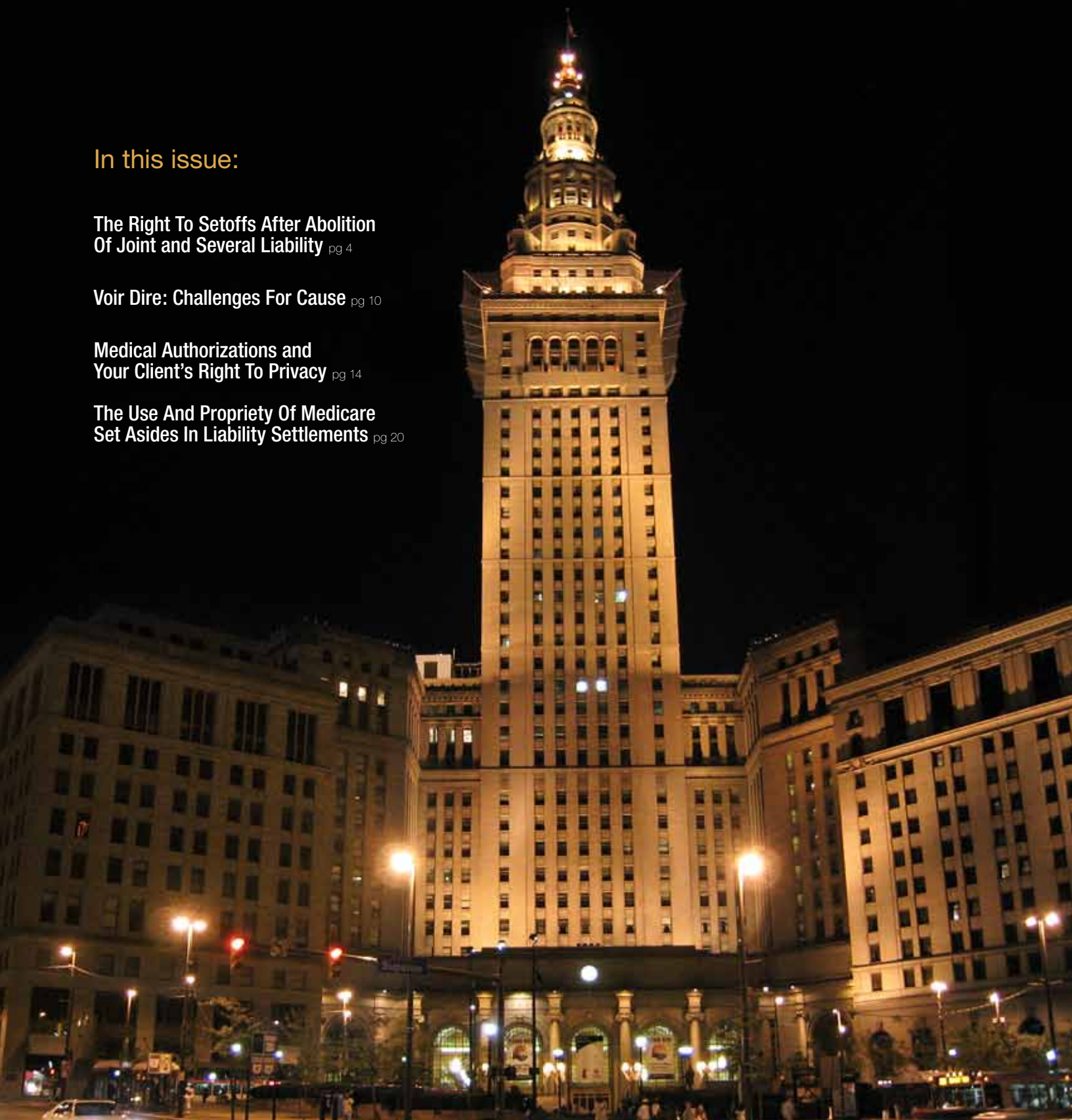
CATA News

Winter 2010 • 2011

Cleveland Academy of Trial Attorneys
www.clevelandtrialattorneys.org



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Cover Photo by Joanna Eustache

Opinions expressed in the articles herein are those of the authors and are not necessarily shared by CATA.

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President's Message

My associate recently was involved in a car accident and, within a few days, solicitation letters from lawyers began arriving in the mail. He brought the letters to the office to show me. After looking through them to see whether they complied with ethics requirements, I advised my associate that I was deeply disappointed. "Aha," he said. "I knew it. They're unethical aren't they?" "Absolutely not," I replied, "but two of them haven't paid their CATA dues!"

Their loss, as there has never been a better time to join our organization. For starters, the CATA Newsletter is now back after a one-year hiatus and – I hope you will agree – it is better than ever. We have re-formatted, re-formulated, and rejuvenated our publication under the leadership of Editors Kathleen St. John and Donna Taylor-Kolis, and with assistance from committee members Ellen Hirshman (advertisements), Chris Mellino (verdicts and settlements), Jay Kelley, Sam Butcher, Andrew Thompson, David Grant, John Liber, and George Loucas. We hope you enjoy this issue, and if you see one of our advertisers, please be sure to mention that you saw their advertisement in the CATA Newsletter! (I'm imagining something like this, "Hey, saw your ad in the CATA Newsletter. Thanks for supporting us. Maybe next year you'll buy two?")

Our CLE luncheons will be under the direction of CATA Secretary Sam Butcher this year. These luncheons remain a great way to grab a quick bite, get an hour's worth of CLE, and catch up over lunch with colleagues, judges, and staff attorneys. Vice-President John Liber will be putting together our CATA Litigation Institute this year. Last year's Institute with cross-examination guru Larry Pozner was a big hit, and I expect this year's event to be even better.

As I finish writing this "Message," I am in the midst of preparing for a complex medical malpractice trial. In an effort to find inspiration for crafting a simple trial theme, I turned to Robert Fulghum's "All I Really Need to Know I Learned in Kindergarten." I didn't find my theme this time, but I did find this nugget, which seems to encapsulate for me what our collection of trial attorneys is all about: "When you go out into the world, watch out for traffic, hold hands, and stick together." Let's stick together and have a great year. ■

Kathleen J. St. John
Editor

Donna Taylor-Kolis
Editor

Message from the Editors

At the first meeting of our CATA News committee, Brian Eisen posed a question that has inspired us throughout this endeavor. What is CATA about? Is it just a local branch of the OAJ, or is it something else?

We confess to being aficionados of the Greater Cleveland area. We live here; we practice here; and we believe our community holds a treasure trove of talent, not the least of which can be found within our membership.

So we would like to take this opportunity to invite our members to showcase that talent within the CATA News. As we have attempted to do in this issue, CATA News will focus on articles discussing current legal and practical issues affecting your practices in lieu of the Case Summaries that were the focus of past issues. We have also started a new feature – *Beyond the Practice* – to highlight the good works CATA members do in the community, and we will continue to interview local judges to learn about them and their unique perspectives from the bench.

To encourage members to make greater use of the CATA website, CATA News will no longer be publishing the "Listing of Experts in the CATA Deposition Bank" feature of past issues. The deposition bank, however, continues to be available to CATA members at www.clevelandtrialattorneys.org. We also encourage you to continue to update our collective resources by sharing your expert depositions, expert reports, and noteworthy briefs on the CATA website. Please send these materials by mail or email to Rose Graf at rgraf@nphm.com or at the following address:

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Materials may be sent in e-trans format, .pdf format, or on disk or hard copy.

As for the *Verdicts & Settlements* column, it continues to be featured at the end of this newsletter, along with a blank form for reporting your future verdicts and settlements. Chris Mellino is the point person for collecting the *Verdicts & Settlements* forms, so please send your completed forms to him at cmm@mellinolaw.com.

Finally, we welcome your ideas, suggestions, and criticisms so that we can continue to make this publication responsive to our members' needs. Please feel free to contact us at kstjohn@nphm.com or donna@andersonlawoffice.net.

We hope you will find this publication useful, and, as Brian said, we encourage you to support our wonderful advertisers. Have a safe holiday, and you can look forward to the next edition of CATA News in May of 2011. ■

Your Editors,

Kathleen J. St. John and Donna Taylor-Kolis

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The Right To Setoffs After Abolition Of Joint And Several Liability

by Toby Hirshman

In 2002, Senate Bill 120 was passed. Effective 4/9/03, joint and several liability was abolished in tort actions in most circumstances in the state of Ohio. It was replaced by apportioned and several liability. There has been much discussion among lawyers in the state as to the effect of this change as it relates to the law on setoffs. Some have suggested that, under the new statutory scheme, when a plaintiff settles with one defendant before trial and then obtains a verdict at trial against another defendant, the apportioned verdict will be subject to a setoff. In fact, as a review of the pertinent statutes and case law will make clear, setoff and contribution among joint tortfeasors are concepts which are incompatible with apportioned and several liability.

History of Setoffs and Contribution Among Joint Tortfeasors

A history of the law of setoff and contribution among joint tortfeasors will prove helpful in explaining why these concepts have no applicability in the environment of apportioned and several liability. To begin with, it is worthwhile noting that setoff and contribution among joint tortfeasors are but opposite sides of the same coin. Contribution is the amount that a defendant can get from a co-defendant as a credit against amounts paid based on relative fault. Setoff, on the other hand, is the amount that a defendant can get from a plaintiff as a credit against amounts to be paid based on relative fault. Neither doctrine was part of the common law. Rather, each is a creature of statute which was added as the principles of blame allocation evolved.

In the early 19th Century, the law of contributory negligence was adopted by the American Courts. It was first recognized in Massachusetts.[1] Over the next century, the doctrine was adopted by most American jurisdictions.[2] The doctrine was sometimes explained as arising as a punitive device to deny a plaintiff recovery for his wrongful acts.[3] It was sometimes explained based on the doctrine of clean hands. However, contributory negligence and the "all or nothing" rule was also based on the principle that fault for a single, indivisible injury could not be apportioned.[4] The doctrine of joint and several liability developed concurrently with the doctrine of contributory negligence.[5] Like the doctrine of contributory negligence, the doctrine of joint and several liability was based on the assumption that injuries were indivisible and fault could not be apportioned.[6]

Adoption of Comparative Negligence and Recognition of Setoff and Contribution Among Joint Tortfeasors

In response to the harshness of the "all or nothing" approach of contributory negligence comparative negligence was adopted by the vast majority of jurisdictions.[7] In the late 1960's only 7 states had adopted comparative negligence. Now, virtually all have done so except for Alabama, Maryland, North Carolina and Virginia.[8] In the other 46 states, for years juries have been routinely asked to apportion liability between the plaintiff and the defendant and have shown an ability to do so. Although, at common law, there was no contribution among joint tortfeasors or setoff since it was believed that injuries were indivisible and fault could not be apportioned, by the 1960's

the majority of jurisdictions had passed statutes permitting contributions among joint tortfeasors.[9] The move towards comparative negligence accelerated the move toward contribution, and the comparative negligence statutes in many states provided for setoff and contribution.[10] Once apportionment of damages was permitted between plaintiffs and defendants, there was no compelling reason to deny apportionment among defendants through contribution.[11]

Apportionment of Damages Among Joint Tortfeasors

With comparative negligence and contribution, the jury was asked to apportion damages. But joint and several liability still applied. If a defendant was insolvent, the plaintiff could collect the entire judgment from any liable defendant with deep pockets regardless of his apportioned liability. However, cases like *Walt Disney World Co. v. Wood*[12] and a perceived insurance crisis impelled a movement to several/apportioned liability. In *Wood*, Mrs. Wood was injured on a miniature car ride at Disney World. Her fiancé had rammed her from behind. The jury found the plaintiff to be 14% negligent, the fiancé to be 85% negligent, and Disney to be 1% negligent. Applying the doctrines of joint and several liability and comparative negligence, the court entered judgment against Disney World for 85% of the plaintiff's damages. Presumably due to the fiancé's lack of assets, there was no recourse against the fiancé. Disney, with 1% of the liability, was left holding the bag.

Because of cases like this and the perceived insurance crisis, in the decade from the mid-1980's to the mid-1990's, 35 states enacted some type of reform which modified, restricted or abolished joint and several liability.[13] Some states abolished joint and several liability entirely. Some states abolished joint and several liability except for certain types of torts. And some states, like Ohio, abolished joint and several liability for certain types of damages, such as noneconomic damages.[14] What has become clear is that when joint and several liability is abolished and liability is apportioned as several liability, there is no longer a need for the remedy of contribution or the remedy of setoff to prevent overpayment by one defendant. Since each defendant is only liable for his separately apportioned damages, there is no basis for a setoff.

Experience of Other Jurisdictions

In contrast to those states which abolished joint and several liability in the 1980's and 1990's, Ohio did not do so until 2003. There is, accordingly, almost 20 years of experience in other states dealing with the question of what apportioned liability does to the right of setoff. There is a rich body of case law from other jurisdictions which establishes with virtual unanimity that setoff is not compatible with apportioned several liability.

Florida is one of those states. Florida abolished joint and several liability for non-economic damages in 1988 when it enacted Florida Statute §768.81(3). That section reads, in pertinent part, as follows:

> Apportionment of Damages *** [T]he court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against the party on the basis of the doctrine of joint and several liability.

In essence, joint and several liability was abolished in Florida for non-economic damages. In *Wells v. Tallahassee Memorial Regional Medical Center, Inc.*,[15] the Florida Supreme Court was provided with an opportunity to construe Florida Statute §768.81(3). In that case, plaintiff filed a medical malpractice wrongful death action against TMRMC, Dr. Alfred, and Anesthesia Associates. Prior to trial, plaintiff settled with Dr. Alfred for $250,000 and with Anesthesia Associates for $50,000. TMRMC was the sole defendant at trial. The jury was instructed to apportion liability against all the parties, whether present or not. The jury returned a verdict for plaintiff, finding TMRMC 90% at fault, Dr. Alfred 5% at fault, and Anesthesia Associates 5% at fault. Total damages were assessed at $573,854. TMRMC moved that the judgment be reduced by $300,000 as a setoff for amounts paid by settling defendants. The court denied defendant's motion. On appeal, the Florida Supreme Court held that where the liability is several, rather than joint and several, there is no right to a setoff for monies already paid by settling defendants. It is in a concurring opinion that the court's rationale is most succinctly stated:

> With the enactment of 768.81(3), the need for, and role of, [a] contribution scheme... has been substantially reduced. Under §768.81(3), a judgment is entered against a particular tortfeasor/defendant only 'on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.' Since the tortfeasor/defendant now faces a judgment based only on its 'percentage of fault,' it... has no basis for seeking contribution from another tortfeasor who might have also contributed to the cause of the claimant's injury. Such a tortfeasor/

> defendant is no longer in need of or entitled to contribution, either by a claim against other tortfeasors, or by reduction in the judgment rendered against him in the amount of any settlements made by the claimant with other tortfeasors. Since the 'problem' of a tortfeasor paying more than his fair share has been eliminated by the enactment of §768.81(3), the 'solution' to the problem by the scheme of contribution and setoff is no longer needed.[16]

Thus, where each tortfeasor, by virtue of apportionment, is only liable for his apportioned share of harm, there is no basis for invoking the doctrine of contribution or the doctrine of setoff since no defendant has been asked to pay for more than his share of the harm caused.

The result reached in *Wells* has been reached in virtually every jurisdiction that has considered the effect of several liability on the right to setoff. See *Hoch v. Allied-Signal, Inc.*, 24 Cal. App. 4th 48, 29 Cal. Rptr. 2d 615 (1994) (No setoff in automobile products case where plaintiff settled with Ford and obtained an apportioned verdict against the seatbelt manufacturer); *Gemstar Ltd. v. Ernst and Young*, 185 Ariz. 493, 917 P.2d 222 (1996) (Held that since there is several liability by statute, there will be no setoff for amounts paid by another not present at trial); *Neil v. Kavena*, 176 Ariz. 93, 859 P.2d 203 (Ariz. App. 1993) (Arizona law providing for apportioned liability does not allow for setoff); *Wilson v. Galt*, 100 N.M. 227, 668 P.2d 1104 (1983) (Setoff not allowed when apportionment has occurred); *Thomas v. Solberg*, 442 N.W.2d 73 (Iowa 1989) (No setoff allowed where the statutory language requires the jury to apportion fault); *McDermott, Inc. v. AmClyde and River Don Castings, Ltd.*, 511 U.S. 202, 114 S. Ct. 1461 (1994) (Held in Admiralty that liability of non-settling defendant should be calculated with reference to the jury's allocation of proportionate responsibility and that no setoff should be applied); *Charles v. Giant Eagle Markets*, 513 Pa. 474, 522 A.2d 1 (1987) (No setoff when there has been an apportionment by jury); *Kussman v. City and County of Denver*, 706 P.2d 776 (Colo. 1984) (No setoff allowed where there has been an apportionment); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984) (Held that the non-settling defendant's liability and the plaintiff's recovery shall be reduced by the percent share of causation assigned to the settling tortfeasor by the trier of fact even if the result is a recovery for the plaintiff in excess of the verdict); *Krieser v. Hobbs*, 166 F.3d 736 (5th Cir. 1999) (Interpreting Mississippi law, held that non-settling party has no right to a setoff from the verdict where fault has been apportioned); *Nilsson v. Bierman*, 150 N.H. 393, 839 A.2d 25 (2003) (Held that pro tanto setoff does not apply where apportionment of damages has occurred); *Barber v. Cox Communication, Inc.*, 629 N.E.2d 1253 (Ind. App. 1994) (Personal injury defendant not entitled to setoff based on amount by which another party had settled with plaintiff; settler had been named as non-party for purpose of fault allocation, and allowing setoff would have produced double credit for non-settling defendant); *Glenn v. Fleming*, 240 Kan. 724, 732 P.2d 750 (1987) (Trial court's reduction of plaintiff's judgment against non-settling defendant by amount plaintiff received as a result of settlement with other defendants prior to trial held to be improper where non-settling defendant had opportunity to have fault of settling parties computed by jury but failed to do so); *York v. InTrust Bank N.A.*, 265 Kan. 271, 962 P.2d 405 (1998) (Reaffirming setoff where joint and several liability remains); *D.D. Williamson & Co., Inc. v. Allied Chemical Corp.*, 569 S.W.2d 672 (KY 1978) (Held, where buyer of allegedly defective ammonia entered into settlement agreement with seller pursuant to which buyer received $16,500 in partial satisfaction and buyer proceeded to trial against manufacturer of ammonia, and jury found that buyer's total damages were $20,000 and that seller and manufacturer were each responsible for 50% of damages, buyer was entitled to recover $10,000 from manufacturer and manufacturer was not entitled to deduct the $16,500 received from seller from the total damages of $20,000); *Rogers v. Spady*, 147 N.J. Super. 274, 371 A.2d 285 (1977) (Held, where settling defendant pays $5,000 and case proceeds against non-settling defendant and jury finds non-settling defendant to be 100% responsible, nonsettling defendant is not entitled to a setoff); *Varner v. Perryman*, 969 S.W.2d 410 (Tenn. App. 1997) (Uniform contribution among tortfeasors act did not entitle defendant truck owner to reduce judgment against it for its comparative share of fault by amounts already paid to plaintiffs by defendant who had settled previously); *Johnson v. General Motors Corp.*, 190 W. Va. 236, 438 S.E.2d 28 (1993) (When plaintiff seeks to recover damages on theory of crash worthiness against motor vehicle manufacturer, and manufacturer requests that jury apportion damages, and jury does so, prior settlements between plaintiff and other defendant will not be set off from jury verdict); *Haderlie v. Sondgeroth*, 866 P.2d 703, 708 (Wyo. 1993) ("... after joint and several liability was abolished, no tortfeasor would ever pay more than his proportionate share of a judgment. Thus, there would never be a need for contribution or for credit upon a judgment. Credit would not be given because the amount of judgment for which each defendant is liable is always limited by the percentage of fault assigned to that defendant. Therefore, as a matter of law, [defendant] can have no

credit upon the judgment for sums paid by others because [defendant], if and when he pays 100% of this judgment, will not pay more than the 'percentage of the amount of fault attributed to him' by the jury in its verdict...."); *Petrolane Inc. v. Robles*, 154 P.3d 1014 (Alaska 2007) (Under comparative fault statutory framework where each defendant is liable only for that harm caused by him, there is no reason to allow a non-settling defendant a setoff).

Indeed, there are only 2 states that can even arguably be said to have allowed setoffs under circumstances where liability is apportioned. One of those states is Idaho. In *Curtis v. Canyon Highway District No. 4*,[17] a setoff for a settling defendant's payment was allowed under circumstances where joint and several liability had been statutorily abolished. However, the *Curtis* court was confronted with a specific statute mandating a setoff, as well as a rule limiting implied repeal unless two statutes are "manifestly inconsistent with and repugnant to each other."[18] By an amendment to the statute which predated *Curtis* but did not apply to it, the Idaho legislature corrected this error, acknowledging the incompatibility of setoff with several liability regimes. As the Idaho Supreme Court subsequently acknowledged in *Tuttle v. Wayment Farms, Inc.*,[19] in abolishing setoff where several liability applied, the Idaho legislature acknowledged the incompatibility:

> Joint and several liability was eliminated from most actions arising after 1987. In multiple defendant cases prior to 1987, a single defendant was free to settle and, under §6-805 [providing for setoffs when one party settles], the amount paid in settlement would be credited to all other non-settling defendants. When joint and several liability was eliminated, §6-805 was not changed, and this has created an irregularity in the law and made settlements more difficult. Under the present system, in multiple defendant cases, each defendant only pays its pro rata share of the total damages and, therefore, should not be entitled to any credit for the pro rata share paid by another defendant in settlement. The proposed amendments to §6-805 eliminate this problem and make the section consistent with the prior elimination of joint and several liability.[20]

In *Tuttle*, the Idaho Supreme Court held that the jury's damage award should not be reduced by the amount of a prior settlement. Thus, although Idaho may have originally failed to appreciate the incompatibility of setoff with apportioned and several liability, the state has subsequently corrected this error.

The only other jurisdiction which might arguably be said to allow setoff where there is apportioned and several liability is Maine. In *Hewitt v. Bahmueller*,[21] the plaintiff was injured in a propane explosion in a camper on real property. She brought an action against a number of different defendants who were either using a stove at the time of the explosion, owned the property where the explosion occurred, or manufactured the stove. Prior to trial, settlement was reached with the owner of the property and the manufacturer of the stove for $193,000 and $97,000 respectively. Trial proceeded against a non-settling defendant. A verdict was rendered in favor of the plaintiff in the amount of $180,000. The court proceeded, pursuant to Maine's setoff statute, 14 M.R.S.A. §163, to reduce the verdict to -0- based on the settlements reached before trial. However, unlike Ohio and the multitude of other states whose case law is set forth above, Maine has not replaced joint and several liability with apportioned and several liability. Rather, with 14 M.R.S.A. §156, the state has retained a system of joint and several liability. That section, quoted in *Hewitt*, provides as follows:

> In a case involving multi-party defendants, each defendant *shall be jointly and severally liable* to the plaintiff for the full amount of plaintiff's damages....[22]

Thus, although it is true that Maine allows a non-settling defendant to set off a verdict against him with payments from a settling defendant, it does not do so in the context of apportioned and several liability.

What the above analysis shows is that <u>every</u> state which has considered the question of setoffs in the presence of apportioned and several liability has reached the same conclusion: that setoff and apportioned and several liability are mutually exclusive.

The Ohio Statutory Scheme

With the passage of Senate Bill 120 in 2002, the Ohio General Assembly set up a new statutory scheme in which joint and several liability was abolished in most circumstances. Ohio Rev. Code §2307.22, as enacted, provides that, as it relates to non-economic damages, proportionate (several) liability applies in all tort cases.[23] As it relates to economic damages, the statute provides that, as to any defendant found to be 50% or less at fault, proportionate (several) liability applies.[24] However, as to any defendant found to be more than 50% at fault, joint and several liability remains the law for economic damages.[25]

Ohio Rev. Code §2307.28 provides for setoffs. It states, in pertinent part:

> When a release... is given in good faith... for the same injury or loss... the release... reduces the claim... to the extent of the greater of any amount stipulated by the release... or the amount of the consideration paid....

This section, however, must be read in conjunction with Ohio Rev. Code §2307.29 which states, in pertinent part, as follows:

> No provision of §2307.25 to <u>2307.28</u> [dealing with contribution and setoff] applies to a tort claim to the extent that §2307.22 to 2307.24... make a party... liable to the plaintiff only for the proportionate share of that party.... (Emphasis added).

In other words, Ohio Rev. Code §2307.29 makes it clear that when several liability applies, there will be no contribution or setoff. This, of course, makes perfect sense in light of the obvious incompatibility between the concepts of setoff and apportioned and several liability. As the Supreme Court of the United States characterizes it, to allow an apportionment of liability and to then allow a setoff, constitutes a double credit to the non-settling defendant.[26]

Conclusion

In the above analysis, an attempt has been made to establish that although the Ohio courts have not yet had an opportunity to rule on the issue, public policy, authority from other states and the Ohio statutory scheme all point in the same direction. Where joint and several liability has been replaced by apportioned and several liability, there is no place for setoffs. Indeed, setoff and contribution amongst joint tortfeasors were remedies created by statute to deal with the inequities associated with joint and several liability where one defendant might be left holding the bag for another defendant's fault. If the Ohio Supreme Court approaches the question in an even-handed fashion with an eye towards facilitating the development of predictable and sound jurisprudence, they will, when confronted with the issue, find setoff and apportioned liability and several liability to be mutually exclusive concepts. ■

End Notes

1. *Smith v. Smith*, 19 Mass. (2 Dick) 621, 624 (1824).
2. O'Conner K.M., Sreenan, G.P., *Apportionment of Damages: Evolution of a Fault Based System of Liability for Negligence*, 61 J. Air. L. & Com. 365 (1995-1996). [Hereinafter referred to as O'Conner].
3. W. Page Keeton *et al.*, PROSSER & KEETON ON THE LAW OF TORTS § 65 (5th Ed. 1984).
4. O'Conner at 367.
5. O'Conner at 368.
6. *Id.* at 368.
7. *Id.* at 368-369.
8. *Id.* at 369.
9. *Id.* at 373.
10. *Id.*
11. *Id.*
12. 515 So.2d 198 (Fla. 1987).
13. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 Tenn. L. Rev. 199, 203 (Winter 1990)
14. *See* Ohio Rev. Code §2307.22.
15. 659 So. 2d 249 (1995).
16. *Id.* at 256.
17. 122 Idaho 73, 831 P.2d 541 (1992).
18. *Id.*, 831 P.2d at 546.
19. 131 Idaho 105, 952 P.2d 1241 (Idaho 1998).
20. *Id.*, 952 P.2d at 1244 (quoting the statement of purpose for the 1991 amendment of Idaho Code §6-805).
21. 584 A.2d 664 (Me. 1991).
22. *Id.* at 666 n.2 (quoting 14 M.R.S.A. §156) (emphasis added).
23. O.R.C. §2307.22(C).
24. O.R.C. §2307.22(B).
25. O.R.C. §2307.22(B)(1).
26. *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 210 (1994).

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Voir Dire: Challenges for Cause

by Donna Taylor-Kolis

As a litigator, you can spend one hundred hours and tens of thousands of dollars preparing your case for trial. You may have the best facts you have ever seen and, because the trial Gods have smiled upon you, you may have been able to get that one perfect expert to testify for you. All of this effort will have been in vain if you get the wrong jury.

Getting the right jury is particularly important in today's politically-charged climate. Today, more than ever before, many jurors come to Court with preexisting biases against the civil justice system and those who seek redress therein. It is thus more important than ever to ferret out those jurors whose biases will prevent your client from receiving a fair trial. And, since the number of peremptory challenges to which your client is entitled are limited, it is important to have as many as possible biased veniremen removed "for cause."

How do you do this? As those of you who are familiar with Dennis Mulvihill's "Cause is King" presentation[1] know, the first thing you must do in every trial is file a pretrial bench memorandum reviewing Ohio law on "for cause" challenges. Many judges appreciate this handy review of the law, and it will assist you in making your "cause" challenges during *Voir Dire* without having to engage in lengthy sidebar explanations. With Dennis' permission we are posting his brief on the CATA website.[2] We urge you to consult it as a resource for your own brief.

Meanwhile, this article provides a brief review of some of the most important "for cause" challenges you can make.

Per Se Disqualifications For Cause: R.C. 2313.42(A)-(I)

Ohio Revised Code Section 2313.42(A)-(I) articulates a series of "good cause" challenges that *per se* disqualify a person from jury service. These include, but are not limited to, having been convicted of a crime "which by law renders him disqualified to serve on a jury," having "an interest in the cause," having "an action pending between him and either party," and – most critically for our purposes – being "the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee... of either party."[3]

The Ohio Supreme Court has held that when the "good cause" challenges enumerated in R.C. §2313.42(A)-(I) are factually established, the potential juror *must* be dismissed. In *Hall v. Banc One Management Corp.*,[4] the Court held as follows:

> The principal challenges to prospective jurors incorporated into R.C. 2313.42(A) through (I), which are tried to the court, *establish a conclusive presumption of disqualification if found valid*. The court must dismiss the prospective juror and may not rehabilitate or exercise discretion to seat the prospective juror upon the prospective juror's pledge of fairness.[5]

In other words, in determining whether a "good cause" challenge has been established under R.C. 2313.42 (A)-(I), the court's role is limited to assessing the truth of the challenge based on the prospective juror's testimony. The court may not exercise discretion or independently evaluate the

prospective juror's impartiality.[6]

Thus, if you have a medical malpractice case against, for instance, the Cleveland Clinic, and a potential juror's spouse is employed by that entity, the court *must* dismiss that prospective juror. In Cuyahoga County, where some of the biggest employers are the Clinic, University Hospital, and MetroHealth, the "good cause" challenge of R.C. 2313.42(E) is invaluable.

Disqualification Where A Prospective Juror Discloses By His/Her Answers That He/She Cannot Be Fair And Impartial Or Will Not Follow The Law: R.C. 2313.42(J)

But what if your potential juror – that one teeming with talk radio biases sitting there in the first row – hasn't committed a crime, isn't related to anyone employed by the Clinic, and doesn't come within any of the other "good cause" challenges of R.C. 2313.42(A)-(I)?

This is where the all important "J" challenge comes in, and where the "Cause is King" method truly comes into play.

Under R.C. 2313.42 (J), "good cause" exists to dismiss the juror if he "discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court."

Two things are especially noteworthy about the wording of this provision. First, the use of the plural in the word "answers" means that testing the prospective juror's bias involves more than asking the single question: "Can you be fair and impartial?" Of course I can! most people would say (unless they were trying to stay off of the jury). Which is to say that, in most instances, we need to probe deeper to determine whether the prospective juror can *truly* be fair and impartial. By using the plural with respect to "answer," the General Assembly acknowledged the need for more thorough questioning on the impartiality issue, and the Ohio courts have recognized this, too.[7]

Second, this provision is noteworthy for providing, *in the alternative*, that a prospective juror may be dismissed if he discloses by his answers that he "will not follow the law as given to him by the Court." Here again, indirect questions are more likely to elicit the prospective juror's true feelings than simply asking whether he or she will follow the law. For instance, if the juror concedes that he or she could not award a dollar figure for a Life Care Plan above a certain amount (even though caps do not apply to such economic damages), that juror would be admitting that he or she could not follow the law – even if his or her answer to the direct question would otherwise elicit a positive answer.

In short, the "J" provision is the "wild card" of the "good cause" challenges. It authorizes the probing of prospective juror biases through questions that get the jurors "talking" about what they really believe. Whereas a juror is likely to answer "yes" to questions of whether he or she can be fair and impartial or will follow the law as given by the court, engaging the venire in a conversation through a series of questions, as authorized by the "J" provision, will reveal the prospective jurors' "true colors," and enable you to get the biased jurors dismissed "for cause."

Disqualification For Cause When The Court Has "Any Doubt" As To The Juror Being "Entirely Unbiased": R.C. 2313.43

Another important juror challenge to be aware of is that set forth in R.C. 2313.43. That section provides that, in addition to the challenges set forth in R.C. 2313.42, a juror may be excused for cause based on "a suspicion of prejudice or partiality for either party" or for any other cause that may render him or her an unsuitable juror. This section further provides that the "validity of such challenge shall be determined by the court and be sustained if the court *has any doubt* as to the juror's being *entirely unbiased*."[8]

The use of this provision, in conjunction with the "J" provision, is the basis of the "Cause is King" concept. With both these provisions, the idea is to get the jurors talking in an effort to reveal their deep-seated biases. We all come into the courtroom with our lives' experiences which can't be erased when considering the case. If you can get the potential jurors talking, they often concede that, based on their own life experiences, one of the parties is, for them, starting a little "ahead of the starting line." And if that is so, that juror is not "entirely unbiased" and should be dismissed for cause.

Preserving "Good Cause" Challenges For Appeal

The goal, of course, is to get the biased juror dismissed for cause during *voir dire*, but that is not the only reason for making "good cause" challenges. Rather, if you have a legitimate basis for a "good cause" challenge, and the court does not grant it to the detriment of your case, preserving the challenge during *voir dire* can be the basis of reversal on appeal. As explained in *McGarry v. Horlacher*, "[t]he erroneous denial of a challenge for cause may be prejudicial [and hence reversible error] because it forces a party to use a peremptory challenge on a prospective juror who should have been excused for cause, giving that party fewer peremptories than the law provides."[9]

There exists a case on point that is

illustrative of this principle: *Tisdale v. Toledo Surgical Specialists, Inc.*[10] I commend it to your reading. In *Tisdale*, our colleagues and friends, Peter H. Weinberger and David Goldense, fought the good fight and, when left with a juror whom the court would not dismiss when it was clear by her answers that in her own mind she couldn't be fair, they skillfully created a record showing bias. A peremptory was used to eliminate the juror. They then had to face down another juror who had worked at the Toledo Hospital for whom they had no peremptories left and that juror was ultimately seated. Defense verdict! In reversing the case for a new trial, the Court of Appeals stated that although the trial court tried to rehabilitate the latter juror ("Ms. D"), "lingering doubts exist regarding whether she could be *entirely* unbiased."[11]

We have all been in the frustrating position of having defense counsel or judges try to rehabilitate biased jurors with the simple question: "But you could be fair in this case, couldn't you?" We can't allow this to stand and have an obligation to be persistent.

As has been often stated by our current Ohio Association of Justice president, Dennis Mulvihill, "In this politically charged climate where politicians regularly run campaigns which stress the importance of closing the courthouse doors to injured tort victims, it is critical that anyone who believes similarly be examined thoroughly in *Voir Dire* and that the Court be aware of any biases or prejudices that may be revealed which would make that person disqualified for jury service pursuant to R.C. 2313.42(J) and 2313.43."

In closing, good questioning, my fellow warriors, and may Cause be King in your cases. ■

End Notes

1. The phrase "Cause is King" was first used by Florida jury consultant, Jay Burke, to describe the importance of challenging for cause jurors who possess biases detrimental to one's ability to get a fair trial. Current OAJ President and CATA member Dennis Mulvihill borrowed this phrase for his popular *voir dire* seminar,"Cause is King."
2. To access this brief, entitled "Plaintiff's Memorandum on Voir Dire and Cause Challenges," CATA members may go to the "Members Only" section of the CATA website.
3. The listed examples are taken from R.C.

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Sidebar: Challenges for Cause

by Ellen H. Hirshman

I have attended seminars advocating the "Cause is King" approach to voir dire. In fact, I have traveled to Florida and worked with Jay Burke personally on developing a voir dire dedicated to identifying jurors you can challenge for cause. I agree with the mantra that we should try to excuse "for cause" as many prospective malcontent jurors as possible, but am not totally sold on Jay Burke's approach. The reason for this is that Jay Burke's approach has a tendency to cut the juror off when answering questions. I do not like cutting jurors off in the manner that he advocates.

I personally have blended some of Jay Burke's approach to voir dire with David Ball's approach. In his book *David Ball on Damages*, Ball proposes getting the jurors to talk. I agree with him. The more you get those jurors to talk, the more they let you into their innermost thoughts and feelings. This is the key to gathering information that assists you in excusing them for cause. Ball also explains that the best way to pose your questions is to give them a chance to side with one point of view or the other. (E.g., "Now some people think it's unfair to make a doctor pay if what he did was not on purpose. Others think a doctor should pay even if it was not on purpose. Which are you closer to?")[1]

I have found that several issues really get jurors talking. The most explosive issue is **health care**. I ask the question, "Do you believe good medical care is a right or a privilege?", and boy, does that get people riled up. I have had jurors in Cuyahoga County who immediately want to answer that question as soon as they have been moved up into the juror's box from the back of the room during voir dire. One juror talked about how it is a right because it is guaranteed by the United States Constitution as an aspect of the "pursuit of happiness." Another more conservative juror jumped all over that and said it is absolutely a privilege. After all, it's the PURSUIT of happiness. Not everyone is guaranteed happiness. Guess who bumped the former juror and who bumped the latter?

My point is that you need to get jurors talking and talking honestly. I have prepared some voir dire examinations that I am happy to discuss/share with anyone. Just give me a call (216- 781-2811) or email me at ehh@lintonhirshman.com. ■

End Notes

1. *David Ball on Damages*, at p. 102.

§2313.42(A), (B), (C) and (E). The other express "good cause" challenges listed in R.C. 2313.42 are: "(D) That he formerly was a juror in the same cause; ... (F) That he is subpoenaed in good faith as a witness in the cause; (G) That he is akin by consanguinity or affinity within the fourth degree, to either party, or to the attorney of either party; (H) That he or his spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him; (I) That he, not being a regular juror of the term, has already served as a talesman in the trial of any cause, in any court of record in the county within the preceding twelve months; [and] (J) That he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court." With respect to the last "good cause" challenge, see the discussion above, *infra*.

4. 114 Ohio St.3d 484, 2007 Ohio-4640.
5. *Id.* at the syllabus (emphasis added).
6. *Id.* at ¶¶34-35.
7. *See, e.g., State v. Webb*, 70 Ohio St.3d 325, 1994-Ohio-425 (affirming juror's disqualification for cause when she testified that impartiality would be extremely difficult, even though she also conceded she could listen to the evidence and follow the court's instructions in response to leading questions from opposing attorney).
8. R.C. 2313.43 (emphasis added). See also, *State v. Cornwell*, 86 Ohio St.3d 560, 563, 1999-Ohio-125; *State v. Allard*, 75 Ohio St.3d 482, 495, 1996-Ohio-208 (juror should be excused for cause if the court has "any doubt" as to the juror being "entirely unbiased").
9. 149 Ohio App.3d 33, 38.
10. 6th App. Dist. No. L-07-1300, 2008-Ohio-6539.
11. *Id.* at ¶50 (emphasis by the Court).

Sidebar Two: Challenges for Cause

by Ellen H. Hirshman

Editor's Note: *Of course, not all judges conduct voir dire in the same way. Some allow the parties to ask questions, with no time limitations; others allow questions, but with strict time limitations; and some conduct the voir dire themselves with questions submitted by the attorneys. Ellen Hirshman asked attorneys who have recently tried cases in various counties to discuss how the judges in their trials handled voir dire. Here are some of the comments she received.*

Cuyahoga County

"My most recent trials in Cuyahoga County have been with visiting Judges Griffin, Rocker, Corrigan and Coyne. These judges have not restricted the lawyers in their questioning of prospective jurors. The questioning is usually limited to the eight potential jurors in the box.

"There continues to be an ongoing problem, however, with juror availability. I have been delayed upwards of 1 ½ days in starting trial due to a lack of jurors...."

Thomas Brunn, Cleveland, Ohio

Hamilton County

"Judge Thomas Nurre, a visiting judge, conducts peremptory challenges at side bar out of the hearing of the jury, so they are unaware who dismissed a particular juror...."

Pam Pantages, Cleveland, Ohio

Lucas County

"My recent experience in Toledo with retired Judge Bowman was that he allowed the lawyers to ask the majority of the questions without limitations. The entire panel was questioned and, afterward, peremptories were exercised in chambers on any member of the panel, not just the first eight...."

Christopher Mellino, Cleveland, Ohio

Medina County

"In a case several years ago, Judge Kimbler gave the plaintiffs 6 peremptory challenges and each of the co-defendants 3...."

Pam Pantages, Cleveland, Ohio

Richland County

"Judge Henson seats 10 jurors at the completion of voir dire, but delays identifying who the two alternate jurors are until the end of the trial. He pulls two names out of a hat to identify the two alternates, then sends the remaining eight back into the room for deliberations. He believes this motivates all ten jurors to pay attention. Judge Henson also refuses to allow jury questionnaires or jury note-taking...."

Pam Pantages, Cleveland, Ohio

Stark County

"In Stark County, jurors' names are anonymous and each is assigned a number. You receive a skeletal information sheet on each potential juror an hour or so before jury selection begins. About the only meaningful information on those sheets is the juror (or his/her spouse's) place of employment, and prior jury service.

"Most judges require that questions be asked of the entire group as opposed to the first eight "in the box." One judge conducts almost all the voir dire personally, and there is little attorney involvement.

"It pays to read Stark County Local Rules 5.01-5.16, which cover jury selection and voir dire, particularly Rules 5.04-5.05!

"We are fortunate to have a bench that is generally receptive to new and innovative ideas, like pretrial motions on voir dire issues, juror questionnaires, and other novel approaches to unique issues. Do not be afraid to suggest something new or different. Chances are, it will be considered on its merits and not be dismissed out of hand...." *Brian Wilson, Canton, Ohio*

Summit County

"In two recent trials in Summit County with Judge Alison McCarty, the entire panel of prospective jurors was questioned, which consisted of 50 people in one case and 80 in the second case. Peremptory challenges could only be used on the first 8 jurors in the box at the time the challenge was made. Plaintiffs were given a number of challenges equal to the total number given to the defendants."

Christopher Mellino, Cleveland, Ohio ■

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Medical Authorizations And Your Client's Right To Privacy

by Kathleen J. St. John

What do orthopaedic injuries from an automobile accident have in common with your client's gynecological records? Nothing, you say? In most Ohio appellate districts, you'd be right; or, at least, you'd have the opportunity to prove you're right through an *in camera* inspection. However, in at least one appellate district – the Second – it has been held that defendants seeking your client's medical records have the right to have your client sign blanket medical authorizations permitting the defense to sort through your client's records to determine what's relevant and what isn't.

This article seeks to establish why the majority view in Ohio should be followed instead of the Second District's holding in *Bogart v. Blakely*[1], and what you can do to protect your client's interest in keeping irrelevant medical records confidential.

The Patient's Right To Privacy

Although at common law there was no physician-patient privilege, contemporary law recognizes the importance of keeping medical records confidential. The Ohio Public Records Act, for instance, prohibits public institutions from releasing medical records that are the subject of a public records request.[2] The federal Health Information Portability and Accountability Act of 1996 ("HIPAA") prevents health care providers from disclosing medical information except in certain circumstances.[3] The Ohio Supreme Court has recognized a tort for breach of confidentiality related to medical information[4], and has applied this tort to health care providers and third parties who disclose information without authorization to do so.[5]

Most important, for our purposes, the Ohio Revised Code codifies the patient's right to keep medical records confidential through the statutorily created physician-patient privilege. That statute, R.C. 2317.02 (B), provides that a physician "shall not testify" concerning a communication made by a patient to the physician, unless certain exceptions apply or unless the patient is deemed to have waived the privilege.[6]

The exceptions or waiver occur in a number of ways expressed in the statute.[7] As relevant here, the privilege "does not apply" and "a physician... may testify or... be compelled to testify" if "a medical claim..., an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the patient..., or the patient's guardian or other legal representative."[8]

The waiver that occurs upon the filing of a civil action is not absolute. Rather, the statute provides that if the testimonial privilege is waived because a civil action has been filed, "a physician... may be compelled to testify or to submit to discovery under the Rules of Civil Procedure *only as to a communication* made to the physician... by the patient in question in that relation, or the physician's... advice to the patient in question, *that related causally or historically to physical or mental injuries that are relevant to issues in the... civil action.*"[9]

Under Ohio law, therefore, discovery of a patient's medical records is statutorily limited to those records that are "causally or historically" related to the injuries in question in the lawsuit. The problem that arises, and that the case law attempts to resolve, is who gets to make the determination of whether a patient's medical records are "causally or historically" related to the injuries at issue in the lawsuit.

The Majority View: The Patient's Right To An In Camera Inspection

"It is axiomatic that once privileged information is disclosed, there is no way for it to be made private once again."[10] Accordingly, the overwhelming majority of Ohio appellate courts that have addressed the issue have held that, where there is a good faith dispute as to whether certain medical records are causally or historically related to the injuries at issue, the documents should be provided to the court for an *in camera* review to determine whether they are subject to discovery.[11]

The classic situation in which this issue arises is this. The defendant in, say, a motor vehicle accident action requests the plaintiff to sign one or more medical records authorizations directing the plaintiff's health care providers to release the plaintiff's records to the defendant's attorney. Sometimes the authorizations are limited in time but still request the patient's entire medical history during that restricted time period; other times the defense demands blanket medical authorizations, releasing records as to the plaintiff's entire medical history.

In these situations, three competing interests are at stake. The plaintiff has an interest in protecting her privacy, and not disclosing any records not causally or historically related to the injuries sustained in the accident. After all, the physician-patient privilege is designed "'to encourage patients to make full disclosure of their symptoms and conditions to their physicians without fear that such matters will later become public.'"[12] If orthopaedic injuries, for instance, are what are being alleged, the plaintiff has a substantial interest in keeping the details of her sexual or reproductive history private.

The plaintiff also has an interest in knowing what records have been turned over to the defense. Blanket medical authorizations deprive her of the notice to which she is entitled in discovery under the Civil Rules.

The defense, on the other hand, has an interest in obtaining full discovery. Receiving records directly from the health care providers may be thought more efficient. And, if the plaintiff is left to determine what is causally or historically related, the defense might believe relevant records will be withheld.

Finally, the trial courts have an interest in not having to conduct *in camera* inspections in each and every civil action in which a party's physical or mental health is at issue.

Good Faith Belief Standard: Plaintiff's Burden

Some Ohio appellate courts resolve these competing interests by requiring a factual basis for contending that certain records are privileged antecedent to an *in camera* inspection.[13] Under this approach, if the trial court finds there is not a good faith belief that certain records are privileged, it need not conduct an *in camera* inspection.[14]

To establish a good faith belief, the plaintiff may assert that she "examined the records in question and found nothing to suggest prior treatment that might, in any way, be related to the injuries [she] sustained [in the accident in question]."[15] Other courts have found a good faith belief to exist based simply on the fact that the discovery request was overbroad on its face. For instance, in an auto accident case where the plaintiff alleged injuries to her jaws, neck, back, arms, wrists and various other parts of her body, as well as pain and mental anguish, the Seventh District found the request for the plaintiff's OB/GYN records to be overbroad on its face, requiring the trial court to conduct an *in camera* inspection.[16]

Alternative Viewpoint 1: Plaintiff Should Have No Burden

At least one appellate judge has opined that it is unfair to place the burden on the plaintiff to establish a good faith belief that the medical records defendant seeks are privileged. In *Piatt v. Miller*, Judge Cosme, concurring that the trial court abused its discretion in ordering the plaintiff to sign a blanket medical authorization, disagreed that plaintiff should have *any* burden to articulate reasons why the requested records are privileged. Instead, the focus should be on requiring the party seeking discovery to narrowly tailor medical authorizations to seek only relevant medical records:

> Requiring requests to be carefully tailored provides a two-fold benefit. First, such requests prevent the waste of both judicial and attorney time and resources. Overbroad discovery requests automatically create discovery disputes. Plaintiff objects, which in turn, triggers the likelihood of court involvement. Discovery requests that are properly framed to solicit only relevant information would reduce the need for in camera inspections. Court involvement would only be required when a factual (*sic*) based true impasse arises concerning the discoverability of specific records.[17]

Alternative Viewpoint 2: Plaintiff Has No Burden When Authorization Is Overbroad

Other Ohio appellate courts, including the Eighth District[18], have at least implicitly recognized that the plaintiff is entitled to an *in camera* inspection whenever, from the overbreadth of the medical authorization, it appears that some of the material requested may be protected by the privilege. In such cases, any concern that the courts will be unduly burdened with *in camera* reviews is kept in check by the court's ability to subject a party to sanctions if she "unreasonably assert[s] the privilege."[19]

The Minority View: A Plaintiff May Be Required To Sign Blanket Medical Authorizations Without An In Camera Inspection

The lone Ohio appellate court that condones requiring a plaintiff to sign blanket medical authorizations without an *in camera* inspection is the Second District. Its position was set forth recently in *Bogart v. Blakely*.[20]

Bogart arose from an automobile accident in which the plaintiff alleged multiple permanent physical and mental injuries. The trial court granted a motion to compel the plaintiff to provide "full information regarding his past medical history and authorizations sufficient to obtain release of all medical records generated within the last ten years within a certain date."[21] Although the plaintiff did not officially move for an *in camera* inspection, he did argue, in opposition to the motion, that "an in camera review can be used to determine what is and what is not discoverable."[22] The trial court rejected this argument, finding that "[i]n this appellate district" the answer to the question of "whether the Plaintiff may be required to sign blank medical authorizations as have been requested during discovery" is "yes."[23]

The court of appeals agreed – or, in any event, found the trial court did not abuse its discretion in compelling the plaintiff to sign the blanket authorizations.

The court's analysis was driven by an older Ohio Supreme Court case, *State ex rel. Floyd v. Court of Common Pleas*,[24] which was based on an earlier version of the privilege statute. At the time of *Floyd*, the filing of an action did not waive the physician-patient privilege until the plaintiff took the stand to testify. Under those circumstances, and applying Civ. R. 16 and the local court rules, the Court held that requiring the plaintiff to produce his/her medical records in discovery did not result in a waiver of privilege; hence, the plaintiff could be compelled to produce the medical records in discovery because she could still raise the attorney-client privilege at trial. The Second District followed *Floyd* in *Horton v. Addy*,[25] where it upheld the trial court's order compelling plaintiff to turn over "all medical records" based on the *Floyd* distinction between producing records in discovery versus having them admitted at trial.

The Tenth District, in *Ward v. Johnson's Indus. Caterers, Inc.*, rejected the holding in *Horton*, stating that "*Horton* seemingly ignores the fact that R.C. 2317.02 (B) (2)'s protection regarding records that are causally or historically related extends to discovery, not just to testimony."[26] Despite discussing the *Ward* decision,[27] the Second District in *Bogart* continued to follow *Horton*.[28] The court believed that *Horton* best resolves the competing interests, though it was most concerned with alleviating the burden on the trial courts. Thus, the court in *Bogart* stated:

> As we noted in *Horton*, "The distinction between discovery and disclosure attempts to accommodate three competing values: the confidentiality of privileged medical information, a personal injury defendant's right to effectively prepare for trial, and minimization of judicial involvement in pretrial discovery disputes. Perhaps no better accommodation is possible, particularly when trial judges must manage increasing numbers of cases.[29]

The court in *Bogart* also rejected the plaintiff's contention that "in camera review is a necessity when the parties cannot agree on whether medical records are related causally or historically to the injuries claimed." Oddly, the court rejected this argument at least in part because the plaintiff "failed to move for an in camera inspection"[30] -- even though, earlier in the opinion, the court noted that plaintiff argued to the trial court that in camera inspections "can be used to determine what is and is not discoverable."[31] But, here again, the court's decision seems to pivot on easing the trial court's burden, for it added:

> Prior to trial, it is unreasonable and impractical to require a trial judge to attempt to determine whether a plaintiff's extensive medical history is relevant to the underlying action, and we accordingly conclude that Bogart is not entitled to in camera review.[32]

The Problem With Bogart

The problem with *Bogart* is that it tramples the plaintiff's right to protect her unrelated medical records from discovery. Why should the defendant's attorney, paralegal, legal assistant, or expert witness be permitted to ogle the plaintiff's OB/GYN records when what is alleged in the lawsuit is a neck sprain? As the late Chief Justice Moyer stated:

> *Biddle* stressed the importance

> of upholding an individual's right to medical confidentiality beyond just the facts of that case. '[I]t is for the patient – not some medical practitioner, lawyer, or court – to determine what the patient's interests are with regard to confidential medical information.'**** As the Supreme Court of California has observed in discussing the related concept of a right to privacy, such a right 'is not so much one of total secrecy as it is of the right to define one's circle of intimacy – to choose who shall see beneath the quotidian mask.'**** If the right to confidentiality is to mean anything, an individual must be able to direct the disclosure of his or her own private information.[33]

As noted in *Ward*, moreover, Ohio's privilege statute protects unrelated medical records not only from disclosure at trial but also from discovery. Thus, *Bogart's* reliance on former case law interpreting a materially different version of the privilege statute does not give proper deference to the current legislative mandate or to the plaintiff's interests.

The majority view, on the other hand, gives the proper recognition to each of the competing interests. Neither of the parties' interests are harmed by having the court conduct an *in camera* inspection. And the court's interest in not being overburdened is protected as long as there is some mechanism for ensuring that it is only called on to inspect records where relevance is genuinely in dispute.

One suggestion is a *"pseudo in camera inspection process"* whereby the plaintiff would sign the authorizations releasing records to an outside vendor. The plaintiff's counsel would then examine the records, and if she believed certain of the records to be privileged, she would submit only those records for an *in camera* inspection, while the others would be released to the defendants.[34] This method alleviates the court's burden by minimizing the instances of judicial involvement, while ensuring that only those records truly in dispute are placed before the court. This method also ensures that the plaintiff is on notice of all records received by the defense.[35]

Alternatively, the defendant "should obtain pertinent medical information by deposing the medical records custodian. A deposition will allow [plaintiff's] counsel to seek a protective order or an in camera review of private and confidential information that is irrelevant to her claim."[36]

Finally, requiring defendants to narrowly tailor medical authorizations also serves to balance the parties' interests and minimize court involvement.

If a combination of these methods were used, each side would be doing its part to unburden the trial court of needless *in camera* reviews, while protecting their clients' respective rights to privacy and discovery. ■

End Notes

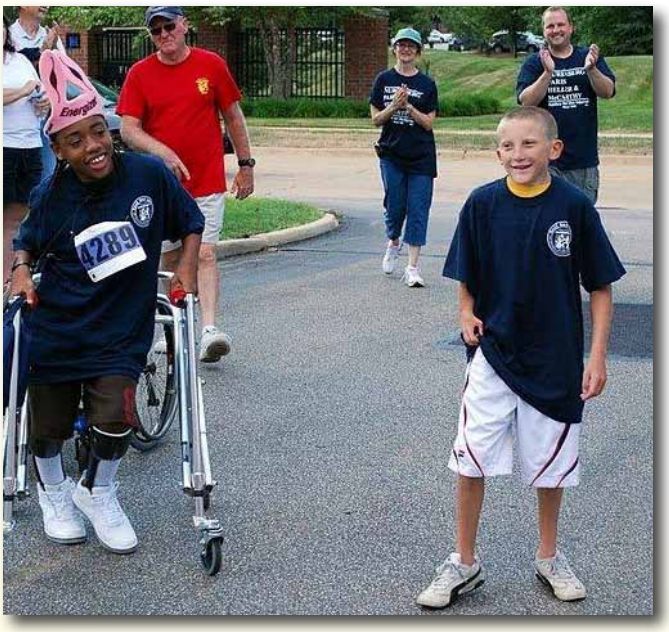
1. 2nd App. Dist. No. 2010 CA 13, 2010-Ohio-4526 (Sept. 24, 2010).
2. *Hageman v. Southwest General Health Center*, 119 Ohio St.3d 185, 2008-Ohio-3343, ¶9 (citing R.C. 149.43(A)(1)(a)).
3. *Hageman*, at ¶9 (citing 45 C.F.R. 164.502).
4. *Biddle v. Warren Gen. Hosp.* (1999), 86 Ohio St.3d 395, 1999-Ohio-115.
5. *Biddle, supra; Hageman, supra.*
6. R.C. 2317.02 (B) (1).
7. See R.C. 2317.02 (B)(1)(a)-(e); R.C. 2317.02(B)(2)(a)-(b); and R.C. 2151.421.
8. R.C. 2317.02 (B)(1)(a)(iii).
9. R.C. 2317.02 (B)(3)(a) (emphasis added).
10. *Neftzer v. Neftzer* (12th Dist. 2000), 140 Ohio App.3d 618, 621.
11. *See, e.g., Cargile v. Barrow* (1st Dist.), 182 Ohio App.3d 55, 2009-Ohio-371, n.5; *Nester v. Lima Memorial Hospital* (3rd Dist.), 139 Ohio App.3d 883, 2000-Ohio-1916; *Folmar v. Griffin* (5th Dist.), 166 Ohio App.3d 154, 2006-Ohio-1849, ¶25; *Piatt v. Miller*, 6th App. Dist. No. L-09-1202, 2010-Ohio-1363, ¶16; *Patterson v. Zdanski*, 7th App. Dist. No. 03 BE 1, 2003-Ohio-5464; *Wooten v. Westfield Ins. Co.* (8th Dist.), 181 Ohio App.3d 59, 2009-Ohio-494 ; *Mason v. Booker* (10th Dist.), 185 Ohio App.3d 19, 2009- Ohio-6198, ¶1; *Sweet v. Sweet*, 11th Dist. No. 2004-A-0062, 2005-Ohio-7060, ¶13; *Neftzer, supra,* (12th Dist.), 140 Ohio App.3d at 621.
12. *Piatt, supra*, 2010-Ohio-1363, ¶24 (Cosme, J., concurring) (quoting *State v. Antill* (1964), 176 Ohio St. 61, 64-65).
13. *See, e.g., Piatt, supra*, at ¶17.
14. *Patterson, supra*, 2003-Ohio-5464, ¶19; *Piatt, supra,* at ¶19.
15. *Piatt, supra*, at ¶20.
16. *Patterson, supra*, at ¶21.
17. *Piatt, supra*, at ¶28 (Cosme, J., concurring).
18. *See, e.g., Wooten, supra*, 181 Ohio App.3d 59, 2009-Ohio-494; *Miller v. Bassett*, 8th Dist. No. 86938, 2006-Ohio-3590; *Porter v. Litigation Mgt., Inc.*, 8th Dist. No. 76159, 2000 Ohio App. LEXIS 2022.
19. *Cargile, supra*, 2009-Ohio-371 at ¶12 ("unreasonably asserting the privilege may subject a party to sanctions by the trial court.")
20. 2nd Dist. No. 2010 CA 13, 2010-Ohio-4526 (Sept. 24, 2010).
21. *Id.* at ¶2.
22. *Id.*
23. *Id.* at ¶3.
24. (1978), 55 Ohio St.2d 27.
25. 2nd Dist. No. 13524, 1993 Ohio App. LEXIS 281.
26. *Ward v. Johnson's Indus. Caterers, Inc.*, 10th Dist. No. 97APE11-1531, 1998 Ohio App. LEXIS 2841, *15.
27. *Bogart* at ¶¶47-50.
28. *Horton*, in fact, has been overruled, although on other procedural grounds. See, *Horton v. Addy* (1994), 69 Ohio St.3d 181, 1994-Ohio-353.
29. *Bogart* at ¶63 (quoting *Horton* at *14).
30. *Id.* at ¶70.
31. *Id.* at ¶2.
32. *Id.* at ¶70.
33. *Hageman, supra,* 2008-Ohio-3343 at ¶13 (quoting *Biddle, supra*, 86 Ohio St.3d at 408; and *Hill v. Natl. Collegiate Athletic Assn.* (1994), 7 Cal. 4th 1, 26).
34. *See, e.g., Wooten, supra,* 181 Ohio App.3d 59, 2009-Ohio-494, ¶8.
35. At the very least, if the plaintiff is required to sign a blanket medical authorization, an addendum should be added requiring the defense to provide plaintiff with copies of all records received from plaintiff's medical care providers.
36. *Geary v. Schroering* (Ky. App. 1998), 979 S.W.2d 134, 135.

Once again this year a group of CATA members had the privilege of volunteering at the Youth Challenge "Race Day" event. Donna Taylor-Kolis, the CATA member who first introduced us to Youth Challenge, and attorneys and family members from the Nurenberg, Paris firm spent a Saturday morning in August "manning" the water stations, shouting "times" to the racers, giving directions, tying balloons, and – most importantly – cheering on the racers in the able-bodied and challenged divisions.

Youth Challenge is a nonprofit organization formed almost 35 years ago by Mary Sue Tanis. The organization provides recreational activities for children with physical disabilities. From its humble beginnings on a playground in Fairview Park, the organization has grown to helping 150 disabled children and providing service opportunities for 400 teen volunteers a year. After completing a $2 million Capital Campaign, Youth Challenge moved into a new headquarters in Westlake in 2008.

The "Race Day" event involved two different races – a 5k fund-raising event in which able-bodied runners pay a fee to support the organization, and a 1m race for the Youth Challenge kids. The challenged children are paired with able-bodied children of the same age who assist them in completing the course. At the end, awards are given to the top finishers in each division.

CATA has supported Youth Challenge since 1999 when then-president Bob Linton proposed we adopt an official charity. Linton, Taylor-Kolis, and current CATA president Brian Eisen have served terms on the Youth Challenge board of directors, and Eisen has served as president of that board. ■



Beyond The Practice: CATA Members In The Community

In addition to working hard to represent their clients, CATA attorneys serve their communities in diverse ways. Here are what some of our members are doing.

Steve Goldberg, and his law firm, **Steven M. Goldberg Co., LPA**, sponsored a fundraiser at the Cleveland Metroparks Zoo to benefit Kati's Hope Foundation for Mesothelioma. Kati's Hope Foundation was started in 2005 by Kati Maloney Lopresti who is believed to have contracted mesothelioma by washing her father's clothes when he returned home from his job as an asbestos worker. Kati lost her fight with the disease in 2007, but the Foundation continues to help people like her through raising funds for medical research, raising awareness of the disease, and helping victims of mesothelioma defray expenses not covered by insurance. The Steven M. Goldberg Co., LPA is a law firm that represents victims of mesothelioma. Goldberg also serves as a Trustee with Kati's Hope Foundation.

John A. Lancione of **Lancione & Lancione, PLL**, has published an article, *What We Do Does Not Matter. Anymore. The New Position of the American College of Obstetricians and Gynecologists on Electronic Fetal Monitoring*. Appearing in the December 2010 issue of the American Association of Justice's *Professional Negligence Law Reporter*, the article traces the history of the American College of Obstetricians and Gynecologists (ACOG) guidelines for electronic fetal monitoring (EFM) from 1975 to the present. It notes that whereas the first 30 years of ACOG guidelines focused on the use of EFMs to detect abnormal fetal responses in time to permit intervention, in 2005 the ACOG guidelines shifted their "focus... from helping pregnant women and their unborn babies to protecting their members from lawsuits." Then, in 2009, "ACOG dramatically changed the rules that apply to EFM" and created "new guidelines that put mothers and their unborn babies at unnecessary risk." The article is a must-read for attorneys handling birth trauma cases.

Jack Landskroner of **Landskroner-Grieco-Madden, LTD**, reports that the Landskroner Foundation for Children just completed a gun lock give away and lead testing kit give away. Since its inception, the Landskroner Foundation has distributed over 3700 gun safety locks and over 750 lead testing kits to families in northeast Ohio to help keep their homes safe for children. In October, the Landskroner Foundation also held its 12th Annual Law School Closing Argument Competition. This competition, held annually since 1999, involves students selected from law schools across the state giving closing arguments based on a child injury case. The jury is composed of members of the media, experienced plaintiff and defense lawyers, and lay persons. Scholarship awards are given to the winners.

Joel Levin of **Levin & Associates Co., LPA**, has authored a play about Justice Benjamin Cardozo entitled *Marrano Justice*. The play premiered in Sonoma, Arizona last summer, and a film of the play had its Ohio premiere at the CWRU Law School in November 2010. The play is accompanied by 13 Ladino songs performed by local musicians.

David M. Paris of **Nurenberg, Paris, Heller & McCarthy Co., LPA** was honored by Cleveland State University with a 2010 Distinguished Alumni Award. The award honors outstanding CSU alumni who have made important contributions to the school and their community. Paris spearheads the Nurenberg Paris Scholarship Fund at the Cleveland Marshall College of Law. Under his leadership, the firm has also funded the Plaintiff's Table at the law school's new Electronic Trial Courtroom which is scheduled for official opening in 2011. Paris has also been appointed to the CMBA's Task Force for Judicial Excellence headed by the Honorable Timothy McMonagle and James D. Robenalt, Esq.

Peter H. Weinberger of **Spangenberg, Shibley & Liber, LLP,** is serving as chairman of the Skin Cancer Research Institute Advisory Council at Case Western Reserve University, and has funded a research fellowship for the Institute. One of the top centers for skin cancer research worldwide, the Skin Cancer Research Institute's mission is to discover causes of cancer, prevent skin cancers, and develop new therapies. Weinberger is also an advisory member of the Law Medicine Institute of the CWRU Law School, the oldest law school based center for the study of legal medicine and health law in the United States.

Also from **Spangenberg, Shibley & Liber, LLP, Peter J. Brodhead** is active in trustee and committee work at North Coast Community Homes (a non-profit organization providing safe, comfortable and affordable housing for individuals with mental retardation, mental illness, and other disabilities) and the Cleveland Institute of Music. **Dennis R. Lansdowne** of the Spangenberg law firm is on the board of directors at the Beck Center for the Arts, a non-profit, performing arts and arts education organization dedicated to enriching the quality of life in Northeastern Ohio. ■

John Cattie is The Garretson Firm Resolution Group's lead contact to initiate any case/fact specific discussions. He can be reached at 704.559.4300 or jcattie@garretsonfirm.com.

The Use And Propriety Of Medicare Set Asides In Liability Settlements

by John Cattie

Editor's Note: *A Medicare Set Aside ("MSA") is a separate account set up from the proceeds of a client's recovery for use in funding post-settlement medical bills related to the injury in question. This article traces the use of MSAs in the Workers' Compensation context, and addresses whether and when MSAs are advisable in tort liability settlements.*

In all settlements, compliance with Medicare rules and regulations can involve two obligations: (1) the satisfaction and discharge of Medicare's reimbursement claim for injury related care from the date of injury through the date of settlement; and (2) the evaluation of obligations associated with future costs of care that may be provided to the claimant from the date of settlement onward. In our experience, the most logical way to assure that these obligations have been satisfied is to review the relevant statutes as well as any guidance from the Centers for Medicare & Medicaid Services ("CMS")[1] interpreting those statutes and apply this information to the facts of each case. Accordingly, this article summarizes our complete White Paper (found at www.garretsonfirm.com), which is based on the currently available guidance concerning satisfaction of Medicare's future interest in liability settlements.[2]

MSA Overview

The purpose of an MSA, in both the liability and Workers' Compensation ("WC") context, is to pay for future injury-related care which would otherwise be covered by Medicare. However, the MSA obligation in a liability settlement is less definable when compared to the traditional application in a WC settlement. This is because in a WC settlement, following no fault standards, there are only three "buckets" of damages: (1) indemnity; (2) past medicals; and (3) future medicals. Because every WC settlement has a future cost of care damage allocation, the only condition left to consider is whether there is a permanent burden-shift over to Medicare in the obligation to pay for that future injury-related medical care. The same is not the case in a liability settlement, as issues of comparative fault, special damages, and other, non-future medical damages are present, and serve to confound an easy application of MSA concepts. Far from being a position we take on WC settlements, the lack of a uniform damage allocation in liability settlements can be considered a truism when it comes to identifying the lack of any MSA guidance from CMS.

Medicare's Recovery Rights (The Law)

Medicare's right of recovery extends both to the past and the future.[3] This is the case for both liability and WC cases. As such, when we talk about Medicare compliance, we are really talking about two separate and distinct moving parts. On the one hand, Medicare has past interests that must be considered and protected. This is represented by conditional payments made by Medicare for injury-related care from the date of injury to the date of settlement. On the other hand, Medicare also has future interests that must be considered and protected. This is represented by payments made by Medicare from the date of settlement onward for injury-related care. Both past and future interests must be considered and

protected in order for settling parties to be deemed Medicare compliant in the reimbursement sense.

Differences Between WC & Liability Settlements

When the various individual factors are viewed in their totality, one cannot conclude that the MSA obligation in a liability settlement equals that of a WC settlement at this time. The composition of a liability settlement is much more complex than a WC settlement. A WC settlement contains a finite number of potential recovery buckets: (1) indemnity; (2) past medical expenses; and (3) future medical expenses. On the other hand, a liability settlement contains many more potential recovery buckets when both economic damages (*i.e.*, past medical expenses, future medical expenses, loss of earning capacity, loss of household services, *etc.*) and non-economic damages (*i.e.*, pain & suffering, mental anguish, loss of independence, loss of society, *etc.*) are considered. Typically, these settlements also differ in the fact that settlement proceeds are often allocated specifically in a WC settlement while settlement proceeds are not often allocated in a liability settlement.[4] These distinctions are critical – so much so that merely "bootstrapping" the WC rules to liability settlements is hardly compliant.

Currently Enacted Law re: MSAs in Liability Settlements

A fact often lost in the MSA debate is that the MSA obligation is not one imposed by the Medicare Secondary Payer ("MSP") statute. The MSP statute itself does not discuss MSAs. In fact, a review of **all** currently enacted federal statutes and regulations may lead one to the conclusion that there is no currently enacted law imposing an MSA obligation on settling parties. Current law does not even provide the settlement community with a statutory definition of "MSA" or "Medicare Set Aside Arrangement," and currently enacted law makes no mention of these terms.

Current Guidance from CMS re: MSAs in Liability Settlements

The MSA obligation, such as it is, is one imposed by CMS Policy Memoranda as opposed to currently enacted law. While CMS continues to release memoranda formalizing MSA procedures for WC cases, it has yet to release even a single memorandum formalizing standards or guidance for the review of liability insurance settlements for MSA obligation purposes.

Simply put, to date CMS has not chosen to expand its MSA guidance to specifically include liability settlements without a WC component. That is not to say CMS cannot make such an extension. However, we submit that – regardless of characterization – unless a settlement has a specific allocation for future medical expenses otherwise covered by Medicare, the elements that would even permit us to recommend MSAs in the liability context do not exist.

The Proper Use and Application of MSAs in Liability Settlements

Based on the currently enacted law and guidance, the establishment of MSAs in a liability settlement should be the exception, not the rule. The MSA obligation in a liability settlement is only clear (on its face) in the specific case where a definitive allocation for future injury-related medical expenses exists for an injured Medicare beneficiary. Here's an example of a specific situation where an MSA would be recommended in the liability context: a liability action proceeds to trial and results in a judgment in favor of a Medicare beneficiary. The trier of fact determines that a specific portion of the award is to be applied for future medical expenses. Here, there would be an identifiable portion of the judgment against which to apply future medicals. Hence, there would exist an identifiable future cost of care component to the recovery, leading to the need to determine if a permanent burden shift exists by reason of the lack of any primary payer (other than Medicare) to make such payments.

Where the conditions exist that lead to considering and protecting Medicare's future interest through the establishment of an MSA (*i.e.*, future cost of care allocation and permanent burden shift), then an MSA may be appropriate even in a liability settlement. Without a future cost of care component to the gross recovery, an MSA is never appropriate.

Conclusion

The use of MSAs is a topic of nationwide debate. The lack of any statutory requirement complicates the debate. While the legal community can follow guidance about how to use MSAs in WC settlements, no similar guidance exists about how to use MSAs in liability settlements.

Our analysis is based on our firm's many years of experience with Medicare compliance issues. While our analysis is subject to interpretation, having specifically addressed this issue with CMS in both single event and mass tort settlement programs, we submit that until actual statutory guidance or any type of CMS guidance is provided, the question whether an MSA is required in liability settlements will be extremely fact-intensive with the required elements leading to an affirmative answer being few and far between. We submit this article to assist settling parties to better understand the use of MSAs in a liability settlement context. To download the complete White Paper, please visit our website: www.garretsonfirm.com. ■

End Notes

1. CMS is the federal agency charged by the United States Department of Health & Human Services with the administration of Medicare programs, including Medicare Secondary Payer ("MSP").
2. Information in this article is current through October 1, 2010.
3. Memorandum from Thomas L. Grissom, Director, CMS Center for Medicare Management, to All Regional Administrators, "Medicare Secondary Payer-Workers Compensation (WC) Frequently Asked Questions," question & answer No. 13 (April 22, 2003), *available at* www.cms.hhs.gov/WorkerCompAgencyServices/ (last visited August 11, 2010).
4. *See* 42 C.F.R. §§411.46 and 411.47. If liability settlements include an allocation for future medicals, and there is a permanent burden shift to Medicare of the responsibility to pay for future injury-related care under the terms of the settlement, we can see a rationale for protecting Medicare's interests in limited situations using MSAs. However, the current federal regulations provide that only those settlements containing an allocation for future medical expenses meet the exception set forth in 42 C.F.R. §411.46(d)(2). The mere existence of and/or release of future medical expenses under the terms of the settlement fails to meet this allocation threshold.

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Sidebar: Cooperating With The U.S. Attorney's Office To Resolve Your Medicare Lien

by Samuel V. Butcher

Now that you have read John Cattie's article on Medicare Set-Asides, how are you going to comply with the law to satisfy your client's obligation to Medicare and protect yourself and your client? Well, you could contact the Centers for Medicare and Medicaid Services ("CMS") or the company with whom they have contracted to handle Medicare collection for our area, the Medicare Secondary Payer Recovery Contractor ("MSPRC"). You will need to find out what your client owes Medicare and begin the process that will eventually lead to Medicare's demand for reimbursement. Medicare's demand will be based upon its conditional payments minus an amount for procurement costs determined by the application of a formula found in the Code of Federal Regulations. Needless to say, there are many issues that can arise throughout the process, not the least of which is the relatedness of payments listed by Medicare on its Conditional Payment Summary for its payment of medical bills that are considered part of your client's claim. You may also, in difficult circumstances, consider the need to ask Medicare to compromise its demand for payment. Although MSPRC is far more efficient than was its predecessor, Administar Federal, dealing with this official government contractor can be impersonal, time consuming, cumbersome at best, and the source of an added measure of frustration.

I suggest to you that there is another approach you can take that you will find to be a far better alternative. Contact the Civil Division of the U.S. Attorney's Office and let them handle the matter for you. You will need to provide the name of your client, your client's HIC number, the date of the accident or occurrence that gave rise to your client's claim, the nature of your client's claim-related injuries, and the period of time during which your client treated for those injuries. The U.S. Attorney's Office will contact MSPRC for you to obtain Medicare's Conditional Payment Summary. Once you receive the summary, if you find that there are issues of relatedness as to payments on the list for which Medicare is seeking reimbursement, the U.S. Attorney's Office can and will help you resolve those issues. They will also assist you in obtaining a compromise of Medicare's demand for payment if the circumstances truly warrant an accommodation. I have found that while the U.S. Attorney represents Medicare's interests, they understand the need to balance the equities between Medicare, Attorney, and Client so that Medicare receives some reimbursement, the attorney can be paid, and, most importantly, the injury victim receives a meaningful measure of compensation.

The key to dealing with the U.S. Attorney's Office is having the right attitude and taking a thoughtful approach. You will develop and maintain a far better relationship with their office if you don't ask for a relatedness review and seek a compromise in every case. If you've recovered $100,000.00 for your client and Medicare's demand for payment is$5,000.00, pay the $5,000.00! Also be mindful not to ask the U.S. Attorney's Office to fix problems that have arisen after you have already contacted MSPRC. They don't deal with any cases that have already been opened by the contractor.

So when should you contact the U.S. Attorney's Office? You should do so once you are certain that your Medicare recipient client has a meritorious claim that you will be pursuing. Don't wait until the statute of limitations is

continued on next page

about to run to contact the U.S. Attorney's Office to see if a settlement can be worked out that will satisfy Medicare and provide your client with a meaningful measure of compensation. They cannot initiate the process with MSPRC, obtain a Conditional Payments Summary, work out issues of relatedness, and compromise a claim quickly enough to meet a last minute deadline. You do need to realize, however, if you have contacted the U.S. Attorney's Office early on and they have provided you a Conditional Payment Summary, you cannot rely on that summary several months later when you're negotiating the potential settlement of your client's claim. The U.S. Attorney's Office is aware of the fact that healthcare providers may have up to 18 months to submit claims to Medicare. Thus they will be unwilling to rely on an outdated Conditional Payment Summary in dealing with you and they will still need to obtain for you Medicare's formal demand.

There is another practice pointer of which you should be aware. When you have tentatively settled your case subject to resolution of the Medicare lien, you should advise the U.S. Attorney's Office of the date of settlement. Why is this important? The reason is that payment for any claim-related treatment beginning the day after the settlement date will not be considered part of Medicare's lien. If, for some reason, three months have passed since the date of settlement and you're dealing with the U.S. Attorney's Office trying to resolve your client's Medicare lien and your client is still treating for claim-related injuries, you can avoid having to reimburse Medicare for payments made over those last three months. The amount owed Medicare cuts off at the date of settlement. Despite some of the gloom and doom that has been spread regarding Medicare's interest in seeking reimbursement for the cost of future treatment, at this point in time, Medicare does not expect to be reimbursed out of the proceeds of any settlement or judgment for its payment of future medical bills for the treatment of claim related injuries.

You will find that with a courteous approach dealing with the U.S. Attorney's Office will serve your client and you far better than dealing with CMS or MSPRC directly and on your own. The U.S. attorneys in the Northern District are understanding, accommodating, and can be extremely helpful in difficult situations. Building a good rapport with their office is one way to reduce some of the stress associated with your practice. ■

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In For The Fight Of Our Lives: November 2, 2010 Election Post Mortem

by John R. Liber II

The ongoing, systematic erosion of the fundamental civil tort protections for Ohioans just got a considerable boost in the arm. Were you upset by *Westfield v. Galatis*? Concerned upon the enactment of the 2005 Tort Reform legislation that was surprisingly upheld in *Arbino*? Alarmed by *Comer v. Risko* and the potential expansion of the reasoning into other sacred grounds by *Wuerth*? Frightened by *Lawson, Robinson v. Bates, Kaminski* and *Burnett v. Motorists*?[1] Well friends, even though Halloween is behind us, if you are not downright terrified of the consequences of this past election, you should be. Before this past Tuesday, we were already in the midst of the most dramatic destruction of individual rights by the Ohio Supreme Court in the history of jurisprudence. Now the political pieces are in place to take it to an even more disturbing level.

The voter discontent that swept Barack Obama into the White House two years ago returned with a vengeance on Tuesday. However, if the 2008 election was a broom, 2010 was a tidal wave. At the national level, the Republicans picked up 8 seats in the Senate to even the board (the two independents usually caucus with the Democrats - but that is hardly a margin of distinction) together with a historic 64 seats in the House (but not the super-majority necessary to override a presidential veto), and six gubernatorial seats (which may prove significant for 2012). The economy? The deficit? Health care? The Tea Party? It could be all, just one, or any combination thereof. But in 2010, these phenomena spelled doom for most Democratic incumbents. It will also be interesting to see what happens in two years. If the environment does not change dramatically for the better, then, in 2012, those in power now may find themselves regretting what they wished for now.

In Ohio, November 2, 2010 was also a clean sweep for the Republicans state-wide. John Kasich defeated incumbent Governor Ted Strickland 49.33% to 46.74, Mike Dewine defeated incumbent Attorney General Richard Cordray 47.80% to 45.98, Dave Yost defeated David Pepper 50.55% to 44.58 for Ohio Auditor, in the Secretary of State race John Husted defeated Maryellen O'Shaughnessy 54.04% to 41.09, and Josh Mandel defeated Kevin Boyce for Treasurer 54% to 40.21.

For George Voinovich's open U.S. Senate seat, sitting Lieutenant Governor Lee Fisher was beaten by former U.S. Trade Representative and current Squire Sanders & Dempsey (Cincinnati) partner Rob Portman 57.25% to 39.00.

These elections will go down in history in more ways than expected. As the Ohio Association of Justice President Dennis Mulvihill observed, "everyone who has taken on the honorable challenge of protecting the rights of injured victims in Ohio is in for the fight of their lives." While remaining optimistic, Dennis is hoping to capture the outrage and use it as momentum to re-energize trial lawyers across Ohio to step it up and face the considerable task at hand. "The agenda of the wealthy and powerful forces against individual rights is unmistakable. The right wing conservatives are utilizing the Chamber of Commerce to obtain the complete elimination of any productive civil tort protection in Ohio under the thinly disguised framework of economic stimulus and job creation." Mulvihill also pointed

out that unless the loopholes in the judicial campaign financing are closed and the so-called non-partisan judicial ballots are eliminated, this trend is likely to continue. "While the admirable efforts of our small-in-comparison membership allowed us to apply $1.3 million dollars in support of the Supreme Court races, we were still outspent by a 3 to 1 margin by the other candidates and the money poured into Ohio television spots by the Chamber of Commerce."

Whether it was the wide margin in spending, voter dissatisfaction, the economy, and/or the judicial ballot deficiencies, our clients and colleagues are once again faced with the consequences of the losing end of an important election at the state level. For the Ohio Supreme Court, Justice Maureen O'Connor defeated Chief Justice Eric Brown 2.2 million votes to 1.4 for the Chief Justice seat. In the other race, Justice Judith Lanzinger defeated Eleventh District Court of Appeals Administrative Judge Mary Jane Trapp 1.6 million votes to 1.275. Senior Associate Justice Paul E. Pfeifer was re-elected without opposition.

While hers was the largest return for a Democratically supported judicial candidate, Judge Trapp observed that until the ballot deficiency is corrected, any Democratic candidate for Ohio Supreme Court faces a significant disadvantage. "1.75 million people voted for Democrat Governor Ted Strickland, but 482,000 [or 27%] did not continue down the ballot to vote for the Democratic Supreme Court candidate," Judge Trapp reported. By comparison, 1.85 million Ohioans voted for Republican challenger John Kasich and 1.68 million voted for Lanzinger (9%).

While the additional votes may not have helped Judge Trapp had the deficiency been equalized, her point about the "non-partisan" judicial ballot rings loud. "Historically, even with pre-printed single party sample ballots, Democratic voters often skip past judicial candidates whose name is not familiar because the party affiliation is not printed on the ballot." Dennis Mulvihill added that, "this is a common problem that usually benefits Republican candidates. Due to the clear disparity, the Ohio Association of Justice has a case pending in the Sixth Circuit Court of Appeals challenging this archaic and ineffective process. We expect that we will prevail in light of the recent decision of *Carey v. Wolnitzek*."

The bottom line here, folks, is that money is just not enough. Money of course is necessary, but we will still be outspent considerably. True success is going to involve the way that we structure the voting and create voter interest. Otherwise, we will face the conservative agenda running the show at every level of government.

Locally, other than the anomalous stigma of an indicted judge on administrative leave still receiving a little more than 125,000 votes (Michael Astrab did prevail with 141,055), in the contested races for the Court of Appeals, Kathleen Keogh defeated Brian Moriarity 63.74% to 36.26, and Eileen Gallagher defeated Elizabeth Harvey 70.44% to 29.56. In Common Pleas, Lance Mason defeated Pamela Barket 54.95% to 45.04, Maureen Clancy defeated Robert McClelland 56.49% to 43.50, and Dick Ambrose defeated Mary Elaine Hall 65.49% to 34.50. Unopposed were Appellate Judges Mary Eileen Kilbane, and Melody Stewart, and Common Pleas Judges Villanueva, McGinty, Donnelly, P. Corrigan, Matia, John Russo, H. Gallagher, E. Gallagher and B. Corrigan. In the only Domestic Relations Division contested race, Rosemary Grdina Gold defeated Bernadette Marshall 53.1% to 46.88. The Juvenile Division seats were all uncontested.

Voter turnout was 47.97% statewide, and, of the 978,268 registered voters in Cuyahoga County, 414,927 cast ballots (or 42.41%). Hamilton led the large counties with 49% turnout, followed by Franklin (45%), and Lucas (44%). This was much less compared to the prior midterm elections in 2006 where statewide turnout was 56.4% and Cuyahoga County was 44.56% according to the Secretary of State.

While CATA President Brian Eisen was also disappointed by the results, he too is empowered by the challenge we face. "This is what we do!" Eisen enthusiastically exclaimed. "We take on some of the most catastrophic and devastating experiences that individuals face and pour considerable time, energy, and most importantly - talent - into producing a positive result in the face of an onslaught of powerful opposing forces. The judicial and political landscape may now be more hostile than before, but if I know one thing about CATA members, it is that we don't quit. Our case is simply too important and our will too strong."

After licking our wounds and evaluating the areas in need of improvement, the lessons of the 2010 mid-term elections should provide each one of us with sufficient motivation to work for change. ■

End Notes

1. The above-referenced cases are as follows: *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849; *Arbino v. Johnson & Johnson,* 116 Ohio St.3d 468, 2007-Ohio-6948; *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559; *Nat'l Union Fire Ins. Co. v. Wuerth,* 122 Ohio St.3d 594, 2009-Ohio-3601; *N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson,* 103 Ohio St.3d 188, 2004-Ohio-4886; *Robinson v. Bates,* 112 Ohio St.3d 17, 2006-Ohio-6362; *Kaminski v. Metal & Wire Prods. Co.,* 125 Ohio St.3d 250, 2010-Ohio-1027; and *Burnett v. Motorists Mut. Ins. Co.,* 118 Ohio St.3d 493, 2008-Ohio-2751.

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Pointers From The Bench: Interviews With Judge Dick Ambrose And Judge John J. Russo

by Christopher Mellino

CATA recently spent time with Judge Dick Ambrose and Judge John J. Russo to get their take on what the Plaintiffs' Bar could do to get better results from jurors in Cuyahoga County.

The insight which follows came not only from their own observations of us at work, but also from feedback jurors have given when being debriefed after trial.

Judge Dick Ambrose practiced law for 17 years as a civil litigator representing both plaintiffs and defendants in employment law cases and business litigation before he became a judge. He also represented Plaintiffs in personal injury cases. Judge Ambrose estimates that he presides over 3-4 civil cases per year.

Judge John J. Russo practiced for twelve years doing criminal defense and representing small businesses. He also has experience in collections and general civil litigation. Judge Russo presides over 3-6 civil cases per year.

Both judges have been on the Common Pleas bench about 6 years.

The first thing CATA wanted to know was what does the bench see from Plaintiffs' lawyers that drives them crazy.

For Judge Russo, it is not getting to the point, being too obtuse and not simply just stating what they were asking for as damages.

Judge Ambrose believes that we are too cynical with questioning of experts. But, a long preamble before asking a question, especially if it misstates testimony or throws in an opinion of counsel as well as adding commentary after a witness gives an answer, are his pet peeves.

Jurors have expressed to both Judges their frustration that lawyers treat them as if they are stupid. Jurors complain that they are not given enough credit by lawyers who hammer home the same point for too long or too many times especially in a single cross examination.

Next CATA examined each phase of a trial with the judges who offered the following suggestions.

PreTrial: Prepare early, don't wait until the final pretrial to start preparing. Both judges are very proactive in helping us get our cases settled at a settlement conference or final pretrial with the caveat that we come prepared with a specific number and can justify that number. Judge Russo was adamant that a Plaintiff's lawyer should know the specials, and know what numbers support the dollar figure you are looking for.

Voir Dire: Court Rule is that 18 jurors are brought up for each trial. If you think you will need more because of multiple defendants or you

anticipate many challenges for cause, let the court know ahead of time.

Both Judges believe it is necessary to give Plaintiffs an equal number of peremptory challenges as the total number given to all defendants, in order to ensure a fair jury selection process.

Opening: For Judge Russo, successful openings are about us giving the jury an opportunity to relate to the Plaintiff and put themselves in the Plaintiff's shoes. Judge Ambrose's advice is to focus on the positives of your case but absolutely address your weaknesses or you will look like you are hiding the ball.

Evidence: A plaintiff can never have too much visual evidence. It is generally believed that 60-65% of the population are visual learners. Judge Ambrose cautions that whatever evidence is being presented by spoken word rather than visually is subject to being misconstrued by the visual learners on the jury. If the jury misconstrues the evidence, don't blame the jury, blame your presentation.

Both judges agreed that most jurors like hearing evidence explained to them by expert witnesses, especially on the damages issues. However, Judge Ambrose felt that experts should limit their testimony to the technical issue that they are being asked to address and not go on at length and bore the jury.

The single most important factor in getting a plaintiff's verdict is the likeability and credibility of the plaintiff according to Judge Ambrose. Judge Russo has been told by jurors that a plaintiff who is too eager, who talks too much, or insists on telling his or her story on the witness stand loses all credibility. They are perceived as trying to sell their case and being only out for money.

Closing Argument: Most jurors feel qualified to decide who is right and who should win. They are not at all comfortable putting a monetary value on an injury. Neither Judge felt that we are doing a good enough job explaining what dollar amounts we are asking for and especially how the jury should get there. Ballparking damages is fatal to your case. Both Judges echoed the same thoughts. Be specific, be clear what you are asking for, get to the point and never ask the jury to put their own value on your case – they won't. That is a recipe for an inadequate verdict or a defense verdict.

Finally the Judges were asked whether they believed Plaintiffs receive a fair shake from the justice system in our county. They both believe that good cases still get good results. But soft tissue, low impact cases obviously do not. Juror skepticism, and *Robinson*[1] numbers coming into evidence are factors, but both felt that the economy was the biggest single factor driving down the amount of verdicts.

Judge Ambrose added that the Plaintiffs' bar is losing the battle of public perception about frivolous lawsuits because of the proliferation of lawyer advertising in the mass media, and noted that there may be a temporal relationship between the explosion of the lawyer ads on television and the perception that there are too many frivolous lawsuits. ■

End Notes

1. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362.

CATA Luncheon Seminar Series

For The 2010/2011 Term

Please save the following dates for attendance at the upcoming CATA Luncheon Series for the 2010/2011 term:

December 9, 2010
January 20, 2011
March 16, 2011
April 14, 2011

All luncheons are scheduled for Thursdays, except for the March luncheon which falls on a Wednesday, the day before St. Patty's Day! The luncheons begin at 12:00 noon with your choice of several box lunch selections. The one hour CLE follows from 12:30-1:30 p.m.

If you have any questions, please contact CATA Secretary, Sam Butcher, at (216) 781-2258 or SamB@stewartdechant.com.

Christopher Mellino

Verdict Spotlight

by Christopher Mellino

The consensus following the Ohio Supreme Court's decision in *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250, 2010 Ohio 1027 was that intentional tort cases against employers are no longer viable in Ohio.

Frank Gallucci

Michael Shroge

CATA members Frank Gallucci and Michael Shroge debunked that sentiment by obtaining a $597,785 verdict for their client, Larry Hewitt, against his employer, L.E. Meyers Group, in just such a case. The case was tried in front of Judge Thomas Pokorny in Cuyahoga County last September.

Mr. Hewitt was badly burned by 7200 volts of electricity while on the job as a second step apprentice. He suffered second and third degree burns on his right hand, arm, shoulder and back. His injuries also resulted in reflex sympathetic dystrophy of his right arm, which is his dominant arm.

So, how did Plaintiffs overcome the burden of establishing a "deliberate intent to cause injuries" by the employer as required by R.C. 2745.01 and the Court in *Kaminski*?

Not only did attorneys Gallucci and Shroge prove their case, they did it without any expert testimony on liability. They simply relied on the facts of the case.

On the day in question, at the morning safety meeting, two of the company's foremen decided that the workers did not need to wear rubber gloves and protective sleeves that day. Mr. Hewitt was working alone in a bucket on deenergized lines while his supervisor was on the ground directing traffic. As a truck was passing by, the supervisor yelled up to the Plaintiff. When the Plaintiff turned to see what the supervisor was yelling about he came in contact with an energized line carrying 7200 volts of electricity.

During the depositions of the Defendant's employees it was established that the company's safety rules prohibited apprentices from: working solo in a bucket around high voltages; working unsupervised; and working around energized lines without rubber gloves and sleeves.

Frank and Mike obtained admissions from five different company employees that the removal of these safeguards were "deliberately and intentionally made decisions" which got them past a directed verdict and into the jury's hands.

Another unusual aspect of the case was that the jury consisted of highly educated, white collar professionals including an internal medicine physician, a physiotherapist, the son of a partner at the law firm Thompson Hine, the wife of a CFO, and a C.P.A. The advantage to the Plaintiff was that the jury understood the statute and knew exactly what they were looking for as they went through the evidence.Something to consider when selecting your next jury.

Congratulations Frank and Mike on a job well done. ■

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

Counsel for Plaintiff(s): _____
Law Firm: _____
Telephone: _____

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____
_____
_____
_____
_____

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

RETURN FORM TO: **Christopher Mellino**
The Mellino Law Firm
200 Public Square, Suite 2900
Cleveland, Ohio 44113
(216) 241-1901; Fax (216) 621-8348
Email: cmm@mellinolaw.com

CATA Verdicts & Settlements

Editor's Note: *The following verdicts and settlements submitted by CATA members are listed in reverse chronological order according to the date of the verdict or settlement.*

Linda Simon v. Sally Belfi

Type of Case: Assured Clear Distance Ahead

Verdict: $384,557.39

Plaintiff's Counsel: Andrew R. Young and Jonathan D. Mester, Nurenberg, Paris, Heller & McCarthy Co., LPA, (216) 621-2300

Defendant's Counsel: Roger H. Williams, Esq.

Court: Lorain County, Case No. 07CV153007

Date Of Verdict: October 21, 1010

Insurance Company: State Farm Mutual Automobile Insurance Company

Damages: Two diagnostic right knee arthroscopic procedures and a lower lumbar spine decompression

Summary: Plaintiff was involved in a car accident on October 5, 2005. Liability was admitted as this was a rear end accident. While property damage estimates were considerable, the photographs seemingly showed minor property damage. A motion *in limine* was granted excluding the photographs and the property damage estimates from the evidence. Defendant argued that the second diagnostic knee arthroscopic surgery and the lower lumbar spine decompression were unrelated to the October 5, 2005 accident. Jury awarded economic damages of $48,000. State Farm's last offer was $50,000.

Plaintiff's Expert: Louis Keppler, M.D.

Defendant's Expert: Robert Corn, M.D.

Renee L. Martin v. LKQ Corp., et al.

Type of Case: Two Auto Cases - October 3, 2007 and December 5, 2007

Verdict: Combined Verdict of $119,200.00

Plaintiff's Counsel: Andrew R. Young, Nurenberg, Paris, Heller & McCarthy Co., LPA, (216) 621-2300

Defendants' Counsel: Eric J. Stecz, Mark J. Scarpitti, Michael F. Farrell, and Alan B. Glassman

Court: Summit County, Case No. CV2009107266, Judge Mary Margaret Rowlands

Date Of Verdict: October 6, 2010

Insurance Company: Nationwide Mutual Fire Insurance - 1st Accident Tortfeasor; State Farm Mutual Automobile Insurance - 1st Accident UM/UIM; Grange Insurance - 2nd Accident; Travelers Insurance - 2nd Accident

Damages: Bilateral Brachial Plexopathy / Aggravation of Degenerative Disc Disease

Summary: Plaintiff was involved in a car accident on October 3, 2007. She was involved in a second (single car) accident on December 5, 2007 that resulted from an incorrect auto part being installed into her vehicle during repairs following the first accident. The defendants for the second accident were the parts supplier and the body shop who performed the repairs from the first accident. All parties stipulated to negligence. Jury awarded economic damages in total amount of $49,200. Defendants' last collective offer was $60,000.

Plaintiff's Expert: William R. Bauer, M.D. - Neurologist

Defendants' Expert: None

Charles M. Penson v. Hancock County Sheriff's Dept., et al.

Type of Case: Civil Rights - Wrongful Shooting

Settlement: $2,650,000.00

Plaintiff's Counsel: Nicholas A. DiCello, Spangenberg Shibley & Liber LLP, (216) 696-3232 and Terry H. Gilbert, Friedman & Gilbert, (216) 241-1430

Defendants' Counsel: Paul D. Krepps (Pittsburgh)

Court: U.S. Dist. Ct. Northern Dist. of W. Virginia, Case No. 08-183, Judge Frederick P. Stamp, Jr.

Date Of Settlement: September 8, 2010

Insurance Company: St. Paul Fire & Marine / Travelers

Damages: Permanent Quadriplegia; Medical Bills

Summary: Plaintiff was shot 3 times during the attempted service of a federal arrest warrant from which he attempted to flee. Plaintiff was unarmed. Contrary to conclusions of post-shooting investigators, Plaintiff's Counsel established Plaintiff was shot in the back and developed evidence of a cover up.

Plaintiff's Experts: Ken Katsaris (Use of Force); David Balash (Forensics); Arnold Friedman, M.D. (Radiology); Marianne Boeing (Life Care Plan); Harvey Rosen (Economist)

Defendants' Experts: Michael Odle (Use of Force); Patricia Constantinni (Life Care Plan); Daniel Selby (Economist); Michael DiVivo, Jr., M.D. (Life Expectancy)

Betty A. Siska v. Julie D. O'Neil

Type of Case: Motor Vehicle Accident

Verdict: $44,405.48

Plaintiff's Counsel: Mark R. Koberna and Rick D. Sonkin, Sonkin & Koberna Co., LPA, (216) 514-8300

Defendant's Counsel: Vincent E. Cononico

Court: Cuyahoga County, Case No. CV-09-698353, Judge Porter

Date Of Verdict: July 28, 2010

Insurance Company: Allstate

Damages: Non-displaced fractured sternum and microfractures of three ribs

Summary: Plaintiff was injured when defendant driver lost control of her vehicle, crossed centerline and struck plaintiff's vehicle essentially head on. Defendant admitted liability, and did not testify at trial.

Plaintiff's Expert: Dr. Sudish Murthy

Defendant's Expert: None

Milton Muhfelder, et al. v. Akron General Medical Center, et al.

Type of Case: Medical Malpractice

Verdict: $1,500,000.00

Plaintiff's Counsel: Christopher M. Mellino and Michael E. Lyford, The Mellino Law Firm, LLC, Cleveland, Ohio, (216) 241-1901

Defendant's Counsel: D. Cheryl Atwell, Reminger Co., LPA, Akron, OH, Counsel for Esther Rehmus, M.D.; David M. Best, David M. Best Co., LPA, Akron, OH, Counsel for Michael Smith, M.D.; Stephan C. Kremer, Reminger Co., LPA, Akron, OH, Counsel for Colin Moorhead, M.D.

Court: Summit County, Case No. 2008 05 3760, Judge Alison McCarty

Date Of Verdict: June 3, 2010

Summary: Hematologist Dr. Esther Rehmus unknowingly cut open an artery in Plaintiff's hip while performing a bone marrow biopsy.

After the biopsy, Plaintiff started complaining of excruciating pain in his leg. Nurses consistently documented his pain as 10 out of 10 even though Plaintiff was heavily narcotized. Plaintiff internally bled out over half the blood in his body and required blood transfusions. He could not move his leg or feel anything below the knee. Serial CT scans showed a massive, expanding hematoma around Plaintiff's sciatic nerve.

After two days of inaction, Dr. Michael Smith, an orthopedic surgeon, was consulted. Dr. Smith did not come to the hospital to evacuate the hematoma or even to examine Plaintiff. Instead, after talking to a second year resident on the phone, he concluded Dr. Rehmus had stuck the bone marrow biopsy needle directly into Plaintiff's sciatic nerve, thereby permanently and irreversibly injuring Plaintiff.

Plaintiff's superior gluteal artery continued to bleed unabated for a total of five days. Eventually another orthopedic surgeon was consulted. He immediately took steps to stop the bleeding and surgically removed two massive softball-sized hematomas from Plaintiff's hip and buttocks.

Plaintiff's sciatic nerve is permanently damaged. He has lost the use of his right leg from the knee down. He has a foot drop and suffers from chronic pain in his leg and foot.

After a 3-week trial, the jury returned a verdict in favor of Plaintiffs and against Dr. Rehmus and her group in the amount of $1,200,000.00 and against Dr. Smith and his group in the amount of $300,000.00, for a total amount of $1,500,000.00.

Plaintiffs' Experts: Paul Collier, M.D., Pittsburgh, PA, Vascular Surgery; Ronald Sacher, M.D., Cincinnati, OH, Hematology; Kevin Bell, M.D., Warren, NJ, Internal Medicine; Richard Bonfiglio, M.D., Murrysville, PA, Physical Medicine & Rehabilitation; Marianne Boeing, RN, Cleveland, OH, Life Care Planner

Defendants' Experts: Lisa Boggio, M.D., Chicago, IL, Hematology; John A. Botsford, M.D., Cincinnati, OH, Radiology; Jeffery Dardinger, M.D., Cincinnati, OH, Radiology; Bruce Rabin, M.D., Baltimore, MD, Neurology; Walter Hauser, M.D., Columbus, OH, Orthopedic Surgery; Brian Davison, M.D., Columbus, OH, Orthopedic Surgery; Nabil Ebrageim, M.D., Toledo, OH, Orthopedic Surgery; Gregory Vrabec, M.D., Akron, OH, Orthopedic Surgery; Michael Terry, M.D., Chicago, IL, Orthopedic Surgery; Paul Skudder, M.D., Albany, NY, Vascular Surgery; Michael Linz, M.D., Canton, OH, Internal Medicine; William Miser, M.D., Columbus, OH, Family Medicine

Kazanas v. Williams

Type of Case: Motor Vehicle Accident - rear end

Verdict: $25,000.00 + $3,000.00 PJI. Total $28,000.00

Plaintiff's Counsel: Francis E. Sweeney, Jr., Law Office of Francis E. Sweeney, Jr., (216) 928-9288

Defendant's Counsel: Ritzler, Coughlin & Swansinger

Court: Cuyahoga County, Case No. CV-08-659932

Date Of Verdict: March 30, 2010

Insurance Company: AIG
Damages: 10K stipulated per Robinson

Summary: MVA rear ender pre-existing back issues. 4K offer.

Plaintiff's Expert: Xenos Vangelos, M.D.

Defendant's Expert: None

Jane Smith, Adm. v. ABC Nursing Home, Dr. John Doe, XYZ Pharmaceutical

Type of Case: Nursing Home / Medical Malpractice

Settlement: $1,000,000.00

Plaintiff's Counsel: J. Michael Monteleone and M. Jane Rua, Jeffries, Kube, Forrest & Monteleone Co., LPA, (216) 771-4050

Defendant's Counsel: Confidential- per Defendants' insistence

Court: Confidential - per Defendants' insistence

Date Of Settlement: December 30, 2009

Damages: Death

Summary: 85 year old female broke her arm shoveling snow in her driveway. Her doctor admitted her to a nursing home for temporary stay. Doctor wrote a prescription for patient's rheumatoid arthritis to be given one per week. The nurse transcribed the doctor's order incorrectly giving her the drug every day. After 17 days the patient died from the overdose.

Plaintiff's Expert: Confidential - per Defendants' insistence

Defendant's Expert: Confidential - per Defendants' insistence

Estate of Jane Doe v. John Doe Assisted Living Facility, Owners & Medical Director

Type of Case: Assisted Living Facility Negligence / Medical Malpractice

Settlement: $710,000.00

Plaintiff's Counsel: Susan E. Petersen, Petersen & Petersen, (216) 279-4480

Defendants' Counsel: Withheld

Court: Withheld

Date Of Settlement: November, 2009

Damages: See below. In economic damages, Plaintiff claimed $19,000 in medical bills. The Complaint included a claim for punitive damages.

Summary: An 83 year old woman was placed by her family in an assisted living facility with early stage Alzheimer's disease. Prior to admission, the disease affected her in such a way that she would have episodic periods of emotional outbursts and forgetfulness. However, she was able to independently care for herself and perform life-sustaining activities. She did all the housework in the family home. She was able to carry on lengthy and meaningful conversations. She recognized family members and friends. She was physically strong. Upon admission to the facility, she became confused and began acting out as she wanted to go home. Instead of contacting the family, the facility's nurses began overdosing and chemically restraining her with antipsychotic medications ordered by the medical director. This continued during the entire 16 day stay.

The family checked on the resident daily by phone as instructed by the owner of the facility. She had told the family to avoid visiting until the resident had time to adjust. While the resident was not doing well, the owner told the family that she was adjusting. On day 16, the resident was found unresponsive and transported to the ER in respiratory arrest. She was admitted to the I.C.U. where she remained for the next few days. The hospital photographed her physical injuries, which included bruises on her legs, and arms, a cut above a black eye, and a major laceration on her thigh. She couldn't move. Her struggle to get better continued once she was transferred to Fairhaven Nursing Home. She survived but was never the same. Plaintiff's expert opined that the trauma accelerated her brain disease, resulting in a need for placement in a nursing home where she died 20 months later. The case was amended to include a claim for wrongful death.

A former nurse from the facility testified that the owner specifically told the nurses to keep the resident drugged. The facility's medical director had increased the order for the anti-psychotic medication and added another during the stay. He admitted to never looking at the medication administration record, which documented the repeated overdosing.

Plaintiff's Expert: Sharon Brangman, M.D., Syracuse, NY, Geriatrics

Defendants' Experts: Ronald Kotler, M.D., Philadelphia, PA; Meade Perlman, M.D., North Canton, OH

Nevada Williams v. Allstate Insurance Co., et al.

Type of Case: Auto - Rear end - Uninsured Motorist

Verdict/Settlement: Verdict - $160,000. Settlement $100,000 of coverage + $100,000 for PJI and Bad Faith

Plaintiff's Counsel: Mitchell A. Weisman, Weisman, Kennedy & Berris, (216) 781-1111 and Craig Bashein (joined in on Bad Faith claim only), Bashein & Bashein Co., LPA,

(216) 771-3239

Defendants' Counsel: Thomas M. Coughlin, Jr.

Court: Cuyahoga County, Case No. CV 06605414

Date Of Verdict: October 2, 2009

Insurance Company: Allstate Insurance Co.

Damages: Chronic neck pain / non-operated disc issue

Summary: Plaintiff was rear-ended by a hit and run driver. Small impact. Arbitration Award was $32,000. Allstate offered $5,000 and never offered any more. Medical bills were $7,500.

Plaintiff's Expert: Dr. Susan Stephens

Defendants' Expert: N/A

Edna Zell, et al. v. Nationwide Insurance, et al.

Type of Case: Bodily Injury, Motor Vehicle Collision

Verdict: Judith Rios $65,000.00 plus Prejudgment Interest; Edna Zell $25,842.15 plus Prejudgment Interest

Plaintiffs' Counsel: Stephen B. Doucette, Sonkin & Koberna Co., LPA, (216) 514-8300

Defendants' Counsel: John Ours, Allstate Staff Counsel

Court: Trumbull County, Case No. 2008 CV 00294, Judge Andrew Logan

Date Of Verdict: September 10, 2009

Insurance Company: Allstate

Damages: Edna Zell - Medical Expenses $3,580.60 (Robinson Bates), Lost Wages $700; Judith Rios - Medical Expenses $6,593.35 (Robinson Bates)

Summary: On January 29, 2006 defendant failed to yield and pulled out from a stop sign, hitting plaintiff's vehicle in the rear quarter as it traveled past at about 25 mph. Plaintiffs' vehicle spun to a stop in the road. Liability was established by Summary Judgment.

Edna Zell was of retirement age but continued working as a bank teller. She suffered a soft-tissue injury to her left shoulder/trapezius area that required her to avoid lifting heavy objects and post traumatic stress disorder that limited her driving to good weather. Her last demand was $15,000.00. Defendant's

last offer was $4,500.00. The Verdict was $25,842.15 plus Prejudgment Interest.

Judith Rios was a retired homemaker. She suffered injury to her thoracic and cervical spine, including a bulging disc that affected the nerve leading down her left arm, causing her pain with use. She suffered anxiety while traveling following the collision. She had to alter her activities of daily living to avoid episodes of pain in her left arm and limited her travel to Trumbull County, foregoing family vacations. Her last demand for settlement was $45,000.00. Defendant's last offer was $4,935.00. The Verdict was $65,000.00 plus Prejudgment Interest.

Plaintiffs' Experts: One treating physician for each plaintiff. Dr. David L. Anstadt and Dr. Gregory E. Yager.

Defendants' Expert: None

Baby Doe v. ABC Hospital, et al.

Type of Case: Medical Malpractice

Settlement: $8,000,000.00

Plaintiff's Counsel: Brian N. Eisen, Romney Cullers and Todd E. Gurney, Greene & Eisen Co., LPA, (216) 687-0900

Defendants' Counsel: Withheld

Court: Common Pleas Court in Northwest Ohio

Date Of Settlement: Summer 2009

Summary: Baby Doe was delivered by Cesarean section after his mother's uterus ruptured during labor. He was limp, blue, and not breathing. When the hospital's "Code Pink" team could not resuscitate him, a pediatrician was summoned. By the time the pediatrician arrived, Baby Doe had sustained permanent brain damage, ultimately resulting in cerebral palsy. Greene & Eisen filed suit, claiming that the obstetrician and nurses overlooked fetal monitoring strips that showed fetal distress before the uterine rupture occurred, and that the hospital failed to call the pediatrician promptly. A confidential settlement was reached before trial.

Elizabeth M. Barnish, et al. v. Carolyn S. Neltner, M.D., et al.

Type of Case: Medical Malpractice

Verdict: $10,615.000.00

Plaintiffs' Counsel: Brian N. Eisen, Romney Cullers and Todd E. Gurney, Greene & Eisen Co., LPA., (216) 687-0900

Defendants' Counsel: John S. Wasung and David T. Henderson, Kritch Drutchas Wagner Valitutti & Sherbrook, Toledo, OH

Court: Franklin County, Case No. 06CVA-11-15448, Judge Sheward

Date Of Verdict: March 27, 2009

Insurance Company: Michigan Hospital Association

Damages: Incomplete tetraplegia. Following a 9-day trial, the jury returned a verdict of $10,615,000.00; $9,100,000.00 for Mrs. Barnish's damages, and $1,515,000.00 for her husband's loss of consortium claim.

Summary: In November 2005, Mrs. Barnish, a 53-year-old resident of Grove City, Ohio presented to Dr. Carolyn S. Neltner, M.D. of Central Ohio Neurological Surgeons, Inc., with complaints of pain in her right arm. Dr. Neltner diagnosed Mrs. Barnish with Radiculopathy and recommended an Anterior Cervical Diskectomy with Fusion ("ACDF") to remove the disc between the C5 and C6 vertebrae in Mrs. Barnish's cervical spine and replace it with a bone plug.

On December 1, 2005, while performing the ACDF procedure, Dr. Neltner tamped the bone plug in too hard or too far, striking Mrs. Barnish's spinal cord. In the recovery room following surgery, it was noted that Mrs. Barnish had no sensation in her lower body, and a stat MRI was performed. According to the neuroradiologist at the hospital, the results of the study indicated that the bone plug was causing compression of Mrs. Barnish's spinal cord. Instead of taking Mrs. Barnish immediately back to surgery to remove the offending bone plug, however, Dr. Neltner delayed for more than six hours, resulting in further injury to Mrs. Barnish.

The defense contended that: (a) Dr. Neltner did not tamp the bone plug directly into Mrs. Barnish's spinal cord; (b) the radiology studies did not show ongoing cord compression; and (c) the delay in taking Mrs. Barnish back to surgery to remove the bone plug did not cause any injury.

Plaintiffs' Experts: Morris M. Soraino, M.D., Rockford, IL, Neurosurgery; Jerome Barakos, M.D., San Francisco, CA, Neuroradiology; Walter Panis, M.D., Boston, MA, Neurology/Physical Medicine and Rehabilitation; Marianne Boeing, Cleveland, OH, VoCare Services - Life Care Planning; George Cyphers, Cleveland, OH, VoCare Services - Vocational Rehabilitation; Burke, Rosen & Associates, Cleveland, OH, Economics

Defendants' Experts: Terry Lichtor, M.D., Ph.D., Rush University Medical Center, Chicago, IL, Neurosurgery; Patrick W. McCormick, M.D., Neurosurgical Network, Inc., Toledo, OH, Neurosurgery; Gordon Sze, M.D., Yale University School of Medicine, Dept. of Diag. Radiology, Section of Neuroradiology, New Haven, CT, Neuroradiology;

Edward Nieshoff, Jr., M.D., Rehabilitation Institute of Michigan, Detroit, MI, Spinal Cord Injury/Rehabilitation

Pauline Medenis v. Priscilla Cinadar

Type of Case: Auto Accident

Settlement: $225,000

Plaintiff's Counsel: Robert P. Rutter, Rutter & Russin, (216) 642-1425

Defendant's Counsel: Kirk Roman

Court: Cuyahoga County, Case No. CV-07-632215, Judge Stuart Friedman

Date Of Settlement: November 2008

Insurance Company: Nationwide Mutual Fire Insurance Company

Damages: Right comminuted hip fracture and right wrist fracture

Summary: Plaintiff fell getting into passenger door of car when defendant inadvertently began to pull away before plaintiff had fully entered. Plaintiff broke her hip and wrist and subsequently developed incontinence problems due to a low back injury.

Plaintiff's Experts: Dr. Tim Sidor - Southwest Urology; Dr. Paul Saluan - Southwest Orthopaedics

Robert Reed v. Allstate Insurance Company

Type of Case: Direct action for insurance proceeds

Verdict: $135,696

Plaintiff's Counsel: Robert P. Rutter, Rutter & Russin, (216) 642-1425

Defendant's Counsel: Roger Williams

Court: Lorain County, Case No. 07 CV 151245

Date Of Verdict: October 2008

Insurance Company: Allstate Insurance Company

Damages: Insurance claim for value of stolen car

Summary: Robert Reed's car was stolen from his Avon Lake driveway overnight. A neighbor's car was also stolen that same night and several other neighbors had items stolen from their cars. The police suspected a group of juveniles who had been conducting similar raids in Avon and North Ridgeville.

Reed's car was recovered a few days later in Lorain, damaged beyond repair. He submitted a claim to Allstate for the $7,000 cost of the car. He was current on his car payments, the car had no mechanical problems, he had a steady job, he had a wife and four children, and he had no previous claim history. In short, there were no red flags about the claim.

Allstate sent the matter to SIU because its experts determined that the car had been moved with a key and Reed claimed to have all the keys. Allstate conducted an examination under oath and then denied the claim, accusing Reed of orchestrating the theft because he did not want to go through the trouble of selling his car for its fair market value.

Reed sued in Lorain County Common Pleas. Judge Mark Betleski overruled Allstate's motion to dismiss the bad faith and punitive damage claims. The jury awarded $18,000 in compensatory damages and $32,500 in punitive damages and attorney fees. Judge Betleski awarded PJI of $2,675 and attorney fees/expenses of $82,521, bringing the total damage award to $135,696. Allstate did not appeal, and satisfied the judgment.

Plaintiff's Experts: Mark Sargent - Motor Vehicle Analysis; Mark Ames - Locksmith . ■

Application for Membership

I hereby apply for membership in The Cleveland Academy of Trial Attorneys, pursuant to the invitation extended to me by the member of the Academy whose signature appears below. I understand that my application must be seconded by a member of the Academy and approved by the President. If admitted to the Academy, I agree to abide by its Constitution and By-Laws and *participate fully in the program of the Academy*. I certify that I possess the following qualifications for membership prescribed by the Constitution:

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2. ***Service rendered or a willingness to serve in promoting the best interests of the legal profession and the standards and techniques of trial practice.***
3. ***Excellent character and integrity of the highest order.***

In addition, I certify that no more than 25% of my practice and that of my firm's practice if I am not a sole practitioner, is devoted to personal injury litigation defense.

Name_____**Age:**_____

Firm Name:_____

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Home Address:_____**Phone No:**_____

Law School Attended and Date of Degree: _____

_____

Professional Honors or Articles Written: _____

_____

Date of Admission to Ohio Bar:_____**Date of Commenced Practice:**_____

Percentage of Cases Representing Claimants:_____

Names of Partners, Associates and/or Office Associates (State Which):_____

_____

Membership in Legal Associations (Bar, Fraternity, Etc.):_____

_____

Date:_____**Applicant:**_____

Invited:_____**Seconded By:**_____

President's Approval:_____**Date:**_____

Please return completed Application with $125.00 fee to: **CATA, c/o George E. Loucas, R.Ph., J.D.**
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