GDLA NEWSLETTER

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THE PRESIDENT'S MESSAGE

BY: George E. Duncan, Jr.

Unless you maintain a defense practice in Lake Wobegone, Minnesota, (the little town that time forgot and the decades cannot improve) your recent discussions over coffee and cocktails has probably had a tendency to gravitate toward the topics of six- figure associate's compensation packages, litigation guidelines and fee audits. On the one hand, there seem to be some people/clients/shmucks more than eager to pay members of the law school class of 2000, $200.00 an hour to watch someone take a deposition. At the same time there is another body of clients that seems to feel that its trial counsel who has tried a hundred cases over the past twenty years, (half of those having a million dollar exposure), needs to be freezing his rates. As the Mad Hatter in *Alice in Wonderland* observed, "What's up is down and what's down is up".

The traditional defense practitioner is faced with a serious dilemma. On the one hand, most of us thoroughly enjoy what we do. We enjoy the challenge of difficult cases and trials, we feel that there is a higher purpose to the civil justice system than giving someone money because his lawyer can think of a theory and file a lawsuit for him. By and large, most of us even enjoy our business relationships with the front line claim handlers with whom we work on a daily basis.

At the same time, the economics of a litigation practice are becoming very difficult; yea, almost overwhelming. We hire and train competent young attorneys and absorb the start-up losses associated with their practice only to have them be plucked away after a few years by larger firms offering to pay them as much as we are making. We deal with clients who insist that they share in, if not totally receive, the benefit of technology we purchase and systems that we implement. We deal with claims professionals who themselves receive pressure from their superiors to cut litigation costs and find a sacrificial lamb if a case does not turn out exactly as planned.

How will this dilemma be resolved? I think that the solution is easy and obvious. We simply need to arrange for a meeting of representatives of the insurance industry and the defense bar. We will gather at Camp David with Jimmy Carter as our mediator and in a few short weeks,

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the problem will be solved. Obviously, the solution to the problem is neither obvious nor easy.

Although I do not have the simple answer to the problem, I have two observations that give me a great deal of optimism despite the level of problems and level of pessimism that we now face:

First: I do not think that the rest of the world is decidedly more stupid than the insurance industry, nor do I think that the insurance industry is decidedly more stupid than the rest of the world. Second, tort litigation is not going to dry up anytime soon.

There will always be some clients that feel that they are getting the best legal representation because they are dealing with the highest paid partner in the largest firm in the city. Likewise, there will always be some Fortune 100 clients that need to deal with national law firms or firms of a certain size. By and large however, most clients are bottom-line oriented.

Given the fact that many large firms have committed to radically increase their overhead by following the lead of "Silicon Valley", legal fees will have to escalate (unless, of course, senior partners are willing to cut their draws so that first year associates can make more money). I am not convinced however, that clients are particularly sympathetic to the need to raise salaries of first year associates. I am not sure that the run of the mill Fortune 500 or Fortune 1000 company perceives the need to pay lawyers $300 and $400 an hour to handle its products liability litigation. In short, I am not convinced that the rest of the world is decidedly more stupid than the insurance industry. Over the next five years, there should be tremendous opportunities for niche marketing by small to mid size firms who have experience and competence in handling significant litigation, who have streamlined their practices in response to insurance industry pressures and who are able to offer quality legal services for less than $300 per hour.

On the other side of the coin, large segments of the insurance industry have fallen into the syndrome of paying anything on any case simply to avoid a risk and close a file. Unless the insurance industry is decidedly more stupid than the rest of the business world, it is on the verge of seeing that escalation in claim costs and settlement values of cases is not being driven by verdicts but is being driven by settlements. It does not take a rocket scientist or a first year associate with a Harvard degree to figure that since the areas of practice that try cases (i.e., medical malpractice) are staying fairly stable and profitable and the areas of coverage that don't try cases (i.e., GL and products liability) remain volatile, something might be said for adjusting to claims philosophies back toward trying meritless or questionable cases. If this occurs, where will the industry find its experienced and competent trial lawyers? What will the law of supply and demand do to rates?

I commend to you that article in this newsletter by Jimmy Singer. Jimmy served as the representative of the Georgia Defense Lawyer's Association at a conclave in Chicago sponsored by the DRI. This conclave is the first of a series of such meetings which we expect to have both at the national and local level concerning the new economics of defense litigation practices.

The bottom line is that we all want to foster our long-standing business and client relationships. It is enjoyable to be on approved lists of insurance companies and we would certainly enjoy having meaningful dialogue with the insurance industry over economic issues. By the same token, we have <u>needs</u> in addition to these wants. The most compelling of these needs is to be paid fairly, reasonably, competitively and promptly for the services we provide.

Most busy defense lawyers might be well served to see the current economic situation with insurance carrier relationships to be not so much of a "crisis" but an opportunity. To avail ourselves of this opportunity however me need to be more conscious of issues relating to marketing as well as issues relating to maintaining the high standards of advocacy. The Georgia Defense Lawyer's Association hopes to continue and expand its focus into each of these areas. I encourage you to maintain and increase your activity level with the Association. Stay tuned....

George E. Duncan, Jr.
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ANNUAL CONVENTION - AMELIA ISLAND AUGUST 3-5, 2000

The "Family Friendly" format for the GDLA Annual Meeting is proving to be very popular and we are looking to have a great attendance at this year's meeting.

We have filled our room allotment and The Ritz Carlton Amelia Island is now sold out. Therefore, barring cancellations at The Ritz, if you wish to attend the convention, you will have to seek accommodations at another hotel/motel facility.

GOOD NEWS!!!!

Even though you may be staying at another hotel/motel, The Ritz Carlton will allow all GDLA attendees to use their hotel amenities, i.e. pool, beach, restaurants, etc. This is a great opportunity to participate in your Annual Convention at The Ritz, enjoy their wonderful amenities, even though you are not a guest there.

Again, you are urged to make your reservations immediately. The various hotel/motel facilities are filling quickly as it is the last weekend before school starts. MAKE YOUR HOTEL RESERVATION NOW!

IMPORTANT!!!!

No matter where you are staying, you will need to REGISTER FOR THE CONVENTION so that we can include you and your family in on the banquet, the two "cocktail and kool ade" parties and the other convention activities. Please call Al Shurley at 912-755-9813 to register.

National speakers to include: Microsurgery and Brain Research Inst. "The Spine on Parade; Biodynamics Research Corp. "The Biodynamics of Low Velocity Collisions and Benedict Engineering, Inc. "Animation – Fact or Fiction".

See you in August!!!!

George E. Duncan

Mark your Calendars!

2000

- August 3-6 — Annual Meeting, Amelia Island, Florida. The expected program will focus on scientific (and not-so-scientific) evidence, and also will have segments of the program tailored to individual practice needs. Plan now to attend!!!
- October 4-8 — DRI Annual Meeting, New Orleans Marriott, New Orleans, LA
- November 29 - December 2 — GDLA Trial Academy, Callaway Gardens

2001

- July 19-22 — Annual Meeting, Sandestin Beach

MINUTES OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION 2000 WINTER BOARD MEETING, ORLANDO, FLORIDA

On February 26, 2000, the Georgia Defense Lawyers Association held its winter Board meeting at the Grand Cypress Hotel in Orlando, Florida. President Duncan called the meeting to order. In attendance were President George Duncan, Executive Vice-President Greg Melton, Secretary/Treasurer Walter McClelland, immediate past President Steve Kyle, as well as Board members Bob Travis, John Foster, Bruce Welch, Salty Forbes, Rick Rominger, Grant Smith, George Lilly, and Hank Scrudder.

Mr. Morton G. Forbes, incorporator, presented the charter of the Georgia Defense Lawyers Association, inc. A motion was made, seconded and duly passed, that the charter of the corporation be approved and accepted. A motion was made, seconded and duly passed, that the existing By-Laws of the Georgia Defense Lawyers Association be adopted and approved as the By-Laws of the Georgia Defense Lawyers Association, Inc. would be approved and accepted. Finally, it was moved, seconded and duly approved, that the Minutes of the Directors' initial organizational meeting of the Georgia Defense Lawyers Association, Inc. be accepted and approved.

A resolution was duly made, seconded and passed, that the current meeting and convention chairman, Steven J. Kyle, be authorized and directed to enter into contractual arrangements on behalf of the Georgia Defense Lawyers Association, Inc. with various venues on behalf of the corporation, which authority shall include, but is not limited to, execution of hold harmless and indemnity agreements with regard to the use of housing facilities at hotels, resorts, bed and breakfasts, and other like accommodations. It was further resolved that the contracts that Mr. Kyle ahs previously entered into with Amelia Island plantation and the Hyatt Grand Cypress Hotel in Orlando, Florida, be ratified and approved by the corporation, including the hold harmless and indemnity agreements contained therein. It was further resolved that any and all acts on the part of Mr. Kyle while acting in his capacity as meeting and convention chairman in executing these or any future contracts, were ratified and approved.

Mr. McClelland delivered the treasurer's report. A motion was made, seconded and duly passed, that the reading of preceding Fall Board Meeting Minutes would be waived, and the Minutes were adopted unanimously as previously published.

Alternative Revenue Committee

Rick Rominger made and presented an analysis which he made of other Bar Associations and Continuing Legal Education Committees, regarding various proposals for sponsorships and use of alternative revenue sources. He presented and presided over a lively discussion, as well as the submission of several proposed written guidelines regarding all of the aspects of sponsorships to the Corporation's Annual Meeting, Winter CLE Meeting, newsletter, journal and other alternative revenue possibilities. A motion was duly made, seconded and passed that Mr. Romminger's proposals be reduced to specific guidelines, and consist of at least three different areas: 1) opportunities at the Corporation's annual meetings, including the sponsorships of cocktail parties, banquets, individual events, etc.; 2) that web page links be offered for advertising to sponsors; and 30 that ads be offered in the Corporation's newsletter.

It was further moved, seconded and unanimously passed, that there be at least

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three levels of sponsorship, to wit: premier, gold, and silver, with different costs and different privileges being offered depending upon the level of sponsorship. It was decided that Mr. Rominger would prepare a final draft of the guidelines and submit them to the Board as soon as possible, along with a list of proposed advertisers, and that Mr. Forbes would coordinate this effort.

Winter CLE

President Duncan reported that attendance at the Winter CLE seminar was down this year, in spite of the fact that Warner Fox presented an excellent program. Efforts should be made in the future to promote the Winter CLE as being a wonderful opportunity to obtain CLE at a minimal cost, and it was felt that through some additional effort, the attendance could be increased.

Trial Academy

Mr. Melton announced that the faculty for the upcoming Trial Academy was in place, and everything was preceding on schedule. The Trial Academy would be held the last weekend in November, and 50 students would be needed in order to break even. Promotional efforts will be made with diligence as the November date approaches.

Long Range Planning Committee

Hank Scrudder announced that the State Bar of Georgia's proposed advisory opinion had been published regarding litigation guidelines and third-party audits.

Law Journal

Grant Smith announced that the 2000 edition of the Law Journal was on track, and that he had received commitments for between 12 to 13 articles. He presented an estimate to put the Journal on CD-Rom, and it was decided to put the cost of the Journal in hard copy form versus CD-Rom on the Spring Agenda for a decision.

Newsletter

John Foster announced that a newsletter should be published in March, and perhaps one additional newsletter in May. A discussion ensued concerning printing the newsletter on glossy paper, which would increase the cost. Because of the cost issue, it was decided not to print the newsletter on glossy paper.

Membership Report

Mr. Forbes reported that there were 2 individuals whose application had been submitted for membership, and had been approved by the membership Committee. These were Janet Cheryl Allen, and Jay Phillip Milam. Upon motion duly made, seconded and passed, the applications for membership of Ms. Allen and Mr. Milam were unanimously approved.

Annual Meeting

Mr. Melton reported that the plans for the program at the Annual Meeting in Amelia were on schedule, and that all of the speakers should be lined up by the end of March. It was decided that Mr. Kyle and Mr. Melton will set the registration fee, which will include two cocktail parites and a banquet, as well as the CLE credits.

Future Board Meetings

Mr. Kyle presented several alternatives for next year's Winter Board Meeting, and recommended Kiawah Island. The Spring Board Meeting was also discussed, and it was decided that this would be held in Atlanta.

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Dick Richardson Memorial

Grant Smith reported that he was working on a solicitation letter to member of the Board for the initial funding of the Willis J. Richardson, Jr. Memorial, and would ask that each Board member contribute a specified amount. Thereafter, there would be a separate letter which Mr. Smith would prepare to go the membership to seek additional contributions.

Change to the By-Laws

Currently, the Officers are elected at the Annual Meeting and actually take office 45 days thereafter. It was duly moved, seconded and passed, that the incoming officers elected at the Annual Meeting would actually take office at the conclusion of the Annual Meeting.

Discussion was also had with regard to a proposal to change the corporation's fiscal year from July 1 to October 1. After discussion, it was decided to table such proposal until the Spring Board Meeting.

There being no further business, a motion was duly made, seconded and approved, that the meeting be adjourned.

DRI ANNUAL MEETING UPDATE

By: Salty Forbes

The DRI 2000 Annual Meeting will be held October 4th through October 8th in New Orleans, Louisiana. Some of the highlights of the meeting will include:

(1) a presentation on courtroom technique by trial masters James Jeans and James McElhaney;

(2) a walk through the technology of the 21st Century courtroom followed by hands-on technology workshops;

(3) great social events including an exclusive DRI member only night at the House of Blues and the President's Mardi Gras Gala;

(4) a year's worth of CLE;

(5) Insurance Round Table – In Search of Three Part Harmony. Speakers include Lee Bennett of St. Paul's Fire & Marine Insurance Company, Jane DiVirgilio of Traveler's Property & Casualty Insurance Company, Janet Kloemhamer of Fireman's Fund, Charles O'-Connor of Liberty Mutual Group, and Laura Stone Lawrence of Royal and Sunalliance.

(6) a blockbuster products liability program which will feature Mary A. Wells, Alan Schoem, Jim Walter, Roger McCarthy, Ph.D.; Thomas G. Quinn, Richard C. Seib, Malcolm E. Wheeler;

(7) networking opportunities with great defense lawyers from across the country.

(8) national conclave of SLDOs.

Mark your calendars now, send in your registration and reserve your room!

See you in New Orleans.

2000 LEGISLATION UPDATE

By: John C. Edwards

House Bill 340 effective July 1, 2000

Amends O.C.G.A. § 24-10-24 to increase the witness fee to $25.00 per diem and allows for fee to be paid by check of an attorney or law firm.

House Bill 708 effective July 1, 2000

Amends O.C.G.A. § 9-11-4 to provide for waiver of service by a defendant. Allows for mailing of summons and complaint by first class mail or other reliable means and requires defendant to return waiver within 30 days from the date on which the request is sent or 60 days if the defendant is addressed outside any judicial district of the United States. If the defendant fails to comply with the request for waiver of service, the Court shall impose the cost incurred in effecting service unless good cause for the failure is shown. Where defendant returns the waiver of service timely, defendant has 60 days after the date on which the request for waiver of service was sent to answer or 90 days if the defendant was addressed outside any judicial district of the United States.

House Bill 1346 effective March 30, 2000

Amends O.C.G.A. §5-6-46 limiting the supersedeas bond for the punitive damages portion of any judgment to $25 million.

House Bill 1346 effective March 30, 2000

Amends O.C.G.A. §14-2-510 to make venue in a tort action against a corporation proper in the county where the cause of action originated. However, if venue is based solely on this basis, the defendant has the right to remove the action within 45 days of the service of the summons to the county in Georgia where the defendant maintains its principle place of business. Removal does not appear proper for a foreign corporation with a registered agent in this state but which does not have a principle place of business in this state.

Senate Bill 211 effective July 1, 2000

Amends Code Section 40-8-76.1 so as to include sport utility vehicle as a passenger vehicle in which seatbelts are required.

Senate Bill 344 effective January 1, 2001

Amends O.C.G.A. §33-7-11 so as to increase the minimum liability insurance limit to $25,000/ $50,000 because of bodily injury or death and $25,000 because of property damage.

Senate Bill 403 effective May 1, 2000

Amends O.C.G.A. §15-10-52 to allow pleadings in Magistrate Court to be filed electronically. Provides forms for electronic filing of verifications or affidavits. Allows for subsequent pleadings and notices to be filed electronically only on a party who has filed pleadings electronically.

Senate Bill 436 effective July 1, 2000

Amends all code sections in the Official Code of Georgia Annotated relating to delivery of notices by certified or registered mail so as to provide for delivery of such notices by over night delivery through the postal service or a commercial delivery service.

CAN A DEFENSE FIRM STILL BE PROFITABLE? A REPORT ON DRI'S SMALL LAW FIRM ECONOMICS SYMPOSIUM

By: James E. Singer

At the end of April, the DRI conducted its first ever Small Law Firm Economics Symposium. Forty-seven states were represented and the firms from each did primarily defense work. Over 30% of firms represented did more than 80% insurance defense practice. The concerns voiced were a loss of insurance clients (intentional or unintentional), particularly related to billing issues; partners, personnel and administration (given the diverse practice areas within firms, and widely divergent billing rates); and general law firm economics including hourly rates and salaries. This article will highlight the symposium and will hopefully provide beneficial information for all GDLA firms, small or large.

One of the speakers noted that the property casualty insurance industry is the largest consumer of legal services in the United States and that 5% of all persons in the U.S. are somehow employed related to the insurance industry. Therefore, the insurance defense practice will never go away. Also, the more insurance carriers integrate with financial service providers, there will be the opportunity for insurance-related firms to either obtain, or lose, some of that financial work at higher rates. However, in-house captive counsel are also here to stay. Can your firm market with the underwriting part of the insurance company? Can a law firm respond in a two-line E-mail to a question, get to an 80% certainty on an answer to a question promptly, and move on to the next task? The E-commerce mentality is taking over the insurance industry and a prompt, short and fast response is what is going to be looked for by all insurance companies. Since most cases settle, the run of the mill insurance case is looked at like a commodity, and a firm which can do it cheaper and quicker is viewed more favorably than one that takes longer to achieve the same task. In determining their firms, one vice president from a large insurance company noted they look at three bottom-line factors: 1) quality, 2) how long it took to perform the task, and 3) how much it cost, but not necessarily in that order.

A Ph.D. in business administration with a thesis in law firm management and profitability was also a lead speaker. He was adamant that firm size did not determine profitability but, regardless of the type work or the size of the firm, the key to profitability is how a law firm manages five profitability factors. These are:

1) hours worked,
2) billable hours,
3) billing rate,
4) collections, and
5) profit margin.

The gist is that most lawyers, urban or rural, small or large firms, are in the office 2200 hours per year, but typically don't come close to billing that amount. Under hours billed there accordingly needs to be a major emphasis, to partners and associates, on becoming more efficient in leveraging time, which means cutting out distractions. He believes that firms should actually be at minimum billing to clients 90% of the hours in the office, and this should approach 95% in productive firms. This includes any write-down or write-off time before it is billed and includes marketing or other non-billable work. He was emphatic that time be kept and entered on a daily basis, and that should be non-negotiable in any firm. He is a big proponent of approaching clients on a face-to-face basis trying to go up at least $5.00 or $10.00 a year, which automatically drops to the bottom line. Collections should be in the 94 - 97% range for any firm, and must be closely monitored. A bill that goes 3 - 6 months without being paid is incredibly hard to ultimately collect. The profit margin is simply the difference between total income received and total expenses excluding anything to equity owners or partners. He states there should be across the board a minimum of 35%, and in most instances, 40 - 42% net. Firms should be working towards a 46 - 47% or higher percentage. An increase can only be done by managing all the factors, including cutting the fat, and if not every year, at least every few years, starting from scratch and looking

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at every single expense item in the firm.

He believes that a distinction needs to be made between what is preference and what is need, and only buying what is necessary. He also believes that the ratio of billing employees to non-billing employees should be substantial, particularly now that paralegals and associates are much more computer (and therefore keyboard) literate. He is a big believer in contingency fees and a big believer in diversification of practice, but he constantly reiterated purely insurance defense firms can be profitable, (all partners in the $180,000 - $240,000 average per year income), but that a firm must manage all five profitability areas at all times, without slacking off on one or the other at any point. He also states that the average paralegal bills 1350 per year and that is not enough. They need to be at a minimum of 1500. It is anticipated the videotape of his presentation will be condensed and made available to state organizations or, perhaps even firms for a small fee.

Technology was also discussed, though time constraints prevented any real nuts and bolts information. The speaker did note that document management software is absolutely essential in any practice, regardless of size. It was suggested that a privileged and confidential language header be placed on all e-mails as well as some letterhead designations so clients may make a copy of the communication and place it in the file. Care also should be taken to utilize more efficiently the technological capability firms have. Most firms only use 10 - 20% of the technological capabilities they possess. Also, since the 1960s, computer speeds have doubled every 18 months. Firms need to look carefully at what they are purchasing, not only to be able to efficiently use what they have, but to insure that it will meet the foreseeable needs into the future.

It was also pointed out that government contracts have already been signed to modify 76 federal courtrooms, such that every juror will have a screen in front of them and there will be scanner-type displays on every counsel table, as well as the witness stand. Documents will not be handed to the jury, but will simply be placed on the scanner or called up on a computer at counsel's table, and all counsel, jury, the court, and the witness can instantly see the same document. It is a given, and a startling thought, that the way we conduct business universally, and particularly within the legal profession, will change more in the next five years than it has in the last 50.

Finally, a vice president of CitiBank gave some statistical information on firms from surveys. In the firms that they utilize, salary expenses approximate 28 - 31%, but in profitable firms should never be more than 30% of gross revenue. Technology expenses should represent only 4 - 6% of annual revenues and occupancy expense should not exceed 6%. He knows that in most of his firms, the average was approximately 47% profit margin, but primarily insurance defense firms were averaging only 23% profitability.

DRI is making an effort to provide resources and benefits to the lions share of its members. Small firms, less than 18 - 20 in size, make up more than 60% of DRI's membership. The DRI is considering a technology person to be placed on staff, and also is considering taking seminar material and condensing it to be made available on a regional basis. DRI has established chat rooms within its Webpage, and is also considering ways to get survey information with a maximum response, including short e-mails.

In summary, the symposium essentially indicated the old adage, "If it ain't broke, don't fix it," will not apply as we continue to rush into the twenty-first century. Technology, as well as changes in the insurance industry, will force us to continue to change and adapt if we are to continue to be successful, and as with the law, we need to keep an open mind and be flexible, retaining what has been successful in the past, but continually modifying and adjusting where necessary.

HUMOR

The following are excerpts of actual Court testimony:

Q. Doctor, before you performed the autopsy, did you check for a pulse?
A. No.
Q. Did you check for blood pressure?
A. No.
Q. Did you check for breathing?
A. No.
Q. So, then it is possible that the patient was alive when you began the autopsy?
A. No.
Q. How can you be so sure, Doctor?
A. Because his brain was sitting on my desk in a jar.
Q. But could the patient have still been alive nevertheless?
A. Yes, it is possible that he could have been alive and practicing law somewhere.

Q. Trooper, when you stopped the defendant, were your red and blue lights flashing?
A. Yes.
Q. Did the defendant say anything when she got out of her car?
A. Yes, sir.
Q. What did she say?
A. What disco am I at.

Q. How old is your son, the one living with you?
A. Thirty-eight or thirty-five, I can't remember which.
Q. How long has he lived with you?
A. Forty-five years.

Q. And where was the location of the accident?
A. Approximately milepost 499.
Q. And where is milepost 499?
A. Probably between milepost 498 and 500.

Q. This my asthenia gravis, does it affect your memory at all?
A. Yes.
Q. And in what ways does it affect your memory?
A. I forget.
Q. You forget. Can you give us an example of something that you've forgotten?

NEWS WORTHY ITEMS WANTED

Are you aware of a recent important legislative enactment or a major defense victory in the Courtroom? Have you attended any events our readers would be interested in? We would like to report it in the GDLA Newsletter. Send your items to: John Foster, Post Office Box 13929, Savannah, Georgia 31416, or call him at (912) 352-1190, or e-mail him at jfoster@forbesandbowman.com

FIGHTING THE LOSS OF PROFESSIONALISM: AN INDIVIDUAL REMEDY

By: David L. Winter

PART II

RESPECT YOUR CLIENT

We must carry this respect for the law into our practice of advising clients. It is vital for a good lawyer to learn about his or her client, not only about their business or the facts of a case, but more importantly to learn their concerns, their goals, and their desires. Only by knowing the client can we select and implement the proper course of action.

Once we understand our client's goals, we obviously need to keep our client apprized of the progress of the action, but also should keep them abreast of changes in the law that affect their business or their life. A lawyer needs to assist the client, not handle him or her as a commodity, to be dropped and ignored at some later date. By respecting our client, we serve not only him or her, but we also serve society.

Even as we understand our client's goals, we must recognize our own, and the law's, limitations. Many times I have been told by an attorney that he or she was equally comfortable arguing either side of any issue, as that is what they were trained to do. I am not certain that is possible, nor prudent. Each of us has a moral compass, a result of our childhood, our education, and our life time of experiences. Each of us has a set of guidelines by which we govern our life. As such, it is difficult to conceive that we could argue either side of any issue, and present that case convincingly. Realistically, each of us has a limited ability to argue different sides of an issue. In order to represent our clients in the most professional manner, we must recognize the limitation, and use it to our benefit as well as theirs.

Likewise, the law has its own limitations. Just as Portia proved, the law is not designed to collect a "pound of flesh," nor can the law always act as swiftly as the client desires. Respect for our client is shown by explaining the options available in any given scenario, and by evaluating the risks and benefits of each approach. By guiding the client to his or her options we respect the clients right and desire to decide the proper course of action.

RESPECT THE COURT

In addition to respect for the law, it is incumbent upon lawyers to respect the court. The court is the personification of those rules that are to guide society and to guide us.

Respect for the court, however, is not satisfied by merely saying "yes, your honor" or "no, your honor." Respect for the court means complying with deadlines and court guidelines, assisting the court in focusing on the issue, and allowing your case to ease through the court system.

Respect the court in your written presentation. A properly drafted motion, response, or reply, should highlight the issue for the court, provide the necessary legal and factual background, in proper evidentiary form, and should not require repeated readings to determine the problem that the court must solve. The attorney's obligation in dealing with the court is to focus its attention, not waste its time.

The respect for the court also includes the manner in which you present your case to the court. During arguments in law and motion, or in trial, comments of counsel should be addressed to the court, not to opposing counsel. There is little that is less professional than two attorneys squabbling at counsel table, as petulant children, before the court. Argument before the court should be focused on the facts, the evidence, and the law, not a "mommy, he's poking me; tell him to stop," presentation.

Likewise, argument before the court should not be a regurgitation of everything set forth in your papers. A properly crafted written presentation should allow the court, you, and your opponent to focus on the key issues. Therefore your argument should be limited to those issues, and to any additional information or law. Assist the court in argument by inquiring whether the court has a tentative ruling, or whether the court wishes to hear argument on any specific point. With that guidance, then direct the court to the crux of the issue, not a circular

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tour of litigation, with only occasional references to the disputed issue.

Respect for the court does not require one to abandon the representation of one's client. An attorney with the proper passion for the law, and for his or her case, will on occasion get into heated exchanges with the court. So long as those exchanges are focused on the facts and law, and not the personal ability of the court to comprehend the issue, an attorney not only can, but should, appropriately argue the case. There are certain instances, however, where one's argument infers disrespect. One should endeavor to never question "has the court read my papers?" To ask the question suggests either that you were late in making the presentation, or that you are questioning the preparation of the court. Likewise, the use of the term "with all due respect" is generally an inference of no respect. Avoid that terminology. If necessary to preserve an issue on appeal, advise the court that you want to insure the record is complete, and that you wish to place on the record all of the necessary components to protect your clients rights. Most courts will concede that, either by indicating that in court's opinion "you have made your record," or by allowing you to do so. Either is sufficient and still provides respect for the court.

If you do intend to challenge a court by writ or by appeal, advise the court. Although there are a number of judges who are thin skinned, and who are troubled by the mere challenge to their decision, it is a simple sign of respect to advise the court that you have an honest difference of opinion on its ruling, and that you intend to exercise your client's rights. This is not a threat to the court, and should not be conveyed as such; rather, it is simply an expression that you honestly disagree with the court's decision. You advise the court of your intentions out of respect, not as a threat.

Respect for the court goes beyond dealing with the judge. The functioning of any courtroom requires the integration of the skills of the clerk, often the bailiff, and other courtroom assistance. By treating all of them with proper respect, by being polite, by being punctual, by being prepared, one maximizes the ability to protect your client's interests. A court clerk is often overwhelmed with the paperwork that goes with the practice of litigation today. By insuring that the clerk's job is made easier, by being organized and prepared, you minimize any problems in presenting your client's case.

RESPECT YOUR STAFF AND CO-WORKERS

Aside from the rare solo practitioner who types, files, and serves all of his work, all of us must deal with staff members, associates, or partners. As soon as one brings in any employee, the attorney is part of a team. Success of that team is not occasioned by success of the attorney alone; it requires the success of the team. The practice of law requires coordination and cooperation with others. It is no longer a game of tennis singles; it is now a team game.

The success of that team depends upon the maximization of the skills of the members of that team. Yet simply hiring the most educated or technically proficient individuals does not insure success. Success is insured by motivating your team to help your client succeed.

Start with the simple rules, the rules we all learned in Kindergarten. Say "please" and "thank you." In those moments where the pressure of our work gets to all of us, and someone explodes, be mature enough to apologize for inappropriate behavior.

Do not blame the messenger, whether it is the secretary who relays a message to you, or the associate who advises that the argument you want to make is not supported by law or the evidence.

Take responsibility for your team. There is little more troubling than the attorney who stands before a court, or before opposing counsel, and blames his or her staff for shortcomings. If items are not served, or phone calls not made, it is ultimately the attorney's fault. Although none

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of us need tolerate an incompetent secretary, staff member, associate, or partner, the actions of that individual, or inactions, are still those of your team. You are ultimately responsible for their performance, and it is up to you to step to the forefront and take responsibility. Out of respect for your teammates, do not offer them up as sacrifice to the court or opposing counsel. To do so is to doom you to a life of struggle, as that lack of respect will result in poor quality people working with you.

Remember that your staff, associates, and partners work with you, not for you. Once they invest in the success of the team, the success of the team is more likely.

Remember that all your co-workers have lives, and families. We all know that our practice sometimes calls upon us to do things on short notice, or to work late, or come in early, or give up that weekend. When those things happen, give as much notice as possible to the others on your team, allowing them to make adjustments where possible. It is not disrespectful to require someone to work for the good of your client. It is disrespectful to make extreme demands, with little or no notice. When your team does rise to the occasion, acknowledge their work, and insure that they understand your appreciation for their work and their sacrifices. A kind word, a public acknowledgment, and recognition for their efforts will pay off far beyond the effort one needs to expend, and often far beyond monetary payments. Certainly money is a factor in everyone's job. However, pride in one's work, recognition for one's activities, and respect for one's work and work product go far in your team success.

RESPECT YOUR FAMILY

The practice of law is demanding. It is stressful, it is time consuming and from time-to-time, it can be overwhelming. But the practice of law is still our profession, it is not our life. Our life is our spouse, our children, our parents, siblings, in-laws and our friends. What makes a good attorney is someone who is connected to life, who understands the effect of law on society, and who practices law in a manner that is supportive of society.

That means spending time with your family, explaining to them why you work so hard, and so passionately at your profession. Keep them "in the loop," aware of your schedule, your obligations, and those points where the demands of your profession will interfere with your home life. Keeping your family abreast of your work makes life easier. It is a simple sign of respect.

RESPECT YOUR COMMUNITY

An attorney shows respect for his community by becoming involved. Life is more than the practice of law. Involve yourself in your community in any way that makes it and you better.

Get involved in local politics, local business, local charities, local youth activities. Be part of your community, be a leader, and make the world better. Show by your actions your respect for the law, for society, and for our profession.

Becoming involved in your community also carries with it substantial benefits, some of which are not obvious. Clearly, involvement in a club or organization may lead to new business for you, or you may simply meet new people and make great life long friends. Even if you are not so lucky, you still obtain an ideal opportunity to see where your community stands on issues. For the litigator, a cross-section of your community that you can tap into, and can present your case as hypotheticals to, provides an ideal jury panel for evaluation of your cases. Although we all benefit from discussing our cases with other lawyers, or with the secretaries and staff, anyone who works in the law has a slightly jaded view. Juries frequently surprise us with their viewpoints and with their insights. By becoming involved in the community, you have the ideal opportunity to run your cases by a jury panel, by a group of individuals who are dedicated, but not legally trained. These individuals

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can help you, enormously, in the evaluation of your case, and in the manner in which you should present it. This is truly a win - win situation.

FINALLY, RESPECT YOURSELF

The key component of any attorney is personal integrity. When you begin in this profession, as a gift, you have one scoop of integrity. So long as you maintain your credibility, that scoop of integrity will last your entire career. However, once lost, it is impossible to regain. As a professional, you protect your own integrity in a number of ways:

1. Take only clients that you honestly can represent;

2. Bill honestly and fairly for the work that you do;

3. When you give your word, live up to it;

4. Do not commit your client until you have the authority to do so; and

5. Practice the rules of respect for your opponent, for the court, for the law, for the community, for your family, and for yourself.

Our profession is made up of individuals, and each of us has an obligation to maintain the highest standards for our profession. If we each endeavor, in every aspect of our life, to reflect a professional, the image of our profession will grow. It is not up to the media, or the legislature, or anyone else. It is up to us.

David L. Winter is a partner with Moore, Winter, Skebba & McLennan, L.L.P. in Glendale, California. His practice for the last 20 years has primarily involved complex litigation, particularly property related litigation, including construction accident, premises liability, and construction defect cases.

If you are not already a member of Georgia Defense Lawyers Association we invite you to apply for membership. If interested, please contact Morton G. Forbes at the following:

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THE EVALUATION OF NEUROLAW EVIDENCE

A Significant Challenge for Defense Counsel

By: Peter B. Silvain, Ph.D

Introduction

The term, "neurolaw" defines a rapidly developing subspecialty in personal injury and medical malpractice law. Many neurolawyers are currently sharing data regarding successful and proposed theories of evidence involving neurological and neuropsychological injury. Counsel should become skilled in the evaluation and the courtroom examination of this growing body of information.

Statement of the Problem

The insurance industry is faced with the very difficult task of determining which claims have true evidence of Organic Brain Syndrome (OBS) and which cases are based on over-interpreted data, invalid tests, incorrect self-reported patient information or other significant errors in the plaintiff's claim.

A truly damaged person has clear and convincing evidence of immediate harm to the brain. In addition, there are well recognized patterns of long-term recovery. In general, these cases are addressed quickly and professionally by insurance claims managers and insurance counsel. After dealing with issues of liability and coverage, evidence of true damage will, in most cases, lead to the rapid and satisfactory settlement of the claim within the terms and limits of the policy. However, there are a significant number of claims and torts in which the "neurolaw" evidence of organic brain syndrome is false and misleading.

A group of Florida based insurance consultants have been collecting data on the patterns of evidence used by psychological and neurological injury claimants and plaintiffs for over ten years. The researchers conducted an examination of 1,000 psychological injury claims and concluded that 68% of the cases involved a claim of Organic Brain Syndrome (OBS). *(OBS is a generic title for claims of closed head injury, traumatic brain injury, and post-concussion syndrome. In addition, certain toxic exposure cases as well as hypoxic brain injury were also included).* The remaining 32% of the psychological injury cases included anxiety disorders such as Posttraumatic Stress Disorder, and depressive illness. The majority of cases involved multiple areas of evidence including CT scans, MRI, SPECT scans, EEG, Quantitative EEG, brain mapping techniques, clinical interviews, psychiatric evaluation, neuropsychological testing and other neurological and medical observations of the patient / claimant. **Clearly, the most controversial evidence examined by the researchers was in the form of neuropsychological test findings. The argument is not with neuropsychology as a science but with the questionable interpretation of data that appears in so many forensic matters.**

Neuropsychological Evidence

The field of neuropsychology has existed for nearly 50 years. It is quite helpful in medical settings but, in many forensic cases, it fails to meet evidentiary standards. Counsel should consider multiple weaknesses in the forensic presentation of this data:

1. In many cases, the "neuropsychologist," is not well trained or qualified.

2. Neuropsychologists or other head injury evaluators frequently fail to:

   a. Rule out the transient effects of prescribed medication and other drugs

   b. Review the claimant's past school records

   c. Rule out the effects of peripheral nerve damage

   d. Rule out the effects of depression and anxiety

   e. Rule out the effects of aging

   f. Rule out the effects of prior head injury or disease

   g. Rule out the effects of prior exposure to neurotoxins

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h. Rule out the effects of personality disorders

i. Rule out test response manipulation

j. Consider that neuropsychological deficits are typically demonstrated in the normal population

Neuropsychological tests are developed on specific normative populations and many of these tests have very definite limitations and guidelines regarding their administration and the selection of persons that should be tested. In many cases, the plaintiff does not fall within the normative (standardized) population and his or her responses cannot be statistically compared to the normative data provided by the test publisher. In other cases, the tests are conducted by less qualified technicians and may not be administered properly. At this time, only one state (Louisiana) currently requires neuropsychologists to take a separate licensing test.

In an examination of the literature surrounding 108 of the plaintiff's most frequently used neuropsychological tests, over 1,000 test characteristics and weaknesses were identified that could cause the test findings to be declared invalid (1). Probably the most serious problem in the forensic presentation of neuropsychological test evidence is the overinterpretation of the data by the neuropsychologist. Although the tests may provide an indication of poor brain functioning or low intellectual capacity, they do not reveal the cause of the deficit.

The actual basis for substandard performance may not be, at all, related to the cause of action but may be related to preexisting conditions, medication effects or an inherited or developmental problem.

The Head Injury Claim With No Medical Evidence of Actual Head Injury

Every year there are thousands of head injury claims that do not involve actual organic brain injury. The most common profile follows:

1. There is a low speed, minor impact accident.

2. There is no loss of consciousness or possibly a very mild concussion with a questionable loss of consciousness.

3. The claimant has a number of non-related life stressors that may involve job dissatisfaction, a dysfunctional family or problems related to a personality disorder. Usually, the claimant has experienced some important personal loss within the past months or even years.

4. The claimant sees several physicians with complaints of a continual, generalized, dull headache that is accompanied by nonspecific impairments such as easy fatigability, "dizziness" (lightheadedness), insomnia, and other mental difficulties.

5. The claimant is prescribed antidepressant, antianxiety, narcotic analgesic, anti-inflammatory and hypnotic medications. Frequently, claimants take more than eight different medications each day.

6. The claimant is sent for neuropsychological testing.

7. Without a careful review of the claimant's complete medical, social and psychological history, the neuropsychologist issues the diagnosis of Organic Brain Syndrome and then makes the additional error of attempting to establish the proximate cause. In a significant number of cases, there is no electrodiagnostic evidence to confirm the neuropsychological test results.

Although there is no proximately caused, organic brain syndrome in these cases, they are presented as such. If defense counsel is not prepared to conduct detailed, technical discovery, the insurer may be asked to pay a settlement or verdict that far exceeds the actual value of the case. Aggressive discovery is the key to defending any case of organic brain syn-

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drome.

Summary

Many areas of neurolaw evidence do not meet true scientific or evidentiary requirements and should be vigorously cross-examined. In the case of neuropsychology, the tests themselves, have inherent weaknesses and strict limitations and the data is frequently overinterpreted.

Diagnostic tests such as the Quantitative EEG (QEEG) and the SPECT scan are a blend of new technologies that are prompting expert testimony that is beyond the scope of the current scientific data. For example, the SPECT scan, (Single Photon Emission Computed Tomography) provides images of regional cerebral blood flow (rCBF). However, many psychiatric and other medical conditions may cause abnormalities on these scans that are not related to head injury.

Most scientific reports on the QEEG (also referred to as EEG brain mapping) have demonstrated research applications and few studies have been verified or reproduced at a level sufficient to be considered in forensic applications.
Techniques used in EEG brain mapping vary substantially among laboratories, and the findings with one specific technique may not apply when using a different technique.

There is only one avenue for defense counsel and that is to conduct thorough discovery. Discovery of medical records, school records, pharmacy records and test data is essential. With that level of information, defense counsel and the claims and risk managers can make informed decisions regarding case management and trial preparation.

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(1) Neuropsychological Test Evidence, Cross-examination System for Insurance Defense Counsel (chart system), MEDPsych Corporation, 4984 Palm Coast Parkway, NW, Ste. 5, Palm Coast, Florida 32137, (904) 446-4300.

Copies of this chart may be obtained from Warner Fox of Hawkins & Parnell, LLP, Atlanta, (404) 614-7400.

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Dr. Silvain has lectured on the subject of psychological injury to over 13,000 insurance claims managers and defense counsel in 300 programs throughout the United States and Canada. In January, he spoke before the Winter meeting of the Georgia Defense Lawyers Association. Dr. Silvain is a defense consultant and can be reached through his Palm Coast, Florida Office at (800) 251-0799.

Georgia Defense Lawyers Association wishes to express its sincere gratitude and thanks to Insurance specialists, Inc., a Premier sponsor of the organization, for sponsoring the Saturday night banquet at the upcoming annual meeting and also Applied Technical Services, a Gold sponsor of he Association, for sponsoring the Friday night cocktail party at the upcoming annual meeting.

UPDATE REGARDING PROPOSED FORMAL ADVISORY OPINION REQUEST #99-R2

The State Bar of Georgia's Proposed Formal Advisory Opinion Request #99-R2 regarding litigation guidelines and third party audits has been published. As of May 17th, two separate formal comments have been filed with the Supreme Court, one on behalf of American International Companies and the other on behalf of American Insurance Association and Zurich U.S. AIC requested oral argument which, we understand, is the first time any such request has ever been made regarding the Supreme Court's decision on a request by the State Bar for a formal advisory opinion. The Formal Advisory Opinion Board of the State Bar was scheduled to meet on June 17th. At this time, we have no further word on the status of this formal advisory opinion request.