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An Asset in Your Case: The Importance of Legal Nurse Consultants

By Marcelle Slobaszewski, RN, BSN, CLNC, founder, and CEO Legal Medical Link - Legal Nurse Consulting & Expert Services

Marcelle Slobaszewski

In any medical injury case, a strong litigation team is of utmost importance and in many cases consists of the attorney and support staff, to include a nurse. Having a registered nurse, more specifically a Legal Nurse Consultant (LNC), as part of your litigation team can be critical. They expertly interpret and analyze complex medical records, identify relevant and crucial medical details, assess the severity of injuries, explain medical terminology, and recommend appropriate medical experts to support the case. Their core competency lies in their ability to help the attorney throughout the entire litigation process, thus enhancing the outcome of their medical related cases. Legal nurse consultants ultimately strengthen the legal case by translating complex medical information into understandable legal arguments, thereby allowing the attorney to build a stronger case strategy and mitigate their client's risk exposure.

Here are 5 reasons you need a legal nurse consultant for your case:

1. **A LEGAL NURSE CONSULTANT CAN ACCURATELY AND EFFICIENTLY REVIEW MEDICAL RECORDS**

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IDCA President's Letter

Pat Sealey
IDCA President

MOVEMENT IS MEDICINE

When I was tasked with putting together the IDCA Annual Meeting in September I immediately knew the most important presentation for me would be the panel on fitness. We had a fantastic panel consisting of Judge Sharon Soorholtz Greer, Jim Craig, Katie Overberg and Gail Witte. If only one of you heard them and decided to make fitness a priority in your life, then the whole meeting can be considered a success.

Seventy-seven percent of the United States population does not make exercise a part of their lives. Exercise is truly a wonder drug. If you could take a pill and it was proven to delay the onset of chronic disease, reduce stress, slow or reverse cognitive decline or allow you to live a decade longer—we would all take that pill. Study after study has shown exercise does all of that, yet only 23% of us choose to exercise. "The data demonstrating the effectiveness of exercise on lifespan are as close to irrefutable as one can find in all human biology". In addition, it is even more effective in preserving your health.

Please consider incorporating exercise into your life. You do not have to go jogging or swim laps. If you are doing no form of exercise now, then the benefits of exercise begin with any activity. Start with going for a walk, practice getting off the ground without any assistance, practice squatting when getting out of the chair without using your arms—DO ANYTHING! Gradually start to incorporate more and more. You will feel the benefits immediately.

Young attorneys start now. If nothing else, model exercise to your children. Give them this wonder drug for them to use in their lives.

Older attorneys it is never too late. Muscle loss and inactivity puts your life at risk. Muscle will help you survive old age. It will allow you to survive adverse outcomes from surgery. It will greatly reduce the chance of your falling, which is a significant cause of death and disability.

I am looking forward to being the President of IDCA this year. I am more looking forward to hearing any of you share with me your exercise journeys. I hope that we all will enjoy a healthy and happy year. I know that is much more likely if we all keep moving.

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- A legal nurse consultant can provide crucial insights into medical record and pre-existing and comorbid conditions, and correlate their relation to alleged injuries. Though many attorneys specialized in injury cases become proficient at reviewing medical records, having a legal nurse consultant on as an available resource can take the understanding and interpretation of these medical records and case issues to the next level.

- Medical records are often voluminous and require a general understanding of medical jargon to understand what the medical professional is notating. If the attorney is attempting to review the records on their own, it generally will take an extended amount of time because the attorney will need to research certain terms in the records to understand exactly what is being read. Legal nurse consultants are better able to efficiently review the records because they understand the terminology and treatment recommendations.

- A legal nurse consultant is familiar with medical records because of the experience gained by preparing medical records throughout their career. The legal nurse consultant will ensure all important details are documented in the records and will also be able to advise if anything important is missing from the records which could have caused the injuries.

- While reviewing the records, a legal nurse consultant will often prepare a summary of the medical treatment. This provides significant case presentation support to the attorney and allows the attorney to pinpoint certain parts of the record without having to spend hours searching. The summary provides a picture of the entire medical treatment rendered, determines risk exposure, and establishes mitigating factors.

2. A LEGAL NURSE CONSULTANT CAN DETERMINE THE LEGAL CAUSE OF INJURY

- A legal nurse consultant will be able to identify factors which mitigate the cause or that which aided in the cause of the injuries sustained. The legal nurse consultant will provide an analysis as to why these actions led to the result and whether or not the offsetting factors diminish the risk exposure. By having a legal nurse consultant, the attorney will be fully prepared to affirm what caused the injuries when presenting the case to opposing counsel or the jury, and interject mitigating factors to offset any risk exposure.

3. A LEGAL NURSE CONSULTANT CAN ADVISE ON THE STANDARD OF CARE

- Legal nurse consultants have an extensive hands-on background working in the medical field and are familiar with the standard of care otherwise known as reasonable care a skilled medical professional should provide to a patient. This helps establish the medical professional's duty to the patient and provides insight as to whether the standard of care was breached. During the review of the medical records, the legal nurse consultant will provide insight as to what the medical professional should have done under the circumstances based on the legal nurse consultant's knowledge, experience, and education. This provides the attorney support in depositions and at trial by explaining what the reasonable standard of care was under the circumstances and how the medical professional failed to act reasonably.

4. A LEGAL NURSE CONSULTANT CAN ASSIST BY MITIGATING DAMAGES

- The last element an attorney needs to argue is the amount of damages sustained by the injured person. This can always be tricky if the attorney does not have adequate knowledge as to the severity of the injuries and future medical treatment required for the remainder of the injured person's life. A legal nurse consultant will review all the facts of the treatment and will be able to advise the typical outcome based on those facts to include minimizing risk analysis and exposure through mitigating circumstances. Additionally, the legal nurse consultant can identify any pre-existing conditions which could have affected the injury. This will impact the damages and allow a defense to the amount of damages sustained. By receiving an evaluation of the damages sustained, the attorney will save significant time and money on evaluating whether or not to proceed through the litigation process. For example, a defense attorney may elect to settle a case based on his client's risk exposure as opposed to taking the case to trial.

5. A LEGAL NURSE CONSULTANT CAN ADD VALUE TO THE CASE

- The most important reason to hire a legal nurse consultant to assist with a medical case is because they can add tremendous value to the case. This value is often added in indirect ways such as providing the attorney with more time to create successful legal strategies for the case rather than stressing over the medical details. The legal nurse consultant will point out what is important for the

attorney to understand in order to most effectively present the case.

- Many legal nurse consultants have had many years of experience applying their education, knowledge, and skills in the real world. This experience allows them to provide insights into the practical application of medicine, not just the theory. Being privy to this information makes their analysis of a case invaluable.
- Testimony from expert doctors can often make or break a medical case. A legal nurse consultant can provide recommendations for expert medical doctors who are qualified to support the facts of the case. Often, a nurse vets doctors and other experts affirming whether these experts will be able to provide credible testimony.
- Legal nurse consultants provide a cost-effective and efficient tool to utilize in your medical cases. Legal Medical Link has a team of legal nurses with a vast knowledge of understanding health injury and medical issues and trends. The legal nurse consultants at Legal Medical Link work in collaboration with the attorney and litigation team to get the cases across the finish line.

COMMON QUESTIONS ABOUT LEGAL NURSES:

- What is a legal nurse consultant? A legal nurse consultant usually has years of experience as a nurse and consultant. Marcelle Slobaszewski, RN, BSN, CLNC, is the founder and owner of Legal Medical Link, Legal Nurse Consulting & Expert Services. Marcelle is both a Registered Nurse and is a Legal Nurse Consultant. Her education includes a Bachelor of Science in Nursing and combined experience in the clinical and legal space that spans over 32 years.
- Are legal nurse consultants in demand? According to the American Association of Legal Nurse Consultants (AALNC) and Bureau of Labor Statistics (BLS) the industry is projected to grow 9% year over year until 2030. Legal Nurse Consultants are high in demand and are able to help solve many issues in civil defense litigation, mass tort litigation, class action lawsuits, and criminal court cases.

WHAT DOES A LEGAL NURSE CONSULTANT DO?

Legal nurse consultants can help with medical malpractice and personal injury lawsuits, assist with mitigating risk exposure to decrease damages, and streamline operations in the areas of personal injury, nursing home negligence, product liability, medical or nursing malpractice, toxic torts, and criminal law. Our customers include plaintiff and defense attorneys, personal injury, medical malpractice, toxic tort, long term care, criminal defense, correctional health, and product liability attorneys, in addition to insurance companies, health care organizations, and corporations.

A memorable case for Marcelle related to a 60 year old woman who suffered a colon injury and postsurgical complications as a result of alleged negligence during a robotic surgical procedure. Her alleged injuries included:

- Colon injury
- Intense pain and discomfort
- Small bowel obstruction
- Ileus

After case review and analysis, Marcelle found that all allegations were not supported by the medical records or tangible documents as there was no evidence of surgical provider negligence. In fact, the records proved that patient noncompliance with recommended treatment and care was the causative factor pertaining to her complications. After the defense attorney brought these critical facts to opposing counsel's attention, the lawsuit was dropped. This is what a legal nurse consultant does. We assist the defense attorney in fighting for the accused by dispelling accusations or assisting with offsetting any risk exposure with mitigating factors thereby minimizing the damages and value of the case.

ADDITIONAL BENEFITS TO THE LEGAL COMMUNITY:

Hiring a Legal Medical Link, Legal Nurse Consultant saves attorneys time and money in the form of case dismissal or potentially decreased payout at settlement, mediation, or arbitration. Additionally, the time a Legal Nurse Consultant spends assisting with development of defense counsel's medical-legal cases are billable hours. Furthermore, nurses receive advanced training in the area of medical record review and can provide valuable information for case development and act as fact witnesses or locate expert witnesses for testimony.

IN CONCLUSION, a legal nurse consultant is a knowledgeable, skilled, and experienced registered nurse professional who has the professional industry knowledge and qualifications to provide advice and opinions in medical related claims. An experienced legal nurse consultant provides critical support in plaintiff or defense cases involving health, illness, or injury. Moreover, a legal nurse consultant bridges the gap between the legal and medical worlds and works as a guide in a health injury related case to ensure there is a strong voice from the medical field. They can act as advisors, researchers, educators, or other roles a medical-legal case might require. As the medical expert, legal nurse consultants

ease the burden of counsel by focusing on the medical aspects of the case and in turn the attorney is afforded the opportunity to focus on the legal aspects in a medical-legal matter. By using a legal nurse consultant, firms can often save their clients time and money by letting them review and analyze records, develop reports and other presentations, create chronologies, organize medical records, assist with or create demonstrative evidence, and perform research pertaining to specific medical issues to aid in case presentation. Furthermore, they are able to bring important, often times hidden, crucial facts in medical records or course of treatment to their attorneys' attention that many attorneys may overlook. This makes it easier for attorneys to not miss any important aspects of the case and confidently present the case.

Legal Medical Link is a legal nurse consulting and expert services firm that specializes in litigation support for defense law firms and insurance companies. Our healthcare experts help attorneys succeed in their cases, simplify the complexities of the medical world, and improve case presentation and outcomes. We assist firms to better understand case challenges, leverage time and resources, increase profitability, and achieve the best possible outcome for their client. The attorney's expertise in law and the legal nurse consultant's knowledge of the healthcare system and medical information produce a winning strategy in strengthening the case. As legal nurse consultants, we take pride in our work product and our comprehensive analysis and reports are developed through our dedicated time in research and analysis of the obvious injuries or conditions and case issues. These methods have equipped our attorney clients with not only important information but an understanding of their cases prior to entering the settlement, mediation, or arbitration process. Cases are in great hands with a Legal Medical Link Legal Nurse Consultant and lawyer by their client's side.

A Legal Medical Link, Legal Nurse Consultant's vast knowledge base makes us an imperative member of a legal team and a reliable asset who will ensure your health injury case runs smoothly. Hire a Legal Nurse Consultant in Warrensburg, MO to assist with your medical-legal case. If interested, please contact us at 660-422-1361 or email us at marcelle@legalmedicallink.com.

Case Law Update

By Zack A. Martin
Heidman Law Firm, PLLC


Zack A. Martin

The Iowa Supreme Court recently addressed the requirement that a certificate of merit affidavit ("COMA") under Iowa Code § 147.140 "must be signed by the expert witness . . . under the oath of the expert witness." A COMA is needed in cases where the plaintiff's action: (1) is "for personal injury or wrongful death;" (2) is "against a health care provider;" (3) is "based upon the alleged negligence in the practice of that profession or occupation or in patient care;" and (4) includes "a cause of action for which expert testimony is necessary to establish a prima facie case."

In a pair of cases, the Court found that a COMA which is neither sworn and subscribed before a notary nor includes language that "certifies under penalty of perjury and pursuant to the laws of the state of Iowa that the preceding is true and correct" fails to substantially comply with the requirements of Iowa Code § 147.140. As a result, medical malpractice cases in which these deficient COMAs have been filed are subject to mandatory dismissal with prejudice under Iowa Code § 147.140(6).

MILLER V. CATHOLIC HEALTH INITIATIVES-IOWA, CORP., 7 N.W.3D 367 (IOWA 2024)

FACTUAL & PROCEDURAL BACKGROUND

Meredith Miller was treated at MercyOne Des Moines Medical Center following an automobile accident. Once there, physicians removed an airway device placed by paramedics and ordered an oral endotracheal tube. However, instead of placing the tube in the trachea, the tube was placed in Meredith's esophagus. Her oxygen levels plummeted, and she died within fifteen minutes.

Meredith's surviving husband filed a lawsuit alleging medical malpractice against Catholic Health Initiatives (MercyOne Des Moines). Various defendants answered on December 23, 2021 and January 3, 2022, respectively. These answers triggered the sixty-day clock under Iowa Code § 147.140 to serve each defendant with a COMA.

On February 21, 2022, 60 days after the answer of the first set of defendants, plaintiff served all defendants a document entitled "Service of Certificate of Merit and Notice of Same." The document was a report from an expert retained by the plaintiff. The letter was signed on hospital letterhead but did not include an affidavit, sworn oath, or any declaration that the report was signed under penalty of perjury.

On May 12, 2022, the defendants moved to dismiss the plaintiff's medical malpractice claim for failing to substantially comply with the COMA requirements. The defendants claimed that the report was deficient because it was not signed under oath. The Plaintiff resisted, arguing that the letter substantially complied with Iowa Code § 147.140 because it contained a handwritten signature, curriculum vitae, and opinions "in anticipation of litigation, with the understanding that her testimony in this regard would be presented to the court under oath."

On June 2, 2022, with the motion still pending, the plaintiff served a second document captioned "Affidavit of Dr. Lynette Mark" on the defendants. The plaintiff's expert signed the document which included the language that the expert:

> certif[ies] under penalty of perjury and pursuant to the laws of the State of Iowa, that the expert opinion letter dated February 20, 2022, which I produced to Counsel for the Plaintiffs, was true and correct, and all opinions made therein were made within a reasonable degree of medical certainty.

This document was served 105 days and 94 days after the statutory deadlines for serving a COMA on each respective set of defendants had expired.

The district court denied the defendants' motions. The district court found that the February 21, 2022 letter substantially complied with Iowa Code § 147.140. The court reasoned that the letter "was provided early in the litigation," "it clearly identified Miller's expert and qualifications," and "it set forth in the expert's own words all of the information required" in the statute. Based on this conclusion, the court did not address whether the June 2, 2022 affidavit substantially complied with the sixty-day deadline.

The defendants applied for interlocutory review. The Iowa Supreme Court granted the application and retained the case.

QUESTION PRESENTED

Does an unsworn signature on an expert's certificate of merit substantially comply with the statute requiring an affidavit signed under oath?

HOLDING

No, the expert's signed but unsworn report did not substantially comply with section 147.140's affidavit requirement, and this violation was not cured by the expert's sworn declaration served over three months after the statutory deadline. Reversed and remanded for dismissal of the medical malpractice claims with prejudice.

ANALYSIS

The Court began with the text of Iowa Code § 147.140 which provides in relevant part:

> b. A certificate of merit *affidavit* must be signed by the expert witness and certify the purpose for calling the expert witness by providing *under the oath* of the expert witness all of the following:
>
> (1) The expert witness's statement of familiarity with the applicable standard of care.
>
> (2) The expert witness's statement that the standard of care was breached by the health care provider named in the petition.

The Court reiterated that this language "'unambiguously requires that the expert witness personally sign the certificate of merit under oath within sixty days of the defendants' answer.'" The Court found that the February 20, 2022 letter was not signed under oath and therefore did not strictly comply with Iowa Code § 147.140. However, Iowa Code § 147.140(6) requires that a plaintiff only "substantially comply" with its requirements to avoid dismissal with prejudice, which the Court then turned to address.

The Court restated Iowa's standard for substantial compliance: "compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." The Court concluded that "requiring the expert to sign under oath is necessary to ensure the reasonable objectives of section 147.140." The Court found that the "expert's sworn oath is essential" to the objective of Iowa Code § 147.140, enabling healthcare providers to quickly dismiss professional negligence claims that are not supported by the requisite expert testimony. In further support of its holding that unsworn signatures do not substantially comply with Iowa Code § 147.140, the Supreme Court cited a New Jersey appellate decision reaching the same conclusion with respect to its analogous COMA statute. The opinion later cites additional cases from other jurisdictions supporting the Iowa Supreme Court's analysis "addressing certificate of merit statutes requiring medical experts to sign under oath."

Iowa Code defines an affidavit to be "a written declaration made under oath." The oath requirement has previously been found to ensure that the affiant "recognizes the obligation to be truthful when making the statement." Another statute permits the requirements for a sworn statement to be satisfied through a self-attestation that the affiant "certifies under penalty of perjury and pursuant to the laws of the state of Iowa that the preceding is true and correct."

Finding that the February 20, 2022 letter did not meet the definition for "affidavit" and also did not include the self-attestation language, the Court concluded the letter did not substantially comply with Iowa Code § 147.140. The Court found it was "not at liberty to eliminate the requirement that the expert sign the certificate of merit under oath when the governing statute uses the term 'affidavit' six times." "A contrary holding would undermine many Iowa statutes requiring sworn statements or verifications" including, for example, Iowa Code § 598.13 governing financial affidavits in marital dissolution cases. The plaintiff cited no Iowa case holding an affidavit requirement was satisfied by a document that was not signed under oath or penalty of perjury. While the Court noted it was not questioning the veracity of the plaintiff's expert, it could not "second guess the legislature's choice to require certificates of merit to be signed under oath."

Finally, in addressing the plaintiff's argument regarding the subsequent affidavit provided on June 2, 2022, the Court found this position was "foreclosed by *Estate of Fahrmann*, where we held that a properly sworn certificate of merit affidavit served forty-two days after the statutory deadline did not cure the violation." Because the subsequent sworn report was served over ninety days after the deadline, and the plaintiffs failed to request an extension of the deadline, the defendants were entitled to an order dismissing the plaintiff's medical malpractice action with prejudice.

WHY IT MATTERS

Miller precludes plaintiffs from relying on signed but unsworn statements from expert healthcare professionals in an effort to satisfy their requirement to provide a COMA in medical malpractice cases, within 60 days of a defendant's answer. Cases subject to the COMA requirement and relying on unsworn statements are subject to dismissal with prejudice, pursuant to the terms of Iowa Code § 147.140, as interpreted by the Iowa Supreme Court.

SHONTZ V. MERCY MED. CTR.-CLINTON, INC., 2024 WL 2868931 (IOWA 2024)

FACTUAL & PROCEDURAL BACKGROUND

Dr. Amareshwar Chiruvella performed abdominal surgery on Shirley Gomez at the Mercy Medical Center in Clinton, Iowa on September 4, 2020. Dr. Chiruvella provided follow-up care in the weeks after her surgery. On September 16, Gomez suffered a fatal pulmonary embolism. On August 26, 2022, her estate and her three daughters filed this civil action against Mercy and Dr. Chiruvella alleging negligence in the surgical and post-surgical care of Gomez. The plaintiffs timely served separate COMAs against each defendant. Neither COMA contained a jurat nor was there any indication that the expert had signed under oath. Furthermore, neither COMA included a declaration that the expert signed under penalty of perjury. However, the COMAs were in the form of an affidavit and began with the phrase that the expert "affirms and states as follows." The COMAs were signed by the expert.

The defendants filed a motion to dismiss, arguing that the unsworn signatures on the COMAs failed to substantially comply with Iowa Code § 147.140. The plaintiffs resisted, arguing the COMAs substantially complied because they were signed and contained language that the expert "affirms and states as follows." The defendants replied that this phrase was insufficient to satisfy the self-attestation language indicating that the affidavit was "signed under penalty of perjury."

The district court found the COMAs were in substantial compliance with Iowa Code § 147.140 and entered a ruling denying the defendants' motion. The defendants applied for interlocutory review. The Supreme Court granted the application and retained the case. The Supreme Court had previously granted the interlocutory appeal filed in *Miller*.

QUESTION PRESENTED

Whether an expert's signed but unsworn certificate of merit substantially complies with the affidavit requirement of Iowa Code § 147.140.

HOLDING

No. The Court found that, despite some factual differences, *Shontz* presented "the same dispositive issue we recently decided in *Miller*." *Miller*'s holding that Iowa Code § 147.140 "unambiguously requires the expert to timely sign the certificate under oath . . . controls the outcome of [*Shontz*]." The Court reversed and remanded for entry of an order dismissing the action with prejudice pursuant to Iowa Code § 147.140(6).

ANALYSIS

Reiterating its findings in *Miller*, the Court noted that an oath or declaration under penalty of perjury "binds the conscience of the person and emphasizes the obligation to be truthful." The Court further noted that it was not at liberty to remove the sworn signature requirement from a COMA statute that "uses the term 'affidavit' six times." After further quoting *Miller* regarding the consequences of plaintiff's proposed reading of Iowa Code § 147.140, the Court concluded that "stare decisis dictates the same result here."

WHY IT MATTERS

The rationale in *Miller* extends beyond unsworn reports or letters offered by plaintiffs in response to the COMA requirement. Even documents in affidavit form (i.e., signed by the expert and providing the expert "affirms" the contents contained therein) fail to meet the requirement of being sworn before a notary or self-attested through the statement that the expert "certifies under penalty of perjury and pursuant to the laws of the state of Iowa that the preceding is true and correct."

The COMA found deficient in *Shontz* appears to be a form which originated from the office of plaintiff's counsel on appeal, Trial Lawyers for Justice. This form has been used by various plaintiff's attorneys in the state. In defending a medical malpractice case, careful attention to the language used and form of the plaintiff's COMA is critical. Any case supported by a COMA that was not sworn and subscribed before a notary or fails to include the proper self-attestation language is subject to a motion to dismiss with prejudice.

Self-Driving Vehicles and Questions of Product Liability

By Denis F. Alia

Denis F. Alia

Denis F. Alia is a partner at Cetrulo LLP's Boston, Massachusetts office. He concentrates his practice on the defense of litigation matters, including claims arising from products liability, toxic torts, automotive accidents and insurance claims, and premises litigation. Denis has represented a broad range of companies, including manufacturers of heavy industrial equipment and automotive friction parts, and ride-sharing companies. Denis is also a member of the national coordinating team that manages multi-jurisdictional toxic tort litigation for a Fortune 500 company.

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Vehicle automation is defined based on the extent to which a car's integrated technology performs a variety of driving functions with or without the presence of a human operator behind the wheel. Levels of automation fall on a broad spectrum, with vehicles that provide human drivers with simple warnings or alerts at one end, to vehicles that are considered fully autonomous at the other end. Vehicles first included automated technology as early as the 1950s, and that technology continues to advance rapidly today. Due to these rapid technological advances, legislatures and judiciaries across the United States are working to pass regulations and develop a body of precedent to respond to questions of products liability raised when automated vehicles are involved in accidents. Although there are few clearly defined legal conclusions at the intersection of products liability and autonomous vehicles today, those that exist illustrate courts' reluctance to apportion liability to autonomous vehicle manufacturers. Nonetheless, autonomous vehicle litigation today, as well as the mounting body of law concerning products liability and general automation technology, raises interesting questions the defense bar should consider as it continues providing effective defense strategies for its clients.

VEHICLE AUTOMATION

Vehicle automation is generally defined as a vehicle's technological ability to perform the functions of a human driver with or without human aid. *See* SAE Int'l, J3016 APR2021, Surface Vehicle Recommended Prac. 6 (2021); Alexander S. Gillis & Ben Lutkevich, *Self-Driving Car (Autonomous Car or Driverless Car)*, TechTarget, *https://www.techtarget.com/searchen-terpriseai/definition/driverless-car* (last updated June 2024). SAE International (f/k/a the Society of Automotive Engineers), in conjunction with the International Organization for Standardization ("ISO"), recommends standards by which vehicle automation is defined. *See* Surface Vehicle Recommended Prac., *supra*, at 1-2; *About SAE International*, SAE Int'l, *https://www.sae.org/about/history* (last visited July 8, 2024). A vehicle considered "fully autonomous" or "self-driving" is one that operates completely without the aid of a human driver. *See* Surface Vehicle Recommended Prac., *supra*, at 34; Lutkevich, *supra*. Because those cars are generally not available in today's market, SAE Inter- national prefers the term "automation" to describe the technological abilities of cars produced in the US today. *See* Surface Vehicle Recommended Prac., *supra*, at 34; *Automated Vehicles for Safety*, NHTSA, *https:// www.nhtsa.gov/technology-innovation/automated-vehicles-safety#resources* (last visited July 8, 2024).

LEVELS OF AUTOMATION

SAE International defines six levels of vehicle automation; the levels range from L0, where a human driver performs all driving functions with some technological assistance, to L5, where the vehicle is fully autonomous. *See Automated Vehicles for Safety, supra; What is an Autonomous Car?*, Synopsis, *https://www.synopsys.com/automotive/what-is-autonomous-car.html* (last visited July 8, 2024). As previously mentioned, L0 vehicles provide basic technological assistance to the driver, such as warnings and alerts, like blind- spot monitoring. *See Automated Vehicles for Safety, supra;* Surface Vehicle Recommended Prac., *supra*, at 6. L1 vehicles assist the driver with acceleration, braking or steering, but not both, while L2 vehicles assist the driver with those three tasks simultaneously. *See Automated Vehicles for Safety, supra*. Some of Tesla's models can be classified as L2 vehicles, however these vehicles also require a driver-monitoring system (i.e., touch-sensitivity on the steering wheel). *See Automated Vehicles for Safety, supra.* L3 vehicles, which are generally unavailable in the US today, assist the driver by controlling specific driving functions such as navigating through traffic at low speeds. *See* Surface

Vehicle Recommended Prac., *supra,* at 31; *Automated Vehicles for Safety, supra*. In an L3 vehicle, the human driver must monitor the vehicle's movements at all times. *See Automated Vehicles for Safety, supra*. L4 and L5 vehicles, which are unavailable in all car markets today, are essentially fully autonomous. *See Automated Vehicles for Safety, supra*. An L4 vehicle performs many driving functions, without human intervention, in specific geographic areas, whereas L5 vehicles perform all driving functions, anywhere, without human intervention. *See Automated Vehicles for Safety, supra;* Surface Vehicle Recommended Prac., *supra,* at 26, 32. Currently, L4 vehicles are being tested for market production, while L5 vehicles will likely remain in development for at least the next decade. *See* Mark Fagan et al., Autonomous Vehicles Are Coming: Five Policy Actions Cities Can Take Now to be Ready 6 (2021).

A BRIEF HISTORY OF VEHICLE AUTOMATION

Automation technology first appeared in vehicles in the 1950s with the advent of safety features such as cruise control and anti-lock brakes. *See Automated Vehicles for Safety, supra*. Shortly thereafter, in 1966, the National Traffic and Motor Vehicle Safety Act was passed in the US, mandating the first set of rules for vehicle safety. *See* National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718. In the early 1980s, a German company developed a vehicle that used a computerized vision system to operate on the highway, without traffic, at high-way speeds. *See* James M. Anderson et al., Autonomous Vehicle Technology 56 (2016). By the 1990s, technology in the US further advanced the pursuit of self-driving cars when researchers in California tested a car that was guided by magnets embedded into the highway. *See id.* It was around this same time that Congress directed the Department of Transportation and the National Automated Highway System Consortium to develop an "automated highway system," while companies in Europe and Japan developed adaptive cruise control functions that further advanced vehicle automation. *See* Keith Barry, *Big Bets and Broken Promises: A Timeline of Tesla's Self- Driving Aspirations, Consumer Reps. (Nov. 11, 2021), https://www.consumerreports.org/cars/autonomous-driving/timeline-of-tesla-self-driving-aspirationsa9686689375/#:~:text=Big%20Bets%20and%20Broken%20Promises%3A%20%20Timeline%20of,2014%20 . . .%20 8 % 20 October% 202015% 20 . . .% 20More%20items.* These advances paved the way for Tesla to create their "Autopilot" feature, which debuted in the mid-2010s and continues to be refined to this day. *See id.* This technology provides a variety of auto- mated assistance to the human driver including a self-driving system where the human driver is still responsible for most driving functions. *See id.*

LEGISLATING VEHICLE AUTOMATION

At least 27 states, and the District of Columbia, have enacted legislation relating to autonomous vehicles. *See* Justin Banner, *Are Self-Driving Vehicles Legal in My State?,* Motortrend (Jan. 6, 2023), *https://www.motortrend.com/features/state- laws-autonomous-self-driving-driver- less-cars-vehicles-legal/* (stating 27 states have enacted autonomous vehicle legislation); *Autonomous Vehicles—Self-Driving Vehicles Enacted Legislation, NCSL, https://www.ncsl.org/transportation/autonomous-vehicles#state* (last updated Feb. 18, 2020) (stating 29 states have enacted autonomous vehicle legislation). At least six states regulate autonomous vehicles by executive order, and at least five states regulate autonomous vehicles by both legislation and executive order. *See Autonomous Vehicles—Self-Driving Vehicles Enacted Legislation, supra.* Of the states with autonomous vehicle legislation, California's regulations are among the strictest, while Florida's are more lenient. *See* Roy Furchgott, *Public Streets Are the Lab for Self-Driving Experiments,* N.Y. Times (Dec. 23, 2021), *https://www.nytimes.com/2021/12/23/business/tesla-self-driving-regulations.html?searchResultPosition=24.*

As an example, California requires a driver to be "seated in the driver's seat, monitoring the safe operation of the autonomous vehicle, and capable of taking over immediate manual control of the vehicle in the event of an autonomous technology failure or other emergency." Cal. Veh. Code § 38750(b)(2) (West 2022). In contrast, Florida does not require the presence of a human operator in a car that is "fully autonomous." *See* Fla. Stat. Ann. § 316.85 (West 2019); Evan P. Dahdah, *An Attempt to Control What Controls Itself: Unraveling Florida's Autonomous Vehicle Laws,* 38 Trial Advoc. (FDLA) 31, 34-36 (2019). Moreover, when compared to Florida, California more clearly apportions liability to vehicle manufacturers in the event that the autonomous driving system fails, causing damage. *See* Cal. Veh. Code § 38750(G)(3) (West 2022); Dahdah, *supra* at 36. California law requires manufacturers to certify that their autonomous vehicles have been tested on public roads in compliance with state testing standards, *see* Cal. Veh. Code § 38750(G)(2)-(3) (West 2022), while Florida law protects manufacturers against defects in the autonomous vehicle technology caused by third-party modifications. *See* Fla. Stat. Ann. § 316.86 (West 2016); Dahdah, *supra* at 36.

CASE LAW SURVEY OF SELF-DRIVING CARS AND PRODUCTS LIABILITY

As a result of the continuous technological leaps being made in the autonomous vehicle industry, there are few, if any, settled legal conclusions regarding products liability and autonomous vehicles. *See* Julia Doskoch, Note, *"Your Honor, the Car Crashed Itself ": Navigating Autonomous Vehicle Liability in the Age of*

Innovation, 2023 B.C. Intell. Prop. & Tech. F.J. 1, 5 (2023); Atilla Kasap, *States' Approaches to Autonomous Vehicle Technology in Light of Federal Law,* 19 Ohio State Tech. L.J. 315, 321 (2023). Some unsettled questions include whether, and to what extent, federal law preempts state regulation when applied to products liability cases, *see* Kasap, *supra*, at 410, and to what extent federal regulations, rather than common law tort theories, are better equipped to adapt and decrease the risk of autonomous vehicles crashes. *See generally* Kevin M.K. Fodouop, Note, *The Road to Optimal Safety: Crash-Adaptive Regulation of Autonomous Vehicles at the National Highway Traffic Safety Administration,* 98 N.Y.U.L. Rev. 1358 (2023) (proposing development of data tracking system the NTSB could use to adapt and improve autonomous vehicle regulations to reduce risk of autonomous vehicle crashes). Although the question of who is liable when an autonomous vehicle crashes and causes damage is currently academic in nature, *see* Doskoch, *supra,* at 6-7, the several cases that are available generally illustrate that, currently, courts are reluctant to apportion liability to manufacturers when an autonomous vehicle is involved in an accident.

In some cases where an autonomous vehicle was involved in an accident, courts dismissed the matters before addressing products liability issues or theories specifically relating to the autonomous vehicle at issue. For example, in *Wang v. Tesla, Inc.*, 20-CV-3040 (NGG) (SJB), 2021 WL 3023088 (E.D.N.Y. July 16, 2021), the court dismissed the case because the Plaintiff insufficiently pleaded fraud and failed to certify an alleged class. Additionally, in *Umeda v. Tesla Inc.*, No. 20-CV- 02926-SVK, 2020 WL 5653496 (N.D. Cal. Sept. 23, 2020), the court dismissed the case based on *forum non conveniens*. For those cases where questions of liability and other issues relating to autonomous vehicles were reached, courts decided against apportioning liability to vehicle manufacturers for various reasons.

IN CALIFORNIA, A CAR MANUFACTURER IS NOT A "DRIVER"

In Escudero v. Tesla Inc., No. RG21090128, 2021 WL 2772434 (Super. Ct. Cali. Feb. 26, 2021), a California court dismissed a negligence action, with prejudice, after concluding that liability rests on the human driver physically operating the car, not the car's manufacturer, even if the car operated mostly without the driver's aid. *Id*. Interpreting the California State Vehicle Code, the court concluded that a car's "driver", even one operating autonomously to a certain extent, is the person who is in "actual, physical control of the vehicle." *See id*. The court reasoned that, without precedent establishing otherwise, they could not apportion liability to the car's manufacturer when the human occupant had the opportunity to override the vehicle's automation features. *See id.*

MARKETING MATERIALS DO NOT CONSTITUTE A WARRANTY

In *Son v. Tesla Motors*, No. SACV 16-02282 JVS, 2019 WL 4238874, at *5-6 (C.D. Cal. Apr. 15, 2019), the Federal District Court for the Central District of California dismissed a breach of contract action against a car manufacturer because the marketing materials for a car's automation features did not create a warranty between the manufacturer and the consumer promising that the car would stop itself to prevent a collision. Id. Plaintiff alleged that the car manufacturer's marketing materials, advertising automatic breaking and forward collision warning, warranted that the car would actually prevent a forward collision. *See id.* at *1, *4-6. The court dismissed the case without prejudice, reasoning that the marketing materials indicated only that the automation features were *designed* to prevent collision; those materials did not promise that the automation features would *actually* prevent a collision. *Id.* at *5-6 (emphasis added).

CONSUMERS DO NOT EXPECT AN AUTONOMOUS VEHICLE TO PREVENT A COLLISION

In *Youngberg v. Gen. Motors LLC.,* No. 20-339-JWB, 2022 WL 3925272, at *3 (E.D. Okla. Aug. 24, 2022), the Federal District Court for the Eastern District of Oklahoma dismissed a product liability claim because a reasonable consumer in 2013, the year of the vehicle involved in the accident at issue in this case, would not expect an autonomous vehicle to avoid a collision. *Id*. Rather, a consumer in 2013 would expect that responsibility to fall to the vehicle's human driver. *See id.* In this case, Plaintiffs alleged that the vehicle in question was defectively designed and unreasonably dangerous because it was not equipped with automation technology such as a forward collision warning system and an automatic braking system, even though it was technologically and economically feasible for the vehicle's manufacturer to install those systems in the vehicle at issue. *See id.* at *1-3. The court concluded that, even if it was technologically feasible to make the vehicle at issue safer by providing some level of automation, that fact alone is insufficient to establish that the vehicle was unreasonably safe when it left the manufacturing plant. *See id.* at *4. Consumers in 2013 would expect human drivers to take responsibility for front-end collisions while traveling at highway speeds rather than a vehicle's automatic safety features. *See id.*

PRODUCT LIABILITY AND AUTOMATION: BEYOND VEHICLE AUTOMATION

Beyond vehicle automation, artificial intelligence ("AI") is one technological development where product liability and automation may intersect. Foundationally, AI, and AI enabled technologies, are designed to function like a human brain and, using sophisticated computer software, learn new tasks, engage in reasoning, and problem-solve to complete new functions. *See* Kevin Roose

& Cade Metz, *How to Become an Expert on A.I.,* N.Y. Times (Apr. 4, 2023), *https://www.nytimes.com/ article/ai-artificial-intelligence-chatbot. html?searchResultPosition=16.* Automation alone is distinct from AI because, unlike AI, automated systems do not learn how to complete tasks, but rather their systems are manually configured to complete certain tasks. *See* Jody Glidden, *Understanding What Artificial Intelligence is, and what It's Not,* Forbes (Apr. 14, 2021), *https://www.forbes.com/sites/forbesbusinesscouncil/2021/04/14/under-standing-what-artificial-intelligence- is-and-what-its-not/?sh=7d8b758248cd.* However, when combined, AI and automation create an intelligent form of automation, where an automated machine can learn how to complete certain tasks based on an integrated AI system. *See What is Automation?,* IBM, *https://www.ibm.com/topics/automation* (last visited July 8, 2024). For example, car manufacturers may use intelligent automation to regulate a robotic system's production of vehicles based on an integrated AI's analysis of supply and demand. *See What is Intelligent Automation?, supra.*

Product liability and intelligent automation may intersect when courts apportion liability to AI manufacturers when their products fail to function as promised. For example, in *Conn. Fair Hous. Ctr. v. Core-logic Rental Prop. Sols., LLC,* 369 F. Supp. 3d 362 (D. Conn. Mar. 25, 2019), the court held the Defendant software company liable because its software violated the Fair Housing Act ("FHA") by discriminating against individuals with arrest records. *See id*. at 372. Here, Defendant's software analyzed a tenancy applicant's criminal record and, using an algorithm, determined that the applicant was disqualified to become a tenant because of a prior arrest. *See id.* at 367-68. In a series of publications, the US Department of Housing and Urban Development ("HUD") issued guidance stating that landlords who own federally-assisted housing units cannot disqualify housing applicants based on arrest records alone, because arrest records disproportionately affect African American and Hispanic rental applicants. *See id.* at 371. Therefore, use of those records to screen housing applications violates the Fair Housing Act ("FHA"). *See id.* Because Defendant held out its software as one capable of screening housing applications in compliance with the FHA, and because that software failed do so, causing the landlord to disqualify a housing applicant in violation of the FHA, the court apportioned liability to the Defendant for those discriminatory actions. *See id.* Defendant's liability was partially based on agency principles, where the court concluded that the Defendant, in employing its tenant screening software, acted as the landlord's agent, and was liable as the landlord's agent. *See id.* at 373-74.

CONCLUSION

There are few, if any, well-defined legal conclusions to questions regarding autonomous vehicles and products liability. However, as the current cases discussed above illustrate, courts are reluctant to apportion liability to vehicle manufacturers when their vehicles are involved in accidents for a variety of reasons. In developing precedent to apply to current issues of products liability and vehicle automation, courts around the country are: (1) defining ambiguous terms in statutory compilations to better determine who is liable when an autonomous vehicle is involved in an accident; (2) applying contract law to examine alleged warranties made by autonomous vehicle manufacturers; and (3) courts are looking to common law tort theories, such as consumer expectations, when apportioning liability. With an industry that is rapidly changing, and a corresponding body of precedent developing just as quickly, it is important for defense counsel to take each of these considerations in turn and ask questions such as: (1) how will changes to state autonomous vehicle regulations affect my client's defense strategies?; (2) what warranties must my client navigate to ensure accurate representations as to their products' level of automation?; and (3) how will consumer expectations change as to their reliance on vehicle automation to prevent crashes and other various accidents? These and other questions will be important for the defense bar to consider as it continues providing effective defense strategies for its clients in this age of technological advances in vehicle automation.

New Member Profile

Jenny Juehring

Jenny Juehring joined Lane & Waterman LLP in 2020. Her law practice focuses on commercial litigation, municipal tort claims, employment litigation, and appellate practice. Prior to joining Lane & Waterman LLP, Jenny spent a year clerking for the Honorable Leonard T. Strand of the United States District Court for the Northern District of Iowa. In 2019, she received her J.D., magna cum laude, from the Washington University School of Law, where she served as the Managing Editor of the Washington University Law Review.

Jenny serves as the Seventh District Representative on the Iowa State Bar Association Young Lawyers Division Executive Council. She also serves on the Board of Directors of the Deanery School of Music in Davenport, Iowa.

Jenny lives in Bettendorf with her husband, Daniel, and their twin boys.

Iowa Rules of Appellate Procedure—Highlights of the Recent Amendments

By Benjamin J. Patterson, Lane & Waterman LLP, Davenport, Iowa

Benjamin J. Patterson

Earlier this year, substantive amendments went into effect to Chapter 6 of the Iowa Court Rules, Iowa Rules of Appellate Procedure. A more detailed summary of these amendments and additional helpful information can be found on the Iowa Judicial Branch website at https://www.iowacourts.gov/iowa-courts/supreme-court/appellate-procedure-overview. This article is merely intended to provide a brief overview of some of the key appellate briefing changes that are likely to impact members of the IDCA.

Elimination of Appendices. The requirement that the parties submit a joint appendix has been eliminated. It was recognized that the appellate judges have access to the entire court record via EDMS. Instead, only the orders and judgments being appealed must be attached to the appellant's brief when filed. Transcripts of oral rulings may not be attached. A party desiring to utilize an appendix in an extraordinary case may request leave of court to do so.

Elimination of Proof Briefs. It was explained that the two-step process of filing proof briefs and final briefs was to facilitate the designation and preparation of the appendix. Because the appendix is no longer required, the proof brief/final brief process is not necessary. Likewise, the designation of parts process is eliminated as unnecessary.

Briefing Contents. Images are allowed in briefs subject to certain parameters; the requirement to list all authorities under the "statement of issues presented for review" is eliminated; rule clarifying that merely citing to the notice of appeal does not satisfy the requirement of showing how error was preserved on an issue; and statement of case is now "nature of the case" and the rule was reworded to clarify what should and should not be included. The length of appellant's and appellee's briefs was reduced from 14,000 words to 13,000 words.

References to Record in Briefs. The EDMS docket numbering system must be used when citing to the record in briefs. The citation must include the docket number, the title of the document, and specific page number. The following illustrative example is provided: "D0023, M. New Trial at 5 (5/26/2020)." Intelligible abbreviations may be used for the document title. The short form citation for that example would be: "D0023 at 5." New Appellate Procedure Chart D provides additional citation format examples.

Notification of Attorney General. In any appeal that draws into question the constitutionality of an act of the general assembly, if the State of Iowa or an officer, agency or employee thereof is not a party in an official capacity, notice must be provided to the attorney general within 3 days after the brief is filed. The notice must include the supreme court case number, a reference to rule 6.901(3) identifying the act called into question, and the contact information of the attorney of records. A copy of the notice must also be filed with the clerk of the supreme court within 3 days of the filing of the brief.

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Mike Gibbons

The **Meritorious Service Award** is bestowed upon IDCA members whose longstanding commitment and service to the IDCA has helped to preserve and further the civil trial system in the State of Iowa.

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Chris Wertzberger

The **President's Award** is given in honor and recognition of superior commitment and service to IDCA throughout the year.

Outgoing Board Members

Chris Wertzberger & Mike Gibbons

Chris Wertzberger and Mike Gibbons (pictured middle, respectively) were recognized for their service on the IDCA Board of Directors.

Passing the Gavel

Amanda Richards

Amanda Richards was recognized for her service as IDCA president (2023-2024) by Pat Sealey, IDCA incoming president (2024-2025) and by DRI.

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