Georgia Defense Lawyer©

Advancing the Civil Defense Bar©

Winter 2009

2009 Medicare Notification Requirements: Are you and your clients prepared?

by Melisa C. Zwilling and Bennett L. Pugh

In recent years, ever-increasing obligations have been imposed on claimants, defendants, attorneys, providers and others to help preserve and protect rapidly depleting Medicare Trust Funds. Included among those obligations are repaying Medicare for conditional payment claims and using Medicare set-asides in appropriate cases.

Recently, Congress passed Section 111 of the Medicare Medicaid and SCHIP Extension Act of 2007. The new law requires liability insurers, self-insurers, no-fault insurers and workers' compensation insurers to report certain information concerning Medicare beneficiaries. In addition to requiring every insurer to substantially overhaul its claims-handling process to include a notification element, Congress established mind-numbing financial penalties for failure to comply with what essentially, already had been the law for several years.

History and Purpose of the Medicare Secondary Payer Act

In 1980, the Medicare Secondary Payer Act (MSPA) was enacted to reduce federal expenditures on health care. That legislation relegated Medicare to secondary-payer status when other entities, including private insurers and workers compensation carriers, had responsibility for paying medical expenses. Congress believed it was appropriate to place the burden of paying expenses on such "primary" payers, by whom the burden of payment was much better absorbed.

Although the MSPA is "structurally complex - a complexity that has produced considerable confusion among courts attempting to construe it - the MSP's function is straightforward." That function is to preserve and protect the Medicare program. The MSPA and corresponding regulations have been amended and expanded several times since the original date of enactment. The clear Congressional intent is "that the MSP provisions be construed to make

Medicare a secondary payer to the maximum extent possible." Previously, one member of Congress stated:

Unfortunately, performance under the MSP Program has not measured up. Failure to follow the

Continued on page 18

Inside This Issue

Member & Legal News - 4

Case Law Updates - 8

***Moreland v. Austin*: Its Impact on Ex Parte Communications - 10**

Employee Free Choice Act - 12

Annual Meeting Info - 13

Daubert and Computer Simulation - 14

Savannah Judicial Reception - 16

Fall Board Meeting Highlights - 27

GDLA Committees - 30

Meet the Judges!

Mark your calendars for February 26 as the GDLA hosts a reception for the judiciary at the French American Brasserie in Atlanta.

Judges have been invited from the Fulton, DeKalb, Gwinnett, Clayton and Cobb Superior and State Courts; the GA Supreme Court; GA Court of Appeals; Atlanta Division of the US District Court for the Northern District of GA; Eleventh Circuit Court of Appeals and State Board of Workers' Compensation.

There will be an open bar and heavy hors d'oeuvre.

Details will follow via the GDLA blast e-mail system and via a written invitation to GDLA members.

Judge Jerry Baxter, **Ella Baxter**, **Judge Toby Prodgers** and **Judge Ural Glanville**

FORENSIC CONSULTING & EXPERT WITNESS SERVICES

- Since 1984 -

FORCON INTERNATIONAL

www.forcon.com

GENERAL AREAS OF EXPERTISE

- Accident Reconstruction
- Architecture
- Automotive Fires & Failures
- Biomechanics
- Boat Accident Reconstruction
- Catastrophe Engineering
- Chemical Engineering
- Chemistry
- Civil Engineering
- Codes & Standards
- Construction
- Electrical Engineering
- Electronics
- Geology
- Geotechnical Engineering
- Highway Engineering
- Industrial Hygiene
- Injury Causation
- Materials Engineering
- Marine Engineering
- Mechanical Engineering
- Metallurgy
- Roofing
- Safety/OSHA
- Soils Science
- Structural Engineering

EXAMPLES OF SPECIALIZED EXPERTISE

- Adhesives
- Amusement Ride Accidents
- Batteries
- Blasting Damage
- Boilers & Furnaces
- Brake Failures
- Coatings
- Commercial vehicles
- Construction defects
- Container Handling Equipment
- Conveyor Systems
- Corrosion
- Cranes & Lifting Equipment
- EIFS
- Electrical Fires & Failures
- Electric Utility Plant Equipment
- Elevators
- Erosion & Sedimentation
- Fire Protection Systems
- Fuel gases
- Glass & window systems
- Heating & Air Conditioning Systems
- Heavy construction machinery
- Indoor Air Quality
- Low Speed Vehicle Accidents
- Manufacturing Machinery
- Marine Structures
- Mold
- Packaging
- Polymers & Plastics
- Power Tools
- Pulp & Paper Mill Equipment
- Refractory
- Roof Damage & Failures
- Sawmill Equipment
- Slip and Fall
- Toxic Chemical Exposure
- Welding
- Workplace Accidents

1534 Dunwoody Village Parkway, Suite 105 - Atlanta, GA 30338
770-390-0980 - Fax 770-390-0981

Georgia Defense Lawyer
Volume VI, Issue I

Editor: Peter D. Muller

Georgia Defense Lawyer, the official publication of the Georgia Defense Lawyers Association, is published four times annually. For editorial information, please contact Peter Muller at pdmuller@bouhan.com.

GDLA Office

Steve Milano, Executive Director
P.O. Box 8558
Atlanta, GA 31106
Tel: 404-817-9377
E-mail: contact@gdla.org

President's Message

Change

"Change" is the current watchword. It was the focus of presidential campaigns. It is the theme of the new administration in Washington. We only need open the paper, turn on the television, or power up a computer, to recognize with the current economy change is not only something desired, it is absolutely essential. In the last edition of our news letter, I inquired, in essence, what each of us are doing to effectuate a positive change in the lives of others. Those include young lawyers entering the practice, our neighbors, and those perhaps less fortunate than us in our community. Did you take it to heart? Have you done something in the last quarter to attempt to help someone change for the better?

Have you done something in the last quarter to attempt to help someone change for the better?

Change in our practice occurs incredibly rapidly. When I began practice we would go to law school libraries to consult treatises, review law review articles, and to use that incredibly new invention of computer research. Now our associates can access more information sitting in their bed at home on a laptop than I did at the law library. I remember a lawyer in Florida in the 1980's who refused to get a fax machine contending that it was not how the law was supposed to be practiced. Now we have electronic filing in our courts and can instantly communicate 24/7 anywhere in the world. We have PowerPoint presentations and computer animation and podiums that rise electronically.

What is coming next? We think of what has happened in how we practice law and generally how we live our lives with the technological innovations the last 25 years. Newt Gingrich was recently a speaker at the DRI annual meeting in New Orleans, and with apologies if I am remembering this wrong, he mentioned that the current thought is that science and technology will change four times more in the next 25 years than it has in the last 25. By comparison, he asked us to go back to 1908, and imagine what we would do in a day, or the handling of a case, in 2008. That is the overwhelming change we can expect within the next 25 years!

How does that "change" affect our practice? How does it affect us as an association? That is one of the reasons we have a long-range planning committee in the Georgia Defense Lawyers Association. We, as an association, are trying to not only keep up with the times, but in fact stay ahead of the times to not only meet the change that is surely coming, but to greet that change.

To that end, you do not want to miss our annual meeting, June 11-14 at the Westin Casuarina on Seven Mile Beach on Grand Cayman. Meeting Director Kyle has negotiated a fantastic rate of only $220 per night and Staten Bitting is planning an exceptional program that will not only allow you to keep up with change in your practice, and in the law, but to stay on the cutting edge.

Make your plans now. I look forward to seeing you in Grand Cayman.

Yours for the defense,

Jimmy Singer
President , GDLA

Member & Legal News

Member News

Chip W. Benton, *Hall, Booth, Smith & Slover*, Atlanta, was named by the *Atlanta Business Chronicle* as one of its 40 under 40 Up and Comers.

Annarita M. Busbee is now with *Owen, Gleaton, Egan, Jones & Sweeney*, Atlanta.

John C. Jones is now in private practice in Marietta. He can be reached at 770-427-8066.

Clinton F. Fletcher, *Nelson Mullins Riley & Scarborough*, Atlanta, was appointed DRI's Young Lawyer Substantive Liaison to the DRI's Aerospace Committee.

Fred Gleaton, *Owen, Gleaton, Egan, Jones & Sweeney*, Atlanta, recently qualified as a Diplomate, American Board of Professional Liability Attorneys.

Henry D. Green, Jr. is now with *Green & Sapp*, Atlanta. The firm's new address is 1827 Powers Ferry Rd. , Bldg. 4, Atlanta, GA 30339.

Jo A. Jagor appeared on behalf of *Hall Booth Smith & Slover*, Atlanta, at the first of the Atlanta Bar Association's Children At Risk task force meetings in 2009. ABA President Shayna M. Steinfeld called together attorneys in top law firms to coordinate resources available for attorneys, paralegals and others who seek volunteer opportunities to help stabilize the lives of children targeted in need. Contact the ABA to find out how you or your firm can help.

Barbara Marschalk, *Drew, Eckl, Farnham*, Atlanta, recently became an equity partner at the firm.

Curtis J. Martin, II has been named as a partner at *Mozley, Finlayson & Loggins*, Atlanta. He was also elected vice president of the Gate City Bar Association.

Carol Michel, *Weinberg, Wheeler, Hudgins, Gunn & Dial*, Atlanta, was recently invited to become a member of The International Association of Defense Counsel. The invitation-only association includes approximately 2,500 attorneys worldwide.

Joe Murphey, *Murphey's Law Firm*, Marietta, has been selected as one of the founding members of the Georgia Academy of Mediators and Arbitrators. Membership in the Academy is by invitation only and is limited to the top 5 percent of neutrals in the state. More information can be found at www.georgiamediators.org/joseph-murphey. Mr. Murphey mediates through Miles Mediation & Arbitration Services.

Christopher E. Parker, *Mozley, Finlayson & Loggins*, Atlanta, has joined the panel of neutrals at **BAY Mediation & Arbitration Services**. He is available to assist with the resolution of workplace disputes involving contracts, restrictive covenants, discrimination and wage & hour claims, as well as business disputes involving trade secret claims. More information is available at www.bayadr.com.

Andrew M. Wilkes, *Oliver Maner*, Savannah, was recently made partner.

New Members

The following were inducted at the Fall Board meeting. **Abdi Ammari**, *Drew Eckl & Farnham*, Atlanta; **Kristen Beightol**, *Dennis Corry Porter & Smith*, Atlanta; **Terrell W. Benton, III**, *Hall Booth Smith & Slover*, Atlanta; **Christina E. Campbell**, *Drew Eckl & Farnham*, Atlanta; **William A. Dinges**, *Temple Strickland Dinges & Schwartz*, Decatur; **Laura Eschleman**, *Nall & Miller*, Atlanta; **Joshua D. Jewkes**, *Ashe Rafuse & Hill*, Atlanta; **Gary Hurst**, *Drew Eckl & Farnham*, Atlanta; **R. Bates Lovett**, *Hunter Maclean Exley & Dunn*, Savannah; **Curtis J. Martin**, *Mozley Finlayson & Loggins*, Atlanta; **Amanda L. Matthews**, *Nall & Miller*, Atlanta; **Marlie McDonnell**, *Balch & Bingham*, Atlanta; **Talia J. Nurse**, *Drew Eckle & Farnham*, Atlanta; **Anthony Procacci**, *Savell & Williams*, Atlanta; **Matthew Schreck**, *Savell & Williams*, Atlanta; **Jason B. Schwartz**, *Temple Strickland Dinges & Schwartz*, Decatur; **William D. Strickland**, *Temple Strickland Dinges & Schwartz*, Decatur; **William D. Temple, Sr.**, *Temple Strickland Dinges & Schwartz*, Decatur; **Cynthia Tolbert**, *Moore, Clarke, DuVall & Rodgers*, Albany

GDLA Continues to Increase its Visibility

The GDLA made a presentation to newly inducted attorneys at their swearing-in ceremony in Fulton County in December. Past President **Warner Fox**, Hawkins & Parnell, Atlanta, made the presentation on behalf of the GDLA.

Firm News

Cruser & Mitchell has opened an Indianapolis office.

Gray Tagtmeyer King, LLP is now **Gray King Chamberlin & Martineau, LLC**, Atlanta.

Hawkins, Parnell & Thackston has opened a Los Angeles office.

Cases of Note

Curtis J. Martin, II and **John L. McKinley, Jr.**, *Mozley, Finlayson & Loggins*, Atlanta, recently obtained a defense verdict on behalf of a global package delivery company in a jury trial in Fulton County State Court. The plaintiff claimed that the defendant's tractor-trailer driver negligently caused a collision on the interstate, seriously injuring the plaintiff. Plaintiff, who was driving a passenger vehicle, claimed permanent spinal injuries and disability from the collision.

Continued on page 6

Exponent®

Our team of scientists, engineers, medical professionals and business consultants provides expertise in more than 90 disciplines to support technically challenging litigation cases.

Over the past 40 years, Exponent has been involved in more than 30,000 cases. We have provided science-based investigations for litigation involving product liability, environmental/toxic tort issues, construction disputes, intellectual property, and personal injury.

- Accident Reconstruction
- Biomechanics and Injury Assessment
- Civil and Structural Engineering
- Construction Consulting
- Data Analysis
- Electrical/Electronics
- Environmental/Toxic Tort
- Fires and Explosions
- Food and Chemicals
- Health and Epidemiology
- Materials Evaluation
- Mechanical Design Assessment
- Visual
- Communications/Demonstrative Evidence
- Warnings and Labels/Human Factors

www.exponent.com

Bette McKenzie
21 Strathmore Road, Natick, MA 01760
(508) 652-8582 (508) 652-8500
boston-office@exponent.com

Exponent is certified to ISO 9001

continued from page 4

Ken Moorman with *Weinberg, Wheeler, Hudgins, Gunn and Dial* obtained a defense verdict in Athens-Clarke Superior Court in a trip/fall case after five-day jury trial. Plaintiffs were represented by Steven Saccoccia and Charles Bridgers. Plaintiff lady tripped over security cable on walkway of restaurant, fell forward; serious elbow fracture and related injuries; $100,000 in medical expenses. Plaintiffs rejected six figure pre-trial offer. Defendant now contemplating bringing Motion for Fees/Expenses under OCGA 9-11-68 as amended.

Musa L. Eubanks, *Insley and Race*, Atlanta, recently obtained a favorable ruling on behalf of Appellant Howard University in a retaliation case. In Furline, et al. v. Morrison, 04-CV-1029, 04-CV-1114 (July 24, 2008), the District of Columbia Court of Appeals reversed a 2004 jury verdict in favor of Appellee Morrison, an employee of Howard University Hospital, with direction for the trial court to enter judgment in favor of Appellants.

Ms. Morrison sued her former supervisor and Howard University Hospital under the District of Columbia Human Rights Act (a statute that is substantially similar to Title VII), alleging that she was terminated for complaining of age discrimination. The age discrimination claim was dismissed by summary judgment. Ms. Morrison was suspended for time and attendance issues, an adverse action that the Appellee claimed was retaliatory.

The issue that the Court of Appeals focused on was the multi-layered discipline system in place when the decision to suspend Ms. Morrison was made. The court found that even if her supervisor had some retaliatory motive in his decision to suspend her that the multi-layered suspension system in place was an "independent review" of the time and attendance charges.

The suspension system in place required five levels of approval before it became effective. This included individual supervisors, along with the Hospital Chief Financial Officer, the Office of General Counsel and the Human Resources Department.

Reprinted with permission from DRI's The Voice.

Engineering Systems Inc.

esi-website.com

National, multidisciplinary forensic engineering, scientific and consulting firm with over 135 professionals supporting multiple disciplines and specialty areas.

Representative Disciplines and Specialty Areas

- Aeronautical
- Automotive
- Biomechanical
- Boiler/Machinery
- Chemical
- Civil/Structural
- Code Compliance
- Electrical/Electronic
- Environmental
- Finite Element Analysis
- Fire & Explosion
- Marine
- Mechanical
- Materials/Metallurgy
- Modeling, Simulation
- Oil & Gas
- Patents & IP
- Plastics
- Safety
- Utility—Electric, Gas

Selected Areas of Expertise

Automotive (Passenger, Commercial, Industrial, Off-Road) A/R
Commercial and Patent Disputes
Electrical, Elevator, HVAC System Evaluations
Environmental Inspections (mold, IAQ, Phase I/II)
Failure Analysis
Fire, Explosion, Arson, C/O Investigations
Metallurgical Laboratories (with SEM), Testing Services
Industrial Safety Investigations
Intellectual Property
Porch, Stair, Flooring and Deck Incidents
Product Failures and Liability Analysis
Property Casualty & Loss Investigations
Sprinkler/Fire Suppression Systems
Windstorm/Tornado/Hurricane Damage Inspection

CHICAGO/AURORA, IL
(ESI Corporate Headquarters)
630-851-4566

FORT MYERS, FL
239-482-0500

ATLANTA (NORCROSS), GA
866-596-3994 (toll free)

MIAMI, FL
305-779-5911

HOUSTON, TX
281-448-6060

ST. LOUIS (O'FALLON), MO
636-240-6095

KANSAS CITY, MO
816-471-7877

COLORADO SPRINGS, CO
719-535-0400

Appellate Case Law Update

By L. Lee Hicks
McClure, Ramsay, Dickerson & Escoe, Toccoa

The following case law update was provided by the GDLA's Appellate Substantive Law Committee.

Damani v. State
S08G0601, S08G0602, S08G0603, S08G0608, S08G0611, S08G0613
September 22, 2008

In this case, the District Attorney of Cobb County filed 12 complaints for condemnation of several machines which the State contended were illegal gambling devices. The trial court concluded that four of the 11 devices were subject to condemnation, but the seven remaining were not. The State appealed. After requesting that the entire record be transmitted to the court of appeals, it became clear that that entire record was not transmitted. The State then filed a motion in the court of appeals requesting that the trial court be ordered to transmit the complete record. The court of appeals then issued an opinion resolving the case and denying the State's motion as moot. The supreme court then granted certiorari and vacated the judgment, determining that the entire trial record should have been sent to the court of appeals. Relying on O.C.G.A. §5-6-48(d), the supreme court held that there are two considerations when determining whether an appellate court should exercise discretion to supplement the record. First, the court should consider that cases should be decided according to their true and complete facts as they occurred in the trial court. Second, the court should also consider that cases on appeal should not be delayed by proceedings in the trial court. The first consideration prevails over the second. Based on this, the supreme court determined that the court of appeals should have ordered the trial court to convey the complete record.

Popham v. Yancey
S08A1394
September 22, 2008

In this case, Kyle Yancey petitioned the Superior Court of Cobb County and asked that a receiver be appointed to sell certain property owned by Peter Popham in order to satisfy a judgment Yancey had obtained against Popham. The trial court granted the request and Popham appealed. In his notice of appeal, Popham requested that the record be prepared and forwarded to the Court without a transcript. Relying on the rule that court proceedings are presumed to be lawful in the absence of a transcript, the Supreme Court affirmed.

Mackey v. Federal National Mortgage Association
A08A1056
September 24, 2008

In this case, the court of appeals affirmed the grant of a writ of possession to Fannie Mae in a dispossessory proceeding. The Mackeys contended on appeal the dispossessory warrant was fatally flawed. However, no transcript was submitted to the court of appeals. Relying on the presumption the evidence supported the grant of the writ of possession absent a transcript, the court of appeals affirmed.

Morris v. Morris
S08A1372
November 3, 2008

In this case, the supreme court affirmed a judgment finding Clyde Morris in contempt for failing to comply with the provisions of his divorce decree. Interestingly, in the original appeal, Morris stated that a transcript would not be prepared. However, in his brief, he challenged factual findings underlying the order and relied on documents not contained in the record. The supreme court issued an order striking the brief and ordered Morris to insure that the record was sent to the supreme court. Morris then approached the trial court exparte and the trial court entered an order supplementing the record on appeal with documents neither admitted nor properly proffered at the hearing. The opposing party objected, and the trial court entered an amended order supplementing the record with only some of the documents Morris had asked the trial court to add. A substituted brief was filed. Morris continued in the substituted brief to rely on documents not properly in the record and others that were not admitted or proffered in the trial court. Again, relying on the rule that a proceeding is presumed to have been conducted in accordance with law absent a transcript, the supreme court affirmed.

Byrd v. Rachaman
A08A2132
November 7, 2008

In this case, the trial court granted summary judgment to Rachaman in his suit for breach of a promissory note. Byrd contended there was error because the trial court denied his motion to withdraw admissions. Those admissions essentially proved Rachaman's case. However, Byrd did not prepare and include a transcript in the appellate record. The court of appeals, presuming the hearing on the motion to withdraw admissions was not done in error, affirmed.

City of Greenville v. Bray
S08A0692
November 17, 2008

In this case, James Curtis Bray applied to run for mayor for the City of Greenville in 2007. After a chal-

Continued on page 26

Insurance Coverage Case Law Update

By Brian T. Moore
GDLA Insurance Law SLC Chair
Drew, Eckl & Farnham, Atlanta

The following case law update was provided by the GDLA's Insurance Coverage Substantive Law Committee.

Nationwide Mut. Fire Ins. Co. v. Kim,
No. 08A1063
(Ga. Ct. App. Nov. 14, 2008)

In this appeal in a declaratory judgment action, the court ruled a policy's criminal acts exclusion does not preclude an insurer from having to defend its insured when the plaintiff has substituted claims in negligence and gross negligence.

The underlying tort suit originally had been based upon a claim for battery arising from the insured throwing an ice cream scoop at a karaoke bar customer. However, the plaintiff subsequently had amended the complaint to remove the intentional acts and to allege only negligence and gross negligence, and the defendant testified that he had not intended to throw the scoop. The insurer filed a motion for summary judgment in the DJ action, claiming that the facts established that its insured had acted intentionally, and the trial court denied the motion.

The court of appeals held that a factual issue existed as to whether the defendant's acts were intentional or negligent, and therefore summary judgment was not proper. As a result, the insurer has a duty to provide a defense to the claims.

Smith v. Stoddard
No. 08A1189
(Ga. Ct. App. Nov. 19, 2008)

The court of appeals held that an uninsured motorist policy does not cover a plaintiff's right to attorneys' fees and expenses of litigation against the tortfeasor under O.C.G.A. § 13-6-11.

The plaintiff brought suit against the defendant as a result of a motor vehicle accident and also sought fees and expenses of litigation under O.C.G.A. § 13-6-11, based on the tortfeasor's bad faith and stubborn litigiousness. After receiving policy limits from the defendant's liability carrier, the plaintiff made a claim against his own UM insurer for excess damages, including the award under O.C.G.A. § 13-6-11. In seeking these damages, the plaintiff did not allege that his UM carrier had acted in bad faith or had been stubbornly litigious. Rather, the plaintiff relied solely upon the defendant's conduct

The UM insurer sought summary judgment on the issue, arguing that the UM coverage did not give the plaintiff a claim for attorney fees or expenses of litigation. The trial court granted summary judgment to the UM insurer.

The Georgia Court of Appeals affirmed, holding that there was no coverage for the fees and expenses. The court noted that the UM statute makes no provision for the recovery of attorneys' fees and expenses against a UM insurer based on the tortfeasor's stubborn litigiousness or bad faith conduct. The court also held that the UM insurance policy did not cover such damages, because the language of the policy limited coverage to the type required by the UM statute, i.e., for bodily injury and property damage.

Owners Ins. Co. v. Smith Mech. Contr. Inc.
No. 08A1563
(Ga. Ct. App. Nov. 20, 2008)

The care, custody, or control provision of an insurance policy did not exclude coverage for the damage to the property at issue, since the undisputed evidence showed that there was no bailment of property.

The insured had filed suit for indemnification against its insurer, seeking to recover amounts that the insured had paid to its customer after the customer's peanut cleaner was damaged while the insured was moving the cleaner with the insured's crane. The trial court granted summary judgment to the insured, ruling that the care, custody, or control provision of the policy did not exclude coverage for the damage, because there was no bailment of the cleaner.

The court of appeals affirmed, noting (1) no evidence showed the customer had delivered exclusive possession of the cleaner to the insured; (2) the customer's maintenance supervisor was in charge of the job it had hired the insured to do and the supervisor had the authority to control the job; (3) the insured never took the cleaner off the customer's job site; (4) the insured's job was simply to lift the cleaner from its foundation, set it on the ground and then hoist it onto a truck; and (5) the damage to the cleaner was not caused by any failure of the insured to perform the job it had been contracted to do in a workmanlike manner.

McClellan v. Evans
No. 08A1277
(Ga. Ct. App. Nov. 17, 2008)

Uninsured motorist policy was not relevant in personal injury action case. Evidence of an agreement between the defendant/tortfeasor and the plaintiff's UM carrier ("agreement") is inadmissible when the agreement only established the defendant's agreement to cooperate with the UM carrier by appearing at trial.

The plaintiff had been struck and injured by a vehicle driven by the defendant. In the tort suit, the jury found for the defendant. The plaintiff appealed, arguing the trial court had erred in denying the plaintiff's pretrial motion for permission to introduce the agreement.

Continued on page 26

Moreland vs. Austin:
Its Impact on Ex Parte Communications

By Matthew P. Stone
Freeman, Mathis & Gary, Atlanta

In November 2008, the Supreme Court of Georgia unanimously reversed the Georgia Court of Appeals' decision in Austin v. Moreland, 288 Ga. App. 270 (2007), in which the lower court had held that defense counsel could, in certain circumstances, engage in ex parte conversations with a plaintiff's doctors.

Austin involved a medical malpractice claim where defense counsel had ex parte discussions with prior treating physicians of the plaintiff's deceased husband. The court of appeals held that those discussions did not violate HIPAA, because the plaintiff had produced her deceased husband's medical records containing protected health information (PHI), and defense counsel's discussions did not go beyond the content of those records. Austin, 288 Ga. App. at 275. The court of appeals reasoned that O.C.G.A. § 9-11-34(c)(2), governing requests for production to non-party healthcare providers, afforded greater protection than HIPAA by requiring notice and opportunity for a plaintiff to object to a defendants' written discovery requests. Id. at 274-75.

The Supreme Court of Georgia, however, held that this "analysis misses the mark," as it focuses on the discoverability of PHI instead of on the method used to discover it: "[S]ervice of a request for production of documents is insufficient because, although it gave plaintiff notice and an opportunity to object to the production of written documents, it did not give plaintiff an opportunity to object to the ex parte oral contact and the discovery of the physicians' recollections and mental impressions." Moreland v. Austin, 2008 WL 4762052, at 2 -3 (Ga. Sup. Ct., Nov. 3, 2008).

Notwithstanding that a plaintiff waives his right to privacy for medical records relating to a medical condition he places in issue, the supreme court concluded that "HIPAA preempts Georgia law with regard to ex parte communications between defense counsel and plaintiff's prior treating physicians

Supreme Court of Georgia Reverses Court of Appeals, Finding HIPAA Precludes Defense Counsel's Ex Parte Conversations with Plaintiff's Doctors

because HIPAA affords patients more control over their medical records when it comes to informal contacts between litigants and physicians." Id. at 3. The supreme court clarified that defense counsel may continue to have ex parte conversations with a plaintiff's healthcare providers about "benign" matters that do not relate to PHI, such as scheduling testimony. Id. at 3. If, however, defense counsel wants to discuss PHI with a plaintiff's healthcare provider, he "must first obtain a valid authorization, or a protective order, or ensure that the patient has been given notice and an opportunity to object to the ex parte contact, all in compliance with the requirements of HIPAA as set forth in 45 CFR § 164.512(e)." Id.

Because HIPAA does not authorize a remedy or penalty for violating its mandates in the context of a civil lawsuit, the supreme court noted that trial courts, in the exercise of their broad discretion under O.C.G.A. § 9-11-37, will need to fashion an appropriate remedy for HIPAA violations. Id. at 4. Those remedies, of course, range in severity from a "slap on the wrist" to striking a defendant's answer. Other penalties which have been urged by plaintiff attorneys include the exclusion of any medical witness who has violated HIPAA.

Matthew P. Stone is a partner of Freeman Mathis & Gary, LLP in Atlanta. His practice spans the firm's Commercial & Complex Litigation and Corporate & Governmental Liability practice groups, where he concentrates on the defense of motor vehicle and general liability claims involving catastrophic personal injury and wrongful death.

GDLA Annual Calendar

Feb. 26 -- Spring Board Meeting
(Hawkins & Parnell)

Feb. 27 -- Judicial Reception
(French American Brasserie, Atlanta)

April 25 -- Spring Board Meeting
((Charleston Place, Charleston, SC)

June 11-14 -- GDLA Annual Meeting
(Westin Casuarina, Grand Caymans)

June 12 -- Summer Board Meeting
(Westin Casuarina, Grand Caymans)

June 13 -- Annual Business Meeting
(Westin Casuarina, Grand Caymans)

October 24 -- Fall Board Meeting
(Brasstown Valley Resort,
Young Harris, GA)

December 3-5* -- Melburne D. "Mac"
McLendon Trial Academy
(Callaway Gardens)

**Tentative Dates*

BAY
Mediation & Arbitration Services, LLC
Time Well Spent

The trained and experienced neutrals of BAY Mediation & Arbitration Services have helped resolve thousands of cases in Georgia and the Southeast.

Founded in 2002, BAY offers friendly, cost-effective dispute resolution in a *new*, spacious, facility.

- 12 conference rooms
- flat screens & projectors
- wi-fi & digital hookups
- made-to-order meals
- continuous refreshments
- attentive staff

Conveniently located near GA-400 & I-285

5775 Glenridge Drive, N.E.
Building E, Suite 100
Atlanta, GA 30328
678-222-0248 (scheduling)
404-252-3376 (fax)

www.bayadr.com

BAY Neutrals:

William S. Allred
W. Bruce Barrickman
M. Gino Brogdon
Victor J. Faenza
Matthew D. Gansereit
Valerie G. Tobin
George D. Wenick
F. Scott Young

Employee Free Choice Act:
Changing the Balance Power

By Mel Haas
Constangy, Brooks & Smith, Macon

Among the barrage of political advertisements during the week before the recent Presidential election was a TV ad in which a typical "boss" (heavy set, three-piece suit, cigar) is sitting on one end of a see-saw, and a blue-collar worker is sitting on the other end. The boss man has the blue-collar worker stuck up in the air because he outweighs him by at least 50 pounds. In the next scene in the ad, the blue-collar worker has three co-workers sitting on his end of the see-saw with him, acting collectively to strand the boss man up in the air. This spot advocated the enactment of new federal legislation, and the message was clear that by acting collectively, employees can exert power over the big bad bosses of the world and change the balance of power between employers and employees.

That TV spot was the first salvo in what will be a monumental battle between business and labor organizations in the next Congress over a bill called the Employee Free Choice Act. This proposed legislation, which is the highest priority of organized labor in the next Congress, is viewed as pay-back for the millions of dollars which unions invested in the recent Presidential and Congressional elections. If enacted as presently proposed, it would do nothing less than revolutionize our federal labor relations systems as it has existed since originally enacted in 1935.

Organized labor in the U.S., which has seen its share of the private sector workforce drop from 35% in the 1950's to 7.5% today, is determined to reverse that trend; its main weapon to accomplish that goal is the Employee Free Choice Act.

Our existing federal labor relations system is built upon the notion of employee self- determination. If a majority of employees vote in a secret ballot election to designate a union as their collective bargaining representative, an employer is legally obligated to deal with those employees through their elected collective bargaining representative for a reasonable period of time and to negotiate in good faith in an effort to reach a collective bargaining contract.

This proposed legislation . . . if enacted as presently proposed, would do nothing less than revolutionize our federal labor relations systems as it has existed since originally enacted in 1935.

As presently proposed, the Employee Free Choice Act would do three things. First, it would eliminate secret ballot elections and require that an employer recognize and collectively bargain with a union if a majority of employees simply sign a card designating the union as their bargaining representative. These signatures could be obtained without the employer ever knowing that the union was obtaining them or having an opportunity to discuss the issues with its employees. Also, because there is no secret ballot, union organizers would know whether or not each employee has voted in favor of unionizing, so union organizers could obtain signatures through coercive and fraudulent means, without employers or employees having any recourse.

Second, the Employee Free Choice Act would require that if a majority of employees in a particular group signed a union card, an employer must begin negotiations within 10 days of a union demand for collective bargaining. If after 120 days of collective bargaining the parties have not agreed to a new contract, the matter is referred to an arbitrator who will determine the terms of the contract in binding "interest" arbitration.

The third provision of the Employee Free Choice Act greatly increases the penalties for violation of the National Labor Relations Act by employers. Employers would be subject to fines up to $20,000 per violation for minor violations of the National Labor Relations Act. In a very real sense, the Employee Free Choice Act would upend the balance of power between employers and employees just as depicted in that TV ad promoting the passage of this bill. If the Employee Free Choice Act becomes law, employees would have virtually unfettered power over employers, and employers would have to completely rethink how they deal with the possibility of union organizing.

Submissions Needed

The GDLA is currently seeking depositions, motions, briefs, rulings, interrogatories and other work product for our online Brief Bank, Discovery Tools and Tort Reform Database.

We currently have many valuable documents to assist you in your case research, but would like more. If you have not yet donated, please consider doing so today.

Please log into the Members area of www.gdla.org to see what we are looking for and send any submissions in .pdf or .doc format to the GDLA office at contact@gdla.org.

42nd GDLA Annual Meeting

Grand Cayman Islands!

June 11-14, 2009

Come join Georgia's Defense Lawyers at the GDLA Annual Meeting
at the Westin Casuarina, Grand Cayman Islands

Incredible Room Rates Starting at $274!

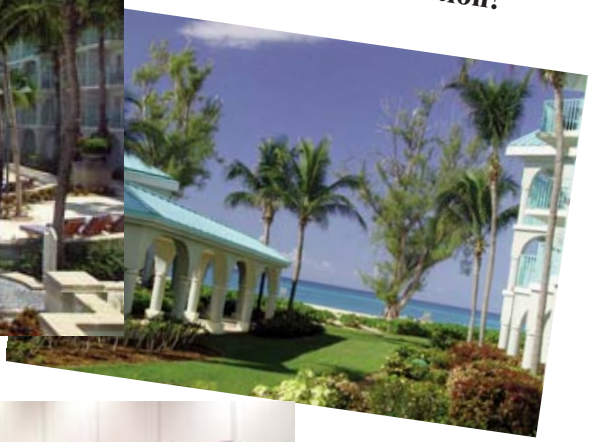
(includes all taxes and fees!)

Non-Stop Flights from Atlanta!

The Caribbean

Couples Getaway

Fabulous Location!



Build Your Network

Westin Casuarina Resort

Golf - Tennis - Annual Dinner - Spouse & Kids Activities
6 CLE hours - Spouses' Activities - Trade Show

visit **www.gdla.org** for more detailed information on our annual meeting and for registration and reservation information

Daubert in the 21st Century and Computer Simulation

Ever since the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), expert opinion testimony has been subjected to increased scrutiny relative to its ability to withstand "testing pursuant to the scientific method." Computer modeling and simulation can be a tool for withstanding a Daubert challenge, by providing a method for testing expert opinion testimony. This article will address how computer modeling and simulation can be used by your expert as a testing method to substantiate, both scientifically and legally, the admissibility of expert opinion testimony.

I. Daubert and the "Testing" Factor

The Daubert decision highlighted several factors to be utilized by trial judges to determine whether expert opinion testimony should be admitted at trial. The first factor addressed in Daubert was "testing" pursuant to the scientific method

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generated hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Daubert, 579 U.S. at 593 (citations omitted).

Daubert-based challenges often focus their attack on the inability of the expert to demonstrate that his or her opinions were tested pursuant to the scientific method. See e.g., Thierfelder v. Virco, Inc., 502 F. Supp. 2d 1025 (W.D. Mo. 2007) (court considered motion to exclude admission of expert testimony due to expert's failure to conduct any tests, or computer modeling, to substantiate opinions to be offered at trial); Avance v. Kerr - McGee Chemical, LLC, No. 5:04 CV209, 2006 WL 3912471 (E.D. Tex. Dec. 6, 2006) (court considered motion to deny admission of expert testimony due to expert's failure to conduct tests in accordance with a scientific method). Courts are inundated with motions to exclude testimony due to the failure of experts to perform testing in accordance with the scientific method, as well as the experts' inability to provide testimony based on such testing.

As a result, some courts have commented that they would look forward to opportunities to consider expert testimony that could be supported by tests founded on computer modeling and simulation. See, e.g., Ortiz v. Yale Materials Handling Corp., No. CIV 03-3657FLW, 2005 WL 2044923 (D.N.J. Aug. 24, 2005), (trial judge granted defendant's motion to strike plaintiff's expert testimony, pointing out that the expert's opinion testimony was unreliable, because he failed to perform relevant testing in accordance with the scientific method).

II. Computer Modeling and Simulation

In the age of computer-generated special effects, where the impossible becomes believable, it is critical to distinguish between "computer animation" and "computer simulation." Though these terms are used interchangeably in most commonplace conversations - - and sometimes even in the legal context - - there are very important distinctions between these two concepts. These distinctions also affect their credibility and accuracy and, thus, their admissibility in the courts.

Computer simulation is a method of "scientific modeling," where mathematical algorithms and solution techniques are used to solve problems in accordance with scientifically accepted and recognized equations, subject to certain conditions, boundary limits and constraints. Scientific modeling through computer simulation programs provides volumes of data that can then be made available for subsequent scrutiny. Traditionally, the results of scientific modeling are depicted in large tables and graphs which exhibit numerical relationships. It is often difficult to fully comprehend these tables and graphs, making the expert's opinion testimony relating to his or her "mathematical tests" nearly impossible for lay witnesses to comprehend. Computer simulation allows the forensic expert to use computers to demonstrate the meaning of the mathematical studies.

It is important to note that computer simulation is not "computer animation." Computer animation is not necessarily defined by scientific principles.

Animation is merely used to illustrate an expert's testimony while simulations contain scientific or physical principles requiring validation. Animations do not draw conclusions; they attempt to recreate a scene or process. Thus, they are treated like demonstrative aides. Computer simulations are created by entering data into computer models which analyze the data and reach a conclusion. Because the simulations themselves draw conclusions, they may have independent evidentiary value. As these later computer simulations appear on the scene, the courts will be faced with making the Daubert analysis.

Harris v. State, 13 P.3d 489, 494 (Okla. Crim. Ct. App. 2000) (citations omitted).

Most importantly, computer-generated models and simulations are not merely illustrative or demonstrative tools. They can also form the ultimate basis or foundation for an expert's opinions, because they apply scientific princi-

By Scott S. Katz, Butler Pappas Weihmuller Katz Craig, Tampa, Fla
Elliot L. Stern, Elliot L. Stern, Ph.D., P.E. Florida Forensic Engineering, Inc., Tampa, Fla


ples, data, and methods to reformulate the way in which events actually occurred. Again, it is the mathematical modeling, along with scientific principles, that leads to the validity of the result from a computer simulation. See 2 McCormick On Evidence 218 (6th Ed.) (2007).

Computer models can also be used to test hypotheses of experts as to what did or could happen concerning events related in litigation. The inputs contain variables as well as known information; the computer runs these inputs through formulae based on scientific principles. Based on the results of the model, depending on the variable inputs, the expert may be able to form a conclusion about his hypothesis and then will base his opinion upon these results. Typically, there is no graphic image created by this type of "data modeling" as the terms is used here. The foundation for such models parallels the foundation described above for simulations. Id.; see generally State v. Serge, No. 01-CR-260, 2001 WL 34058294 (Pa. Commw. Ct. Sept. 14, 2001).

Computer simulation is a valid foundation for expert opinion testimony. In McCurdy v. Ford Motor Co., No. 1:04-CV-155 (WLS), 2006 WL 2793167 (M.D. Ga. Sept. 26, 2006), the trial court considered the defendant's motion to exclude expert testimony based on the theory the expert did not test his opinion or theories. The court rejected the defendant's motion and found that the expert witness had actually tested his theories in accordance with a scientific method, although the expert did not personally perform all of the testing involved. The court specifically recognized that the expert's opinion withstood a Daubert challenge due to the use, in part, of computer simulation, although the simulation was performed by another expert. In Montgomery v. Mitsubishi Motors Corp., No. 04-3234, 2006 WL 1892719 (E.D. Pa. June 10, 2006), the trial court rejected a motion to exclude expert testimony. The court found the expert's opinions were deemed more reliable due to the use of computer simulation tests. See also Appelera Corp. v. Micromass UK, Ltd., 204 F. Supp. 2d 724 (D. Del. 2002); Livingston v. Isuzu Motors, Ltd., 910 F. Supp 1473 (D. Mont. 1995); cf. Lyons v. J.A. Augur, Inc., 821 So.2d 536 (La. Ct. App. 2002) (computer simulation tests were held admissible, but not based on Daubert).

III. "Real-Life" Examples

Forensic engineers should use science, i.e., mathematics and engineering, to assist in the explanation of the evidence and the determination of facts through the litigation process. Forensic engineers are trained problem solvers, who specialize in determining the cause and/or origin of technically difficult subjects such as accident reconstruction, product failure and work-related injury. Sometimes "common sense" and "logic" tempt forensic engineers to believe no systematic procedure is needed to form a valid opinion, and that general knowledge and experience can provide a sufficient foundation for a conclusion. However, since Daubert, expert opinion testimony must also pass muster per "the scientific method" to be admissible

The scientific method is a process by which the forensic engineer seeks to construct an accurate and consistent explanation for a loss, while minimizing the influences of bias and prejudice. The scientific method consists of four steps: (1) Data collection through observation and description; (2) Formulation of a hypothesis; (3) Testing of a hypothesis in order to predict quantitatively the results of new observations, in accord with scientific principles; and (4) Performance of experimental tests in order to verify, refine or reject a hypothesis, as well as determine the sensitivity of the hypothesis' assumptions and tolerances.

Computer modeling and simulation is a means by which such matters can be represented on a systematic basis. When used as a tool for forensic engineering, computer modeling is mostly a group of mathematical relationships or formulae governed by the laws of physics and the engineering sciences. These models can be mathematically solved, yielding results which can also be compared to the actual circumstances, i.e., data. By using scientific modeling, computer simulations can effectively "test" the validity or invalidity of an expert's opinions. The following computer modeling and simulation examples are simplifications of actual events, but were used to test expert opinion testimony.

Roof Collapse - A building is constructed in a location requiring roof design and storm drainage capable of safely handling a rainfall rate of 4 inches per hour. During a rain of 2 inches per hour for 2 hours, a roof portion collapses in the area surrounding a main, bowl-type roof drain, resulting in substantial losses. Forensic investigations include analysis of the building and roof structure, storm drainage system, design plans, actual construction and cause of failure. Structural engineers indicate the cause of the collapse is a progressive failure due to repeated high loading of additional live load (water weight during rain water draining of the roof).

During the investigation, it is observed that the EPDM roof membrane within the mounting ring of the main drain had a hole cut within the membrane smaller than proper installation instructions

Continued on page 23

Savannah Judges Reception

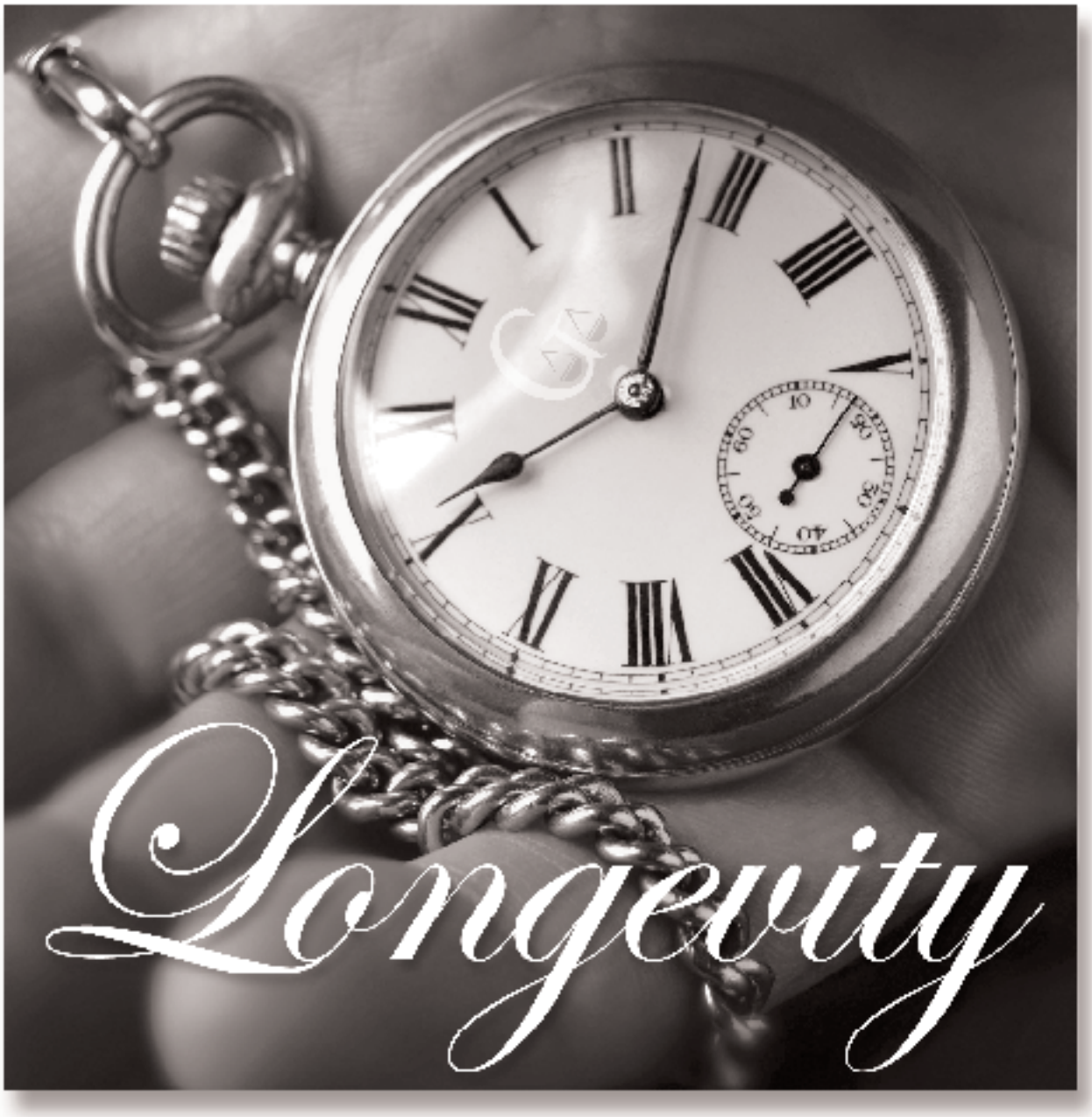
The Chatham Club, Savannah November 20, 2008

GDLA members met and mingled with with members of Georgia's judiciary in November at the Chatham Club in Savannah. The reception, one of a series held by the GDLA around the state, was open to GDLA members only, giving the association's membership an opportunity to interact with the judiciary in a more informal atmosphere than the court room.

Special thanks for Salty Forbes for sponsoring the reception at his club and Sally Akins for organizing the day's activities.

The GDLA's next judicial reception is scheduled for February 26 at the French American Brasserie (FAB) in Atlanta

Clockwise from top left: GDLA board member **Peter Muller**, **Judge Michael Barker** and **Judge Patricia Stone**; GDLA president **Jimmy Singer**, GDLA secretary/treasurer, **Bubba Hughes** and **Curt Thomas**; GDLA vice president, **Kirby Gould Mason** and **Tracie Smith**; GDLA board member **David Nelson**, **Judge Herman Coolidge** and GDLA past president, **Salty Forbes**; **Malcolm Mackenzie** and **Judge Ronald Ginsberg**; Judge Ginsberg and David Nelson; **Judge Penny Freesemann** and Kirby Mason; **Judge William Moore** and **Pat O'Connor**; **Steve Sims** and **Judge Claire Cornwell-Williams**; Bubba Hughes, Judge Coolidge and Tracie Smith



GEORGIA LAWYERS INSURANCE COMPANY

GaLawIC.com

Experience real service, and become a satisfied Georgia Lawyers customer. Call 866-372-3435 today for a free no obligation quote.

At Georgia Lawyers Insurance Company, time has shown that our superior personalized service complimented by our proactive claims handling pays off. That's why, while other insurance companies have left the state, we're still here after 5 years. Once you become an insured, you'll understand why Georgia Lawyers has such an excellent retention rate. At Georgia Lawyers Insurance Company, we work exclusively with lawyers and law firms, but we specialize in service.

continued from page 1

MSP law is costing the taxpayer billions of dollars . . . . Studies by the General Accounting Office and the inspector general of the Department of Health and Human Services have repeatedly identified the MSP program as gushing with leaks of Federal tax dollars.

Accordingly, through numerous amendments, Congress has "clarified and augmented the Government's powers to recoup conditional Medicare payments from primary sources." Whenever a federal court has denied Medicare's recovery, Congress has subsequently amended the MSPA to specifically legislate, or clarify, the legislative intent behind the MSPA to enable Medicare to recover such funds. For example, Congress enacted the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003. With passage of the MMA, Congress essentially overturned several federal court cases which "severely limit[ed] the applicability of the MSP provisions at considerable expense to the Medicare program . . . . The Congress rejected these attempts to incorrectly limit the application and scope of the MSPA." The clear Congressional intent is to expand, not limit, Medicare's rights under the MSPA.

It is important to recognize that the MSPA applies to almost every case. The MSPA itself provides that Medicare may refuse to pay for an individual's medical treatment *to the extent that . . . payment has been made or can reasonably be expected to be made under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (including a self-insured plan) or under no fault insurance.*

In all such cases, Medicare is "secondary," meaning that if any other entity could be deemed a primary payer for an individual's medical treatment, Medicare may either not pay for treatment at all or pay and seek reimbursement.

Parties Cannot Legally Bind Medicare to Terms of Settlement Agreement

Countless discussions have occurred recently, as well as over the past several years, concerning how to fully protect the interests of primary payers if the settlement agreement places responsibility for repaying a Medicare conditional payment claim on the claimant. It has been incorrectly suggested that simply including language in the settlement documents stating that, for example, the claimant will be responsible for repaying any conditional payment claims is sufficient to protect an employer or insurance carrier from future claims by Medicare. While including such language in settlement agreements is certainly advisable and may prove quite useful, it is NOT binding on Medicare. The law, including federal statutes, the Federal Regulations and abundant case law, is very clear that an individual or entity who is not a party to a contract, which would obviously include a settlement agreement, is not legally bound by the terms of that contract. Therefore, parties may not legally limit Medicare's right to recover money from the primary payer for conditional payment claims asserted by Medicare after the date of settlement.

Further, federal law is crystal clear that no state court, board, or commission has jurisdiction over any federal agency. Therefore, having a state court, board, or commission enter an order in any case purporting to limit Medicare's rights or ability to recover against the primary payer is ineffective and could easily be disregarded by Medicare. The "Supremacy" theory is a longstanding legal principle providing that federal law is "Supreme" to any and all conflicting or contradictory state laws or contracts. The same Supremacy principle applies when it comes to attempting to limit Medicare's right to recover, which is granted by federal law, by including language in settlement documents stating that Medicare can only recover from a claimant if Medicare asserts conditional payment claims after the date of settlement. Medicare may legally completely disregard that language.

Be aware, however, that Medicare's demand for reimbursement will not be issued until after Centers for Medicare and Medicaid Services [CMS] has been provided with copies of the final and approved settlement documents. If money is being paid to a claimant to cover any conditional payment claims, language may be included in the settlement documents placing a burden on the claimant to resolve such claims. Again, however, Medicare is not bound by any such language and may proceed against the primary payer if it so chooses, where a claimant does not fulfill his or her obligation to repay Medicare. The Federal Regulations clearly provide that primary payers are responsible for reimbursing Medicare's conditional payment claims. When tort claims are resolved, primary payers remain responsible to Medicare to repay conditional payments even if money was paid to the claimant for the express purpose of resolving such claims and even if the claims were highly disputed. Being well informed of the law and acting accordingly can prevent substantial problems in the future.

Conditional Payment Claims and the Duty to Notify Medicare of a Potential Primary Payer

To help ensure Medicare does not pay claims for which a primary

payer should pay, the MSPA has imposed an affirmative duty on primary payers, in addition to many others, to notify Medicare of potential primary payer situations. The Code of Federal Regulations states:

If it is demonstrated to a primary payer that CMS has made a Medicare primary payment for services for which the primary payer has made or should have made primary payment, it must provide notice about primary payment responsibility and information about the underlying MSP situation to the entity or entities designated by CMS to receive and process that information.

The meaning of the word "demonstrated" is key in determining when the duty to provide notice to Medicare arises. The Rules and Regulations promulgated by the Secretary of the CMS, as published on February 22, 2008, stated:

Section 301(b)(2)(A) of the MMA amended section 1862(b)(2)(B) of the Act to specify that a primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment that the Secretary makes with respect to an item or service if it is demonstrated that the primary plan has or had a responsibility to make payment with respect to the item or service. It added language establishing that a primary plan's responsibility for this payment "may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means."

Accordingly, notice to Medicare must be provided at least by the time of settlement or when a judgment is entered. Prior to this clarification, the parties had to provide notice to Medicare when they "knew or should be aware" of a possible primary payer situation. Thus, parties were expected to infer in many cases that Medicare had made a conditional payment and notify Medicare of the same. If information was available that would allow parties to determine the existence of a Medicare conditional payment claim, the parties were deemed to have sufficient con-

Continued on page 20

continued from page 17

structive knowledge of Medicare's claim; actual knowledge was not required. As of February 2008, however, parties are expected to give notice to and reimburse Medicare upon a "demonstration" of primary payer responsibility. Of course, as you all know, the rules change on July 1, 2009.

2009 Medicare Notification Requirements

In December 2007, significant amendments were made to the MSPA which will allow Medicare to more easily identify situations in which a primary payer exist, so that Medicare can avoid making conditional payments or can more easily recover such payments if made. The new law imposes an enormous obligation on the insurance industry and self insurers to notify Medicare of potential primary payer situations. Beginning on July 1, 2009, plans are required to "determine whether a claimant (including an individual whose claim is unresolved) is entitled to [Medicare] benefits" and, if so, submit certain information to Medicare. The information must be submitted "by or on behalf of liability insurance (including self-insurance), no fault insurance, and workers' compensation laws and plans" concerning all Medicare beneficiaries. The new legislation is expected to save Medicare over one billion dollars between 2008 and 2017 alone, as it will enable Medicare to refrain from making payments when a primary payer exists in certain cases and to more efficiently recover conditional payments from primary payers.

CMS has acknowledged that some individuals do not even know they are Medicare beneficiaries. Plans covered by the new reporting requirements, however, will have no "safe harbor," even if the claimant signs a document stating that he or she is not covered by Medicare. As such, the parties will need to look at factors including the claimant's age, whether the claimant is entitled to Social Security Disability and other indicators that the claimant may be a Medicare beneficiary. In addition, research can be conducted through the Social Security Administration and Medicare to determine a claimant's status definitively. Given that 44 million people are Medicare recipients, many claims will be affected by the new requirements.

Registration Process for Electronic Reporting

The first step of the Reporting process is Registration. Responsible Reporting Entities (RREs), or insurers and self-insureds, must register with the CMS Coordination of Benefits Contractor (COBC) between May 1, 2009 and June 30, 2009. Although an RRE may use an Agent to do the actual reporting, the RRE itself must register. The RRE will remain solely responsible and accountable for complying with CMS instructions for implementing reporting protocols and for the accuracy of the data submitted. Following registration, RREs will be assigned a quarterly submission timeframe (7 days) during which they must submit files. Submissions will be accepted only during the specified timeframe. All claims involving Medicare beneficiaries where the settlement, judgment, award or other payment date is July 1, 2009 or thereafter must be reported in the initial submission.

Information Which Must be Reported to Medicare Beginning July 1, 2009

CMS posted an Updated Interim Record Layout Information for Mandatory Insurer Reporting on December 9, 2008. The record layout offers a summary of the reporting requirements and is available only on the CMS Web site. The record layout also includes all information which must be reported on a claim and the detailed format in which the information will be submitted. Complete instructions and requirements will be published in a User Guide, available at a later date on the CMS Web site.

RREs' initial file submissions must report all claims in which the injured party is/was a Medicare beneficiary that are resolved (or partially resolved) through a settlement, judgment, award or other payment on or after July 1, 2009, regardless of the assigned date for a particular RRE's first submission. This includes resolution (or partial resolution) through one payment obligation (regardless of whether the payment obligation is executed through a single payment, a structured settlement, or an annuity), as well as those situations in which there is a responsibility for ongoing medical services. A one-time payment for a defense evaluation made to a provider or physician does not trigger the requirement to report. As of December 5, 2008, "there is no exception to the reporting requirements for alleged de minimus or 'nuisance' settlements, judgments, awards or other payments. (CMS is gathering data related to this issue and will issue instructions if it adopts a de minimus or 'nuisance value' exception for reporting purposes.)" In the liability context, if no claim was made for medicals, i.e., the claim is simply a property damage only claim in which no release of medicals is being obtained, reporting is not required.

Claims in which the RRE has accepted ongoing responsibility for medical payments, such as a workers' compensation claim with open medical benefits, must be reported initially and then at the termination of the responsibility for ongoing benefits. During the claims-handling process in such cases, quarterly reporting also needs to be

done if the information concerning that particular claim has changed.

If no settlement, judgment, award, or any other payment is made in a case involving a Medicare beneficiary, no report is required to be filed. In claims in which multiple defendants are present, all RREs involved in a settlement of such case remain responsible for reporting the claim to Medicare.

Timing for Provision of Information to Medicare

On September 15, 2008, CMS issued an "Implementation Timeline" for compliance with the Mandatory Insurer Reporting Requirements (located at 42 U.S.C. § 1395y(b)(7)&(b)(8)). For liability, no-fault, workers' compensation insurers, and self-insureds, the reporting timeline is as follows:

January 1, 2009 - June 30, 2009 - Recommended systems development period

May 1, 2009 - June 30, 2009 - Electronic registration via the Coordination of Benefits secure web site for all liability, no-fault and workers' compensation Responsible Reporting Entities

July 1, 2009 - September 30, 2009 - Testing period for all liability, no-fault, and workers' compensation Responsible Reporting Entities

Oct. 1-Dec. 31, 2009 - All liability, no-fault, and workers' compensation Responsible Reporting Entities must transmit their first submission based on a predetermined schedule with the Coordination of Benefits Contractor

January 1, 2010 - All liability, no-fault and workers' compensation Responsible Reporting Entities will be submitting appropriate files and be in compliance by this date

CMS is allowing responsible entities time to get up to speed and ensure that their plan for compliance is working smoothly before CMS begins to assess penalties for non-compliance.

Penalties for Failure to Provide Required Information

Medicare has indicated that claims settling completely before July 1, 2009 are not subject to the new law; however, any claims still pending as of July 1 will be subject to the

Continued on page 22

continued from page 21

notification provisions. RREs who fail to provide notification to Medicare are "subject to a civil money penalty of $1,000 for each day of noncompliance with respect to each claimant." This penalty is in addition to any other penalties prescribed by law and any Medicare secondary payer claim. CMS has indicated that its initial concern is educating RREs on how to properly implement a reporting program instead of focusing immediately on the penalties which may be assessed for failure to report. There are no safe harbors, however, and all plans are expected to fully comply with the law. Given the relatively short period of time within which RREs must comply with Reporting Requirements and the extensive amount of work which must be done, steps should be taken in that direction right away.

Method of Reporting

RREs have three options for submitting data using the COB Secure Web site (COBSW). RREs may transmit files using Hypertext Transfer Protocol over Secure Socket Layer (HTTPS) or Secure File Transfer Protocol (SFTP). RREs who plan to report a large number of claims may submit files using Connect: Direct via AT&T Global Network System (AGNS). If a RRE chooses to utilize AGNS for file submission, an account will need to be established well in advance because the process may require considerable time.

Ensuring Compliance with the New Law

To ensure compliance with the new law, insurance companies, employers, self-insurers, and any other entity covered by the notification requirements should seriously consider implementing policies and procedures sooner, rather than later. Below are some suggestions which, if followed, will help identify Medicare beneficiaries early in the claims-handling process, so that the appropriate claims can be reported to Medicare:

1) Immediately upon receiving notice of any type of claim and periodically throughout the claim handling process, insurers and self-insurers should ask the claimant whether he or she is a current Medicare beneficiary. The age of the claimant should be reviewed to see if he or she is or will soon be 65 and, therefore, eligible for Medicare benefits. In addition, the claimant's Social Security Disability status, including whether an application for such benefits is pending, should be ascertained.

2) During the litigation discovery process, including written discovery requests and depositions, defense attorneys should always ask the claimant about his or her Medicare and Social Security Disability status.

Conclusion

It only takes a minute to "do the math" and realize that, for every Medicare eligible claimant about which an insurer fails to notify Medicare, it will cost the insurer $365,000 per year of noncompliance. In just three short years, the amount due Medicare would exceed $1 million for a single claimant. That penalty would be assessed regardless of whether the amount of the initial settlement, judgment, award, or other payment was $2,000 or $200,000. As such, insurance carriers and the attorneys who represent them must take steps now to ensure they are fully prepared to comply with the Medicare Notification Requirements beginning July 1, 2009.

This article was updated from original publication in the October 2008 ADLA Journal*, published by the Alabama Defense Lawyers Association. The complete article, including footnotes, can be downloaded at the GDLA Web site at www.gdla.org/medicare.pdf*

Bennett L. Pugh, *Carr Allison*, Birmingham, AL, can be reached at blp@carrallison.com.

Melissa Zwilling, *Carr Allison*, Birmingham, AL, can be reached at mcz@carrallison.com.

Daubert and Computer Simulation

continued from page 15

indicate. As a result, the flow area of the membrane opening is approximately half of the proper installation per drain's instructions. Expert opinions indicate the smaller hole size of the membrane within the main drain is a proximate cause of the roof failure. Modeling and simulation methods provide a means to quantitatively test the effect of the reduced membrane hole size, as well as the performance of the drain system on the live roof load during rain events.

A model of the roof drain system and the EPDM membrane within the mounting ring is used for the membrane deflection analysis. The behavior of the EPDM within the drain ring is mathematically represented. The analysis results are shown by the color coded displacement and deformed shape of the membrane due to water loading during drainage. The non-deformed position and size of the membrane hole is shown by the asterisk label, indicating the original membrane hole edge. The analytical membrane model shown is then used to predict the membrane response to water bag loading during an actual physical test. In this way, the membrane model is tested and validated, too.

The roof drain and EPDM model are "connected" to the drain system piping model in order to represent the performance of the entire drain system. The rain profile is defined by the intensity (rate of fall) and duration of the rain falling on the roof's surface. The rain profile information is obtained by weather radar data for the subject building's location. The accumulation of water on the roof in the area by the drain (the collapsed area) is influenced by the rain rate, the roof slope geometry, and the rate of water removal by the drain system performance. The drain system performance, in turn, is dependent on the depth of water and corresponding pressure of the water flowing into the drain opening. The time varying system is also modeled by "time-domain" simulation, where the governing equations for the entire roof drainage system are repeatedly solved over small increments of time. In this way, the overall behavior of the roof drainage system can be quantified over time. The effect of the size of the actual (smaller) EPDM membrane hole compared to the "proper" (larger) hole is consequently quantified in order to test the experts' opinions.

The functional capacity difference of the smaller and larger membrane holes is shown by subjecting the roof to a theoretical rain profile

Continued on page 24

continued from page 23

of 2 inches/hr over 4 hours. As can be seen by a plot, the water depth in the drain area reaches a maximum depth of 1.5 inches when the drain system contains the larger membrane hole. In comparison, the actual smaller hole restricts the drain flow rate; and the depth of water continues to accumulate, resulting in a 90% increase in live load on the roof. By providing actual rain profile data for the building location, the time domain simulation is employed to quantify the additional load on the roof under simulations of "real life" circumstances. Through the use of computer modeling and simulation methods, the opinions of the experts can be tested, and the sensitivity to assumptions (tolerances) established.

Auto Accident Reconstruction - A white Ford Focus turned left at an intersection and was struck by a dark blue Hyundai Triburon, fatally injuring both the driver and front seat occupants of the Ford. The posted speed limit for the roadways in all directions is 45 mph. Forensic investigation and accident reconstruction methods are used to determine the vehicles' speeds prior to the collision. Through the systematic observation of data and combined application of damaged-based and trajectory-based reconstruction techniques, a vehicle collision is analyzed. Much of the initial data used in reconstruction is the collision evidence. Collision evidence includes tire marks, impact marking, roadway markings, damage to the vehicles, debris locations, positions of rest, damage to property and the environment, among others. Scene photographs are used to independently map (separate from the homicide investigation) the scene and identify collision evidence. The evidence analysis is employed to determine the point of impact and post-collision paths of each vehicle as depicted.

Computer modeling and simulations systematically apply engineering sciences, principles of physics, vehicle properties and test data. The conservation or momentum serves as the theoretical basis for reconstruction of impact speeds in vehicle collisions. (It should be noted the magnitude of external forces produced by the tires, as well as gouging and scraping of vehicle components on the ground during the collision, are normally small when compared to the magnitude of collision forces; however, they should not be ignored depending

on the evidence.) Energy methods are used to analyze the dissipation of kinetic energy. Vehicle velocities, changes in velocity (D V), rates of rotation, and other meters of the dynamics of the vehicles are calculated. Through accident reconstruction simulation, the governing equations are repeatedly solved for small time increments to provide the data and visual representation of the analysis results.

Simulation modeling and analysis is a powerful tool in accident reconstruction to test and verify the opinions of experts, as well as consider the affects of alternative conditions or operator responses. In this example, the Hyundai was traveling 80 mph prior to the initiation of the skid. At the time the driver of the Ford initiated the left turn, the Hyundai was 340 feet away from the intersection. This computer simulation completely supported the accuracy of the witness testimony. The driver of the Hyundai was later arrested for two counts of Vehicular Homicide and Culpable Negligence.

IV. Conclusion

"Testing pursuant to the scientific method" is a critical part of any Daubert analysis. After all, it was the first factor referenced by the Supreme Court in Daubert. Although no single factor has been deemed more important than another, those involved in the litigation process know that it is often the inability to reliably test an expert's opinion pursuant to the scientific method that ultimately leads to Daubert challenges. Through the proper usage of scientific modeling, computer simulations can be created to serve as a "modern mathematical laboratory," which can determine the validity, or invalidity, of expert opinion testimony. By properly using computer modeling and simulation, forensic experts and litigators can build the necessary scientific and legal foundation for the admission (or exclusion) of expert opinion testimony at trial, per the dictates of Daubert and its progeny.

***Scott S. Katz**, is a Partner with Butler Pappas Weihmuller Katz Craig. **Elliot L. Stern**, Ph.D., P.E. is an Engineer with Florida Forensic Engineering, Inc.*

This article was reprinted with the permission of the National Association of Subrogation Professionals.

Appellate Case Law Update

continued from page 8

lenge to his qualifications, the superintendent of elections disqualified him. The Superior Court of Meriweather County then reversed. Bray won the race for mayor. After that, the City filed an appeal from the superior court's prior order. The supreme court determined that the appeal was moot. Reasoning that the case involved a pre-election challenge to a candidate's qualifications, the supreme court determined that any challenge should have been brought in the form of a petition for stay of an election prior to the election date.

Olarsch v. Newell
A08A1278
November 20, 2008

Olarsch filed a motion for extension of time to file a new trial and motion for judgment notwithstanding the verdict two days before the judgment was entered in the trial court. However, O.C.G.A. §5-6-39(b) expressly states that no extensions in time shall be granted for filing motions for new trial or for judgment notwithstanding the verdict. Therefore, the court of appeals determined that Olarsch was required to file a motion for new trial and JNOV within 30 days after the entry of judgment, which he did not do. For that reason, the court of appeals determined that the trial court did not err in dismissing Olarsch's notice of appeal.

Ruskin v. AAF McQuay, Inc.
A08A1230
November 25, 2008

In this case, the court of appeals affirmed a judgment finding Ruskin in contempt of an order adopting a settlement agreement entered into between the parties. The court of appeals determined that Ruskin should be sanctioned for frivolous appeals penalties in the amount of $2,000 against him and $2,000 against his counsel. The court of appeals specifically determined that Ruskin had stubbornly delayed enforcement of a settlement agreement to which he had voluntarily agreed.

Yates v. CACV of Colorado LLC, A08A2288
December 3, 2008

In this case, CACV of Colorado, LLC obtained an arbitration award against Yates for failure to pay credit card debt. When CACV petitioned to confirm the award, Yates answered and asserted a counterclaim. After a hearing, the trial court entered an order confirming the award but made no ruling on the counterclaim. Yates then appealed, but the court of appeals held that the appeal was premature and had to be dismissed. The court of appeals relied on the rule that unless summary judgment is granted on a claim or the matter is certified pursuant to O.C.G.A. §9-11-54(b), a direct appeal is premature and must be dismissed where a counterclaim remains pending.

Insurance Coverage Case Law Update

continued from page 9

The court of appeals affirmed the judgment in the defendant's favor, holding that the trial court had properly excluded evidence of the agreement, because the UM policy was not relevant. The court of appeals also reasoned that the agreement itself established only that the defendant had agreed to cooperate with the UM carrier by appearing at trial.

A special thanks to ***Eric Mull*** *an associate with Drew Eckl & Farnham, Atlanta, specializing in commercial litigation, subrogation, and insurance coverage matters.*

GDLA's Auto SLC Holds Accident Reconstruction CLE

The GDLA's automobile substantive law committee, in conjunction with GDLA sponsor **Kimley-Horn and Associates**, Orlando, Fla., recently held a CLE seminar in Savannah. The three-hour seminar covered a variety of topics including biology and technology. GDLA member **Michael L. Miller**, *Drew, Eckl & Farnham*, Atlanta, discussed the post-accident investigation. Kimley-Horn experts **Chris Stewart** and **Rodney Pack** also presented. The **Honorable Ronald E. Ginsberg,** *Chatham County State Court*, rounded out the CLE program with a presentation on ethics.

For more information on the seminar contents, contact Chris Stewart at 407-427-1630 or chris.stewart@kimley-horn.com.

GDLA Fall Board Meeting Highlights

Highlights from the October 18 GDLA Board of Directors Meeting. Submitted by GDLA Secretary/ Treasurer, Edward M. Hughes and edited by Executive Director Steve Milano.

The GDLA Board of Directors met at the Reynolds Plantation at Lake Oconee on October 18, 2008.

In attendance were: President, Jimmy Singer; Executive Vice President, Staten Bitting; Executive Director, Steve Milano; Secretary/Treasurer, Edward M. Hughes; Directors and Past Presidents: Matt Moffett, Ted Freeman, Hall McKinley, Joe Chambless, Jason Willcox, Grant Smith, Walter McClelland, Steve Kyle, Craig Avery, Mal Haas, Johnny Foster, Chris Parker, Rusty Gunn, Warner Fox, Jo A. Jagor, Lynn M. Roberson, David Whitworth, Peter Muller, Bob Travis, Evelyn Fletcher, Sally Akins. Brian Moore, as an invitee Chair of the Insurance Coverage Substantive Law Committee, was also present.

The minutes of the annual meeting held at Ponte Vedra on June 15, 2008 were reviewed and approved.

A list of 19 applicants for membership since the last board meeting had been approved by the Admissions Committee, and a list of those names was distributed. On motion of Lynn Roberson and duly seconded, they were unanimously approved for membership.

There are 660 members, but 68 are delinquent with dues, although their status becomes inactive one year following non-payment.

Ted Freeman gave the report of the Membership Recruitment and Retention Committee. He indicated the committee had met three times and prepared a new recruiting brochure which was shared with the board. The suggestion was made that the brochure be sent to DRI members who are not members of the GDLA. The brochure was favorably received and the plan was unanimously approved. Ted mentioned that our emphasis on larger firms had not panned out and that our time might better be spent on a different approach to attract new members from different areas of the state. We need to concentrate on members from smaller cities, such as, Brunswick, Gainesville, Athens, Rome, etc.

. . . our emphasis on . . . [recruiting members from] . . . larger firms had not panned out and . . . our time might better be spent on a different approach to attract new members from different areas of the state. We need to concentrate on members from smaller cities, such as, Brunswick, Gainesville, Athens, Rome, etc.

In the past we have recruited new members through current members via a "member-get-a-member" campaign. Lynn Roberson commented the trial academy draws from outside of Atlanta and is a good recruitment tool. Steve Milano mentioned that a mailing was done to DRI's 400+ Georgia members who were not GDLA members, and that we acquired only 11 members from that mailing and that actually the "member-get-a-member" worked better.

With respect to the larger firms, Bob Travis and Warner Fox had met with litigation representatives of two of the larger firms and the representatives seemed receptive, but overall it was not very effective, primarily likely due to the demands on associates' time, tight budgets at large firms, and the firms therefore not being willing to bear the cost in addition to costs already paid.

There was also discussion concerning our having more to offer to medium-sized to small firms outside of Atlanta, including the trial academy, CLE seminars, blast e-mail, deposition boot camp, etc. The discussion evolved into a review of updating the Web site, which would be important to younger lawyers in particular. Steve Milano indicated that Kirby Mason will make a presentation concerning the Web site to assist in making decisions on content.

Ted Freeman mentioned a survey of the membership, and Steve Milano pointed out that there had not been one in four years. Ted believes an easy-to-use survey asking members to identify the most important thing about the organization, with a potential award for participating in the survey, might be helpful.

Jo Jagor reported for the Younger Lawyers Section that the deposition boot camp is in the works and that the materials from the Alabama Defense Lawyers Association had been secured. The boot camp is to be conducted at Georgia State University. Jo is being assisted by Will Ellis and Evelyn Fletcher in connection with the work in preparing for the boot camp. There was overall discussion on whether we should focus on membership firms and have all of the spaces occupied by member firms or whether we should open it up as a possible tool for recruitment. The consensus was that we need to offer it as a benefit to membership, so we could do an early offering to member firms, or an early notice to potential attendees from member firms. Jo Jagor commented that the boot camp is a benefit for beginning attorneys and is not really directed to members.

Jimmy Singer pointed out that the Executive Committee met this

Continued on page 28

GDLA Fall Board Meeting Highlights

continued from page 27

summer and Matt Moffett was designated head of the Education Committee, which will try to provide CLE every quarter for younger lawyers. The effort is for new lawyers to have exposure at least quarterly and for them to interact with instructors and well as each other, which is good for retaining young lawyers as members.

Johnny Foster gave the report on the substantive law committees Program and described how the program had been operating for four years. There are 12 committees with 473 members and each committee has a chair; all but three have vice-chairs. One committee is doing a CLE program on construction law and stormwater issues and there will be an automobile CLE in Savannah in November.

Of the substantive law committees, professional liability is the largest with 73 members; worker's comp 52; insurance coverage 50; premises liability 47; products liability 47; automobile 40.

A discussion ensued as to whether the membership is aware of the committees and aware of the ability to e-mail significant information. John Fosters wants feedback on how to improve the committees and whether e-mail should go to all members or just those who do that type of work and that, although the chair appointments are annual to the committees, by default, they are continuing in their areas of practice and maybe the appointment should be for longer than one year.

With respect to the Web site specifically, Steve Milano indicated that Kirby Mason had thought that the Web site does look acceptable, but that the board needs to look at it at a meeting and get feedback on what tools are useful.

The basic issue was what we want the Web site to do. The proposed items that are "donated" to the Web site are vetted by the chairs of the committee. An question was asked about the control of the Web site and Steve Milano indicated he manages the site and saves money on what a Web site contractor or designer would charge. President Singer asked Kirby Mason to make a presentation at the winter board meeting on the Web Site Committee's recommendations and on the necessary budget

Walter McClelland, chair of the Judicial Relations Committee discussed how the committee is notified of vacancies and candidates for possible judgeships. The Judicial Qualifications Commission invites the organization to participate and on occasion a member of the Committee has appeared before the Commission.

President Singer commented that at the spring board meeting it was agreed to have a judicial reception outside of Atlanta. Sally Akins reported that a Savannah Judicial Reception is going to be held November 20th at the Chatham Club with a half-day CLE seminar earlier that day with the topic of accident reconstruction provided by a sponsor. Judge Ginsberg is also going to speak relating to technology use in trials. The seminar is from 9:00 a.m. to 12:00 noon at the Coastal Georgia Center with the reception at 5:30 p.m.

A discussion occurred regarding GDLA's contribution to the National Foundation of Judicial Excellence, and the board reaffirmed its commitment to making the final of the association's three promised payments this year.

The Treasurer's report was presented by Edward M. Hughes with the assistance of Steve Milano. A handout was presented regarding our overall income and expenses.

Staten Bitting commented that there should be accessible information electronically available concerning the bank accounts and budgets in light of automated systems that are currently available. Steve Kyle reported on upcoming meetings with a particular emphasis on airfares.

Steve reported the spring board meeting in 2009 is going to be in Charleston, South Carolina, at the Charleston Place. As a result of Evelyn Fletcher's efforts and contacts, we have a deal to stay there for $299/night from April 23 until April 26. Evelyn also reported on the upcoming DRI SE Region meeting held the same weekend at the same venue, and that the regional cocktail meeting would include GDLA board members.

Staten Bitting reported on the annual meeting program that he wanted to use more economical resources such as members within the organization. To qualify for CLE credits we could have a panel discussion. We need to obtain six hours total and have two hours provided by sponsors at their cost, and one hour with a DRI provided speaker, and get someone from the Cayman Island legal field to speak to us. Mel Haas has volunteered to speak on what is likely to be major changes in the employment area in the United States, should a Democrat be elected president.

Peter Muller reported on the newsletter, gave an overview of the current issue being prepared and asked for feedback. Ted Freeman asked if there was anything in the newsletter specifically directed to younger lawyers. Peter commented that primarily Parnell's article on marketing is directed toward younger lawyers, but Ted thinks it would be good to have younger lawyer input, to have something dedicated to them.

Lynn Roberson spoke on the Law Journal of which she is editor and indicated she was soliciting articles from the GDLA's substantive law committees.

Lynn next spoke on the Trial Academy and indicated that the fac-

ulty has been lined up, including Michael Sullivan speaking on ethics and Al Parnell doing a lunch/marketing program.

Sally Akins presented on the status of sponsorships. She remarked that Steve Milano has improved the relationship with the sponsors and what we receive from them, and sid they do have significant economic impact. Communications have been made with Kimley-Horn and Associates, an engineering firm, helping with the Savannah seminar and the importance of our notifying the sponsor when a member uses their services was discussed.

On the Education Committee, Matt Moffett indicated that Steve Milano was working to have some CLE events quarterly, including the upcoming construction presentation and storm water at Maggiano's with sponsorship funding and Ken Sisco is speaking on construction defects. Lynn Roberson mentioned that we should persuade the sponsors to go statewide on seminars to expand our appearance and to get them to give the same seminar all over the state.

Evelyn Fletcher reported on the DRI annual meeting and DRI SE Region meeting.

There was no report from the Amicus Committee, although there may be one issue coming before the Committee according to Jamie Weston, who was not present for the meeting.

Bob Travis commented on the bombing of the Dalton law firm and recommended we all e-mail our thoughts to anyone we know in a firm struck by tragedies of that nature, as it is a perilous world.

Jimmy Singer acknowledged the presence of several Ex-Presidents, including Joe Chambliss, Johnny Foster, Walter McClelland, Grant Smith, Steve Kyle, Warner Fox, David Whitworth and Bob Travis, all of whom continue to work hard on behalf of the organization.

There being no further business, the meeting was adjourned on motion and second.

GDLA Committees

Admissions
Warner Fox, Chair
Hawkins & Parnell, Atlanta
Joe Chambliss
Retired, Newnan
Morton G. Forbes, Chair Emeritus
Forbes, Foster & Poole, Savannah
Rick Marchetti
Marchetti & Lomax, Columbus
J. Bruce Welch
Hawkins & Parnell, Atlanta
David Whitworth
The Whitworth Law Firm, Brunswick

Membership Recruitment & Retention
Ted Freeman, Chair
Freeman, Mathis, Gary, Atlanta
Chris Parker
Mozley, Finlayson & Loggins, Atlanta
Grant Smith
Dennis, Corry, Porter & Smith, Atlanta

Younger Lawyers
Will Ellis, Co-Chair
Hawkins & Parnell, Atlanta
Jo A. Jagor, Co-Chair
Hall, Booth, Smith & Slover, Atlanta

Meetings
Steve Kyle, Chair
Bovis, Kyle & Burch, Atlanta

Amicus Committee
Jamie Weston, Chair
Hull, Towill, Norman, Barrett & Salley, Augusta

Law Journal
Lynn Roberson, Chair
Swift, Currie, McGhee, Hiers, Atlanta

Sponsors & Exhibitors
Sally Akins, Chair
Ellis, Painter, Ratterree & Adams, Savannah

Web Site
Kirby Mason, Chair
Hunter, Maclean, Exley & Dunn, Savannah
David Nelson
Chambliss, Higdon, Richardson, Katz & Griggs, Macon

Trial Academy
Lynn Roberson, Chair
Swift, Currie, McGhee & Hiers, Atlanta

Education
Matt Moffett, Chair
Gray, Rust, St. Amand, Moffett & Brieske, Atlanta

Workers' Compensation Academy
Rick Thompson, Chair
Drew, Eckl, Farnham, Atlanta

Newsletter
Peter Muller
Bouhan, Williams & Levy, Savannah

Judicial Relations
Walter B. McClelland, Chair
Timothy Buckley
Luanne Clarke
Morton G. "Salty"
Forbes Frederick N. Gleaton
Lynn M. Roberson
James S. V. "Jamie" Weston

Long-Range Planning
Chair - **Hall McKinley**
Drew, Eckl, Farnham, Atlanta

Legislative Liaison
Rep. Edward H. Lindsey, Jr.
Goodman McGuffey Lindsey & Johnson, Atlanta

Substantive Law Committees

Appellate
Chair - **L. Lee Hicks**
McClure, Ramsay, Dickerson & Escoe, Toccoa
Vice Chair - **Matthew McLaughlin**
Carlock, Copeland, Semler & Stair, Atlanta
Chair Emeritus - **Amy Snell**
Fulcher Hagler, Augusta

Automobile
Chair - **Edward R. Stabell, III**
B*rennan, Harris & Rominger*, Savannah
Vice Chair - **Open**

Commercial Litigation
Chair - **Duke Groover**
James, Bates, Pope, & Spivey, Macon
Vice Chair - **Kimberly C. Harris**
Ellis, Painter, Ratterree & Adams, Savannah
Chair Emeritus - **Al Adams**
Holland & Knight, Atlanta

Construction
Chair - **Tracy Ann O'Connell**
Ellis, Painter, Ratterree & Adams, Savannah
Vice Chair - **Kenneth Sisco**
Hawkins & Parnell, Atlanta

Employment
Chair - **Stephen V. Mooney**
Weinberg, Wheeler, Hudgins, Atlanta
Vice Chair - **David Cole**
Freeman, Mathis, Gary, Atlanta
Chair Emeritus - **Chris Parker**
Mozley, Finlayson & Loggins, Atlanta

Insurance Coverage
Chair - **Brian T. Moore**
Drew, Eckl & Farnham, Atlanta
Vice Chair - **David P. Dekle**
Fulcher, Hagler, Augusta

Mass Torts
Chair - **Jennifer Techman**
Evert, Weathersby, Houff, Atlanta
Vice Chair - **R. Bates Lovett**
Hunter, Maclean, Exley & Dunn, Savannah
Chair Emeritus - **Elizabeth O'Neill**
Hawkins & Parnell, Atlanta

Premises Liability
Chair - **Patricia M. Peters**
Hawkins & Parnell, Atlanta
Vice Chair - **Kimberly Stevens**
Hawkins & Parnell, Atlanta

Products Liability
Chair - **Rachel Fuerst**
Weinberg, Wheeler, Hudgins, Gunn & Dial, Atlanta
Vice Chair - **Open**
Chair Emeritus - **Frank Brannen**
King & Spalding, Atlanta

Professional Liability
Chair - **Andrew M. Wilkes**
Oliver, Maner, Savannah
Vice Chair - **T. Case Maner**
Owen, Gleaton, Egan, Jones & Sweeney, Atlanta
Chair Emeritus - **William Hunter**
Oliver, Maner, Savannah

Trucking
Chair - **John D. Dixon**
Dennis, Corry, Porter & Smith, Atlanta
Vice Chair - **Michael L. Miller**
Drew, Eckl & Farnham, Atlanta

Workers' Compensation
Chair - **Rick Thompson**
Drew, Eckl & Farnham, Atlanta
Vice Chair - **Open**
Chair Emeritus - **Lisa Wade**
Swift, Currie, McGhee & Hiers, Atlanta

Charge Book
Sally Akins, Chair
Ellis , Painter, Ratterree & Adams, Savannah

The Merrill Advantage: Complete support for law firms

Merrill Corporation

Litigation Support

Court Reporting and Legal Videography

Document Services

Language Translations

Multimedia Trial Services

eDiscovery

Lextranet® Web Hosting

1117 West Peachtree St. NW • Atlanta, GA 30309

404.351.3070

www.merrillcorp.com/law

MERRILL CORPORATION