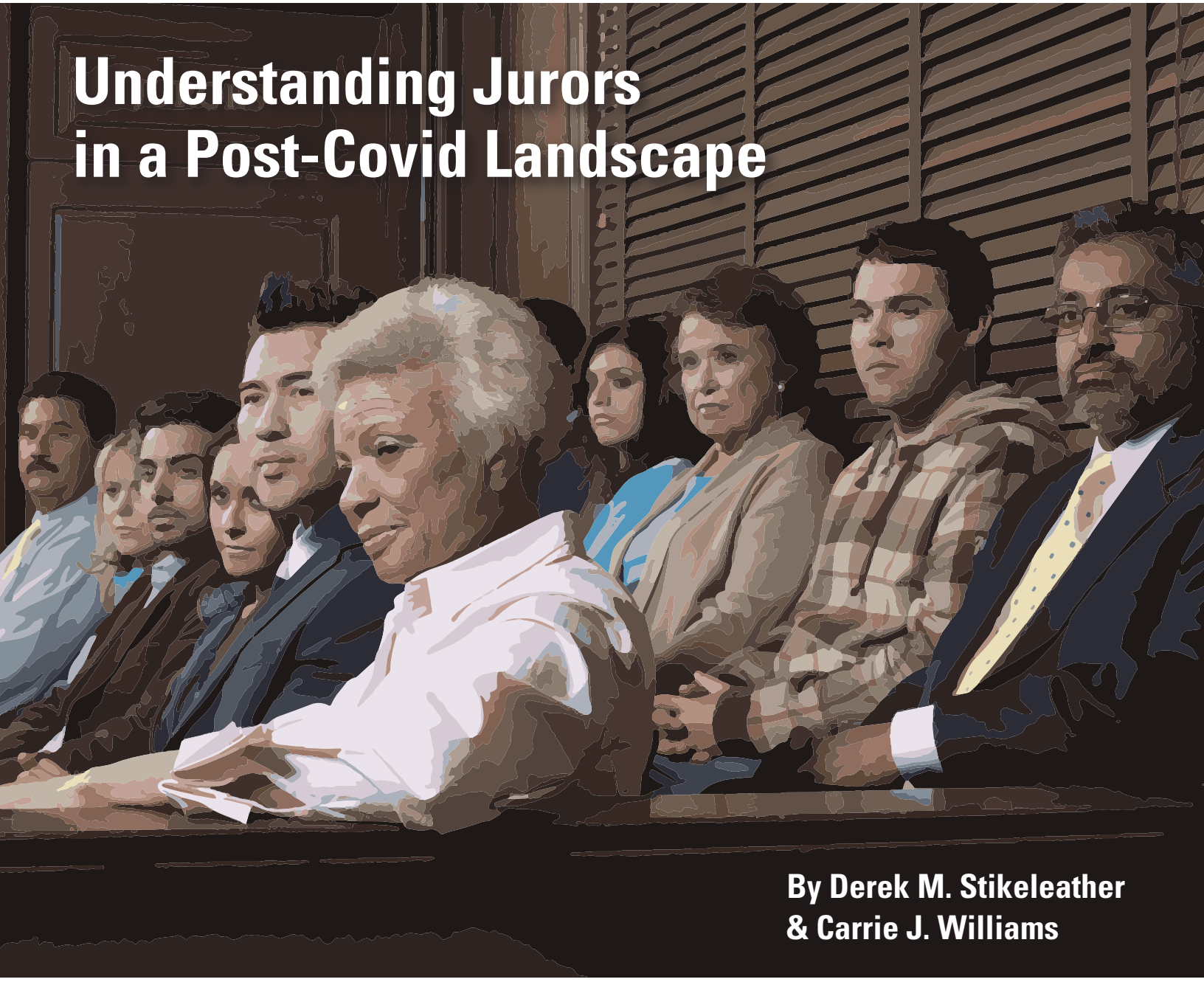
THE DEFENSE LINE

Spring 2024

A Publication From Maryland Defense Counsel, Inc.

Understanding Jurors in a Post-Covid Landscape



By Derek M. Stikeleather & Carrie J. Williams

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President's Message

Sheryl A. Tirocchi, Esquire
Godwin Tirocchi, LLC

Welcome to the latest edition of *The Defense Line*! Many thanks to our esteemed editor Nicholas Phillips and our graphics consultant Brian Greenlee for their phenomenal work throughout the year and especially in putting this issue together. The MDC's Executive Committee has been working hard this past year to re-energize our organization and I am deeply appreciative of their continued investment in MDC and the legal community we support. A huge thank you to our Executive Director, Aimee Hiers, who provides invaluable support and direction to our Board, to MDC and its members.

As I wrap up my term as President, I am excited for the future of the organization as we re-vamp our programming to include new opportunities for continuing education, practical skill building, and networking.

We had a great turn-out at our Deposition Bootcamp in January. The deposition bootcamp aids in providing practical skills taking and defending fact and expert witness depositions in small group settings. We had an engaging group of attorneys, both as participants and coaches, and look forward to expanding this program next year.

Our President-Elect, Amy Askew, spear-headed our new "Conversations and Cocktails" this year and the MDC hosted several fantastic speakers who shared their insights on emerging topics and new developments impacting our legal community. A special thank you to John Sly, Esq. or Waranch & Brown for his presentation "Know the Role of AI in the Law," Toyja Kelley, Esq. of Locke Lord LLP for his presentation "DEI is Not Dead: Diversity in the Legal Profession after the Harvard Decision", Lydia Lawless, Esq. of Kramon & Graham for her presentation "Hot Topics in Legal Ethics: What Every Practitioner Needs to Know" and Derek Stikeleather, Esq. of Goodell DeVries for his presentation "Latest Developments in Maryland Rule 5-702." These programs would not be successful without the assistance and participation of this communities' attorneys and the attendance of the programs.

MDC was also very active this past Legislative session and provided valuable testimony in Annapolis. The Judicial Selections committee also conducted several rounds of interviews and provided key feedback and recommendations as part of the judicial nominations process. MDC has several committees focused on various aspects of our legal community and substantive practice areas. We encourage anyone interested in getting involved to contact any Officer of the Board or our Executive Director, Aimee Hiers. Thank you to all of our committee chairs and members for their continued support and contributions to MDC.

MDC will hold its' award-winning Trial Academy on September 25, 2024. Mark your calendars and keep your eye out for additional details and registration information. Additionally, we are in the process of ramping up our educational and networking events so be on the lookout for email notices. Creating new networking opportunities and strengthening relationships and community within our profession is also central to our mission and we hope to see you all in person at future events.

We want MDC to be a substantial asset to your practice. If you want to get more involved, or if you have ideas for how we can do things better, please call me or any of the other officers or board members. I hope everyone has an amazing Summer and I look forward to seeing you at our Annual Meeting at Nick's Fish House on June 20, 2024!

THE DEFENSE LINE
Spring 2024

61 Years of Service to Our Members (1962–2024)

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Understanding Jurors in a Post-Covid Landscape

Derek M. Stikeleather and Carrie J. Williams

The COVID-19 pandemic touched nearly every aspect of modern life. Our families, schools, workplaces, religious institutions, and healthcare providers were all affected by the worst global healthcare crisis in 100 years. Even though the worst of the pandemic is (hopefully) behind us, some of its effects are just now becoming clear. One example is jurors' altered attitudes towards scientific evidence, experts, and institutions. Jurors are more skeptical—and sometimes even hostile—to broadly accepted scientific principles and mainstream scientists. This article will examine why the pandemic has given rise to what we have called "QAnon Jurors," how to spot them, and how, if at all, to persuade them.

A. The COVID-19 Pandemic's Effect on our Decision-Making and Worldview: the Rise of "QAnon Jurors."

Research shows that when people are confronted with death and their own mortality, they often gravitate toward their pre-existing belief system and worldview as a way to manage anxiety.[1] Known as "Terror Management Theory," social scientists have found that, in times of prolonged turmoil and uncertainty, this desire to seek comfort in one's own worldview can promote ideological extremism in individuals and, on a societal level, increased polarization.[2] During the COVID-19 pandemic, this natural tendency to lean into extreme versions of one's pre-existing belief system led some people to minimize the threat of the virus and ignore the warnings of public health professionals.[3] These same people grew distrustful of scientists and other experts, eschewed expert opinions in favor of "doing their own research," and ultimately resorted to conspiracy theories when faced with evidence of sky-rocketing COVID infection rates and death.[4]

The pandemic's existential threat to global public health and the related economic and social upheaval pulled most people from their routine face-to-face interactions with community institutions and public events and drew many into online communities. While widely available digital communication allowed a remote-work revolution that saved the economy, it also allowed online fringe conspiracy groups to thrive.

One of the most highly publicized online fringe groups is QAnon, which emerged in 2017 among far-right Americans. QAnon revolves around a core belief that a cabal of Satanic and cannibalistic pedophiles operate a global child sex-trafficking ring that supports the Democratic Party and opposes Donald Trump. It is fed by anonymous postings of an individual (or individuals) called "Q," ostensibly a federal government insider willing to leak the deepest secrets about the United States government and the Democratic Party. Consumers of Q's posts then spread its salacious conspiracy theories among their social and political networks, a process that takes a life of its own and creates dozens of different versions of each post and can reach tens of millions of people.

Although QAnon preceded the pandemic and it is unlikely that, even today, a large percentage of any jury pool fully embraces all that QAnon promotes, the pandemic helped QAnon and other online extremist groups gain a previously unimaginable level of acceptance. Two in five Americans say that it is, at least, probably true that "regardless of who is officially in charge, there is a single group of people who secretly control events and rule the world together."[5] Many elected officials and even members of Congress trade in QAnon conspiracies and solicit the support of QAnon adherents. This is consistent with a more polarized social landscape that appears less like a bell curve and more like a barbell.

For purposes of this article, a "QAnon juror" is not someone who shows up to jury selection wearing a QAnon t-shirt and chanting "Hang Mike Pence!" More broadly, the shorthand label defines jurors who are not merely conservative or liberal but *extreme* and almost unreachable. They exist on *both* ends of the political spectrum, and their numbers are growing. But our focus tilts to those on the far right because they have traditionally been considered defense-friendly in civil trials, whereas the far-left juror has always been considered reliably plaintiff-friendly.

B. The Importance of Identifying the "QAnon Juror."

Post-COVID research shows that belief in conspiracy theories is the *strongest predictor* of a plaintiff-friendly juror.[6] Other influential factors include a general distrust of institutions, anti-corporate sentiment, low levels of education, and a willingness to rely on one's intuition as opposed to facts.[7] Combined, this makes identifying potential "QAnon Jurors" critical to defense counsel's litigation success.

Further complicating matters, the "QAnon Juror" has upended the conventional wisdom about political affiliation and defense-friendly views. It is no longer the case that conservative or Republican jurisdictions are reliably defense-friendly. Jury consultant Nick Polavin's research shows that only when the conspiracy theory variable was

Continued page 6

[1] Pyszczynski, Tom, et. al, *Terror Management Theory and the COVID-19 Pandemic*, J. Humanist Psychol., 2021 March; 61(2); 173-89.
[2] Lorie Sicafuse, PhD., *Impact of the COVID-19 crisis on jurors' attitudes & decisions, Part I of IV*, available at https://www.courtroomsciences.com/blog/litigation-consulting-1/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-133 (last visited Sept. 3, 2023).
[3] Pyszczynski, *supra* note 1.
[4] *See* Chris Barncard, *During pandemic, proponents of 'doing your own research' believed more COVID misinformation*, University of Wisconsin-Madison News (Aug. 15, 2023), available at https://news.wisc.edu/during-pandemic-proponents-of-doing-your-own-research-believed-more-covid-misinformation/ (last visited Sept. 3, 2023).
[5] https://today.yougov.com/topics/politics/articles-reports/2022/03/30/which-groups-americans-believe-conspiracies
[6] Nick Polavin, *Who Needs Evidence? The Rise of Conspiracy Minded Jurors*, For The Defense, May 2023, at 39, available at https://digitaleditions.walsworth.com/publication/?m=55594&i=791404&p=40&ver=html5 (last visited Sept. 4, 2023).
[7] *Id.*

(UNDERSTANDING JURORS) *Continued from page 5*

controlled for were Republicans significantly more likely than Democrats to side with the defendant.[8] When belief in conspiracy theories was factored in, Republicans became more likely to side with the plaintiff than Democrats.[9]

In fact, far-right Republicans were found to be almost as plaintiff-friendly as far-left Democrats.[10] This makes sense given the importance of the above factors. Not only are far-right Republicans most likely to believe in conspiracy theories, but they are also most likely to have less formal education and, post-COVID, most likely to distrust medical science.[11] Lower-educated conservatives also harbor the strongest anti-corporate beliefs of *any* potential jurors.[12] All in all, learning how to recognize and avoid the "QAnon Juror" could fundamentally change a trial.

C. Using Voir Dire and Social Media to Identify "QAnon Jurors."

Social media and background research can be very helpful when evaluating potential jurors, but post-COVID the inquiry must be more nuanced than simple political orientation.[13] The good news is that conspiracy theorists typically disseminate their beliefs. If social-media research into potential jurors is feasible and permitted, look for posts supporting far-right political candidates, posts spreading COVID misinformation or expressing distrust for public health officials, or posts expressing support for other conspiracy theories.

Through voir dire or a juror questionnaire, information about the following factors should be sought to the extent possible:

- Unvaccinated for COVID-19
- Lack of trust in government institutions such as the EPA or FDA
- Lack of trust in scientists or public health institutions
- Belief in an intuitive ability to tell if information is true or false
- Less formal education
- Low income
- High religiosity
- Ingroup loyalty (i.e., importance of loyalty to the groups with which one identifies)

These factors have been most closely identified with a belief in conspiracy theories.[14] By adjusting previously held beliefs about political affiliation and plaintiff-friendly jurors, and by looking for signs of conspiracy theorists, it is possible to spot and strike "QAnon Jurors."

D. What to do if a "QAnon Juror" Slips Through

Jury selection is not foolproof and is admittedly reliant on snap judgments that factor likely *associations* between limited pieces of a potential juror's biographical data and the juror's likely views about the case. The key is realizing which data points are reliably helpful and which are unhelpful misconceptions; a conspiracy-minded juror can slip through the most careful selection process. Fortunately, once a "QAnon Juror" is seated, there are ways that defense counsel can tailor their trial strategy accordingly.

One tactic defense counsel may choose is an appeal to the processing style of the "QAnon Juror." Research has identified two general processing modes, logical and intuitive.[15] People in logical processing mode carefully analyze facts and evidence to arrive at a rational conclusion. Intuitive processing, on the other hand, relies on "gut feelings," emotional reactions, and heuristics. The "QAnon Juror" is more likely to engage in intuitive processing, relying on their instincts and weighing feelings over facts.[16]

Defense counsel can tailor their approach to appeal to intuitive information processors. Carefully constructed, fact-intensive refutations of the plaintiff's allegations will not be effective.[17] Rather, a simple, relatable narrative that focuses on the conduct of the key parties is essential.[18] So is timing. Defense counsel cannot wait until after the plaintiff's case to introduce their message. The narrative and should begin immediately, during voir dire and opening statements.[19]

Another tactic defense counsel might choose, particularly in liberal jurisdictions, is to lean into the remaining jurors' belief in scientific consensus and government institutions. Emphasizing the importance of embracing evidence-based scientific principles and resisting emotional decision-making can give liberal jurors a way to feel good about supporting the defense.[20] Themes leveraging this belief in science have proven particularly persuasive among liberal jurors since the pandemic.[21]

Conclusion

The pandemic changed everything, and litigation is no exception. Much of the conventional wisdom about defense-friendly jurors has expired. Now, identifying and striking "QAnon Jurors" is crucial to defense counsel's litigation success. If, despite social media research and careful voir dire questions, a "QAnon Juror" ends up on the jury, defense counsel must tailor their litigation strategies accordingly. Counsel must choose whether to appeal to the intuitive processing of the "QAnon Juror" or appeal to the remaining jurors' belief in evidence-based, scientific analysis.

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This article originally appeared in the newsletter of the ABA Toxic Torts and Environmental Law Committee.

8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.* According to a Pew study, Republicans' confidence in medical scientists fell from 83% in 2016 to 66% in 2021. The number is likely far lower among far-right Republicans.
12 Stratton Hores, et. al, *Jury Selection is Critical in Preventing Shock Verdicts*, Reuters, Aug. 3, 2022, available at https://www.reuters.com/legal/legalindustry/jury-selection-is-critical-preventing-shock-verdicts-2022-08-03/ (last visited Sept. 3, 2023).
13 Polavin, *supra* at n. 5.
14 *Id.*
15 CSI-Courtroom Sciences, Inc., *Impact of the COVID-19 crisis on jurors' attitudes & decisions, Part III of IV*, available at https://www.courtroomsciences.com/blog/litigation-consulting-1/impact-of-the-covid-19-crisis-on-jurors-attitudes-decisions-134 (last visited Sept. 3, 2023).
16 *Id.* Some research suggests that, in the wake of the pandemic, jurors are generally more likely to make decisions using intuitive processing. Defense counsel may want to consider adopting some strategies for persuading intuitive processors regardless of whether there is a "Q-Anon Juror" present.
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*

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Empowering Legal Professionals: Navigating AI Solutions for Efficiency and Data Security

Michael T. Murray and Tony Donofrio

The emergence of artificial intelligence as a viable tool in the practice of law promises both efficiency and elevated enterprise risk. Integrating AI tools into legal practice without compromising the security of sensitive client information is a paramount concern. In this article, we'll examine how AI is revolutionizing certain aspects of legal work, while offering best practices for employing these technologies and providing guidance for legal professionals in selecting the right AI products and service providers.

The Intersection of AI and Legal Practice

The integration of AI in the legal sector is trans- forming the landscape of legal practice, introducing unprecedented efficiencies in case management, document review and legal research. Zach Warren, manager of technology and innovation at the Thomson Reuters Institute, encapsulates this transformation succinctly: "Legal generative AI is **supposed to augment** what a lawyer does. It is not going to do legal reasoning, not going to do case strategy. What it's supposed to do is do repeatable rote tasks much more quickly and efficiently." This shift allows legal professionals to focus on the substantive aspects of their work, ensuring higher-quality outcomes and more effective client service. However, to effectively unlock this potential without introducing material liability and reputational risk, stringent data protection and governance measures are required. Following is a brief rundown of processes where AI will be of value, along with information privacy and risk management considerations for each use case.

Faster Data Analysis and Routine Document Synthesis

In the daily grind of legal practice, generating, reviewing and distributing standard-form content, such as contracts and filing motions, can be streamlined using AI. Generative AI, coupled with expert human oversight, significantly reduces the production time and effort while improving quality in the production of such content. The efficiency is generated by the speed drafting, while quality is improved by having a second set of AI "eyeballs" on final draft, providing comparison and comments against other similar content.

Using AI in this way requires particular attention to the following risks:

- Work product and copyright compliance. Content generated by large language models may contain content published and copyrighted in publicly available form, such as journals and other news media. Lawyer review of any generated content should include considerations for appropriate citation references where applicable.
- Content bias. Both generation and analysis of content using AI models are subject to societal and cultural biases based on the particular model's source content exposure. Review of analysis, and of generated content, must bear this in mind.

Efficient Legal Research

Generative AI technologies offer a substantial advantage in legal research by jumpstarting the process, reducing the hours or even days traditionally spent sifting through and summarizing content. This not only saves time but also allows lawyers to apply their expertise to refine the results, ensuring that the research output is thorough, accurate and of high quality. Zena Applebaum, global VP of product marketing for research products at Thomson Reuters, highlights the efficiency of this technology: "For any of the tasks that lawyers do on a regular basis, this technology allows them to do those things faster and create a starting point much earlier in the process."

Using AI in this way requires particular attention to data privacy and security risks. When applying client or firm data to query, or especially train, an AI model, ensuring the data is not permanently stored or available in any way for public use is critical.

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www.mddefensecounsel.org/leadership.html

Navigating Complexity with Plain-Language Prompting

Generative AI tools capable of understanding plain- language queries significantly lower the barrier to searching and accessing content. Think about the power of "asking a set of documents a question" versus "searching for an indexed word." This advancement allows for quicker, more effective development of arguments and strategies by rapidly organizing relevant information and precedents.

Using AI in this way requires particular attention to the following risks:

- Data privacy and security (as noted above)
- Content bias (as noted above)
- Quality degradation. As with humans, AI answers are particularly variable based on how the questions are posed. Ensuring concept searches are both comprehensive and accurate will be important to guarantee high-quality analytics.

The security and privacy of legal data are paramount. Professional, licensed generative AI tools offer a secure ecosystem for working with proprietary data, minimizing the risk associated with public-facing tools. Moreover, as these tools are trained on high-quality legal content, they promise outputs that are both trustworthy and accurate, distinguishing them from other large language models.

Vetting AI Vendors: Key Considerations

The widespread use of AI, from unlocking our phones to predicting our next favorite movie, under- lines its potential to stream-

Continued on page 9

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line business procedures in legal services. However, the selection process for AI vendors involves critical considerations beyond just technological capabilities.

When selecting an AI vendor, it is critical to ensure an alignment with your firm's legal and ethical standards as well as data security requirements. A vendor's flexibility, not just in terms of tools, but also in legal services like videography and real-time transcription, is crucial. The balance between embracing rapid technological advancements and maintaining accuracy and reliability is delicate.

Transparency is a cornerstone of a trustworthy AI vendor relationship. Legal professionals should inquire whether AI tools are used as assistive content or are considered final products. The consensus is clear: AI-generated material should not be regarded as the final work product; you need a skilled professional behind the machine. Even the most technologically advanced solutions rely on trained, professional reporters to capture and manage the preservation of the record and certify accuracy.

Beyond that, the security of derived content and the proprietary nature of AI models are critical factors. Vendors should not only protect confidential information but also ensure their AI models are built on secure, private content, preventing any inadvertent sharing through systemwide training models.

What are the critical factors for vetting AI vendors?

Legal Environment Alignment

With AI laws in place across various jurisdictions, understanding the legal landscape is vital. The procurement process must consider data privacy, disclosures and cross-border transfers, adjusting the evaluation criteria to ensure compliance with specific legal regimes.

Risk Assessment

The deployment of AI introduces risks of bias, fairness, transparency and environmental impact. This underscores the importance of making sure you are collaborating with a partner you can trust to help navigate these complexities while providing the security needed to keep your data and organization safe.

Data Privacy and Processing

In jurisdictions with stringent privacy laws, thorough disclosures regarding data collection and processing are necessary. Vendors must demonstrate transparent practices and robust data protection measures to ensure compliance and protect consumer rights.

Vendor Compatibility

Beyond the technical fit, assessing a vendor's commitment to privacy, transparency and ethical standards is key. This involves scrutinizing data handling practices, compliance with privacy laws and the transparency of the AI algorithms.

Collaborative Vetting

The responsibility for vetting AI extends beyond in-house counsel to include IT, security teams, legal and compliance departments, data protection officers and external counsel. This collaborative effort ensures a comprehensive evaluation from technical, legal, ethical and business perspectives.

By incorporating these expanded considerations into the vendor vetting process, legal professionals can navigate the AI landscape with a more informed and holistic approach. This ensures not only the efficient integration of AI into legal services but also adherence to ethical standards and regulatory compliance, safeguarding the interests of clients and the organization.

Aligning AI Procurement with Legal and Ethical Standards

AI's application extends into critical areas like cybersecurity, health care, finance and legal services, underscoring its potential to enhance efficiency. Yet this comes with inherent responsibilities, especially in legal environments where privacy, data ethics and compliance with evolving regulations must be maintained.

The responsibility for vetting AI solutions often falls to general counsel, sometimes late in the prourement process. This necessitates a nuanced approach that evaluates AI not only for its immediate benefits but also for its long-term implications on privacy, ethics and regulation. The **"Brussels**

Continued on page 10

Editors' Corner

The editorial staff wish to express our thanks for the outstanding contributions made by MDC members to this publication of *The Defense Line*. The articles in this edition provide a peek behind the curtain into the mindset of contemporary juries, artificial intelligence and data security, and garageman's liens. We continue to look for articles and case updates for publication and will accept those submissions at any time. We continue to look forward to opportunities to support the MDC and be a resource to its members.

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

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Co-chair, Publications Committee

We have a vacancy on the Publications Committee. If you or one of your colleagues are looking to get involved with the MDC and are interested in joining the Publications Committee, please reach out to Nick Phillips or Chris Jeffries.

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effect" and similar regulatory frameworks globally demand that organizations align their AI strategies with legal requirements, making compliance a critical factor in vendor selection.

Testimonial Evidence Management and AI Automated Speech Recognition

While AI offers remarkable efficiencies in various domains, its role in legal transcription remains a topic of debate. Although AI excels in areas like predictive analytics and big data, it often falls short in meeting the high accuracy demands when taking the record of testimonial evidence. The nuanced and complex nature of language, as well as the broad variability in audio capture, requires a level of precision that AI speech recognition simply cannot deliver consistently.

Understanding the purpose of AI in legal proceedings takes a shift in thinking. AI-generated materials should not be considered the final product but rather raw, inadmissible initial drafts that can be useful for boosting efficiencies and working on tasks that don't require an accurate record more quickly. AI-generated materials should not be confused with any certified transcript, videography or other material. Certified capture is the role and responsibility of the officiating reporter as the ultimate guardian of the record.

Utilizing the ways that AI technologies can complement the work of skilled reporting professionals is the happy medium. AI can help legal professionals work quickly and efficiently when draft materials or a head start on a project is needed. When selecting which AI tool to use, factors such as accuracy, security and the provision of an officer of the court to capture the certified record should be considered.

As legal professionals navigate the evolving interface of AI and legal practice, insights from industry leaders provide invaluable guidance. By carefully selecting AI solutions that prioritize efficiency without compromising data security, legal practitioners can harness the benefits of technology while upholding their commitment to client confidentiality and ethical practice. The key is making sure to balance the best of the efficiencies and speed of AI technologies for draft inadmissible materials with the skilled reporting capture of the certified record by the officer of the court. Here are key points to consider when using AI-based products and services in your discovery and management of testimonial evidence:

- Careful use of "raw" AI-generated text and audio/video content. Content produced from sources such as a remote deposition recording, augmented with AI analysis or summarization, can be effective for rapid review and strategy, but should never be construed as replacing a human-reviewed official version with certified accuracy assessed by an unbiased professional.
- Content security/chain of custody. Content produced by your service providers, as well as your firm's staff, should be vetted to ensure that your data is protected at rest and in transit and is never inappropriately utilized by the plethora of third-party tools and platforms proliferating rapidly in the marketplace.

Michael T. Murray is the director of client solutions for Veritext Legal Solutions. Murray stays on top of litigation technology trends and travels throughout the nation speaking and providing informative and entertaining CLEs, educational instruction and product demonstrations to legal professionals.

Tony Donofrio is the chief technology officer at Veritext. He develops and supports the mission-critical systems clients, reporters and employees use every day. His focus at Veritext is to ensure that clients and Veritext staff have the very best experience with easy-to-use, highly reliable and highly secure tools.

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A Family Affair in the Courtroom: A Father-Daughter Duo's Journey Through A Medical Malpractice Trial

Neal Brown

The legal profession often runs in families, but it's not every day that a father and daughter find themselves side by side, advocating for justice in the high-stakes arena of medical malpractice litigation. This article shares a personal narrative of such a partnership, reflecting on the challenges, the learning experiences, and the pride that comes with such a unique professional collaboration.

Rachel Giroux and Neal Brown in Court

The Case at Hand

Our story begins with a surgical medical malpractice case. A gall bladder had been transected during a routine laparoscopic cholecystectomy (gall bladder removal). The stakes were high, and the medical intricacies were complex. But the unique aspect of this trial was not just the legal/medical battle; it was the fact that I, an attorney with 35 years of experience, had the privilege of trying this case alongside my daughter, Rachel Giroux, a smart lawyer in her own right.

Preparing for Battle

As we delved into preparation of the case, it became clear that this was a shared mission. We poured over medical records, consulted with experts, and crafted our trial strategy. The process was intense, but working together was interesting and exciting. There was no getting around the fact that the injury was real and there was a surgical complication. Instead, we decided to take control of the narrative by stating, "All surgery has risks, and a complication is not malpractice." We embraced that mantra and then attacked the specific claim of negligence—not using intraoperative cholangiogram.

In the Courtroom

The courtroom in the County became our arena, and as the trial progressed, I witnessed my daughter's legal acumen firsthand. Her direct- and cross-examinations were sharp, her legal arguments persuasive, and her presence impressive. In the end, the jury accepted our narrative and found in favor of our surgeon. It was a proud moment for me, not just as a lawyer but as a father.

Lessons Learned

This experience was more than a professional milestone; it was a life lesson in partnership, respect, and family legacy. We learned from each other, grew together, and ultimately, succeeded in securing justice (a defense verdict) for our defendant/surgeon.

Conclusion

Trying a case with Rachel was an unforgettable experience. It reinforced the values of hard work, dedication, and the importance of family. For those lawyers who can work with family members, cherish it. It's a rare and rewarding journey that transcends the confines of the courtroom.

Neal Brown is a founding partner of Baltimore-based Waranch & Brown. He is a practicing trial attorney and an MDC member

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MDC's 2024 Deposition Bootcamp

On Tuesday, **January 23, 2024**, MDC held another successful **Deposition Bootcamp** at the Baltimore offices of Miles & Stockbridge, PC. This is the Fifth Deposition Bootcamp that MDC has conducted in recent years. Participants were able to practice their skills taking/defending depositions on witnesses in a small group setting while receiving helpful hints from deans of the bar. Just like earlier versions of the program, this event was very well-attended and well received.

MDC would like to thank the Executive Committee, and MDC Executive Director Aimee Hiers, among others, who worked hard to organize the event. We are looking forward to the Trial Academy which will be held in the fall of 2024. Check www.mddefensecounsel.org for details.

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Legislative Summary

2024 Workers' Compensation Legislative Summary

Michael L. Dailey

The 2024 Legislative Session proved to be especially busy for the MDC as to workers' compensation bills. Julie Murry, Ashlee Smith, Nancy Courson and Mike Dailey as well as Lyndsey Meninger on behalf of Chesapeake Employer's Ins. Co. testified before House Economic Matters and Senate Finance on the bills that impacting our clients and members. Although the Maryland Association of Justice was actively backing over 8 bills, the only bill to pass impacting the majority of our clients and members was SB 843/HB669. This bill increases exposure for our clients in hearing loss claims, increasing the loss to 4000 hz under Labor and Employment Code Section 9-505. In addition the new law chips away some of the age related hearing loss deductions previously available as part of the statutorily required loss measurements when determining compensability. The change in section b (3) allows the deduction of the age related hearing loss beginning at 50 years old which was the only deduction language under the prior low. The new section now qualifies it and states "or for the date of the last exposure to the industrial noise, whichever is less".

The MAJ continued its efforts to redefine disability in 9-503 hypertension claims and backed a bill that would have allowed disability to be found when a doctor diagnosis hypertension and prescribes medication to treat it. The MDC opposed the bills in both the house and senate and neither made it out of committee.

Other bills the MDC opposed failed to pass include and A bill that sought to allow social workers to provide psychological impairment ratings; an exception to the 5 year reopening which would have extended the five years indefinitely if the case were on appeal when the 5 years ran; and finally a bill that would be impacted and increased payments when an injured worker has two jobs and is able to continue working one of the two and only disabled from the second. The bill would have resulted in TTD payments even though the Claimant was able to work at least one of the jobs. We anticipate that many of these bills will be introduced again during next year's session.

Spotlight

Prince George's Circuit Court Grants Daubert/Rochkind Motion, Excludes Plaintiffs' Insurance Expert

On March 5, 2024, Judge Crystal D. Mittelstaedt of the Circuit Court for Prince George's County granted a *Daubert/Rochkind* motion filed by **Kamil Ismail** of **Goodell, DeVries LLP** to preclude an expert designated by the plaintiffs in a first-party insurance coverage dispute. The plaintiffs had proffered Robert W. Adams, ALHC, of Philadelphia, as an expert on insurance underwriting and claims-handling practices. However, after deposing Mr. Adams and attaching his testimony in a Rule 5-702 motion, the defense argued successfully that Mr. Adams's proffered opinions were inadmissible, because he lacked qualifications and his opinions lacked an adequate foundation, would invade the province of the court and of the jury, and would not be of assistance to the trier of fact.

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Sounding Out Community Noise Complaints

Understanding the complexities of reported noise disturbances may require a multifaceted scientific approach

Ryan Harne and Eric Ahlberg

From construction sites to pickleball courts to traffic congestion, community noise complaints arising from everyday sources create concerns over the effect of noise on well-being and health, the loss of sleep and recovery, and adverse effects on the development of children.

For municipalities, construction companies, and other large-scale noise generators, it's best practice to develop a comprehensive noise monitoring plan before launching sound-producing activities, especially given the rise of noise-detecting technologies and public awareness of the impacts of noise exposures. Smart cities are turning up the volume on noise complaints by installing cameras and sound meters to capture vehicle noise violations while apps like the Airnoise app allow residents to register airplane noise complaints with the click of a button.

Despite their best efforts, stakeholders — ranging from construction sites and flight path operators to schools and community recreation centers — may find themselves facing community noise complaints, which can carry the risk of litigation, reputation damage, and frayed public relations if not handled correctly. Determining the legitimacy of these noise complaints requires a suite of tools and a data-driven approach to analyze the alleged sources of the complaint, establish the significance of the disturbance, and predict community response while proactively working to prevent noise complaints in the future.

The varying human perception of noise

Analyzing noise complaints requires knowing what data to collect, but this is complicated by the fact that everyone perceives sound differently. An individual's response to sound — or psychoacoustic perception of sound — varies based on cultural factors, sensitivity to noise, what they were doing at the time of exposure, and more.

For example, sources of noise such as football games, children's recreation areas, and concerts often elicit very different responses from those nearby, ranging from fun and playful to a minor annoyance to the cause of significant disruption. In 2019, for instance, the volume of noise at Kentucky's Bourbon & Beyond festival made headlines, but while some residents were angered, others described a very loud Foo Fighters set as a "nice lullaby" for their children. There's also always the possibility that a noise-producing venture becomes a source of litigation: Northwestern University has recently been involved in a lawsuit related to its Ryan Field stadium and proposal to host summer concerts to help pay for the facility, which has been met with outrage from residents over the potential disturbances.

Because people perceive sound differently, data from sound-level meters and laboratory microphones using essential acoustic metrics (e.g., A-weighted decibels expressed in units dBA or dB(A) and Zwicker parameters) is critical because it helps characterize how "noisy" a sound may have seemed to a particular group.

Measuring sound to quantify noise perceptions

As our ears and brains interpret sound differently, we hear some frequencies as louder than others. A-weighted decibel units (dBA) used to measure data from sound-level meter readings are designed to account for variations in the human perception of loudness by modifying the decibel (dB) reading according to how sensitive the average human ear is to different frequencies of sound (the A-weighting).

For example, a change in sound level of ±5 dBA is considered clearly noticeable, whereas people would categorize a change in sound level of ±10 dBA as twice or half as loud. But if the sound level changes only by ±3 dBA, many people may not even notice the increase or decrease. As a result, an absolute change in sound level must be interpreted carefully in light of human perception variations.

Predictive models play an essential role in analyzing community noise complaints because the complaint may be driven by a small number of highly annoyed residents.

While basic sound level meter readings provide important information about human perception through loudness measures, the time-dependent data collected by a laboratory microphone or an advanced sound level meter with data recording capabilities provides detailed insights, especially regarding annoyance. We can quantify how "annoying" a noise was by processing microphone pressure data for noise metrics known as Zwicker parameters, which include sharpness, fluctuation strength, and roughness.

For example, when Zwicker parameters show that the sharpness and roughness characteristics of a sound are especially high, they uncover particular insights, such as why a fingernail scratch on a blackboard might draw cringes even when heard from a hundred feet away. Zwicker parameters also quantitatively explain why sirens and alarm clocks work well to alert people to critical information.

Putting community noise complaints in context

In addition to the human perception of sound, examining the human context of sound can help reveal how a community may have perceived a given sound:

- When was the noise created? Was it during the workday when residents were away from their homes?
- What produced the noise? Was the noise created by a diesel generator powering construction equipment all night long?
- Was the noise impulsive and periodic in nature, like pickleball or pile-driving, or was it continuous, like an

Continued on page 17

(NOISE COMPLAINTS) *Continued from page 16*

engine idling?

- How long did the noise last: for a minute or for hours?
- Where is the neighborhood? Is the community already exposed to other noise sources?

For instance, community noise complaints are often generated by noise sources that are not native to the community. This is why construction projects near neighborhoods, recreational activities adjacent to residential housing, and traffic near homes often generate noise complaints, whereas noisy lawnmowing in the morning and children who play and shout late into the evening often do not.

Consequently, if absolute sound levels from recordings suggests there is no cause for a noise concern, it is possible a community has risen up against an unfamiliar noise source that temporarily upset the acoustic norms of the community.

Gathering sound data

Knowing how to best collect data is as important as knowing what data to collect. Here are some best practices for gathering data about sound issues and noise complaints:

Know your codes:

- *Recording noise:* Municipal codes often dictate how to record noise and often recommend the use of sound level meters to record a noise source in the community.
- *Distance from noise:* While local codes may require measuring the sound level a certain distance from the noise source, community noise complaints often originate from a resident who is at a different distance from the noise. For example, the codes may require that construction companies monitor the sound level of their activities at a distance of 50 feet, but neighborhood complaints may be collected from residents hundreds of feet away from the construction. In other cases, sound may travel a shorter distance than codes indicate due to natural barriers obscuring the noise, such as hills, dense foliage, or other commercial and industrial buildings. As a result, it's good practice to collect acoustic measurements not only from the required locations according to code but also from where the complaints originated.

Measure sound in real-time:

- *Continuous acoustic data:* Because basic sound level meters often only save the overall sound level per increment of time, such as one-second increments, it's wise to complement averaged sound-level meter readings with continuous acoustic data collected using traditional laboratory microphones or advanced sound level meters, which collect the actual sounds as heard in time. Stakeholders can use this real-time data to analyze the human perception-based characteristics of noise, including Zwicker parameters, that sound-level meters do not capture.

If your community noise complaint is delivered long after the noise has ceased, making it difficult to collect new acoustic recordings, it is possible to work with data collected during the noise-generating activities — or even to work with no acoustic data at all. For example, if a construction site only had vibration data to work with, that could be leveraged to confirm sound levels and model the likely propagation of sound over a specific distance.

Science meets psychology: interpreting community noise complaints

With sufficient data gathered — the contextual information about the noise generation along with the loudness recorded by sound level meters and lab microphones — we can assess the legitimacy of the complaint by building a predictive model to analyze community reaction to a given acoustic disturbance. These models account for the duration, location, frequency, and loudness of the noise, as well as the location of the community, to approximate the seriousness of potential community reactions.

Predictive models play an essential role in analyzing community noise complaints because the complaint may be driven by a small number of highly annoyed residents. It's often best practice to de-escalate community reactions by acknowledging how the noise exposures may have affected their quality of life while interpreting such impacts considering the factual data.

Eric Ahlberg, Ph.D., P.E. is a Civil and Structural Engineer, and is a Managing Engineer at Exponent. Dr. Ahlberg received a Ph.D. in Civil Engineering at the University of California, Los Angeles. His primary area of research is in soil-structure interaction of foundation elements. He is involved in drilled shaft and abutment wall research, including lateral performance of drilled shafts and passive pressure development for wall-type foundations.

Ryan Harne, Ph.D., P.E., FASME is a Managing Engineer at Exponent. Dr. Harne's expertise is in mechanical engineering, with specialization in the fields of acoustics, vibration, mechanical design, materials, and manufacturing. He has years of experience applying this knowledge to consumer products, industrial equipment and processes, building construction products and practices, manufacturing technology, automotive applications, and more.

This article originally appeared in Exponent Insights on March 7, 2024 (www.exponent.com).

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What Were They Thinking? The Science Behind Human Behavior

An D. Nguyen

A man tried to open a pressurized canister with a screwdriver. As he pushed the screwdriver, a violent explosion caused burns. A worker entered a room marked with 'Danger: Toxic Fumes' without proper personal protective equipment. Upon entry, he collapsed to the floor, unable to breathe. Another smoked a cigarette near gas equipment marked 'no smoking.' In an instant, the flick of the lighter triggered a devastating explosion. These stories make you wonder: what were they thinking?

This is where Human Factors comes in — the scientific study of human behavior and decision making. Human Factors is a discipline that bridges the gap between humans and the systems they interact with, drawing insights from various fields such as psychology, physiology, cognitive science, and linguistics. It examines how human capabilities, limitations, and cognitive processes influence their interaction with products, environments, and so on.

Understanding the science behind human behavior could be crucial in determining the root cause of an accident. Consider a fire case at a warehouse storing gasoline drums. The drums were surrounded by warning signs urging caution and prohibiting smoking nearby, which workers followed closely around the full drums. However, empty drums stored separately were treated with less caution. Unfortunately, a lit cigarette was thrown into one of the empty drums and caused a massive fire. Were the warning signs a failure in this case? Not necessarily. A human factors expert could argue that the signs effectively communicated the danger around full drums. The expert could also perform a linguistic analysis to show that the problem likely stemmed from human assumptions and the lack of training about the dangers of fumes in empty containers. In this case, the word "empty" led workers to perceive that there was "nothing" in these drums to be cautious about. Even though, in reality, gasoline fumes can be more flammable than the liquid. By going beyond the physical characteristics of the warnings to consider language interpretation and human assumptions, human factors experts can bolster the defense of the warnings.

Human factors analyses can be applicable to a wide range of accidents. In a slip/trip and fall case, a human factors expert examines not only lighting and signage but also how all the information is displayed together (information hierarchy), and how expectation and mental framework affect hazard perception. In a vehicle accident, the expert can look into distractions and the cognitive load people face when making split-second decisions. Someone may fail to see an oncoming motorcycle due to "inattentional blindness," where focus on one task makes him oblivious to other stimuli.

As these examples demonstrate, human decisions can play a significant role in an accident. However, it is often easy to focus on concrete physical evidence while overlooking the potential influence of cognitive biases. By providing scientific explanations of human behaviors, human factors experts can be valuable assets in litigation. They empower attorneys to build a more comprehensive picture of the accident and help juries make a more informed determination of liability by considering the limitations of human judgment.

An D. Nguyen, Ph.D. is a Human Factors Consultant for SEA, Ltd., and she received her Bachelor of Science in Psychology from Truman State University, her Master of Arts and Doctor of Philosophy degrees in Cognitive Science from Johns Hopkins University. She has over six years of experience conducting behavioral studies with human subjects to understand their cognitive abilities. Dr. Nguyen specializes in assessing human factors issues across a range of litigative and research-based projects. In evaluating warnings, labels, and instructions, she leverages her cognitive science expertise to go beyond surface-level assessments.

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Maryland Garageman's Liens: What They Cover and How They Are Effectuated

Malcolm S. Brisker and David Shea

The mechanic's lien is a well-known legal device to ensure those making repairs on an owner's property have a legal claim to the property if the owner doesn't make the required payments for those repairs. However, Maryland provides a special type of mechanic's lien known as a "garageman's lien," which defines specific rights afforded to those making repairs on a boat, plane, or motor vehicle. *See Allstate Lien & Recovery Corp. v. Stansbury*, 219 Md. App. 575, 577 (2014) (discussing the Md. Comm. Law Code Ann. § 16-202 and referring to a "garageman's lien").

Typically, a lien created under this statute functions just like a mechanic's lien in other contexts. It grants someone who has performed repairs on, for example, a car, a security interest in that car if the owner has not paid for those repairs for 30 days or more. If the owner continues to owe this money once the lien attaches, the mechanic (the "lien holder") can sell the car and recoup the money he or she is owed. (**Note**: to be legal, this sale must follow a *very* specific notice procedure as discussed more below) In the *Allstate Lien* case, for example, Maryland's Appellate Court explained that a mechanic can recoup not only the money owed for the repairs but also "costs of process" fees when he sells the car, but that such processing/sale fees are not included in the lien itself if the owner redeems the vehicle prior to sale. *See* 219 Md. App. at 528-529.

What is less well-known, however, is that this statute also accounts for money owed simply for *storing* a vehicle, plane, or boat. The text of the statute has three main sections addressing circumstances in which "any person" who performs "a service to or materials" to a vehicle at the owner's request and in that person's custody "has a lien… for any charge incurred" — one for aircraft, one for boats, and one for motor vehicles. § 16-202(a),(b),(c). The allowable charges associated with actual *work* that can be covered by a lien differ somewhat for each of these vehicle types; all cover repair and servicing charges, as well as the costs of any parts or accessories sold, but "servicing and maintenance" is also included for boats and planes, while "inspection" costs are only included for planes.

Included in these provisions, however, are also charges related to "storage" for all three vehicle types as well as "parking, handling, or tiedown" for an aircraft, as well as "wet or dry wharfage" (a fee charged by a terminal for loading and unloading goods) for a boat. *Id.*

The proper use of garageman's lien as it relates to these types of storage fees has only been fully explored in a few Maryland cases and only in the motor vehicle context.[1] These cases make clear that if a mechanic, service person, or vehicle storage business wants to cover the full gamut of costs envisioned by this statute, it must provide the correct notice to the property owner and properly publish the sale or auction of the vehicle. The Court of Appeals made a point to spell out the full requirements of someone trying to effectuate a garageman's lien, through a public sale, in *Friendly Fin. Corp. v. Orbit Chrysler Plymouth Dodge Truck, Inc.*, 378 Md. 337 (2003). The case involved repairs *and* storage of a vehicle and so steps #1 through #3 relate only to a lien for repairs, but as to the required steps to effectuate a storage lien, the court wrote:

> (4) The garage stores the vehicle, creating a lien in favor of the garage for storage costs. § 16-202(c)(1)(ii).
>
> (5) The garage retains possession of the vehicle until either the charges are paid or the lien is otherwise discharged. § 16-203(a).
>
> (6) The garage, within 30 days of the creation of the lien, sends notice of the lien to all holders of perfected security interests. § 16-203(b)(1)(i).
>
> (7) If the bill remains unpaid for 30 days, the garage, may initiate a public sale of the vehicle. § 16-207(a).
>
> (8) The garage sends notice, at least 10 days prior to sale, to the owner, all holders of perfected security interests, and the Motor Vehicle Administration. § 16-207(b)(2).
>
> (9) The garage publishes notice once a week for the two weeks immediately preceding the sale in one or more newspapers of general circulation in the county where the sale is to be held. § 16-207(b)(1).
>
> (10) The garage sells the vehicle. § 16-207.

Id. at 345-46 (subsequently detailing how the proceeds of the sale are applied under § 16-207(e)(1). The big-ticket items for business owners hoping to sell a vehicle in this way are: #6 required notice of the lien to the vehicle owner and anyone with a perfected security interest in it (i.e., lender); #8 required notice of the public sale to all such interested parties and the MVA, and #9 the required publication of the public sale in one or more newspapers "of general circulation in the county [of sale]," *once a week for two weeks prior to the sale*. As was the case in *Friendly Fin. Corp.*, these provisions allow a garage that does repairs to a vehicle to effectuate a lien on the cost of repairs and, once those costs go unpaid, also pursue a storage lien for costs of storage as well.[2]

But, and importantly, they also allow a business to place liens on vehicles they are simply storing for an individual who stops paying for that storage, and a mechanism to potentially place this kind of storage cost lien

Continued on the bottom of page 22

[1] The two seminal Maryland cases on this issue have subsequently been cited by a few federal cases in the District of Maryland, but there is no case law around this statute as it relates to airplanes and boats at all, with the sole exception of *Zimmerman Marine v. WV Rotten Kids*, 2017 U.S. Dist. LEXIS 90359 (D. Md. June 12, 2017). There, the court refused to grant summary judgment to either side as there remained questions as to which line-item repairs to a boat had already been paid for and released from the lien in question and whether the contract between parties properly granted possession of the boat to the repairer during the repairs.

[2] While the statute provides for storage fees capped at $5 a day, not to exceed $300, for any storage fees associated with a "third party holder [of the vehicle]," there is no such cap for a business that directly contracts with customers for the storage of vehicles (whether related to any repair services or not). *See* § 16-207(f)(1).

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Goodell DeVries Launches Risk Management, Investigations, and Compliance Practice

Goodell DeVries has launched its **Risk Management, Investigations, and Compliance Practice Group**. The group, comprised of former prosecutors, an Assistant Attorney General, and a Director of Risk Management, counsels organizations in civil, criminal, regulatory, and crisis scenarios — from risk assessment, management, and mitigation to internal investigation and representation in administrative proceedings, trials, and appeals. The team also provides guidance on regulatory compliance to reduce the likelihood of government investigations and, wherever possible, assist in shaping the regulatory framework.

Practice Chair **Jared Green** is a former prosecutor and an experienced investigator and courtroom attorney. He represents organizations in a range of matters, including those related to serious injury, death, workplace violence, allegations of harassment, sexual and physical assault, and claims of excessive use of force by security personnel. In these cases, Jared conducts internal investigations, provides support during government/law enforcement investigations, and represents clients in parallel civil, criminal, and licensing proceedings.

He is joined by partners **Craig Brodsky**, who handles licensing and regulatory investigations and responds to inquiries from government agencies, licensing bodies, and regulators; **John Grimm**, a former Assistant Attorney General, who focuses on regulatory compliance, administrative law, and administrative appeals; **Peggy Chu**, a former Director of Risk Management, who performs proactive risk analyses, root cause analyses (RCA), and apparent cause analyses (ACA), and provides assistance with regulatory compliance and licensing matters; and **Jessica Ayd**, who investigates matters and complaints before licensing boards, defends clients in proceedings before the Office of Administrative Hearings, and handles investigations related to serious injury and death. Associates **David Shea**, also a former prosecutor, and **Joseph Kavanagh** contribute additional investigatory and litigation experience to the team.

If your organization would like help in identifying potential risks, or assistance in navigating an existing criminal, civil, or regulatory issue, contact Jared Green at jgreen@gdldlaw.com.

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(MARYLAND GARAGEMAN'S LIENS) *Continued from page 21*

on a car that has been repaired and paid for but which the owner has left sitting on that business's lot (presuming that the owner is on notice that they will be charged storage fees for any vehicle they don't promptly pick up).

As *Friendly Fin. Corp.* explained, however, failure to give proper notice to both the lienor and those with perfected security interests in the vehicle under § 16-203(b) disallows recovery of storage fees under § 16-203(c)(2)(ii). Id. at 347 (citing § 16-207(e)(3)(ii) as laying out the "penalty for this omission"). It should be noted, however, that penalty provision only disallows "storage charges incurred or imposed by the lienor," thereby arguably leaving any charges for third-party storage fees covered by the lien, albeit capped at $300. See n. 2 *supra*.

If you would like assistance with a dispute involving a mechanic's lien or garageman's lien, please contact the authors, Malcolm S. Brisker and David Shea. Mr. Brisker is a partner at Goodell DeVries, where he concentrates his legal practice in all areas of civil defense litigation, including product liability, construction, and insurance defense. He can be reached at msb@gdldlaw.com. Mr. Shea is an associate at Goodell DeVries and focuses his practice on commercial litigation. He represents clients in a wide range of matters, including contractual disputes, employment law issues, and business tort litigation. He can be reached at dshea@gdldlaw.com.

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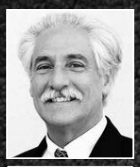
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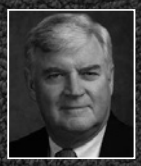
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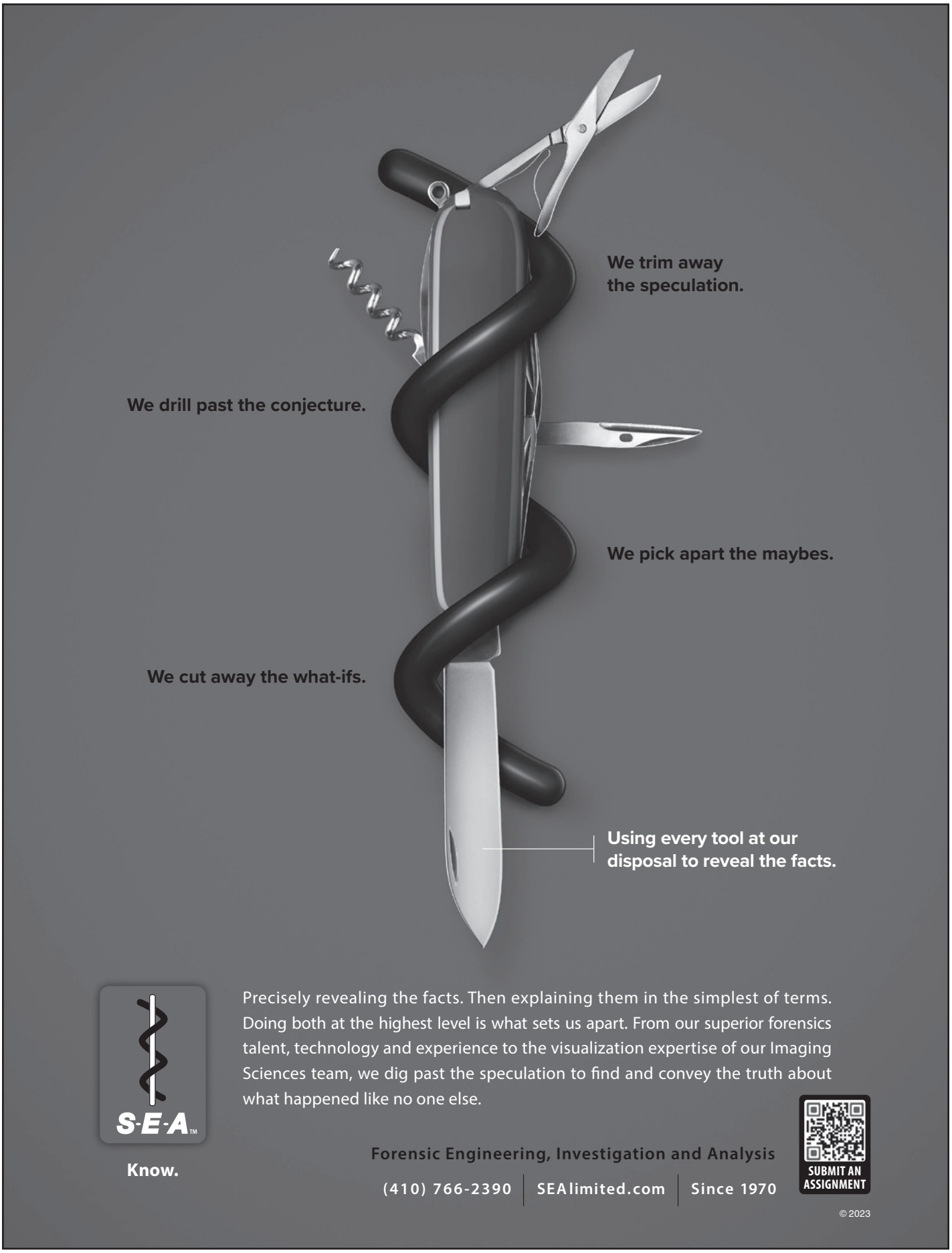
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