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## UPCOMING EVENTS

**New York Service Project:** July 8, 2011 in New York, New York. Join fellow members of the New Lawyers Division for a Habitat for Humanity build in conjunction with AAJ's summer convention. Space is limited so RSVP today!

**AAJ's Annual Convention:** July 9-13, 2011 in New York, New York

**NLD Party:** July 10, 2011 at Amnesia located at 609 West 29th Street in New York City.

**NLD Business Meeting:** July 11, 2011 from 2:00 pm-4:00 pm at the Hilton, Rotunda in New York, New York

**NLD Awards Reception:** July 11, 2011 from 4:30 pm-6:30 pm at the Etrusca Restaurant, Hilton New York.



Formerly the Association of Trial Lawyers of America (ATLA®)

## From the Chair

By **Brian P. Galligan**

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Brian P. Galligan

In this, my final "From the Chair" message, I want to say thank you. Thank you to all the NLD members who have made this year so successful for the New Lawyers Division and for AAJ.

Over the past year, more than 1,000 members have been recruited or retained for AAJ through NLD efforts. We've organized

and held membership phonathons in Washington, D.C., New Orleans, Miami, Las Vegas, New Orleans again, Atlanta, and Las Vegas again. NLD members took time away from their law practices and families to travel and make thousands of calls for days at a time and to tell the story of AAJ and why membership in our association is so important to the future of the civil justice system. The effort to retain members and to recruit new ones goes on and I know that the NLD will continue provide the spark, energy, and determination necessary to make sure that AAJ stays strong for the future. Thank you!

This year, NLD members have raised over \$45,000 for pro-civil justice candidates for Congress. NLD members gave up their time to travel to phonathons in Las Vegas and Memphis to make the hardest of calls asking AAJ members to give money to our PAC. NLD members also responded to efforts to raise money for to the DCCC and DSCC to help preserve a pro-civil justice majority in Congress. With the political fight to preserve our system of justice for injured Americans only getting harder, the efforts of NLD members who raised money or who answered the call to give have never been more critical. Thank you!

At the Winter Convention in Miami, 20 NLD members arrived a day early to help put a roof on homes for families in need with Habitat for Humanity. Those

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## FROM THE CHAIR *continued*

families are now enjoying the shelter NLD members helped to provide. As I write this, NLD members are signing up for our Habitat service project at the Annual Convention in New York. As trial lawyers, we must always work hard to counter the often unfair and undeserved characterizations of what we do in the media and in public discourse. Giving back through NLD and these public service projects has been a good way to do just that. Thank you!

NLD members have also been active and involved writing articles for AAJ publications, in speaking at education programs, serving on NLD and AAJ committees,

and in fighting for justice for clients in courtrooms across the country.

It has truly been an honor and a privilege to be Chair of the AAJ New Lawyers Division, and meet and work with so many amazing and talented new lawyers from all over the country. With such an engaged and active membership, along with the best staff in the world, we have been able to accomplish a lot for AAJ.

The NLD represents the future of AAJ and a robust, engaged, and vibrant membership is critical to that future. Given your efforts this year, the future looks very bright. Thank you! ■

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# From the Bench: Honorable Brendan J. Sheehan

By William B. Eadie, Esq.

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Honorable Brendan J. Sheehan



William B. Eadie, Esq.

The Honorable Brendan J. Sheehan is a common pleas judge in Cuyahoga County, Ohio. NLD member attorney William Eadie spoke with Judge Sheehan about his experiences as a lawyer, prosecutor, and now judge, and advice he might have for those of us just starting out.

**Will: Thanks for taking the time to speak with me, Judge. First, can you tell us how you become a judge in the first place?**

Sure. I was a product of the system—I was introduced to law at a young age, and saw the system work firsthand, which made me interested in the process. I lost my father to crime at age 15 and watched his killer’s murder trial and conviction. I saw the prosecutors at work, and decided I wanted to be a part of that process. I worked as a bailiff while attending Cleveland-Marshall College of Law and eventually became a law clerk with the Hon. Donald Nugent—who had been one of the prosecutors in my dad’s case years before.

I became a prosecutor at a relatively young age. Working as a prosecutor and eventually winning a seat on the bench gave me a chance to give back the way I felt those prosecutors did for my family years ago. Now I’m a judge in the Cuyahoga County Court of Common Pleas, which serves Cleveland, Ohio, and the surrounding areas.

**That’s an amazing story. What’s your caseload like as a judge?**

I hear both civil and criminal cases. On the civil side, anything from a simple slip-and-fall to complex wrongful death cases. On the criminal side, I hear cases on anything from simple assault, to murder with a death specification. I have about 500 active cases pending at this point. Of those,

about 200 are civil, 100 or so are criminal, and the remaining 200 are foreclosure actions. The foreclosure caseload has been a result of the economy and the uptick in foreclosures, which has strained resources across the judicial system.

**Will: What do you miss most about the practice of law now that you are a judge?**

I miss being able to be in front of a jury and talk to them, ask them questions. That was a big learning curve for me after becoming a judge, where I need to step back and let the attorneys do the interacting with the jury as the party representatives. But I really love being a judge, too. I enjoy being able to help ensure a fair and impartial outcome, help keep the process moving for the parties so they can get to a final outcome in a case. And I still interact with the jury, but in a different and more formal role.

**Will: What advice do you have for new lawyers who want to improve their argument skills in the courtroom?**

Always know what courtroom you’re going into. Before you do anything in a courtroom—or even an initial conference with a judge—know the local rules, the judge’s rules and the rules of evidence. You’ll be more comfortable in whatever you’re doing, and you’ll be better able to communicate clearly and effectively because of that comfort level. Knowing the rules, the judge, and the case lets you operate with confidence, and that really takes down the stress level.

**Will: What is something that is important to you from a judge’s perspective that new lawyers do in the court or how they should act in court? What advice do you have for new lawyers?**

Any new lawyer, before they come to practice in a courtroom, should watch a courtroom. Take the time to come down and watch some proceedings and see how things work. That can be invaluable.

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## FROM THE BENCH: HONORABLE BRENDAN J. SHEEHAN *continued*

Also, every attorney needs a good mentor. Mentors have been there, done that, and are able to explain the process. There are so many pitfalls out there for new lawyers, and having someone who has navigated the waters before is critical to help you avoid the pitfalls. Some people come right out of law school, hang a shingle, and have no idea how to conduct themselves in a courtroom. Spend the time to find and rely on a mentor, and even as a new lawyer you'll be able to avoid clearly appearing to be a "new lawyer."

Oh, and that reminds me about something I think all lawyers should remember, something that being on the bench has really brought home the importance of—always be yourself. Don't get in front of a jury and try to be Clarence Darrow or Johnnie Cochran. When you aren't being yourself, jurors pick up on that immediately and you lose credibility. You are a lawyer, you have your own style, and while you will find ways to become more effective over time, you'll never develop if you're trying to be someone else.

**Will: You mentioned the importance of mentorship for new attorneys. What advice would you give to a new lawyer who is looking for a mentor? How would you suggest they go about it?**

Well, first, know what resources are already available and take advantage of them. At Cleveland-Marshall, for example, there is a mentoring program the school coordinates, and I am sure other law schools have similar programs, or at least, they ought to. Also look to bar associations and other lawyer groups, for mentorship programs or recommendations for mentors. Finally, don't be afraid to reach out to attorneys and ask. Most successful attorneys know how much they relied on their own mentors to get where they are, and are happy to help others.

**Will: What are some of the things that a new lawyer should prepare their client for in the courtroom?**

Well, we have 34 judges here, and they each run their courtroom in their own way. The point is, some things depend on the court, and that goes back to knowing your courtroom before you—or your client—come in.

For me, the main thing to understand is that for major case events like a final pretrial conference, I expect the clients to be present, and to be informed about not just that meeting, but about their case in general. That means that attorneys need to keep their client aware of their case, when there's a motion to continue, or when there's a major filing. Sometimes I think

attorneys get used to having an uninformed client, and that can lead to problems down the road—and not just in my courtroom!

**Will: What suggestions do you have for new lawyers in dealing with clients, especially when the client is older than the new lawyer?**

I would say, managing client expectations. People rely on their lawyer, but they also come into the system with preconceptions, some of which are not accurate. So when an attorney only focuses on the positive aspects of the case, that can create a situation where a client is blind-sided by a development or even the outcome in their case. It's important for lawyers generally to keep clients informed of both the strengths and weaknesses of their case, which is something you learn over time the hard way if you don't take that approach from the beginning. I think I struggled with that as a young prosecutor; being so focused on my position that I overlooked or downplayed the strengths of the other side.

**Will: What advice would you give to a less experienced attorney, from a judge's perspective or jury's perspective, when they are up against a more experienced attorney?**

Know the rules. We're all playing by the same set of rules, and while a more experienced attorneys may have developed confidence their skill set, they don't have a separate set of rules just because they've been around longer. Confidence is very apparent in the courtroom, and it comes from knowing you know the ground rules so you can focus on the case.

**Will: If you could give a new lawyer one piece of advice on preserving his or her trial record for appeal, what would that be?**

Always ask the court to make a record. If there is a sidebar, ask the court to include the court reporter. For an objection, or a motion in limine, always try to make sure it is documented. If you have a motion, go ahead and file it rather than just handling things verbally. In the end, when and if there is a reviewing court, they'll be relying on that record and you documenting in that record what happened—and you'll be the one asked about failures to get things in the record. You'll have the responsibility later, so act with the authority now.

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**FROM THE BENCH: HONORABLE BRENDAN J. SHEEHAN continued**

**Will: Do you have any “pet peeves” when it comes to legal writing or oral argument that you would share with new lawyers?**

Sure. For oral argument, always answer the question. Sounds simple enough, but as lawyers we often want to constantly make our argument, and that can mean answering a question you wish you had been asked. But it is painfully clear to the judge or panel asking the questions when you are not giving them a straight answer.

For legal writing, state the issue clearly, up front, and deal with it directly. I’ll review 30-page briefs that spend 25 pages on everything but what matters to deciding the motion. If it isn’t relevant, it is probably a waste of time for the court. And don’t hide from the facts. Be clear about the facts. I can sometimes finish reading two sets of briefs and think I’m reading about two different cases, and I’m left wondering who isn’t being straight with the facts. It doesn’t take too long to figure out, and that’s not where you want to leave a judge who has to decide your issue. You want to be clear with him or her.

On a related note, don’t be afraid to ask for oral argument. If it is a complex issue, a motion for summary judgment, or you think the briefing has left things unclear, by all means ask for oral argument. They don’t have to grant the request, of course but there is no harm in asking.

**Will: Have you found oral argument helps you as a judge in deciding those types of issues?**

Oh, yes, very much so. If I put down briefs and they feel like I read apples and oranges, oral argument really helps cut through the mess and get to the core issue and the core facts bearing on that issue. It gives me a chance to ask a question point blank and get an answer, rather than searching through briefs that never getting to the specific point.

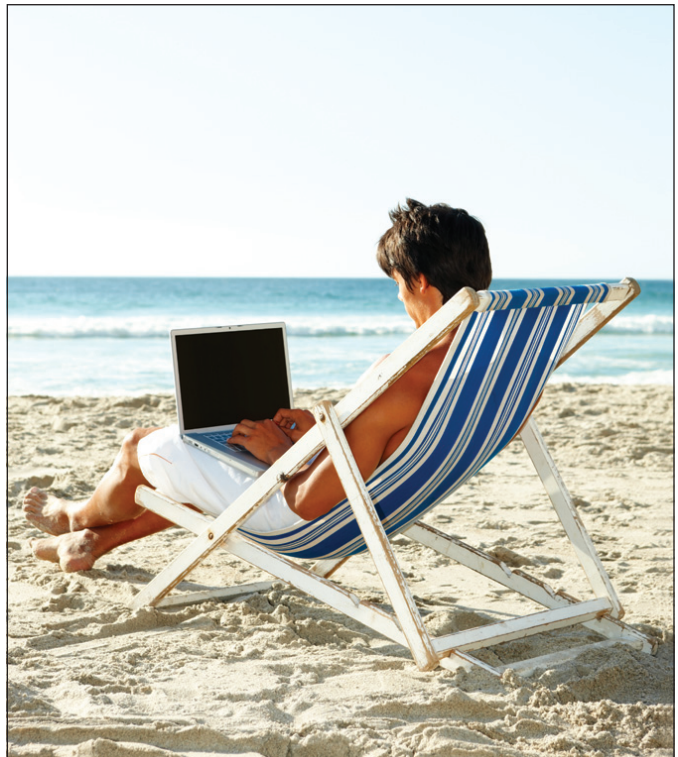
**Will: Practicing law is very time consuming. Do you have any tips to help a new lawyer effectively balance her or his work and personal lives?**

Always remember your family. This job can eat you up, and it will. All you have is your family, your spouse, your children. New lawyers need to make time for their spouse, for their kids, to maintain the health of those relationships. And speaking of health, make sure you’re doing something physical on a regular basis—working out, sports, whatever. It is easy to dive into research and writing, pull late hours, run around working on client matters and feel exhausted at the end of the day, but it isn’t a substitute for maintaining your

physical and mental health. It will wear you down, so make some time to exercise and build yourself back up.

**Will: Thanks for all your insights, judge!**

I’m happy to help people avoid the mistakes I made, and avoid the mistakes I see others make. Hope it helped. ■



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# Do You Have a Viable Nursing Home Abuse/Neglect Case?

By Lorie A. Brown, R.N., M.N., J.D.

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Lorie A. Brown

In the past, claims against nursing homes were rare and the value of an older adult in the nursing home was perceived to be low because elderly citizens in a nursing home have a significant amount of comorbidities. Many of them do not have a spouse who is living and their life expectancies are usually short. However, in recent

years, juries are upset with the provision of poor care to our most vulnerable citizens and will no longer tolerate substandard care. They fear that when they get old, they will be forced to go to one of these facilities. Therefore, they want to send a message to these facilities, that people come first, not profits.

## What makes a good Nursing Home case?

So what makes a viable nursing home abuse/neglect case? There are several factors that must be considered. One of the most important factors is a likeable family. A family that is involved in their loved one's care, participates in the care plan conferences, and visits frequently. If the family is divided on whether or not they want to pursue litigation, their perception of the care their loved one received or their motivation for pursuing the claim, it will present serious difficulties to the plaintiff's attorney. If the family is not united, it is not worth the headache and the struggle to proceed with these claims.

The next factor which makes a good nursing home case is either a continuing pattern of poor care or single incident of obvious neglect with significant damage. Examples of continuing pattern of poor care include:

- 1) continued failure to follow the facilities' policies and procedures,
- 2) continued failure to develop or follow the care plan, and

- 3) continued failure to follow the physician's orders.

Lastly, needless to say, there must be serious harm such as a pressure ulcer stage IV, broken hip, amputation, or death. The injury must be serious to overcome the defenses that the patient was so sick to begin with and was going to die soon.

If there is not a continuing pattern of bad care, then there would need to be obvious neglect. Examples of these types of cases include;

- 1) failure to follow the physician's order,
- 2) dropping a patient from a lift,
- 3) failing to maintain safety and allowing a patient to strangulate on a restraint or between the mattress and bedrail,
- 4) allowing the patient to elope (leave the facility unattended and unnoticed),
- 5) failing to notify the physician of a significant change in condition, or
- 6) failing to evaluate a patient after a fall with injury.

To bolster a liability claim, it is also helpful to have evidence of understaffing, and evidence of fraudulent record keeping. Nursing homes are notoriously understaffed and the available staff does not have enough time to complete all of the required tasks. Consequently, patient's acquire pressure ulcers and become dehydrated, and because of the lack of time, records are falsified in an attempt to protect the facility's license and cover up malpractice. For evidence of staffing, it is helpful to contact former disgruntled employees to talk about staffing. Could they complete all their work in the time allotted? Did patients go without being turned every two hours? Did they have time to encourage patients to drink and feed them? Were they asked to complete the ADL sheet regardless of the care provided? These CNAs are usually given a large number of patients to provide care without help in turning, lifting, dressing, toileting, bathing, or

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## DO YOU HAVE A VIABLE NURSING HOME ABUSE/NEGLECT CASE? *continued*

feeding. If one CNA is absent and is not replaced, that adds a significant amount to the other CNA's workload. It is important to compare the time cards with the signatures on the ADL sheets, to ensure that the person was working that day and that the facility was adequately staffed.

### What are the regulations affecting Nursing Homes?

Nursing Homes are one of the most heavily regulated industries, second only to the nuclear power industry. All nursing homes in the United States that receive government funding through Medicare and/or Medicaid are subject to federal regulations. The Omnibus Budget Reconciliation Act (OBRA) also known as the Nursing Home Reform Act of 1987, found at 42 C.F.R. part 483, is the body of law which governs nursing homes. Any complaint against a nursing home should be filed with the state agency responsible for licensing and surveying the home. Anyone can file a complaint. Once a complaint is filed, a survey investigation of the facility must be performed. If the survey identifies deficiencies, these violations of federal law can be used to show the breach in the standard of care in these cases.

Nursing homes are also required to perform an assessment of the patient using the "Minimum Data Set" (MDS) for all Medicare or Medicaid patients. The MDS form provides a comprehensive assessment of the patient's functional capabilities and helps the nursing home identify patient's health or other needs. If the MDS form differs from the assessment in other parts of the records, this is evidence of providing false information to the government.

### What are common areas of Nursing Home abuse/neglect cases?

**A. Decubitus Ulcers (bed sores or pressure ulcers)** are the most common claim made against nursing homes. These claims will be discussed in more detail below. 42 C.F.R. § 483.25(c).

c) Pressure sores. Based on the comprehensive assessment of a resident, the facility must ensure that—

(1) A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and

(2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.

**B. Dehydration and Malnutrition** 42 C.F.R. §§ 483.25(i) (1) and (2). Because of understaffing and the difficulties of the elderly in chewing and swallowing, and decreased appetite, many patients have trouble in this area. However, due to the difficulty proving damages in the nutrition and hydration area alone, it is beneficial to combine these allegations with other ones.

(i) Nutrition. Based on a resident's comprehensive assessment, the facility must ensure that a resident—

(1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; and

(2) Receives a therapeutic diet when there is a nutritional problem.

(j) Hydration. The facility must provide each resident with sufficient fluid intake to maintain proper hydration and health.

**C. Medication Errors** 42 C.F.R. § 483.25(m). Also due to the understaffing and the homelike environment, this is a frequent problem with staff who are unfamiliar with the individual patient.

(1) It is free of medication error rates of 5% or greater; and

(2) Residents are free of any significant medication errors.

**D. Unnecessary Drugs** 42 C.F.R. § 483.25(I).

An unnecessary drug is any drug when used:

(1) In excessive dosage (including duplicate drug therapy); or

(2) For excessive duration; or

(3) Without adequate monitoring; or

(4) Without adequate indications for its use; or

(5) In the presence of adverse consequences which indicate the dosage should be reduced or discontinued; or

(6) Any combination of the reasons above.

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## DO YOU HAVE A VIABLE NURSING HOME ABUSE/NEGLECT CASE? *continued*

### **E. Unnecessary Anti-Psychotic Drugs** 42 C.F.R. § 483.25(1)(2).

(1) Residents who have not used anti-psychotic drugs are not given these drugs unless anti-psychotic drug therapy is necessary to treat a specific condition as diagnosed and documented in the clinical records; and

(2) Residents who use anti-psychotic drugs receive gradual dose reductions, and behavioral interventions, unless clinically contraindicated, in an effort to discontinue these drugs.

### **F. Misuse of Chemical and/or Physical Restraints** 42 C.F.R. § 483.13(a).

A resident “has the right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident’s medical symptoms.”

### **G. Injuries Precipitated by Untoward Incidents** 42 C.F.R. § 483.13(b).

“resident has the right to be free from verbal, sexual, physical and mental abuse, corporal punishment and involuntary seclusion.”

### **H. Accidents and Falls** 42 C.F.R. § 483.25(h). Although falls occur, everything that can be done must be done to prevent falls and decrease injury.

(1) The resident environment remains as free of accident hazards as is possible; and

(2) Each resident receives adequate supervision and assistance devices to prevent accidents.

### **I. Contractures** 42 C.F.R. § 483.25(e).

(1) A resident who enters the facility without a limited range of motion does not experience reduction in range of motion unless the resident’s clinical condition demonstrates that a reduction in range of motion is unavoidable; and

(2) A resident with a limited range of motion receives appropriate treatment and services to increase range of motion and/or to prevent further decrease in range of motion.

### **Do I have a Decubitus/ Pressure Ulcer Claim?**

Pressure ulcers occur as a result of unrelieved pressure to the skin. These usually occur on the bony prominences. Unrelieved pressure on the skin squeezes tiny blood vessels which supply the skin with nutrients and oxygen. When nutrients and oxygen do not reach the tissue, the tissue dies and a pressure ulcer forms. The area of pressure may feel warmer than the surrounding tissue. The skin may appear reddened and stays reddened even after the pressure is relieved. Slight rubbing or friction of the skin can cause minor pressure ulcers, such as being turned and slid over a sheet.

Defenses against pressure ulcer cases are that the ulcer was not caused by pressure but was vascular. Pressure ulcers are to be distinguished from stasis (vascular) ulcers which do not occur over bony prominences and are usually multiple in nature. These occur as a result of poor vasculature. Also, pressure ulcers are to be distinguished from Kennedy terminal ulcers which occur in the dying process as a result of skin death and multi-system organ failure. They have a unique appearance unlike pressure ulcers and occur almost spontaneously. Another defense is deep tissue injury. If the ulcer develops from the inside out, superficial damage is not seen until later, when tissue undergoes necrosis, reaching the outer layer of skin and resulting in the formation of an external wound.

To prevent pressure ulcers, the facility must determine which patient’s are at risk and then develop interventions to minimize the risk. A validated risk assessment tool such as the Braden Scale or the Norton Scale uses a systematic risk assessment to determine if a patient is at high risk for pressure ulcers. Pressure ulcer risk needs to be reassessed at periodic intervals. Factors include immobility, incontinence, nutritional factors such as inadequate dietary intake and impaired nutritional status, and altered level of consciousness.

The skin is the largest organ in the body accounting for approximately 15 percent of our body weight. It forms a barrier between internal organs and external environment and participates in many vital bodily functions.

There are four stages of pressure ulcers. Stage 1 is described as nonblanchable erythema of intact skin: discoloration, warmth, edema, and duration may be indicators in darker skin. With Stage 2, “partial thickness loss of dermis presenting as a shallow open ulcer with a

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## DO YOU HAVE A VIABLE NURSING HOME ABUSE/NEGLECT CASE? *continued*

red pink wound bed, without slough. May also present as an intact or open/ruptured serum-filled blister.” Stage 3 presents as a “full thickness tissue loss. Subcutaneous fat may be visible but bone, tendon or muscle are not exposed. Slough may be present but does not obscure the depth of tissue loss. May include undermining and tunneling.” Lastly, Stage 4, being the worst, is full thickness with extensive destruction, necrosis, or damage to muscle, bone, or a tendon. Slough or eschar may be present on some parts of the wound bed. Often include undermining and tunneling. If a wound is classified as unstageable, it is full thickness tissue loss in which the base of the ulcer is covered by slough (yellow, tan, gray, green, or brown) and/or eschar (tan, brown, or black) in the wound bed.

The key to proving these cases is through the patient’s care plan, the facility’s policies and procedures and nationally recognized clinical practice guidelines. Many national organizations have promulgated peer reviewed authoritative guidelines on pressure ulcer prevention and management. These guidelines can be found at [www.guidelines.gov](http://www.guidelines.gov) and search pressure ulcer prevention.

The facility must do everything it can do to prevent these ulcers. If the facility has done everything, then the ulcer may have been unavoidable. All at-risk individuals should have a systematic skin inspection at least once a day with particular attention to the bony prominences.

The results should be documented. It used to be the standard of care to massage bony prominences to stimulate blood flow and avert pressure ulcer formation. However, research has shown that this may lead to deep tissue trauma. Preventative measures which need to be taken are to minimize shear-related injury. Redistribute pressure by turning or repositioning at least every two hours. Positioning devices, such as pillows or foam wedges, should be used to keep bony prominences from direct contact with each other according to a written plan. Use skin protectant to decrease moisture. Maximize nutrition by increasing protein and vitamins. Use a low air loss bed or mattress, or air-fluidized surface. Implementation of a bowel and bladder management program to avoid skin contact with urine and feces. Treatment of pressure ulcers includes all of the above in addition to implement strategies to optimize wound healing, wound management, use of antibiotics (topical or systemic if indicated and ordered), debridement of devitalized tissue, evaluation of need for operative repair, and evaluation of pain management.

### What are the economic pitfalls to avoid in Nursing Home abuse/neglect cases?

If the attorney is not careful, litigation against a nursing home can be an economic land mine. The time and expense involved in pouring through mounds of documentation to evaluate the case and identify the

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#### **RESOURCES FOR STANDARDS OF CARE IN NURSING HOME CASES**

**Policies and Procedures of Nursing Home Resident’s Care Plan**

**National Pressure Ulcer Advisory Panel—guidelines, staging information and illustrations of pressure ulcers.**  
<http://www.npuap.org/resources.htm>.

**Wound, Ostomy and Continence Nurses Society—publications and standards on wound care.**  
<http://www.wocncenter.com/members/bookstore/store.cfm>

**American Medical Directors Association—guidelines pertaining to the management of patients in long term care settings**  
<http://www.amda.com/tools/guidelines.cfm>

**American Geriatrics Association—guidelines for treatment of older adults**  
[http://americangeriatrics.org/health\\_care\\_professionals/clinical\\_practice/clinical\\_guidelines\\_recommendations/](http://americangeriatrics.org/health_care_professionals/clinical_practice/clinical_guidelines_recommendations/)

**Searchable comprehensive repository of guidelines published by numerous organizations and associations**  
<http://www.guidelines.gov>

**Joint Commission on Accreditation of Long Term Care Facility—standards**  
[http://www.jointcommission.org/accreditation/long\\_term\\_care.aspx](http://www.jointcommission.org/accreditation/long_term_care.aspx)

**Guidance to Surveyors for Long Term Care Facilities**  
[http://cms.gov/manuals/Downloads/som107ap\\_pp\\_guidelines\\_tcf.pdf](http://cms.gov/manuals/Downloads/som107ap_pp_guidelines_tcf.pdf)

**Federal OBRA Comprehensive Long Term Care Facilities**  
[http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title42/42cfr483\\_main\\_02.tpl](http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/ecfrbrowse/Title42/42cfr483_main_02.tpl)

## DO YOU HAVE A VIABLE NURSING HOME ABUSE/NEGLECT CASE? *continued*

necessary information as well as the cost of experts makes these cases difficult. In addition, Medicare has an automatic lien. The amount of repayment may be in excess of the value of the case. It is important to determine the conditional payment amount so that you can have the information necessary to determine if it is worthwhile to proceed with the claim.

As mentioned previously, the family must be united on their goal in litigation. A family who is out for the money will not make a good impression on the jury. A family who is proceeding with litigation so that this will not happen to anyone else has a good motive and the jury will like them.

Unlike medical malpractice claims, the special damages will not drive the value of the case. Most times in Nursing Home cases, the special damages are not that significant.

The main cost is the nursing home care which the patient requires regardless of the neglect. Another consideration is to evaluate your state law to determine if there are any caps which will limit recovery. Some states have absolute caps, whereas other states have a cap on noneconomic damages. If it is a wrongful death case, some states have a cap on loss of love and affection if the deceased does not have a spouse or dependent next of kin. The main element that drives damages in these cases is the jury's anger toward the nursing home for providing substandard care to our most vulnerable citizens, the elderly.

Lorie A. Brown, R.N., M.N., J.D., is a practicing nurse-attorney who consults with attorneys on medical issues in their cases including prescreening cases for merit, finding experts and performing medical research. The views expressed in this column are those of the author. [www.brownlaw1.com](http://www.brownlaw1.com)

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# The Constitutional Rights of Jurors to Determine the Facts

By Nelson Boyle

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Nelson Boyle

The following article provides some thoughts for consideration when you prepare to empower the jury in your next trial or defend a jury's verdict on appeal.

## Jurors Are “Constitutional Officers”

Jurors are constitutional officers with a prescribed duty to perform.<sup>1</sup> Some states and the federal government constitutionally grant the right to serve on a jury and to have a civil case tried by a jury.<sup>2</sup>

In states such as Colorado, which grant a civil jury as a statutory right or by procedural rule, jurors become constitutional officers once the right to a jury trial has been statutorily granted.<sup>3</sup> A juror's oath prescribes the juror's duty to well and truly try the issues and render a true verdict according to the law and the evidence.<sup>4</sup> Constitutions generally secure the “right of any person to serve on any jury.”<sup>5</sup>

Without exception, every jurisdiction has precedent explaining in some manner that the right to a jury trial comprehends a fair verdict for all persons, free from influence or poison of evidence, which should not have been admitted and the admission of which aroused the passions or prejudices of the jury, impugning its impartiality.<sup>6</sup> This precedent limits the jurors' rights to consider extemporaneous knowledge and facts.

However, in a matter of first impression, the Colorado Supreme Court recently held that, during deliberations and calculation of damages, jurors may share and consider their own expertise and experience, derived from their professional and educational backgrounds.<sup>7</sup> This holding strengthened the jurors' constitutional right to have their verdict stand and to bring to bear their professional knowledge, expertise, and experience.

## Historical Roots of Our Jury System

The American jury system is a masterpiece derived from the English system; fought for and won in order that citizens might stand in judgment of their peers in civil cases. The criminal and civil jury right belongs both to the litigants and to the citizens who honor their sacred democratic duty and place their lives on hold to mete out justice.

The “Interpretive Commentary” to section 15 of article 1 of *Vernon's Ann. Tex. Const.*, contains a brief, but eloquent discussion of America's “constitutional inheritance from England” of trial by jury.<sup>8</sup>

Alexis de Tocqueville's enduring assessment of the American jury remains true today:

In America being placed upon the jury is looked upon as a burden, but it is a burden that is easily borne, and to which one readily submits.<sup>9</sup>

Tocqueville aptly described the common citizen's right to serve on a jury, the role the jury played in the formation and endurance of our democracy, and even the differences between the English and the American civil jury.<sup>10</sup> In fact, “the institution of the jury raises the people itself ... to the bench of judicial authority.”<sup>11</sup>

On occasion, the United States Supreme Court has taken to lengthy discussion of the jury's right to determine the facts.<sup>12</sup> In *Blakely* and *Sparf*, the Court explained what we already know: The Citizens' right to adjudicate controversies is a pillar of our democracy.<sup>13</sup>

In *Sparf*, Justice Harlan's majority opinion and Justice Gray's dissent provided equally compelling chronicles of the jury's role from the Magna Carta, through the American Colonial Period under English Common Law, as this Nation's Founders understood it, and through the first century of American jurisprudence up to that 1895 decision.<sup>14</sup> Unquestionably, as its *right*, a Jury should determine the facts.

Much more recently, in *Blakely*, Justice Scalia explored the jury's franchise, its role and rights, as it was understood in 1789.<sup>15</sup> No “mere procedural formality,” the right to a jury

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## THE CONSTITUTIONAL RIGHTS OF JURORS TO DETERMINE THE FACTS *continued*

trial is a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.<sup>16</sup>

Under *Blakely* and *Apprendi*, we have come to understand that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

*Id.* The jury has the right to exercise its franchise and thus control the judiciary through its determination of the facts. *Id.* Justice Scalia's reasoning applies to civil cases and the role of civil juries as well.

### You Are Wondering, "So What?"

Tocqueville's accurate assessment of our jury system included a fair warning for you to consider: The jurors' constitutional right to determine the facts of a case is a personal right, held by them, and it must be honored and guarded from interference from the court, the litigants, and other jurors.

Too, the jurors' willingness to exercise their rights and perform their duties must be cherished. Else, we risk citizens refusing to bear the burden and ceasing to exercise their Franchise—knowing their careful and considerate assessment of the facts would be cast aside by their fellows or even upon innuendo and unfounded accusations of the jury's dereliction of duty.

Before your next trial, consider the jury's Constitutional right to decide the facts in your civil or criminal case. Consider (and appreciate), as well, that jurors willingly show up at trial, of their own volition, and perform that function.

The jury's right, itself, is a thing of substance—it is not merely a straw man, ready to be trampled upon and destroyed by fellow jurors, the Courts, the political branches, nor the litigants themselves. Rather, the jury's deliberations must be protected from outside influence; its verdict must be guarded and upheld, except in those rare circumstances when no evidence supports the holding. Many advocates have described techniques for communicating with juror—sand empowering them.<sup>17</sup>

When you are preparing for trial, you should consider the jurors' constitutional right to try your client's case. Consider the history described in *Blakely* and *Sparf*. Consider adding Tocqueville's wisdom to your jury empowerment rap. ■

- 1 Fleagle v. People, 87 Colo. 532, 289 P. 1078, 1079-80 (1930); COLO. CONST., art. 2, § 23.
- 2 E.g., U.S. CONST., art. III, § 2, cl. 3, amends. VI, VII; ALA. CONST. Art. I, § 11; ARK. CONST., Art. 2, §7; GA. CONST., Art. 1, § 1, ¶ XI; IOWA. CONST. Art. I, § 7; IND. CONST., Art.1, §, 20; MD. CONST., Dec. of Rights, Art. 23 (in cases where sum in controversy is greater than \$15,000); MICH. CONST. Art. 1, § 14 (see *Leary v. Fisher*, 248 Mich. 574, 578, 227 N.W. 767, 768 (1929)); MINN. CONST., Art. 1, §4; MISS. CONST. Art. 3, § 31; N.C. CONST., Art. I, § 25 (in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable); N.J. CONST, Art. 1, ¶9; OR. CONST., Art. 1, §17; *Rummell v. Co-Op Cabs, Inc.*, 30 Ohio Law Abs. 615, 1939 WL 8071 (Ohio Ct. App. Oct. 7, 1939); PENN. CONST., Art. 1, §6; TEX. CONST. Art. 1, § 15; WASH. CONST. Art. 1, §21; W. VA. CONST. Art. 3, § 13. However, the United States Supreme Court has held that the Seventh Amendment right to a jury trial for civil cases does not apply in state proceedings. *Elliott v. City of Wheat Ridge*, 49 F.3d 1458, 1459 (10th Cir. 1995) (citing *Eilenbecker v. Dist. Ct. of Plymouth Cty.*, 134 U.S. 31, 34, 10 S. Ct. 424, 425, 33 L. Ed. 801 (1890) (“the first eight articles of the amendments to the constitution have reference to powers exercised by the government of the United States, and not to those of the states”). The rule in *Elliott*, relying on *Eilenbecker*, is itself suspect, given that the First, Second, Fourth, Fifth, Sixth, and Eighth Amendments have all since been incorporated through the Fourteenth Amendment.
- 3 E.g., COLO. R. Civ. P. 38; *Blades v. DaFoe*, 704 P.2d 317, 320 (Colo.1985) (“right to a jury trial in a civil action or proceeding is governed by C.R.C.P. 38 promulgated by this court pursuant to our constitutional rule-making power embodied in article VI, section 21 of the Colorado Constitution.”); *Parker v. Plympton*, 85 Colo. 87, 273 P. 1030 (1928). *C.f.* Louisiana appears to be another state that grants the right to a civil jury by statute or rule.
- 4 E.g. COLO. R. Civ. P. 47; *Demato v. People*, 49 Colo. 147, 111 P. 703, 704 (1910).
- 5 E.g., COLO. CONST. Art. II, § 23.
- 6 E.g., *Oaks v. People*, 150 Colo. 64, 371 P.2d 443, 446-47 (1962).
- 7 *Kendrick v. Pippin*, \_\_\_ P.3d \_\_\_, 2011 WL 1758826, at \*10-15 (Colo. May 9, 2011) (discussing other jurisdictions' approaches).
- 8 VERNON'S ANN. TEX. CONST. art. I, § 15.
- 9 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, PART IN THE SECOND 360, Appx. R. (New York: J&HG Langley 1840); see also *Rummell*, 30 Ohio Law Abs. 615, 1939 WL 8071 (“The jury are a body of laymen, selected by a lot, to ascertain, under the guidance of a judge, the truth in questions of fact arising either in a civil litigation or a criminal process \*\*\*. Their province is strictly limited to questions of fact, and within that province they are still further restricted to the exclusive consideration of matters that have been proved by evidence in the course of the trial. They must submit to the direction of the judge as to any rule or principle of law that may be applicable to the case, etc.”) (quoting *Encyclopedia Britannica*, “Jury”).
- 10 TOCQUEVILLE, *Id.*, Appx. R, S, T at 359-62.
- 11 ALEXIS DE TOCQUEVILLE, *I DEMOCRACY IN AMERICA* 309 (New York: J&HG Langley, 4th ed. 1841).
- 12 E.g., *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) (J. Scalia); *Sparf v. United States*, 156 U.S. 51 (1895) (J. Harlan, Maj.Op. and J. Gray, Diss. Op.).
- 13 *Id.*
- 14 156 U.S. 51, 51-107 (J. Harlan, Maj.), 110-83 (J. Gray, dissenting).
- 15 *Blakely*, 542 U.S. 296.
- 16 *Id.* at 305-306 (citing e.g., *Letter XV by the Federal Farmer* (Jan. 18, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (H. Storing ed. 1981) (describing the jury as “secur[ing] to the people at large, their just and rightful controul in the judicial department”); John Adams, *Diary Entry* (Feb. 12, 1771), reprinted in 2 WORKS OF JOHN ADAMS 252, 253 (C. Adams ed. 1850) (“[T]he common people, should have as complete a control . . . in every judgment of a court of judicature” as in the legislature); letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 PAPERS OF THOMAS JEFFERSON 282, 283 (J. Boyd ed. 1958) (“Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative”); Jones v. United States, 526 U.S. 227, 244-48, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)).
- 17 See e.g., DAVID BALL, PH.D., DAVID BALL ON DAMAGES (3d ed., NITA 2011).

# AAJ Secretary Election: New Lawyers Division Questionnaire

## Questions and Answers with Lisa Blue Baron and Rhonda Hill Wilson

Introduction by Brian P. Galligan  
Chair, New Lawyers Division

As Chair of the AAJ New Lawyers Division, I recognize that the contested election for AAJ Secretary carries with it significant implications for the future of our organization and the members of the NLD. Contested elections can be good for an organization by requiring members to directly confront and consider the direction of their organization. During this campaign season before the New York Convention, I want to give both candidates as many opportunities as I can to interact with New Lawyers and to share their vision for the future of AAJ. I hope that in doing so, NLD members will possess all the information they need to make an informed decision with respect to their vote at the Membership meeting in New York on July 12.

The NLD Executive Committee has put together a short list of questions for both candidates to answer relating to issues that are important to the NLD. Both Lisa Blue Baron

and Rhonda Hill Wilson have provided thoughtful responses to each of the questions posed. I encourage you to read and consider each candidate's answers and to seek out and engage the candidates with respect to issues that are important to you. Most important, be sure to show up and VOTE at the Membership Meeting at the AAJ Annual Convention in New York on July 12 from 3:00 pm–5:00 pm (ET) in the Sheraton Hotel, Empire Ballroom, 3rd Floor.

I want to thank both Lisa Blue Baron and Rhonda Hill Wilson for their willingness to engage and get involved in leading our great organization. I am well aware of the sacrifice and commitment required to be an AAJ officer and applaud their willingness to serve. ■

## Answers to New Lawyers Division Questionnaire

### Lisa Blue Baron

**Do you support or oppose the Board Revitalization Amendment that will be voted on by AAJ membership at the 2011 Annual Convention in New York? Explain your position.**



Lisa Blue Baron

I support the Board Revitalization Amendment because it encourages diversity and input from the women and minority caucuses. As we increase our membership, the demographics of AAJ are beginning to change. New Lawyers comprise 13% of our total membership but only have 5% representation on our board. Similarly, our minority member-

ship comprises 13.5% of the total membership but only have 5% representation on the board. The Board Revitalization Amendment gives more voice to these minority caucuses. We should welcome and encourage this change within AAJ.

**How does AAJ address the “graying” of our membership and what can AAJ do better to make the association more appealing and/or relevant to new lawyers?**

First, AAJ needs to find out what is most important to new lawyers. We can better meet the needs of young lawyers by opening our ears to them, rather than peremptorily deciding what should be important to young attorneys. For this reason, AAJ needs to reach out to new lawyers and use their creativity to determine which educational programs meet their needs. Next, AAJ should respond by implementing the recommended programs and suggesting other programs that may be relevant. One possibility is providing programs that advise young lawyers of the challenges and benefits of different practice areas. With tort “reform” imposing restrictions on damages and limiting types of cases that can be brought, young attorneys have more difficulty finding areas of law they are comfortable practicing within.

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## ANSWERS TO NEW LAWYERS DIVISION QUESTIONNAIRE: LISA BLUE BARON *continued*

Finally, AAJ should involve young lawyers in speaking engagements to utilize their fresh perspectives. When these steps are taken, our “graying” membership will benefit from new ideas provided by younger members who are actively engaged in AAJ. Further, young lawyers will benefit from interactions with experienced attorneys and programs targeted to meet their needs.

### **Assuming AAJ’s revenue picture remains stable, would you support or advocate for cuts in funding for the New Lawyers Division (NLD) or AAJ support of NLD activities?**

I would not support any cuts for the NLD. Rather, I would advocate for and encourage new activities in this division.

### **What is the number one piece of advice you would give to new lawyers about being a successful trial lawyer?**

My advice is twofold. First, to be a great trial lawyer, you must be a great person, a great friend, a great spouse, a great parent, and a great law partner. Second, take risks; learn how to handle rejection, and learn to redeem yourself by moving forward and never looking back at past mistakes.

### **Please tell us anything else you think new lawyers ought to know about you or your candidacy for AAJ Secretary?**

I have been a practicing lawyer and a forensic psychologist for thirty years. Should I be elected AAJ Secretary, it is my goal for our organization to be inclusive of all types of lawyers and law practices. It is also my goal to be substantive and listen to the membership to find out concerns for their future and the future of the organization.

## Answers to New Lawyers Division Questionnaire **Rhonda Hill Wilson**

### **Do you support or oppose the Board Revitalization Amendment that will be voted on by AAJ membership at the 2011 Annual Convention in New York? Explain your position.**



Rhonda Hill Wilson

First, this amendment is much different from the original proposed amendment. However, there are additional changes that I suggest. I believe that there should be some manner of written confirmation that due diligence has been performed in the selection of a minority or woman as a new board member by the state. Also, if, as stated in the amendment,

the state board of governors cannot select a minority or woman member, then I think that the task of selecting a Minority member or Women Caucus member should first go the state trial lawyers’ organization’s Women Caucus or Minority Caucus (if they exist in that state) before going to the national Women Caucus or Minority Caucus of AAJ. I

believe that the impact of this subsection should be reviewed yearly before the third year of its implementation for analysis of its organizational impact. Finally, I am committed to the involvement of young lawyers, minority lawyers, and women lawyers in leadership positions in all levels of our organization whatever the outcome of this amendment.

### **How does AAJ address the “graying” of our membership and what can AAJ do better to make the association more appealing and/or relevant to new lawyers?**

AAJ should work to bring more new lawyers into the organization. It can do this by encouraging AAJ events in local areas much like the Women Lawyers did this year by specifically identifying young lawyers that we know would be interested in AAJ activities to become members of AAJ. The present phonathons sponsored by the New Lawyers should continue and be promoted. There should be additional research done to find out what would make AAJ more attractive to new lawyers and where that outreach should begin. We should enhance communications to new lawyers using the most recent social media including Facebook and

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## ANSWERS TO NEW LAWYERS DIVISION QUESTIONNAIRE: RHONDA HILL WILSON *continued*

LinkedIn and research the new and efficient means of communicating.

In addition, we should offer new lawyers in AAJ programs that will allow them to develop their practices. Also, AAJ should continue to work on legislation or federal administrative action to permit our costs to be deducted in the year they are incurred. This will assist the cash flow of new lawyers and assist all trial lawyer practices. These are a few of the things that I would suggest for increasing the relevancy of AAJ to new lawyers and potential new lawyers of AAJ.

AAJ can also address the “pipeline” for new members which begins in high school and college. We could easily begin a program that replicates a program offered by the University of Pennsylvania Law School on “Street Law” to educate high school students on trial law. I am also involved in a Mock Trial program that is focused on high school students at the Temple University Law School in Philadelphia, Pennsylvania. We should resurrect and/or re-energize the AAJ Ambassador’s Program that focuses on law students nationwide.

### **Assuming AAJ’s revenue picture remains stable, would you support or advocate for cuts in funding for the New Lawyers Division (NLD) or AAJ support of NLD activities?**

I would not recommend cuts in funding for AAJ NLD or NLD activities. However, if the revenue picture does not remain stable and if there are required cuts to the budget, it would be my expectation that the New Lawyers Division would sacrifice the same as other members of the association. The programs and activities offered by the New Lawyers are vitally important, valuable, and serve as a model in some instances to other parts of our organization.

### **What is the number one piece of advice you would give to new lawyers about being a successful trial lawyer?**

My best advice to new lawyers is to be courageous in the practice of law and in your own lives. You cannot separate the two. You must have the courage to stand up and speak out even if your case or position is initially unpopular. Strive for excellence in all you do. Whether it is legal writing or trial presentation, practice and prepare until it is the best job you can do. Honesty and integrity are also critical requirements of a successful trial lawyer.

### **Please tell us anything else you think new lawyers ought to know about you or your candidacy for AAJ Secretary?**

It has been my honor and pleasure to work on behalf of the American Association for Justice and its members for the past fifteen years. Beginning with my work teaching with the education arm of AAJ, the National College of Advocacy, to service as AAJ Parliamentarian and Treasurer, my work has been my way of giving back to this organization and to the profession.

My goals as AAJ Secretary for 2011–2012 include strengthening and promoting our organization and its mission by membership growth and satisfaction. My further goal in this area is to make sure that each member of AAJ is valued as an important part of this organization. Each of our members including those who practice as solo practitioners or with small firms is vitally important!

Additional goals are to oversee financial stability of the organization while increasing PAC membership and participation so that we may continue to carry out the necessary work of AAJ and to maintain access to the court by our clients.

Finally, we must provide leadership to the country on the honor and dignity of the legal profession.

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