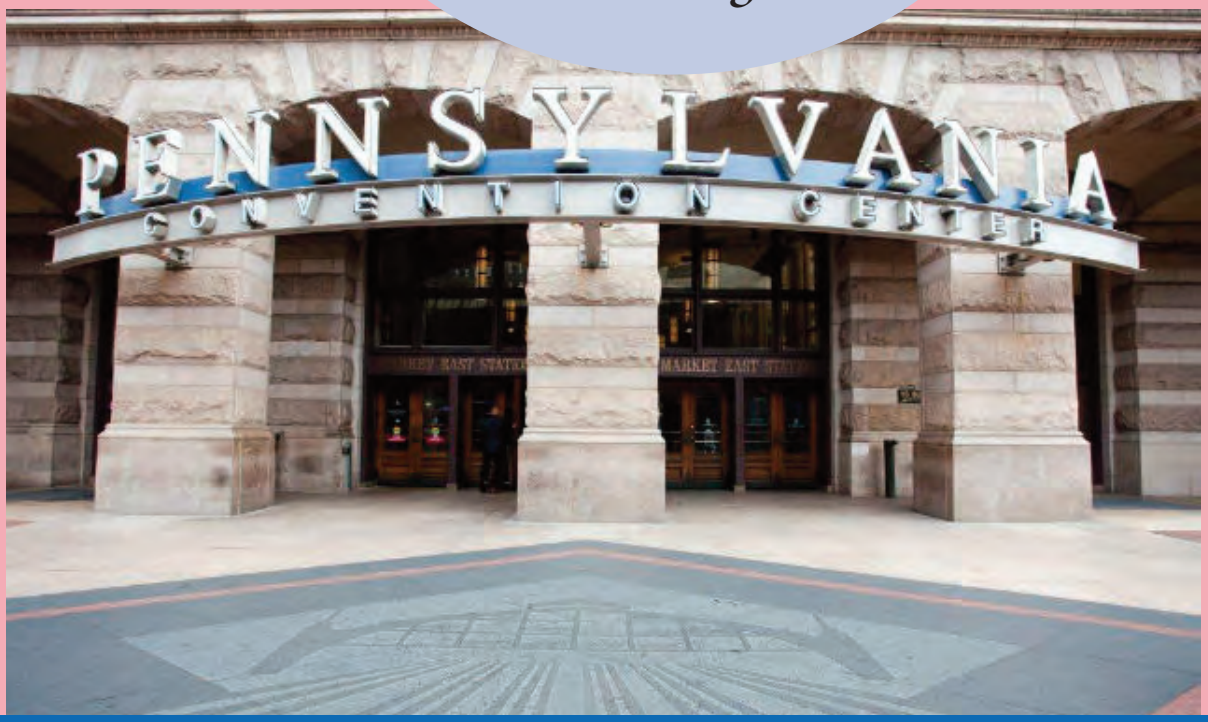
DRI 25th Annual...

Personal Injury Potpourri

Including Ethics...



Philadelphia

APRIL 20, 2023

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Director

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Next DRI Seminar

ANNUAL

Personal Injury Practicum

Fall 2023

Date, Time and Venue to be Announced

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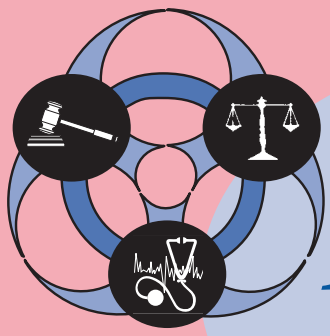

DRI Annual

Personal Injury Potpourri

Including Ethics...

Harris T. Bock, Esq.
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DRI

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PHILADELPHIA

Thursday April 20, 2023

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DRI Annual Personal Injury Potpourri Including Ethics...

Topics and Seminar Participants

ONE	*Philadelphia Court of Common Pleas Update*	Hon. Daniel J. Anders, *Civil Division – Supervising Judge* Peter Divon, Director *Dispute Resolution Center* Maureen M. Eagen, Esq., Director *The Arbitration Center* Theresa Italiano, Esq.
TWO	*Recent* Stare Decisis *Review*	Susan C. Keesler, Esq. Joseph A. Cullen, Jr., Esq.
THREE	*Unique Legal Issues Applicable to Ride Share Platforms*	Amanda Jonas Lorentson, Esq.
FOUR	*Depositions – It Might Be Time to Change Your Technique*	James E. Beasley, Jr., Esq.
FIVE	*Important Factors in Case Evaluation*	Edith A. Pearce, Esq. Monica E. O'Neill, Esq.
SIX	*What's New in UM/UIM*	Scott B. Cooper, Esq.
SEVEN	*Why is Everyone So Interested in Marijuana*	Steve Schain, Esq.
EIGHT	*KEYNOTE ADDRESS*	Jeffrey P. Goodman, Esq.
NINE	*Forensic Technology Update*	Justin P. Schorr, Ph.D.
TEN	*Conducting Online Arbitrations*	Ann T. Greeley, Ph.D.
ELEVEN	*Don't Neglect Witness Prep*	Brock Atkins, Esq. Justin A. Bayer, Esq.
TWELVE	*The Wonderful World of Subro*	Judge Sandra Mazer Moss (Ret.) Joseph L. McGlynn, Esq. Joseph Ricchezza, Esq.
THIRTEEN	*Artifical Intelligence in Medical / Legal Issues*	Prof. Samuel D. Hodge, Jr.

DRI Annual
Personal Injury Potpourri
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Topic Outlines

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Civil Jury Trials As of April 2023

- Scheduling 25-30 trial date certains & 150-180 pools each month
  - Every case has settled or been called to trial during trial month
- 14 jury panels are selected each week
  - Jury selection generally occurs on Thursday and Friday but 1 jury panel is selected on Monday, Tuesday and Wednesday
  - 9 to 12 cases settle each month during jury selection or at trial
    - Jurors remain the most limited resource in conducting jury trials during the pandemic. Help your colleagues by settling cases that can be settled without picking a jury. Use juries only for cases that must go to verdict.
- 10 day trial notice for pool cases
  - Informal notice that case will be called to trial within next 10 days
  - Additional time for parties to engage in last minute settlement discussions and to prepare for trial
  - Court reserves right to call any pool case to trial on next day's notice

Pretrial Conferences for Major Jury Programs

- All major jury programs are "current" except for medical malpractice cases
  - Pretrial conferences and trials occur in the projected month
  - Expedited and standard cases are listed for trial as pool cases in the next trial month, e.g., May 2023 pretrials scheduled in June 2023 trial term
- Medical malpractice cases
  - Medical malpractice cases are scheduled with oldest pending cases
  - In April 2023, Judge Schulman held pretrial conferences on cases with projected pretrial conferences in February and March 2023
  - In June 2023, Judge Schulman will hold pretrial conferences on cases with projected pretrial conferences in April and May 2023

Case Management Changes for Medical Malpractice Cases

- Judge Susan Schulman serves as judicial leader of medical malpractice program
- One Year Case Management Conference
  - 12 months after case initiation
  - Conducted by Judge Schulman to discuss status of
    - Discovery, expert reports and dispositive motions
    - Parties' interest in settlement with medmal JPT program
      - 15 highly experienced medmal attorneys conduct settlement conference
    - Demand required by plaintiff
- Scheduling of pretrial conferences
  - Will only schedule pretrial conference if Plaintiff files certificate of compliance, which confirms that all expert reports have been exchanged
    - Pretrial conference **will not be scheduled** unless certificate of compliance is filed
  - If certificate of compliance is not timely filed, Court will issue a rule to show cause as to why sanctions should not be issued

New Case Filings in 2023

Comparison of case filings from 2017 to 2019 to case filings from January 1, 2023 to March 31, 2023:

- 10% fewer Motor Vehicle cases filed in 2023
- 10% fewer Premises Liability cases filed in 2023
- More Medical Malpractice cases filed in 2023 due to change in venue rule

Note: The case filings are from major jury, major non-jury and arbitration programs.

Mass Tort Program

- Three cases designated as mass torts in 2022
  - Round-up
  - Paraquat
  - Zantac
- Trials scheduled in 2023
  - Round-up
  - Risperdal
  - Asbestos

Arbitration Center & Arbitration Appeals

- Arbitration center is current with its inventory
  - Scheduling approximately 600 cases each month
- Arbitration appeals
  - Arbitration appeals continue to be called to trial
  - Important settlement opportunity with Rebecca Grausam-Charamella, Esquire at conference scheduled 30-60 days after appeal filed
- To serve as an arbitrator, please contact Maureen Eagen at maureen.eagen@courts.phila.gov

Case Management Conferences

- Case management conferences are virtual
  - https://www.courts.phila.gov/livestreams/civil/hearings/
- New case management form
  - https://www.courts.phila.gov/pdf/forms/civil/CMC-105.pdf
  - Electronically file 5 days prior to the conference in the Conference Submissions section of e-filing system
- All complex track cases – including medical malpractice cases – are conducted on the papers

Dispute Resolution Center

- As of March 2023, all JPT conferences are hosted via Zoom by the Court's dispute resolution center
  - Date that appears on the docket is a real date
- 2021 and 2022 major jury programs
  - JPT conference occurs BEFORE pretrial conference
  - Please be responsive to scheduling requests by JPT
- 2020 major jury program
  - JPT conference occurs AFTER pretrial conference but BEFORE trial month
- To volunteer as a JPT, please email Pete Divon at peter.divon@courts.phila.gov

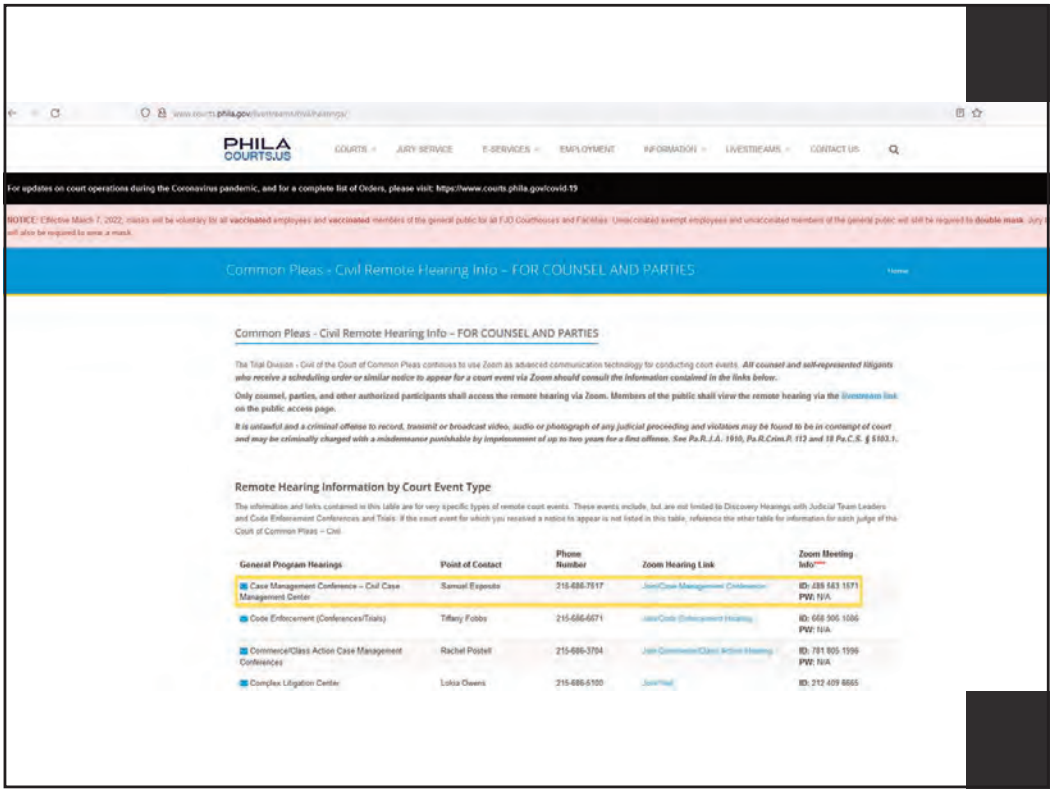
Virtual Versus In-Person

- Virtual
  - Case management conferences
  - Discovery Court
  - JPT settlement conferences
  - Pretrial conferences
  - Rule hearings
- In-person
  - Civil jury trials
  - Civil non-jury trials and petition actions (Act 135, code enforcement, etc)
  - Arbitration center
- Presiding Judge's discretion
  - Settlement conferences by trial Judge
  - Hearings on motions

https://www.courts.phila.gov/remote-hearings/

or

Meeting ID # 489-563-1571



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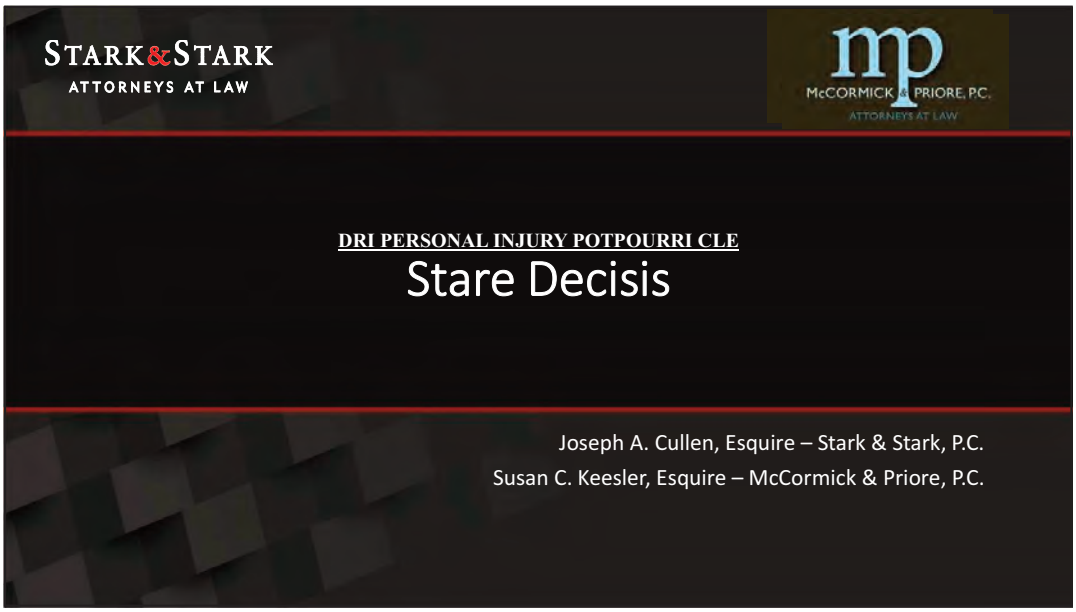
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Joseph A. Cullen, Esquire – Stark & Stark, P.C.
Susan C. Keesler, Esquire – McCormick & Priore, P.C.

Improper Venue

- *Hangey v. Husqvarna*, 247 A.3d 1136 (Pa. Super. 2021) (en banc) (lawnmower)
- Rule 2179(a)(2) – "regularly conducts business"
  - Quality and Quantity (quality often not at issue)
  - Quantity ~1%
    - "Sufficiently continuous so as to be considered habitual"
    - % is only one factor
    - $1.4 billion global sales/$75,310 (.005%)
    - Defendant had authorized dealer in Philadelphia
    - "[R]egularly does not mean principally, and a defendant may perform acts regularly even though these acts make up a small part of its total activities."
- *Appeal granted,* 278 A.3d 301 (Pa., May 10, 2022)
  - argued /new standard will apply to medical malpractice
  - will impact medical malpractice cases

"Totality of the Circumstances"

- *J.P. by Pinkston v. Sherman St. Soccer*, 273 A.3d 1045 (Pa. Super. 2022)
  - injury at futsal tournament in Lehigh County
  - Plaintiff sued in Philadelphia claiming Defendants, which designed futsal court, did business there
  - venue transfer affirmed, distinguishing *Hangey*
  - in five years before accident, Defendants did .5% to 1.67% of business
  - work in Philadelphia done by subcontractors, not employees
  - no office in Philadelphia
- *Hausmann v. Bernd*, 271 A.3d 486 (Pa. Super. 2022)
  - auto accident with plumbing company truck in Montgomery County
  - Plaintiff sued in Philadelphia claiming Defendants did business there
  - venue transfer affirmed, distinguishing *Hangey*
  - in four years before accident, Defendants did .27% of business
  - .002% in year of accident

Forum Non Conveniens

- Even more important since *Hangey*
- Rule 1006(d)(1) ("For the convenience of parties and witnesses")
- *Cheeseman v. Lethal Exterminator, Inc.*, 701 A.2d 156, 162 (Pa. 1997)
  - [A] petition to transfer venue should not be granted unless the defendant meets its burden of demonstrating, with detailed information on the record, that the plaintiff's chosen forum is oppressive or vexatious to the defendant.
  - Superior Court applied as such
- *Bratic v. Rubendall*, 99 A.3d 1, 10 (Pa. 2014)
  - [T]he showing of oppression needed for a judge to exercise discretion in favor of granting a forum non conveniens motion is not as severe as suggested by the Superior Court's post-*Cheeseman* cases. As between Philadelphia and adjoining Bucks County, the situation in *Cheeseman*, we speak of mere inconvenience; as between Philadelphia and counties 100 miles away, simple inconvenience fades in the mirror and we near oppressiveness with every milepost of the turnpike and Schuylkill Expressway.
- Bargain – reasonable standard but no contiguous transfers?

- BUT:
  - *Kendall v. Ford Motor Co.*, 284 A.3d 958 (Pa. Super. 2022) (Bucks)
  - *Doe v. Bright Horizons Children's Ctr., LLC*, 261 A.3d 1065 (Pa. Super. 2021), reargument denied (Nov. 17, 2021), appeal denied, 281 A.3d 303 (Pa. 2022) (Berks)
  - *Powers v. Verizon Pennsylvania, LLC*, 230 A.3d 492 (Pa. Super. 2020) (Bucks)
- SO DON'T RULE OUT CONTIGUOUS/LOCAL TRANSFERS
- TRIAL COURT DISCRETION ESPECIALLY STRONG – "any proper basis"
  - *Kendall v. Ford Motor Co.*, 284 A.3d 958, *4 (Pa. Super. 2022) (affirmed transfer to Bucks)
  - *McGuinness v. Elite-Crete Sys.*, 2022 WL 4231028, at *5–6 (Pa. Super. 2022) (affirmed transfer to Allegheny)

Other "Salient Factors"

- *Ritchey v. Rutter's Inc.,* 2022 Pa. Super. Lexis 436, 2022 WL 11514289 (Oct. 20, 2022)
  - Auto accident occurred in central PA
  - Plaintiff sued Defendants in Philadelphia County; Defendants filed motion to transfer to Cumberland County (site of accident) or York County (for convenience of parties and witnesses)
  - Order denying motion to transfer venue affirmed
  - Forum non conveniens requires more than just inconvenience
  - Defendants' 20 affidavits were insufficiently detailed - Affidavits need to be descriptive and detailed
  - While Philadelphia was more than 100 miles from site of accident, not all relevant witnesses would be inconvenienced
  - Other factors:
    - Plaintiff received months of medical treatment from two medical providers in Philadelphia, one of which was plaintiff's expert witness
    - Two key eyewitnesses to the accident testified of their willingness to travel to Philadelphia for depositions and trial and that it would *not* be oppressive or inconvenient for them to do so

Pleading New Matter

- *Borel Builders v. Burke*, 2023 WL 371660 (Pa. Super., Jan. 24, 2023) (non-precedential)
  - Defendant's new matter pled "claims are barred by the applicable statute of limitations."
  - Plaintiff filed no PO's for lack of specificity
  - Bench trial where Defendant asserted statute of limitations defense
  - *Sua sponte,* trial court found defense waived because new matter included no facts
  - Superior Court affirmed:
    - [Defendant's] pleading regarding the defense stated only a cursory legal conclusion . . . . [Defendant] did not plead sufficient facts to substantiate the statute of limitations defense.
    - Although the trial court raised the issue of waiver *sua sponte*, we discern no error. [Defendant's] failure to plead or substantiate the defense with specificity frustrated the trial court's ability to decide the merits of the claim. We therefore affirm its finding of waiver.
- Bench trial, so the trial court had to decide merits of the defense
- Not clear if Defendant argued waiver based on lack of PO's or otherwise raised waiver
- Pa.R.C.P. No. 1030:
  - lists 23 affirmative defenses that "shall be pleaded" – not exclusive
- Plead what facts you can or amend within 20 days as of right or with leave/consent
  - Difficult because you only have the complaint

Statutory Immunity

- *Yoder v. McCarthy Construction, Inc.,* 2023 Pa. Super. Lexis 36 (Pa. Super Jan. 31, 2023)
  - Plaintiff sued in Philadelphia claiming Defendants, which designed futsal court, did business there
  - Verdict for plaintiff, post-trial motions reversed
  - Rationale: The defendant was a worker's compensation statutory employer and thus was immune from tort liability asserted by the plaintiff, who was a subcontractor's employee. **Worker's compensation immunity, including statutory employer, is jurisdictional and cannot be waived. Whether an entity is a statutory employer is a question of law for the court, not a question of fact for the jury**. Plaintiff was an employee of the relevant subcontractor, not an independent contractor. He received worker's compensator benefits, and is judicially estopped from denying his employee status. Statutory employer status is not limited to general contractors.

Products Liability

- *Mains v. The Sherwin-Williams Co.,* 2022 U.S. Dist. Lexis 204711, 2022 WL 16857007 (E.D. Pa. Nov. 10, 2022)
  - Summary judgment granted
  - Rationale:
    - Plaintiff's warning defect theory fails as a matter of law because plaintiffs admit they never read the label on the defendant's product. An unread warning cannot be causal.
    - Plaintiffs' failure to warn claim is also preempted by the Hazardous Substances Act because the Act does not require defendant to include spontaneous combustion on the label as a principal hazard
    - Plaintiffs cannot establish a design or manufacturing defect because they lack expert evidence that the product, defective or not, caused the fire that injured them
    - Plaintiffs have not designated a cause and origin expert. Lay testimony is speculative and no substitute for expert fire causation testimony, given possible alternative origins.
    - Expert testimony is also necessary to prove this product was defective, since any alleged defect would require particularized knowledge about its chemical components and their corresponding combustibility
    - Plaintiffs cannot rely on the malfunction theory to establish manufacturing defect because they would need expert testimony to eliminate other possible causes
    - The same absence of expert causation testimony requires dismissal of plaintiffs' negligence theory.
    - Plaintiffs fail to show any FHSA noncompliance. Warranty claims are preempted by the FHSA since noncompliance has not been shown.
    - Implied warranty of merchantability is similar to strict liability, and fails where plaintiff cannot establish a product defect.

Various Evidentiary Issues

- *Cleveland Brothers Equipment Co. v. Vorobey,* 2023 U.S. Dist. Lexis 23447 (M.D. Pa. Feb. 10, 2023)
  - Motions in limine decided
  - Evidence concerning the cross-claim defendant' lack of participation in the arbitration that led to settlement of the underlying action is excluded as irrelevant
  - Whether and why a party participated in a legal proceeding has no bearing on whether the party owed a common law duty to the original plaintiff.
  - An expert cannot offer opinions contrary to undisputed facts, but can opine where the facts are disputed.
  - Since negligence is conceded, the driver's criminal conviction is more prejudicial and time wasting than probative.
  - A driver's prior accident history does not have to be substantially similar to the current accident to be admissible.
  - For the same reasons that treating physicians need not submit expert reports concerning their personal actions, attorneys for the original plaintiff in the same litigation may testify to the fairness of their settlement without submitting expert reports under Fed. R. Civ. P. 26.

Statutory Confidentiality

Confidentiality of PennDOT records

- *Puricelli v. Commonwealth, Dept. of Transportation,* 2023 Pa. Commw. Lexis 2 (Pa. Commw. Jan. 4, 2023)
  - Preliminary objections sustained; mandamus denied
  - Rationale:
    - By statute, information received by the Department of Transportation for purposes of determining the competency of automobile drivers "shall be confidential and shall be used solely for the purpose of determining the qualifications of any person to drive a motor vehicle are confidential by statute" and cannot be "used as evidence in any civil or criminal trial."
    - Plaintiff automobile accident victim cannot obtain discovery from PennDoT of such information, even with the consent of the driver whose records are sought. **Consent is not an exception to statutory confidentiality.**

Instructing Deponent Not to Answer

- *The Fiduciary Trust Co. Intern. of Pennsylvania v. Geisinger-Community Medical Center*, 2022 WL 672386, at *12 (Lackawanna Cty., 2022) (Nealon, J.)
  - Only three bases for instructing deponent not to answer:
    - cognizable privilege
    - prior evidentiary ruling
    - Rule 4012 (a) - unreasonable annoyance, embarrassment, oppression, burden, or expense
- Questioning may seek medical opinions from the defendant provider
- "It is clear that plaintiffs should be permitted to question defendant-physicians concerning their medical opinions and whether their treatment complied with the standard of care."
  - citing *Nealon* and *Ignelzi* decisions and rejecting inconsistent decisions by Wettick, J.
- Awarding fees for motion to compel re-deposition, not for prior deposition

John Doe Pleadings

- *Woelfel v. Universal Linx Serv. Inc.*, No. 2021-CV- 1131 (Lehigh C.C.P. 2022)
  - Pa.R.Civ.P. 2005
    - Plaintiff may designate John Doe party but must move to amend complaint within 20 days after learning identity
- Amendment denied because Plaintiff waited six months after learning identity
- Concern over abusive John Doe practices

Preview of 2023 Decisions

Bert Co. v. Turk, 275 A.3d 958 (Pa., March 29, 2022)

- Jury awarded $250,000 in compensatory damages jointly and severally against 4 defendants
- Punitive damages of $1.5 million, $500,000, $500,000, and $300,000 ($2.8 million total)
- 11.2x compensatory damages
- Trial and Superior Courts used $250,000 as to each defendant, so ratios 6:1, 2;1, 2:1, and 1.8:1
- Allocatur:
  - How to calculate ratio – apply compensatory award to punitive award against each defendant or in aggregate?
  - If the latter, does a 11.2 multiplier violate *BMW v. Gore (1996) and State Farm v. Campbell* (2003)?
    - only single-digit (and maybe low single digit) multipliers are constitutional

Argued October 25, 2022

Klar v. Dairy Farmers of Am., Inc., 281 A.3d 299 (Pa., June 27, 2022)

- Defendant/employer hosts golf outing for employees and requires employees to pay a fee to attend
- Employee allegedly served while visibly intoxicated and causes accident
- Plaintiff claimed negligence *per se* under 47 P.S. § 4-493(1)(licensee serves visibly intoxicated patron)
- MJOP to defendant and Superior Court affirmed because defendant was social host, not licensee
- Allocatur:
  - [Whether] a non-licensed host who invites guests to an event for purposes that are not purely social, and requires those who wish to attend to pay a fee in exchange for alcohol . . . [is] liable to an innocent third party who is injured as the result of a guest who left the event and was provided alcohol while visibly intoxicated during the event?

TWENTY-FIRST CENTURY PROBLEMS & NINETEENTH CENTURY SOLUTIONS
We need to scrap the independent contractor debate

Amanda Jonas Lorentson, Esq.

From the benign—a minor motor vehicle accident—to the horrific—sexual assault and abuse—Uber and Lyft unequivocally facilitate tortious and even criminal acts on a daily basis. Yet antiquated precedent, established long before we understood the full nature of rideshare services, have long since shielded these entities from liability—with most cases never making it anywhere close to the jury.

For much of the past decade, jurists have found themselves painted into a corner by the all-too-eager brush strokes of the rideshares' own making—asked to simplify the claims of this burgeoning field of plaintiffs into the narrow and wonky (and one-sided) independent contractor/employee analysis. However, courts around the country have begun to break away from this method of scrutiny and paved their own inroads for civil liability.

A Brief Primer on the Rideshare and the Sharing Economy

> The sharing economy is an IT-facilitated peer-to-peer model for commercial or non-commercial sharing of underutilized goods and service capacity through an intermediary without transfer of ownership.[1]

Uber and Lyft are two very large pieces of what is referred to as the sharing, gig, or on-demand economy. Whatever you call it, the sharing economy, particularly in the transportation sector, relies on the basic equation (1) Person A needs a ride, (2) Person B has a car, and (3) Platform C connects A and B together.

While Uber and Lyft are both relatively new companies (Uber officially launched in 2011, followed by Lyft a year later in 2012), the concept of ridesharing is not new. From 1915 to 1916, there was the short-lived and relatively forgotten "Jitney"—a car-sharing phenomenon that was born out of the 1914 recession and the arrival of Ford's Model T. It died at the hands of bureaucracy and political pressure from powerful railroads and municipal authorities.[2] More recent still was the ever-sketchy Craigslist "ride board." Craigslist, which went live in 1996, was the go-to method of ridesharing—with prospective drivers and passengers bartering money or company in exchange for daily commutes and cross-country road trips.

Truly, the first form of ridesharing was hitchhiking, a practice that became popular with soldiers during WWI. The soldiers, without other means of transportation, would hitchhike "a free ride home" while on furlough. Hitchhiking, or "thumbing," all but disappeared in the 1970s as a result of several highly publicized rapes and murders. While Jitney, Craigslist, and hitchhiking all connect drivers and passengers, just like the modern rideshares, they differ in at least one very crucial way: You pay Uber and Lyft to eliminate the stranger danger.

Of all the predecessors to Uber and Lyft, Craigslist is the most similar—an online platform where drivers connect with riders. However, Craigslist does not orchestrate matching riders with drivers; it does not revenue share with drivers; it does not track when a ride begins or ends or if it even happens, and—most importantly—it does not vouch for the safety, security, or quality of the ride. Lyft replaced and improved rideboards and casual carpool lines by connecting individuals seeking transportation with individuals willing to provide such transportation in real time, while also adding an unprecedented level of consumer safety, customer service, and service reliability.

Uber and Lyft used the promise of safety, service, and reliability to win licenses from regulatory bodies, utility commissions, and legislatures across every state in the country. In Lyft's application to the Pennsylvania Public Utility Commission in 2014, it argued that while ridesharing was "nothing new," Lyft could offer what "online marketplaces such as Craigslist" could not: "adding an unprecedented level of consumer safety, customer service, and service reliability."[3] Lyft didn't just promise to be the new Craigslist; it promised to be the "Super-Craigslist"—a ridesharing platform that offered, unlike any of its predecessors, "casual carpooling, commuter pick-up lines, employer and community ride boards."[4]

This promise made getting into a stranger's car as ordinary as hailing a taxi. A recent case out of the Supreme Court of Pennsylvania, *Lowman v. Unemployment Compensation Board of Review*,[5] explains this ride with strangers in Ubers and Lyfts perfectly:

> There is comfort in the conclusion Uber controlled and directed [the driver's] performance of driving-for-hire services. Uber, presenting itself as a transportation network company, invites a passenger without any personal contact with anyone, to request a ride from a driver (who will be a stranger). Vetting, monitoring and supervising the provision of services by its drivers is implicit in Uber's services.[6]

There is much debate, in courts and in academic circles, as to whether or not Uber and Lyft employees qualify as independent contractors or employees. This distinction is crucial in the tort context. For example, if Lyft classified all of its drivers as employees, the *respondeat superior* doctrine would assign liability to Lyft for the employee driver's tortious conduct.[7] However, if the Lyft drivers were given independent contractor status, the common law as codified in Restatement (Second) of Torts § 409 would leave Lyft without liability for the driver's misconduct, unless Lyft itself was found to have engaged in a separate tortious act (i.e., negligent hiring, training, and/or supervision).[8]

The Complicated Road to Tort Liability

Countless times in the past decade, courts around the country have grappled with this distinction as applied to rideshare context. In *Doe v. Uber Technologies, Inc.*,[9] two plaintiffs, Jane Doe 1 and Jane Doe 2, brought various negligent and intentional tort–based claims against Uber for separate instances of sexual assault perpetrated by Uber drivers. Uber moved to dismiss the claim in part on the premise that the drivers were independent contractors, not employees, and therefore they could not be held vicariously liable for the driver's conduct. In determining Uber's potential liability, the court considered the issue of independent contractors versus employees. Although the court found that the plaintiffs sufficiently alleged enough facts to establish an employer/employee relationship between Uber and the drivers, the court underscored the impossibility of retrofitting Uber into existing classifications under tort law—finding that Uber was not conclusively an employer of employees, nor of independent contractors, nor entirely a common carrier, nor strictly a technology company.

Similarly, in *Search v. Uber Technologies, Inc.*, a suit brought by a passenger who was stabbed by an Uber driver, the district court sitting in Washington, D.C., found that "[g]iven the particular conditions of Uber's arrangement with its drivers . . . the Court [could not] determine as a matter of law that Deresee was an independent contractor."[10] Because the *Search* court found that even precedent addressing the closely related taxicab industry was not instructive given Uber's unique platform model, it was forced to come to conclusions on Uber's relationship to drivers using "the hoary legal principle known as the duck test: if it walks like a duck, swims like a duck, and quacks like a duck, it's a duck."[11] In *Cunningham v. Lyft, Inc.*, the Massachusetts district

court found that Lyft's insistence on classifying drivers as independent contractors and not employees was an attempt at "create[ing] a false dichotomy between the administrative and operational aspects of their business."[12] The court found it was better to throw out the independent contractor/employee distinction alltogether, focusing rather on the realities of Lyft's rideshare business to determine liability or lack thereof: "[a] business cannot alter the substance of its usual course of business merely by careful (or careless) self-labeling in its dealings with contractors, employees, customers, or the public."[13]

The difficulty of answering this independent contractor versus employee quandary is not just something that frustrates the courts; a quick Lexis or Westlaw search will produce thousands of academic articles arguing for a better way to make this determination. Many draw a hard line, arguing in favor of picking one hardline classification and sticking to it. Others belabor the merits of returning to the old classics as a solution: the ABC Test,[14] the IRS Right to Control Test,[15] the Economic Realities Test,[16] and any number of state-specific criteria based on federal regulations, such as the Fair Labor Standards Act of 1938 (FLSA) and the Employee Retirement Income Security Act (ERISA).

In late 2022, the U.S. Department of Labor released a proposal to rescind a 2021 rule that made it easier for employers to classify workers as independent contractors, rather than employees under the FLSA. While this proposal certainly moves the needle toward a pro-employee definition of employment, it is not as rigorous as the ABC test used in states like California and Illinois.

In 2019, the California legislature adopted, and the governor signed, Assembly Bill (AB) 5, codifying an earlier California Supreme Court decision holding that the ABC test applies for purposes of determining whether an individual is an employee covered by state Wage Orders. Although the ABC faced several legal challenges California's ABC test still stands as three states, Alabama, South Dakota, and Washington passed laws similarly addressing gig workers. [17]Even closer to home, the New Jersey Supreme Court's 2015 decision in the *Hargrove v. Sleepy's, LLC* case, established an ABC test for wage and hour lawsuits that while heavily litigated in the past several years (including a 2023 Appellate Devision decision that further carved out exceptions to the ABC test), it still stands.[18]

Independent Contractor/Employee Debate is a Dated Antiquity

An allegiance to method, the need to pigeonhole a worker as an independent contractor or an employee to ascertain tort liability, is understandable because while ridesharing is a modern phenomenon, the independent contractor distinction is not. The 1889 U.S. Supreme Court case *Singer Manufacturing Co. v. Rahn*, asked if a company was liable for the tortious conduct of a sewing-machine salesman, whom, employed under a written contract and paid on commission, used a company-supplied wagon—with his own horse and harness—to make sales.[19] The Court's analysis centered around whether or not the salesman was acting as an employee or an independent contractor when he ran into the plaintiff with his horse and buggy. The almost timeless reliance on this distinction is explained by Yale Professor Roscoe T. Steffen in a 1935 article for the *University of Chicago Law Review*: The "rationalization [of the independent contractor/employee distinction] in terms of 'control'. . . gives principal significance to the notion of fault, in keeping with the supposed basis of liability for torts of negligence. The person most to blame for an injury should pay."[20]

Noting a similar inability experienced by courts almost a century later to define an "independent contractor"—"It is all very confusing." Steffen explained that this distinction was necessary to combat the trend to hold "employers increasingly [responsible] for the torts of his employees."[21] Steffen makes it clear that the common law reliance on the independent contractor/employee distinction was based fundamentally in a sense of judicial fairness: "The principal having delegated the performance of a certain class of acts to the agent, it is not unjust that he, being the person who has appointed the agent, and *who will have the benefits of his efforts if successful*, should bear the risk of his exceeding his authority."[22]

There are two other points in Steffen's article that are especially relevant to today's discussion. First, while the scheme of almost strict liability for the worker's action made sense when "the employer worked at the elbow of his employee," the advent of the modern large corporation, typified by hands-off and "absentee ownership," meant that employer control over the worker's actions had all but vanished.[23] Second, during the turn of the century, the average independent contractor "by and large [was] financially better able to absorb losses . . . than the individual employer himself would be."[24]

These points are relevant because they draw a stark contrast to the realities in which Lyft and Uber currently operate—a world where, as the *Lowman* court noted, Lyft and Uber exact an acute level of control over every single ride given by drivers; a world where it would be inconceivable to imagine any rideshare driver even having insurance coverage that is comparable to Lyft's or Uber's assets.

Why then—if the courts and academics struggle to bootstrap together a viable distinction between rideshare independent contractors and employees; if we acknowledge this determination of liability is antiquated, dated, and based in a reality that no longer exists—do we engage in the exhaustive and, quite frankly, lazy mode of analysis?

The Ubers and Lyfts of a century ago—the manufacturers, factory owners, and construction companies—swapped workers' titles to and from "servant" to "agent" to "independent contractor" to "employee," depending on what label was most advantageous to either escape tort liability or enforce contractual obligations.[25] The same happens now with Lyft and Uber entering state markets as "common carriers," then redefining themselves as "transportation network companies," or a technology platform, fighting to call drivers independent contractors rather than drivers. When the inevitable happens, a plaintiff brings a case against Uber or Lyft and asks the court to hold the complete opposite, it puts the court in the unenviable position of being asked to decide between two clunky designations. Legal professor and scholar Marc Galanter wrote that "repeat players" such as Uber and Lyft are able to secure this "body of 'precedent' cases—that is cases capable of influencing the outcome of future cases—[that are] favorable to [them]," merely because they have the resources and wherewithal to strategically settle or try cases, an advantage plaintiffs seldom have.[26] It is no wonder then that the body of precedent skews heavily in favor of Uber and Lyft.

Is Amazon the Answer?

The independent contractor/employee distinction is a tired and outmoded method of analysis that needs to be abandoned. As Judge Cardozo once said, "principles that have served their day expire, and new principles are born."[27]

When you really get down to the core issue at heart here, what we are really arguing about is whether or not Uber and Lyft owe a duty to the passnegers they transport.

Of course they do.

As the *Cunningham* court found, "the realities of Lyft's business . . . encompasses [sic] the transportation of riders."[28] While Lyft and Uber argue that they are merely "connecting riders and drivers," this is no more the case than "a grocery store's business is merely connecting shoppers and food producers, or a car repair shop's business is merely connecting car owners and mechanics."[29] The court argued that the focus should be on "what the business offers its customers."[30] Lyft and Uber are not simply offering a platform, they are offering a branded product with the promise of safety. As noted by the *Search* court, "Uber, through several forms of media such as its mobile app and its website, represented to customers that it is your private driver, that it subjects its drivers to rigorous screening procedures before hiring them, and that it continues to monitor those drivers after they are hired."[31]

Additionally, as noted by the courts, Uber and Lyft are in the business of transporting riders; therefore, why then wouldn't the fundamental safety and regulatory guidelines that apply to taxicabs, busses, and trains alike apply to these rideshare companies? In a suit against Uber and Lyft, a group of plaintiffs argued that both rideshare companies failed to accommodate disabled passengers and/or to properly train drivers in assisting disabled riders in violation of the ADA.[32] The court rejected Uber's argument of the "unworkability of Title III's application to technology companies that provide platforms for peer-to-peer sharing," and found that Uber is not immune to ADA compliance.

A preview of the future of rideshare liability might in fact be found in a case that has nothing to do with Uber or Lyft at all. Pennsylvania joined a quickly growing common law movement to hold Amazon responsible for the sale of dangerous products sold through its website.[33] While Amazon escaped liability for years as merely a "hands-off" online marketplace, recently courts in California, Texas, Wisconsin, and Pennsylvania have held that Amazon's possession of injury-causing products in its warehouses, and the shipment of them in boxes covered in the company's logo, puts Amazon in the liability crosshairs. Contrast this with Craigslist. If a seller

were to post the same injury-causing product in the "For Sale" section and sell the product to a buyer who ends up injured as a result, while both examples include a transaction and an injury, only one sale contains an implicit guarantee. When you buy something from a stranger on Craigslist, you are not buying something from Craigslist. You are not entering your credit card information on Craigslist or expecting a shipment from Craigslist in Craigslist packaging. You are aware that you are buying from a stranger with no promises or guarantees from Craigslist. Similar to the rideshare context, when you book a ride with Uber, you are booking a ride with Uber. You are using its application; you are trusting its process; you are selecting a type of service (Uber Share, Uber Black, Uber X); and you are expecting the driver will display an Uber logo and log the ride in the Uber app. In contrast, if you were to connect with a driver on a Craigslist ride board, you have no such expectation—you are getting a ride from a stranger, not an Uber driver.

In 2019, the Third Circuit held in *Oberdorf v. Amazon* (*Oberdorf I*) that Amazon was not shielded from liability for products sold on its website by third party vendors. This was the first time a court held a marketplace such as Amazon potentially liable for injuries from products sold by third-party sellers on its site. In *Oberdorf I,* the plaintiff purchased a dog collar on Amazon from a third-party vendor "The Furry Gang." A year later, while walking her dog, the collar broke causing the retractacble leash to recoil, striking the plaintiff and permanently blinding her in her left eye.[34] The Third Circuit, applying a four part test based on the Restatement (Second) of Torts, Section 402A, found that the all four factors weighed in favor of imposing strict liability on Amazon.

Widespread scrutiny from the retail industry lead the Third Circuit to *Oberdorf II*, where it vacated *Oberdorf I,* re-heard the case *en banc*, and sought certification from the Pennsylvania Supreme Court on the following question:

> Under Pennsylvania law, is an e-commerce business, like Amazon, strictly liable for a defective product that was purchased on its platform from a third-party vendor, which product was neither possessed nor owned by the e-commerce business?[35]

Although the case settled before any decision could be rendered, it begs the question: is Amazon the answer to rideshare liabilty?

[1] Daniel Schlagwein et al., *Consolidated, Systemic Conceptualization, and Definition of the "Sharing Economy,"* 71 J. ASS'N INFO. SCI. & TECH. 817 (2020).
[2] Sophie Schmidt, *Uber Before Uber: The Brief Wild Ride of the Jitney*, MEDIUM (Dec. 22, 2015), https://medium.com/UBER-under-the-hood/UBER-before-UBER-35730f2bfcc9#:~:text=Streetcars%20were%20cheap%20to%20ride,result%2C%20streetcars%20were%20wildly%20successful.
[3] Lyft 2014 Common Carrier Application.
[4] *Id.*
[5] 235 A.3d 278 (Pa. 2020).
[6] *Id*. at 305–06.
[7] Doe v. Uber Techs., Inc., 184 F. Supp. 3d 774, 784 (N.D. Cal. 2016).
[8] Except as stated in §§ 410–429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants. *See* RESTATEMENT (SECOND) OF TORTS § 409.
[9] 184 F. Supp. 3d 774.
[10] 128 F. Supp. 3d 222, 234 (D.D.C. 2015).
[11] *Id.* at 235.
[12] Civ. Action No. 1:19-cv-11974-IT, 2020 U.S. Dist. LEXIS 90333, at *28–29 (D. Mass. May 22, 2020).
[13] *Id*. at *28 (quoting Carey v. Gatehouse Media Mass. I, Inc., 92 Mass. App. Ct. 801, 80 n.9 (2018)).
[14] Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PA. J.L. & SOC. CHANGE 53, 65 (2015).
[15] Sarah F. Carter, Note, *What Is an Employee? Crafting a More Effective Test for the Modern Workforce*, 47 FLA. ST. U.L. REV. 501 (2020).
[16] Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295 (2001).
[17] *California's ABC test for independent contractors stands* (2022) *Manatt*. Available at: https://www.manatt.com/insights/newsletters/employment-law/californias-abc-test-for-independent-contractors (Accessed: April 6, 2023).
[18] https://www.jdsupra.com/legalnews/new-jersey-is-becoming-the-next-4705644/
[19] 132 U.S. 518, 522 (1889).
[20] Roscoe T. Steffen, *Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501 (1935).
[21] *Id.* at 506.
[22] *Id.* at 507 (quoting Hamlyn v. Houston & Co. [1903] 1 K.B. 81, 85 (UK)) [emphasis in original].
[23] *Id.*
[24] *Id*. at 518.
[25] *Id.* at 514.
[26] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 102 (1974).
[27] *Id.* at 166–67.
[28] Cunningham v. Lyft, Inc., Civ. Action No. 1:19-cv-11974-IT, 2020 U.S. Dist. LEXIS 90333, at *28–29 (D. Mass. May 22, 2020).
[29] *Id.* at *29.
[30] *Id.*
[31] Search v. Uber Techs., Inc., 128 F. Supp. 3d 222, 235 (D.D.C. 2015).
[32] Ramos v. Uber Techs., Inc., 2015 WL 758087 (W.D. Tex. Feb. 20, 2015).
[33] Jay Greene, *Burning Laptops and Flooded Homes: Courts Hold Amazon Liable for Faulty Products*, WASH. POST (Aug. 29, 2020), https://www.washingtonpost.com/technology/2020/08/29/amazon-product-liability-losses.
[34] *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 142 (3d Cir. 2019)
[35] *Oberdorf v. Amazon.com Inc.*, 818 F. App'x 138, 143 (3d Cir. 2020)

Depositions: The Rules, a few cases, and my thoughts on making your deposition effective.

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Depositions – Rules of Civil Procedure

Rule 4003.1 - Scope of Discovery Generally. Opinions and Contentions

(a) Subject to the provisions of Rules 4003.2 to 4003.5 inclusive and Rule 4011, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Depositions – Rules of Civil Procedure

Rule 4003.1 - Scope of Discovery Generally. Opinions and Contentions

(b) It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
(c) Except as otherwise provided by these rules, it is not ground for objection that the information sought involves an opinion or contention that relates to a fact or the application of law to fact.
231 Pa. Code § 4003.1

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Depositions – Rules of Civil Procedure

Rule 4003.6 - Discovery of Treating Physician

Information may be obtained from the treating physician of a party only upon written consent of that party or through a method of discovery authorized by this chapter. This rule shall not prevent an attorney from obtaining information from:
(1) the attorney's client,
(2) an employee of the attorney's client, or
(3) an ostensible employee of the attorney's client.
231 Pa. Code § 4003.6

White v. Behlke, 2004 Pa. Dist. & Cnty. Dec. LEXIS 202; 65 Pa. D. & C.4th 479 (Lacka. Co. 2004) is one of the seminal cases on the interpretation of this Rule.

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Depositions – Rules of Civil Procedure

Rule 4003.6 - Discovery of Treating Physician

White v. Behlke:

"The parties' discovery dispute in this malpractice action concerns defense counsel's ability to privately communicate with a plaintiff's subsequent treating physician, and more specifically, the scope of the "ostensible employee" exception in Pa.R.C.P. 4003.6(3) which generally bars *ex parte* contact between a treating physician and defense counsel. Counsel for the defendant hospital argues that Rule 4003.6(3) permits defense counsel to privately discuss the plaintiff's medical condition with any subsequent treating physician who conceivably may be an ostensible employee of the hospital even if that physician's treatment is not the subject of the pending malpractice suit."

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Depositions – Rules of Civil Procedure

Rule 4003.6 - Discovery of Treating Physician

White v. Behlke

"For the reasons set forth below, we conclude that defense counsel may invoke the "ostensible employee" exception to engage in ex parte communications with the plaintiff's treating physician only if that physician's status as an ostensible agent of the defendant and the physician's treatment of the plaintiff are both at issue in the medical negligence litigation."

Why is this important? What to watch for when defense counsel attempts to get clever with avoiding this Rule. Serious sanctions for violating this Rule.

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Depositions – Rules of Civil Procedure

Rule 4011 - Limitation of Scope of Discovery

No discovery, including discovery of electronically stored information, shall be permitted which
(a) is sought in bad faith;
(b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party;
(c) is beyond the scope of discovery as set forth in Rules 4003.1 through 4003.6;
(d) is prohibited by any law barring disclosure of mediation communications and mediation documents; or
(e) would require the making of an unreasonable investigation by the deponent or any party or witness.
231 Pa. Code § 4011

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Depositions – Rules of Civil Procedure:

4011 comment in *I.L. v. AHN*

Further, this Court does not find any of the limits of the scope of discovery as set forth in Pa.R.C.P 4011 applicable here. To the contrary, *this Court finds that conduct of counsel raising spurious or speaking objections, instructing a deponent not to answer, or ending a deposition in contradiction to the reasoning set forth herein to thereby compel opposing counsel to expend unnecessary legal effort and Court intervention may — in itself — be a violation of Pa.R.C.P. 4011(b).*

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty., 3/30/2021)

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Depositions – Rules of Civil Procedure

4011 comment in *I.L. v. AHN*

As such, future deposition conduct that would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party, particularly to reschedule a deposition because of said conduct; **shall be met** with the imposition of sanction(s) in this matter or any similar matters brought before this Court presiding as Special Motions Judge.

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty., 3/30/2021)

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Depositions – Rules of Civil Procedure

Rule 4012 - Protective Orders

(a) Upon motion by a party or by the person from whom discovery or deposition is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense, including one or more of the following:
(1) that the discovery or deposition shall be prohibited;
(2) that the discovery or deposition shall be only on specified terms and conditions, including a designation of the time and place;
(3) that the discovery or deposition shall be only by a method of discovery or deposition other than that selected by the party seeking discovery or deposition;
(4) that certain matters shall not be inquired into;
(5) that the scope of discovery or deposition shall be limited;

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Depositions – Rules of Civil Procedure

Rule 4012 - Protective Orders

(a) Upon motion by a party or by the person from whom discovery or deposition is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense, including one or more of the following:

(6) that discovery or deposition shall be conducted with no one present except persons designated by the court;

(7) that a deposition shall be sealed and shall be opened only by order of the court;

(8) that the parties simultaneously shall file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;

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Depositions – Rules of Civil Procedure

Rule 4012 - Protective Orders

(9) that a trade secret or other confidential research, development or commercial information shall not be disclosed or be disclosed only in a designated way.

(b) At any time during the taking of a deposition, on motion of any party or of the deponent, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (a). If the order made terminates the examination it shall be resumed thereafter only upon order of the court. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order and to obtain the court's ruling thereon.

231 Pa. Code § 4012

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Depositions – Rules of Civil Procedure

Rule 4016 - Taking of Depositions. Objections

(a) Objection to taking a deposition because of the disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(b) Objections to the competency of a witness or to the competency, relevancy, or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which was known to the objecting party and which might have been obviated or removed if made at that time.

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Depositions – Rules of Civil Procedure

Rule 4016 - Taking of Depositions. Objections

(c) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of oral questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might have been obviated, removed, or cured if objections had been promptly made, are waived unless seasonable objection is made at the taking of the deposition.

(d) All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.
231 Pa. Code § 4016

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Depositions – Rules of Civil Procedure

Rule 4020 - Use of Depositions at Trial

(a) At the trial, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with any one of the following provisions:
(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness, or as permitted by the Pennsylvania Rules of Evidence.
(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a party or a person designated under Rule 4004(a)(2) or 4007.1(e) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party, may be used by an adverse party for any purpose.
(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds
(a) that the witness is dead, or

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Depositions – Rules of Civil Procedure

Rule 4020 - Use of Depositions at Trial

(b) that the witness is at a greater distance than one hundred miles from the place of trial or is outside the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition, or that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment, or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.
(4) If only part of a deposition is offered in evidence by a party, any other party may require the offering party to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.
(5) A deposition upon oral examination of a medical witness, other than a party, may be used at trial for any purpose whether or not the witness is available to testify.

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Depositions – Rules of Civil Procedure

Rule 4020 - Use of Depositions at Trial

(b) Substitution of parties does not affect the right to use depositions previously taken; and, when an action has been dismissed and another action involving the same subject is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the former action may be used in the latter as if originally taken therein. A deposition previously taken may also be used as permitted by the Pennsylvania Rules of Evidence.
(c) Subject to the provisions of Rule 4016(b), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

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Depositions – Rules of Civil Procedure

Rule 4020 - Use of Depositions at Trial

(d) A party shall not be deemed to make a person his or her own witness for any purpose by taking the person's deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use of an adverse party of a deposition as described in subdivision (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by that party or by any other party.

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Depositions – Caselaw updates

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty., 3/30/2021) – transition from "Wettick triad" to the Nealon approach.

Reversed the Wettick rejection of the *Hall v. Clifton Precision* standards of Judge Gawthrop. After decades of working to get uniform deposition standards, PA is getting closer to FRCP/Gawthrop approach that began in *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993).

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Depositions – Caselaw updates

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty.), 3/30/2021

*7: "This Court notes that Judge Nealon's Opinions in *Howarth-Gadomsk*i, *infra* and *Karim*, *infra* address at length Judge Wettick's Opinions in *Lattaker v. Magee Women's Hosp. of UPMC*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1144, 2016 WL 3678620 (Alleg. Co. 2016); *McLane v. Valley Medical Facilities*, Inc., 2009 Pa. Dist. & Cnty. Dec. LEXIS 766, 2009 WL 6471086 (Alleg. Co. 2009); and *Belan v. Ward*, 67 Pa. D. & C. 4th 529 (Alleg. Co. 2004). **This Court incorporates by reference and adopts the reasoning and conclusions of Judge Nealon in *Howarth-Gadomski* and *Karim* as applied to the above-referenced J. Wettick Opinions as will be discussed herein."** (emphasis added)

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Depositions – Caselaw updates

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty.), 3/30/2021

Opinion testimony: proper to elicit from defendant.

Defense Counsel's first objection is that Plaintiffs may not seek the opinion of a defendant physician. This Court notes that prior to 1978, former Pennsylvania Rule of Civil Procedure 4011(f) had extended testimonial proscription to parties, and stated that "[n]o discovery....shall be permitted which....would require a deponent, whether or not a party, to give an opinion as an expert witness, over his objection." *Smith v. SEPTA*, 3 Pa. D. & C.3d 476, 477 n.2 (Phila. Co. 1977) . However, on November 20, 1978, the Supreme Court rescinded Pa.R.C.P. 4011(f) . *See Neal by Neal v. Lu*, 365 Pa. Super. 464, 530 A.2d 103 (Pa. Super. 1987). **In its stead, the Supreme Court adopted Pa.R.C.P. 4003.1.**

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Depositions – Caselaw updates

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty.), 3/30/2021

Opinion testimony: proper to elicit from defendant.

This Court addresses each section of Pa.R.C.P. 4003.1 as applied to Dr. Thomas' deposition. The privilege exception of Pa.R.C.P 4003.1(a) was not raised nor is at issue. Plaintiffs' Counsel's questioning, particularly regarding the timing of delivery and standards of care were relevant to the subject matter and any claims or defense of the plaintiff or any of the other party defendants of this medical malpractice lawsuit. While said discovery responses may not be admissible at trial for evidentiary reasons, there is no preclusion at this juncture for a party to seek responses that may lead to the discovery of admissible evidence pursuant to Rule 4003.1(b).

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Depositions – Caselaw updates

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty.), 3/30/2021

Opinion testimony: proper to elicit from defendant.

Pursuant to Pa.R.C.P. 4003.1(c) , defense counsel do not have grounds for an objection asserting that because the information sought from a defendant expert involves an opinion or contention that it should therefore be precluded in discovery. To the contrary, Rule 4003.1(c) , specifically states: "Except as otherwise provided by these rules, it is not ground for objection that the information sought involves an opinion or contention that relates to a fact or the application of law to fact. (emphasis added). *See also Howarth- Gadomski, infra*, 2019 Pa. Dist. & Cnty. Dec. LEXIS 7764, [WL] at *4-5 (1989 Explanatory Comment to Rule 4003.1(c) confirms that opinions are discoverable in Pennsylvania).

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Depositions – Caselaw updates

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty.), 3/30/2021

Stipulations relating to defendant not offering expert opinions at trial and therefore they are off limits at the deposition: *not appropriate.*

This Court finds the *Lattaker-McLane-Belan* line of cases an untenable standard applicable to deposition opinion testimony in Allegheny County. This Court cannot disregard the practical distinctions in every case, especially in medical negligence lawsuits whereby facts and opinions are invariably intertwined and amorphic during the discovery phase of litigation. "When dealing with medical evidence, the line of demarcation between fact and opinion is often amorphous." *Karim*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1159, [WL] at *13.

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Depositions – Caselaw updates

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty.), 3/30/2021

Stipulations relating to defendant not offering expert opinions at trial and therefore they are off limits at the deposition: *not appropriate.*

Special Motions Court in Allegheny County is not the proper venue for the parties to parse the nuances and distinctions of facts from opinions based upon stipulations relating to the discovery of defendant expert opinions. This Court finds no compelling authority to limit discovery in this regard.

Furthermore, the rule creates more problems than it allegedly solves. By example, consideration must be given its applicability and/or enforcement at trial related to adverse inference jury instructions. The standard jury charge instruction regarding adverse inference is found at Pa.S.S.J.I. (Civ) §5.50 (2020) with subcommittee notes.

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Depositions – Caselaw updates

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty.), 3/30/2021

Retrospective analysis questions: *appropriate* to ask defendant

Judge Nealon's analysis in *Karim v. Reedy*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1159, 2016 WL 111324 at *11 (Lacka. Co. 2016) thoroughly addresses the nature of retrospective reviews in medical negligence cases, confirming "[i]t is quite common for defendant physicians in malpractice trials to offer retrospective assessments of the propriety of their care. (*Karim citing, e.g. , Hyrcza v. West Penn Allegheny Health System, Inc.*, 2009 PA Super 119, 978 A.2d 961, 978 (Pa. Super. 2009). In effect, every evaluation of care in a medical negligence case is a retrospective review: Indeed, expert witnesses who review medical records, deposition transcripts and other pertinent information in order to address the standard of care and causation issues in medical professional liability actions always conduct after-the-fact evaluations and provide retrospective assessments of the quality of the care and the impact, if any, that it had upon the patient's outcome. *Karim*, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1159, [WL] at *11 .

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Depositions – Caselaw updates

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty.), 3/30/2021

Retrospective analysis questions: *appropriate* to ask defendant

This Court adopts the rationale of *Karim*, and similarly applies the same reasoning to defendant medical care personnel. Defendant expert parties may similarly be questioned at deposition like any other expert witness and may also provide retrospective assessments in discovery. In accord with Judge Nealon, this Court finds that current expert opinions may be discoverable regardless of admissibility at trial. This standard is soundly supported by *Petrancosta v. Malik*, 2014 U.S. Dist. LEXIS 115457, 2014 WL 4100723 (M.D. Pa. 2014) and *Cravath v. Mercy Hospital*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 727, 2013 WL 6991989 (Lacka. Co. 2013) cited in *Karim*.

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Depositions – Caselaw updates

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty.), 3/30/2021

Speaking objections – improper and sanctionable

Hall v. Clifton Precision, 150 F.R.D. 525, 530 (E.D. Pa. 1993) provides guidance on the issue of speaking objections and interjections requiring that an objection be concise and non-suggestive. As summarized in Association of Trial Lawyers of America, July, 2004, ATLA Annual Convention Reference Materials, Volume 2, Advocacy Track: Discovery: Overcoming Obstacles in Getting to the Truth, § III. Speaking Objections : The [Hall] court reasoned that allowing speaking objections and interjections could become a tool for defending attorneys to effectively circumvent the no-consultation rule and interrupt the flow of a deposition. *Hall*, 150 F.R.D. at 530.

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Depositions – Caselaw updates

I.L. v. Allegheny Health Network, 2021 Pa. D&C Dec. LEXIS 216 (C.P. Allegheny Cty.), 3/30/2021

Speaking objections – improper and sanctionable

The court further prohibited an attorney from instructing a witness not to answer a question unless the objection is on the ground that the witness's potential answer is "protected by a privilege or a limitation on evidence directed by the court." Id. at 531 . S*ee Ethical Issues in Depositions*, 2 Ann.2004 ATLACLE 1461 (2004).

While counsel may object at deposition to identify an issue as a transcript place-marker, the objection is not to be an instructional speaking objection nor an instruction not to answer. As set forth earlier in this Opinion, this Court has detailed the objections by Defense Counsel. It is clear all the objections were speaking objections. It is not necessary for objecting counsel to make such lengthy and detailed objections.

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Depositions: Federal Court

Background

Judge Gawthrop's deposition opinion--*Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993). *See also O'Brien v. Amtrak*,163 F.R.D. 232 (E.D. Pa. 1995), which follows this opinion and has very good language re taking a second (redeposition)deposition and ordering monetary sanctions against the offending party. *Also see Johnson v. Wayne Manor Apts*, 152 FRD 56 (ED PA 1993) which cites *Hall* with approval. *But see* Pa state court opinion in *Acri v. Golden Triangle*, 142 Pitts Legal Jrnl 225 (1994) which takes an opposing view to these cases.

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Depositions: Federal Court

Background

Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa 1993)--opinion from Judge Gawthrop re: impermissibility of instructing witness not to answer deposition questions. *But see Judge Wetticks* contrary opinion from *Allegheny County in Acri v. Golden Triangle Acceptance Co.*, 142 P.L.J. 225 (CCP 1994). *See Applied Telematics, Inc. v. Sprint Corp*., No 94-4603 (E.D. Pa 1995--Magistrate Naythons) which agrees with *Hall*.

Federal Rule of Civil Procedure 30(d) generally restricts the length of a deposition to one day of 7 hours. Also, there is a limit as to how many depos can be taken without court order.

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Depositions: Federal Court

The *Hall* Rule

The *Hall Rule* as adopted by Judge Gawthrop in *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993), stated:

5. Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of decid-ing whether to assert a privilege.

6. Any conferences which occur pursuant to, or in violation of, guideline are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.

7. Any conferences which occur pursuant to, or in violation of, guideline shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record. *Id.* at 531-32.

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Depositions: Federal Court

In *Petrancosta v. Malik*, 2014 U.S. Dist. LEXIS 115457, 2014 WL 4100723 (M.D. Pa. 2014), the Federal District Court evaluated a dispute concerning the permissible scope of discovery and expert testimony pursuant to Fed.R.Civ.P. 26 in a medical negligence action. At deposition, defense counsel objected to a treating physician answering questions about X-rays and CAT scans related to plaintiff's condition. Defense counsel asserted that the physician's current opinion, retrospective interpretation, or present day review was not reasonably calculated to lead to the discovery of admissible evidence because the physician would not be offered as an expert at trial.
Petrancosta, 2014 U.S. Dist. LEXIS 115457, [WL] at *5.

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Depositions: Federal Court

Petrancosta v. Malik, 2014 U.S. Dist. LEXIS 115457, 2014 WL 4100723 (M.D. Pa. 2014)

In reaching its conclusion, the court distinguished *Jistarri v. Nappi*, 378 Pa. Super. 583, 549 A.2d 210 (Pa. Super. 1998) (defendant may not be required to give expert testimony on the negligence of other defendants at trial) from the issue of whether the defendant doctor may provide his opinion at deposition in discovery.

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Depositions: Federal Court

Petrancosta v. Malik, 2014 U.S. Dist. LEXIS 115457, 2014 WL 4100723 (M.D. Pa. 2014)

The court concluded, "there is no basis for Defendant's contention that inadmissibility at trial means that Dr. Malik's current opinion is not reasonably calculated to lead to the discovery of other admissible evidence." 2014 U.S. Dist. LEXIS 115457, [WL] at *6.

Fn. 19: This applied standard in no manner prejudges whether the defendant expert's responses will be favorable or unfavorable to any party. Moreover, it does not preclude any party from filing Motion(s) in Limine or objections at the time of trial related to admissibility or other legal issues. However, defense counsel may not use such an objection as a basis for the witness not to answer at deposition.

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Depositions: Federal Court

Petrancosta v. Malik, 2014 U.S. Dist. LEXIS 115457, 2014 WL 4100723 (M.D. Pa. 2014)

Accordingly, plaintiff was permitted to re-depose the physician with defendant ordered to pay the cost of the second appearance fee for the videographer and court reporter. 2014 U.S. Dist. LEXIS 115457, [WL] at *9 . The court found "the better practice is to allow the deposition to proceed and deal with objections before trial." 2014 U.S. Dist. LEXIS 115457, [WL] at *8 .

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Depositions: Summary

Many lawyers take depositions just to speak with everybody and use a standard outline approach for all. Just because you can depose a witness doesn't always mean that you should.

I recommend that one really has to put the time in ahead of the deposition to recognize the nuances of the facts, benefits and risks of these depositions. Many times there are hidden dangers that can really jam you up at trial. Pa.R.C.P. 4003.6 is an example, as is Pa.R.C.P. 4020(a)5.
Also one has to be cognizant of the forum in which the deposition is being taken, and have a relevant case or two if needed to attach to the transcript if you run into an opposing attorney that decides to be obstructionist. Also have the phone number of the judge (more likely to be useful in federal court). But have it anyway.

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Questions, thoughts or comments?

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Cited
As of: January 28, 2023 8:43 PM Z

I.L. v. Allegheny Health Network

Common Pleas Court of Allegheny County, Pennsylvania, Civil Division

March 30, 2021, Decided

CIVIL DIVISION G.D. 18 - 011924

Reporter
2021 Pa. Dist. & Cnty. Dec. LEXIS 216 *

I.L., a Minor, by ASHLEY LAU and JUSTIN KEATING, Guardians, and ASHLEY LAU and JUSTIN KEATING, individually, Plaintiffs, vs. ALLEGHENY HEALTH NETWORK; WEST PENN ALLEGHENY HEALTH SYSTEM, INC., d/b/a THE WESTERN PENNSYLVANIA HOSPITAL; ALLEGHENY SPECIALTY PRACTICE NETWORK; ALLEGHENY CLINIC; CENTURY MEDICAL ASSOCIATES; ALLEGHENY PERINATAL ASSOCIATES; JAMES ROWLAND, M.D.; CHRISTANN JACKSON, M.D.; RONALD THOMAS, M.D.; MARIA N. UDREA, M.D.; JOHN LUIZA, M.D.; FAITH IGHOYIVWI, M.D.; PAUL WEINBAUM, M.D.; and, AURORA MARCELO MIRANDA, M.D., Defendants.

Core Terms

deposition, discovery, questions, defense counsel, delivery, Plaintiffs', standard of care, deponent, answers, expert testimony, objected, retrospective, answer a question, Motions, expert opinion, patient, records, deposition transcript, talking, medical negligence, instructing, repetitive, offering, speaking, nuances, opinion testimony, trial court, defendant-physician, discoverable, grounds

Judges: **[*1]** PHILIP A. IGNELZI, J.

Opinion by: PHILIP A. IGNELZI

Opinion

OPINION and ORDER of COURT

IGNELZI, J.

This Pretrial Discovery Opinion and Order of Court involves the discovery deposition of a defendant physician in a medical negligence action and various objections raised, including but not limited to, the scope and breadth of opinion testimony at deposition. Before this Court are Plaintiffs' Motion to Overrule Objection and Reconvene Deposition (ECF 53)[1] and Defendants' Response in Opposition to Plaintiffs' Motion (ECF 52). Plaintiffs seek to reconvene the deposition to compel the physician to answer questions regarding the timing of the delivery and any follow-up questions that reasonably flow from his responses. (ECF 53, Proposed Order at ¶¶2-3). This Court is the assigned Special Motions Judge pursuant to Allegheny County Local Rule 208.3(A)(5).[2] The Special Motions Judge handles the bulk of all pretrial discovery motions. The motions assignment has a long and storied history.[3] As with any

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[1] "ECF" means electronic court filing identified on the Department of Court Records docket.

[2] This Court currently presides as the assigned Special Motions Judge for pretrial discovery matters before the Court of Common Pleas of Allegheny County ("CCPAC"). *See* Allegh. L. R. 208.3(A)(5). CCPAC employs a master calendar list with designated procedures for the disposition of motions, including a Calendar Control Judge (Rule 208.3(A)(3); Motions Judge (Rule 208.3(A)(4); and Special Motions Judge (Rule 208.3(A)(5). This Court also presides over General Docket trials and is also assigned to the Commerce and Complex Litigation Center pursuant to Allegh. L. R. 249. *See also* https://www.alleghenycourts.us/civil/commerce_complex_litigation.aspx

Pursuant to Allegh. L. R. 208(A)(5)(c):

> All uncontested matters may be presented to the Special Motions Judge on Fridays at 10:00 A.M., 12:00 Noon, and 2:00 P.M. For contested motions, the **[*2]** moving party may obtain a Friday argument date and time, in person or by telephone, from the Assignment Room (700 City—County Building, 412-350-5463) between 1:30 P.M. and 4:30 P.M.; or the moving party may place the matter on a 2:00 P.M. Add—On List any time after 8:30 A.M. on the Friday on which it will be argued. The Add—On List is located in the Courtroom of the Special Motions Judge.

[3] The designated times to present motions are euphemistically

storied history, there are certain portions which need to be amended and changed.[4]

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known among local counsel as "Happy Hour." Regrettably, while "Happy Hour" may be perceived as an efficient pre-COVID-19 manner to address discovery issues, provide counsel court-time and social opportunity, it spawned a veritable cottage guild of litigants seeking the Special Motions Judge's intervention oft-times to mediate issues related to counsel's behavior, counsel's (in)ability to properly ascertain the governing Rules of Discovery Procedure, to compel counsel to professionally confer and consult with opposing counsel to resolve issues, or to compel counsel to make reasonable efforts to expedite litigation consistent with the interests of the client. Experience suggests counsel, at times, used ready-access to "Happy Hour" as opportunity for informal continuing legal education, such as requiring the court to sift through voluminous and/or excessive poorly-drafted interrogatories, answers, requests for admission/production, and/or responses.

Any continuing acceptance of informal "Happy Hour" norms undermines judicial economy by compelling a party to seek court intervention to, in effect, have the Court examine and edit a party's lax work product. "Happy Hour" motion practice is not a substitute for meeting and conferring beforehand to resolve issues.

As a result, the Court has proposed an amendment to Allegheny Local Rule 208.3(A)(4)(b) to promote that counsel confer and consult before presenting a Motion. The proposed amendment at Rule 208.3(a)(4)(b)(ii) reads as follows:

> **(b) Presentation:**
>
> **(ii) Absent compelling circumstances, the Court requires the parties to conduct a meaningful "meet and confer" prior to presentation of any contested motion. The Court will inquire into the specifics of the meet and confer during the hearing**.

[4] As of February 8, 2021, the Court has posted this requirement in the Remote Discovery Court Procedures — Civil Discovery Motions, Fifth Judicial District of Pennsylvania, Allegheny County. *See* https://www.alleghenycourts.us/Civil/DiscoveryMotions.aspx. While this Court is not requiring a certification, it is this Court's intent to capture and apply the spirit of Federal Rule of Civil Procedure addressing parties' failure to make disclosures or to cooperate in discovery and apply sanctions. As *Fed.R.Civ.P. 37(a)(1)* in pertinent part states: "The [discovery] motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." This Court is henceforth adopting the well-reasoned standard underlying the duty of counsel in good faith to confer and consult. At hearing, counsel will be accountable for the specifics of their meaningful efforts to meet and confer.

As per this Opinion, the previous herein described "Happy Hour" norms are no longer acceptable and offending counsel will be sanctioned for egregious conduct. Henceforth, counsel at bar in Allegheny County is well-informed to exercise professional discretion in applying the proper discovery rules to the appropriate discovery vehicle (interrogatories, production requests, admissions, and depositions) when submitting notices, requests or responses to opposing counsel *before* a party is compelled to seek court intervention. For example, voluminous and repetitive written interrogatories are not an expedient substitute for simply noticing a deposition and asking the questions directly of the deponent *without the need* to appear at Happy Hour to reconcile the dispute related to counsel's choice or manner of discovery. To be clear, this guidance is not intended to chill the zealous advocacy of any party or to seek resolution of legitimate discovery disputes. It is intended to establish a new norm for motions practice in the Court of Common Pleas of Allegheny County before the Special Motions Judge.

To assist in this transition, this Court acknowledges the wit of Mark Twain who stated that *humor is mankind's greatest blessing*. Heeding Samuel Clemens' adage — and to create a new local euphemism to encapsulate this transformation — this Court announced on its first day assigned as Special Motions Judge, that its stated goal is to convert "Happy Hour" into "Happy Minute." As the injection of appropriate humor is necessary so that advocates and jurists not take themselves too seriously, it is the expectation that by adopting this simple new "Happy Minute" moniker, this quip will be a blessing for lawyers and judges to acknowledge their respective roles to effect judicial economy and resolve discovery issues by meeting and conferring before presentation of a motion.

Procedural Summary

This action was initiated on September 17, 2018, by Praecipe for Writ of Summons (ECF 1). Thereafter, on November 7, 2018, Plaintiffs filed their initial Complaint (ECF 19)[5] in medical negligence related to the birth of I.L., a minor. Plaintiffs aver as a result of an emergent cesarean section on September 24, 2016, the baby suffered hypoxic ischemic encephalopathy (HIE) causing severe injury to the brain due to deprivation of oxygen. (ECF 53 at ¶5).

Plaintiffs' Third **[*3]** Amended Complaint (ECF 38), alleges, *inter alia*, that deponent Defendant, Ronald Thomas, M.D.: acted in his own right as a medical practitioner and as agent of specific corporate

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[5] Plaintiffs subsequently filed a First Amended Complaint (ECF 23), Second Amended Complaint (ECF 31), and a Third Amended Complaint (ECF 38).

Defendants (ECF 38 at ¶12); signed a prenatal ultrasound report that was conducted on or about August 25, 2016 (ECF 38 at ¶38); was consulted by co-Defendant physician Christann Jackson, M.D. related to a September 23, 2016 sonogram; and "recommended that an induction should be scheduled within the next day or so given the bowel appearance and doppler results[.]" (ECF 38 at ¶¶45, 46).

Count IV of Plaintiffs' Third Amended Complaint against Dr. Thomas alleges negligence, and avers that Defendant Deponent Thomas failed to exercise reasonable treatment and care, in any or all of the following respects:

> (a) In failing to make a plan for delivery by 38 weeks;
>
> (b) In failing to arrange for Ashley's admission to the hospital and delivery of I.L. at 38 weeks 1 day on September 23, 2016, given elevated umbilical artery value in combination with fetal growth restriction and gastroschisis with evidence of increasing bowel dilation;
>
> (c) In failing to arrange for delivery of I.L. before the presentation of Ashley Lau on September 24, **[*4]** 2016 at West Penn Hospital in active labor; and
>
> (d) In failing to review and/or correctly interpret the electronic fetal monitor tracing recorded on September 22, 2016 which clearly reflected contractions mandating admission and delivery of I.L on September 23, 2016 at the latest.

(ECF 38 at ¶77).

Dr. Thomas' video deposition was conducted on August 5, 2020 from 10:09 a.m. until 2:05 p.m. The Plaintiffs' Motion (ECF 53) and Defendants' Response (ECF 52) relate to the scope and breadth of the deposition, objections raised, and the conduct of counsel. Plaintiffs aver Defense Counsel's objections and interruptions frustrated the essential purpose of discovery by raising speaking objections and directing the Defendant deponent to not answer certain questions related to medical opinion testimony. (ECF 53 at ¶8). Defendants aver that due to Plaintiffs' Counsel's repetitive questioning, unnecessarily prolonged deposition, and personal attacks on counsel; that Defense Counsel had properly placed valid objections and ended the deposition after four hours. (ECF 52 at ¶1). The repetitive areas are detailed in Defendant's Response at Exhibit B consisting of four (4) pages containing sixty-one (61) **[*5]** bullet points. (ECF 52, Exhibit B).

Each party incorporated excerpts of the deposition in support of their contentions. Dr. Thomas' complete deposition transcript was attached as Exhibit A to Defendants' Response. (Deposition of Ronald Thomas, M.D., August 5, 2020, ECF 52 at Exh. A). Defense Counsel raised objections at deposition pages 21, 24, 28, 29, 48, 50, 62, 66, 67, 97, 105, 108, 118, 145, 146, and 148. This Court has reviewed the pertinent pleadings and every page and line of the one hundred forty-nine (149) page deposition transcript including objections and the interaction of counsel.[6]

Factual Summary

Upon review of the record before this Court, the nature of Dr. Thomas' medical training and specialty is high-risk obstetrics. (Dr. Thomas dep. at p. 31). The Complaint, deposition transcript, and related pleadings provide limited information, but it may be inferred that Dr. Thomas is an expert in maternal fetal medicine.[7] In this instance, Dr. Thomas was involved in two ultrasound examinations of the mother Ms. Lau, dated September 1 and 23, 2016. (*Id.* at p. 6). On September 23, Dr. Thomas was consulted and recommended that an induction should be scheduled within the next day or so given the **[*6]** bowel appearance and the doppler results. (ECF 38 at ¶¶45-47).

Dr. Thomas did not see Ms. Lau on either September 1 or 23. (Dr. Thomas dep. at p. 7). On September 24, 2016 at 5:17 p.m., the child was delivered via emergency C-section at West Penn Hospital. (ECF 38 at ¶¶47-52). Dr. Thomas did not speak to Ms. Lau or her family after the events of labor and delivery and had no direct involvement whatsoever. (Dr. Thomas dep. at pp. 60-61).

It is clear from review of the Third Amended Complaint and Dr. Thomas' Deposition Transcript, that one of the

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[6] Defendant's Response in Opposition to Plaintiff's Motion to Overrule Objection and Reconvene Deposition (ECF 52) contains at Exhibit A: Dr. Thomas' August 5, 2020 Deposition Transcript and Exhibit B: Defendant's List of instances of Plaintiff's repetitive questioning at Dr. Thomas' Deposition.

[7] For the specific purpose of addressing the Motion and Response before this Court, the Court takes judicial notice of public information at Ronald L Thomas, MD | Find A Doctor | Allegheny Health Network (ahn.org). At said website, Dr. Thomas' areas of expertise are listed as: Genetics, Gestational Diabetes, High Risk Obstetrics, Maternal-Fetal Medicine, Miscarriage, OB/GYN Ultrasounds, and Recurrent Pregnancy Loss.

Plaintiffs' theories against Dr. Thomas involves his participation on September 23, 2016, the day before delivery. It is alleged that on that date, Dr. Jackson read the ultrasound / sonogram and did a remote evaluation with Dr. Thomas. Based upon this remote evaluation, it is alleged Dr. Thomas suggested delivery within the next day or two. Plaintiffs contend delivery should have occurred on September 23, 2016 at the latest.

The deposition questions and objections are related to factual testimony, standard of care, timing and management of delivery, opinion testimony, and repetitive **[*7]** questioning.

Scope and Standard of Review

In preparing this Opinion, this Court has reviewed substantial appellate law as well as opinions from Pennsylvania Courts of Common Pleas including District and County reports. This review includes Allegheny County Court of Common Pleas discovery opinions by the well-recognized jurist, the Honorable R. Stanton Wettick and the recent and well-reasoned opinions of the Honorable Terrence R. Nealon of the Court of Common Pleas of Lackawanna County. This Court adopts the standard of review for discovery disputes as thoroughly articulated in *Howarth-Gadomski v. Henzes, 2019 Pa. Dist. & Cnty. Dec. LEXIS 7764, 2019 WL 6354235 (Lacka. Co. 2019)* and *Karim v. Reedy, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1159, 2016 WL 111324 (Lacka. Co. 2016)*.[8]

> "The trial court is responsible for overseeing discovery between the parties and, therefore, it is within that court's discretion to determine the appropriate measures to insure adequate and prompt discovery of matters allowed by the Rules of Civil Procedure." *Rohm and Haas Co. v. Lin, 2010 PA Super 26, 992 A.2d 132, 143 (Pa. Super. 2010)*, cert. denied, *565 U.S. 1093, 132 S. Ct. 852, 181 L. Ed. 2d 550 (2011)*. Under *Pa.R.C.P. 4003.1*, "discovery is liberally allowed with respect to any matter, not privileged, which is relevant to the cause being tried." *Berg v. Nationwide Mutual Insurance Company, Inc., 2012 PA Super 88, 44 A.3d 1164, 1178 n. 8 (Pa. Super. 2012)*, *app. denied, 619 Pa. 719, 65 A.3d 412 (2013)*. Information is relevant "if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or supports a reasonable inference or presumption **[*8]** regarding a material fact." *Klein v. Aronchick, 2014 PA Super 3, 85 A.3d 487, 498 (Pa. Super. 2014)*, *app. denied, 628 Pa. 632, 104 A.3d 5 (2014)*. The relevancy standard applicable to discovery is necessarily broader than the relevancy test used at trial for the admission of evidence. *Com. v. TAP Pharmaceutical Products, Inc., 904 A.2d 986, 994 (Pa. Cmwlth. 2006)*; *George v. Schirra, 2002 PA Super 395, 814 A.2d 202, 205 (Pa. Super. 2002)*. Moreover, any doubts regarding relevancy are to be resolved in favor of discovery. *Ario v. Deloitte & Touche, LLP, 934 A.2d 1290, 1293 (Pa. Cmwlth. 2007)*.

"Pennsylvania has a long history of liberal discovery in order to further the truth-determining process essential to our judicial system, prevent unfair surprises should the matter proceed to trial, enhance an attorney's ability to strongly and effectively advocate for a client, and enable the efficient operation of our judicial system." *Office of the District Attorney of Philadelphia v. Bagwell, 155 A.3d 1119, 1138 (Pa. Cmwlth. 2017)*, *app. denied, 643 Pa. 669, 174 A.3d 560 (2017)*. "Of the various discovery procedures available to litigants, depositions provide the most effective means of investigating a claim or defense via spontaneous responses to commonly unscripted questions." Ezrin v. Hospice Preferred Choice, Inc., 2018 WL 4778396, at *5 (Lacka. Co. 2018). In a deposition setting, "as the inquiry proceeds, the framing of each question is dependent upon the answers to preceding questions." *Arvonio v. PNC Wealth Management, 35 Pa. D. & C. 5th 213, 220-223 (Lacka. Co. 2013)* (quoting *Nardell v. Scranton-Springbrook Water Service Co., 24 Pa. D. & C. 2d 663, 667, 51 Luz. Legal Reg. Rep. 155 (Luz. Co. 1961)*). As a result, depositions provide litigants and their counsel the opportunity to discover the details of their adversary's claims or defenses while simultaneously locking witnesses into their

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[8] This Court notes that Judge Nealon's Opinions in *Howarth-Gadomski, infra* and *Karim, infra* address at length Judge Wettick's Opinions in *Lattaker v. Magee Women's Hosp. of UPMC, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1144, 2016 WL 3678620 (Alleg. Co. 2016)*; *McLane v. Valley Medical Facilities, Inc., 2009 Pa. Dist. & Cnty. Dec. LEXIS 766, 2009 WL 6471086 (Alleg. Co. 2009)*; and ***Belan v. Ward, 67 Pa. D. & C. 4th 529 (Alleg. Co. 2004)***. This Court incorporates by reference and adopts the reasoning and conclusions of Judge Nealon in Howarth-Gadomski and Karim as applied to the above-referenced J. Wettick Opinions as will be discussed herein.

anticipated trial testimony. **[*9]** *See* Brown v. Trinidad, 2015 PA Super 46, 111 A.3d 765, 774 (Pa. Super. 2015) ("Although taking the deposition of a witness on the day of trial is unusual, we agree with the trial court that it nonetheless had the effect of making Trinidad aware of what [the witness's] trial testimony would be."). To that end, "[l]itigants and their counsel have an obligation to act reasonably in scheduling and conducting discovery depositions." Euceda v. Green, 40 Pa. D. & C. 5th 317, 331 (Lacka. Co. 2014).

Our discovery rules are designed "to allow a fair trial on the merits" and to enable the party seeking to prove a claim or defense to secure discovery pertinent to the matters which [s]he will be required to prove at trial. Keystone Dedicated Logistics, LLC v. JGB Enterprises, Inc., 2013 PA Super 225, 77 A.3d 1, 12 (Pa. Super. 2013). For that reason, the party objecting to discovery generally bears the burden of establishing that the requested information is not discoverable. Koken v. One Beacon Ins. Co., 911 A.2d 1021, 1025 (Pa. Cmwlth. 2006); Brogan v. Rosenn, Jenkins & Greenwald, LLP, 28 Pa. D. & C.5th 553, 562 (Lacka. Co. 2013). Furthermore, any limitations on discovery sought by the civil litigants should be construed narrowly. Venosh v. Henzes, 31 Pa. D. & C. 5th 411, 420 (Lacka. Co. 2013), *aff'd, 105 A.3d 788 (Pa. Super. 2014).*

Howarth-Gadomski v. Henzes, 2019 Pa. Dist. & Cnty. Dec. LEXIS 7764, 2019 WL 6354235 at *3-4 (Lacka. Co. 2019). *See also* Karim v. Reedy, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1159, 2016 WL 111324 (Lacka. Co. 2016)(Judge Nealon articulated the scope and standard of review almost identically as in Howarth-Gadomski with additional citations to several Lackawanna County cases: Scranton Laminated Label, Inc. v. Florimonte, 28 Pa. D. & C.5th 502, 521 (Lacka. Co. 2013), *aff'd, 100 A.3d 314 (Pa. Super. 2014), app. denied, 629 Pa. 638, 105 A.3d 738 (2014), cert. denied, 574 U.S. 1191, 135 S. Ct. 1505, 191 L. Ed. 2d 432 (2015)* and McAndrew v. Donegal Mut. Ins. Co., 56 Pa. D. & C. 4th 1, 7 (Lacka. Co. 2002)).

Discovery Deposition Objections

The first objection Defense Counsel raised is that **[*10]** Dr. Thomas is only a fact witness and therefore Plaintiffs are not permitted to seek opinion testimony. Plaintiffs' Counsel questioned Dr. Thomas about Hypoxic Ischemic Encephalopathy ("HIE"). (Dr. Thomas dep. at page 21, line 1 to page 23, line 1).[9] Defense Counsel continued throughout the deposition to object to Plaintiffs' Counsel seeking expert opinion testimony. (*Id.* at 145:13-147:12).

> Q. And I know the American College of Obstetrics has a definition that they have used in the past. They define HIE as an etiology considered to be a limitation of oxygen and blood flow near the time of birth. Is that a fair definition of HIE?
> A. That is fair.
> DEFENSE COUNSEL: Counselor, objection. You are going far afield here. My client was not involved in delivery. I have given you some latitude here, but please get to the facts of this case. He is not here to talk about HIE. He is not here to talk about his criteria or ACOG. So, he is a fact witness, please focus on his facts. He is not here to talk about HIE, so get a new question, please.

(*Id.* at 21:1-16).

The second objection Defense Counsel raised precluded any questioning that did not involve Dr. Thomas' participation. Defense Counsel justified **[*11]** this objection by stating: "[b]ut what happens after his involvement, that is a retrospective review." (*Id.* at 22:25-23:1).

Defense Counsel continued to object that Dr. Thomas is not giving opinions unless it relates to his specific involvement in Plaintiff's care:

> A. So, the antenatal testing again has to be emphasized as being a view of a chronic nature, not to address an acute episode or an acute insult.
> Q. Do you think that this was an acute insult?
> DEFENSE COUNSEL: He is not going to answer that. He is not here to comment on what happened to your client after his care ended, so he is not answering that.

(*Id.* at 28:1-3).

The next objection Defense Counsel raised was Dr. Thomas did not deliver the baby, Plaintiffs' Counsel could not ask anything about the delivery:

> DEFENSE COUNSEL: He is not talking about delivery. Unless you know a fact that I don't, he wasn't involved in delivery.
> PLAINTIFFS' COUNSEL: I am not talking about this

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[9] Deposition transcript citations are in the following format: page number : line number.

> delivery. I am talking about the management of patients like this. We are talking about —
>
> DEFENSE COUNSEL: He's not answering. Counselor, I'm going to spare you. You are trying to get standard of care opinions out of a fact witness on a topic he had no involvement **[*12]** with, so he is not answering that.

(*Id.* at 50:24-51:9).

Defense Counsel concluded that any questions about delivery were not permitted and maintained his objections because Dr. Thomas' last involvement with the patient was on September 23, 2016 (the day before delivery on September 24). However, Dr. Thomas had participated in a remote evaluation with Dr. Jackson on September 23, 2016, wherein Dr. Thomas suggested delivery within the next day or two. (*Id.* at 8:16-22). Later in the deposition, Plaintiffs' Counsel pursued questioning Dr. Thomas about the events of September 24, 2016.

Defense Counsel objected to Plaintiffs' Counsel asking whether Dr. Thomas' September 23, 2016 recommendation was to have the patient admitted and delivered within 24 to 48 hours. (*Id.* at 62:14-72:18).

> DEFENSE COUNSEL: No, counselor. You are trying to be cute here and get an opinion that I have told you he won't give. So, he has answered your question generically. We are not talking about this patient after the 23rd.

(*Id.* at 62:21-25).

Defense Counsel objected that this question had been asked and answered at least five (5) times. (*Id.* at 66:3-5). However, notwithstanding Defense Counsel's objections, this was the **[*13]** first time Dr. Thomas testified about a 24 to 48 hour recommendation. (*Id.* at pp. 62:14-72:18). At this point, Doctor Thomas indicated that delivery would be acceptable within that week and further testified that he thought there was a three to four-day window to work with in terms of moving toward delivery. (*Id.* at 72:14-18).

Defense Counsel next objected that Dr. Thomas is not a records custodian and asserted that Plaintiffs' questions are not reasonably calculated to lead to the discovery of admissible evidence. (*Id.* at 96:1-97:6).

Again, Defense Counsel asserts Dr. Thomas is not an expert. (*Id.* at 108:22-23). When questioned by Plaintiffs' Counsel as to whether Dr. Thomas will be supplying expert testimony at trial, Defense Counsel would not make such a representation. (*Id.* at 108:24-109:4). In fact, Defense Counsel stated Dr. Thomas will defend himself at trial as the law allows within the confines of his treatment. (*Id.*). Despite almost three pages of argument between counsel, Dr. Thomas does eventually answer the question. (*Id.* at 110:1-22).

Finally, Defense Counsel suspended the deposition after alleging he was personally attacked when Plaintiffs' Counsel stated that Defense Counsel **[*14]** was coaching the witness. (*Id.* at 148:2-149:23). As a result, Defense Counsel unilaterally terminated the deposition. (*Id.* at 149:1-2).

Application of Law to Defendants' Objections

I. Discovery of Defendant Expert Opinions

Defense Counsel's first objection is that Plaintiffs may not seek the opinion of a defendant physician. This Court notes that prior to 1978, former *Pennsylvania Rule of Civil Procedure 4011(f)* had extended testimonial proscription to parties, and stated that "[n]o discovery....shall be permitted which....would require a deponent, whether or not a party, to give an opinion as an expert witness, over his objection." *Smith v. SEPTA, 3 Pa. D. & C.3d 476, 477 n.2 (Phila. Co. 1977)*. However, on November 20, 1978, the Supreme Court rescinded *Pa.R.C.P. 4011(f)*. *See Neal by Neal v. Lu, 365 Pa. Super. 464, 530 A.2d 103 (Pa. Super. 1987)*. In its stead, the Supreme Court adopted *Pa.R.C.P. 4003.1*.

This Court addresses each section of *Pa.R.C.P. 4003.1* as applied to Dr. Thomas' deposition. The privilege exception of *Pa.R.C.P 4003.1(a)* was not raised nor is at issue.[10] Plaintiffs' Counsel's questioning, particularly regarding the timing of delivery and standards of care

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[10] ***Pa.R.C.P. 4003.1(a)*** states:

> Subject to the provisions of *Rules 4003.2 to 4003.5* inclusive and *Rule 4011*, ***a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action***, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. (emphasis added).

were relevant to the subject matter and any claims or defense of the plaintiff or any of the other party defendants of this medical malpractice lawsuit. While said discovery responses may not be admissible at trial for evidentiary reasons, there is no preclusion **[*15]** at this juncture for a party to seek responses that may lead to the discovery of admissible evidence pursuant to *Rule 4003.1(b).*[11]

Pursuant to *Pa.R.C.P. 4003.1(c)*, defense counsel do not have grounds for an objection asserting that because the information sought from a defendant expert involves an opinion or contention that it should therefore be precluded in discovery. To the contrary, *Rule 4003.1(c)*, specifically states: "Except as otherwise provided by these rules, ***it is not ground for objection that the information sought involves an opinion or contention that relates to a fact or the application of law to fact***. (emphasis added). *See also* Howarth-Gadomski, infra, 2019 Pa. Dist. & Cnty. Dec. LEXIS 7764, [WL] at *4-5 (1989 Explanatory Comment to *Rule 4003.1(c)* confirms that opinions **[*16]** are discoverable in Pennsylvania).

While the 1978 amendment and *Pa.R.C.P 4003.1* are clear, the application of the amendment and Rule throughout the trial courts of Pennsylvania has not been clear nor consistent.[12] As a result of the inconsistency of application, it is understandable that Defense Counsel herein made objections relying on the nuanced case law previously developed in Allegheny County.[13] *Cf.* Lattaker v. Magee Women's Hosp. of UPMC, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1144, 2016 WL 3678620 (Alleg. Co. 2016); McLane v. Valley Medical Facilities, Inc., 2009 Pa. Dist. & Cnty. Dec. LEXIS 766, 2009 WL 6471086 (Alleg. Co. 2009); and ***Belan v. Ward, 67 Pa. D. & C. 4th 529 (Alleg. Co. 2004)***.[14] As discussed herein, those nuances are now obsolete as applied to expert opinion in discovery — an objection related to an expert providing an opinion in discovery is no longer viable.

Discovery responses related to the timing of delivery or standards of care may lead to the discovery of admissible evidence related to the plaintiffs' or any other party's conduct as pertaining to a claim or defense. In medicine, as in other professional disciplines, standards of care evolve. ***At the discovery phase***, this Special Motions Court will not parse the nuances of standards of care, the innumerable facts specific to a case, determine whether a physician (or other person within a specialized discipline) can refuse to answer an inquiry within their general knowledge or within the realm of their qualifications, knowledge, skill, experience, training, or education and *then* determine whether the response would be admissible at trial. Persons within specialized disciplines, including physicians, are inherently adept at answering questions within those realms for purposes of discovery, ***irrespective*** as to whether the answers are admissible at trial.[15]

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[11] ***Pa.R.C.P. 4003.1(b)*** states: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." On a practical note, discovery is akin to "peeling an onion." Delving further into discovery, layers are removed and one learns facts the party did not know at an earlier stage of discovery. Thus, later discovered items may render an item which did not appear reasonably calculated to lead to the discovery of admissible evidence to be the exact opposite.

[12] *See* Judge Nealon's thorough analysis of the varying trial court applications of the Rule related to discovery of defendant expert opinions. Howarth-Gadomski, infra, 2019 Pa. Dist. & Cnty. Dec. LEXIS 7764, [WL] at *6-8. It is worth noting one Court of Common Pleas permitted plaintiffs' counsel to ask opinion questions of a treating physician who was not a party defendant in the case. *Accord* Boscaino v. Centre Medical & Surgical Associations, 82 Pa. D. & C.4th 201, 2006 WL 472241 (Centre Co. 2006) (stating "the Jistarri principle allies to admissibility, not discoverability").

[13] *See* Matthew P. Keris, *It Ain't Over 'Til It's Over: Judge Wettick Affirms Practice of Limiting Deposition Opinions of Defendant Physicians*, Defense Digest, Vol 22, No. 4 (December 2016):

> As it currently stands, the issue of doctors' opinions at depositions can be argued both ways, at least until an appellate court offers further guidance. Until then, if defense counsel does not want a client to be compelled to provide standard of care testimony at deposition, he or she can continue the practice of having them state on the deposition record that they will not serve as an expert at the time of trial and instruct their **[*17]** client not to provide answers to those questions if asked. This protective practice ain't over until an appellate court says it's over.

[14] To simplify reference these three opinions shall be identified hereinafter as Lattaker-McLane-Belan, the "Wettick Trilogy."

[15] Protestations including counsel's unnecessary instructions for a witness not to answer (absent privilege or other reason by court order as set forth herein) are counterproductive to the

Further, this Court does not find any of the limits of the scope of **[*18]** discovery as set forth in *Pa.R.C.P 4011* applicable here.[16] To the contrary, this Court finds that conduct of counsel raising spurious or speaking objections, instructing a deponent not to answer, or ending a deposition in contradiction to the reasoning set forth herein to thereby compel opposing counsel to expend unnecessary legal effort and Court intervention may — in itself — be a violation of *Pa.R.C.P. 4011(b)*. As such, future deposition conduct that would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party, particularly to reschedule a deposition because of said conduct; shall be met with the imposition of sanction(s) in this matter or any similar matters brought before this Court presiding as Special Motions Judge.

As this Court is the assigned Special Motions Judge pursuant to Allegh. L. R. 208.3(A)(5), it concludes that in the Courts of Common Pleas of Allegheny County, a defendant-physician can be asked opinion questions, including standards of care, and properly grounded hypothetical questions in deposition.

During the deposition, Defense Counsel asserted Dr. Thomas is not an expert. (Dr. Thomas dep. at 108:22-23). When questioned by Plaintiffs' **[*19]** Counsel as to whether Dr. Thomas will be supplying expert testimony at trial, Defense Counsel would not make such a representation but stated Dr. Thomas will defend himself at trial as the law allows within the confines of his treatment. (*Id.* at 108:24-109:4). This deposition interaction requires this Court to examine whether a stipulation by Defense Counsel limiting the scope of the defendant expert's opinion at trial precludes inquiry at deposition. Upon review, this Court finds that such stipulations are not workable.

As a starting point, this Court finds Judge Nealon's opinions in *Howarth-Gadomski v. Henzes, 2019 Pa. Dist. & Cnty. Dec. LEXIS 7764, 2019 WL 6354235 (Lacka. Co. 2019)* and *Karim v. Reedy, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1159, 2016 WL 111324 (Lacka. Co. 2016)* instructive and persuasive, including Judge Nealon's analysis of Judge Wettick's Trilogy of Lattaker-McLane-Belan.

The Wettick Trilogy, Lattaker-McLane-Belan, (which first established and then expanded the "stipulation rule") addresses nuances related to the scope of defendant expert opinions dependent upon the nature of whether the deponent would be offering expert testimony at trial and/or would stipulate to limiting their testimony.

> The proffered opportunity for a defendant-physician to avoid answering standard of care questions, based upon a stipulation not to offer any expert testimony on the **[*20]** standard of care at the time of trial, was first mentioned in ***Belan v. Ward, 67 Pa. D. & C. 4th 529 (Alleg. Co. 2004)***. In summarizing the plaintiff's discovery argument, now-retired Judge R. Stanton Wettick stated:
>
> > According to plaintiff, the defendant should have a choice: the defendant shall fully respond to deposition inquiries relevant to the standard of care, including information that may enhance counsel's ability to crossexamine the witness, or the defendant shall place on the record that he or she will not be offering any expert testimony as to the standard of care.

*Howarth-Gadomski v. Henzes, 2019 Pa. Dist. & Cnty. Dec. LEXIS 7764, 2019 WL 6354235 at *6 (Lacka. Co.*

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discovery process. Moreover, the unjustified refusal to answer and subsequent compelled intervention of the Special Motions Court is a strain on judicial economy. In effect, counsel's overzealous conduct would have the Special Motions Court engage in prognostic folly to determine admissible evidence before the conclusion of discovery. Moreover, the additional expenditure of counsel's time and court resources to provide an unnecessary prognostic ruling far outweighs the witness simply answering the question at deposition and preserving the objection for the time of trial, ***after*** all discovery has concluded. To conclude otherwise would flip judicial economy on its head and place the Court in an obligatory position to babysit legal professionals over myriad nuanced discovery disputes. Special Motions Court or "Happy Hour" is not the judicial mechanism for presupposing the materiality of one's claim or defense and/or is not the forum for a party seeking premature admissibility determinations. *See* n.2, *infra*. The Rules of Evidence provide recourse for the parties at the time of trial.

[16] ***Pa.R.C.P. No. 4011***, Limitation of Scope of Discovery:

No discovery, including discovery of electronically stored information, shall be permitted which

(a) is sought in bad faith;

(b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party;

(c) is beyond the scope of discovery as set forth in ***Rules 4003.1 through 4003.6***;

(d) is prohibited by any law barring disclosure of mediation communications and mediation documents; or

(e) would require the making of an unreasonable investigation by the deponent or any party or witness.

2019) citing to ***Belan, at 531***. (Defendant-physician must answer questions relating to standard of care ***unless*** physician states on record they will not be offering any expert testimony on the issue at trial).

After Belan (2004), Judge Wettick refined the stipulation standard in McLane (2009):

> In my discovery rulings, where a professional states prior to or at his deposition that he or she will not be offering any expert testimony, I have drawn the following line: The witness may be questioned about all decisions that he or she made at the time he or she was furnishing services. The witness can be asked about what this witness did and did not do and why this witness did not take other actions. However, the witness who will not be offering expert testimony cannot be asked to make an after the fact evaluation of his or her work.

*2009 Pa. Dist. & Cnty. Dec. LEXIS 766, [WL] at *2*. (Cytotechnologists cannot be compelled **[*21]** to answer deposition opinion questions if not offering expert testimony at trial).

Finally, in Lattaker (2016), Judge Wettick sought to further nuance the stipulation standard when defense counsel declined to allow the defendant-obstetrician to offer opinions about fetal monitoring strips:

> Under both the rulings in McLane and Karim, the treating physician may be asked to look at strips, PAP smear slides, x-rays, and the like if this will assist in remembering what occurred. The only difference is that under McLane, the defendants cannot be asked what they see today, and why the medical treatment they provided did not fall below the standard of care.

*Lattaker v. Magee Women's Hosp. of UPMC, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1144, 2016 WL 3678620 at *5*.

This Court finds the Lattaker-McLane-Belan line of cases an untenable standard applicable to deposition opinion testimony in Allegheny County. This Court cannot disregard the practical distinctions in every case, especially in medical negligence lawsuits whereby facts and opinions are invariably intertwined and amorphic during the discovery phase of litigation. "When dealing with medical evidence, the line of demarcation between fact and opinion is often amorphous." *Karim, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1159, [WL] at *13*. Special Motions Court in Allegheny County is not the proper venue for the **[*22]** parties to parse the nuances and distinctions of facts from opinions based upon stipulations relating to the discovery of defendant expert opinions. This Court finds no compelling authority to limit discovery in this regard.

Furthermore, the rule creates more problems than it allegedly solves. By example, consideration must be given its applicability and/or enforcement at trial related to adverse inference jury instructions. The standard jury charge instruction regarding adverse inference is found at *Pa.S.S.J.I. (Civ) §5.50* (2020) with subcommittee notes.[17]

The general rule in Pennsylvania is that "[i]f a party fails to call a witness or other evidence within his or her control, the fact finder may be permitted to draw an adverse inference." Leonard Packel and Anne Poulin, *Pennsylvania Evidence* § 427 at 348, note 1 (West's Pennsylvania Practice 2013, 4th Edition, 2019-2020 Supplement, December 2019). This rule applies in civil cases and when applied to witnesses it is known as the "missing witness rule." *Id.*

A review of the standard jury instruction and supporting authority referenced by Packel and Poulin in *Pennsylvania Evidence* leads to the conclusion that the area of the law related to the adverse **[*23]** inference/missing witness rule is as clear as mud. In Allegheny County it is time to clear the discovery waters with less pretrial agitation and fewer unnecessary esoteric discovery disputes.

As Judge Nealon opined in Howarth-Gadowksi citing his analysis in Karim, the stipulation alternative articulated by Judge Wettick in McLane would "create disputes regarding any negative or adverse inferences to be drawn from the defendant-physician's failure to offer medical opinion testimony or to discuss the standard of care," which testimony would be "within that party's exclusive control, and would presumably be favorable to or support the cause of that party." *Howarth-Gadomski, 2019 Pa. Dist. & Cnty. Dec. LEXIS 7764, [WL] at *7*.

A pretrial discovery stipulation precluding a defendant

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[17] *5.50 (Civ)*

FAILURE OF A PARTY TO TESTIFY—ADVERSE INFERENCE

The [plaintiff] [defendant] did not testify during the trial. You may find that [his] [her] testimony would have been unfavorable to [his] [her] case, unless [his] [her] failure to testify is satisfactorily explained.

expert litigant from testifying at trial related to opinions or standards of care improperly and prematurely handcuffs defendant expert litigants from exercising their right to testify at trial. The attempt to enforce such stipulations only creates additional disputes. Simply stated, throughout discovery and even during trial, facts and opinions are uncovered that may alter legal strategy or assessment. A defendant expert litigant must retain the option to testify at trial related **[*24]** to opinions and standards of care.

For example, a defendant may change their mind and determine they must testify at trial. This Court finds that any stipulation does not bar such a determination by a party. Discovery and trial are fluid by their nature -- information obtained in discovery or during trial may alter legal strategy or the previous stipulation to not testify. It is also respectfully submitted, that if a defendant was precluded from testifying at trial by any discovery stipulation this would create presumptive grounds for appeal. From the defendant party's perspective, the stipulation is not workable.

The "stipulation rule" also fails to address the plaintiff's independent right to call the defendant healthcare provider / physician in their case-in-chief or read their deposition in their case-in-chief. *See Pa.R.C.P. 4020(a)(1), Use of Depositions at Trial.* In this instance, the plaintiff has the right to know answers in discovery in advance of trial.

Restricting defendant expert testimony in discovery based upon a stipulation unintentionally welcomes a myriad of discovery-based nuances that will require the Court to address unnecessary minutia whereby the former "stipulation rule" will be swallowed **[*25]** by a plethora of discovery-litigated exceptions. Further, it creates additional problems at trial.

Plainly stated, the "stipulation" objection is an unworkable mechanism. It improperly precludes appropriate inquiry ***in discovery*** of relevant and material information, or information that may lead to the discovery of other admissible evidence.

Finally, as addressed by Judge Nealon in Howarth-Gadomski (2019) and Karim (2016) and referenced above:

> No Pennsylvania statute, rule, or appellate authority entitles a malpractice defendant-deponent to refuse to answer questions soliciting medical opinions, including those regarding the standard of care. *Rule 4003.1(c)*, the Explanatory Comments to *Rules 4003.1* and *4003.5*, and our decisional precedent firmly state that such a party-deponent may not object to deposition inquiries on the basis that they seek opinion testimony, and that a defendant-physician need not author a pre-trial expert report since any plaintiff may discover that party's opinions via an oral deposition.

*Howarth-Gadomski, 2019 Pa. Dist. & Cnty. Dec. LEXIS 7764, [WL] at *1.*

"The governing law simply does not provide a defendant-healthcare professional with the ability to prevent the discovery of his or her opinions based upon that defendant's agreement not to disclose them at trial." **[*26]** *Karim, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1159, [WL] at *13.*

Further review of the Wettick Trilogy with the beacon of hindsight has now exposed its foundational flaw. There is no Pennsylvania statute, rule, or appellate authority for the creation of the stipulation rule. In this Court's humble opinion grounded in litigation practicum, the stipulation rule has caused confusion among discovery counsel when applied to varying fact patterns. In practice, despite its noble intellectual intent, the stipulation rule has inadvertently welcomed more problems than it has solved. Simply put, the clinical cure had become worse than the disease. As such, this opinion offers a new remedy in Allegheny County related to discovery depositions of defendant expert litigants.

The Court would be remiss in its duty to provide guidance to practitioners in failing to address the consequences of rejecting the Wettick Trilogy Lattaker-McLane-***Belan***. For example, the implementation of the Stipulation Rule precluded plaintiffs from asking defendant treating physicians questions relating to whether the treatment provided to the plaintiff met the accepted standard of professional care. This line of discovery questioning is appropriate and permissible now and in the future. **[*27]**

Henceforth, applying this Court's standard to the facts of *McLane*, it would be appropriate for plaintiff's counsel to have the witness cytotechonologist review slides with a microscope at the deposition and question the deponent on their present review of the slides. Similarly, applying the standard to the facts of *Lattaker*, it is appropriate and permissible for the defendant treating physician to be required to review fetal monitoring strips and likewise be questioned by plaintiff's counsel about the review.

II. Retrospective Review

Defense Counsel objected on the basis that Dr. Thomas did not participate in the delivery of the baby and therefore the physician's opinion or insights are a retrospective review and not discoverable. This Court disagrees. By their very nature, opinions sought in medical negligence lawsuits are retrospective reviews of facts which, by necessity, include expert analysis of those facts in conjunction with standards of care and other factors related to the care of the patient. In this matter, the retrospective review involves an obstetrics delivery in 2016 and the facts and medical opinions related to legal claims and defenses surrounding that delivery. Specifically, **[*28]** an issue within this case relates to allegations about Dr. Thomas' recommendations for the timing of delivery.

This Court finds no prohibition to preclude deposition questioning because the defendant expert did not actually participate in every element of the patient's care.[18] Broader questioning is permitted as the scope of discovery is broad and expressly includes the discovery of expert opinions. *See* discussion of *Pa.R.C.P. 4003.1* and *4011*, Discovery of Defendant Expert Opinions, *infra*.

> The ability to discover the potential expert testimony of a party witness, either by propounding written interrogatories or by taking oral or written depositions, is fettered only by the general limitations that apply to all discovery. Since the rescission of *Rule 4011(f)* in 1978, the party witness against whom discovery is sought can no longer object on the ground that the requested disclosure would require him or her "to give an opinion as an expert witness."

Neal v. Lu, M.D., 365 Pa. Super. 464, 530 A.2d 103 at 107 (Pa. Super. 1987).

Judge Nealon's analysis in *Karim v. Reedy, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1159, 2016 WL 111324 at *11 (Lacka. Co. 2016)* thoroughly addresses the nature of retrospective reviews in medical negligence cases, confirming "[i]t is quite common for defendant-physicians in malpractice trials to offer retrospective assessments of the propriety of their care. (Karim *citing, e.g., Hyrcza v. West Penn Allegheny Health System, Inc., 2009 PA Super 119, 978 A.2d 961, 978 (Pa. Super. 2009)*. In effect, every evaluation of care in a medical negligence case is a retrospective review:

> Indeed, expert witnesses who review medical records, deposition transcripts and other pertinent

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[18] The physician's opinion related to areas within his expertise that are founded on claims or defenses in the subject lawsuit are open for discovery. In the matter before this Court, the deponent physician is qualified in the areas of Genetics, Gestational Diabetes, High Risk Obstetrics, Maternal-Fetal Medicine, Miscarriage, OB/GYN Ultrasounds, and Recurrent Pregnancy Loss. *See* n.7, *infra*.

In modern obstetrics medical practice, the sole practitioner is rare as many doctors in an obstetrics practice are involved with the pregnant patient from initial date of diagnosis through delivery. It is not unusual that differing physicians from the same practice may interact with the patient on different dates. It is possible that the physician that delivers the child may have never met the mother patient before delivery, particularly in emergent circumstances. *See also* Danforth's Obstetrics and Gynecology, Tenth Edition, Chapter 1., Prenatal Care, LWW-OBGYN 10TH CH 01 Vern L. Katz, June 2010 (discussion of various factors related to pregnancy and interaction of patient and care providers throughout gestation).

The patient does not solely make the decision for the timing of delivery. It is the medical practice in consultation with other members of the clinical team guided by principles, in conjunction with the unique circumstances attendant to the patient, which determine the timing of delivery. Thus, members of the clinical team — in the area of their expertise — and within the realm of the particular physician's qualifications, knowledge, skill, experience, training, or education may express a professional opinion on the timing of delivery — regardless of whether or not the specific physician actually delivers the baby.

> There are several important principles to consider in the timing of delivery. First, the decisions regarding delivery timing are complex and must take into account relative maternal and newborn risks, practice environment, and patient preferences. Second, late-preterm **[*29]** or early-term deliveries may be warranted for maternal benefit or newborn benefit, or both. In some cases, health care providers will need to weigh competing risks and benefits for the woman and her fetus. For these reasons, and because the recommendations for timing of delivery are based on limited data, decisions regarding timing of delivery always should be individualized to the needs of the patient. Additionally, recommendations for timing of delivery before 39 weeks of gestation are dependent on an accurate determination of gestational age.

"Medically indicated late-preterm and early-term deliveries," ACOG Committee Opinion No. 818, American College of Obstetricians and Gynecologists, Obstet. Gynecol. 2021; 137:e29-33 (February 2021).

> information in order to address the standard of care and causation issues in medical professional liability actions always conduct after-the-fact evaluations and provide retrospective **[*30]** assessments of the quality of the care and the impact, if any, that it had upon the patient's outcome.

*Karim, 2016 Pa. Dist. & Cnty. Dec. LEXIS 1159, [WL] at *11*.

This Court adopts the rationale of *Karim*, and similarly applies the same reasoning to defendant medical care personnel. Defendant expert parties may similarly be questioned at deposition like any other expert witness and may also provide retrospective assessments in discovery.[19] In accord with Judge Nealon, this Court finds that current expert opinions may be discoverable regardless of admissibility at trial. This standard is soundly supported by *Petrancosta v. Malik, 2014 U.S. Dist. LEXIS 115457, 2014 WL 4100723 (M.D. Pa. 2014)* and *Cravath v. Mercy Hospital, 2013 Pa. Dist. & Cnty. Dec. LEXIS 727, 2013 WL 6991989 (Lacka. Co. 2013)* cited in Karim.

In Petrancosta, the Federal District Court evaluated a dispute concerning the permissible scope of discovery and expert testimony pursuant to *Fed.R.Civ.P. 26* in a medical negligence action. At deposition, defense counsel objected to a treating physician answering questions about X-rays and CAT scans related to plaintiff's condition. Defense counsel asserted that the physician's current opinion, retrospective interpretation, or present day review was not reasonably calculated to lead to the discovery of admissible evidence because the physician would not be offered as an expert at trial. *Petrancosta, 2014 U.S. Dist. LEXIS 115457, [WL] at *5*. In reaching its conclusion, the court distinguished **[*31]** *Jistarri v. Nappi, 378 Pa. Super. 583, 549 A.2d 210 (Pa. Super. 1998)*(defendant may not be required to give expert testimony *on the negligence of other defendants at trial*) from the issue of whether the defendant doctor may provide his *opinion at deposition in discovery*. The court concluded, "there is no basis for Defendant's contention that inadmissibility at trial means that Dr. Malik's current opinion is not reasonably calculated to lead to the discovery of other admissible evidence." *2014 U.S. Dist. LEXIS 115457, [WL] at *6*. Accordingly, plaintiff was permitted to re-depose the physician with defendant ordered to pay the cost of the second appearance fee for the videographer and court reporter. *2014 U.S. Dist. LEXIS 115457, [WL] at *9*. The court found "the better practice is to allow the deposition to proceed and deal with objections before trial." *2014 U.S. Dist. LEXIS 115457, [WL] at *8*.

In Cravath, the Lackawanna County Court of Common Pleas ordered a defendant physician to submit to a re-deposition and respond to opinion-related inquiries. Defense counsel had objected on 59 separate occasions and directed the defendant doctor not to answer plaintiff counsel's questions. Upon review of the deposition transcript and record, and applying the standards of *Pa.R.C.P. 4003.1* and *4011*, Judge Mazzoni opined, "[t]he discovery deposition of a defendant physician is not limited to his treatment, **[*32]** as Defense Counsel suggests. It is clear that a defendant physician can be asked opinion question and properly-ground hypothetical questions as well." *Cravath, 2013 Pa. Dist. & Cnty. Dec. LEXIS 727, [WL] at *5 citing Neal v. Lu, M.D., 365 Pa. Super. 464, 530 A.2d 103 (Pa. Super. 1987)*. The court concluded, "[a] plaintiff has a right to depose a defendant physician as to facts he knows and opinions he holds." *Cravath, 2013 Pa. Dist. & Cnty. Dec. LEXIS 727, [WL] at *5*.[20]

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[19] This applied standard in no manner prejudges whether the defendant expert's responses will be favorable or unfavorable to any party. Moreover, it does not preclude any party from filing Motion(s) in Limine or objections at the time of trial related to admissibility or other legal issues. However, defense counsel may not use such an objection as a basis for the witness not to answer at deposition.

[20] In ruling upon a standard of care question, the Cravath court at *2013 Pa. Dist. & Cnty. Dec. LEXIS 727, [WL] at *3-4 citing Buckman v. Verazin, 2012 PA Super 216, 54 A.3d 956 (Pa. Super. 2012)* stated:

> 2. Inquiry: "If a patient was experiencing chest pain after an angioplasty procedure, do you understand that the standard of care requires you to determine whether a patient's chest pain is relived by physical exertion, meaning walking or sitting up before discharge?" (N.T. 70-83).
>
> Ruling: Not Permissible—this inquiry interjects a standard of care that the doctor is asked to accept. As stated in Buckman, what the doctor believed to be the standard of care is of "no moment."

This Court takes exception with the Cravath court's statement of the holding in Buckman and the Cravath court's conclusion as applied to the standard of care inquiry above. This Court holds that a physician is well-adept in their education, training, skills, and experience to answer such a question; albeit to agree, disagree, accept, reject, modify, amend, explain, or

This Court finds the reasoning of Karim to be well-grounded and concludes that Dr. Thomas may be questioned on his opinion related to the timing of delivery. In conjunction with *Pennsylvania Rules of Civil Procedure 4003.1* and *4011*, and the underlying persuasive precedent of Petrancosta and Cravath, this Court holds that defendant expert opinions are discoverable regardless of whether said opinions will be ultimately admissible at trial.

As such, **[*33]** a deponent physician may be examined, ***in discovery***, of his professional opinion or the standard of care related to the timing of delivery for a patient that was in his medical practice's care. The Special Motions Discovery Court does not prejudge nor address the admissibility of any such opinion obtained in discovery — that is a matter addressed by the trial court.[21]

III. Records Custodian Objection / Instruction Not to Answer

During deposition, Defense Counsel objected that Dr. Thomas was not a records custodian and instructed the deponent not to answer a question in a line of questions about worksheets from the medical record. (Dr. Thomas dep. 94:7-97-21). This Court finds no basis for Defense Counsel to instruct the witness not to answer. The question did not relate to a privilege or preclusion from a prior order of court. Albeit Dr. Thomas may not be a "records custodian," but Defense Counsel's characterization is not a substantive basis for an objection to question the witness's knowledge about the patient's medical record. As the transcript indicates, Dr. Thomas eventually did answer the question. (*Id.* at 97:10-21)("there is nothing in the worksheets that is not part of the **[*34]** ultrasound images or the formal report.").

Even if Plaintiffs Counsel's questioning related to qualifying Dr. Thomas as a "records custodian," which it did not, this is still not an appropriate objection to direct a witness not to answer. Merely questioning a witness about the medical records with regard to how they are prepared generated or maintained is not improper especially when the witness has knowledge as to these specific items. As is indicated by Dr. Thomas' answer, he understood the Plaintiffs Counsel's questions and was able to answer.

This Court acknowledges there are valid and strategic reasons for counsel to place objections on the record. This Court further acknowledges the prior caselaw on discovery in Allegheny County promoted and encouraged such objections.[22] However, absent privilege or prior court order, an instruction to a deponent not to answer a question without a good faith basis[23] will subject the obstructionist to risk of sanction.[24] To obstruct the answer to a question defeats the purpose of a discovery deposition and disregards the inherent protections afforded by *Rule 4016(b)* which preserves valid objections for consideration at trial.

Hall v. Clifton Precision, 150 F.R.D. 525, 530 (E.D. Pa. 1993) provides guidance on the issue of speaking objections and interjections requiring that an objection be concise and non-suggestive.[25] As summarized in Association of Trial Lawyers of America, July, 2004,

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otherwise condition their response.

[21] By way of example, while Dr. Thomas was not asked to interpret fetal monitoring strips applicable to the time of delivery, it would be permissible upon re-deposition to question him about the strips. This discovery standard is consistent with the holding of Karim.

[22] This Court is professionally familiar with Defense Counsel in this case. As a trial lawyer, this jurist had litigated cases against Defense Counsel and as a jurist has had the honor and privilege of presiding over a case tried by Defense Counsel before this Court. Simply stated, Defense Counsel is a superb, highly qualified, and ethical lawyer. Defense Counsel was only advocating that which was heretofore permissible in Allegheny County during depositions.

[23] This Court acknowledges that there may be regrettable circumstances where deposition questions might be sought in bad faith or other circumstances that would be oppressive to the deponent. However, based on this Court's experience as a civil trial lawyer for twenty-two years and three years as a Judge in the Civil Division, this is the exception and not the norm of practitioners in Allegheny County. This Court is loath to create rules to remedy exceptions. Such circumstances do not preclude objecting counsel's good faith prerogative to seek court intervention for the protection of the deponent pursuant to ***Pa.R.C.P. 4012(a)***.

[24] "A common tactic in depositions is to impede the questioning lawyer's progress with objections or instructions not to answer." A. Darby Dickerson, *The Law of Ethics and Civil Depositions* ***[*35]***, 57 MD. L. REV. 273, 345 (1998) citing to Hall, 150 F.R.D. at 531 (addressing improper "strategic interruptions, suggestions, statements, and arguments of counsel").

[25] As set forth hereinafter, this Court provides a detailed analysis on its adoption of some of the standards discussed by Judge Gawthrop in Hall.

ATLA Annual Convention Reference Materials, Volume 2, *Advocacy Track: Discovery: Overcoming Obstacles in Getting to the Truth, § III. Speaking Objections*:

> The [Hall] court reasoned that allowing speaking objections and interjections could become a tool for defending attorneys to effectively circumvent the no-consultation rule and interrupt the flow of a deposition. *Hall, 150 F.R.D. at 530*. The court further prohibited an attorney from instructing a witness not to answer a question unless the objection is on the ground that the witness's potential answer is "protected by a privilege or a limitation on evidence directed by the court." *Id. at 531*.

See Ethical Issues in Depositions, 2 Ann.2004 ATLA-CLE 1461 (2004).

While counsel may object at deposition to identify an issue as a transcript place-marker, the objection is not to be an instructional speaking objection nor an instruction not to answer. As set forth earlier in this Opinion, this Court has detailed the objections by Defense Counsel. It is clear all the objections **[*36]** were speaking objections. It is not necessary for objecting counsel to make such lengthy and detailed objections.

Pa.R.C.P. 4016(b), Taking of Depositions. Objections, provides instructive guidance:

> Objections to the competency of a witness or to the competency, relevancy, or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which was known to the objecting party and which might have been obviated or removed if made at that time.

A close and thorough reading of *Pa.R.C.P. 4016* confirms the fundamental distinction between *Pa.R.C.P. 4016(b)* and *4016(c)* as applied to deposition objections.[26] When both *subsections (b)* and *(c)* are read in conjunction, it is evident under *Rule 4016(b)* that objections to the "competency, relevancy, or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition" *unless* the ground for the objection might have been "obviated or removed."

As a practical matter, discovery is a dynamic process searching for information that may lead to admissible evidence. Oft-times the grounds for an objection cannot be determined at the time of deposition because, by its very nature, discovery is an ongoing **[*37]** process. In discovery, information is being developed. Therefore, a party cannot be charged in those circumstances to register an objection and/or have the responding party obviate or remove the objection contemporaneous with the deposition.

This Court sitting as Special Motions Discovery Judge has no special powers of foreseeability as to eventual substantive issues that will be presented at trial and has no mystical faculty to count evidentiary angels dancing on the head of a mid-discovery pin. Moreover, pursuant to *Pa.R.C.P. 4003.1* and *4020(a)* and *(c)* "any information gathered during discovery is still subject to the rules of evidence regarding its admissibility." *Bennett v. Graham, 552 Pa. 205, 714 A.2d 393, 396 (Pa. 1998)*. As such, admissibility of evidence at trial remains subject to the authority of the trial court. As stated in *Rule 4003.1(b)*, and additionally referenced at 5 West's Pa. Prac., *Discovery* §10:4, "it is not grounds for objection that the information sought (for example, hearsay) will be inadmissible at trial if the information appears reasonably calculated to lead to discovery of admissible evidence." Plainly assessed, *Rule 4016(b)* applies to the ***substance*** of the elicited testimony.

In contrast, *Rule 4016(c)* commands that errors or irregularities "in the ***form*** of oral questions or answers **[*38]** . . . . are waived unless seasonable objection is made at the taking of the deposition." Objections to the form include compound, questions that are ambiguous, unintelligible, misstatements of

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[26] ***Pa.R.C.P. No. 4016***

Rule 4016. Taking of Depositions. Objections

. . . .

(b) Objections to the competency of a witness or to the competency, relevancy, or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which was known to the objecting party and which might have been obviated or removed if made at that time.

(c) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of oral questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might have been obviated, removed, or cured if objections had been promptly made, are waived unless seasonable objection is made at the taking of the deposition.

. . . .

evidence or testimony, argumentative, assuming facts not in evidence, calling for speculation and deponent answers that are non-responsive. *See* 5 West's Pa. Prac., *Discovery* §10:9. The underlying rationale for objections as to form being waived if not raised at deposition is that counsel is provided opportunity to obviate or remove the error or irregularity contemporaneous with the transcribed record of testimony. In other words, once etched in stone the testimony as recorded will not change unless counsel objects to preserve the issue and provides the responding party synchronous opportunity to cure.[27]

As affirmed in this Opinion, the objection shall be stated succinctly identifying the proper grounds for the objection without argument. *See also, Id.* at §10:13.

To further clarify the parameters of deposition objections in Allegheny County, this Court adopts the guidance of *Lackawanna County Local Rule of Civil Procedure 4007.1(a)*, that counsel making any objection during an oral deposition shall state the word **[*39]** "objection," and briefly state the legal basis for the objection without argument.

IV. Repetitive Deposition Questions

As identified above, the deposition transcript is replete with objections. Upon detailed review of Defendant's Response, Exhibit B (ECF 52 at Exh. B containing four-page list with 61 line items) and Dr. Thomas's entire deposition transcript, this Court disagrees with Defense Counsel that the questioning was repetitive. Although the deposition was lengthy, considerable time and effort was expended on counsels' competitive rejoinders regarding the discoverable nature of the questions asked and appropriateness of follow-through questions.

Accordingly, follow-through questions are permissible. Plaintiffs' Counsel may ask reasonable follow-up questions that arise from Dr. Thomas' previous answer to a question. *See also*, *Cravath v. Mercy Hospital, 2013 Pa. Dist. & Cnty. Dec. LEXIS 727, 2013 WL 6991989 (Lacka. Co. 2013)*(court grants re-deposition of physician after deponent was instructed on 59 occasions not to answer plaintiff counsel's inquiries):

> The scope of this deposition will be limited to the questions deemed permissible and any relevant follow-up questions which reasonably flow from the answers received from the initial response. We caution Counsel, however, not to **[*40]** expand the scope of the inquiries and further caution Counsel not to direct the deponent to refuse to testify on matters that have been deemed "permissible," qualified or otherwise.

*2013 Pa. Dist. & Cnty. Dec. LEXIS 727, [WL] at *5.* (emphasis omitted).

As adopted herein, counsel making any objection during an oral deposition shall state the word "objection," and briefly state the legal basis for the objection without argument, nor instruct the witness not to answer. Plainly put, "Objection. Asked and answered," will comply with this Court's standard henceforth.[28]

In addition, this Court does note that Defense Counsel properly objected to a repetitive line of questioning related to the baby being oxygenated and neurologically intact on September 23, as asked and answered. (Dr. Thomas dep. at 118:2-119:13). Plaintiffs' Counsel is precluded from further inquiry on this issue.

As adopted herein, the fact that a question is repetitive or irrelevant is not an appropriate ground for instructing a witness not to answer a question, since it does not involve a matter of privilege or limitation from a prior court order. The proper procedure to follow when an objection is raised to a question propounded in a deposition is for the attorney who raises **[*41]** the objection to note his objection but to allow the question to be answered.

Counsel herein and litigants before the Court of Common Pleas of Allegheny County are well-advised to heed the admonishment quoted above from Cravath relating to the parameters of permissible and relevant

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[27] While the Court is absolutely confident of the Court's interpretation of ***Pa.R.C.P. 4016***, counsel can avoid any confusion or misinterpretation by both counsel stipulating at the commencement of the deposition to preserve all objections until trial, except to those objections as to form. *See Talmadge v. Ervin, 2020 PA Super 176, 236 A.3d 1154, 1160 (Pa. Super. 2020) citing Starner v. Wirth, 440 Pa. 177, 269 A.2d 674, 677 (Pa. 1970)* (case involved trial recorded deposition testimony of an expert witness which was recorded for ***use at trial***). To be clear, the matter *sub judice* is related to a discovery deposition of a party defendant.

[28] *See* ***Lacka. Co. R.C.P. 4007.1(a)***, "Counsel making an objection during an oral deposition shall state the word 'objection,' and briefly state the legal basis for the objection without argument," adopted herein.

follow-up questions in depositions.

Conclusion

As stated earlier, this Court is aware of the standards applicable to depositions established by Judge Gawthrop in *Hall v. Clifton Precision, a Div. of Litton Systems, Inc., 150 F.R.D. 525, 531, 62 USLW 2103, 27 Fed. R. Serv. 3d (Callaghan) 10 (E.D. Pa. 1993)*.

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did—what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.

Hall at 528.

This Court is cognizant of the April 22, 1994 Opinion by Judge Wettick in *Acri v. Golden Triangle Mgmt. Acceptance Co., GD93-12188, 1994 Pa. Dist. & Cnty. Dec. LEXIS 150, 1994 WL 1691957*, *printed in* 142 Pittsburgh Legal J. 225 (Alleg. Co. 1994) where the court acknowledged that "[w]e need not turn the lawyer for the deponent into a fly on the wall in order to protect litigants' rights **[*42]** to obtain information from a witness. . ." *Acri, 1994 Pa. Dist. & Cnty. Dec. LEXIS 150, [WL] at *17*.

In essence Judge Wettick in Acri rejected all the mandates of Hall. This Court adopts the following analysis of the Hall opinion:

> **1. Any objection shall be stated concisely in a non-argumentative and non-suggestive manner; and**
>
> **2. Counsel shall not direct or request that a witness not answer a question unless counsel has objected on the ground that the answer is protected by a privilege or a limitation on evidence directed by the Court.**

This Court finds the above two proposals from *Hall* persuasive and practical as applied to deposition discovery in Allegheny County. "In short, depositions are to be limited to what they were and are intended to be: question-and-answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit." *Id. at 531*.

Henceforth, this Court parts company with Judge Wettick's rationale in *Acri* wherein he concluded, "I choose not to follow the Hall v. Clifton Precision guidelines[.]" In short, choosing not to follow the practical application of Hall to discovery depositions in Allegheny County has permitted the discovery court tail to wag the trial court dog. This shall no longer be the case. For the reasons set **[*43]** forth, this Court now adopts the deposition guidelines stated herein.[29]

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[29] The "*Hall Standards*" have been recognized by courts throughout the country. *See Armstrong v. Hussmann Corp., 163 F.R.D. 299, 301-05, 66 Empl. Prac. Dec. (CCH) P43707 (E.D. Mo. 1995)*; *In re ML-Lee Acquisition Fund II, L.P. and ML-Lee Acquisition Fund (Retirement Accounts) II, L.P. Securities Litigation, 848 F. Supp. 527, 567, Fed. Sec. L. Rep. (CCH) P 98,198 (D. Del. 1994)*; *Bucher v. Richardson Hosp. Authority, 160 F.R.D. 88, 94 (N.D. Tex. 1994)*; *Holland v. Fisher, 3 Mass. L. Rptr. 167, 1994 WL 878780 (Mass. Super. Ct. 1994)*; *Van Pilsum v. Iowa State University of Science and Technology, 152 F.R.D. 179, 180-81, 28 Fed. R. Serv. 3d 574 (S.D. Iowa 1993)*; *Johnson v. Wayne Manor Apartments, 152 F.R.D. 56, 58-59, 28 Fed. R. Serv. 3d 508 (E.D. Pa. 1993)*; *Deutschman v. Beneficial Corp., 132 F.R.D. 359, Fed. Sec. L. Rep. (CCH) P 95895 (D. Del. 1990)*; *In re Amezaga, 195 B.R. 221, 35 Fed. R. Serv. 3d 163 (Bankr. D. P.R. 1996)*; *Damaj v. Farmers Ins. Co., 164 F.R.D. 559 (N.D. Okla. 1995)*; *Bucher v. Richardson Hosp. Authority, 160 F.R.D. 88 (N.D. Tex. 1994)*; *Odone v. Croda Int'l PLC, 170 F.R.D. 66, 37 Fed. R. Serv. 3d (Callaghan) 157 (D.D.C. 1997)*;*Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 55, Fed. Sec. L. Rep. (CCH) P 98063 (Del. 1994)*; *Dominick v. Troscoso, 1996 Mass. Super. LEXIS 374, 1996 WL 408769 (Mass. Super. Ct. 1996)*; *Burrows v. Redbud Community Hosp. Dist., 187 F.R.D. 606 (N.D. Cal. 1998)*; *Quantachrome Corp. v. Micromeritics Instrument Corp., 189 F.R.D. 697, 46 Fed. R. Serv. 3d 253 (S.D. Fla. 1999)*; *Collins v. International Dairy Queen, Inc., 1998 U.S. Dist. LEXIS 8254, 1998 WL 293314 (M.D. Ga. 1998)*; *Chapsky v. Baxter V. Mueller Div., Baxter Healthcare Corp., 1994 U.S. Dist. LEXIS 9099, 1994 WL 327348 (N.D. Ill. 1994)*; *Sinclair v. Kmart Corp., 1996 U.S. Dist. LEXIS 19661, 1996 WL 748038 (D. Kan. 1996)*; *Boyd v. University of Maryland Medical System, 173 F.R.D. 143, 38 Fed. R. Serv. 3d 1030 (D. Md. 1997)*; *Metayer v. PFL Life Ins. Co., 1999 U.S. Dist. LEXIS 23432, 1999 WL 33117063 (D. Me. 1999)*. *Phinney v. Paulshock, 181 F.R.D. 185, 42 Fed. R. Serv. 3d 244 (D.N.H. 1998)*, aff'd, *199 F.3d 1, 45 Fed. R. Serv. 3d 1328 (1st Cir. 1999)*; *Mruz v. Caring, Inc., 107 F. Supp. 2d 596 (D.N.J. 2000)*, order rev'd on other grounds, *166 F. Supp. 2d 61 (D.N.J. 2001)*; *U.S., for Use and Benefit of Boucher, v. Murphy, 11 F. Supp. 572 (W.D. Mich. 1935)*; and *Teletel, Inc. v. Tel-Tel US Corp., 2000 U.S. Dist. LEXIS 13273, 2000 WL 1335872 (S.D. N.Y. 2000)*; *Plaisted v. Geisinger Medical Center, 210 F.R.D. 527, 54 Fed. R. Serv. 3d (Callaghan) 191 (M.D. Pa. 2002)* ("We believe that Hall has established clear,

The unilateral termination of a deposition must be supported by a good faith factual or legal basis that, by necessity, could not be addressed by preserving an objection on the record or by submitting a prior motion for protective order. The absence of a good faith factual or legal basis to unilaterally end a deposition shall result in sanction.

This standard does not preclude nor limit counsel from raising or preserving an objection as to admissibility ***at the time of trial*** pursuant to the Pennsylvania Rules of Evidence, including the filing of a Motion in Limine. The preservation of the objection should not disrupt the fair examination of the deponent while, at the same time, provide protection on the issue of admissibility for trial.

Finally, this Court does not now, and in the future will not, condone any type of conduct which reduces or denigrates the level of legal professionalism to unnecessary argumentative barbs or other less than professional behavior. Suffice it to say once:

> Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed **[*44]** overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly[.]

Hall v. Clifton Precision, a Div. of Litton Systems, Inc., 150 F.R.D. 525, 531, 62 USLW 2103, 27 Fed. R. Serv. 3d (Callaghan) 10 (E.D. Pa. 1993). A word to the wise shall be sufficient for all counsel bringing discovery deposition matters before this Court.

An Order of Court shall follow, this **30th day of March, 2021**.

BY THE COURT:

/s/ Philip A. Ignelzi, J.

PHILIP A. IGNELZI

ORDER OF COURT

AND NOW, to wit, this **30th day of March, 2021**, it is hereby **ORDERED**:

1. Within sixty (60) days of the date of this Order, Defendant Dr. Ronald Thomas shall present for a re-deposition in this matter. Counsel shall comply with the mandates developed in this Court's Opinion and the terms herein;

2. Plaintiffs' Counsel is permitted to question Dr. Thomas in all areas which were interrupted by objections and/or areas Plaintiffs' Counsel was not permitted to develop because of instructions to the deponent not to answer question(s);

3. Re-deposition of Dr. Thomas shall include any other areas of questioning which were precluded by Defense Counsel's termination of the initial deposition;

4. Plaintiffs' **[*45]** Counsel shall not question areas which were covered in the initial deposition; and

5. Failure of any party to comply with the terms of this Opinion and Order of Court shall subject the offending party to risk of sanction.

BY THE COURT:

/s/ Philip A. Ignelzi, J.

PHILIP A. IGNELZI

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workable guidelines."). 2 Leighton, Litigating Premises Security Cases, Chapter 8 Discovery, § 8:14 Motion and memorandum for deposition protocol (December 2020).

IMPORTANT FACTORS IN CASE EVALUATION AND VALUATION

Whether you are counsel for Plaintiff or Defendants, case evaluation is one of the most important skills to develop, hone and maintain. When a new client approaches you for representation, not only is it important to understand that issues and facts supporting the claim or defense, it is, at times, even more important to evaluate~~d~~ the client him/herself, as it will shape both your strategy and presentation in addition to affecting your valuation of the case. The follow is a guideline to valu~~at~~ing and evaluating a case:

I. INTAKE

A · **Underlying Facts**

Many times attorneys fail to understand from their clients the complete factual picture giving rise to the cases. For instance, when one hears that there was an auto accident, the basic questions of tort status, injuries and responsible parties is always asked. However, when one looks more deeply into the case, many time there is so much more information which can bolster or contradict the evaluation of the claims and enhance or reduce the valuation of the case.

Such factors are:

- Prior injuries and medical status.

- Prior accidents (of both the injured person and the person causing the injuries)

- Independent witnesses and related video.

Although medical records from prior injuries may exist for years, the advent of videos, surveillance and social media posts as being a regular part of our society requires the immediate attention to the need to locate and secure such digital data prior to its loss. Therefore, upon signing a new client, one should:

1. Have the location of the accident checked for any available videos so that preservation actions can be taken.

2. Inquire as to whether the car has any recording device, whether the insurance company has an monitoring devise or whether the driver maintained any type of dash-cam, or speed monitor.

3. One may need to ask the client to take serial photos of injuries as they heal to show not just the healing process but also to illustrate the pain and suffering aspect to injuries that may seem less traumatic in the future. This is especially important when dealing with scarring.

4. Recordings of 911 calls are more readily retained and available than in the past. Obtaining these records quickly can show the severity of the reactions to those reporting the incident. Also, Right to Know or FOIA requests need to be sent quickly to obtain necessary reports, documents, photos, permits and approvals.

5. Obtaining witness interviews and information can provide invaluable perspective, since, over time, witnesses' memories fade and immediate reactions are forgotten. This may require the canvass of the location as well as review of the previously described electronic data.

B · Who, exactly, is the Client?

Although it may be obvious as to who your client is by name, address and other identifying data, actually understanding WHO your client is becomes a larger factor in the ultimate evaluation of the case.

1. Additional factors that are necessary to know are the client's ability to communicate, whether there are any language barriers or educational barriers, whether there are cultural or personal intricacies related to trust held by the client, whether the client carries any specific implicit biases which would affect the attorney's ability to understand and investigate the case.

2. Within the multi-cultural society in which we practice, it is very important for the attorney to be able to set-aside their own person experiences and expectation in order to hear the client's explanation of the facts within their own understanding and experiences. This is necessary because when one judges another's actions simply based upon their own experience, important facts are missed which may interfere with your ability to develop your client's persona and viewpoint. These are factors whether one is practicing as counsel for Plaintiffs for Defendants.

e.g.: day-laborers and their employers;
an individual's experience with authority and government;
an individual's level of trust given prior personal experiences.

3 There are issues particularly related to actions involving minors, such as potential influence by parents, their level of mental and social maturity, ability to express themselves, level of actual educational ability which may not

comport with chronological age or grade level. Additionally, with regard to the physical injuries, it is important to understand how continued growth will affect the injury and/or scarring. With regard to social and emotional injury, there can be a fine line between necessary documentation and the negative consequences of reminder.

II. EVALUATION FOR RESOLUTION

Evaluation of a case of for resolution is an art.

A · Injuries and Medical Treatment

Obviously, the extent of injuries is ultimately the driving factor in evaluating a case for resolution. However, how those injuries are worked-up, presented and refuted plays a large part in reaching the "outer limits" of a perceived range of value.

1. Diagnostic testing is important to provide what is considered to be objective evidence of injuries. However, one can created a greater effect than simply stating that there was a positive finding on a diagnostic study by having visual aids e.g. showing the screws and plates, highlighting and increased signal or colorizing herniations. On the converse, views of osteophytes and degenerative conditions can be used to challenge findings.

2. Frequency and timing of medical treatment can be a positive or negative, but, should be explained if it inconsistent with the complaints. For instance, knowing the reasons for missed appointments or gaps in treatment, if any, can change the dynamic of evaluation.

3. Having the right treating physicians and experts greatly affect the valuation, as an expert who may reach in an opinion outside of their specialty may be less convincing. Similarly, selecting an IME doctor, or being stuck with a selection made for you, is a factor in evaluation and may result in the exact opposite of the intended effect. Certain experts that can be successfully challenged may not carry the weight desired.

4. Electronic records have changed the review of medical records. Although they are much easier to read, oftentimes the medical provider is restricted to choices and limited fields which may result in the records not telling a complete story. Similarly, diagnosis coding can be a positive and negative in the review of records. If this becomes an important issue in your case, it may be necessary to consult with a coding expert.

5. Opinions relating to future medical treatment can bolster the valuation of the case, and the presentation and explanation of it is important, as it

can also give rise to a defense of failure to mitigate. From all perspectives developing both the expert opinions on the need, or lack thereof, is equally as important as understanding whether a particular plaintiff has the means or inclination to have such treatment, intervention or surgery.

B. · How Does the Plaintiff / Defendant Present?

1. Unfortunately, some people are just more likeable than others, and this can vary depending upon who the audience is and how the client is perceived. Anger is a factor on all sides, and controlling a client's anger can be a determinative factor in the outcome of a case.

2. Some persons are more sensitive to pain and more expressive of pain, and sometimes this may have a cultural element to it. It is important to understand who your client is in order to best present their experiences and so that you can convey through demand, mediation, arbitration or trial their perspective and point of view.

3. Some people talk too much or too little. Knowing whether your client falls into one of these categories affects the valuation of your case.

C. · Liability

1. Obviously, liability is always a factor. However, sometimes a lawyer can be distracted by the injury and overlook the need to address issues of liability. Similarly, sometimes in a clear liability case a lawyer may not focus on building a strong damages or defense. When evaluating a case, it is necessary to take a birds-eye, objective view to the entire case so that when you are preparing an evaluation you have honestly looked as all sides.

2. Removing you and your client's rose-colored glasses can be difficult, but it is a necessity to accurately evaluate your case and to explain to your client the opposing perspective. While you wouldn't want to alter your value on the basis of claims or defenses that your opposing counsel seems to have overlooked, you need to explain to your client that they may catch on in the future or that a jury or arbitrator may see it themselves.

3. Comparative negligence needs to be established through evidence that the average person can understand, digest and accept. Similarly, the defense against comparative negligence should not be stark denial but rather plausible explanation of factors leading to the incident. Since the effect of comparative negligence is to reduce the ultimate valuation of the case, it is important to explain to the client that an evaluation of comparative negligence is, in reality, a sliding scale where the entire spectrum must be considered and understood.

D. · Economic Damages

1. Providing a clear explanation of economic damages it very important for the purposes of evaluation of a case for resolution. The obvious past lost earnings where a person was unable to work for a period of time, can be presented most times without expert testimony. However, deciding when to hire an expert to present future lost earning, benefits, lost pensions, 401k contributions, insurances and other economic elements often can raise the valuation of a case. It is important to discuss in detail with your client ~~as~~ how the injury has affected them outside of the physical injuries. Many clients suffer loss of babysitters which affects their ability to work, loss of insurance which affects their ability to treat, and loss of educational or promotional opportunities due to the unfortunate timing of the injury. Also, loss of a vehicle or loss of mobility can create not just a loss of a job but loss of additional earnings or earning opportunities. Additionally, when people miss work for lengths of time, they can encounter perceived, ongoing disability which can affect their work assignments.

2. Liens- Liens- Liens

Request them early and often! It is very difficult to evaluate a case when the actual lien is unknown. Be sure to review the claimed lien for line items which are unrelated and for line items which may not be statutorily recoverable (such as certain charges in a workers compensation lien). Also, know that settlements paid in resolution of a case by certain defendants, such as political subdivisions, may not subject to subrogation.

2023 Personal Injury Potpourri

Uninsured/Underinsured Motorist Update

Philadelphia
April 2023

SchmidtKramer INJURY LAWYERS

Scott B. Cooper, Esquire

SCHMIDT KRAMER P.C.
209 State Street • Harrisburg, PA 17101

717-232-6300 717-888-8888 1-800-232-6301

scooper@schmidtkramer.com

Statute of Limitations

Erie Ins. Exch. v. Bristol,

174 A.3d 578 (Mundy, J., Pa. 2017).

Look at date of denial/date of alleged breach.

HOUSEHOLD EXCLUSION

Gallagher v. GEICO, 201 A.3d 131 (Baer, J., Pa. 2019).

Recent Household Exclusion

- Erie Ins. Exch. v. Mione, --- A.3d --- (Pa. 2023) (upholds Eichelman)
- See also National Gen. Ins. Co. v. Sheldon (Third Circuit)

Who Can Stack? Intra-policy v. Inter-policy

Donovan v. State Farm Mut. Auto. Ins. Co., 256 A.3d 1145 (Pa. 2021)

Regular Use

Rush v. Erie Ins. Exch., 265 A.3d 794 (Pa. Super. 2021)

(Pending in Pennsylvania Supreme Court, argument to be scheduled)

Section 1738 Rejection of Stacking

Sackett – I, II, or III

Franks v. State Farm. Mut. Auto. Ins. Co., Pennsylvania Supreme Court argued Nov/Dec. 2022).

Barnard v. Travelers, 216 A.2d 1045 (Pa. 2019).

The insurance carrier must obtain a separate waiver of her right to stack the coverage if an insured under a policy of insurance subject to the Pennsylvania Motor Vehicle Financial Responsibility Law has waived stacking but later secures an increase in the limit of her UIM coverage on her existing policy.

TNC Issues

Rental

Uber/LYFT/TNC

Uber Eats, Doordash

Carsharing/P2P

Rental Cars

67 Pa. Code Section 63.43

TNC (Uber, Lyft)

53 Pa. C.S.A. Sections 57A01-57A22 (compare to taxis)

Uber Eats/Door Dash

Malzberg v. Josey, 2883-20 (N.J. App. Div. Sept. 27, 2022).

Peer to Peer Car Rental

Act 93 of 2022 – SB 1222

- 40 P.S. Sections 991.2801-991.2809
- Effective July 11, 2022
- Immediately – Section 8 (1)(II)

P2P Carsharing (Car rental)

- Airbnb for cars
- Rent from the car owner and not Hertz, Enterprise, etc. through an app
- Turo, Getaround, Uber rent, Lyft rentals

Liability – Section 2804 (A) (1)

A Peer-to-Peer carsharing program shall assume liability of a shared vehicle owner for bodily injury or property damage to third parties or uninsured and underinsured motorist or personal injury protection losses during the carsharing period in an amount stated in the carsharing agreement which amount may not be less than those specified in 75 Pa. C.S. CH. 17

Exclusions – Owner's policy Section 2804 (C)

The statute shall not be construed to:

invalidate an exclusion that excludes coverage for a motor vehicle made available for rent, sharing or hire or any business purpose

Hypothetical 1

Driver of a TNC has the app on and is waiting for a ride to retain them. While waiting, the driver is hit head-on by another vehicle who is uninsured. The driver wants to make a uninsured motorist claim. Which policy applies?

a. driver policy
b. tnc policy
c. both

Hypothetical 2

Passenger in a TNC is injured and wants to bring a claim for injuries against both another driver and the operator of the TNC. The passenger in the TNC has limited tort on his/her personal policy. Assume no serious injury. Does limited tort apply?

a. Yes
b. No

Hypothetical 3

TNC operator causes an accident injuring your client. The operator is insured with Progressive and has 15K in liability coverage. What is the liability coverage in the case you would bring for your client?

a. 15K
b. 500K
c. 750K
d. $1 million

Hypothetical 4

You decide to leave your car pursuant to a P2P program and drop it off. While it is parked and before being "rented" another driver hits it in the rear and totals it. Who pays the property damages?

a. Your policy
b. P2P policy
c. Other driver's policy

Hypothetical 5

You are a passenger injured while occupying a vehicle that is being operated pursuant to a P2P rental agreement. Who pays your medical bills?

a. Your policy
b. P2P driver personal policy
c. Health insurance
d. P2P app policy

Hypothetical 6

You are driver of a P2P rental injured while operating the vehicle. Assume the other tortfeasor driver is underinsured and you, the P2P driver, have 250K of underinsured motorist benefits on your personal policy with State Farm. Can you recover?

a. Yes

b. No

Cannabis and Personal Injury

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2401 Pennsylvania Ave., Suite 1A-1
Philadelphia, PA 19130
Phone: 215-235 2280

New Jersey Office
811 Church Road, Suite 125
Cherry Hill, NJ 08002
Phone: 856 773 0692

steve@smart-counsel.com

SPEAKER: STEVE SCHAIN

DATE: APRIL 20, 2023

Steve Schain, Esq.

- Senior Counsel to national Cannabis, Hemp and Hallucinogens law firm Smart-Counsel, LLC, runs PA and NJ practices and Chairs Financial Services Group
- 2019 National Law Journal "Finance, Banking, & Capital Markets Trailblazer" award winner
- Admitted to practice in PA and NJ, represents entities, governments and individuals in litigation, regulation, compliance, preparing and submitting license applications, entity formation, and drafting legislation

LEARNING OBJECTIVES

1. Cannabis Industry Overview

2. Cannabis Law and Regulators

3. Cannabis Related Claims

CANNABIS INFUSED SNACK PRODUCTS ON THE SHELVES

CANNABIS-INFUSED POTATO CHIPS

CANNABIS-INFUSED PRETZELS

CANNABIS-INFUSED CORN CHIPS

CANNABIS-INFUSED CHEX MIX

CANNABIS-INFUSED POPCORN

CANNABIS-INFUSED FRUIT SLICES

CANNABIS-INFUSED NUTS

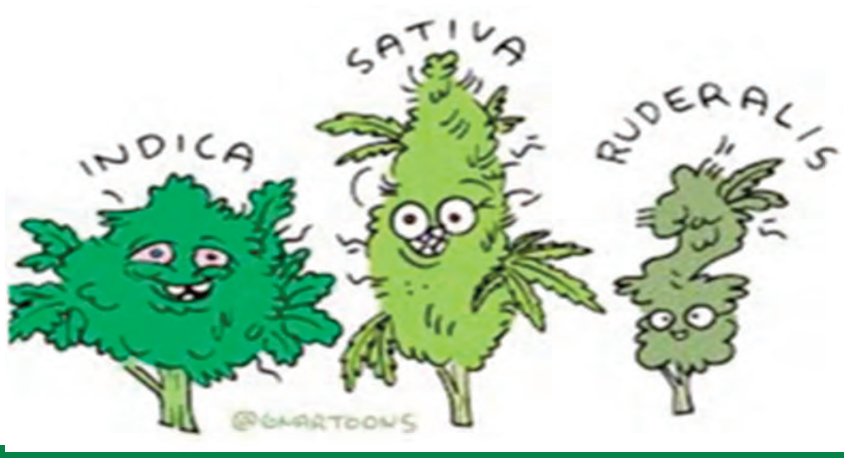
CANNABIS-INFUSED QUINOA GRANOLA BITES

CANNABIS-INFUSED JERKY

Cannabis Industry Overview

NCIA'S NORTHEAST CANNABIS BUSINESS CONFERENCE
BOSTON, MA | FEBRUARY 19-20, 2020

TYPES OF CANNABIS

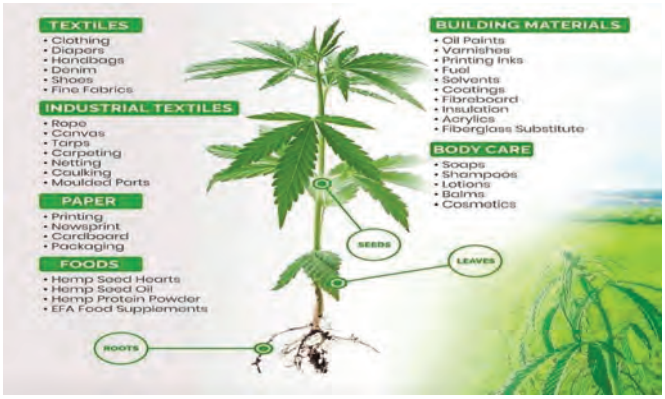


MARIJUANA, HEMP & CBD

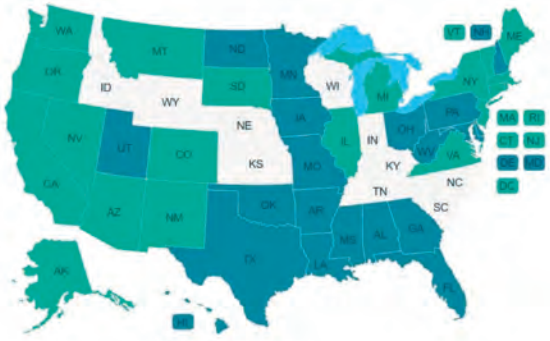
Marijuana	Hemp: Oil Based & Fibrous	CBD
• > 0.3% THC • Psychoactive • Medical & Adult Uses • Federal Illegal Level	• < 0.3% THC • Non-psychoactive • Thousands of Uses • 100% Federally Legal	• Isolate, Full Spectrum or Broad Spectrum • Non-psychoactive • Multiple Uses • Legality depends on THC %

Hemp Derived Products

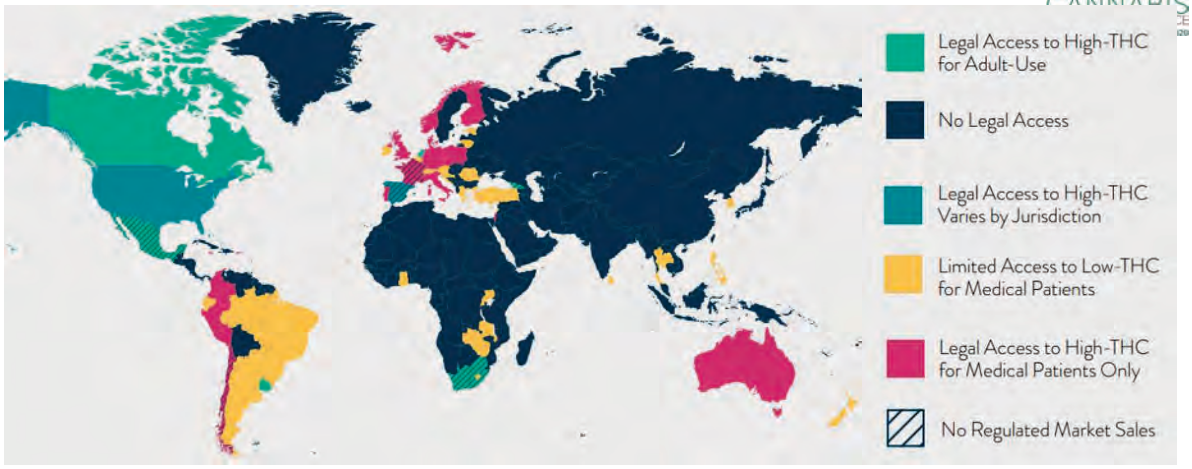
NCIA'S NORTHEAST CANNABIS BUSINESS CONFERENCE



Current Domestic Legalization



Current Global Legalization

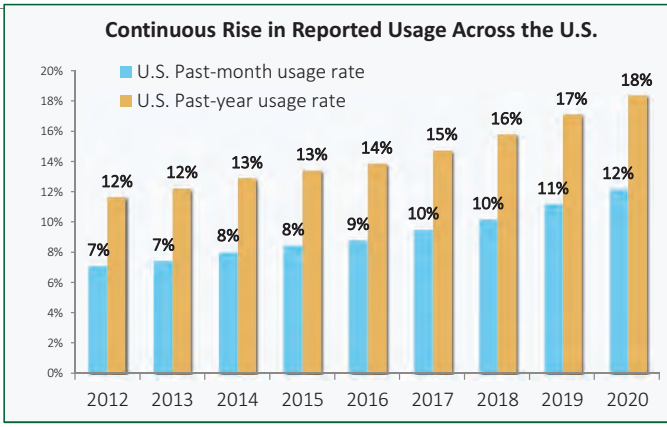


1 in 5 Americans Annually Use Cannabis

Global Cannabis Use

Cannabis Consumers
268 Million

Adults who consume
7.6%

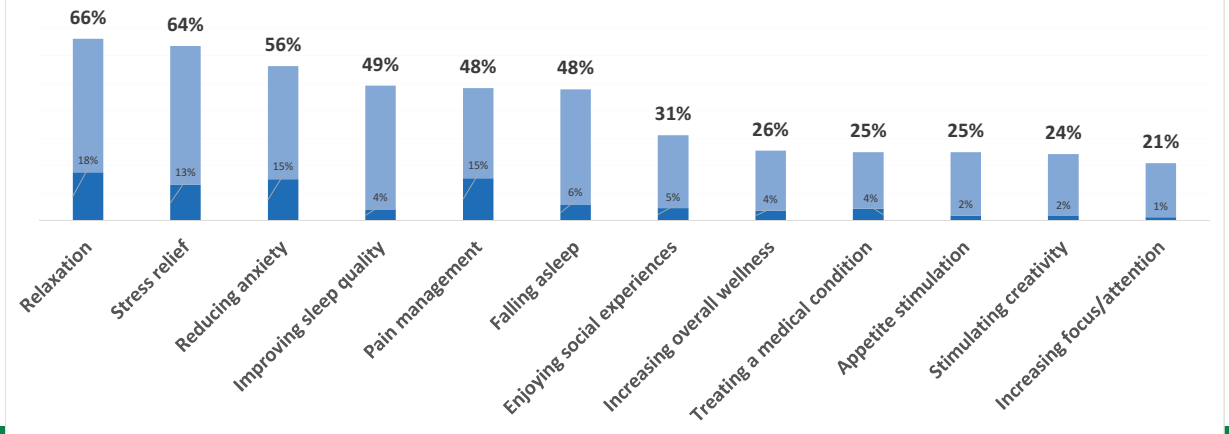


Estimated U.S. Annual Cannabis Consumers

2020
47 Million

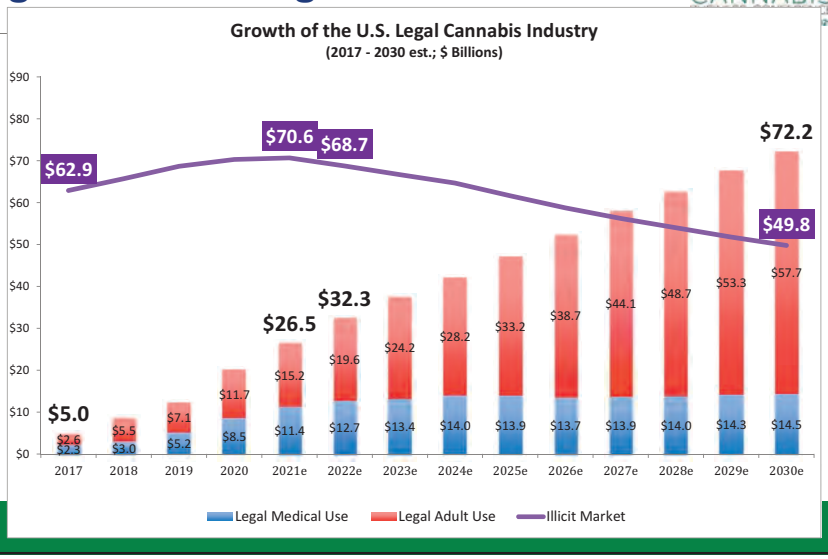
2030
71 Million

Leading Reasons for Cannabis Use



Transitioning Consumers to the Legal Market is Driving Growth in Regulated Markets

- Legal cannabis growth catalysts:
  - Transitioning consumers to the legal market
  - Normalization of public attitudes
  - Affirmative research on therapeutic use
  - Expansion of retail access
  - Legal market product and consumer experience innovation



CANNABIS DELIVERY SYSTEMS

> Flower – Combustion

> Oil - Vape

> Concentrates/Extracts - Kief - "Dabs" – Shatter Wax

> Infused Products

- Sweets and Savories: Edibles (ex. Gummies); Baked Goods
- Tinctures - Topicals - Oral Mucosal
- Suppository - Vaginal Inserts

NCIA'S NORTHEAST CANNABIS BUSINESS CONFERENCE
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Vaporizers

vireo

NCIA'S NORTHEAST CANNABIS BUSINESS CONFERENCE
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Suppositorie

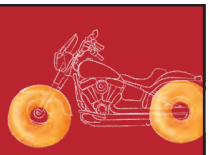
vireo

PARTIES

1. Inner Circle - "Touch The Product"

- ✓ **Producers (Growers)**
- ✓ **Processors (including product infusers)**
- ✓ **Sellers (medical and retailers)**
- ✓ **Transporters**

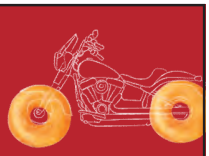
PARTIES



2. Outer Circle - Ancillary Industries

- ✓ Advertising, PR and Marketing Agencies
- ✓ Banking & Payment Processing
- ✓ General Service
  - Accounting
  - Legal
  - Consulting
  - Insurance

PARTIES



2. Outer Circle - Ancillary Industries (Cont.)

- ✓ Paraphernalia – Wholesale
- ✓ Professional Training & Education
- ✓ Support Items Retailer (Paraphernalia)
- ✓ Security Services and Equipment
- ✓ Technology & Software

Private Investors
Real Estate Services
Venture Capital/Fund
Testing & Lab Services

PARTIES

2. Outer Circle - Ancillary Industries (Cont.)

- ✓ Government & Regulation
- ✓ Cultivation Products
- ✓ Industry Organizations & Nonprofits
- ✓ Infused Product Manufacturer
- Healthcare
- News & Information
- Packaging & Supplies

PARTIES

3. "Barbarians at the Gate"

- ✓ Big Pharma
- ✓ Diet Supplement Companies
- ✓ Big Tobacco
- ✓ Other Countries (e.g., Colombia)

KIKOKO

- Cannabis botanical wellness product company

-Sensibly dosed pharmaceutical & alcohol alternatives addressing sleep, stress, pain, anxiety, libido, mood and focus issues

Kikoko

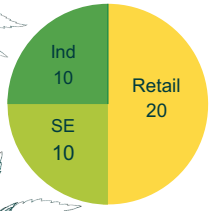
- Infused herbal teas, mints and Honey Shots

- Made with organically sun-grown cannabis, organic adaptogenic herbs, and pure New Zealand Manuka honey

MSO – Multi State Operator

THE APOTHECARIUM DISPENSARY

How will they look..



Ownership:

20 Retail Dispensary Licensees
10 Independent Applicants
10 Social Equity Applicants

Potential concepts

- Lodging
- Restaurants
  - Infused dining
  - Non-alcoholic beverages
- Entertainment/events
- Co-working space
- Wellness/spa

Cannabis Laws and Regulators

Central Organizing Principle

Under Federal law, Marijuana is 100% illegal

Central Organizing Principle

Controlled Substance Act, 21 USC §812

lists Marijuana as a Schedule I controlled substance indicating that drug/substance:

- ✓ Has a high potential for abuse.
- ✓ Has no currently accepted medical use in treatment in the United States
- ✓ There's a lack of accepted safety for use under medical supervision

DEA Schedules

CLASSIFIED DRUGS	
I:	Heroin, LSD, **MARIJUANA**, Ecstasy, Methaqualone, and Peyote
II:	Vicodin, Methamphetamine, Demerol, Oxycodone, Fentanyl, Adderall
III:	Tylenol with Codeine, Ketamine, Anabolic Steroids, Testosterone
IV:	Xanax, Soma, Darvon, Darvocet, Valium, Ambien, Tramadol
V:	Robitussin AC, Motofen, Lyrica

Central Organizing Principle

U.S. Constitution's Supremacy Clause

State laws conflicting with federal law are generally preempted and void.

U.S. Const., Art. VI, cl. 2; Wickard v. Filburn, 317 U.S. 111, 124 (1942)

"[N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress"

Central Organizing Principle

Cole Memo of 2013

Provides that while marijuana remains an illegal substance under Controlled Substances Act, Justice Department would focus resources on *"most significant threats in the most effective, consistent, and rational way"*

Central Organizing Principle

The Justice Department's lists
"8 Enforcement Priorities"

designed to prevent:

1. Distribution of Marijuana to minors;
2. Revenue from Marijuana sales going to criminal enterprises, gangs, and cartels;
3. Diversion of Marijuana From states where "legal under state law in some form" to other states;
4. State-authorized Marijuana activity from being used as a cover/pretext for trafficking other illegal drugs or illegal activity;

Central Organizing Principle

5. Violence and use of firearms in Marijuana cultivation and distribution;
6. Drugged driving and exacerbation of other adverse public health consequences associated with Marijuana use;
7. Growing of Marijuana on public lands and attendant public safety and environmental dangers posed by MJ production on public lands; and
8. Marijuana possession or use on federal property

Rohrabacher-Blumenauer Amendment

- Passed as attachment to Commerce, Justice, and Science Appropriations bill for fiscal year 2014
- Repeatedly renewed, and commonly known as Rohrabacher-Blumenauer Amendment
- Prohibits Justice Department from using federal funds to prevent states "from implementing their own State laws that authorize the use, distribution, possession or cultivation of medical marijuana"

January 4, 2018 Sessions "Marijuana Enforcement" Memorandum

Internal guidance to U. S. Attorneys rescinding prior guidances

Like predecessors, creates no "rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal"

Pursuant to U.S. Attorneys' Manual, an internal Justice Department set of standard operating procedures, each U.S. Attorney has discretion to choose which laws to enforce

To commence prosecution U.S. Attorney must believes that: conduct constitutes a federal offense; admissible evidence is sufficient to obtain/sustain a conviction, and a **substantial federal interest** would be served by prosecution. Manual, §9-27.000.

"Substantial Federal Interest"

To determine whether prosecution serves "substantial federal interest", must weigh:

1. Federal law enforcement priorities, including any initiatives or operations aimed at accomplishing those priorities
2. offense's nature and seriousness
3. deterrent effect of prosecution
4. person's culpability in connection with offense
5. person's history with respect to criminal activity
6. person's willingness to cooperate in investigation/prosecution of others
7. interests of any victims and
8. probable sentence or other consequences if person is convicted.

Manual. §9-27.230

Delta 8 THC

•2018 Farm Bill both legalized Hemp and its derivatives and removed plant *Cannabis sativa L.* containing no more than 0.3% Delta-9 THC on a dry-weight basis from the Controlled Substance Act and Drug Enforcement Administration's purview.

•A cannabinoid of the THC "family" of compounds commonly derived from *Cannabis* plant, Delta-8 THC is a double bond isomer of Delta-9 THC, the federally illegal psychotropic-effect-producing cannabinoid sourced from *Cannabis*.

•An isomer is a type of "chemical analog" comprising one of two or more compounds containing the identical number of atoms of the same elements but differing in structural arrangement and properties.

•There are 30 known THC isomers, and Delta-9 THC and Delta-8 THC differ regarding the single double bond's location.

Delta 8 THC

•Stated another way, while similar in molecular structure, Delta-8 THC is a different molecule than Delta-9 THC.

•Delta-8 THC is derived either directly from Hemp plant or converted from CBD isolate

•Because Hemp cultivars do not express Delta-8 THC in sufficient concentrations or quantities to be economically viable to extract for commercial purposes, and CBD is cheap and abundant, deriving Delta-8 THC by converting from CBD isolate is faster, cheaper and more popular method.

•Because they are less regulated, cheaper and, unlike Delta-9 THC, can be sold virtually anywhere (including online) and as consumables, Delta-8 THC smokable flower, vape, and edibles sales are exploding and severely cutting into the legalized *Cannabis* market.

Delta 8 THC

•At the state level, Delta-8 THC products are as follows:

- Legal: Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland. Massachusetts, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma (explicitly excludes Delta-8 from Marijuana's legal definition), Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Washington D.C., West Virginia, Wisconsin and Wyoming

- Illegal: Alaska, Arizona, Colorado, Delaware, Idaho, Iowa, Missouri, Montana, Nevada, New York, North Dakota, Oregon, Rhode Island, Utah, Vermont and Washington

Delta 8 THC

- - Legal But Restricted or Regulated: California (products with more than 0.3% Delta-8 THC are state regulated), Connecticut (only purchasable from a licensed *Cannabis* retailer), Hawaii (except for edible/inhalable products {gummies, vape, flower and drink), Delta-8 THC is legal), Louisiana (while barring inhalables like flowers and vapes, consumable Delta-8 products like tinctures and gummies up to 8mg THC per serving allowed), Michigan (only purchasable from licensed *Cannabis* retailer), Minnesota (Delta-8 plants may contain up to 0.3% of any THC type and consumables up to 5 mg THC/serving allowed) and Virginia (except for food/drink THC-containing product),

Federal Legality

- Depends on whether derived directly from Hemp or converted from CBD
- Because 2018 Farm Bill's "hemp" definition encompasses "cannabinoids" and "derivatives" of Hemp, Hemp-derived Delta-8 THC is probably not prohibited by CSA and Delta-8 THC derived from CBD is probably also exempt (if not containing Delta-9 THC concentrations exceeding "0.3% by dry weight" legal limit).

AUTHORITIES AND REGULATORS

Federal Agencies

DEA
U.S. DRUG ENFORCEMENT ADMINISTRATION

USDA United States Department of Agriculture

Federal Trade Commission
Protecting America's Consumers

FDA

STATE AGENCIES

ATTORNEY GENERAL	DEPARTMENT OF HEALTH
DEPARTMENT OF AGRICULTURE	BOARD OF PHARMACY

TORT CLAIMS

- Although no reported recoveries against MRB, tort exposure may exist for:

1. Products Liability

2. Medical Malpractice, and

3. Server Liability.

TORT CLAIMS

"Design Defects"

- Common to each item of the same design and though usually unknown to the manufacturer
- Exist before the product is manufactured.

"Manufacturing Defects"

*Caused by a failure in manufacturing process and unique to individual product manufactured.

*A manufacturing line failure could cause same defect to appear in multiple individual products.

TORT CLAIMS

"Failure to Warn"

*Claims based on product's foreseeable uses/misuses

*Asserts that a "failure to forewarn the user of potential harms" occurred.

"Breach of Warranty"

*Stem from defective materials/workmanship giving rise to claims based on breaches of warranties that are either:

1. written (and accompany product); or
2. implied by law.

TORT CLAIMS

"Medical Malpractice"

*Specific professional negligence tort law subset

*Defined as a physician's act/omission during patient's treatment deviating from medical community's accepted norms of practice which injures patient.

*Because of varying nature of states Medical *Marijuana* programs and tort law system, no unified national exposure standard exists

*In systems requiring physician to "prescribe" a specific strain, "THC dosage" or "delivery system", arguably a "treatment decision" may occur that triggering medical malpractice claim.

TORT CLAIMS

"Server Liability"

*Claims against sellers of both medical or adult use *Marijuana* to diminished capacity patients/customers whom injure third parties (ex., car crashes).

*38 states have "**Dram Shop**" acts or case law holding an alcoholic-drink-seller strictly liable to anyone injured by an obviously intoxicated party whom seller served.

*18 states have "**Social Host Liability**" laws holding party hosts liable for any alcohol-related injuries resulting from providing alcohol to minors or 3rd Parties or encouraging/allowing anyone to drink excessively and either be injured or killed or caused another's injury or death.

RICO CLAIMS

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1964(c)("RICO")

- Federal statute focusing on "racketeering activity" for acts performed as part of an "ongoing criminal organization" called an "enterprise
- Encompasses Controlled Substance Act violations
- Allows for recovery of "treble damages" (*i.e.*, triple actual damages) and attorneys fees
- Not only do MRB's fall within RICO's ambit, civil liability exists for those knowingly facilitating an MRB efforts who may be deemed civil RICO conspirators and jointly and severally liable for all injuries caused by the conspiracy. 18 U.S.C. §1964(d); Salinas v. United States, 522 U.S. 52, 63-64 (1997).

RICO CLAIMS

- MRB's RICO exposure presently been limited to "adjacent property nuisance" cases:
  - Safe Streets Alliance v. Hickenlooper, 859 F.3d 865, 884-91 (10th Cir. 2017)
  - New Vision Hotels Two, LLC v. Medical Marijuana of the Rockies, LLC, Et Al., District of Colorado Civil Action No:15-cv-00350
  - Crimson Galeria Limited Partnership Et Al. v. Healthy Pharms, Inc. Et Al., District of Massachusetts Civil Action 1:17-cv-11696.

RICO CLAIMS

Safe Streets Alliance

*Colorado property owner filed a RICO suit against adjacent marijuana-odor-emitting cultivation facility alleging that smell diminished value and interfered with property use and enjoyment

*Trial court dismissed RICO claim due to failure to demonstrate "plausible injury" to property proximately caused by grower's activities

*10th Circuit Court of Appeals reversed holding that plaintiff could prevail by demonstrating that emitted-odor interfered with property's use or diminished its market value, or that stigma associated with nexus-to-a-MRB diminished property's value.

RICO CLAIMS

New Vision Hotels Two

*Stemming from "loss of high school ski team business due to MRB's proximity, Holiday Inn franchisee asserted RICO claims against unopened nearby prospective dispensary that investors abandoned following suit's filing.

*Plaintiff then asserted RICO claims against prospective dispensary's service providers, collecting $70,000 from project's accountant and tax surety bond's underwriter.

RICO CLAIMS

Crimson Galeria Limited Partnership

- Also asserting "diminished property values RICO claim" against a prospective dispensary
- Plaintiff submitted a commercial real estate appraisal assessing a $26 million value diminution to its Harvard Square buildings resulting from dispensary's opening.
- Case settled.

Drug Dealer Liability Act

*Establishing form of "market liability", DDLA makes drug dealers civilly liable to those injured by a driver under the influence of drugs, families losing a child to illegal drugs and others injured by illegal drugs.

*DDLA plaintiff need not prove that drug user received a specific defendant's illegal drugs but, instead, only that:

(1) defendant was distributing illegal drugs in injury-causing-user's community;

(2) distributor was distributing same type of drug used by user; and

(3) defendant's community distribution was simultaneous with when user was using.

Drug Dealer Liability Act

Although 16 states have passed a DDLA statute seeking redress for those injured by illegal drugs, state licensed and compliant MRB's fall outside of DDLA's scope because DDLA's :

1. "specified controlled dangerous substance" definition excludes *Marijuana;* and

2. limits "marketing of controlled dangerous substances" definition to "illegal distributing, dispensing, or possessing with intent to distribute, a specified controlled dangerous substance".

DUI Law and Regulations

- According to the NHTSA, scientific studies consistently find that marijuana-impaired drivers pose a comparatively nominal accident risk.
- The largest-ever controlled trial assessing cannabis use and automobile accidents concludes that after controlling for age and gender, marijuana-impaired drivers possess virtually no statistically significant risk of crash compared with drug-free drivers.
- In its July 2017 Marijuana-Impaired Driving Report to Congress, NHTSA recommended that efficient methods for training law enforcement personnel be instituted, including drug recognition experts to increase each officer's overall knowledge of the general manifestations of marijuana impairment and to be able to recognize these indicators in encounters with drivers.

Blood Alcohol Content

- When consumed, alcohol is readily absorbed into blood system *via* gastrointestinal tract.

- While factors like presence of food may influence process, absorption occurs in a consistent manner over time and peak blood alcohol concentration ("BAC") is normally achieved within 20 minutes after ceasing drinking.

- Impairment increases with growing BAC concentration and wanes with reduced BAC concentration.

- Correlation between impairment and alcohol concentration allows use of BAC to infer driver's degree of impairment in a reliable and scientifically accepted manner.

What Does Cannabis "Under the Influence" Mean?

- Unlike alcohol, terrific range among states' "driving under the influence of drugs" approach.

- 15 presently have zero tolerance statutes: AZ, DE, GA, ID, IL, IN, IA, MI, MN, NC, RI, SD, UT, VA and WI.

- Others:

1. require a "urine /blood sample determined" THC threshold in driver's system to be deemed under the influence;

2. evaluate Cannabis impairment based on driver's behavior, regardless of actual THC in his system

- Unlike widely accepted "field" and "blood alcohol" tests provided probable cause basis for arrest, no universal test for Cannabis consumption is presently available.

Blood/Urine Chemical Tests

- Although no standardized "active THC limit, several states use 5 nanograms of THC

- In *per se* limit states:

  1. any THC amount may grounds for a criminal offense; and

  2. if tests reveal THC level exceeding of state's legal limit, grounds exist for filing charges

- Because THC is fat-soluble and remains in tissue for weeks post-ingestion, positive test results may occur having no bearing on individual's actual intoxication level

  *regardless of recent ingestion, regular user will have measurable THC metabolites

  *recent AAA study determined that even tests looking only for active THC, and excluding prior use residual THC, are not a reliable driving fitness indicator

- No reliable marijuana intoxication biomarker has not been identified and impairment can vary based on:

  1. consumed THC's concentration
  2. whether frequent/heavy user;
  3. elapsed time since cannabis ingestion
  4. ingestion method.

Oral Swab Test

- In place of more complicated blood/urine drug detecting tests, some CA municipalities and CA Highway Patrol test with "oral swab examinations" identifying trace Cannabis amounts in a driver's saliva

Observed Impairment Test

- To determine if potentially impaired while driving, many jurisdictions use driver behavior and physical factors (ex. tongue color and pupil dilation_.

- Common field sobriety tests include:

1. Horizontal-Gaze Nystagmus
2. 1 Leg Stand; and
3. Walk and Turn.

- Results inherently subjective and observational testing's reliability is limited by skill of person administering the test.

Horizontal-Gaze Nystagmus Test

- Administered by an officer moving finger/object from side-to-side in front of a driver's face to detect an involuntary jerking of the eye associated with high intoxication levels

- After being strained beyond a 45° angle, a person's eye is believed to jerk naturally

- If eye begins to jerk at or before the 45° point, reaction deemed that a driver is impaired

- NHTSA estimates test as 77% effective

One Leg Stand Test

- During 1 Leg Stand test, driver instructed to raise foot, hold still, count, and look down.
- If driver hops, sways or puts foot down, officer has grounds for an arrest.
- According to NHTSA, test is effective 65% of the time

"Walk and Turn" - "Walk the Line" Tests

- Splits attention of person suspected of driving under the influence of Cannabis between mental and physical tasks.
- Officer provides instructions to the driver and looks for loss of balance, inability to stay on the line, beginning before instructed, breaks in walking and the wrong number of steps.
- NHTSA estimates test to be effective 68% of the time.

Cannabis and Personal Injury

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DRI's 25th Annual Personal Injury Potpourri
Forensic Technology Update, 2023
Justin P. Schorr, Ph.D., President

The world around us is changing rapidly. Technology continues to develop at an exponential pace, and new frontiers are being breached just as quickly as they come into focus. While fears of automation continue to swirl over industries with mainstream news coverage assuring us that large-scale job loss is just around the corner – it is important to stop for a moment and take stock of the world as it actually exists. While it may not seem like being in the business of collision reconstruction would provide unique insight into how things may play out – consider that experts in this field were told "learn to code" and to start making other career plans when Event Data Recorders (EDRs) first came into prominence a few short decades ago. Instead of killing the industry, collision reconstruction experts became more in demand, as the addition of data did not eliminate the need for an engineer's review but made it all the more necessary and important. At the same time, the recent prediction that I feel most comfortable with is that vehicles with this technology are still far, far away from being as safe, let alone safer, than their human occupants. Still, while this next decade will see the development and deployment of human-enhancing, lifesaving, advanced driver assistance systems – those with higher ambitions (say, to corner the market on a 3-trillion-dollar transportation industry) will continue to push for more and more automation. Only time will tell how these "driverless dreams" will play out.

In looking towards the "next big thing" in the world of collision reconstruction – the first foundational shift has already begun with more and more crashes being captured by video cameras (which seem to be almost everywhere: ATMs, doorbells, dashcams, private and public surveillance, and more). While video is objective evidence, which can be analyzed, quantified, and explained in plain language with compelling visuals – this process is tedious, complicated, and requires knowledge of everything from physics to lens distortion in order to produce an accurate, understandable end product. Moreover, video analysis is oftentimes reliant on detailed data defining the surrounding environment – the collection of which has been accomplished by notebooks and wheels, transit-prism survey equipment, one-man GPS-based survey equipment, laser scanners capable of capturing small windows over an extended period of time, 360-degree laser scanners which capture millions of points in a matter of minutes, and, most recently, drones. Moving forward, the combination of more recent laser scanning devices with quick-collection, non-intrusive, drone-based devices will allow for site data to be captured in decreasingly burdensome periods of time, at accuracies far beyond that which my grandfather, wheel-in-hand, could have ever imagined when he started this company in 1961.

New data sources certainly do not end with video and drones – more and more the devices, which we have become reliant upon, are documenting and memorializing our every move. There is a wealth of information from our vehicles and mobile devices which is time-synced and stored in the infotainment systems present on nearly all new vehicles. Our cell phones themselves are now accessible to forward-thinking firms on the cutting edge of new data extraction technologies. Even old technologies, like digital cameras, have experienced a resurgence as the photographs they capture contain detailed metadata which allows for analysis of potential spoliation issues, and the images themselves can be post-processed to produce a 3-dimensional end product that is growing increasingly accurate. Networking and communications have allowed ambitious firms like DJS to place "boots on the ground" at locations throughout the country – providing 24/7 response services from Philadelphia to Salt Lake, to Santa Monica, and everywhere in between. 3D Engineering Animations are becoming more detailed – and, here at DJS, we have even traveled to the 4th dimension as we have created virtual reality environments ready for exploration by anyone who puts on the headset. That's right – rather than wondering,

"what the heck was this driver thinking," we are now able to place you directly in that driver's shoes where you can experience everything that driver could see – or should have seen – in the moments prior to a crash.

What has become obvious is that to achieve a complete "picture" of a crash requires well-rounded professionals, knowledgeable in a broad spectrum of disciplines who know what data exists, have the wide-ranging toolbox of skills required to obtain that data, have the physics and engineering-based training to analyze the data, possess the intuitive and industry-specific experience to understand how to present this data, and have the creative vision and technical ability to produce compelling exhibits highlighting the case-specific needs of the client. Not only has technology failed to remove the human from this industry, but "one-man shops" are giving way to teams of humans with diverse backgrounds who are not beholden to technology – but rather find unique and inventive ways to harness its power and apply it to meet the needs of their clients.

Further supporting the "need" for the human, consider the dark shadow that three years of Covid has cast over the scientific community and we arrive at the question of how (not if) this distrust will manifest in the court room. Will cynical juries be dismissive of even the highest academic credentials? What, if anything, can replace the credentialism that is ubiquitous throughout our society? While the answers to these questions are unclear (and it is unclear if these questions are even relevant) the answer likely lies in the forgotten land of personal and professional relationships which remain the backbone of this industry and society more broadly. These relationships, which seem *soooo* 2005, require a renewed focus in a world where fact checks require fact checks and no one seems to know who or what to trust. The best credentials in the courtroom of tomorrow are going to be whether the other side uses your expert witness services as well.

Moving back into the more tangible elements of today's collision reconstruction world, this analysis remains a critical aspect of modern litigation involving vehicular accidents. Engineers are at the forefront of this process, using their skills and cutting-edge technology to determine the dynamic elements of a collision with a high level of accuracy. State-of-the art visual tools can then be used to communicate a scientific analysis most effectively to a jury. As technology advances, the field of collision reconstruction is also evolving, providing greater accuracy and more insightful analysis for legal professionals. To examine the growth within the industry, we keep the following four elements in mind as they are at the core of an effective reconstruction: data collection, data analysis, rendering opinions, and demonstrating results.

One place where the industry continues to make strides is in the speed and breadth of the site data which can be collected after a collision – as well as the speed at which teams can be deployed to be on-site collecting said data. Savvy companies within the industry are branching out – realizing that, so long as they can get boots on the ground to a crash scene quickly after a crash, the connected world in which we live in has removed the geographic walls which used to restrict their reach. Once deployed, modern-day laser scanners can collect 360 degrees of data in less than 2 minutes; a far cry from the 8-minute, 30-degree window which was achievable when these devices first came to prominence in the early 2000's. Further, rapid improvements in processing abilities have drones poised to be the "next big thing" in data collection as these units increase speed and range exponentially when compared to laser-scanning units. As computers become better suited to "build-up" 3-dimentional point clouds from drone photographs with ever increasing accuracy and detail, laser-scanners may be pushed to the side as the non-stop march of technological advancements plows forward.

In the initial stage of collision reconstruction, engineers ideally collect data from the accident scene. This may involve a combination of traditional methods, such as measurements and photographs, and more advanced techniques like 3D laser scanning and drone imagery. These technologies allow engineers to create a comprehensive, accurate digital representation of the accident scene for further analysis. Most of the time, however, the future litigation status of a motor vehicle collision is unknown at the time the collision occurred and, therefore, scene data is limited to that which is collected by the police. For whatever reason, getting scene data from the police (whatever data they actually collect – most often a subset of the data which was there to be collected) can be a challenge – creating the need for specific, targeted requests. As such, advising legal

professionals on what data they should be requesting and the form in which to request this data is an important early role of engineers in today's world.

With regard to sources of data, these are plentiful as modern vehicles are equipped with numerous sensors and electronic systems that provide valuable data for collision reconstruction. These data sources differ between heavy vehicles and passenger vehicles and within each category depending on the make and model of the vehicle and/or engine. It is incumbent upon the engineer to understand not only *how* to acquire this data but also what data is there to be acquired. Once again, preparation and having a robust base of knowledge are both paramount to making sure that data can be acquired in a complete and efficient manner. Moreover, understanding and strategizing based on the available sources of data the elements known to be reported by those sources manages expectations and keeps everyone on the same page when an inspection occurs.

To provide some specifics, here is a general timeline of access to electronic data in vehicles, devices, & the cloud:

Event Data Recorders (EDRs): Beginning in the 1990s, vehicles became equipped with EDRs and, with this, gained the ability to memorialize electronic information relating to a crash. This information includes parameters such as speed, brake and accelerator pedal status, and steering data. Since the inception of EDRs, almost all auto manufacturers have elected to install these recording devices as part of the airbag control system. These devices are triggered to record events when certain criteria are met. The events typically include five seconds of data preceding the initial trigger. The National Highway Traffic Safety Administration (NHTSA) Part 563 defined EDR requirements for data accuracy, collection, and storage. The ruling applies to vehicles with a Gross Vehicle Weight Rating (GVWR) of less than 8,500 pounds and manufactured on or after September 1, 2012. The Vehicle Identification Number (VIN) is used to determine if a vehicle is equipped with an EDR that is supported for electronic data imaging.

Extracting EDR Information: NHTSA Part 563 also requires tools to be commercially available to access and retrieve data stored in the EDR. The process is often referred to as data imaging. In most cases, data can be retrieved through the diagnostic link connector, usually in the driver's footwell area, with the appropriate hardware and software. Depending on the damage to the vehicle, it may be necessary to locate and plug directly into the EDR module to image the recorded data.

Infotainment & Telematic Systems: Modern vehicles in the automobile market are generating a wealth of data every moment – but where does this data go? And is it stored anywhere? Infotainment systems, commonly located in the center of your vehicle's dashboard, are among one of the newest available technologies which is doubling as a powerful data source. Designed to enhance the user experience, touchscreens are often the graphical user interface allowing for control of features like climate control or in-vehicle audio. Another control method is a voice prompt, activated by a button located on the steering wheel, providing a path for audible communication between the user and vehicle. Infotainment systems include Ford Sync, Chrysler Uconnect, GMC IntelliLink, and Toyota Entune. Another in-vehicle system, Telematic units, can be stand-alone, like OnStar by General Motors, or integrated within the infotainment system to provide communication between the vehicle and external devices or networks. While the data source is identical, it is essential to understand that infotainment/telematic data is different from data stored by EDRs. Information stored within these systems can vary from personal cell phone messages to GPS navigation data, to vehicle events such as light activations or door operations. Voice recordings are also among the potentially stored and retrieved data. Data of this kind can be useful not only in vehicle crashes, but also in non-crash related incidents such as theft or other crimes. When a cell phone connects to an infotainment system via Bluetooth or USB, users may notice a prompt on their phone screen asking for permission to access phone content. Consequently, the vehicle can record content including when a call was placed or when a text message was sent and the number of the recipient. Additionally, cars can store where and when you were at a specific location and the route traveled to arrive there. Compared to EDRs, these systems can record a larger amount of data sometimes spanning years or hundreds of miles. The data

extracted from infotainment systems can be analyzed and applied in many situations to further understand how a collision or an event occurred.

Extracting Infotainment & Telematic Data: With modern forensic tools, investigators can now access data within infotainment & telematic systems of vehicles. Some vehicles require the electrical system to be intact and functional to support data imaging, while others require the removal of the electronic module and disassembly down to the circuit board. Once disassembled, the appropriate forensic tools are used to communicate with the module's memory. The size of this memory varies and could have a similar capacity to smaller hard drives found in laptops. Given the memory capacity, data imaging times can be lengthy, sometimes taking hours to complete the process. However, the infotainment data set is the most robust source of data relating to a collision. These units marry the vehicle data with the device data and memorialize all driving events, not just those that are captured in traditional data downloads.

Motorcycle, Off-road Vehicle, & Watercraft Event Data: Automobiles are not the only motorized vehicles that possess the ability to record speeds and parameters potentially relevant to a crash or incident. Select Kawasaki motorcycles are equipped with EDRs dating back to 2013. A tip-over sensor in the motorcycle is used as an event trigger to signal the electronics to store data. Other newer motorcycles, UTVs, and watercrafts such as Can-Am record fault code diagnostic information as well as data parameters including speed related to the last 60 seconds of usage. The data retrieval process involves locating the engine control unit and connecting hardware directly to it. In addition to the last usage data, logged fault codes can help uncover defects, failures, or vehicle issues germane to its condition leading up to the incident.

Cell Phones: Almost everything that someone does on their smartphone is stored in some capacity. Further, if the user deletes data, forensic tools may recover it. Damaged devices can yield data as well, even if the device does not power on. The type and quantity of data varies depending on the device. Except for older iPhones (iPhone 4 and earlier,) Apple devices have unique security characteristics. On the other hand, Android devices are different. Android's operating system is open source, which allows multiple manufacturers such as Samsung and LG to personalize the operating system as needed for their application. Since the Android operating system is accessible and can be customized, it is not encrypted like Apple, which makes it easier to bypass the passcode in some cases. Cellphones in 2020 store a wealth of data compared to cellphones in the 1990's, especially personal information. Text messages, call logs, pictures, browsing history, and geolocation are only a few of the data types that current mobile devices store. Additional metadata for these data types provide further information such as timestamps and even the latitude and longitude of where a picture was taken.

Social Media & Cloud Data: The cloud is sometimes referred to as a magical place that users can store their data to free up space on their devices. Data can be backed up onto the cloud in case the device gets damaged or lost. So, what if the device is inaccessible in a forensic investigation? There is a slight chance that the user backed up their data onto their computer. For Apple users, this data goes to the iCloud or iTunes, and for Android, backup data is stored to Google Drive or sometimes by the carrier. This data is preserved not only for the user, but for forensic analysts. The cloud is utilized by many platforms, including Facebook, Instagram, and Google. User data such as pictures or messages are stored in the cloud. For example, Facebook stores a user's posts, comments, likes, shares, messages, etc. Each platform retains its own distinctive data types, meaning that data may be stored differently depending on the platform, as well as the data that a platform's developer decides to store by default.

To round out our discussion of data collection, the integration of external data sources, such as traffic cameras, GPS, and telematics data can significantly enhance the accuracy and comprehensiveness of a collision reconstruction. For example, GPS data can provide information on vehicle location, speed, and direction, while telematics systems can offer detailed information on driving behavior, vehicle performance, and environmental conditions. These data sources can then be evaluated within the context of the vehicle data and the analysis of the physical evidence to enhance accuracy and generate a comprehensive understanding of the collision event.

Preparation is again paramount with additional data sources, as surveillance video data is becoming ubiquitous and increasingly important in the evidence-gathering stage. Knowing the locations of potential video recordings prior to arriving on-site greatly increases the likelihood that this temporal data will be preserved.

With regard to data analysis, advanced simulation software, such as PC-Crash, enables engineers to recreate and analyze complex accident scenarios using the collected data. These programs offer powerful tools for modeling vehicle dynamics, occupant kinematics, and even post-collision events like secondary impacts and rollovers. Through these simulations, engineers can examine various hypotheses and identify the most plausible sequence of events. Further, machine learning and artificial intelligence techniques are increasingly being applied in collision reconstruction. By analyzing large datasets, engineers can identify patterns and relationships that would be difficult or impossible to discern using traditional methods. These advanced techniques can help improve the accuracy and efficiency of collision reconstruction analysis.

Mainly, however, the advancements in the analysis arena come with regard to how to better analyze more ubiquitous physical evidence such as video data. Here is a brief synopsis of the process by which surveillance video data is analyzed:

Overview: Surveillance video, when properly analyzed, can be used to determine the actual speeds and trajectories of vehicles involved in a collision (over the time period which is captured by the video). From an engineering standpoint, while this analysis process can reveal the objective physics of a collision, it is a difficult and tedious process which requires sufficient knowledge and skill to complete. This section provides the reader with a brief perspective on each stage of the process to paint a picture of what to look for when reviewing an engineering analysis of video data. The multi-stage process begins with examination of the physical video file, specifically the “metadata” (i.e., data describing the data) contained within. Once this preliminary step is complete, we can begin stage one – the camera match.

Stage 1 – The Camera Match: The first stage in the videogrammetry analysis involves establishing an accurate “camera match.” This stage of the analysis utilizes the 3-dimensional measurements collected during a site inspection in order to establish the static environment through which the objects will eventually be “tracked.” In this stage, the general concept is to select different locations, or “points” in the static (unchanging) environment visible in the 2-dimensional still images (the individual frames) from the video. The High-Definition Surveying (HDS) Laser Scan data of the surrounding environment details the locations, in a 3-dimensional space, of the “points” selected in the 2-dimensional camera images. This data, along with the physical location of the camera itself and data describing the characteristics of the camera lens, is then processed to create flat, rectilinear (or “corrected”) versions of the individual images captured by the video. In later steps, this image correction stage allows for detailed analysis of the speeds and trajectories of objects as they move through the now rectilinear, static environment.

Stage 2 – Object Tracking: With the camera match portion of the videogrammetry analysis complete, the next stage of this analysis involves object movement tracking. Similar to the previous stage where trackers are placed at static locations, trackers are once again placed on the individual frames throughout the image sequence. In this stage, however, the trackers are placed at dynamic locations corresponding to the current position of the object as it travels through the area captured by the video data.

Stage 3 – Image Resolution: The third stage of this analysis involves accounting for the errors associated with the resolution of the video image itself. Here, measurements of the scan data were performed with Leica Cyclone software, and measurements of the image resolution were performed with ImageJ software. Using data that specifies the measurements of the object (ideally laser scan data – but not necessarily), frames where the object is both closest and furthest from the camera are selected. The image resolution error is a product of the number of pixels the object spans at these locations.

Stage 4 – Combination: Combining the error from all three stages of this analysis, the total margin of error for the videogrammetry process (specific to this collision event) is established for both the lateral and longitudinal directions when the object is both nearest and furthest away from the camera. By establishing the absolute maximum error range, the speeds and trajectories detailed by the videogrammetry analysis can be analyzed and understood within their proper, objective contexts as they relate to an event.

Takeaway: Proper video tracking analysis is a complicated, tedious process which requires a robust knowledge of what steps to perform and why one must perform them. Since surveillance video can serve as an objective establishment of the physics of the actual collision event, it is even more important that a proper analysis be performed as data of this nature should leave no room for ambiguity. If you see a video analysis performed where the image clearly has not been rectified – this is your first clue that the results may be questionable, and the analyst is likely either under-equipped or under-informed.

As a result of their expertise and the sophisticated tools at their disposal, engineers are well-positioned to render opinions on key aspects of a collision, such as the cause, contributing factors, and the extent of damages. These opinions are grounded in scientific principles and supported by data, making them compelling and persuasive in the context of legal proceedings. One challenge in collision reconstruction is accounting for uncertainty in the data and analysis. Engineers can address this by using statistical methods to quantify the uncertainty in their findings, providing a range of possible outcomes rather than a single, definitive conclusion. This approach can help lawyers better understand the strengths and weaknesses of their case and prepare for potential challenges from opposing counsel.

Finally, perhaps the most important element of any expert analysis is how the results of that analysis are communicated to a client and eventually to a jury. To effectively communicate their findings to a legal audience, engineers must create clear, compelling visualizations of their analysis. This can include 2D diagrams, 3D models, and animations that show the sequence of events and the impact of various factors on the collision. “Engineering animations” are accurate, to-scale three-dimensional (primarily) visual representations of an engineering analysis of a specific event. These animations are only as accurate as the engineering analysis, field data, and other available data which serve as their foundation. While there are always questions surrounding whether the animations will be accepted in court – the keys to ensuring their acceptance are the accuracy of the underlying analysis and the manner in which they are presented for acceptance. That is, presenting the court with a stand-alone engineering animation is not nearly as powerful as explaining that the animation is simply a visual representation of the analysis. Framing the engineering animation in this accurate and understandable way shifts the burden of credibility from the animation itself to where it should be – the underlying analysis.

For collisions between motor vehicles, the reconstruction, and any representative engineering animation, must account for the three components of every vehicular crash – the roadway, the vehicles, and the drivers. The accuracy of the first two components (the roadway and the vehicles) is established via the manner in which the data is collected – ideally by state-of-the-art laser scanners with millimeter-level accuracy. As for the third component, the driver, the accuracy of any dynamic element (steering, speed, timing, etc.) is established through a robust and comprehensive analysis, while the accuracy of static elements (such as sight lines) is established using the same tools as those used to document the roadways and the vehicles. While these are the same components considered in an engineering analysis, the accuracy (both quantifiably and visually) of the vehicles and environment are more prominent when developing a three-dimensional representation of the analysis.

While visuals often leave the longest-lasting impression on the audience, it cannot be overstated that the accuracy is what separates engineering animations from anything else. To ensure that these projects are accepted in court it is important to remain mindful of standards and best practices such as:

- Following a methodology that has been evaluated and excepted within the relevant scientific community.
- Proper education and training by the animator.

- Expertise in the field of computer animation.
- Experience with similar work products.
- The ability to replicate the animations given the same input parameters.
- The ability to calculate accuracy in terms of percent error.

While these are *not* requirements for an engineering animation, making sure that they are addressed can be the difference not only in getting them accepted, but also in demonstrating why one animation is more accurate and a better representation than another.

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Dr. Ann T. Greeley
Vice President - Research

Using Social Science and Mock Arbitrations to Prepare your Case

DECISIONQUEST.COM Jury Research & Consulting | Legal Graphics | Trial Technology

Litigation Support Tools

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Overview of Today's Talk

- Online Mock Arbitrations:
  - How Arbitrators Think
  - What's different in an Online Arbitration
- Tips for Communicating during an Arbitration
- Importance of using demonstratives in Arbitrations

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3

Remote/Online Arbitrations: Consider Research

- Secure
- Outside/Objective Opinions
- Strategic Analysis from both mock Arbitrators and Consultants

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4

Arbitrators Are Human FIRST

- Even the most intelligent people take mental shortcuts
  - Judges, doctors, engineers, etc.. limit how much mental effort they use in decision making
  - Anchoring
  - Hindsight logic
  - Use Heuristics

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5

Remote Arbitrations Require Logistical Planning

- Lighting
  - Internet/Ethernet
  - Camera
- Different kinds of advanced strategic planning
  - Documents
- Technical knowledge or practice
- Communication issues

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6

Information Processing

- Information is processed differently online vs. in person.
  - Brain works harder, causes Zoom fatigue, etc.
  - Cognitive overload
  - Peripheral vs. Deeper thinking
- Pre-hearing submissions/briefs need to be more persuasive and tell a good story
  - Peripheral cues differ remote vs. in person
- Overall, simplify!

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7

Communicating with Arbitrators

- What arguments are most persuasive?
  - What is believable
- What holes do you have in your story?
  - What is understandable/missing
- What experiences does each the arbitrator draw on when deciding the case?
- What questions from the arbitrators were not anticipated?

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8

Practice The Way You Play

- Opportunity to get comfortable presenting on the virtual platform
- Pushes you to think sooner about what your presentations will be/ Thinking on your feet
- Beneficial for online or in-person arbitrations
- May be a simple process or a more complex process
  - One arbitrator/local attorney or former judge
  - Unknown venue/several arbitrators/diff backgrds

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9

Follow the Procedures of the Real Arbitration

- How many arbitrators will there be?
- Match arbitrators/Type of background/number
  - Will there be both opening and closing statements?
  - What will the level of discovery be?
  - Will there be witnesses?
  - What information will be provided to the arbitrators before the arbitration?
  - Will the format mean sessions spread out??

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10

Mock Arbitrators Should Not Know Which Side Is Funding the Project

- Demand characteristics
- Attorney and law firm names are redacted from documents
- Mock arbitrators are asked to not do any online research about the case
- Set limits about how much material to review

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Virtual Platform: Dealing with Barriers

Barrier: familiarity with internet/equipment/techniques

- Using zoom: muting, video/audio/glitches
- We test their equipment and internet speeds/ offer equipment
- Over the last year, most mock arbitrators have upgraded their equipment and internet speeds
- Paper or Electronic: Many prefer to type out notes or answers Some however need everything on paper as well

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The Process

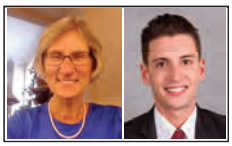
Arbitrators log into virtual check-in room

Arbitrators are sent to virtual waiting room

WAITING ROOM

- Answer last minute question
- Review protocols for research project

Arbitrators proceed to virtual research room



Additional virtual discussion rooms can be added

13

Virtual Research Format (Cont.)

- What feedback do attorneys want from the arbitrators?
  - Can they interrupt presentations?
  - Do they hold questions until end of presentations?
  - Pros and cons to doing it each way

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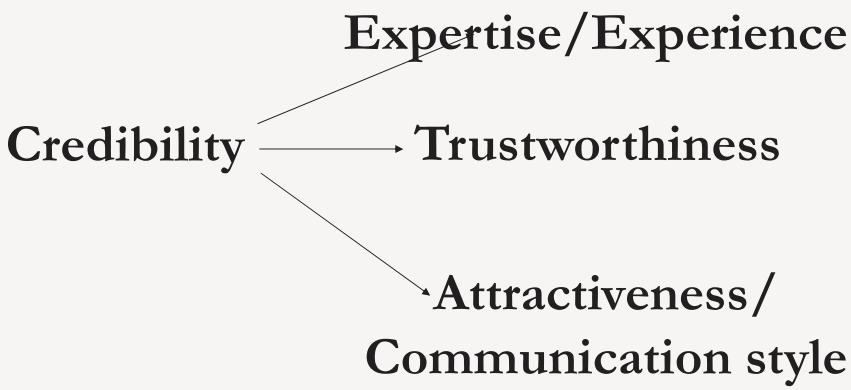
Components of Messenger Credibility



How Do Remote Video Depositions Differ?

- More technical awareness required
- Camera doesn't forget
- Setting becomes very important

=> Some examples….

Tools

- Sharing exhibits
- Annotating by the lawyer or witness
- Saving annotated exhibits
- Using the chat box
- Breakouts and their advantages
- Technical mishaps

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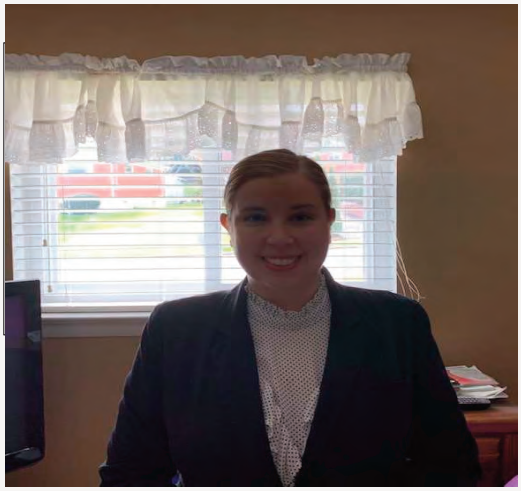
Lighting/Setting



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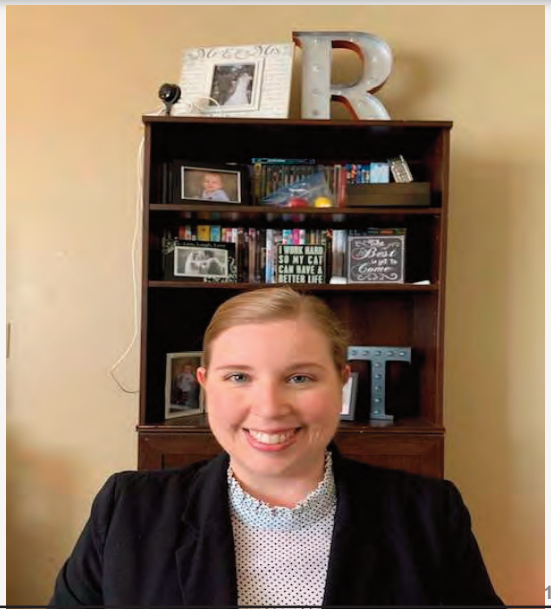
Background



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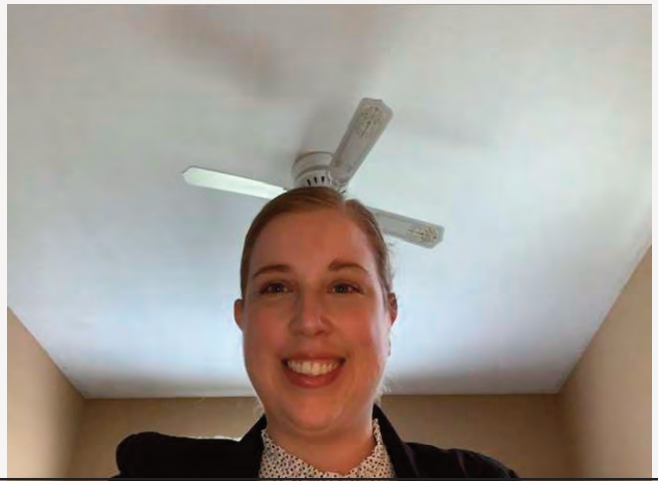
Camera Angle



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How are remote depositions different?

- Body language becomes magnified
- Conflicts between content and demeanor are more apparent
- Time is magnified

21

Witness Communication

22

One Last Reminder

23

Mock Arbitration: The Report

- The report describes the thought process of each arbitrator, which side they favored and the information that they based their decisions on
- The arbitrators' suggestions on how to improve the presentations
- The information the arbitrators wanted to know that was not available to them in the presentations
- Graphics recommendations

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Summary

- Do the arbitration research online if the real arbitration is online
- Start thinking about your virtual courtroom early
- Make sure you get quality mock arbitrators
- Ensure the proper security measures are used
- Make sure to use the same rules and procedures as the real arbitration
- Make sure the mock arbitrators do not know who is paying for the research project

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Preparing A Witness/Client for Deposition

Brock Atkins, Esq.
Justin A. Bayer, Esq.

Timing

When?

Where?

How Often?

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TMZ
JUN 20 2012 12:27:16

TMZ
MAR 6 2014 14:58:27

What to Review

Checklist

- Complaint/Answer
- Discovery Responses
- Key Documents
- CV/Resume

Types of Witnesses

Types of Witnesses

Types of People

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7

The Big Picture

Helping Witness Understand Process and the Big Picture

- "Depositions"
- Their Role
- The Case

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8

Stress Test

Tips on final preparations

Fires Involving Utility Companies

Presented By:
Hon. Sandra Mazer Moss (Ret.)
Joseph L. McGlynn, Esquire – de Luca Levine LLC
Joseph A. Ricchezza, Esquire – Salmon, Ricchezza, Singer & Turchi, LLP

On December 28, 2015, successful businessman Thomas Rayburn passed away of a heart attack while in this home. He was survived by his wife, Missy, and his autistic 30 year old son, Justin. For the next year, the house remained in the same condition including the holiday decorations.

One year later to the day on a snowy evening, Justin was asleep in his bedroom when he heard crackling sounds and smelled smoke coming from downstairs. He also heard the smoke and carbon monoxide detectors going off. He ran down the steps to see the living room TV and surrounding area on fire. He woke up his mother and they exited the house. In the process of doing so, he burned his hand on the doorknob. He then ran across the street and watched his house burning in flames.

The house sustained significant damage with repairs totaling $750,000. There was also damage to the personal items in the house totaling $500,000. In addition, the Rayburns had to relocate and live in a small rented home for close to one year. Justin Rayburn's condition deteriorated after this fire as he began to experience nightmares, flashbacks, tearfulness, irritiable bowel syndrome and depression. His mother had initial nausea and vomiting from carbon monoxide exposure with lingering headaches. Mrs. Rayburn also had a small art studio in home. The fire caused damage to some of her current projects.

What types of claims for damages arise out of the preceding fact pattern?

Possible Claims:

- Real Property Loss
- Personal Property Loss
- Additional Living Expense
- Lost Profits
- CO exposure
- Negligent Infliction of Emotional Distress

How do you investigate this fire and evaluate potential claims and defenses?

- Preservation letters to and from parties
- Retention of liability experts including Origin & Cause and Electrical Engineer
- Site inspection with notice to all interested parties
- Consider in situ testing v. removal of evidence
- Retention of evidence and possible lab examination
- Possible involvement of ATF OR Public Uitility Commission
- Securing of video cameras from property and surrounding properties (e.g Ring Doorbells)

RING Video

Additional Facts..

- **Earlier on the day of the fire, the telecommunication company was at the house working on their system**
- **The electric utility reported a branch striking a power line on the same circuit as this house at 12:02 a.m.**
- **Earlier in the month of the fire, an electrician installed a ceiling fan in the family room of the house**

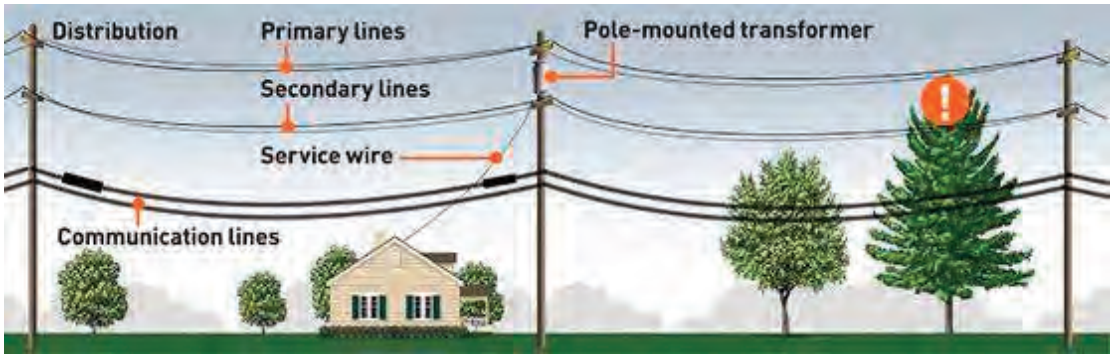
What theories come to mind after hearing this fact pattern?

- **Telecomm company did work without a properly grounded system that led to the fire**
- **The branch hitting the power line caused an arc event that led to an equipment failure in the house**
- **There was a fault in an underground cable outside the home**
- **The electrician failed to properly make a connection that caused the TV to malfunction and catch on fire**
- **The television or ceiling fan malfunctioned due to a possible defect**

Have you encountered prior cases where the fire was caused by an underground fault and what do you do?

- **Overhead facilities v. underground facilities**
  - **Manholes, duct banks and conduits**

- Overhead facilities v. underground facilities
  - Map out the electric path e.g. utility poles, primaries v. secondaries, transformers, service drops, meter etc.



- Need to assess the date of install and the installer of the underground cable
- Weak splice connections may exist so need to determine who connected the service from the utility to the customer line
- Determine if prior work was performed on the underground cable
- Examine cable age, rating, conduit etc.

What is your cause of action and theory of liability?

- **Negligence, Breach of Warranty and Strict Liability**
  - **Dangerous Instrumentality; Highest Degree of Care Owed**
  - **Electricity is a good and a product**
- **Suit against electric company, electrician, telecommunications company and TV manufacturer**
- **Failure to properly install, service, inspect and maintain facilities**
- **Suit for insured and uninsured losses**

What types of defenses might you assert?

- **Comparative fault of Plaintiff/insured for not maintain their equipment**
- **Viability of the negligent infliction of emotional distress claim**
- **Tariffs**
- **Spoliation of Evidence**
- **Cost of repair v. FMV v. replacement value under policy**

What types of information and discovery do you need to obtain from the other side and third parties?

- **Focus on causation, liability, and damages**
- **Plaintiff:**
  - **Policies, Procedures, and Protocols**
  - **Agreements with third-party contractors (scope of work, refer to other documents)**
  - **Revitalization and Refurbishment projects, related studies**
  - **Job/Project documentation, incident reports, call/radio logs**
  - **Complete service history for property**
  - **Billing records and account history for property owner**
  - **Tariff**

- **Defense:**
  - **All communications regarding notice to the utility**
  - **All work done on electric at the property including contractor names**
  - **Borough file re permits etc.**
  - **Identity of all electrical equipment, manuals, receipts**
  - **History of flickering lights, outages, fires etc.**
  - **Real estate value records e.g. Realtor, Zillow, tax records**
  - **Personal property: acquisition records, photos, video, replacement documents**
  - **ALE: other rentals in area**
  - **Lost profits: work with expert early in case**
  - **Subpoena all contractors before and after who worked on property**
  - **Full insurance claim file and insurance policy**

What are some other issues that arise from fires involving utility companies?

- **AMI METERS**
- **POWER SURGES**
- **SERVICE DISRUPTIONS**
- **INSTALLATION DEFECTS**
- **INFRASTRUCTURE FAILURES**
- **INSPECTION & MAINTENANCE**
- **EXCAVATION DAMAGE**
- **TREE AND VEGETATION DAMAGE**
- **STORM/WEATHER DAMAGE**
- **TARIFF DEFENSES**

Artificial Intelligence is Altering the Face of Medicine

By: Samuel D. Hodge, Jr.
Dispute Resolution Institute

I. Artificial Intelligence

A. Artificial intelligence permeates all aspects of life from providing driving directions to answering questions through applications like Siri and Alexa.

B. Health care is no different.[1] About 86% of medical providers use at least one type of artificial intelligence in their practices.[2]

C. However, such employment presents uncharted risks since not all possible results presented by these systems are known.[3] As a result, the tort implications remain unsettled since both the technology and its uses are still emerging.[4]

II. The Science of Artificial Intelligence

A. Artificial intelligence (hereinafter "AI") deals with the hardware and software applications that permit computers "to determine relationships between datasets and apply the learned relationships in a predictive fashion."[5]

B. These systems attempt to mimic the brain's neural network.[6] They employ different types of information such as "algorithms, pattern matching, rules, deep learning and cognitive computing" to determine how to understand the information.[7]

III. How AI Works

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[1] *Arguing the Pros and Cons of Artificial Intelligence in Healthcare*, Health IT Analytics, March 2, 2022, https://healthitanalytics.com/news/arguing-the-pros-and-cons-of-artificial-intelligence-in-healthcare.
[2] Sarah Kamensky, *Artificial Intelligence and Technology in Health Care: Overview and Possible Legal Implications*, 21 DEPAUL J. HEALTH CARE L. 1 (2020).
[3] *Id.*
[4] *Id.* at 1-2.
[5] Supratik K. Moulik et al., *Applications of Artificial Intelligence in the Emergency Department*, 27 EMERGENCY RADIOLOGY 355, 358 (2020).
[6] *Id.*
[7] *What is artificial intelligence in medicine?*, IBM, https://www.ibm.com/uk-en/watson-health/learn/artificial-intelligence-medicine.

A. These systems work by the software accumulating background data about a problem "through sensors or human input."[8] That information is then compared to the collected data, and the software decodes the background information founded upon the previously collected materials.[9]

B. The software contemplates many various possibilities, and "predicts which action will be most successful based on the collected information."[10] While this method produces useful outcomes, it is restricted by the boundaries of the imputed data.[11]

C. These systems can perform undertakings previously believed to demand human intelligence. They can deal with uncertainty, "learning from experience; making predictions; interpreting language in a complex, contextual manner."[12]

IV. Artificial Intelligence in Healthcare

A. It is estimated that by 2030, "AI may affect up to 14% of global domestic product with half of this effect coming from improvements in productivity," and the health care field will probably be a priority for its implementation.[13]

B. "AI will transform healthcare by 'deriving new and important insights from the vast amount of data generated during the delivery of health care every day.'"[14]

C. These systems are presently being used to diagnose disorders such as heart arrhythmias, low blood sugar, tissue pathologies, and abnormalities visible on diagnostic imaging.[15]

V. Advancements In Medicine

A. Physicians have long grappled with "balancing the exorbitant amount of patient information with diagnosing disease accurately," and that dilemma

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[8] Tom Harris & Chris Pollette, *How Robots Work*, HOWSTUFFWORKS (Jan. 10, 2022), https://science.howstuffworks.com/robot.htm.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Frank Griffin, *Artificial Intelligence and Liability in Health Care*, 31 HEALTH MATRIX 65, 67 (2021).
[14] *Id.*
[15] Giovanni Briganti & Olivier Le Moine, *Artificial Intelligence in Medicine: Today and Tomorrow*, 7 FRONTIERS MED., 1, 2-3 (2020).

has been exacerbated by "an overall shortage of clinical support."[16]

B. The development of AI in medicine allows physicians to diagnose and treat illnesses from a new platform.[17]

C. The magic of this technology is that it can answer queries presented by physicians, suggest diagnoses and treatment strategies, and predict the probability of success behind each treatment suggestion.[18]

D. An AI system can oversee an individual's health and can offer a customized treatment plan premised upon the patient's medical records.[19]

E. The one medical application of artificial intelligence that has garnered much attention is robotic surgery.

1. This form of high-tech surgery permits a doctor to perform a variety of complex procedures with increased exactness than is available through conventional techniques.[20]

2. This type of AI assembles information by observing physicians perform recurrent surgeries.[21] Coupled with the capacity to remember the movements of a surgeon, AI assists these robots with the deduction and use of cognitive actions like decision-making, problem-solving, and speech recognition.[22]

VI. Limitations of Artificial Intelligence in Medicine

A. AI in the medical field will test the status quo as health care embraces the new technology.[23]

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[16] Talya Van Embden, *Paging Dr. Robot: Applying an Outdated, Regulated Scheme to Robotic Medicine*, 43 NOVA L. REV. 387, 398 (2019).
[17] *Id.*
[18] Jessica S. Allain, *From Jeopardy! To Jaundice: The Medical Liability Implications of Dr. Watson and Other Artificial Intelligence Systems*, 73 LA. L. REV. 1049, 1050-51 (2013).
[19] *Id.*
[20] *Robotic surgery*, MAYO CLINIC (Mar. 26, 2021), https://www.mayoclinic.org/tests-procedures/robotic-surgery/about/pac-20394974.
[21] Madhu Prasad, *AI-Enabled Robotic Surgery: How Collaborative Robots Are Assisting Surgeons*, FAR NORTH (Oct. 18, 2020), https://www.farnorthsurgery.com/blog/aienabled-robotic-surgery-how-collaborative-robots-are-assisting-surgeons.
[22] *Id.*
[23] *Arguing the Pros and Cons of Artificial Intelligence in Healthcare, surpa,* note 2.

B. Some medical personnel, such as pathologists and radiologists, are concerned that the new technology will replace them.[24]

C. Some studies reveal that patients are hesitant to follow the recommendations presented by AI even when it surpasses doctor recommendations.[25]

D. Another criticism is that surgical robots "operate logically, as opposed to empathetically."[26]

1. While AI software may be able to assign a patient to a particular rehabilitation unit or nursing home, the system may not consider a patient's modest financial means or the person's personal preferences.[27]

E. Artificial intelligence also raises challenges involving data privacy and security. These concerns are magnified because most algorithms require access to a vast amount of data and patient records for training and many health systems are not ready for its full-scale implementation.[28]

VII. Legal Issues Raised by Artificial Intelligence in Medicine

A. The use of AI in medicine will create tort consequences because of the inability to forecast all liability scenarios.[29]

1. Little guidance exists on how the tort system will respond to these quickly changing medical systems, and the duty of care.[30]

2. This deficiency means that health care providers will be unable to depend upon accepted medical practices but will be required to repeatedly research, and follow the most recent developments to ascertain the best and safest treatment plan.[31]

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[24] *Id.*

[25] Chiara Longoni & Carey K. Morewedge, *AI Can Outperform Doctors. So Why Don't Patients Trust It?*, HARV. BUS. REV. (Oct. 30, 2019), https://hbr.org/2019/10/ai-canout-perform-doctors-so-why-dont-patients-trust-it.

[26] Arguing the *Pros & Cons of Artificial Intelligence in Medicine, supra* note 2.

[27] *Id.*

[28] Ben Leonard and Ruth Reader, *Artificial intelligence was supposed to transform heath care. It hasn't*, Politico, August 15,2022, https://www.politico.com/news/2022/08/15/artificial-intelligence-health-care-00051828.

[29] *Id.*

[30] Gary E. Marchant & Lucille M. Tournas, AI Health Care Liability: From Research Trials to Court Trials, J. HEALTH & LIFE SCIS. L. , Feb. 2019, at 23, 32.

[31] Gary E. Marchant & Lucille M. Tournas, *supra* note 53.

3. The allocation of responsibility among the stakeholders when no one entity is solely responsible for the diagnosis muddles judicial resolution.

4. It is also hard to determine breaches of the duty of care given untested AI software.[32]

5. The primary reason for apprehension in assigning responsibility for medical errors arises when no one can "'see' the reasoning made by the artificial intelligence technology."[33]

6. This limitation fosters concerns about whether standard products liability principles should be applied, finding that the technology manufacturer is responsible, or if the physician managing the patient through AI technology should be liable.[34]

B. Products Liability

1. Since products liability is a creature of state law, theories of liability will sound in negligence, strict liability, or breach of warranty.[35]

   i. Regardless of the theory, a claimant must prove the item that caused the injury was defective at the time it left the hands of the seller, and that the defect caused the injury.[36]

2. Suppliers of medical devices and manufacturers are an obvious target for injured claimants.[37]

3. Several theories of products liability arise - design defect, manufacturing defect, and marketing defect.[38]

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[32] *Id*.
[33] Sarah Kamensky*, supra* note 3.
[34] *Id*.
[35] *Id.*
[36] John Villasenor, *Product liability as a way to address AI harms*, BROOKINGS (Oct. 31, 2019), https://www.brookings.edu/research/products-liability-law-as-a-way-to-address-ai-harms/.
[37] David Goguen, *Product Liability Claims Involving Medical Devices*, NOLO, https://www.nolo.com/legal-encyclopedia/product-liability-claims-medical-devices-29684.html.
[38] What is Product Liability?, FINDLAW (Jul. 2, 2019), https://www.findlaw.com/ injury/product-liability/what-is-product-liability.html#:~:text=Product%20liability%20refers%20to%20a,are%20in%20the%20distribution%20chain.

4. A creator of AI technology cannot always foresee how the computer will function once it is utilized in the field.[39]

    i. Consequently, one might assert that it is not fair to allocate liability to an entity whose efforts were detached from the actual use of the technology.[40]

5. Defenses to a Product's Liability Claim

    i. One theory is that the software was not defective. Rather, if a defect was present in the product, it was created after the unit or software was given to the user.[41]

    ii. A more fundamental issue is whether software can be the foundation of a products liability claim. The defense may assert that software is more like a service than a tangible item.

C. Informed Consent

1. A few issues arise involving informed consent and artificial intelligence. For instance, does the law of informed consent compel health care providers to tell their patients that AI will be used to help in treatment decisions?

2. Informed consent is premised upon the patient's right of self-decision is based upon the duty to reveal. That right can only be properly exercised if the patient is given sufficient information to make an intelligent decision.[42]

3. The standard for ascertaining whether there is an obligation to reveal that AI was employed in arriving at a diagnosis is "what a reasonable patient would find material."[43]

4. Nevertheless, there is no obvious answer to this determination.

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[39] Sarah Kamensky, *supra* note 3 at 13.
[40] *Id.*
[41] John Villasenor, Product liability as a way to address AI harms, BROOKINGS (Oct. 31, 2019), https://www.brookings.edu/research/products-liability-law-as-a-way-to-addressai-harms/.
[42] Canterbury v. Spence, 464 F.2d 772, 786 (D.C. Cir. 1972).
[43] I. Glenn Cohen, *supra*, note 81 at 1443.

5. One possibility is to treat this technology as another "member of the care team."[44]

6. Health care providers may even be required to explain how they use an AI system and how much they do or do not understand the recommendations given their limited understanding of how the technology arrived at its conclusions.[45]

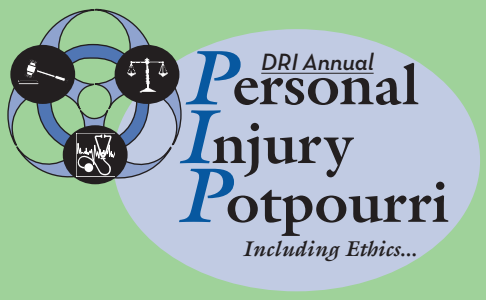
7. Courts may analogize an AI system to a consulting doctor.

D. Breach of Warranty

1. If the claimant can overcome the initial problem of showing that the technology is a product and not a service, the plaintiff must then prove that (1) the product was obtained from the defendant; (2) the seller provided an express and implied warranties; (3) the seller breached the warranty because the system did not work as advertised; and (4) the plaintiff was injured.[46]

2. It is unlikely for a patient to succeed on a breach of warranty claim in a medical device setting because it is typically the medical provider, and not the patient, that purchased the system.

[44] *Id.*
[45] *Id.*
[46] Joe Fornadel & Wes Moran, *Predicting Liability Risks Based on the Existing Regulatory and Legal Framework*, FOR DEF., Sept. 2020, at 48, 52.



Biographical Background

Seminar Participants and Contributors

Highest Quality CLE

BIOGRAPHIES

HON. DANIEL J. ANDERS

Judge Daniel J. Anders has served on the Court of Common Pleas of Philadelphia since 2007. He was nominated by Governor Edward Rendell and unanimously confirmed by the Pennsylvania State Senate in 2007. On November 3, 2009, Judge Anders was elected to a full ten-year term. On November 5, 2019, Judge Anders was retained for a second ten-year term.

Judge Anders currently serves as the Supervising Judge of the Civil Division where he manages nearly 30 trial judges who are assigned to the Civil Division and who hear all civil cases including mass torts, major jury, arbitration appeals, non-jury and equity matters, mortgage foreclosure, tax matters, and statutory appeals. He previously served as a Judicial Team Leader in the Civil Division, where he was responsible for the case management and disposition of nearly 8000 civil jury cases from initiation of the civil action all the way through trial and post-trial motions. Judge Anders previously served in the Criminal Division, where he conducted hundreds of jury and bench trials on major felony cases including attempted murder and rape cases. He started his judicial service in the Family Court Division, where he heard cases involving at-risk children who were abused or neglected.

Judge Anders routinely lectures to judges, lawyers and law students on Pennsylvania civil law and the Pennsylvania Rules of Evidence, including at the Pennsylvania Bar Institute, the Pennsylvania Conference of State Trial Judges and the Philadelphia Bar Association's Bench-Bar conference. He is an adjunct law professor for the Drexel University Kline School of Law where he teaches Pennsylvania Civil Practice. Judge Anders is the General Editor for *Ohlbaum on the Pennsylvania Rules of Evidence* as well as three legal practice guides published by LexisNexis: *Pennsylvania Civil Pre-Trial Practice, Pennsylvania Civil Trial Practice* and *Pennsylvania Civil Discovery*. Judge Anders currently serves as one of two judges on the Supreme Court of Pennsylvania's Civil Procedural Rules Committee. From 2017 to 2020, Judge Anders was the president of the International Association of LGBTQ+ Judges, which has nearly 500 judicial members from across the world.

Prior to his judicial service, Judge Anders practiced at Pepper Hamilton LLP, where he represented clients in business-to-business litigation to help resolve disputes in a fair and equitable manner. As an attorney, his outstanding legal and community work won him high praise from his peers in the legal and business communities, including being named as a "Lawyer on the Fast Track" by the Philadelphia Legal Intelligencer and one of the Philadelphia Business Journal's "Forty Under 40."

Judge Anders is the first openly LGBTQ person nominated by a Governor and confirmed by the State Senate as a judge in Pennsylvania, and the first openly gay man to run for public office in the City of Philadelphia. He graduated *cum laude* from the

University of Pittsburgh's law school and served as an editor of the school's Law Review. He received his undergraduate degree in political science from Lehigh University

BROCK ATKINS, ESQUIRE

Brock J. Atkins is Counsel at Tucker Law Group and focuses his practice on complex civil litigation matters. He is a highly recognized trial lawyer with more than 50 cases tried to jury verdict in both state and federal court. His experience includes litigating matters involving civil rights violations, employment discrimination, personal injury and class actions.

Before joining the Tucker Law Group, Mr. Atkins worked for the City of Philadelphia Law Department in the Civil Rights Unit and the Tort Claims Unit as a Divisional Deputy City Solicitor. As a City Solicitor, Mr. Atkins provided advice and counseling to various City departments. Mr. Atkins also trained attorneys in the Law Department on effective trial, oral and written advocacy. He has lectured at national conferences on trial advocacy, jury selection, municipal liability and police/community relations.

Mr. Atkins coordinated efforts between the Department of Justice and the Philadelphia Police Department, and helped the City implement the Department of Justice's recommendations. Committed to improving police/community relations, Mr. Atkins served as the liaison between the Law Department and the Police Oversight Board.

Mr. Atkins is a graduate of Georgetown University Law School. He is licensed to practice in Pennsylvania and Georgia. He lives in the Germantown section of the City with his wife and three children.

JUSTIN A. BAYER, ESQUIRE

Mr. Bayer is a partner in the firm and focuses his practice on defending clients from claims involving professional liability, commercial transportation, municipal defense, bad faith and commercial disputes. He frequently defends high exposure claims as well as complex insurance and professional liability matters throughout Pennsylvania and New Jersey. He also regularly consults with clients on claim avoidance and pre-suit claims.

Mr. Bayer frequently teaches legal education programs for risk managers, claims professionals, other lawyers, and law students. He regularly presents on topics including case evaluation, legal ethics, professional liability, commercial transportation, risk, and legal procedure.

He has been honored as a Pennsylvania Super Lawyer by both the Philadelphia Magazine and by Law and Politics in 2019, 2020, and 2021. Previously he was recognized as a "Rising Star" from 2007-2018 by both publications. Mr. Bayer also serves as a court-appointed settlement facilitator and mediator for complex civil cases.

Mr. Bayer is an active member of the Montgomery Bar Association and the Pennsylvania Bar Association. He is currently the President-elect of the Montgomery Bar Association. He is a past President of the Trial Lawyer's Section, past Chair of the Young Lawyers' Division of the Pennsylvania Bar Association and was a member of the Pennsylvania Bar Association's Board of Governors from 2015-2018. He is also an active member of several Risk, Claims and Civil Defense organizations.

Mr. Bayer is a graduate of Lehigh University (2001) and Villanova University School of Law (2004). He is admitted to practice in the United States Court of Appeals for the Third Circuit, the United States District Court for the Eastern, Middle and Western Districts of Pennsylvania, the Commonwealth of Pennsylvania, the Superior Court of New Jersey and the United States District Court for the District of New Jersey.

Mr. Bayer resides with his wife, Kelly, and their two sons, George and Thomas, in Montgomery County, Pennsylvania.

JAMES E. BEASLEY, JR., ESQUIRE

Jim Beasley Jr. is the managing member of The Beasley Firm, assuming that role after his mentor and father, Jim Beasley, Sr., passed away in 2004. Since that time, Jim has shaped the
Firm to best meet the changing requirements and increasing demands that the new millennium has placed on law firms. As of 2016, the Firm is as strong, tight and focused as it has ever been, determined to litigate the toughest civil lawsuits. Under Jim's direction, The Beasley Firm continues to be the go-to destination for all aggrieved people, including lawyers, judges, and even physicians, pursuing
professional malpractice, air crash litigation, libel, and business torts.
Jim's results exceed $300 million in awards for his clients, in a variety of complex matters. Thus far in his career, Jim has been voted as one of the Best Lawyers in America, a top 100 Pennsylvania Super Lawyer since 2006, and one of the top 75 plaintiffs' attorneys in the United States. He carries a 10 rating with Avvo and is one of the diminishing numbers of attorneys that would rather be on trial than pushing paper. As noted below, Jim has a particular expertise in aviation litigation as well as medical malpractice claims.

After graduating from Temple University with a major in the Honors molecular biology program, and a minor in history, Jim went to the University of Pennsylvania to study medicine, and in particular molecular genetics. However, growing up as the son of Jim Beasley, Sr. caused him to refocus his career, and to that end, he received his law degree from the University of Pennsylvania, in addition to the medical degree he received from PENN. Jim has a third graduate degree — a Masters in Trial Advocacy — graduating first in his class, with Honors, from the Temple University Beasley School of Law. He is a Fellow of the American College of Legal Medicine and frequently lectures on complex civil litigation.

Jim makes sure that the Firm continues to contribute to the community. To that end, Jim frequently has a number of *pro bono* clients, and in 2009 was an award winner for the Philadelphia Volunteer for the Indigent Program. The Firm also sponsors the Temple University Beasley School of Law's LEAP (Law, Education, and Planning) program, which has high school students participate in "mock trial" programs across the Commonwealth of Pennsylvania. This program has helped focus many local high school students to attend college and gives many their first introduction into the Law.

Jim is also an accomplished stunt pilot, with commercial and multi-engine instrument ratings, and is one of the few pilots in the world qualified to operate high-performance World War II fighter aircraft, such as the North American P-51 Mustang and the immortal Supermarine Spitfire. He is one of a dozen civilian pilots chosen by the U.S. Air Force to fly these classic fighters alongside today's operational fighters at air shows around the world. Each summer you can watch Jim as one of the featured performers at Atlantic City Air Show — "Thunder Over the Boardwalk"— flying his P-51 Mustang over a record crowd of 700,000 spectators.

SCOTT B. COOPER, ESQUIRE

Scott Cooper is a partner at Schmidt Kramer and specializes in personal injury law with an emphasis on motor vehicle accident and insurance cases. An active member of the Pennsylvania Association for Justice (PAJ), Mr. Cooper served as its 2012-13 President. He has also named chair of its Legislative Policy Committee and served on both the Executive Committee and Board of Governors. In 2014, Mr. Cooper was appointed by Pennsylvania Governor Tom Wolf to Co-chair, and to help lead, a Transition Team review of the Department of State/Commonwealth for the incoming Administration.

In 2022, and since 2006, Mr. Cooper was named by Pennsylvania Super Lawyers® as a Pennsylvania Super Lawyer and he has been listed again as one of the Top 100 lawyers in Philadelphia and the Commonwealth. Prior to that recognition, he was a Pennsylvania Super Lawyers® Rising Star and in 2006 was named by the Legal Intelligencer as a "Lawyer on the Fast Track." In 2008, Mr. Cooper was honored by PAJ and awarded its prestigious Milton D. Rosenberg Award for leadership and efforts for victims' rights. In 2005, Mr. Cooper received the Association's prestigious George F. Douglas Amicus Curiae Award for outstanding appellate advocacy.

He was also voted "Reader's Choice Attorney" by Harrisburg Magazine. In 2014 and 2015, he was named a Top Lawyer by the Central Pennsylvania Business Journal for his personal injury work on behalf of Plaintiffs. He has also been named to the Best Lawyers in America each year since 2013. In the 2023 edition of Best Lawyers he was named Lawyer of the Year for Appellate Practice, Insurance Law and Litigation – Insurance. He was also selected for Personal Injury Litigation – Plaintiffs. In 2016, he was appointed by Dean Christian Johnson of the Widener School of Law – Commonwealth to its Board of Advisors.

Mr. Cooper is Honored and privileged to have been awarded “America’s Most Honored Professionals 2015” for continuous professional recognition – an accomplishment realized by the Top 1% of American Professionals.

In December 2014 he was named a “Select Lawyer” by Susquehanna Style Magazine. In March 2015 he was invited to membership in The National Trial Lawyers: Top 100 Trial Lawyers. In the June 2015 edition of Harrisburg Magazine he was named a Local Legal Leader 2015 for his work in Personal Injury & Auto Accidents. He is also a member of The National Association of Distinguished Counsel, the NADC is comprised of the top one percent of the nation’s attorneys.
Mr. Cooper is an editor for the leading treatise on Pennsylvania Auto Insurance released in December 2012, the Third Edition of the Pennsylvania Motor Vehicle Financial Responsibility Law, Pennsylvania Motor Vehicle Insurance: An Analysis of the Financial Responsibility Law. He is also an editor of the supplements for the Third Edition which have been released in 2013 and 2014 and was also a contributing editor on the Second Edition of the treatise. Mr. Cooper has been involved in and argued many significant appellate cases in the Pennsylvania state and federal courts including: Rupert v. Liberty Mutual, Prudential v. Colbert, Mullin v. Commonwealth, Richmond v. Prudential, L.S. v. Eschbach, Ricks v. Nationwide, Wirth v. Aetna, Nott v. Aetna, Blood v. Old Guard, Sackett v. Nationwide, Everhart v. PMA, State Farm v. Rosenthal, Craley v. State Farm, Erie v. Baker, Orsag v. Farmers, Generette v. Donegal, GEICO v. Ayers, Heller v. League of Cities, Smith v. Rohrbaugh, Marlette v. State Farm, Stepanovich v. State Farm, Wolfe v. Allstate and Bumbarger v. Peerless.

He is also the author of “The A to Z of Civil Depositions in Pennsylvania” published by PBI Press in February 2013. The text is a manual for attorneys who need assistance and ideas with handling various types of civil depositions in the Pennsylvania state and federal courts. He has also served as an adjunct Professor at the Harrisburg campus of Widener University School of Law where he taught a Products Liability course.

Mr. Cooper is also a member of the Philadelphia Trial Lawyers Association (PTLA), American Association for Justice (AAJ) and the Pennsylvania and Dauphin County Bar Associations. A frequent lecturer and author who is also involved with the community through the Harrisburg Jewish Community Center, Mr. Cooper received his J.D. from Widener University School of Law (1993) and his B.A. from the University at Albany (1990).

JOSEPH A. CULLEN, JR., ESQUIRE

Joseph A. Cullen, Jr. is a Shareholder and Member of Stark & Stark’s Accident & Personal Injury Group focusing on the area of catastrophic personal injuries and wrongful death. Mr. Cullen concentrates his practice in the representation of Plaintiffs in all aspects of personal injury litigation including motor vehicle accidents, motorcycle accidents, trucking accidents, bus accidents, commercial vehicle accidents, bicycle

accidents, pedestrian accidents, dram shop litigation, premise liability litigation, and construction accidents. Mr. Cullen is an experienced and skilled trial attorney litigating both state court and federal court cases throughout the Commonwealth of Pennsylvania. Mr. Cullen is often called upon by other attorneys to handle complex catastrophic personal injury and wrongful death cases.

In addition to personal injury litigation, Mr. Cullen serves as Solicitor to the Bucks County Office of the Controller. In that capacity, Mr. Cullen provides legal services to the Controller of Bucks County, on a wide array of legal issues.

PETER J. DIVON

Peter Divon is presently the Director of the Discovery Court Unit and the Dispute Resolution Center within the First Judicial District – Court of Common Pleas. He has twenty years of experience within the First Judicial District, specifically within the Civil Section of the Trial Division. He is a former judicial aide to the Honorable Paul P. Panepinto. He is currently the ADA Coordinator for the First Judicial District – Trial Division Civil and a member of Mid-Atlantic Association for Court Management. As Director of the Discovery Court Unit, he oversees approximately 30,000 motions per year in all Major Jury cases, Commerce, Non-Jury, Arbitration, Arbitration Appeal, Petition Actions and over 300 Name Change Petitions. As director of the Dispute Resolution Center he oversees over 3600 settlement conferences, which currently has a 41% settlement rate.

MAUREEN M. EAGEN, ESQUIRE

Ms. Eagen has been the Director of the Arbitration Center since 2014. Prior to her appointment as Director, Ms. Eagen was law clerk to the Honorable D. Webster Keogh, who was assigned to the Major Civil Trial division, Day Forward program. Ms. Eagen also clerked for Judge Keogh during his tenure as Administrative Judge and Supervising Judge of the Criminal Trial division. For approximately five years, Ms. Eagen served as a law clerk to various Senior Judges in the Criminal Trial Division handling major felony cases.

Ms. Eagen graduated magna cum laude from the University of Scranton with a B.S. in Economics/Finance in 1988. She received her J.D. from the Dickinson School of Law in 1991. After law school, Ms. Eagen clerked for the Honorable Leon Katz and the Honorable Albert John Snite, Jr., before returning to Northeastern Pennsylvania. There, she worked for three years as a litigation associate with Rosenn, Jenkins & Greenwald. She returned to Philadelphia in 1996 and worked for Post & Schell, as well as Rubintate, Jacobs & Saba.

During her tenure with the FJD, she has helped coordinate the “Law Day” trials for the Early Education Program with the Honorable (Ret) Annette Rizzo and participated in the

FJD's Management Development Program and Civil Education, Training and Development Program. Ms. Eagen also serves on the Board of Trustees for Independence Charter School, currently as Vice President.

JEFFREY P. GOODMAN, ESQUIRE

Jeffrey, a partner at Saltz Mongeluzzi Bendesky, is a trial lawyer who focuses on complex and high-profile cases around the globe. Primarily representing victims in mass disasters, Jeffrey has set numerous records for the largest settlements and verdicts in history. Jeffrey holds the records for: the largest settlement in American History for a construction disaster ($1.2 Billion – Surfside Condominium Collapse); the largest settlement in American History for a train derailment ($227 Million – Derailment of Amtrak Train 188); and the largest settlement in American history for a maritime accident ($150+ Million – Sinking of Stretch Duck 07). Based on this experience, courts around the country regularly ask Jeffrey to serve as lead counsel or appoint Jeff to plaintiff's management committees. In his first 12 years of practice, Jeffrey obtained and collected over $2 Billion for families whose loved ones were killed and survivors who were catastrophically injured due to the negligence of corporations.

Jeffrey's most notable work relates to the June 24, 2021, collapse of Champlain Towers in Surfside, Florida that claimed the lives of 98 people. Jeffrey served as co-lead counsel on behalf of the Plaintiffs for all issues of liability, construction, and collapse causation. Following the announcement of the record-setting $1.2 Billion settlement, the Honorable Michael A. Hanzman, who presided over the case, praised Jeffrey's work stating:
"Mr. Goodman is one of the finest construction litigation attorneys that has ever appeared before the Court. His competence and expertise were immediately apparent to everyone involved in this case, and his outstanding work was critical to its success. The Defendants were represented by some of the most talented and formidable construction defect lawyers in the country … and without [Mr. Goodman's] talents and experience this may not have been a 'fair fight'. The Plaintiff class was very fortunate to have him as part of the leadership team."

The $1.2 Billion settlement is the largest settlement in American History for a single event and also the largest settlement in American history for a construction failure. The second largest construction settlement in American History was also due in large part to Jeffrey's work. In 2017, following a six-month jury trial in Philadelphia, Jeffrey, along with SMB President Bob Mongeluzzi won a favorable verdict and a $227 Million award on behalf of the victims of the Market Street Building Collapse in Philadelphia, which killed 7 people.

Recently, Jeffrey served as lead counsel on behalf of the families whose loved ones died in the September 25, 2021 Amtrak derailment near Joplin Montana. Jeffrey led

the complex settlement negotiations in this case that resulted in a total settlement of $81.5 Million on behalf of SMB's clients.

Currently, Jeffrey serves as co-lead counsel for the 34 families whose loved ones died in the sinking of the Conception Dive Boat in California. Jeffrey also represents dozens of individuals who have been catastrophically injured by corporate negligence and the families of those that have been killed. Jeffrey is based out of SMB's Philadelphia office; however, his unique cross-border experience leads Jeff to routinely represent clients throughout the United States and internationally. Jeffrey has obtained multi-million-dollar recoveries for clients in Pennsylvania, New York, Illinois, Montana, New Jersey, Florida, West Virginia, North Carolina and the US Virgin Islands.

ANN T. GREELEY, Ph.D.

Ann Greeley has been a psychologist and trial consultant for 30 years and is currently the Vice President of DecisionQuest's Northeast Division. She has consulted on over 1,000 civil and criminal cases in more than 100 federal and state jurisdictions throughout the country. She has conducted extensive pre-trial research including traditional in-person mock trials and focus groups, online jury research, online and in-person surveys, in-person and remote witness preparation, jury selections and post-trial interviews and consulted on online and in-person mediations, arbitrations and bench trials. She has worked in venues in most of the 50 states and territories, including Alaska, Puerto Rico and Guam.

Dr. Greeley has worked on intellectual property, product liability, antitrust, white collar, commercial, employment, insurance coverage, environmental, personal injury, including sexual assault and abuse cases, and medical, accounting and legal malpractice cases, many of which have been high stakes. She has written extensively on jury research, witness preparation and jury selection as well as diversity issues in the courtroom and most recently, the psychology of jurors in the COVID-19 era

SAMUEL D. HODGE, JR., ESQUIRE

Samuel D. Hodge, Jr. is a mediator/arbitrator with the Dispute Resolution Institute and a professor at Temple University where he teaches both law and anatomy. As a seasoned litigator he enjoyed an AV preeminent rating and has been named a Top Lawyer in Pennsylvania on multiple occasions. He is considered one of the most popular continuing legal education instructors in the country and has received multiple teaching awards including the Temple University Great Teacher Award and his Anatomy for Lawyers course was the recipient of the ACLEA Award for Outstanding Achievement in Continuing Legal Education. His interactive teaching style has received national attention including stories in the New York Times, the Chronicle of Higher Education, the Philadelphia Inquirer, National Public Radio and television. In addition, he is the most published author on medical/legal matters in the country and his research has

been cited in court opinions, legislation, law reviews and legal or medical journals. He has authored more than 170 articles and 10 books including Anatomy and Physiology for Legal Professionals, PBI Press, Head Trauma and Brain Injuries for Lawyers, ABA; The Spine, ABA; The Forensic Autopsy, ABA; Clinical Anatomy for Attorneys, ABA; the award-winning book, Anatomy for Litigators, ALI ABA; Law and Society McGraw Hill; The Legal Environment of Business, McGraw Hill and Thermography and Personal Injury Litigation, John Wiley and Sons. Mr. Hodge is a graduate of Temple University School of Law and the Graduate Legal Studies Division of the Law School. He has also received mediation training at the Strauss Institute for Dispute Resolution and is a member of the American Association of Anatomists and the American College of Legal Medicine.

THERESA M. ITALIANO, ESQUIRE

Ms. Italiano joined the Civil Case Management Center as a Case Manager in August, 2015, becoming the Supervising Case Manager in July 2019 and subsequently, Director of the Case Management Center in March 2020. Immediately prior to coming to the Center, she was an Assistant City Solicitor in the Child Welfare Unit after having held the position of legislative aide in Philadelphia City Council for several years. Ms. Italiano began her legal career as an associate at the firm of Naulty, Scaricamazza and McDevitt. She also served six years as a Hearing Committee Member for the Disciplinary Board of the Supreme Court of Pennsylvania. Prior to attending law school, she was an elementary school teacher in the William Penn School District for eleven years. A member of both the Pennsylvania and New Jersey bars, Ms. Italiano earned both a B.S. cum laude and an M.S. from the University of Pennsylvania. She received her J.D. from Temple University School of Law.

SUSAN C. KEESLER, ESQUIRE

Ms. Keesler is an associate at McCormick & Priore. Ms. Keesler brings several years of litigation experience which spans a broad range of practice areas including general litigation, criminal law, and employment discrimination law. Prior to joining McCormick & Priore, Ms. Keesler served as an Assistant District Attorney for the Office of the Philadelphia District Attorney, where she prosecuted a variety of cases ranging from sex offenses, domestic violence, and multi-defendant complex gun violence cases, and conducted misdemeanor and felony bench and jury trials. More recently, Ms. Keesler practiced as an employment discrimination and civil rights attorney where she represented plaintiffs in various actions for violations of federal and state laws, including Title VII, Title IX, Section 1981, Section 1983, the American with Disabilities Act, the Age Discrimination in Employment Act, the Family Medical Leave Act, Whistleblower Protection laws, and common law tort claims both in Pennsylvania and New Jersey. Ms.

Keesler currently focuses her practice in areas of premises litigation, products liability, and construction litigation.

AMANDA JONAS LORENTSON, ESQUIRE

Amanda Jonas Lorentson is a trial attorney and passionate advocate for victim's rights. At McEldrew Purtell, Amanda represents victims of catastrophic personal injury, rideshare negligence, premise liability, FELA, civil rights and medical malpractice. Prior to joining McEldrew Purtell, Amanda earned a master's degree in education from George Mason University and her bachelor's degree summa cum laude in English from the University of Buffalo. Amanda began her career teaching math, science and English to elementary and middle school students of Washington DC and Philadelphia public schools. Amanda earned her law degree from University of Pennsylvania Carey School of Law during which time she also interned with the Defenders Association of Philadelphia.

Amanda began her legal career at Kline & Specter. At Kline & Specter, Amanda realized her passion as an advocate for victim's rights by securing millions on behalf of her clients.
Amanda also serves on the Eastern District of Pennsylvania Volunteer Attorney Panels, representing formerly pro se civil rights, employment, and social security plaintiffs. She coaches Penn Law's trial advocacy team, is an adjunct professor at Thomas Jefferson University and is an active member of the Pennsylvania Association for Justice. PAJ recently named Amanda the 2023 Amber Racine Award winner for founding the Diverse Mentoring Initiative—a program that places diverse 1Ls from across the country in plaintiff's firms in Pennsylvania for paid summer clerkships.

When not practicing law, Amanda—a Buffalo, NY native—is cheering on the Buffalo Bills or spending time with her husband and her rescue pup, Emmy.

JOSEPH L. McGLYNN, ESQUIRE

Joe McGlynn is a partner at de Luce Levine. Joe applies his courtroom knowledge and years of trial practice to assist clients with their subrogation cases. He conducts initial investigations and evaluations of claims and advises clients regarding recovery potential in large loss property matters. Having conducted over 40 jury trials, as well as numerous bench trials, Joe employs tactics learned through those experiences to provide a strategy that yields the best possible results.

As a former ADA in the Philadelphia District Attorney's Office, Joe successfully prosecuted some of the city's highest-profile crimes, seeking justice on behalf of the community's most vulnerable victims.

JUDGE SANDRA MAZER MOSS (RET.)

In joining the Dispute Resolution Institute in January 2014, Judge Moss brings to the private sector the special and unique skills she finely honed over the last three decades. Her consummate experience in supervising, presiding over, and resolving the entire gamut of civil litigation is unparalleled. The judge's creative, hands-on, and practical approach makes her exceptionally qualified to serve as an arbitrator, mediator, private judge, or special master.

As a stalwart of the First Judicial District Civil Trial Division, Judge Moss has served as Trial Judge, Judicial Team Leader, and most notably, was the founder and first Supervising Judge of the Complex Litigation Center. It was at the Center that Her Honor developed groundbreaking special programs for asbestos and mass tort cases. Many of the protocols that she created have been adopted throughout the nation, and were the basis of her appointment as Chair of the State Judges Mass Tort Litigation Committee, where she served under the auspices of The Conference of Chief Justices.

Judge Moss has been known for years by the trial bar as the judge who was able to settle the cases that the lawyers said would never settle. Her Honor's excellent listening skills and analytical out-of-the-box approach enabled her to forge a consensus where amicable resolution was not on counsel's radar screen. The judge's willingness to stay with a case and "work it," even when the parties are at an impasse, bodes extremely well for her success as an ADR professional.

It is no surprise that Judge Moss' weighty accomplishments have been recognized by local and national organizations. The Philadelphia Bar presented her with "The William J. Brennan Distinguished Jurist Award," which is the highest award given to a jurist in recognition of Judicial Excellence. Her willingness to train other judges was recognized by the National Judicial College by awarding Judge Moss their highly coveted Service Award, and her expertise in case resolution resulted in Judge Moss' testifying before The Unites States Senate Judiciary Committee.

A graduate of the Beasley School of Law at Temple University, Judge Moss has been awarded their "Certificate of Honor," was given by the alumni association's inaugural "Women's Champion Award," and has been a President of their Inn of Court. In addition to serving as an Adjunct Professor of Law at Temple, she has also taught at Widener Law School and Drexel University, and participated in literally hundreds of continuing legal and judicial education programs.

MONICA O'NEILL, ESQUIRE

Monica is a partner at Thomas, Thomas & Hafer. Monica is admitted to practice in Pennsylvania, New Jersey and New York. As an Assistant District Attorney in the Kings County District Attorney's Office, Brooklyn, New York, she specialized in investigating

and prosecuting arson and economic crimes. Her practice focuses in the area of insurance defense, including property, arson, casualty, fraud and construction litigation.

She has been published in numerous insurance industry publications and is a frequent speaker at national and regional conferences of PLRB and IASIU in the areas of arson investigation, fraud detection and the adjustment of property claims. She currently is a member of the Philadelphia Loss Conference and is frequently appointed by the Philadelphia County Court of Common Pleas to preside over settlement conferences as a Judge pro tem.

EDITH A. PEARCE, ESQUIRE

Edith Pearce is an exceptionally smart (she is a member of MENSA) and gifted female personal injury lawyer. Edith Pearce spent over 10 years working as a lawyer for an insurance company and defense firm before concentrating her practice on injured victims and starting The Pearce Law Firm. Having grown up in the Philadelphia suburbs, graduating from Villanova University and Temple Law School, Edith is a true "Philadelphia lawyer." Edith Pearce has been practicing law for over 25 years and is a well-known woman personal injury attorney & legal expert who has appeared on various television programs, including ABC, CN8, NBC 10 News, and Fox 29 News and is a frequent invited guest on Who's Who In PhillyLabor Radio Show on WWDB 860 AM Talk Radio. Edith has been listed by Philadelphia Magazine 10 times starting in June 2005 as a "Super Lawyer". The Super Lawyer designation is awarded to only 5% of Pennsylvania lawyers, and is based on a survey of more than 34,000 lawyers across Pennsylvania. Edith Pearce has received the highest rating (AV Rating) from Martindale-Hubbell, the country's preeminent personal injury lawyer rating service. An AV rating signifies a lawyer who has "achieved the highest levels of professional skill and integrity," and is only awarded to about 2 out of every 10 lawyers. Edith Pearce has received the following accolades and awards: Top 100 National Trial Lawyers; Newsweek 20 Leaders in the Law; Top Rated Lawyers as published by The Philadelphia Inquirer; Top Rated 10.0 Avvo Rating; 10 Best Female Attorneys by the American Institute of Personal Injury Attorneys; and inclusion in the peer review publication, The Best Lawyers in America.

JOSEPH RICCHEZZA, ESQUIRE

Joseph Ricchezza is the managing partner at Salmon Ricchezza Singer & Turchi. Mr. Ricchezza was born in Philadelphia, Pennsylvania and is currently a resident of New Jersey. Mr. Ricchezza actively litigates matters throughout the State of New Jersey and in Philadelphia and the surrounding counties. He has also been admitted pro hac vice in other jurisdictions at the request of his clients. Mr. Ricchezza has been named as a *Pennsylvania 2020 and 2021 Super Lawyer*. He has also received the *AV Preeminent* rating from Martindale-Hubbell. In addition to his active litigation practice, he serves as an appointed arbitrator and mediator at the request of various insurance

carriers and defendants. He also provides periodic seminars and educational courses covering a wide variety of topics including deposition strategy and techniques, evidence preservation, personal injury protection benefits, defense and indemnity obligations, commercial vehicle emergency investigations, mitigation of damages in catastrophic loss cases and common carrier liability. He is the author of “Threshold Determinations Pennsylvania’s Unique Approach to Strict Products Liability” and “A Critique of the Various Court Secrecy Reforms and a Model for Future Reforms”.

STEVEN M. SCHAIN, ESQUIRE

2019 National Law Journal “Finance, Banking, & Capital Markets Trailblazer” award winner, Senior Counsel Steve Schain runs 100% woman owned, national cannabis law firm Smart-Counsel, LLC's PA and NJ practices and Chair its Financial Services Group. Admitted to practice in Pennsylvania and New Jersey, Steve represents entities, governments and individuals in litigation, regulation, compliance, preparing and submitting license applications, entity formation, and drafting legislation. A nationally recognized consumer finance litigation, banking law and cannabis law expert, Steve is a *The Legal Intelligencer*, *New Jersey Law Journal,* and *Cannabis Business Executive* columnist, frequent Pennsylvania Bar Institute and National Bar Institute author and lecturer and serves as a court appointed judge *pro tempore* and arbitrator. Steve is also an Adjunct Faculty Member of, and teaches “Cannabis Law” at, Stockton University, one of only 5 universities offering a minor in Cannabis Studies. Steve serves on, and makes regular presentations to, National Cannabis Industry Association, International Cannabis Bar Association, Pennsylvania Credit Union Association, Bank Secrecy Act Compliance Group, Cannabis Professional Advancement Series, and Marijuana Business Daily. Steve also serves on both Commonwealth of Pennsylvania and Philadelphia County administrative committees charged with drafting and revising state and local cannabis related regulations. Steve earned his B.A. degree from Pennsylvania State University and his J.D. degree from the University of Pittsburgh School of Law, where he served as an editor of the Law Review and graduated with honors. Before entering private practice, Steve served as law clerk to a U.S. District Court judge for the Eastern District of Pennsylvania.

JUSTIN P. SCHORR, Ph.D.

Dr. Schorr earned his doctorate in civil and environmental (transportation) engineering in 2015 from The George Washington University. He accredits his most valuable training to his father and grandfather, both of whom were industry leaders in collision reconstruction. Now the principal collision reconstruction engineer and president of DJS Associates, Inc., Justin specializes in traffic engineering, intelligent transportation systems, and collision reconstruction. Previously an adjunct professor at GW, Justin has brought his engaging style of teaching to the legal, insurance, and engineering communities, offering CE and CLE accredited seminars on topic including Automated Vehicles, Technology in Collision Reconstruction, and Engineering Animations.

Course Planner: *Harris T. Bock, Esq.*

Director of Dispute Resolution Institute, Mr. Bock is a respected and recognized leader in the ADR field. One of the handful of full time neutrals in the Philadelphia area, his practice for the last two decades has been devoted exclusively to serving as arbitrator, mediator, factfinder or hearing officer. Mr. Bock's areas of expertise include business, personal injury, professional malpractice, employment, insurance, partnership, law firm and equitable distribution disputes.

Mr. Bock is routinely selected by agreement of counsel as well as State and Federal Judiciary to serve as Arbitrator, Special Master or Mediator. He is currently Special Hearing Officer for the Commonwealth Court of Pennsylvania. A frequent lecturer for continuing legal education programs, commercial trade associations, insurance carriers and Trial Lawyer and Defense Counsel groups in all aspects of dispute resolution, Mr. Bock has authored numerous articles in the ADR field. He was the founding Managing Editor and was instrumental in initiating publication of The Philadelphia County Reporter in 1977 and served in such capacity until 1990.

Director Bock serves as a consultant in ADR design and utilization. He created and implemented a unique mediation program in the Philadelphia Common Pleas Court and served as Chair of the Philadelphia Bar Association ADR Committee for five years. Under his leadership, ADR awareness and utilization in the Philadelphia area increased substantially. He has also served as special ADR Consultant to governmental entities and Fortune 500 companies, and was recently appointed by the Mayor, President of City Council, and the City Controller to serve as the Hearing Officer for the Philadelphia Water Department's proposed $318 million rate increase for fiscal years 2009-2012.

Mr. Bock is currently Adjunct Professor of Alternative Dispute Resolution at Villanova Law School and has assisted in the teaching of courses on dispute resolution at numerous accredited institutions. He served on the ADR Section of the Pennsylvania Futures Commission and on other state and national ADR related committees and organizations. Mr. Bock also served as an Arbitrator for The International Commission on Holocaust Era Insurance Claims.

Mr. Bock was born and raised in Philadelphia. After graduating from Central High School with Barnwell Honors in 1966, he was inducted into The Beta Alpha Psi Honor Society at Temple University, where he received his B.B.A. in 1970. A 1973 graduate of Villanova Law School, and winner of the U.S. Law Week prize for academic excellence, he received his primary mediation training at Harvard Law School in 1990. Since that time he has received and participated in extensive ADR training from numerous nationally respected training programs. Mr. Bock has also taught mediation with faculty from Pepperdine University Law School's renowned Straus Institute.

Mr. Bock is frequently selected by agreement of the parties and by the Court to serve as special master.

Mr. Bock currently serves as a Board Member of the Philadelphia Affiliate of Susan G. Komen for the Cure.

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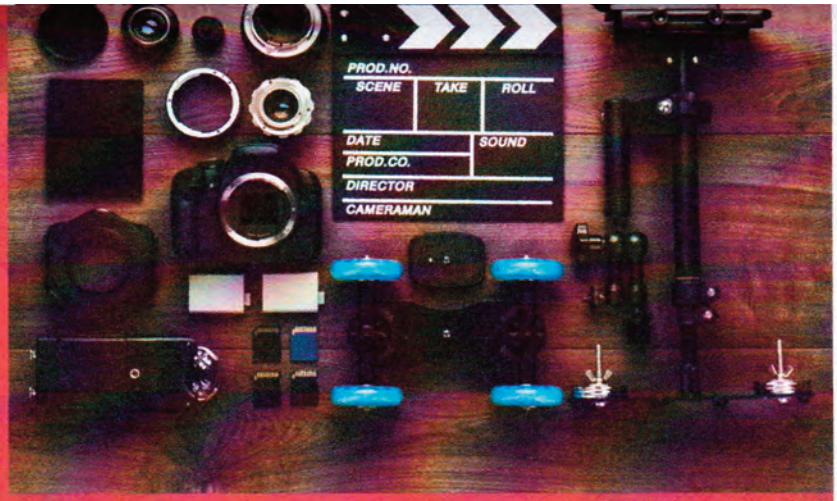

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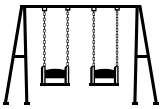

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