THE DEFENSE LINE

Summer 2025

A Publication From Maryland Defense Counsel, Inc.

Understanding AI Agents: What Civil Defense Lawyers Need to Know

By John T. Sly

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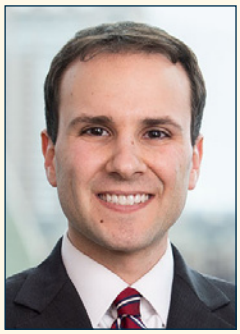

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"I am honored to be nominated for the role of President of Maryland Defense Counsel (MDC) for the 2025 – 2026 term. This is truly a privilege and I am grateful for the opportunity to help guide this excellent organization over the next year. During my term, I welcome anyone to reach out if you have any interest in getting more involved in MDC, if you would like to present a topic during a seminar, or if there is a topic that you have an interest in learning more about. Thank you for your continued support of MDC and I look forward to working with each and every one of you in continuing to make MDC the premier bar association."

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Summer 2025

63 Years of Service to Our Members (1962–2025)

The Defense Line is a publication from Maryland Defense Counsel, Inc.

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Cover Image: Shutterstock.com

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Understanding AI Agents: What Civil Defense Lawyers Need to Know

John T. Sly

As artificial intelligence continues to evolve, one of the most transformative developments for the legal profession is the emergence of AI agents. These aren't just glorified chatbots or simple prompt-based tools. AI agents are autonomous, goal-oriented programs capable of planning and executing multi-step tasks with limited or no human intervention. For civil defense lawyers, understanding what AI agents are, how they might be used in our practice, and the risks they carry — especially in legal research — is becoming increasingly essential.

In Formal Opinion 512, issued on July 29, 2024, the American Bar Association's Standing Committee on Ethics and Professional Responsibility provided its most comprehensive guidance to date on the ethical use of generative artificial intelligence (GAI) in legal practice. The opinion underscores that while GAI tools offer potential efficiency gains, lawyers remain fully responsible for the accuracy, reliability, and confidentiality of any AI-assisted work product. As the ABA puts it, "GAI tools do not relieve lawyers of their ethical duties under the Model Rules of Professional Conduct."

The opinion directly addresses core ethical obligations under several rules. Under Model Rule 1.1 (Competence), lawyers must understand the limitations of AI tools and "exercise independent professional judgment" when relying on AI outputs. Importantly, Formal Opinion 512 states that "lawyers must verify the accuracy of GAI-generated content, including citations and quotations from legal authorities, to avoid the risk of relying on false or 'hallucinated' information." This is especially relevant in light of recent cases where fabricated case citations generated by AI have led to public disciplinary consequences.

Additionally, the opinion highlights confidentiality concerns under Model Rule 1.6, noting that lawyers must avoid sharing sensitive client information with AI tools unless "reasonable efforts" have been made to ensure that the platform protects that information. The ABA also advises that lawyers should consider whether to disclose their use of GAI tools to clients under Rule 1.4 (Communication), particularly when those tools play a significant role in the representation. Ultimately, Formal Opinion 512 makes clear that GAI tools can assist lawyers—but cannot replace the ethical and professional judgment required of them. As AI becomes more integrated into legal workflows, this opinion serves as an important benchmark for responsible and informed adoption.

This article aims to demystify AI agents for Maryland defense counsel, exploring both their promise and the potential pitfalls they pose.

What Is an AI Agent?

An AI agent is a software entity designed to perform tasks autonomously. Unlike traditional AI tools, which typically require user input for each action, AI agents can:

- Accept a goal or objective (*e.g.*, "find recent Maryland appellate opinions on expert witness admissibility");
- Break that goal into sub-tasks;
- Interact with external systems (databases, websites, applications),
- Adapt to new information, and
- Present results in a usable form (*e.g.*, a memo, a summary, a list of citations).

In simple terms, AI agents function more like junior associates or digital interns than calculators. They can be given a task and sent off to work while the user focuses on other matters.

Potential Legal Applications

AI agents are particularly well-suited for work that is repetitive, research-intensive, and rule-based—making them a natural fit for several legal functions. Below are some of the more promising applications relevant to civil defense practice.

1. Automated Legal Research

AI agents can be instructed to identify case law, statutes, and administrative decisions relevant to a legal issue. For example, an agent could:

- Search for all federal district court decisions within the Fourth Circuit over the past five years on a particular evidentiary issue;
- Identify trends in judicial reasoning;
- Extract and summarize holdings;
- Format results in memo form.

What makes this different from traditional keyword search is the automation: Once programmed with a goal, the agent works

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See photos from MDC past events: mddefensecounsel.org/gallery

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through multiple steps and sources without requiring continuous input.

2. Monitoring Legal Developments
AI agents can track:

- New court decisions in jurisdictions of interest;
- Proposed legislation in Maryland or in Congress;
- Amendments to federal and state court rules;
- Regulatory guidance and administrative bulletins.

Imagine an AI agent that notifies you every time a bill affecting medical malpractice caps is introduced or amended in the Maryland legislature — or one that flags a Maryland Supreme Court decision with implications for summary judgment standards.

3. Compliance and Litigation Risk Assessment
In the corporate and healthcare defense arenas, AI agents can:

- Analyze large volumes of contracts or policies for potential compliance risks;
- Compare language across documents to flag inconsistencies;
- Track patterns in claims data and litigation trends.

Some law firms and insurers are already experimenting with agents that can comb through electronic health records or incident reports to flag high-risk files.

4. Drafting and Document Review
AI agents can assist in:

- Drafting form responses to discovery requests;
- Reviewing large production sets for key facts or themes;
- Identifying missing or inconsistent information across pleadings or disclosures.

This use is particularly valuable in mass tort and complex litigation settings, where managing large document volumes efficiently is a constant challenge.

5. Case Management Support
Some AI agents are being developed to serve as quasi-paralegals:

- Creating to-do lists based on deadlines and court rules;
- Monitoring docket updates;
- Coordinating calendar events across multiple cases and teams.

The goal isn't to replace legal staff but to relieve them from routine or time-consuming administrative burdens.

Key Risks: Hallucinations and Reliability

Despite the potential, AI agents are not without risk. Perhaps the most well-known and troubling issue is *hallucination* — when an AI system generates plausible but false or fabricated information.

In legal research, this can manifest as:

- Citing non-existent cases (*e.g.*, fabricated federal reporter citations),
- Misrepresenting holdings or procedural postures,
- Misapplying precedent across jurisdictions or contexts.

These errors are particularly dangerous because they are often presented confidently and in proper legal formatting, making them difficult to spot without careful human review.

Example:
A New York attorney made headlines in 2023 when a brief submitted to federal court included multiple fabricated cases produced by ChatGPT. While that example involved a general-purpose AI tool, similar issues can arise with AI agents if proper controls are not in place.

Future Safeguards: Integrating with Trusted Legal Databases

One promising avenue is the potential future development of AI agents that cross-reference their findings against verified databases such as Westlaw, LexisNexis, or Bloomberg Law.

- Before presenting a citation, the agent could check the case's existence and subsequent history.
- Citations could be accompanied by confidence ratings or source links.
- Agents could be configured to only use certain vetted sources or licensed platforms.

These improvements would not eliminate the need for human oversight, but they would reduce the risk of gross errors and help ensure the reliability of automated research.

Moreover, we may soon see AI agents that monitor *ongoing validity* of citations — flagging when a case cited in a prior brief has since been overturned or criticized. For defense lawyers managing multiple active files or repeat issues, this kind of real-time legal hygiene could be a game-changer.

Best Practices for Using AI Agents in Legal Practice

To safely integrate AI agents into your workflow:

- Test in non-critical environments first (*e.g.*, internal memos or research exercises);
- Never skip human verification, especially for case law or statutory interpretations (keep a "person in the loop);
- Work with IT or vendors to understand how data is stored and secured;
- Avoid inputting privileged or confidential client data into consumer-grade platforms;
- Stay updated on bar guidance, court rules, and ethics opinions related to AI.

The Maryland State Bar Association, the ABA, and many state courts are actively exploring how AI technologies intersect with legal ethics, privilege, and professional responsibility.

Conclusion

AI agents are not science fiction — they're here, and they're evolving quickly. For civil defense attorneys, they offer new ways to conduct research, manage caseloads, and advise clients more efficiently, but understanding their strengths, limitations, and safeguards is critical to making informed, ethical, and effective use of this technology.

The next few years will likely see dramatic developments in this space. As lawyers, we don't need to become data scientists — but we do need to become informed users and vigilant stewards of new legal technologies.

John T. Sly, Esquire is Partner at Warrach & Brown, LLC. John has a strong interest in the intersection of law, medicine, and emerging technology, particularly, the legal and ethical implications of AI use in litigation and risk management.

Data Security in the Age of AI: Safeguarding Sensitive Information — Q2 2025 Facts & Findings

Tony Donofrio

AI in the Legal Industry: Best Practices

As AI and machine learning are increasingly applied to law practice, they bring benefits and dangers. On the one hand, they provide enormous efficiency in rote task execution and, with more recent advances, analysis and decision-making. On the other hand, if not applied thoughtfully, they can introduce material risks to information privacy and data security. The legal field is attractive to cybercriminals due to the highly confidential and sensitive information. Mismanaged use of AI can introduce new vulnerabilities for them to exploit.

A data breach can have grave consequences for any firm: Economic loss, reputational damage, regulatory penalties, and legal liabilities. As AI systems' role in managing and analyzing sensitive data becomes more significant, lawyers must improve their data privacy and cybersecurity rigor.

Legal professionals must embrace best practices to protect sensitive information from AI-related risks. Generally accepted and fundamental practices in secure data management still apply to using AI tools but with increased urgency. These practices and processes are critical when your firm manages its own systems. When your firm utilizes external services and systems, it is imperative to ensure that the providers follow best practices. The key practices and system implementation areas are encryption, data masking or anonymizing, and process controls and validation.

Encryption

At the core of data security, encryption converts data into a code only authorized parties can decrypt. Since AI platforms tend to be external services, it is imperative for legal professionals to use end-to-end data encryption at rest (i.e., wherever the data is stored and processed in your system and the AI platform provider's system) and in transit (i.e., whenever data is being sent or received over the internet through your AI platform provider's system) to ensure clients' sensitive data is protected. Encryption safeguards data from interception by cybercriminals.

We should see increased adoption of an emerging encryption approach called homomorphic encryption, which enables encrypted operations on encrypted data rather than plaintext data. This technology further ensures privacy by averting the risk of inappropriate data access while data is decrypted for processing using standard encryption/decryption schemes.

Data Masking Or Anonymizing

Data masking conceals information in a database by replacing it with substituted content, making it impossible for cybercriminals to obtain sensitive details. This is important during system development and testing, especially when real data might be in danger due to vulnerabilities within the testing environment. Legal professionals can be confident that their masked data is secure even in less controlled environments. This is especially important when introducing AI platforms to the system since they are generally external to the system's environment.

Process Controls And Validation

It is critical for businesses and organizations to conduct regular security audits and vulnerability assessments aimed at identifying and mitigating the potential exposure of sensitive data. Controls and audits should be technical and operational. Audits of controls such as SOC-2 will help ensure your firm is following sound operational practices around information security and privacy. It is equally important to conduct regular broad synthetic technical assessment exercises to identify system vulnerabilities. Exercises like external and internal penetration testing, compatibility checks, and application vulnerability scanning are more important than ever. Third party risk assessments of your AI platform providers should demonstrate the effectiveness of their audits of their controls. This proactive approach ensures that all measures are current and effective in defending against cyberattacks.

Leveraging Advanced Technologies for Enhanced Data Security

Cybersecurity Tools

Cyberattacks' continually advancing nature necessitates using improved technologies to ensure data security. AI can continuously process large datasets in real time to identify patterns and anomalies that threaten our systems. When used as part of your cybersecurity arsenal, AI can provide early warnings of threats, which can then be blocked or mitigated. Check that your cybersecurity tool kit addresses AI-based hazards and leverages

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The MDC Expert List

The MDC expert list is designed to be used as a contact list for informational purposes only. It provides names of experts sorted by area of expertise with corresponding contact names and email addresses of MDC members who have information about each expert as a result of experience with the expert either as a proponent or as an opponent of the expert in litigation. A member seeking information about an expert will be required to contact the listed MDC member(s) for details. The fact that an expert's name appears on the list is not an endorsement or an indictment of that expert by MDC; it simply means that the listed MDC members may have useful information about that expert. MDC takes no position with regard to the licensure, qualifications, or suitability of any expert on the list.

To check out the **MDC Expert List**, visit **www.mddefensecounsel.org** and click the red "Expert List" button in the left hand corner of the home page or access it from the directory menu.

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To volunteer, contact the chairs at **www.mddefensecounsel.org/leadership.html**

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AI to defend against threats and identify vulnerabilities.

Verification of Authenticity Using Blockchain

AI adoption may exacerbate the challenge of content authentication. When machines can generate and edit content, how can we guarantee that similar or derivative content produced by trained professionals is not compromised? Blockchain technology provides a tamperproof decentralized ledger for transactions and content. It is used in the legal industry to execute contracts, case files, and other vital documents that parties send, confirm, revisit, or change. We can expect blockchain to be more commonly used to certify content's authenticity.

Building and Maintaining a Proactive Defense Posture

With the emergence of generative AI, the cybersecurity stakes are higher than ever. It is time for firms to redouble their vigilance and efforts around data privacy and security. All the best practices still apply, with the aforementioned points gaining emphasis where the use of AI is concerned. Beyond that, the following considerations should be covered.

It is paramount to choose the right AI vendors to ensure data security. Third-party risk assessments must be updated and applied to any service or system provider using AI. It is critical to review security policies and practices as well as validation and certification artifacts. When using AI, ask these important questions:

- Does the service provider store your or your client's data on their systems after processing? If so, how, why, where, and for how long?
- Does the service provider train their AI model using your or your client's data? If so, is that acceptable? (Typically, it is not acceptable for law practices.))
- How does the service provider ensure that bias, hallucinations, and regression do not adversely affect the accuracy and quality of their service?

Data ownership is a critical concern when vetting AI vendors. Firms should ensure they retain ownership of their data, and vendors should not be able to use data beyond the scope of the agreement.

Understanding how vendors allow access to the data and with whom it is shared is critical to maintaining security. Vendors must have clear policies outlining which people can access the data and under what conditions, as well as any other third parties with whom the data might be shared. Firms should also ask about the transparency of the AI system. A vendor should be able to explain how its AI models work and how it ensures the data fed to those models is secure.

By following best practices in cybersecurity and properly vetting AI vendors, firms can guarantee that their organization and the organizations they partner with protect the privacy and confidentiality of client and firm information. By redoubling these efforts, firms can reap the benefits of reduced cybersecurity risk and enjoy the immense advantages that AI promises.

Tony Donofrio is Chief Technology Officer at Veritext. Tony develops and supports the mission-critical systems clients, reporters, and employees use daily. He focuses on ensuring clients and staff have the best experience with easy-to-use, highly reliable, and highly secure tools.

Editors' Corner

The editorial staff would like to extend our gratitude to members of MDC and the defense bar for their contributions to this edition of *The Defense Line*. Additionally, we wish to thank Sridhar Natarajan, M.D., M.S., Amy Courtney, Ph.D., Jeff Trueman, Esquire, and Planet Depos for their insightful articles in this publication of *The Defense Line*. The articles in the current edition highlight issues that are central to litigation presently, including the benefits and risks of the use of Artificial Intelligence (AI) and the legal ethics that the use of AI presents. The current edition also offers strategies of timeless importance for oral advocacy and effective mediation. Contributors also discuss the complexities of the analysis of motor vehicle crashes that involve fire, the nuances of third-party litigation funding, and the procedures for addressing workplace violence. The current publication also features summaries of workers' compensation and liability-related bills from the 2025 legislative session of the Maryland General Assembly. This edition of *The Defense Line* offers excellent learning points, and we hope that you enjoy the diversity of articles.

We are grateful to serve as a resource to the members of MDC and continue to look forward to opportunities to support MDC.

Please contact the Publications Committee if you have any comments, suggestions, or submissions for the next edition of *The Defense Line*.

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Legal Ethics and AI: Oops, I Did It Again...

Craig S. Brodsky

No, I am not referring to the Britney Spears song. Instead, it's fake case cites, a judge's admonition, sanctions and impending discipline.

Today's lesson comes from U.S. District Court Judge Kelly Rankin in the District of Wyoming after he discovered that plaintiffs' counsel cited eight nonexistent cases in motions in *limine*. The case, *Wadsworth v. Walmart Inc., et al*, is a product liability action involving hoverboards. Summary judgment motions have been denied, and the case appears headed toward trial.

On Jan. 22, plaintiffs filed motions in *limine* citing nine cases. Likely due to the defense responses, Rankin learned that all but one of the cases appeared as if generated by artificial intelligence. Therefore, he, *sua sponte*, issued a show cause order directing three different plaintiff's lawyers to show cause "why he or she should not be sanctioned."

Rankin also instructed the lawyers to provide true and correct copies of the cases used in support of the motions in *limine*, required them to provide a thorough explanation of what happened, and asked them to explain why they should not be sanctioned under Rule 11 and the court's inherent power. He mandated the responses be under oath.

All three lawyers responded, each taking responsibility for their part in the use of fake cases in the motions. Two lawyers — lead counsel and lead local counsel — admitted they did not read the motions before they were filed. Instead, each relied upon another lawyer on the team to prepare and file the motions.

In his response, lead counsel told the court about the remedial steps promptly taken after the show cause order issued. The steps taken included promptly withdrawing the motions in *limine*, being honest and forthcoming about the use of AI in the response to the show cause order, paying opposing counsels' fees for defending the motions in *limine*, and implementing policies, safeguards, and training to prevent another occurrence in the future (and providing proof of such measures).

The court found all three lawyers violated Rule 11. The court stated it was easy to Shepardize cases. Rankin admonished the lead lawyers who did not review the motion before it was filed, suggesting they left themselves open to Rule 11. The court also concluded a lawyer who closely read the brief should have questioned its accuracy because it contained an obviously erroneous legal standard.

The lawyer primarily responsible for the motions was sanctioned hardest, a $3,000 fine and revocation of his pro hac vice status. The revocation of his pro hac status may be considered discipline that could follow him across many cases.

The lead lawyer and local counsel were each fined $1,000. Depending on local rules, the finding of a Rule 11 violation may also have to be disclosed in other cases.

The obvious violations here were the failure to check cites and relying too much on AI to prepare briefs. However, there are also other ethics issues. The primary ones relate to office policies and reviewing of the work by colleagues. Secondary issues relate to "taking responsibility."

In Maryland, managerial responsibilities are primarily governed by Rule 19-305.1 and 19-305.3. Partners and managing attorneys should put policies and procedures in place so firms and offices comply with the Rules of Professional Conduct.

From *Wadsworth*, we know that every firm needs to have an AI policy. Other obvious areas include IOLTA, billing, calendaring.

Under Rules 5.1 and 5.3, when partners and managing attorneys put proper policies and procedures in place, they are generally not responsible for the misconduct of others in their office. Of course, there are exceptions. Some core exceptions are when a lawyer fails to take steps to avoid a rule violation he or she knows about before it occurs or failure to mitigate misconduct after learning about a rule violation.

I'm not suggesting that all lawyers need to spend the next several weeks going over all the policies in the office. I am, however, suggesting if you don't have one on AI or you allow folks to sign your name to pleadings before you review them yourself, you might consider instituting some additional steps.

Craig Brodsky, Esquire is Partner at Goodell, DeVries, Leech & Dann LLP. For more than 25 years, Craig has represented attorneys in disciplinary cases and legal malpractice cases, and he has served as ethics counsel to numerous clients. Craig's Legal Ethics column appears monthly in The Daily Record.

The Evolution and Adoption of Litigation Technology

Planet Depos

The evolution and adoption of litigation technology has touched all corners of the legal landscape, and the court reporting industry is no exception. From basic tools to sophisticated systems, advancements in litigation technology have streamlined proceedings for legal professionals, making it easier to collaborate, stay organized, and prepare for their cases without sacrificing accuracy or security.

Image: Pixabay.com

The Early Days of Litigation Technology in Court Reporting

The journey of litigation technology in the court reporting industry has been marked by significant milestones. In the 1970s, the first computer-aided transcription system was invented, making it less time-consuming for court reporters to produce their transcripts. Over the next three decades, the court reporting profession would continue to transform thanks to technology. This led to closed captioning capabilities and Computer-Aided Realtime Translation (CART), now known as Communication Access Realtime Translation.

Modern Litigation Technology and Court Reporting

As digital tools become more user-friendly and easily accessible, the adoption of legal technology has increased. Today, technology is prevalent in all aspects of court reporting, from scheduling a proceeding to case management, to capturing the record and producing a verbatim transcript. Legal videography, remote proceedings, digital exhibits, and online document repositories are all great examples of how useful modern litigation technology can be.

Adoption of AI in Litigation Technology

Artificial intelligence (AI) and automated speech recognition (ASR) technologies are paving the way for faster, more efficient processes when it comes to court reporting. Innovative solutions, like the Planet Pro™ Litigation Technology Suite, are changing the game for legal professionals across the board. Whether it's live streaming a deposition feed in real time, generating rough drafts in less than 24 hours, or summarizing lengthy transcripts, our litigation technology serves as a time-saving tool designed to enhance and optimize proceedings from beginning to end.

Planet Depos is a leading court reporting firm that harnesses innovative technology to streamline proceedings and deliver better outcomes for clients. As the only international firm which industry experts lead, Planet Depos dedicates itself to reshaping the field with cutting-edge, technology-driven services.

2025 Inaugural Sidebar Social

MDC was a proud sponsor of the inaugural **Sidebar Social** on May 15, 2025 at the Sky Lobby Conference Center in Baltimore. The theme of the event was "Choose civility. Choose connection." Approximately 140 members of the plaintiffs' and defense bars, including federal and state judges, Maryland Association for Justice (MAJ), and MDC, came together for an evening of cocktails and networking. The event was an opportunity for defense counsel to demonstrate to the legal community an equal commitment to civility, in litigation and communications, with opposing counsel. The turnout was spectacular, and MDC thanks all event sponsors!

Winning the Nine-Figure Argument: Strategies for Success When $100,000,000+ is at Stake on the Day

Jordan D. Rosenfeld

The first time you prepare for an argument where your client could lose more than $100 million, it is important to practice self-care. Three years ago, I was preparing for my first nine-figure argument. Memorial Day weekend 2022, I locked myself in my home office and studied the relevant briefing, researched, and practiced out loud for 42 billable hours. By Monday afternoon, I was hallucinating. (This is not self-care).

Bad health choices aside, I won that argument. The court not only denied the plaintiffs' summary judgment, it granted mine, eliminating $250 million of exposure for my clients. I thought I had probably won the biggest victory of my career that day, or at least the biggest I would see for a long time. But since then, on four separate occasions, I won arguments that extinguished between $100 million and $700 million in exposure. At trial in November 2024, I delivered closing argument in the rare literal bet-the-company case: if I lost, the Judge would order a $300 million company to liquidate. (I won.)

I wanted to turn these experiences into useful advice for fellow practitioners. So, I set out to answer the following questions for *The Defense Line:* Other than the stakes, what do these wins have in common? Is there a blueprint for winning nine-figure arguments, and if there is, is it any different from winning any other argument? As someone who has argued a half-dozen times when $100,000,000+ was at stake, but many dozens of times when less money was at stake, I can tell you that some key principles are the same. But there are major differences in successfully preparing for and presenting your high-stakes argument.

What is the Same about High-Stakes Arguments?

The most important principle for winning any argument is the same: The judge is deciding the issues, and the judge wants your help to decide. It is essential to recognize specifically what this means. The judge does not care what is important *to you*, or to your client. First, the judge cares about getting the law right. But second, judges care about avoiding a result that seems unconscionable. It is a rare judge that unflinchingly punishes an innocent and rewards a wrongdoer. Judges, particularly in Maryland, prefer a legal interpretation that prevents a wildly unfair outcome. Again, however, the measure is not what seems wildly unfair in your client's eyes. Fairness is measured from an objective totality of the circumstances

When this is your audience, a detached, you will gain the most traction with a detached, reasonable voice. The law, you argue, points in one direction. We see this in cases A, B, C, D, etc. Applying those principles to the facts of this case, there is an answer that the law commands (the one that you are advocating). That outcome, Your Honor, also happens to be the fairest outcome.

Adopting this argument structure, you essentially ignore the fact that you are in an adversarial proceeding, trying to beat an opponent. That is a useful approach for two reasons. First, you want to remove your arguments from the fray. Nothing you are telling the judge has to do with the passions of the parties. Your argument comes from a higher place: Concern for a correct legal outcome. Second, the ideal argument is one the judge can largely copy and paste into their decision, and the judge does not have an opponent. The judge is trying to articulate what the law commands. When your argument reads as a well-crafted opinion, you have made the judge's job much easier.

What is Different about High-Stakes Arguments?

Keeping the focus where it belongs — on the judge — the main difference at high-stakes argument is that the judge feels the weight of the decision acutely. In every nine-figure argument of mine, the judge has asked unsolicited questions about the consequences of particular rulings: If she rules for the plaintiff will the company go under, or in the case of a government defendant would judgment for the plaintiff require an act of the legislature, etc. Trial court judges also typically assume that the losing party in a high-stakes matter, whoever that may be, will appeal. Intermediate appellate judges will assume that there will be a cert petition. The judge therefore assumes there will be more scrutiny of her decision when it's a high-stakes case.

Because the judge anticipates more scrutiny, the judge will apply more scrutiny. That is an advantage for a defendant looking to fend off summary judgment. To maximize that advantage, be aware of these factors weighing on the judge, but do not raise them. Like I said, the judge will *ask you* about the consequences of possible rulings. The judge *is already* aware of the likelihood of appeal. Hammering these points is essentially daring the judge to rule against you. It is like asking if they have the courage to decide in your opponent's favor. You want to be the judge's thoughtful guide, not their antagonist.

The foundation and bulk of your argument should be about what the law commands. The judge will not take a big swing on a decision against you if you calmly and carefully explain why the law cannot support it.

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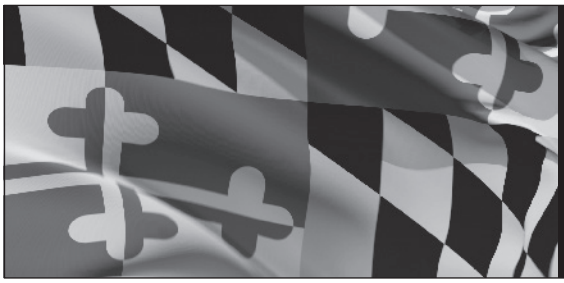

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Making the Ask

What about when you are the defendant making a dispositive motion? Certainly, that same scrutiny works against you. But on three occasions in the last three years, I have convinced a judge to grant a summary judgment that wiped out more than $100 million in exposure. It is a lot of work. But it can be done. The following four tips create the foundation of an effective ask:

1. **Present a comprehensive legal view:** Remember that the judge is hoping your argument will write much of her opinion for her, and in the high-stakes case, that opinion will have to withstand appellate scrutiny. Your argument, in other words, must be suitable to print as a reported appellate decision. For each for the questions at issue, you need to show the judge that you have considered the whole universe of cases in this area of the law, and that you can perfectly articulate the principles. You then demonstrate that this case is the next in that line. Applying the principles to the facts in front of you, there is only one result (the one you are asking for).
2. **Create an argument materials:** As you re-read the briefs, and especially as you moot, the apparent weak points of your arguments will become all too clear. If you give yourself enough time and prep, and moot with smart people, you will come up with good answers to the tough questions. But it is asking too much of yourself to keep all of these second-level arguments in your head. This is particularly true in high-stakes argument at the trial court, which often involves an all-day argument. To keep track of my second-level arguments, I create what I call an "argument matrix." It is a two-column table with multiple rows for every argument section. Each row has a potential tough question for that argument in the left-hand column, and the best answers (and cites if you have them) in the right-hand column. That way, when the judge starts grilling you, you look down at your notes, find the tough question, and boom, there is your answer. If you moot with enough smart people, you will come up with way more tough questions than any one judge can in the moment. If you do this far enough in advance, you will show up to court with all of the answers.
3. **Prepare for unlimited scrutiny:** This is arguably an offshoot of (1), because a comprehensive view withstands scrutiny. But the takeaway is that preparation has to be at another level. For at least your own time researching, mooting, and practicing out loud, you need to behave as if there is no budget. Whatever billable time you are personally capable of spending on prep is a pittance compared to what is at stake. That prep makes the difference. Standing at a lectern for eight hours the weekend before argument to practice talking out loud may seem unfathomable, or unnecessary for someone who has argued however many times before. But getting closer to real-life conditions for more time rather than less gives you an edge. The same applies to running down research rabbit holes. It does not matter that the briefing is long done. When the judge asks a question that is not accounted for in the briefs, pointing that out gets you nothing. The judge's decision must withstand scrutiny; the decision hopefully copies and pastes much of your argument; and your argument therefore needs to have an answer for every question.
4. **Embrace technology and visual aids:** When asking for a big grant of a dispositive motion, you want the barrier to entry to be as low as possible for the judge. In a big, complicated case, that means asking the judge to keep a lot of legal principles and facts straight. Creating a slide deck and bringing a hotseat technician, the same as you might for trial, is a worthwhile investment for any high-stakes argument. For these purposes, I am big believer in flow charts. There might be a legal principle that I think is a sure winner, but I never bet that just one legal principle is strong enough to get my motion granted. So, in successful arguments in the past, I have presented a visual to the judge that shows all of the hurdles that plaintiff must clear to withstand summary judgment, which is another way of telling the judge here are all the principles she must analyze, and if and only if none of the list applies would this claim survive. In terms of presenting a comprehensive view, visual aids can be very powerful evidence that the law really does command one result and permitting the claim to continue would be hard to justify.

Jordan Rosenfeld presenting at MDC's Lunch and Learn on April 3, 2025 at Saul Ewing LLP.

Conclusion: You Can Do This

The good news is that the blueprint to success in nine-figure argument does not require more skills than you have. There is no bullet point above that lists having otherworldly charisma or a once-in-a-generation mind as a prerequisite. Everything you have to do to succeed is something you do, or something you have done. When the opportunity comes your way for a nine-figure day, follow these principles, and believe in yourself. Or give me a call. I know a guy who can enter his appearance in a pinch.

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Force or Fire? Analysis of Occupant Injury Mechanisms in Fatal Motor Vehicle Crashes with Fire

Sridhar Natarajan and Amy Courtney

In a fatal motor vehicle collision (MVC) with fire, associating the cause of death with the overall event may seem clear. Therefore, analysis of all the available evidence may not be completed. However, the complexity of identifying mechanisms of injury in fatal MVCs with fire stems from the potential for antemortem blunt traumatic and antemortem and postmortem thermal injuries, as well as the contributions of toxicology findings. This complexity is particularly apparent when a more detailed understanding is needed to inform insurance compensation decisions, litigation claims, or automotive safety research, for example.

Tragic events like these require objective clarity, which may not be considered during the initial autopsy and investigation. This article is focused on analysis of mechanisms of occupant injuries. Types of information and other areas of investigation that may inform the injury analysis in a given event are discussed. It is highly likely there may be more to a fatal MVC with fire than first impressions indicate, and this information will help identify and describe the relevance of evidence that may inform the injury analyses.

Crash and vehicle factors that increase the risk of acutely fatal blunt traumatic injuries also increase the risk of post-crash fire. Some thermal effects on the body are well established to occur postmortem. Other findings and laboratory measurements are more indicative of whether thermal effects were present in a living (antemortem) individual. The terminal thermal effects identified may obscure blunt traumatic injuries, or, in severe cases, even be mistaken for them. A correct analysis may be informed by understanding the crash event; the involved vehicle and its restraint systems; the location, kinematic response, and biomechanical environment of the deceased occupant; the origin, pattern, and severity of the fire; and/or the totality of the medical forensic autopsy information.

Prevalence of Fatal MVCs with Fire

Various studies have found that 3% to 4% of *fatal* crashes involving passenger vehicles in the U.S. also have a fire.[1, 2] The strongest indicators of whether a fire is likely to result include the severity of the crash, characterized by the crash energy, whether multiple impacts occurred, and whether severe intrusion occurs.[3, 4] Each of these crash-related factors also increases the likelihood of blunt traumatic injuries.

Crash and Vehicle Information

If the vehicle's electronic data was preserved, it should be obtained. The newer the vehicle, the more information may be available regarding pre-crash and crash-related vehicle dynamics, as well as restraint use and deployment. If crash forces and/or fire have damaged the housing of the airbag control module (ACM), for example, it may be worth looking into whether the microchips themselves can be extracted and the data obtained with external equipment. In vehicles with more driver assist technology or electronic monitoring, data may also be stored other places on the vehicle or remotely.

To analyze possible biomechanical mechanisms of blunt traumatic injury, an understanding of the number and direction of impacts and the severity of each is helpful. For a crash involving multiple impacts, the timing between the impacts may be relevant to occupant motion after the first impact and their position and subsequent motion for each additional impact.

After a fatal crash, the vehicle often contains valuable evidence that informs an injury analysis. However, if a fire has also occurred, thermal damage may be extensive. Fire suppression efforts may further affect evidence that may have been present. Nevertheless, informative physical evidence may still be present. For example, intrusion of vehicle structures into the occupant space, physically distorted seat and seatback frames, focal deformation to the steering wheel, or steering column collapse due to driver interaction may be observable even after extensive fire damage. Seat belt marks on latch plates or D-rings may be observable. Areas of sparing from the fire, such as seats or parts of the seatback, may also help inform the occupant injury analysis.

Collection of postmortem remains is challenging in these situations, and the condition of remains at the death scene versus those delivered to the coroner or medical examiner may change. In addition to reports generated by law enforcement, a major accident investigation team, and sometimes other state and federal agencies, it is helpful to obtain available scene photographs in their original digital format. It may be helpful to obtain recordings of 911 calls related to the event, which may include verbal descriptions of initial perceptions. It may be helpful to obtain available security camera, body camera, and bystander cell phone video (including from social media) and to consider witness statements and testimony. These may include information about the scene, vehicle, and occupant(s) at times before all of the thermal damage has taken place or before a decedent has been moved. A scene inspection by coroner or medical examiner staff may include photographs while the remains are still within the vehicle and/or immediately after extraction. These materials can provide important information for biomechanical, fire, structural, and medical forensic analyses. The constellations of findings can help ascertain the medical forensic validity as to the mechanism of death, the cause of death, trauma analysis, pathologic disease processes,

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[1] K.H. Digges et al., SAE International, 2004-01-0475 (2004).
[2] T.A. Fordyce et al., SAE International, 2006-01-0790 (2006).
[3] M. Egelhaaf, D. Wolpert, 22nd ESV Conference (NHTSA), Paper No. 11-0315, (2011).
[4] A. Viklund et al., *Traffic Injury Prevention*, 14:823-827 (2013).

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and the manner of death.

Biomechanical Evaluation

An injury analysis of a fatal MVC with fire will seek to identify potential blunt traumatic injury mechanisms (hypotheses) and then evaluate whether the available evidence supports or refutes them. It is relevant to know whether the deceased was using their lap and shoulder belt properly; whether supplemental restraints deployed; whether forceful contact likely occurred between the individual and some structure, object, or other occupant; and whether the individual was physically entrapped by intrusion into the occupant space. Timing of deployment of passive restraints (e.g., airbags, pretensioners) in the context of the crash sequence may also be relevant to injury risk and potential mechanisms.

Biomechanical evaluation of a fatal MVC with fire may take several forms. Utilizing basic information about the deceased occupant and crash events, the overall likelihood of blunt traumatic injury and/or fatality in a similar event can be evaluated. Medical findings documented in medical records, photos, imaging studies, and the medical examiner file can be used to focus the injury risk analyses. The influence of multiple impacts in an event can be evaluated in series, considering likely occupant orientation after each preceding impact as well as the effectiveness of restraints in subsequent impacts.

More specifically, the kinematics, including direction and extent of movement, and the kinetics (loading on the body) for a similar occupant may be informed by results of relevant crash and sled testing. The resulting loading to specific areas of the body can be compared to federally mandated injury assessment reference values (IARVs)[4] and published results of biomechanical testing to evaluate risk of injury.[5-7] Factors that may affect the likelihood of blunt traumatic injury may be identified, such as being unrestrained or improperly restrained; being out of position; and occupant size, age, or reduced tolerance due to medical conditions or interventions.

In addition, there may be biomechanical data available from relevant standardized testing or research-based testing of a similar make and model to the involved vehicle(s). Bespoke testing, utilizing standard test methodology, can be helpful to answer questions or evaluate specific potential biomechanical injury or vehicle damage mechanisms when needed. If there are concerns about whether specific conditions related to the involved vehicle presented an increased risk of injuries in the event, similar analyses can be conducted with alternate conditions or peer vehicles to evaluate whether the outcome would likely have been different.

> Some reported thermal "injuries" are well-documented postmortem phenomena, including some of the most visually disturbing findings such as charring and pugilistic posturing (boxer pose).

Fatal MVCs with fire present medical forensic challenges with regard to identifying the extent of blunt trauma that may have occurred during the event. Especially when acutely lethal central nervous system injury is suspected, biomechanical and medical forensic evaluations may provide complementary bases to come to a conclusion to a reasonable degree of certainty.[8]

This is as convenient a place as any to point out that, if there are multiple occupants in a vehicle involved in a fatal MVC with fire, each individual must be analyzed. Results from one individual cannot reasonably be applied to other occupants in the vehicle. As in severe crashes without fire, variations in occupant characteristics, seating location, restraint use, and exposure to loading may result in different blunt traumatic injury patterns and severity.

Medical Forensic Evaluation

A coroner or medical examiner is tasked with determining Cause of Death and Manner of Death. Cause of Death is the injury or injuries that led to the demise; the mechanism of death is the physiologic derailments that ended the individual's life. Contributing events or medical findings should be identified and considered when deemed medically forensically applicable. Manner of Death is a medical legal opinion, typically classified as natural, accident, homicide, suicide, or undetermined, and it is beyond the scope of this article.

Thermal effects of a fatal MVC with fire are often prominent, but a complete, orderly examination of the remains needs to be performed. In a rare case, the medical examiner may uncover evidence of homicide, where the crash and/or fire were intended to hide that evidence. A medical examiner or medical forensic expert may be asked to distinguish between blunt traumatic injuries from the crash event and thermal consequences of the fire. They may also be asked to help evaluate whether a driver-related factor likely contributed to the cause of the crash event, such as being under the influence of a substance or experiencing a medical emergency, for example.

Medical forensic analysis of a decedent in an MVC with fire is largely based on trained pathology observations, including visual, microscopic evaluation, examination and dissection of organ systems, and medical imaging studies (x-ray, CT, etc.). These trained observations are accompanied by toxicology to test for presence of drugs and alcohol. After a fatal MVC with fire, additional laboratory measurements that may be informative include the level of carboxyhemoglobin (COHb) in the blood, which is discussed further below.

In addition to an autopsy report, it may be helpful to obtain the coroner's/medical examiner's file, which may include investigator summaries and hand-written notes of measurements and observations. Autopsy photographs in their original format should be requested; in many jurisdictions, the file materials and autopsy photographs need to be requested separately and may require special permissions and timing. Autopsy photographs often include images of the remains "as received" as well as of the autopsy procedure and findings. Any of these photographs may provide information relevant to the analysis of injury mechanisms for the biomechanical analysis as well as the medical forensic analysis. Sometimes, documentation of findings may be in one source but not another.

Documentation of autopsy findings may be organized into pathologic diagnoses. In the case of MVC with fire involvement the subcategories may list thermal injuries, blunt traumatic injuries, toxicology, carboxyhemoglobin (COHb), and pathologic (pre-existing, chronic, or disease) findings. Formats of autopsy reports as well as summary outlines

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[5] H.J. Mertz et al., *Stapp Car Crash Journal*, 2016-22-0018 (2016).
[6] J. Yaek et al., SAE International, 2020-01-0518 (2020).
[7] C.S. Parenteau, A.C. Courtney, et al., IRCOBI Conference, Paper No. IRC-21-50 (2021).
[8] Yoganandan et al., Accidental Injury: Biomechanics and Prevention, 3rd ed., Springer, ISBN 978-1-4939-1731-0 (2015).

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of findings are variable.

Weights of the remains, including individual organs, are a standard part of an autopsy and may be informative with regard to cause of death or a contributory cause of death. After a fatal MVC with fire, postmortem thermal effects may result in loss of overall length and weight of the remains due to combustion and dehydration, so that the reported values are not consistent with those of the individual when they were living. Thermal effects may also obscure otherwise relevant external findings, such as skin abrasions, lacerations, and seat belt marks.

Death in a fire often occurs a considerable time before the fire is brought under control.[10, 11] It is important to be aware that some reported thermal "injuries" are well-documented postmortem phenomena, including some of the most visually disturbing findings. For example, charring of the body largely occurs after death has taken place. The amount of charring and thermal artifact on a body is not a medical or scientific indicator of the time of death or cause of death. It is unrelated to whether the individual was alive or conscious after the crash event.

After exposure to fire, muscles and tendons cool, dry out, and contract. This shortening of muscles and tendons causes joint flexures, resulting in pugilistic posturing, so called because it resembles a boxer in a ready stance. Pugilistic posturing is a postmortem phenomenon. It is unrelated to perimortem posturing or movement, if any, of the individual. It is unrelated to whether the individual was alive or conscious after the crash event.

In evaluating whether an individual was alive when they were exposed to fire, certain medical forensic findings may be informative. If there are heat-related changes to the lining of the trachea, the individual may have breathed in injuriously hot air. If there is soot in the lower respiratory tract past the mouth and throat, the individual may have breathed in smoke. If there is soot in the esophagus, the individual may have swallowed it. In a body that has charring, there is a risk of postmortem transfer of soot particles to the respiratory mucosa. Techniques at autopsy can minimize or eliminate the postmortem artifact. Widely accepted medical forensic texts contain examples of true effects of heat-related damage and smoke inhalation for comparison.

Terms such as "flash fire" or "flashover" may be offered as a *deus ex machina* explanation for low carboxyhemoglobin values that suggest an occupant was not breathing in the smoky environment after an MVC with fire. Flashovers are not common and require a specific stoichiometric mix of fuel, temperature, and oxygen (chemistry) to initiate. If this is an issue, qualified individuals should evaluate whether or not the conditions of the subject fire were likely consistent with a flashover event at any time after the crash.

Quantifying COHb through toxicological analysis of blood collected at autopsy may indicate whether an individual was breathing in smoky air prior to death.[12] There are some general principles for interpretation to be considered in the context of additional incident information. In a fire, carbon monoxide (CO) fumes are generated. Carbon monoxide binds to hemoglobin to form COHb. CO has an affinity to hemoglobin where oxygen attaches that is 200-300 times greater than oxygen. Therefore, it takes only a few breaths of smoke, depending on the CO concentration, to elevate COHb to lethal levels. Lethal levels of COHb are 50-60% in healthy adults, lower in susceptible individuals. COHb levels may reach 10% or more in smokers or individuals exposed to smoky or sooty work environments. The lower threshold for reporting blood levels of COHb varies by jurisdiction and laboratory and may be as high as 10%. Some research suggests that for any postmortem COHb level below 20%, a cause of death other than smoke inhalation should be sought.[13]

Sometimes a question is raised whether low measured COHb levels after a fatal MVC with fire is due to a phenomenon called flash fire or flashover, when a fire suddenly becomes so hot and spreads so fast the individual is unable to breathe. A flashover may happen in closed spaces, including closed or partially vented vehicles, under specific conditions. Experimental studies of flashovers in vehicles indicate that it can take several minutes or longer after a post-MVC fire starts before such conditions are reached, if they are reached at all.[13] If this is an issue, a fire expert may be needed to evaluate the fire temperature and chemistry, and whether conditions would likely have been consistent with a flashover at any time during the post-crash fire.

When lethal head or cervical spine blunt trauma are suspected and the head has been exposed to fire, careful evaluation may be needed to determine, if possible, whether any skull fractures are due to blunt trauma or thermal effects. Certain patterns of intracranial hemorrhage in or around the brain are associated with blunt trauma and high head accelerations, while others are known to result from postmortem artifact due to exposure to fire.

Acutely lethal central nervous system trauma can be challenging to identify after an MVC with fire. For example, lethal diffuse axonal injury (DAI) caused by a head impact may not be observable in the brain tissue, even under a microscope, as observable pathology takes time to develop and does not progress after the time of death.

Other parts of the medical forensic examination may inform the likelihood of central nervous system trauma. A posterior neck dissection is recommended when blunt force trauma to the head and/or cervical spine is suspected but evidence from the usual anterior autopsy approach is limited or absent. A posterior neck dissection may show concomitant injuries consistent with serious central nervous system blunt trauma, such as cervical spine fractures and/or dislocations, cord compression, and/or muscular hemorrhages. A biomechanical evaluation of the likelihood of serious or worse central nervous system trauma can be a complementary way to evaluate whether a mechanism was likely present in the subject incident.[9]

In addition, scene information may be helpful in determining the likelihood of

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9 J.E. Leestma, ed., *Chapter 6, Forensic Neuropathology*, 2nd ed., Taylor & Francis Group, ISBN 978-0-8493-9167-5 (2009).
10 V.J. DiMaio et al., *Forensic Pathology*, 3rd ed., CRC Press, ISBN 978-0367251482 (2021).
11 W.U. Spitz, *Spitz and Fisher's Medicolegal Investigation of Death*, 4th ed., Charles C. Thomas Publisher, Ltd. ISBN 0-398-073444 (2006).
12 D. Dolinak et al., *Forensic Pathology Principles and Practice*, 2nd ed., Elsevier, ISBN 0-12-219951-0 (2005).
13 Wirthwein, *The American Journal of Forensic Medicine and Pathology*, 17(2):117-123 (1996).
14 A. Tewarson, *Fire Safety Science*, 8:1205-1216 (2005).

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acutely lethal central nervous system injury or loss of consciousness due to blunt trauma before thermal effects took place. Did any witness detect a pulse, breathing, consciousness, movement, or sound from the decedent after the crash event? Is there reliable evidence that the decedent released their own seat belt buckle or attempted to exit the vehicle? If there was movement, was it consistent with purposeful movement, or was it more consistent with peri-mortem seizure-type activity? If there were breath sounds, were they consistent with regular respiration, or were they more consistent with agonal breathing (the final few breaths in the dying process)?

A careful examination of the thermal pattern on the body compared to evidence in the vehicle may also be informative. If there are defined areas of sparing on the surface of the body, such as on the back, buttocks, and posterior thighs, that are also consistent with areas on the seat and seatback that are not burned, these are indications that the individual may not have been attempting purposeful movement while the fire was taking place.

Similar care may need to be taken to determine, if possible, whether fractures of bones of the thorax are due to blunt trauma or to thermal effects. Blunt traumatic injuries of the internal organs of the thorax and abdominal regions are likely to be preserved after a fatal MVC with fire, as thermal effects progress from the outside in. Findings such as laceration of the heart or a major blood vessel, or significant quantities of blood in the lungs or abdominal cavity are consistent with acutely lethal blunt trauma. While similar considerations apply to fractures of bones of the extremities, these are rarely acutely fatal, unless a major blood vessel such as a femoral artery is lacerated. However, blunt traumatic fractures of the extremities are relevant to the overall severity of the event.

Less frequently after a fatal MVC with fire, the medical forensic evidence or toxicology results will be consistent with a medical event that precipitated the crash event itself. Findings in organs such as the heart, liver, kidneys or brain may indicate a medical cause or contribution to death. For certain medical events, such as sudden cardiac death, acute pathologic changes in the heart muscle and enzymes typically assessed to inform a diagnosis may not have time to become apparent prior to death. If so indicated, a review of related organ systems and of relevant pre-incident medical records of the individual may be helpful.

Summary

In summary, although a small percentage of fatal motor vehicle crashes involve a fire, these events present significant challenges for analysis. Nevertheless, the worst-case scenario should not be assumed. Initial impressions can be misleading, especially in the setting of obvious thermal effects. Fatal MVCs with fire often involve the potential for blunt trauma and thermal consequences. Analysis of the biomechanical and medical mechanisms of injury in a particular event may be complex and multidisciplinary, but they are worth the effort when it is important to understand what really happened.

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Better Data from Better Bargaining

Jeff Trueman

Traditional bargaining, with its hallmark extreme demands and offers, is not your friend. Its perceived advantages do not outweigh the very real damage it can do to the economics of your law practice and to the ability of clients to make informed decisions about whether to litigate or settle. If you would like to collect better information to aid in better decision making, read on.

Parties often begin settlement talks with extreme numbers that reflect their "best day in court." Over the course of many hours, each side makes incremental moves. Before arriving at a number that's "good enough" to be done, the parties can hit impasse and stop before revealing their best numbers. By that time, the parties often lose faith in the process and lack incentive to close the gap. Thus, they would rather walk away than find out what might have been possible.

This traditional form of bargaining may be familiar to legal professionals, but it's not a tradition worth keeping. It has become a reliable way of generating disinterest in the process and suspicion that the other side (including your side) wasted everyone's time, did not participate in "good faith" and is hiding its true number.

Some lawyers believe extreme opening numbers are necessary. Clients want strong advocates who will take a tough stance. Everyone wants "room to move." "Outrageous" demands need to be ground down. "Lowball" offers need to be drawn out.

These justifications ignore the larger risks of infuriating your opponent, empowering the most extreme people on the other side, and increasing the odds of ending the process without any idea of what might be possible. Even when the negotiating dynamic is less adversarial, competition can be intense to get the most amount of money or pay the least amount possible. Antagonism and distrust, especially when the stakes are high, make the process more difficult and therefore more expensive for everyone.

If you want to obtain better outcomes in mediation, prepare in advance and think about how you are going to get what you want. Here are a few tips:

Share information with the other side and do it early. Obviously, this will help the other side understand the reasons for your position. But it will also help you and your client think critically about your goal. Overconfidence has a tendency of building and hardening over time, making it more difficult and time-consuming to readjust expectations. Have a realistic conversation with your client before mediation.

Arguing your case to your mediator may not convince the other side. Confrontational allegations that seemingly justify your opening number will not generate movement. Save your arguments until impasse sets in so that you can focus on the strongest aspects of your case *when it counts*. Furthermore, what persuades a judge or mediator may not persuade the other side who may be in complete denial about a critical aspect of the case. If you intend to "shoot them down" and "win" the argument to justify your extreme number, expect an equal and opposite reaction from the other side. That tension might feel good to litigators, but it will not get the other side to listen and take seriously your client's perspective. Keep in mind, victory and defeat are not the only two outcome possibilities in mediation.

Manage the numbers so that you communicate more effectively. Of course, each side is trying to maximize their economic outcome. But extreme opening positions can backfire — something I have witnessed more than a few times. If credibility matters, think about how much you will have to concede after opening with an extreme number. Instead of bargaining in a way that diminishes your credibility, protect yourself by conveying a realistic range. You are free to convey more than just hard numbers. For instance, you can convey a typical opening number along with a range (not necessarily a bracket) that is more aggressive. The other side can respond either to the number or the range or propose something else.

Decide who will go first. There is no rule requiring plaintiff to make a demand first. You can also limit the number of moves. Therefore, the defense can open with an offer that is "generous" and pull the plug if the other side fails to respond cooperatively. Remember that risk settles cases. And use your mediator. If the parties share their "end of day" ranges with the mediator confidentially, the mediator may be able to employ any number of techniques to help the parties settle the case.

Jeff Trueman, Esquire is a full-time mediator and arbitrator with more than twenty years of experience helping parties resolve litigated and pre-suit disputes concerning wrongful death, catastrophic injuries, sexual abuse, professional malpractice, and employment. Jeff also serves as Adjunct Professor at the University of Maryland Francis King Carey School of Law and Pepperdine Caruso School of Law.

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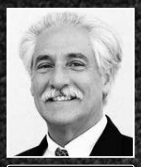
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Maryland: No Longer the Home of the Waive

Christine Hogan

On October 1, 2024, the statute entitled "Limiting a Recreational Facility's Liability" or § 5-401.2 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, took effect, substantially pivoting from the State's prior common-law position on exculpatory clauses by condemning most contractual provisions that waive or shift liability for a recreational facility's own negligence as "void and unenforceable." These waivers have been a cornerstone of risk-management practice in swimming pools, gyms, amusement parks, "play places" and the like, and the new law will impact myriad membership agreements, participant forms, and vendor contracts.

The statute applies to every "commercial recreational facility, commercial athletic facility, or amusement attraction." Gymnasiums and swimming pools are expressly included within its scope, with the exclusion of two categories:

1. A lodging establishment (i.e. a hotel); unless the establishment owns, maintains, or operates a recreational facility that is "available for use by the general public;" and

2. A unit of State or local government that leases land or facilities to a recreational facility.

The law invalidates any contract term "relating to the use" of such an establishment that limits the facility's liability, releases the facility from liability or requires another party to indemnify or hold the facility harmless "for injury caused by or resulting from the negligence or other wrongful act of the recreational facility or its agents or on-duty employees."

There are two other important statutory exceptions. First, the statute makes plain that it "may not be interpreted to affect, extend or limit" liability for governmental entities under the Maryland or Local Government Tort Claims Acts. In addition, the statute includes a carve-out for "health club service agreements" (defined in § 14-12B-01 of the Commercial Law Article of the Annotated Code of Maryland) as to services rendered for an adult. As such, health clubs which fall under the purview of the Commercial Law Article governing prepaid membership contracts may still rely on such waivers for adult patrons (but not minors).

As the law does not include a retroactive provision, contracts executed on or after October 1, 2024 are governed prospectively. It is not clear whether pre-existing waivers survive, but judicial scrutiny is expected given the statute's proclamation that these now illegal exculpatory clauses are "against public policy."

Maryland previously followed the common-law rule set forth in *Wolf v. Ford* that waivers are enforceable unless: (1) The language was ambiguous or too narrow; (2) enforcement would violate a specific statutory prohibition; or (3) enforcement offends a strong public interest. There were few statutory exceptions to the rule, including landlord-tenant leases and mobile-home parks. Notwithstanding those limited exceptions, litigation surrounding these waivers involved a fact-based investigation based on the waiver's clarity and breadth, and the recreational facility would prevail if it utilized a sweeping waiver which expressly referenced "negligence" and "personal injury." The legislature's choice to render these provisions void denotes an unqualified public policy decision versus a case-by-case analysis. The new statute conforms with jurisdictions such as New York and Virginia, which invalidated such waivers long ago.

The implications of the newly enacted legislation are far-reaching. Counsel for recreational operators must remove negligence-waiving language from membership applications, online "click-wrap" forms, and contracts with vendors. Indemnity provisions favoring the operator are no longer permissible for claims resulting from the facility's negligence. Clauses addressing third-party negligence or property damages remain viable, but must be narrowly drafted. Insurance portfolios should be revisited to compensate for the loss of contractual risk transfer, and insurance limits and/or specialty lines may be required.

Attorneys for the recreational operators can no longer expect dismissal by way of dispositive motions for summary judgment based on waivers where a claim stems from negligence against the facility, creating an easier road to recovery for the plaintiff's bar. Recreational operators should still secure participant acknowledgments of inherent risks (e.g. rug burns from diving on the ground in sports activities or at a children's "play place," slipping on ice at skating rink), since assumption of risk and contributory negligence remain viable defenses.

There are lingering questions that will need to be resolve by the courts as issues arise. For instance, the statute does not define "commercial," so non-profit, religious or collegiate athletic activities or camps may attempt to argue they fall outside the statute's scope. The statute applies to negligence of "agents or on-duty employees," so claims involving independent-contractor negligence remain murky. Courts will further need to decide whether the statute applies retroactively. Practitioners need to review the statute whenever these matters are implicated for guidance, and the courts will need to resolve remaining issues; all with the mindset that safety practices (and not liability waivers) are now the best defense against personal injury claims.

Christine Hogan, Esquire is Of Counsel at Wilson Elser Moskowitz Edelman & Dicker LLP, where she focuses on insurance defense and business litigation, among other practice areas. Christine serves on the Executive Council for Bar Association of Baltimore City Young Lawyers' Division and also as Co-Chair of the Mentoring Committee.

More States Pushing Back on Third-Party Litigation Funding

Survey finds nearly 90% want legal reforms with litigation funding

Michael Silvestri

Litigation funding, or the third-party financing of plaintiffs' lawsuits, has become a multibillion-dollar industry in the United States, and it continues to grow. Unfortunately, state and federal regulations have not kept pace, despite the desire among the vast majority of Americans for increased regulations due to various problems with these dark-money investments. Recently, however, the industry has received greater publicity and scrutiny, and more states are starting to take action toward passing regulations to address some of these issues.

State of Litigation Funding

Litigation funding is a third party's financing of a plaintiff's lawsuit, and it has become big business in the United States. A number of large companies have formed a focus exclusively on funding such lawsuits, essentially betting on the outcome by determining what the suit is worth and providing a loan to the plaintiff in a certain amount and for a certain percentage based on that determination. The plaintiffs are not limited to using the loan funds for their litigation, and may use that money for anything they wish while they await whatever payout may come from their lawsuit.

In 2022, such companies reportedly invested approximately $3.2 billion in funding plaintiffs' lawsuits. That represented a 16% increase from the amount invested the year before. The companies are typically thought to bet on commercial lawsuits, including class actions, bankruptcy and patent cases, although they may take on any type of case.

According to the results of a survey of 2,000 people conducted by The Harris Poll and commissioned by the American Property Casualty Insurance Association and Munich Re, nearly 60% of people did not know that third parties were funding litigation, but nearly 90% wanted legal reforms with litigation funding, and 88% believed that all parties to a suit involving such funding should be made aware of that funding.

Issues with Litigation Funding

Those survey respondents were correct in their belief that there are problems with the state of third-party litigation funding. For instance, the third party that funds the litigation may have greater control over the litigation and the strategy and decision-making involved. In addition, third-party litigation funding may affect attorney-client privilege because the lending company generally does not come within the scope of the privilege, and any communications that the plaintiff's attorney has with the company controlling the litigation may be disclosed in discovery, along with any conversations that the plaintiff has with the company. Litigation-funding agreements also have run afoul of usury laws, with predatory funding companies known to have charged rates as high as 100% or more.

The fact that a litigation-funding arrangement exists, however, may not always be discoverable. Courts are still sifting through whether litigation funding agreements are discoverable, and at least some courts have held that they are not. Without such transparency, the defense — unlike the plaintiff, who likely knows that an insurance company is funding and controlling the other side — will be in the dark about who or what is controlling the plaintiff's case. The litigation-funding company's control of the plaintiff's case could create hidden biases on the plaintiff's side, about which the defense should be entitled to know. The involvement of litigation funding also could create impediments to settlement because, similar to liens, the plaintiff will have to pay off the litigation-funding loan; although unlike a medical or other lien, it is the plaintiff's choice to take out a loan on the case, and the defense should not be expected to agree to a higher settlement as a result.

Upcoming events will be announced at MDdefensecounsel.org and through MDC emails.

The Solutions

Given all of the above, it seems clear that there should be some regulation of litigation funding, and courts have sometimes taken the lead with mixed results:

- In 2019, in *V5 Technologies LLC v. Switch Ltd.*, the U.S. District Court for the District of Nevada declined

Continued on page 28

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(THIRD-PARTY LITIGATION FUNDING) *Continued from page 27*

to allow discovery into litigation funding in the case, based on the defendant's asserted purpose in exposing potential bias.

- In 2021, in *Cirba Inc. v. VMWare Inc.*, the District of Delaware noted the lack of consensus on discoverability of litigation funding and did not allow discovery into litigation-funding information because of the lack of clarity of the relevance of the information to damages. Nevertheless, Chief Judge Colm Connolly of the U.S. District Court for the District of Delaware has a standing order requiring the disclosure of specific information relating to litigation funding and allows parties to seek additional discovery concerning the nature of the agreements for certain specified reasons. Judge Connelly's requirements recently survived a mandamus challenge in the U.S. Court of Appeals for the Federal Circuit.

Considering the mixed results in the courts, legislatures should take action to regulate litigation funding and clarify the law regarding such funding. Some legislatures have started to do so:

- Indiana recently enacted a law to (1) block foreign entities from funding lawsuits in the state, (2) forbid the companies from influencing the outcome and (3) require the funding to be disclosed in the litigation.
- West Virginia enacted a law that bars funding companies from (1) offering commissions to attorneys and medical providers who refer clients to the company, (2) advertising false or misleading information, (3) referring clients to specific attorneys and (4) attempting to waive settlements.
- At least 10 other states this past session reportedly considered legislation concerning litigation funding, but none of those passed.

More states should follow the lead of Indiana and West Virginia and pass laws to bring this booming, shadowy business into the light.

Michael Silvestri, Esquire is Of Counsel at Wilson Elser Moskowitz Edelman & Dicker LLP. Michael focuses his practice on the defense of companies and individuals in product liability and insurance defense matters. In addition, he represents insurance companies in coverage matters, including monitoring and coverage determination focused on coverage for professional errors and omissions (E&O) and lawyers (LPL).

2025 Liability Bills Legislative Summary

Christopher C. Jeffries and Joseph S. Johnston

During the 2025 Legislative Session, MDC monitored numerous bills on diverse topics, including, among others: Changes in available damages for tortious injury to or death of a pet; changes to the statute of limitations for prosecution or enforcement of local consumer protection codes; and revisions to the Maryland Medical Practice Act and Maryland Physician Assistants Act.

MDC's efforts primarily focused on two bills, House Bill 113/Senate Bill 548 and House Bill 1099. HB 113/SB 548 sought to repeal in its entirety the current cap on non-economic damages in Section 11-108 of the Courts and Judicial Proceedings Article (applicable to non-medical malpractice personal injury cases). MDC monitored this bill, submitted written testimony in opposition to it, and MDC's Legislative Co-Chair, Joe Johnston of Goodell DeVries, testified in opposition to the bill. Ultimately, the bill did not become law.

House Bill 1099 sought to allow for the award of punitive damages in a civil action where the defendant acted with gross negligence, instead of with actual malice, and requires the State Court Administrator to assess a certain surcharge on a defendant against whom a judgment for punitive damages is entered. MDC monitored this bill and submitted written testimony in opposition to it. Ultimately, the bill did not become law.

Christopher C. Jeffries, Esquire is Principal at Kramon & Graham P.A., a past president of MDC, and Co-Chair of MDC's Legislative Committee. Chris has a broad litigation practice, focusing primarily on commercial and personal injury litigation.

Image: Shutterstock.com

Joseph F. Johnston, Esquire is Partner at Goodell DeVries and Co-Chair of MDC's Legislative Committee. Joe concentrates his practice primarily in medical malpractice defense and other personal injury defense.

Get Involved With MDC Committees

To volunteer, contact the chairs at

www.mddefensecounsel.org/leadership.html

MDC 2025 Crab Feast

MDC held its **Annual Meeting and Crab Feast** at Nick's Fish House Upper Deck in Baltimore on Thursday, June 12, 2025. MDC would like to thank our members, sponsors, and new Board for their support. It was great to see everyone!

New board members include:

President: Zachary A. Miller, Esq., *Wilson Elser Moskowitz Edelman & Dicker LLP*

President-Elect: Rachel L. Gebhart, Esq., *GodwinTirocchi, LLC*

Treasurer: Anthony M. Conti, Esq., *Conti Fenn LLC*

Secretary: Ashley Wetzel, *Nelson Mullins Riley & Scarborough LLP*

Immediate Past President: Amy E. Askew, Esq., *Kramon & Graham PA*

Addressing Workplace Violence, Trespassing, and Harassment in Maryland: What Businesses Need to Know

Jared M. Green

In the course of business operations, unfortunate incidents of workplace violence or criminal behavior may arise. These incidents can take various forms, such as a patron attacking or threatening an employee, an employee reacting violently to a manager, or an employee experiencing intimate partner violence that spills into the workplace.

When such situations occur, it's crucial for businesses to take appropriate steps to protect employees, customers, and the business itself.

Barring the Individual from the Property

If an incident occurs on private business property and you do not want the individual to return, you must formally notify them that they are not permitted back on the premises. Under Maryland law, a person may not enter or cross over private property after being notified by the owner or the owner's agent that they are not allowed to do so.

Best Practices for Issuing a Trespassing Notice

Providing written notice is best, even though verbal notice may suffice, as it creates a clear record of communication and strengthens any potential legal action. Businesses should also maintain documentation of the notice, how it was delivered or served, and any related communications.

What to Do If the Individual Returns

If the individual comes back after being barred, the business can:

- Contact the police and report them for trespassing.
- Initiate criminal charges for trespassing (more details can be found in my prior post: *Handling Criminal Incidents in Business: A Guide*.
- Seek a Peace Order (Restraining Order) — an often-overlooked option. Trespassing qualifies as a basis for obtaining a Peace Order in Maryland.

Addressing Harassing Behavior

Not all problematic behavior rises to the level of a criminal act — at least, not initially. However, under Maryland law, some conduct may still constitute harassment.

Understanding Maryland's Harassment Law

Harassment occurs when a person:

- Maliciously engages in a course of conduct that alarms or seriously annoys another person,
- Does so with the intent to harass, alarm, or annoy,
- Continues the behavior after receiving a reasonable warning or request to stop, and
- Lacks a legal purpose for their actions.

Many business-related situations fit this scenario but fail to meet the legal definition of harassment simply because the individual was never asked to stop.

How to Handle Harassing Behavior

If someone is engaging in behavior that could escalate into harassment, it may be advisable to issue a formal warning instructing them to stop, along with a barring notice. If they persist, you may then:

- Contact the police and report them for harassment.
- Initiate criminal charges.
- Consider seeking a Peace Order, as harassment also qualifies for one under Maryland law.

Important Considerations

Each situation is unique and requires careful handling. Factors to consider include:

- **Likelihood of Repeat Behavior** — Does the individual pose an ongoing threat?
- **Risk of Escalation** — Could barring or informing them to stop inflame their behavior rather than deter it?
- **Public Relations Concerns** — In high-profile cases or customer-related disputes, what are the reputational risks?
- **Industry-Specific Regulations** — Some sectors, like healthcare, may have legal restrictions on outright barring individuals. For example, a hospital's emergency department may not bar someone entirely under certain circumstances.

Why Consulting an Attorney is Important

Handling workplace violence, trespassing, and harassment involves complex legal and practical considerations. Missteps could lead to legal liability, ineffective enforcement, or unintended consequences. An attorney can help you:

- Determine the best course of action for your business.
- Ensure compliance with state and federal laws.
- Draft legally sound notices for barring and harassment warnings.
- Assist in pursuing criminal charges or civil remedies, including Peace Orders.

By taking proactive legal steps, businesses can protect their employees, customers, and operations while staying within the bounds of the law.

Jared Green, Esquire is Partner at Goodell DeVries, where he defends healthcare providers and institutions in cases of alleged medical negligence. A former prosecutor, Jared also serves as Chair of the firm's Risk Management, Investigations, and Compliance practice, where, drawing on his criminal law experience, he conducts internal investigations and advises clients on workplace violence incidents, law enforcement inquiries, and criminal prosecutions.

Handling Criminal Incidents in Business: A Guide

Jared M. Green

In the course of business operations, criminal incidents — particularly those concerning workplace violence — unfortunately arise. These incidents may involve, for example, a patron who attacks or threatens an employee, an employee who reacts violently to their manager, or an employee who is experiencing intimate partner violence. In such cases, it's crucial for the organization to know the appropriate steps to take to ensure employee and customer safety and potentially legal compliance.

Immediate Response: Call the Police

Safety is paramount. When a criminal incident occurs, calling the police should be the first response. This not only ensures immediate assistance, but also provides timely documentation of the incident and allows law enforcement to assess the situation and offer guidance.

Understanding Misdemeanor Arrests

Most criminal incidents in the workplace will be misdemeanors, which are more common and often less serious than felonies. When the crime is a misdemeanor, the police can only arrest the suspect if the crime occurs in their presence or under specific statutory exceptions. If the crime does not occur in police presence, and no exception applies, the police typically will not file criminal charges themselves. Instead, in Maryland, the officers will instruct the victim, whether an individual or a business, on how to file criminal charges against the offender.

Citizen-Initiated Charges in Maryland

In Maryland, private individuals can file criminal charges. Here's how it works:

1. **Complaint:** A citizen can submit an Application for Statement of Charges to a commissioner in the county (or Baltimore City) where the crime occurred. This paperwork is similar to what the police would submit.
2. **Probable Cause:** A commissioner will review the application and determine whether there is probable cause to believe a crime has been committed. If the commissioner finds probable cause, the individual is charged.
3. **Summons or Warrant:** The charge may result in a summons, requiring the individual to appear in court, or an arrest warrant, authorizing the police to arrest the individual.

The Role of the State's Attorney's Office

Depending on the county or city, the complainant may need to consult with a prosecutor before charges are filed. Regardless of jurisdiction, the complainant will need to work with the State's Attorney's Office to prosecute the charges because, ultimately, the decision to proceed with criminal charges in Maryland rests with the State's Attorney's Office in the jurisdiction where the crime occurred. While individuals are victimized, crimes are prosecuted by the State of Maryland through a prosecutor acting on behalf of the State. It can be helpful for a business or individual to have an attorney during these discussions to ensure that all of the necessary information is relayed to the prosecutor and the appropriate decision is made.

Visit MDdefensecounsel.org for Upcoming Events:

- **2025 Past Presidents Reception: Date TBA**
- **Fall Seminars**

Conclusion

Knowing the proper steps to take when a criminal incident occurs in a business setting is crucial for ensuring safety and potentially legal compliance. By understanding the role of the police, the process of citizen-initiated charges, and the involvement of the State's Attorney's Office, businesses can better navigate these challenging situations.

Jared Green, Esquire is Partner at Goodell DeVries, where he defends healthcare providers and institutions in cases of alleged medical negligence. A former prosecutor, Jared also serves as Chair of the firm's Risk Management, Investigations, and Compliance practice, where, drawing on his criminal law experience, he conducts internal investigations and advises clients on workplace violence incidents, law enforcement inquiries, and criminal prosecutions.

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2025 Workers' Compensation Legislative Summary

Michael L. Dailey

MDC Worker's Compensation Chair, Julie Murray, MDC members Ashlee Smith, Nancy Courson, and Legislative Co-Chair, Mike Dailey as well as Lyndsey Meninger, on behalf of Chesapeake Employer's Ins. Co., testified before House Economic Matters and Senate Finance on the bills that potentially impact our members and their clients.

The 2025 Legislative Session for workers' compensation legislation centered primarily upon proposed changes to the board membership and operation of the Uninsured Employers Fund (UEF). MDC monitored and testified on several of these bills. SB695 changes the membership of the UEF board by adding two new board members, increasing the board from three to five. The UEF board under this new law must have two members that have substantial experience as an officer or employee of a property and casualty insurance company; one must have experience in accounting or finance; one must be a policy holder of a Maryland workers' compensation policy; and one must be a representative of the general public. MDC supported this bill, and Governor Moore signed it into law, and it will go into effect on October 1, 2025.

Another UEF bill HB 193/SB219 passed both the House and the Senate and made it to the Governor's desk for signature. This bill, as originally introduced, was opposed by MDC and others, and would have enabled the UEF to increase its assessments against employers/insurers by up to 1% if the Fund determined that it needed the increase to remain solvent. In addition, HB193/SB219 allowed a special monitor to be retained to oversee and assess the financial condition of the Fund. In addition, SB227 provided a mechanism to increase the efficiency of the UEF award payments (reducing the time deadline to 30 days) and also, provided an offset mechanism to prevent double payments if the Employer had already made indemnity payments to claimant that are the subject of an order issued by the Commission. The final amended version of that bill, however, removed that double payment protection and only provided for a future credit against permanency if the employer had already paid claimant, but the UEF is ordered to make that same payment. Governor Moore vetoed HB193/SB219 and SB 227 citing concerns about raising the assessment against employers and insurers who are complying with the insurance coverage requirement. SB227 was vetoed in part because of the removal of the double payment safeguard.

SB306 was a thoroughly researched and well-reasoned, potentially large money-saving pharmaceutical fee schedule bill introduced by Senate Finance Chair, Pam Beidel. This bill would have required the Commission to create an implement a pharmacy fee schedule in workers' compensation cases. The mail in pharmacy providers and others testified in opposition to this bill, but offered no substantive justification for these unregulated and unchecked pharmacy charges. The testimony demonstrated that many employers and insurers do not have a pharmacy czar to review and challenge excessive pharmacy charges. The evidence presented at hearing demonstrates that this pharmaceutical fee schedule would save employers and insurers millions of dollars each year in reducing the unregulated pharmacy industry in Maryland workers compensation arena. Maryland already has a medical fee schedule and a fee schedule committee in place. The fiscal note presented compelling evidence to support this important and cost saving legislative effort. Although the bill was voted out favorably by Senate Finance, the house committee did not vote on it prior to the expiration of this session and therefore it did not make it to a full vote. I expect that we will see this important legislative introduced again, perhaps next session.

A Commission back bill, SB830, enables all parties to obtain the prior and subsequent claims filed by the injured worker, including medicals filed, without having to subpoena the Commission file. The process of how this will be implemented has not been finalized, but should allow the parties to a claim to obtain those prior and subsequent claim files through CompHub. This law goes into effect October 1, 2025.

Several other workers compensation bills did not become law. The Maryland Association of Justice continued its efforts in support of removal or redefinition of the disability requirement in hypertension cases for first responders under 9-503 contained in HB217/SB173. In addition, the MAJ supported HB1210 that would allow social workers to provide psychological impairment ratings. Both these bills were opposed by MDC, and nether became law.

Michael L. Dailey, Esquire is a Co-Founder of Schmidt, Dailey & O'Neill. Michael represents employers and insurers in Maryland, the District of Columbia, and Virginia workers' compensation cases as well as in general tort liability cases. He is a past president of MDC and is the DRI Mid-Atlantic Regional Director.

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Breaking Silence: The Ethics of Lawyers Critiquing Clients

George S. Mahaffey

Earlier this year, attorney Mark Lemley was criticized for having the temerity to terminate his representation of Meta during an ongoing copyright infringement case because of its CEO's alleged "descent into toxic masculinity."[1] Critics pounced, alleging that Lemley's denunciation of Mark Zuckerberg was, at best, a terrible business decision and, at worst, a potential violation of his ethical responsibilities. While criticism of a client at the end of a representation is generally imprudent, would Lemley's statements have been unethical if made in Maryland? Though there are no Maryland cases with precisely the same facts, there is some guidance in Rules 19-301.16, 19-301.6, 19-301.9, and 19-303.6.

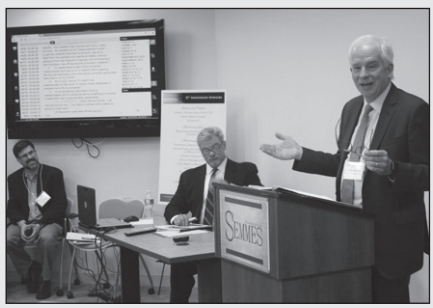
Maryland Rule 19-301.16(b) states that an attorney may withdraw from a representation if the client "insists upon action or inaction that the attorney considers repugnant or with which the attorney has a fundamental disagreement." Lemley disagreed with Mr. Zuckerberg's recent actions at Meta which may, as others have noted, hasten the United States' fall into an "electoral autocracy"[2] or "competitive authoritarianism"[3] in the vein of Hungary or Turkey.

Given his view of the changes at Meta, Lemley would be permitted to end the representation. While withdrawal may have been permissible, what about Lemley's pointed criticism of Zuckerberg? Rule 19-301.6 cautions against revealing "information relating to representation of a client" without first obtaining the client's informed consent. While it does not appear that Lemley's statements would have technically violated the rule by revealing information, he should be cautious about making assertions that could undermine his former client's interests in the ongoing litigation. Rule 19-301.9 states that an attorney who has formerly represented a client in a matter shall not thereafter use information relating to the representation to the disadvantage of a former client. Again, it does not appear that Lemley's criticism of Zuckerberg descending into "toxic masculinity" or becoming a "Musk wannabe" would run afoul of the rule. Rule 19-303.6 sets forth the general prohibition against an attorney making statements that the attorney knows or should know will have a substantial likelihood of materially prejudicing an adjudicative procedure. Since the rule tries to strike a balance between the right of free expression and a fair trial, it might not necessarily be implicated in litigation, but it is something the attorney needs to be mindful of. Finally, if Lemley were a Maryland attorney, he would be mindful of Rule 19-308.4, which can be invoked for conduct that brings disrepute to the legal profession.[4]

The bottom line is that Lemley's denunciation of Zuckerberg and termination of his representation of Meta was likely not unethical as no client confidences were revealed, at least under the law in Maryland, though it may prove be a poor business choice. That said, the ethical rules should not be used to muzzle an attorney who remains steadfast in his or her beliefs, especially in a time of hyper-partisanship and constant constitutional crises. However, to the extent one feels driven to criticize a former client, make sure to refrain from revealing information about the representation or using such information to his or her detriment.[5]

George Mahaffey, Esquire is Counsel to Goodell DeVries, where he advises and defends a wide variety of clients in professional liability matters. George handles ethics-related matters on behalf of accountants, attorneys, engineers, design professionals, and financial services and insurance professionals.

[1] *See "High powered lawyer: I won't represent Meta anymore thanks to Zuckerberg's MAGA turn,"* Zachary Folk, The Daily Beast (January 14, 2025).
[2] *See "In a real sense, U.S. democracy has died: how Trump is emulating Hungary's Orban,"* David Smith, The Guardian (February 7, 2025).
[3] *See "The Path to American Authoritarianism — What Comes After Democratic Breakdown,"* Steven Levitsky and Lucian A. Way, Foreign Affairs (February 11, 2025).
[4] *See AGC v. Park*, 46 A.2d 1153, 427 Md. 180 (2012).
[5] *See Fla. Bar v. Knowles*, 99 So. 3d 918 (2012) (where an attorney was disciplined in Florida for disparaging an ex-client by claiming they had engaged in or were likely to engage in criminal conduct).



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Circuit Court for Anne Arundel County
Case No. C-02-FM-16-000663

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1200

September Term, 2023

KASIMIER JAROSZ

v.

DONNAMARIE JAROSZ

Graeff,
Arthur,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: February 11, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

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