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What Does the Future Hold for Severe Obesity Claims Under the ADA?

Robert G. Chadwick Jr., *Chadwick Soefje & Ladik, PLLC*

In 2013, the American Medical Association ("AMA") recognized obesity as a "disease … with multiple pathophysiological aspects." AMA Resolution 420, A-13 (May 16, 2013). The AMA noted that the World Health Organization, the U.S. Food and Drug Administration, the National Institutes of Health, the Internal Revenue Service, and one of the largest health insurance companies, Cigna, all recognize obesity as a disease. *Id*.

According to data published by the U.S. Department of Health & Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, about one in thirteen adults (7.7%) in the United States are considered to have extreme or severe obesity. Extreme obesity is defined as a body mass index of 40 or greater.

Despite this data, there is no federal law expressly outlawing discrimination in private employment on the basis of severe obesity. That has not stopped persistent plaintiffs from claiming unlaw-

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Inside This Issue

Letter from the President

***Jason R. Jobe*, Esq.**, *Thompson Coe*

As we move through the dog days of summer, there is relief in sight—three fall days in beautiful Chicago! PLDF's 10th Annual Meeting will be in the Windy City, September 25 - 27 at the W Chicago – Lakeshore. Once again, we have put together an impressive lineup of attorneys and claims professionals who will speak on a broad range of topics and tips applicable to defending professional liability claims. In addition to expanding your knowledge and knocking out CLE/CE credits, you will enjoy the opportunities to

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ful discrimination under existing federal laws, such as the Americans with Disabilities Act (ADA"), which prohibits covered private employers from "discriminat[ing] against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). Since the early days of the ADA, federal courts have thus been forced to address the question of whether severe obesity is implicitly protected as a disability under the Act.

Surprisingly, nearly thirty years after the passage of the ADA, there is still no consensus on this question. As late as June 2019, two federal courts reached materially different conclusions regarding the reach of the Act. At the heart of the dispute is whether extreme obesity itself can qualify as a disability under the ADA even if it is not caused by an underlying physiological disorder or condition.

The ADA

The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). The Act sets forth no definition of "physical or mental impairment."

To be sure, after a series of Supreme Court decisions that narrowly defined "disability," Congress enacted the ADA Amendments Act of 2008 to ensure that the ADA's "definition of disability … be construed in favor of broad coverage." 42 U.S.C. § 12102(4)(A). Still, the amendment does not provide a definition for the term "physical or mental impairment."

The Equal Employment Opportunity Commission

Although a regulation by the Equal Employment Opportunity Commission ("EEOC") supplies a definition of "physical or mental impairment", the definition is silent on whether obesity independent of an underlying physiological disorder is an impairment under the Act. 29 C.F.R. § 36.105(b)(1). Other EEOC interpretive guidance, which construes both the ADA and the EEOC regulation, however, states in pertinent part:

> "It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments. The definition of the term 'impairment' does not include physical characteristics such as … weight … that are within 'normal' range and are not the result of a physiological disorder."

29 C.F.R. pt. 1630, app. § 1630.2(h).

Some federal courts have concluded "that a … natural reading of the [EEOC's] interpretive guidance is that an individual's weight is generally a physical characteristic that qualifies as a physical impairment only if it falls outside the normal range *and* it occurs as the result of a physiological disorder [emphasis in original]." *See Morriss v. BNSF Ry., Co.*, 817 F.3d 1104, 1108 (8th Cir.), *cert. denied*, 137 S.Ct. 256 (2016). As the Eighth Circuit reasoned, "reading … the EEOC interpretive guidance in its entirety supports this conclusion" because, for example, "the interpretive guidance also provides that '[o]ther conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.'" *Id.* at 1108-09 (alteration in original) (quoting 29 C.F.R. pt 1630, app. § 1630.2(h)).

In a 2018 case, however, the Ninth Circuit cited an amicus brief filed by the EEOC advancing a different construction

of its interpretive guidance: "[W]eight (1) is not an impairment when it is in the normal range and lacks a physiological cause but (2) may be an impairment when it is either outside the 'normal' range *or* occurs as a result of a physiological disorder [emphasis added]." *See Taylor v. Burlington Northern Railroad Holdings, Inc*., 904 F.3d 846, 851 (9th Cir. 2018).

The position taken by the EEOC in its amicus brief is consistent with a compliance manual it withdrew in 2012. In that manual, the EEOC took the position that "normal deviations in height, weight or strength that are not the result of a physiological disorder are not impairments … At extremes, however, such deviations may constitute impairments." (EEOC Compliance Manual § 902.2(c)(5)(2012) The position taken by the EEOC in its amicus brief is also consistent with a position the agency has taken in litigation as a plaintiff.

Velez v. Cloghan Concepts, LLC, No. 18-CV-1901, 2019 WL 2423145 (S.D. Cal. June 10, 2019)

In a June 10, 2019 Order, the U.S. District Court for the Southern District of California addressed a complaint in which the plaintiff alleged he was severely obese, ostensibly because of a Binge Eating Disorder ("BED"). The plaintiff alleged he was denied a public accommodation by a restaurant in violation of the ADA.

The restaurant filed a motion to dismiss arguing, among other grounds, the plaintiff had not alleged a qualifying disability under the ADA. In rejecting this argument, the Court joined a minority group of district court decisions holding extreme obesity is an ADA impairment even without evidence of a physiological cause. *See McCollum v. Livingston*, No. 14-CV-3253, 2017 WL 608665, at *35 (S.D.Tex. Feb. 3, 2017); *EEOC v. Res. for Human Dev., Inc*., 827 F.Supp. 2d 688, 693-95 (E.D.La. 2011); *Lowe v. Am. Eurocopter*, LLC, No. 10-CV-24, 2010 WL 5232523, at *7-8 (N.D.Miss. Dec. 16, 2010*). See also Taylor v. Burlington Northern Railroad Holdings, Inc*., ___ P.3d ___, 2019 WL 3023161 (Wash. July 11, 2019)(endorsing a similar position in interpreting the disability provisions of the Washington Law Against Discrimination).

For its reasoning, the Court cited the EEOC's *Taylor* amicus brief and its discontinued compliance manual: "In the absence of clear, binding authority, the Court adopts the definition the EEOC set forth in its amicus brief and compliance manual: weight may be an impairment when it falls outside the normal range *or* occurs as the result of a physiological disorder [emphasis in original]." The Court thus did not consider whether the ADA itself mandated a different interpretation than that advanced by the EEOC.

As for whether the plaintiff's alleged weight exceeded the "normal range", the Court noted the "Plaintiff has alleged that he has morbid obesity, which is sufficient to allege his weight exceeds the normal range." Even after this analysis, the Court still granted the motion to dismiss on other grounds.

Richardson v. Chicago Transit Authority, 926 F.3d 881 (7th Cir. 2019)

Two days later, in a decision dated June 12, 2019, the Seventh Circuit Court of Appeals addressed a complaint in which the plaintiff alleged his employer violated the ADA by "refus[ing] to allow [him] to return to work because it regarded him as too obese to work as a bus operator." The U.S. District Court for the Northern District of Illinois had granted summary judgment in favor of the employer, and the plaintiff appealed.

In affirming the district court opinion, the Seventh Circuit held that extreme obesity only qualifies as a disability under the ADA if it is caused by an underlying physiological disorder or condition, a threshold showing not met by the plaintiff. *Id*. at 884. The Court further held that, to survive summary judgment on a claim of a perceived disability, a plaintiff "must present sufficient evidence to permit a reasonable jury to infer that [his employer] perceived his extreme disability was caused by an underlying physiological disorder or condition", another threshold showing not made by the plaintiff. *Id*. at 892. These holdings were in line with previous rulings by the Eighth, Sixth and Second Circuits. *See Morriss*, 817 F.3d at 1108-13; *EEOC v. Watkins Motor Lines, Inc*., 463 F.3d 436, 441-43 (6th Cir. 2006); *Francis v. City of Meridien*, 129 F.3d 281, 286-87 (2d Cir. 1997). *See also Sturgill v. Norfolk S. Ry. Co.,* No. 18-CV-566, 2019 WL 1063374, at *3-4 (E.D. Va. Mar. 6, 2019)

For its reasoning, the Seventh Circuit agreed with the Eighth Circuit's reading of the EEOC's interpretive guidance regarding the definition of "impairment." The Court added:

> "If we were to read the EEOC interpretive guidance in the way [it] suggests, even an employee with normal weight could claim a weight-based physical impairment if his weight was the result of a physiological disorder. Likewise, any employee whose weight—or other physical characteristic—is even slightly outside the 'normal range' would have a physical impairment even with no underlying physiological cause. Such results are inconsistent with the ADA's text and purpose and must be rejected.

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> Otherwise, 'the 'regarded as' prong would become a catch-all cause of action for discrimination based on appearance, size, and any number of other things far removed from the reasons the [ADA] [was] passed.'"

Id. at 890.

The Seventh Circuit also disagreed that opinions of the medical community were a persuasive source of information as to the scope of the ADA. In this regard, the Court opined: "The ADA is an antidiscrimination—not a public—statute, and Congress's desires as it relates to the ADA do not necessarily align with those of the medical community." *Id*. "at 891. At bottom, [the plaintiff] does not present any evidence suggesting an underlying physiological disorder or condition caused his extreme obesity." *Id*. "Without such evidence, we cannot call [the plaintiff's] extreme obesity a physical impairment within the meaning of the ADA …" *Id*.

Two Roads Forward for Severe Obesity Claims Under the ADA

In the wake of the decisions in *Velez* and *Richardson*, there are two roads forward for severe obesity claims alleging discrimination under the ADA. The first road is a legal one. If more federal appellate courts agree with the Second, Sixth, Seventh and Eighth Circuits, this road may ultimately prove to be a dead end. If one or more appellate courts agree with *Velez*, this road may ultimately lead to the U.S. Supreme Court.

The second road is an evidentiary one. Even as it was dismissing the plaintiff's ADA claims for want of evidence, *Richardson* included a gratuitous footnote explaining how this evidentiary burden could be satisfied. *Id*. at 891, n. 10. Citing *Watkins*, 463 F.3d at 443-45 & n. 1, the footnote explains "[i]t is possible that morbid obesity is a disorder that by its very nature has a physiological cause." *Id*. The footnote also cites *Cook v. State of R.I. Dept. of Mental Health, Retardation & Hosps*., 10 F.3d 17, 23 (1st Cir. 1993) which concluded a jury could find the plaintiff's "morbid obesity" was a "physical impairment" because "she presented expert testimony that morbid obesity is a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite- suppressing signal system, capable of causing adverse effects within the musculoskeletal, respiratory, and cardiovascular system." *Id*. This footnote thus leaves open the question of whether a more sophisticated claim would have survived summary judgment in *Richardson*.

It is likely both roads will be well-traveled in the near future by severely obese claimants. The reasoning of *Velez* is an incentive for future claimants to test the legal road, especially in federal circuits which have not yet decided whether severe obesity without a physiological cause constitutes an impairment under the ADA. The footnote of *Richardson* is an invitation to future plaintiffs to support claims of severe obesity discrimination with better evidence (1) of the underlying physiological cause, or (2) that severe or morbid obesity always has an underlying physiological cause. As long as such incentives exists, employers should expect severe obesity claims under the ADA to continue and become more sophisticated. ■

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When Attorneys Are Sued by Non-Clients: The Immunity and Privilege Rule

Keith J. Broady, Kathleen M. Loucks and Lauren E. Nuffort, *Lommen Abdo*

Typically, lawsuits against attorneys are brought by clients alleging legal malpractice. An essential element of a legal malpractice claim is the existence of an attorney-client relationship. The general rule is that a lawyer is liable only to his or her client and not to third persons. *Nat'l Sav. Bank of District of Columbia v. Ward*, 100 U.S. 195, 200 (1879) ("Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third-party"). Generally, when a non-client brings a lawsuit they cannot assert a legal malpractice claim. If a legal malpractice claim is asserted by a non-client, consideration should be given to promptly serving a dispositive motion to dismiss.

On occasion non-clients assert claims that are not for legal malpractice against attorneys relating to conduct of the attorney within the course and scope of rendering legal services to a client. Examples include claims of civil conspiracy or aiding and abetting a client to breach a contract or breach of some other duty owed by the client to the non-client. For instance, if a client refuses to close on a

Under the immunity and privilege rule, an attorney is immune and/or privileged from liability to non-clients for conduct within the scope of their representation of their clients. This rule makes sense because an attorney owes a duty of care to his or her own client, not to third parties who claim to have been damaged by the attorney's negligence.

transaction under the terms of a signed agreement, a non-client may assert the attorney advising the client has conspired with the client or aided and abetted the client in the breaching conduct, causing damages to the non-client. But, attorneys owe a duty of loyalty to clients and a duty to give clients independent legal advice. An attorney has to use that "degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession in carrying out the services for his client." *Temple Hoyne Buell v. Holland & Hart*, 851 P.2d 192, 198 (Colo. Ct. App. 1992). If an attorney owed a duty to third parties, then conflicts of interest would be inevitable and it would impair the attorney's duty to represent her client within the bounds of the law. As the Supreme Court of New York succinctly stated in *D. & C. Textile Corp. v. Rudin*, 246 N.Y.S.2d 813, 817 (N.Y. 1964), "[p]ublic policy requires that attorneys . . . shall be free to advise their clients without fear that the attorneys will be personally liable to third persons if the advice the attorneys have given to their clients later proves erroneous."

The Immunity and Privilege Rule

Under the immunity and privilege rule, an attorney is immune and/or privileged from liability to non-clients for conduct within the scope of their representation of their clients. *See e.g., MedPartners, Inc. v. Calfee, Halter & Griswold, L.L.P.*, 748 N.E.2d 604, 617 (Ohio Ct. App. 2000) (attorney immune from liability to non-clients arising from attorney's work in good faith and on behalf of his client). This rule makes sense because an attorney owes a duty of care to his or her own client, not to third parties who claim to have been damaged by the attorney's negligence. *Ward*, 100 U.S. at 200; *see also Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230, 240 (Colo. 1995) ("Because attorneys do not owe a duty of reasonable care to non-clients, attorney malpractice cannot extend to non-clients.").

Courts throughout the country recognize the importance of protecting the attorney-client relationship and duties owed to clients. The United States Court of Appeals for the Eighth Circuit held that "an attorney who acts within the scope of the attorney-client relationship will not be liable to third persons for actions arising out of his professional relationship unless the attorney exceeds the scope of his employment or acts for personal gain." *Maness v. Star-Kist Foods, Inc.*, 7 F.3d 704, 709 (8th Cir. 1993) (involving a claim of tortious interference with contract by plaintiff/appellant employee against employer's attorney). Similarly, in *McDonald v. Stewart*, 182 N.W.2d

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437, 440 (Minn. 1970), the Minnesota Supreme Court affirmed the grant of summary judgment for the defendant-attorney concluding "an attorney acting within the scope of his employment as attorney is immune from liability to third persons for actions arising out of that professional relationship." The Minnesota Supreme Court explained that the immunity afforded to attorneys is only limited if the attorney exceeds the scope of the attorney-client relationship, acts for personal gain, or helps her client perpetrate fraudulent or unlawful activity. *Id*.

The court in *Fraidin v. Weitzman*, 611 A.2d 1046, 1080 (Md. 1992) explained the rule as follows:

> …there can be no conspiracy where an attorney's advice or advocacy is for the benefit of his client and not for the attorney's sole personal benefit. We have held that to impose liability on an attorney for giving advice regarding a matter of no personal interest to him or her, would be a "'fundamentally erratical change in the law' which would radically change the nature of attorney-client relationships . . ." *Johnson v. Baker*, 84 Md.App. 521, 530, 581 A.2d 48 (1990) (citing *Kartiganer Assoc., P.C. v. Town of New Windsor*, 108 A.D.2d 898, 485 N.Y.S.2d 782, 783–84 (1985) ("attorney not liable for inducing client to breach contract with another if attorney acts on client's behalf and within scope of his authority")); See *Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321, 328 (9th Cir.1982) (An advisor's conduct is privileged when motivated by a desire to benefit the principal, even though such conduct also improves the advisor's own position.).

Exceptions to the Immunity and Privilege Rule

There are exceptions to the immunity and privilege rule. One of the most common exceptions is third party beneficiary claims.

An attorney may owe a duty to a third party if the attorney was hired for the purpose of benefitting a third party. *See MacLeish v. Boardman & Clark LLP*, 924 N.W.2d 799 (Wis. 2019) (non-client named as a beneficiary in a will has standing to sue attorney for malpractice if beneficiary can demonstrate attorney's negligence impeded testator's intent); *Calvert v. Scharf*, 619 S.E.2d 197 (W. Va. 2005) (intended beneficiaries of a will who are specifically identifiable can sue lawyer who prepared will when they can show the testator's intent was frustrated by the negligence of the lawyer resulting in the loss of the beneficiaries' interest under the will); *see also* Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* § 7.10, at 379 (3rd ed. 1993) ("the vast majority of modern decisions have favored expanding privity beyond the confines of the attorney-client relationship where the plaintiff was intended to be *the* beneficiary of the lawyer's retention.").

The California Supreme Court held in *Lucas v. Hamm*, 364 P.2d 685, (Cal. 1961), cert. denied 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed.2d 525 (1962), that an intended beneficiary may bring an action for legal malpractice against the decedent's attorney where the attorney's negligent act caused the named beneficiary to lose the intended bequest. The Minnesota Supreme Court has denied a claim based on the third party beneficiary theory by a son against an attorney for his deceased father who prepared a deed transferring ownership into joint tenancy. *Marker v. Greenberg*, 313 N.W.2d 4 (Minn. 1981). S*ee also McIntosh Cty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 546 (Minn. 2008) (recognizing a non-client may hold attorney liable for malpractice only if the non-client was a direct and intended beneficiary of the attorney's services to the client; but holding dismissal of claim against attorney by district court was proper where attorney was not aware of an intent by the client to benefit non-clients of attorney).

An attorney is generally not liable to a third party for malpractice that is alleged to have occurred during adversarial proceedings because adversaries do not usually desire to benefit one another. *Wild v. TransWorld Airlines, Inc.*, 14 S.W.3d 166, 168 (Mo. App. Ct. 2000).

There is also an exception for conduct by the attorney that is malicious, fraudulent, or tortously violates a court order or judgment. *Tensfeldt v. Haberman*, 319 Wis.2d 329, 768 N.W.2d 641 (2009). *See also Sanctions in Minerals Dev. & Supply Co. v. Hunton & Williams LLP.*, 361 Wis.2d 284, 862 N.W.2d 618 (Table) (Wis. Ct. App. 2015) (allegations against attorney not sufficient to fall within the fraud exception to attorney-client immunity; affirming dismissal of complaint that describes all conduct allegedly engaged in by the attorney as falling within the scope of the law firm's "attorney-client agency" with its client and does not allege conduct that is "malicious, fraudulent or tortious" so as to deprive the attorney of immunity.).

The Wisconsin Supreme Court held that lawyers could be liable to non-clients if the attorney intentionally and willfully withheld information for the purpose of misleading or misinforming the non-client. *Goerke v. Vojvodich*, 226 N.W.2d 211, 215 (Wis. 1975). In *Goerke*, a third party complaint was brought seeking indemnification from attorneys who represented the plaintiff in a real estate transaction. The non-clients (the third party

plaintiffs) alleged that the lawyers for the plaintiff (the third party defendants) willfully and intentionally withheld information about the plaintiff's mental incompetency. *Id.* The court held that the lawyers could only be liable to the non-clients if their failure to disclose the information amounted to fraud where the defendant attorneys "actually intended to mislead or misinform the other party and, in fact, [did] so to the detriment of that party." *Id.* But under the facts in *Goerke*, there was no allegation in the third party complaint that the defendant attorneys withheld information for the purpose of misleading or misinforming the non-clients.

Sanctions Relating to Ignoring the Immunity and Privilege Rule

One court awarded sanctions where the complaint against the attorneys and their client failed to take into account the law on immunity and privilege of attorneys. *Sanctions in Minerals Dev. & Supply Co. v. Hunton & Williams LLP.*, 361 Wis.2d 284, 862 N.W.2d 618 (Table) 2015 WL 789681, 2015 WI App 28 (Wis. Ct. App. 2015). The court concluded that after the receipt of the safe harbor notice citing to the immunity and privilege rule, the attorneys for the plaintiff "should have come to their senses and said boy, this case is a train wreck and it's time to get out of it" and they needlessly increased the costs of litigation by failing to "have had the good sense to pull the plug on this action" in a timely manner after learning of defects in their case.

A purpose of allowing sanctions for continuing frivolous litigation is to help maintain the integrity of the judicial system and the legal profession. This purpose is served by awarding sanctions against a plaintiff's attorneys when they "fail to pull the plug" on a claim by a non-client against an opposing attorney which is barred by the immunity and privilege rule. Attorneys must be able to perform their duties to clients without being concerned that persons on the other side of any legal matter, transaction or litigation will sue the attorney or attempt to drag the attorney into a lengthy lawsuit when they do not like what the attorney's client did. Prompt dismissal of claims by non-clients against attorneys, and sanctions by courts, preserve both the integrity of the attorney-client relationship and the judicial system.

Conclusion

The general rule is that a legal malpractice claim against an attorney can only be brought by a client who is in privity of contract with the attorney. The immunity and privilege rule can provide a powerful defense for attorneys who are sued by non-clients for matters arising out of the attorney's professional conduct within the course and scope of an attorney's representation of a client. The immunity and privilege rule does not provide a complete defense to all claims asserted by non-clients against attorneys. ■

Didn't See That Coming: Effective Assistance of Counsel in Plea Agreements

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The vast majority of criminal convictions are the result of plea agreements, not trials, largely because many criminal defendants wish to have some semblance of control over their futures. For most criminal defendants, plea bargaining results in a lighter sentence for a less severe charge than might stem from a conviction at trial. Pleading guilty also usually reduces attorney's fees and provides the accused with a far quicker resolution and much less stress than a trial would. However, pleading guilty carries certain risks for both the person accused and the lawyer advising them.

A decade ago, the United States Supreme Court held that criminal defense counsel must inform clients about potential immigration consequences of a guilty plea (*Padilla v. Kentucky,* 559 U.S. 356 (2009)), and earlier this summer the Court further expanded the obligations of criminal defense counsel when it reaffirmed the "dual sovereignty doctrine" (*Gamble v. United States*, 139 S. Ct. 1960 (2019)). Criminal defense lawyers should be cognizant that advising clients to plead guilty without fully evaluating the risks—even in areas outside the criminal defense lawyer's area of expertise—could lead to allegations of ineffective assistance of counsel, and malpractice or ethics claims (not to mention unintended consequences for the client).[1]

Padilla v. Kentucky

While pleading guilty to certain crimes may be the best option for a citizen, it could lead to deportation for a non-citizen, and a malpractice or ethics

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complaint for the lawyer advising them. Criminal defense attorneys are not required to be experts in immigration law, but they should exercise caution when advising non-citizens to enter a guilty plea, and be certain to inform the client that such a plea could result in removal from the United States.

The petitioner in *Padilla* was a lawful permanent resident who pled guilty to marijuana trafficking, an offense that made his deportation virtually mandatory under the removal statute. *Padilla,* 559 U.S. at 359. Padilla claimed that his counsel told him not to worry about deportation since he had been living legally in the United States for more than 40 years. Padilla sought post-conviction relief based on ineffective assistance of counsel, claiming that he would have gone to trial rather than plead guilty had he been properly advised. The Kentucky Supreme Court denied relief after holding that the Sixth Amendment did not protect a criminal defendant from erroneous advice about deportation because it was merely a collateral consequence of his conviction. *Id.*

The United States Supreme Court granted certiorari and held that the distinction between collateral and direct consequences of a guilty plea was not appropriate in the context of deportation, especially because the consequences of Padilla's plea could be easily determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was clearly incorrect. The Court determined that Padilla sufficiently alleged that his counsel was constitutionally deficient, and remanded for a determination on whether he had been prejudiced. *Id.* at 374. The Court further held that constitutionally mandated effective assistance of counsel requires counsel to inform her client whether a guilty plea carries a risk of deportation. *Id.*

The Court noted that under contemporary law if a non-citizen is found to have committed a removable offense his removal is practically inevitable aside from limited discretion vested in the Attorney General to cancel removal proceedings. The Court noted that although removal is a civil proceeding, deportation is a penalty that has long been enmeshed with criminal convictions for non-citizens, and that is now a nearly automatic penalty for certain offenses.

In coming to its determination, the Court outlined how the judicial system had historically addressed the intersection of criminal convictions and immigration consequences: "While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation." *Id.* at 360. The Court noted that under contemporary law if a non-citizen is found to have committed a removable offense his removal is practically inevitable aside from limited discretion vested in the Attorney General to cancel removal proceedings. *Id.* at 365. The Court noted that although removal is a civil proceeding, deportation is a penalty that has long been enmeshed with criminal convictions for non-citizens, and that is now a nearly automatic penalty for certain offenses. *Id.* at 355-366.

The Court disagreed with the Kentucky Supreme Court's distinction between direct and collateral consequences to define the scope of constitutionally mandated effective assistance of counsel required under *Strickland v. Washington*, 466 U.S. 668 (1984) (the leading case on determination of effective assistance of counsel) in the context of deportation. Observing that other states analyzed similar situations as the Kentucky Supreme Court had, the Court said that given the unique nature of deportation as a "penalty" it need not address the distinction between collateral and direct consequences of a guilty plea in determining whether the defendant received effective assistance of counsel. *Id*. Deportation is so closely aligned with the criminal process, the court held, "advice regarding deportation is not categorically removed from the ambit of Sixth Amendment right to counsel" and *Strickland* applies to determine the effectiveness of the assistance of counsel. *Id*. at 366.

The *Strickland* standard is a two-part analysis. First, the court must determine if the representation fell below an "objective standard of reasonableness." *Id*. Second, the court must determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. Applying this standard to the facts of *Padilla*, the Court ruled that "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id*. at 369. The Court

acknowledged that some areas of immigration law are murky and that in such a circumstance it was the duty of the criminal defense lawyer to advise the defendant of the potential adverse immigration consequences. *Id*. The Court rejected an argument from the solicitor general that only affirmative mis-advice could constitute ineffective assistance of counsel, as that conclusion would lead to absurd results. *Id*. at 370.

As the issue of immigration consequences of conviction will principally occur during plea negotiations, the Court held that in order to provide effective assistance "counsel must inform her client whether his plea carries a risk of deportation." *Id*. at 374. In the dissent that perhaps portends the consequences of the *Gamble* decision we will discuss next, Justice Scalia, joined by Justice Thomas, found that the original meaning of the Sixth Amendment was only that it would allow a criminal defendant to employ or obtain volunteer counsel and that the Constitution is not an "all purpose tool for judicial construction of a perfect world" in which a criminal defendant would be advised of all of the potential consequences of his guilty plea. The extent of the collateral consequences that a criminal defendant must be advised of has not been addressed further by the Supreme Court, but with the reaffirmation of the dual sovereignty doctrine in *Gamble*, that may soon be a topic that it will need to address.

Gamble v. United States

The protection against double jeopardy pre-dates the Constitution and is among the most valuable protections available to citizens. In *Gamble,* however, the court reaffirmed the "dual sovereignty doctrine" which holds that a trial or conviction under state law is not the "same offense" as defined in the Fifth Amendment as a trial or conviction for the same conduct under a federal statute. 139 S. Ct. 1960, 1964. The reverse also holds. *Id*.

Gamble, a convicted felon, pled guilty to the Alabama state crime of felon in possession of a firearm. *Id*. He was sentenced to ten years with all but one year suspended. *Id*. at 1989. For some reason that is not clear from either the opinion or the oral argument, Gamble was then indicted and charged under the federal analog, 18 USC §922(g)(1), for the same conduct of being a felon in possession of a firearm. Gamble pled guilty to the federal charge and was sentenced to an additional three years in prison, for a total of four years. *Id*. The Court's holding was based upon the interpretation of "same offense" in the Fifth Amendment, which does to not relate to conduct, but to violations of statute, as defined by each sovereign. *Id*. at 1964-1965. Given that each sovereign has its own laws, they may enforce them and not place a criminal defendant in double jeopardy thereby.

As observed by Justice Ginsberg in her dissent, joined by Justice Gorsuch, the majority's holding is misguided because "the Federal Government was able to multiply Gamble's time in prison because of the doctrine that, for double jeopardy purposes, identical criminal laws enacted by 'separate sovereigns' are difference 'offences.'" *Id.* at 1989. The dissent argued that the Double Jeopardy Clause should bar successive prosecutions for the same offense by parts of the whole USA. *Id.* In his concurrence, Justice Thomas pointed out that "[t]he founding generation foresaw very limited potential for overlapping criminal prosecutions by the States and Federal Government." *Id*. at 1980. It is undoubtedly the case that, for good or ill, that is exactly what now exists in the criminal law. The creation of a federal system was designed to create a "double security for the rights of the people," but with the development of concurrent federal and state criminal laws and the application of dual sovereignty, "federalism is invoked to withhold liberty." *Id*. at 1991. The double jeopardy clause has been turned from a protection of the people and a restraint on government into a power of government to prosecute an individual twice for the same conduct under separate sovereigns. *Id*.

Conclusion

The consequence of the *Gamble* decision is not only that state and federal authorities could successively try a criminal defendant, should the first be unsuccessful, but could also use the defendant's guilty plea to one sovereign as evidence to support a separate set of charges brought by the other sovereign for the very same conduct. The latter is precisely what happened to the defendant in *Gamble*. In addition, the ability of one sovereign to successively try a defendant for the same conduct should the first be unsuccessful, is likely to be used as a threat to extract better plea deals. Such threats could then require criminal defense counsel to obtain an agreement from the non-charging sovereign to agree not to charge the defendant should the defendant plead guilty to the first set of charges brought.

As the prospect of successive prosecution exists after the *Gamble* decision, and with the court having held in *Padilla* that deportation is a consequence that a criminal defendant must be advised of, it seems likely that those bringing claims against criminal defense lawyers will argue that there is a requirement for the provision of effective assistance of counsel that criminal defense counsel advise of the possibility of successive charges

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being brought by a separate sovereign. Likewise, a consequence of a guilty plea being used as evidence in successive prosecution may need to be among the matters a criminal defendant is advised of before proceeding to trial or pleading guilty. The double jeopardy protections of state constitutions may need to be invoked to prevent such consequences. Irrespective of how this area of the law develops, it is likely that claims will be brought against criminal defense counsel. ■

(Endnote)

[1] In many jurisdictions, a convicted person must bring an ethical complaint against their lawyer for "ineffective assistance of counsel" as a precursor to seeking post-conviction relief. While it is more common to seek post-conviction relief after a guilty verdict at trial, such relief may also be sought after a guilty plea. Criminal defense attorneys are required to know of and advise their clients of an increasingly broad spectrum of potential risks of pleading guilty as constitutionally mandated "effective assistance of counsel" requirements are expanding.

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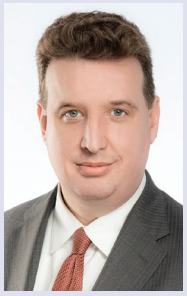

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Financial Elder Abuse and Professional Liability Claims: A Developing Exposure?

Glen R. Olson and Jonathan Rizzardi, *Long & Levit LLP*

Introduction

The elder abuse legislation adopted in many states primarily addresses two rough categories of claims designed to: (1) protect seniors from physical abuse in long term care and other healthcare facilities; and (2) prevent financial abuse and exploitation, including by duress or coercion by guardians, conservators, trustees and other fiduciaries having control over an elder person's finances. (A good summary of the civil and criminal financial exploitation statutes in effect at the state level is located on the U.S. Department of Justice website: https://www.justice.gov/elderjustice/prosecutors/statutes.) Because the financial component of elder abuse statutes is frequently broadly drawn it leaves significant room for its extension to claims in which professionals representing seniors are alleged to have over-reached or mishandled their client's financial affairs. We have recently experienced this expansion of elder abuse allegations in the real estate agents and lawyers professional liability claims we have defended in California.

Real estate agents and brokers, insurance agents and brokers, lawyers and accountants are certainly amenable to the assertion of these claims as many defense attorneys and insurers have recently experienced. It is now common, where the plaintiff or plaintiffs are nearing or over the age of retirement, for professional liability complaints to include counts for violation of state elder abuse laws. These claims can raise the claims exposure for the defendant and its insurer, particularly where they allow for increased damages including the recovery of attorney's fees.

This article discusses some ways in which plaintiffs have woven themes of elder abuse into professional liability litigation. As discussed below, these elder abuse claims run the gamut from situations in which the elderly plaintiff was very clearly subjected to undue influence or coercion to situations in which those concerns were not implicated and the financial elder abuse allegations appear to have been "thrown in" to increase the defendant's exposure. It is worth noting, however, that in either situation the elder abuse claims (assuming the plaintiff is of the requisite age) may be difficult to resolve by motion. Their presence in the case up to mediation, settlement conference or trial, may in fact tend to increase the damage exposure.

California Decisions

A good starting point for analyzing professional liability related elder abuse claims is the 2008 California Court of Appeal decision in *Wood v. Jamison*. 83 Cal.Rptr.3d 877 (2008). In that case, the elderly parties, Donald and Merle Peterson, had been married for 55 years. A few months prior to the incident that led to the *Wood v. Jamison* lawsuit, the Petersons' only child died and Mr. Peterson moved into an Alzheimer's care facility.

An individual named McComb then came onto the scene falsely claiming to be Mrs. Peterson's nephew. He convinced her to transfer approximately

$174,000 to him in a series of transactions. He also convinced Mrs. Peterson to obtain a $250,000 loan secured by her residence, purportedly for a business venture that McComb was considering.

The defendant attorney, Jamison, represented McComb in the business venture. At the same time he also performed legal services for Mrs. Peterson, including meeting with McComb and Mrs. Peterson to discuss the financing of the business venture, selecting a lender, gathering documents necessary to close the loan, and attending the loan escrow closing with Mrs. Peterson. The chosen lender paid Jamison a $4,000 referral fee from the loan proceeds, and he received an additional $10,000 from the loan proceeds as repayment of a loan he had made to McComb. At no time did Jamison inform Mrs. Peterson that he was not her attorney, or provide her with any conflict disclosures or waivers.

The malpractice case brought by Mrs. Peterson's conservator proceeded to a bench trial against Jamison. The court found that he had committed malpractice, breached his fiduciary duty to Mrs. Peterson and committed financial abuse of an elder as provided in the Welfare and Institutions Code. See W&I Code §15619.30(a). The court awarded damages in the amount of $122,322.23 consisting of the $118,322.23 that had been paid to the lender and the $4,000 finder's fee. The court also awarded attorneys' fees pursuant to Welfare and Institutions Code §15657.5(a).

The Court of Appeal affirmed the judgment. 83 Cal.Rptr.3d at 881. As to attorney malpractice, the Court held that, had Jamison properly advised Mrs. Peterson, it is more likely than not that the loan transaction would not have occurred. Citing *Viner v. Sweet*, 117 Cal. App.4th 1218, 1224, 12 Cal.Rptr.3d 533 (2004). As to Jamison's liability for violation of the Elder Abuse Act, the court held that Jamison committed financial abuse of an elder when he took the undisclosed finder's fee, and that Jamison knowingly aided and abetted McComb's abusive scheme to take the $250,000 loan proceeds. Id. at 884-885.

> While the Elder Abuse Act began with a focus on data collection and encouraging claims reporting to facilitate criminal enforcement, the focus shifted in 1991 to private civil enforcement of laws against elder abuse and neglect.

It is easy to see how the analysis applied in *Wood v. Jamison* may transfer to claims against real estate brokers and insurance agents and brokers as well. The claimed "financial abuse" may be the commissions, finder's fees or other benefits the defendant receives in closing the real estate transaction placing the insurance policy in question.

An example of the latter took place in *Mahan v. Charles W. Chan Insurance Agency, Inc.* 222 Cal.Rptr.3d 360 (2017), addressing the liability of an insurance agency handling life insurance policies for elderly clients. In the mid-1990s, the Mahans purchased two life insurance policies, naming their children as beneficiaries. Together the two policies provided death benefits of approximately $1,000,000, at an annual premium of $14,000. Their daughter was appointed trustee of an irrevocable living trust that was funded with sufficient amounts to pay ongoing premium costs.

Fast forward to 2013 when Mr. Mahan, an attorney, nearing the end of his career, was suffering from confusion and cognitive decline; his wife was in an even more precarious state of health having been diagnosed with Alzheimer's. Allegedly "seizing on the situation," the defendant insurance agents carried out an elaborate scheme that involved arranging the surrender of one of the life insurance policies and the replacement of the other policy with one providing more limited coverage at a "massively" increased cost. 222 Cal.Rptr.3d at 366. The premiums for the new coverage amounted to some $800,000, forcing the Mahans to feed cash into the trust to sustain it. The defendants allegedly earned $100,000 in commissions associated with the transaction.

The Mahans and their trustee sued the agency alleging a cause of action under the Elder Abuse Act. The defendants responded with a highly technical defense—the proper plaintiff was the trust and it was not 65 years old for purposes of the Welfare and Institutions Code. They prevailed on demurrers, with the trial court concluding that the Mahans had not alleged any deprivation of property cognizable under the Elder Abuse Act.

The Court of Appeal reversed. It first noted that financial abuse of an elder for purposes of the Welfare and Institutions Code occurs when a person or entity does any of the following: (1) takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud; (2) assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud; or (3) takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining real

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or personal property of an elder or dependent adult by undue influence.

As to the agency's argument that there had not been a deprivation of property, the Court of Appeal noted that the terms "wrongful use" and "undue influence" were specifically defined in the statute. The viability of the defense argument hinged on the claim that long before the insurance agents' appearance on the scene, the Mahans had ceded control over the life insurance policies to the trust and specifically to their daughter as trustee. The Court observed, however, that the elder abuse legislation originally enacted in 1982 had the broad purpose of protecting class of elders who were particularly vulnerable to abuse. 22 Cal. Rptr.3d at 374-375.

While the Elder Abuse Act began with a focus on data collection and encouraging claims reporting to facilitate criminal enforcement, the focus shifted in 1991 to private civil enforcement of laws against elder abuse and neglect. See *Delaney v. Baker*, 20 Cal.4th 23, 33, 82 Cal.Rptr.2d 610 (1999). The concept of financial elder abuse then began to garner concentrated legislative attention in California in the late 1990s. From the mid-1980s, fiduciary abuse had been among the types of elder abuse covered by the Act. But beginning in 1997, the Legislature took a series of steps to strengthen the remedies available for financial injury inflicted on elders by those who "misuse positions of trust and confidence."

In 1998, the Legislature substituted the phrase "financial abuse" for the narrower phrase "fiduciary abuse" used throughout the Act. Then, in 2004, it created a new class of claims for "financial abuse," enacting a private enforcement provision tailored to these specific claims. W&I Code § 15657.5. The scheme of remedies allowed for recovery of attorneys' fees and costs for "financial abuse" claims approved by a preponderance of the evidence, while clear and convincing evidence remains the standard applicable to fee and cost recover for claims of physical abuse or neglect. 222 Cal. Rptr.3d at 376.

The Court of Appeal in the *Mahan* case noted that the legislative history resolved most of the questions raised by the appeal. As to deprivation of property, the Court concluded that while the alleged restricting of the insurance policies occurred as to policies the Mahans no longer owned, the defendants nevertheless took something from the Mahans that was cognizable under the Elder Abuse Act. The Court specifically rejected the defense argument that a deprivation must involve the direct taking by one person of the property of another, as if there was some kind of privity requirement. Instead, there was a deprivation in the form of elders who could never again qualify for life insurance of the same value that they secured in the 1990s.

The Court also addressed whether, when the agency was paid its commission, it deprived the Mahans of the "property of an elder." Id. at 380. The Court concluded that whether the commission money flowed directly into the respondents' pockets made no difference, as all commission payments made by the trust were fairly traceable.

In *Bounds v. Superior Court (KMA Group), et al.*, 177 Cal.Rptr.3d 320 (2014), the Second District of the California Court of Appeal addressed elder abuse claims raised in the real estate context. The plaintiff was an 88 year old widow, who was allegedly suffering from Alzheimer's disease. She contended that for approximately six months, the defendant real estate agents and their affiliated businesses engaged in abusive conduct resulting in her signing, among other documents, escrow instructions authorizing the sale of real property owned by the trust. While the escrow was cancelled, the plaintiffs alleged that the existence of the escrow instructions significantly reduced their right to sell the property at fair market value or to use it to secure a loan on favorable terms.

The Court of Appeal observed that the facts of the *Bounds* case raised a question of first impression: whether, to allege a "taking" of a property right under the Elder Abuse Act, it was sufficient to plead that an elder had entered into an unconsummated agreement which impaired the value of the property, or whether the Act required that the agreement had actually been performed and that title had been conveyed. Reversing a trial court order dismissing the financial elder abuse claims, the Court of Appeal held that, because property rights include, among other things, the right to use and sell property, allegations that an executory agreement had been entered into which significantly impaired the value of the property adequately pleaded a claim taking for purposes of Welfare and Institutions Code.

Bounds arose out of a commercial property transaction. The plaintiffs' trust owned Torrance, California property on which the family operated a business for more than 40 years. That business shared a driveway and parking lot with an enterprise entitled KopyKake Enterprises. One of the defendants, Mayer, was a principal of KMA Group, LLC. Without her family's knowledge and in a deteriorating mental condition, Bounds began negotiating with Mayer to sell the real property to KMA and KopyKake. Defendant Sojka, President of Sojka-Nikkel Commercial Realty Group (Sojka-Nikkel), was also involved in the negotiations, attempting to persuade Bounds to sell. Mayer and Sojka apparently allegedly made exaggerated claims about the poor physical and financial conditional of the real

property to frighten Bounds into selling it at a bargain price. After Bounds' family members became aware of the transaction, and advised Mayer and Sojka that Bounds was acting with diminished capacity, Mayer's responded that Bounds had had agreed to sell. The parties had signed a Letter of Intent (LOI) for the sale of real property and equipment, with the LOI stating that no real estate agent represented any party. Sojka allegedly knew the sales price was substantially under market and that Bounds was acting without any professional assistance and with impaired mental capacity. 177 Cal.Rptr.3d at 324.

KMA and KopyKake then sued the Bounds Trust seeking specific performance of the transaction pursuant to the escrow instructions. The Trust and Bounds cross-complained against Mayer, KMA, KopyKake, Sojka and Sojka-Nikkel alleging causes of action for financial elder abuse, rescission and declaratory relief and seeking recovery of compensatory and punitive damages and attorneys' fees. The cross-complaint alleged that, following the execution of the escrow instructions and lease, no lender would loan money against the property on reasonable and commercially acceptable terms.

The Court of Appeal noted the Act included a broad definition of "financial abuse," i.e., abuse occurs when a person or entity "takes, secretes, appropriates, obtains, or retains real or personal property of an elder for a wrongful use or with an intent to defraud or both. W&I Code §15610.30. "Wrongful use" in turn means that the party knew or should have known that its conduct was likely to be harmful to the elder adult. The Court held that a prospective, as well as a consummated, transfer can impair property rights for purposes of the elder abuse statutes. 177 Cal.Rptr.3d at 329-330.

A Similar Result in Oregon

A decision from the Court of Appeal of Oregon, *Church v. Woods*, 77 P.3d 1150 (Or. App. 2003), suggests that Oregon's Elder Abuse Act may be broadly construed as well. In *Church*, the plaintiff was an 83 year old bachelor with no children who lived with his brother. Concerned about his mental health, the brother took him to a neurologist who diagnosed him with Alzheimer's disease. Because the brother then needed to conduct some personal business, he arranged for the plaintiff to stay with the defendant, his grandniece at her home.

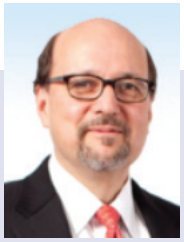
The defendant's grandniece took advantage of the situation, having the plaintiff obtain an Oregon DMV identification card listing her address as his address. While at the DMV office, the plaintiff then transferred title to one of his vehicles to the defendant and added her name to the titles of two other vehicles. The defendant then had the plaintiff add her name to his checking account and grant co-ownership in real property with the right of survivorship.

At a bench trial, the court found that the plaintiff had lacked the capacity to execute the transactions and the court rescinded them. However, the court dismissed the financial abuse claim concluding there was never a taking, nor an appropriation of property within the meaning of the relevant statute. ORS 124.110(1)(a). The plaintiff appealed the dismissal of the financial abuse claim.

The Court of Appeal noted that Oregon's Elder Abuse Act does not define "takes" or "taking." The Court observed that, as to the plaintiff's real property, the interest was divisible and could be partitioned and sold, even though neither co-owner could force a sale of the estate in fee simple before the other died. The possibility of that portioning and sale, in the opinion of the appellate court, constituted a taking of property. Accordingly, the Court remanded the financial abuse claim to the trial court to determine whether the defendant had acted wrongfully, a factual issue that was not resolved in the lower court. 77 P.3d at 1154.

Conclusion

While, in the decisions discussed above, the defendants were almost uniformly unsuccessful in arguing for a narrow interpretation of the elder financial abuse statues, there may nonetheless by situations in which elder abuse claims can be challenged on the pleadings. The case law does illustrate, however, that the statutes will often be broadly interpreted to save the plaintiffs' claims whenever possible, and particularly where the facts of a particular claim implicate issues of over-reaching, undue influence or coercion. ■



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Spotlight on PLDF Women Leaders
– Kiera O'Connell Goral –

The PLDF Women's Initiative continues our tour of the country by heading southwest to the Lone Star State, for an interview with PLDF board member Kiera O'Connell Goral. Kiera serves as Assistant Vice-President of Claims for QBE Specialty Programs, which is part of one of the largest and oldest insurance companies in the world. She manages a team of claims attorneys and TPAs on several large programs, including accountants, wealth managers, insurance professionals, title agents, mortgage brokers, architects and engineers, and other professionals. Kiera is a frequent speaker on cutting-edge issues in the professional liability space, including her presentation at the 2018 PLDF meeting in New Orleans on liability and defense issues for real estate agents, home inspectors, and title agents.

Kiera brings an interesting perspective to our initiative, having spent her first years after graduating from the Levin College of Law at the University of Florida (yes, Kiera is a Gator) working as a defense lawyer before holding positions with two different professional liability insurers. We asked Kiera to tell us about the decisions that led to her current role with QBE.

KG: *After about 10 years working for a law firm, I received a call from a client asking if I would be interested in joining the carrier's professional liability claims team. At the time, I had a one year old and the job offered a good deal of flexibility. I started working as Senior Claims Counsel and, a few years later, was approached with the opportunity to join QBE. I was pretty happy with my job at the time but ultimately QBE provided a better career path and the opportunity to be more involved with different aspects of the business. I accepted the offer, and a few months later was promoted to a supervisor role. I now manage a team of claims professionals who handle a variety of professional liability claims.*

We also asked Kiera to tell us what she finds truly rewarding about her current position with QBE, and the different hats that she is able to wear there.

KG: *QBE has a unique approach to customer focus, and we welcome feedback from our insureds both during the claims process and after a claim is resolved. I receive emails from insureds praising my team members, and that is very rewarding.*

While not part of my everyday job, my role as co-chair of QBE's Women's Initiative Network is extremely rewarding. As part of its diversity and inclusion program, QBE offers four Business Resource Groups, including WIN. Through WIN, I've had the opportunity to work to identify challenges related to diversity and inclusion, and address those challenges through financial grants that have a direct impact on the communities where we work. Last year, our grant money was awarded to the Doyenne Group, an organization in the Madison, Wisconsin area dedicated to advancing female entrepreunuers. The grant money went toward offering women a one-year program that helps them grow their business, improve profitability by strengthening business acumen, and build key networks.

When asked to identify one or two key decisions that helped her on the path to success, Kiera echoed the sentiments of other PLDF women leaders we have interviewed, that the road to leadership is traceable more to a mindset than one or two choices.

KG: *I don't believe there was any one decision, but more of a continued commitment to self-awareness and a focus on the greater good of the team as opposed to individual ambition. I have worked hard to understand my strengths, and the areas where I have room to improve. I also look to assemble teams of people with different strengths, which makes each person integral to the team's success.*

A 2017 study by McKinsey & Company found that while women outnumber men at entry-level positions in the insurance industry, women are significantly underrepresented near the top of organizational charts. (McKinsey, "Closing the Gap: Leadership Perspective on Promoting Women in Financial Services"). Specifically, while the data used in the study indicated that 57% of entry-level positions in the insurance industry were filled by women, women made up only 30% of positions at the Vice-President level, and only 18% of C-suite positions. We asked Kiera to tell us about any challenges she has had to overcome in reaching her current leadership position, and whether she has advice to share with younger women struggling to climb the ladder.

KG: *I remember so many occasions where I was the only woman in the room, whether it was in court or at a deposition. Staying confident in that environment was definitely challenging as a young attorney.*

The best advice I can offer to younger professionals is to be comfortable in your own skin, and allow your litigation or leadership style to evolve from there. I also recommend accepting every opportunity to speak in front of a group and soliciting feedback from someone you trust. This is not easy, but it is a great way to develop communication skills.

The McKinsey study identified three fundamental building blocks for success in the financial services sector, including the insurance industry: building a strong network of sponsors, taking risks early and often, and knowing and communicating one's value. With respect to sponsorship, we asked Kiera whether she had role models to whom she looked for advice and mentorship.

KG: *I have had a few people on whom I relied for advice and guidance throughout my career. This was so impactful early in my career, when one of the partners with whom I worked became a mentor to me. There is so much formality around mentors and sponsors now, and at this time I don't have that type of relationship. But I do have a great professional support system and one colleague who shares feedback and constructive criticism with me and vice versa.*

We also asked Kiera for her views on what changes companies can make that would help to increase the percentage of women in leadership roles.

KG: *Many companies are just now realizing the value that diversity in leadership can bring to an organization, yet there is still a long way to go. Companies really need to be committed to creating an inclusive culture that encourages the success of women in leadership roles. Individuals and businesses can help by investing in companies that focus on diversity and inclusion and that have achieved fair pay.*

The McKinsey report identified the ongoing challenge of balancing work with other interests as one obstacle to the progress of women in the insurance industry. We asked Kiera if she had any advice for those struggling with work-life balance.

KG: *Be patient and try to keep your focus on the moment. It is easy to become overwhelmed and lose focus when work and life are pulling you in a million different directions. You're not doing yourself, your family, your company or clients any good if you're too overwhelmed to focus on what you're doing at the moment.*

Finally, we asked Kiera to share some final nuggets of wisdom, including the advice she would give her younger self as she started out on her successful career.

KG: *Welcome feedback and learn from it, and keep organized to avoid unnecessary stress. I try to seek constructive criticism as often as possible and admittedly that is not always easy. For example, if I'm leading a big meeting, I'll identify someone in advance to provide feedback on something very specific, such as my communication skills during that meeting. I try to use what I learn to be hopefully be more effective in the future.*

Thank you, Kiera, for sharing the story of your path to leadership, and your tips for success. We can definitely all learn from each other as we work collectively to increase diversity in law firms and the insurance industry. ■

Practicing Well: Self-Evaluation

Patty Beck, *Minnesota Lawyers Mutual Insurance Company*

It's no secret that practicing law can be stressful on many fronts. Some lawyers struggle with temporary stressors (i.e., a specific case), while others struggle with long-term stressors (i.e., private practice in general). It's easy to know *when* we're stressed, but it can be incredibly difficult to know why or how to manage that stress (which can be stressful in itself!).

We often hear that self-evaluation is an important tool, but it can difficult if you don't know where to begin. Do you go online to find an evaluation approved by experts? Do you seek professional help from a counselor or other specialist? Both options are excellent choices, but some people find the most basic approach speaks to them the most. Below is an exercise that a lawyer shared with me when I was considering a job change a few years ago. I was admittedly skeptical of how simple it seemed, but it turned out to be exactly what I needed to make positive changes in my life (and has helped countless other lawyers evaluate their personal and professional lifestyles as well).

Start by spending 15-30 minutes making a list of everything in life that makes you happy, both personally and professionally. Be liberal with the list and include absolutely everything that comes to mind. Then put the list away and do not look at it for three weeks. After three weeks, go back and circle everything that your current lifestyle allows you to experience at a minimum on a bi-weekly basis. If at least 50% of the items on your list are not circled, something needs to change. There is no reason that you should not be able to regularly experience the things in life that make you happy!

It's important to understand what you are stressed about (and why) so that you can make appropriate changes to your lifestyle both personally and professionally. Although this may seem obvious, it can be incredibly difficult for professionals in the midst of an endless battle with stress to see the bigger picture.

You can even go a step further and put an asterisk next to the 10 items most important to your happiness, and if all 10 of those items are not already circled, that's an even bigger indicator that something must change.

On the flip side, this exercise can help identify sources of stress by making a list of things that cause you stress. Writing these down gives you an opportunity to identify commonalities and themes, which can be helpful in understanding the types of changes needed to manage and alleviate specific stressors altogether. This can be especially helpful when evaluating a significant job change. Often the same underlying issues can exist regardless of setting (i.e., the stress of billing time may not go away simply because you have switched law firms; the stress of demanding clients may not go away simply because you have switched practice areas; the stress of the litigation process may not disappear just because you are managing the litigation rather than litigating yourself).

It's important to understand what you are stressed about (and why) so that you can make appropriate changes to your lifestyle both personally and professionally. Although this may seem obvious, it can be incredibly difficult for professionals in the midst of an endless battle with stress to see the bigger picture. Even if you are perfectly content with life, do a self-evaluation anyway as it's always good to know what makes you happy (and will be an excellent resource if anything ever changes!). ■

About the AUTHOR

Patty Beck is a Claim Attorney with *Minnesota Lawyers Mutual Insurance Company*, where she manages litigation involving legal malpractice claims, advises attorneys facing existing and potential ethical dilemmas, and resolves complex pre-suit malpractice claims on behalf of MLM insureds. She is Co-Chair of the MSBA's Life and The Law Committee and frequently speaks on topics related to ethics, legal malpractice, and attorney wellness.

Once again, we have put together an impressive lineup of attorneys and claims professionals who will speak on a broad range of topics and tips applicable to defending professional liability claims.

socialize and network with others in the industry—a focus of PLDF that I believe sets us apart from other organizations. We will have the Young Professionals Reception, the Welcome Reception for all members, group dinners around the city, a practice committee luncheon, field trips (Chicago Architecture Foundation River Cruise or the Chicago Crime Tour) and a member dinner at Cité (on the 70th floor of Lake Point Tower). And yes, this is all included in your registration fee! If you have not done so already, you can register and book your hotel room on PLDF's website.

With this being my last column as President, I wanted to take the opportunity to thank *everyone* for another great and productive year that has seen growth in membership, outreach and member benefits. This is the result of a collaborative effort. I want to specifically thank our amazing Board of Directors—Tom Jensen (*Lind Jensen Sullivan & Peterson*); Tim Gephart (*Minnesota Lawyers Mutual Insurance Company*), Erin Higgins (*Conn Kavanaugh*), Lisa Tulk (*Kessler Collins PC*), Pat Eckler (*Pretzel & Stouffer, Chartered*), Andrew Jones (*Furman Kornfeld & Brennan, LLP*), Kathleen Buck (*Minnesota Lawyers Mutual Insurance Company*), Paul Ruiz (*Adventist Health*), Louie Castoria (*Kaufman Dolowich Voluck, LLP*), Kiera Goral (*QBE*), Molly Eiden (*Minnesota Lawyers Mutual Insurance Company*), David Anderson (*Collins Einhorn Farrell PC*), Peter Biging (*Goldberg Segalla LLP*), Dan Church (*Morrow Willnauer Church, LLC*) and Glen Olson (*Long & Levit LLP*), who have invested significant time and resources continuously working to improve the organization. I also appreciate the dedication of our practice committee leaders, whose hard work has resulted in increased involvement among and contributions from the committees. I must also highlight the great job by our new managing directors, Sandra Wulf and Sara Decatoire, who had big shoes to fill following Chris Jensen's promotion to the role of full-time grandmother. They made the transition seamless and have brought some great new ideas to the organization.

Speaking of filling big shoes, Erin Higgins was certainly a hard act to follow as President. I really appreciate all of her advice and assistance this year. I hope to be a similar resource after passing the torch to our next President, Lisa Tulk. Last, but certainly not least, I want to recognize and thank Pat Eckler and Tom Jensen for the remarkable job they have done with the publication you are currently reading. They have taken the *PLD Quarterly* to a new level in quality and substance.

Before being sent out to pasture, I wanted to once again emphasize my main recommendation for all members—get involved in order to get the most out of your membership. There are many numerous opportunities that include meeting and work with great people, taking on leadership positions and gaining valuable exposure for you and your firm/company. As we approach the culmination of our year in Chicago, I wanted to revisit the following new-year "resolutions" recommended for all members in my initial column last fall:

1) Attend the Annual Meeting;
2) Spread the word about PLDF to your co-workers, colleagues, and other acquaintances within the profession;
3) Join and become involved in PLDF practice committees and the Young Professionals committee;
3) Submit an article for the *PLD Quarterly*;
4) Submit a program proposal for the Annual Meeting with a panel of attorneys and claims professionals;
5) Think PLDF for assignments and referrals; and,
6) Provide feedback to the leadership.

Hopefully you have met at least some of these "resolutions" in the past year, and you will continue to consider them moving forward.

As always, feel free to contact me if you have any questions, comments or suggestions. I look forward to seeing everyone in Chicago! ■

2019 Annual Meeting

We are excited to welcome you to the 2019 PLDF Annual Meeting in Chicago. The Annual Meeting will kick off Wednesday, September 25 with our Committee Leadership gathering, Young Professionals Reception, the Welcome Reception, and of course, our Dine-Arounds. Thursday, September 26, will find us in education sessions designed specifically for those in the professional liability community. Following our education sessions, Annual Meeting attendees are invited to tour the Windy City with friends and colleagues and then dine at one of Chicago's fantastic restaurants. Our final day of the Annual Meeting will include more great education programs and opportunities to visit with vendors and professional liability colleagues.

Visit **http://bit.ly/PLDFAnnualMeetingRegistration** to learn more about the Annual Meeting and Register Today!

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