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The Voice

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Three Federal Procedure Answers That You Should Know but Probably Don't

By Sharon D. Stuart and Ashley L. Crank

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New Member Spotlight

Tara N. Gess, Construction Enterprises, Inc.

Tara N. Gess practices as in-house counsel at Construction Enterprises, Inc., (CEI), in the area of commercial law, predominantly construction law. CEI, based in Franklin...

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Quote of the Week

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—Donald E. Westlake

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The Federal Rules of Civil Procedure are our bread and butter. The purpose of the rules is set out in Rule 1: to effect an integrated procedural system, which is vital to make sure that the courts function efficiently. We are expected to have a basic knowledge of the Federal Rules. However, most of us are continually surprised by new things that we learn that were right under our noses—in the rules. While the three pointers below do not substitute for reading the rules, they should help you avoid some common mistakes.

Federal Rule of Civil Procedure 6: How Much Time Do You Really Have to File That Brief?

Accurately computing time and deadlines in our cases is vital to everything that we do. We live and die by our calendars, so we must get it right. This can be tough because the Federal Rules of Civil Procedure are strict, and the manner of computing time may differ between state and federal courts. Nonetheless, Federal Rule of Civil Procedure 6 applies when computing any period of time under the rules, by court order or by any applicable statute that does not specify its own method of computing time.

When computing time, *do not* count the first day of the period. For example, if an order is entered today, giving us 10 days to file a brief, we start counting tomorrow. However, we *do* count the last day of the period *unless* it is a Saturday, Sunday, or legal holiday *or* weather or other conditions make the clerk's office inaccessible. If the clerk's office is inaccessible, the time for filing is extended under Federal Rule 6(a) to the first accessible day that is not a Saturday, Sunday, or legal holiday. *See* Fed. R. Civ. P. 6 (a)(6) and your local rules for the list of legal holidays.

How do you determine what is truly the "last day" to file your brief? According to Federal Rule 6(a)(4), you should e-file by midnight in the court's time zone. However, if you are required to file by other means, your brief should be filed no later than when the clerk's office is scheduled to close. Moreover, how do you properly calculate the "next day" under Federal Rule 6? For the next day *after* an event, simply count forward until you get to a day that is not a weekend or holiday. But to calculate the next day *before* an event, such as pre-trial deadlines, you must count *backward*. The comment to Federal Rule 6(a)(5) directs us always to continue to count in the direction that we are going. Thus, if we are counting backward, and the deadline falls on a Saturday, we need actually to back our deadline up to Friday, the day before. Last, Federal Rule of Civil Procedure 6(d) follows the three-day mail rule: if a party serves a notice or other paper by mail, by leaving with the clerk of court or by other means consented to, add three days to the other party's time to respond.

Federal Rule of Civil Procedure 8: The Shotgun Pleading

As defense lawyers, we must be quick to identify "shotgun pleadings." The shotgun pleading incorporates all of the factual allegations into each count without delineating which allegations pertain to each count. This plainly violates Federal Rule of Civil Procedure 8(a)(2). In *Jackson v. Bank of America*, the Eleventh Circuit held that a shotgun pleading makes it "nearly impossible for [d]efendants and the [c]ourt to determine with any certainty which factual allegations give rise to which claims for relief" and requires the court to act as a plaintiff's lawyer to analyze and rewrite the complaint into "an intelligible document." 898 F.3d 1348, 1356–57 (11th Cir. 2018). The court reiterated that the district court has the right to dismiss a shotgun pleading on that basis alone. *Id.* at 1357. Therefore, even if a defendant does not file a motion to dismiss, the court can dismiss on its own motion, after giving a plaintiff one chance to amend. *Id.* at 1358. If the plaintiff does not remedy the deficiency in that amendment, the trial court may dismiss the complaint, with prejudice, and may reserve its jurisdiction to award fees and costs. *Id.* at 1359.

Federal Rule of Civil Procedure 13 and Federal Rule of Civil Procedure 14: Which Applies?

Federal Rule of Civil Procedure 14 applies when a defendant brings in a non-party who is, or may be, liable to it, for all or part of the claim against it. In other words, "It's not

my fault, it's this other guy's fault, and if I'm found liable, he's liable to me." However, assume that you are a defendant insurance company looking to (1) bring in another potential claimant to the insurance proceeds, or (2) add a tort claimant to a counterclaim for declaratory judgment. How do you do it? The knee-jerk reaction may be to file a third-party complaint against the non-party. But is this correct? No. Why? Because Federal Rule 14 makes clear that a third-party complaint is properly brought against a non-party who is, or may be, liable to a defendant. In these two examples, the insurer is not claiming that the tort claimant is liable to it. Rather, the insurance company must join the parties under Federal Rule 19, which *requires* joinder of certain parties, or Federal Rule 20, which *permits* joinder of certain parties. The comments to Rule 13 make clear that Rule 13(h) allows a party pleading a counterclaim or cross-claim to join additional persons when Rules 19 or 20 are satisfied.

Sharon D. Stuart is chair of the IADC Insurance and Reinsurance Committee. Ms. Stuart is a partner in the Litigation Practice Group of Christian & Small LLP in Birmingham, Alabama, where she handles complex business, insurance, and product liability cases in state and federal courts and in arbitration. Ms. Stuart is listed in the Best Lawyers in America and in the Top 50 Women MidSouth Super Lawyers and as one of Benchmark Litigation's Top 250 Women in Litigation. She is also active in the Alabama Defense Lawyers (immediate past president), DRI (DRI Women in the Law Committee Steering Committee), and the American Inns of Court.

Ashley L. Crank is an associate in the Litigation Practice Group of Christian & Small LLP in Birmingham, Alabama. Her practice involves insurance coverage, product liability litigation, and other insurance defense matters. Ms. Crank serves on the DRI Young Lawyers Committee Steering Committee, the executive committee of the Alabama Defense Lawyers Young Lawyers Section, the editorial board for the Birmingham Bar Association, the editorial board for the Primerus Young Lawyers Section, and as vice president of the Board of Trustees for the Birmingham Legal Aid Society.

Keep The Defense Wins Coming!

Please send 250–500 word summaries of your "wins," including the case name, your firm name, your firm position, city of practice, and e-mail address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in "And the Defense Wins," and it may take several weeks for *The Voice* to publish your win.

Gena Sluga and Lon Johnson


DRI members Gena Sluga and Lon Johnson of **Christian, Dichter & Sluga, P.C.**, in Phoenix, Arizona obtained summary judgment in Arizona Federal District Court for an insurer facing a $1.5 million stipulated judgment in an insurance bad faith action. In *Wilshire Insurance Company v. Yager*, No. CV-16-00192-TUC-JAS, 2018 WL 5801537 (D. Ariz. Nov. 5, 2018), the auto insurer denied coverage for a car accident because, although the vehicle was a covered auto, the driver was not listed as an insured as required by the policy. The policyholder had agreed to insure the vehicle for his friend, the vehicle owner/driver. However, the policy also required the driver to be listed as an insured. The driver's assignee argued that the driver had a reasonable expectation of coverage and also that the insurer waived or was estopped from asserting coverage defenses by initially defending the driver without reservation. The court found that the plain language of the policy did not include the driver as an "insured," and did not create a reasonable expectation of coverage. Additionally, Arizona law did not support a finding of estoppel or waiver without evidence of prejudice caused by the delayed reservation of rights.

Melissa Richardson and David Noble


DRI members Melissa Richardson and David Noble of **Walters Richardson, PLLC** in Lexington, KY, successfully obtained a unanimous defense verdict on liability on behalf of their clients, Bowling Trucking and the Estate of Charles Turner, in Powell Circuit Court. Mr. Turner was driving down the Mountain Parkway when he entered a significant fog area. This fog was exacerbated by smoke from area wildfires. There was a warning sign at the top of the Mountain advising drivers of the potential for reduced visibility. Mr. Turner slowed as a result. He was driving his loaded coal truck down the mountain at approximately 15–20 mph when he came upon two vehicles that were stopped in the roadway ahead of him. The physical evidence shows that he made a hard braking maneuver and started to veer to the left to avoid these vehicles. While in the process of responding to these vehicles, Mr. Turner was rear-ended by three vehicles. The first vehicle to impact Mr. Turner's coal truck struck it so hard that the back of the trailer came open and coal started pouring onto the vehicle and the roadway. The lone plaintiff who proceeded to trial was driving the vehicle that first impacted Mr. Turner's coal truck. He alleged he was being careful and that, but for Mr. Turner stopping in the roadway, he would not have been injured. Evidence showed that the Plaintiff was going 55 mph at the time of impact and 70 mph just two seconds before impact. Despite a significant crash, Plaintiff had relatively minor injuries. Nevertheless, he asked the jury for more than one million dollars in damages to compensate him for his pain and suffering. Video footage of the road conditions was secured during the course of the litigation from a first-responder who had a dash camera. The jurors were able to see that the conditions on the roadway became progressively worse, which was echoed by the testimony of nearly all fact witnesses. As a result, the jury determined Mr. Turner had not acted improperly as alleged by Plaintiff.

Gary M. Burt and Clara E. Conklin


DRI member Gary M. Burt, managing director at **Primmer Piper Eggleston & Cramer PC** in Manchester, New Hampshire, and fellow DRI member Clara E. Conklin, an associate with the firm, successfully convinced the New Hampshire Supreme Court to affirm the superior court's decision extending immunity to their client, Jessica Elliot d/b/a Hidden Pond Farm pursuant to New Hampshire's Equine Activity Statute, RSA 508:19. The decision, issued September 21, 2018 was the court's first effort at interpreting and applying the statute.

The matter arose from an accident on July 20, 2014, when the plaintiff, a thirteen-year-old, but very experienced rider, was severely injured while dismounting from Wilma, a horse owned by Elliot and used in her riding classes. The plaintiff had been Elliot's student for two years, participating in lessons at the farm, as well as shows. She had ridden

Wilma in the past without incident, and ridden horses with which she was unfamiliar at shows without incident. She had ridden Wilma the day prior to the incident, and described the day as wonderful on her social media page.

Elliot was a well-recognized expert in riding, training, and instruction. She has been involved in equine activity since a young girl. She had provided instruction at a number of riding arenas, and more recently opened her own training facility at Hidden Pond Farm.

On the day prior to the accident, the plaintiff had engaged in a "free ride" where the rider pays to ride the horse without supervision or instruction. She has texted Elliot later that day, asking for a lesson the following day, but Elliot indicated she would not be available. The plaintiff then asked if she could take a free ride, and if so what horse she should use. Elliot responded "Wilma."

Elliot was not present at the farm on the date of the accident. The plaintiff arrived, saddled Wilma and started her ride within the riding arena. At some point, Wilma was not responding well to command. The plaintiff continued to ride. Wilma started responding, and the plaintiff then ended the ride and started to dismount. She was unsure what actually happened next, but she fell to the ground, and was Wilma stepped on her, resulting in serious internal injury.

Based on the undisputed evidence before it, the superior court found that the statute extended immunity to Elliot despite not being present. The trial court noted that the injuries arose from an inherent risk of equine activity as defined by the statute, and that Elliot had made a reasonable assessment that the activity could be safely undertaken based on her knowledge of the plaintiff's abilities and the equine activity she was engaging in.

On appeal, the New Hampshire Supreme Court rejected plaintiff's contention that the legislature's statement of intent, not included as part of the text of the statute, should be used construing the language of the statute. The court noted that plaintiff's suggestion would have necessarily eliminated any protection an equine professional might have pursuant to the statute.

The court also rejected the plaintiff's position that the accident did not arise from an inherent risk of equine activity or that Elliot's failure to enforce her own rule that a minor needs to be accompanied by an adult, as the described event fell clearly within the statutory definition of risks inherent with equine activities.

Finally, the court concluded that the record was more than sufficient to establish that Elliot had made an informed, knowledgeable decision about the rider's abilities to perform safely the activity. The court noted that Elliot had been plaintiff's instructor for two years, and was familiar with Wilma's disposition.

Michael Bono

After a three-day trial in the Supreme Court for New York County, DRI member Michael Bono of **Wade Clark Mulcahy** in New York City obtained a rare defense verdict on liability in a hit in the rear accident case in *Smyth v. Murphy*, Index number 157795/2013.

Plaintiff testified to being involved in at least ten on the job accidents spanning over two decades. In each accident, plaintiff injured his cervical and lumbar spine and received medical treatment for those injuries, often filing related lawsuits.

Defendant Murphy testified that on the date of the accident, she tapped Smyth's sanitation vehicle in the rear while he was stopped at a yellow light on the West Side highway during light snowfall. There was one scratch on Mrs. Murphy's vehicle and no evidence of any damage to plaintiff's vehicle. Despite the light impact, plaintiff called an ambulance and was taken to the hospital for treatment of his long standing cervical and lumbar spine injuries. Sometime later, plaintiff underwent cervical and lumbar surgeries by Dr. Lattuga.

During the trial, the defense raised a number of credibility issues, including the apparent failure of plaintiff to inform his physicians about the number of prior accidents he had been involved in, including multiple accidents close in time to the 2013 accident at issue. In addition, the defense presented proof that a prior MRI scan was the same as a scan taken shortly after this accident. After brief deliberations, the jury returned a verdict in favor of the defendants.

Let DRI Circles Work for You

DRI member lawyer-to-lawyer connections have become even easier and even more valuable. The DRI Circles App allows members to connect with each other by establishing personal networks or "circles." Through DRI Circles, you can create networks based on practice area, geographic region, shared interests, etc. The DRI Circles app allows you to send messages, set up meetings, refer and track business, references and more on your mobile device. Join DRI Circles today or update your app to get even more out of your membership.

Take a look at some of the recently added valuable benefits available through the DRI Circles App:

- Added chat functionality within a business referral
- Added functionality to broadcast a message within a group
- Increased circles limit to 250 participants
- Videoconferencing

Important Note: If you are already utilizing the DRI Circles app, you will need to delete the current version and download the **newest** version to take advantage of these newly added features. Upon downloading the updated version, you will be notified of any future enhancements via Apple or Google.

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Make *For The Defense* Digital Edition Your "Go To" DRI Publication in the New Year

In 2019, make one of your priority New Year's resolutions to establish *For The Defense*—Digital Edition as your "Go To" DRI publication. If you have not had the chance to do so already, **NOW** is the time to take advantage of the opportunity to view DRI's flagship publication in its online format. Please take a minute to watch this brief video that provides an overview and outlines the benefits and advantages of making *FTD*—Digital Edition your "go to" DRI publication.

Great news! *FTD* digital edition is also available as an App (click the following links to download the App on Apple or Google Play). Similar to the *FTD* digital edition that comes to your inbox, the App allows you to search and share content with clients and colleagues. The App also allows you to create a favorite, zoom and pinch to see content, search and connect with advertisers and more! It is important to note that you need your DRI website login and password to download issues in the App, the App will notify you when a new issue is available.

Click here to access the December issue of *FTD* digital edition.

Bullivant Fights Hunger

The rate of food insecurity (being without access to a sufficient quantity of affordable, nutritious food) in Oregon is 14.6 percent. Team Bullivant Houser Bailey joined the Oregon Food Bank and other volunteers earlier this month to help fight hunger. Members of the firm helped process 13,369 lbs of rice, creating 11,140 meals, with every volunteer providing 100 meals each!

FINAL REMINDER: Golden Coat SLDO Challenge

WHO: All SLDO members, core sponsors, law firms, and friends.

WHAT: A diehard, fierce, nationwide competition among SLDOs to collect the most new and gently used coats. All collected coats will be donated to organizations in your local community, which will provide them free of charge to individuals in need. Winner (collector of the most coats) will receive a Golden Coat Award provided by #DRICares and bragging rights. All who participates are winners and will feel awesome for helping others.

WHEN: November 10, 2018, to December 31, 2018.

HOW: Each SLDO will report to Melissa Roeder (mroeder@foleymansfield.com) on the number of coats collected. The top three SLDOs will be announced in *The Voice*.

Has Marriott's Massive Data Breach Left You with a Sudden Interest in Cybersecurity?

Read Ice Miller's Stephen E. Reynolds, CIPP/US, CISSP and Tiffany S. Kim's article, "Not to Fear, the Feds Are Here: Preserving Attorney–Client Privilege in Data Breach Response," here on DRI LegalPoint to learn the latest on these timely and important items.

DRI LegalPoint (formerly DRI Online) is a DRI members-only service that provides exclusive access to a vast online library of DRI articles, books and materials. Members can search thousands of documents and filter them by practice area and resource. **DRI LegalPoint** includes content from:

- *For the Defense*
- *In-House Defense Quarterly*
- Committee Newsletters
- Defense Library Series (DLS) NEW
- Seminar Materials
- DRI Defense Wins Reporter

In addition to having the ability to search all of the valuable **DRI LegalPoint** content, visitors may also access Defense Library Series (DLS) books separately and review the table of contents and individual chapters.

Leverage the expertise of leading defense practitioners and find the on-point articles and resources you need with **DRI LegalPoint**.

How Has GDPR Compliance Impacted Your Law Firm?

Read more about GDPR compliance in "Why We Need to Care: The Effect of the GDPR on American and Canadian Business" in DRI LegalPoint.

See for yourself how **DRI LegalPoint** can assist you in leveraging the expertise of leading defense practitioners and find the on-point articles and resources you need by clicking here. If you have not yet accessed **DRI LegalPoint**, please click here to view a brief video and find out what you are missing.

Women in the Law, January 23–25, 2019

DRI's Women in the Law Committee proudly presents this premier educational and networking event designed to bring together women attorneys within corporate legal departments or law firms to connect and grow. We gather distinguished faculty from around the country, including in-house lawyers from some of the most recognized companies in America, experienced and successful trial lawyers, and nationally prominent business and professional coaches. Our superior programming provides concrete tools, real-world data, and experienced-based advice to invigorate our practice, increase our connections, and rise together in our professions and in our communities. Click here to view the brochure and register for the program.

Product Liability Conference, February 6–9, 2019

Welcome to Austin, the preeminent city for music, food, and fun. To take advantage of the unique location, we tailored this year's conference to have the most networking events ever at a DRI Product Liability Conference. Check out all the events on the next page! Also, the main stage and SLG presentations are chock-full of dynamic speakers, concentrating on all aspects of defending the product manufacturer, from voir dire to closing arguments, with legal writing and depositions in between—and even a musical production! You do not want to miss it! For the first time ever, conference registration includes a free Product Liability Case Law Update Webinar, presented by the Young Lawyers SLG of the DRI Product Liability Committee. Click here to view the brochure and register for the program.

Toxic Torts and Environmental Law Seminar, March 14–15, 2019

DRI is back in the Big Easy with the latest in environmental and toxic tort law to take your practice to the next level. Come to New Orleans to polish your skills with the best lawyers, judges, and experts from across the country. This is the premier gathering for the defense bar, focusing on litigation tactics, science, and regulatory updates, presented in one of America's most enjoyable and hospitable cities. Click here to view the brochure and register for the program.

Medical Liability and Health Care Law Seminar, March 20–22, 2019

Join your colleagues in historic Nashville for the 2019 DRI Medical Liability and Health Care Law Seminar. The annual two-day seminar has something for everyone, with comprehensive instruction by leading attorneys, physicians, and in-house counsel on the hottest topics. Networking events include a Women in the Law luncheon, a Young Lawyers-sponsored gathering in downtown Nashville, a DRI for Life-sponsored run/walk, and a community service project with Operation Gratitude, mailing care packages to overseas military service men and women. Arrive early and participate in the first-ever, in-depth, and interactive session with both the DRI Litigation Skills and Medical Liability

Upcoming Seminars

and Health Care Law Committees on cross-examination of a life care planner. Register now to ensure your place at this cutting-edge seminar. Click here to view the brochure and register for the program.

Trial Skills and Damages, March 20–22, 2019

The evolution of legal practice over the past several decades has been shaped by technological innovation. Technology simultaneously provides a medium through which we can educate juries on complex matters and provides lawyers with the tools that they need to make better decisions leading up to and during trial. That is not to say that technology dominates the courtroom. Come learn how you can blend proven trial tactics and technology through presentations and demonstrations on effectively navigating the complex damages case, including mock oral arguments and hard-hitting technology-focused presentations from experts and consultants. Join us at the new Park MGM Las Vegas Hotel this March for practice-enhancing education and networking. Click here to register for the program.

Upcoming Webinars

How to Evaluate & Improve Your E-Discovery Process, January 16, 2019, 12:00pm–1:00pm CST

dri™ WEBINAR

With new privacy requirements (*i.e.*, GDPR, California Privacy Laws) and the growing amount of places and data to review, defense attorneys are facing new obstacles in effectively evaluating and producing documents without private data in their cases. To help alleviate these emerging concerns, attorneys must look into new ways to streamline their e-discovery processes that will get them the data necessary to quickly assess their cases and make try or settle decisions earlier. Watch this upcoming webinar and learn a few key universal principles that will help your legal department evaluate and take steps to improve your e-discovery processes today. Click here to learn more.

DRI Membership—Did You Know...

Save on Student Loans with Laurel Road

Wouldn't it be great to save up to $20,000 on your law school loan? What can you do with that money in your wallet? Buy a home or a car, invest in your business, cover health care insurance for a year, or build up a savings account?

Did you know that DRI members receive an extra .25 percent discount when refinancing student loans with Laurel Road, DRI's newest partner and endorsed student loan refinancing provider? Those who select auto pay receive an additional .25 percent discount. There are no origination fees or prepayment penalties.

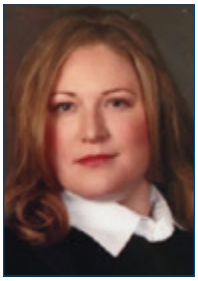
Laurel Road's new Parent Plus Program allows you to refinance your child's Parent Plus Loan at reasonable rates.

DRI Membership pays you back! Check out Laurel Road.

If you don't ask, you don't get.

New Member Spotlight

Tara N. Gess, Construction Enterprises, Inc.



Tara N. Gess practices as in-house counsel at Construction Enterprises, Inc., (CEI), in the area of commercial law, predominantly construction law. CEI, based in Franklin, Tennessee, is a third-party general contractor specializing in the multi-family market.

In early 2000s, Ms. Gess moved from Wisconsin to Nashville, Tennessee, to take a crack at the music industry. Though she found success writing with hit songwriters and even singing at the Bluebird Café, she found that music was more of a hobby for her and that the law was her real passion. In 2015, Ms. Gess was admitted to practice law in Tennessee, though she spent many years as support staff in various high-volume litigation defense law firms before and while attending law school.

In addition to her DRI membership, Ms. Gess is a member of the American Bar Association, the Tennessee Bar Association, the Tennessee Association of Construction Counsel (TACC), and the Town of Smyrna Board of Adjustments and Appeals. In 2017, Ms. Gess presented a CLE at a TACC conference with a novel topic, "Recovery of In-House Counsel Fees," based on her recovery of fees in connection with her work on an arbitration in Missouri.

Though Ms. Gess loves the practice of law every bit as much as the first day she began practicing, she believes strongly in the philosophy of *work hard/play hard*. She volunteers every winter coaching youth girls' basketball. She also enjoys travel, backpacking, kayaking, and riding horses every chance she gets.

If Ms. Gess could sum up her style and personal philosophy, she would say simply that she believes in balance—idealism with a healthy dose of pragmatism, litigation when necessary, but a preference for de-escalation and negotiation, and an old-fashioned view that the practice of law, regardless of that which is being advocated, should always focus on justness.

Quote of the Week

"As we struggle with shopping lists and invitations, compounded by December's bad weather, it is good to be reminded that there are people in our lives who are worth this aggravation, and people to whom we are worth the same."

—Donald E. Westlake