THE DEFENSE LINE

June 2022

A Publication From Maryland Defense Counsel, Inc.

When A Judge Says "Expert," The Jury Hears "EXPERT!!!"

By
Neal M. Brown &
R. Alexander Carlson

Featured Articles

President's Message

Thank you for reading this issue of *The Defense Line* and for your continued support of Maryland Defense Counsel, Inc.! While it's been great to see so many Maryland colleagues over zoom calls and hearings, it sure feels good to be back in the courtroom and to have jury trials back on calendar. We look forward to safely moving out of the pandemic, including seeing members and friends at happy hours and the upcoming Crab Feast!

Katherine A. Lawler, Esquire
Nelson Mullins Riley & Scarborough LLP

There is much to read about in this issue, including reports from a very busy Legislative Session, updates on several judicial vacancies, and excellent legal analysis from our members. Please note that our Annual Meeting will once again be held in conjunction with a crab feast at Nick's Fish House to mark the end of the 2021–2022 fiscal year and the beginning of the new year and new executive board terms. We are excited to see you all there to celebrate and reconnect!

One significant board update you will also notice on the MDC website is that our executive director, Marisa Capone, has left her administrative role at MDC to return to private practice with Goodell, DeVries, Leech & Dann. We wish her the very best in this next chapter! In her nearly four years serving MDC, Marisa has provided significant support to the executive board, particularly in coordinating our member events and helping to automate aspects like event registration and membership signup and renewal. Because of her help in setting up the Wild Apricot platform for MDC, we are experimenting with further automation that will help MDC to be fully attorney-run without an executive director going forward. Instead of the ed@mddefensecounsel.org email address Marisa, and formerly Kathleen Shemer, had monitored and maintained, we have a new email address for all MDC-related inquiries and information: **info@mddefensecounsel.org**. The website and Membership-only access through Wild Apricot will look largely the same, but we truly appreciate your patience in any delays with responding to requests during this transition.

Throughout this transition, Maryland Defense Counsel will continue to serve our members through legislative efforts, involvement in the judicial selection process, connection with quality expert and litigation vendor services, and provision of excellent legal resources. Please do not hesitate to contact us through the new email address for more information in any of these areas or to get further involved!

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*See our **Judicial Selections Committee** ad on page 8.*

THE DEFENSE LINE

June 2022

60 Years of Service to Our Members (1962–2022)

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

MARYLAND DEFENSE COUNSEL, INC. SINCE 1962

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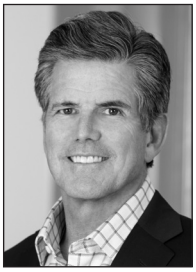
When A Judge Says "Expert," The Jury Hears "*EXPERT!!!*"

Neal M. Brown and R. Alexander Carlson



The attorney begins by asking foundational questions concerning the witness's qualifications. From the jury's perspective, they can see that the attorney appears to be building to something: "When did you obtain your doctorate?" "Have you ever been published in your field?" "And doctor, how long have you held that position?"…

Next, the attorney turns to the judge and tenders the witness as an expert in a particular field. From the jury's perspective, they see a break in the attorney's routine. They see the attorney halt his own questioning of the witness to suddenly, and in front of the jury, ask a question of the judge. And not just any question; the attorney asks that the judge — someone who has let every other witness testify without comment, praise, or criticism — to declare their witness an "expert."

Opposing counsel is then given the opportunity to object or conduct *voir dire*. Afterwards, and assuming the witness meets the requirements of Maryland Rule 5-702, the judge makes a declaration. From the jury's perspective, they see this honorifically titled person in a black robe who sits high in the courtroom (and takes no side in the case), make an affirmative statement about this witness. The jury sees the judge acknowledge this special witness as an "expert."

At the end of the trial, the jury must decide whether to accept or reject the opinion of this witness. But is a jury truly able to make an independent and uninfluenced decision after hearing the Court give its seal of approval and declaring this witness an "expert"?

The American Bar Association ("ABA") answer to this question is "no," and it denounces the practice of any court referring to these opinion witnesses as "experts" in the presence of the jury. ABA Civil Trial Practice Standard 14 states, "[t]he Court should not, in the presence of the jury, declare that a witness is qualified as an expert or to render an expert opinion, and counsel should not ask the Court to do so."[1]

We have found no good reason for courts to continue to follow the traditional Maryland approach of tendering a witness as an expert in the presence of the jury. We believe the time has come for Maryland to change the common practice of a court declaring a witness an "expert" in the presence of the jury. We advocate for our courts to adopt the ABA approach and conduct all offers and findings of expert status outside the presence of the jury. We welcome thoughts and comments on this approach.

The Meaning of "Expert"

The term "expert" is often used by the Maryland legal system to refer to a particular category of witnesses: those who have satisfied the criteria of Maryland Rule 5-702. Black's Law Dictionary defines "expert" as follows:

> Someone who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder.[2]

Nothing in this legal definition denotes that the person is a master, or a genius, or an infallible being.

But this *legal* definition differs from the common-usage meaning of the term "expert," which often carries a greater degree of grandeur. The term "expert" was originally derived from the Latin term "expertus," which meant "well-proven, tested; **shown to be true**."[3] Unlike Black's Law Dictionary, Merriam Webster's Dictionary, defines "expert" as "one with the special skill or knowledge **representing mastery of a particular subject**."[4] In any video game or competition, "expert" is the most difficult setting at which one can play. Consequently, the common parlance usage of "expert" likely carries with it notions that exceed the minimum threshold requirements of Maryland Rule 5-702. To some, the term may even carry notions of absoluteness or incontrovertibility.

Moreover, the term "expert" is not just a noun, but also an adjective, communicating the speaker's belief or opinion about the degree of skill possessed by a particular person. A judge's declaration that a particular witness is testifying as an "expert" may unintentionally communicate to a juror that this neutral and learned magistrate believes a particular witness's testimony carries more weight or greater degree of truth.

The Law In Maryland

Under Maryland Rule 5-702, "[e]xpert testimony may be admitted … if the court determines that the testimony will assist the trier of fact." Nothing within that portion of the Rule requires that the trial court declare the witness to be an "expert" *in front of the jury* before permitting opinion testimony. Nothing within that Rule requires that the court make *any type* of declaration in front of the jury.

Maryland Rule 5-702 further provides that, in "making that determination, the court shall determine … whether the witness is qualified as an expert by knowledge, skill, experience, training, or education." *Id.* Nothing within this portion of the Rule requires that the judge inform the jury of his or her finding — or that the judge inform the jury of any belief by the court regarding the witness's knowledge, skill, or training. In fact, the ordinary practice is for a jury to hear only the admissible evidence, not the reasons underlying the admissibility ruling.[5]

We have found no Maryland statute, Rule, or appellate case in this State requiring the court to declare, in front of the jury, that a particular witness is an expert.

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1 *ABA Civil Trial Practice Standard 14* (Aug. 2007) (available at https://www.americanbar.org/groups/litigation/policy/civil_trial_standards/).

2 *See* EXPERT, Black's Law Dictionary (11th ed. 2019).

3 *See* EXPERTUS, The Oxford Latin Dictionary 649 (1968) (emphasis added).

4 *See* EXPERT Merriam-Webster.com. 2011. https://www.merriam-webster.com (last visited March 6, 2022) (emphasis added).

5 Maryland Rule 5-104(c) provides, "[h]earings on preliminary matters shall be conducted out of the hearing of the jury when required by rule or the interests of justice."

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To the contrary, that position appears to be inconsistent with the advisements suggested under the Maryland Pattern Jury Instructions:

> Arguments about objections or motions are usually made out of the hearing of the jury, either here at the bench or after you have been excused from the courtroom. This is because **questions of law and admissibility of evidence do not involve the jury; they are decided by the judge.… You should draw no conclusions from my rulings, either as to the merits of the case or as to my views regarding any witness** or the case itself.[6]

The Court of Appeals has similarly opined, "[i]t is the policy of the law to protect the province of the jury from invasion by the court. The court must not assume the power of judging the credibility of witnesses or determining the weight of testimony in case of discrepancy."[7]

Though Maryland appellate courts have yet to address this issue — whether a trial court should declare the witness to be an expert in the presence of the jury — legal precedent in other jurisdictions establishes that such judicial recognition is inappropriate and may be prejudicial.[8]

Other Jurisdictions

Several circuits have adopted the ABA recommended approach, disallowing trial courts from recognizing witnesses as experts in the presence of the jury. The Sixth Circuit discourages the practice of a court declaring a witness "an expert" in the presence of the jury.[9] In *Johnson*, the Court of Appeals for the Sixth Circuit reasoned as follows:

> We pause here to comment on the procedure used by the trial judge in declaring before the jury that Officer Dews was to be considered an expert….**When a court certifies that a witness is an expert, it lends a note of approval to the witness that *inordinately enhances the witness's stature and detracts from the court's neutrality and detachment.***[10]

Courts in other circuits have reached similar conclusions. The Court of Appeals for the Eighth Circuit similarly commented:

> Although it is for the court to determine whether a witness is qualified to testify as an expert, there is no requirement that the court specifically make that finding in open court upon proffer of the offering party. **Such an offer and finding by the Court might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgement of the witnesses' expertise by the Court.**[11]

In the Seventh Circuit, the Court of Appeals did not address this issue directly but, in *dicta*, obliquely referenced the ABA process favorably:

> The judge, however, has a rule that an expert witness is not to be called an expert in front of the jury, lest the jurors be awed and think the witness infallible. Our court has not considered this rule as yet, but it has been accepted by other courts… and the ABA likewise recommends that trial courts not endorse witnesses as "experts."[12]

The Federal Rules of Evidence do not specify whether courts should declare witnesses to be "experts" in the presence of the jury. However, the Advisory Committee Note to the 2000 amendment to Rule 702 discouraged the court's use of the term "expert" in the presence of the jury:

> The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." … The use of the term "expert" in the

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6 MPJI-Cv 1:1 INTRODUCTION, MPJI-Cv 1:1 (emphasis added).

7 *Singleton v. Roman*, 195 Md. 241, 246, 72 A.2d 705, 707 (1950) (emphasis added).

8 The Maryland Pattern Civil Jury Instructions does use and define the term "expert" for the jury:

> An expert is a witness who has special training or experience in a given field. You should give expert testimony the weight and value you believe it should have. You are not required to accept any expert's opinion. You should consider an expert's opinion together with all the other evidence.
>
> MPJI-Cv 1:4 EXPERT OPINION TESTIMONY, MPJI-Cv 1:4. Nonetheless, this broad statement at the end of trial is distinctly different than a judge singling out particular witnesses and labeling them as "experts" in front of the jury and immediately preceding the substance of those witnesses' testimony. *See also Johnson*, 488 F.3d at 698 (citing *Berry v. McDermid Transp., Inc.*, 2005 WL 2147946, at *4 (S.D. Ind. Aug.1, 2005) for the proposition that jury instructions should use the phrase "opinion witnesses" instead of "expert witnesses").

9 *See United States v. Johnson*, 488 F.3d 690, 697 (6th Cir. 2007).

10 *Id.* (emphasis added).

11 *See United States v. Bartley*, 855 F.2d 547, 552 (8th Cir.1988) (emphasis added).

12 *United States v. Lopez*, 870 F.3d 573, 583 (7th Cir. 2017).

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> Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. **Such a practice ensures that trial courts do not inadvertently put their stamp of authority on a witness' opinion, and protects against the jury's being overwhelmed by the so-called "experts."**[13]

A few states have also adopted this approach, whereby the trial court refrains from declaring a witness to be an "expert" in the presence of the jury. The Supreme Court of Arizona, adopting this approach, observed as follows:

> By submitting the witness as an expert in the presence of the jury, counsel may make it appear that he or she is seeking the judge's endorsement that the witness is to be considered an expert.... **In our view, the trial judge should discourage procedures that may make it appear that the court endorses the expert status of the witness.**[14]

The Supreme Court of Kentucky used language that was even stronger than that in Arizona, stating:

> Great care should be exercised by a trial judge when the determination has been made that a witness is an expert. If the jury is so informed such a conclusion obviously enhances the credibility of that witness in the eyes of the jury. All such rulings should be made outside the hearing of the jury and **there should be no declaration that the witness is an expert.**[15]

Academic Publications

In addition to courts, several noted legal scholars have discussed the dangers accompanying the practice of a trial court declaring a witness to be an "expert" in the presence of the jury. McCormick on Evidence recognized the position that such an approach "might influence the jury in its evaluation of the expert and the better procedure is to avoid an acknowledgment of the witness's expertise by the court."[16]

The Honorable Judge Charles R. Richey of the United States District Court for the District of Columbia, published an oft-cited article, delineating the risks created when a court declares a witness to be an "expert" in front of the jury.[17] Judge Richey noted:

> One source of the term's prejudice is that the everyday meaning of the word "expert" … **every human being's ears pick up on the word "expert," giving the "expert" witness more attention and credence than any other witness or evidence.** In other words, to the jury an "expert" is just an unbridled authority figure, and as such he or she is more believable. Thus, in normal parlance, stating that someone is an "expert" not only speaks to his or her credentials, but also vouches for his or her credibility. This does not comport with fundamental fairness.[18]

Renown trial lawyer Irving Younger also emphasized how a court's declaration that a witness is an expert may impact a jury:

> [Y]ou say to the judge something like, 'Your Honor, I ask the court to declare Dr. Elko an expert in the field of physiology.' Now, you see, all you're doing is saying to the judge, 'Your Honor, with respect to…whether the expert can give his opinion, have I done it, Judge? Have I done it?' And, of course you've done it, so the judge says, 'Yes.'
>
> How does the jury hear it? The jury hears it as the judge certifying that your expert is an expert. The judge's authority begins to be associated with your expert's authority. And since the judge is the ultimate figure in the courtroom, it's a very nice phenomenon to have working for you."[19]

The MDC Expert List

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

Practical Application of the ABA Approach

Maryland courts can comply with the ABA approach by implementing a minor change to its traditional routine. Under the ABA approach, the tendering of an expert would proceed as follows:

1. Counsel proceeds in the ordinary course, questioning the witness as to their background, education, experience, and other qualifications;
2. Counsel does **NOT** inquire as to whether the witness has been recognized by any other courts as an expert;

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13 Fed. R. Evid. 702 advisory committee's notes to 2000 amendment (citations and internal quotation marks omitted) (emphasis added).

14 *State v. McKinney*, 185 Ariz. 567, 917 P.2d 1214, 1233 (Ariz. 1996) overruled on other grounds by *State v. Martinez*, 196 Ariz. 451, 999 P.2d 795 (2000) (emphasis added).

15 *Luttrell v. Commonwealth*, 952 S.W.2d 216, 218 (Ky. 1997); for additional authority, *see Osorio v. State*, 186 So. 3d 601, 610 (Fla. Dist. Ct. App. 2016) ("While this court and others have repeated the recommendation that trial courts ought to refrain from directly declaring the expert status of a witness in front of the jury.… Today we clarify that such practice is impermissible. Judges must not use their position of authority to establish or bolster the credibility of certain trial witnesses.").

16 *See* 1 McCormick on Evidence, § 13, at 69 n.14 (Kenneth S. Bround, et al. eds., 6th ed. 2006) (citation omitted).

17 Charles R. Richey Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules Evidence in Civil and Criminal Jury Trials, 154 F.R.D. 537, 541, 544 (1994).

18 *Id.* (emphasis added).

19 Irving Younger, A Practical Approach to the Use of Expert Testimony, 31 Clev. St. L. Rev. 1, 16 (1982).

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The Judicial Selections Committee is in the midst of an active season, having recently conducted interviews for vacancies in Washington County, Caroline County, Charles County, Cecil County, Baltimore City, and the Maryland Court of Special Appeals. We encourage MDC members to participate by attending future judicial nominations interviews or by joining the Judicial Selections Committee!

If interested, please contact **Jennifer Alexander**, jalexander@mhlawyers.com, or her paralegal, **Natalie Kalmus**, nkalmus@mhlawyers.com.

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3. When counsel intends to tender the witness as an expert in a particular field, **he or she approaches the bench and makes the motion at the bench;**[20]
4. If there is no objection, **the motion is granted *at the bench*.** Counsel proceeds to question the witness;
5. If there is an objection to the witness's qualifications, the jury is excused so that *voir dire* and the ensuing hearing may be conducted outside the presence of the jury;
6. The trial then resumes in the ordinary course.

This change would mark little difference in procedure and create minimal delay in the proceeding of a jury trial.[21]

Conclusion

As the Supreme Court explained in *Daubert v. Merrell Dow Pharmaceuticals*, expert testimony "can be both powerful and quite misleading" because of the jury's "difficulty in evaluating it."[22] Does a court's declaration, in front of the jury, that a particular witness is an "expert" assist the jury in a benign way? Or does it unduly influence the jury's evaluation of that witness? We believe the time is ripe for Maryland to address this issue and adopt the approach suggested by the ABA. In our experience as defense trial counsel, we offer to the jury qualified experts who base their opinions on literature, experience, and training. The jury can make their own determination as to the weight they want to give our experts versus those advanced by plaintiffs. We feel confident that balance will tip in favor of the defense.

Respectfully, it is time for Maryland judges to stop saying "expert" in light of the fact that the jury may be hearing "EXPERT!!!"?

Neal Brown is a Fellow of the American College of Trial Lawyers and a Martindale-Hubbell AV-rated trial attorney. He is the founding partner of Waranch & Brown, where he has devoted his career to defending hospitals and health care providers in medical malpractice and licensure issues.

Alex Carlson is an experienced trial attorney and associate at Waranch & Brown, LLC. His work focuses on defending medical malpractice claims and representing physicians and other health care providers in professional licensing matters.

The MDC Expert List

To downlaod 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.

[20] Some scholars advocate for the abolishment of the entire practice of *tendering* a witness as an expert altogether, instead waiting until the actual opinion testimony to ascertain whether there will be an objection to the witness's qualifications.

[21] Of note, nothing within the ABA approach prohibits trial attorneys from referring to a witness as an expert in closing remarks as it is proper argument and commentary. Of course this recommended procedure applies to all proffered experts—from both sides.

[22] 509 U.S. 579, 595 (1993) (internal citations omitted)

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Interpreting Numbers In Distributive Bargaining

Jeff Trueman

When participants in mediation are focused on the value of a case rather than the needs and interests of parties, the numbers do all the talking. Much of the time, there is little interest in trying to solve underlying problems that created the conflict and the parties have no interest in maintaining a relationship after the case is over. Consequently, the parties and their lawyers need to agree on a dollar-figure in order to fully resolve the dispute. Usually this concerns a resource with a fixed amount like an insurance policy. Each party asserts its claim over the same resource that gets apportioned through a process called distributive bargaining. Neither side adds value or expands the pie. What one side gains, another loses. Both sides want to achieve the best financial outcome possible for themselves.

Although "compromise" may be a dirty word in hotly contested litigation (and in our culture generally), parties must offer and accept concessions in order to reach resolution. Although distributive bargaining typically reduces the number of tools available to the mediator, the overall goal is to generate movement on the numbers because, as I have said many times, "movement begets movement." Here are a few strategic considerations for counsel when negotiations are confined to the distribution of a fixed resource.

Plan your moves. Many attorneys unwittingly revert to a "reactive" strategy where they impulsively respond to their opponent's last number. Without realizing it, they relinquish control over the outcome by failing to plan their bargaining moves and allowing their opponent to control the course of the negotiation. Attorneys that have anticipated each move and countermove, however, have a better chance of influencing the ultimate outcome. Of course, they can alter their plan as the dynamic unfolds and respond competitively or cooperatively as conditions warrant. But sometimes staying the course, no matter how the other side responds, can bring about impasse in such a way that permits the mediator to prompt each side to have an important internal conversation about their outcome goal. In this respect, I believe that impasse has great value.

Anchor with credibility. Although the plaintiff almost always opens the bargaining rounds, the defense should consider going first in some cases in order to "anchor" the plaintiff to its settlement range. Much has been written about what anchoring is and its ability to influence perceived value so I will not rehash it here. I will emphasize, however, that in order for it to work, the number cannot be extreme. Everyone knows that initial numbers that are outrageously high or insultingly low are meaningless because the final number is usually far from the starting point. Extreme numbers may give counsel "lots of room to move," but they are not credible and do not incentivize other parties to bargain meaningfully (because, as stated above, most people react to their opponents, rather than respond according to an overall plan). For an anchor to be effective, it has to be relatively realistic. Otherwise, the opportunity to influence the other side's perception of "value" is lost.

Bidding against oneself. Every mediator has heard it too many times: "It's their move. I won't bid against myself." Although this phrase applies when the sequence of moves get derailed, one party may feel it is bidding against itself when their opponent's is so far out of whack that it feels like no proposal was made at all. In mediation, unfortunately, most people talk and few ask questions. Thus, opportunities to get information are missed. Why not ask questions about the rationale for a particular demand or offer — especially when that number is a non-starter? In my opinion, there is no harm in asking questions. I have seen counsel readjust their demand or offer in a way that gives them credibility and in turn, cooperative movement from their opponent.

Reciprocity. We are familiar with social norms such as reciprocity. When you help me, I feel obligated to help you. If you make life difficult for me, I will do the same for you. Recall my point earlier, "movement begets movement." When lawyers are overly-competitive, a downward cycle begins where each subsequent move becomes smaller and smaller, prompting predictions of impasse or the frustrating feeling that "We're wasting our time." Often those cases settle very close to trial but on terms less favorable and with higher costs. To avoid that outcome, counsel or the mediator might suggest small but equal (reciprocal) moves to get the process back on track.

Patience. Finally, keep in mind that bargaining over dollars is a process that cannot be rushed despite how frustrating or tedious it may be. Haggling is the rule in competitive, distributive contexts. Resist the temptation to "cut to the chase." To close the inevitable gap that results from hours of "banging heads," your mediator should offer a number of techniques that can close the deal. Patience and perseverance is usually the only way through a process characterized by "banging heads" or whatever you call distributive bargaining. .

Jeff Trueman, Esq., an independent commercial mediator and the former director of Civil ADR for the Circuit Court for Baltimore City. He can be reached at jt@jefftrueman.com

See photos from past events at mddefensecounsel.org/gallery

5 Tips For Appellate Oral Argument

Joshua F. Kahn and Laura A. Cellucci

Oral argument in an appellate court represents a critical moment in every case. The briefs are written, and the panel may already be leaning towards a decision. Oral argument, therefore, is an opportunity to cement the panel's decision in your favor, or perhaps your final chance to save your case. To say the least, it is a pressure packed inflection point in the life of a case. Thorough preparation, however, will relieve some of this pressure.

Below are five important tips to help you prepare for and present effective appellate oral argument (which the authors assembled immediately after delivering oral argument before an *en banc* panel of the Delaware Supreme Court):

1. Know your audience. Familiarize yourself with the panel hearing the appeal. Gain insight into backgrounds and judicial leanings of each judge. Watch your judges in recent oral arguments in other cases, and read prior opinions. Often, a prime source of insight will come from former clerks. At a minimum, consult with counsel who have appeared before the judges on your panel.

2. Know your forum. Familiarize yourself with the applicable rules – written and unwritten. How are you expected to dress? Some forums still maintain strict, traditional dress codes. How are you expected to refer to your opponent (e.g. "Mr./Ms. ___," "Plaintiff/Defendant's counsel," "Appellant/Appellee's counsel," "My friend," etc.)? How do you reserve time for rebuttal, and how do you track the time remaining during your argument? If arguing in a forum for the first time, be sure to consult with experienced, local counsel and watch oral arguments.

3. Know your weaknesses. Perhaps more important than memorizing the high points of your arguments in your appellate briefs is recognizing your weaknesses. Prepare for the panel to ask questions that probe the weaknesses and limitations of your theories, and identify the responses that are logical, persuasive and keep the panel with you on the most critical issues.

4. Answer the question. When your position prompts a question from the panel, answer it directly. When you finish your answer, confirm with the judge whether their question was sufficiently answered. This approach assists the panel in analyzing the issues (the question was posed for a reason, after all) while enhancing your credibility. An evasive response, on the other hand, is both unhelpful and tips the court to a problem in your case that you are trying to hide (which will only shine a brighter light on the issue).

5. Hit the high points without sacrificing pace. Appeals often raise numerous complex issues of law and extensive records produced from years of litigation. Yet each side is typically given between 15 and 30 minutes to present their arguments and rebut their opponents'. Speaking like an auctioneer to address every point is not the solution. Instead, aim to hit the high points of your arguments while maintaining a moderate, rhythmic pace that can be easily followed. This applies to rebuttal, too, where the tendency is to speak fast to address as much of your opponent's oral presentation as possible in the few minutes reserved. Inevitably, certain arguments and issues will not be raised at oral argument. Not to worry: those issues will have been sufficiently addressed in your brief.

Keywords: Mass Torts, Appeals, Oral Argument

This article was previously published on February 03, 2022 for American Bar Association

Joshua F. Kahn and Laura A. Cellucci are principals at Miles & Stockbridge P.C. in Baltimore, Maryland. They litigate complex class actions in state and federal courts involving a wide range of legal subject matters, including insurance, health care, and consumer protection.

Editors' Corner

The editorial staff wish to express our thanks to the contributions made by MDC members to this publication of *The Defense Line*. We are proud to present in this issue several excellent articles addressing appellate argument strategy, approaches to negotiating settlements, deposition practice, and more. This gratitude for this issue goes to: **Neal M. Brown** and **R. Alexander Carlson** of Waranch and Brown, LLC, **Jeff Trueman, Esq.**, Mediator and Arbitrator, and **Joshua F. Kahn** and **Laura A. Cellucci** of Miles & Stockbridge, P.C., **Carly Wilson** and **Nate Pascal** of Planet Depos for their contributions to this issue. We continue to look forward to opportunities to support the MDC and be a resource to its members.

If you have any comments, suggestions, or submissions for future editions of *The Defense Line*, please contact the Publications Committee.

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Work From Home Tools & Tips for Remote Depos

Carly Wilson

There have been many changes for all of us over the past two years. Overwhelmingly, the legal industry has transitioned to a remote work environment, to varying degrees. This trend is not particular to just the legal industry, and in response to the shift, thousands of work from home tips and tools have exploded on the net. Attorneys need to zero in on the top ones that will specifically help with remote depositions. To that end, here is a shortlist of some tools and tips to elevate the remote depo experience.

Tools:

Noise-Canceling software: Do you have a furry friend that always wants to say hello during your depos? Or maybe your next-door neighbor seems to have his lawn mowing schedule synced up with your calendar? Noise-cancelling software will keep those distractions muted! Krisp is a free app that removes background noise and echo from your meetings. You can get it at: www.Krisp.ai.

Video Conference Lighting: Video calls have become the common way to collaborate virtually. One aspect of video calls that is overlooked is lighting quality. If your lighting is inadequate, it looks unprofessional and hard to see, and back lighting will wash you out. Disorienting shadows will be an issue if your light source is coming from the side or being blocked by something in the room. These examples from life size blog give a great visual to these common lighting issues.

If your office space is in the basement or a room with limited light, consider a small ring light or light cube. We rounded up two highly rated options in affordable price ranges:

Ring Light — Under $20

Cube Light — Under $75

If you need a quick fix because your new lighting won't be here in time, then be sure to position yourself with light facing you. If you can face a window, let natural light work in your favor, but if not, a desk lamp will do. Again, test it out first to see how it looks and make sure to position your light facing you, not behind you!

Webcam: Does your home office setup include a docking station for your laptop and an extra monitor or two? It's much easier to look at the larger screen, but your webcam may be on your laptop causing your video to be a side shot of you not looking directly into the camera. Investing in a webcam to attach to the top of your monitor will provide clear video and save you from staring at your small laptop screen for the entire depo. We've shared two highly rated webcams at different price points for you!

Webcam — Under $25

Webcam — Under $75

Top Ten Tips:

Once you have your new tools set up for your remote depo, make sure you run through this checklist to set you up for a seamless call.

1. Set up your tools: noise cancelling software, lighting, webcam
2. Use a wired connection
3. Have a backup plan
4. Use a headset or headphones
5. Keep a charger on hand
6. Close out any other apps
7. Use a virtual background
8. Log in early
9. Dress for success
10. Keep a glass of water nearby

We are living in the age of remote work with home offices and advanced technology as the backbone. It has never been this simple to set up a professional working environment at home. With these tips, remote depositions are practically in person, however great the distance between attendees.

Planet Depos has been covering remote depositions for more than a decade. For more information or tips on remote depositions, visit Planet Depos Blog. To schedule your remote depositions, contact Planet Depos Scheduling at 888.433.3767, or scheduling@planetdepos.com.

Legislative Summary
Session 2022: Workers Compensation Legislative Wrap Up

Michael L. Dailey

The 2022 legislative session ran from January 13, 2022 through April 13, 2022 and our legislative committee and the workers compensation committee worked tirelessly to testify before Senate Finance and House Economic Matters to provide MDC's insight and concerns to the committees overseeing these bills pending before the house and senate.

Two bills aimed at expanding occupational disease presumptions were introduced this session. The first, HB 439/SB 374 sought to include 911 operators under the compensability presumption umbrella currently limited to first responders and public safety workers in limited and defined circumstances. The 911 bill sought to create a new and separate presumption solely applicable to 911 operators. The bills would have made post-traumatic stress disorder a presumed compensable occupational disease for 911 operators. The MDC as one of the defense bar advocates testified in opposition to the bill and it died in committee.

The other presumption bill introduced was SB 10, intending to create a new presumed compensable occupational disease for Covid-19 positive tests from public safety and healthcare workers. The bill did not define or limit how the employees contracted Covid-19 and only required a positive Covid-19 test produced by the covered employee. The bill was strongly contested by the MDC and the entire defense bar, arguing that not only should it fail for attempting to define Covid-19 as an occupational disease which it is not under the Workers' Compensation Act. In addition, we argued it is not a necessary bill. The Commission presented testimony stating that the number of Covid-19 case filings has dropped significantly over the last year. In addition, the bill was extremely overbroad in its inclusion of healthcare workers without definition, and no qualifiers as to those who may receive the benefit of such a presumption. Fortunately, the bill died in committee.

The other highly contested bill was the reintroduction of a claim for legal services bill backed by the Maryland Association for Justice. HB 501/SB 433 was an effort by the MAJ to allow an award by the Commission for claimant attorney fees when the issue involved authorization for medical treatment and did not include payment of indemnity benefits from which claimant attorney fees usually derive. Despite claims by the MAJ that there is a large number of these medical only claims filed each year, the evidence provided by Chesapeake Employers Insurance Co. refuted those claims, and the bill received an unfavorable report and it died in committee.

Finally, two workplace cannabis use bills did not move out of committee. HB 628 Medical Cannabis and Workplace Discrimination aimed at expanding the rights of injured workers to use cannabis for work related injuries received an unfavorable report. HB 614, Medical Cannabis and Workers Compensation Benefits, intending to require employers and insurers to pay for medical cannabis for work injuries, was withdrawn by the sponsor.

Our workers compensation chair Julie Murray, along with Ashlee Smith, Nancy Courson and legislative co-chair Michael Dailey were instrumental in our efforts this session to help defeat these potentially costly changes to the workers compensation statute and landscape.

For Immediate Release

Two Baltimore-based Law Firms Join Forces: Goodell, DeVries, Leech & Dann Combines with Astrachan Gunst Thomas

Baltimore, MD (February 2, 2022) — The law firms of Goodell, DeVries, Leech & Dann and Astrachan Gunst Thomas are pleased to announce they have combined, effective February 1, 2022. The combination joins Goodell DeVries's powerful litigation experience with Astrachan Gunst Thomas' business, intellectual property and transactional expertise, and significantly expands the services offered to local, regional, and national clients.

Goodell DeVries's attorneys have a deep bench of litigators who represent clients throughout the United States in product liability and mass torts, complex commercial and class action litigation, insurance, toxic torts, and appellate matters. The firm is highly regarded for its professional liability defense and for its medical malpractice litigation defense. These medical malpractice lawyers represent many of the largest and most renowned health care systems throughout Maryland, Virginia, and the District of Columbia. The firm also has an active Maryland cannabis law practice.

Astrachan Gunst Thomas' attorneys bring many combined decades of business, intellectual property, mergers and acquisitions and transactional experience. The combination will allow Goodell DeVries to offer to its clients, old and new, a full menu of services, including general business counseling, negotiation and preparation of business and intellectual property agreements, mergers and acquisitions, intellectual property litigation, intellectual property clearance, registration, protection and licensing, employment law, and advertising/mass communications law. Astrachan Gunst Thomas is nationally known for its expertise in copyrights, trademarks, trade secrets, advertising law, and litigation relating to these disciplines, and the representation of businesses with creative products.

Linda Woolf, Co-Managing Partner at Goodell DeVries, looks forward to the opportunities the new combination offers. "Joining forces with Astrachan Gunst Thomas means we can deliver even more to our clients. Our new colleagues bring deep experience in everything from business counseling and transactions, to IP litigation, protection and exploitation. We represent organizations across many different industries, and we see the increasingly complex business and transactional questions that arise for them. We're excited to add to our bench a team with the knowledge and experience to advise on those matters."

Jim Astrachan adds, "This is a great opportunity for the clients and lawyers of both firms."

The combined firm retains the name Goodell, DeVries, Leech & Dann and is located at One South Street in downtown Baltimore.

For more information, visit: www.gdldlaw.com.

Diamond in the Rough: Tips to Receive a Polished Rough Draft

Planet Depos

Contact ***Nate Pascal*** *for questions about Planet Depos services.*

Rough drafts are such an added value to attorneys, especially in fast-moving litigation. The uncertified rough draft, ideally delivered by the court reporter within hours of the proceedings, is the "unofficial" transcript provided before the final transcript is ready. These unofficial transcripts are useful to prepare for future depositions in the case, determine if additional documents are needed, and much, much more. The better the quality of the rough, the more helpful it is. What can attorneys and their teams do to receive the best possible rough draft? We asked a few of our own powerhouse court reporters for their insight, and it turns out, there are a few things that make a big difference in the quality of the rough draft.

Request a rough draft when you schedule the deposition. Court reporter of two years Court Petros confirms the most helpful thing an attorney can do when ordering a rough is to make the rough draft request in advance. This allows the scheduling coordinator to reserve a reporter who has the flexibility to provide the rough in the timeframe requested. Equally important, advance notice enables the court reporter to head into the deposition knowing they need a rough ready by x. The reporter will then prepare accordingly — rough drafts do require extra preparation.

Help your court reporter build a dictionary. Court reporters take down the record with speed and amazing apparent ease. One tool helping reporters do this is the dictionary they have built over their career, a lexicon pulled from a wide variety of case matters, with medical, legal, or technological terminology, and any other subject matter you can think of. But each case is unique, so to aid the reporter in building the dictionary relevant to your case, send them a list of specific names and terms.

Speaking of dictionaries, provide spellings to the court reporter. This tip was universal, with every reporter highlighting how helpful it is to receive spellings from the legal team, either prior to the deposition or on breaks. This shaves off valuable minutes spent seeking correct spellings, meaning the rough is ready that much sooner, and is that much more accurate!

Make sure the court reporter can access exhibits. If possible, make exhibits available to the court reporter prior to the deposition, whether remote or in-person. Court reporting professionals love prep materials – as veteran court reporter Lori Stokes says, the more they can prepare in advance, the better the rough will be. Having the exhibits prior to the deposition is a huge help to the court reporter, as they may also contain spellings, terms, etc. that the reporter will need for the rough.

Additional prep materials are always welcome and helpful to court reporters. If there are previous transcripts in the case, send them. Court reporter of two years Cassidy Western specifically said the roughs she has turned around fastest were those where she had access to previous transcripts in the case. If previous depositions were covered by the same court reporting agency, they will already have those transcripts to provide to the reporter, but double check to make sure the reporter has all previous witnesses. There is no such thing as too many prep materials. This was another unanimous tip from all the reporters polled. Hint, reporters always love receiving a copy of the Notice of Deposition.

Test with the remote technician before the deposition. Yes, we keep saying it. It's essential. You need to test your internet connection and speed, test your audio and video, microphone, etc. before you log in to take the remote deposition. Everyone participating in a remote deposition needs to be able to see and hear. The reporter who can't hear the participant who didn't test their connection and equipment can't promise a highly accurate rough draft (or final). Schedule the test.

For remote depositions, log in early. It is always recommended to log in early to remote depositions. You can quickly check your connection, audio, and video. Make it a habit to log in early to give the reporter your name, firm name, and names of other attorneys from your firm who will be joining. If possible, providing a list of attendees from your firm before the remote deposition would be even better.

Make your admonitions. Remind the witness that a deposition is not a conversation, and to avoid slipping into conversational speech. Remind them not to anticipate your question but to let you finish your question before they answer. Remind them to give verbal responses. Ask them to spell their name on the record. Remind them (and

Continued bottom of page 19

Upcoming events will be announced at MDdefensecounsel.org.

The MDC Expert List

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

2022 DRI Free Membership Pilot Program for SLDOs

John T. Sly

DRI State Representative for Maryland

Great news! DRI is planning to bring back the SLDO Free Membership offer, which will be offered as a pilot over the summer of 2022.

With this updated program, **MDC members can join DRI for the first time at no cost for the first year.** In addition, DRI is expanding the eligibility to former DRI members who haven't had a DRI membership in at least 5 years.

Membership in both MDC and DRI can provide numerous opportunities to meet your colleagues and learn about issues impacting your practice. We highly encourage you to take advantage of the opportunity to join DRI through this program.

This free membership pilot will run from **June 15, 2022 – August 31, 2022**.

dri™
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(DIAMOND IN THE ROUGH) *Continued from page 18*

yourself) to speak up, speak clearly and slowly, for the benefit of the court reporter and an accurate record.

Make use of your technician in remote depositions. The technician, among other duties, shares and marks exhibits in remote depositions. Even if all the attorneys present have copies of the exhibits, have the tech display them for the reporter's benefit, so the reporter is not double-tasking, trying to pull the exhibits from the chat while simultaneously taking down an accurate record.

Check in with the reporter on breaks. If you know you speak quickly or quietly or that the matter at hand is packed with tongue-twisting terminology, at a break, ask the reporter if they're ok. Court reporters have seen and heard it all, but they are human and may need you to slow down, or speak up, or provide them with the spelling of a name or term. Court reporter of 33 years Stephanie Battaglia noted that if you think you're going too fast, you probably are, so just double check with the reporter at the first and subsequent breaks.

Mind your manners and let each other speak in the deposition. There is no other way to say it. Try to not speak over each other. Lori points out that it isn't even a matter of not getting down what is said, but that people are not saying their complete thought, for being talked over or interrupted. And it will be frustrating to read a rough and final filled with dashes because participants weren't letting each other finish their sentences. Cassidy reiterated the importance of parties finishing their sentences, suggesting the taking attorney repeat on an as-needed basis the admonitions given at the start of the deposition. Witnesses often need to be reminded to let attorneys finish the question, give verbal responses, and the like. This not only translates to a clean, complete rough, but fewer interruptions by the reporter seeking clarification when there is crosstalk.

If an interpreter was scheduled for the deposition, use their talent to get the best rough draft. Often a deponent may speak excellent English even if it isn't their first language. However, even if they are fluently bilingual, words may come up that don't directly translate, or they may have a beautiful accent which isn't so easy to understand, especially in a remote setting. If you took the time to reserve a professional interpreter, let them help you, the deponent, and the court reporter make a clear record.

The court reporter is hard at work even on breaks. Pleasantries and small talk are always nice, but your reporter is more than likely working hard to get you a clean usable rough draft as quickly as possible. This means utilizing precious minutes to hone the rough draft so they don't scramble at the end of the deposition. They typically work through breaks in the deposition, checking spellings, cleaning up messy spots and the like.

These tips outline what you can do from scheduling the deposition right up to the moment you go on the record. They set you firmly on the path to a quality rough draft from the court reporter.

Planet Depos court reporters have been covering legal proceedings in all variety of case matters, all over the globe, with a combined experience totaling centuries. From realtime to roughs, in-person or remote, the Planet Depos court reporter will make it happen. To schedule your next proceeding, contact Planet Depos at scheduling@planetdepos.com, or schedule online at https://planetdepos.com/schedule-now/.

For Immediate Release

Amy E. Askew Named One of Maryland's Top 100 Women

Kramon & Graham trial attorney selected for statewide honor

Baltimore, MD (April 11, 2022) — Kramon & Graham, a leading law firm providing litigation, real estate, and transactional services, is pleased to announce that trial attorney Amy E. Askew has been named to *The Daily Record's* 2022 list of Maryland's Top 100 Women.

Established in 1996, the Top 100 Women Award recognizes the outstanding achievements of Maryland women as demonstrated through their professional accomplishments, mentoring, and community leadership. "The Top 100 Women demonstrate the incredible progress women have made in leadership roles in Maryland. They inspire change and help to ensure that women have access to every opportunity," said Suzanne Fischer-Huettner, senior group publisher of *The Daily Record*. "They bring unique gifts to leadership roles and help advance and grow companies across this great state."

Amy will be honored at a reception with other Top 100 Women on May 9 at the University of Maryland Riggs Alumni Center. The event will recognize Maryland's highest achieving women and draw business and community leaders from around the state.

Leader of Kramon & Graham's Rail Industry practice group, Amy is a successful trial and appellate attorney with more than twenty years of complex commercial and civil litigation experience. In addition to her work with the rail industry, she represents health care institutions and providers as well as lawyers and law firms in professional liability actions and claims before professional boards. She also represents local and national businesses and defends companies in class-action litigation matters.

This is Amy's second time to be honored with the *Daily Record's* Top 100 Women Award. She also received it in 2017. Other firm principals who have received the award include Natalie McSherry, Cynthia Berman, and Jean Lewis.

Amy has received numerous professional honors for her case work, including the Maryland State Bar Association's Litigator of the Year Award, and recognition by *Chambers USA*, *Benchmark Litigation*, and *Best Lawyers*, which named her Baltimore Litigation-Health Care Lawyer of the Year for 2022.

Amy serves on Kramon & Graham's Diversity Equity & Inclusion Committee and the firm's Associate Mentoring Committee. She has served as an alumnae mentor with the Baltimore Girls' School Leadership Coalition, an organization that promotes leadership skills in young women, and as a volunteer for My Sister's Place. For many years, Amy served on the board of the Baltimore Urban Debate League, an organization dedicated to improving educational and life outcomes for disadvantaged students in Baltimore's under-resourced public schools through debate.

Amy is a Fellow of the American Bar Foundation and a member of the American Bar Association, Federal Bar Association, Maryland State Bar Association, Bar Association of Baltimore City, National Association of Railroad Trial Counsel, International Association of Defense Counsel, Defense Research Institute, and the Maryland Defense Counsel.

She is a graduate of the University of Baltimore School of Law (J.D., *magna cum laude*, 2001), Franklin & Marshall College (B.A., 1996) and Oldfields School (1992).

About Kramon & Graham

Consistently recognized as one of Maryland's leading law firms, Kramon & Graham provides litigation, real estate, and transactional services to clients locally and across the country. The firm's practices include commercial litigation, white-collar and criminal defense, class actions, government contracts, professional liability defense, personal injury and wrongful death claims, state and federal appeals, asset recovery, real estate, transactions, and insurance coverage. For more information about Kramon & Graham, visit www.kramonandgraham.com.

Media Contact: Mary Ellen Chambers, *Marketing Director*
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Spotlights


Goodell DeVries Prevails in Medical Malpractice Trial in St. Mary's County, Maryland Circuit Court

On December 17, 2021, Goodell DeVries attorneys **Thomas V. Monahan, Jr.** and **Kira E. Zuber** obtained a defense verdict for an ENT physician and her practice group following a seven-day jury trial in the Circuit Court for St. Mary's County, Maryland.

The plaintiff alleged that his ENT doctor failed to diagnose a giant cell granuloma, an exceedingly rare benign tumor. He claimed that the delayed diagnosis resulted in surgery to remove a significant portion of the roof of his mouth and that his subsequent difficulties eating, drinking, and speaking caused him to experience PTSD, anxiety, and depression.

The defense established that the ENT physician complied with the standard of care and took all reasonable steps to diagnose the plaintiff's condition. The defense also offered testimony from an otolaryngologist with particular expertise in head and neck surgery that the plaintiff would have required essentially the same surgery even had an earlier diagnosis been made.

Debra L. Wynne secured a favorable result in an underinsured motorist trial in the Circuit Court for Montgomery County following 3 days of trial in December, 2021. Plaintiff, represented by ChasenBoscolo, was a passenger in a Toyota Tundra 4X4 Crew Max pickup truck which was being driven by her husband and owned by their business when they were rear ended by a Honda Pilot. Property damage was minimal; an airbag in the Honda Pilot deployed, but the airbags in the Tundra did not. Plaintiff declined an ambulance at the scene and never went to a hospital for her injuries. Two (2) days post-accident, Plaintiff began treating with a chiropractor for neck & back injuries and was discharged approximately seven (7) months later with no pain in the cervical or lumbar spine and a 2/10 pain in the thoracic spine. Seven (7) months thereafter, Plaintiff was seen by a different healthcare provider and began treating for neck & back pain. Her attorneys, ChasenBoscolo, referred her to a pain management physician nineteen (19) months after the accident. The pain management physician opined that Plaintiff sustained permanent injuries as a result of the subject motor vehicle accident and would need medical treatment, to include radiofrequency ablations and steroid injections, for the rest of her life. After the carrier for the Honda Pilot paid its policy limits ($30,000), Plaintiff filed suit against her own insurance carrier, The Hartford Accident & Indemnity Co. Defendant stipulated that the accident was caused by the driver of the Honda Pilot and that it had issued a $1,000,000 liability policy which included uninsured/underinsured motorists coverage for the vehicle in which Plaintiff was a passenger. Defendant presented testimony from an orthopedic surgeon who testified that Plaintiff had pre-existing degenerative changes in her spine, had previously been treated for neck & back pain and sustained only a temporary exacerbation of her pre-existing injuries as a result of the accident. At mediation, Plaintiff's demand was $1,050,000 and no offer was made. At trial, Plaintiff sought only future medical expenses of $27,820.02 as well as pain and suffering damages in the amount of $450,000. The jury awarded Plaintiff $25,000 for future medical expenses and $25,000 for pain and suffering. After the set-off for the amount paid by the tortfeasor, The Hartford paid $20,000.


Goodell DeVries Attorneys Obtain Defense Jury Verdict in Medical Malpractice Suit

On December 9, 2021, **Craig B. Merkle** and **Peggy Chu** obtained a defense verdict following an eight-day medical malpractice trial before a jury in the Circuit Court for Baltimore County. In the lawsuit, the plaintiff alleged that she experienced severe pain, emotional trauma and PTSD due to inadequate anesthesia during a cesarean section. The defense was able to establish that their anesthesiologist client complied with the standard of care for converting a labor epidural to a surgical epidural and that the plaintiff sustained an uncommon and unpredictable response during the final steps of the cesarean delivery. The jury found that the defendant had not breached the standard of care and that he also had not been negligent in obtaining informed consent.

Spotlights continued on page 23

See photos from past events at mddefensecounsel.org/gallery

(SPOTLIGHTS) *Continued from page 22*

Goodell DeVries Prevails in Fifth Amendment Legal Ethics Case

In a novel case applying the Fifth Amendment's right against self-incrimination to attorney discipline, Goodell DeVries lawyers **Craig Brodsky** and **George Mahaffey** convinced the Maryland Court of Appeals that their client, Ed Malone, should have been able to testify in his own defense despite asserting the Fifth Amendment during discovery.

Mr. Malone had previously asserted his Fifth Amendment privilege, refusing to testify because he feared prosecution in Texas for participating in a lawyers' reading of the Declaration of Independence while not a lawyer. Bar Counsel never moved to compel the testimony, instead moving in limine to preclude Mr. Malone from testifying at trial. The Circuit Court granted the motion and precluded Mr. Malone from testifying on the 14 mitigation factors identified by the Court of Appeals. After the Circuit Court issued its Findings of Fact and Conclusions of Law, Mr. Malone filed exceptions to ruling with the Maryland Court of Appeals. On February 1, 2022, the Court of Appeals unanimously reversed, affirming that the Fifth Amendment applies to attorney discipline and faulting Bar Counsel for not moving to compel the testimony that the circuit court later precluded. It held that Mr. Malone should have been permitted to testify on mitigation. The case has now been remanded to the Circuit Court for Montgomery County to hear that evidence.

This case is significant because it affirms lawyers' right to assert the Fifth Amendment in disciplinary cases and underscores the importance of mitigation evidence in attorney disciplinary proceedings.

You can find a link to the opinion here (https://f.hubspotusercontent20.net/hubfs/4158429/PDFs/AGCvMalone-NoAG47a20-01-27-22.pdf) and *The Daily Record* article here (https://thedailyrecord.com/2022/02/02/maryland-lawyer-wins-limited-fifth-amendment-victory-in-ethics-case/).

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