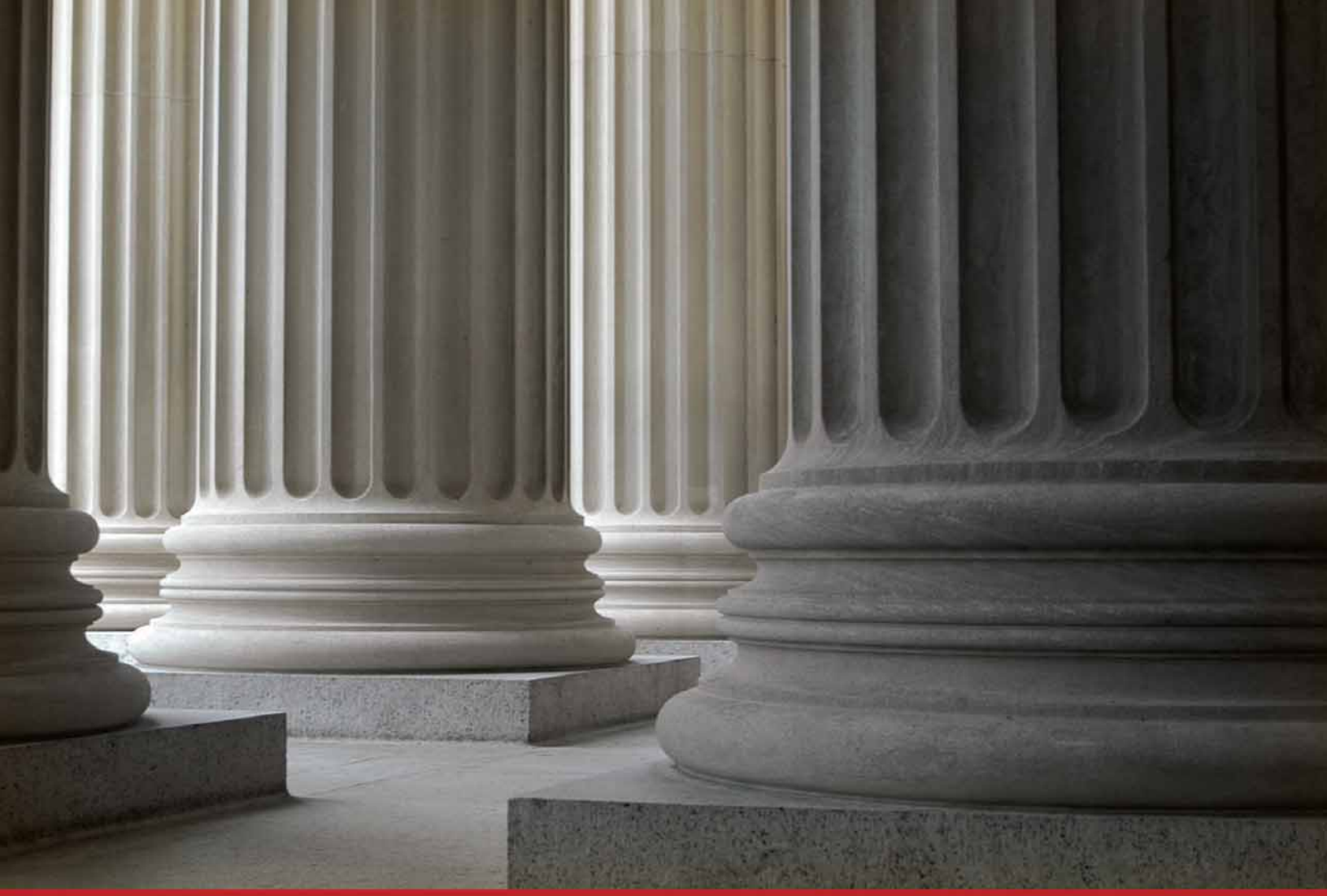
FAMILY PURPOSE DOCTRINE; SERVICE; SUMMARY JUDGMENT

***Anderson v. Lewis, et al.*, 809 S.E. 2d 260 (Ga. Ct. App. 2017).**

Teena Anderson filed suit to recover damages for injuries sustained in an automobile accident with Dana Brown. Brown's grandfather, Clarence Lewis, owned the vehicle Brown was driving at the time of the accident. Anderson brought suit against Brown and against Lewis based upon the family purpose doctrine.

The trial court dismissed Brown for lack of service and therefore granted summary judgment for Lewis based upon the precedent set by *O'Hara v. Gilmore*, 310 Ga. App. 620, 713 S.E. 2d 869 (2011). *O'Hara* involved a nearly identical fact pattern: the parents of a driver were barred from judgment as a matter of law when their daughter was dismissed as a party due to lack of service. Anderson contended that the ruling in *O'Hara* was inconsistent with the Supreme Court's decision in *Hedquist v. Merrill Lynch, Pierce, Fenner & Smith*, 272 Ga. 209, 210 (1), 528 S.E. 2d 508 (2000) and should therefore be overruled. *Hedquist* held that only an adjudication on the merits of the case bar a claim against a vicariously liable master (e.g. claims brought under the family purpose doctrine). The dismissal of Brown for lack of service was not an adjudication on the merits; thus, the trial court had no basis to grant summary judgment for Lewis.

The Court of Appeals overruled *O'Hara* to the extent it conflicted with the Supreme Court's holding in *Hedquist* and reversed the trial court's judgment. ◆



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Inaugural Deposition Skills Workshop Explores Cross-Examining an Orthopedic Surgeon

Immediately preceding the 15th Annual Judicial Reception on February 1, 2018 at the State Bar, GDLA hosted the first in what will be a series of CLEs focused on cross-examining plaintiff's expert witnesses. The initial installment addressed deposing a spinal surgeon regarding alleged orthopedic injuries.

Wayne Melnick of Freeman Mathis & Gary in Atlanta was the moderator. Panelists included Will Ellis of Hawkins Parnell Thackston & Young in Atlanta; Dave Nelson of Chambless Higdon Richardson Katz & Griggs in Macon; and Matt Stone of Stone Kalfus in Atlanta. Each had specific experience with a particular surgeon, and they used their prior knowledge to explore what pre-deposition discovery can and should be done in such situations. In addition, video from actual cross-examinations was presented and dissected.

The program drew a record crowd for a GDLA educational program. Look for another one to take place immediately prior to the 16th Annual Judicial Reception on February 7, 2019, at the State Bar.

If you have ideas about which type of expert you would like to see covered in 2019—and also if you believe you could participate as a speaker—please reach out to GDLA Executive Director Jennifer Davis. ◆

Pictured at the CLE are: 1. Will Ellis, Dave Nelson, and Wayne Melnick; 2. Matt Stone and Zach Matthews; and 3. Wayne Melnick.

Board of Directors Holds Winter Meeting

As is tradition, the GDLA Board of Directors held its Winter Meeting the day after the judicial reception, convening at State Bar Headquarters on February 2, 2018. We were again honored to have DRI Executive Director John Kouris there to report on the state of the national defense bar and DRI's efforts in that regard. GDLA is a state affiliate of DRI. After adjourning, past presidents, officers and vice presidents headed to the Capital City Club for the third annual Past Presidents Luncheon.

Those present at the Winter Meeting were **Executive Committee:** President Sarah B. "Sally" Akins, Ellis Painter Ratterree & Adams, Savannah; President-Elect Hall F. McKinley III, Drew Eckl & Farnham, Atlanta; Treasurer David N. Nelson, Chambless Higdon Richardson Katz & Griggs, Macon; Secretary Jeffrey S. Ward, Drew Eckl & Farnham, Brunswick; Immediate Past President Peter D. Muller, Goodman McGuffey, Savannah; Past President Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta; and Past President Kirby G. Mason, Hunter Maclean, Savannah. **Vice Presidents:** James D. "Dart" Meadows, Balch & Bingham, Atlanta; George R. Hall, Hull Barrett, Augusta; and William T. "Bill" Casey, Jr., Swift Currie McGhee & Hiers, Atlanta. **Directors:** Beth Boone, Hall Booth Smith, Brunswick,; Garret W. Meader, Drew Eckl & Farnham, Brunswick; Martin A. "Marty" Levinson, Hawkins Parnell Thackston & Young, Atlanta; Jason D. Lewis, Chambless Higdon Richardson, Macon; Jason C. Logan, Constangy Brooks Smith & Prophete, Macon; Tracie G. Macke, Brennan Wasden & Painter, Savannah; Wayne S. Melnick, Freeman Mathis & Gary, Atlanta; Erica L. Morton, Swift Currie McGhee & Hiers, Atlanta; James C. Purcell, Fulcher Hagler, Augusta; Ashley Rice, Waldon Adelman Castilla Hiestand & Prout, Atlanta; Joseph D. Stephens, Cowsert Heath, Athens; James S.V. Weston, Trotter Jones, Augusta; and C. Jason Willcox, Moore Clarke DuVall & Rodgers, Albany. **Past Presidents:** N. Staten Bitting, Jr., Fulcher Hagler, Augusta; George E. Duncan, Jr., Dennis Corry Smith & Dixon, Atlanta; Morton G. "Salty" Forbes, Forbes Foster & Pool, Savannah; Warner S. Fox, Hawkins Parnell Thackston & Young, Atlanta; Theodore "Ted" Freeman, Freeman Mathis & Gary, Atlanta; W. Melvin "Mel" Haas III, Constangy Brooks Smith & Prophete, Macon; Walter B. McClelland, Mabry & McClelland, Atlanta; and Lynn M. Roberson, Miles Mediation, Atlanta. **Committee Leaders:** Judicial Chair David C. Marshall, Hawkins Parnell Thackston & Young, Atlanta; and Legislative Chair Jacob E. "Jake" Daly Freeman Mathis & Gary, Atlanta. **DRI:** John Kouris, DRI Executive Director; and Douglas K. Burrell, DRI Secretary-Treasurer, Drew Eckl & Farnham, Atlanta; **GDLA:** Jennifer M. Davis, Executive Director. ◆

Pictured are: 1. President-Elect Hall McKinley and VP Dart Meadows; 2. DRI Executive Director John Kouris; 3. VP Bill Casey and Past President Matt Moffett; 4. Jason Logan and Joe Stephens; 5. David Marshall; and 6. Jake Daly.

GDLA Honors its Past Presidents


1

GDLA Past Presidents were honored at the third annual luncheon held on February 2, 2018 at the Capital City Club downtown. The gathering followed the Winter Meeting of the Board of Directors. President Sally Akins entertained the crowd with a trivia contest about each of the past presidents.

Those present are pictured above in photo 1. Front row (L-R) are: J. Bruce Welch, 1992- 93, Hawkins Parnell Thackston & Young, Atlanta; current President Sarah B. "Sally" Akins, Ellis Painter Ratterree & Adams, Savannah; Morton G. "Salty" Forbes, 1991-1992, Forbes Foster & Pool, Savannah; Robert M. "Bob" Travis, 2007-2008, Bryan Cave, Atlanta; Kirby G. Mason, 2014-2015, Hunter Maclean, Savannah; and James E. "Jimmy" Singer, 2008-2009, Bovis Kyle Burch & Medlin, Atlanta. Back row are: Lynn M. Roberson, 2012-2013, Miles Mediation, Atlanta; N. Staten Bitting, Jr., 2009-2010, Fulcher Hagler, Augusta; Theodore "Ted" Freeman, 2013-2014, Freeman Mathis & Gary, Atlanta; Warner S. Fox, 2006-2007, Hawkins Parnell Thackston & Young, Atlanta; Matthew G. Moffett, 2015-2016, Gray Rust St. Amand Moffett & Brieske, Atlanta; Walter B. McClelland, 2001-2002, Mabry & McClelland, Atlanta; Eugene P. "Bo" Chambers, Jr., 1981-1982, Chambers & Aholt, Decatur; and Peter D. Muller, 2016-2017, Goodman McGuffey, Savannah. Photo 2: Past Presidents Staten Bitting, Walter McClelland, Jimmy Singer and Bob Travis. Photo 3: Past Presidents Lynn Roberson and Ted Freeman. ◆


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GDLA Honors Judiciary at 15th Annual Reception

The 15th Annual Judicial Reception took place on February 1, 2018 at the State Bar Center in Atlanta. Pictured enjoying the evening are (L-R): 1. Jack Hancock, Mark Bardack, Supreme Court Justice Mike Boggs, and President Sally Akins; 2. Kimberly Stevens, Wayne Melnick, U.S. District Court Judges Leigh May and Tripp Self, and Lindsay Ferguson; 3. Bert Hummel and Court of Appeals Judge Chris McFadden; 4. Kevin Doyle and Cobb Superior Court Judge Ann Harris; 5. Court of Appeals Chief Judge Stephen Dillard and John McKinley. **See more photo highlights on the next two pages.**

More Scenes from the 15th Annual Judicial Reception

The 15th Annual Judicial Reception attracted a record number of GDLA members and judges from various state and federal courts. Pictured are 1. Earl King and DeKalb State Court Judge Al Wong; 2. Alycen Moss, Court of Appeals Judge Sara Doyle, Sherrie Brady, Parks Stone, and Frank Bedinger; 3. VP Bill Casey and Cobb State Court Judge Jane Manning; 4. Clint Fletcher, President-Elect Hall McKinley, and DRI Executive Director John Kouris; 5. Cobb Superior Court Judge Greg Poole, Patrick Leed, and Cobb Superior Court Judge Rob Leonard; 6. U.S. District Court Judge Mark Cohen and Marty Levinson; 7. Sandie Cianflone, Fulton State Court Judge Susan Edlein, and Stephanie Vari; 8. DeKalb State Court Judge Stacey Hydrick and Past President Warner Fox; 9. Rick Sager, Anandhi Rajan, Court of Appeals Judge John Ellington, Steve Mooney, and Shane Keith; 10. Angie Doan and Court of Appeals Judge Carla McMillian; 11. Henry State Court Judge Jason Harper and James Hankins; 12. Forsyth State Court Judge Leslie Abernathy-Maddox and Matt Stone; 13. Cobb State Court Judge Eric Brewton and Brian Johnson; 14. State Board of Workers' Compensation Chairman Judge Frank McKay and LeRyan Lambert; 15. Fulton Superior Court Judge Paige Whitaker and Secretary Jeff Ward. **See previous page for more photos.**


6
BOARD OF DIRECTORS


7


8
JUDGE


9


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JUDGE


11
MEMBER


12


13
JUDGE
MEMBER


14


15

GDLA-GTLA Women Compete in the Kitchen, Not the Courtroom

The women's caucuses of GDLA and the Georgia Trial Lawyers Association (GTLA) enjoyed an evening of networking, wine tastings, and cooking tutorials at Vino Venue on March 1, 2018. After getting acquainted at a welcome reception, the ladies divided into four teams to cook in competition for the best tapas dish. There were prizes for the winners and for two opposing lawyers who scheduled a mediation that night!


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Pictured enjoying some friendly culinary competition are: 1. Angela Forstie, Chelsea Murphy, Elizabeth Stell, Ashley Rice, Meri Benoit, Samantha Dorsey, Sharon Zinns, and Natanya Brooks (that's GTLA, GTLA, GDLA, GDLA, GTLA, GDLA, and two GTLAs.) 2. Jennifer Coalson and Dana Schwartzenfeld of GTLA and GDLA, respectively. 3. Tracee Benzo and Carolyn Lee of GTLA and GDLA, respectively. 5. Judy Farrington Aust and Liliya Makhlaychuk-Sharma of GDLA and GTLA, respectively.

5. GDLA President Sally Akins and GTLA member Michelle King. 6. GDLA's Gillian Crowl and Lucy Aquino with GTLA Women's Caucus Chair Laurie Vickery and GDLA member/State Bar YLD President Nicole Leet.

Lunchtime Fun with U.S. Legal Support

GDLA Platinum Sponsor U.S. Legal Support sponsored a burger lunch hour on April 11, 2018, at Gibney's Pub in Peachtree Center. It was a great opportunity for a midday break to network with other members and enjoy the pub's famous, mouthwatering sandwich.

Pictured relishing the burger lunch are: 1. Ryan Del Campo; 2. U.S. Legal Support's John Shinkle, David Lin, and Jesse Elison; 3. Jim Cook and Chuck Dalziel; 4. U.S. Legal Support's Rachel Amin and Past President Warner Fox; 5. Michael P. DiOrio and Jason Deere; 6. Matt Boyer, Tina Cheng, and Sam Hughes; 7. U.S. Legal Support's Lorrie Thomason, President-Elect Hall McKinley, and Vice President Pamela Lee.

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GDLA and DRI Young Lawyers Hold Joint Happy Hour

The Young Lawyers Committees of DRI and GDLA held a joint DRI/GDLA Young Lawyers Happy Hour at Establishment in Midtown Atlanta on May 3, 2018. The event was organized by Brett Tarver of Jones Day in Atlanta, and sponsored by GDLA Platinum Sponsor Engineering Systems, Inc. (ESI). DRI members who have not been members of GDLA within the past five years, and otherwise qualify for membership, are eligible for a free year of GDLA membership.

Pictured at happy hour are: 1. ESI's Heather Uhrinek, GDLA Past President and DRI Regional Director Ted Freeman, and Brett Tarver; 2. Jennifer Nichols, Josh Joel, Elissa Haynes, and Yamisi James; 3. Rachel Hudgins, Elizabeth Stell, and Elizabeth Googe; 4. Alan Payne, Tina Cheng, and Mike Davis.

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GDLA and GTLA Present Inaugural Civility & Professionalism Awards

The Georgia Defense Lawyers Association and Georgia Trial Lawyers Association teamed up to create the GDLA-GTLA Civility & Professionalism Award to recognize and honor a member of each organization who embodies these ideals. Each group chose the winner from nominations submitted from their respective memberships.

For the inaugural award, GDLA selected Phil Henry of Cash Krugler & Fredericks in Atlanta and GTLA chose Michael Rust of Gray Rust St. Amand Moffett & Brieske in Atlanta. The honors were bestowed at a reception on May 9 at the Capital City Club downtown.

Court of Appeals Judge Carla McMillian (center photo 1) offered welcoming remarks on behalf of the Chief Justice's Commission on Professionalism and the appellate bench. GTLA President Laurie Speed of Speed + King Law Firm in Atlanta (right) presented the award to Mr. Rust (second from right) and GDLA President Sally Akins (left) of Ellis Painter Ratterree & Adams in Savannah presented the award to Mr. Henry. (Photo 1 is courtesy of John Disney, *Daily Report.*)

Also pictured at the celebration are (L-R): 2. Jena Emory, Jennifer Coalson, Kayla Chen, and Nicole Leet; 3. Bill Major, Ken Hodges, and Past President Matt Moffett; 4. Judy Aust and Court of Appeals Judge Chris McFadden.


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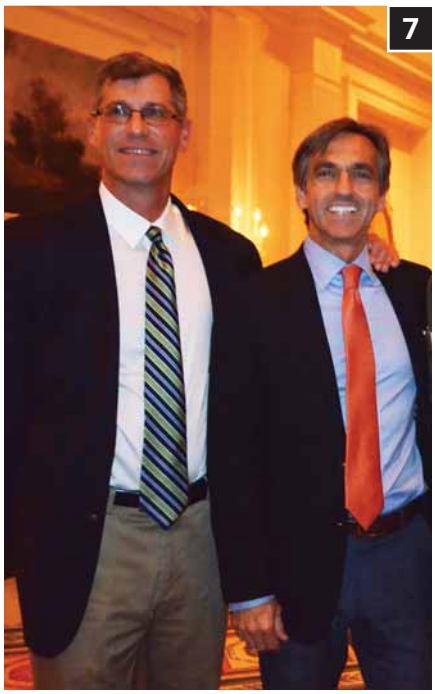
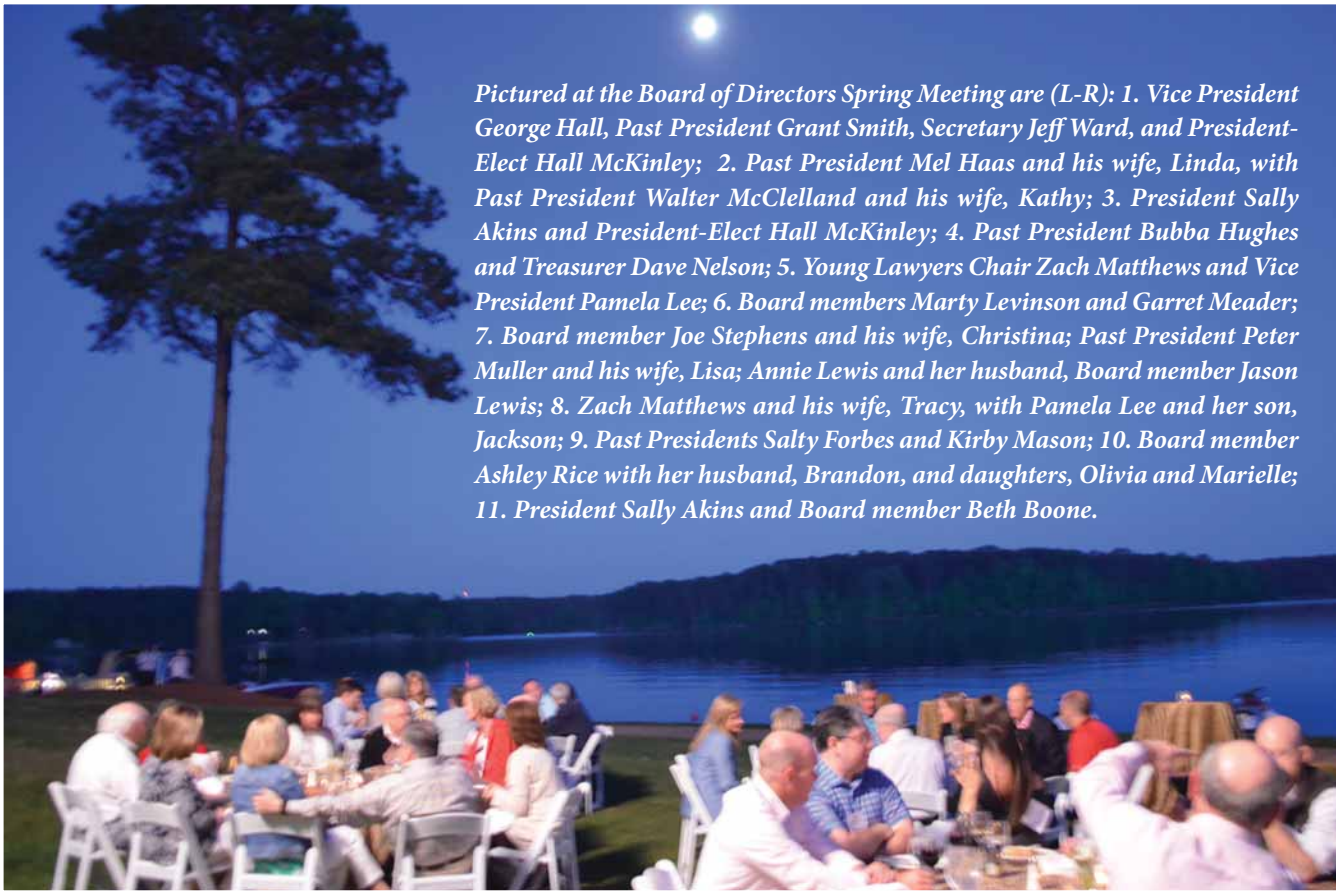


Pictured enjoying the reception in honor of the inaugural GDLA-GTLA Civility & Professionalism Award winners are (L-R): 5. Court of Appeals Judges John Ellington and Herb Phipps with Lance Lourie and Past President Walter McClelland; 6. Andy Cash and Harvey Gray; 7. Jim Brieske and State Bar Executive Director Jeff Davis; 8. Treasurer Dave Nelson and William Atkins; 9. Candis Jones and Madeleine Simmons; 10. Vice President Bill Casey, Mary Lewis, and Jimmy Hurt.

Board Holds Spring Meeting at Lake Oconee

The GDLA Board of Directors held its Spring Meeting at the Ritz-Carlton Reynolds at Lake Oconee from April 27-29, 2018. The weekend commenced with a reception in Magnolia Cottage, after which everyone enjoyed dinner on the lakefront lawn under a spectacular moonlit sky. The Board met on Saturday morning, and then the group adjourned to enjoy the resort. That evening was another cocktail reception, and then everyone dispersed to dinner on their own. For a full report, find the minutes in the members only area of our website.

Those present were **Executive Committee:** President Sarah B. "Sally" Akins, Ellis Painter Ratterree & Adams, Savannah; President-Elect Hall F. McKinley III, Drew Eckl & Farnham, Atlanta; Treasurer David N. Nelson, Chambless Higdon Richardson Katz & Griggs, Macon; Secretary Jeffrey S. Ward, Drew Eckl & Farnham, Brunswick; Immediate Past President Peter D. Muller, Goodman McGuffey, Savannah; and Past President Kirby G. Mason, Hunter Maclean Exley & Dunn, Savannah. **Vice Presidents:** William T. "Bill" Casey, Jr., Swift Currie McGhee & Hiers, Atlanta; George R. Hall, Hull Barrett, Augusta; Pamela N. Lee, Swift Currie McGhee & Hiers, Atlanta. **Directors:** Beth Boone, Hall Booth Smith, Brunswick; Martin A. "Marty" Levinson, Hawkins Parnell Thackston & Young, Atlanta; Jason D. Lewis, Chambless Higdon Richardson, Macon; Garret W. Meader, Drew Eckl & Farnham, Brunswick; James Purcell, Fulcher Hagler, Augusta; Ashley Rice, Waldon Adelman Castilla Hiestand & Prout, Atlanta; Joseph D. Stephens, Cowsert Heath, Athens; and James S.V. "Jamie" Weston, Trotter Jones, Augusta. Past Presidents: N. Staten Bitting, Jr., Fulcher Hagler, Augusta; Morton G. "Salty" Forbes, Forbes Foster & Pool, Savannah; Theodore "Ted" Freeman, Freeman Mathis & Gary, Atlanta; W. Melvin Haas III, Constangy Brooks Smith & Prophete, Macon; Edward M. "Bubba" Hughes, Ellis Painter Ratterree & Adams, Savannah; Walter B. McClelland, Mabry & McClelland, Atlanta; and Grant B. Smith, Dennis Corry Smith & Dixon. Atlanta. **Committee Leader**: Young Lawyers Chair Zach Matthews, McMickle Kurey & Branch, Alpharetta. **GDLA:** Jennifer M. Davis, Executive Director. ◆



Pictured at the Board of Directors Spring Meeting are (L-R): 1. Vice President George Hall, Past President Grant Smith, Secretary Jeff Ward, and President-Elect Hall McKinley; 2. Past President Mel Haas and his wife, Linda, with Past President Walter McClelland and his wife, Kathy; 3. President Sally Akins and President-Elect Hall McKinley; 4. Past President Bubba Hughes and Treasurer Dave Nelson; 5. Young Lawyers Chair Zach Matthews and Vice President Pamela Lee; 6. Board members Marty Levinson and Garret Meader; 7. Board member Joe Stephens and his wife, Christina; Past President Peter Muller and his wife, Lisa; Annie Lewis and her husband, Board member Jason Lewis; 8. Zach Matthews and his wife, Tracy, with Pamela Lee and her son, Jackson; 9. Past Presidents Salty Forbes and Kirby Mason; 10. Board member Ashley Rice with her husband, Brandon, and daughters, Olivia and Marielle; 11. President Sally Akins and Board member Beth Boone.

Body Language

Continued from page 15

then be in positions that are neutral and not oppositional with each other.

Reading the Body Language of the Other Side

Like businesspeople negotiating a deal, mediation participants will telegraph whether they are closed or open to ideas, whether they are lying or hiding information, and whether they intend to walk away.

But in business negotiations, the parties typically spend the day together as they work out a deal, and they can witness the other side's body language firsthand. Mediations, on the other hand, involve disputes and lawsuits, not deals; in a nod to the tensions that typically run high, in most cases mediators find it is more productive if the parties are separated for most of the day.

That critical difference means that the mediator has a heightened need to be attuned to body language. The mediator has the job of delivering tough messages, diplomatically pointing out the flaws in a case, and softening the blow of unpalatable offers and demands. To succeed, the mediator needs to gather information beyond the words the parties say.

Closed vs. Open Body Language

When a person uses open body movements, he is listening and engaged. But when he starts to fold his arms across his body and cross his legs away from the speaker, he may be telegraphing that he does not like what is being said. The situation is even clearer if the person clenches his hands:

> Research into the Hands Clenched position by negotiation experts Neirenberg and Calero showed that it was also a frustration gesture when used during a negotiation, signaling that the person was holding back a negative or anxious attitude. It was a position assumed by a person who felt they were either not convincing the other person or thought they were losing the negotiation.[3]

The Peases found that the higher the person held his clenched hands, the more intense his negative attitude. Even if the person is crossing his arms simply for effect, his closed position can hurt the chances the mediation will succeed. Studies show that a person in a closed position will retain 38 percent less of what is said.[4]

> It may be pointless continuing your line of argument even though the person could be verbally agreeing with you. The fact is that body language is more honest than words. Your objective should be to try to work out why they crossed their arms and to try to move the person into a more receptive position.[5]

To get the deal done, the mediator and the lawyers need to communicate that they are open and receptive to settlement by maintaining open body language and using gestures with their palms facing up. They should nod frequently while others are speaking. They also need to pay attention when someone closes off his body, and take steps to get that person re-engaged in the discussion—before making the next offer or demand.

Spotting a Lie

Was that *really* the least the plaintiff would accept? Does the defendant *actually* have evidence no one else knows about?

People have less control over everyday, automatic gestures than they do over their words. By keying in to the body language, lawyers may be able to spot someone who is lying even when the person's words sound believable.

Savvy attorneys should watch for any hand-to-face gesture, which could mean that a person is lying or at least holding back information. For example, a person may cover his mouth, touch his nose, rub his eye, or grab his ear. The person may scratch his neck, pull on his collar, or gulp several times.[6] His legs may start to move or twitch, or conversely may suddenly go still.[7] He may cross and lock his ankles when he is holding back important information.[8] If a person says he understands your point of view but simultaneously shakes his head no[9] or pretends to pick imaginary lint from his clothing,[10] he probably disagrees with you.

Ready to Make a Decision—or Leave?

When a person leans forward, one hand on one leg and the other elbow on the other leg, he is showing "seated readiness." The Peases called seated readiness "[o]ne of the most valuable gestures a negotiator can learn to recognize,"[11] because it marks the point at which the listener is ready to make a decision. But if the person leans forward with both hands on his knees or gripping the chair, he is ready to leave—a far different message, and one the mediator and lawyers need to handle completely differently.[12]

Using Body Language to Influence the Mediation

Because body language is so powerful, lawyers, clients and mediators can use it to encourage suits to settle. By mirroring and smiling to establish rapport, bringing visual aids, and making apologies more effective, mediation participants can increase the chances of winning a favorable outcome at mediation.

Mirroring

Scientists have discovered that the human brain has a "mirror neuron system" that allows a person to mirror the actions and behavior of someone else. This neuron system allows one person to intuit the feelings of another, and to empathize and experience similar emotions.[13] "Studies into synchronous body language behavior show that people who feel similar emotions, or are on the same wavelength and are likely to be experiencing a rapport, will also begin to match each other's body language and expressions."[14]

Mirroring may be innate, but it also can be a tool to build rapport in a mediation. "It is possible to influence others by mirroring their positive gestures and posture. This has the effect of putting the other person in a receptive and relaxed frame of mind, because he can 'see' that you understand his point of view."[15]

The Old-Fashioned Smile

Negative emotions run high at mediations, but as simple a thing as smiling can relax the participants and make a settlement more likely. According to research by Professor Ulf Dimberg at Uppsala University in Sweden, the human face instinctively reacts to a happy or angry look on another person's face. In fact, even people who are trying not to react to someone else's expression "could not avoid producing a facial reaction."[16]

Businesspeople talk about 'emotional contagion,' and tout a "strong correlation between smiling and positive business outcomes."[17] "[S]miling at the appropriate time, such as during the opening stages of a negotiating situation where people are sizing each other up, produces a positive response on both sides of the table that gives more successful outcomes and higher sales ratios."[18]

Don't try to fake your way through the smile, though. A genuine smile, known as the Duchenne smile, "involves both voluntary and involuntary contraction from two muscles: the zygomatic major (raising the corners of the mouth) and the orbicularis oculi (raising the cheeks and producing crow's feet around the eyes)."[19] Many people can spot a fake smile.[20]

Visual Presentations Persuade

The business world is quantifying what lawyers have known all along: humans are more persuaded by what they see than what they hear. According to a study at the Wharton Research Center, when a business presentation includes visual aids, retention zooms from 10 percent to 50 percent and the average meeting is shortened from 25.7 minutes to 18.6 minutes.[21] So attorneys should curate their strongest exhibits and use them at strategic points during a mediation.

Rethinking the Apology

According to studies by Professor Jennifer Robbennolt of the University of Illinois College of Law, a defendant who apologizes may whittle down the size of the amount he has to pay. Robbennolt found that claimants who received apologies "judged an offer as being more adequate, felt less need to punish the other party, and were more willing to forgive than were participants who did not receive apologies."[22] Furthermore, they were more likely "to accept a particular settlement offer."[23]

Attorneys sometimes advise their clients to take advantage of mediation to offer an apology, in hopes it will placate an angry plaintiff and decrease the amount it takes to get the case settled. But in most cases, the apology is weak and ineffective. The defendant sits directly opposite the plaintiff, legs spread and elbows on the arms of the chair. He gazes away from the plaintiff as he mumbles a half-hearted, defiant apology. Nothing about his body language suggests he really is sorry.

If the client has decided to make an apology, why not coach him on how to use body language to support his goal? He should start the mediation by offering the plaintiff a submissive handshake, and when he apologizes he should avoid looking cocky and letting

his body language bely his words. He should put his elbows inside the chair, not on the arms, and, with palms facing up, offer his apology while looking directly at the plaintiff.

Conclusion

By virtue of their training and natural skill set, lawyers tend to be excellent verbal communicators. By adding in an understanding of body language, they can help their clients favorably settle cases at mediation. ◆

Lee Tarte Wallace has been handling complex cases involving business disputes, product liability, premises liability, class actions, mass torts, medical malpractice, personal injury and whistleblower/qui tam law for the past 25 years. A Past President of the Georgia Association for Women Lawyers, Ms Wallace has been named a Georgia SuperLawyer every year since the poll began. She trained in the mediation and negotiation workshop courses while in law school at Harvard. She is a mediator and arbitrator at BAY Mediation & Arbitration Services, GDLA Platinum Sponsor.

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Structured Settlements

Continued from page 20

escalating medical malpractice jury verdicts. The early innovators of the use of structured settlements where reminded of the Thalidomide cases and the structured settlement industry was born. Because of the innovation, ingenuity, and hard work of the early adopters of the structured settlement concept, the practice has become an integral part of the litigation and claims settlement landscape for over forty years now in the United States.

Structured Settlements and the Qualified Assignment Process

Tax law, under the doctrine of *constructive receipt*, prohibits a claimant from owning a structured settlement annuity in his or her own right. As such, the annuity is owned either by the defendant insurance carrier or by an affiliate of the life insurer which has agreed to accept an assignment of the defendant's liability for the future payments. This assignment transaction is known as a 'Qualified Assignment' under Section 130(c) of the Internal Revenue Code.

In exchange for allowing income tax-free treatment of structured settlements and a Qualified Assignment of the future payment obligation, Congress requires a number of key elements of the settlement be met.

The periodic payments must constitute damages (other than punitive damages) on account of physical injury or sickness.

The periodic payments must be fixed and determinable at time of settlement as to amount and time of payment.

The plaintiff must not have the ability to accelerate, defer, increase, or decrease the periodic payments.

The periodic payments must be payable by the defendant or its insurer ("a party to the suit or agreement") or by an assignee who has assumed the defendant's periodic payment obligation under a qualified assignment under Internal Revenue Code section 130.

Advantages for the Plaintiff

Structured settlement annuities, like other safe investment vehicles, grow in amount over time from earnings on the principal and current tax law allows this growth free from income tax. Although each settlement plan is different, it is not unusual for an annuity to pay out double or triple what it costs to buy it in today's dollars. In a structured settlement case, the full amount (the settlement amount and the annuity growth) is received income tax-free by the plaintiff.

With a structured settlement, the biggest advantage to a plaintiff is certainty. The plaintiff avoids the risk of mismanagement of their funds which can result in financial loss. Most plaintiffs have little to no tolerance for investment risk. Losses in market-based investments may take months or years to



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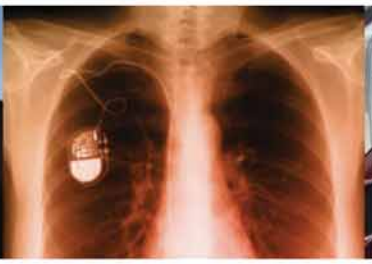


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recover, leading to potentially irrecoverable economic hardship. The security, stability and peace of mind comes from knowing the income payments will be received on the scheduled dates and further allows them to tailor the annuity to meet their specific life needs in the future. With the use of a lifetime annuity, a plaintiff can ensure that he/she will never outlive the stream of income as the payments will continue until the time of death.

Advantage to Defendant/ Insurance Carrier

It is not unusual for a plaintiff and the insurance carrier to disagree on the value of a claim because, usually, the claim is being evaluated in terms of a one-time cash settlement. Often, however, if a plaintiff shifts the focus to what he or she will need in the way of future income or benefits, an agreement can be reached which is beneficial to both parties. In short, this device often breaks deadlocks between the claimant and the insurance carrier.

Structured settlements allow the defendant/insurer to evaluate their cases in terms of what it would cost to fund an annuity which will take care of the plaintiff's future medical expenses, lost wages, and any additional future expenses. Both sides can become more creative in negotiations with the use of structured settlements during settlement discussions. In addition, the use of structured settlements elevates the probability of timely settlements, which in turn reduces the costs of litigation and the risks associated with the uncertain outcomes of a jury trial.

Nuances to Consider

There are several nuances to consider with respect to structured settlements, including:

Sub-Standard Medical Underwriting (Rated Age). A substandard policy (Rated Age) is a life annuity policy written on an individual whose life expectancy has been reduced by illness, trauma, or pre-existing conditions. Using Rated Ages can reduce the cost of the annuity or, it can increase the benefits payments for the same cost which can facilitate the settlement process. To obtain a rated age, work with a settlement consultant to navigate the paperwork and to assist in the collection of medical information.

Economic Damage Analyses: Life care planners, economists, and vocational rehabilitation experts are often crucial to the development and validation of the plaintiff's past, present, and future damages. Life care plans and wage loss projections, adjusted for inflation and other economic influences, can be priced to a present value cost with structured annuity pricing.

Cases of All Sizes: Initially, the structured settlement concept was used almost exclusively on large, catastrophic-injury cases. Today, approximately half of the cases structured nation-wide are less than $50,000 in annuity premium. Most settlements where a portion is structured also include upfront cash for attorney fees, medical expenses, and existing liens. Cases with smaller structures are often those for minors or where an adult wants to utilize a long deferral period to augment retirement income.

Summary

Structured settlements, when used effectively, offer benefits to all parties in a claim or litigation. The injured party and their family can tailor a stream of guaranteed future periodic payments to their unique, specific needs, removing uncertainty and investment risk. The plaintiff can plan for medical care, income needs, and future life events. The defendant / insurer can agree to the periodic payments as part of settlement negotiations and, following IRC Sec. 130(c) elements, permanently assign the obligation to a third party, allowing the insurer to close its file.

Structured settlements work best when future periodic payment streams can be matched to a plaintiff's unique and specific long-term needs. Hundreds of thousands of cases have resolved over the last forty plus years in the United States using some type of structured settlement, representing tens of billions of settlement dollars being multiplied for the plaintiff's benefit, income tax-free. ◆

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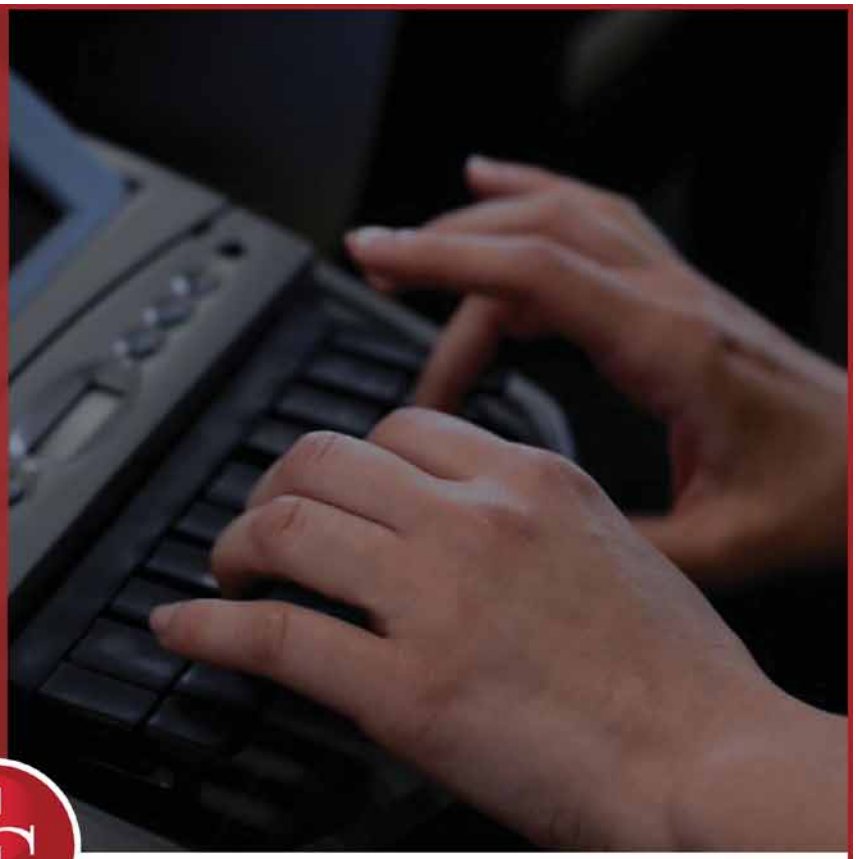

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Social Influence

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initial minority vote becomes the final group vote.[5]

Several factors need to be present before minority group members can be influential, though. First, there must be more than one individual in the minority.[5] Unlike "12 Angry Men," a single individual is not typically influential enough to sway the opinions of 11 other people (although it has been known to occur, particularly in intellectual property litigation).

Minority group members also need to remain consistent in their stance.[6] Consistency is important because: (1) it causes the majority group members to take notice of the discrepant opinion and rethink their position; (2) it gives the impression that the minority group is convinced they are correct and committed to their stance; and (3) it creates doubt in the minds of the majority group members regarding their opinion. All minority group members need to remain consistent, however. Once one minority member moves to the majority, the minority group loses their credibility and becomes less influential.

Finally, the minority group needs to be flexible in their ideas and open to hearing the viewpoints of the majority group members. The minority group can also increase its influence by compromising with the majority group and moving more toward the majority group's position.[7] Doing so signifies to the majority that the minority group is rational in their thought processes and not dogmatically adhering to their initial views.[8] As a result, the majority group shifts its opinion in the direction of the minority group.

Social Desirability Bias

Jurors are also influenced by societal expectations. Society's influence affects jurors' decision-making at two points in the trial process: *voir dire* and jury deliberations. During *voir dire*, attorneys ask jurors probing questions in an attempt to uncover jurors' beliefs and attitudes on case-relevant topics. However, these questions are typically asked in open court and the responses could be potentially embarrassing for jurors. For example, answering questions about attitudes toward race/ethnicity-related issues, large corporations, frivolous lawsuits, and religious affiliations in front of strangers can elicit stress in jurors. Private post-trial interviews with both actual and mock jurors have revealed that many jurors are compelled to express "politically correct" attitudes toward sensitive topics.

> ***"When these individuals are probed further by counsel, they may downplay their negative feelings about large corporations out of a fear that they will be ostracized by the larger group for holding such an extreme position."***

Although attorneys may believe that jurors are being open and honest in their responses, it is more likely that jurors are responding in a socially desirable way. Social desirability bias is a social psychological phenomenon in which individuals answer questions in a manner that will be viewed favorably by others. These favorable responses can take the form of over-reporting "good behavior" (e.g., frequency of volunteering behaviors), under-reporting "bad behavior" (e.g., frequency of alcohol use), possessing socially acceptable attitudes (e.g., the belief that discrimination of any kind is bad), and so on. It is difficult to know whether an individual is responding in a socially desirable way. However, as we will discuss in a later section, there is an approach that can help to identify socially desirable responding.

Social desirability can be especially dangerous if an attorney inadvertently allows "bad" jurors onto the panel. Take, for example, a case involving a large corporation. Only a few hands may be raised in response to the *voir dire* question, "Does anyone have strong feelings, positive or negative, about large corporations?" The fact that so few people have raised their hands immediately tells those individuals who have raised their hands that they possess a minority opinion. When these individuals are probed further by counsel, they may downplay their negative feelings about large corporations out of a fear that they will be ostracized by the larger group for holding such an extreme position. As a result, an attorney's concern about a potential juror may not rise to the level of striking the juror. However, unbeknownst to the attorney, one of the jurors who was passed over actually believes that all large corporations put profit over safety and would always side against them. While this may seem like an extreme example, it is observed regularly by our trained eyes and ears as litigation psychology experts. Moreover, it highlights the notion that the courtroom is not always a place where "what you see is what you get;" it is closer to, "you get what I want you to see."

Social desirability bias can reappear in the deliberation room. For example, consider a sexual assault case. Jurors in these types of cases can be reluctant to bring up rape stereotypes, such as "women 'cry rape' when they have been caught being unfaithful" and "women lie about being sexually assaulted."[9,10] Today, such comments often make individuals look insensitive, at best, or like a misogynist, at worst. We have seen primarily male jurors initially bring up these notions, only to be subsequently rebuked by the female (and some male) jurors. There-

fore, rather than entertain the notion that a sexual assault did not occur (assuming the facts of the case warrant such an assertion), jurors come to their verdict decision using other pieces of information—sometimes factual, other times attitudinal.

We observed this very process in a recent sexual assault mock trial. Initially, the male and female jurors of a deliberation group were discussing case relevant topics until one of the female panel members indicated that she had personal experience with sexual assault. For her, the focus was less on the case facts and more on her worry that any verdict against the plaintiff would be tantamount to "encouraging victim blaming" and "endorsing a rape culture." The few male jurors who initially brought up the possibility that the plaintiff initiated the sexual contact or was not being entirely truthful about the events tempered their opinions after this female juror shared her experience with the group. Essentially, this female sharing her personal experience set the precedent for how sexual assault should be viewed by the other group members. This jury ultimately rendered a verdict of $7,860,125 ($360,125 for compensatory and $7,500,000 for exemplary/punitive damages). This number is in stark contrast to the award amounts given by the other two deliberating groups—$40,000 and $125,000 in compensatory damages, respectively; neither of these two remaining groups awarded exemplary/punitive damages. Had counsel relied on the group verdicts from the other two juries, they could have made a costly mistake for their client.

One may argue that a juror with personal experience with sexual assault would never be allowed on a jury in a case involving sexual assault; however, this presupposes that potential jurors would disclose this information to the court. As we've previously mentioned, jurors may not always be forthcoming when asked about sensitive issues in open court or during written questionnaires. Jurors may even be motivated to profess neutrality, while concealing biases that may decrease their chances of being on the jury (i.e., a "stealth juror"). Moreover, with 1 in 5 women experiencing rape at some time in their lives,[11] it may be difficult to exclude all rape survivors from the venire. This is why it is important for counsel to conduct mock trials or focus groups to understand the group dynamics and how jurors' interactions with one another can shape their opinions of the case. At the very least, counsel must be ready to offer cogent arguments for cause challenges to level the playing field during selection.

The strong opinions that result from group polarization often culminate in surprisingly high compensatory and punitive damage awards.

Group Polarization

A final topic of social influence we would like to discuss is the notion of group polarization. This occurs when a group adopts a more extreme position than that which was initially held by most of its members. Over the course of discussion, the individual positions of group members often become more extreme, leading to a more extreme group-level decision—sometimes referred to as a "severity shift."[12] The strong opinions that result from group polarization often culminate in surprisingly high compensatory and punitive damage awards. Data collected from post-trial interviews with actual jurors and during mock trials reveal that polarized jurors often attempt to "one-up" each other in sharing their individual damage award preferences within the group. It should be noted that group polarization processes also can be favorable for the defense. On several occasions, we have observed mock jurors' anger towards an unsympathetic plaintiff intensify as several jurors provided examples of the plaintiff's irresponsibility and untrustworthiness over the course of deliberations. Such defense-oriented polarization has resulted in a straight defense verdict when many individual jurors initially felt that the plaintiff was entitled to recover *something*. However, group polarization processes tend to exert a stronger impact on plaintiff-oriented decision-making due to the emotional arguments advanced by typical pro-plaintiff jurors to respond from the perspective of another person or group.[16] By indicating "most people," "some of my friends," and "men typically," individuals can separate themselves from the sensitive response and project their beliefs onto other individuals. Research has shown this to be a successful technique when asking questions that are prone to socially desirable answers.

Continued on next page

Another important reason to use a supplemental juror questionnaire is that it allows counsel to look for discrepancies between juror questionnaire responses and open court *voir dire* responses. These discrepancies can help counsel identify potential "stealth jurors." Because stealth jurors rarely plan or contemplate consistency in their written and oral responses, they will often "slip up" during oral *voir dire*. For example, we have experienced an anti-oil company juror say in her juror questionnaire that she joined the Sierra Club because of her concern for the environment. When the oil company attorney asked her in open court why she joined, she replied, "I like the hikes." We have also seen jurors completely disavow anti-corporate juror questionnaire responses in open court.

Although juror questionnaires can be used to reduce social desirability bias and identify stealth jurors during *voir dire*, their use is often disregarded. This may be due to a variety of factors, such as overlooking the tactical advantage it provides, fundamentally disagreeing with its use, believing a questionnaire is not warranted in a particular case, or not arduously campaigning for its use. Whatever the reason, our experience has shown us that the juror questionnaire is the most commonly neglected weapon in trial strategy. However, failing to use one could significantly increase the chances that "bad jurors" make their way into the jury deliberation room.

Voir Dire

Another way to minimize social desirability bias at trial is to create a safe environment for jurors to express their biases. For example, anti-corporate attitudes are often suppressed by social influence, as we have discussed previously. However, such attitudes are important for a defense attorney to be aware of. To approach this type of situation, a defense attorney may ask jurors, "Some jurors believe that large corporations always put profits over safety. Other jurors believe that large corporations always try to do the right thing by their customers and their employees. Which of these statements are you closer to?" When a juror indicates that his or her attitudes fall more in line with the first statement (i.e., profits over safety), the defense should embrace the bias, thank the juror for being so open, and ask other jurors whether they agree with that individual. This approach can be tailored to other case types; however, the key is to understand that social pressures are being exerted on jurors to respond in a way that they believe the attorneys, judge, and other jurors expect them to respond. By changing the rules of what are acceptable responses, you can change the way that jurors will respond by maximizing candor (i.e., they will respond more truthfully).

Jury Selection

Information gathered from a supplemental juror questionnaire and during oral voir dire also is critical in predicting how social influence will unfold in the deliberation room. In addition to revealing pre-existing biases and case-related beliefs, responses to supplemental juror questionnaires and oral *voir dire* inquiries can reveal individual juror personality characteristics that can significantly impact the jury group decision-making process. However, the effects of juror personality on group decision-making is not as straightforward as one might assume. For instance, personality traits such as belief in a protestant work ethic (i.e., the belief that anyone who works hard can achieve success) and belief in a just world (i.e., the belief that the world is a fair place and people get what they deserve) have historically been associated with pro-defense jurors by both academic and applied researchers.[17] Yet, research has shown that, in some cases, individuals with these seemingly conservative beliefs are more inclined than their counterparts to side with the plaintiff in some group decision-making contexts—the so-called "betrayal effect".[18]

Ultimately, identifying group "leaders" is critical for counsel; but again, this task is not as straightforward as it may seem. Although responses to juror questionnaire and oral *voir dire* inquiries may illuminate leaders relatively quickly (apart from stealth jurors), we have seen such identifications backfire dramatically. For example, a male, middle-aged, well-educated conservative Marine was an extremely influential leader in a mock trial we recently conducted. Much to the surprise of counsel, however, this mock juror convinced his fellow jury members to side with the plaintiff. Defense counsel subsequently admitted that, "We would have let him slip by in jury selection, and probably even would have favored him." This statement epitomizes why it is important to enlist the services of a doctoral-level psychologist with special training in conducting mock trials, understanding the impact of social influence on jurors, and identifying the various juror "types."

Conclusion

As previously stated, humans are social beings and cannot escape the influence of one another. From television to movies to social media, we are constantly inundated with information and attempts to persuade our thinking. While we would like to believe that our decisions are made inside of a vacuum, the truth of the matter is that they are not. We would also like to believe that we are intelligent enough to not let the pressures of conformity dictate our thinking. Once again, those perceptions do not match reality. As a result, properly trained and credentialed litigation psychologists and attorneys need to work hand in hand to make sure these social influences are identified, understood, and ameliorated in every case. If not, counsel may be left with only a best guess estimate of how the case may unfold. ◆

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President's Message

Continued from page 5

membership and draws a larger crowd each year. It is a great time for GDLA members and judges to enjoy some relaxed fellowship outside of the courtroom.

Immediately before the Judicial Reception this year, we held the first of what we expect to be an ongoing educational series, Expert Deposition Skills Workshop. The inaugural session focused on deposing an orthopedic surgeon, and was organized and moderated by Wayne Melnick, Freeman Mathis & Gary, Atlanta. The program attracted the largest turnout for any seminar to date. Panelists were: Will Ellis, Hawkins Parnell Thackston & Young, Atlanta; Zach Matthews, McMickle Kurey & Branch, Alpharetta; Dave Nelson, Chambless Higdon Richardson Katz & Griggs, Macon; and Matt Stone, Stone Kalfus, Atlanta. Each offered exceedingly helpful and insightful practice pointers to the rapt audience that included a range of experience levels.

On the day following the Judicial Reception, we held the Third Annual Past Presidents Luncheon at the Capital City Club downtown. This event, during which the Association pays tribute to and thanks all the Past Presidents for their contributions and dedication to the Association, was the brainchild of Past President Matt Moffett when he was at the helm.

GDLA initiated a Women's Caucus and it had its first event in March in conjunction with GTLA's Women's Caucus. The fun evening combined wine tasting, a spirited tapas cooking competition, and networking for trial lawyers on both sides of the "v." We plan to continue holding these women's events.

Our Amicus Committee has been very busy, having filed 11 briefs since June 2017. At press time, there were two additional requests for amicus briefs under consideration. Our thanks and appreciation go to Co-Chairs Marty Levinson and Garret Meader on their continued efforts in heading this vitally important committee.

GDLA continues to build on its relationship with GTLA, an effort that was started by Matt Moffett. In addition to the joint Women's Caucus event previously mentioned, we have worked together to establish the GDLA-GTLA Professional Civility Award. In May, we will gather together for a reception at Capital City downtown, during which a member of both GDLA and GTLA will receive an award, the recipient of which will have been selected by the other organization. The Supreme Court and Court of Appeals will be invited to celebrate with us that evening.

GDLA's connection to the national defense bar, DRI, was strengthened this year when Past President Ted Freeman, Freeman Mathis & Gary, Atlanta, was installed as DRI Southeast Regional Director. Also, Douglas Burrell, Drew Eckl & Farnham, Atlanta, was elected DRI Secretary. Both he and Ted serve on the DRI Board of Directors, providing GDLA with a valuable connection to the national defense bar.

GDLA continues to enhance its visibility at the state level, as well. In June 2017, we collected our sixth Best Newsletter Award from the State Bar of Georgia; the first five had been consecutively presented.

GDLA continues to grow and now has more than 900 members from across the state. Sadly, we lost an important member in February 2018 with the passing of one of our founders; Gould Hagler, Fulcher Hagler, Augusta, served as President from 1975-1976. Gould would be proud to know GDLA has truly become an impressive collection of lawyers, rivaling any other group in this state not only in professional and intellectual acumen, but also the ability to have fun.

I have thoroughly enjoyed serving as a director and an officer of GDLA. I extend my thanks to the Board of Directors, Executive Committee and Officers for their hard work, guidance and counsel this year.

A very large thank you goes out to Dart Meadows, Balch & Bingham, Atlanta, for his efforts in putting together an outstanding *Law Journal*. Having served as *Law Journal* editor myself, I can tell you it is an incredibly time-consuming process. I know you will find this edition is filled with timely, interesting and useful articles on a wide variety of subjects.

Last, but most definitely not least, is thanks to Jennifer Davis, our incredibly talented and hard-working Executive Director. Without Jennifer, the Association would not be thriving as it is today. ◆

For the Defense,

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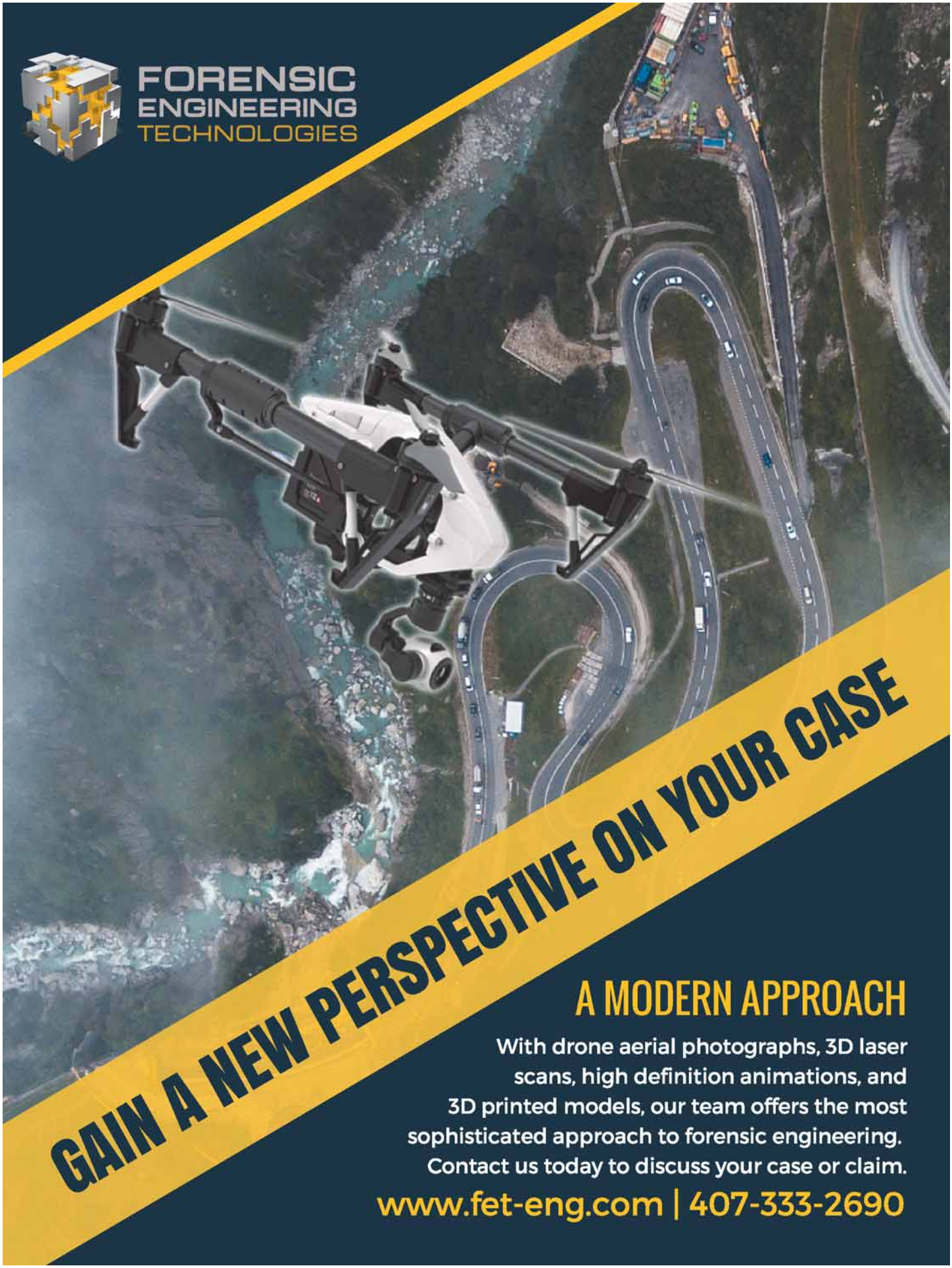
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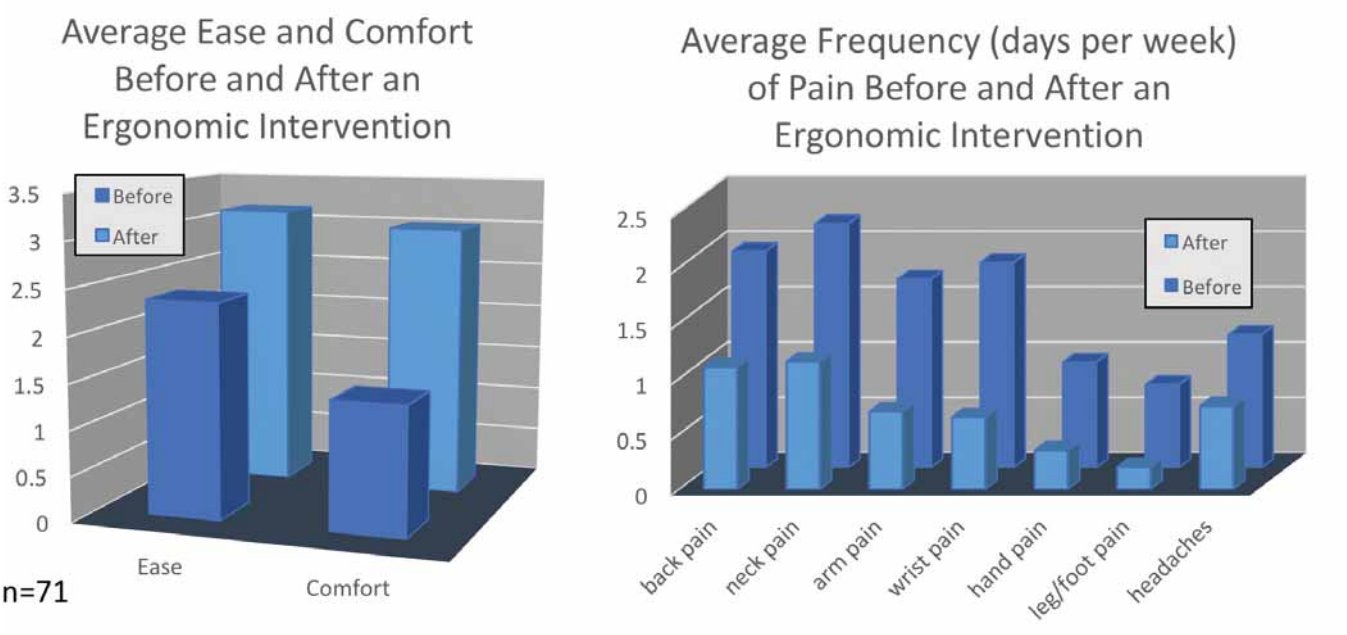


Figure 2. Effects of an ergonomic intervention

Office Ergonomics

Continued from page 25

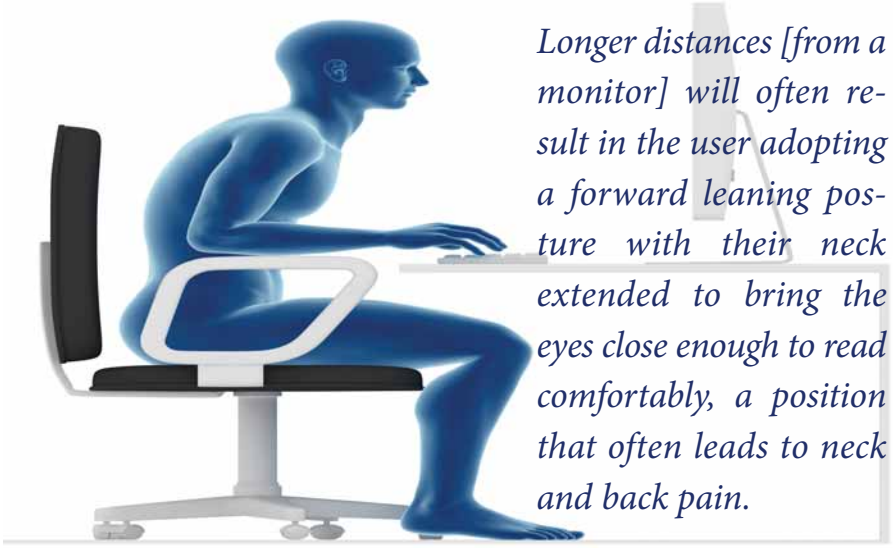
not contradicted by) scientific research that can be adapted to each individual:

Chair—Your chair does not need to be expensive or have more adjustments than you know how to operate. The most critical adjustable features include: height (which is present on almost all chairs), seat back height (which many chairs have but users often don't know how to adjust it), and seat pan depth, the horizontal distance from the front of the seat to the seat back (only a few chairs have this adjustment available). The seat pan should have a "waterfall" front, with a padded and forward curved contour and no hard edges that cause uncomfortable pressure on the back of the legs. An adjustable seat back angle (a common feature) is a nice extra if recognized and used, but is not critical. A task chair should have no arms, because arms tend to encourage awkward upper body posture and interfere with positioning of the chair relative to the desk. Individuals with low back pain due to disc disease and certain other problems may benefit from a kneeling chair or similar device which results in a more open hip angle.

Seated posture—Generally, feet should rest flat on the floor or a footrest, and knees and hips should be at about 90 degrees (though a more open hip angle may benefit some individuals with low back pain). With hands on the keyboard, elbows should be at about 90 degrees, and wrists should be neutrally aligned with the arms and hands, avoiding any angling upward, downward, inward, or outward.

Monitor—The monitor should be positioned directly in front of the user with the active window centered; in general, the use of multiple monitors should be avoided. Except for individuals who primarily use their monitors to observe graphics or video, the monitor functions more like a book than a television, and should be placed at a distance comparable to that used by the individual when reading. Longer distances will often result in the user adopting a forward leaning posture with their neck extended to bring the eyes close enough to read comfortably, a position that often leads to neck and back pain. The monitor should be positioned with the top of the screen at or slightly above eye level when sitting erect with the neck neutral, so that eye movements will be sufficient to comfortably view most of the screen without having to lean the neck forward or back. The monitor should be placed to avoid glare from light sources behind the user, and the monitor brightness should be adjusted to match the background brightness as closely as possible.

Keyboard and mouse—The alpha portion of the keyboard (excluding the numeric keypad usually at the far right of the keyboard) should be positioned directly between the monitor and the user, centered on the active window. The size and shape of the keyboard should permit neutral alignment of the wrists. An adjustable split keyboard may allow optimal customization, particularly if traditional keyboards are uncomfortable. A keyboard tray or drawer can be used to ensure that the keyboard is at the ideal height. Numeric keypads should not be included on the keyboard unless they are typically utilized. The mouse should be located immediately to the side of the keyboard, and a neutral position mouse as shown in Figure 1 (see page 60) is recommended, particularly if wrist, forearm or shoulder discomfort is present. Soft palm rests (also often called wrist rests or hand rests) should be utilized for the keyboard



Longer distances [from a monitor] will often result in the user adopting a forward leaning posture with their neck extended to bring the eyes close enough to read comfortably, a position that often leads to neck and back pain.

and the mouse to support a neutral wrist posture, encourage relaxation of the arms when not typing or using the mouse, and avoid pressure over the carpal tunnel.

Vision correction—Glasses, if worn, should be designed specifically for reading or computer use. The focal length (optimal reading distance) for such glasses should match the monitor distance. Bifocals, progressive lenses, and half lenses should be avoided, as they often result in tilting of the head and neck to see the screen. Monovision contact lenses (correcting for distance vision in one eye and near vision in the other) should not be used, nor should other contact lenses that correct for near and distance vision simultaneously. If nearsighted, consider moving the monitor closer. If farsighted, if over 40 years of age with normal distance vision, or if contact lenses are worn for distant vision, full near vision glasses set to an appropriate focal length should normally be used.

Laptops—Because the monitor position cannot normally be separated from the keyboard position, laptops should be used only occasionally. If used as desktop devices, the laptop should be equipped with a separate keyboard, monitor, and mouse.

Standing workstations—Adjustable or standing workstations may be useful for individuals with low back pain due to disc disease, but the same principles for monitor, keyboard, and mouse placement apply. There is no indication of any cardiovascular benefit from utilizing a typical standing workstation,[6] though a standing position has been shown to improve alertness over sitting, particularly in fatigued individuals.[7] A foot rest or foot rail may help alleviate positional discomfort for individuals who stand for long periods.

Individual assessment—If an individual complains of pain or discomfort, or is interested in preventing musculoskeletal issues related to their computer workstations, it may be useful to coordinate an ergonomic assessment and intervention. Individualized evaluations of office workspaces have been shown to markedly improve comfort and ease of use, and substantially reduce the severity and frequency of pain (see Figure 2 on previous page).[8]

Conclusion

When making decisions about office space, furnishings, and computer equipment, don't forget to ensure that the interface between employees and their workstations is idealized for each individual user. One size does NOT fit all. Many employees now spend 8 hours or more in front of a computer monitor, and relatively small adjustments can mean the difference between being comfortably productive and associating the workplace with constant pain. ◆

Dr. Mitch Garber is a Senior Managing Consultant with GDLA Platinum Sponsor Engineering Systems Inc. (ESI). He is a physician/engineer with over 25 years of military and civilian experience in transportation accident investigation. He was the first and only full-time Medical Officer at the U.S. National Transportation Safety Board, and specializes in the investigation of medical issues in transportation and other accidents, including the evaluation of pathology, toxicology, human performance, and biomechanics. Dr. Garber has also been providing what he calls "concierge office ergonomics" services for nearly 20 years.

Endnotes

1 Nachemson, A. L. The lumbar spine, an orthopedic challenge. Spine. 1976 1(1): 59-71.

2 See https://www.osha.gov/SLTC/etools/computerworkstations/components_monitors.html, most recently accessed on 2/12/2018.

3 See, for instance, Grandjean E et.al. Preferred VDT workstation settings, body posture and physical impairments. J Hum Ergol (Tokyo). 1982 Sep; 11(1):45-53.

4 Rempel D et.al. The Effects of Visual Display Distance on Eye Accommodation, Head Posture, and Vision and Neck Symptoms. Human Factors. 2007. 49(5), 830–838.

5 See, for instance, Aarås, A et.al. Can a more neutral position of the forearm when operating a computer mouse reduce the pain level for VDU operators? A prospective epidemiological intervention study. International Journal of Human-Computer Interaction. 2001. 13(1), 13–40.

6 See, for instance, Tudor-Locke C et. al. Changing the way we work: elevating energy expenditure with workstation alternatives. Int J Obes (Lond). 2014 Jun;38(6):755-65.

7 See, for instance, Caldwell JA et. al. Body posture affects electroencephalographic activity and psychomotor vigilance task performance in sleep-deprived subjects. Clin Neurophysiol. 2003 Jan;114(1):23-31.

8 Garber M, Piercy R. Unpublished data, 2009

Appellate Case Law

Continued from page 26

The Court of Appeals, Ellington, J., reversed the grant of summary judgment to Mulkey and his employer, the Carroll County Water Authority (CCWA). Tracey Roberts and her husband were injured when the van she was driving collided with a pile of dirt at a CCWA work site. The trial court granted summary judgment to Mulkey on the basis of official immunity and for the CCWA on the basis of sovereign immunity *sua sponte*. In an alternate holding, the trial court found that even if Mulkey and CCWA were not immune from suit, they were entitled to summary judgment on the merits.

The Court, citing previous cases, noted that official immunity generally applies "to government officials and employees sued in their individual capacities. Under that doctrine, a public officer or employee may not be held liable for his or her discretionary acts unless such acts are willful, wanton, or outside the scope of his authority. However, there is no immunity for ministerial acts negligently performed or for ministerial or discretionary acts performed with malice or an intent to injure. Thus, a public officer or employee may be personally liable for ministerial acts negligently performed, or for ministerial acts he or she negligently failed to perform." (Citations omitted).

In this environment the Court determined that there was no evidence that Mulkey had acted with malice or intent to injure. He acted in a ministerial manner, rather than a discretionary one, as his failure to place cones on the road was not discretionary. A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. (Citation omitted). Viewed in a light most favorable to the plaintiff, the evidence showed that Mulkey's supervisor's instruction to Mulkey to deploy warning signs was clear, definite, and certain, and required the execution of a relatively simple, specific duty, such that the deployment of warning signs was a ministerial act. (Citation omitted).

BAD FAITH: The insured's estate brought action against automobile liability insurer to recover for bad faith failure to settle claim. The trial court granted insurer's motion for summary judgment. Administrator appealed. The Court of Appeals, McFadden, J., affirmed and reversed in part.

***Hughes v. First Acceptance Insurance Company of Georgia, Inc.*, 343 Ga.App. 693 (2017).**

The Court found that there were genuine issues of material fact as to the failure-to-settle claim, and as such the trial court correctly denied summary judgment to the plaintiff, but erroneously granted summary judgment to the defendant. However, because the plaintiff did not point to any evidence of bad faith or willful or wanton conduct, which would support the claims for attorney fees and punitive damages, the trial court properly granted summary judgment on those claims.

Jackson caused a five vehicle collision causing his own death and injured others, including Julie An and her minor child, Jina Hong. First Acceptance insured Jackson with liability limits of $25,000 per person and $50,000 per accident. The plaintiffs' lawyer contacted First Acceptance stating he would make a demand when his clients had finished treatment. The lawyers for First Acceptance responded by following up with a letter to all parties and their lawyers, requesting a settlement conference. Thereafter, the lawyer for An and Hong sent two letters to the attorney for First Acceptance, and later claiming the letters constituted an offer to settle their claims with a 30-day deadline. After the 30th day passed, An and Hong filed suit. The lawyers for First Acceptance responded by sending a letter by facsimile to the plaintiff's' lawyer, stating that the June 2, 2009 letters from counsel for An and Hong "had been inadvertently placed with some medical records and no follow-up had occurred." Later, An and Hong sent another letter to First Acceptance withdrawing their offer. First Acceptance responded stating a settlement conference would be scheduled within two weeks. First Acceptance offered to settle Hong's claims for $25,000, but it was rejected. An additional of $50,000 was also rejected. At trial the jury awarded Plaintiffs $5,334,220.

On appeal the Court reversed the grant of summary judgment to First Acceptance on the failure-to-settle claim. It found that there were genuine issues of material fact. The Court also found the letters from Plaintiffs to First Acceptance created genuine issues of material fact as to whether Hong offered to settle her claims within the insured's policy limits and to release the insured from further liability, and whether the offer included a 30-day deadline for a response. Further, there were genuine issues as to whether First Acceptance acted reasonably. The Court also held that the trial court properly granted summary judgment to First Acceptance on Hughes' claims for attorney fees and punitive damages because he failed to point to any evidence of bad faith or willful or wanton conduct that would support those claims.

FINAL JUDGMENT: When a trial court enters a judgment that resolves all of the issues in a case except the amount to be awarded for the expenses of service of process under O.C.G.A. § 9–11–4 (d), is the judgment final?

***Edokpolor et al. v. Grady Memorial Hospital Corporation*, ___ Ga.__, 808 S.E.2d 653 (2017).**

The Supreme Court of Georgia granted certiorari and the Court, Blackwell, J., reversed the Court of Appeals decision, holding that the judgment was not final.

Plaintiffs filed a lawsuit against Grady Memorial Hospital Corporation for the wrongful death of their decedent. Grady did not waive formal service of process and later the trial court granted a motion under O.C.G.A § 9–11–4 for an award of the expenses. The trial court reserved the amount of the

award for a later date. Four years after the filing of the complaint, the trial court entered summary judgment in favor of Grady. However, the trial court still had not ruled on the amount of the expenses for service. Three months after the grant of summary judgment, the plaintiffs filed a motion to reconsider and modify the summary judgment. They asserted that the case was still pending asserting the summary judgment was only interlocutory because the award of expenses remained in the breast of the court. Nearly a year after the grant of summary judgment the trial court entered an order establishing the amount of the expenses and ordered that the summary judgment was final and no longer subject to reconsideration or modification.

The plaintiffs filed a notice of appeal within 30 days, asserting that the trial court erred when it granted summary judgment to Grady, and arguing that the summary judgment still was appealable because the expenses award remained outstanding. The Court of Appeals disagreed and dismissed the appeal, reasoning that the reserved issue about expenses under O.C.G.A. § 9–11–4 (d) (4) was "ancillary" to the case and, therefore, the summary judgment was a final judgment that had to be appealed within 30 days. The Court phrased the issue as, "The question here is whether the summary judgment was a final judgment or whether the case instead remained pending in the trial court until the expenses award was finally determined."

The Court began its reasoning citing *Sotter v. Stephens*, 291 Ga. 79, 84 (2012), where the Court considered whether a case was pending in the trial court when that court had reserved the issue of the amount of attorney fees to be awarded under O.C.G.A. § 13–6–11. In that case, the Court reasoned that because the amount of fees was reserved for future determination by the trial court, "one cannot claim that 'the case is no longer pending in the court below' as required by O.C.G.A. § 5–6–34 (a) (1)." *Id.* at 84. It then cited several cases where reserved awards were held to be not final. *See Islamkhan v. Khan*, 299 Ga. 548, 550 (2016) ("final order" in a divorce case the trial court's order specifically reserved resolution of the attorney fees was not a final judgment); *Jarvis v. Jarvis*, 291 Ga. 818, 819 (2012) (reserved attorney's fees, the final decree of divorce was not a final judgment); *Miller v. Miller*, 288 Ga. 274, 282 (2010) (no final judgment until the reserved issues of attorney fees under both O.C.G.A. § 19–6–2 and O.C.G.A. § 9–15–14). It also explained where the Court thought the Court of Appeals got it wrong. They stated: " The Court of Appeals erred when it concluded that the pre-judgment filing of a motion under O.C.G.A. § 9–11–4 (d) is analogous to a post-judgment filing of a motion for attorney fees under O.C.G.A. § 9–15–14." It was not analogous because a claim for attorney fees under that O.C.G.A. § 9–15–14 must be asserted post-judgment. ◆

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