NEW JERSEY DEFENSE

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PRESIDENT'S LETTER
"TIME"

As I look back on what has been a very eventful year, I find myself reflecting on how fast time moves. It reminds me of a children's book that I enjoy "Slowly, Slowly, Slowly said the Sloth!

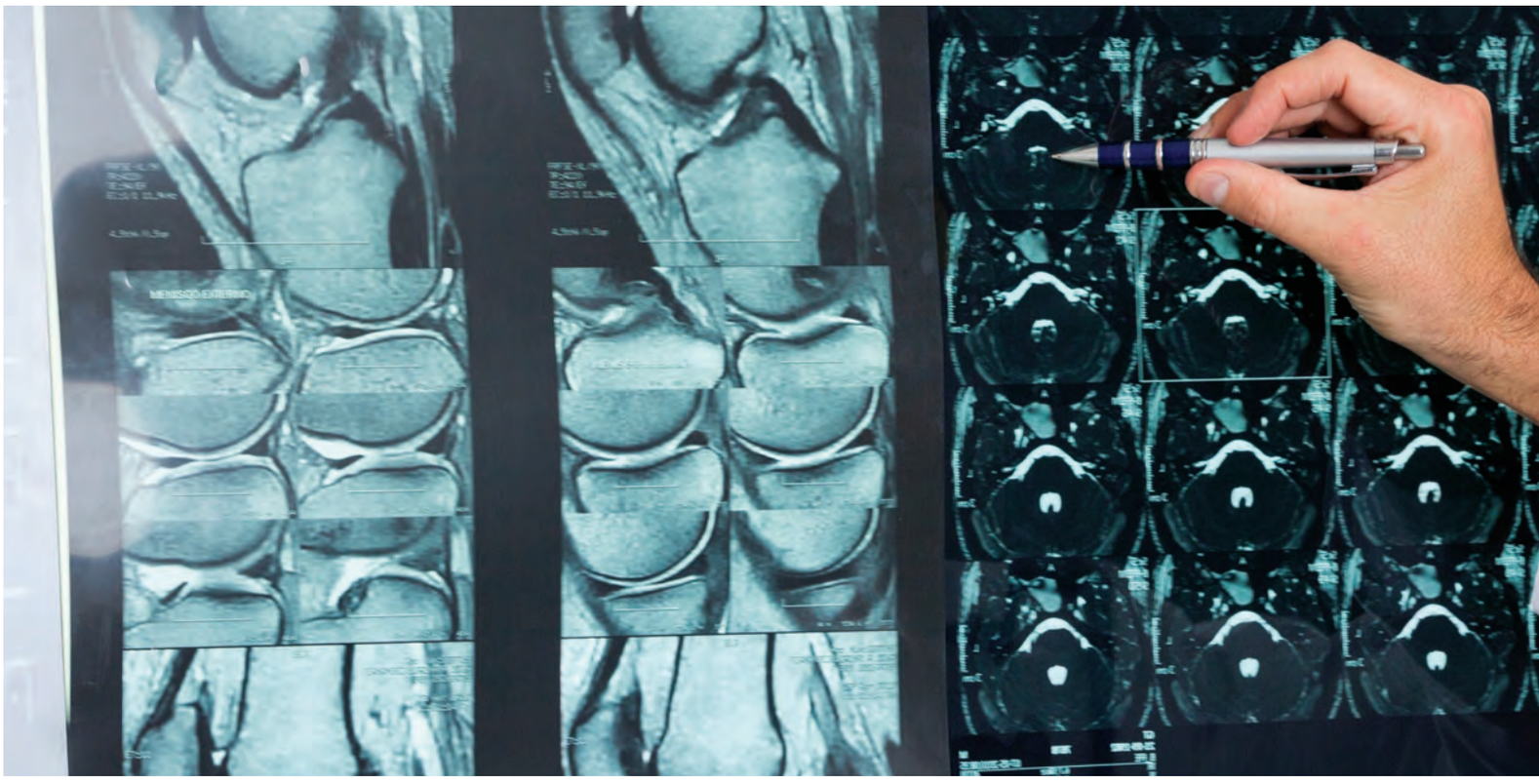
Most people know Eric Carle as the author of the "The Very Hungry Caterpillar." Justifiably so, it is quite popular. But, he is also the mind behind the story of the sloth. While most of the book features the Sloth being methodically ridiculed by a variety of species, its message is a very powerful one.

The back of the book reads "Why are we always in a hurry? Rush. Rush. Rush. We scurry from here and there. We play computer games and then - Quick! Click! - we watch TV. We eat fast food. Everyone tells us to make it snappy! Hurry up! Time is flying! Step on it! There's so little time just to be with friends, to watch a sunset or gaze upon a star-filled sky. Ah, what we could learn - even if just a little - from the gentle sloth who slowly, slowly, slowly crawls along a branch of a tree, eats a little, sleeps a lot, and lives in peace."

As lawyers we live in a very fast paced environment. Our very success is dependent on the efficient use of time. I wonder how the book would end if the Sloth had a Summary Judgment brief due in 2 days? Perhaps we could all learn a lesson from the story. Take some time to enjoy the moments life gives to each of us. Make sure that when you look back, you are happy with your use of time.

NJDA will be hosting our 51st Convention in Hershey, PA from June 22-25, 2017. We hope you will take some time and join us. It is sure to be fun for all so bring your family. The convention will feature Hershey Park, WaterPark, Golf, Shopping, Restaurants, 5-6 CLE credits and FUN. We want to encourage you to get involved. Join us, write an article, participate on a committee, follow us on Twitter, like us on Facebook, and find us on LinkedIn.

CHAD M. MOORE, ESQ.



OPINION ON CAUSE AND NEW DEFERENCE TO THE TESTIFYING TREATING PHYSICIAN

BY MICHAEL J. MCCAFFREY, ESQ.

Attorneys should know that under some circumstances a medical expert may testify to prognosis, diagnosis and **cause** without having issued a narrative report and without having been named in discovery a proposed expert witness. This article discusses those circumstances.

The issue was argued in a recent trial at which your author was the defendant's attorney. The court permitted a radiologist, not nominated by plaintiff as an expert, to testify that a herniated intervertebral disc was bright on imaging and therefore was an "acute" condition. Such opinion on acuity, in the interpretation of MR images, was rare or unknown until recently, but now has been proffered in litigation, and proffered with increasing frequency, as some rapacious attorneys discover willing experts and are assisted by favorable law, law to which we now turn.

Consider *Stigliano by Stigliano v. Connaught Lab., Inc.*, 140 N.J. 305 (1995). The issue was whether the defense may introduce at trial the video *de bene esse* of plaintiff's treating physician, in which the physician would opine to the **cause** of the infant's chronic-seizure syndrome. The court held in the affirmative, on ground that plaintiff, by instituting litigation, had waived the physician-patient privilege articulated at N.J.R.E. 506. Such waiver had been recognized earlier *Stempler v. Speidell*, 100 N.J. 368 (1985). The court in *Stigliano* added the perplexing observation that "although the treating doctors are doubtless 'experts' they are in this case more accurately fact witnesses…" and suggested that a quibbling effort to distinguish fact from opinion creates an "artificial distinction," because a medical opinion on cause is **both** a fact and an opinion and because to treat a "disorder" the doctor must identify its cause.

The Court in *Stigliano* wrote, essentially in an exercise of judicial notice, that treating physicians "did not examine [plaintiff] in anticipation of litigation." Such declaration would suggest an unfamiliarity with the engine of litigation as it is stoked and driven by attorneys who commonly represent the plaintiff and who commonly suggest to the plaintiff, before treatment has begun, the names of physicians who are most appropriate to undertake treatment, physicians who have demonstrated a will to testify favorably to the attorneys' previous clients. The court in *Stigliano* views the cause of a seizure, and by implication, of a herniated intervertebral disc, of a carcinoma, of a headache, of any manner of illness, to be a matter of fact, and not a matter of opinion, when the cause is announced by a treating physician. Really? We don't need no medical research? A doctor cannot set or surgically fixate a fractured bone without knowing the manner of misfortune?

Unresolved issues in *Stigliano* were what notice of **opinion** must be tendered to an adverse party and what report of a "treating" physician would be required. One who believed those issues to be resolved by R. 4:17-4(e) (expert's **or** treating physician's names and reports) now would be mistaken. Those issues were considered in *Delvecchio v. Tp. of Bridgewater*, 224 N.J. 559 (2016). The predominant issue there was: may a plaintiff rely upon the testimony of a

treating physician, not designated an expert witness, to establish the existence of a disability (or injury).

The court in *Delvecchio* held in the affirmative. It offered the *dictum* that an **opinion** on the **cause** of an illness or disorder, when uttered by a "treating" physician, now is really the opinion of a lay witness, which may be evidential under *N.J.R.E.* 701 (opinion of lay witness) and is not the opinion an expert subject to *N.J.R.E.* 702 (testimony by experts). The court thereby would make superfluous, in those instances, the sensible, scientific demand of *N.J.R.E.* 703 (bases of opinion testimony by experts). If the witness is a lay witness she cannot be required to have a scientific basis for her opinion, right?

The court in *Delvecchio* rigged full sail to the ship launched in *Stigliano* and set course for the precipitous edge of the known world of discovery and definition, but it unfurled into the breeze a flag of caution. The Court affirmed a party's obligation to respond appropriately to requests for opinions of proposed witnesses for trial. The court suggested that a treating physician would not be permitted to utter at trial an opinion requested in discovery but not provided. Yet the court then blunted the force of that obligation by suggesting in *obiter dictum* that rather than burdening the physician with issuing a report, someone, one not identified, should be required to give to the adverse party only a "summary" of the physician's opinions and proposed testimony. That someone perhaps would be the attorney? Would he be required to actually speak to the doctor? Would a paraphrased or incomplete opinion suffice? Would the doctor be permitted to testify to matters beyond the "four corners" of the summary?

Opinions on cause are reflexively expressed often by doctors who want to get paid by the insurance carrier in a PIP setting. Is that doctor now a lay witness whose opinion on cause must be given deference? Is a radiologist, that most modern and perhaps most influential of experts in many cases, who has not seen the plaintiff and who has recommended no treatment, a "treating" doctor entitled to the mantle of deference?

The reasoning of the court in *Delvecchio* does not include, among its premises, motive in the real world of litigation. The plaintiff who accepts and complies with his attorney's recommendation in the selection of a "treating" physician would enjoy the benefit of testimony by a physician who may be, in the eyes of jurors, an apparently impartial medical witness on the issue of cause, a luxurious benefit enjoyed without the price of serving that physician's report as would be required of an expert witness. The benefit to a party (who would be the plaintiff in most cases), the "potential effect," was noted by the court in *Stigliano* and is obvious to us all.

Therefore, the attorney preparing for trial in a case of bodily injury now should serve a demand for each report and writing in which each possible witness expresses an opinion on cause and should serve a supplemental interrogatory requesting each and every such opinion of said witness and the grounds for each opinion. That attorney may wish then to depose the "treating" physician, to be most prepared for the trial. Which party pays, and what sum gets paid, for the deposition of the treating physician who opines to cause, under R. 4:14-7(b)(2) (deposition of expert witness or treating physician) is unresolved. The wake of *Delvecchio* may capsize evidential rules limiting expert opinion.

Michael J. McCaffrey since 1992 has been certified by the Supreme Court of New Jersey as a Civil Trial Attorney. He received a B.A. (philosophy) from Rutgers University in 1978 and was graduated from the Indiana University School of Law, Bloomington, where he was selected through a writing competition to serve on the Indiana Law Journal.

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ARE INSUREDS ENTITLED TO PRIOR RECORDED STATEMENTS BEFORE SUBMITTING TO AN EXAMINATION UNDER OATH?: PRACTICE TIPS FOR INSURANCE DEFENSE COUNSEL

BY CHRISTIAN R. BAILLIE, ESQ.

An Examination Under Oath ("EUO") is a discovery device utilized by insurers, through their counsel, to investigate a first party insurance claim. It is essentially a deposition, with counsel examining the insured under oath in the presence of a court reporter; however, it is prescribed by a condition within the insurance policy itself rather than the rules of court. One issue that frequently comes up, particularly when an insured is represented by counsel, is whether the insured is entitled to a copy of a prior recorded statement. (Often, as a first line of defense, an adjuster or investigator will take a recorded statement of an insured, frequently over the phone, with the insured's permission.) More and more, insureds' attorneys are requesting this prior to submitting their client for an EUO. This article will examine this practice from insurance defense counsel's point of view.

At the outset, it must be noted that it is well-settled that an insured must cooperate with an insurer's investigation, including submitting to an EUO "as often as may be reasonably required". *See* N.J.S.A. 17:36-5.20; *DiFrancisco v. Chubb Ins. Co.*, 283 N.J. Super. 601 (App. Div. 1995). Other than a complete copy of the policy, insureds are not entitled to any other documentation prior to complying with their duties under the policy unless otherwise stated in the policy itself. This includes a copy of a prior recorded statement, be it the audio itself or a written transcript. (Although there are no cases directly on point in New Jersey, several foreign jurisdictions have addressed this issue and sided with the carriers.[1]) Nevertheless, this does not stop insureds' attorneys from requesting it, often upon the threat of not producing their client for an EUO. The question then is: what now?

There are three steps to answering this question. First is whether the carrier actually wants to withhold the statement or simply acquiesce to the request. An EUO is demanded for a reason—namely, because there is some issue with the claim, i.e., an available exclusion depending on the facts, a suspicion of fraudulent conduct, the insured's claim history, etc. The beauty of a claim investigation is that unlike in litigation, the carrier does not have to show its cards and turn over any investigative materials prior to conducting an examination. Thus, most carriers will not want to turn over the prior recorded statement to allow the insured to "get his story straight." While minor inconsistencies are not necessarily indicative of fraud, comparing the insured's EUO testimony with the prior recorded statement for significant factual discrepancies is a critical aspect of the investigation. Therefore, other than the most straightforward of claims (which likely would not necessitate an EUO in any event), the prior recorded statement should not be turned over prior to the EUO.

The second step is to determine how the request should be denied. This, of course, *could* be made in person or over the phone. However, we strongly suggest that it be in writing. Our office has encountered situations where the insured's attorney has claimed that either the adjuster or counsel promised to provide the recorded statement prior to the EUO. Such a commitment arguably could take the matter outside of the requirements of the policy and case law and create a duty to provide the statement. Therefore, the letter to the insured's attorney should confirm that no promise has ever been made to provide a copy of the recorded statement, and expressly state that it will not be provided. The author would suggest citing to the case law in footnote one of this article in support of this position, as well as the cooperation conditions in the policy (which

often explicitly refer to EUOs). Defense counsel also should inquire with the adjuster and/or investigator to confirm that no promise was made to provide the statement prior to counsel being involved. Assuming no promise was made, this should also be set forth in the letter. Defense counsel should also hedge his or her bets and indicate that even if any such representation was made, it is expressly revoked. Finally, the letter should indicate that if the claim is ultimately denied after the investigation is complete, a copy of the prior recorded statement and EUO transcript will be provided to counsel (if the claim is paid, then the issue is moot). This demonstrates good faith and may foster a spirit of cooperation.

The final step is whether the carrier wants to be proactive and file a declaratory judgment action ("DJ"), or simply deny the claim. Generally speaking, unless the claim is particularly large, we would not recommend filing a DJ. The case law suggests that the onus is actually on the insured to file a DJ if they have an issue with the investigation. *See DiFrancisco, supra*, 283 N.J. Super. at 613-14 (citing N.J.S.A. 2A:16-50 to -62).

If the carrier denies the claim, there are three possible outcomes. One, the insured drops the claim (which is a strong indication that he or she had something to hide). Two, the insured and/or counsel indicate a willingness to comply. If this occurs, the author would suggest recommending to the carrier that they conduct the EUO under a reservation of rights. (So as long as there is not a significant delay, it is unlikely that a court will hold that the insured forfeited his or her claim under these circumstances.) The third and final possible outcome is that the insured files either a DJ or a breach of contract action. If it is the former, defense counsel will be in the same position as if the DJ had been proactively filed and the issue can be litigated. If the insured files a breach of contract action, the author would recommend filing a motion to dismiss the Complaint with prejudice in lieu of filing an Answer. Given that most policies condition filing a lawsuit against the carrier upon full cooperation with all duties under the policy, such a lawsuit fails to state a valid claim. In the alternative, defense counsel should request that the complaint be dismissed without prejudice and that the insured not be permitted to reinstate it until he or she has fully complied with all policy conditions (i.e., submitting to an EUO without any strings attached).

In conclusion, insureds are not entitled to a copy of a prior recorded statement as a condition precedent to appearing for an EUO. In most instances, any request for the recorded statement prior to the EUO should be denied. The denial of the request should be made in writing, citing to the relevant policy conditions and case law, as well as denying that any promises to provide the statement were made. With the possible exception of a large claim, the carrier simply should deny the claim and put the ball in the insured's court. These disputes often resolve through communication between counsel. Thus, there is no reason to waste resources litigating an issue that may become moot, particularly if the insured ultimately files a lawsuit, which puts defense counsel and the carrier in the same position as if a proactive DJ had been filed.

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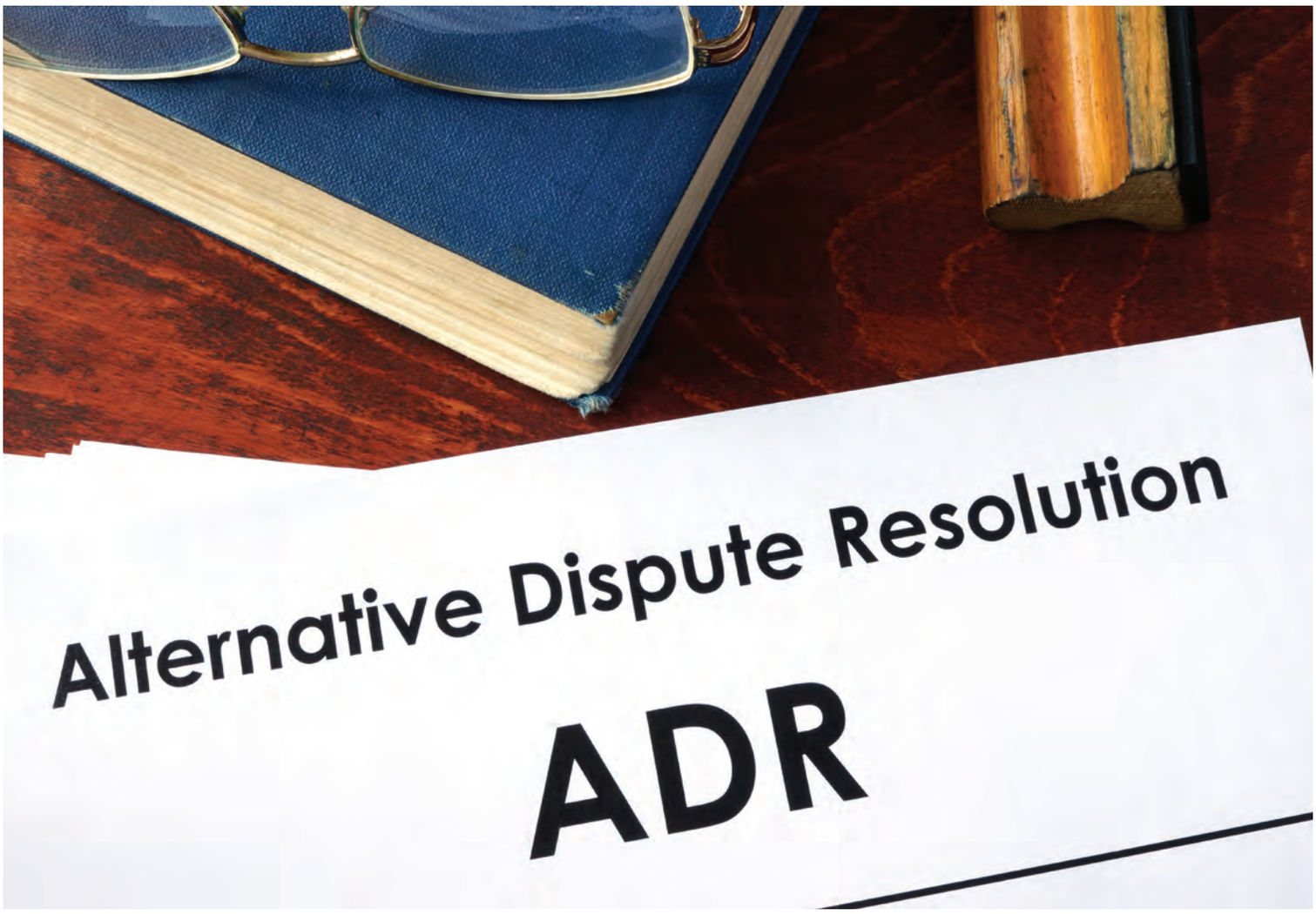
[1]*See, e.g., Morris v. Economy Fire and Cas. Co.*, 848 N.E.2d 663 (Ind. 2006); Brizuela v. Calfarm Ins. Co., 116 Cal. App. 4th 578 (Cal. Ct. App. 2004); *Gerke v. Travelers Cas. Ins. Co. of Am.*, 815 F. Supp. 2d 1190 (D. Or. 2011); *Jones v. Tennessee Farmers Mut. Ins. Co.*, No. M2003-00862-COA-R3-CV, 2004 WL 170359 (Tenn. Ct. App. Jan. 27, 2004).

Christian R. Baillie, Esq. is an attorney at Methfessel & Werbel



NEW JERSEY ADR AND YOU: MAYBE NOT PERFECT TOGETHER, BUT NOT BAD

BY MICHAEL J. NEEDLEMAN, ESQ.

Winston Churchill is credited with saying, "Democracy is the worst form of government there is – except for all the others." Something similar is true with alternative dispute resolution ("ADR") in that it is the worse, most unappealing (to all sides) path to take – until it results in a settlement that makes all sides equally unhappy and so is the best outcome.

The purpose of this article is to provide some insight into the alternative dispute resolution process. Though it may seem like an easy and lower-stakes alternative to landing in court, there are as many complications and the stakes could be just as high.

ALTERNATIVE DISPUTE RESOLUTION IN NEW JERSEY

ADR as a means of resolving disputes is codified in the Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1, et seq. (hereinafter the "APDR"). The APDR divides itself into Arbitration, N.J.S.A. 2A:23B-1, and Mediation, N.J.S.A. 2A:23C-1. The key difference between arbitration and mediation, of course, is that arbitration is designed to bring about a final, binding decision, whereas mediation is designed to be conciliatory and bring about agreement between the parties. The APDR has confidentiality requirements of the parties and the mediator, and conflict disclosure requirements of the mediator, but otherwise leaves the handling of the mediation to the discretion and good judgment of the mediator and the parties.[1] N.J.S.A. 2A:23C-1 to -9. Arbitration, on the other hand, is rather well defined: the APDR provides the manner of hearings, the issuance of subpoenas and taking of sworn testimony, the conduct of the arbitrator, and the issuance of the award. N.J.S.A. 2A:23B-9, -15, -17, and -19. The APDR also establishes and defines court jurisdiction, recognition and enforcement awards. N.J.S.A. 2A:23B-5. Consistent with the policy of encouraging ADR in lieu of burdening

the courts, the APDR makes it clear that once APDR arbitration begins, the court's role ends. *Minkowitz v. Israeli*, 433 N.J. Super. 111 (App. Div. 2013).[2]

The APDR and Rules of Court intersect but do not collide. Rule 4:21A provides for compulsory, non-binding arbitration in every case filed, save for cases involving products liability or the Law Against Discrimination.[3] Any party may appeal, de novo, an arbitration award under Rule 4:21A. Similarly, Rule 1:40 provides for court-ordered mediation. Though more and more courts appear to be ordering mediation in more and more cases, Rule 1:40 mediation continues to be facilitative only. Regardless, whether mediation or arbitration is selected as the chosen means of resolution, the parties would do well to put both the agreement to resolve and the terms of the resolution in writing. *See Willingboro Mall, Ltd. v. 240/242 Franklin Ave., LLC*, 215 N.J. 242 (2013).

At this point, a discussion of the advantages and disadvantages of arbitration and mediation is appropriate.

ARBITRATION

As noted, arbitration is an alternative dispute process that provides a binding final resolution to a claim. To the degree arbitration is final, it is reasonable to ask what advantage there is to pursuing arbitration in lieu of trial. Arbitration represents a way of securing a judgment on the parties' terms, on the parties' schedule, in a manner to which the parties agree. For instance, trial often occurs when the court calendar says it does, and the parties are at the mercy of the selection of judge and jury pool. At that, we have all experienced the exquisite let down of appearing at a trial call, only to wait until noon, and be told the case will be re-listed. If a particular witness cannot make it to court (and ignores a subpoena), that obviously hurts. Whether particular evidence is admissible is left to the judge. The possibility of a "runaway verdict" is ever present. Only a trial presents the unpredictable and very scary prospect that we litigators are under constant scrutiny by the jury: should I have worn the red tie? Are my heels too high? It must be remembered, however, that by virtue of paying taxes and filing fees, trial is a means of resolution without added cost: the parties do not pay judges or jurors at the beginning of a trial.

On the other hand, arbitration is scheduled on the parties' and, if scheduled carefully, the witnesses' calendar. The parties select the arbitrator or arbitrators. (It goes without saying that familiarity with or research into the selected arbitrator or arbitrators is vital.) To the extent the arbitrator is selected by the parties, the arbitrator can deal with evidence conflicts in a way the parties agree upon. Though one side will be unhappy with the decision, if enough thought is put into the process, the unhappy party should at least be satisfied with the decision-making process. Additionally, the possibility of a runaway verdict is nullified: in many cases, the parties agree to a "high-low" arrangement whereby the verdict is what the arbitrator decides, so long as the decision is within an agreed upon range; if the decision is higher than the agreed-upon range, the "high" number is binding, and if the decision is lower than the agreed-upon range, the "low" number is binding. Finally, those intangible worries like the color of one's shirt are presumably eliminated. It must be remembered, however, that arbitration costs money. For obvious reasons, the better arbitrators are in higher demand, and can demand higher fees. Most of the time, the fairest way to account for these costs is to split the costs of the arbitration equally among the parties, but the APDR has no rule regarding the splitting of fees.

MEDIATION

Mediation, of course, presents a free-wheeling means of resolution. Each of the concerns about trial can be alleviated by choosing mediation. Mediation is non-binding, however. As such, the parties are not compelled to do anything before, during, or after the process. In this way, mediation can be an unproductive waste of time. Because it is so free-wheeling, it can also be a very productive use of time. If settlement discussions have already begun, a good mediator can help "bridge the gap," to use a familiar term. If a particular party's personality or point of view is impeding settlement, mediation may be better than arbitration at addressing those concerns in a way that makes the litigant feel heard, while not necessarily producing an unfair result.

The advantages and disadvantages here may be more obvious. In lieu of discussing each one, it may be more useful to say, simply, choose wisely.

Winston Churchill may have been determined, but he never tried to resolve a case in certain New Jersey counties, or dared ask for more time in others. Ah well, no one is perfect.

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[1]The APDR excludes, however, collective bargaining disputes, PERC matters, school and student matters, and in-Chambers discussions from its own requirements. *See* N.J.S.A. 2A:23C-1.

[2]A note to practitioners: If you desire to arbitrate some, but not all, issues involved in a case, make sure the arbitration agreement clearly and specifically spells that out. If the agreement is silent on this point, or if it is unclear, the Supreme Court has ruled the APDR is to be read expansively such that any particular issue not specifically reserved for judicial determination is presumed to be within the authority and jurisdiction of the arbitrator.

[3]It is also true that Rule 4:21A provides the parties to a case may unanimously certify to the court that the arbitration hearing will not be productive or should otherwise be cancelled, which the court may do in its discretion.

[4]Keep in mind that LAD cases are not subject to Rule 4:21A arbitrations, but are subject to Rule 1:40 mediation. While the sensitive nature of these cases may suggest mediation would be preferred, it is not altogether clear those cases would not benefit from compulsory, non-binding arbitration. After all, the case ostensibly will be tried to a jury.

Michael J. Needleman is a Partner with Fineman Krekstein & Harris in Cherry Hill, NJ and Philadelphia. He sits on the NJDA ADR Committee, and has lectured on developments in New Jersey ADR and served on panels discussing New Jersey ADR. When not gesticulating wildly in court, he can often be found hiding from his children at home in Montgomery County, Pa.

THE COST OF DOING BUSINESS—WHO IS PICKING UP THE TAB?

BY JOSEPH M. MORGESE, ESQ.

For several decades comprehensive general liability insurance policies ("CGLs"), which protect business owners against liability to third-parties, have been held inapplicable to claims based on faulty workmanship or "business risk." Whether replacing or repairing defective materials or poor workmanship, this risk—the cost of doing business—has generally not been passed on to the general contractor's liability insurer.

In New Jersey, the Supreme Court has consistently recognized that the typical language of CGLs excludes liability coverage of contractors and subcontractors for subpar work. *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233 (1979). The consequences of "shoddy" subcontractor work have typically left insured-contractors responsible for replacement or repair of faulty goods and work. The courts have long-relied on the idea that to hold otherwise, a CGL policy would operate more like a performance bond or guarantee of work and less like an insurance policy.

In *Weedo*, the Court noted that CGL policies do not cover an accident due to faulty workmanship. Where the alleged damage pertains to the risk that the contractor's work may be faulty, an insurer may not be required to indemnify the insureds. However, *Weedo* dealt with coverage of an insured contractor's own defective work, not the work of a subcontractor, and did not address whether the alleged faulty workmanship constituted a covered "occurrence" under the 1973 standard form CGL.

In August 2016, the New Jersey Supreme Court revisited the construction of standard insurance policies issued to general contractors and developers. Specifically, in *Cypress Point Condominium Association, Inc. v. Adria Towers, LLC*, the Court considered whether rainwater damage resulting from a subcontractor's faulty workmanship qualified as "property damage" and an "occurrence"

under a property developer's CGL policy. 226 N.J. 403, 426-27 (2016).

The Appellate Division has distinguished *Weedo v. Stone-E-Brick, Inc., supra, and Fireman's Ins. Co. of Newark v. National Fire Union Ins. Co.*, 387 N.J. Super. 434 (App. Div. 2006), from *Cypress*, stating that *Weedo* and *Fireman's* (1) involved only replacement costs flowing from a business risk, rather than consequential damages caused by defective work; and (2) interpreted different language than the policy language involved in Cypress. The policy language in both *Weedo* and *Fireman's* were based on the 1973 version of the standard CGL form, whereas Cypress interpreted the 1986 standard CGL form.

In both *Weedo* and *Fireman's*, the relevant exclusions for "business risks" excluded coverage for the "insured's products" and "work performed." The policy exclusion in *Weedo* provided:

> This insurance policy does not apply . . .
>
> (n) to property damage to the named insured's products arising out of such products or any part of such products;
>
> (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

81 N.J. at 241. The *Weedo* court distinguished between "business risk" or faulty workmanship and the risk of injury to people as a result of the faulty workmanship. 81 N.J. at 239. *Fireman's, supra*, held that claims against an insured general contractor for the cost of replacing sub-standard condominium firewalls installed by subcontractors did not qualify as covered "property damage" caused by an "occurrence" under the 1973 standard form CGL policy. 387 N.J. Super. at 446, 449. Thus, the court's focus was on the replacement cost of sub-standard materials and not damage caused by the materials to the remainder of the structure or any other building or person.

The policy at issue in *Cypress* defines "occurrence" differently. The 1973 form discussed in *Weedo* defines "occurrence" as "'an accident . . . which results in . . . property damage neither expected nor intended from the standpoint of the insured.'" *Firemen's, supra*, 387 N.J. Super. at 441. In *Cypress*, the policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." "Property damage," therefore, is not directly included in the policy's definition of "occurrence," and *Firemen's* is consequently not squarely on point. *Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C.*, 441 N.J. Super. 369, 379-80 (App. Div. 2015).

In *Cypress*, the court addressed the 1986 form which included a "your work" exclusion that eliminated coverage for a variety of business risks, including the cost of repairing damage to the contractor's own work. This exclusion, not present in the 1973 form, provides:

> This insurance does not apply to:
> . . . .
> l. Damage to Your Work [the "Your Work" Exclusion]
> "Property damage" to "your work" arising out of it or any part of it . . . .
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor. [The "subcontractor's exception"].
>
> The policy defines "Your Work" as:
>
> a. Work or operations performed by you or on your behalf; and
>
> b. Materials, parts or equipment furnished in connection with such work or operations.

Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C., 441 N.J. Super. 369, 380 (App. Div. 2015).

In light of the policy construction in *Cypress*, the water damage was found to be a covered loss arising out of faulty workmanship of subcontractors. Essentially, the court found that consequential water damage to the completed and non-defective portions of buildings was an "accident" and an "occurrence" under the policies. Unlike *Weedo*, consequential water damage is not defective-work; it is a result of defective work. The Appellate Division construed the "subcontractor exception" to the "your work" exclusion, finding that coverage for consequential damages was triggered for the plaintiff's claims against the developer. The court held that consequential damages caused by a subcontractor's faulty workmanship are considered differently, for risk purposes, than property damage caused by a general contractor's work.

The New Jersey Supreme Court affirmed that two CGL carriers must provide coverage to the developer and general contractors of condominiums, as a result of units sustaining water damage, caused by faulty workmanship. Thus, the Court recognized a distinction between faulty workmanship by a named insured contractor causing property damage (*Weedo*), typically not covered, and consequential damages caused by a subcontractor's faulty workmanship (*Cypress*), which may be covered.

Perhaps this decision is less of a change than initially believed, relying more on the court's interpretation of the policy language and less on precedent.

Ultimately, *Cypress* indicates that insurers *may* end up paying the price of doing business, depending on the policy definitions, exclusions, and exceptions to exclusions. The Supreme Court acknowledged that if the insurer decides that this is a risk it does not want to insure, it can clearly amend the policy to exclude coverage by either eliminating the subcontractor exception or adding a breach of contract exclusion—something for client insurers to keep in mind before "opening a tab" or providing CGL coverage.

Joseph M. Morgese, Esq. is an attorney at Hoagland, Longo, Moran, Dunst & Doukas, LLP.

O'TOOLE'S COUCH

Ringling Brothers and Barnum & Bailey Circus, founded in 1884 by five of the seven Ringling brothers, performed its last show, "Out of This World," in May 2017. When we read that this iconic event would be no more, we anxiously sought out tickets for the final tour. "The Greatest Show on Earth," entertainment that we so enjoyed as children, had to be experienced by our seven and eleven-year-old grandsons.

The arena at the Prudential Center was packed, and well over half the crowd was under twelve years old. Nearly every child held a blinking sword in his hand, to wave throughout the performance as the lights were turned down. (Of course, the price of the lighted sword was ridiculous, but who could deny their child. The good news is that the swords continued to light for weeks after the performance.)

There were some changes from our childhood circus memories. Instead of three rings, there was one gigantic ring. The first act was the high-wire presentation with an interplanetary theme. The entire universe was depicted with all of the planets moving simultaneously as the astronauts walked across the tightropes in exploration, minus Pluto, of course. There was also a dramatic light presentation that made the act quite spectacular.

Later in the show, there was an acrobatic high-wire performance with as many as six acrobats balancing simultaneously, once again enhanced by the panoramic lighting. In the finale of this act, all the acrobats approached from various directions and wound up in a six-man chain. This was an act I would have enjoyed seeing again in slow motion.

Of course, no circus would be complete without clowns and the clown car. There were dozens of clowns performing in the usual specialties of magic, comedy, juggling, acrobatics and, of course, the clown car. No matter how many times you see the clown car, it is difficult to understand how so many clowns can fit in such a small space. Hey, it's one of the mysteries of the universe.

Elephants were no longer part of the circus, but there were "lions and tigers and bears – Oh my." OK, no bears, but there were lions, tigers, llamas, donkeys, kangaroos, goats, horses, and dogs of all sizes. The cat handler, alone in the ring with fourteen performing lions and tigers, put on quite a show lying between two of the largest animals' heads. The occasional animal roaring was certainly an attention getter. This entertained the kids, but I was a nervous wreck thinking how easily one of the cats could take a chunk out of the handler. (I did have my business cards with me.)

The entire pace of the show was always aided by the band and dancers who performed while the stage was being reset.

UNDER THE BIG TOP

Our grandsons really loved one of the motorcycle acts where a dozen motorcycles were riding, engines roaring, inside a large sphere in extremely close quarters (again my business cards were at hand.) This was an exciting act!

While this last hurrah for Ringling Brothers and Barnum & Bailey Circus was spectacular and delighted all the kids, it didn't quite live up to my boyhood memories. I was lucky enough to see several different circuses with my family. My father, who worked for the Newark Evening News, always had advance knowledge of when the circus was coming to town. There was the Shriners, Cole Brothers, Big Top and, of course, Ringling Brothers. In those days, the circus was under the gigantic big top and we would be sure to go and watch the tents being set up. I can remember the roustabouts swinging their large sledge hammers to knock in the tent hooks that secured the tent corners. These muscle men were always kind to the children watching in awe. (Once I was asked if I wanted to take a swing with the sledge hammer, which sounded exciting, but I couldn't even lift the hammer, much less swing it.) These old-time circuses afforded the opportunity to really get close to the acts. You could smell the animals and see the eyes of the performers, which gave us kids the feeling that we were participating in the theatrics.

The circus always began with an entrance parade with all of the acts being led by the Ring Master. Another thing lacking in modern-day circuses is the Midway. The side shows sometimes had Carnival Barkers who wore striped vests and skimmers. There was always something you had to see for 50 cents. These acts included the Fat Lady, the Sword Swallower, the Tall Man (who today could be a potential NBA player), and the Double-Jointed Lady. You could also have your weight guessed. There were separate scales for men and women; imagine the delights of the women when they found out they had lost ten pounds, usually resulting in a tip from the lady! There were always acts involving rather gruesome reptiles. My childhood memory is that the snakes were more than ten-feet long. The handler would wrap the snake around himself. If you were lucky, or crazy, you might get a chance to touch or hold the snake. None of my friends ever attempted this, and perhaps this is where my fear of snakes comes from. Another less scary side show act was the magician who specialized in cutting his beautiful assistant in half. Of course, she always emerged unscathed!

Since most of the side shows would now be deemed as politically incorrect, and the days of a circus traveling across the country are gone, our grandchildren will never see the old-fashioned circuses of my boyhood. However, I am so glad we were able to enjoy Ringling Brothers' last hurrah with our grandsons!

OFFICERS & COMMITTEES

OFFICERS

CHAIRMAN OF THE BOARD
Gregory F. McGroarty, Esq.
Cooper Maren Nitsberg Voss & DeCoursey
485 Route 1 South, Bldg. A, Ste 200
Iselin, NJ 08830
732-362-3289
Gregory_F_Mcgroarty@progressive.com

PRESIDENT
Chad M. Moore, Esq.
Hoagland Longo Moran Dunst & Doukas, LLP
40 Paterson Street
New Brunswick, NJ 08902
732-545-4717
cmoore@hoaglandlongo.com

PRESIDENT-ELECT
Natalie H. Mantell, Esq.
Gibbons, P.C.
One Gateway Center
Newark, NJ 07102
973-596-4533
nmantell@gibbonslaw.com

SECRETARY-TREASURER
Aldo J. Russo, Esq.
Lamb Kretzer LLC
110B Meadowlands Parkway
Secaucus, NJ 07094
201-798-0400
ajr@lambkretzer.com

VICE PRESIDENTS
NORTHERN REGION
Michelle M. O'Brien, Esq.
Purcell Mulcahy Hawkins & Flanagan LLC
One Pluckemin Way
Bedminster, NJ 07921
908-306-6707
Mobrien@pmhfl.com

CENTRAL REGION
Melissa Steedle Bogad, Esq.
Winston & Strawn, LLP
One Riverfront Plaza
Newark, NJ 07102
973-848-7643
mbogad@winston.com

SOUTHERN REGION
C. Robert Luthman, Esq.
Weir & Associates, LLP
108 Straube Center Blvd.
Pennington, NJ 08534
609-737-9511
rluthman@weirattorneys.com

DIRECTORS

2014 – 2017
Stephen R. Banks, Esq.
Haddix & Associates
161 Gaither Drive
Mt. Laurel, NJ 08054
856-439-5422
Stephen.Banks@aig.com

Brian J. Chabarek, Esq.
Davison Eastman Muñoz Lederman & Paone, P.A.
100 Willow Brook Road, Suite 100
Freehold, NJ 07728
732-410-2350
bchabarek@demlplaw.com

2015 – 2018
Ryan Richman, Esq.
McCarter & English, LLP
100 Mulberry Street
Newark, NJ 07102
973-622-4444
rrichman@mccarter.com

Michael Malia, Esq.
Pringle Quinn Anzano, P.C.
701 7th Avenue
Belmar, NJ 07719
732-280-2400
mmalia@pringle-quinn.com

2016 – 2019
John V. Mallon, Esq.
Chasan Lamparello Mallon & Cappuzzo
300 Lighting Way
Secaucus, NJ 07094
201-348-6000
jvmallon@chasanlaw.com

Natalie S. Watson, Esq.
McCarter & English, LLP
100 Mulberry Street
Newark, NJ 07102
973-622-4444
nwatson@mccarter.com

DRI STATE REPRESENTATIVE
Mario J. Delano, Esq.
Campbell Foley Delano & Adams, LLC
601 Bangs Avenue
Asbury Park, NJ 07712
732-775-6520
mdelano@campbellfoley.com

COMMITTEES

AMICUS CURIAE
Stephen J. Foley, Jr., Esq.
Campbell Foley Delano & Adams
601 Bangs Avenue
Asbury Park, NJ 07712
732-775-6520
sfoleyjr@campbellfoley.com

BY-LAWS
J.R. Peter Wilson, Esq.

CONVENTION
Chad M. Moore, Esq.
Hoagland Longo Moran Dunst & Doukas, LLP
40 Paterson Street
New Brunswick, NJ 08902
732-545-4717
cmoore@hoaglandlongo.com

DIVERSITY
Natalie Watson, Esq.
McCarter & English, LLP
100 Mulberry Street
Newark, NJ 07102
973-622-4444
nwatson@mccarter.com

FINANCE
Aldo J. Russo, Esq.
Lamb Kretzer LLC
110B Meadowlands Parkway
Secaucus, NJ 07094
(201)798-0400
ajr@lambkretzer.com

LEGISLATIVE
Jeffrey Bartolino, Esq.
NJM, 301 Sullivan Way
West Trenton, NJ 08628-3496
609-883-1300
jbartolino@njm.com

LONG TERM PLANNING
Kevin J. DeCoursey, Esq.
Cooper Maren Nitsberg Voss & DeCoursey
485 Route 1 South, Bldg. A,
Suite 200, Iselin, NJ 08830
732-726-7180
kDecour1@progressive.com

MEDICAL DIRECTORY
Michael J. Leegan, Esq.
Goldberg Segalla
902 Carnegie Center
Princeton, NJ 08540
609-986-1320
mleegan@goldbergsegalla.com

MEMBERSHIP
Michael J. Leegan, Esq.
Goldberg Segalla
902 Carnegie Center
Princeton, NJ 08540
609-986-1320
mleegan@goldbergsegalla.com

Kevin J. DeCoursey, Esq.
Cooper Maren Nitsberg Voss & DeCoursey
485 Route 1 South, Bldg. A,
Suite 200, Iselin, NJ 08830
732-726-7180
kDecour1@progressive.com

NEW JERSEY DEFENSE
Natalie H. Mantell, Esq.
Gibbons, P.C.
One Gateway Center
Newark, NJ 07102
973-596-4533
nmantell@gibbonslaw.com

PUBLIC RELATIONS
Ryan Richman, Esq.
McCarter & English, LLP
100 Mulberry Street
Newark, NJ 07102
973-622-4444
rrichman@mccarter.com

Michelle O'Brien, Esq.
Purcell Mulcahy Hawkins & Flanagan
One Pluckemin Way
Bedminster, NJ 07921
908-306-6707
mobrien@pmhfl.com

TECHNOLOGY
Charles P. Hopkins, II, Esq.
908-601-3100
Charles.hopkins.esq.bc.edu

TRIAL COLLEGE
C. Robert Luthman, Esq.
Weir & Associates
108 Straube Center Blvd.
Pennington, NJ 08534
609-737-9511
rluthman@weirattorneys.com

TRIAL COLLEGE & WOMEN AND THE LAW
Marie A. Carey, Esq.
Law Offices of Marie A. Carey, Esq.
325 Columbia Turnpike
Florham Park, NJ 07932
973-443-9100
marie.carey@usaa.com

YOUNG LAWYERS
Christopher A. Rojao, Esq.
McCarter & English, LLP
100 Mulberry Street
Newark, NJ 07102
973-622-4444
crojao@mccarter.com

Katelyn E. Cutinello, Esq.
Bubb Grogan & Cocca, LLP
25 Prospect Street
Morristown, NJ 07960
973-539-6500
kcutinello@bgc-law.com

SUBSTANTIVE COMMITTEE

CHAIRS AND VICE CHAIRS 2016 - 2017

ADR
Michael Malia, Esq.
Pringle Quinn Anzano, P.C.
701 7th Avenue
Belmar, NJ 07719
732-280-2400
mmalia@pringle-quinn.com

APPELLATE PRACTICE
Natalie H. Mantell, Esq.
Gibbons, P.C.
One Gateway Center
Newark, NJ 07102
973-596-4533
nmantell@gibbonslaw.com

AUTOMOBILE LIABILITY
Juliann Alicino, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08902
732-545-4717
jalicino@hoaglandlongo.com

CONSTRUCTION LAW
Michael J. Leegan, Esq.
Goldberg Segalla
902 Carnegie Center
Princeton, NJ 08540
609-986-1320
mleegan@goldbergsegalla.com

EMPLOYMENT LAW
Brian Chabarek, Esq.
Davison Eastman Muñoz Lederman & Paone
100 Willow Brook Road, Suite 100
Freehold, NJ 07728
732-462-7198
bchabarek@demlplaw.com

ENVIRONMENTAL LAW
Joanne Vos, Esq.
Maraziti Falcon, LLP
150 JFK Parkway
Short Hills, NJ 07078
973-912-9008
jvos@mfhenvlaw.com

Jacob Grouser, Esq.
Hoagland Longo Moran Dunst & Doukas, LLP
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
jgrouser@hoaglandlongo.com

FRAUD
Michael Malia, Esq.
Pringle Quinn Anzano, P.C.
701 7th Avenue
Belmar, NJ 07719
732-280-2400
mmalia@pringle-quinn.com

INSURANCE LAW
Nathan Buurma, Esq.
NJM
301 Sullivan Way
West Trenton, NJ 08628-3496
609-883-1300
nbuurma@njm.com

PHILANTHROPY
Denise M. Luckenbach, Esq.
Sellar Richardson, P.C.
293 Eisenhower Parkway, Suite 170
Livingston, NJ 07039
973-992-6677
dluckenbach@sellarrichardson.com

PREMISES LIABILITY
Jeffrey Maziarz, Esq.
Hoagland Longo Moran Dunst & Doukas, LLP
40 Paterson Street
New Brunswick, NJ 08903
732-545-4717
jmaziarz@hoaglandlongo.com

PRODUCTS LIABILITY
Robert M. Cook, Esq.
Goldberg Segalla
902 Carnegie Center
Princeton, NJ 08540
609-986-1380
rcook@goldbergsegalla.com

PROFESSIONAL LIABILITY
Herbert Kruttschnitt, Esq.
Law Offices of Gerard Green
200 Schultz Drive
Red Bank, NJ 07701
732-933-7900
Herbert.kruttschnitt@cna.com

PUBLIC ENTITY LAW
Natalie Watson, Esq.
McCarter & English, LLP
100 Mulberry Street
Newark, NJ 07102
973-622-4444
nwatson@mccarter.com

Aldo J. Russo, Esq.
Lamb Kretzer, LLC
110B Meadowlands Parkway
Secaucus, NJ 07094
201-798-0400
ajr@lambkretzer.com

PIP
Nicole R. Cassata, Esq.
Chasan Leyner & Lamparello, P.C.
300 Harmon Meadow Blvd.
Secaucus, NJ 07094
201-348-6000
ncassata@chasanlaw.com

TRUCKING LAW
Robert M. Cook, Esq.
Goldberg Segalla
902 Carnegie Center
Princeton, NJ 08540
609-986-1320
rcook@goldbergsegalla.com

WORKERS' COMPENSATION
Stephen Banks, Esq.
Dempster & Haddix
161 Gaither Drive, Suite 201
Mt. Laurel, NJ 08054
856-778-7841
stephen.banks@aig.com

Michele G. Haas, Esq.
Hoagland Longo Moran Dunst & Doukas
40 Paterson Street
New Brunswick, NJ 08902
732-545-4717
mhaas@hoaglandlongo.com

George C. Roselle, III, Esq.
Lamb Kretzer, LLC
110B Meadowlands Parkway
Secaucus, NJ 07094
201-798-0400
ger@lambkretzer.com

NEW JERSEY
DEFENSE ASSOCIATION
P.O. BOX 463
LINWOOD, NJ 08221

FPO
INDICIA
GOES HERE

NEW MEMBERS

PATRICIA A. PALMA

RICHARD WICKERSHAM JR.

CONTACT

MARYANNE R. STEEDLE
Executive Director
New Jersey Defense Association
P.O. Box 463
Linwood, NJ 08221
(609) 927-1180
njda@comcast.net

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NOV 10

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NOV 21

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