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Cover design by Joanna Eustache.

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The Elusive Principle Of Work-Life Balance

by Rhonda Baker Debevec

As a young lawyer, I would not have dared to utter the phrase "work-life balance." Accurately or not, I was convinced it would have been viewed as a weakness. Generally rejecting the notion that "work-life balance" was a desirable goal, I committed myself to becoming the best trial lawyer I could be and immersed myself in the law. Because I loved what I was doing, the long-hours seldom felt like "work" and my personal commitments often felt like unwanted distractions.

After becoming a parent, I felt differently and then strived to be both the best parent and trial lawyer possible. Notwithstanding the inherent challenges presented, I generally shied away from openly discussing any difficulties encountered with balancing these competing demands. Over the years, however, I increasingly met men and women who, not only shared their own struggles, but also advocated for different arrangements on when, and how, work was to be performed. Or, stated another way, they sought improved work-life balance.

So, what is "work-life balance"? Simply put, it is prioritizing one's competing professional and personal demands in a manner acceptable to that individual. Not surprisingly, what constitutes an optimal work-life balance varies a lot based upon individual. Although the phrase is frequently associated with mothers in the workforce, several studies establish that professionals increasingly prioritize flexibility over financial rewards regardless of gender and family status.

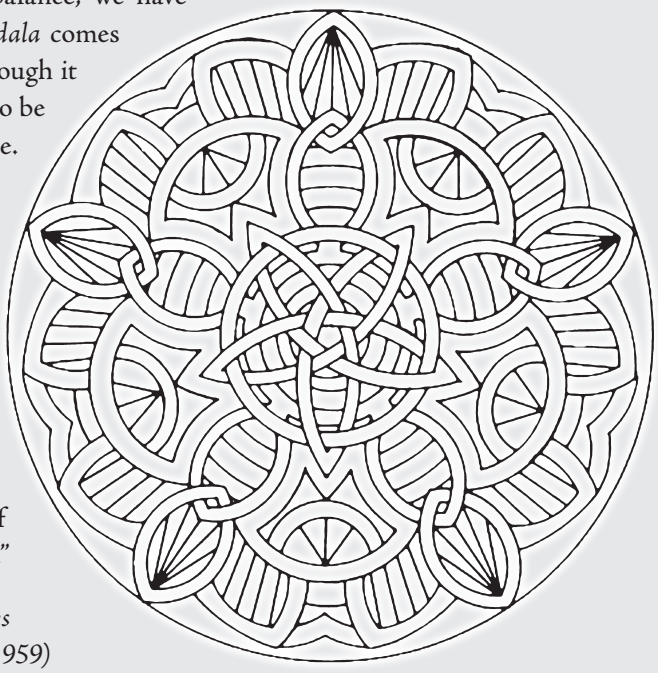
Although the term "balance" is usually viewed as a positive attribute, the phrase "work-life balance" can be polarizing. For some, it can even invoke images of would-be freeloaders taking advantage of their more industrious counter-parts. To be sure, there are inherent tensions. Employers may incorrectly assume that those seeking work-life balance demand the same rewards as employees who have invested and sacrificed more for their careers. While employees simultaneously may underestimate the negative impact their desired flexibility might have on their employer's goals or operating costs. Both employers and employees can view flexible work arrangements, even if only temporary, as a permanent barrier to future advancement.

In addition to these general tensions, the plaintiff-contingency-based practice's competitive environment presents another barrier to creative solutions. Moreover, lawyers appropriately feel emotionally committed to their clients' causes. New lawyers especially can feel compelled to devote oneself to work given their inexperience and the exacting demands of trial preparation. This veritable maelstrom of factors works against striking a reasonable balance between work and private pursuits.

Yet, our profession can work to improve these factors. Lawyers, and especially trial lawyers, disproportionately suffer from stress-related conditions. While stress cannot, nor should it, be entirely eliminated, efforts to reduce and manage it can be encouraged especially in new lawyers. As a practical matter, lawyers cannot truly be there for their clients if they do not, at some level, care for themselves and their loved ones. ■

Editor's Note:

In keeping with the President's message of work-life balance, we have chosen a mandala for the cover design. The word *mandala* comes from Sanskrit and roughly translated means *circle*. Although it is associated with many world religions, it has also come to be used in secular culture to signify the universe and balance. Carl Jung viewed mandalas as representing an attempt to bring order out of chaos. "Their basic motif," he wrote, "is the premonition of a centre of personality, a kind of central point within the psyche, to which everything is related, by which everything is arranged, and which is itself a source of energy. The energy of the central point is manifested in the almost irresistible compulsion and urge to *become what one is*.... Although the centre is represented by an innermost point, it is surrounded by a periphery containing everything that belongs to the self – the paired opposites that make up the total personality."



C.G. Jung, The Collected Works, Volume 9,i (The Archetypes of the Collective Unconscious), ¶634 (Bollingen Series XX, 1959) (italics in the original).

Judge Frank G. Forchione is a judge on the Stark County Court of Common Pleas General Division in Canton, Ohio, where he was first elected in 2008, and re-elected in 2014.

What Do Juries Really Think?

by Judge Frank G. Forchione

In the course of the last eight years on the bench, and hundreds of jury trials, my curiosity has been peaked as to what do jurors really think? Very early on, I started speaking to the jurors at the end of every trial. At first, I just wanted to thank them for their service and find out whether there was any way that we could make jury service more comfortable, but I quickly found out that jurors had their own concerns, and a lot of questions. More than anything else, jurors wanted to discuss the trial, the attorneys, and the court system as a whole. As a result of these conversations, I decided to let lawyers know: what do jurors really think?

1. Lawyers Talk Too Much

Jurors want to see things. They look forward to observing witnesses testifying on the stand; they are anxious to examine all the exhibits. They express annoyance when lawyers ramble on and on. A lawyer that can make arguments brief and to the point is going to score a lot of points. Over and over, I've heard jurors express their frustration that the "lawyers seemed to talk down to us." It's important not to be condescending. The use of big words not only frightens them, but confuses them and makes them feel inferior.

Another major question jurors stress is: "Why do they make the same point over and over and over? Do they think we're stupid?" Give jurors credit; they actually are listening. They certainly don't want to be lectured, as they get enough of lecturing in their routine lives. Treat jurors like you would a family member. As one juror pointed out about a plaintiff's lawyer: "He had me from the beginning; he spoke to me like a friend. I trusted him and would have felt confident going to him to discuss any of my personal problems."

2. Jurors Hate Side Bars

There is nothing more aggravating than someone telling secrets to someone else in one's presence. Simply put, jurors hate sidebars like Browns fans hate the Steelers. After all the talking, arguing and bickering in the courtroom, it seems odd that jurors would get so upset about the whispering, but jurors feel as if attorneys and Judge are trying to keep something from them – and they're usually right. One juror groaned, "Sidebars are nothing but lawyers trying to find a way not to tell us the truth." Many victim advocates have proposed a "Bill of Rights" to bar these meetings. Unfortunately jurors do not understand the importance of and need for these discussions.

Judges themselves hate sidebars because it slows down the trial process. Sometimes the judges dislike getting up time and time again at the bench. Jurors pick up on the Judge's frustrations very easily. Jurors also feel sympathy for the court reporter as she tries to translate the attorneys talking over each other during the sidebar. One juror smirked, "I don't know why they thought they were keeping anything from us. We're so close to them, and they talked so loud, we heard just about everything."

3. Eye Contact Is Important

My father always taught me that when you greet someone, shake their hand firmly and look them straight in the eye. The same holds true with jurors – eye contact is important. During opening and closing arguments, it is important to make eye contact with jurors. It's easier to influence them when you have their attention. On the other hand, you have to be careful not to stare. You don't want to intimidate them or make any one feel singled out. Several jurors have expressed discomfort when lawyers "turn their heads and glare at us every time they ask a question of a witness." When that happens, jurors feel that they are "being played by the lawyer." *Too much* attention can actually be a negative.

Jurors also feel it's important that the lawyers make eye contact with opposing counsel when they are discussing matters, and especially with the judge when they are making a point. Eye contact is equally important with witnesses. Witnesses that take the stand and turn away or gaze up in the air appear to be dodging the truth. Jurors find witnesses more credible when their attention is directed towards the attorney while they respond to their questions. Witnesses are rewarded when they focus on the jury during the critical parts of their testimony. Jurors frown on witnesses who refuse to make eye contact with the opposing lawyer during cross examination, but who, instead, often glance over at their own lawyer, desperate for a life preserver. As one juror observed, "When you're looking for your own lawyer to help in cross examination, you're in real trouble."

4. Professionalism Counts

Most studies conclude that jurors tend to align themselves with the attorneys they like the best. When an attorney is disrespectful to opposing counsel, or the judge, they actually are hurting their own client's case. Think about it – no one enjoys watching rudeness or constant conflict for several hours at a time. Therefore, don't take witnesses' answers or judges' decisions personally. When you address the court saying, "I'll be brief", don't go on a longwinded diatribe on opposing counsel's case.

In addition, it is important to develop a poker face. Expressions of dismay or frustration, such as throwing hands up in the air or pounding fists on the table appear childish in the jurors' eyes. If things aren't going your way, show you can take a punch. Jurors pay close attention to how the lawyers treat witnesses: don't interrupt or cut off witnesses when they are legitimately trying to answer a question. One juror stated: "I get very frustrated when the attorneys don't let the witnesses say what they want." Another juror asked, "Why do they demand "'yes' or 'no' answers" when it's obvious that it couldn't be answered simply with a yes or no?"

5. Jurors Find It Hard To Believe Expert Witnesses

Although expert witnesses are one of the most important parts of every case, jurors candidly admit, "We have a hard time believing anything an expert witness says." For the most part, jurors feel that experts are overpaid "hired guns" who will testify to anything as long as they're getting paid. Therefore, if you are going to bring in an expert witness, find one who will be viewed as objective, who charges reasonable fees, and speaks in terms that they jury will understand. As one juror said after hearing the fee the expert billed, "He should be charged with robbery!" A consistent comment is: "They are nothing but professional witnesses." Another juror stated, laughing, "If I live life again, I want to be an expert witness."

The most effective witnesses are those who can actually step off the witness stand and explain their opinions in language that jurors can understand. They must be able to speak the English language clearly, and in succinct sentences. Jurors hate complicated medical jargon like "myocardial infarction", when "heart attack" is the term that everyone knows. Most jurors will follow expert witnesses who are good teachers, who simplify complex information in a manner a jury can decipher. Remember, if you have trouble comprehending your own witness, the jurors are probably going to feel the same way. Trust your instincts.

6. Admit The Obvious

Jurors get frustrated when lawyers and witnesses fail to concede even the most obvious point at the trial. The facts are being presented to the jury because there are two sides to the story. For the most part, every case has some level of weakness. Instead of acknowledging the problem, witnesses get on the stand, panic, and stumble over their words, trying to defend a hopeless point. Jurors have more confidence in those who will admit a flaw in a polite and prompt manner. Conceding weaknesses in a case also displays integrity with the jury. One juror complained, "How can I trust his testimony when he won't even admit the obvious?"

7. Use Technology, But Make Sure It Works

In this day and age, jurors expect technology to be utilized during the trial. It's used in schools, in the workplace, and even at home. The attorney who doesn't use technology is placed at a disadvantage. The use of technology in a courtroom is no longer feared, but welcomed. The public is used to seeing computers on judges' benches and counsel tables during fictionalized television trials and if used properly, technology can actually be a visual

storyteller. As one juror questioned, "Technology is always used on *CSI* and *Law and Order*; why aren't they using it in this case?" Using computers, CDs and DVDs can help in presenting evidence effectively and clearly; it makes it easier for the jury to follow along, which in turn allows you to be a better lawyer.

However, if you are going to use technology, make sure it works. It may be best to have an experienced trial technician nearby. Get to know the bailiff and court staff; they can be a big help in walking you through the technology specific to each courthouse. Jurors and judges get frustrated when technology doesn't work. Any delays will cause both your client and yourself unnecessary distress. As one juror noted, "Why didn't they try it out on their own beforehand instead of wasting our time watching them try to get it to work?"

8. Preparation And Organization Make an Impact

Jurors love lawyers who are prepared and organized. It builds a feeling of confidence that if the lawyer knows what they're doing, they must be right. Jurors are impressed when the attorney is prepared enough to have the right paper in their hands or files at the time of questioning. If an attorney appears disorganized, the impression is that they did not know what they were doing, and perhaps their case isn't that good. Mark all your exhibits prior to trial. You can save everyone a lot of time by avoiding the unnecessary exercise of handing every exhibit to the court reporter to place a sticker on it and mark it.

9. Jurors Struggle With Jury Instructions

More attorneys focus so much on the presentation of evidence at trial that they forget how crucial jury instructions become. The majority of jurors have no prior jury experience. Legal definitions seem foreign to them. For example, jurors are unfamiliar with the concepts of "burden of proof", "standard of care", "negligence", and are often overwhelmed the first time that they hear these definitions at the close of the trial. Jurors commented, "Why don't they explain these terms to us at the beginning? Then maybe we could understand."

A good idea may be to define these terms immediately by PowerPoint during voir dire or in the opening statement. Trial court judges frequently grant permission to do so. Requesting that the judge read the jury instructions prior to closing arguments would also give counsel a second opportunity to go over the terms to the jury. Some judges allow written jury instructions to be taken back to the jury at the end of the trial. It may be beneficial to make this request so that jurors can have the instructions to view while deliberating. One juror pointed out that, "It's hard for us to decide the issues when it's never really explained to us what we're deciding."

10. Jurors Notice Small Things

Jurors observe things that most of us don't see at trial. They make judgments on the plaintiffs by the amount of jewelry they wear, whether they walk up three flights of stairs or take the elevator, and how they interact with their attorney, as well as courthouse staff. They pay attention to the lawyers – how they communicate with their clients, opposing lawyers and judges. One juror disclosed, "I had no faith in the attorney when I walked by the counsel table and saw on his laptop that he had Facebook up." Another juror admitted that she was influenced by the respect that an attorney showed to the jury. "Every time we walked in or out of the courtroom, he stood up while opposing counsel sat at his chair looking at emails."

Hopefully these thoughts can assist you in your practice at trial. It's always helpful to know what a jury really thinks! ■

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Don't Let Them Put a "Blanket" Over Your Interview of a Party-Opponent's Current and Former Employees:

OSC Board of Professional Conduct Advisory Opinion 2016-5.

by Susan E. Petersen

It was a significant death case. We believed the physician altered the office policy manual. We learned from depositions the defendant's office manager would know of changes in the manual. Defense counsel told us she was no longer employed and her whereabouts unknown (i.e., "sorry we can't help you.")

With that, we tracked her down. During a phone conversation, we took her through our ethics checklist on communications with former employees. We explained we represented a party with interests adverse to her former employer. She consented to an interview. We asked her not to divulge any communications she may have had with defense counsel. She said she had not spoken to anyone and was not represented. She went on to tell us the defendant was a very dishonest person and gave numerous examples. She didn't know if he altered the policy manual, but she would know if she looked at it. She agreed to a meeting.

About an hour into the drive to meet this former employee, my phone rang. It was my office. "Your interview called. You need to listen to her voicemail."

Hi, this is _____. I had talked to the attorneys for Dr. _____ and I was advised I was not allowed to see you. Please don't make a trip over. I don't know if she got in touch with you. Let me know. Okay. Sorry. Thank you.

We then received a faxed letter from the defense attorney advising that she represented ALL former employees and we were not to make any further contact.

If you encounter a blanket, "I represent all" claim from opposing counsel, don't be halted in your search for the truth. A defense attorney's declaration of blanket representation does not, by itself, establish legal representation of all former/current employees. In fact, such a claim is fraught with potential and inherent conflicts of interest for that lawyer. Rule 4.1(a)(1) prohibits a lawyer from making a false statement of fact or law to a third person. Likewise, Rule 3.4(a) prohibits a lawyer from unlawfully obstructing another party's access to evidence.

In fact, you may contact an unrepresented former employee of a party-opponent without ever obtaining consent from that party irrespective of the role or title formerly held by the ex-employee and irrespective of any blanket representation asserted by the defense. Who says so? The Ohio Supreme Court's Board of Professional Conduct says so in its new Advisory Opinion 2016-5.

Ohio Supreme Court Advisory Opinions provide advice for attorneys and judges as to the application of the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, the Supreme Court Rules for the Government of the Bar, and the Supreme Court Rules for the Government of the Judiciary to their everyday practices. The opinions also provide advice for judges and judicial employees as to the current Ohio Ethics Law.

Advisory Opinion 2016-5

On August 5, 2016, the Board released Opinion 2016-5 withdrawing Opinion 2005-3[1], expanding its prior position on ethical communications with current and former employees. The new Opinion details what constitutes ethical communications with both former and current employees. It makes clear that when representing an interest adverse to a corporation, a lawyer may communicate with certain current and any former employees of the corporation without the consent of the corporation's lawyers.

The Opinion first cites to Ohio Rule of Professional Conduct 4.2, "Communication with Person Represented by Counsel," which generally prohibits communication about the subject of a representation between a lawyer and a party known to be represented by another lawyer in a matter, unless the lawyer has prior consent from opposing counsel to the communication or is authorized by law to do so. The purpose of Rule 4.2 is enunciated in paragraph one of the comment section:

> [1] This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

As Rule 4.2 does not specifically address the propriety of ex parte contact between a lawyer and a former employee of a party-opponent, Opinion 2016-5, along with a trend in national case law, will help us all to stay within ethical boundaries.

Claims Of Blanket Representation Of All Former Employees Are Empirically Unethical

As to former unrepresented employees, Opinion 2016-5 states —

> A lawyer may communicate on the subject matter of the representation with former employees of the corporation, without notification or consent of the corporation's lawyer, as long as the former employee is not represented by counsel. A lawyer representing an interest adverse to a corporation may communicate with certain employees of the corporation without the consent of a corporation's lawyer, even when a corporate lawyer asserts blanket representation of the corporation and all of its current and former employees.

As lawyers on both sides know, the testimony of a reliable ex-employee is a treasure-trove of truthful and candid evidence in a case. A claim of blanket representation as to potential fact witnesses is an obvious attempt to obstruct opposing counsel's access to witnesses and evidence.[2] Former employees often know the inner workings of the opposing side and are willing to "spill the beans" without fear of repercussions. Access to these individuals is key in a lawyer's search for the truth.

Opinion 2016-5 makes very clear that the ethical rules do not support lawyers who attempt to block access to fact witnesses by claiming to represent all corporate employees without having an individualized and proper attorney-client relationship with each. It explains–

> A corporate lawyer's blanket assertion of representation of the corporation and all of its current and former employees is unsupported by the Rules of Professional Conduct. Such a declaration by a corporation's lawyer does not, by itself, establish legal representation of all employees and is fraught with potential and inherent conflicts of interest for the corporate lawyer.
>
> A lawyer representing a corporation may not prohibit contact with all current and former employees. A similar view was expressed by the ABA: "[A] lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization." ABA, Formal Op. 95-396 (1995).

The Board's conclusion flows logically from the very purpose of the Rule - protect the attorney-client relationship and promote access to factual information.[3]

No Category Of Unrepresented Former Employees Is Off-Limits

Opinion 2015-6 tells us that a lawyer may communicate with ANY former and unrepresented corporate employees, without notification or consent of that corporation's lawyers. This edict specifically includes those former employees who worked in management and those whose prior acts or omissions may be imputed to the corporation. The Board concluded that these contacts are permissible under Rule 4.2, reiterating its position in Adv. Op. 1996-1.

The Board explained that "[o]nce a management employee has left the corporation, he or she no longer supervises, directs, or consults with the corporation's lawyer and cannot obligate the organization. Former employees cannot bind the organization and their statements cannot be introduced

as admissions of the organization.[4] Geoffrey Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, Sec. 38.7 (3d ed. Supp. 2011). Similarly, under the law of agency, the former management employee is no longer acting on behalf of the organization. See Mich. Op. RI-360 (2013)."

In analyzing contact with unrepresented former employees whose prior acts or omissions may be imputed, the Board first looked to the distinction between current and former employees, referred to as "constituents" in comment [7] to Prof. Cond. R. 4.2, reasoning –

> The comment directs that, in the "case of represented organization, [the] rule prohibits communications with a constituent of the organization . . . whose act or omission may be imputed to the organization . . . ." (emphasis added.) This sentence is immediately followed by the statement that "[c]onsent of the organization's lawyer is not required for communication with a former constituent," thus clarifying that a lawyer's communication is permitted with former employees, even those whose prior act or omissions may eventually be imputed to the corporation. *Id*. (emphasis added.)

In concluding that contact with all former unrepresented employees is permissible, it further relied upon numerous federal court holdings and American Bar Association's Formal Op. 1991-359 (a lawyer may communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.)[5] Back in 1991, the ABA concluded that Model Rule 4.2 did not prohibit ex parte contacts with any former corporate employee, even if they were in one of the categories under which communication was prohibited while they were employed. It also relied upon federal court holdings in accord with the view that contact with all former unrepresented employees is permissible.

Clearly, Opinion 2016-5 is part of a national trend of embracing the position that Rule 4.2 does not prohibit contact with former employees of an organization.[6] One court which held that Rule 4.2 does not prohibit contact with former employees of a corporation,[7] eloquently explained:

> Indeed, exclusion of former employees furthers both the specific and the more general purposes of rule 4.2. It must be remembered that rule 4.2 is but one part of a comprehensive system of laws and regulations designed to hold counsel to the highest professional standards in our adversary system. Within that system, pretrial (including precomplaint) discovery plays an essential role. It is the phase in which material facts are discovered, issues are narrowed as theories of the case are tested, rejected, or refined, and the parties and their attorneys have the opportunity to assess the strengths and weaknesses of their case with an eye toward both trial and the negotiation of settlement. Courts have long recognized that informal interviews are an exceptionally efficient means for the meaningful gathering of facts. They are generally more conducive to full disclosure and far less costly than the more structured processes of formal discovery, or even informal investigation with opposing counsel present. See *Niesig v. Team I*, 76 N.Y.2d 363, 372, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990) (`Costly formal depositions that may deter litigants with limited resources, or even somewhat less formal and costly interviews attended by adversary counsel, are no substitute for such off-the-record private efforts to learn and assemble, rather than perpetuate, information')…
>
> Former employees may be a useful source of meaningful information, because they may feel less directly tied to the employer's interests and therefore more willing to discuss informally what they know. At the same time, these employees may still have economic and other ties to the organization that would make them reluctant to speak freely in the presence of the organization's attorneys, even in an informal setting. In effect, immunizing former employees from all ex parte interviews would permit the organization to monitor the flow of nonprivileged information to a potential adversary at the expense of uncovering material facts. Fairness in our established system of adversary representation would be the casualty.

The Ethical Former Employee Interview

Before making contact with former employees, be sure that you are intimately familiar with the applicable ethical rules:

- Rule 1.6 (Confidentiality of Information)[8]
- Rule 4.2 (Communication Between Lawyer and Opposing Parties)[9]
- Rule 4.3 (Dealing with Unrepresented Person)[10]
- Rule 4.4 (Respect for Rights of Third Parties)[11]

When you do make initial contact, disclose your identity. Critically, you must fully explain that you represent a client adverse to the former employer. You must also immediately inform the former employee not to divulge any

privileged communications that he or she may have had with corporate or other retained counsel. You must then ensure not to solicit information from the former employee that you know or reasonably know to be protected by the attorney-client privilege.

Per Rule 4.3, do not, under any circumstances, give legal advice to the unrepresented employee, other than to consult with independent counsel. As articulated in Comment 3 to Rule 4.2, "[a] lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule. Even if the represented former employee initiated or consented to the communication, you must terminate the communication."[12]

Use "Extreme Caution" in Contacting Current Employees

Opinion 2016-5 also addresses what constitutes ethical communications with an opposing corporation's current employees, and more critically, what does not. It delineates three categories of current employees that an adverse lawyer may not contact without permission of corporate counsel, citing to Comment 7[13] to Rule 4.2.

Do not contact those current employees who:

1. supervise, direct, or regularly consult with the corporation's lawyer concerning the subject of the representation;
2. have the authority to obligate the corporation with respect to the matter;
3. employees whose "act[s] or omission[s] in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

All other current employees who do not fall into the three categorical exceptions may be contacted without consent of the organization's lawyer. As with former employees, corporate counsel's blanket assertion of representation of all current corporate employees is not supported by the Rules of Professional Conduct.

While not specifically articulated by Opinion 2016-5, careful thought and analysis should be made as to whether a current employee falls within the three "no-contact" categories:

1. **Those who supervise, direct, or regularly consult with the corporation's lawyer concerning the subject of the representation.**

This first category applies to those employees who are typically upper-level management types to whom the corporation's lawyers look for decisions with respect to the subject of representation. For example, this would include a senior vice president who is directing outside counsel about the discovery process. Important to note however, this category is specific to the "subject of the representation." In large corporations, some managers may direct or control counsel for some matters, but not others. The vice president of human resources may direct the corporation's lawyer on an employment discrimination matter and therefore, be covered by Rule 4.2. However, if the human resource manager was a witness to the alleged act of discrimination, but has no involvement in the direction or control of the organization's lawyer handling the defense of the discrimination claim, the employee would not be protected. The mere fact that a current employee holds a management position does not automatically trigger protections.

This category also includes those who "regularly consult" with the corporation's lawyer. For example, a safety compliance officer employed by a company who works closely with and provides expertise to the lawyer defending the company against a negligence claim would be covered by the rule. Conversely, an employee who is simply interviewed or questioned by an organization's lawyer about a matter does not "regularly consult" with the organization's lawyer.

2. **Those who have the authority to obligate the corporation with respect to the matter.**

Typically, this category would include members of an organization's upper-level management. An example would be an employee with the authority to make a settlement offer on behalf of the organization. The status of being a "supervisor" does not automatically mean that the individual is protected by this part of the rule. For example, a supervisor of a department employee who is alleged to have sexually harassed another does not fall within this category unless he or she has the authority to settle or compromise the claim on behalf of the organization.

3. **Those whose act[s] or omission[s] in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.**

This category includes those whose actions or omissions are part of the matter in question and likely would be a named party but for the vicarious liability of their corporate employer. Typical examples of employees in this category would include the nurse who failed to administer medications which allegedly caused significant injury or death to a patient, a corporate delivery driver who is alleged to have run a red light while driving in the scope and course of his employment and injured another driver, or the supervisor who is accused of sexually assaulting another employee. Importantly, this category

(cont. on p. 12)

Checklist for Communication with *Former and Select Current Corporate* Employees

Case Name: _____

Name of Interviewee: _____

Corporate Position/Title: _____

Date of interview: _____

Review this form before contacting the employee, enter a "check" where indicated for each condition item, sign the form only after completing the checks, and keep in a witness folder.

1. The attorney must disclose his or her identity. _____
2. The attorney must fully explain that he or she represents a client adverse to the corporation. _____
3. The attorney must immediately inform the former/current employee not to divulge any privileged communications that the former/current employee may have had with corporate or other retained counsel. _____
4. The attorney must endeavor not to solicit information from former/current employees that the lawyer knows or reasonably knows to be protected by the attorney-client privilege. _____
5. The attorney may not give advice to the unrepresented employee, other than advice to seek separate counsel in the matter. _____
6. If the interviewee states that he or she is represented by counsel in the matter, immediately terminate the communication. _____

Attorney's Signature: _____

CURRENT EMPLOYEES:

* Communications with *current* employees who do not fit in one of the three articulated categories in Rule 4.2, Comment 7, are permitted *ex parte* if the guidelines set forth herein are met.

**** Ex parte communication is prohibited with current employees who 1) supervise, direct, or regularly consult with the corporation's lawyer concerning the subject of the representation; 2) have the authority to obligate the corporation with respect to the matter; and 3) employees whose "act[s] or omission[s] in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Extreme caution should be observed by adverse lawyers when interviewing current employees who do not satisfy the categories set forth in Prof.Cond.R. 4.2, cmt. [7]. A lawyer representing an interest adverse to a corporation may communicate with certain employees of the corporation without the consent of a corporation's lawyer, even when a corporate lawyer asserts blanket representation of the corporation and all of its current and former employees. Ohio Supreme Court Board of Professional Conduct Advisory Opinion 2016-5.***

FORMER EMPLOYEES:

* Communications with *former* employees are permitted *ex parte* if the guidelines set forth herein are met.

**** A lawyer may communicate on the subject matter of the representation with former employees of the corporation, without notification or consent of the corporation's lawyer, as long as the former employee is not represented by counsel. A lawyer representing an interest adverse to a corporation may communicate with certain employees of the corporation without the consent of a corporation's lawyer, even when a corporate lawyer asserts blanket representation of the corporation and all of its current and former employees. Ohio Supreme Court Board of Professional Conduct Advisory Opinion 2016-5.***

does not include current employees who are merely fact witnesses to the act or omission.

Opinion 2016-5 does warn that "[e]xtreme caution should be observed by adverse lawyers when interviewing current employees, even those employees who do not satisfy the categories set forth in Prof. Cond. R. 4.2, cmt. [7]." The danger comes via the unknown. You may inadvertently violate Rule 4.2 simply because you don't know whether the employee interviewee regularly consults with the corporation's lawyer or has the authority to bind the organization –

> In close cases, it may be appropriate to notify the corporation's lawyer before making contact with current employees. If a legitimate basis for denying contact is given by the corporate lawyer, the adverse lawyer may need to conduct further investigation through other means or engage in limited discovery before initial contact with a current employee is made.

Supra. Finally, know that when contacting someone in an "exempt" category, you must follow the same ethical mandates as you would in communicating with an unrepresented former employee. State your role in the matter, avoid inquiry into privileged matters, and do not give the unrepresented constituent legal advice. If they advise that they are represented, terminate the interview immediately. The mere fact, however, that a current or former constituent may possess privileged information does not in itself prohibit a lawyer adverse to the organization from contacting the employee.

All in all, the findings in Opinion 2016-5 lend further support to the importance of employee interviews. Some of the best evidence and testimony comes from former employees of an opposing corporation. The more difficult the opposition makes it for you, the more likely it is that the former employee is someone you should interview. Find them. Talk to them. Follow every single ethical rule articulated in Opinion 2016-5, but do your client a favor and make the effort to secure the interview. In the end, the communication will likely be a game changer. We've had it happen over and over again. ■

End Notes

1. Ohio Supreme Court Op. 2005-3 (2005) stated that representation of a corporation and all corporate employees would be "fraught with impermissible conflicts of interest." The Ohio board took the language of the comment to ABA Rule 4.2 as its standard. "Accordingly, the lawyer may not communicate ex parte with any employee who supervises, directs, or regularly consults with the corporation's lawyer concerning the matter, or has authority to obligate the corporation with respect to the matter, or whose act or omission in connection with the matter may be imputed to the corporation for purposes of civil or criminal liability."
2. Ohio Supreme Court Op. 2016-5 is in accord with the position articulated in the Restatement (Third) of the Law Governing Lawyers, *Section 100*, which states that "[c]ontact with a former employee or agent is ordinarily permitted, even if the person had formerly been within the category of those with whom contact is prohibited. Denial of access to such a person would impede an adversary's search for relevant facts without facilitating the employer's relationship with its counsel."
3. *See also* Professors Rotunda and Dzienkowski in *The Lawyer's Deskbook on Professional Responsibility* (ABA 2006-2007), § 4.2-6(c): "Any other reading of Rule 4.2 is unnatural and strained. It is not the purpose of Rule 4.2 to prevent the disclosure of prejudicial testimony but to protect the client-lawyer relationship. The attorney for the employer does not have a client-lawyer relationship with a former employee. Moreover, to so interpret the Rule would make it more expensive for the lawyer to obtain information about her case, because she would have to proceed by way of deposition rather than interview if the opposing lawyer refused consent. Furthermore, Rule 4.2 protects a person from being damaged by a binding disclosure made without that person's lawyer being present. But former employees are not represented by the employer's lawyer."
4. "Statements made by a 'party's agent or employee on a matter within the scope of that relationship and while it existed' are non-hearsay statements admissible against the party. Consequently, only communications with current employees of a corporation are prohibited when their admissions would constitute admissions of the corporation under Fed.R.Evid. 801(d)(2)(D)." Ohio Supreme Court Op. 2016-5.
5. In *United States v. Beiersdorf-Jobst, Inc.*, 980 F. Supp. 257, 262 (N.D. Ohio 1997) (citing with approval Adv. Op. 1996-1), the court held that contact with former employees was permitted under former DR 7-104(A)(1), based on the premise that the "unimpeded flow of information between adversaries . . . encourage[s] the early detection and elimination of both undisputed and meritless claims." The court made no distinction between different categories of former employees, e.g. management employees, employees with the authority to bind the corporation, or whose prior acts or omissions may be imputed, and suggested no exceptions to its general holding. *See also Smith v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883, 890 (W.D. Mich. 2004) (ex parte contact with former employees is not subject to Rule 4.2).
6. *Clark v. Beverly Health & Rehab. Servs. Inc.*, 440 Mass. 270, 797 N.E.2d 905 (2003); *Continental Ins. Co. v. Superior Ct.,* 32 Cal. App. 4th 94, 37 Cal. Rptr. 843 (1995); *Niesig v. Team I*, 76 N.Y.2d. 363,559 N.Y.S.2d. 493 (1990); *H.B.A. Mgmt. Inc. v. Estate of Schwartz*, 693 So. 2d 541 (Fla. 1997); *Smith v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883 (W.D. Mich. 2004); *Terra Int'l. v. Mississippi Chem.*,913 F. Supp. 1306 (N.D. Iowa 1996); *Orlowski v. Dominick's Finer Foods Inc.*, 937 F. Supp. 723 (N.D. Ill.996); *Humco Inc. v. Noble*, 31 S.W.3d 916 (Ky. 2000); *Wright v. Group Health Hosp.*, 691 P.2d 564(Wash. 1985); *Smith v. Kansas City S. Ry. Co.*, 87 S.W.3d 266 (Mo. App. 2002).
7. *Clark v. Beverly Health & Rehab. Servs. Inc.*, 440 Mass. 270, 277, 797 N.E.2d 905 (2003)
8. RULE 1.6: CONFIDENTIALITY OF INFORMATION (c) A lawyer shall make *reasonable* efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to information related to the representation of a client.
9. RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

10. RULE 4.3: DEALING WITH UNREPRESENTED PERSON In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.
11. RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS
    (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, harass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
12. Opinion 2016-5, citing to *Davis v. Creditors Interchange Receivable Mgmt., LLC*, 585 F. Supp. 2d 968 (N.D. Ohio 2008).
13. Comment 7 to Rule 4.2 states: "[7] In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability... If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4."

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Obtaining Audit Trails in Medical Claims

By Vicki L. DeSantis and Meghan P. Connolly

In the age of electronic medical records, audit trails have become a hot topic in medical malpractice litigation. But even considering the obvious relevance of audit trails, plaintiffs' lawyers often report difficulty in discovering them from defendants. When audit trails are produced, they can be difficult to analyze. By coming to understand audit trails more fully, we can successfully obtain them from defendants in usable form, and effectively use them as evidence.

What is an Audit Trail?

In pursuit of audit trails, it is very important to remember that they are part of the patient's "designated record set" as defined by HIPAA. The term "record" means any item, collection, or grouping of information that includes PHI (Protected Health Information) and is maintained, collected, used, or disseminated by or for a covered entity. 45 CFR § 164.501. Just as a patient's medical bills are part of their medical record, so too are audit trails.

Audit trails contain health information specific to the individual patient's condition. Patients have a right to obtain their medical records, including audit trails, pursuant to Ohio law. See O.R.C. § 3701.74(A)(8) (Providing that "Medical record" means "data in any form that pertains to a patient's medical history, diagnosis, prognosis, or medical condition and that is generated and maintained by a health care provider in the process of the patient's health care treatment.").

An audit trail is an electronic log of information automatically generated by electronic medical record software that records information when a patient record is accessed in the facility's computer network. Pursuant to 21 CFR Part 11, (11.10e), an audit trail is an accounting of all accesses to, and actions in, a patient's electronic medical record. It is secure, computer-generated and time-stamped to independently record date and time of user entries and actions that create, modify, or delete electronic records. Audit trails include access logs and system logs. The audit trail captures data such as the date, patient's identity, the identity of the individual accessing the electronic medical record and where the access occurred. In addition, you will want the time of entry and exit to the record, as well as the portion of the record accessed, and any modifications or deletions made thereto.

Healthcare providers including hospitals and nursing homes that utilize electronic medical records are *required* to maintain an audit trail in order to comply with HIPAA. Specifically, 45 CFR § 164.312(b) mandates that providers "[i] mplement hardware, software, and/or procedural mechanisms that record and examine activity in information systems that contain or use electronic protected health information." And 45 CFR § 164.308(a)(1)(ii)(D) mandates that providers must "[i]mplement procedures to regularly review records of information system activity, such as audit logs, access reports, and security incident tracking reports." Properly maintained and monitored audit trails are required to satisfy these components of HIPAA. HIPAA also

requires providers to retain audit trails for as long as medical records must be retained under the Act, which is *at least* six years.[1]

Providers are also required to maintain an audit trail pursuant to the Health Information Technology for Economic and Clinical Health Act (HITECH). HITECH requires healthcare providers to maintain "[u]se of secure, computer-generated, time-stamped audit trails to independently record the date and time of operator entries and actions that create, modify, or delete electronic records." 21 CFR § 11.10(e). HITECH further requires that: "[r]ecord changes shall not obscure previously recorded information." *Id*. Therefore, if a deletion in a record is made, the deleted information should remain legible.

The audit trail is described in HITECH as a procedure and control that is "designed to ensure the authenticity, integrity, and, when appropriate, the confidentiality of electronic records, and to ensure that the signer cannot readily repudiate the signed record as not genuine." *Id*. Clearly, the audit trail requirement is intended to hold medical care providers accountable for the manner in which they access and make additions and changes to a medical record.

If the response to a request for an audit trail is that no such thing exists, the response is an admitted breach of HIPAA and HITECH that can and perhaps should be reported to the Attorney General and the Centers for Medicare and Medicaid Services.

It is also important to recognize that for one hospital admission, there may be multiple audit trails for different areas of the hospital, such as the emergency room, radiology, ICU, etc., when those departments are not running on the same electronic medical record software. The importance is twofold. Not only is this important to know so that the pertinent audit trail(s) can be requested, but it may be relevant to the care that your client did or did not receive. When various departments of a hospital system are not seamlessly sharing electronic patient information, patient care can suffer as a result. Hospitals won't tell you if there are multiple audit logs so you must ask for them, otherwise you may only be getting a piece of the puzzle.

Why is the Audit Trail Important?

The audit trail includes information that is relevant to the standard of care. Because audit trails show from what computer station the record was accessed (doctor's laptop, nurse's station, patient's room, computer on wheels (COW)), they are particularly useful in cases where the timing of care provided is crucial to the standard of care. For example, the audit trail can prove that medical information was reviewed at a certain time outside of the patient's room, and yet no care providers entered the patient's room to respond for a certain amount of time. Further, by physically placing a provider at a work station outside of the patient's room, the audit trail can disprove the provider's later testimony that they were providing patient care at a critical time. By showing that a doctor never accessed a patient's medical record from their laptop while on call, the audit trail prevents the doctor from later testifying that she did check the patient's record from home and that it showed no cause for concern.

The audit trail can also expose a "cover up"— it can show improper alterations or deletions in the record after an event. Where entries in the legal version of an electronic medical record appear to be timely made, the audit trail will expose late entries and deletions. For example, the audit trail will show if a provider goes back in time to add to a patient's records after an adverse event or deletes information that is potentially incriminating. By logging information about when a provider reviewed patient records, and from where, the audit trail also allows effective cross examination on why the record was reviewed or changed at specific times after an event when patient care had long since concluded.

Having the audit trail, in hand, helps to hold witnesses in the case accountable to the truth during deposition. If a doctor or nurse testifying knows you have the audit trail, they know they will be exposed if their testimony does not comport with the audit trail. If witnesses are deposed before you obtain the audit trail, you can use the audit trail to impeach the witness.

Audit trails are also important as a matter of principle. The American Medical Association Code of Ethics states that "the utmost effort and care must be taken to protect the confidentiality of all medical records, including computerized medical records". See AMA Code of Ethics Opinion 5.07 – Confidentiality: Computers. As part of that effort, AMA guidelines require logging of access to patient records, and review of the logs, for confidentiality and security purposes. Thus, audit trails are important because the patient has a right to know who is viewing their protected health information, and the purpose of the viewing. Additionally, patients have a right to know if changes have been made to their records, or if portions of their records have been deleted. The best way to find this information is through discovery of the audit trail.

Obtaining the Audit Trail in formal discovery

Because audit trails are part of the medical record, a patient should be entitled to discover the audit trail before filing suit. However, such requests are

often unsuccessful before litigation. Therefore, the first step to obtaining the audit trail is usually through written discovery. Sample Interrogatory language and Requests for Production appear below. Each of these requests is important to discover audit trails in a usable format.

ROG: Identify the software charting program utilized by [Hospital] in [Time Period] and the person most knowledgeable of the same.

RPD: Produce complete and accurate color copies of all computer access log files or audit trails utilized by [Hospital], as well as, all disclosure logs that relate to any computer records concerning [Patient], including any records that identify, evidence, or summarize any person(s) who accessed [Patient]'s records in [Time Period].

RPD: Produce [Hospital]'s policies and procedures regarding maintenance and review of audit trails and access logs, and all [Hospital]'s policies and procedures regarding access to patient medical records.

RPD: Produce a legend for the computer station locations at [Hospital] that identifies all computer stations as they are identified in the audit trail.

RPD: Produce color screen shots of the settings that were selected when the audit trail is printed.

Screen shots should always be produced in color, as requested above. Moreover, color versions of the electronic medical records can reveal additional information such as text that has been edited or corrected and portions of the record that the system flags in color for medically significant reasons like abnormal lab work and allergies. A hospital's software system may recognize signs and symptoms of certain conditions, like stroke, in a patient's medical record. If the software distinguishes abnormal signs and symptoms in the patient's record, the system may identify those items in red font to alert the medical provider. In a failure to diagnose case, it would be important evidence to show that while the health care providers missed the diagnosis, the EMRs did not.

A motion to compel may be necessary to overcome defense objections to producing the audit trail. The arguments most often asserted are that production of the audit trail is overly burdensome, that production of the audit trail violates HIPAA, and the assertion of attorney-client privilege, peer review privilege, or work product privilege. In arguing against the application of various privileges, it is important to emphasize that audit trails are simply raw data.

If you have only requested the audit trail for your client's records, there can be no HIPAA violation. So much focus is placed on keeping records confidential under HIPAA that it is often forgotten that one of the main purposes of HIPAA was to grant patient access to their own health information. 45 CFR § 164.524. The audit trail is part of patient health information and is part of the patient's medical record, so HIPAA *supports* a patient's right to access his or her audit trail.

Defendants will be hard pressed to demonstrate that printing out one patient's audit trail is unduly burdensome. It may be necessary to consult an independent source of knowledge about the provider's software, like the software user manual or a technician familiar with the system. The manual may show how easy it is to print an audit trail on a single patient, and the technician may even be able to assist the defendant in producing the audit trail to you. Remember, the audit trail is simply a computer printout that is pre-programmed into the software, as required by law, and can be printed out by any competent operator with a few keystrokes or mouse clicks.

Even if an attorney for the hospital reviews the audit trail(s), this information

Editor's Note

As we finalize this issue of the ***CATA News***, we invite you to start thinking of articles to submit for the Spring 2017 issue. If you don't have time to write one yourself, but have a topic in mind, please let us know and we'll see if someone else might take on the assignment. We'd also like to see more of our members represented in the Beyond the Practice section, so please send us your "good deeds" and "community activities" for inclusion in that section. Finally, please feel free to submit your Verdicts and Settlements to us year-round and we'll stockpile them for future issues.

From everyone at the ***CATA News***, we hope you enjoy this issue!

Kathleen J. St. John
Editor-in-Chief

does not appear in the actual access logs. An employee or risk manager will be the one to have accessed the log with their password. Just because the defense attorney views the log doesn't make it attorney-client privileged.

Likewise, the audit trail is not protected by peer review privilege. Even when a peer review committee reviews a patient's audit trail or electronic medical records, it is clear that the audit trail is not specifically generated by the peer review committee. Rather, it is automatically generated by the software for every patient in the ordinary course of the provider's business. It does not contain any information about the discussions held during a peer review committee meeting. It does not make any sense that a patient's medical record would be altered or edited as part of a peer review process. (*See Hall v. Flannery, et al.*, 2015 WL 2008345 (S.D. Illinois 2015)). When it helps to resolve a dispute, you may agree to redaction of the peer reviewer's identity in the audit trail, because their identity is not relevant to your case.

For similar reasons, work product privilege does not apply to audit trails. Because the audit trail is part of the patient's health information and is automatically generated, it cannot be argued that an audit trail was created in anticipation of litigation. *Id.* Further, there is no work product, analysis, conclusions, or a lawyer's mental impressions, contained in the data.

Beyond written discovery, it is sometimes necessary is to depose the Civ.R. 30(b)(5) person most knowledgeable and/or responsible for the EMR system at the facility. This person should provide a wealth of knowledge to assist you in understanding your client's audit trail.

When the audit trail is produced, it is important to obtain screen shots of the settings under which the audit trail was obtained. Screen shots of the settings are extremely important because the person providing the audit trail has discretion to select or deselect portions of the audit trail when running the report. This allows the person providing the audit trail to print it in a way that makes no sense, or that holds back important information. A screenshot of the settings will help you overcome those obstacles, and to go back and request that changes be made to the audit trail so that it includes the information you are requesting in usable form.

Defendants also like to produce their query results as raw numbers instead of in a useful format--things like IP addresses and port numbers, and nonsense text for the database field itself. This is done to obscure relevant information and to show the Judge that the output is confusing and not useful. Audit trails produced in unusable form are not acceptable and must be provided in a different format.

Additionally, some Defendants may claim their system's audit trails are "proprietary", but that argument is garbage. Only the source code that creates the EMR program's unique user interface is proprietary. The nice-looking display and click sequence to navigate the system--the layout of the data on the screen, how intuitive it is to use--that is the proprietary part. The data in the system is not proprietary at all-- that belongs to your client.

Conclusion

When the standard of medical care provided is at issue, the audit trail can be a vital piece of evidence. Although it can take considerable time and effort to obtain, the audit trail should be requested in every medical malpractice case. As providers are compelled to produce audit trails often over time, and as the court becomes familiar with the importance of production of the audit trail in medical cases, our cases will become stronger and our clients will be better served. ■

End Notes

1. The retention period under state law must not be less than the federal mandate under HIPAA, but state law can enforce a longer retention period.

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Setting The Record Straight: *Jones v. Metrohealth*, The Affordable Care Act, And Limitations On Damages For Future Medical Expenses

by Dustin B. Herman

While the state of Ohio has allowed political subdivisions to be sued, it has significantly reduced their liability by statute. R.C. 2744.05(C)(1) sets caps on non-economic damages and R.C. 2744.05(B)(1) provides for a reduction of economic damages when a plaintiff is entitled to have those damages paid by an insurance company (or any other source).

In *Jones v. MetroHealth Medical Center*, 2016-Ohio-4858, 2016 WL 3632469 (8th Dist.), the Eighth District Court of Appeals reduced a $14.5 million jury verdict against MetroHealth (a government-owned hospital) to just over $5.1 million based upon the provisions in the aforementioned statute regarding political subdivision liability.

Notably, the court upheld an offset for future medical expenses based upon the plaintiff being "entitled to" have future medical expenses paid by an Affordable Care Act insurance plan. A motion has been filed to have the case heard en banc, and OAJ and CATA filed a joint Amicus Brief in support of the Motion.[1]

Even though the offset in *Jones* was based upon a statute that only applied to political subdivisions, private defendants will cite *Jones* in post-trial motions (we have already seen it done) and argue that they are entitled to receive a similar offset for future benefits under an ACA plan. It is so important to remember that the *Jones* case has a very limited holding and that it only applies to cases brought against governmental tortfeasors. Additionally, there are still many, many reasons why a governmental tortfeasor in future cases would not be entitled to such an offset.

Case Facts

Alijah Jones was born at 25 weeks and suffers from cerebral palsy, developmental delays, and visual impairment. He will need 24-hour attendant care for the remainder of his life. The Becker Law Firm obtained a $14.5 million verdict against MetroHealth and Steven Weight, M.D., for the birth injury sustained by Alijah Jones.

The Verdict

The jury verdict against MetroHealth and Dr. Weight consisted of $5 million in non-economic damages for Alijah (reduced to $250,000 per statutory caps), $1 million for loss of consortium by Alijah's mother (reduced to $250,000 per statutory caps), and $500,000 in past economic damages (reduced to $0 per statutory collateral source offset). Those reductions were all upheld in their entirety by the appellate court.

The verdict also included an award of $8 million for future economic loss. The trial court held that the entire $8 million award corresponded to future medical expenses, but that the maximum amount Alijah could recover for future medical expenses was $2,951,291 because any medical expenses in addition to that would be covered by a collateral source (an ACA plan or Medicare).

Category of Damages in Verdict	Amount of Verdict	Reduction by Trial Court	Review by Eighth District
Non-economic damages for Alijah	$5,000,000	Reduced to $250,000 per damages caps under R.C. 2744.05(C)(1)	Upheld
Loss of consortium for Alijah's mother	$1,000,000	Reduced to $250,000 per damages caps under R.C. 2744.05(C)(1)	Upheld
Past economic damages	$500,000	Reduced to $0 per statutory collateral source offset under R.C. 2744.05(B)(1)	Upheld
Future economic damages	$8,000,000	Reduced to $2,951,291 in future medical expenses per statutory collateral source offset under R.C. 2744.05(B)(1)	$1,700,000 added back to the verdict to represent future loss of earning capacity
TOTAL	**$14,500,000**	**$3,451,291**	**$5,151,291**

The Eighth District held that "the court erred because it could not have concluded to a reasonable degree of certainty that the $8 million award for future economic damages comprised only the life care plan. The court failed to consider the possibility that at least some part of the $8 million award consisted of lost future wages." [2]

The *Jones* court determined that at least $1.7 million of the verdict should have been attributed to future lost income, and that only $6.3 million represented compensation for the life care plan. The *Jones* court ultimately added $1.7 million back to the verdict, but agreed with the trial court that $2,951,291 was the maximum amount Alijah could recover for future medical expenses since any additional medical expenses would be covered by a collateral source (an ACA plan or Medicare).

Practice Tip: The burden of proving entitlement to an offset is on the political subdivision. The *Jones* court stated, "a political subdivision like MetroHealth that makes it known it intends to seek a post-trial offset for collateral benefits chooses to forego offering specific interrogatories at its own peril. MetroHealth as the party seeking an offset under R.C. 2744.05(B)(1), had the burden of showing its entitlement to offset." [3]

Thus, the Eighth District reduced the verdict to $5,151,291 (*i.e.*, $250,000 + $250,000 + $2,951,291 + $1,700,000). See the chart above for a breakdown of the verdict.

The Statutory Offset

First, at a post-trial hearing, the trial court heard new evidence regarding the appropriate amount of the offset. Plaintiff argued that it was improper for the trial court to hear new evidence post-trial. The Eighth District held that "R.C. 2744.05(B) requires a post-trial hearing in which the trial judge is authorized to hear additional evidence" and that "the court, not the jury, decides the amount that must be offset from a damage award against a political subdivision." [4]

Practice Tip: You can cite to *Jones* to prevent a defendant from introducing evidence of an ACA insurance plan at trial. In support of its ruling that a post-trial offset hearing was necessary, the court stated: "R.C. 2744.05(B) does not 'abrogate that aspect of the collateral source rule which provides that the receipt of [collateral] benefits is not to be admitted in evidence, or otherwise disclosed to the jury.'" [5]

Second, the *Jones* court (adopting the trial court's findings) held that, per the statutory collateral source offset, the maximum amount of future medical expenses that Alijah could recover was $2,951,291. The court arrived at this conclusion by looking at the life care plan and determining (or speculating as to) which benefits would be covered by a collateral source.

Practice Tip: Offsets must "match" losses that are actually included in the verdict. The Ohio Supreme Court has stated: "[T]he one inexorable source of agreement seems to be that there shall be no constitutionality without a requirement that deductible benefits be matched to those losses actually awarded by the jury." [6]

Both parties agreed that neither Medicare nor an insurance plan under the ACA would cover expenses for transportation, home care, and housing,[7] so Alijah was permitted to recover those expenses.

Practice Tip: In future cases, it must be pointed out to the judge that even the trial court in *Jones* excluded from offset those items in the life care plan which would not be covered by Medicare or an ACA insurance plan (although the *Jones* court did not go far enough in this regard).

Alijah was 12 years old at the time of the verdict, and all the experts who testified at the post-trial hearing agreed that he

would be eligible for Medicare when he turned 20 (due to his father's disability). The court found that for that 8-year period before he turned 20, an ACA insurance plan would cover Alijah's medical expenses and that "the maximum amount of the child's premium for health care would be $8,000 per year, with a maximum out-of-pocket expense of $6,500 per year" so that "the most the child would spend in the eight-year period for medical expenses would be $116,000." [8]

The court also found that Medicare would cover 80% of customary and ordinary care after Alijah turned 20 and so Alijah was permitted to recover 20% of the expenses in the life care plan (excluding transportation, home care, and housing), after he turned 20.

So the amount of $2,951,291 constituted transportation, home care, housing, the price of an ACA plan for 8 years, and 20% of the other expenses in the life care plan after age 20.

The *Jones* Decision Only Applies To Cases Brought Against Governmental Tortfeasors

Chapter 2744 of the Revised Code is titled "Political Subdivision Tort Liability" and allows political subdivisions to be sued under certain circumstances. When suit is allowed to be brought against a political subdivision, R.C. 2744.05 limits the damages recoverable.

> Essentially, R.C. 2744.05(B) provides for two things when an action is brought against a political subdivision to recover for injury, death, or loss to persons or property. First, the collateral source rule is abrogated as to the political subdivision. The clear language of the statute requires the court to deduct the collateral benefits from the award recovered by the plaintiff. This conserves the fiscal resources of political subdivisions by providing the protection of sovereign immunity when a person injured by the negligence of the political subdivision is compensated by insurance or some other source of reimbursement. *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29, 550 N.E.2d 181, 182. The statute limits the recovery of injured parties to the amount of the award which has not been paid by other sources. Second, R.C. 2744.05(B) abolishes the insurer's right of subrogation against the political subdivision. Thus, a governmental tortfeasor is liable to pay the injured party only the amount not covered by insurance or some other source, and insurers are not permitted to recover the money paid to an insured by asserting subrogation rights against the governmental entity. *Grange Mut. Cas. Co. v. Columbus* (1989), 49 Ohio App.3d 50, 53, 550 N.E.2d 524, 527. [9]

Practice Tip: Explain to the judge that there is no similar statute that applies to private defendants, and more importantly, such a statute would be constitutionally impermissible; the only reason liability against a political subdivision can be limited in this way, and that subrogation interests can be extinguished by statute, is because the default setting for governmental liability is complete governmental *immunity*.

Practice Tip: R.C. 2323.41 permits a defendant to place into evidence certain collateral source benefits – but the statute excludes collateral benefits that have "a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation." It is virtually certain that every single ACA-compliant insurance plan will provide the insurance companies with a right of subrogation, and therefore benefits under an ACA plan cannot be introduced into evidence, nor can private defendants seek an offset for such benefits. See Affidavit of Jeffrey D. Zimon, Esq., which is attached as Exhibit A to Plaintiffs' Brief in Opposition to Defendants' Motion to Conduct Post-Trial Evidentiary Hearing on Setoff of Economic Damages Award, *Riedel v. Akron General Health System*, Cuyahoga County, No. 14-834147, filed July 22, 2016. This Brief and Affidavit are available to download from the Cuyahoga County Clerk's website, or just email me, and I will send you a copy. (Please Note: This motion for setoff that cited *Jones* was filed by a private defendant.)

Offsets Must "Match" Losses Actually Included In The Verdict And Matching Determinations Must Be Made With "Reasonable Certainty"

A political subdivision "is entitled to an offset for future collateral benefits only to the extent that they can be determined with a reasonable degree of certainty."[10] Reasonable certainty has been defined by the Sixth Circuit as a "high probability." [11]

> [I]t is the defendant's burden to prove the extent to which it is entitled to an offset under R.C. 2744.05(B). Otherwise, the statute could operate to arbitrarily reduce the damages that a jury awards a plaintiff by allowing deductions for collateral benefits that are not included in the jury's award, or that are not reasonably certain to be received.[12]

Side-Stepping The Viability Of The ACA (What A Move!)

The *Jones* Court side-stepped the issue of whether the ACA is reasonably certain to exist in the future. It did so

by addressing the viability of Medicare first, stating that the Plaintiff gave "no plausible basis for us to conclude that Medicare will cease to exist in the near future."[13] Then later in the decision, the Court lumped in the ACA with the previous arguments, stating Plaintiff "does argue that Medicaid, Medicare, and the Affordable Care Act are political targets subject to privatization, budget cuts, and even repeal, but those are the same arguments we earlier rejected and need not repeat." No other attention was given to the viability of the ACA or whether it may be repealed or amended.

"Reasonable Certainty"? "Entitled To Receive"? What Will An ACA Plan Look Like Next Year? In 10 Years??

The ACA does not entitle plaintiffs to specific medical treatment in the future. Rather, it represents an obligation to purchase health insurance or face adverse tax consequences. The ACA sets some minimum requirements, but plans vary widely from state to state, and the "truth is that the essential benefits that the ACA requires health plans to cover are extremely vague and unstable."[14] The ACA uses general terms such as "hospitalization" and "pediatric services,"[15] and "leaves it up to the states to fill in the details."[16] "Moreover, the essential benefits requirements do not apply to self-insured plans, employer plans in the large group market, or plans that already existed when the ACA was enacted." [17]

The fact of the matter is that "[i]ndividual health insurance plans continue to have wide leeway in deciding which services they will cover at any point in time."[18] And in addition to that, plans are only good for one year at a time, people switch insurance plans over time, they change jobs, they move from state to state, and the insurance plans and coverage they purchase will depend upon their marital status, age, health, etc. "Furthermore, plans continue to be allowed to decide whether or not a certain type of care is 'medically necessary,' and therefore will or will not be covered."

How can a verdict be reduced based upon benefits the plaintiff is "entitled to receive," when coverage still depends upon the approval of an insurance company at some unascertained point in the future? Would an insurance company be legally required to approve all treatment contained within the plaintiff's life care plan 10 or 20 years down the road? Of course not. Likewise, there is the issue of certain care being "in network" or "out-of-network," which, as we all know, can substantially affect the price of medical care. As one commentator observed, "[t]here is no degree of certainty regarding the exact coverage a plaintiff will receive in the future or whether the law's requirements will stand the tests of time."[19]

The bottom line is that nobody knows what specific medical care a person will be entitled to receive under an ACA insurance plan 5, 10, or 20 years from now.

Practice Tip: The arguments above – and the sources cited in the footnotes – can be used in cases involving private defendants, but also, they can still be used in cases involving governmental tortfeasors. Before an offset can occur, the specific care to be offset must, first, be contained within the verdict, and second, be matched to a benefit which the plaintiff is entitled to receive in the future. Rather than merely focusing on the viability of the ACA in general, focus on whether the plaintiff is (will be) entitled to receive the *specific medical care in the life care plan* in the future. The answer to that question depends upon the state in which the person resides at the time the medical care is required, the specific insurance plan the person bought, the insurance company that issued the plan, whether the essential benefits required under an ACA plan have changed, whether the insurance company will approve the treatment as "medically necessary" at the time the treatment is sought, and whether the chosen healthcare provider is "in-network" or "out-of-network." Furthermore, nobody knows what an ACA plan will cost in 5 or 10 years, so a court should not be permitted to limit a plaintiff's recovery to the amount it would cost to purchase a plan today.

Conclusion – Ten Takeaways

1. *Jones* only applies to cases against governmental tortfeasors.
2. There is no statute that entitles private defendants to a similar offset to the one in *Jones*.
3. The burden of proving entitlement to an offset is on the defendant.
4. To be offset, collateral benefits must be "matched" to losses actually awarded by the jury.
5. To be offset, collateral benefits must be "reasonably certain" to be received in the future.
6. *Jones* reaffirms that the collateral source rule would prevent evidence of ACA benefits from being disclosed to the jury.
7. All ACA-compliant insurance plans will contain a right of subrogation and therefore private defendants cannot obtain an offset for benefits obtained through an ACA plan or introduce evidence of such benefits at trial.
8. There will be many items in a life care plan that will not be covered by Medicare or an ACA plan under any circumstances, and the holding in *Jones* requires that those items not be subject to an offset.

9. It is impossible to determine whether the specific medical treatment listed in a life care plan will be covered in the future by an insurance plan or whether the care the plaintiff seeks will be "in-network" or "out-of-network."

10. The costs of ACA-compliant insurance plans are ever-changing, and the trial court should not speculate as to what the maximum premiums or out-of-pocket expenses will be in 5 or 10 or 20 years down the road. ■

End Notes

1. As of the date of this writing (October 27, 2016), no decision has been made as to whether the Eighth District will hear the case *en banc*.
2. *Jones*, 2016-Ohio-4858, ¶ 37.
3. *Jones*, 2016-Ohio-4858, ¶ 40 (citing *Buchman v. Bd. of Edn.*, 73 Ohio St. 3d 260 (1995)).
4. *Jones*, 2016-Ohio-4858, ¶'s 19-20.
5. *Jones*, 2016-Ohio-4858, ¶ 18 (quoting *Buchman v. Bd. of Edn.*, 73 Ohio St. 3d 260, 270 (1995)).
6. *Buchman v. Bd. of Edn.*, 73 Ohio St. 3d 260, 269, 652 N.E. 2d 952, 960 (1995).
7. The life care plan also had a second option for "facility care" which totaled $6,374,639. Both parties agreed that neither Medicare nor an ACA insurance plan would cover facility care. In the Motion for Reconsideration, Plaintiff argues that the jury could have awarded this amount and thus there should be no offset whatsoever for future medical expenses.
8. *Jones*, 2016-Ohio-4858, ¶ 55.
9. *Lamb v. Quincy*, 92 Ohio App.3d 592, 597, 636 N.E. 412, 415 (3rd Dist. 1993).
10. *Buchman*, 73 Ohio St. 3d at 266.
11. *Schilz v. City of Taylor, Mich.*, 825 F.2d 944, 946 (6th Cir. 1987).
12. *Buchman*, 73 Ohio St. 3d at 270 (emphasis added) (citations omitted).
13. *Jones*, 2016-Ohio-4858 at ¶ 50.
14. See Maxwell J. Mehlman, Jay Angoff, Patrick A. Malone, Charles M. Silver, and Peter H. Weinberger, *Compensating Persons Injured by Medical Malpractice and Other Tortious Behavior for Future Medical Expenses Under the Affordable Care Act*, Annals of Health Law, Volume 25, Issue 1, Winter 2016, p.35 (citing Nicholas Bagley & Helen Levy, Essential Health Benefits and the Affordable Care Act: Law and Process, 39 J. HEALTH POL., POLY, & L. 441, 448 (2014) (stating that the states have "no additional guidance or regulations on essential health benefits" leaving leaders to make decisions based on "vague guidance and guesswork")).
15. See 42 U.S.C.A. § 18022 (2015) ("[T]he ACA states: . . . [T]he Secretary shall define the essential health benefits, except that such benefits shall include at least the following general categories and the items and services covered within the categories: (A) Ambulatory patient services. (B) Emergency services. (C) Hospitalization. (D) Maternity and newborn care. (E) Mental health and substance use disorder services, including behavioral health treatment. (F) Prescription drugs. (G) Rehabilitative and habilitative services and devices. (H) Laboratory services. (I) Preventive and wellness services and chronic disease management. (J) Pediatric services, including oral and vision care.").
16. See Mehlman at 38, citing Amanda Cassidy, Health Policy Brief: Essential Health Benefits, HEALTH AFF. 1 (May 2, 2013) ("Rather than establishing a national standard for these benefits, the Department of Health and Human Services (HHS) decided to allow each state to choose from a set of plans to serve as the benchmark plan in their state. Whatever benefits that plan covers in the 10 categories will be deemed the essential benefits for plans in the state.").
17. See Mehlman at 39.
18. See Mehlman at 39, citing Jennifer McCarthy, The Complete Guide to Health Insurance, THE SIMPLE DOLLAR, http://www.thesimpledollar.com/health-insurance-guide/ (last updated May 1, 2015) (referencing a comparison image that illustrates that 68% of Minnesota's health insurance plans do not cover labor and delivery, 60% do not cover mental health services, and 28% do not cover specialty drugs and only 45% of Massachusetts's plans cover hospitalization, hospital-based physician care and imaging).
19. See Mehlman at 40, citing Seth L. Cardeli, Thwart the Assault on Future Medical Expenses, 50 TRIAL 14, 19 n.4 (2014).

2016 Annual Dinner: A Photo Montage

Beyond The Practice: CATA Members In The Community

by Dana M. Paris

Attorney **Daniel Klonowski** was recently appointed by Judge Deborah J. Nicastro to serve as the Acting Judge in the Garfield Heights Municipal Court. This Court is very active as its jurisdiction extends to the following communities: Brecksville, Cuyahoga Heights, Garfield Heights, Independence, Maple Heights, Metro Parks, Newburgh Heights, Valley View and Walton Hills. As the Acting Judge, Daniel Klonowski will be presiding over the small claims docket, criminal arraignments and eviction matters. After growing up in Garfield Heights and having a law office in the community for almost 38 years, Klonowski is proud to serve the residents of his hometown. It's also especially touching since Klonowski is serving in the same position that his father, Leonard J. Klonowski, served when he was the first Acting Judge of Garfield Heights Municipal Court in the 1950's and 1960's.

Daniel Klonowski is sworn-in as Acting Judge in the Garfield Hts. Municipal Court

Mike Becker, Esq.

The **Becker Law Firm** has partnered with CBS for the second year in an effort to raise awareness and help end bullying with a program called "2 Strong 4 Bullies". The hope and intent of the partnership is to end bullying and prevent the dangerous and destructive consequences that often follow. This program targets school-aged children and pre-teens who may be victims of bullying or witness acts of bullying either at school or online. 2 Strong 4 Bullies encourages students to be brave and report the acts of bullying to the school supervisors in an effort to help stop and prevent this behavior from happening to others in the future. Further information can be found at: www.Cleveland19.com/2strong4bullies.com.

In October 2016, the attorneys and staff from **Landskroner Grieco Merriman** facilitated the 18th Annual Law Student Closing Argument Competition sponsored by the Landskroner Foundation for Children. This event, held at the Cuyahoga County Courthouse, was established to encourage and promote students of the law to take interest in and pursue public interest ventures as part of their professional practice. This includes advocating on behalf of children who are unable to protect their own interests. Law students from schools across the state were selected to give a closing argument based on a child injury case. The students were judged by a jury panel composed of experienced members of the bar and bench across Northeast Ohio. Winners receive scholarship awards which, to date, total over $25,000. This year included students from the University of Akron School of Law, Ohio Northern University Claude W. Pettit College of Law, Case Western Reserve University School of Law, and the Cleveland–Marshall College of Law. Students from the University of Akron School of Law were awarded first and second place, and a student from the Ohio Northern Claude W. Pettit College of Law finished third.

Jack Landskroner presents awards to winners of the 18th Annual Law Student Closing Argument Competition.

For the second year in a row, **CATA's Community Outreach Committee** organized a partnership event with Shoes and Clothes for Kids® (SC4K) to provide winter coats and boots for preschool and school age children. CATA donated $2,000 seed money, which, along with donations from **CATA members**, enabled CATA to provide coats and boots for some 200 children. On Friday, October 14th, a group of CATA members traveled to the Merrick House in Tremont to help 40 preschool children choose new winter coats, boots, hats and gloves for the upcoming winter season. The children first gathered in small groups to hear a CATA member read stories, then were assisted by the other CATA members in choosing their winter outerwear. The CATA donations also enabled 160 school age children to select new winter clothing in the after-school program at the Merrick House. Thank you to everyone who helped and contributed to making this event a great success. Our hearts are full! ■

CATA members await the arrival of the preschoold children at the Merrick House.

Dana M. Paris is an associate at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.621.2300 or danaparis@nphm.com.

Amanda M. Buzo, Esq. is the Executive Director for Community Fund Management Foundation. CFMF is a nonprofit trust advisor that administers trusts for Ohio residents with disabilities. She may be reached at amanda@cfmf.org or 216.736.4540. Please visit our website at www.cfmf.org for our forms and fee schedule.

Ohio Medicaid: Information for Personal Injury Attorneys

by Amanda M. Buzo

I had the pleasure of working with personal injury attorneys from across the country in my role as a probate, special needs, and elder law attorney. Together, we addressed the litany of issues that arose after a case was resolved when there was a minor, incompetent, or person with a disability involved. Now, as Executive Director of one of the country's largest pooled trusts, I continue to receive similar phone calls asking if a Community Fund Management Foundation trust can help keep the attorney's client eligible for public benefits, specifically Medicaid.

We all have cases that follow us through our career; hopefully they are good cases but many times they are the challenging ones. One of my worst experiences from the beginning of my career involved a widow in her early eighties. Her personal injury attorney had reached a nice settlement and had asked me to attend a family meeting as questions had arisen regarding the client's Social Security Retirement and Medicare. At the same time the attorney was reaching over the kitchen table to give the client a sizable check, I was reading the notices from the Social Security Administration and Ohio Medicaid indicating the widow was actually a Supplemental Security Income and Medicaid recipient. I was completely blindsided and had the unfortunate task of notifying the widow and her three angry sons that her receipt of the funds was likely to cause her to lose her SSI and Medicaid. The purpose of this article is to help you identify questions to ask so this situation does not happen to you.

<u>During the Initial Client Interview:</u>

- What type of health insurance does the client currently have?
- If the client says he/she receives Medicaid, what type of Medicaid is received? Is it ABD (also known as Community Medicaid), MAGI, Waiver, or Nursing Home?
- Does the client currently receive or expect to receive Medicare within 30 months of the settlement date?
- Make a copy of the client's driver license and all health insurance cards (front and back).

Government benefits are either means-tested or not. "Means-tested" refers to eligibility being dependent on an income and/or resource test. The most common means-tested benefits are Medicaid, Supplemental Security Income ("SSI"), food assistance, and subsidized housing. Government benefits that do not have an income or resource test include Social Security Disability Insurance ("SSD" or "SSDI"), Social Security Retirement, or Medicare. Do not assume that just because a person is retirement age that he or she receives Social Security Retirement; it is possible for an aged individual to receive SSI.

Ohio changed from a 209(b) to a 1634 state effective August 1, 2016. As a result, Ohio Aged, Blind, and Disabled ("ABD") Medicaid eligibility is now tied to eligibility for SSI. The resource test is now $2,000, which is an increase from the former threshold of $1,500. The income test is equal to the maximum SSI benefit, which is currently $733 per month but will increase to

$735 effective January 1, 2017. The eligibility rules for MAGI, Waiver, and Nursing Home Medicaid are different from ABD/Community Medicaid rules and therefore it is important to know what eligibility rules apply when you are investigating a potential claim.

While it is well-settled that a Medicare Set-Aside is required in workers' compensation cases, CMS has not addressed whether a Medicare Set-Aside is mandatory in personal injury litigation. Therefore, it is helpful to not only ask a potential client whether he or she is a current Medicare recipient, but also if they expect to be a Medicare recipient within thirty months of the settlement date. This future eligibility is likely if the client is applying for SSDI, since Medicare will begin twenty-nine months after they are found to be disabled, or if the client will turn 65.

Many of your clients will not know what type of benefits they receive. They will confuse Medicaid and Medicare, and are unlikely to know what kind of Medicaid he or she receives. They will tell you they receive Social Security but not know how or when or why. That is why it is important to request a copy of all cards and periodically review the information with the client to confirm the benefits have not changed. A client who does not have details can contact the Social Security Administration or Ohio Department of Medicaid and request a benefit letter.

Prior to the Settlement/Award:

- Is the net amount to the client over $2,000?
- Does the client have immediate needs, such as payment of debt or purchase of preneed funeral, vehicle, or home, and will expend the litigation proceeds in the same month received?
- Is your client age 65 or older at the time of the settlement or award?
- How should the client's check be made payable?
- Can you design the settlement in a way that will deliver the check at the beginning of the month?
- Does the client have a minor child on public benefits?
- Does this matter require probate court approval?
- Is a guardian required?

If your client is a current Medicaid recipient, then he or she is likely to have less than $2,000 in resources. As a result, a small settlement may not impact means-tested benefits especially if it is combined with "spending down" in the month received. Spending down refers to the act of taking cash and purchasing,

or converting to, an exempt asset. Exempt assets include a preneed funeral, clothing, one vehicle, and one personal residence. The payment of outstanding debt belonging to the plaintiff is also acceptable. What is generally not acceptable is gifting it to a third party.

Many clients with disabilities may consider the use of a trust to hold their personal injury settlement; this type of trust is known as a special needs or Medicaid payback trust. The trust itself is an exempt asset if properly drafted, and the transfer to the trust is not a penalized transfer. There are restrictions as to the type of trust available if a client is age 65 or older at the time is established, so knowing a client's exact age is important. If a client is utilizing a trust, it is preferred that the check for the benefit of the plaintiff be made payable to the trustee of the trust so the funds are never received by or available to the plaintiff.

If a client is not utilizing a trust but instead expects to "spend down," is it possible for you to provide the check at the beginning of the month? While I would be careful not to hold funds in your IOLTA for any meaningful time as that could be considered constructive receipt, it would be helpful for the client to receive the check at the beginning of a month since the resource test is assessed on the last day of the month. This allows the client the maximum number of days to cash and spend the funds, instead of hurrying at the end of a month.

Another question to ask is if the plaintiff has a minor child, and if that child receives public benefits. Your client may be a competent adult that is not on any public benefits, but has a child who receives SSI or Medicaid. Both programs employ "deeming," which imposes a parent's income and resources to a minor child and can cause the child to lose eligibility for government benefits even if he or she is not named as a plaintiff.

If your plaintiff is an adult incompetent or a minor, the county probate court of their residence will need to approve the settlement and a guardian will need to be appointed if not previously considered.

After the Time of Settlement/Award:

- Notification to government agencies

A person on means-tested benefits is obligated to notify the agency of any change in income or resources within ten days. While that notification has not been extended to counsel, it is wise to remind your client that he or she has obligations to report changes or risk being found guilty of fraud.

You may be saying to yourself that you are a litigation or trial attorney and do not wish to engage in these types of questions. While that is understandable, I would also point out that clients who lose benefits due to a settlement or who simply receive a check with no guidance are also less likely to refer that attorney to someone else. I recommend that if you do not wish to engage in these conversations that you establish a strong relationship with an experienced special needs or elder law attorney who can assist your client.

So how was the case involving the distraught widow client resolved? Once the family calmed enough to listen, I explained her options, which were to spend all the money in the month received, establish and fund a pooled trust because she was over age 65, or disenroll from SSI and Medicaid with the understanding she can re-apply when she had spent the funds and was once again financially eligible. Her options unfortunately did not include giving money away to her sons or tithing to her church, both of which were included in her expectations before she met with me. She picked the presented option best for her and, while still angry that she was unexpectedly forced into making such a decision, was ultimately satisfied with the resolution. ■

Brenda M. Johnson is an associate at Nurenberg, Paris, Heller & McCarthy Co., LPA. She can be reached at 216.621.2300 or bjohnson@nphm.com.

Distracted Driving Discovery 101 – Basic Guidelines and Resources

by Brenda M. Johnson

Cell phones and other wireless devices have become our constant companions. Their power to distract us, however, can be catastrophic, especially where driving is concerned. The dangers of texting or making phone calls while driving are well known, which is why both state and federal laws restrict such activities. Under Ohio law, texting while driving is a misdemeanor offense, and drivers under the age of 18 are prohibited from any use of cellular phones.[1] The use of hand held phones by commercial vehicle operators is prohibited by federal law.[2] However, even hands-free use of these devices is a potential for disaster, as the proliferation of apps that can be accessed on phones and other wireless devices while driving has been blamed for the biggest spike in traffic deaths in fifty years.[3]

This means that now, more than ever, cell phone, texting, and wireless data usage records are critical sources of information in motor vehicle cases. In order to benefit from such information, however, your first priority should be making sure you know what information is available and how to obtain it. This article is meant to serve as a first-step resource for doing so.

As an initial matter, you should take every available step, as early as possible, to identify every wireless-capable device aboard the vehicle at the time of the events at issue in your case, and the wireless service provider associated with the device. Requests for such information should extend beyond cell phones, and should include tablets, iPads, laptops, GPS devices, and any other devices with wireless capability that the driver may have had access to. If you have this information available to you prior to suit, you should direct preservation letters to the providers as soon as possible, as some providers have limited retention periods. For the same reason, if you are in suit already, you should take immediate steps to obtain this information from the carriers.

Depending on the complexity of your case and the potential need for forensic analysis, you may want to work with an expert in preparing your discovery requests. However, a sample of information to request, either at the preservation stage or subpoena stage, might include the following:

- Account activity and cellular phone tower "ping" information regarding the cellular phone number for which you are seeking discovery, for the relevant time period, which would include
  - Make, model, and ESN, IMEI, or MEID[4] numbers for the devices associated with the account;
  - Types of services subscribed to for each device;
  - Cellular calls to and from each device, with their time of initiation and duration;
  - All alphanumeric and text messages, including SMS/MMS[5] messages, sent to and from each device, including time of initiation or receipt;
  - All data communications with the device, including time and duration of transmission; and
  - Tower locations for cell phone towers accessed by the device during the time period at issue.

The good news is that most cell phone providers will supply you with information upon receipt of a subpoena sent by fax, and will not insist on formal service. The trick is knowing who to contact. The major cell phone providers each have

subpoena compliance departments, but the contact details are subject to change without warning. It also can be hard to determine which "provider" actually maintains records, since some well-known cell services (such as MetroPCS) are simply marketing names owned by other providers. The advent of "hybrid calling" services such as Republic Wireless raises even more questions, which will be addressed below. That said, the following is a list of the most current contact information for the major carriers:

AT&T and Cricket (which is an AT&T subsidiary)

Custodian of Records
11760 U.S. Highway 1, Suite 600
North Palm Beach. FL 33408
(800) 635-6480
Fax: (888) 938-4715

AT&T will accept both preservation letters and civil subpoenas by fax. You should include a cover letter with your contact information and an email address, as the requested documents will be provided by email. AT&T charges a $35.00 processing fee for records requests, along with an additional $10.00 for each month of records requested.

Verizon

Attn: Verizon Security Assistance Team (VSAT)
180 Washington Valley Road
Bedminster, NJ 07921
(800) 451-5242
Fax: (325) 949-6916

Verizon will accept both preservation letters and civil subpoenas by fax. Questions, but not service, can be directed to verizonlegalcompliance@verizon.com

T-Mobile and MetroPCS (a prepaid service provided by T-Mobile)

Custodian of Records
4 Sylvan Way
Parsippany, NJ 07054
(866) 537-0911
Fax: (973) 292-8697

Sprint and Virgin Mobile

Sprint Legal Compliance
6480 Sprint Parkway
Overland, KS 66251
(800) 877-7330
Fax: (816) 600-3111

Sprint and Virgin Mobile accept all legal demands for customer information by fax.

TracFone Wireless, Inc.

TracFone provides prepaid wireless services under various brand names, including Net10 Wireless, Straight Talk, Safelink Wireless, SIMPLE Mobile, Telcel America, and Page Plus. Questions about civil discovery can be directed to TracFone's subpoena compliance department (800) 810-7094; however, subpoenas will only be accepted by TracFone's registered agent in Ohio:

Corporate Creations Network, Inc.
119 E. Court Street
Cincinnati, Ohio 45202

TracFone can provide subscriber information, information on payment methods, and point of purchase information. Call, text, and "ping" information, however, may be in the possession of other carriers. Any subpoena directed to TracFone should specifically ask for the identities of all carriers that may have such information.

A Note on "Hybrid Calling Services"

Recently, certain voice over internet protocol (VoIP) providers have been branching into the consumer cell phone market, providing what are referred to as "hybrid calling" or "VoIP based/mobile connectivity" services. These calling services rely primarily on WiFi, and only fall back on cell networks when WiFi is not available. One of the more visible of these services is Republic Wireless, which is the product name for a service provided by a company called Bandwidth.com, Inc. Google recently launched a similar service called "Project Fi."

On its law enforcement website page, Bandwidth.com, Inc. represents that due to the nature of VoIP and its business model, "you should never assume that a number is associated with Republic Wireless even though it may appear as if the number you are investigating is 'mobile' in nature."[6] The company represents that "as a courtesy" it will verify numbers "for authorized entities without legal process," but it is unclear whether this courtesy would extend to attorneys in civil litigation. The law enforcement guide provides for subpoenas in civil litigation to be directed to the registered agent on file with the appropriate secretary of state's office, which in Ohio is CSC-Lawyers Incorporating Service, 50 West Broad Street, Suite 1800, Columbus, Ohio 43215. Inquiries can be directed to legal@bandwidth.com which is indicated as the "preferred method." Google's "Project Fi" website, on the other hand, contains no information as to how to obtain information or records relating to numbers associated with its service. ■

End Notes

1. *See* R.C. § 4511.204 (barring texting); R.C. § 4511.205 (barring use of cellular phones by underage drivers).
2. *See* 49 CFR 392.82 (barring use of handheld devices while operating commercial vehicles).
3. *See* Neal E. Boudette, *Biggest Spike in Traffic Deaths in 50 Years? Blame Apps*, New York Times (Nov. 15, 2016), http://nyti.ms/2eW0eU9 (last accessed Nov. 20, 2016).
4. "ESN" stands for Electronic Serial Number. "IMEI" stands for International Mobile Equipment Identity, and "MEID" stands for Mobile Equipment Identifier. These numbers are used to uniquely identifymobile devices.
5. SMS and MMS are the two standard text messaging protocols used to send messages over a cellular network.
6. http://bandwidth.com/law-enforcement-guide (last accessed Nov. 18, 2016).

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Homeowners Have A New Source of Compensation:

Eighth District Court of Appeals Tells Contractor Licensing Bond Surety To Do Its Job

by Daniel J. Myers, Esq.[1]

Representing consumers against fraudulent, unscrupulous, and shoddy construction contractors can be genuinely frustrating for an attorney. The clients' goals are usually straightforward and reasonable: most clients just want to have the shoddy or incomplete work fixed with minimal out of pocket costs or attorney's fees. Achieving this goal is usually very difficult. Most contractors are small and have minimal assets. To make matters worse, construction contractor insurance policies do not provide coverage for bad work, and homeowners are routinely denied access to most contractor licensing bonds. Generally, the value of these claims is limited by the assets of the contractor, and not by the law. These situations put enormous financial pressure on homeowners.

In *Koster v. Chowdhury*[2], the Eighth District Court of Appeals relieved some of the pressure and made it easier for many consumers to make claims against a contractor's licensing bond. *Koster* is the first decision from an Ohio court of appeals expressly holding that homeowners are permitted to make direct claims against a construction contractor's licensing bond.

A. What are Contractor Licensing Bonds?

Ohio has a state-wide building code regulating home construction, called the Residential Code of Ohio.[3] Many local governments have their own building codes that apply to new residential construction as well as repairs and remodeling projects.[4] Many, but not all[5], local governments require contractors to be licensed, bonded, and insured.[6] Bonds, generally referred to as "Contractor Bonds" or "Licensing Bonds" are intended to be used for the protection of property owners who are having work performed by contractors.

Bonds are not insurance.[7] Unlike insurance, bond sureties have the right to seek recourse against their principals, the contractors, when they pay claims to homeowners.[8] Amounts of bonds vary greatly, from $5,000 to $25,000 or more. For example, Summit County requires a $10,000 bond[9] while the City of Cleveland requires a $25,000 bond.[10]

Coverage and scope vary, as well. In the City of Cleveland, the bond language states that it covers (1) damage sustained on account of work done in violation of code, as well as (2) "damages sustained . . . from or by reason . . . of anything done under and by virtue of any permits issued . . . for the doing of any work required to be done in the construction, alteration, repair . . . or remodeling of any building."[11] This language is relatively standard, although it is not universal from city to city. Some bonds provide greater or less protection, including requirements for the contractor to comply with all laws of the State of Ohio, which seem to include consumer protection laws such as the Consumer Sales Practices Act, Home Construction Service Suppliers Act, and the Home Solicitation Sales Act.[12]

B. Why Do Contractor Bonds Matter, and Why is the *Koster* Decision so Important?

Unlike a bodily injury claim and automobile accident claims, where tradition and statute[13] provide injured parties with the ability to make claims against the insurer of the tortfeasor, a homeowner who is economically harmed by shoddy work or unscrupulous business practices cannot make their own claim against a construction contractor's general liability insurance policy. Instead, the contractor would have to first cooperate and submit the claim. Many contractors refuse or do not bother to make such claims. Even if they do, it is likely that the insurance company will claim that damages are not covered because they arose from delays, breach of contract, or shoddy work, none of which are an "occurrence" under the policy.[14] Therefore, insurance is not generally a source of much compensation for homeowners, outside of nuisance value, or in cases involving bodily injury or property damage. The only practical avenues for compensation are the assets of the construction contractor or the proceeds of a contractor licensing bond.

Unless a homeowner has hired a large contractor with substantial revenues, many residential contractors have limited equipment, property, and funds. In most cases, the only real recourse or compensation available is under the contractor's licensing bond. Therefore, it is critical to homeowners that they be allowed to make claims against their contractor's licensing bond. Under *Koster*, homeowners within the City of Cleveland, and other jurisdictions where licensing bonds use similar language, can now make such claims.

The Eighth District Court of Appeals held that, because the language used in the bond specifically protected "any person" from damages caused by a contractor, homeowners like Laura Koster are intended third-party beneficiaries of those bonds, and as such have direct claims against the surety and the right to bring suit on these bonds.[15]

Before *Koster*, there was little to no authority for this proposition which turned out in favor of homeowners. In fact, the most recent Eighth District decision dealing with similar issues held that a member of the public was not a third-party beneficiary of a contractor's licensing bond. Prohibiting homeowners from making bond claims against a contractor's licensing bond[16] effectively makes it impossible for homeowners to be able to afford necessary work and repairs. It also makes it impossible for anyone, including city governments, to enforce the licensing bonds.[17] To add insult to injury, disappointed homeowners may be criminally prosecuted due to the incomplete or defective work—such deficient work may violate city housing code and lead to criminal prosecution of the property owner.[18]

C. What Reasons Were Used by the Eighth District Court of Appeals?

In *Koster*, the Eighth District reversed and remanded a trial court decision which granted Western Surety Company ("Western Surety") summary judgment on the issue of a homeowner's standing to assert a bond claim. The Eighth District held that the parties to the bond, i.e. the City of Cleveland, Western Surety, and the construction contractor, intended to benefit homeowners like Laura Koster.[19] The court stated that the intent of the parties was found in the language used in the bond, which expressly made proceeds of the bond available "for the use of *any person* with whom the contractor shall contract to construct or remodel any building."[20] Furthermore, the City of Cleveland Department of Law issued an email to Western Surety telling it to "communicate and deal with" counsel for the homeowner on the bond claim.[21] The court distinguished the previous Eighth District decision by stating that the bond language analyzed in this case is not found in that previous opinion, and therefore "reliance on that case . . . is misplaced."

During oral argument, at least one judge found it troubling that Western Surety would ask that it be allowed to essentially avoid all liability under those bonds that it sold. The court declined the invitation of the homeowner's counsel to decide the case on broader grounds, and did not include reference to any of those arguments in its opinion. Western Surety later moved for reconsideration of the decision, which was denied by the Eighth District. Although it may still be appealed to the Supreme Court of Ohio, the *Koster* decision is the law within Cuyahoga County.

D. How do Homeowners and Attorneys Use the *Koster* Decision?

The *Koster* decision essentially allows any property owner (consumer or business) to make a claim directly against a contractor's licensing bond, so long as that licensing bond uses language that allows the bond funds to be used by "any person," or "any person with whom the contractor" has a contract.[22] Therefore, property owners can now safely make claims against bond sureties for City of Cleveland, as well as other city bonds. Not all cities use the "any person" language, but a large number do. For example, the bond utilized by the City of Parma includes similar language, while the bond used in the City of Westlake may lack that language. Westlake permits contractors and sureties to use their own bond language as opposed to a governmentally mandated form.

E. What Does the Future Hold for Bond Claims and Related Litigation?

Litigation surrounding these bonds and their meaning is not over. Western Surety can appeal the *Koster* decision to the Supreme Court of Ohio. However, even if it does not appeal the decision, the focus will turn to the specific scope of damages covered by the language of the bond. Some bonds state that they cover only damages arising from violations of building code, while others, like the City of Cleveland bonds, state that they cover code violations and any other damages suffered by a property owner resulting from work done under a permit. Will courts limit that scope, as requested by Western Surety, or will they hold that the objective intent of the parties as to the scope of damages covered is found in the language of the bond?

As the Eighth District noted, the licensing bonds are not performance bonds, which pay for someone else to complete work.[23] Instead, the bonds ensure compliance with the building code.[24] However, this issue may lead to future litigation. The City of Cleveland Codified Ordinances make it a violation of the building code to abandon work, leave work incomplete for too long, or perform shoddy or unworkmanlike construction services.[25] If a bond covers those code violations, it likely becomes a *de facto or de jure* performance bond.

F. Conclusion.

Attorneys practicing in Cuyahoga County should request the relevant contractor licensing and bond forms, as well as any code violations issued, in public records requests issued to their clients' local building department. This should be done promptly at the outset of the case. If the bond or ordinance language states the penal sum is for the benefit or use of "any person," "any person with whom the principal shall contract," or similar language, it is likely that clients can make direct claims against those bonds. Additional evidence of this intent may be found in the ordinances of the city requiring the bond, as well. Claims should be submitted directly to the bond surety before suit is filed (absent some statute of limitation issue), and if the adjuster objects to the claim because it is directly from the homeowner, a copy of the *Koster* decision should be sent to the adjuster. Ultimately, the Eighth District has given many Cuyahoga County property owners, whether they be businesses or consumers, an important remedy to the harm caused by bad contractors. Attorneys need to be aware of this decision, and use it, to advocate for their clients. ■

End Notes

1. Daniel J. Myers is the founder of Myers Law, LLC, a consumer protection law firm representing consumers in various lawsuits and disputes across Ohio. He is class co-counsel on various consumer class actions, and represents homeowners from all corners of the State of Ohio. He can be reached by phone at (216) 236-8202 or via email at DMyers@MyersLawLLC.com. His Consumer Law Blog, which includes tips for attorneys, can be found at www.OhioHomeownerLaw.com.
2. *Koster v. Chowdhury*, 8th Dist. Cuyahoga No. 103489, 2016-Ohio-5704
3. Ohio Administrative Code 4101:8-1 *et seq.*
4. *See, e.g.*, Cleveland Cod. Ord. § 3101.
5. At the time of this publication, the City of Shaker Heights has no bond requirement.
6. With few exceptions, most of the cities or counties in Northeast Ohio have requirements for licensing, bonding, and insuring of contractors, and state requirements exist for some trades, requiring licensing, but not bonding.
7. *Koster*, ¶ 4.
8. *Republic-Franklin Ins. Co. v. Progressive Cas. Ins. Co.*, 45 Ohio St.2d 93, 95, 341 N.E.2d 600 (1976).
9. Cod. Ord. of Summit County, Ohio § 1323.03(d).
10. Cleveland Cod. Ord. § 3107.07(a)(3) & § 3107.07(b)(4).
11. City of Cleveland Bldg. Dept., Contractor Registration Package, located at http://webapp.cleveland-oh.gov/aspnet/docs/get.aspx?id=252&file=GeneralContractorPackage.pdf.
12. R.C. 1345.01 *et seq.*; R.C. 1345.21 *et seq.*; R.C. 4722.01 *et seq.*
13. R.C. 3929.05 & R.C. 3929.06.
14. *Westfield Insurance Co. v. Custom Agri Sys., Inc.*, 133 Ohio St. 3d 476, 2012-Ohio-4712, ¶¶ 14, 19 (2012).
15. *Koster v. Chowdhury,* 2016-Ohio-5704, ¶¶ 13, 16.
16. *Soltesz v. Dicamillo*, 8th Dist. Cuyahoga No. 69048, 1996 Ohio App. LEXIS 494 (Feb. 15, 1996).
17. *Koster*, at ¶ 14.
18. *See, e.g.*, Cleve. Cod. Ord. § 601.06.
19. *Koster v. Chowhury,* 2016-Ohio-5704, ¶ 13.
20. *Id.*
21. *Id.*, at ¶ 15.
22. *Id.*, at ¶ 5.
23. *Id.*, at ¶ 5, fn.2.
24. *Id.*
25. Cleve. Cod. Ord. § 3103.25(j).

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Jury Sends Strong Message to Nursing Home Industry by Assessing $4.4 Million Dollars for Death of Nursing Home Resident

By William B. Eadie and Michael A. Hill

I recently tried a nursing home wrongful death case to verdict with Michael Hill on behalf of the Estate of Leona Maxim (Cuyahoga County Nos. 16 867545 and 15 845038). The jury returned a $4.4 million verdict, of which $3 million were punitive damages.

In 2010, Kindred purchased an independent nursing home in Solon, Ohio, called "Stratford Commons." Kindred implemented its own practices, including rebranding the nursing home as Kindred Transitional Care and Rehabilitation-Stratford, hiring a new Executive Director, and mandating that caregivers follow its hundreds of policies and procedures. They had the executive director/administrator participate on weekly calls with the regional director, along with all Ohio administrators, to keep them focused on financial targets. As is the case with these facilities, the largest expense is staff, the largest revenue is from increasing the number of residents.

Leona Maxim already lived at the nursing home for three years when it was taken over by Kindred. She was in her early 70s, wheelchair-bound, had a prior stroke, and suffered from COPD requiring oxygen via nasal cannula, congestive heart failure, a seizure disorder, Parkinson's, dysphagia (and was on a peg tube for years), and had a history of urinary tract infections and aspirational pneumonias. She had never had skin breakdowns. She was out of bed daily, participated in activities, and had weekly visits and daily phone calls from family.

In March of 2011, 11 months after Kindred purchased the nursing home, a single nursing assistant turned Leona while she was in bed. Because Leona had weak legs and midsection following a stroke, Leona was unable to stop her momentum and rolled out of bed, hitting her knees on the floor. She was found between the bed and night stand on her knees, holding onto the side rail of the bed.

Luckily Leona was not seriously injured. Leona's family asked the nursing home to use two nursing assistants whenever Leona was getting care that required repositioning her in bed moving forward. Leona's doctor ordered that two people assist Leona with all care that required repositioning in bed in the future.

On June 3, 2013, a single nursing assistant rolled Leona out of bed for a second time while repositioning her in bed. A second assistant was not present. This time the impact of the fall severely fractured Leona's right femur bone—although there was not much displacement, there was significant angulation of the bone. The break ran from a little below her right hip hardware from a prior hip replacement down to the knee.

Leona was hospitalized for 7 days, and given a leg immobilizer brace rather than surgery. She was returned to Kindred Stratford with instructions to take precautions to prevent skin injuries. Due to fear of falling, Leona was unable to get out of bed for two weeks after returning to the nursing home.

We discovered during investigation that the order for two-person assistance, in place since March 29, 2011, did not show up in the June, 2013 physician orders. Leona had been to the hospital at the end of April for pneumonia, and the nursing home had canceled her physician orders. It failed to re-instate the two-person assist

order. During trial, although Kindred Stratford claimed to take responsibility for the fall and broken leg, its lawyer repeatedly referenced the ***hospital's*** failure to send the order back with Leona.

We also discovered nursing aide records reflecting single-person assistance being given while the order was in place. Those records ended about a year before the second fall. The jury appears to have factored in the failure to provide the assistance over that period into their decision on punitive damages.

We called Kindred Stratford's nursing staff to testify that the order was in place for Leona's safety to protect her from rolling out of bed. They also testified she had a right to that level of care, and that the risk to her of falling if only one aide assisted included broken bones and even death. It could also have a great probability of causing substantial harm.

Kindred Stratford's former Executive Director admitted that nursing staff members complained that they wanted more staff to help with resident care. He dismissed that as common in the industry.

The Cuyahoga County Medical Examiner testified at trial regarding his conclusion that Leona Maxim's death was caused by the fall and broken leg. He explained that, when a large bone is broken, the body is forced to devote significant energy to heal that broken bone. Because energy is being directed toward healing the fracture, there is less energy available to fight off infection and maintain life. This commonly results in a steady stream of decline. As a result, falls in the elderly are a matter of life and death.

Kindred Stratford's medical expert claimed the broken leg had nothing to do with her death, even though it had not healed by the time she died.

Leona developed multiple wounds from the brace used to immobilize her broken leg. One became a Stage IV pressure sore, that was deep enough to expose the tendon in her leg. That pressure sore became infected with an antibiotic-resistant bacteria.

At trial, Kindred Stratford argued that although there was a "mistake" in the order, Leona was "assisted" to the floor and never rolled out of bed. Kindred Stratford also argued that the brace was placed properly and never mismanaged, despite complaints from her family and records from the therapy department even three weeks after her return to the facility that they had to retrain staff on brace placement.

Trial lasted two and a half weeks. The jury deliberated for an afternoon on compensatory damages. The punitive damages phase took a morning—openings, admitting one piece of new evidence excluded in the compensatory phase, and closings—and deliberations took that afternoon. The jury knew beforehand that there could be a punitive damages phase, as it was discussed during jury selection.

Our theme throughout was that Kindred failed to take responsibility for what they had done. The defense played into this by claiming to take responsibility, then trying to minimize responsibility at every turn.

Michael put on all the family members and friends, establishing among other things that Leona was fairly active and energized before the broken leg, even though wheelchair bound. We also reinforced that by calling nursing and dietary staff to testify as to Leona's socializing and taking pride in her appearance and family. Kindred Stratford still could not help but argue she was on the verge of death.

In closing I showed the jury a quote I'd seen a day or two before by luck on social media:

A Narcissist's Prayer
That didn't happen.
And if it did, it wasn't that bad.
And if it was, that's not a big deal.
And if it is, that's not my fault.
And if it was . . .
You deserved it.

I told the jury that it struck me as exactly what Kindred was doing in defending the case. But the last bit bothered me, because (as we'd painstakingly established with every witness), no one blamed Leona or her family. (Michael had discovered in multiple focus groups there was a desire to blame Leona or her family—for falling, for not recovering, for staying at the facility. The defense was confused by our questioning on the issue.)

Then it hit me: they were saying she deserved it. Blaming Leona's pre-existing medical conditions for her death was the ultimate way to blame Leona for her death.

The Defense could not pivot from their theory that Leona was just going to die either way, even while claiming to take responsibility. I think that disconnect minimized the effectiveness of the strategy for the jury. Michael and I had worked from jury selection on to establish "brutal honesty" as our approach. We tried to show the problems and fears we had to the jury. And we pushed their experts further out on the limb with their opinions rather than fighting to pull them closer to ours. When the defense tried to attack Michael and me as dishonest lawyers on close, it fell on deaf ears.

We were repeatedly told "this is not a punitives case," including by defense counsel. I think he believed that, right up until the moment the second verdict came in. ■

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Co-Defendants With A Vicarious Liability Relationship Should Be Treated As A Single Party

By Todd E. Gurney

When a direct claim for medical negligence is asserted against a physician (Dr. X), and a secondary claim for vicarious liability is asserted against the physician's employer (ABC Corp.), the physician and the employer should be treated as a single party. Only one of the defendants (Dr. X) can be held directly liable. The other defendant (ABC Corp.) can be held liable only vicariously for the negligence of the physician. Both defendants, therefore, will be defending the ***very same conduct*** of the physician. Accordingly, the defendants should be limited to a single defense presentation – throughout discovery and trial.

A recent trend has emerged, however, where co-defendants in this scenario hire separate counsel (sometimes just two partners from the same law firm) and attempt to present separate defenses. The obvious goal of this defense strategy is to create an unfair advantage by "doubling-up" on everything – *e.g.*, separate sets of expert witnesses, separate examinations of each witness (called by the plaintiff and the co-defendant), separate peremptory challenges, and separate opening statements and closing arguments. This should not be permitted.

In cases where the claims against co-defendants involve different conduct, a jury ultimately may **apportion liability** between the defendants.[1] But, liability cannot be apportioned between co-defendants with a vicarious liability relationship because the same conduct gives rise to the liability of both defendants.

Ohio law specifically defines co-defendants with a vicarious liability relationship as a "single party." Indeed, Revised Code Section 2307.24 states, in pertinent part, that "a principal and agent, a master and servant, or other persons having a vicarious liability relationship shall constitute a **single party** when determining percentages of tortious conduct..."[2]

If a jury determines that Dr. X was negligent, then both Dr. X and ABC Corp. will be found liable for that negligence. Conversely, if the jury determines that Dr. X was not negligent, then both defendants will be absolved from liability. Since both defendants will be seeking to defend against the ***very same allegations*** of negligence against Dr. X, their defenses necessarily stand and fall together. Thus, liability could never be apportioned between them. Pursuant to Revised Code Section 2307.24(B), therefore, they "shall constitute a single party" and should be treated as such throughout the litigation.

Trial courts have broad discretion to control the manner in which evidence is presented. Co-defendants may not put up separate defense presentations simply because they may appear by different counsel. Indeed, if parties were permitted to present separate cases-in-chief simply because they have different attorneys, then nothing would prevent co-plaintiffs (husband and wife) from presenting separate cases-in-chief. For instance, after the plaintiff presents her case-in-chief, her husband could separately present his derivative claim against Dr. X with his own team,

including another full panel of experts. Of course, no trial court would permit this to happen. But it would be no different than permitting co-defendants with a vicarious liability relationship from doing so.

If the plaintiffs are restricted to one case-in-chief to present a single negligence claim and a secondary derivative claim, then the defendants should not be permitted to present two complete cases-in-chief to defend against a single direct claim and a secondary vicarious liability claim. To permit otherwise would allow on one side of the same controversy (the defense) to dominate the fact-finding process. Such trial procedure is not only unfair, but clearly not contemplated by Revised Code Section 2315.01, which dictates trial procedure in Ohio.

Section 2315.01(A)(6) provides, in pertinent part: "If several defendants have separate defenses ***and*** appear by different counsel, the court shall arrange their relative order."[3] The implication of the statute is that defendants who do not have separate defenses do not need to be arranged in relative order because they do not have anything different to add to the process. Permitting multiple presentations of the ***same defense*** would run afoul of the trial procedure clearly established by statute. "In the absence of a good reason to the contrary, it is reversible error for a trial court to fail to follow trial procedure as provided in R.C. § 2315.01."[4] One defense presentation is all that should be afforded.

The recent trial court decision in *Strauss v. Akron Gen. Med. Ctr.*, Case No. CV 2010 05 3668 (Summit Cty. 2011) is instructive here. The trial court in *Strauss* exercised its discretion to limit the co-defendants to the presentation of testimony of a single expert witness. That case involved a direct claim against a physician for his negligence and a vicarious liability claim against the hospital as a result of the physician's conduct. The court determined that one defendant was potentially **only vicariously liable** and, therefore, the court found "no reason" why that defendant would require its own expert witness:

> Only two defendants remain in this case: Dr. Passero and Northeast Ohio Pulmonary, Critical Care and Sleep Associates. Only Dr. Passero can be held directly liable for medical malpractice. The corporate defendant would be liable only vicariously for the negligence of Dr. Passero. As such, this Court sees no reason each defendant requires a separate expert in this case.

The very same reasoning applies to cases involving vicarious liability relationships based upon a theory of agency by estoppel. In cases involving a "*Clark* claim" against a hospital, where there are no direct claims against the hospital (*e.g.*, no claims of nursing or hospital negligence), only the physician can be held directly liable for medical negligence. The hospital would be liable only vicariously for the negligence of the physician. As such, there is no reason for the hospital to require a separate set of expert witnesses.

Not only should co-defendants with a vicarious liability relationship be limited to a single defense presentation, they should not be permitted to conduct "tag-team" cross-examinations of the plaintiff's witnesses. Instead, they should be treated as a single party, and limited to a single cross-examination of each witness.

In addition, co-defendants with a vicarious liability relationship should not be permitted to "cross-examine" each other's witnesses. For instance, they should not be permitted to lob "soft-ball" questions to each other's witnesses, thereby allowing the witness to undo everything the plaintiff was able to accomplish on cross-examination, and also to repeat testimony that more appropriately should have been presented during the direct examination of the witness. Such "cross-examinations" really are nothing of the sort. In fact, they simply are a sham, and provide yet another opportunity for co-defendants to unfairly dominate the presentation of evidence.

The very nature of "cross"-examination requires that the interests of the parties truly be "adverse." The mere fact that a case is brought against two defendants certainly does not make them adverse to each other, especially when their primary interest in preventing the plaintiff from recovering is cooperative.[5]

Even though some courts have permitted co-defendants to cross-examine a defendant when that defendant has been called by the plaintiff, those courts have held that such a right exists only in those cases where the defendants' interests are adverse to each other.[6] When interests are ***not*** truly adverse, however, such rights are curtailed.

Only where the defendants have attempted to escape liability by affirmatively blaming each other have courts found their interests truly to be adverse and therefore permitted the defendants to cross-examine each other during the plaintiff's case-in-chief.[8] Obviously that cannot happen in a case where one party is only vicariously liable for the conduct of the other.

When the interests of co-defendants are identical, there is no possible way for either defendant to steer any liability to the other.[9] For that reason, their interests cannot possibly be adverse. Therefore, courts should not permit them to put on sham cross-examinations of each other during the plaintiff's case. For the same reasons, they should not be permitted to cross-examine each other's

witnesses during the presentation of their respective cases-in-chief.

Finally, co-defendants with identical interests should not be afforded separate sets of peremptory challenges. Ohio Civil Rule 47(C) controls the number of peremptory challenges provided to "each party." The Rule provides:

> In addition to challenges for cause provided by law, each party peremptorily may challenge three jurors. **If the interests of multiple litigants are essentially the same, "each party" shall mean "each side."**[10]

The Ohio Supreme Court interpreted this Rule in the seminal case of *LeFort*. In that case, the court affirmed the trial court's decision to permit each defendant to exercise three peremptory challenges because the interests of the defendants were not identical:

> Each defendant asserted allegations which, if proved, would absolve it from liability to the detriment of the others. In sum, the defenses asserted did not necessarily stand or fall together. Each defendant, therefore, pursuant to Civ. R. 47(B), was entitled to three peremptory challenges.[11]

Co-defendants with a vicarious liability relationship, however, cannot absolve themselves from liability by blaming each other. In fact, since both defendants are defending the very same conduct of Dr. X, the defenses necessarily stand and fall together. Thus, the co-defendants are not entitled to separate peremptory challenges.

Furthermore, with respect to voir dire, both defendants will be seeking to do the exact same thing: Identify (and strike) those jurors who might be biased against healthcare providers and in favor of victims, or who might be inclined towards a large verdict. It would be preposterous to suggest that either defendant has an interest in voir dire that is materially antagonistic to the interests of the other defendant. Therefore, because the interests of the co-defendants are not antagonistic, they should be treated as a single "side" under Civil Rule 47(C) and afforded a single set of peremptory challenges.[12]

In sum, co-defendants with a vicarious liability relationship should be treated as a single party. They are entitled only to one set of expert witnesses, one examination of each witness, one set of peremptory challenges, one opening statement, and one closing argument. In other words, they should be treated the same as co-plaintiffs who are presenting a single, direct claim of negligence. ■

End Notes

1. R.C. § 2307.23.
2. R.C. § 2307.24(B) (emphasis added).
3. (Emphasis added.)
4. *Polasky v. Stampler,* 30 Ohio App.2d 15, 19, 281 N.E.2d 191 (1971).
5. *Fulton v. Aszman*, 4 Ohio App.3d 64 (1982).
6. *See, e.g., Rice v. Yellow Cab Co*., 117 Ohio App. 183 (1961); *see also Fulton v. Aszman*, 4 Ohio App.3d 64 (1982).
7. *See, e.g., Stachura v. Doctors Hospital Inc.* (June 26, 1989), 5th Dist. No. CA-7625.
8. *See e.g., Mitchell v. Columbiana Cty. Mental Hlth. Ctr.*, 7th Dist. No. 00 CO 46, 2001-Ohio-3472; *Mueller v. Lindes*, 8th Dist. No. 80522, 2002-Ohio-5465.
9. *See* R.C. § 2307.24(B).
10. (Emphasis added.) Civ.R. 47(C).
11. *LeFort v. Century 21-Maitland Realty Co*., 32 Ohio St.3d 121, 125, 512 N.E.2d 640, 644 (1987).
12. *See LeFort.*

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Verdict Spotlight

by Susan E. Petersen

Aaron Riedel was 28 years old when he suddenly experienced excruciating back pain. It was odd. He hadn't done anything to injure his back. The pain was so bad it prompted him to go to the Lodi Community Hospital E.R. to find out what was wrong. There, Aaron reported and the doctor documented that he had recently been diagnosed with an abdominal MRSA skin infection (2 weeks prior) that had been treated with incision and drainage and the antibiotic, Bactrim. The E.R. doctor discharged Aaron with a diagnosis of a muscle strain and prescribed pain killers and told Aaron to return if his symptoms worsened.

The next night, Aaron returned to the Lodi E.R. with worsening (9/10) back pain that radiated into his flank. Aaron reported to the triage nurse that he had been seen the previous night with back pain, which had become worse. He again reported his recent MRSA diagnosis and Bactrim medication. The E.R. doctor suspected a kidney stone, which was ruled out by CT scan. Aaron was sent home with a diagnosis of back pain and provided with steroid treatment.

Aaron returned a third night in a row with worsening back pain. During the course of the E.R. admission, he began to experience tingling and weakness in his legs. Aaron was transferred to Akron General Medical Center for an MRI. The MRI revealed a large thoracic spinal epidural abscess compressing the spinal cord. Emergency surgery was performed, but it was too late to salvage the spinal cord and prevent permanent neurological injury. Aaron was rendered an incomplete paraplegic.

This was only part of the tragic story eloquently told by CATA Members Stuart Scott and William Hawal of Spangenberg, Shibley & Liber to a Cuyahoga County jury this past June. The other portion of the story was how Aaron's devastating life-altering injuries were entirely preventable had the emergency room doctor looked at the medical records and discovered that Aaron had a recent MRSA infection. MRSA infections are known to get into the bloodstream and seed into the spinal epidural space. Infections of the spine are extremely dangerous and E.R. doctors who suspect it as a potential source of back pain must rule out infections with MRI imaging studies.

During the course of the nine-day trial, Stuart and Bill presented evidence which convinced the jury that a simple spinal MRI would have resulted in a finding of the growing infection in Aaron's thoracic spinal canal (spinal epidural abscess) in time to have the abscess surgically drained before it caused permanent neurological injury. The plaintiffs' medical experts testified that had he been transferred to Akron on the night of the second E.R. admission, surgery would have been virtually 100% successful in preventing the paralysis.

The defendant doctor testified that although he was aware that MRSA was in the medical records, he was unaware that this was a recent

diagnosis, and did not ask Aaron anything about his MRSA diagnosis. However, the doctor also testified that given Aaron's symptoms, he would have sent Aaron for an MRI of the spine if he had known the MRSA infection was recent. Although the prior evening's records were available to the doctor, he never read them because he was unaware that the hospital maintained those records on-site.

After more than six hours of deliberations, the jury sent a strong message about the duty of care emergency room doctors must follow and the patient safety this community demands by returning a verdict of $5.6 million. The verdict was broken down as follows: $5.2 in economic damages for Aaron, $0 in non-economic damages, and $200,000 for consortium to each of his two daughters for the altered relationship with their father who is now mostly wheelchair bound. In light of the zero award of non-economics for Aaron, Stuart and Bill were able to secure an Order granting a new trial on the sole issue of non-economic damages. Interesting to note, the last official offer on the case from the defense was $1.8 Million.

With each trial comes lessons learned. Stuart advises to choose your life care planner carefully and don't stretch the plan. Juries can be skeptical of life care plans that are more than bare bones. In this same vein, beware of the defense economist who will try and confuse the jury about the present value calculation of the life care plan by using higher discount rates on allegedly "insured" municipal bonds that result in a lower present value and shift the risk of default onto your client.

A sincere congratulations to Stuart and Bill for the outstanding result they achieved for the Aaron and his family.

The case is *Aaron Riedel, et al., v. Akron General Health System, et al.*, Cuyahoga County C.P. No. 14 834147, Judge Tim McCormick presiding. ■

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: **Kathleen J. St. John, Esq.**
Nurenberg, Paris, Heller & McCarthy Co., LPA
600 Superior Avenue, E., Suite 1200
Cleveland, Ohio 44114
(216) 621-2300; Fax (216) 771-2242
Email: kstjohn@nphm.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.*

John Doe v. ABC Tavern

Type of Case: Negligent Security
Settlement: $125,000
Plaintiff's Counsel: Howard Mishkind, Mishkind Law Firm Co., LPA, 23240 Chagrin Boulevard, Suite 101, Beachwood, Ohio 44122, (216) 595-1900
Defendant's Counsel: N/A
Court: N/A – settled presuit
Date Of Settlement: November, 2016
Insurance Company: Ohio Mutual Insurance Company
Damages: Colon resection secondary to gun shot wound

Summary: Plaintiff, a 34 year-old single male customer in Defendant's bar, was the victim of a shooting. The assailant was convicted and is currently incarcerated. Plaintiff alleged inadequate security. Defendant argued that there was not a heightened foreseeable risk of criminal activity taking place at their bar. Further, they asserted that Plaintiff was contributorily negligent in attempting to intervene.

Plaintiff's Expert: N/A
Defendant's Expert: N/A

Estate of Leona Maxim v. Kindred Nursing & Rehab–Stratford

Type of Case: Nursing Home Wrongful Death
Verdict: $4.4 Million ($1.4 compensatory, $3 million punitive)
Plaintiff's Counsel: William B. Eadie and Michael A. Hill, Spangenberg, Shibley & Liber, LLP, 1001 Lakeside Avenue, East, Suite 1700, Cleveland, Ohio 44114, (216) 696-3232
Defendant's Counsel: Paul McCartney and Jennifer Becker, Bonezzi Switzer
Court: Cuyahoga County Common Pleas Case No. CV 16 867545, Judge William Coyne (Trial)
Date Of Verdict: October 24, 2016 (compensatory), October 25, 2016 (punitive)
Insurance Company: Captive/Self Insured (Kindred Healthcare)

Summary: Kindred Stratford rolled Leona Maxim out of bed in 2011, after which a two-person assist for care requiring repositioning in bed order was put in place. In June, 2013, the facility rolled Leona out of bed again, when a lone aide was repositioning her in bed. This resulted in a broken right femur. Leona died 11 weeks later.

Plaintiff's Experts: Dr. Coleman Seskind (Illinois); Ernest Tosh (Texas)
Defendants' Experts: Mark Levine (Florida); Dr. Jeffrey Schlaudecker (University of Cincinnati)

Sawicki v. Trent

Type of Case: Auto vs. Pedestrian
Settlement: $250K (policy limit)
Plaintiff's Counsel: Christopher Carney & Larry Klein, Klein & Carney Co., L.P.A., 55 Public Square, Suite 1200, Cleveland, Ohio 44113, (216) 861-0111
Defendant's Counsel: William Riedel
Court: Ashtabula Common Pleas
Date Of Settlement: October 20, 2016
Insurance Company: Erie
Damages: 2 fractured elbows requiring multiple surgeries

Summary: Plaintiff walked out onto street to pick up a paper that had blown out of his car when defendant ran a stop sign at a side street and hit plaintiff as she was making her turn.

Plaintiff's Experts: Choya Hawn (Introtech); Rod Durgin (Vocational Expert); Alex Constable (Economist)
Defendant's Expert: N/A

Melanie Clink v. Grounds by Coffey, Inc., et al.

Type of Case: Bicycle Collision
Verdict: $25,500
Plaintiff's Counsel: Meghan P. Connolly and Gregory S. Scott, Lowe Eklund Wakefield Co. LPA, 610 Skylight Office Tower, 1660 W. 2nd Street, Cleveland, Ohio 44113, (216) 781-2600
Defendants' Counsel: Stephen C. Merriam
Court: Cuyahoga County Common Pleas Case No. CV-851490, Judge Maureen Clancy
Date Of Verdict: October 19, 2016
Insurance Company: State Auto
Damages: Orthopedic injuries including: Tibia fractures with ORIF, then hardware removal surgery. Nasal fractures with fixation surgery, C6 "chip" fracture

Summary: Plaintiff was riding her bike, traveling north on Big Creek Parkway in Middleburg Heights when she encountered the defendants' landscaping trailer parked partially in the travel lane. The trailer did not have temporary traffic control devices (cones) properly marking a path around the trailer. Plaintiff collided with the left side of the trailer while attempting to pass it. The jury assigned 49% comparative fault to the plaintiff.

Plaintiff's Experts: Robert Burch, CHST; Roger E. Wilber, M.D.
Defendants' Expert: Sean A. Doyle

Confidential

Type of Case: Legal Malpractice
Settlement: $305,000.00
Plaintiff's Counsel: Howard Mishkind, Mishkind Law Firm Co., LPA, 23240 Chagrin Boulevard, Suite 101, Beachwood, Ohio 44122, (216) 595-1900
Defendant's Counsel: Withheld
Court: Summit County
Date Of Settlement: October, 2016
Insurance Company: Withheld
Damages: Wrongful death claim for 59 year-old patient that died after surgery

Summary: Plaintiff is the surviving spouse. Her husband died of a gastric bleed following surgery. She hired Defendant attorney. Defendant filed suit and dismissed the action prior to commencing or attempting to commence the cause of action. Defendant failed to advise Plaintiff that the savings statute did not apply. Case settled prior to trial and after a failed mediation conference.

Plaintiff's Experts: Paul Grant, M.D. (University of Michigan - Hospitalist); John Weisensell, Esq. (Akron, Ohio - Legal Malpractice Expert); Janet Carr, R.N.; Hope Gerhardstein, R.N.
Defendant's Expert: Michael Yaffe, M.D. (Columbus, Ohio)

Erik J. Sands, et al. v. Wooster Motor Ways, Inc., et al.

Type of Case: Semi-Truck vs. Car Crash
Settlement: $550,000.00
Plaintiffs' Counsel: Andrew R. Young, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendants' Counsel: Frank Leonetti
Court: Wayne County Court of Common Pleas Case No. 13-CV-0114, Judge Wiest
Date Of Settlement: October, 2016

Summary: On March 4, 2012, Erik Sands was a backseat passenger in a car that was involved in a crash with a semi-truck on State Route 585 in Wayne County. As a result of the crash, Erik suffered multiple orthopaedic injuries including a right tibial shaft fracture, an open distal fibular fracture on the left, a pelvic ring injury, lacerations, and additional injuries. His treatment included surgical intervention for stabilization of the right tibia and left fibula. The right proximal tibia fracture healed, but Erik had ongoing wound ulcers that caused ongoing complications and infections.

The underlying fault for the crash was vehemently contested. The police report faulted the driver of Erik's vehicle, who was killed in the crash. That driver's $50,000 policy limits were offered to Erik pre-suit before Andrew Young was hired to represent the plaintiff. After Young was hired, suit was filed against the semi-truck company and its driver. Almost three years after the accident, while the suit was pending, Erik died. The death certificate listed "cardiopulmonary arrest" as the immediate cause of death due to "diabetes mellitus." The complaint was amended to include a wrongful death claim as Erik's experts related his death to the ongoing infections and complications caused by the injuries sustained in the crash.

In addition to contesting liability, the truck company and its driver hotly disputed causation on the wrongful death claim. The defendants' endocrinologist opined that the truck crash was not a cause of Erik's death, and cited Erik's non-compliance with diabetic management as a basis for his opinion. The only issue not in dispute was the fact that Erik suffered multiple orthopaedic injuries that were objectively related to the crash. Following a mediation at which the defendants' last offer was $350,000, additional discovery was conducted, after which the case settled for $550,000.

Plaintiffs' Experts: James B. Crawford (Introtech Crash Reconstruction Services - Liability Expert); Michael K. Napier, Sr. (TrukingExpert.com, Inc. - Liability Expert); Nicholas DiNicola, M.D. (Ohio Orthopaedic Associates - Damages Expert); and James L. Bernene, M.D., MACP (Damages Expert)
Defendants' Experts: Daniel B. Mendlovic, M.D., FACE (Damages Expert); and Sebastian A. B. Van Nooten (Hrycay Consulting Engineers, Inc. - Liability Expert)

Jane Doe, Admin. v. John Roe, M.D., et al.

Type of Case: Medical Malpractice
Settlement: $1,650,000.00
Plaintiff's Counsel: David M. Paris, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: October, 2016
Insurance Company: Confidential
Damages: Wrongful death

Summary: Improper surgical technique resulting in wrongful death.

Plaintiff's Experts: Confidential
Defendants' Experts: Confidential

Melissa Knothe-Tate v. Stacy Shriver

Type of Case: Negligence - Motor Vehicle Accident
Verdict: $85,042.80
Plaintiff's Counsel: Ladi Williams, Jack Landskroner, Landskroner, Grieco, Merriman, LLC, 1360 W. 9th Street, Suite 200, Cleveland, Ohio 44113, (216) 522-9000

Defendant's Counsel: Anne Markowski
Court: Cuyahoga County Common Pleas Case No. CV-15-854826, Judge Joseph Russo
Date Of Verdict: September 30, 2016
Insurance Company: State Farm Insurance
Damages: $39,032.32 in medical specials, $12,000.00 - Robinson-Bates Figure

Summary: Plaintiff was involved in a motor vehicle collision on October 21, 2014, that caused injury to her right shoulder AC joint and tore the surrounding ligaments. This shoulder had been successfully reconstructed in December of 2013 following a bike injury and the plaintiff had returned to full function with no pain or symptoms prior to the October 21, 2014 collision. The last offer of settlement was $20,000.00.

Plaintiff's Expert: Joseph Iannotti, M.D.
Defendants' Expert: Irwin Mandel, M.D.

John Mackey v. Chandler Eddy

Type of Case: Motor Vehicle
Settlement: $350,000.00
Plaintiff's Counsel: David A. Herman, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendant's Counsel: Thomas Wright, Esq. and Molly Harbaugh, Esq.
Court: Lake County Common Pleas Court
Date Of Settlement: September 20, 2016
Insurance Company: Cincinnati

Summary: Defendant lost control of his van while exiting a highway and smashed into plaintiff's vehicle causing him to suffer a herniated disc and nerve injury.

Plaintiff's Expert: Marc Winkleman, M.D.
Defendant's Expert: Michael Devereaux, M.D.

Tony L. Hager, et al. vs. Progressive Insurance Co., et al.

Type of Case: Motor Vehicle Collision
Settlement: $340,000.00
Plaintiffs' Counsel: Florence J. Murray and Leslie O. Murray, Murray & Murray Co., LPA, 111 East Shoreline Drive, Sandusky, Ohio 44870, (419) 624-3011
Defendants' Counsel: Lorri J. Britsch and Edward Rhode
Court: Erie County Common Pleas Case No. 15-CV-0038, Judge Tygh Tone
Date Of Settlement: September 6, 2016
Insurance Company: State Auto Insurance Co. and Progressive Insurance Co.
Damages: Disc bulges at C5-C7 and partial tear left rotator cuff, leading to reduction in pay and early retirement in April, 2016.

Summary: The collision caused Mr. Hager to suffer permanent, substantial impairment, and due to the physical demands of being a glass installer, he was forced to retire on May 1st, 2016 at age 58, nine years earlier than the average retirement age of 67 and the earliest age Mr. Hager planned on retiring. Prior to the collision, he was earning approximately $808 per week, plus overtime. In the immediate period after the collision, Mr. Hager missed 77 days of work and earned only $278 per week while on disability. Mr. Hager's total lost wages from the crash were $521,344.25.

Plaintiffs' Experts: Treating Physicians: Daniel Berry (Family Doctor); Mark Bej (Pain Management); Ajit Krishnaney and Phillip Stickney (Orthopedists)
Defendants' Expert: David Hannallah

Thomas v. First Energy, et al.

Type of Case: Electrical Contact
Settlement: $60.7 Million
Plaintiff's Counsel: Michael Becker, Romney Cullers, David Skall, The Becker Law Firm, 134 Middle Avenue, Elyria, Ohio 44035, (440) 323-7070
Defendants' Counsel: Thomas Michals and Kevin Boyce
Court: Cuyahoga County Common Pleas Court, Judge Janet Burnside
Date Of Settlement: September, 2016
Damages: Severe burns, profound brain injury, partial amputation

Summary: Plaintiff, a 12 year-old girl, contacted a downed, energized power line that was damaged during a storm. It remained fully energized for several days after the power company had received multiple calls about it.

Plaintiff's Experts: Gregory Booth (Engineer); Bradley Shepherd (Engineer); Tucker Mann (Utilities Industry)
Defendants' Experts: Richard Brooks (Engineer); Philip Stark, Ph.D. (Statistician)

Jane Doe v. ABC Trucking Co.

Type of Case: Truck vs. Car
Settlement: $1,995,000.00
Plaintiff's Counsel: Andrew R. Young, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendant's Counsel: Confidential
Court: Confidential
Date Of Settlement: August, 2016
Insurance Company: Confidential
Damages: Wrongful death

Summary: Truck rear ends car.

Plaintiff's Expert: Confidential
Defendant's Expert: Confidential

Confidential

Type of Case: Birth Injury-Brachial Plexus
Settlement: $1,500,000.00
Plaintiff's Counsel: Howard Mishkind, Mishkind Law Firm Co., LPA, 23240 Chagrin Boulevard, Suite 101, Beachwood, Ohio 44122, (216) 595-1900
Defendant's Counsel: Withheld
Court: Withheld
Date Of Settlement: July, 2016
Insurance Company: Withheld
Damages: Brachial Plexus injury

Summary: Failure to timely deliver macrosomic baby by C-Section resulting in Severe Brachial Plexus injury.

Plaintiff's Experts: James Balducci, M.D. (OB-Gyn); Richard Bonfiglio, M.D. (Physical Medicine and Rehab); Rod Durgin, Ph.D. (Vocational Expert); Marianne Boeing (Life Care)

Aaron Riedel, et al. v. Lodi Community Hospital, et al.

Type of Case: Medical Malpractice
Verdict: $5,600,000.00
Plaintiffs' Counsel: William Hawal and Stuart Scott, Spangenberg, Shibley & Liber, LLP, 1001 Lakeside Avenue, East, Suite 1700, Cleveland, Ohio 44114, (216) 696-3232
Defendants' Counsel: William Bonezzi and Elizabeth Nocera Davis
Court: Cuyahoga County Common Pleas Court, Judge McCormick
Date Of Verdict: June 24, 2016
Insurance Company: Hospital self-insured; ER Group - off shore insurer
Damages: Incomplete Paraplegia

Summary: Patient presented to ER on consecutive evenings with severe mid-back pain and a recent history of a MRSA skin infection. During third ER visit, patient developed neurologic deficits, prompting transfer to Akron Medical Center where MRI revealed thoracic epidural abscess. Abscess was successfully drained, but patient's neurologic function was only partially restored.

Plaintiffs' Experts: Michael MacQuarrie, M.D.; Rakesh Patel, M.D.; Jon Zenilman, M.D.; Darlene Carruthers; John F. Burke, Ph.D.
Defendants' Experts: Henry Smoak, M.D.; Michael McIlroy, M.D.; Richard Katz, M.D.; James E. Brown, Jr., M.D.; John Scarbrough, Ph.D.; Alpesh Patel, M.D.; Rabih Darouiche, M.D.

Daniel S. Mazzei, et al. v. Megan Quimby, et al.

Type of Case: Motor Vehicle Accident
Settlement: $350,000.00 (policy limits)
Plaintiffs' Counsel: Jordan D. Lebovitz, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Court: Mahoning County Court of Common Pleas
Date Of Settlement: June, 2016

Summary: Plaintiff, along with three (3) passengers, was traveling home in August of 2014 when Defendant Quimby (22 years-old at the time) failed to yield while turning onto SR 534 from Mahoning Avenue in Milton, Ohio. Defendant Quimby was driving a 2004 Dodge Ram pickup truck that she was "test-driving" from a local auto dealership when she crashed into Plaintiff's vehicle. The Plaintiffs suffered a variety of injuries including, but not limited to, fractured femur, fractured sternum, fractured left hip, fractured wrist, and a series of broken ribs.

Estate of Jane Doe v. John Doe Nursing Home Facility

Type of Case: Wrongful Death; Nursing Home Negligence
Settlement: $1,500,000.00
Plaintiff's Counsel: Susan & Todd Petersen, Petersen & Petersen, 428 South Street, Chardon, Ohio 44024, (440) 279-4480
Defendant's Counsel: Withheld
Court: Withheld
Date Of Settlement: June, 2016
Insurance Company: Withheld
Damages: Death of 75 year-old woman

Summary: In 2016, Petersen & Petersen negotiated a $1.5 million settlement in a negligence and wrongful death claim. The client claimed that a 75+ year-old woman was the victim of substandard nursing care during an inpatient rehabilitation stay, following a five day stay at the hospital for pneumonia. She was readmitted to the nursing home in stable condition. She was found unconscious and unresponsive less than 24 hours later. Plaintiff brought suit, alleging the nursing care was negligent and caused the woman's death. Punitive damages were also alleged. The defendant nursing provider disputed the allegations. The remaining terms of the settlement, including, but not limited to the identity of the parties and Court in which the matter was pending, are confidential.

Plaintiff's Expert: Withheld
Defendant's Expert: Withheld

Anthony McMichael, Admin. Est. Of Nakeyia McMichael v. General Emergency Medical Specialists, Inc.

Type of Case: Medical Negligence, Wrongful Death
Verdict: $4,580,000
Plaintiff's Counsel: Nicholas A. DiCello, Michael A. Hill, Peter H. Weinberger, Spangenberg, Shibley & Liber, LLP, 1001 Lakeside Avenue, East, Suite 1700, Cleveland, Ohio

44114, (216) 696-3232
Defendant's Counsel: Anna Carulus, Joe Herbert
Court: Summit County Common Pleas Case No. 2013 11 5404, Judge John Enlow
Date Of Verdict: May 18, 2016
Insurance Company: ProAssurance
Damages: Wrongful death, lost wages and lost services

Summary: Nakeyia McMichael presented to Akron General Medical Center's ER with 10/10 headache, nausea and vomiting in the early morning hours of June 8, 2012. Defendants diagnosed Nakeyia with and treated her for a migraine before sending her home. Nakeyia died the following day from progressive cerebral edema resulting in brain herniation. Plaintiff alleged that Nakeyia had a history of lupus cerebritis – swelling of the brain caused by lupus – that acutely flared with lupus attacks, which Nakeyia was having on June 8, 2012. Plaintiff alleged that Nakeyia had been properly treated for acute exacerbations of cerebral edema with IV medications, in the past, including at Akron General proximately 18 months earlier. Defendants disputed that Nakeyia had lupus cerebritis and denied that Nakeyia died from progressive cerebral edema and brain herniation.

Plaintiff's Experts: Michael MacQuarrie, M.D. (Emergency Medicine); Tommasina Papa-Rugino, M.D. (Neurology/Headache Medicine); Jerome Barakos, M.D. (Neuroradiology); Eric Gershwin, M.D. (Rheumatology); John Burke, Ph.D. (Economist)
Defendant's Experts: Kristsopher Brickman, M.D. (Emergency Medicine); Guy Rordorf, M.D. (Neurology)

John Doe, a Minor v. ABC Hospital, et al.

Type of Case: Medical Malpractice
Settlement: Confidential
Plaintiff's Counsel: Jonathan D. Mester, Nurenberg Paris, Heller & McCarthy Co., LPA, 600 Superior Avenue, East, Suite 1200, Cleveland, Ohio 44114, (216) 621-2300
Defendants' Counsel: Withheld
Court: Withheld
Date Of Settlement: April, 2016
Insurance Company: Withheld
Damages: Cerebral Palsy

Summary: This medical malpractice/birth injury case was litigated in Carrollton, Georgia. The case involved a woman who was thirty-two weeks pregnant when she was involved in an accident with a truck. As a result of the accident, she was taken to a local hospital for observation. Thereafter, a c-section was performed to deliver her child the following day. Unfortunately, the child was born with a very severe brain injury, which requires twenty-four hour care for the child. The cost of caring for this child for the rest of his life expectancy is projected to be in the range of $20 - $25 million. Jonathan filed a lawsuit against the physicians who were involved in her care, as well as the hospital, contending that the fetal monitoring strips indicated that the baby was in trouble and needed to be delivered sooner, and that if an earlier delivery occurred the baby would have been born without a significant brain injury. Following a several year litigation which involved traveling throughout the country for medical expert depositions, the case settled for a confidential amount.

Plaintiff's Expert: Withheld
Defendant's Expert: Withheld

Estate of Fred Coward v. Jose Villavicencio, M.D.

Type of Case: Medical Malpractice/Wrongful Death
Verdict: $950,000 compensatory & $1,900,000 punitive
Plaintiff's Counsel: Howard Mishkind, Mishkind Law Firm Co., LPA, 23240 Chagrin Boulevard, Suite 101, Beachwood, Ohio 44122, (216) 595-1900
Defendant's Counsel: *
Court: Franklin County Court of Common Pleas
Date Of Verdict: March, 2016
Insurance Company: N/A
Damages: Death of patient following overdose of pain mediation

Summary: Plaintiff was a patient of defendant for chronic pain treatment. Plaintiff overdosed on narcotic medications. Defendant was uninsured and prior to trial had his medical license removed. Liability was determined on motions and damages heard by Magistrate Timothy McCarthy. Post judgment collection efforts are still ongoing as defendant was uninsured.

Plaintiff's Expert: William Santaro, M.D. (Laureldale, Pennsylvania - Pain Management)

Estate of John Doe, et al. v. John Doe Retailer and Chain of Delivery Subcontractors

Type of Case: Wrongful death; Natural Gas Explosion/Fire
Settlement: $17,000,000.00
Plaintiffs' Counsel: Susan & Todd Petersen, Petersen & Petersen, 428 South Street, Chardon, Ohio 44024, (440) 279-4480
Defendant's Counsel: Withheld
Court: Withheld
Date Of Settlement: November, 2015
Insurance Company: Withheld
Damages: Death of 87 year-old man; emotional injuries to 89 year-old widow

Summary: Attorneys Susan and Todd Petersen obtained a $17 Million settlement for the death of an 87 year-old man and his surviving 89 year-old wife, who were victims of a natural gas home explosion and fire on day five of trial.

At the time of the home explosion, the elderly couple were sitting at their kitchen table. With a giant "boom" and rush of air blowing out all the windows, the 89 year-old wife grabbed her husband to exit through the back kitchen door. As she passed by the basement steps, she could feel the heat coming up. She exited through the garage safely, only to realize that her 87 year-old husband did not. He had decided to exit through the front door, but was trapped inside. Within a minute, the entire house was engulfed in flames. First responders performed a search and rescue and found him in the bathtub still alive. He was taken to the hospital but died one hour after the explosion from smoke inhalation. He had first and second degree burns all over his body. He left behind his widow and four adult children.

Two and one half months before, the couple had purchased an electric dryer from a retailer. As part of the purchase price, they paid for removal and haul away of the existing gas dryer. Explosion investigators discovered that the gas line in the basement, which sat directly behind the new dryer, had been left uncapped and valve to the line was found partially open. Capping of unused gas lines is required by law in Ohio, not to mention being the most basic of appliance installation rules.

Through sworn depositions and via discovery of internal documents, the Petersens uncovered evidence that the retailer had cut expenses in its delivery systems, forcing delivery subcontractors to do more with less. The retailer knew quite well what this belt-tightening had led to, i.e. low-paying jobs that they had trouble filling with qualified candidates. Instead, they accepted the practice of taking who they could get and then not training them on the safety protocols and procedures, including those safety rules which relate to working with natural gas. The Petersen legal team uncovered evidence that indeed the delivery team at issue was untrained and unqualified. More egregious was the fact that they were not the only unqualified team being sent into the homes of trusting and unsuspecting customers. Publicly available criminal dockets and internal company files showed a pattern of criminal after criminal wearing the retailer's uniform and working deliveries.

The Petersen law firm investigation revealed that the retailer, in its contracts with delivery contractors/operators, required background checks – theoretically. However, they ultimately learned in terms of their clients' delivery, the subcontractors let the delivery man start working before the results ever came back. Later, the results of his background check actually came back and they rejected him on paper, but still let him work. After the driver had already worked for months (including the job at issue), the company finally fired him. Amazingly, the company let him return several months later under a fake name. At the time of trial, the delivery man was incarcerated on multiple unrelated criminal convictions.

Sworn deposition testimony taken by the Petersens revealed that when the retailer was considering hiring the subcontractor delivery company, it knew that this very same company had already used unqualified workers with severe criminal records in its other markets, but hired them anyway. The Petersen firm alleged that all of the entities in the chain of delivery were responsible for the tragic home explosion and resulting death and injuries to the widow and this entire family. The lawsuit included claims for negligent removal of the gas appliance, negligent hiring, training, supervision and retention, and punitive damages.

Plaintiffs' Expert: Withheld
Defendant's Expert: Withheld

Jane Doe v. John Doe Physician's Practice, et al.

Type of Case: Wrongful Death; Medical Malpractice
Settlement: $2,000,000.00 (policy limit)
Plaintiff's Counsel: Susan & Todd Petersen, Petersen & Petersen, 428 South Street, Chardon, Ohio 44024, (440) 279-4480
Defendants' Counsel: Withheld
Court: Withheld
Date Of Settlement: April, 2015
Insurance Company: Withheld
Damages: Wrongful Death of 71 year-old woman

Summary: This was a wrongful death medical negligence case against a physician and practice for negligent prescribing of the medication Aldactone. The physician prescribed the drug after the patient complained of hair loss, despite no research into off-label usage of the drug. Aldactone's intended use is as a diuretic and antihypertensive medication. The drug was also contraindicated for this patient, but prescribed anyway. Punitive damages were alleged based upon evidence that the doctor – in the month before her death – increased the dosage, despite having lowered it at a prior visit with knowledge of an elevated potassium level that was hypokalemic. He then failed to order timely lab work to monitor her potassium level. Less than one month on the contraindicated high dose, the woman suffered an arrhythmia and cardiac arrest due to hypokalemia. She died within days of the event.

Plaintiff's Expert: Withheld
Defendants' Expert: N/A ■

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:

1. ***Skill, interest and ability in trial and appellate practice.***
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_____

Firm Name:_____

Office Address:_____ **Phone No:**_____

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

Law School Attended and Date of Degree:_____

_____

Professional Honors or Articles Written:_____

_____

Date of Admission to Ohio Bar:_____ **Date 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 membership fee to: **CATA, c/o William B. Eadie, Esq.**
Spangenberg, Shibley & Liber
1001 Lakeside Avenue, Suite 1700
Cleveland, Ohio 44114

First Year Lawyer Dues: $28
New Member Applications received before July 1st: $125
New Member Applications received on or after July 1st: $75
(Reduced mid-year rates do not apply to Current Members. Current Members remain responsible for annual dues ($125) regardless of when payment is received.)

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