THE DEFENSE LINE

Winter 2026

A Publication From Maryland Defense Counsel, Inc.

Mediation:
The Art of a Critical Process

Also Featured

President's Message

Welcome to our Winter 2026 edition of *The Defense Line*. It is a privilege to serve as President of Maryland Defense Counsel and to work alongside such an engaged and accomplished group of defense practitioners. Our strength as an organization continues to come from active participation, thoughtful programming, and the professional relationships that set MDC apart from other organizations.

Zachary A. Miller, Esquire

Wilson Elser Moskowitz Edelman & Dicker LLP

This past year has been an excellent example of that commitment. In October, our Lunch and Learn on *Shaping the Settlement: Negotiation Skills for Defense Counsel* provided excellent practical, immediately applicable strategies from Amy Askew, Matthew Youssef, and Jeff Trueman that many members have already put to use in their practices. We were also proud to host our Past Presidents Reception, an opportunity to recognize the leadership that built MDC into the organization it is today and to connect generations of defense counsel.

Looking ahead, we have a full and exciting calendar. On March 25, 2026, MDC will co-sponsor *Deposition Skills in Practice: Strategies from Both Sides of the Bar* at the University of Maryland Francis King Carey School of Law. This program-presented in partnership with the MSBA Young Lawyers Division, the Maryland Association for Justice, Planet Depos, and the Animal Legal Defense Fund, reflects MDC's commitment to substantive programming and meaningful collaboration across the bar.

We are also looking forward to a more social opportunity to connect at a karaoke night on April 16, 2026, in Baltimore that will be co-sponsored by MDC and MSBA Young Lawyers Division. In addition, in May 2026, MDC will once again host its famous Deposition Bootcamp, designed to provide hands-on training and practical insight for attorneys at all stages of practice. And, of course, we will close out the spring with one of MDC's favorite traditions-our Annual Crab Feast in June 2026. Please be on the lookout for invitations to these events.

I would also like to extend a sincere thank you to our editor, Ellen Chang, and to Brian Greenlee for their hard work and dedication in putting together an excellent issue of *The Defense Line*. Their efforts help keep our membership informed and connected.

On behalf of MDC's Executive Committee, thank you for your continued engagement and commitment to Maryland Defense Counsel. I look forward to seeing many of you in the months ahead.

Sincerely,
Zachary Miller

Get Involved With MDC Committees

To volunteer, contact the chairs at

www.mddefensecounsel.org/leadership.html

Committees

- Appellate Practice
- Judicial Selections
- Legislative
- Programs & Membership
- Publications
- Sponsorship
- Young Lawyers

Substantive Law Committee

- Commercial Law
- Construction Liability
- Employment Law
- Health Care and Compliance
- Lead Paint
- Privacy, Data, and Security
- Products Liability
- Workers' Compensation

THE DEFENSE LINE
Winter 2026

64 Years of Service to Our Members (1962–2026)

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

MARYLAND DEFENSE COUNSEL, INC. SINCE 1962

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

E-mail:
info@mddefensecounsel.org

www.mddefensecounsel.org

Cover Image: Shutterstock.com

Table of Contents

Back to the Future — Key Components for Preparing for a Successful Mediation

Denise M. Motta, Brooks Saible, and Joseph Megariotis


Denise M. Motta


Brooks Saible


Joseph Megariotis

Mediation is a part of almost every dispute, but are defense attorneys employing best practices to ensure the case is ready for mediation and ultimately resolution? Mediation is a process — not an event — and many practitioners have not changed their mediation approach to take advantage of new considerations and techniques. A successful mediation may not always result in settlement, but there could be other advantages making mediation a success. In order to allow for the best possible chance of success, practitioners should not only prepare cases for mediation by evaluating liability, damages, and expert considerations, but also should employ certain tactics before and during the mediation.

Key Considerations

Is the Case/Dispute Appropriate for Mediation?

Leaving aside the fact that most courts order mediation or settlement conferences, before going to mediation, it is important to determine if the case or dispute is ready. Mediation should not be something that parties simply do to check a box or comply with a court order (or a contractual requirement), but when parties have enough information to evaluate appropriately the strengths and weakness of their positions, as well as the damages at issue.

When parties treat mediation as an "event" and not a "process," parties may not consider mediation until after the close of discovery. However, parties should consider if mediation can proceed early in the case — before discovery or after limited discovery (i.e., limited document exchange or depositions of key witnesses). In many construction contracts, mediation is a condition precedent to arbitration, but the parties will not benefit from going to mediation if they do not have enough information to evaluate the case properly. The same is true in cases involving catastrophic injuries or employment disputes. Yet, it is often unnecessary to incur the cost of extensive discovery or document exchange to get to the key issues and evaluate the claims in dispute.

Also, before proceeding to mediation, the parties should consider if expert evaluation is necessary. Do you need a technical expert? Do you need an expert to evaluate damages? Do you need an IME? If so, you should consider the implications of exchanging expert reports or opinions before the disclosure deadlines and make sure you provide sufficient time for expert evaluation before proceeding to mediation.

Who is the Right Mediator?

Attorneys often use mediators simply because they have used the mediator in the past with some level of success, but is he/she really the best mediator for your case and the goals you may have for the mediation? Before you can select the right mediator, you and your client need to understand the strengths and weaknesses of your case, as well as what you hope to achieve from the mediation. For example, if the goal is to settle the claim in order to avoid risk either because the case involves bad facts, clear liability, or other business reason, it may not be necessary to retain a mediator who will study the mediation submissions, but instead, a mediator who can use his/her reputation to reach a settlement. This is often referred to as a "Facilitative" Mediation.

On the other hand, if you want to use the mediation as a way to get insight on the strengths and weakness of the arguments or an understanding of your adversary's value (if the case does not settle), you should consider a mediator who is a subject-matter expert who will come to the mediation prepared as an unbiased third-party to offer insights on the positions that all parties at the mediation advance. A mediator does not decide the outcome of the mediation, but facilitates a discussion between the parties so that they can make an educated decision as to whether it makes sense to resolve the dispute. This is often referred to as an "Evaluative" Mediation.

How to Prepare for Mediation?

Preparing for mediation starts with a proper evaluation of the case. You cannot look at the case through "rose-colored glasses." Instead, it is important to understand and evaluate your best position as well as the opposing position. This will allow you to anticipate the potential arguments that the opposing side may raise at mediation and also, will allow you to set your client's expectations. This evaluation includes analyzing legal arguments, identifying helpful and harmful evidence, and engaging expert witnesses

Continued on page 6

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

(BACK TO THE FUTURE) *Continued from page 5*

as necessary. Parties should consider carefully potential impediments to resolution, such as workers' compensation carrier liens, Medicare, and ERISA liens as well as each side's litigation costs.

If experts are involved, this is a good time to have candid conversations regarding the strengths and/or weaknesses of the other side's expert opinions as well as your own. Are there facts or documents in the file that would support or refute their experts' findings? Oftentimes, experts base their opinions on assumptions and identifying flaws in those assumptions in advance of mediation may widen the range of discussion among parties. Expert involvement in advance of mediation also can assist in clarifying differences that are truly key. The potential benefit is preventing parties from relying on certain categories of differences without realizing the true magnitude and materiality of such differences from a damages standpoint.

Analyzing jury verdicts in your jurisdiction not only will help show the value of a particular injury or claim, but also will show recent trends of which you and your client need to be aware and for which you and your client should prepare adequately.

A proper evaluation of the case will allow for more meaningful discussion about the issues and value of the case at the mediation; otherwise, a party may spend time at the mediation trying to move another party off of an unrealistic expectation.

In addition, it is important to prepare a roadmap for your negotiations in advance of the mediation. You should discuss who will make the opening offer in negotiations and how you will respond based on the expectations that your case evaluation generates.

Should You Participate in a Pre-Mediation Conference?

In complex cases, a pre-mediation conference with the mediator is advisable. You can use the conference to explain your client's position and to answer any questions the mediator may have in advance of the mediation. The mediator also may use the pre-mediation conference as an opportunity to identify issues that parties should consider and evaluate in advance of the mediation. You also can use the pre-mediation conference to identify impediments to resolution, such as an unprepared adversary, insufficient settlement authority, or an uncooperative client. This will allow the mediator to develop strategies in advance of the mediation to address these issues.

In construction and other complex cases, you should consider participating in pre-mediation expert witness exchanges and presentations. In most instances, it is difficult for a party to evaluate appropriately an adversary's expert opinion quickly. Pre-mediation exchanges of expert reports or presentations will afford parties time to digest the information, enlist the parties' own experts to evaluate and respond, and prepare to address adverse experts at the scheduled mediation session.

What Should You Include in Your Mediation Brief and Should You Share?

Your mediation statement should outline your position in clear and concise terms, with citations to legal authorities and supporting evidence. To the extent that you know, you should address the adversary's arguments — or at a minimum, prepare to address the adversary's arguments at the mediation.

You should use the mediation statement to educate the mediator by showing the strengths of your position and the bases for your belief that you will prevail. In complex cases, you should include an itemization of damages and even share a spreadsheet with the mediator. The spreadsheet can include a short statement of your position on the plaintiff's entitlement to particular claim for damages.

Because mediation should be a process where both sides come to an agreement, you should strongly consider sharing your mediation statement with the other side in advance of the mediation. Again, this prevents a surprise that may thwart the purpose of the mediation at the outset of negotiations. You can send any information that you want to keep confidential, such as a damages itemization, to the mediator separately and confidentially.

Who Should Participate at Mediation?

Participants at mediation may seem obvious: (1) Client; (2) Adjuster; and (3) Counsel. However, you should consider if your expert should participate (or be available) based on circumstances of the case and your expectation of negotiations. In complex cases with many moving parts, a qualified and experienced expert can assist in mediation to simplify complex issues for purposes of mediation discussions. Expert presence (in person or virtually) also can be helpful if a party presents new/different information during the course of the mediation and when discussions regarding such information impacts the positions the parties advance at mediation. Additionally, you may need someone other than your direct client-contact at mediation if that person is not the ultimate decision-maker. You also may want to include members of your support staff if you anticipate the necessity of locating additional documents or evidence as the mediation moves forward.

Should You Insist on In-Person or Virtual Mediation?

Since the Covid-19 pandemic, almost all parties are familiar with virtual meeting platforms. Parties regularly use Zoom and Teams for mediation, and these meeting platforms often cut down on expenses associated with mediation. Moreover, some insurance companies no longer allow travel for mediation. Notwithstanding, one side or the other may insist on appearing in person. In that case, you proceed in person and use virtual capabilities to conference in any participant who does not have to be present physically.

Continued on page 7

The MDC Expert List

The MDC Expert List is a contact list for informational purposes only. The List provides the names of experts, their areas of expertise, and the names and contact information of MDC members who are familiar with each expert. A member seeking information about an expert must contact the MDC member(s) in the List for details. The appearance of an expert's name on the List is neither an endorsement nor an indictment of that expert by MDC; it is simply affirmation that MDC members may have useful information about that expert. MDC takes no position regarding 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.

(BACK TO THE FUTURE) *Continued from page 6*

Would an Opening Statement be Beneficial?

In recent years, parties and mediators have moved away from formal opening statements. Many view opening statements as unnecessary in cases involving experienced business parties; likewise, skipping opening statements eliminates the risk of inflaming one party or an injured plaintiff. However, opening statements may be useful where one party wants his or her "day in court," or where you believe that opposing counsel may not have educated the opposing party properly about risk. Again, an expert witness's short opening statement may be beneficial.

Even if the parties and mediator agree that no side will make formal opening statements, you should outline your position to address issues as the issues come up at mediation. You might consider preparing a PowerPoint presentation as if you were providing an opening statement, so you are able to address quickly any issues the opposing party raises during negotiations.

What is Your Negotiation Strategy?

At mediation, it is important to remember the goals you outlined at the beginning of the process. If your goal is to reach a settlement, that will guide your negotiation strategy. If your goal is, potentially, to reach a settlement while also learning about the other side's case — or even to get an idea of how they value the case — you will take a different approach at mediation.

Keep in mind that parties do not want to bid against themselves; so, if prior to mediation, there was an offer or demand to which you did not respond, you should provide a response in the first exchange of numbers, along with justification as to why you have offered that amount. Even if the parties are far apart at the start, and seemingly, there is no chance for settlement, the recommendation is to "trust the process" and attempt to bridge the gap. Resist using brackets too soon. Brackets may be helpful to move the dispute closer to resolution, but brackets often signal that the midline is the settlement amount, which could create the wrong impression.

In determining the amount of your offer, try to avoid increasing the amount of a current demand or lowering the amount of the last offer, unless there are reasons supporting the change in position. Just as parties do not want to bid against themselves, human nature is to view a negative change in position as disrespectful, which may delay the purpose of the mediation.

Make sure you also clearly delineate any contingencies or deal terms. For example, you should address confidentiality, non-disparagement, lien resolution, and other important terms at the outset and advise the mediator that all offers will be subject to the same terms. The mediator, then, can get an agreement on those terms or see if any of the terms is a deal-breaker from the start.

Also, if there are important coverage positions that require discussion, then make sure to communicate this clearly and effectively to the mediator and opposing counsel — even if you're not the one making the argument. Obviously, if you're assigned defense counsel, you should not be the one making those arguments. However, you should, nonetheless, help facilitate that discussion between the mediator and your adjuster, so that everyone is on the same page. If coverage is a legitimate impediment to resolving the case, then you should ensure that coverage counsel attends the mediation to discuss the coverage position. As always, communication is key, and you're not doing anyone a favor — including your client — by keeping the mediator and opposing counsel in the dark about coverage issues that will require discussion at some point.

Finally, for larger mediations, particularly when there are 10 or more parties, keep in mind that you may have limited face time with the mediator and opposing counsel and even less time to communicate your defense. For this reason, it's important to know your goal and to use the time with the mediator as efficiently as possible to advance that goal.

Do You Document the Deal at the Conclusion of Mediation?

The mediator can confirm the terms of the settlement at the conclusion of the mediation, subject to a formal settlement agreement. However, to facilitate the settlement, you can prepare a term sheet or settlement agreement before or during the mediation, which the parties can execute once they reach a deal.

Conclusion

Because mediation is a process, not an event, it is important for attorneys to pay particular attention to the above considerations to achieve a successful result. Bear in mind, also, that successful mediation is not necessarily or exclusively settlement of the case; mediation may be a success, even without settlement, when a party is able to resolve certain issues or gain information about an adversary's case. The biggest impediments to a successful mediation are inadequate preparation or unrealistic positions. Utilizing the tips above will ensure that you and your client prepare for mediation even if the case does not resolve fully.

Denise M. Motta, Esquire is Of Counsel in the Louisville office of Wilson Elser. Ms. Motta is a Panel Member with the American Arbitration Association (AAA) Construction and Commercial, where she serves as an arbitrator and mediator.

Brooks Saible, Esquire is the founding Partner of Saible Law Group in St. Petersburg, Florida. Mr. Saible is an experienced trial attorney who has successfully mediated hundreds of cases for contractors, developers, construction managers, and design professionals.

Joseph Megariotis, Esquire is Partner at Connel Foley in Newark, New Jersey. Mr. Megarlotis focuses on complex commercial disputes, including franchise and trademark litigation in the retail and hospitality sectors, as well as the defense of large exposure/catastrophic casualty events.

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

Virtual Mediation: Is It as Good?

Douglas J. Furlong

I started my own alternative dispute resolution firm about two weeks before the Covid-19 lockdown hit. Since the 1990s, I had been regularly conducting mediations at the request of the courts and my Bar colleagues, as an adjunct to a very busy civil litigation practice. Not surprisingly, all my mediations over 20+ years were in-person. But in March 2020, in-person mediation became impossible. The thing I was planning to do full-time came to a screeching halt.

But maybe not. The whole world was getting on Zoom and Microsoft Teams. Early adopters of virtual mediation had been writing and speaking about it for a few years. However, every ADR practitioner I asked said they didn't do it, didn't like it, had big concerns as to its effectiveness, and generally, thought it was a bad idea. Upon further inquiry, though, I found that every one of the folks with such strong opinions hadn't actually conducted a virtual mediation! They knew it wouldn't work because… they just knew it wouldn't work .

The skeptics' concerns boiled down to a few assumptions:

- It would be harder to read body language, facial expressions, and emotional cues, all the bread and butter of a good mediation and a good mediator.
- There could be technical difficulties precluding full participation.
- "Zoom Fatigue" may become a factor in an extended session.
- Participants' joining from home or elsewhere may be distracted.

I have to admit, I had these same concerns. Even after I had mastered the technology, I had my doubts. But you can't start a new practice without starting the new practice. So, I dove in. And I was very happily surprised.

The above assumptions were just that — assumptions. In practice, they didn't bear out. Several hundred zoom mediations in, I can report that, when performed properly, virtual ADR is as effective as in-person mediation.

What does a "proper" virtual mediation look like? It should go without saying, but it's essential the mediator be able to properly and effectively utilize virtual meeting technology, including pre-setting breakout rooms, seamlessly moving participants between rooms and sharing screens. Also, the mediator should be presenting a professional office background on camera.

But what else? It starts with scheduling. This should occur during a pre-mediation Zoom or Teams call. The attorneys who will be representing the parties at the mediation and the mediator should be handling this video call, not their assistants. During the call, which shouldn't take more than 10 minutes, the mediator can ensure the mediation is scheduled to occur on a date that both sides will have the information they need to make settlement decisions. Also, any of the participants can identify and deal with any potential technical challenges.

After receiving and reviewing the participants' mediation statements/materials, and before the mediation itself, the mediator should schedule a virtual call with each attorney, sans client, to discuss the particulars of the case and to ensure that the mediator is fully aware of any hot-button issues or concerns the attorney may have going into the mediation. This is really the beginning of the mediation. In addition to drilling down on the main factual and legal disputes, this is an opportunity for the attorneys to candidly discuss with the mediator the barriers to settlement as they see it, including any personal conflicts or history between the participants that will require management.

In the end, though, successful virtual mediation requires purposeful attention to the same thing that underlies any successful mediation — establishing an early and meaningful rapport with all participants. This absolutely can occur in a virtual mediation, where the mediator is able to interact directly with the participants through the camera. I have conducted every type of civil non-domestic mediation on Zoom, including cases with a highly charged emotional component, e.g., wrongful death, business divorce, medical and other professional malpractice, will caveat, etc. Perhaps it's the ubiquity of virtual meetings since the pandemic, but people have become used to the technology, so it's not really an impediment to making the interpersonal connections necessary to effectively discuss settlement. The participants are open to this. It's their case. They want the process to succeed.

There are occasions where one or both sides will request in-person mediation, and I'm always happy to do that. There is certainly no downside vis-à-vis effectiveness. But fully 80% of the time in my practice, attorneys are requesting virtual mediation, largely due to the convenience, cost savings, and other efficiencies when mediating that way. The market dictates practice. Attorneys are not interested in engaging in a process that will be a waste of time. They are requesting virtual mediation because, in their experience, it works. Their cases are settling. And their claim rep from Miami didn't have to spend two days in Baltimore.

Douglas J. Furlong, Esquire is the Principal of Furlong ADR, LLC. Drawing on more than 30 years of practice as a civil litigator for both plaintiffs and defendants, Mr. Furlong has mediated hundreds of cases for more than 20 years.

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

Artificial Intelligence on Trial: Navigating and Challenging Improper Use of AI in Legal Proceedings

Christian Castile, Jaclyn Setili Woodand, and Charlotte Flynn


Christian Castile


Jaclyn Setili Woodand


Charlotte Flynn

The time of Artificial Intelligence (AI) as a distant futuristic eventuality has long ended—even within the legal profession. Once science fiction, AI now has become a practical, evolving tool that is already reshaping the ways we serve the interests of our clients. While AI promises both gains in efficiency and reductions in costs, increasing reliance on AI in litigation also raises critical questions of reliability, transparency, and ethics.

The law defines AI with growing specificity. 15 U.S. Code § 9401 defines AI as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments." The Department of Defense, in 10 U.S. Code § 2358, offers a complementary and more technical view, identifying AI as "any artificial system that performs tasks...without significant human oversight," "learn[s] from experience," improves with data exposure, and uses "perception, planning, reasoning, learning, communicating, decision making, and acting" to achieve defined goals.

In litigation, AI can take many forms. Increasingly, legal teams are integrating tools such as Lexis+ AI, Casetext's CoCounsel, Harvey, Everlaw, and even general-purpose platforms like ChatGPT into day-to-day functions. Some attorneys may choose to rely on AI to draft initial versions of pleadings or briefs, summarize deposition transcripts, or even identify inconsistencies across large volumes of evidence. Discovery, in particular, already provides fertile grounds for AI innovation and application, and that trend shows no signs of slowing down. Advanced language models continue to grow in skill, capable of flagging and isolating potentially privileged content in a collection or synthesizing key information from massive production sets, which, in turn, help legal teams uncover patterns and insights more efficiently than ever before.

While these developments promise a more streamlined and cost-effective litigation process, the technology also introduce new challenges. This is particularly true when legal professionals use AI without oversight or disclosure, which can open the door to ethical violations and even sanctions. This article focuses on identifying those risks and outlining how defense attorneys can respond when opposing counsel crosses the still-evolving line.

AI Risks and Concerns

The endless potential advantages of incorporating AI as a litigation tool are not without significant risks. For defense counsel, understanding how and when AI can go wrong is essential not only for guarding against personal missteps, but also in developing the skills to identify and respond when opposing counsel crosses ethical or procedural lines.

One key area of concern relates to data and information privacy. Not all AI is created the same, and one of the most critical distinctions between models is whether it is a public (or "open-source") system or a private (or "enterprise-secure") platform. Open-source AI, like ChatGPT, is broadly accessible in part because training is available on large, publicly available datasets. These systems are constantly evolving, typically, by incorporating data and input from user interactions to improve future performance. One immediately can see the significant legal risks this creates. A public AI platform may retain and use for training purposes content or even inadvertently expose it to third parties, raising red flags for confidentiality and privilege. By contrast, the design of private AI systems factors in data security and access control. Private AI platforms, typically, are for use in or among a specific organization or user base, such as an in-house legal team or law firm, and operate within closed environments that safeguard proprietary or sensitive information.

Another pressing concern is the phenomenon of AI "hallucinations," which refers to situations where AI produces factually incorrect or made-up outputs and presents such content as credible. In the legal context, depending on the question that the AI model posed, hallucinations can take the form of fake case citations, made-up facts from otherwise real cases, non-existent statutes, or legal principles with incorrect explanation, just to name a few. And the dangers of hallucinated content are not theoretical. In recent years, multiple courts have imposed sanctions against attorneys who submitted AI-generated briefs that were riddled with fabricated citations.

A recent and instructive example of the perils associated with AI-generated hallucinations is in *Shahid v. Esaam*, No. A25A0196, 2025 Ga. App. LEXIS 299 (Ct. App. June 30, 2025), where the Georgia Court of Appeals vacated a trial court's divorce decree order because both the trial court's order and the appellee's brief relied extensively on non-existent case law. The underlying appellate dispute centered on whether service by publication was proper, but the presence of fake authorities in the record fundamentally compromised the appellate court's review. The court not only vacated the judgment and remanded for a new hearing, but it also imposed the maximum permissible penalty on counsel for filing frivolous motions, explicitly referencing the dangers of AI hallucinations and the ethical responsibilities of attorneys to verify the accuracy of their filings. *Shahid*, thus, starkly illustrates the systemic risks which uncritical reliance on AI-generated legal research generates.

Judicial Response to AI

As we continue to explore the implications of AI in litigation, the judiciary has become a cautious, but proactive voice in the developing dialogue. While there is no uniform national rule governing the use of AI in legal practice, several federal courts have issued standing orders, proposed local rules, or otherwise, expressed concern over the reliability and accountability of AI-generated content, the volume of which likely will increase continually. Even in districts without court-wide guidance, many federal judges have adopted their own standing orders addressing AI-generated content. Unsurprisingly, though, jurisdictions across the country have

Continued on page 12

(ARTIFICIAL INTELLIGENCE) *Continued from page 11*

taken different approaches.

One example of the judicial response to generative AI in litigation comes from Judge Michael Baylson of the Eastern District of Pennsylvania. His standing order mandates that any party using AI in the preparation of court filings must include "a clear and plain factual statement" disclosing such use, and the party must certify independent verifications of all legal and factual citations. Judge Padin in the District of New Jersey has adopted a similar approach: Her standing policy requires attorneys to identify both the AI tool and the specific portions of the filing that AI generated. Counsel must also certify that a human reviewed the AI tool's output for accuracy and relevance. These types of orders reflect the foundational nature of an attorney's duty of diligence under Rule 11 of the Federal Rules of Civil Procedure.

In the Eastern District of Texas, by contrast, Local Rule AT-3(m) does not mandate the disclosure of AI use in briefing, but the Rule *does* warn attorneys of the "factually or legally inaccurate content" that AI often produces and explicitly reaffirms that filings that attorneys created with the assistance of AI remain subject to the obligations of Rule 11. The Eastern District of Michigan has gone a step further, proposing Local Rule 5.1(a)(4), which would require affirmative disclosure of any use of generative AI in drafting a court filing. The proposed rule defines "generative AI" broadly and mandates that attorneys attest that they personally verified all legal citations and have ensured the accuracy of the submitted content.

With this sort of piecemeal approach, of course, there is bound to be disagreement and divergence, which inevitably leads to outliers. The Western District of North Carolina, at one end of the spectrum, has adopted one of the most restrictive approaches we have seen. The Western District's standing policy effectively bans the use of generative AI in legal filings, requiring a dual certification from filing attorneys that: (1) The party used no generative AI in researching or drafting the document, and (2) a human has reviewed and verified "every statement and every citation" for accuracy. *See* W.D. N.C., Dkt. No. 3:24-mc-104, June 18, 2024 (Standing Order "In Re: Use of Artificial Intelligence"). At the other end of the spectrum, the Illinois Supreme Court has declined to impose AI-specific disclosure requirements in state court litigation altogether. In doing so, the Court emphasized that existing ethical and procedural safeguards like Rule 11 already provide adequate oversight mechanisms. Illinois Supreme Court Policy on Artificial Intelligence, eff. Jan. 1, 2025.

This jurisdictional divergence serves to underscore the need for counsel to familiarize themselves with local standing orders and proposed rules regarding AI use, even if only to help understand how to respond when your opponent incorporates AI-generated content into practice.

Practice Tips for Preempting and Responding to Improper Use of AI

Conferring with Counsel and Striking Problematic Filings

With the increasing use of and reliance on AI tools, litigators are bound to come across a filing that appears to rely on the use of AI. The first step, of course, is to determine whether the applicable jurisdiction/judge applies any rules or standing orders. If it appears that the filing does violate an applicable rule (or if there are no AI-specific rules), an affirmative response may be appropriate.

First, however, courts and local rules often require parties to confer in good faith before seeking judicial intervention regarding deficient or problematic filings. In such courts, failure to correct the mistake timely may result in dire consequences. Indeed, even in jurisdictions where there is no meet and confer requirement, it may be beneficial to send a deficiency letter or notice to the offending counsel, alerting them that their improper or incorrect use of AI did not go unnoticed and giving them an opportunity to withdraw the offending filing. For example, in *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 462 (S.D.N.Y. 2023), the court lambasted plaintiffs' counsel when they "abandoned their responsibilities [by submitting] nonexistent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question." However, if plaintiffs' counsel had "com[e] clean about their actions shortly after they received the defendant's March 15 brief questioning the existence of the cases," the court clarified, then the outcome might have been different — before imposing a penalty of $5,000 jointly and severally imposed on the attorneys and law firm involved in the faulty filing and ordering, among other things, that they "shall send via first-class mail a letter individually addressed to each judge falsely identified as" an author of a fake case.

When a conference does not resolve the issue or is unnecessary, a party may escalate the issue by moving to strike the offending filing on the grounds of Federal Rule of Civil Procedure 11 and 37, as well as a court's inherent authority to strike submissions that contain false or fabricated content.

In *Lacey v. State Farm Gen. Ins. Co.*, 2025 U.S. Dist. LEXIS 90370, at *1, 10 (C.D. Cal. May 6, 2025), the Special Master granted defendant's motion to strike the plaintiff's brief in a privilege dispute after determining

Continued on page 13

(ARTIFICIAL INTELLIGENCE) *Continued from page 12*

that the inclusion of "bogus AI-generated research" constituted reckless conduct "with the improper purpose of trying to influence [the] analysis of the disputed privilege issues." Beyond that, the court also denied the underlying discovery relief that plaintiff sought, illustrating that submitting — or knowing when and how to challenge — AI-generated briefing can result in dispositive consequences, potentially. Similarly, in *Gonzalez v. Texas Taxpayers & Research Association*, 2025 U.S. Dist. LEXIS 16801 (W.D. Tex. Jan. 29, 2025), the court granted defendant's motion to strike the plaintiff's brief after finding that the brief contained numerous non-existent case citations which an AI tool generated. The court emphasized that regardless of whether the errors were the result of AI or administrative mistakes, the submission of a brief "that contained an abundance of technical and substantive errors" warranted striking the filing and imposing monetary sanctions.

Protective Orders

The rise of generative AI in litigation unfortunately, but unsurprisingly, has outpaced the development of uniform procedural safeguards. Presently, no nationwide rule or standardized protocol exists to regulate how legal professionals may use, store, process, or analyze AI systems for discovery materials. Yet the ethical and practical implications of incorporating AI into the discovery process are substantial, especially when it comes to safeguarding confidential and privileged client information.

The American Bar Association's Model Rules of Professional Conduct provide a useful starting point. Rule 1.6(c) imposes a duty of technological competence, requiring that lawyers "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." This obligation applies regardless of the medium which stores or transmits the information, such that it would extend to digital tools like AI. The use of open-source AI in discovery, therefore, implicates this rule directly.

Open-source generative AI platforms, such as ChatGPT, Claude, and Gemini, typically, train on broad internet datasets and are accessible to the general public. Although some of these tools include usage restrictions or privacy disclaimers, its design does not protect the confidentiality of litigation materials. Uploading sensitive discovery documents into such platforms likely would result in the loss of privilege or waiver of confidentiality protections. It may also expose the underlying data to potential retention by the model's training algorithm, raising additional risks around future use and third-party access. To illustrate, imagine exposure to the public of the Coca-Cola recipe by way of feeding into ChatGPT discovery documents in a patent violation lawsuit.

To mitigate these dangers, protective orders may be an effective means of identifying guardrails for AI use in discovery. Targeted language in a protective order can limit the use of open-source generative AI, while AI-savvy counsel can maintain provisions allowing for the use of secure, closed-universe AI tools that comply with professional standards and preserve client confidences.

For example, a protective order may include provisions such as the following:

> **Prohibition on Open-Source AI:** The order may bar any receiving party from uploading or inputting confidential material into an open-source or publicly accessible generative AI system, regardless of whether that information has been redacted or anonymized. A provision of this nature should make clear that restrictions on AI use apply even when a party has anonymized or redacted the underlying discovery materials, as even a party's good-faith effort to obscure identifying details does not, in itself, immunize the disclosure.
>
> **Permitted Use of Secure AI Tools:** The order may carve out exceptions for document review platforms that employ artificial intelligence within a limited, private, and secure data environment, such as those that e-discovery vendors or in-house litigation support software us or provide.

By proactively negotiating such provisions during discovery planning conferences, counsel can more closely safeguard client confidentiality.

In the event of an ongoing case in which the governing protective order does not explicitly address the use of AI, but AI subsequently becomes a concern, a party still may argue that the general language of a protective order prevents the use of generative AI in confidential proceedings. Most standard protective orders include language prohibiting the disclosure or use of protected material for any purpose other than the prosecution or defense of the action and limit access to such material to only the individuals whom the order authorizes. These provisions can provide a strong basis for arguing that the uploading of confidential documents into an open-source AI platform violates the letter and spirit of the protective order. For example, in *Black v. City of San Diego*, 2025 U.S. Dist. LEXIS 84355 (S.D. Cal. May 2, 2025), a court determined that the use of open-source generative AI would violate a protective order that merely ruled that proceedings be "Confidential," as the data would not be confidential if a party fed it into an open-source AI.

Practically speaking, if AI-related concerns arise after a court enters a protective order, parties can and should raise the issue early, either through meet-and-confer efforts or a clarifying order from the court. However, even without formal modification, cases like *Black* highlight the viable argument that even threadbare protective orders bar the provision of confidential materials to open-source AI platforms.

Conclusion

Emerging jurisprudence on AI misuse in litigation underscores the importance of remaining informed and up to speed on technological advances in the legal profession. Courts have demonstrated a willingness to strike deficient filings and impose sanctions where AI-generated content undermines the reliability of submissions, and savvy defense counsel should prepare to invoke these remedies when necessary to safeguard the adversarial process and advocate for the rights of their clients.

Christian Castile, Esquire is an Associate at Reed Smith whose practice involves a wide range of commercial litigation matters, with an emphasis on defending pharmaceutical and medical device manufacturers in products liability litigation.

Jaclyn Setili Wood, Esquire is Counsel at Reed Smith and is a member of the Life Sciences Health Industry Group. Ms. Wood focuses the majority of her practice on complex litigation for pharmaceutical and medical device manufacturers.

Charlotte Flynn, Esquire is an Associate at Reed Smith and concentrates her practice on commercial litigation, with a particular focus on product liability and personal injury cases.

Get Involved with MDC Committees

AI in Litigation Support: Balancing Efficiency with Ethics

Michael T. Murray

The rise of artificial intelligence promises to influence the practice of law by introducing new technologies that may alter traditional methods of legal practice. This shift is particularly evident in the domain of legal research, where AI-driven tools are streamlining tasks such as document review, case law analysis and deposition evaluation by quickly delivering efficiently distilled insights. Yet the real development isn't simply in using AI; it's in knowing how to talk to it. Effective prompt engineering — or how you ask for what you need — has quickly become a strategic skill for lawyers determined to master the future of their craft.

A Brief History

AI's roots go back further than many realize. Early experiments in natural language interaction, such as the ELIZA chatbot of the 1960s, showed that people readily engaged with computers in dialogue. Fast-forward to 1997, and IBM's Deep Blue shocked the world by defeating a chess grandmaster, demonstrating machine capabilities in problem-solving. The true inflection point for language, however, came with Google's breakthrough 2017 paper "Attention Is All You Need," which paved the way for modern large language models like OpenAI's ChatGPT.

Why does this matter for lawyers? Today's large language models ("LLMs"), by implementing training on vast swaths of legal, technical, and plain-English data, don't just match keywords, but also process patterns that assume the meaning, context and nuance of your query. This unlocks research capabilities that are not just faster, but often more comprehensively precise than legacy methods.

Beyond Keyword Search

Traditional legal research tools respond to keyword searching. If you wanted to know whether the phrase "ignored safety warnings" appeared in a document trove, you'd painstakingly craft Boolean queries adding "and," "or," and "within X words," and manually sift through the results.

Natural language processing alters the dynamic of information retrieval. With modern LLMs, users can pose questions such as, "Did anyone say the company ignored safety warnings?" and the system leverages statistical language patterns to identify relevant phrases, paraphrases, and associated concepts across large datasets. Rather than relying on rigid keyword matches, this approach enables more flexible, context-aware querying — making complex search capabilities accessible even to nontechnical users.

The legal advantage? Users catch more relevant information, spend less time filtering false positives, and can pose nuanced questions exactly as they would to a colleague.

Prompt Engineering

Success with AI starts and often ends with how you phrase your queries. Prompt engineering is about being purposeful, precise, and iterative.

Best Practices:

- Be specific. Instead of "contradictions," ask, "What inconsistencies exist between this and earlier testimony?"
- Frame the context. "You are a legal assistant reviewing this transcript in a [employment discrimination/IP litigation] case in [jurisdiction]. Please summarize all direct references to [topic]."
- Define the output format. "Bullet-point the answer; cite page and line numbers; and limit to 200 words."
- Iterate. Like a skilled researcher, refine your questions based on prior answers, drilling down until you surface what matters.

Try this template: "*For [case type/context], search [uploaded documents] and [task: summarize, identify, list, compare] with [constraints: concise, quote page and line, exclude vague references].*"

- Don't be afraid to ask the AI to improve your own prompts. LLMs excel at optimizing instructions. Many AI tools even allow for multistep conversational sessions, fostering an iterative dialogue that sharpens both your question and the machine's understanding with each round.

The Next Leap Forward

Even the best-trained LLMs can hallucinate (generate plausible but incorrect information) if left to answer from memory. Enter retrieval-augmented generation (RAG): A model architecture that grounds the AI's output in your specific source materials, such as deposition transcripts, pleadings or exhibits. Instead of speculation, you get answers with citations directly tied to your uploaded documents. RAG is the preferred workflow for legal, regulatory or compliance work, ensuring results are not only helpful, but verifiable.

Continued on page 16

(AI IN LIGITATION SUPPORT) *Continued from page 15*

Case Law Meets the Future

AI isn't just a Silicon Valley fascination. U.S. courts have recognized technology-assisted review in a series of landmark cases:

- *Da Silva Moore v. Publicis Groupe* (2012) and *Rio Tinto v. Vale* (2015) established judicial acceptance of predictive coding for e-discovery.
- *Hyles v. City of New York* (2016) reaffirmed that while TAR may be superior in theory, parties retain flexibility if alternative methods are reasonable.

These precedents enable law firms to deploy advanced AI confidently for document review, so long as results are transparent and testable.

Pitfalls, Ethics, and the Lawyer's Continuing Duty

Recent headlines have warned of sometimes embarrassing pitfalls: Attorneys submitting briefs riddled with fictitious case citations generated by ChatGPT (*Mata v. Avianca*, 2023) or expert declarations grounded in hallucinated academic references. Sanctions and media scrutiny have followed.

The ABA's Model Rules are unequivocal: Lawyers must ensure competence not just in fact-finding, but in verifying the accuracy and authenticity of any AI-derived content. Think of AI as a tireless research assistant that can rapidly process vast amounts of legal information, but still requires human oversight for judgment, nuance, and legal reasoning. Ultimately, human insight is necessary because the lawyer is accountable for every submission. Best practices require:

- Fact-checking every AI suggestion.
- Grounding AI searches in your own evidence, not just the public internet.
- Requesting explainable results with source references.

A Preview of the Future

AI is not here to replace lawyers, but to reduce the time that legal professionals spend on routine tasks, allowing attorneys to focus on higher-value analysis, strategy, and client service. By automating rote keyword sifting and offering nuanced, context-aware insights, AI allows legal professionals to focus on strategic thinking, client influence, and case narrative. The future likely will feature:

- Conversational searches: AI that grows more adept at multiturn dialogues, synthesizing sprawling document sets into concise answers.
- Custom legal agents: Firm-specific AI tools fine-tuned to internal style, preferred authorities, and procedural idiosyncrasies.
- Ethical and regulatory innovation: New case law and guidance ensuring fair, safe, and responsible adoption of AI across the profession.

The next generation of legal professionals will stand out not just for memorizing statutes, but for their ability to apply emerging technologies thoughtfully while upholding core legal and ethical responsibilities. Mastering prompt engineering, harnessing RAG workflows, and staying vigilant as ethical guardians are how today's attorneys become tomorrow's industry thought leaders.

Michael T. Murray is the Director of Client Solutions for Veritext Legal Solutions. Mr. Murray presents CLEs, educational instruction, and product demonstrations to legal professionals.

Editors' Corner

The editorial staff extends its gratitude to members of MDC and the defense bar for contributing to this edition of *The Defense Line*. We also wish to thank the skilled professionals of MDC sponsors Veritext and Exponent for their contributions to the current edition. We are pleased that in the new year, legal professionals continue to offer informative commentary and provocative discussion on a wide range of litigation topics that bear on so many aspects of day-to-day litigation. The practicalities of these insights are endless. In the current edition, contributors distill the nuances of mediation as a strategic, essential *process* worth mastering, mine the ethical implications and reliability of the use of Artificial Intelligence (AI), and spotlight a critical appellate ruling which, without *certiorari*, may stand to complicate *Daubert* challenges. The application of human factors analysis to the certification of a class in a class action lawsuit, the delicate, ever important subtleties of the tripartite relationship, the pragmatic tools for adhering to professionalism and obtaining the best outcome in the face of challenging opposing counsel, and the impacts of the new FDA quality management system on active implantable medical devices also are among the myriad contributions in the current publication. This edition of *The Defense Line* is a wellspring of information which we hope you enjoy and find useful.

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*.

Ellen E. Chang
Co-Chair, Publications Committee
Wilson Elser Moskowitz Edelman & Dicker LLP
(410) 962-5820
ellen.chang@wilsonelser.com

Luciana Brienza
Co-Chair, Publications Committee
GodwinTirocchi, LLC
(410) 418-8778
brienza@godwintirocchi.com

2025 Past Presidents Reception

MDC hosted its annual **Past Presidents Reception** at The Center Club in Baltimore on Thursday, October 30, 2025. Former MDC Presidents, MDC sponsors, members of the Judiciary, and Maryland defense attorneys celebrated the leadership and ongoing contributions of past MDC Presidents as well as the accomplishments of MDC as an organization. MDC wishes to thank our sponsors for a splendid evening!

Message from Your DRI Mid-Atlantic Regional Director

David A. Anderson

It is an honor and privilege to be serving as your Mid-Atlantic Regional Director for DRI and to address the Maryland Civil Defense Bar! 2026 brings new challenges and opportunities, and I would like to tell you how I see our International Civil Defense Organization assisting the Maryland Defense Counsel.

DRI supports the success of the civil defense bar and the businesses it serves through the following value propositions:

Business Development: DRI members build their practices with qualified referrals from other members as well as publishing and speaking opportunities.

Education: DRI's renowned programming promotes the technical skills and knowledge that our members need to excel professionally and personally.

Advocacy: DRI's policy arm, The Center, advocates for legislation supporting successful outcomes for our members and their clients.

National and International Platform: DRI provides members with a far-reaching presence to promote their practice and support their clients.

Leadership Development: DRI affords its members with unlimited leadership opportunities and career development throughout the organization.

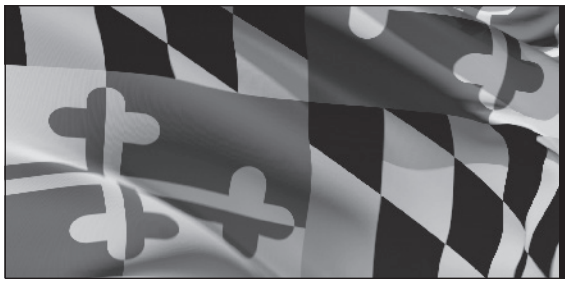
Networking: DRI members enjoy building valuable relationships with colleagues through events, volunteer opportunities, and a vibrant membership community.

I look forward to working with your Association President, Zak Miller, and President Elect, Rachel Gebhart, in promoting the Maryland Defense Counsel and assisting your members in providing excellent representation for your clients. As a Past President of the South Carolina Defense Trial Attorneys' Association, I know the importance of a viable state defense organization. Your Past President and current DRI State Representative, and my friend Chris Jeffries, stand ready to assist you. For a list of current seminars or to become a member of DRI please visit dri.org, the Association of Lawyers Defending Business.

The plaintiff's bar is using third party litigation funding, AI tools, and a constant barrage of advertising nuclear verdicts to threaten our clients and also, to raid our talented associates and mid-level civil defense attorneys to join their ranks. How do we combat their efforts? It is through supporting your state level organizations like the Maryland Defense Counsel and joining together with our National Organization to promote our craft and trade. DRI has white papers on these various topics, and we promote the exchange of information to be informed and have an alternative to the constant barrage of information from the plaintiff's bar. Become active in the Maryland Defense Counsel organization and join us in DRI. Let's begin to level the playing field and promote appreciation of the role the civil defense lawyer plays, seek ways to improve the civil justice system, and preserve the civil jury.

— David A. Anderson, *DRI Mid-Atlantic Regional Director*

David A. Anderson is a shareholder with Richardson Plowden & Robinson, PA a South Carolina civil defense firm with offices in Columbia, Charleston and Myrtle Beach. He can be reached at 803-576-372 or danderson@richardsonplowden.com.



Get Involved With MDC Committees

To volunteer, contact the chairs at

www.mddefensecounsel.org/leadership.html

Appellate Court Undermines Rochkind by Conflating Rule 5-702 and Rule 2-501

Derek Stikeleather

DISCLOSURE: Although I do not represent the defendant hospital in *Jabbi v. Adventist Healthcare*, Inc. No. 2071 (Sept. Term, 2023) (March 5, 2025) (reported), I often represent Maryland hospitals seeking to exclude causation experts whom the Plaintiffs' Bar favor. That said, I have devoted more of my professional life to the admissibility of causation-expert testimony under Rule 5-702 and the impact of Maryland's adoption of the Daubert standard in 2020 than to any other subject. The Appellate Court's reported *Jabbi* opinion merits not only commentary but also certiorari.

Maryland cannot simultaneously adopt *Daubert*, as the Supreme Court of Maryland expressly did in its 2020 *Rochkind v. Stevenson* decision, but subsequently reject *General Electric Co. v. Joiner's* bright-line abuse-of-discretion standard — as the Appellate Court apparently did in the recent reported decision *Jabbi v. Adventist Healthcare, Inc., No. 2071* (Sept. Term, 2023) (March 5, 2025) *(reported)*. Because the defendant would have been entitled to summary judgment if the court excluded the expert, the *Jabbi* court viewed the challenged expert testimony in the "light most favorable" to the expert. Allowing *Jabbi* to stand as a precedential opinion would destroy the clarity that the adoption of *Daubert* provided and open a second era of "jurisprudential drift" for Maryland's expert-testimony case law.

Recent History of Rule 5-702 and *Daubert*

Since 2020, when the Supreme Court of Maryland handed down the landmark *Rochkind v. Stevenson* opinion, adopting the *Daubert* standard and holding that "all expert testimony is reviewed under the abuse of discretion standard," much ink has been spilled on exactly what that means. 471 Md. 1, 37 (2020)(emphasis added) (citing *Gen'l Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997)).

Despite *Daubert's* adoption, the path for reliable review of 5-702 rulings to admit or exclude expert testimony has not been smooth. The Supreme Court has reversed the Appellate Court's post-*Rochkind* 5-702 rulings in *State v. Matthews*, 479 Md. 278 (2022), *Oglesby v. Baltimore School Associates*, 484 Md. 296 (2023), and *Katz, Abosch, Windesheim, Gershman & Freedman, P.A. v. Parkway Neuroscience, and Spine Institute, LLC*, 485 Md. 335 (2023). In *Abruquah v. State*, 483 Md. 637 (2023), on a bypass petition, the Supreme Court split 4-3 and reversed the trial court's admission of expert testimony. The Supreme Court also addressed Rule 5-702's proper application in *Frankel v. Deane*, 480 Md. 682 (2022), vacating the Appellate Court's application of the *Daubert* standard. *Id*. at 714-15.

This jurisprudential turbulence prompted Justice Booth to write a lengthy separate concurrence in *Katz, Abosch*, in which she proposed a closer embrace of the standards that various federal appellate courts use to review *Daubert* rulings for abuse of discretion. *See* 485 Md. at 399-407 (J. Booth, concurring). For my part, I have been commenting on the evolution of Maryland Rule 5-702 almost every step of the way.

When Rule 5-702 Meets 2-501, Each Rule Must Stay in Its Lane.

A fundamental point with which trial and appellate judges continue to struggle is the relationship between Rule 5-702 (admissibility of expert testimony) and Rule 2-501 (summary judgment). When applying only one of these rules, courts rarely struggle to articulate the correct standard.

Courts evaluate experts under Rule 5-702's three elements (qualifications, fit, and sufficient factual basis), each of which the *proponent* of the testimony must satisfy by a *preponderance* of the evidence. The FRE 702 Rules Committee even amended the Rule in December 2023 to clarify and emphasize that judges, as "gatekeepers," must ensure that the expert meets each required element by a preponderance of the evidence. FRE 702, Notes of Advisory Committee on 2023 Amendments. There is no presumption in favor of *admitting* expert testimony or rejecting *Daubert* challenges to the sufficiency of the opinion's factual basis as "going to the weight of the evidence" and letting the jury sort it out. *See id.* Although *Daubert* inquiries can be a heavy lift, courts, generally, know what the rules are and try to apply the rules correctly. Under both *Daubert* and *Rochkind*, reviewing courts apply deferential abuse-of-discretion review to all trial-court 5-702 rulings.

Courts, generally, are even more reliable when applying the well-settled Rule 2-501 standard for summary-judgment motions, where the rules clearly favor the non-movant. A movant is entitled to summary judgment only if a non-movant cannot prove its *prima facie* case with all disputed facts and reasonable inferences drawn in its favor (i.e., when evidence is viewed in the light most favorable to the non-movant). Reviewing courts apply non-deferential *de novo* review to all 2-501 rulings.

The judicial wires often cross when a Rule 5-702 motion, if a court grants it, would prompt an immediate, undeniable motion for summary judgment under Rule 2-501. Confusion is even more likely when a party files a single motion under both Rules 5-702 and 2-501 on the basis that summary judgment would be obligatory *if the court granted the motion to exclude the expert*.

Although Rule 5-702's standards DO NOT CHANGE when the plaintiff's case collapses without the expert's testimony, some courts still think that it does. The proximity of the expert challenge and often-immediate request for summary judgment too often prompts judges to believe that the admissibility of the testimony must be viewed in the light most favorable to the expert's admission. That is fundamentally wrong. Yet even the Supreme Court of Maryland—before it adopted *Daubert* — slipped into this error in a 2014 footnote in *Hamilton v. Kirson*, 439 Md. 501, 521 n.11 (2014), and a year later in

Continued on page 22

(ROCHKIND) *Continued from page 21*

Roy v. Dackman, 445 Md. 23, 38-40 (2015), stating in both opinions court lower the expert admissibility standards when exclusion of the expert would end the case.

Apparently, after 2015, no reported decision has cited *Hamilton* or *Roy* for this proposition. And one simply cannot reconcile the 2020 *Rochkind* holding with either case's view of Rule 5-702 because *Joiner v. General Electric*, 522 U.S. 136 (1997) squarely addressed the standards of review that apply to a case-dispositive exclusion of expert testimony. *Joiner* held that, when reviewing a decision to preclude expert testimony, the abuse-of-discretion standard remains controlling — regardless of the consequences of the expert's preclusion. *Joiner*, 522 U.S. at 142-43. Holding, otherwise, ironically would create a safe haven for unreliable expert opinions when such opinions are crucial to a case — when even-handed application of the *Daubert* standards is most important to a fair trial.

The federal Eleventh Circuit had wrongly held that a case-dispositive ruling that found expert testimony inadmissible should have a "particularly stringent" review on appeal because it resulted in summary judgment. *Joiner v. General Electric Co.*, 78 F.3d 524, 529 (11th Cir. 1996). The Supreme Court's *Joiner* decision promptly corrected the error because the Court reasoned that the "particularly stringent" review conflicted with an abuse-of-discretion standard. Its holding clarified that, on "a motion for summary judgment, disputed issues of fact are resolved against the moving party," *but* "the question of **admissibility of expert testimony is not such an issue of fact**, and is reviewable under the abuse of discretion standard." 522 U.S. at 142-43 (emphasis added). That holding settled the matter for all jurisdictions that use the *Daubert* standard. And, after *Rochkind*, Maryland is one of those jurisdictions.

Following the Supreme Court of Maryland's adoption of the *Daubert* standard, the Appellate Court cannot carve out a special, more stringent standard of review for Rule 5-702 rulings that preclude expert testimony essential to a party's case. After *Daubert*, the Fourth Circuit consistently has applied abuse-of-discretion review to decisions on the admissibility of expert testimony — even if case-dispositive — because "the trial judge must have considerable leeway in deciding" whether a particular expert's testimony is reliable. *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 200 (4th Cir. 2001) (*quoting Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1998)). This is true even when the "question of admission is close," and preclusion ends the case. *See Cavallo v. Star Enterpris*e, 100 F.3d 1150, 1159 (4th Cir. 1996).

The *Jabbi* Decision Gets 5-702 Review Wrong

In *Jabbi*, we see the Appellate Court conflating expert admissibility and summary judgment almost from the outset of its opinion. Although the appellant framed her issues presented as questions of expert admissibility, the Appellate Court's opinion re-framed it into one issue presented that conflates — or at least crowds — the Rule 5-702 and summary-judgment inquiries: "Did the Circuit Court abuse its discretion in precluding appellants' expert witness testimony, *which in turn formed the basis for its grant of summary judgment*?" Slip op. at 1 & n.2 (emphasis added). Admissibility under Rule 5-702 and summary judgment are separate, sequential inquiries. The standard for the subsequent summary-judgment inquiry cannot bleed into the threshold inquiry of expert admissibility.

After *Rochkind* and *Joiner*, the impact of a 5-702 ruling on summary judgment simply is not relevant to the 5-702 ruling. The inquiries proceed sequentially—but separately. The expert testimony is either admissible or inadmissible under 5-702. The appellate court reviews the trial court's decision to admit or exclude for abuse of discretion. If inadmissible, the trial court is often left with a simple legal question: Can this case proceed without admissible expert testimony that is essential to prove the case? Of course, as a matter of law, it cannot.

Conflating expert admissibility with summary judgment, the *Jabbi* court's reported opinion repeatedly makes the fundamental error of reviewing the evidence supporting the trial court's decision to exclude expert testimony "in the light most favorable to appellants," while incorrectly stating that the trial court, which must apply a preponderance-of-the-evidence test when making its 5-702 ruling, "must not weigh the evidence" when doing so:

- "The only evidence before the court was the extensive deposition testimony of appellants' experts (and the literature they relied on), and it is pellucid that on summary judgment the court *must view all inferences* from the underlying facts in the *light most favorable* to the nonmoving party. In evaluating a motion for summary judgment, the court *must not weigh the evidence* or make credibility determinations." Slip op. at 22 (emphasis added).
- "Based on the evidence in this record, and viewing *all inferences in a light most favorable to appellants*, the court's conclusion that the experts' testimony relied 'on speculation and assumptions that are not supported by the literature or the facts presented' is demonstrably incorrect." *Id.* at 23 (emphasis added).
- "Again, viewing this evidence in a *light most favorable to appellants*, the court abused its discretion in perfunctorily concluding that the appellants' experts' testimony was speculative and 'not supported by the literature or the facts presented.'" *Id.* at 24 (emphasis added).

The *Jabbi* Appellate Court ultimately returned to the abuse-of-discretion standard only after first reviewing the admissibility ruling in the light most favorable to the excluded expert. It found abuse of discretion *because* it found the testimony admissible if viewed in the light most favorable to the excluded expert. *See* slip op. at 25. That is the antithesis of abuse-of-discretion review and plain error under *Joiner* and *Rochkind*.

Given these errors in a reported opinion, and the importance of the standard of review for Rule 5-702 rulings, a filing for petition for *certiorari* seems very likely. Left as-is, the *Jabbi* opinion would leave trial courts and practitioners guessing on the proper standards for Rule 5-702 challenges. More guidance is desperately necessary.

Derek Stikeleather, Esquire is Partner at Goodell DeVries, where he chairs the Appellate and Critical Motions Practice Group. Mr. Stikeleather practices principally in appellate advocacy and complex litigation.

Is There a Class in Your Class Action?

What human factors can reveal about consumer decision-making and purchase behavior in class action certifications

Ben Lester

Class action lawsuits focus increasingly on issues of alleged misrepresentation based on consumer perception and understanding of myriad consumer products and services. Given the potential size of class actions, the consequences can scale quickly for product manufacturers facing reputational and monetary damages.

With so much at stake, the certification phase of a class action lawsuit — when the court determines if the group allegedly affected is a class in the eyes of the law — has become increasingly important. Without certification, a court can dismiss a lawsuit without moving on to the next phase: Examining the merits of the claims.

For example, in KIND LLC "Healthy & All Nat." Litig, 15-MD-2645, 2022 U.S. Dist. LEXIS 163207 (S.D.N.Y. Sept. 9, 2022), the plaintiffs who purchased KIND products alleged the product's label, "All Natural/Non GMO," was deceptive. Yet plaintiffs' interpretations of the phrase "All Natural" ranged from products "made from whole nuts, fruits, and whole grains" to products made with "ingredients [that] were not synthetic, not chemicals, [but were] natural ingredients" to products "pull[ed] out of the Earth' or 'dirt,' or 'untouched.'"

Based on this testimony, the Southern District of New York declined to certify the class, finding that the interpretations were so varied that "common questions no longer predominated." In other words, the complaints were not similar enough to justify combining the plaintiffs' grievances into one lawsuit.

As this case shows, claims of misrepresentation in marketing and product labeling can benefit from human factors analysis of consumer understanding, decision-making, and purchase behavior, all of which can affect whether a court finds that a group in a class action lawsuit is a class or not. Analyzing misrepresentation issues using human factors techniques can help clarify consumer decision-making and behavior in class action lawsuits, which can affect any imaginable product, from a financial offering to vehicles, cosmetics, food and beverages, and medical devices.

What makes consumers a class in a class action lawsuit?

Before examining the merits of class action claims, courts require class certification according to four components under Fed. R. Civ. P. 23(a): Numerosity, commonality, typicality, and adequacy of representation.

Commonality and typicality are central to determining the homogeneity and representativeness of the group of people whom alleged misrepresentations about a product or service affect. For commonality, questions of law or fact have to be common to everyone in the class seeking certification. For typicality, stakeholders must show how well those individuals who seek to represent the entirety of the class as plaintiffs represent and reflect the grievances of the proposed class.

In misrepresentation claims, the allegation often is that a group of people form a class because they purchased a product for the same specific reason, and if the product manufacturer had disclosed the "truth" about some value-reducing characteristic of the product, the class would not have purchased or leased the product. Take, for example, the label of a hypothetical juice product that describes its contents as "naturally sweetened," but processed sugar (sucrose) turns out to be an ingredient.

In this example, one group of purchasers might have read the label and bought the juice because they believed fruit sugars (fructose) sweetened the food product. Had the label addressed the misunderstanding (i.e., that fructose was not the exclusive sweetener of the juice), some consumers would not have bought it (i.e., they would have behaved uniformly in a different way). This group might be considered a class.

In contrast, a court may not consider some consumers part of the same class if they read the label and bought the juice because they have been buying that brand for 20 years and would not have changed their purchase decision even if they knew the "truth" about the sweetener in the product.

> With the potential for class action lawsuits to expand to hundreds of thousands of people who all saw the same digital ad, testing what actual users experience is increasingly important.

Determining commonality and typicality can be challenging because consumer purchase behavior is complex and involves many factors, including demographics, economics, cultural influences, timing, and past behavior (even that of prior generations of buyers). Purchase decisions vary widely because consumers pay attention to different sources of information, process that information differently, and apply different situational contexts, from past purchase behavior to varying financial circumstances, to the availability of alternatives, to the acute need for a given product.

Factoring in human factors

Human factors methodologies can illuminate consumer decision-making and purchase, lease, or subscription behavior during the certification phase of a class action by answering questions about the materiality of the representations to the purchase, prior experience and familiarity, brand loyalty, the presence of alternatives during decision-making, and potential costs associated with tradeoffs.

A human factors approach can provide a better understanding of consumer purchase motivations in product labeling and marketing misrepresentation claims through surveys, deposition/case review, scientific literature analysis, expert testimony, report writing, and novel data collection. Data collection can include customized methods such as presenting representative samples of labels or advertisements to participants and documenting information that is relevant to the class action using "covert" methods such as eye tracking, which records what participants look at and how much time they spend looking at those sources. User experience testing can also put data from surveys and case and

Continued on page 25

(CLASS ACTION) *Continued from page 24*

literature reviews to the test in a lab environment that offers product-user testing tools.

Surveys and novel human factors data collection tools in real life

Exponent recently put the value of a well-constructed survey and novel human factors data collection tools — including replicating consumer targeting — to the test in a case involving an insurance carrier. Plaintiffs alleged that the carrier's print and email marketing ads were deceptive because the information promoted inaccurate understanding of what the product did.

Knowing the type of consumers that the insurance company targeted, we designed and conducted a survey to target consumers who had not bought the policy by presenting mock ads to would-be purchasers. We learned that the group of potential consumers uniformly misunderstood what the product did; consumers who viewed this marketing material believed that it was an investment vehicle when, in reality, it was a policy that only paid for funeral expenses.

The evolving role of online marketplaces and user testing in digital misrepresentation

Digital marketing can reach many more consumers faster than print. With the potential for class action lawsuits to expand to hundreds of thousands of people who all saw the same digital ad, testing what actual users experience is increasingly important.

To this end, through an experimental study, we provided one of our clients with a customized approach to test what actual users experienced online. Our client asked us to analyze a pop-up banner disclaimer and evaluate the allegation that the disclaimer was not sufficiently conspicuous.

Because the website no longer existed by the time the parties litigated the case, we reconstructed the website from archival screen captures with an identical banner disclaimer and identical functionality, to the extent that it was relevant to the allegations in the case. Using eye tracking, we observed that most potential consumers did look at the banner, which is information that may be relevant to the certification or decertification of a class.

Whether trying to certify or decertify a group of people as a class, stakeholders can turn to human factors expertise to analyze essential features of consumer decision-making and purchase behavior. Human factors experts can help illuminate the homogeneity and representativeness of members of a proposed class by analyzing how they perceive, understand, and interact with products and ads, using eye tracking and other tools for virtual platforms, which are more interactive than print forums.

Ben Lester, Ph.D. is a cognitive psychologist and human factors principal scientist at Exponent. Dr. Lester specializes in the application of memory, perception, visibility, attention, and information processing to analyses of accidents, injuries, safety, and consumer decision-making.

When You Just Want to Scream: The Ethics of Dealing with Toxic Personalities

Daniel L. Bray and Amanda Nardi

In the age of the keyboard warrior, toxic personalities abound, which can create ethical dilemmas. As attorneys and claims professionals, we have certain ethical duties to uphold while ensuring we do right by our clients. Toxic personalities can make this responsibility feel difficult, and at times, impossible. To preserve our peace, and ultimately, ensure that we can perform our job effectively, it is important that we explore and implement ways to set boundaries, practice assertiveness, and know when to walk away from a difficult interaction. In doing so, we can seek guidance from the Model Rules of Professional Conduct and other ethical frameworks. It is inevitable that we will encounter difficult personalities in our careers; the effect those personalities has on us depends on how we navigate them.

Ethical Framework: The Model Rules of Professional Conduct

The Model Rules of Professional Conduct serve as the blueprint for lawyering ethics. The Model Rules are rules of reason that presuppose a larger legal context shaping the lawyer's role. In dealing with toxic personalities, we can seek guidance from the Model Rules. The following Model Rules further touch on ethical violations that can arise from toxic personalities. Further, attorneys can be subject to sanctions should they fail to abide by the professional rules of lawyering.

- **Preamble and Scope:**

  The Preamble and Scope section of the Model Rules outline the following duty: "A lawyer...is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." This section further clarifies that "a lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs... A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others... A lawyer should demonstrate respect for the legal system and for those who serve it..."

- **Model Rule 3.1:**

  Model Rule 3.1 outlines the ethical bounds of meritorious claims and contentions. This Rule states that, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

- **Model Rule 3.2:**

  Model Rule 3.2 enforces the duty of a lawyer to expedite litigation. Specifically, it states that, "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

- **Model Rule 3.3:**

  Model Rule 3.3 explains the necessity of candor toward the tribunal. This Rule states that, "A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer... "

- **Model Rule 3.4:**

  Model Rule 3.4 outlines the duty to engage in fairness to opposing parties and counselors. This Rule states that, "A lawyer shall not... unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document... falsify evidence... knowingly disobey an obligation under the rules of a tribunal... make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party... "

- **Model Rule 8.3:**

  Model Rule 8.3 outlines duties for reporting professional misconduct. "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

- **Federal Rule of Civil Procedure 11:**

  F.R.C.P. 11, which requires signatures on pleadings to confirm "it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous 'argument for extending, modifying, or reversing existing law or for establishing new law.'"

  Should an attorney violate this Rule, the court may impose sanctions upon that attorney responsible for the violation. Instructional comments to this Rule indicate that when an attorney signs a complaint or other paper in court, the attorney represents that the filing has legal and evidentiary support and is not filed in bad faith. This baseline of fair play is enforced by F.R.C.P. 11. The purpose for sanctions under this Rule is to punish the abuse of court process and to reimburse litigants for the costs of unfounded or abusive filings.

Ethical Framework: Nationwide

Ohio

- **Ohio Rules of Professional Responsibility:**
  - Preamble:
    - Ohio removed language of "zealously advocate" to "the rules of the adversary system".
  - Rule 3.1: Meritorious Claims and Contentions
  - Rule 4.1: Truthfulness in Statements to Others
  - Rule 4.4: Respect for Rights of Third Persons
    - Ohio incorporated the Model Rules into its own rules of professional responsibility with regard to meritorious claims and being truthful and respectful of others.

- **Ohio's "Rule 11" — Ohio Rule of Civil Procedure Rule 11:**

Continued on page 28

(TOXIC PERSONALITIES) *Continued from page 27*

- Good faith basis
- Scandalous or indecent matter
- Sanctions

- **Ohio's Frivolous Lawsuit Statute — O.R.C. 2323.51:**
  - Harass or maliciously injure another party
  - Unnecessary delay (iii) Increase in cost of litigation
  - Not warranted under existing law or no good faith basis for new law
  - Allegations have no evidentiary support

Georgia

Georgia incorporated the Model Rules into its own statewide rules of professional conduct. The Preamble for Georgia's Rules of Professional Conduct is identical to the Model Rules, emphasizing that a lawyer is responsible for the quality of justice and should use the law's procedures for legitimate purposes rather than to harass or intimate others. Georgia also embraced the exact language of the Model Rules with regard to its Rule of Professional Conduct 8.3, emphasizing the duty of a lawyer to report misconduct.

- **Georgia Rule of Professional Conduct 3.4:**

  Georgia's Rule 3.4 states that, "A lawyer shall not use methods of obtaining evidence that violate the legal rights of the opposing party or counsel; or present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter." To expand on this duty, Georgia included an instructional comment advising that "the responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of the opposing party or counsel. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence."

- **Georgia's "Rule 11" — O.C.G.A. § 9-11-11:**

  This statute is Georgia's state-specific version of F.R.C.P. 11. The statute states that a signature on pleadings and documents "constitutes a certificate by [him] that [he] has read the pleading and that it is not interposed for delay." O.C.G.A. § 9-11-11 further allows for sanctions should an attorney violate this rule.

- **Georgia's Frivolous Lawsuit Statute — O.C.G.A. § 9-15-14:**

  Georgia also has a specific statute that contemplates litigation costs and attorney's fees for frivolous actions and defenses. The statute provides that, "... reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim... with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim... "

Texas

- **Texas Rules of Professional Responsibility:**
  - Preamble: A Lawyer's Responsibilities — "zealously pursue client's interests"
  - Rule 3.02: Minimizing the Burdens and Delays of Litigation
  - Rule 3.03: Candor to the Tribunal
  - Rule 3.04: Fairness in Adjudicatory Proceedings

- **Texas' "Rule 11" — Rule of Civil Procedure 13:**
  - "Groundless" and "good cause"

- **Texas' Frivolous Lawsuit Statute:**
  - Chapter 9 — Texas Civil Practice and Remedies Code – Sanctions
  - Chapter 10 — Texas Civil Practice and Remedies Code – Sanctions

Real-World Examples

The following real-world case examples show textbook violations of the ethical rules that resulted in sanctions.

- ***Attorney Grievance Commission of Maryland v. Stephen E. Whitted, AG No. 47, September Term, 2021***

  After attorney Mr. Whitted chronically failed to pay child support to his ex-wife, Ms. Jordan, who had custody of the children, Ms. Jordan filed a motion in the Superior Court of Fulton County asking the court's permission to relocate the minor children. Mr. Whitted subsequently filed a separate lawsuit in that same court, naming as defendants Ms. Jordan; her attorney, the attorney's law firm, and a John Doe, alleging that: (l) Ms. Jordan's attorney harassed, intimidated, and maliciously injured Mr. Whitted by filing a petition alleging that he committed emotional crnelty against Ms. Jordan; (2) Ms. Jordan altered court orders; (3) certain court orders were illegal; (4) Ms. Jordan converted "to her own use" money from her 40l(k) plan that had been awarded to Mr. Whitted; and (5) John Doe had a "tryst" with Ms. Jordan that resulted in the birth of a child. Following court rulings on the issues, Mr. Whitted continuously disobeyed the orders and filed additional claims against Ms. Jordan. The Supreme Court of Maryland ultimately sanctioned Mr. Whitted with an *indefinite suspension* for "repeatedly filing retaliatory meritless claims against his ex-wife, her new husband, her attorneys, and judges who ruled against him; filing meritless appeals; repeating failed arguments and ignoring rulings."

- ***Attorney Grievance Commission v. Rheinstein, 466 Md. 648 (2020)***

  In this case, the Court disbarred an attorney who made misrepresentations to the Court to intimidate his opponents, made baseless and unsubstantiated claims, and attempted to disqualify *every attorney* whom his opponents retained.

Ethics in Action: 6 Practical Tips

Now that we are familiar with the Model Rules of Professional Conduct, state-specific ethical frameworks, and real-world examples of consequences for engaging with toxic personalities, we can take away the following 6 tips to put into practice:

- **Put the client's interests first.** At the end of the day, regardless of the type of personalities with whom we deal, the ultimate goal is to achieve the best outcome for our clients. We can protect client interests and continue to move cases forward by asking ourselves whether what we are about to say or do will cause a reaction that could be harmful to the client. If the answer to that internal question is "yes," then we can reset and respond in a more productive way.

- **If you encounter a keyboard warrior, consider picking up the phone.** In today's world, it is easy to hide behind a screen and type as we wish. Many of the professionals with whom we deal on a daily basis take an aggressive approach to email commu-

Continued on page 29

(TOXIC PERSONALITIES) *Continued from page 28*

nications to appear "assertive." However, a majority of the time, this aggressive approach leads to more miscommunicating and souring of feelings rather than progressing a case forward. If you notice that a specific adversary is taking the "keyboard warrior" approach to communicating, and you find yourself stuck going back and forth with no progress, consider calling the individual to see if you can talk through the issues. There is a benefit to hearing the voice on the other side of the emails, and many times, a phone call can clarify things that were lost in digital translation.

- **Document everything in writing.** Even though picking up the phone can be beneficial to resolving disputes and creating a relationship with the other side, some professionals take advantage of the lack of documentation that comes with a phone call. A prime example of this is where an attorney tells you one thing on the phone, but then sings a very different tune when it comes to the email you receive afterward. If you encounter this issue, make sure you document the contents of your phone conversations in writing with a follow-up email and save all communications.
- **It is never too late to deescalate.** It is very easy to get caught up in a back-and-forth with opposing counsel, especially when counsel is rude, aggressive, or makes personal attacks on your credibility or experience. Despite any of the strong words that may come your way, it is important always to be thinking of how a judge or jury will perceive you. Both the court and members of a jury universally frown upon "lawyer fighting." If you feel emotions running high, and well, you just want to scream, consider the outward appearance of the disagreement before a judge or members of the public deciding your case. Do you want factfinders to perceive you as unprofessional or petty? Or would you rather that they perceive you as the attorney who remained calm and professional despite opposing counsel stomping their feet? It is never too late to deescalate a situation and attempt to bring focus back to the important aspects of the case.
- **Consider if the issue in dispute is truly important.** Not every aspect of a case has to be an argument. Inevitably, there will be things on which you and opposing counsel disagree; the important takeaway is to focus on the issues that are truly important and pick your battles accordingly. When dealing with toxic personalities, it can be very tempting to dig your heels in on any and all disagreements because you do simply do not want to "give in" to opposing counsel. Just as we must always think about what is best for our clients, we must also be willing to compromise in situations where compromise is the answer. Ask yourself, "is there something that I can give up here or compromise in order to find common ground that could help my client win in the bigger picture?" This mentality will help keep your eyes on the prize and help filter out issues that may not be important to your case.
- **Remember that we are all human.** Intangible relationships and soft skills can make or break a case. It can be difficult to establish a relationship with opposing counsel if they have a toxic personality. However, to the extent possible, laying a foundation for a positive relationship can be the difference between opposing counsel convincing their client to settle their case or not. It is human nature not to want to help people who treat you poorly. Developing a mutual respect and good rapport with opposing counsel will make the difficult conversations easier and your life a lot less stressful.

Conclusion

Lawyers have a heightened standard of responsibility in performing our jobs efficiently and ethically. We can use the framework of ethics and duties which the Model Rules establish and our own state-specific rules to help guide us when we come across a difficult situation. The unfortunate truth is that we will encounter toxic personalities at different points in our careers. With this truth must come the understanding that (1) there are repercussions for acting unethically, and that lawyers have a duty to report any unethical behavior should a toxic personality go that far; and (2) there are ways to deal with toxic personalities that will benefit both your mental health and your client's interests. Next time you encounter a difficult communication that makes you want to scream, remember our six practical tips to help get you through it. We are not only lawyers, but we are humans, and we can all do better to make everyone's lives a little bit easier.

Daniel L. Bray, Esquire is an experienced litigator whose practice focuses on defending trucking and aviation clients in major catastrophic losses. Mr. Bray also counsels commercial and transportation businesses on the management and avoidance of risk.

Amanda Nardi, Esquire specializes in general liability matters with a focus on trucking and transportation, premises liability, and negligent security.

LUNCH & LEARN

Shaping the Settlement: Negotiation Skills for Defense Counsel

We are thrilled to share the success of another recent Lunch & Learn, "Shaping the Settlement: Negotiation Skills for Defense Counsel," which MDC held on October 28, 2025 at Wilson Elser Moskowitz Edelman & Dicker LLP in Baltimore. MDC would like to thank mediator and arbitrator **Jeff Trueman, Esquire**, **Matthew J. Youssef, Esquire** of Niles, Barton & Wilmer, LLP, and **Amy E. Askew, Esquire** of Kramon & Graham, P.A. for sharing strategies for managing plaintiffs' demands and clients, leveraging case strengths, and navigating difficult negotiations!

We thank our sponsors for helping to make this event possible. Stay tuned for more events like this in the future!

A Primer on the Tripartite Relationship

Craig S. Brodsky

The tripartite relationship is a term of art which describes the complex relationship between (1) an insurance company, (2) its insured, and (3) defense counsel retained to represent the insured. The relationship arises when an insurance company retains counsel to defend a claim or lawsuit against a policyholder. While the relationship benefits all three parties, it also gives rise to a complicated set of duties and ethical responsibilities that can create conflicts and other issues that require management.

The benefits of the tripartite relationship are easy to spot. All parties benefit from an aligned relationship with privileged communications. The insured benefits from experienced defense counsel whom the insurer pays. The insurer also has a relationship with defense counsel through which it can participate in litigation strategy decisions while managing costs.

The tripartite relationship, however, is not without pitfalls. Indeed, a host of ethical issues arise whenever a carrier retains counsel for its policyholders. And the first question is the most important: "Who is the client?" The answer is important for determining if privilege applies to certain communications and conflicts-of-interest exist. These are the types of ethical issues that permeate the tripartite relationship.

In general, there are two schools of thought as to whether defense counsel represents the insured (the "single-client theory"), e.g., *Safeway Managing General Agency Inc. v. Clark & Gamble*, 985 S.W.2d 166, 168 (Tex. App.-San Antonio 1998), or both the insured and the insurer (the "dual-client theory"). E.g. *Mitchum v. Hudgens*, 533 So.2d 194, 198 (Ala. 1988) (considering the carrier and the insured clients). Maryland has not expressly adopted one or the other, but cases and ethics opinions suggest that Maryland uses a hybrid approach where defense counsel owes a duty to both the insured and the insurer.

Perhaps the most well-known Maryland case addressing the tripartite relationship is *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396 (1975). In *Brohawn*, the then-Court of Appeals addressed if carrier-appointed counsel could defend an insured in a case where there was a coverage dispute. The court recognized some aspects of the dual representation theory, including that defense counsel owes a duty to both the insurer and the insured. However, the court did not go as far as to consider both the carrier and the insured as clients. Instead, the court relied upon *Fid. & Cas. Co. v. McConnaughy*, 228 Md. 1 (1962), which holds that defense counsel must represent the insured with complete fidelity and cannot advance the interests of the insurer to the detriment of the insured. Ultimately, defense counsel owes a duty to both the carrier and the client, but defense counsel owes a higher duty to the insured.

The principle that defense counsel, in the event of a potential or actual conflict, owes his or her loyalty to the insured rather than the carrier has repeated itself in the 50 years since *Brohawn*. For example, in Maryland Ethics Docket 2000–23 Ethics Opinion, staff counsel for a carrier asked the MSBA Ethics Committee if withdrawal was mandatory when the positions of the insured and insurer were in conflict — such as when there are coverage issues. The committee cited a passage from Ethics Opinion 1999-7 (which I have not been able to locate) with approval: An attorney representing a carrier is impliedly authorized to provide information which Rule 1.6 ordinarily protects so the carrier can evaluate a claim, so long as the lawyer does not include information detrimental to the insured. After considering the dual representation theory from the Restatement of the Law Governing Lawyers, and the constraints of *Brohawn*, the committee concluded withdrawal was not mandatory; but directed the lawyer to look at the specific facts of the case to determine if there was a conflict under the normal conflict rules.

The notion of defense counsel owing a duty to the carrier also arises in authorities which address whether the attorney client privilege or work product doctrine apply. In *Cutchin v. State*, 143 Md. App 81 (2002), the Court of Special Appeals addressed if an insured's statements to a carrier were privileged. The Court of Special Appeals held that the attorney-client privilege attached to communications with the carrier (1) when the dominant purpose of the communication was to defend the case and (2) when the insured had a reasonable basis for believing that the communication was privileged. Similarly, in *Allstate Ins. Co. v. Warns*, 2013 U.S. Dist. LEXIS 44507 (D.Md. 2013), U.S. Magistrate Judge Stephanie Gallagher held that a carrier has standing to assert the attorney-client privilege and work-product doctrine because the carrier "serves as the 'client.'" *Id*. at 6-8.

Many jurisdictions also have addressed if defense counsel can submit confidential information in bills to the carrier. In Ethics Opinion 290, the D.C. Bar, of course, approved of disclosures to the carrier in the context of the tripartite relationship. While a disclosure to the carrier, generally, is permissible, if the carrier uses an outside audit service to review legal bills, defense counsel should make an additional disclosure to the insured.

In sum, a carrier's appointment of defense counsel may implicate many of the Maryland Rules of Professional Conduct. These include the rules on conflicts, payment of fees by a third party, and the duty to protect client confidences and secrets. Each of these obligations plays out differently and depends on the specific facts in a particular case. However, defense counsel should remember that while the carrier pays the bills, the highest duty of loyalty is to the insured client.

Craig Brodsky, Esquire is Partner at Goodell DeVries. For more than 25 years, Mr. Brodsky has represented attorneys in disciplinary cases and legal malpractice cases, and he has served as ethics counsel to numerous clients.

The QMSR Transition, New FDA Guidance, and Their Impacts on Active Implantable Medical Devices

Sangeeta Abraham and James Brennan III

In the United States, the Food and Drug Administration (FDA) regulates medical devices and classifies it as Class I, Class II, and Class III, based, in part, on the intended use of the device. On February 2, 2026, the FDA will transition the existing Quality System Regulation (QSR), defined in 21 CFR 820, to the Quality Management System Regulation (QMSR).[1] The amendment will align the current good manufacturing practices in the QSR more closely with ISO 13485:2016, "the international consensus standard for Quality Management Systems for medical devices used by many other regulatory authorities around the world."[2]

The main difference between the existing QSR and upcoming harmonized QMSR is the explicit integration of risk management throughout the regulation. As such, medical device manufacturers should take a risk-based approach throughout the entirety of their quality management system in addition to product design risk management. This type of holistic risk-based approach concerns itself with risks that are inherent to the total product lifecycle, including management responsibilities, purchasing requirements, and process monitoring, among other elements. While the QMSR regulation is similar substantially to the existing QSR,[3] the expectation is for manufacturers to consider updating their internal quality systems in response to this transition. Many manufacturers in the United States, especially those marketing medical devices outside the country, already may be in compliance with ISO 13485:2016 in addition to the QSR; but some domestic-only manufacturers may have to make additional changes to comply.

In preparation for this transition, the FDA has issued some new guidance documents, including one pertaining to premarket approval (PMA) applications entitled "Quality Management System Information for Certain Premarket Submission Reviews," which the FDA issued as draft guidance in October 2025.[4] This guidance more explicitly communicates the risk management activities that the FDA expects a manufacturer to demonstrate, beyond the current description. For example, this draft guidance document contains descriptive language about requirements for the purchasing process, such as:

> *Establish criteria for evaluation and selection of suppliers for the subject device, based on the supplier's ability to provide product that meets requirements, based on the supplier performance, based on the effect of the purchased product on the quality of the device, and proportionate to the risk associated with the device.*[5]

In general, Class III devices that require a PMA are those that "support or sustain human life, are of substantial importance in preventing impairment of human health, or which present a potential, unreasonable risk of illness or injury."[6] A finding by the FDA that sufficient valid scientific evidence is present to provide a reasonable assurance of safety and effectiveness for the device's intended use determines PMA approval. Prior to approving a PMA, the FDA conducts a pre-approval inspection to assess the company's systems, methods, and procedures for the specific device to ensure that the firm effectively established its quality management system.[7]

A PMA is necessary prior to the marketing of certain medical devices in the United States and, as such, manufacturers of complex implantable devices, such as neurostimulators and cardiac pacemakers, should consider the FDA's new guidance documents.

Certain medical devices, such as sacral nerve and spinal cord stimulators (SCS), are Class III medical devices that require a PMA. A neurostimulator applies precisely timed electrical pulses at certain locations of nerve tissue to initiate a desired response. An implantable neurostimulator system, typically, includes an implantable pulse generator (IPG), an electrical lead or leads that electrically connect the IPG to nerve tissue, and devices for patient control and clinician programming and monitoring. The IPG is the "brains" of the system that administers small electrical pulses through the leads and essentially, is the neurostimulator itself.[8]

In general, an IPG consists of a hermetically sealed metallic canister that houses electronic circuitry and a battery for purposes of delivering these electric pulses. SCS devices, for example, utilize these electric pulses to treat certain chronic intractable pain of the trunk and limbs and have been the subject of dozens of recent lawsuits.[9] While we discuss SCS devices, specifically, the general concepts apply to a wide array of cardiac devices and neurostimulators more broadly.

Traditional SCS devices produce tonic electrical waveform stimulation which deliver electrical pulses at a constant frequency, pulse duration, and amplitude. Such devices often use other alternate waveforms, such as burst stimulation, which deliver groups of pulses at a higher frequency and lower amplitude than tonic stimulation. The applications of these waveforms, typically, are either con-

Continued on page 32

[1] When referring to 21 CFR 820 as amended, effective February 2, 2026, FDA uses the term "QMSR."

[2] https://www.fda.gov/medical-devices/quality-system-qs-regulationmedical-device-current-good-manufacturing-practices-cgmp/quality-management-system-regulation-final-rule-amending-quality-system-regulation-frequently-asked

[3] https://www.federalregister.gov/documents/2024/02/02/2024-01709/medical-devices-quality-system-regulation-amendments

[4] https://www.fda.gov/regulatory-information/search-fda-guidance-documents/quality-management-system-information-certain-premarket-submission-reviews

[5] https://www.fda.gov/regulatory-information/search-fda-guidance-documents/quality-management-system-information-certain-premarket-submission-reviews

[6] https://www.fda.gov/medical-devices/premarket-submissions-selecting-and-preparing-correct-submission/premarket-approval-pma

[7] https://www.fda.gov/medical-devices/quality-and-compliance-medical-devices/medical-device-premarket-approval-and-postmarket-inspections-part-iii-inspectional

[8] For general neurostimulator background information, *see* Krames ES, Peckham ES, Peckham PH, Rezai AR (Eds.). *Neuromodulation: Comprehensive Textbook of Principles, Technologies, and Therapies, 2nd Edition, Volumes 1–3*. Academic Press, 2018. ISBN-13: 978-0128053539.

[9] FDA Sued Over Allegedly Defective Spinal Cord Stimulators | Law.com

(QMSR TRANSITION) *Continued from page 31*

tinuous or cyclical, where the application of the waveform occurs at on and off time intervals. These two stimulation delivery methods are the continuous mode and cycled mode.

A clinician can communicate with and program an IPG via an external device such as a wand, which goes over the device to establish a wireless link between a computer and the IPG. The IPG can store parameters, such as the pulse frequency, duration, cycle time, amplitude range, and stimulation type (*e.g.*, tonic or burst), for later use by the patient. A desired therapy pattern is called a program, and a given IPG can store multiple programs that contain unique therapy parameters.

A patient often can communicate with the implanted IPG via a specialized software application in an external device such as a tablet or cell phone. Patients can use this application to turn therapy on and off, adjust stimulation strength, and activate or modify programs created by the clinician.

Many implantable medical devices, including pacemakers and neurostimulators, contain components that are critical to the functionality of the device and which manufacturers purchase from external suppliers. These components include items such as sensors and batteries.

Pacemakers and neurostimulators can contain sensors to indicate the presence of a large magnetic field. These sensors allow a patient or clinician to control temporarily the device by holding a magnet over the IPG, for example, to turn therapy on or off, trigger a fixed-rate stimulation mode, or initiate controller pairing. Some equipment in home, work, and public environments can generate a magnetic field that is strong enough to activate these internal sensors, so patients should avoid lingering near these sources, such as anti-theft gates, arc welders, and induction furnaces.

The longevity of an IPG battery is dependent on many factors, such as program settings, the electrical impedance between active electrodes, and hours of device use. Battery longevity is a critical parameter that both the battery supplier as well as the medical device company incorporating the battery into their product characterize.

Devices with non-rechargeable batteries will require complete IPG replacement when the battery nears depletion. When such replacement occurs, the implanted leads often can remain within the patient and connect to the new IPG. Typically, the design purpose of an IPG is to transmit a warning signal to clinicians and the patient; this warning signal, called an elective replacement indicator, indicates that the battery is nearing depletion and the scheduling of an IPG replacement procedure is necessary.

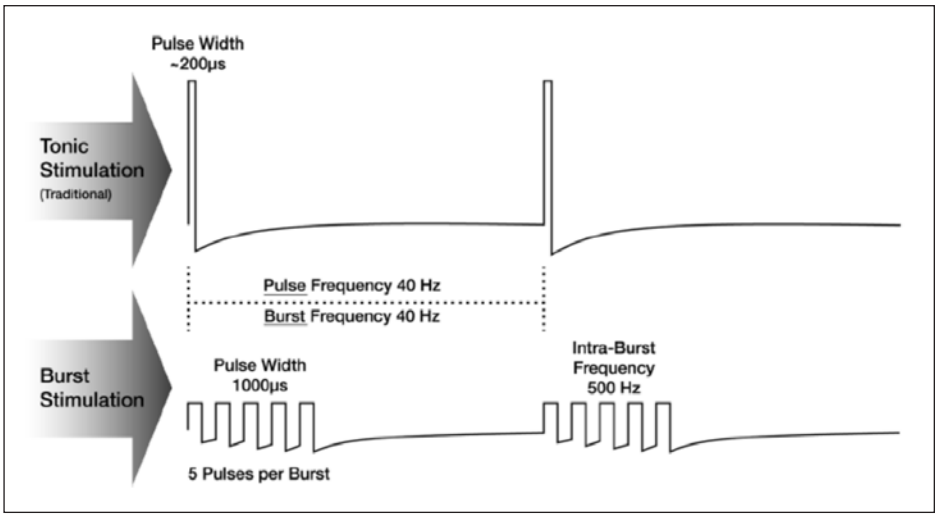


Figure 3: Examples of SCS waveforms. Tonic stimulation provides a consistent stream of pulses at a set frequency, pulse width, and amplitude. Burst stimulation delivers groups of pulses at a lower amplitude and a higher frequency than tonic stimulation. Bursts of pulses are followed by pulse-free periods.[10]

In the examples above, both the battery and the sensors are critical components of an active implantable medical device; according to the FDA's new draft guidance document, the PMA application must detail explicitly the requirements for purchasing and verifying these components, such that the process for evaluating and selecting the supplier is proportionate to the risk associated with it. While this process may not differ substantially from purchasing controls in manufacturers' PMA submissions, the QMSR adds a layer of detail by allowing the FDA to inspect supplier audit reports.[11] This means that the FDA can check purchasing controls information in a PMA application against the supplier audit reports that a manufacturer maintains as part of its documentation to ensure compliance.

The upcoming QMSR transition likely will have far-reaching effects for manufacturers and regulators alike, specifically, the anticipation of quicker access to newly developed medical devices in tandem with the FDA's expectations for an effective quality management system and robust supplier quality programs.[12] Medical device manufacturers should prepare for this transition by assessing existing quality and risk management systems to ensure compliance. The ways in which the FDA's inspection process will differ are yet to be seen, but appropriate documentation of risk-based approaches is critical for medical device manufacturers.

Sangeetha Abraham, Ph.D., PMP, CQE is a biomedical engineer and Managing Scientist at Exponent. Dr. Abraham is an expert in the fields of orthopaedics, orthobiologics, biomaterials, and translational research.

James Brennan, III, Ph.D., is an electrical engineer and Principal at Exponent. Dr. Brennan applies his physics and electrical engineering expertise to craft solutions for multidisciplinary problems across a broad range of industries.

10 Figure 3 in Slavin KV, North RB, Deer TR, Staats P, Davis K, Diaz R. Tonic and burst spinal cord stimulation waveforms for the treatment of chronic, intractable pain: study protocol for a randomized controlled trial. Trials. 2016 Dec 1;17(1):569. This figure is distributed under the terms of the Creative Commons Attribution 4.0 International License (http://creativecommons.org/licenses/by/4.0/).

11 https://www.fda.gov/medical-devices/quality-system-qs-regulationmedical-device-current-good-manufacturing-practices-cgmp/quality-management-system-regulation-final-rule-amending-quality-system-regulation-frequently-asked

12 https://www.federalregister.gov/documents/2024/02/02/2024-01709/medical-devices-quality-system-regulation-amendments

2025 MDC Sponsors

Platinum Sponsors

Exponent®

Planet Depos®
We Make It Happen™

VERITEXT
LEGAL SOLUTIONS

Gold Sponsors

APEX
APPLIED SCIENCE AND ENGINEERING

The McCammon Group

RIMKUS

Silver Sponsors

FORCON INTERNATIONAL
EST. 1984

The National Academy of Distinguished Neutrals
Maryland Chapter

Bronze Sponsors

SALOMON

DigiStream® INVESTIGATIONS

Dunn Law

MDD
A Davies Company

VERSED
ANY EXPERT. EVERY TIME.