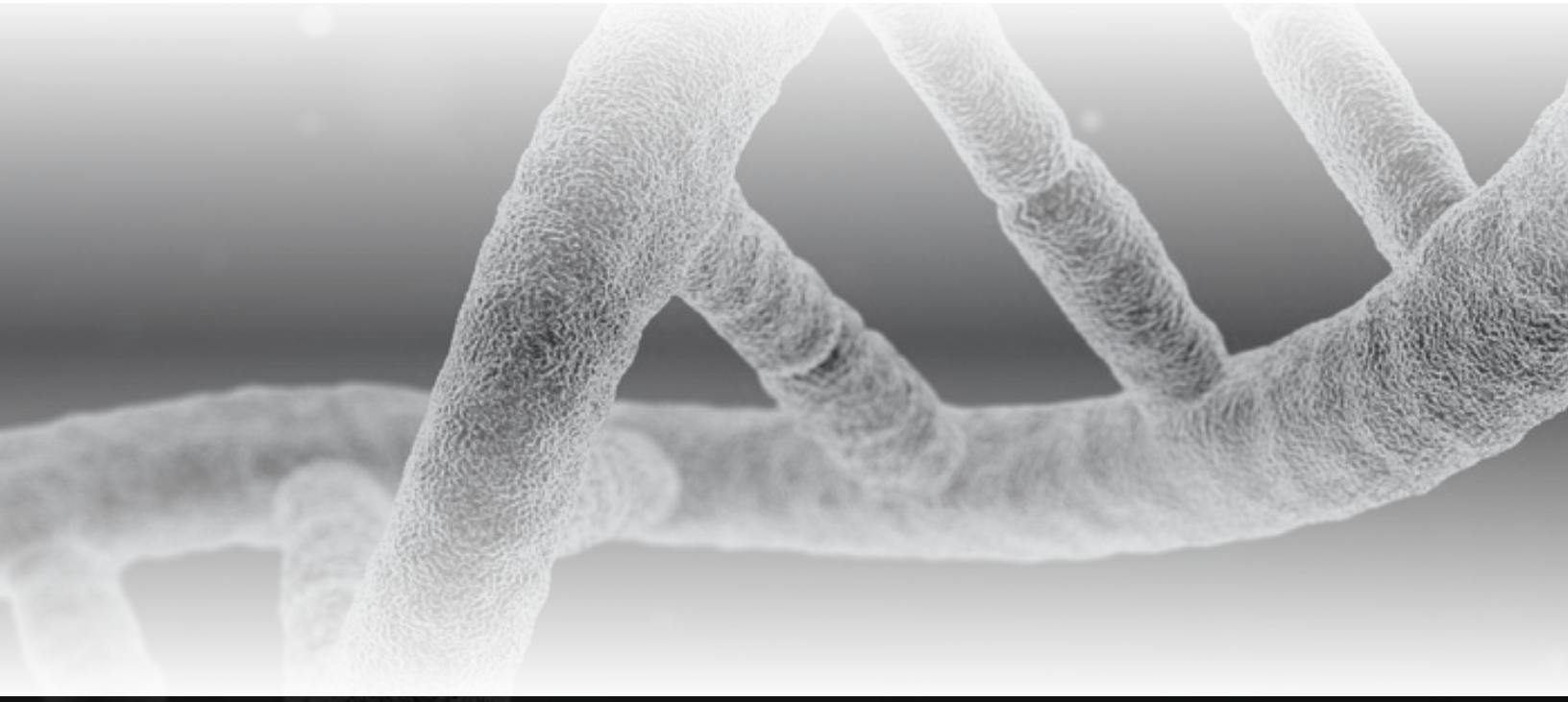
MINNESOTA

Defense

COMPLIMENTARY

WINTER 2020



THE WHOLE TRUTH: WHAT WHOLE EXOME SEQUENCING AND OTHER GENETIC TESTS CAN REVEAL ABOUT CAUSATION IN BIRTH INJURY CASES

MINNESOTA JOINS MAJORITY OF STATES IN ENACTING ADDITIONAL STATUTORY LEGISLATION RELATED TO LICENSING AND REGULATION OF ASSISTED LIVING FACILITIES

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Contents

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THE PRESIDENT'S COLUMN

Benjamin D. McAninch
Blethen Berens

The news about impeachment has your MDLA President a little nervous. While I have had several "perfect calls" since I began my term in August, I want to head off any investigations. Accordingly, I am using this space to update you on the progress we have made on some of the newer initiatives for 2020.

MEMBERSHIP DRIVE

The Membership Committee has been hard at work on its referral program and direct presentations to law firms. Those programs (and our steady membership decline) are discussed elsewhere in this issue. The focus is on recruitment of new members and retention of existing members. In this era, sustaining membership is difficult and I am grateful for the work the Membership Committee is doing.

CLE CREDIT FOR COMMITTEE MEETINGS

We continue to provide value to members through high quality and substantive committee meeting seminars and we have established a more streamlined framework for obtaining CLE credit for such meetings. I am hopeful that this better process will make it easier to get CLE credit for committee meetings—in addition to the networking and professional benefits members already receive.

NO MORE LISTSERVS

We have established a communication network through MDLA which allows communication within the substantive law committees. In the past, we have struggled with keeping the pertinent listservs up to date. Accordingly, the listservs have been eliminated. Instead, **to be included in your committee emails, you must update your MDLA profile to reflect your committee membership**. This step should ensure that you receive all communications from your committees and will allow for more accurate updating of our committee communications as members change firms or change committees.

RECIPROCITY

Many of our members are also admitted in neighboring jurisdictions. To provide additional value we are working with the leadership of the defense organizations in Wisconsin, South Dakota, and North Dakota to provide some sort of reciprocity (either reciprocal memberships or free/reduced CLE and seminar tuition). The reciprocity program is not yet finalized, but I have received positive indications from the other organizations that we will be able to secure some benefit for our members. Stay tuned for updates.

DIVERSITY CLERKSHIP

You have all received emails regarding the inaugural MDLA diversity clerkship program. I understand that many of your firms have already hired summer associates for next year. This initial program is an effort to gauge interest and work toward providing an ongoing opportunity for prospective students of diverse backgrounds to gain exposure to our firms (and vice versa). As with any such endeavor, a more concrete timeline will be established as the program develops. Please consider participating in this program.

President's Column **continued on page 5**

ARTICLES FROM PAST ISSUES

Members wishing to receive copies of articles from past issues of *Minnesota Defense* should forward a check made payable to the Minnesota Defense Lawyers Association in the amount of $5 for postage and handling. In addition to the articles listed below, articles dating back to Fall '82 are available. Direct orders and inquiries to the MDLA office, 1000 Westgate Drive, Suite 252, St. Paul, MN 55114.

Fall 2019

Inclusion: A Critical Element in the Evolutionary Process of the Legal and Construction Professions
Kristine A. Kubes

Microaggressions: Why Seemingly Minor Incidents of Bias Create Major Problems for Women in the Legal Profession
Janine Loetscher and Brittany Skemp

Well-being and Beyond: It's Up to All of Us
Joan Bibelhausen

Summer 2019

MDLA 2019 Legislative Report
Sandy Neren

13 Practical Tips for Tenders of Defense and Indemnity
Sarah Roeder

What it Means to Be Exclusive: The Overruling of Karst and the Effect on the WCA's Exclusivity Provision
Erik Rootes

Spring 2019

Expanding School Liability: How the Minnesota Supreme Court Put the Foreseeability Standard into Question
Tessa McEllistrem and Elle Lannon

From Discharged Debts to Collateral Sources: An Argument for the Expansion of 62Q.75 to Bodily Injury Claims
Cindy Butler and Stacey Sorenson

The Restatement of the Law of Liability Insurance Has Been Approved: Now What?
Lance D. Meyer and Dale O. Thornsjo

Winter 2019

Amicus Curiae Update: 2018
Louise A. Behrendt

Defending Claims Involving Future Radiofrequency Neurotomy Treatments
John R. Crawford and Lauren E. Nuffort

Beyond the Backlog: Legal Reform Needed after Significant Increase in Alleged Elder Abuse Complaints in 2017
Maureen Lodoen, Pat Skoglund and Vicki Hruby

Forget Plausibility – Three Tools to Help Your Motion to Dismiss in Minnesota State Court, Even after Walsh
Jeffrey M. Markowitz

JOIN A COMMITTEE

MDLA committees provide great opportunities for learning and discussion of issues and topics of concern with other members in similar practices. Activity in committees can vary from planning CLE programs, to working on legislation, to informal gatherings that discuss updated practice information or changes in the law. Serving on a committee is one of the best ways to become actively involved in the organization and increase the value of your membership.

If you would like to join a committee's distribution list, please update your member profile on mdla.org specifying the appropriate committee under the "Practice Type" section. You will be automatically added to the distribution list.

To learn more about an MDLA committee, please visit www.mdla.org. Meeting times and dates for each committee are listed online.

Committees available include:

- Amicus Curiae
- Construction Law
- Diversity
- Editorial
- Employment Law
- Events Committee
- Governmental Liability
- Insurance Law
- Law Improvement
- Law Practice Management
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- Medical Liability and Health Care
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- Motor Vehicle Accident
- Products Liability
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RETAIL AND HOSPITALITY

Focused on the defense of retailers, restaurants and hospitality businesses against suits for:

- Minnesota Civil Damage Act
- Premises liability
- Falling merchandise
- Negligent security
- Food-borne illnesses
- Americans with Disabilities Act
- Minnesota Human Rights Act

For more information, email committee chair Steven Bader at sbader@rajhan.com.

JOIN ONE OF MDLA'S COMMITTEES

WOMEN IN THE LAW

The mission statement of the Women in the Law Committee is to connect the more than 200 women who are MDLA members by:

- Providing opportunities to develop and strengthen relationships, facilitating business growth and professional development;
- Supporting women's career advancement by providing a forum for leadership and professional development; and
- Raising awareness about issues of interest to women lawyers.

For more information, email committee chairs Sarah Hoffman at shoffman@bassford.com, Jessie Sogge at jsogge@quinlivan.com, or Lauren Nuffort at lnuffort@lommen.com.

President's Column **continued from page 3**

SPONSORSHIPS/EVENTS

Our newly formed Events Committee has been planning the Midwinter Break and TTS conferences. We held the Midwinter Conference in the Metro area at Great Wolf Lodge, January 24-26, 2020. If you are one of those people who did not attend in the past because "it's all the way in Brainerd/Walker/Alex," we removed that obstacle! Collegiality and opportunity for networking were not lost! Tammy Reno and the committee had a great slate of speakers and activities. These activities were so much fun, you would have thought you were at the Walker American Legion without even having to travel!

We have also reached out to our sponsors to determine what we can do to provide them with value and to determine how we can foster beneficial connections at these events. We received great feedback from past and current sponsors, and we are confident that we will continue to secure the kind of lasting relationships with these entities that allow us to continue to provide excellent content.

IF YOU JOIN MDLA, ALL OF YOUR WILDEST DREAMS WILL COME TRUE

As we start 2020, I encourage you to ask yourself if you are getting everything you possibly can from your membership in MDLA. Consider taking on a leadership role in a committee or on the Board. Consider attending more committee meetings for the professional and client development. Finally, if you have an idea about how MDLA can better assist you in your practice, please feel free to call or email me. I would love to hear any suggestion you may have.

In summary, your membership and participation in this organization is sincerely appreciated.

EXECUTIVE DIRECTOR'S COLUMN

Margaux Meyer
Ewald Consulting

I want to take this time to thank you for being a part of MDLA. January is when we ask for your membership renewal, and Minnesota Defense Lawyers Association is nothing without its members support year after year. MDLA offers invaluable educational and networking opportunities for defense lawyers across. I am so grateful for your membership and work every day to ensure this support is used to continue to add value to the organization.

Over the past year, MDLA Members have impressed with two service projects. In December of 2019, MDLA collected over 130 and donated to Kids in Need Minnesota, a nonprofit dedicated to ensuring every child is prepared to learn in the classroom by providing free school supplies and essentials throughout the state of Minnesota. This generosity is just one of the reasons I am proud to be a part of MDLA.

Looking forward, I encourage you to check out MDLA's Substantive Law Committees. Throughout the year, these committees have meetings open to any member of MDLA and cover relevant and timely topics to the field, CLE credit and a chance to connect. For outstate members, we are working on ways to increase digital accessibility.

New this year is MDLA's Diversity Clerkship program. The Diversity Committee has created a program that will connect diverse law students with law firms for a summer clerkship. This service is supported by our membership dues and comes at no additional cost. In addition to the Diversity Clerkship Program, MDLA is continuing to foster law students through our diversity mentorship program.

JOIN ONE OF MDLA'S COMMITTEES

SUBSTANTIVE LAW

- Construction Law
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- Governmental Liability
- Insurance Law
- Long Term Care
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- Motor Vehicle Accident
- Products Liability
- Retail and Hospitality
- Workers' Compensation

THE WHOLE TRUTH: WHAT WHOLE EXOME SEQUENCING AND OTHER GENETIC TESTS CAN REVEAL ABOUT CAUSATION IN BIRTH INJURY CASES

By Sarah Hoffman, Bassford Remele

The theme advanced by Plaintiffs in birth injury cases often follows a familiar path: the defendant medical provider failed to recognize signs of fetal distress on the electronic fetal monitor, and then neglected to perform a C-section to relieve the baby's distress. Because of that alleged negligence, the baby experienced a loss of blood flow and oxygen, which led to brain damage, followed by neonatal encephalopathy, and ultimately, a diagnosis of cerebral palsy. While this is a common theme, medical literature reveals that most children with neonatal encephalopathy and cerebral palsy did not experience their underlying brain injuries during labor and delivery. In fact, it is estimated that "70% of cases occur before the onset of labor," and "only 4% of cases of encephalopathy can be attributed solely to intrapartum events." *ACOG Practice Bulletin*, "Intrapartum Fetal Heart Rate Monitoring: Nomenclature, Interpretation, and General Management Principles," p. 5, Number 106 (July 2009).

Because events during labor and delivery are rarely the cause of neonatal encephalopathy and cerebral palsy, it is crucial to look for other potential causes of a child's injuries. In recent years, scientific research has revealed that genetics can play a crucial role in the development of the brain injuries that lead to cerebral palsy. Geneticist Dr. G. Bradley Schaefer explains this genetic component:

> The last decade has witnessed an unprecedented advancement in genetic testing and a better understanding of the genetic basis of complex traits. As this information is applied to almost any human medical condition, genetic underpinnings at the core of these disorders are soon discovered. CP [cerebral palsy] is no exception. Previously, CP has been considered by some to be a condition primarily associated with mismanaged perinatal events. An undeniable large body of evidence has now emerged that identifies CP as being a predominantly neurogenetic condition. A carefully planned diagnostic evaluation can identify the cause of CP in 75% or more of the cases. All persons with CP (and their families) deserve an accurate understanding of the cause of the condition.

Schaefer, "Genetic Considerations in Cerebral Palsy," *Seminars in Pediatric Neurology*, 15:21-26 (2018).

Similarly, defendants in medical malpractice cases also deserve an accurate understanding about the cause of a child's neurologic injury. After all, "a lawsuit should be an intensive search for the truth, not a game to be determined in outcome by considerations of tactics and surprise." *Anderson v. Florence*, 288 Minn. 351, 356, 181 N.W.2d 873, 876 (1970) (quoting Louisell, Discovery and Pre-Trial Under the Minnesota Rules, 36 Minn.L.Rev. 633,639).

To facilitate this search for the truth, a variety of blood tests can be performed to explore genetic causes of a child's injuries. These include tests like the microarray, which look for microdeletions and microduplications of chromosomes. Another available test is Whole Exome Sequencing, or WES, which sequences all of a person's genes to look for

Whole Truth **continued on page 8**

Sarah Hoffman is a shareholder with Bassford Remele. Sarah is a health care litigator who helps systems, hospitals, clinics, and individual providers navigate and prevent lawsuits, investigations, board proceedings, and hearings. She also represents providers in licensing actions, and counsels health care clients regarding various legal issues, including laws governing treatment of patients with mental illnesses and confidentiality of medical records.

Whole Truth **continued from page 7**

abnormalities in the portion of the genome that encodes proteins. As the National Institutes of Health explains, "because most known mutations that cause disease occur in exons, whole exome sequencing is thought to be an efficient method to identify possible disease-causing mutations." https://ghr.nlm.nih.gov/primer/testing/sequencing.

To investigate potential genetic causes of a child's encephalopathy and cerebral palsy, the defense can bring motions to compel, asking that both the child and the parents undergo genetic testing, including Whole Exome Sequencing. The remainder of this article will provide a review of the legal standards for compelling such testing under Rule 35; discuss cases from around the country, including in Minnesota, that have addressed genetic testing; and provide strategies for pursuing such motions in future birth injury cases.

THE LEGAL STANDARD FOR COMPELLING GENETIC TESTING: A REVIEW OF RULE 35

The legal basis for compelling genetic testing under Minnesota law is found in Rule 35.01, which states that a court may order a "physical, mental, or blood examination" whenever "the physical or mental condition or the blood relationship of a party, or of an agent of a party, or of a person under control of a party, is in controversy." An order directing such an examination must be based on "good cause." *Id.* The Minnesota Supreme Court has recognized that the showing necessary to demonstrate "good cause" will depend on the nature of the case. *Haynes v. Anderson,* 232 N.W.2d 196, 199 (Minn. 1975).

The rules and cases under federal law—where much of the litigation addressing genetic testing has occurred—provide a similar framework. Rule 35(a)(1) of the Federal Rules of Civil Procedure states that a court may "order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner." Any order for an examination under Rule 35 must be made upon "motion for good cause." *Id.* To satisfy the rule's requirements, the movant must make an "affirmative showing…that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination." *Schlagenhauf v. Holder*, 379 U.S. 104, 118 (1964). "This does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination" because "there are situations where the pleadings alone are sufficient to meet these requirements." *Id.* at 119. For instance, "[a] plaintiff in a negligence action who asserts mental or physical injury…places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury." *Id.*
The "good cause" element is met when there is a "showing that the examination could adduce specific facts relevant to the cause of action and necessary to the defendant's case.'" *Ornelas v. S. Tire Mart LLC*, 292 F.R.D. 388, 391 (S.D. Tex. 2013). "The probability of obtaining the information through other sources is pertinent to the 'good cause' inquiry," and "a plaintiff may not avoid a Rule 35 examination simply on the grounds that other sources of information, such as medical reports and depositions of plaintiff's treating physicians, are available." *Id.* at 391-92. "Good cause" can also be demonstrated by emphasizing the defendant's right to offer alternative causes of the alleged harm. *See McDonough v. Allina Health Sys*., 685 N.W.2d 688, 695 (Minn. Ct. App. 2004) (noting that defense experts may point to "plausible alternative causes" of a plaintiff's injury); *Damgaard v. Avera Health*, 104 F. Supp. 3d 983, 986 (D. Minn. 2015) (recognizing that "it is appropriate for a defense expert to offer possible alternative theories for an injury's cause"). Those alternative causes "need not be proved with certainty or more probably than not," because "[t]o fashion such a rule would unduly tie a defendant's hands in rebutting a plaintiff's case. …" *Allen v. Brown Clinic, P.L.L.P.*, 531 F.3d 568, 574-75 (8th Cir. 2008).

LESSONS FROM CASE LAW: A SUMMARY OF DECISIONS ADDRESSING MOTIONS TO COMPEL GENETIC TESTING

Courts have wrestled with a variety of issues in applying the above standards to motions for genetic testing, most notably, whether courts possess the authority to compel non-parties like parents to submit to genetic testing, and whether privacy concerns associated with genetic testing override defendants' interests in exploring other causes of a child's injuries.

In the case of *Cruz v. Superior Court,* 121 Cal. App. 4th 646, 17 Cal. Rptr. 3d 368 (2004), the California Fourth District Court of Appeals considered whether it had the authority to order the mother of an injured child to undergo genetic testing. The court addressed the question under a California statute similar to federal Rule 35, which permitted physical examination of a party to the action or an agent of any party. *Id.* at 650, 371. While the mother argued that the statute did not permit testing of a non-party like herself, the court ultimately determined that the term "agent" in the statute was "sufficiently broad to include mother under the facts of this case." *Id.* at 652, 372. The court expounded on its reasoning as follows:

> We do not hold that a parent is always to be treated as the child's agent for discovery purposes. But here mother and plaintiff were contemporaneously under the care of OBGYN, and plaintiff's malpractice claim includes charges that his injury resulted in part from the manner in which OBGYN treated mother during her pregnancy and plaintiff's

Whole Truth **continued on page 9**

Whole Truth **continued from page 8**

> delivery. Furthermore, in her capacity as plaintiff's mother, she has a definable economic interest in the outcome of the suit. If plaintiff is successful in obtaining a monetary award, mother's financial burdens resulting from her duty to care for plaintiff will be lessened.

Id. at 652, 372.

Four years later, the United States District Court for the District of Colorado also grappled with the question of whether it had the authority to compel a parent to submit to genetic testing. In the birth injury case of *Cutting v. United States*, 2008 WL 5064267, at *1 (D. Colo. Nov. 24, 2008), the defendants argued that "Plaintiff's explanation of the child's injuries is not supported by the medical records" and that there were "other potential causes, including genetic defects." *Id.* The plaintiffs argued, however, that "all medical opinions of providing doctors to date support their theory of a birth event as the cause." *Id.* The court sided with the defendants in their request to test the child, concluding that there was a "good faith dispute that supports the requested, minimally invasive, one-time blood and urine draw at the time of the IME." *Id.* But the court rejected defendants' request to test the mother, determining that "under persuasive authority," Rule 35 of the Federal Rules of Civil Procedure did not "reach to nonparties." *Id.*

In 2015, the United States District Court for the District of New Jersey reached a similar conclusion in the case of *Young v. United States*, 311 F.R.D. 117 (D.N.J. 2015). There, "a range of genetic tests" had already been performed on the child even before motion practice. *Id.*, 119. Those tests included a microarray test that revealed a microdeletion, which resulted in "the deletion of at least 120 genes." *Id.* The defendants' expert opined that this deletion, "if not inherited, may well explain" the child's injuries. *Id.* The expert also opined that the child's genetic condition would be "clarified by determining whether either of his parents harbor this deletion." *Id.* As a result, the defendants asked the court to order the parents to submit to genetic testing, arguing that if they could show that "the genetic deletion is the product of mutation and that the deletion is the cause of at least some of [the child's] disabilities, then Defendants' liability for [the child's] injuries will be significantly reduced." *Id.* at 120.

However, like the court in *Cutting*, the *Young* court stated that it was "without authority to compel a non-party to submit to an examination under Rule 35." *Id.* at 121. And, the court decided that neither parent fell within the definition of a "party" for purposes of compelling genetic testing under Rule 35. *Id.* Although the defendants argued that the child's parents were parties "because they [were] involved in the pending litigation and [were] financially 'interested' in its outcome," the court determined that their financial considerations were not sufficient to qualify them as parties for purposes of the motion. *Id.* at 121. With regard to the child's father, he had neither "asserted an individual claim nor [had] a representative role in the pending litigation." *Id.* at 121. The court noted that there was no legal authority to support the proposition that "an individual interest in litigation, no matter how attenuated, can render that individual a party for purposes of Rule 35 or that such a person may be compelled by court order to submit to an examination." *Id.* With regard to the mother, who was named in the case caption as the child's parent and natural guardian, the court found that "Rule 35 does not authorize a court to order representatives or natural guardians of minor-plaintiffs to submit to genetic testing." *Id.* at 123. It also determined that the mother's "purported interest in obtaining a monetary judgment for her child does not render her within the scope of Rule 35." *Id.*

While the courts in *Cruz*, *Cutting*, and *Young* were primarily focused on whether they could compel a non-party to submit to testing under Rule 35, in recent years, the issue of privacy in one's genetic information has become a central concern among courts faced with these motions. One example is found in *Meyers by Meyers v. Intel Corp.*, 2015 WL 3643470, at *3 (Del. Super. Ct. June 11, 2015). There, the plaintiffs argued that a child's birth defects were caused by his exposure to certain chemicals used at the defendant's company, where the child's parents worked. *Id.* at *1. The defendant sought to compel the mother, who was a party, and the father, who was not a party, to submit to "trio whole exome sequencing," because that testing had a 35 percent probability of revealing whether the child inherited his birth defects from his parents. *Id.* The parents allowed their child to be tested, but refused to be tested themselves. The defendant argued that testing of both parents was necessary to have the "best chance of determining whether there is an identifiable genetic cause" of the child's health problems. *Id.* at *1. As explained by the defendant, "Trio Whole Exome Sequencing is used in cases where doctors believe there may be a genetic explanation for a medical condition, but all of the particular genetic variations that cause the condition have not yet been identified." *Id.* at *1. But in the end, the court concluded that the results of the testing did not justify what it viewed as an invasion of the parents' privacy:

> In contrast to "standard" genetic tests that analyze one gene or small groups of related genes at a time, Trio Whole Exome Sequencing is an examination of one's entire exome. As noted above, according to Intel, there is "at least a 35% probability" that Trio Whole Exome Sequencing will identify a genetic cause for Jacob's birth defects. Given this low probability of success, the significant privacy concerns relating to blood draws and genetic testing, the fact that [the father] is not a party, and the fact that this Court has no jurisdiction over [the father], the Court finds no basis to compel [him] to submit to genetic testing.

***Whole Truth* continued on page 10**

Whole Truth **continued from page 10**

Id. at *3. Because the child's father was not subject to the testing, the defendant did not pursue testing of the mother.

In 2017, a magistrate judge for the United States District Court for the District of Oregon expressed similar concerns in *Fisher for X.S.F. v. Winding Waters Clinic, PC,* 2017 WL 574383 (D. Or. Feb. 13, 2017), *aff'd*, 2017 WL 4780616 (D. Or. Oct. 22, 2017). In that birth injury action, the defendants sought to compel the child to undergo Whole Exome Sequencing. The child had already undergone comparative genomic hybridization, and the results of that test were normal. But the defendants' genetics expert argued that Whole Exome Sequencing was necessary to "attempt to establish a full and correct diagnosis." *Id.* at *2. The expert further opined that there were "several diagnosable syndromes which match [the child's] finding quite closely" and went on to note that "in similar cases…there is a greater than 50% probability that valuable information concerning the medical diagnosis and what caused it will be uncovered through the proposed testing." *Id.*

The plaintiff argued, however, that the defendants' geneticist had not identified "specific genetic syndromes or conditions for which defendants seek testing." *Id.* at *3. Furthermore, the plaintiff's expert opined that a genetic cause of the child's brain injury was unlikely, and that Whole Exome Sequencing was not necessary. *Id.* He also expressed concerns about privacy, noting that Whole Exome Sequencing "uncovers vast amounts of genetic information that has nothing to do with the potential genetic syndrome." *Id.*

After considering the experts' opinions, the court denied the request for Whole Exome Sequencing. First, the court determined that the child's genetic condition was not "in controversy" for purposes of Rule 35 because the defendant's expert had stated only that "some unidentified and unspecified genetic condition may be a cause or contributing factor." *Id.* at *4. The court felt that this was "insufficient to place the near entirety of [the child's] genetic information at issue, especially in the face of competing testimony … that it is unlikely that [the child's] brain damage has a genetic cause." *Id*. The court also said that the defendants had failed to show "good cause," in part because "genetic information [had] already been examined through chromosomal microarray testing, and the other tests performed indicate that WES would not reveal any additional relevant genetic conditions, given the strength of plaintiff's evidence of hypoxia as a likely cause of [the child's] injuries." *Id.* at *5. The court also reiterated its concerns about privacy interests in genetic information. Although the defendant's expert said that the results could be reviewed in a "very targeted fashion so that only conditions relevant to this lawsuit are disclosed," the court determined that this "potentially targeted disclosure of information" was insufficient. *Id.* at *8. It explained that there would be an "invasion of privacy in the information having been gathered, and harm in the information simply existing," because it "could well be disclosed against the family's wishes in the future, for instance, in conjunction with an insurance application, or as the result of a court proceeding or court order, or from a computer hack of electronic medical records." *Id.*

In February 2018, a magistrate judge for the United States District Court for the District of Minnesota reached a similar conclusion to that of the magistrate in *Fisher*, denying the defendants' request for Whole Exome Sequencing in the case of *Burt v. Winona Health*, No. CV 16-1085 (DWF/FLN), 2018 WL 3647230, at *1 (D. Minn. Aug. 1, 2018). But unlike in *Fisher*, where the district court judge upheld the magistrate's denial of the request for Whole Exome Sequencing, the district court judge in *Burt* reversed the magistrate's ruling, and permitted the testing. In doing so, the court provided the following analysis:

> The Court observes that this is an extremely close call. The Court concludes, however, that because Plaintiffs must prove the cause of [the child's] injuries, [the child's] genetic makeup is "really and genuinely in controversy." … The Court further concludes that Defendants have established good cause for WES testing. Specifically, Defendants' expert … stated that there are numerous genetic disorders that may have caused [the child's] injuries, while also identifying specific conditions that may be a cause. … [He] also explained that "[w]ithout genetic testing to look for these conditions," doctors often misdiagnose a child's injuries. …These facts undercut the Magistrate Judge's finding that Defendants did not "identify[ ] what other causes are likely to be found or why [WES] testing is likely to produce evidence that cannot be ascertained without the testing." [Defendants' expert] identified specific facts justifying WES testing related to [the child's] parents—namely, that their "medical records indicate the possibility of underlying genetic issues within the family."

Id. at *2. The court was mindful of privacy concerns, but determined that the "stipulated protective order in this case is adequate to protect Plaintiffs' private genetic information from disclosure to third parties" and would also allow the parties to "petition the Court for modification of the protective order, which Plaintiffs may do to more comprehensively protect their genetic information." *Id.* at *3. In the end, the court determined that "the relevance of Plaintiffs' genetic makeups outweigh Plaintiffs' physical and privacy concerns relating to WES testing." *Id.*

***Whole Truth* continued on page 11**

Whole Truth **continued from page 10**

The *Burt* court also addressed a unique statutory scheme under Minnesota law that is designed to protect genetic information. The Genetic Privacy Act, codified at Minn. Stat. § 13.386, subd. 3, states that "unless otherwise expressly provided by law, genetic information about an individual may be collected by a government entity…or any other person only with the written informed consent of the individual." In *Burt*, the plaintiffs argued that this Act gave them a "privilege in their genetic information and that Rule 35 is not an exception to the statute." *Id.* at *3. But as the court noted, "the language of Rule 35 plainly permits courts to order parties to undergo 'a physical or mental examination' and does not identify any types of examinations that are exempt from the rule." *Id*. Therefore, the court determined that "[g]enetic testing, including WES, is therefore within the array of examinations that Rule 35 envisions," and that "Rule 35 and Defendants' constitutional right to a jury trial provide legal bases for the Court to order WES testing." *Id.*

STRATEGIES FOR PURSUING GENETIC TESTING IN BIRTH INJURY CASES

Based on the courts' decisions in the cases above, there are a few central principles to remember when bringing a motion to compel genetic testing in a birth injury case.

First, there has been a general reluctance among courts to compel testing of parents who are not parties to the litigation, despite their considerable financial interest in the case. Indeed, the language of Rule 35 of the Federal Rules of Civil Procedure clearly states that only a party, or someone under the party's custody or control, can be subject to a physical or mental examination. Fortunately, Minnesota Rule of Civil Procedure 35.01 also adds that an "agent" of a party may be subject to examination if his or her physical, mental, or blood condition is "in controversy." While there is limited case law in Minnesota addressing genetic testing in birth injury cases, the more expansive wording of the state's rule provides a basis in Minnesota courts to seek testing of non-party parents.

Second, as the *Burt* case demonstrates, identifying specific genetic conditions that could be the cause of a child's injuries may be crucial to establishing the "good cause" component of the motion practice. One of the primary reasons the court refused to allow the testing in *Fisher* was because the defendants' genetics expert had not identified which conditions or syndromes could be the underlying culprit of the child's injuries. Absent identification of specific genetic abnormalities, courts may suspect that genetic testing will simply turn into an impermissible fishing expedition.

Third, some courts may conclude that the odds of obtaining information about a genetic cause are not significant enough to justify the testing. This is particularly true when the chance of discovering a genetic abnormality does not reach the threshold of a "probability." But importantly, cases like *McDonough* and *Damgaard* demonstrate that the law empowers defendants to search for plausible alternative causes of an injury, and that those causes do not need to be proven to a probability.

Finally, privacy issues are of paramount concern to courts. Such concerns are understandable, particularly in our digital age where sensitive genetic information stored in computer systems could be stolen or accidentally released. Yet as the court noted in *Burt*, protective orders are important tools that can be used to keep genetic data safe. Furthermore, to the extent that parents do not want to know all of the information that can be revealed with Whole Exome Sequencing, labs that perform the testing can shield family members from learning about certain genetic abnormalities.

Ultimately, discovering the truth about the cause of a child's brain injury and resulting cerebral palsy is a crucial part of defending a birth injury case. By relying on advances in genetic testing, and cogent legal arguments, defense lawyers can successfully ensure that the whole truth is revealed.

MINNESOTA JOINS MAJORITY OF STATES IN ENACTING ADDITIONAL STATUTORY LEGISLATION RELATED TO LICENSING AND REGULATION OF ASSISTED LIVING FACILITIES

By Elle Lannon and Patti Skoglund, Jardine, Logan & O'Brien P.L.L.P.[1]

This article provides an overview of what some consider sweeping changes by the 2019 Minnesota Legislature for Assisted Living facility licensing and regulation. The primary takeaway for defense counsel is that, although a new law is on the books, it does not go into effect until August 2021. The existing structure, which has been in place since 2007, will remain in effect until that time. Unfortunately, simply looking at the Revisor's website may be a bit confusing. Both the existing and the new laws are currently posted. Although the Revisor has included a note at the top of Chapter 144G indicating which sections of the law are effective when, this information could be lost when reviewing individual sections and it will be important to review the notes associated with each provision of the law to determine whether it is currently in effect or not. In addition, several components of the new assisted living structure still need to go through rulemaking. Although this process is in its initial phase, a final rule will likely not be published until late 2020. As such, the following addresses some of the most significant changes regarding the new assisted living licensing and regulatory requirements.

On May 22, 2019, Gov. Tim Walz signed a bill that significantly affects assisted living licensure. The bill can be found in Minn. Stat. § 144G. Historically, Minnesota has licensed assisted living as a type of licensed home care service rather than as a type of licensed "facility." In structuring assisted living in this way, Minnesota has been in the minority of states because almost all other states license assisted living as a physical facility, not a service type. However, beginning August 1, 2021, Minnesota joins the remaining 49 states in requiring assisted living facilities to be licensed. The new law also requires assisted living facilities with dementia care to meet additional, special licensing requirements. Funding for this new law is detailed in Chapter 60 of the 2019 Session Laws, which provides $30 million to strengthen elder care protections in Minnesota. With an emphasis on new licensing and regulatory processes for assisted living facilities, much of the funding of this legislation will be directed to: strengthening abuse reporting center, establishing a licensure process for both assisted living facilities and assisted living facilities with dementia care, and increasing inspections. This article analyzes some of the most significant changes implemented by this new law.

Assisted Living **continued on page 13**

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1 *We appreciate the input and assistance for this MDLA article from Michelle Klegon of Klegon Law Office. Michelle has extensive experience representing assisted living providers, home care agencies, and long-term care facilities in a variety of areas including regulatory and licensing matters and general consulting work.*

Assisted Living **continued from page 12**

LICENSING

Licensing for Assisted Living Facilities without Dementia Care

The new law requiring assisted living facilities to be licensed goes into effect on August 1, 2021. As such, all facilities may begin the process to become licensed on or after August 1, 2021. The new law requires a licensing fee of $2,000 per building plus $75 per resident which must be paid by the provider regardless of whether the provider is seeking an initial license, a renewal license, or a change of ownership license. A resident is any individual being housed and receiving assisted living services. Like a provider's current application for a home care license, for a facility to be granted a license, the facility must provide information about the operations of the facility, and managerial officials and owners of the facility must undergo, and pass, a background study. Beginning August 1, 2021, all new assisted living facilities applying for a license will be required to first apply for a one-year provisional license, during which time the Minnesota Department of Health will complete a survey of the facility. If the Department determines the provisional licensee is in substantial compliance with the survey requirements, it will issue a facility license to the assisted living provider. The new law requires that facilities renew their license every year, and facilities are prohibited from transferring licenses to another party.

Licensing for Assisted Living Facilities with Dementia Care

A more expensive licensing fee of $3,000 per building plus $100 per resident will be assessed against assisted living facilities with dementia care. Assisted living facilities with dementia care are subject to the same requirements as assisted living facilities, as well as additional requirements specific to providing dementia care services. These additional requirements include demonstrating the facilities can provide sufficient services to dementia residents by either showing the facility has experience managing dementia residents or by showing its compliance history in operating a care facility that is licensed or registered under federal or state law. Additional licensure requirements include having the licensed assisted living director complete at least ten hours of continuing education annually and meeting certain standards for staffing, staff training, policy development, and the provision of resident services.

REGULATIONS FOR THE LICENSING OF ASSISTED LIVING FACILITIES AND ASSISTED LIVING FACILITIES WITH DEMENTIA CARE

Minimum Requirements for Assisted Living Facilities and Assisted Living Facilities with Dementia Care

The new law identifies minimum requirements that an assisted living facility and an assisted living facility with dementia care must meet. In order to be an assisted living facility, or an assisted living facility with dementia care, a provider must:

- Distribute to residents the assisted living bill of rights;
- Provide or make available health-related services, including assistance with self-administration of medication and medication management, and assistance with at least three of the following seven activities of daily living: bathing, dressing, grooming, eating, transferring, continence care, and toileting;
- Provide necessary assessments of the physical and cognitive needs of assisted living clients by a registered nurse;
- Maintain a system for delegation of health care activities to unlicensed personnel by a registered nurse;
- Provide staff access to an on-call registered nurse 24 hours per day, seven days per week;
- Maintain a system to check on each assisted living client at least daily;
- Provide services in a manner that complies with the Nurse Practice Act;
- Utilize a person-centered planning and service delivery process;
- Offer to provide or make available at least the following supportive services to assisted living clients: two meals per day, weekly housekeeping, weekly laundry service, upon the request of the client, reasonable assistance with arranging for transportation to medical and social services appointments, and the name of or other identifying information about the person or persons responsible for providing this assistance, upon the request of the client, reasonable assistance with accessing community resources and social services available in the community, and the name of or other identifying information about the person or persons responsible for providing this assistance, and periodic opportunities for socialization;
- Make available to all prospective and current assisted living clients information consistent with the uniform format and the required components adopted by the commission;

Assisted Living **continued on page 14**

Assisted Living **continued from page 13**

- » Have and maintain a system for delegation of health care activities to unlicensed personnel by a registered nurse;
- » Provide a means for residents to request assistance for health and safety needs 24 hours a day, seven days per week;
- » Provide a means for one or more persons to be available 24 hours a day, seven days per week, who are responsible for responding to the requests of residents for assistance with health or safety needs, with additional requirements;
- » Allow residents the ability to furnish and decorate their unit within the terms of the assisted living contract;
- » Permit residents access to food at any time;
- » Allow residents to choose their visitors and times of visits;
- » Allow residents the right to choose a roommate if sharing a unit;
- » Notify residents of their right to have and use a lockable door to their unit;
- » Develop and implement a staffing plan for determining its staffing level, with additional requirements.

See Minn. Stat. 144G.03, subd. 2.

Policies and Procedures

Further, the new law requires that facilities have policies and procedures in place to address various situations, including the following, non-exhaustive list: reporting of maltreatment of vulnerable adults, conducting and handling background studies on employees, staff training and evaluations, handling complaints regarding staff or services provided by staff, conducting initial resident evaluations and assessments, reminders for medications, treatments, or exercise, and supervision or registered and unlicensed staff members.

See 2019 Minn. Sess. Law Serv. Ch. 60 § 11, subd. 2.

Other Requirements

In addition to the above-mentioned changes, the new law also details requirements regarding the assisted living bill of rights, housing and services for residents, transferring of residents within a facility, business operation, staffing and supervisory requirements, notices, services, medication management, treatment and therapy management services, resident record requirements, staff orientation and annual staff training requirements, training in dementia care, controlling individual restrictions, assisted living contract requirements and terminations, among others.

CONSUMER PROTECTIONS FOR RESIDENTS

Electronic Monitoring

Additional statutory changes include broad consumer protections for residents of assisted living facilities. A significant protection under the new law, beginning August 2, 2021, includes a resident's right to conduct electronic monitoring of the resident's room or private living unit. In addition to applying to assisted living facilities, the electronic monitoring law applies to nursing homes, boarding care homes, and housing with services establishments, with the latter only valid through July 31, 2021. Under the new law, residents are required to notify the facility of any electronic monitoring devices and must receive consent of roommates, if applicable, before placing an electronic monitoring device in any room. However, a resident is not required to submit a notification and consent form to a facility for up to 14 days after an electronic monitoring device is placed if: (1) the resident reasonably fears retaliation by the facility; (2) there has not been a timely written response from the facility to a written communication from the resident or representative expressing a concern prompting the desire for an electronic monitoring device; or (3) the resident has already submitted a Minnesota Adult Abuse Reporting Center report or police report regarding the resident's concerns prompting the desire for an electronic monitoring device. When any of these exceptions apply, the resident is required to provide the notice and consent paperwork to the Office of Ombudsman for Long-Term Care right away. The new law provides specific details regarding the use of electronic monitoring devices. Issues of consent, notice, costs, installation, obstruction of the electronic monitoring device, dissemination of recordings, admissibility and evidence, liability, employee discipline, and penalties are all addressed. Please refer to the new law for situation-specific concerns.

Assisted Living Bill of Rights

Another significant protection afforded to residents under this new law is that facilities are required to provide residents with a copy of the assisted living bill of rights. 2019 Minn. Sess. Law Serv. Ch. 60, art. 1 § 12. The assisted living bill of rights is generally a new concept for assisted living facilities. Currently, providers are required to present residents with the Home Care Bill of Rights for Assisted Living, a concept that has been in place for several years. The assisted living bill of rights provides residents with many rights, including the right to receive appropriate care and services, refuse care and services, participate in care and service planning, courteous treatment, individual

Assisted Living **continued on page 15**

Assisted Living **continued from page 14**

autonomy, confidentiality of records, and access to counsel and advocacy services. Of course, these are just examples. For the full list of rights afforded to residents, please refer to the assisted living bill of rights.

Retaliation

Moreover, on August 1, 2019, a retaliation provision went into effect that prohibits current assisted living facilities, as well as nursing homes, from retaliating against a resident or employee who:

» Files a good faith complaint or grievance, makes a good faith inquiry, or asserts any right;

» Indicates a good faith intention to file a complaint or grievance, make an inquiry, or assert any right;

» Files, in good faith, or indicates an intention to file a maltreatment report;

» Seeks assistance from or reports a reasonable suspicion of a crime or systemic problems or concerns to the director or manager of the facility, the Office of Ombudsman for Long-Term Care, a regulatory or other government agency, or a legal or advocacy organization;

» Advocates or seeks advocacy assistance for necessary or improved care or services or enforcement of rights;

» Takes or indicates an intention to take civil action;

» Participates or indicates an intention to participate in any investigation or administrative or judicial proceeding;

» Contracts or indicates an intention to contract to receive services from a service provider of the resident's choice other than the facility; or

» Places or indicates an intention to place a camera or electronic monitoring device in the resident's private space.

2019 Minn. Sess. Law Serv. Ch. 60, art. 1 § 42; 2019 Minn. Sess. Law Serv. Ch. 60, art. 3 § 2.

CONCLUSION

The signing of HR 90 created expansive changes to the licensing and delivery of assisted living services in Minnesota. Importantly, these statutory changes affect all parties involved in the delivery, receipt, regulation, and enforcement of assisted living services and should be carefully considered when reviewing and analyzing related claims.

PRACTICAL AND ETHICAL PITFALLS OF AUDIO RECORDING NEUROPSYCHOLOGICAL EXAMINATIONS

By Michael T. Burke, Lind, Jensen, Sullivan & Peterson, P.A.

When a party initiates a lawsuit asserting physical or mental injuries, the defending party will typically make a request to evaluate the nature and extent of those injuries via an independent medical examination ("IME"). An increasingly common demand from plaintiffs is to audio record the examination. The typical arguments advanced in favor of audio recording an IME are to ensure that the examiner is not biased toward the examinee, to secure a word-for-word recording similar to deposition testimony, and to appeal to the truth-seeking objectives of the legal system. While these may, at first blush, seem like good reasons, the saying "just because you can doesn't mean you should" is apropos as there are several countervailing arguments against allowing audio recording of IMEs.

As the following paragraphs explain, the presence of audio-recording devices has been shown to skew neuropsychological test results, and disclosing testing materials to the public at large is generally prohibited by the neuropsychological profession. If neuropsychological IMEs are audio recorded, the validity and security of the test is compromised, and defendants are left with a distorted picture of the plaintiff's injuries. This article addresses the mechanics of obtaining an order for examination and provides guidance for combating situations in which an injured party objects to undergoing a neuropsychological IME absent an audio recording.

OBTAINING AN ORDER FOR EXAMINATION BY SATISFYING THE "IN CONTROVERSY" AND "GOOD CAUSE" REQUIREMENTS OF RULE 35

If litigants cannot agree to terms for an IME, the requesting party must seek an order from the court compelling the other party's attendance. The procedural means for doing so is via Minn. R. Civ. P. 35.01, or its federal counterpart, Fed. R. Civ. P. 35(a). Both rules govern orders for examination. The federal rule provides:

> The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control. . . . The order (A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and (B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

See Fed. R. Civ. P. 35(a).

Practical & Ethical Pitfalls **continued on page 17**

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Practical & Ethical Pitfalls **continued from page 16**

The Minnesota rule closely resembles the federal rule, but combines all of the requirements for obtaining orders for examination into one provision instead of partitioning the requirements into subparts:

> In an action in which the physical or mental condition or the blood relationship of a party, or of an agent of a party, or of a person under control of a party, is in controversy, the court in which the action is pending may order the party to submit to, or produce such agent or person for a physical, mental, or blood examination by a suitably licensed or certified examiner. The order may be made only on motion for good cause shown and upon notice to the party or person to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is made.[1]

Regardless of whether the lawsuit is venued in state or federal court, both the Minnesota rule and federal rule have three essential requirements, two of which—the "in controversy" and "good cause" requirements—are codependent in that you cannot logically have one without the other. The third requirement simply mandates that the requesting party provide notice of "the time, place, manner, conditions, and scope of the examination," and disclose the identity of the examiner. Fed. R. Civ. P. 35(a); Minn. R. Civ. P. 35.01. The first two requirements are more nuanced because they call for the requesting party to explain "why" the examination is necessary, whereas the third requirement merely obligates the requesting party to identify the "who, what, where, when, and how."

In order to satisfy the "good cause" requirement to show why the examination is necessary, the requesting party must first establish that a condition is "in controversy." Fed. R. Civ. P. 35(a); Minn. R. Civ. P. 35.01. Certainly, "[a] plaintiff, by coming into court and asserting that he has suffered an injury at the hands of the defendant, has thereby put his physical or mental condition 'in controversy.'"[2] But a plaintiff's assertion that he or she suffered an injury at the hands of the defendant is not the sole way to trigger Rule 35's "in controversy" qualification. *Haynes v. Anderson*, 232 N.W.2d 196, 199 (Minn. 1975). Instead, the only requirement is that the condition itself be "in controversy," regardless of whether the particular condition is pleaded in the complaint. This may seem like a distinction without a difference, but it has an important practical effect.

For example, a plaintiff may argue that because her complaint alleges physical injuries alone, she placed only her physical condition and not her mental condition in controversy. Continuing with this example, the argument follows that the defendant's request for psychological testing would be too expansive, beyond the scope of discovery, and therefore should not be permitted on the grounds that a mental injury was not specifically pleaded in the complaint. *Id*. But, if the defendant has "genuine doubts" about whether the plaintiff's symptoms are mental or physical in origin, that is enough to put the plaintiff's physical *and* mental condition "in controversy." *Id*.; *see also Schlagenhauf*, 379 U.S. at 118 (stating that the "in controversy" and "good cause" requirements of Rule 35 "are not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination"). The end result is that the defendant may compel the plaintiff's attendance at a minimum of two separate IMEs—i.e., one for the physical condition and one for the mental condition.

To be fair, courts are more wary when a party puts his or her opponent's condition in controversy, which is why it is of upmost importance to affirmatively show that each condition for which an examination is sought is "really and genuinely in controversy and that good cause exists for ordering each particular examination." *Schlagenhauf*, 379 U.S. at 118; *Haynes*, 232 N.W.2d at 199. "Plaintiff argues that by asserting physical injuries in her complaint she placed only her physical and not her mental condition in controversy. To place such a restrictive interpretation upon Rule 35.01 would, in our view, substantially undermine its usefulness. The rule does not require that the party to be examined place his or her condition in controversy, but only that the condition be in controversy." *See O'Sullivan v. State v. Minn.*, 176 F.R.D. 325, 328 (D. Minn. 1997) (*Erickson, Mag. J.)* Court-ordered mental examinations "are typically granted when one or more of the following factors are present: (1) a cause of action for intentional or negligent infliction of emotional distress; (2) an allegation of a specific mental or psychiatric injury or disorder; (3) a claim of unusually severe emotional distress; (4) the plaintiff's offer of expert testimony to support a claim of emotional distress; and/or (5) the plaintiff's concession that her mental condition is 'in controversy' within the meaning of Rule 35."

Practical & Ethical Pitfalls **continued on page 18**

1 *Minn. R. Civ. P. 35.01. Because of the similarity between Minnesota Rule and the Federal Rule, federal case law is instructive. See Johnson v. Soo Line R.R. Co., 463 N.W.2d 894, 899 n.7 (Minn. 1990) (stating that when Minnesota "rules of practice are modeled after the federal rules, federal cases interpreting the federal rule are helpful and instructive").*

2 *Schlagenhauf v. Holder, 379 U.S. 104, 126 (1964) (Douglas, J. dissenting in part) (stating that a plaintiff "may not be permitted to recover his judgment unless he permits an inquiry into the true nature of his condition"). Whether a patient places his or her medical condition in controversy is significant as it has the effect of waiving the physician-patient privilege, which permits the defense with access to medical documentation and information regarding the patient's condition.*

Practical & Ethical Pitfalls **continued from page 17**

THE THIRD-PARTY OBSERVATION PROBLEM AND ITS EFFECT ON AUDIO RECORDING NEUROPSYCHOLOGICAL EXAMINATIONS

Audio Recording Affects the Validity of Neuropsychological Test Results

Third-party observation, commonly abbreviated as "TPO," is a heavily researched topic in the neuropsychological field. TPO can be present in two forms. The first form is called "direct presence," which means "a person(s) physically present in the room other than the psychologist or his/her technician and the examinee."[3] The second form of TPO, which includes the use of audio recording, is called "indirect presence." Indirect presence comprises observation "through a window, two-way mirror, use of any camera or audio or video recording device, or any electronic or communication device."

Studies show that TPO—whether direct or indirect—affects the validity of test results due to a phenomenon called "social facilitation."[4] Social facilitation is a term used to describe the psychological finding that the mere presence of other people enhances the predominant behavioral response of humans in particular situations. The phenomenon was initially discovered after observing that cyclists tended to race faster when racing against others as opposed to racing alone.[5]

The study of social facilitation has been applied in various contexts, including the field of neuropsychology. For example, researchers at the State University of New York at Albany investigated whether the indirect presence of audio recording affected the neuropsychological test performance of individuals in the same way as direct TPO.[6] Participants in the study were divided into two groups—those who were aware the examination was audio recorded and those who were not. Follow-up tests showed the non-aware group's scores were "significantly higher" than the audio-recorded group's scores on four out of six subtests of the Memory Assessment Scales, which included their list acquisition score, cued recall score, delayed recall score, and delayed cue recall score. This data led researchers to conclude that "indirect presence of an observer, through tape-recording, influenced the neuropsychological test performance of the examinees in accordance with the social facilitation theory, which suggests that the presence of observers (in the present study the *indirect presence*) affects performance." Other comprehensive studies have confirmed the substantial effect of TPO on delayed recall, learning/memory, attention/processing speed, and intellectual/academic abilities.[7] TPO may also impact tests that measure motor and executive functions.

Apart from empirical evidence showing the effect that audio recording has on test results, it is important to note that neuropsychological tests are not designed to be audio-recorded. The very presence of audio-recording devices deviates from the Standards for Education and Psychological Testing, which mandate that "test users should carefully follow the standardized procedure for administration." Currently, no testing manual recognizes TPO as part of standardized testing procedures because of its effect on social facilitation.

Moreover, audio recording also has an effect on the applicability of normative data and normative comparison. Neuropsychologists use normative data to compare an examinee's performance with that of a larger sample. This normative data is gathered under highly controlled circumstances that do not include TPO. In neuropsychological assessments, normative comparison is used to "draw conclusions about an individual's cognitive capacities, like memory or attention."[8] Deviations from the norm group may result in a finding of an "abnormality." Therefore, introducing an audio-recording device into the examination introduces a variable that was absent when the normative data was gathered, which increases the likelihood of invalid test results.

All these concerns impact the validity of test results. In the legal practice, if an injured party is allowed to audio record

Practical & Ethical Pitfalls **continued on page 19**

3 *Alan Lewandowski et al., Policy Statement of The Am. Bd. of Prof'l Neuropsychology Regarding Third Party Observation & The Recording of Psychological Test Admin. in Neuropsychological Evaluations, 23 Applied Neuropsychology: Adult (2016), https://www.tandfonline.com/doi/.*

4 *Vikram S. Chib et al., Neural Substrates of Social Facilitation Effects on Incentive-Based Performance, 13 Social Cognitive & Affective Neuroscience 391–403 (Apr. 2018), https://academic.oup.com/scan/article/13/4/391/4965846.*

5 *John R. Aiello & Elizabeth A. Douthitt, Social Facilitation from Triplet to Electronic Performance Monitoring, 5 Group Dynamics: Theory, Research, & Prac. 164 (2001), http://www.radford.edu/~jaspelme/_private/gradsoc_articles/socialloafing/SocFacilitation-Triplett2.pdf.*

6 *Marios Constantinou et al., When the Third Party Observer of a Neuropsychological Evaluation is an Audio-Recorder, 16 The Clinical Neuropsychologist (2002), https://www.researchgate.net/publication/8144091_When_the_Third_Party_Observer_of_a_Neuropsychological_Evaluation_is_an_Audio-Recorder.*

7 *Matthew R. Shindell et al., Three's a Crowd: The Impact of Third-Party Observers on Neuropsychological Exams, Am. Bar Assoc. (Sept. 4, 2014), https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/articles/2014/threes-a-crowd-impact-third-party-observers-neuropsychological-exams/; (citing A.D. Eastvold et al., Does a Third Party Observer Affect Neuropsychological Test Performance? It Depends, 26 Clinical Neuropsychologist 520–41 (2012)).*

8 *Jacqueline N. Zadelaar et al., Univariate Comparisons Given Aggregated Normative Data, The Clinical Neuropsychologist (June 19, 2017), https://www.tandfonline.com/doi/full/10.1080/13854046.2017.1348542.*

Practical & Ethical Pitfalls **continued from page 18**

their neuropsychological examination, the requesting party is, for all intents and purposes, precluded from obtaining a standardized evaluation. Audio recording, therefore, impedes a defendant's means of evaluating the nature and extent of the injured party's claim. This hinders the defendant's ability to obtain medical evaluations that could support the defenses asserted or, in the alternative, lead to a more efficient resolution of the case.

Audio Recording Affects the Security of Neuropsychological Testing

Not only does audio recording affect test accuracy, but it also affects test security.[9] Notwithstanding obvious copyright concerns associated with the widespread dissemination of testing materials, neuropsychologists are bound by the ethical rules of their profession, which prohibit releasing testing materials to the public at large. Just as important for neuropsychologists and attorneys alike, "[p]ublic accessibility allows individuals involved in litigation to self-educate or be coached as to how to perform on certain measures of how to selectively pass or fail key components of the neuropsychological evaluation and thus invalidate the results of the assessment." Many tests, such as those that test memory or the ability to problem solve, depend on a lack of familiarity with the test. If the general public has access to the test, such accessibility allows an examinee to prepare for the exam, which skews test results and is analogous to giving students the answers to the test prior to sitting for a final examination.

For defense lawyers, the concern is two-fold. The immediate concern is that the plaintiff with access to testing instruments might be coached to answer questions in a manner that could negatively affect or possibly eliminate the defenses asserted. The more longstanding concern is that a collection of audio recordings may facilitate enterprising attorneys to create a shared database of examinations. Although there are clear privacy concerns here, a shared repository of audio recordings could allow attorneys to dissect a particular neuropsychologist's trends or patterns of questioning. This would facilitate razor-sharp preparation for the exact professional selected to perform the evaluation, which would impair the accuracy of test results.

In addition, permitting an injured party to audio record his or her examination can result in the requesting party being left with no examiner at all. The vast majority of neuropsychologists refuse to conduct an examination if the examination is audio recorded, often basing their refusal on the ethical concerns articulated in this article. In such a scenario, the defense is effectively precluded from retaining an expert to evaluate the conditions in controversy, which results in a loss of information that could support defenses or encourage settlement.[10]

Safeguards for Ensuring Adequate Disclosure Regarding Neuropsychological IMEs Are Already Provided by the Rules of Civil Procedure

As the previous sections of this article show, audio recording neuropsychological IMEs negatively affects test performance and results, and presents both short-term and long-term concerns regarding test security. Audio recording, therefore, is not an appropriate means to ensure that an examination is being performed fairly and in accordance with testing standards. Fortunately, the Rules of Civil Procedure themselves are designed to ensure that both sides are able to prosecute and defend their respective cases on a level playing field, rendering audio recording unnecessary.

After an examination, the examiner's findings and conclusions are put into a detailed report and disclosed to the plaintiff. Minn. R. Civ. P. 26.01(b); *see also* Fed. R. Civ. P. 26(a)(2)(B). If the plaintiff does not receive the report, the examiner's findings are not admissible at trial. The plaintiff is allowed to review the examiner's conclusions and, depending on whether the case is venued in state or federal court, may elect to depose the examiner about his or her findings and conclusions. *Wood v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 353 N.W.2d 195, 197 (Minn. Ct. App. 1984). In the event the case proceeds to trial, the plaintiff has the right to cross-examine the examiner and to introduce contrary expert evidence via their own experts or treating physicians to rebut adverse findings. *Wood*, 353 N.W.2d at 197. Therefore, audio recording an IME is not necessary because the Rules of Civil Procedure already contain many procedural safeguards to exclude "junk science" and ensure that only evidence based on a reasonable degree of medical certainty is presented at trial.

The case of *Tomlin v. Holecek* is instructive for attorneys when faced with a request to audio record an IME. *Tomlin* addressed whether a plaintiff was entitled to audio record his Rule 35 psychological examination. *Tomlin v. Holecek*, 150 F.R.D. 628, 631 (D. Minn. 1993) (Erickson, Mag. J.). The plaintiff argued that the examination exposed him "to the unfettered inquiry of an 'agent' of the Defendants, whose sole function will be to disparage the value of his case." *Id*. at 631. In ruling on the issue, the court determined that audio recording the psychological examination was inconsistent with the underlying purpose of Rule 35. First, the court noted that recording the examiner's interview of the plaintiff would lead to invalidating the examiner's evaluative technique because recording a psychological examination runs contrary to the design of the examination as recognized by the psychological community, which necessitates an unimpeded one-on-one exchange between

Practical & Ethical Pitfalls **continued on page 20**

9 *Nat'l Acad. of Neuropsychology, Test Security: An Update (2003), https://www.nanonline.org/docs/PAIC/PDFs/NANTestSecurityUpdate.pdf.*

10 *Although the scope of this article is focused on audio recording mental examinations, the similar arguments regarding validity and security can be applied to examinations involving physical injuries.*

Practical & Ethical Pitfalls **continued from page 19**

the examiner and the patient. *Id*. at 631–32; *see also Croskey v. BMW of N. Am., Inc.*, 2004 WL 7340302, at *3 (E.D. Mich. June 10, 2004). Without a showing that the evaluative technique used by the examiner was discredited by the psychological community or was of questionable validity, the court declined to promote the "useless act" of recording the examination, which could render the examination futile. *Tomlin*, 150 F.R.D. at 632.

Next, the court found unconvincing the plaintiff's argument that a Rule 35 examination is nothing more than a maligned means by which the defendant can select a "hired gun" to set forth a conclusory report. Instead, the court interpreted Rule 35 as a means to ensure a level playing field between the parties. The court pointed out that the Rule 35 draftsmen "obviously concluded that . . . the crucible of cross-examination was an insufficient test of the truth and, accordingly, independent examinations, which could be undertaken only upon the agreement of the parties or at the discretion of the [c]ourt, were prescribed." The court noted that plaintiffs have an advantage in the litigation because they can select as many health care professionals as they desire, while the defendant's selection is limited by the need to obtain a court order for a one-time appraisal. The court further found reassurance in Rule 35's design by pointing out that both sides' health care professionals are "bound by the methodologies of their discipline and by the same formal or informal principles of professional integrity." *Id*. at 633. The court's gatekeeping function and the jury's credibility determination are enough, coupled with the plaintiff's cross-examination of the expert, to ensure credibility.

Finally, the court explained that allowing a plaintiff to audio-record an examination would introduce an adversarial component into the examination room. As explained by the court:

> Were we to honor the Plaintiff's request, that his counsel be present during the interview or that a tape-recording of the interview be preserved so as to assist in his attorney's questioning of [the examining psychologist], we would be endorsing, if not promoting, the infusion of the adversary process into the psychologist's examining room to an extent which is, in our considered judgment, inconsistent with the just, speedy and inexpensive resolution of civil disputes, and with the dictates of Rule 35.

Id. at 633–34.

While the *Tomlin* decision is clearly applicable in federal court, the similarity between Minnesota Rule 35 and Federal Rule 35 makes *Tomlin*'s analysis both helpful and instructive in cases venued in Minnesota state court.[11] Those faced with a dispute involving audio-recording examinations venued in Minnesota state or federal court should focus on *Tomlin*'s well-considered and rule-based analysis, which stands for the proposition that the Rules of Civil Procedure contain the playbook by which both sides are bound. Extraneous requests, which are not provided for by the Rules and which hinder a party's right to obtain complete discovery on a condition in controversy, should not be encouraged.

CONCLUSION

When a plaintiff starts a lawsuit claiming personal injuries, he or she has already been evaluated by his or her treating physician and, in some cases, has already been referred by counsel for treatment with particular medical professionals. The defense is not permitted to attend these examinations as most occur prior to suit. Consequently, the only means the defense has to test a plaintiff's claimed injuries is to request that the injured party attend an IME in order to verify the credibility of the claim. As this article explains, allowing the plaintiff to audio record his or her examination undermines the validity of the requested test and creates disadvantages for the defendant, not only for the present lawsuit, but potentially for other lawsuits to follow. Ensuring that neuropsychological testing is done in accordance with its design is paramount to ensuring accurate results so that the plaintiff's claims can be properly evaluated within the boundaries articulated by the Rules of Civil Procedure.

11 *Johnson v. Soo Line R.R. Co., 463 N.W.2d 894, 899 n.7 (Minn. 1990) (stating that when Minnesota "rules of practice are modeled after the federal rules, federal cases interpreting the federal rule are helpful and instructive").*

MDLA CONGRATULATES – SEND US YOUR VICTORIES!

The "MDLA Congratulates" column recognizes significant defense victories at summary judgment, trial, or appeal by MDLA members. To be included in the next edition, send a short, one-paragraph summary of the case including the MDLA member attorneys involved, the type of victory, and the issues presented to jmulder@bassford.com, sean.mickelson@wnins.com or director@mdla.org by March 1, 2020. Inclusion in the MDLA Congratulates column is subject to space limitations, and the MDLA Editorial Committee reserves the discretion to determine which cases will be included in the column and/or to shorten submissions as appropriate.

STEVE PLUNKETT, BASSFORD REMELE, OBTAINS DEFENSE JURY VERDICT IN SKILLED NURSING FACILITY PRESSURE WOUND CASE

Steve Plunkett, Bassford Remele, recently received a defense verdict in a nursing home trial in Eau Claire, WI. Plaintiff alleged negligence by the skilled nursing facility's staff related to the care of a resident's skin and pressure wound. The jury returned a verdict in favor of the skilled nursing facility after a few hours of deliberation.

CHRISTINE HINRICHS AND DAVID CAMAROTTO, BASSFORD REMELE, OBTAIN DEFENSE VERDICT IN MEDICAL LIABILITY CASE

Christine Hinrichs and David Camarotto of Bassford Remele, PA, recently obtained a defense verdict in a wrongful death/medical malpractice matter. The plaintiffs alleged that a family practice physician had an obligation to prescribe opioid medications to a new patient and that her decision to refer the patient to the prior prescribers of those medications was negligent and the cause of the patient's subsequent cardiopulmonary arrest and death. The jury deliberated for less than one hour, and returned a verdict finding no negligence on the part of the physician.

BRIAN MEEKER, STATE AUTO HOUSE COUNSEL/ LAW OFFICE OF BRIAN A. MEEKER, OBTAINS DEFENSE VERDICT IN PERSONAL INJURY TRIAL

Brian Meeker, State Auto House Counsel/Law Office of Brian A. Meeker, successfully defended Hamline University in a Ramsey County personal injury trial. The plaintiff alleged extensive damages, including multilevel cervical spine injuries with surgical interventions, as a result of shelves and contents spontaneously falling upon her. The defendant denied fault and, at trial, presented evidence challenging both liability and proximate cause of the injuries. Hamline's liability expert's testimony was essential to the favorable outcome, as he was able to demonstrate that the accident could not possibly have occurred the way plaintiff described it. The jury deliberated for three hours before returning a verdict of no negligence.


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By Richard C. Scattergood
Tomsche, Sonnesyn & Tomsche, P.A.
MDLA DRI State Representative

The 2019 annual meeting in New Orleans was entertaining, informative, and, at times, moving. The meeting began with a well-deserved thank-you to John Kouris, who is retiring after 20 years of service to DRI as its Executive Director. During his tenure, John reorganized the infrastructure and headquarters of DRI, ensured that DRI's information technology was current, maintained the membership and financial viability of DRI, and oversaw many important strategic initiatives, including those relating to diversity and inclusion. For 20 years, John has been a tireless advocate on behalf of DRI, and his contributions cannot be overstated. Thank you, John.

The keynote speaker was Mitch Landrieu, the mayor of New Orleans from 2010-2018, who orchestrated the rebuilding and rebirth of New Orleans following hurricane Katrina. Mr. Landrieu provided insights about finding common sense solutions to large problems through relationship building, listening, and compromise. He was immediately followed by a panel of speakers discussing the importance of emotional intelligence in creating real relationships with clients that lead to maintaining and growing your practice. President-elect Emily Coughlin's husband, Joe, is the director of the MIT Age Lab. His presentation on a future world that is great, delayed, small, and female provided fascinating information regarding the changing demographics, not only among the population at large, but also among the decision-makers who will be running our clients' businesses in the future.

Naturally, there was great sightseeing and social interaction in this historic United States city. I had never previously been to New Orleans and, frankly, did not have high hopes for the city. I was certainly enlightened to see all of the history and art available outside of the shenanigans on Bourbon Street. Don't get me wrong, I had fun on Bourbon Street, too.

For the first time in many years, the Twin Cities will be host to major DRI conferences. On May 14 and 15, 2020, DRI will be holding its business litigation super conference and also its intellectual property conference in the Twin Cities. You will be able to obtain further details through DRI communications. If you practice in these areas and are not currently a DRI member, please get in touch with me as you can receive a significant discount on attending these conferences by joining DRI. I sincerely hope that local attorneys will attend these conferences as we want to encourage DRI to bring more conferences to the Twin Cities to allow our member access to these tremendous learning opportunities without incurring the cost of travel and hotel.

Looking ahead, the 2020 annual meeting will be in Washington, D.C. October 21 – 23, 2020. I can't imagine a better place to be two weeks before the 2020 elections. Mark your calendar now.

DRI SEMINAR SCHEDULE

FEB 5	Product Liability New Orleans Marriott, New Orleans, LA
FEB 20	Toxic Torts and Environmental Law Pointe Hilton Tapatio Cliffs Resort, Phoenix, AZ
MAR 18	Litigation Skills Paris Las Vegas, Las Vegas, NV
MAR 26	Medical Liability and Health Care Law Hilton Austin Downtown, Austin, TX
APR 1	Construction Law Hyatt Regency Chicago, Chicago, IL

For more details on these and other upcoming DRI events, go to www.dri.org/Events

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