

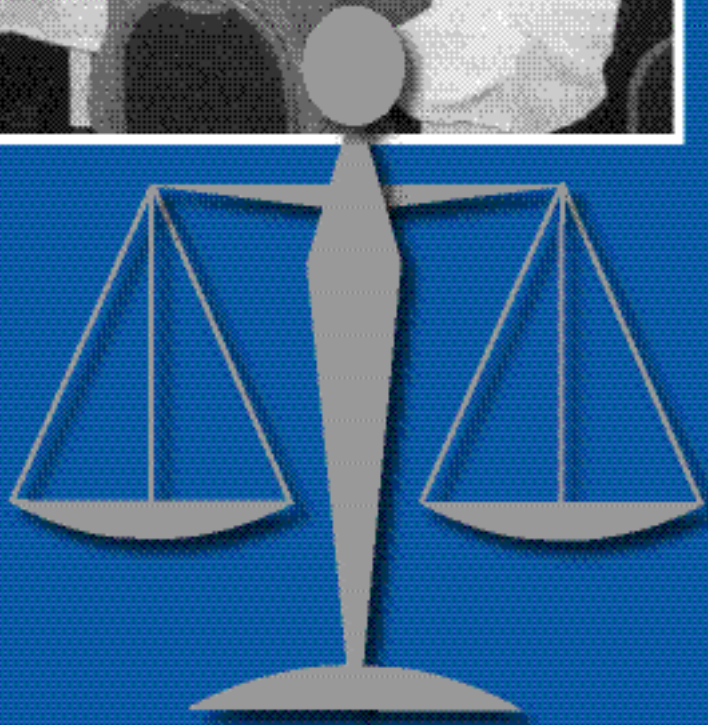
# CALENDAR CALL

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. VII

Winter 2004

No. 3



# CALENDAR CALL

"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. VII

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No. 4



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## ARTICLES

- Chairman's Corner 2
- Litigation Philosophy 4  
*Hardy Gregory, Jr.*
- Unorthodox Mediation Techniques 8  
*J. Sherrod Taylor*
- Recovering Punitive Damages and Attorneys' Fees 12  
*Cale Conley*
- Traditional and Non-Traditional Uses of Mental Health Experts in Employment Lawsuits 18  
*Ann Margaret Pointer*  
*James J. McDonald, Jr.*
- Daubert: The Emerging Profile 28  
*Tyron Elliott, Esq.*



"Plaintiff's Personal Injury" seminar plays to a full house at the Marriott Century Center Hotel in Atlanta. The seminar was co-sponsored with the General Practice and Trial Section, Insurance and TORT Law Section and ICLE.

Calendar Call is the official publication of the General Practice and Trial Section of the State Bar of Georgia. Statements and opinions expressed in the editorials and articles are not necessarily those of the Section of the Bar. Calendar Call welcomes the submission of articles on topics of interest to the Section. Submissions should be doublespaced, typewritten on letter-size paper, with the article on disk together with a bio and picture of the author and forwarded to Cal Callier, Taylor, Harp & Callier, P.O. Box 2645, The Corporate Center, Columbus, Georgia 31902. **Published by Appleby & Associates, Austell, Georgia**



## YES, MABEL, THE LAW CAN BE FUN

certainly have stories of unrealistic clients, unduly litigious opposing counsel as well as the most oft rumored judge afflicted with "robitis". Still, there are funny moments in our practice that make it all bearable.

One of the burdens of practicing law in the rural areas of the state has long been the large number of appointed cases that all local counsel must handle. Up until two years ago, each lawyer in my county would handle at least twenty-five appointed cases annually. No one was exempt from this requirement until they had practiced law for twenty-five years. Each county went by its own rules but this system was not unusual.

About two years ago, the county began contracting with three attorneys to handle indigent defense felony cases. Many of the local attorneys applauded (certainly not me, however) and began to scheme over what they would do with all their free time no longer having to handle a great number of appointed cases.

The United States Supreme Court, however, had other ideas. When the United States Supreme Court decided even misdemeanants had to have attorneys, the indigent defense attorneys rightfully resisted taking on the additional misdemeanor case load. Their contract with the county did

not cover that additional burden. Oh well, at least we went from handling appointed molestations and murders to appointed DUIs and simple batteries.

I say all this to relate some recent fun in the handling of appointed misdemeanors. Last month, I assuredly found humor in entering a guilty plea with an appointed criminal shoplifting case.

There is a young "lady" known locally in the past few years to have supported herself through the means of peddling sexual services. However, with the economy such as it has been, she evidently found the need to shoplift to supplement her other income.

When asked by the judge to explain the need for restitution, since the Defendant never even exited the store, the prosecutor explained: "Apparently on November 12, 2002, she was in Casey's Food Store; they observed her placing some steaks down in her clothing and stopped her when she was attempting to leave and retrieved their steaks and they were not in a saleable condition at that point. About between \$45.00 and \$50.00 worth of steaks." The bench understood at that point the need for restitution.

Continuing with the plea, the Court inquired as to the Defendant's

It goes without saying that most people would not consider the law to be a "fun subject". The average person on the street does not have a fond relationship of most brushes with the law. Whether or not the legal brush occurred because of a divorce, a speeding ticket, a work related injury or something far worse, any interaction with our court systems or enforcement personnel just can't be called fun. Much of the same can be said for a great deal of the practice of law.

Even when we study in law school to learn substantive law, pass the bar and then begin our practice, there often is just not that much fun involved. All general practitioners

means and manner of making a living...

**The Court:**

Have you worked anywhere in the last two years?

**Defendant:**

Sir, no sir...

**The Court:**

Is there any reason you don't work?

**Defendant:**

Sir, no sir. I ain't got no reason why I don't work.

**The Court:**

Well why don't you go to work?

**Defendant:**

I think I might do that this time.

**The Court:**

Have you ever worked?

**Defendant:**

Sir, I ain't never worked a day in my life.

**The Court:**

There is nothing wrong with you, is there?

**Defendant:**

No, sir.

**The Court:**

Do you prostitute?

**Defendant:**

Sir, no. I have did it, but I have did it back down through the years. I don't do it though...

**The Court:**

What about community service? Have you ever done any community service?

**Defendant:**

Sir, no, sir. I ain't did no community service.

**The Court:**

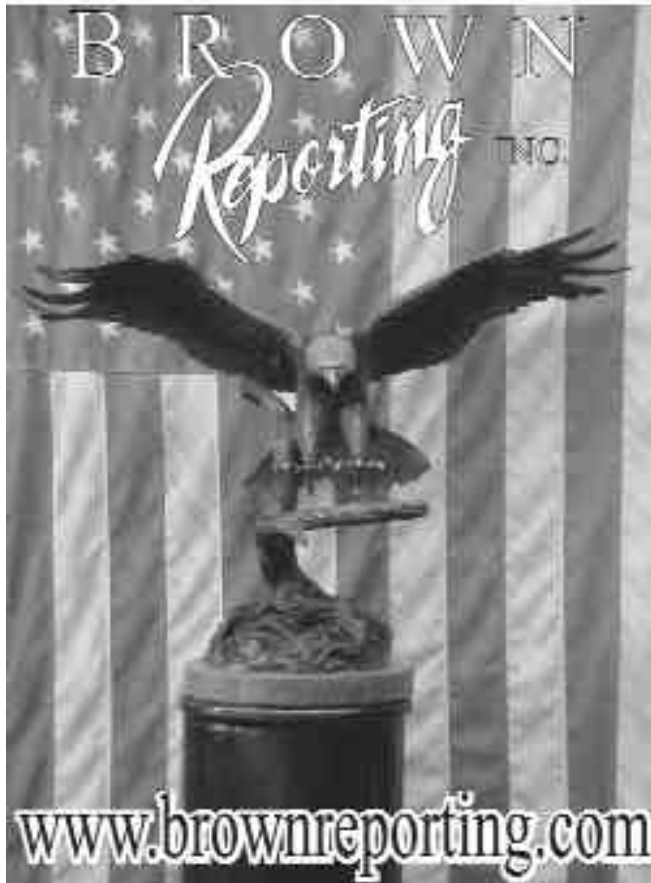
A hundred hours of community service in 03-548. You will have to kind of work that around your job activities. (Emphasis supplied).

**Defendant:**

Yes, sir. Thank you sir. I appreciate it.

After completing the plea, I certainly remembered one of the ways in which the law can be fun, or at least the practice of it. After fighting the good fight all year, perhaps all of us would be better off to rejuvenate ourselves during the holiday season and enter into the new year refreshed with the zeal and knowledge that the law can indeed be fun when we simply choose to look. I hope that all of you have had a very successful and rewarding practice this past year.

W. Wright Gammon, Jr.



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# Litigation Philosophy

Hardy Gregory, Jr.  
Gregory, Christy, Maniklal & Dennis  
Atlanta, Georgia and Cordele, Georgia



*Hardy Gregory, Jr. practices law with the firm of Gregory, Christy, Maniklal & Dennis in Atlanta, Georgia and Cordele, Georgia. The firm primarily represents plaintiffs. For approximately fifteen years Gregory served first as a Superior Court Judge in the Cordele Judicial Circuit and then as a Justice on the Supreme Court of Georgia. He has been engaged in his present practice for approximately thirteen years.*

There are moments during the course of some trials and litigation when a lawyer realizes something more or less fundamental about the nature of what is going on.

Philosophy is too high-toned a word for it but nothing else better came to our minds. So we called these insights litigation philosophy. The intention was to reduce to as few words as possible an idea about the experience that is basically the realization of the truth about something connected with the trial or other procedure in litigation. Another way to put it is to say the experience itself is reduced to a very few words.

Some of the words are not original with the contributor but they are the words that came to mind under the experience. To illustrate basically how the collection of these ideas or points or pieces of philosophy came into being, we were involved in a wrongful death case in Stewart County against the Department of Transportation. Not only did the DOT have the financial backing of the State of Georgia behind it, it also had employees in the local community who helped strike the jury and who were present and obvious every time the jury entered or left the courtroom.

Somewhere along the way it dawned on me that there are not three critical ingredients in a good damage case, there are four. The three are liability, damages and solvency. The fourth is venue. In

the wrong venue the case is no good. So, I contributed to the list, "Venue, venue, venue."

In the beginning all entries related to trials or litigation. Over time, however, some have come into the list that did not arise out of either trials or litigation. The contributors are not all lawyers either. The contributions that are not born in trial or litigation are just plain "life." Contributions of this kind are welcome so long as they come out of experience.

The key to a good contribution to the list is a good (or bad) experience. One is reminded of the discussion in Charles Dickens' *Oliver Twist* where Mr. Brownlow questions Mr. Bumble about a missing gold locket and ring. When Mr. Bumble blamed it on Mrs. Bumble, Mr. Brownlow replied, "That is no excuse. You were present on the occasion of the destruction of these trinkets, and indeed are the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction." Bumble answered, "If the law supposes that, the law is an ass—a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience—by experience."

The eyes of the contributors have been opened by experience, the best teacher of them all. The reader is invited to send in a contribution for future publication. May your experience be a good one, but good or

bad, may it teach you something about the practice of law, or the living of a life. If that happens we will thank you to share it with us; we are all still learning about law and life.

1. Everything matters; some things control. *Hardy Gregory, Jr.*
2. Venue, venue, venue. *Hardy Gregory, Jr.*
3. Opposing counsel is the adversary, not the enemy. *Richard W. Wilson, Jr.*
4. Often the truth is obscured by perception. *Manley F. Brown*
5. Patience and perseverance produce profit. *Hardy Gregory, Jr.*
6. Enthusiasm breeds confidence. *Hardy Gregory, Jr.*
7. It's a long road that hath no turning. *Jesse G. Bowles*
8. Better lose a cause than compromise the truth. *Hardy Gregory, Jr.*
9. Justice may even require sacrifice. *Hardy Gregory, Jr.*
10. Right is right and wrong is wrong. *Hardy Gregory, Jr.*
11. A trial begins in darkness, the lawyers must provide the light. *Richard W. Wilson, Jr.*
12. The lines on a litigator's face should come from hard work and tough decisions rather than liquor and fast living. *Manley F. Brown*
13. Discovery is a tool, not a weapon. *Richard W. Wilson, Jr.*
14. De qustibus non disputandum - matters of preference can't be disputed or argued. *Manley F. Brown*
15. Courts are for the settlement of disputes - Justice is an occasional by-product. *Manley F. Brown*
16. More lies are told in court than anywhere else. *Manley F. Brown*
17. The more ornate the courtroom, the harsher the punishment. *Manley F. Brown*
18. Self-righteousness is a dangerous Judicial character trait. *Manley F. Brown*
19. Some judges rule according to law, others according to personal opinion — the law is an after-thought. *Manley F. Brown*

20. Success breeds success. *Manley F. Brown*
21. Success breeds enthusiasm. *Hardy Gregory, Jr.*
22. Photocopying is no substitute for studying. *Hardy Gregory, Jr.*
23. In litigation the timid should err on the side of boldness, and the bold should err on the side of timidity. *Hardy Gregory, Jr.*
24. Deadlines are devastating. *Hardy Gregory, Jr.*
25. When negotiating a settlement, remember, something for the bears, something for the bulls and nothing for the hogs. *Manley F. Brown*
26. Comparison is the only adequate teacher. If there was but a single thing in the universe it could not be known. *Hardy Gregory, Jr.*
27. The best way to resist temptation is to avoid temptation. *Lamar W. Sizemore, Jr.*
28. Oral argument in an appellate court affords an opportunity to sell an idea; it is not an occasion to cover every point. That is for the brief. *Hardy Gregory, Jr.*
29. It is at least as important to get out of a bad case as it is to get into a good one. *Hardy Gregory, Jr.*
30. In the beginning people did not act according to rules of law, rather rules of law grew out of the way people act. *Hardy Gregory, Jr.*
31. If a thing is immoral, chances are it is illegal. *Manley F. Brown*
32. Success is the best revenge. *Gary C. Christy*
33. Preparation and control are the sword and shield, the heart and soul, of the successful litigator. *Gary C. Christy*
34. Reputation is what you are when others see you; character is what you are when you are alone. *Lamar W. Sizemore, Jr.*
35. The successful lawyer is the one who has learned to respond, rather than react. *Lamar W. Sizemore, Jr.*
36. Explain, explain and explain, until the light comes on. *Hardy Gregory, Jr.*
37. Only death is without friction, all of life is filled with it — nothing

- grows (animal or vegetable) without it — the good life is the proper cultivation of life's frictions. *Lamar W. Sizemore, Sr.*
  38. By lawyer I mean one versed in the laws. By attorney I mean a deputy or legal agent to act for and in the stead (place) of another. By counselor I mean a legal advisor to another. *Lamar W. Sizemore, Sr.*
  39. Seek victory, but only with justice. *Hardy Gregory, Jr.*
  40. One who stays on the shore will never sail. *Gary C. Christy*
  41. To be a success in the profession you must have at least a certain amount of legal ability and a strong willingness to work. *H.T. O'Neal, Jr.*
  42. The legal profession is demanding, and there is very little chance of success in it for a person who is basically lazy. *H.T. O'Neal, Jr.*
  43. The one consuming passion of my life is the law the way the law ought to be. *H.T. O'Neal, Jr.*
  44. Law books constitute the great equalizer among lawyers. *H.T. O'Neal, Jr.*
  45. The biggest mistake a Judge can make is to deviate from book and page for any reason, even the most Christian and charitable of reasons. *H.T. O'Neal, Jr.*
  46. All you can ever want or ask for is an impartial forum where book and page number will be followed. *H.T. O'Neal, Jr.*
  47. There are certain prejudices that cannot be overcome by a world of logic. *Hardy Gregory, Jr.*
  48. An issue is not necessarily put to rest in the eye of the jury even when the pleadings say so. *Hardy Gregory, Jr.*
  49. Read the pleadings — carefully. *Hardy Gregory, Jr. and Manley F. Brown*
  50. Nothing happens automatically. *John C. Bell, Jr.*
  51. Understand the facts. *Manley F. Brown and Hardy Gregory, Jr.*
  52. I'll trade you fifty law books for one good witness any day. *Harry L. Cashin, Jr.*
- Continued on next page*

**Litigation Philosophy** *Continued from page 5*

53. When the judge is with you, sit down. *Hardy Gregory, Jr.*
54. Winning is more fun than losing. *Hardy Gregory, Jr.*
55. Appellate experience, Supreme Court of Georgia: Winning under Rule 59 is like kissing your sister; losing under Rule 59 is like death in action from friendly fire. *Hardy Gregory, Jr.*
56. A deadline is the antidote for indecision. *John C. Bell, Jr.*
57. You can't eat a fish while he's still in the water. *Ken M. Nimmons*
58. We must always read, read, read! A law book is much like an arsenal; it's a place where weaponry for warfare is found. *Ken M. Nimmons*
59. Litigation is hard my boy and sometimes it can be cruel. *Manley F. Brown*
60. Losing has two products, misery and experience. Misery soon passes, but experience endures. *Hardy Gregory, Jr.*
61. No matter how many different ways you skin the cat, the inevitable reality is that the cat is dead. *Ralph Perales*
62. If justice is blind, why does it need a blindfold? *Ralph Perales*
63. Arrogance breeds contempt, contempt breeds disrespect, disrespect breeds overconfidence, overconfidence breeds arrogance. Somewhere in this vicious cycle you will lose your case. *Ralph Perales*
64. Use the power of reason...not the reason of power. *Ralph Perales*
65. When you are dead wrong you ought to lose. *Manley F. Brown and Hardy Gregory, Jr.*
66. Litigation is an exercise to find the facts. Philosophy is an exercise to find the truth. The two together, hopefully, will yield the true facts. *Ralph Perales*
67. Drafting a well written pleading should be every lawyer's aspiration. Drafting an intelligible pleading should be an obligation. *Ralph Perales*
68. Pride and moderation can be guideposts to mediocrity. *John C. Bell, Jr.*
69. Monday ought to be on Tuesday. *Hardy Gregory, Jr.*
70. On occasion brains and intestinal fortitude can defeat multitudes, minions and money. *Harry L. Cashin, Jr.*
71. Everything that happens in front of the jury is evidence. *Hardy Gregory, Jr.*
72. In all the world of litigation, there is nothing so frivolous and irrelevant as the 28-pound dog defense. *Manley F. Brown*
73.  $CA=PR>[(EC+DC) \times TP]$   
Translation: Case Accepted if the Potential Recovery is greater than the Expense of the Case plus the Difficulty of the Case times the Trouble caused by the Plaintiff. *Cal Callier*
74. The price of winning is the same as the price of losing — only the value changes. *Cal Callier*
75. If you work hard, believe in yourself, have confidence and pride, you will be a winner. The price of victory is high, yet so are the rewards. *Cal Callier*
76. If a case is worth taking, it is worth proper preparation and presentation. *Richard W. Wilson, Jr.*
77. Deceit, like a boomerang, will come back to you. *Richard W. Wilson, Jr.*
78. Prevarication and anger are never a substitute for creativeness and energy. *Richard W. Wilson, Jr.*
79. Nothing is absolute. *Richard W. Wilson, Jr.*
80. Show me an open-minded, hardworking, truth worthy lawyer, and I'll show you a candidate to wear the black robe. *Richard W. Wilson, Jr.*
81. Gone With the Wind is not notice pleading. *Richard W. Wilson, Jr.*
82. The amount of the fee earned in a case will always be inversely proportional to the aggravations caused by the client. *Ralph Perales*
83. When your opponent is praising you, remember a eulogy always precedes a funeral. *Manley F. Brown*
84. Always take the depositions before the statute of limitations runs. *Charles R. Adams, III*
85. Do not confuse efforts with results. *Harry L. Cashin, Jr.*  
[from U.S. Navy]
86. Never be complacent when dealing with an adversary you have trounced often because even a blind hog finds an acorn every once in a while. *George H. Carley*
87. There is sometimes justification for righteous indignation, but there is never an excuse for losing your temper. *George H. Carley*
88. When you are preparing an appellate brief or planning for oral argument, don't just read the cases, read the judges who wrote them. *George H. Carley*
89. In every jury case, one side appeals to reason and the other to compassion. The lawyer must prepare or defend accordingly. *David E. Hudson*
90. The reason for so much discovery is that too few witnesses otherwise feel compelled to tell the truth. *David E. Hudson*
91. If you cannot put your argument in a one-page summary, neither you nor the judge will understand it. *David E. Hudson*
92. Never hire anyone who is not smarter than you are. *Paul H. Dunbar, III*
93. Pigs get fat but hogs get butchered...(particularly in condemnation cases). *Paul H. Dunbar, III*
94. There wouldn't be any milk without manure. *James F. Findlay*
95. The first thing that a good lawyer does is to get the facts. The second thing that a good lawyer does is to get all of the facts. *Harry Cashin,*  
as reported by one of his grateful apprentices.

*Continued on next page*

96. Knowing things and proving things are two completely different things.  
*Harry Cashin,*  
as reported by one of his grateful apprentices.
97. Some lawyers make things happen, some lawyers watch things happen, and some lawyers wonder what in the hell happened.  
*Harry Cashin,*  
as reported by one of his grateful apprentices.
98. Do the best you can with what you've got where you're at right now.  
*Jim Waits*
99. We live our lives as we find them and not as we wish they might have been.  
*Carolyn Gregory*
100. If it sounds hokey, do it!  
*Cal Callier*
101. If you don't like the case you've got, try a different case.  
*Cal Callier*
102. Do something, even if it is wrong.  
*Bo Gregory*
103. Think this way: We are twenty minutes early.  
*Hardy "Greg" Gregory, III*
104. The difference between an old wife and a young girlfriend is a whole lot of money.  
*Kice H. Stone*
105. They laughed when I sat down at the piano but their laughter turned to amazement when I stood up and threw it out of the window.  
*H.T. O'Neal, Jr.*
106. If you lose your temper in the courtroom you will get your head knocked off.  
*H.T. O'Neal, Jr.*
107. All a competent lawyer should want is a good judge who leans in his favor.  
*Bert Gregory*
108. With litigation, the three most important details are credibility, credibility and credibility – as to the client, the attorney, and the case.  
*William P. Adams*
109. Always check the pocket part.  
*Katie Wood*

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# Unorthodox Mediation Techniques

J. Sherrod Taylor  
Taylor, Harp, Callier & Morgan  
Columbus, Georgia



*J. Sherrod Taylor is the senior partner of Taylor, Harp, Callier & Morgan in Columbus, Georgia, a firm whose practice is limited to litigation and trial of substantial plaintiff's personal injury cases. Sherrod was admitted to the Bar in 1978 after having earned his degree from the University of Georgia. He has presented numerous workshops and seminars on the medical-legal aspects of civil trial practice, traumatic brain injuries, spinal cord injuries and expert testimony in catastrophic injury cases. He is the author of Neurolaw: Brain and Spinal Cord Injuries.*

## I. INTRODUCTION

Mediation is the form of alternative dispute resolution favored by most trial lawyers. Numerous books<sup>1</sup>, journal articles<sup>2</sup>, and court decisions<sup>3</sup> describe this process from both the plaintiff's<sup>4</sup> and defendant's<sup>5</sup> perspectives. Although traditional mediation methodology has served attorneys and their clients well for many years, unorthodox mediation techniques may also be used effectively to settle complex personal injury and wrongful death civil actions.

This paper explores — in a more or less random manner — some of the non-traditional, paradoxical techniques developed by the author over the course of more than 25 years of trial practice. While the matters discussed here do not purport to be exhaustive in scope, they do illustrate a few creative approaches to settlement that counsel may employ to bring tort cases to a satisfactory conclusion. Since the author is a plaintiff's lawyer, the ideas expressed here necessarily evolved from the claimant's perspective. But defense counsel, too, may derive insight from this discussion.

## II. SELECTING THE MEDIATOR

Counsel for both parties generally select the mediator. As a plaintiff's attorney, however, this author favors

either allowing the defendant alone to choose the mediator or agreeing that the mediator will be a former trial judge. Both approaches have merit. Permitting the defendant to pick the mediator insures that the defendant will be comfortable throughout the mediation process. That is important since the defendant has the money and the goal of the plaintiff is to get the money. Having a former trial judge act as mediator can also be of immeasurable value to all parties.

A mediator — who has previously worked as trial judge — brings much to the proceedings. Such a mediator is acutely aware of the types of evidence that tend to influence jurors. The judge/mediator is also very familiar with the law likely to be applied in making evidentiary rulings and in charging the jury at trial. When unusual legal rules are applicable to the facts of a particular case, having a former judge as mediator enhances discussion of those legal principles during private caucuses with the parties.

*Illustration:* In one recent case, this author secured an \$800,000 settlement offer, after a judge/mediator explained the implications that spoliation of certain evidence by the defendant might have during trial.

Remember: "Good mediators should be both facilitative and evaluative in varying degrees."<sup>6</sup>

### III. SETTLEMENT AUTHORITY

Before beginning any mediation, all parties must possess authority to settle the case. Such authority must never be assumed; it must be stated conclusively at the outset of the proceeding. If settlement authority is absent, the mediation should be terminated before negotiations begin.

*Illustration:* Under most malpractice insurance policies, physician defendants have the right to approve all settlement offers made by their attorneys/insurers. Some doctors, however, enter mediation proceedings without having first approved the making of *any* offer. If plaintiff's attorneys are not aware of this fact, they may blindly engage in "negotiations" that in fact cannot bear fruit. Thus, wise attorneys ascertain that consent to settlement has been given by all parties before the first settlement demand or offer is exchanged.

### IV. TEMPORAL FOCUS OF MEDIATION

Many trial lawyers consider mediation to be a Janus-headed project. The Roman God Janus had two faces — one gazing toward the past, the other toward the future. That notion has merit because the events of the past that gave rise to the lawsuit encompass the liability aspects of the action. Civil cases presenting strong liability on the part of the defendant are typically resolved through settlement. For this reason, mediation proceedings which focus upon the defendant's legal responsibility for causing plaintiff's damages commonly lead to resolution.

The Janus-headed approach also is meritorious since it embodies a review of the plaintiff's anticipated future losses. Presenting a comprehensive Life Care Plan and accompanying economic evidence during mediation will permit the defendant and its insurer to glimpse the

magnitude of plaintiff's damages.

Mediation, however, is not merely a Janus-headed project. Litigants generally recognize that the past is fixed in history and that they cannot change the outcome of preceding events. Moreover, disputing parties usually acknowledge that the future is uncertain and that they cannot know what it will be. Indeed, the vagaries of the future motivate many plaintiffs and defendants to seek a present settlement of their cases. Thus, focusing attention upon present status of the parties and the case itself during mediation may prove exceedingly valuable when discussing various settlement options.

### V. OPENING STATEMENTS

Two different approaches to the opening statements made by the parties during mediation may be employed effectively. One can be called the *Overwhelm Approach*; the other, the *No-whelm Approach*. Selecting one — and only one — of these at the outset, and sticking with it throughout the course of the proceeding, can tend to disorient one's opponent.

#### A. *Overwhelm Approach*

Using this tactic, attorneys reveal all or most of the pertinent facts and law upon which the case is based. Using photographs, charts, blow-ups and other demonstrative exhibits during the opening statement allows the opponent to readily see the mass of materials likely to be presented at trial. Showing such items demonstrates that counsel is ready for trial in the event mediation fails. Once an opponent recognizes that the other party is prepared to go to the jury, the pressure to resolve the matter increases dramatically.

#### B. *No-Whelm Approach*

Using this understated approach, counsel says nothing or very little

during opening statement. This allows the opposition's imagination to run wild. Frustrated, perhaps, the opponent may believe that things could really be bad for him or her at trial. Although things are seldom as bad as we may imagine them to be, good trial lawyers know that fear of the unknown often outweighs fear of the known.

*Illustration:* Withholding a definitive statement of one's true positions during the opening statement sets up an opportunity to use another important tactic when the mediator discusses the case with the opponent during subsequent private caucuses. In a recent case, the author and his partners employed this unorthodox technique in the following manner. During the first private caucus, we told the mediator that we possessed certain strong evidence that would likely influence the trial jury during deliberations. Although we authorized the mediator to tell our opponent that we had such evidence, we did not authorize the mediator to reveal the nature of that evidence to the other side. When the mediator did this and came back to us later, he reported that our opponent appeared to be "deeply concerned" about our "secret evidence." That concern was expressed by the opposition's significantly increasing its previous settlement offer. Fear of the unknown thereby came into play. We later instructed the mediator to advise our opponent that he could, perhaps, earn the right to know the content of this *secret evidence*, if subsequent offers showed a genuine desire to resolve the case. Although we did later settle — after 9 long hours of negotiations — we never revealed the *secret evidence* that we in fact possessed. Once the case was concluded, the defendant's attorney asked us to tell him what that evidence was; we respectfully declined to do so. At that point the frustration of that lawyer became

*Continued on next page*

apparent; he said, “no matter, that just means I don’t have to tell you about the *secret evidence* that we also had.”

## VI. EXPLOIT THE CRACKS

Experienced attorneys recognize that there is probably a “crack” in every case. Virtually every civil action is flawed to some extent. The lawyer’s task, therefore, is to look for and find the flaws that are usually present in the lawsuit at hand. Or, it is counsel’s job to create cracks in the opponent’s case so that these may be exploited during mediation.

### A. Finding Cracks

Sometimes discovery or independent investigation of either the case or the opposing party/lawyer will reveal weaknesses in the opponent’s case. At other times, cracks may first appear when the opposition makes the opening statement during mediation itself. Regardless of when the crack surfaces, calling attention to it in mediation may lead to settlement.

### B. Creating Cracks

Astute lawyers know that they do not always enjoy the luxury of sitting back and waiting for defects in an opponent’s case to appear. Instead, they follow the old maxim: “Good things happen to those who waiteth, if they worketh diligently while they waiteth.” That is to say, aggressive attorneys create cracks in their opponent’s cases. By carefully revealing the presence of flaws in the opposing party’s case to the mediator, seeds of doubt may begin to sprout in the opponent’s caucus room. If those seeds flourish, the desire to settle the case immediately increases. Remember: mediation naturally encourages resolution during a brief time frame. Thus, the revelation of any

pertinent fact or legal principal that “turns up the heat” on the opponent is valuable.

## VII. “HYPOTHETICAL” SETTLEMENT PROPOSALS

We have all heard the adage “it is better to give than to receive” in connection with gifts. But, in mediation, quite the opposite is true. In this context, it is far better to receive settlement proposals than to make them. The advantage during negotiations always inures to the benefit of receivers. Nowhere is this more true than in instances in which one party makes a so-called “hypothetical” settlement proposal.

So-called “hypothetical” proposals are often used in an attempt to re-invigorate negotiations that appear to be stalled. Astute mediators and negotiators, however, recognize that in reality few settlement proposals are “hypothetical.” Although, at first blush, a proposal may appear contingent, in actuality it is probably concrete. Because this is so, the party that *responds* to a so-called “hypothetical” settlement proposal gains a tactical advantage over the party that *makes* such a proposal. Thus, it is better to be on the *receiving* end of these proposals than on the *giving* end. The following illustration makes this point very clear.

*Illustration:* Let’s suppose that a mediation is proceeding as follows:

1. Defendant makes a \$500,000 settlement offer and the mediator conveys that offer to plaintiff in the next caucus.
2. Plaintiff responds by instructing the mediator to demand \$1 million.
3. Instead of making a direct response to plaintiff’s demand, defendant instructs the mediator to tell plaintiff: “We will go to \$600,000 if plaintiff will demand

\$800,000.” [This is a so-called “hypothetical” proposal.]

4. The mediator then conveys defendant’s proposal to plaintiff. If plaintiff accepts defendant’s proposal, defendant’s \$600,000 offer is locked in. That is to say, defendant has made a \$600,000 offer in response to plaintiff’s demand of \$1 million (Step 2 above). Simultaneously, plaintiff’s new demand becomes \$800,000.
5. When the mediator returns to caucus with the defendant, the mediator should first advise defendant that plaintiff has accepted defendant’s proposal. Acceptance of defendant’s proposal solidifies defendant’s \$600,000 offer. The mediator then reminds defendant that plaintiff’s new demand — as required by defendant’s proposal — is \$800,000. Thus, the mediator inquires of the defendant: “How do you wish to respond to this \$800,000 demand?”

Proceeding in this manner effectively “turns the tables” on the party who first makes the so-called “hypothetical” proposal. Some parties and mediators may not recognize this fact. They may erroneously believe that the “hypothetical” proposal, stated in Step 3, first requires plaintiff to “bid against itself” by making an \$800,000 demand. But, this is not the case. Every proposal made during mediation is subject to acceptance by the opposing party — even a so-called “hypothetical” proposal. Once any proposal is accepted by the other party, the party *making* the original proposal is required to respond. Otherwise, the mediation stalls.

For this reason, knowledgeable negotiators will always try to position themselves in such a way that they are the receivers — and

not the givers – of “hypothetical” settlement proposals. Obviously, in order to be in that position, patience is required.

### VIII. MEDIATOR PRESENTS OFFERS TO COUNSEL ONLY

At the outset of any mediation, plaintiff’s counsel should consider advising the mediator that all settlement proposals will be conveyed only to the attorney. That is, the mediator will not be allowed to pass along any defense offer directly to the plaintiff. Although some mediators may become upset by proceeding in this manner, doing so is the only way that plaintiff’s attorney may insulate his or her client from the unfair mediation tactics employed by some unscrupulous defense counsel, who may attempt to drive a wedge between plaintiff and plaintiff’s attorney during mediation.

One such “wedge” may be an attempt to interfere with the attorney-client contract existing between plaintiff and his or her attorney. This can occur in several ways — most notably perhaps by the defendant (1) making an offer of one amount for the plaintiff and another for attorney fees/expenses or (2) making a structured settlement

proposal in which the upfront cash is insufficient to cover the plaintiff’s attorney fees/expenses. Both tactics are deplorable because they seek to pit the plaintiff against counsel.

To avoid such potential conflicts of interests, plaintiff’s counsel can advise the mediator at the beginning of the process that such tactics will not be tolerated. And, at the same time, plaintiff’s attorney tells the mediator that all defense offers must only be conveyed to plaintiff’s counsel. In this way, the purity of the process and the sanctity of the attorney-client contract may be preserved. If proceeding in this manner is not acceptable to the mediator, plaintiff should strongly consider walking out of the mediation.

### IX. WALKING OUT

Leaving a mediation prior to reaching settlement is almost never a bad thing to do! Walking out of an unproductive or abusive mediation demonstrates that a party possesses the resolve and intent to try the action before a jury. Although it may be said that both parties “lose” when mediation is not successful, defendants usually

bear the greater loss because they are deprived of a certain outcome.

Walking out does not necessarily signal the end of negotiations. They are usually only postponed.

*Illustration:* Not long ago, the author and his partners walked out of an unproductive mediation, leaving a mid-seven figure defense offer on the table in a traumatic brain injury case. Within two weeks, a more cooperative defendant returned to the negotiations. After four hours, the offer was increased by more than 50% and the case was settled.

### X. CONCLUSION

Employing some or all of the unorthodox mediation techniques described in this paper — in appropriate situations — can lead to the successful completion of mediation in substantial personal injury/wrongful death litigation. Using these techniques — and by developing your own personal approaches — you and your clients will have the opportunity to settle cases without the necessity for time-consuming and expensive court proceedings.

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#### Foot notes

- 1 See Yarn, *Alternative Dispute Resolution: Pract. & Proc. in Ga.* (2d Ed.) (1997).
- 2 Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 Wash. U.L.Q. 787 (2001); Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and For the Future*, 27 Wm. Mitchell L. Rev. 745 (2000); Edward A. Dauer, *The Future of ADR*, 1 Pepp. Disp. Resol. L.J. 3 (2000); Joseph B. Stulberg, *Symposium: Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 Fla. St. U.L. Rev. 985 (1997).
- 3 *Atlantic Pipe Corporation*, 305 F. 3d 135 (1st Cir. 2002); *In re: Amendments to the Florida Rules for Certified and Court-Appointed Mediators*, 762 So. 2d 441 (Fla. 2000).
- 4 Robert K. Scott, *Mediation from the Plaintiff’s Perspective*, <http://library.lp.findlaw.com/articles/file/00497/001183/title/...> *Alternativedisputeresolution\_1\_1*; Stephen C. Laird, *New Mediation Techniques*, <http://www.texlawyers.com/FSLSCS/library/library44.asp>.

- 5 Edward A. Dauer, *Alternatives to Litigation for Health Care Conflicts and Claims: Alternative Dispute Resolution is Medicine, Hematology/Oncology Clinics of North America*, Vol. 16, No. 6 (Dec. 2002); Jan Ellen Berger, et.al., *Technical Report: Alternative Dispute Resolution in Medical Malpractice, Pediatrics*, Vol. 107, No. 3 (Mar. 2001); Ann H. Nevers, *Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?* 1 Pepp. Disp. Resol. L.J.45 (2000); Rita Lowery Gitchell, *Mediation: A Viable Alternative to Litigation for Medical Malpractice Cases*, 2 Depaul J. Health Care L. 421 (1999); Bryan A. Liang, *Understanding and Applying Alternative Dispute Resolution Methods in Modern Medical Conflicts*, 19 J. Legal Med. 3 (1998); Robert L. Lowes, *Can Malpractice Really Be Kept Out of Court?* *Medical Economics*, Vol. 71, No. 16, p. 106 (Aug. 22, 1994).
- 6 Jeffrey W. Stempel, *Symposium: Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator’s Role*, 24 Fla. St. U.L. Rev. 949, 952 (1997).

# When Compensatory Damages Alone Won't Do Full Justice: Recovering Punitive Damages and Attorneys' Fees

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In many lawsuits, what constitutes full justice can be clearly defined as the full measure of damages which would compensate a person for the injury or harm that he or she suffered because of a negligent or wrongful act of another. In such cases, the basic components of past, present and future medical bills, lost wages, expenses, and pain and suffering generally are "enough" to restore the Plaintiff, at least in the form of a monetary symbol, to his or her pre-injury condition. In other situations, however, the bad faith conduct of a party well before an incident, after an incident, or even during a lawsuit (by the party or counsel) may be of the sort that additional forms of damages are necessary to restore the Plaintiff and fulfill public policy objectives served by our civil justice system. Specifically, there are cases in which punitive damages are needed, not to further compensate the Plaintiff, but to punish a Defendant and deter future misconduct towards others that is contrary to the safety of society. In other scenarios, the unreasonable litigation positions of one party or his counsel may cause his or her opponent to incur attorneys' fees, litigation expenses or other costs unnecessarily — which compounds other "compensatory" damages already suffered, rendering an award of attorneys' fees or litigation costs necessary to accom-

plish a full measure of "justice" in a case.

That concept may seem basic, but the methodology and timing for filing such "more than compensatory" damages claims can be tricky under Georgia law. As it would be nearly impossible to catalog or describe every factual scenario that might support a punitive damages or attorney fee recovery, however, the limited purpose of this paper is to provide a basic outline of the statutory authority applicable to these types of damages, identify representative recent cases that reveal the current contours of the law in each area, and point out a few traps for the unwary that have snared prior litigants venturing into this area of damages. Armed with the basics, hopefully you will be able to identify and respond to issues when you are involved in a case in which the traditional compensatory damages simply are not enough for full justice.

## I. PUNITIVE DAMAGES

Of the topics in this article, punitive or "exemplary" damages are the ones least likely linked to attorney misconduct, most likely linked to societal policies, and most likely tied to a defendant's pre-incident, pre-lawsuit substantive acts (or complete failure to act). Classic examples of "punitive" civil conduct would include drivers who operate a vehicle while highly

intoxicated or under the influence of drugs and cause injury, companies which knowingly manufacture dangerous products with profits rather than safety in mind, or businesses which intentionally breach duties to partners or fiduciaries for their own gain (and the other's detriment). Georgia's punitive damages statute is O.C.G.A. § 51-12-5.1, as amended in 1997, which creates the substantive basis for an award of punitive damages, sets the standard for recovery, describes the purpose of punitive damages, outlines specific procedural hurdles that must be satisfied to obtain such an award, and sets limits on the amounts (and distribution) of such awards. The key points of Georgia's punitive damages statute are outlined as follows:

*The Standard and Substantive Basis for Punitive Damages – 51-12-5.1(b):*

"Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to the consequences."

*The Purpose of Punitive Damages – 51-12-5.1(c):*

"Punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalize or deter a Defendant."

*Key Procedural Points about Punitive Damages – 51-12-5.1(d):*

(1) To be recovered, punitive damages must be specifically prayed for in a Complaint, the trier of fact must first specifically resolve *whether* an award shall be made, and the finding that an award shall be made must be specially noted in the form of the initial verdict; see

also *Wise Moving & Storage, Inc. v. Rieser-Roth*, 259 Ga. App. 832, 578 S.E.2d 535 (2003).

(2) If the trier of fact determines that punitive damages are to be awarded in its initial form of verdict, then the trial recommences and an amount of punitive damages is set by the jury in an amount "sufficient to deter, penalize, or punish the defendant in light of the circumstances of the case."

*Limitations (or Lack of Limitations) on Punitive Awards – 51-12-5.1(e)-(g)*

Subsection (e) creates specific rules in *products liability actions* with two main components summarized here: (1) there is no limitation on the amount of punitive damages that can be awarded in a product liability action, but only one such award may be rendered against a defendant from the same act or omission (i.e., the same product defect); and (2) seventy-five percent (75%) of any *product liability punitive damages awards*, less a proportionate part of the costs of litigation, are deposited into a State of Georgia Treasury Account for the sole use by the State of Georgia.

Subsection (f), in summary form, provides that even if a case does not arise in product liability, there is no "cap" on the amount of punitive damages that can be awarded where the defendant acted with specific intent to harm or while under the influence of alcohol or illicit drugs, though such awards can only be unlimited against an "active tortfeasor."

Subsection (g) sets the general *cap on the amount of punitive damages that can be awarded* in all cases except those identified in sections (e) or (f), and sets that cap at a maximum of \$250,000.

While 51-12-5.1(e) outlines in fairly coherent form the contours of Georgia's punitive damages law, those contours are always subject to

revision by United States Supreme Court precedent, which has been somewhat active in the area in recent years. While the recent trends in the United States Supreme Court's treatment of punitive damages awards would be a proper subject for an elongated treatise and cannot be covered in detail here, there are at least three cases from the last three years which are "required reading" for their impact on all punitive damages awards: *BMW v. Gore*, 517 U.S. 559 (1996) (invalidating a state-court punitive damages award as unreasonably large for the first time, articulating particular constitutional standards for evaluating the bases for such awards, and holding that state court punitive damages awards must be limited to the punitive conduct within the state in which the award was made); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (holding that Courts of Appeals should apply a "de novo" standard when reviewing a trial court's determination of the constitutionality of a punitive damages award), and the latest, and perhaps most far-reaching opinion yet rendered, *State Farm Mutual Ins. Co. v. Campbell*, 538 U.S. \_\_\_\_ (April 7, 2003) (holding Utah punitive damages award unconstitutional and at least suggesting that any punitive damages award more than nine times greater than the compensatory damages award would be subject to reversal on constitutional grounds).

While the actual impact of all those decisions is still in many ways "to be determined" in Georgia, including the impact of *Campbell* in particular, there are still several Georgia decisions that are also "required reading" in the mind of this author for an understanding of punitive damages here. The most notable include the two opinions in *Hospital Authority of Gwinnett*

*Continued on next page*

## Recovering Punitive Damages and Attorneys' Fees *Continued from page 13*

*County v. Jones*, 259 Ga. 759, 386 S.E.2d 120 (1989) (often called *Hospital Authority I*, this opinion sets forth in footnote 3 a set of still generally accepted set of factors for a jury's consideration in the award of punitive damages) and 261 Ga. 613, 409 S.E.2d 501 (1991) (often called *Hospital Authority II*, reaffirming the award after a remand from the United States Supreme Court), as well as the Court of Appeals' recent decision in the much-discussed case of *Time Warner Entertainment Co. v. Six Flags Over Georgia, LLC*, 254 Ga. App. 598, 563 S.E.2d 178 (2002) (reconsidering a \$297 million punitive damages award in light of the Supreme Court's decision in *Leatherman Tool Group* and affirming award for second time). While those cases are by no means an exhaustive list of "important" cases on punitive damages, they are a fundamental starting point for those wishing to understand such awards in Georgia and on a national level.

### II. ATTORNEYS' FEES AND EXPENSES: THREE FORMS OF REMEDIES

Unlike punitive damages, the bases for awards of attorney's fees, costs or expenses of litigation cannot be found in a single statute. Rather, the bases for such awards are scattered through the Georgia code and are established through three statutes that can come into play at different procedural stages in a particular case for different types of damages or misconduct. Understanding the nature of the statutes, and more importantly which one to use for different types of claims that could arise at different points in time or for different types of damages, is critical to laying the proper foundation for such claims. While the outline of these forms of remedy is perhaps overgeneralized below,

the object is a) to provide a basic idea of when to generally implement claims under each statute and b) identify recent cases that may provide additional understanding and guidance in that particular area.

#### A. O.C.G.A. § 13-6-11: RECOVERY OF EXPENSES OF LITIGATION FOR BAD FAITH, STUBBORN LITIGIOUSNESS, OR CAUSING UNNECESSARY TROUBLE AND EXPENSE **BEFORE** LITIGATION BEGINS

O.C.G.A. § 13-6-11 provides as follows, with key points italicized:

"The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has *special-ly pleaded and has made prayer therefore* and where defendant has acted in *bad faith*, has been *stubbornly litigious*, or has *caused the plaintiff unnecessary trouble and expense*, the jury may allow them."

As that language makes clear, as with punitive damages, a "13-6-11" claim for expenses of litigation is one that must be plead specifically in a complaint, including a "prayer" for such damages, or there is no procedural foundation for the claim. See also *Rapid Group, Inc. v. Yellow Cab of Columbus, Inc.*, 253 Ga. App. 43, 557 S.E.2d 420 (2001). This claim for damages can broadly include costs of filing, expenses to pursue the claim *and* attorneys fees *if* the attorneys' fees are supported by substantive evidence of their reasonableness and there is a direct relationship between the fees alleged and the bad faith or stubbornly litigious conduct alleged. See, *Kwickie/Flash Foods, Inc. v. Lakeside Petroleum, Inc.*, 256 Ga. App. 556, 568 S.E.2d 816 (2002) (recent case

affirming that attorney fees could be awarded under O.C.G.A. 13-6-11, but remanding because the trial court failed to allow a party an opportunity to challenge the submitted attorneys' fees). In addition, a party cannot simply claim negligence or bad judgment as a basis for such fees or expenses — there must be at least some evidence of a "dishonest purpose or some moral obliquity [that] implies conscious doing of wrong, and means breach of known duty through some motive of interest or ill will." *Id.*, 557 S.E.2d at 426.

Perhaps the most significant point about damages under O.C.G.A. § 13-6-11 is one articulated by the Court of Appeals in its interpretation of the statute as it relates to timing. Specifically, the Court of Appeals has held that the element of bad faith or stubborn litigiousness that will support a "13-6-11" claim "*must relate to the acts in the transaction itself prior to the litigation*, not to the conduct during or motive with which a party proceeds in the litigation." *Fresh Floors, Inc. v. Forrest Cambridge Apartments, LLC*, 257 Ga. App. 270, 570 S.E.2d 590 (2002); *David G. Brown, P.E. v. Kent*, 274 Ga. 849, 561 S.E.2d 89 (2002). A classic example of such damages would be a situation in which no "bona fide controversy" exists, but a party refuses to pay damages, and as a result, the other party is required to resort to the courts and incur expenses to obtain relief. As stated in *Fresh Floors, supra*, "a defendant who forces a plaintiff to resort to the courts in order to collect a debt is plainly causing him 'unnecessary trouble and expense.'" From that language and similar language in other cases, it seems clear that O.C.G.A. § 13-6-11 is the statute for use when an unreasonable position is taken by a litigant substantively (i.e., in relation to the incident at issue) *before* suit is brought rather

than, as we will see below, a situation where a party or his counsel has taken unreasonable positions during litigation.

An award of attorneys' fees under O.C.G.A. § 13-6-11 will be upheld by the Court of Appeals if there is "any evidence" to support it. *Kwickie/Flash Foods, Inc. v. Lakeside Petroleum, Inc.*, 256 Ga. App. 556, 568 S.E.2d 816 (2002). However, it should be noted that expenses or attorneys fees cannot be awarded for proceedings in the appellate courts (i.e. for expenses occasioned by an alleged frivolous appeal). See *David G. Brown, P.E. v. Kent*, 274 Ga. 849, 561 S.E.2d 89 (2002).

#### B. O.C.G.A. § 9-15-14:

##### GENERALLY, THE STATUTE THAT PROVIDES A REMEDY FOR FRIVOLOUS ACTIONS OR DEFENSES DURING SUIT

O.C.G.A. § 9-15-14 in many ways codifies an appellate decision, *Yost v. Torek*, 256 Ga. 92, 344 S.E.2d 414 (1986). The statute sets forth several main points, summarized here in the order covered in the statute, with key points emphasized with italics:

- (a) In any *civil action in any court of record in this state*, reasonable and necessary attorneys' fees and expenses of litigation *shall* be awarded to any party against whom another party has asserted a claim, defense or other position to which there existed *such a complete absence of any justiciable issue of law or fact* that it could not *reasonably be believed* that a court would accept it.
- (b) Upon a motion by the party or *suaspon*te, the *court* may also assess what are reasonable and necessary attorneys' fees and expenses of litigation where it finds that an attorney or party brought or defendant an action or any part thereof *lacking substantial justification* or for purposes of *delay* or

*harassment*, or unnecessarily "expanded the proceeding by other improper conduct" including abuses of discovery procedures. A lack of "substantial justification" is further defined as "substantially frivolous, substantially groundless, or substantially vexatious."

- (c) –(h): No fees or expense shall be assessed if a claim or defense was asserted in a "good faith attempt to establish a new theory of law in Georgia," the fees and expenses must be reasonable and necessary, a motion for fees can be brought as late as 45 days *after the final disposition of the action*, and the amount of the award shall be determined by the court without a jury (though enforceable as a money judgment), and this section does not apply to magistrate courts except upon an appeal of a magistrate court judgment without substantial justification.

As should be somewhat clear from that statutory summary, a claim under O.C.G.A. § 9-15-14 differs from a "13-6-11" claim in several material ways: First, a "9-15-14" claim is brought by motion, not as a part of the complaint or a prayer in the complaint. Second, a 9-15-14 award is set by the Court, not the jury, and can be awarded *sua sponte* by the Court. Third, a 9-15-14 claim pertains to *in-suit* legal positions, includes the attorney for the opposing party as a potential object of the award, and does not arise from misconduct related to the transaction itself, but rather from legal positions taken in the litigation. Fourth, the motion can be brought *after* the final disposition of the action, while a "13-6-11" claim must be brought as part of the action itself. Fifth, the nature of the conduct at issue is different – while 13-6-11 focuses on bad faith or stubbornness, 9-15-14 focuses on

the legal validity of the claims asserted, at least suggesting a lesser need to provide an "ill motive" for a 9-15-14 award. Finally, and perhaps most significantly, 9-15-14 is couched in mandatory terms ("shall") if it applies, while 13-6-11 is left for jury determination. One similarity between O.C.G.A. § 9-15-14 and § 13-6-11, however, is that neither apply to appellate proceedings – the appropriate remedy for a "frivolous appeal" is governed by O.C.G.A. § 5-6-6, not § 9-15-14.

Two recent cases interpreting motions for damages under O.C.G.A. § 9-15-14 that may assist in further understanding of the contours of the statute are *Ellis v. Stanford*, 256 Ga. App. 294, 568 S.E.2d 157 (2002) (affirming award under § 9-15-14 where litigant maintained a theory throughout the case while presenting no evidence at all to support it) and *Bellah v. Peterson*, 259 Ga. App. 182, 576 S.E.2d 585 (2003) (affirming denial of attorneys' fees under § 9-15-14 and holding that trial court must make specific findings of fact when awarding fees, but does not have to make specific findings in *denying* fees).

#### C. O.C.G.A. § 51-7-80 *et seq.*, THE ABUSIVE LITIGATION STATUTE: TO BE USED AFTER A LAWSUIT IS COMPLETE TO RECOVER FOR ABUSIVE LITIGATION TACTICS DURING A PRIOR CASE

As should be clear from the sections above, both O.C.G.A. § 13-6-11 and § 9-15-14 are to be used in connection with and ancillary to an already-filed proceeding. Neither of those statutes creates an "independent action" in tort. In contrast, O.C.G.A. § 51-7-80 *et. seq.* – Georgia's "Abusive Litigation Statute" – creates an independent

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## Recovering Punitive Damages and Attorneys' Fees *Continued from page 15*

action which can be brought as a *separate lawsuit after the final determination of the first lawsuit* to recover for abusive litigation tactics undertaken in the first lawsuit. As the statute is in derogation of common law, its provisions are strictly construed against the party utilizing the statute and there are precise procedural steps that must be taken to perfect a claim for abusive litigation.

Initially, a claim for abusive litigation must be "set up" during the pendency of the initial litigation by a letter, sent pursuant to the statute by certified mail to *every person or entity* who is alleged to have taken "an active part in the initiation, continuation, or procurement of civil proceedings against another" with "malice" or "without substantial justification." O.C.G.A. §§ 51-7-81, 51-7-82, 51-7-84. Such letter must offer each person or entity the opportunity to alter its tactics or withdraw an "abusive" litigation position within 30 days. §51-7-82. Absent sending such a notice letter, no subsequent abusive litigation claim can be brought. O.C.G.A. § 51-7-84; see also *Carroll County Water Authority v. Bunch*, 240 Ga. App. 533, 523 S.E.2d 412 (1999) (affirming summary judgment for a Defendant who did not personally receive a notice letter to him regarding abusive litigation during the pendency of the first action). If notice is given appropriately and the "abusive" position is not withdrawn, however, a party may bring the action and, if successful before a jury, may recover "all damages allowed by law as proven by the evidence, including costs and expenses of litigation and reasonable attorneys' fees." O.C.G.A. § 51-7-83.

As may be clear from the above description, there is definite overlap between O.C.G.A. § 51-7-80

*et seq.* and O.C.G.A. § 9-15-14. In short, a "9-15-14" claim is the proper procedure to use when only fees, costs and litigation expenses are sought in a civil proceeding in a court of record, while the abusive litigation statute would apply in any court (not just "civil proceedings in a court of record"). While the filing of a motion under 9-15-14 does not preclude an abusive litigation action, a ruling on a 9-15-14 motion in a civil proceeding is "conclusive" as to issues of costs, expenses of litigation and attorneys' fees in that civil proceeding. See O.C.G.A. § 51-7-83(c). To attempt to sort through and analyze that overlap, it seems apparent to this author that in criminal proceedings or magistrate proceedings – or in civil proceedings in a court of record where damages from abusive litigation transcend fees, costs and expenses – O.C.G.A. § 51-7-80 *et seq.* is the proper method for seeking fees for baseless legal tactics. However, the Abusive Litigation statute does *not* apply to workers' compensation cases. *Patterson v. Cox Enterprises, Inc.*, 201 Ga. App. 222, 411 S.E.2d 85 (1991). In civil proceedings in courts of record where the only damages are fees, costs and expenses, however, then O.C.G.A. § 9-15-14 would appear to this author to be the only mechanism for "full justice" (and an abusive litigation claim under title 51 would subsequently be rejected as a matter of law).

In addition to cases cited above, other recent cases that may be helpful in regard to Georgia's Abusive Litigation Statute include *Hallman v. Emory University*, 225 Ga. App. 247, 483 S.E.2d 362 (1997) (opinion by Eldridge, J., reviewing in substantial detail the interplay between 51-7-80 and 9-15-14) and *Great Western Bank v. Southeastern Bank*, 234 Ga. App. 420, 507 S.E.2d

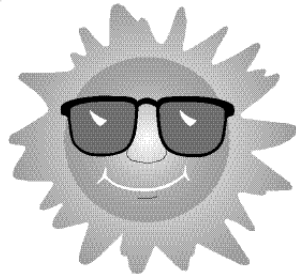
191 (1999) (holding that defendant's failure to seek Rule 11 sanctions in a federal court action against Plaintiff precluded subsequent state court action for abusive litigation against federal court plaintiff).

### CONCLUSION

As noted, the above citations are not intended to and do not "cover the waterfront" in the complex areas of punitive damages and attorneys' fees, but hopefully they will provide a ready reference to applicable and recent law in the area as an "embarkation point" for addressing issues in one of your cases where traditional compensatory damages alone won't do "full justice."

1 This is not to suggest that all post-incident conduct is irrelevant to punitive damages. In fact, post-incident conduct may be highly relevant to a Defendant's "punitive" state of mind, course of conduct, or the need for punitive damages for deterrent purposes. *See, e.g., Moore v. Thompson*, 255 Ga. 236, 336 S.E.2d 749 (1985) (holding that evidence of pleas of guilty to DUI *subsequent* to the incident at issue were admissible on punitive damages issues, for the reasons stated by Judge Beasley in her concurring opinion at 174 Ga. App. 331, 329 S.E.2d 914), *superseded on other grounds as noted in Webster v. Boyett*, 269 Ga. 191, 496 S.E.2d 459 (1998).

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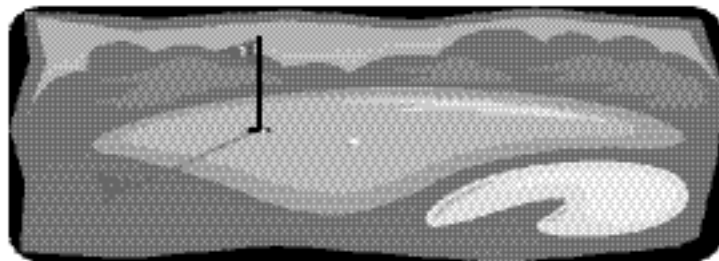
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# Traditional and Non-Traditional Uses of Mental Health Experts in Employment Lawsuits

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## I. The Role of the Mental Health Expert

While expert testimony to support a general claim for mental or emotional distress may not be essential to support some award for such damages, even jury awards for such damages that are unsupported by expert testimony may be subject to reduction. See, e.g., *Dennis v. Columbia Colleton Medical Center*, 290 F.3d 639 (4th Cir. 2002). Despite the fact that emotional distress need not rise to the level of a diagnosable mental disorder to be compensable in employment litigation, establishing a psychiatric diagnosis often makes claims of emotional injury seem more credible. A defendant's ability to refute such testimony successfully typically requires that a mental health professional be retained as an expert on the defense side as well. Notably, in 2001, O.C.G.A. § 9-11-35 was amended specifically to permit the Georgia courts to require examination of a party by a licensed psychologist as well as by a physician, as in the past, thus heightening the potential importance of the opinions of mental health experts in many cases.

The most common role of the mental health expert is to provide diagnostic assessments and opinions regarding the causation of emotional distress and psychological injury claims and the damages associated

with them. Mental health experts also testify on liability issues as well, for example, where a plaintiff's pre-existing personality pathology gave rise to the workplace events that produced the lawsuit.

#### **A. Expert on Damages Issues ("Traditional" Uses)**

As an expert on damages, the mental health expert examines the plaintiff and then usually gives an expert opinion on one or more issues: (1) Is the plaintiff suffering from a diagnosable mental disorder (or did he or she suffer from such a disorder in the past)? (2) If so, what was its cause? In other words, was the condition solely caused by workplace events, or were alternative stressors totally or partially responsible? (3) Is the plaintiff exaggerating his or her symptoms, and is the plaintiff's therapist's diagnosis appropriate? (4) If the mental disorder has not resolved, what is its prognosis and the course of future treatment?

#### **B. Expert on Liability Issues ("Non-Traditional" Uses)**

The mental health expert might also testify on liability issues in addition to or instead of damages issues. Such liability issues can include:

- Whether the plaintiff in a discrimination or intentional infliction case suffers from a personality disorder that caused him or her to misperceive the words and actions of supervisors or coworkers or that affected the plaintiff's interaction with others in the workplace.
- Whether the plaintiff in a sexual harassment case suffers from a personality disorder or traits that caused him or her to perceive the words or actions of supervisors or coworkers in ways other than a "reasonable person" would have perceived them or that caused him or her to "welcome" the conduct at issue in the litigation.

## **II. The Relationship Between the Expert and the Attorney**

Too often, defense counsel treat their mental health expert as remote and unapproachable. This is a mistake. In spite of the necessity for objectivity, the mental health expert is an important member of the defense team.

#### **A. The Expert Should Be Retained Early in the Case**

While many attorneys put off the expense of a mental examination of the plaintiff until late in the case, doing so is often a mistake. The expert should be retained sufficiently early in the case to permit the expert to help educate counsel concerning the possible mental health issues that may be involved in the case and to help shape the theory of the case to integrate those issues and the facts revealed during discovery.

For example, in a sexual harassment case, the defendant might expect to defend the case by steadfastly denying that any of the alleged conduct occurred. A psychiatric examination might reveal, however, a hypersensitivity to sexual cues on the part of the plaintiff, suggesting that the plaintiff did not react to the alleged harasser's compliments and requests for dates as a "reasonable person" would have done. The time to reconcile such inconsistent defenses is early in the case, not on the eve of trial after depositions of the accused harasser and the expert have been taken.

#### **B. Counsel Must Provide the Expert with the Tools Necessary to Be Effective**

Since the actual mental examination of the plaintiff is relatively short and the plaintiff may not be completely forthcoming about all aspects of his

or her life, it is essential that a variety of records be obtained and supplied to the expert before the mental examination of the plaintiff. Records that must be obtained and provided to the expert as soon as possible include:

- Records of all of the treating physician(s), psychologist(s) and psychotherapist(s) of the plaintiff (including patient questionnaires, billing records and psychological testing materials);
- Records of any prior hospitalizations of the plaintiff;
- Records of any prior mental health treatments;
- Records of the plaintiff's primary care physician(s);
- Personnel files from the plaintiff's prior and subsequent employers;
- High school and college transcripts and disciplinary records;
- Court files from prior divorce and child-custody cases; and
- Prior criminal records, if any.

Counsel should also provide the following legal documents to the expert as soon as they become available:

- Complaint or last amended version;
- Depositions of plaintiff and key defense witnesses;
- Written discovery responses (*e.g.*, interrogatory answers) that address mental or emotional damages; and
- Depositions of opposing experts.

In *Rhea v. Rhodes, Inc.*, Case No. 1:02-CV-1746-WBH (N.D. Ga. Order of March 5, 2003), Judge Feldman ordered the production of records by a Title VII and intentional infliction plaintiff's treating psychiatrist even though plaintiff contended that she had last seen the psychiatrist "three years before the incidents which form the substance of the instant complaint . . ." and that such records were privileged under the "psychiatrist-patient privilege." The court ordered that

*Continued on next page*

these records be provided to the defendant because the court could not “conclude that treatment rendered three years prior to the events in this case will not lead to the discovery of relevant evidence.”

### III. The Mental Examination of the Plaintiff

#### A. Compelling a Mental Examination over the Plaintiff’s Objection

Rule 35 of the Federal Rules of Civil Procedure and O.C.G.A. § 9-11-35 provide that when the mental condition of a party is at issue in a lawsuit, upon a showing of “good cause,” the court may order that party to undergo a mental examination by a physician or psychologist. Later, in the *Rhea* case discussed above, the court compelled the plaintiff to submit to a psychiatric and psychological examination, “as plaintiff contends that [she has suffered] compensable mental injuries.” *Id.* Order, May 28, 2003. Similarly, in *Abdullah v. Egleston Children’s Hospital*, Case No. 1-97-CV-1823-JOF (N.D. Ga. Order of February 6, 1999), the court required disclosure of the plaintiff’s medical treatment and related medical records, including records of professionals who provided counseling to plaintiff in drug rehabilitation and who treated him for stress where the plaintiff contended that he had suffered emotional damages caused by the defendant.

Although no court order is necessary if the parties agree to a mental examination of the plaintiff, plaintiff’s attorneys more frequently object to mental examinations or agree to them only with very restrictive conditions. If no agreement can be reached for a mental examination to occur under conditions that are sufficiently flexible to allow the de-

fense examiner to conduct a meaningful inquiry, a motion will be necessary.

Usually, as shown above, the court will order the plaintiff to undergo a Rule 35 mental examination where the plaintiff seeks to recover damages for mental or emotional injuries. Occasionally, however, a court will deny a defendant’s request for a Rule 35 mental examination where the plaintiff merely describes his or her mental damages in general in terms of “embarrassment,” “humiliation,” “mental anguish” and similar non-clinical terms. The weight of judicial authority holds, however, that a defendant is entitled to have the plaintiff undergo a Rule 35 mental examination when one or more of the following are present:

- The plaintiff claims to have suffered a diagnosable mental disorder;
- The plaintiff obtained medical or psychological treatment for his or her injuries;
- The plaintiff plans to have a psychiatric or psychological expert testify at trial;
- The plaintiff claims to be suffering continuing emotional distress; and/or
- The plaintiff has pled a separate claim for intentional infliction of emotional distress.

For example, in *Bethel v. Dixie Homecrafters, Inc.*, 192 F.R.D. 320 (N.D. Ga. 2000), the court ordered plaintiff Bethel to undergo an examination by a psychiatrist even though the plaintiff had not identified an expert witness where she had placed her mental condition in issue and was seeking substantial damages for alleged emotional injuries in her suit for alleged intentional infliction of emotional distress and Title VII. Plaintiff Bethel admitted to other events in her life besides the defendant’s alleged misdeeds,

including four (4) marriages and divorces, abuse by her last husband, drug rehabilitation treatment, and diagnosis with skin cancer that might have been the cause of her emotional distress or that might have contributed significantly to that distress. The court concluded:

Given the nature of Plaintiff’s claims, the fact she has squarely placed her mental condition in controversy, and because of the existence of treating health care professionals who may testify on Plaintiff’s behalf and the existence of other life events that may be contributing factors to Plaintiff’s emotional distress, the court finds that Defendants have affirmatively established good cause for the mental examination.

*Id.* at 323.

#### B. Avoiding Restrictions on Duration or Scope of Examination

Adequate time must be allowed for the examination, given the amount of information that must be obtained. Typically, six to eight hours of face-to-face clinical interview are necessary.

Sometimes plaintiff’s counsel may be willing to stipulate to a mental examination but may insist on conditions or restrictions on the examination. For example, counsel may seek to limit the examination to only two or three hours or may seek to restrict the examiner’s inquiry to exclude certain topics such as the plaintiff’s personal or mental health history before the events at issue in the litigation. These restrictions and conditions must be resisted, and a motion to compel a Rule 35 examination should be brought. Courts have refused to place severe time restrictions on Rule 35 mental examinations. *See, e.g., Morton v. Haskell Co.*, 5 AD Cases 272 (M.D. Fla. 1995) (two-hour restriction rejected);

*Gavenda v. Orleans County*, 174 F.R.D. 272 (W.D.N.Y. 1996) (court declined to impose time limit on examination).

Similarly, the examiner must have wide latitude to conduct a thorough inquiry of the plaintiff's family and educational background, employment history, prior traumatic events (including sexual abuse), prior medical and psychiatric treatment, marital and relational history, and possible alternative sources of emotional distress. Courts generally are reluctant to restrict the scope of an examiner's inquiry. For example, one court permitted the following range of inquiry in a sexual harassment case:

The scope of the examination will be: a full history of plaintiff's entire mental history and its causes; all psychological problems and/or damages that she may have experienced in the past, is currently experiencing or may continue to experience in the future; and the extent of and causes of any such problems.

*Ferrell v. Shell Oil Co.*, 1995 WL 688795, at \*2 (E.D. La. 1995). Similarly, the *Bethel* court authorized an examination to provide "information that reasonably may relate to the issue of causation and the assessment of damages for alleged psychological injuries and any alleged mental stress suffered by Plaintiff . . . and may include recognized and appropriate psychological testing." *Bethel*, *Id.* at 324, n.3.

Sometimes plaintiff's counsel will seek to prevent an examiner from questioning a plaintiff about her sexual history. At least one federal court declined a plaintiff's request that the examiner be prevented from questioning her about her sexual history. In *Hertenstein v. Kimberly Home Health Care, Inc.*, 80 FEP Cases 355 (D. Kan. 1999), the court explained:

This is a sexual harassment case.

[The plaintiff's psychological expert] has opined that alleged actions or inactions of defendant proximately caused the emotional distress of plaintiff. To validly assess her emotional state, the examiner must have leave to make relevant inquiries. To prohibit inquiry into private sexual activities may unreasonably restrict exploring the history of plaintiff relevant to this case.

*Id.* at 359.

Sometimes a plaintiff's counsel may invoke Rule 412 of the Federal Rules of Evidence as a means of attempting to limit an examiner's inquiry into a plaintiff's sexual history. Rule 412 was amended in 1994 to address the admissibility of the victim's sexual history in civil lawsuits alleging sexual harassment or abuse. The amended Rule 412 begins with a general prohibition against the admission of evidence (1) offered to prove that any alleged victim engaged in other sexual behavior, or (2) offered to prove any alleged victim's sexual predisposition. Notwithstanding these restrictions, the Rule makes evidence offered "to prove the sexual behavior or sexual predisposition of any alleged victim" admissible "if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." Some courts have applied Rule 412 to discovery of sexual history information. See, e.g., *Truong v. Smith*, 183 F.R.D. 273 (D. Colo. 1998); *Giron v. Corrections Corp. of America*, 981 F. Supp. 1406 (D.N.M. 1997); *Sanchez v. Zahibi*, 166 F.R.D. 500 (D.N.M. 1997); *Barta v. City & County of Honolulu*, 169 F.R.D. 132 (D. Haw. 1996). Others have refused to do so. See, e.g., *Holt v. Welch Allyn, Inc.* 3 WH Cases 2d 1622 (N.D.N.Y. 1997); *Ramirez v. Nabil's, Inc.*, 1995 WL 609415 (D. Kan. 1995).

Most of the cases interpreting Rule 412 have involved *volitional* sexual

conduct on the part of the plaintiff; *i.e.*, consensual sexual relationships. Also of extreme significance in sexual harassment cases, however, is the existence of any earlier *non-volitional* sexual experiences in the plaintiff's lifetime — *i.e.*, sexual abuse or assault. Molestation as a child or sexual assault as an adult can have a profound and lasting impact on the psychological condition of the victim and is an essential topic of inquiry during a Rule 35 examination of an alleged victim of sexual harassment. At least two courts have held that Rule 412 does not apply to a plaintiff's history of sexual abuse. E.g., *Delancey v. City of Hampton*, 999 F. Supp. 794 (E.D. Va.), *aff'd*, 135 F.3d 769 (4th Cir. 1998) (table), *McClelland v. Montgomery Ward & Co.*, 1995 WL 571324 (N.D. Ill. 1995). But see *S.M. v. J.K.*, 262 F.3d 914 (9th Cir. 2001) (suggesting without holding that prior sexual abuse would be subject to Rule 412).

### C. Preventing Interference from Outsiders

In employment cases, plaintiffs ordered to submit to a mental examination will often request the presence of a third party, such as their attorney, psychotherapist, relatives, or a court reporter. One leading forensic psychiatrist has observed, however, that:

The presence of third parties is fraught with difficulties. Sometimes, such "observers" are converted into witnesses that are used against the examiner, usually criticizing the method of the examination. When the claimant's attorney is present, the claimant's psychological symptoms may appear worse, even if the attorney does not directly interfere with the examination. The attorney's presence highlights the adversarial context of the examination, usually contributing to additional anxiety and a focus on symptomatology

*Continued on next page*

by the claimant. The presence of supportive family members and friends may cause the claimant to appear less symptomatic than previously reported. Emotional support can have a very quieting and soothing influence on the claimant.

Robert I. Simon, *The Credible Forensic Psychiatric Evaluation in Sexual Harassment Litigation*, 26 *Psych. Annals* 139, 142 (1996). In the Northern District, such concerns led the *Bethel* court to refuse the plaintiff's request to have her attorney present during the ordered mental examination, saying that the court agreed with the reasoning in *Shirsat v. Mutual Pharmaceutical Co., Inc.*, 169 FRD 68, 70 (E.D. Pa. 1996). The *Shirsat* court also noted that "an observer, court reporter, or recording device would constitute a distraction during the examination and work to diminish the accuracy of the process." Further, the *Shirsat* court concluded that "the presence of the observer interjects an adversarial, partisan atmosphere into what should be otherwise a wholly objective inquiry[.] . . . [and that] it is recognized that psychological examinations necessitate an examination unimpeded, one-on-one exchange between the doctor and the patient." *Id.* at 71. See also *Breda v. Wolf Camera, Inc.*, 78 FEP Cases 433 (S.D. Ga. 1998), where the court also refused to allow counsel to be present during the examination.

A majority of federal courts in employment cases have disallowed the presence of plaintiff's counsel during the Rule 35 mental examination absent compelling reasons to find otherwise. See, e.g., *Ferrell v. Shell Oil Co.*, 1995 WL 688795 (E.D. La. 1995); *Hirschheimer v. ASOMA Corp.*, 1995 WL 736901 (S.D.N.Y. 1995); *Vinson v. Superior Court*, 43 Cal.3d 833, 239 Cal. Rptr. 292 (1987); *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296, 299

(E.D. Pa. 1983); see also *Wheat v. Biesecker*, 125 F.R.D. 479, 480 (N.D. Ind. 1989) (noting that majority rule is that plaintiff's attorney may not attend a Rule 35 examination). Justifications advanced for this view include: (1) the need to conduct the examination without the distractions of a third person in order to obtain a valid psychiatric profile; (2) providing the defendant with a "level playing field" since the plaintiff's physician examined the plaintiff without the presence of the defendant's attorney; (3) preventing a more adversarial atmosphere during such examinations than is, already, unavoidably present; (4) the possible conflict of interests created by the fact that the presence of the plaintiff's attorney during the examination makes the attorney a potential witness at trial; and (5) the availability of other less obtrusive devices to protect the interests of the plaintiff.

#### **D. Psychological Testing During Mental Examinations**

Psychological testing can be useful in harassment and discrimination cases. The MMPI-2 is routinely allowed during Rule 35 mental examinations. For example, in *Breda v. Wolf Camera, Inc.*, Case No. CV 497-366 (S.D. Ga. Order of October 16, 1998) the court ordered, over plaintiff's objection, administration of both the MMPI-2 and the Rorschach tests as "acceptable diagnostic indicators in a mental examination" even though plaintiff's own "clinician opted to forego the testing" because "reasonable professionals . . . differ in their treatment and diagnostic practices." The court concluded that a mandate by the court to deny the expert "his usual methods of diagnosing would be a presumptuous intrusion into a highly specialized field." Likewise, in *Burger v. Litton Industries*, 68 FEP Cases 737 (S.D.N.Y. 1995), over the

plaintiff's claim that such testing amounted to "harassment," the court ordered the plaintiff in an age and sex discrimination case to take the MMPI-2, which it described as a "generally accepted and commonly used test to obtain a psychological profile and history of the subject." See also *Shirsat v. Mutual Pharm. Co.*, 169 F.R.D. 68, 71-72 (E.D. Pa. 1996); *Hirschheimer v. ASOMA Corp.*, 1995 WL 736901, at \*4-5 (S.D.N.Y. 1995); *Workman v. Carolina Freight Carriers Corp.*, 65 FEP Cases 1209 (M.D. Ala. 1994); *Chaparro v. IBP, Inc.*, 1994 WL 714369 (D. Kan. 1994).

### **IV. The Expert's Opinion**

The evaluation of a plaintiff in litigation involves a review of the individual's personal history, family history, his or her own developmental history (including school history), interpersonal functioning, vocational functioning, employment history, medical history, psychiatric history, role functioning in different areas, and finally, a review of his or her current cognitive and emotional state. Only after all of these factors are considered can an opinion regarding diagnosis and causation be reached.

#### **A. Psychiatric Disorders Typically Found in Employment Litigation**

Criteria for psychiatric diagnoses are defined in the *Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Text Revision (DSM-IV-TR)*. Psychiatric diagnoses often found in employment cases include:

- Mood disorders
- Anxiety Disorders, including Panic Disorder, Generalized Anxiety Disorder, and Posttraumatic Stress Disorder.
- Somatoform disorders
- Psychoactive substance induced disorders

- Sleep disorders
- Sexual function disorders
- V-code disorders of marital, occupational, interpersonal or bereavement issues

Sometimes malingering occurs in the litigation context, but the examiner must use care not to rush to such a conclusion just because a plaintiff may have an incentive (i.e., a large damage award) to feign or exaggerate symptoms. Malingering should be strongly suspected, however, if a combination of the following are present:

- Medicolegal context of presentation.
- Marked discrepancy between the person's claimed stress or disability and the objective findings.
- Lack of cooperation during the diagnostic evaluation and in complying with prescribed treatment regimen.
- The presence of Antisocial Personality Disorder.

#### **B. Preparation of Written Report**

Federal Rule of Civil Procedure 26(a)(2) requires that experts prepare written reports that are provided to the opposing party. O.C.G.A. § 9-11-35(b) requires that if a party against whom the court has ordered a mental examination requests a report, "the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or psychologist setting out his findings, including results of all tests made, diagnoses, and conclusion, together with the reports of all earlier examinations of the same conditions." If the matter is in a jurisdiction in which a report is not required, the following should be considered:

- Will the report just do the opposing counsel's work, or would it be better to force

opposing counsel to learn of the expert's opinions through a deposition?

- Is the case an especially complicated one, such that a written report might help with the presentation of the expert's opinions to the jury?

The expert's opinion (and the reasoning in support of it) must be well-organized and obviously should be consistent with other evidence in the case. The expert and counsel should discuss the expert's opinion before the expert is deposed.

Any expert's report should contain a complete statement of all of the expert's opinions, including the basis and rationale for the opinions, the data relied upon, a catalog of documents reviewed, collateral interviews conducted, and consultations the expert has considered in formulating the opinions expressed. The Federal Rules of Civil Procedure require the expert to include a list of all publications he or she has authored in the past ten years, medical literature or texts relied upon, compensation paid for the evaluation and testimony, and a listing of any other cases in which he or she has testified as an expert within the preceding four years. See F.R.C.P. 26 (a)(2).

### **V. Non-Traditional Uses of Experts and the Role of Axis II Issues in Cases Alleging Harassment, Discrimination, and Intentional Infliction of Emotional Distress**

Psychiatric diagnoses are given on several "axes." Axis I is where acute psychiatric conditions, such as depression, anxiety disorders or PTSD, are diagnosed. Axis II is where personality disorders are diagnosed. Personality disorders are collections

of longstanding pathological personality traits that often adversely affect a person's perception of his or her social environment and ability to get along with others. Personality disorders can play important roles in harassment, discrimination and intentional infliction lawsuits in two key respects: (1) by providing an alternative explanation for emotional distress suffered by the plaintiff, and (2) by constituting the primary cause of the workplace incident at issue.

#### **A. Alternative Cause of Plaintiff's Emotional Distress**

Axis II pathology often can be the cause of emotional distress that may be misattributed to workplace events that occur in temporal proximity with those events.

For example, persons with Borderline Personality Disorder frequently suffer depressions that are not attributable to contemporaneous events but rather to the pathological nature of their own personality development. Individuals who have Borderline Personality Disorders and other personality disorders often repeatedly make poor life choices. They may then suffer depression as a result of failures in the areas of interpersonal relationships, academic achievement and vocational success. Personality disorders may also cause other symptoms and other conditions, such as depression, anxiety, marital discord, relationship difficulties, low self-esteem, substance abuse (including abuse of prescription medication) and even suicide attempts, that may be misattributed to the workplace.

Therefore, where it appears evident that the plaintiff suffers from a personality disorder, it should be considered whether the plaintiff's various symptoms of physical and emotional distress might be more accurately attributed to a personality disorder rather than to workplace events.

*Continued on next page*



## **B. Catalyst of Many Harassment and Discrimination Claims**

It may be that the plaintiff's psychological problems caused the workplace dispute in question, instead of vice versa. This result is particularly true with respect to Axis II pathology. Such pathology may be the catalyst of harassment and discrimination claims in two respects.

### **1. Cause of Conflicts Between Plaintiff and Coworkers**

Personality disorders often cause conflicts between a plaintiff and his or her coworkers that lead to claims of victimization by the plaintiff. In this sense, a plaintiff suffering from a personality disorder may not be merely the innocent victim of another's unprovoked wrongdoing. Such a plaintiff's own irritability, perfectionism, manipulation of others, or sexually suggestive behavior is often the beginning of a chain of events that ultimately leads to a claim of wrongful termination, harassment, or discrimination.

- For example, an employee with a Borderline Personality Disorder may direct sexually suggestive comments or even blatantly seductive conduct toward a supervisor and then angrily accuse the supervisor of sexual harassment should he respond. Borderline personalities tend to view others (particularly those in positions of authority) in extreme terms as either "all good" or "all bad." In the eyes of the Borderline, a boss can go from hero to defendant almost instantly. Such an employee may idolize a supervisor until the boss criticizes the employee's work performance and then react with rage and accuse the supervisor of misconduct.
- An employee with a Histrionic Personality Disorder may dress inappropriately and address flirta-

tious innuendos to her supervisor or coworkers, and then react with surprise (and file a sexual harassment claim) when one of them accepts her apparent sexual overture.

- An employee with an Antisocial Personality Disorder may become involved in altercations or physical violence with coworkers or launch disrespectful verbal attacks on his supervisor, then claim harassment or discrimination when disciplined for it.
- A manager with a Narcissistic Personality Disorder, whose insensitivity toward others may cause subordinates to seek to avoid him or to complain of mistreatment, may ultimately fail as a manager. He will likely react with rage when demoted or terminated, blaming everyone but himself for his troubles in the ensuing litigation.

Most people with personality disorders are wholly lacking in insight into their situation. In their view, they are fine; it is everyone else who has problems. Accordingly, when they fail in the workplace or encounter conflicts with supervisors or coworkers, they often begin a hunt for a culprit that often ends in a lawsuit.

### **2. Cause of Plaintiff's Misperception of Words and Acts of Others**

Personality disorders often are relevant to a plaintiff's perception of the events that precede litigation. Individuals with personality disorders often interpret events in a distorted fashion, thus accounting for the diametrically opposite characterizations of the very same event by the plaintiff and defendant in so many employment lawsuits, particularly in "he said/she said" and similar cases where there are no third-party witnesses to help break the credibility impasse. Unlike psychotic individu-

als who have patently bizarre perceptions, employees who have personality disorders have relatively good contact with reality. Thus, their accusations of coworker misconduct, although false, are not obviously bizarre and on the contrary may sound quite plausible. Often, to the personality-disordered individual, "believing is seeing."

For example, if on account of a personality disorder one presumes that another person is thinking in sexual terms, a variety of behaviors can be construed as sexual in nature — choice of clothing, a smile, an inadvertent touch, a compliment, any sort of effort to engage in joint activities, how close one stands, an invitation to lunch, humorous remarks, gestures, the amount of eye contact, glances, references to other relationships — the list is endless.

Similarly, if one assumes that others are discriminating against him or her, one may perceive discrimination to be lurking around every corner. Inattention, inadvertent slights, non-specific discourtesy, lack of personal concern, random acts of preference, and numerous other ordinary events are consistent with such an assumption and may be construed by the personality disordered individual as evidence of discrimination or bias.

## **C. Recognition by Courts of the Role of Personality Disorders**

Courts have begun to recognize the role that personality disorders play in the genesis of disputes involving alleged workplace harassment, discrimination and intentional infliction claims.

### **1. *Lowe v. Philadelphia Newspapers, Inc.*, 594 F. Supp. 123 (E.D. Pa. 1984)**

In this racial harassment case, the court admitted the testimony of a psychiatrist to show that, because of a personality disorder, the plaintiff was oversensitive to ordinary criticism and perceived it as

harassment. The plaintiff had attempted to have the court exclude testimony of defense psychiatrist concerning her personality disorder from the liability phase. In denying the plaintiff's motion, the court observed that the psychiatrist's testimony was relevant to "whether the alleged harassment claimed by plaintiff is racial and is harassment at all." The court noted that one defense psychiatrist had testified on deposition that, because of her personality disorder, the plaintiff was overly sensitive and may have overreacted to events on the job. As the *Lowe* court explained:

Testimony concerning a . . . plaintiff's mental disorder which causes him or her to perceive criticism as harassment, and to perceive racial slurs where no racial motivation is present, is highly relevant to the question whether plaintiff's perception of racial harassment is correct.

594 F. Supp. at 126.

**2. *Spencer v. General Electric Co.*, 697 F. Supp. 204 (E.D. Va. 1988), *aff'd*, 894 F.2d 651 (4th Cir. 1990)**

A personality disorder was found to be at the root of this sexual harassment case. Although the court found that a hostile working environment existed based upon sexual joking and horseplay on the part of the plaintiff's supervisor and coworkers, it rejected the plaintiff's allegations of more serious misconduct, including "more than 100 sexual assaults" by her supervisor in the workplace during the workday, none of which was corroborated by third-party witnesses. The plaintiff attempted to explain the numerous inconsistencies in her story by presenting testimony from her psychiatrist that the harassing events caused her to develop a post-traumatic stress disorder that impaired her ability to recall details. The court rejected this notion and in-

stead credited the testimony of the defense psychiatrist that the plaintiff's "memory problems" resulted from "convenient selectivity rather than emotional trauma" and that the plaintiff suffered from Histrionic Personality Disorder. The court cited the characteristics of such a disorder, including "immaturity, shallowness, self-centeredness, obsession with one's personal appearance and exaggerated emotionality," and then observed that having heard hours of testimony from and about the plaintiff, the defense psychiatrist's conclusions "ring true."

**3. *Sudtelgte v. Reno*, 63 FEP Cases 1257 (W.D. Mo. 1994)**

The court admitted extensive psychiatric testimony in this sexual harassment lawsuit concerning the fact that the plaintiff suffered from a Paranoid Personality Disorder that adversely affected her ability to get along with supervisors and coworkers and that caused her to feel persistently "picked on." The plaintiff alleged a variety of "harassing" conduct, such as coworkers asking to borrow her car, urging her to drink beer with them, and once photographing her with her finger in her nose. Several psychiatrists and psychologists testified at the trial, all to the same general effect that the plaintiff had numerous preexisting chronic mental problems, including a personality disorder, that interfered with her ability to get along with others and that caused her to misperceive events and the motivations of others. The *Sudtelgte* court held that although the plaintiff subjectively may have felt harassed, her feelings were the result of her abnormal sensitivity caused by her personality disorder, and she could not show that a "reasonable woman" would have been similarly offended. The *Sudtelgte* court also noted the effect of the plaintiff's personality disorder on her credibility, observing that the plaintiff's "current perceptions of present and past events are

grossly unreliable, probably because of her mental illness."

**4. *Pascouau v. Martin Marietta Corp.*, 994 F. Supp. 1276 (D. Colo. 1998), *aff'd in relevant part*, 185 F.3d 874 (10th Cir. 1999)(table)**

The most recent and dramatic recognition by a court of the role of personality disorders in the genesis of harassment and discrimination claims occurred in this case, in which the plaintiff claimed coworkers called her names and passed gas in her presence. The court concluded that "the conduct that could be described as harassment was not based on gender, but rather on Plaintiff's demonstrated lack of interpersonal skills." In its discussion of the facts of the case, the court described at some length the plaintiff's pre-existing psychological problems, many of which arose from the plaintiff's dysfunctional childhood. The court noted that the plaintiff still suffered symptoms of Posttraumatic Stress Disorder as a result of an incident when she was eight years old in which her mother forced her and her sister into a car at knifepoint and then drove the car off a bridge in a suicide attempt. One of the *Pascouau* plaintiff's pre-existing conditions was a mixed personality disorder with borderline and narcissistic characteristics. The *Pascouau* court explained the relevance of the plaintiff's personality disorder:

The personality disorder is a condition, largely the product of being raised in a dysfunctional home with dysfunctional parents, in which Plaintiff did not learn how to solve problems effectively or to communicate effectively with other people. The disorder leads to the formulation of implausible perceptions and thus different kinds of conclusions about what other people's actions and behavior mean as distin-

*Continued on next page*

guished from what a reasonable person not subject to such a disorder would perceive them to mean.

Consistent with this disorder, Plaintiff makes judgments that are highly personalized and overly emotional. She sees things in black and white terms rather than shades of gray that permit allowances and generally feels whatever goes wrong is someone else's fault and she had no role in the misadventure. Persons with this disorder take no responsibility for what goes wrong in their lives.

994 F. Supp. at 1279. The court then discussed the role in the case of the symptoms of Borderline Personality Disorder exhibited by the plaintiff:

The essence of the Plaintiff's complaints in this case is the product of Plaintiff's "splitting," a psychiatric term meaning the patient initially over-evaluates and over-values other people, and then, when the slightest thing goes wrong, demeans those people and becomes angry and upset with them. The major affective characteristic is anger or rage. Secondarily, such a person is fearful of being abandoned or not being liked and does not want to be alone. As a result, the borderline personality very often gets involved in unsuccessful intimate relationships. Depression frequently accompanies this personality disorder because the unsuccessful outcomes of interactions with other people lead to prolonged disappointment.

*Id.* The court credited the testimony of the defense psychiatrist, a Dr. Plezak, noting:

When asked if Plaintiff's allegations had any role in the causes of Plaintiff's disorders, Dr. Plezak replied that the situation is re-

versed in that the disorders are causes of the allegations. The incidents Plaintiff related were characterized by misinterpretations of events and interactions with fellow employees that were far more intense than would be interpreted by a reasonable person.

*Id.* Conversely, the court rejected the view of the plaintiff's psychiatrist that all of the plaintiff's emotional difficulties were the result of her experiences in the workplace, noting that "his conclusion dismisses the profuse psychiatric history of the Plaintiff which accounts for the symptoms she had displayed all her life and continued to display even at the time of trial."

#### **D. Presentation of Axis II Findings**

Axis II pathology may play a variety of roles in an employment lawsuit, which should be explained thoroughly by the expert in any written report or testimony on deposition or at trial. Examples include:

**1. Plaintiff has a personality disorder that caused her to instigate events of which she now complains.**

This situation appears sometimes in sexual harassment cases where an employee with Borderline or Histrionic Personality Disorder "gets the ball rolling" with seductive banter or conduct and then complains when coworkers respond in kind. These effects would be relevant to the issue of the defendant's liability since a plaintiff who "welcomes" harassing conduct cannot later complain about it.

**2. Plaintiff has a personality disorder that caused him to misinterpret words or actions of coworkers.**

A Borderline employee may interpret a supervisor's compliment or friendliness as a sexual overture. An employee with Paranoid Personality

Disorder may interpret coworkers' inadvertent failure to invite him to lunch as racially discriminatory or as a sign that he is about to be fired. The existence of such a disorder would also be relevant to liability in that the allegations of discrimination are a product of the plaintiff's psychological processes rather than of external reality.

**3. Plaintiff has a personality disorder that produced symptoms of emotional distress.**

A Borderline, Narcissistic or Obsessive-Compulsive employee may suffer great distress as a result of a rejection by a significant other outside of work. Particularly in the case of a Borderline, the reaction may be extreme, including making suicidal gestures or requiring psychotropic medication. The existence of this type of disorder would be relevant as it would provide an alternative explanation (besides the workplace event in question) for the plaintiff's objectively-verifiable emotional distress.

**4. Plaintiff has a personality disorder but was nonetheless the subject of unlawful conduct.**

An Axis II diagnosis does not always carry significance in an employment lawsuit. Sometimes, even though the plaintiff has a personality disorder, he or she may still have been the subject of unlawful treatment and have suffered emotional distress as a result that is unrelated to the personality disorder.

**5. Plaintiff has a personality disorder that exacerbated the emotional distress suffered as the result of illegal conduct.**

This is an example of the "eggshell skull" principle applied to Axis II disorders. An employee with Dependent Personality Disorder may become inordinately attached to a supervisor and then be devastated by an unlawful termination, or a Borderline employee may be exploited sexually by an unscrupulous supervisor and then attempt suicide and

require hospitalization following the breakup of the trust. The employer could be liable for this additional damage suffered on account of the plaintiff's heightened susceptibility to harm.

#### **Conclusion**

For these reasons strong consideration should be given to evaluation of a plaintiff's mental condition, even where he or she asserts only general emotional distress damages, without indicating an intent to support such claims with expert testimony. Appropriate examination by a qualified psychiatrist or psychologist may reveal tendencies in the plaintiff caused by personality disorders to see reality differently than objective reality actually was and may also provide critical information to assess causation and extent of injury.

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## **TRADITION OF EXCELLENCE BREAKFAST AND AWARDS CEREMONY**

**TBA**

## **TRADITION OF EXCELLENCE RECEPTION**

# Daubert: The Emerging Profile

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Tyron is a trial attorney practicing personal injury law with traumatic brain injury being one of his areas of concentration. He has obtained verdicts for clients against defendants ranging from Delta Airlines to the United States. He is on the editorial board of the *Journal of Life Care Planning* and of the *Neurolaw Letter*. He is a frequent lecturer in the area of expert witness presentation under the Daubert rules. He has been on the faculty of Intelicus as a presenter for several years.

Tyron is also a certified mediator, conducting both court ordered and private mediation of tort cases in the State of Georgia.

With impact and pervasiveness reminiscent of the way the *Miranda* ruling affected criminal law, the decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed 2d 469, is changing the landscape of civil litigation. It began with what seemed to be a reasonably narrow change in the way scientific expert testimony would be considered by the Federal courts. It gave out guidelines for the admission of testimony regarding testing of the theory or technique used, examination of peer review and publication, examination of the actual error rate, and examination of the general acceptance of the theory in the scientific community. As the progeny of *Daubert* began to emerge, however, the extent and implications of the ruling have spread like ripples on a pond. Some decisions have carved out small but definite distinctions in its applications and others have made great leaps in expanding its scope. With awareness that the impact of *Daubert* is still in flux this article will examine how the Supreme Court and some of the Circuit Courts have refined and shaped the impact of this case in the few years since its arrival.

Any complete analysis requires a reading of *Daubert* itself; but the principal effect of the case was to toss out the old standard of analysis for expert testimony set forth in *Frye v. United States*, 293 F. 1013 (CADC 1923) and change not only the rules for admission of such testimony but

the duty of the trial judge in deciding admissibility. In *Frye* the judge had only to determine if the proffered opinion was of a type that had found acceptance in a relevant field of study by the general scientific community. *Frye's* broad standard was narrowed by *Daubert* and the judge became the arbiter of all aspects of validity using the *Daubert* guidelines. Under *Frye* the judge simply had to decide if other scientists had used this approach. Under *Daubert* the judge becomes the scientist and must make the threshold decision as to whether the particular opinion is "based on valid scientific reasoning and principles".

Both the *Daubert* and *Frye* standards had to fit into the mandates of Rule 702 of the Federal Rules of Evidence. The Rule states that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

It is not enough, then, just to look at the *Daubert* standards and try to see if the expert testimony provides a fit. *Daubert* standards are now considered by many courts as one prong of a three-pronged test the expert must pass in order to have that expert's testimony allowed in evidence. First, the expert must be qualified to testify competently regarding the matters he intends to address; that is, he must

prove that he is, in fact, an expert. Second, his methods must meet the *Daubert* standards. Third, the testimony must assist the trier of fact to understand the evidence or to determine a fact in issue and thus comply with Rule 702. See *City of Tuscaloosa, et al. v. Harcos Chemicals, Inc., et al.* 158 F.3d 548 (11th Cir. 1998).

In the beginning many Circuit Courts sought to limit the application of *Daubert* by simply concluding that it applied only to scientific expert testimony. [See *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19 (2nd Cir. 1994) and *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51 (1993).] One of the better statements of the use of the common sense approach is found in *Sorensen v. Miller*, 97 F.3d 1452 (6th Cir. 1997) when, quoting *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994) the court said:

"If one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness... On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable expert if a proper foundation were laid for his conclusions."

As we go through the permutations of *Daubert*, it is well to remember that in many instances this is still a good rule. The approach to nonscientific expert evidence changed, however, with the decision in *Kumho Tire Co. v. Carmichael*, 199 S.Ct. 1167, 143 L.Ed.2d 238 (1999). In *Kumho* the Supreme Court said:

"We conclude that *Daubert's* general holding setting forth the trial judge's general 'gatekeeping' obligation applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and other specialized knowledge."

Anticipating that the question

would then be raised as to whether the *Daubert* factors would also have to be considered in nonscientific cases the court went on to state:

"We also conclude that a trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is 'flexible', and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination."

Many cases prior to *Kumho* are of little value because they took the "nonscientific approach". And as those that did are making their way to circuit courts they are being reversed in light of *Kumho*. ( See *Jaurequi v. Carter Manufacturing Co.* 173 F.3d 1076 (8th Cir. 1999).

The statement in *Kumho* about broad latitude being given to district courts was an echo of the other landmark interpretive decision issued in 1997 when the court held in *General Electric Co. v. Joiner*, 522 U.S. 136, 143 that the courts of appeal are to apply the "abuse of discretion" standard when reviewing a district court's reliability determination. The latter ruling simply means that, for the practitioner, the ruling of the district judge is not going to be overturned unless it is patently erroneous. The chance for a second look has been greatly diminished.

One other pronouncement in *Kumho* that is often overlooked is the brief explanation about applying *Daubert's* "general acceptance factor", as they term it, to what may be called junk science. The court said that there is no need to worry about applying the standards if the field or discipline itself lacks reliability. As examples, the court cited the fields of

astrology and necromancy. Even if the usual methodologies in those fields are followed, the fields aren't reliable per se. In *Kumho*, the court set up a test in the nature of a pre-*Daubert* exam of the field itself. If that is found unreliable by the court then no further inquiry as to *Daubert* standards is necessary.

Another issue with lasting implications addressed in *Kumho* is how the expert may be determined to be reliable. The court pointed out that in some cases the reliability of the particular expert testimony may be based upon some scientific foundation and the training, skill, or knowledge of the expert in that foundation must be examined. In other cases the relevant reliability concerns may focus "upon the personal knowledge and experience" of the expert. Circuit courts have, at times, struggled with that distinction.

A good example of the way the circuit courts have wrestled with these issues is found in *Michigan Millers Mutual Insurance Insurance Corporation v. Benefield*, 140 F.3d 915 (11th Cir. 1998), a case decided while *Kumho* was wending its way to the Supreme Court. In *Michigan Millers*, the district court had stricken the testimony of an expert on the origin of a fire. The appellants tried to argue that, since their expert testified on the basis of his experience and skill, the *Daubert* criteria did not apply. The Eleventh Circuit first found that, no matter what the expert claimed, his testimony was science based, rather than experience based. They found that the expert claimed to be an expert in fire sciences and had used the scientific method in making his observations. They observed that the use of "science" to explain how something occurred has the potential to carry great weight with a jury. Once the standard was set the court then reviewed the analysis of the trial judge in looking at the expert's opinions. Using the *Joiner* language

*Continued on next page*

the court found that even if there is data properly gathered the district court may find that the expert failed to make a “rational” connection between the data and his opinion. The language cited from *Joiner* states:

“Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert.”

What *Kumho* and following cases, like *Michigan Millers*, show us is that the trial court may first look at the field itself and decide that it is or is not reliable per se. If it is the latter, discussion ends and the evidence is excluded. Assuming that hurdle is cleared, the court may then decide if the field is such that it requires “scientific” testimony. If it is not one that requires scientific testimony, the court may then examine the individual expertise of the witness based on experience, skill or training. If it does require scientific testimony, the court must decide if there is a reliable nexus between the data and the opinion to be offered. If that reliability is not shown, as in *Michigan Millers*, then the evidence can be excluded at that stage.

For the opposite result, where the court found the expert on cause and origin of a fire properly based his opinion on his “experience and training,” See *Talkington v. Cricket B V*, 152 F.3d 254 (4th Cir. 1998).

The Tenth Circuit has taken a similar approach in applying strict nexus requirements. In *Mitchell v. Gencorp*, 165 F.3d 778 (10th Cir. 1999), the plaintiffs tried to prove exposure to products such as Toluene, Xylene, Hexane, and Haptene by a warehouse worker caused chronic myelogenous leukemia. The court first recognized that under Pennsylvania law the plaintiff, in a toxic tort case, must show the levels

of exposure that are actually harmful to humans in general and then show his own levels of exposure before recovery can be had. The court found the experts failed to do this and thus the “good grounds” test was not met. The court quoted from *Rosen v. Ciba-Geigy Corp*, 78 F.3d 316,318(7th Cir. 1996) summing up its attitude by saying:

“Under the regime of *Daubert* ... a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific evidence offered by a genuine scientist.”

For a similar result, see *Moore v. Ashland Chemical, Inc. et al.*, 151 F.3d 269 (5th Cir. 1998). The dissent in *Moore* laments, however, the fact that the court seems to be saying that a clinical medical expert, correctly using and applying generally accepted clinical medical methodology may not express an opinion that a particular chemical caused, aggravated, or contributed to a person’s disease unless that opinion is corroborated by hard scientific methodology.

This focus on the nexus between the methodology and the opinion, particularly an opinion about causation, is a popular *Daubert* test. The Eighth Circuit, in the case of *Blue Dane Simmental Corporation v. American Simmental Association, et al.*, 178 F.3d 1045 (1999), excluded the testimony of an expert economist that the causes of market fluctuation of the price of the Simmental cattle could be shown by before-and-after economic modeling. The court pointed out that his method did not consider all the “independent variables” that could affect the conclusion and that he could not show other economists used this method to determine causation. There was also a lack of articles or papers showing this method had

ever been used. Citing *Joiner*, the court said there was simply too great an analytical gap between the data and the opinion, a phrase we will hear often.

Even though providing rigorous standards, *Daubert* cannot be used in all complex scientific cases to exclude testimony. In *Kennedy v. Collagen Corporation*, 161 F.3d 1226 (9th Cir. 1998), the facts seemed ready made for the plaintiff’s hopes to be dashed by a *Daubert* exam and, at the district level, they were. But the circuit court reversed and found that the expert should have been allowed to have his say. The plaintiff alleged that she had developed atypical systemic lupus erythematosus from the injection of a product called Zyderm, a substance made from the skin, tendons, and connective tissue of bovine animals. The product was designed to remove wrinkles. The circuit court made a narrow distinction in its reversal of the lower court. The district court had excluded the testimony because the expert could not produce scientific studies showing that Zyderm caused lupus and because there was an absence of consensus in the medical community on whether it did. In a point that will be important for future litigants, the court said the trial judge failed to distinguish between the threshold question of admissibility and the persuasive weight to be accorded such testimony by a jury. In taking this view, the circuit court reached the flip side of the *Michigan Millers* case. In effect, they said that if you examine the methodology of the expert in this case, it is sound enough to let a jury decide proximate cause even though it may not be enough to prove causation. It does not have to prove causation. In this case the expert showed the ingredients of Zyderm induced the body to produce autoimmune antibodies that

are the hallmark of autoimmune disease and backed that up with scientific studies. He then examined the patient and showed through the timing of her disease that she had elevated levels of antihistone antibodies commonly found in patients with a condition known as "drug-induced lupus". The circuit court particularly faulted the district court for emphasizing the lack of epidemiological studies, pointing out that other circuits have allowed scientists to reach conclusions as to causation without these kinds of studies. They also faulted his objection to the expert giving an opinion on causation which is permitted by other circuits as long as it is based upon methods reasonably relied upon by experts in their fields. See, e.g, *Zuchowicz v. United States*, 140 F.3rd 381,387 (2nd Cir. 1998).

When their theories are exposed to the *Daubert* test, some experts may well ask "what am I doing here?" In *Black v. Food Lion*, 171 F.3d 308 (5th Cir. 1999) the plaintiff's expert was trying to prove her fall in the defendant's store caused hormonal damage that led to fibromyalgia. After a review of the literature which shows fibromyalgia to be of unknown etiology, and after an observation of other literature showing no link between trauma and fibromyalgia, the court painted the expert into the corner of having said she had eliminated all other

causes so this had to be it. The court delivered the *coup de main* by saying:

"This is not an exercise in scientific logic but in the fallacy of post-hoc prompter-hoc reasoning, which is as unacceptable in science as in law."

In many ways it seems that *Daubert* is giving district courts the incentive to apply stricter standards of logic, correctly or not.

A subsequent decision of the Supreme Court continues to give little comfort to those who would, by pleading ignorance, try to escape some of the harshness of *Daubert*. In *Weisgram v. Marley Co.*, 528 U.S.440, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000), the court dealt with a situation where the district court was lax in making the *Daubert* exam or applying the *Daubert* rulings, even though *Daubert* challenges were being made by the other side. When the circuit court found the *Daubert* standards were not met, the plaintiff argued to the Supreme Court that he would have shored up his case by other means if he had known his expert testimony would be thrown out under *Daubert*. In effect, he said the district judge didn't enforce *Daubert* so why should I have to meet the tests in retrospect. The Supreme Court said:

"Since *Daubert*, moreover, parties relying on expert

evidence have had notice of the exacting standards of reliability such evidence must meet. It is implausible to suggest, post *Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail. A litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk."

The application of *Daubert* is becoming more precise and more rigorous. The attorney contemplating a *Daubert* challenge must ask the same questions of his case and his witness as the circuit courts are asking. The attorney must be prepared to meet a challenge to the validity of the field of expertise of his expert, be prepared to prove the qualifications of his expert by experience where appropriate and by training where appropriate, and, finally he must be comfortable that the opinion his expert is about to offer is based on some literature in that field somewhere and otherwise provides the analytical fit the court will be seeking. The attorney needs to prepare a *Daubert* checklist for each case.

*Daubert* is considered a minefield laid for the advocate, but at least the careful practitioner can now learn where most of the big ones are buried.



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