THE DEFENSE LINE

Winter 2025

A Publication From Maryland Defense Counsel, Inc.

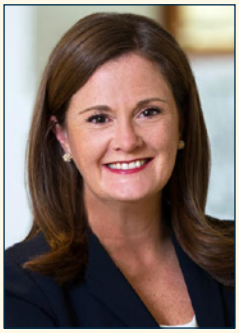
Establishing Medical Foundation — A Key Element for Life Care Planning

By Ashley Grzybowicz & Laura Davis

Also Featured

President's Message

As we step into 2025, I am honored to serve as President of the Maryland Defense Counsel (MDC), an organization that has long been the voice of the defense bar in Maryland. Our members, representing a diverse array of legal disciplines, are united by a shared commitment to excellence, professionalism, and the rule of law.



Amy E. Askew, Esquire
Kramon & Graham PA

Welcome also to the 2025 winter edition of *The Defense Line*! A tremendous thank you goes out to our Publications Co-Chairs, Nicholas Phillips and Tyler Maizel, and our graphics consultant, Brian Greenlee, for putting together another informative issue.

This year promises to bring new challenges and opportunities to our profession. From evolving regulatory landscapes to advancements in litigation technology, the practice of law continues to transform. MDC remains steadfast in its mission to equip our members with the tools, resources, and connections they need to thrive.

Committee Spotlight

Judicial Selection — Lauren Rutkowski *(Chair)*

Legislative Committee — Joseph Johnston *(Chair)*

Appellate Practice Committee — Peter Sheehan *(Chair)*; MDC submitted an *Amicus Curiae* Brief to the Supreme Court of Maryland in *The Key School, Inc. v. Bunker* and *Roman Catholic Archbishop of Washington v. Doe*. (author — Cary Silverman at Shook, Hardy & Bacon, LLP)

2024 Look Back

I was excited to see an amazing turnout at the MDC's Annual Crab Feast in June 2024. At the Crab Feast, the membership approved the new Executive Board: Zachary Miller — President-Elect; Rachel Gebhart — Secretary; Anthony Conti — Treasurer; Sheryl Tirocchi — Immediate Past President. It was a great time and I hope to see you all at the next one!

In September, the MDC was a co-sponsor of the Bringing the Bars Back Together Happy Hour where members had the opportunity to network with the members of other organizations. The MDC also hosted a Lunch & Learn where Joseph I. Rosenberg, CFA, LLC (MBA, MA, CFA) presented on The Value of Forensic Economics — How and Why Damage Award Calculations Differ in Key Areas. Many thanks to Mr. Rosenberg for all of his valuable tips.

In October, Past President Chris Jeffries and I attended the Annual Meeting of DRI in Seattle, Washington. At this meeting Chris was elected to serve as the DRI's State Membership Chair for Maryland. We look forward to working with Chris in partnership with the DRI.

This past fall I also served as the MDC's representative on the Advisory Board for the Pilot Program for Expanded Voir Dire in Maryland. The Advisory Board was chaired by The Honorable Laura Ripken of the Appellate Court of Maryland and consisted of various interested stakeholders in the legal community. The MDC was a sponsor of the Voir Dire Town Hall that was presented in November. In addition to the work being done for the membership, we also hosted the Annual Past Presidents' Reception at the Center Club shortly before Thanksgiving.

2025 Look Forward

In the months ahead, our educational programming includes:

- **February 17, 2025** Lunch & Learn Trial Academy | Noon | Miles & Stockbridge: Opening Statements presented by Chad Joseph of Baxter, Baker, Sidle, Conn & Jones, P.A.
- **April 3, 2025** Lunch & Learn "Winning the Nine-Figure Argument" | Noon | Saul Ewing: Speaker Jordan Rosenfeld, Saul Ewing

Be on the lookout for announcements regarding additional programming and events, including a presentation on expanded voir dire and a Spring Happy Hour!

The MDC continues to advocate for policies that uphold fairness and balance in the justice system, including working closely with lawmakers and stakeholders defending against attempts to reduce or eliminate Maryland's cap on non-economic damages.

I encourage you to get involved — whether by attending an upcoming event, joining one of our committees, or simply sharing your insights with fellow members. Your engagement is what makes MDC the vibrant, impactful organization it is today.

Thank you for your trust and support as we embark on this exciting year. Together, we will continue to advance the defense bar and make a meaningful impact on the legal profession in Maryland.

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

Maryland Defense Counsel, Inc.
1 Windsor Cove
Suite 305
Columbia, SC 29223

E-mail:
info@mddefensecounsel.org

www.mddefensecounsel.org

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Ashley Grzybowicz

Laura Davis

Medical foundation supports the necessary items and services contained in a Life Care Plan and establishing this foundation is important for creating a valid and reliable plan. As we further examine medical foundation as a key element for Life Care Planning, let's start with the published definition of a Life Care Plan from the International Conference on Life Care Planning and the International Academy of Life Care Planners (IALCP), adopted April 1998:

> *"The life care plan is a dynamic document based upon published standards of practice, comprehensive assessment, data analysis, and research, which provides an organized, concise plan for current and future needs with associated costs for individuals who have experienced catastrophic injury or have chronic health care needs."*

In the forensic setting, a properly developed Life Care Plan should educate both the evaluee (subject of the plan) and the trier of fact regarding future care and costs. Items or services meant to restore or maintain the evaluee's optimal health, function, and autonomy can include, but are not limited to, medical and allied health evaluations and care, diagnostic studies, laboratory testing, durable medical equipment and supplies, medications, surgeries and procedures, transportation accommodations, residential renovations, attendant care, and other support services.

Life Care Plans should be personalized to the evaluee, comprehensive, and collaborative in nature. The plan should be designed to reflect the individualized requirements of the evaluee and facilitate optimal functioning, as well as improve quality of life. The plan should serve as a lifelong blueprint to assist in obtaining maximal outcomes and preventing or reducing complications for the evaluee.

Healthcare professionals from a number of different disciplines, including Nursing, Medicine, Psychology, Rehabilitation Counseling, Physical Therapy, Occupational Therapy, and Speech Therapy, may be involved in the practice of Life Care Planning. These professionals may write Life Care Plans as an individual practitioner, leveraging their own experience, training, research, and background knowledge within their primary discipline, and collaborate or consult with those disciplines outside their professional scope of practice.

Life Care Planners should utilize published and peer-reviewed Consensus Statements to guide their practice. Developed from a Delphi analysis, which is a process of achieving group consensus among subject matter experts, the Consensus and Majority Statements (2018) are applicable to all Life Care Planners and provide valid and reliable methodological guidance.

The following Consensus Statements help guide the establishment of medical foundation:

- #60: *"Life Care Planners shall utilize adequate medical and other data for opinions."*
- #64: *"Life Care Planners shall rely on medical/allied health professional opinions."*
- #84: *"Review of evidence-based research, review of clinical practice guidelines, medical records, medical and multidisciplinary consultation and evaluation/assessment of evaluee/family are recognized as best practice sources that provide foundation in life care plans."*

In addition to the *Consensus Statements*, *Standards of Practice for Life Care Planners* (Fourth Edition, 2022), published by the IALCP, defines the methodology and requisites necessary for the development of a Life Care Plan and is considered applicable to all members of the Academy. Traditionally, the Academy represents the largest group of Life Care Planners in the country and its members are diverse in background, education, and profession. The American Academy of Physician Life Care Planners

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(LIFE CARE PLANNING) *Continued from page 5*

(AAPLCP) and the American Association of Nurse Life Care Planners (AANLCP) have developed their own standards of Life Care Planning for their respective members.

Life Care Planning does not represent a separate and distinct profession, but rather a specialty practice. Qualified healthcare professionals can perform the specialty practice of Life Care Planning for an evaluee, which requires multidisciplinary data and consultation, which in turn establishes a firm medical foundation. Specifically, there are several primary steps to establish foundation, which include reviewing medical/clinical records, analyzing clinical practice guidelines, reviewing empirical literature, consulting with treating and/or evaluating healthcare professionals, and/or utilizing testimony citations from the treating and/or evaluating healthcare professionals. These steps establish an appropriate and complete foundation for a Life Care Plan, which is quintessential to the validity of the plan.

Review, analysis, and citation of the evaluee's medical records are important steps for creating a strong foundation for Life Care Plans. Specific foundation from the medical records should be documented within the Life Care Plan in several ways, such as including a comprehensive list of medical records reviewed and including accurate treatment summaries. Treatment summaries derived from the evaluee's medical records often paint a picture of the evaluee's medical history, future needs, and functional abilities. Additionally, treatment summaries can draw direct connections between specific medical record findings and the future care recommendations detailed within the Life Care Plan.

Including current clinical practice guidelines and peer-reviewed research within Life Care Plans is an additional integral part of establishing foundation. Published Life Care Planning consensus requires the Life Care Planner to include relevant evidence-based research and guidelines within his or her plan's foundational framework. Such resources may include guidelines from medical academies, professional associations, and/or governmental agencies, etc., as well as peer-reviewed journal publications. Based upon consensus, the overall research, resources, and processes utilized during Life Care Plan development must be reliable, consistent, transparent, and credible.

The professional role of a Life Care Planner may be compared in analogous terms to the professional role of a "*general contractor*," who must follow codes and standards, along with effectuating foundational input from other subject matter experts to construct or build final plans. As stated previously, Life Care Planners emerge from a variety of healthcare and educational backgrounds, and each has a well-defined scope of practice, in which they must remain, when developing a Life Care Plan. Rarely, if ever, is one person fully qualified to make all recommendations for a comprehensive and evidence-based Life Care Plan. Therefore, it is imperative the Life Care Planner collaborate with appropriate and necessary treating and/or evaluating healthcare providers to obtain plan recommendations which are outside of his or her scope of practice. In addition to establishing foundation through healthcare collaboration, Life Care Planners can document direct connections from healthcare providers' testimonies to the future care and treatment recommendations of their plans.

In summation, Life Care Planners should follow a consistent, valid, and reliable approach to their research, data collection, analysis, and the overall planning process to establish a firm foundation for a Life Care Plan. The evidence-based Life Care Plan is formulated from the application of an appropriate methodology which follows necessary standards, guidelines, and best practices to ensure reliability and validity. The absence of necessary foundation may result in a Life Care Plan being excluded from the evidentiary record.

Ashley Grzybowicz, BSN, RN, CLCP was employed for 11 years at the Medical University of South Carolina in the High-Risk Obstetrics and Gynecology Unit after earning her nursing degree. In addition to caring for obstetric and gynecological patients in the hospital setting, Ms. Grzybowicz was an educator for the MUSC Prenatal Wellness Clinic and received several nominations for the nationally recognized Daisy Award for Extraordinary Nurses. Ms. Grzybowicz completed a 120-hour post-graduate training program in Life Care Planning through the Institute of Rehabilitation and Education Training and currently works as a Certified Life Care Planner and Forensic Nurse Researcher at InQuis Global. She is presently in residency pursuing her Doctor of Nursing Practice, with a focus in Family Medicine. She received the Medical University Hospital Authority (MUHA) full academic scholarship for her Bachelor of Science in Nursing (BSN), and recently received the Nina Smith Scholarship during her doctoral program. Ms. Grzybowicz is a Registered Nurse (RN) and a Board-Certified Life Care Planner (CLCP).

Laura Davis, MS, RN, COHN-S/CM, LNCC, CLC has clinical experience as a Registered Nurse (RN) in medical/surgical care, ambulatory care, community health, occupational health, and case management. Ms. Davis served as a Medical Resource to claim handlers, leadership, and legal counsel with State Farm Insurance for 18 years, and as a Senior Liability Nurse Consultant for Complex Commercial Liability with Liberty Mutual Insurance for four years. In addition to claim file-specific review and analysis, Ms. Davis developed and presented training on various medical issues commonly seen in claims. Ms. Davis also was involved in high-level claims projects, and during her course of employment, attained an Associate in Claims (AIC) and Chartered Property and Casualty Underwriters (CPCU) designations. She completed a 120-hour post-graduate training program in Life Care Planning through the Institute of Rehabilitation and Education Training, and currently works as a Certified Life Care Planner (CLCP) and Nurse Researcher at InQuis Global. Ms. Davis is also a Board-Certified Occupational Health Nurse Specialist/Case Manager (COHN-S/CM) and a Board-Certified Legal Nurse Consultant (LNCC).

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

Resources

American Academy of Physician Life Care Planners (2014). Standards of Practice, www.aaplcp.org

American Association of Nurse Life Care Planners, (2015). Nurse Life Care Planning Standards of Practice, adapted from the American Nurses Association 2010 Nursing: Scope and Standards of Practice, Second Edition. Retrieved from www.aanlcp.org.

Johnson, C., Pomeranz, J. & Stetten, N. 2018. "Consensus and Majority Statements Derived from Life Care Planning Summits Held in 2000, 2002, 2004, 2006, 2008, 2010, 2012, 2015 and 2017 and updated via Delphi Study in 2018." *Journal of Life Care Planning*, 16 (4), 15–18.

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The Duty to Disclose Wrongdoing in a Maryland Business Partnership

David Shea

So, you're in a partnership or some form of corporate ownership that acts like one. Something is rotten in the State of Denmark: you think one of your fellow partners is doing something borderline unethical or maybe even illegal with assets that belong to the partnership. Do you have a *legal* duty to disclose that knowledge to the other partners? This article does not address potential criminal liability here (i.e. you're alleged to be part of a conspiracy committing illegal or fraudulent acts against other partners). Instead, the question this article seeks to explore is whether there is a *civil law duty to disclose* material facts that may impact the partnership, particularly concerning misconduct of *another* partner or partners. The short answer is probably yes, at least hypothetically. But to parrot that annoying law-professor answer every lawyer has undoubtedly heard: *it depends*.

Whether viewing partnerships or other forms of corporate entities, a common thread runs through how courts interpret a "duty to disclose." The law quite logically only imposes a strict and pointed disclosure duty to those who are part of the entity's control group. After all, they are the ones most likely to be privy to material facts others don't know and are best positioned to use that information for self-gain.

And that's largely what the civil law world has concerned itself with: a duty to self-report conflicts of interest and other material information to stakeholders by those who pull the levers. It does NOT hold limited partners and stakeholders accountable for their potential silence in light of their control groups' malfeasance. And that makes sense; to do otherwise would be to blame the potential victim of that malfeasance instead of, or in addition to, blaming the perpetrator.

So where does the duty to disclose begin and end? To fully understand the contours of such a duty, it is worth first looking at how it is understood within other entity structures and business relationships. In addition to the better-known duties of care, loyalty, and good faith, Maryland courts recognize that *corporate directors* have a distinct "duty to disclose" "all facts material" to specific "corporate transactions" to the corporation's shareholders [and somewhat fictionally the "corporation" itself]. *Storetrax.com, Inc. v. Gurland*, 397 Md. 37, 58 (2007). Similarly, agency law requires that an agent has a "duty to disclose information material to the agency" to their principal. *Plank v. Cherneski*, 469 Md. 438, 578 (2020). This again makes logical sense. An agent doing business on behalf of a principal or a director conducting large corporation transactions are both likely in possession of information that could affect that business and need to keep the principal apprised of such information.

In the same way, Maryland common law recognizes a fiduciary duty and a "duty to disclose" that runs from a general partner ("GP") to a limited partner ("LP"). *Forston v. Winstead*, 961 F.2d 469 (1992) (finding no such duty to disclose existed for the law firm retained by the GP to the LPs where there was no fiduciary duty owed by the law firm to the LPs — whether in contract or otherwise). Indeed, just as in the corporate setting, in Maryland, an LP can *statutorily* seek recourse for the misdeeds and self-dealings of a GP in a "derivative" lawsuit (suing on behalf of the partnership itself). *I & G Investors, LLC v. Dunn*, 2013 U.S. Dist. LEXIS 149000, *28-29 (Oct. 16, 2013) (citing Md. Code Ann. Corps & Ass'ns § 10-1001).

The converse, however, does not appear to be true. To be sure, the prudent and conservative approach — would be to keep your partners apprised of material changes in events that might affect the partnership, even if you are an LP. But Maryland caselaw does not appear to explicitly state that *limited* partners owe any kind of duty to disclose to other LPs or the GP(s). It can arguably be inferred by one of the Maryland code sections governing partnerships as part of the sub-duties imposed by the duty of loyalty, although such a duty is far from self-evident from the text itself (emphasis added):

Md. Corps. and Ass'ns Code Ann. § 9A-404. General standards of partner's conduct

(a) The only fiduciary duties a partner owes

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to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c) of this section.

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(1) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(2) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(3) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

(c) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A partner shall discharge the duties to the partnership and the other partners under this title or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A partner does not violate a duty or obligation under this title or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

(f) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

And even in other jurisdictions that explicitly recognize a general fiduciary duty owed amongst partners, the GP or GPs are said to owe a specialized and heightened duty to disclose. *See, e.g.*, *Alloy v. Wills Family Trust*, 179 Md. App. 255, 288 (2008) (quoting J. William Callison & Maureen A. Sullivan, *Partnership Law and Practice*: *General and Limited Partnerships* § 22:7) (emphasis added) (discussing a general duty under D.C. partnership law requiring partners "to disclose [to each other] all material facts concerning the partnership business…." that falls under the duty of loyal but also noting that "[s]ince general partners in a limited partnership typically have the exclusive power and authority to control and manage the partnership, **they owe the limited partners an even greater fiduciary duty** than is imposed on general partnership in the typical general partnership").

So, while it's advisable to keep your fellow partners generally up to date on facts you learn that may impact the partnership, mere suspicion of malfeasance is not a material *fact*. Moreover, after investigating such suspicions (as any reasonable LP should do out of self-interest and on behalf of the partnership), if true and irrefutable misconduct is uncovered, it is the *general partner* who violated a fiduciary duty in his or her failure to disclose self-dealing, a conflict of interest, or outright fraud. A court is far less likely to find any kind of liability or fault with a limited partner who simply did not make enough noise about said general partner's own breach of his or her fiduciary duty. Ultimately, if a limited partner finds themselves in such a position, they must weigh the costs and benefits of bringing suit against the general partner. If suit is brought, this accomplishes a dual purpose: 1) bringing transparency and a remedy for such malfeasance and 2) putting the other partners on notice of the same.

For assistance in understanding your duty to disclose suspected wrongdoing within a business partnership, please contact **David Shea** at **dshea@gdldlaw.com**.

About Goodell DeVries

Goodell DeVries is a regional law firm with a national presence. Our team of attorneys handles the most complex legal challenges for clients across the country in business law, intellectual property, product liability, mass torts, medical malpractice law, appellate matters, complex commercial litigation, insurance, toxic torts, and more. Our lawyers are ranked among the best in the nation by leading directories, including Chambers and Best Lawyers, and we've been named among the top law firms for women by Law360. To learn more, visit www.gdldlaw.com or follow us on LinkedIn.

David Shea is an associate in Goodell DeVries's Commercial and Business Tort Litigation and Risk Management, Investigations, and Compliance Practice Groups.

Editors' Corner

The MDC Editorial Staff would like to extend their sincere thanks to those who provided content for this season's edition of *The Defense Line*. We hope that this edition's focus on ethics, consumer product health, and employer "how-to" guides provides an informative and interesting read for all our subscribers. We will continue to seek articles and case updates for publication and will accept submissions at any time.

We hope that you enjoy this edition of *The Defense Line*. If you have any comments, suggestions, or submissions, please contact the Publications Committee below.

Nicholas J. Phillips
Co-Chair, Publications Committee
Thomas, Thomas & Hafer, LLP
(571) 464-0436
nphillips@tthlaw.com

Tyler B. Maizels
Co-chair, Publications Committee
GodwinTirocchi, LLC
(410) 418-8778
maizels@godwintirocchi.com

Generative AI and Legal Ethics

Craig S. Brodsky

The number of lawyers sanctioned for citing fake cases or quotes created by Generative Artificial Intelligence tools continues to grow.

Earlier this summer, U.S. District Judge Thomas Cullen ordered counsel to show cause as to why she should not be sanctioned under Fed.R.Civ. Pro. 11 and also referred her to the state bar for disciplinary proceedings because she cited multiple fake cases and used fake quotations in a filing. See, *Iovino v. Michael Stapleton Associates, LTD*, 2024 U.S. Dist. LEXIS 130819 (W.D. Va July 24, 2024).

In his scathing opinion, Cullen joined judges from New York Massachusetts and North Carolina, among others, by concluding that improper use of AI generated authorities may give rise to sanctions and disciplinary charges.

In *Iovino*, Cullen issued his order after he could not verify several cases and quotes submitted by plaintiff's counsel. He held that attorneys who fail to ensure that filings are accurate or those who submit filings with fabricated case law or quotations should face scrutiny.

Cullen was particularly troubled by counsel's conduct after the fake authorities came to light. He directed counsel to provide supplemental authority and asked her to explain why the prior briefing contained fake citations. Counsel provided supplemental authorities, but she did not explain "where her seemingly manufactured citations and quotations came from and who [was] primarily to blame for this gross error."

To Cullen, "[T]his silence is deafening." (Aside: if you read my columns regularly, you'll know I would have advised the lawyer to answer the judge's questions directly).

It is obvious that a lawyer should not cite fake cases or use fake quotes in a brief. It is likewise obvious to state that GAI in the legal profession is here to stay. But what is not obvious is how GAI will impact the legal profession. Changes come fast.

As a result, on July 29, 2024, the American Bar Association Standing Committee on Ethics and Professional issued Formal Opinion 512 on Generative Artificial Intelligence Tools. The ABA Standing Committee issued the opinion primarily because GAI tools are a "rapidly moving target" that can create significant ethical issues. The committee believed it necessary to offer "general guidance for lawyers attempting to navigate this emerging landscape."

The committee's general guidance is helpful, but the general nature of Opinion 512 it underscores part of my main concern — GAI has a wide-ranging impact on how lawyers practice that will increase over time. Unsurprisingly, at present, GAI implicates at least eight ethical rules ranging from competence (Md. Rule 19-301.1) to communication (Md. Rule 19-301.4), to fees (Md. Rule 19-301.5), to confidentiality, (Md. Rule 19-301.6), to supervisory obligations (Md. Rule 19-305.1 and Md. Rule 305.3) to the duties of a lawyer before tribunal to be candid and pursue meritorious claims and defenses. (Md. Rules 19-303.1 and 19-303.3).

As a technological feature of practice, lawyers cannot simply ignore GAI. The duty of competence under Rule 19-301.1 includes technical competence, and GAI is just another step forward. It is here to stay. We must embrace it but use it smartly.

Let it be an adjunct to your practice rather than having Chat GPT write your brief. Ensure that your staff understands that GAI can be helpful, but that the work product must be checked for accuracy.

After considering the ethical implications and putting the right processes in place, implement GAI and use it to your clients' advantage.

Craig Brodsky is a partner with Goodell, DeVries, Leech & Dann LLP in Baltimore. For over 25 years, he has represented attorneys in disciplinary cases and legal malpractice cases, and he has served as ethics counsel to numerous clients. His Legal Ethics column appears monthly in The Daily Record. *He can be reached at csb@gdldlaw.com.*

This article originally appeared in The Daily Record *on September 5, 2024.*

MDC's 2024 Crab Feast

Maryland Defense Counsel ("MDC") held its **Annual Meeting and Crab Feast** at Nick's Fish House Upper Deck in Baltimore on Thursday, June 20, 2024. MDC would like thank our members and sponsors for their support of MDC and the new board. It was great to see everyone!

New board members include:

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

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

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

Secretary: Rachel L. Gebhart, Esq., *GodwinTirocchi, LLC*

Immediate Past President: Sheryl A. Tirocchi, Esq., *GodwinTirocchi, LLC*

For Immediate Release

Goodell DeVries Partner Kamil Ismail Receives Baltimore Bar Foundation Fellows Honor

Congratulations to Goodell DeVries partner **Kamil Ismail**, who was selected for the Baltimore Bar Foundation Fellows' honor for 2024. Kamil was selected for his commitment to improving education about the law, democracy, and the administration of justice. He accepted the award at the Bar Association of Baltimore City's annual meeting on June 20, 2024.

Kamil's practice at Goodell DeVries focuses on the areas of product liability, insurance coverage, and commercial and business tort litigation. He is a member of the Character Committee of the Court of Appeals of Maryland for the Sixth Appellate Circuit; a former member of the Governor's Trial Courts Judicial Nominating Commission for the Fourteenth Judicial District, Baltimore City; and a former Adjunct Professor of Advocacy at the University of Baltimore School of Law.

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Spotlight

Tina Billiet

Rachel Giroux

Nick Szokoly

Waranch & Brown, LLC's **Tina Billiet** and **Rachel Giroux**, Esquire, along with The Murphy Firm's **Nick Szokoly**, secured a hard-fought defense verdict on behalf of a local hospital and their obstetrician providers. Plaintiff claimed her obstetricians failed to remove retained products of conception after childbirth and failed to recognize an infection, leading to catastrophic injuries including the amputations of multiple extremities and need for permanent dialysis.

During this two-week trial, the defense team effectively demonstrated there were no retained products or infection which caused injury. The Baltimore City jury agreed, returning a defense verdict within hours of closing arguments.

Automation and the Court Reporting Industry

Planet Depos

As technology continues to advance, fears of robots replacing humans has increased across many industries as corporations look to automate certain job functions to reduce costs and stay on top of trends. This McKinsey report detailed which professions have the most potential for automation, and it may surprise you that court reporting and the legal industry only had a 16% chance. While the report was published in 2016, and the legal space continues to evolve and incorporate litigation technology, it's evident that the court reporting industry has still maintained a strong need for human operation.

"Legal proceedings can get heated with people talking over one another, or you may have a witness that mumbles or has a strong accent," says Sandi Wilson, CSR (CA), FPR, CER, CDR, senior director of litigation technology. "You must have a person there to keep decorum, administer an oath, mark exhibits, identify speakers and ask for questions to be repeated if needed, among other responsibilities. Technology is always going to need that human touch for a 100% verbatim record."

The need for this human element demonstrates that it would be impossible to fully automate the court reporting industry. However, across the nation, there is a critical shortage of stenographic reporters which only continues to worsen year after year, due to low enrollments at stenography schools and retiring reporters leaving the field. These two factors make it harder and harder to meet the growing demand for stenographic reporters.

This is where litigation technology and digital court reporters can assist and serve as a way to supplement the shortage. When digital court reporting was first introduced, many were unsure about it, but they have slowly started to embrace the new technology and new type of (human) court reporter.

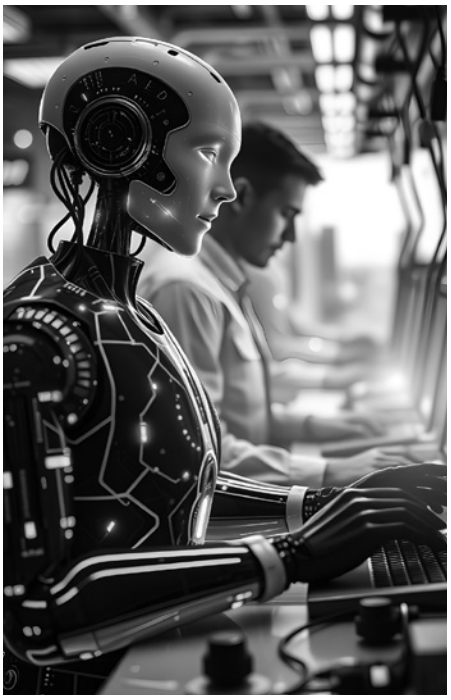

Photo: Pixabay.com

"There is a misconception of what digital court reporting actually is and what it has to offer; I think early on, some of the methods were not as advanced as they are today, and the reporters were not always using quality equipment and technology, so opinions were formed based on the earlier methods of digital reporting," says Wilson. "Today, litigation technology is state-of-the-art. The digital reporting method is no longer the lesser method of court reporting; it's simply a different method of court reporting with the end product being a verbatim transcript."

As litigation technology continues to expand, court reporters have access to new programs and functions that they may not have had before.

"Technology is only going to make a court reporter's job easier; with artificial intelligence and automatic speech recognition programs, it helps reporters work smarter, not harder," says Wilson. "For example, a reporter or transcriber manually typing up a proceeding will take longer than a reporter or transcriber using ASR or AI to make the first pass on creating the transcript. With ASR and AI translation in the 80-to-90% range, the reporter or transcriber can scope and proofread the proceeding, bringing it to 100% accuracy in almost half the time."

Ultimately, Wilson believes that the best-case scenario for the court reporting industry is a combination of amazing technology and a well-trained professional.

"Rather than focusing on the method of court reporting, we need to focus on the professional behind the method," explains Wilson. "If a reporter has a great work ethic, is trained well, keeps up with current technology and is knowledgeable of legal proceedings and decorum, they will have job security for the rest of their career regardless of the reporting method they use to capture the record."

To learn more about digital court reporting, check out our informational video at https://youtu.be/GZ-MaUmpEB4?feature=shared.

Evaluating Consumer Product Health Claims

Jason Clevenger, Ph.D., Jessica Vargas, Ph.D., Nicholas Benetatos, Ph.D.,
Megan Leonhard, M.P.H., Diane Boesenberg


Jason Clevenger, Ph.D.


Jessica Vargas, Ph.D.


Nicholas Benetatos, Ph.D.


Megan Leonhard, M.P.H.


Diane Boesenberg

FTC scrutiny is expanding the scope of evidence-based claim substantiation, increasing the demands for valid scientific research

"*Increase your metabolism.*"

"*Clinically proven to reduce skin irritation.*"

"*Supports joint health.*"

Health-related claims can help sell a variety of consumer products. However, when claims may be misleading or lacking the appropriate level of scientific support, product manufacturers can face significant business and regulatory risks.

In an effort to ensure that health-related claims are "truthful, not misleading, and supported by science," the Federal Trade Commission released its *Health Products Compliance Guidanc*e in 2022. This guidance, the first update from FTC since its 1998 *Dietary Supplements: An Advertising Guide for Industry*, expands the agency's purview from dietary supplements to all health-related products, including foods, diagnostic tests, apps, medical devices, wearables, over-the-counter drugs, and more.

In addition to expanding its scope from dietary supplements to all health-related products, FTC's guidance details how consumer product manufacturers need to substantiate their claims through "competent and reliable scientific evidence" and "clear and conspicuous disclosure." The agency's increased scrutiny signals that substantiation of new and existing health-related claims may need to be reviewed to confirm there is robust evidence the claims are truthful and not false or misleading based on updated guidelines.

Without substantiating their product health claims, manufacturers risk financial penalties and litigation, as well as the loss of time to market, money, and reputational damage that can come with having to retract or restate claims.

Regulation of consumer product health claims

Although this expansion in scope creates a situation where FTC and the Food and Drug Administration share jurisdiction over the marketing of devices, drugs, dietary supplements, foods, and other health-related products, they have different responsibilities. FTC has primary responsibility for regulating all advertising of foods, drugs, devices, and cosmetics but not their labeling. FDA has primary responsibility over the branding of foods, drugs, devices, and cosmetics, as well as the regulation of prescription drug advertising. FTC and FDA also have different legal frameworks — for instance, the FTC, unlike FDA, can't exercise premarket approval over health-related claims.

Importantly, a product's regulatory status can change depending on the claim. For example, dietary supplements making broad and far-reaching claims about being able to "diagnose, cure, treat, mitigate, or prevent" disease could be considered an unapproved drug under the Federal Food, Drug, and Cosmetic Act, subject to the requirements that apply to drugs, even if they are labeled as dietary supplements.

Trending toward increased substantiation

FTC has brought and adjudicated or settled more than 200 cases involving misleading or false health-related claims since 1998. Since 2021, FTC has brought or settled approximately 27 healthcare-related suits, including claims regarding deceptive marketing. Two key principles guide FTC's actions:

1. Health-related claims must be truthful and not misleading (i.e., clear and conspicuous disclosure).
2. Before advertising health-related claims, advertisers must have adequate substantiation (i.e., robust, reproducible, competent and reliable scientific evidence) for all product claims conveyed expressly or implied, preferably based on peer-reviewed guidelines and published methodologies.

For example, a label on a vitamin bottle that claims 95% of orthopedists consume the product reflects an "expressly stated" claim (i.e., 95% of orthopedists take the product), as well as an "implied" claim because it suggests that the vitamin might support bone health since orthopedists take it. Both types of claims need substantiation.

In verifying these claims, stakeholders will want to think about how different audiences might interpret their health-related claims. Someone who has mobility issues for instance, may be more susceptible to an overstated claim like "boosts leg strength and mobility" than someone without mobility concerns. FTC also requires that qualifiers and disclosures must be "clear and conspicuous," disclosing any limitations of a health-related claim. Rigorous substantiation can help reveal product claim limitations.

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Factors affecting the required level of substantiation

According to the updated guidance, claims involving the safety and efficacy of health-related consumer products may receive a higher level of scrutiny and require increased substantiation. According to FTC, factors influencing the amount and type of substantiation required include:

- **Product types:** Consumer health and safety goods generally require a relatively high level of scientific substantiation.
- **Claim types:** Claims that are difficult for consumers to verify on their own — such as claims that cannot be verified without medical testing — may require more substantiation.
- **Truthful claims that might benefit consumers but are difficult or expensive to verify:** The costs and benefits of verifying claims may affect the level of substantiation required.
- **Consequences of a claim being false:** This could include both physical and economic injury, such as a consumer forgoing more effective treatment or the cost of buying an ineffective product.
- **Expert opinion:** What experts in the field consider a reasonable amount of substantiation can affect the level of substantiation required.

Steps for substantiating health-related claims

According to FTC, basic components of valid scientific research include a treatment and control (or comparison) group, randomization, and double blinding, as well as robust methodology and both statistically significant and clinically meaningful and, if necessary, actionable, results. Taking a scientific approach informed by the following steps can help product manufacturers obtain the evidence needed to understand the specific scope and parameters of their health-related claims and go to market with confidence:

1. Conduct a thorough critical review of the existing scientific literature and data on the product — including history of claims made and accepted — and relevant regulatory guidance and standards to identify gaps and opportunities in the evidence base, as well as potential risks and benefits of the claim.
2. Design a study to address a research question and hypothesis that will meet the regulatory expectations and criteria for the claim, including choosing the appropriate study design, such as a randomized controlled trial or an observational study; selecting the relevant outcome measures, such as biomarkers, clinical endpoints, or subjective ratings; defining the study population, sample size, and inclusion and exclusion criteria; and determining the study duration.
3. Create a statistical analysis plan and perform data analysis that can answer the research question and hypothesis and evaluate the statistical significance and clinical relevance of the results — which may include applying appropriate statistical analyses to test the assumptions and limitations of the data and the methods — and reporting the findings.
4. Synthesize and communicate the evidence in a clear and concise manner that can support evaluation of the claim, which may include preparing a complete study report, manuscript, or presentation that summarizes the study objectives, methods, results, and conclusions; highlighting the strengths and weaknesses of the evidence; providing recommendations regarding whether the claim is supported; and outlining the implications of the claim.

Looking to the future of advertising

Although FTC's guidance update was its first in many years, consumer product companies can benefit from thinking about how the stakes for substantiation could increase going forward. In the context of evolving advertising platforms like augmented reality (AR) labels, product claims may be presented to consumers in new ways (e.g., multiple languages, additional content unable to fit on a standard label) with the potential to increase consumer engagement and improve consumer interactions and label understanding — quickly delivering more information than a two-dimensional label can provide. With the touch of a button, consumers may be able to scan AR labels with smart phone cameras to receive a variety of content, including videos, customized messaging, related product recommendations, social media, and much more. With these advances, companies should also be mindful of equitable access for populations or communities who may not have access to AR or smart phones and will continue to rely on traditional labels.

While these labels and others like them may offer added value for consumer products companies — fostering brand loyalty and influencing purchasing decisions with increased speed to different demographics — it's more than likely that as messaging related to health-related digital claims becomes more prominent, so will the demand from regulatory entities in substantiating them. To capitalize on early and ongoing opportunities on these platforms and others, well-designed scientific studies have the potential to help companies appropriately scope and collect the evidence that might be needed for future health-related claims, helping them take advantage of fast-evolving market and advertising trends.

Jason Clevenger, Ph.D. *Dr. Clevenger's expertise focuses on materials characterization and process development for specialty manufacturing, with a particular emphasis on regulated products such as medical devices and pharmaceuticals.*

Jessica Vargas, Ph.D. *is a chemist who specializes in compositional analysis of complex materials in support of product development, manufacturing, and root cause analyses, with an emphasis on materials for biomedical applications.*

Nicholas Benetatos, Ph.D. *joined Exponent in 2019 bringing a wealth of knowledge and experience in regulatory affairs related to medical devices, combination products, pharmaceuticals and their associated underlying science.*

Megan Leonhard, M.P.H. *has experience in project and operations management of community-based health studies, clinical research, and human subject technology user studies. She specializes in wearable technology studies, including serving as study principal investigator.*

Diane Boesenberg *has 25 years of experience in the competitive consumer goods marketplace as a microbiologist, a regulatory professional focused on EPA, CPSC and FDA products and as a strategic corporate partner to quickly launch products while not compromising on compliance.*

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For Immediate Release

Tom Monahan Receives GEDCO Leadership Award

Congratulations to our partner Thomas V. Monahan, Jr. on receiving the Leadership Award from GEDCO (Govans Ecumenical Development Corporation).

Tom accepted the award at GEDCO's 2024 Thanksgiving Tribute gala on November 20. Goodell DeVries partners Jeff Hines, Amy Heinrich, Rick Barnes, Craig Merkle, Tom Waxter, and Jhanelle Graham Caldwell were there to celebrate with Tom and his family.

GEDCO, in partnership with faith-based and community organizations, provides affordable housing, supportive services, and emergency assistance to community residents. Tom has supported the organization for many years, served on its Board of Directors for seven years, and was Chair of the Board for the last four of those seven years.

We salute Tom for his service to GEDCO and congratulate him on this well-deserved accolade.

Ben Middleton Joins Goodell DeVries's Medical Malpractice Team

Robert "Ben" Middleton has joined the Baltimore-based law firm of Goodell DeVries as an associate in the firm's Medical Malpractice Practice Group.

Ben defends healthcare providers and healthcare institutions in malpractice claims. He brings to his practice a wide range of experience as a litigation and trial attorney, including civil litigation, workers' compensation defense, and criminal defense. He has been named a Rising Star by Super Lawyers for 2023, 2024, and the upcoming 2025 edition.

Ben is a member of the Maryland Defense Counsel and the Baltimore County Bar Association. He also volunteers with the Marine Corps Toys for Tots program.

He earned his J.D. with a concentration in litigation in 2015 from the University of Baltimore School of Law. He was also a competing member on the National Moot Court Trial Team. He graduated *cum laude* with a B.A. from Towson University in 2012.

About Goodell DeVries

Goodell DeVries is a regional law firm with a national presence. Our team of attorneys handles the most complex legal challenges for clients across the country in business law, intellectual property, product liability, mass torts, medical malpractice law, appellate matters, complex commercial litigation, insurance, toxic torts, and more. Our lawyers are ranked among the best in the nation by leading directories, including *Chambers* and *Best Lawyers*, and we've been named among the top law firms for women by Law360. To learn more, visit www.gdldlaw.com or follow us on LinkedIn.

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

An Employer's Step-by-Step Guide to Obtaining a Peace Order on Behalf of an Employee

Joseph P. Kavanagh

In 2021, the Maryland General Assembly enacted the Workplace Violence Act, which allows an employer to address workplace violence by seeking a Peace Order on behalf of an employee. A Peace Order instructs an individual (the "Respondent") to stay away from the workplace and to refrain from specific, prohibited conduct. Violating the terms of a Peace Order is a crime, subject to punishment by incarceration and/or a fine.

In June 2024, Goodell DeVries Risk Management, Investigations, and Compliance Group practice chair Jared M. Green provided a guide to handling criminal incidents in the workplace. A Peace Order can be obtained in response to a criminal incident whether or not the police were contacted, or criminal charges were filed. Below is a step-by-step guide to obtaining a Peace Order on behalf of an employee for incidents of workplace violence.

What Conduct is Prohibited by the Peace Order Statute?

Not all criminal acts can form the basis for a peace order. Instead, the Respondent must have committed at least one of the following, enumerated "unlawful acts:"

- An act that causes serious bodily harm
- An act that places the petitioner or the petitioner's employee in fear of imminent serious bodily harm
- Assault in any degree
- False imprisonment
- Harassment
- Stalking
- Trespass
- Malicious destruction of property
- Misuse of telephone facilities and equipment
- Misuse of electronic communication or interactive computer service
- Revenge pornography
- Unlawful Visual surveillance

In the unfortunate event that one or more of the above occurs at the employee's workplace, the employer may seek a Peace Order on behalf of their employee.

Step 1: Obtaining an Interim or Temporary Peace Order

Within thirty days of the enumerated unlawful act(s), the employer or employee must file a Petition for Peace Order and two associated forms in the District Court of Maryland. In total, three forms should be included in an initial peace order filing: 1) Petition for Peace Order, 2) The Addendum to the Petition for Peace Order, and 3) The Peace Order Supplement. The petition should provide specific details regarding the enumerated unlawful act(s) and the addendum should include as many details as known to enable law enforcement to identify and serve the Respondent.

The next steps will depend on whether the petition is filed inside or outside of normal business hours.

If the petition is filed outside of normal business hours, the employee and/or employer will file the paperwork at a commissioner's office in the jurisdiction where the incident occurred. The commissioner will hold a hearing to determine whether to issue an Interim Peace Order. To issue an Interim Peace Order, the commissioner must find there are reasonable grounds to believe that the Respondent committed the enumerated unlawful act(s) at the employee's workplace and that the Respondent is likely to commit an enumerated unlawful act against the employee in the future. If an Interim Peace Order is granted, the commissioner may order the Respondent to:

- Refrain from committing or threatening to commit one of the unlawful acts identified above against the petitioner or the petitioner's employee.
- Refrain from contacting, attempting to contact, or harassing the petitioner or the petitioner's employee.
- Refrain from entering the residence of the petitioner or the petitioner's employee.
- Remain away from the place of employment, school, or temporary residence of the petitioner or the petitioner's employee.

If an Interim Peace Order is obtained, or if the original petition is filed during normal business hours, the employer and/or employee will appear before a Maryland District Court judge for a Temporary Peace Order hearing. If an Interim Peace Order was obtained, the Temporary Peace Order hearing will be held on the first or second day that the court is open following the interim hearing. For example, if an Interim Peace Order is obtained on a Saturday, the temporary hearing will be held on the following Monday or Tuesday, assuming neither is a holiday. If the petition is filed during normal business hours, then the temporary hearing will likely occur on the same day that the petition is filed. At a temporary hearing, the legal standard is the same as during an interim hearing: the judge must find that there are reasonable grounds to believe that the Respondent committed the enumerated unlawful act(s) at the employee's workplace and that the Respondent is likely to commit an enumerated unlawful act against the employee in the future.

Step 2: Obtaining a Final Peace Order

Once a Temporary Peace Order is obtained, the court will schedule a Final Peace Order hearing to occur no more than seven days after the Temporary Peace Order hearing. The court may also order that the

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The MDC Expert List

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Respondent refrain from committing or threatening to commit any of the above unlawful acts, refrain from contacting or attempting to contact the employee, and to stay away from the residence and/or place of business at least until the Final Peace Order hearing. Prior to the final hearing, the Respondent must be served with the Temporary Peace Order by law enforcement.

What if the Respondent is Not Served Prior to the Final Peace Order Hearing?

If the Respondent is not served with the Temporary Peace Order, then the employer and/or employee must still appear at the Final Peace Order hearing. The court can postpone the Temporary Peace Order in intervals of up to seven days while the sheriff attempts to serve the Respondent. It is important to obtain updated address information on the Respondent and complete a change of address form to ensure that law enforcement has up-to-date information on the Respondent. Note that a Temporary Peace Order can only remain in effect for thirty days from the date that the Temporary Order was first obtained. If the Respondent is not served within 30 days, the Temporary Peace Order must be dismissed.

What if the Respondent is Served Prior to the Final Peace Order Hearing?

If the Respondent is served and appears in court, then the Respondent will have the option of either consenting to the entry of a Final Peace Order or proceeding with a contested hearing.

If the Respondent consents, then the court will typically enter a Final Peace Order without hearing testimony or receiving evidence from the parties.

If the Respondent elects a contested hearing, then both sides will have the opportunity to present evidence in the form of witness testimony and exhibits. The employer and/or employee has the burden to prove by a preponderance of the evidence (more likely than not) that the Respondent committed the enumerated unlawful act(s) at the employee's workplace and is likely to commit an unlawful act in the future against the employee.

A Final Peace Order, whether obtained by consent or after a contested hearing, may include any or all of the following relief:

- Order the respondent to refrain from committing or threatening to commit an enumerated unlawful against the petitioner or the petitioner's employee.
- Order the respondent to refrain from contacting, attempting to contact, or harassing the petitioner or the petitioner's employee.
- Order the respondent to refrain from entering the residence of the petitioner or the petitioner's employee.
- Order the respondent to remain away from the place of employment, school, or temporary residence of the petitioner or the petitioner's employee.
- Direct the respondent or petitioner to participate in professionally supervised counseling or, if the parties are amenable, mediation.
- Order either party to pay filing fees and costs of a proceeding under this subtitle.

A Final Peace Order can remain in effect for up to six months from the date of the final peace order hearing. A Final Peace Order can also be extended for an additional six months, after notice is given to the Respondent and the court conducts a hearing finding that good cause exists to extend the order.

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

What if the Respondent Violates the Terms of an Interim, Temporary, or Final Peace Order?

The violation of a peace order is a misdemeanor criminal offense and is punishable by up to ninety days of incarceration and/or a fine of $1,000. Please see our guide on handling criminal incidents in the workplace for additional information. A court may also issue a finding of contempt of the Respondent violates the terms of a peace order.

Peace Orders can be an effective means of protecting employees and deterring future workplace violence and harassment. Appreciating the nuances of Maryland's Peace Order laws and procedures can help businesses respond to and limit workplace violence. If your organization needs assistance identifying potential risks or navigating an existing criminal, civil, or regulatory issue, contact the Risk Management, Investigations, and Compliance practice chair Jared Green at jgreen@gdldlaw.com or RMIC practice group associate Joseph Kavanagh at jkavanagh@gdldlaw.com.

Joseph Kavanagh is an associate in Goodell DeVries's Medical Malpractice Practice Group. He represents healthcare providers, healthcare organizations, and insurance carriers in various malpractice claims.

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