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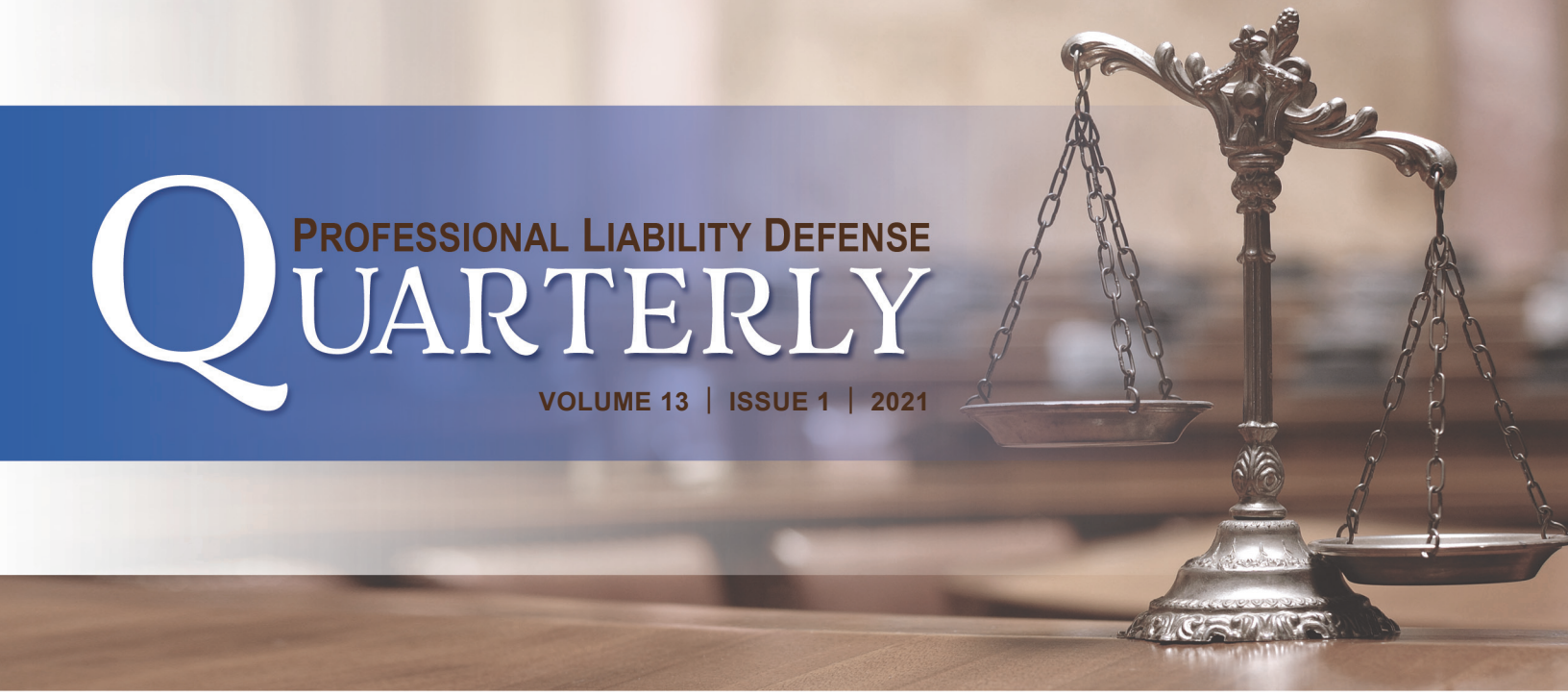

Inside This Issue

Creative Ways to Expand Discovery

Lisa H. Howe and **Janice L. Gallaher** | *Eckenrode-Maupin*

Written discovery and depositions are not the only means to find information that is useful to prepare for trial. This article discusses other investigative tools available to develop information that aids a defense. The first source of information is the Complaint or Petition itself, which will identify all parties and potentially witnesses and healthcare providers. The Complaint or Petition also might identify medical issues important to the case. At some point in the proceedings, the parties will need to identify their expert witnesses. Defense counsel will need to research and investigate all parties, witnesses, and experts. It is important to gather as much information as possible on any and all of these individuals, as it can be used to impeach the witness and can make or break your case.

If the case is in suit, defense counsel should consider propounding written discovery as soon as possible, and including medical and employment authorizations for Plaintiff to sign. In this way, counsel can obtain relevant medical and employment records of Plaintiff early on in the case, with time to conduct discovery on

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Letter from the President

Donald Patrick Eckler | *Pretzel & Stouffer, Chartered*

The heart and soul of the PLDF is the annual meeting. It is where the strengths of the organization are exhibited; especially, the collegiality of our members from across the country and the excellent programming presented by talented lawyers and claims professionals on issues of particular concern and interest to our members. And while our virtual meeting last fall was as good as we could make it, that is what made cancelling the in person meeting last year so difficult.

And that is also what makes planning our annual meeting in Nashville on October 6-8 so exciting.

Several of our programs that were submitted from last year but unable to

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Editors

Online research is also a great tool. There are several key resources to use to find information other than just doing a Google search. You can find useful information on Facebook, Instagram, Myspace, LinkedIn, Blogger, Twitter, TOPIX, Westlaw, PACER, Circuit Court websites, professional licensing boards, and local municipalities.

the information contained within those documents. The medical records and documents of Plaintiff can all be used to identify further discovery that is needed to prepare for trial, such as the names of other healthcare providers who treated the patient. This will assist in creating a list of witnesses who should be deposed or who may have relevant evidence.

Online research is also a great tool. There are several key resources to use to find information other than just doing a Google search. You can find useful information on Facebook, Instagram, Myspace, LinkedIn, Blogger, Twitter, TOPIX, Westlaw, PACER, Circuit Court websites, professional licensing boards, and local municipalities. Social networking sites can help to connect the dots between people, or help find more witnesses, such as family members that you did not know existed. They can also give you an insight into people's lives, how they live, where someone may be, where they are going, what they are doing, where they work, and where they live. Facebook and Instagram have become widely used and are excellent places to look for valuable information, as those sites often reveal the recent activities of parties and witnesses. You may be lucky enough that a party, or one of her friends, will post something that is inconsistent with plaintiff's theory of liability, claimed damages, or that provides a glimpse of their litigation strategy. For example, we had a case recently in which the plaintiff claimed significant physical limitations and that she needed considerable supervision and care. The plaintiff, however, posted on Facebook that she traveled two hours away for a concert with a friend and several photographs evidenced that she had far fewer physical limitations than she claimed. This information went a long way to securing a defense verdict. Facebook or Instagram posts can also provide an understanding of the opposing party's daily routine, scheduled events or photographs showing what the person looks like, all of which can be helpful information for a private investigator conducting surveillance. Information on these social media sites might also shed light on where a person will be at any given time in the future, which can also aid for surveillance and be helpful if you are having difficulty serving a party or witness. Facebook and Instagram are also helpful in figuring out the identities of possible medical providers and witnesses. For example, people may describe on Facebook appointments they have had, what doctors they have seen, the hospital they are in or have been in recently. They may discuss names of people they spend time with, who their close friends are, people who may have witnessed the incident or know what happened. You should not forget about

Myspace. While it has not had the popularity of Facebook or Instagram for some time, it is still used and can be a source of information.

LinkedIn is a great source of information when trying to locate someone. It usually provides previous and current places of employment. If you need to serve a witness with a summons or a subpoena, you could do so at their place of employment. LinkedIn might also tell you how long someone has been with a company and what they do for that company. It may also give you previous employers from whom to request records.

It is also crucial to preserve any positive evidence that is found on a social media site, in the event that the opposing party removes or alters it. If the information is set to "private" on someone's social networking page, you will not have access to the information. Social media sites aggressively defend efforts to subpoena information in civil cases. You cannot "friend" someone just to get information and certainly do not create a fictitious account to friend someone, as those create serious ethical issues. To combat instances in which an opposing party does not have public social media accounts or where information was removed or deleted, counsel should include in their form written discovery requests identification of all social media sites in which the opposing party has an account or had an account during the relevant time periods. Those discovery requests should also include inquiry about any posts or messages about the case or claimed damages, and whether any relevant information has been deleted or made private and, if so, whether it has been preserved. While a vigorous defense of any case requires investigation of parties and witnesses through these social media sites, defense counsel should also assume that opposing counsel will likewise be investigating the defendants and their witnesses and experts. Attorneys should tell their client to make their social media completely private to avoid the other side from finding information on your client. However, keep in mind that you also likely have ethical responsibilities to preserve any information on social media relevant to the case, especially if it is removed or made private. You must also be aware of what your client or important witnesses have posted previously, because opposing counsel probably has already searched that, and prepare clients and witnesses to address it in depositions.

There are many reasons to carefully investigate opposing experts. First, you want to make sure that the opposing experts are not testifying in your case in a manner inconsistent with prior cases. Another reason is to see if they are "professional" witnesses and whether they usually are retained by plaintiff or the defense. Westlaw and Lexis are not free websites, but they can provide useful information. You can run the expert's name through those sites and read the opinions to find out if the expert has been stricken as an expert in the past, or what allegations have been made against the expert. There are times when a court judgment or opinion undermines an expert's credibility, such as if the expert provided opinions in a prior case that are inconsistent with the opinions being provided in your case. DRI and IDEX are also great resources for obtaining information on experts. When you order a DRI report or an IDEX report on an expert, the company will email you a copy of the testimonial history of the expert and any licensure issues. If there is difficulty in obtaining prior depositions of experts, they also provide the names of attorneys involved in the cases and you can contact those attorneys to obtain copies of the previous depositions or to learn how the expert presents as a witness. These are not free resources, but they provide a considerable amount of information and are generally more efficient than conducting the research yourself.

It is helpful to investigate healthcare providers who are parties, witnesses, or experts and Ratemd.com can be a helpful tool. This is a website where people can rate or comment on a physician they saw. There are both good and bad experiences listed on this website. This may give you insight into the healthcare provider's familiarity and experience with the medical issue involved in your case and if it that issue generated complaints in other matters. Professional licensing

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While a vigorous defense of any case requires investigation of parties and witnesses through these social media sites, defense counsel should also assume that opposing counsel will likewise be investigating the defendants and their witnesses and experts. Attorneys should tell their client to make their social media completely private to avoid the other side from finding information on your client.

boards, such as the Board of Healing Arts, American Medical Association, Board of Nursing, and State Licensing Boards are also valuable resources, as they often detail the date a provider obtained his license, when it expires, disciplinary history and possibly malpractice claims. Some boards will even list the nature of any discipline. If someone has been disciplined, you can search for the decisions on-line or contact the Board for copies of the decisions. The address for the license will also give you a good place to look for the individual, as almost all Boards require that a health care professional update his or her contact information timely.

Court files are also a valuable source of information. Prior lawsuits will shed light, for example, on whether a physician has previously been sued for malpractice, whether a plaintiff has a history of filing lawsuits, whether there is related civil or criminal cases, and whether a party or witness has criminal convictions that might be relevant to the case and/or can be used to impeach credibility. However, the ease of access of the records often depends on the jurisdiction. Many jurisdictions have a records search service on their websites in which you can pull up dockets and obtain documents on a given case. PACER is the records search option for all federal cases, and allows examination of all public filings for a fee. Local courts vary widely on whether they maintain on-line dockets, the information provided, and access to records. When the information through a court's website is sparse, lawyers will need to get creative as to cost-effective ways to access the information. Tax assessment websites and the local land records office may help locate property that the individual owns, which can then give you an address. You can also check the Circuit Court websites for recent cases or speeding tickets or other traffic charges involving the person you are trying to locate, as this may give you a recent address for the individual for whom you are searching.

Newspapers may also provide useful information. Many newspapers will have articles regarding crimes that have been committed or serious accidents or events and some will list civil cases that have been filed. Good ways to locate contact information on a witness include whitepages.com, pipl.com, and spokeo.com. These websites are similar to the white pages and allow for discovery of names, addresses and telephone numbers. They may also provide other individuals who have been associated with this address or person, and an approximate age range for the individual. You may also be able to do a reverse address look-up and find a phone number of additional contacts this way.

The informal investigative techniques discussed in this article should provide some valuable information to develop your case. Defense counsel need to be creative and conduct a thorough investigation and discovery so as to be completely prepared for trial and advance the best defense possible. ■

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The Seventh Circuit Limits Standing in FDCPA Actions

Graeme E. Hogan | *Kaufman Dolowich Voluck LLP*

If Super Bowl LV showed us anything, it is that even the best quarterbacks can struggle if they are constantly worried about taking a sack. Attorney debt collectors are often like quarterbacks rushed from the pocket in that they need to keep their head on a swivel, always watching out for the next hard hit that takes the shape of a creative (though often implausible) theory of liability under the Fair Debt Collection Practices Act, 15 U.S.C. §1692, *et seq.* ("FDCPA"). Frequently, these theories look like some sort of expanded interpretation of a collection letter that makes its way past the Motion to Dismiss stage regardless of how minor the alleged harm to the plaintiff may be, if it even exists at all. The Court of Appeals for the Seventh Circuit, in issuing a string of recent decisions on standing, may have provided the extra protection for attorneys that Patrick Mahomes could have only wished for against the new Super Bowl champion Buccaneers.

In each of these cases, the Seventh Circuit revisited the United States Supreme Court's holding in *Spokeo Inc., v. Robins*, which has served as a guidepost for federal courts addressing the concrete harm requirement of Article III standing, along with the Seventh Circuit's own previous holding in *Casillas v. Madison Avenue Associates*. In *Spokeo*, the Supreme Court outlined how standing requires an "injury in fact" via a concrete harm that "actually exists." In *Casillas*, the Seventh Circuit expanded on *Spokeo* and held that bare procedural violations (i.e. mere statutory violations) without allegations of attached concrete harm would not be sufficient for standing. Against that backdrop, the Seventh Circuit issued a set of decisions that many will consider a touchdown for the defense bar.

In *Larkin v. Finance System of Green Bay, Inc.*, the plaintiffs alleged §1692e and §1692f violations after receiving collection letters containing language that alluded to potential decrease to their credit rating if there was a failure to pay. The court noted that its previous decision in *Casillas* had set forth that "it's not enough for an FDCPA plaintiff to simply allege a statutory violation; he must allege (and later establish) that the statutory violation harmed him or 'presented an appreciable risk of harm to the underlying concrete interest that Congress sought to protect." In *Larkin*, while the plaintiffs had alleged §1692e and §1692f violations, the court explained that the complaints failed to identify "any allegation of harm—or even an appreciable risk of harm—from the claimed statutory violation." The court further noted that the plaintiffs' attorney had failed to identify any "concrete injury" both in the written filings and at oral argument. The court thus rejected the plaintiffs' attempt to "invoke the power of the federal courts to litigate an alleged FDCPA violation that did not injure them in any concrete way."

In *Gunn v. Thrasher, Buschmann & Voelkel, P.C.*, the Gunns received a collection letter from a law firm after falling behind on their homeowners' association assessments. The collection letter demanded payment and advised that "[I]f Creditor has recorded a mechanic's lien, covenants, mortgage or security agreement, it may seek to foreclose such mechanic's lien, covenants, mortgage or security agreement." The Gunns did not pay, and the law firm sued in state court under a theory of breach of contract instead of foreclosure. The Gunns brought an FDCPA claim under §1692e(2),(4),(5) & (10) under the theory that the collection letter was misleading "because the law firm would have found it too costly to pursue foreclosure to collect a $2,000 debt." The court addressed standing by noting that the Gunns had not paid anything in response to the letter, and the sentence about foreclosure had not impacted their credit rating. Similarly, the court noted that the letter could not have impacted their ownership interest because only an actual foreclosure *judgment* could have that result. The Gunns' argument that they were "intimidated" and "annoyed" was quickly rejected as the Court explained that it was hard to imagine that "anyone would file any lawsuit without being annoyed (or worse)." Notably, the court also rejected the Gunns' argument that, unlike the plaintiffs in Spokeo and Casillas, their claim was related to the FDCPA's substantive provisions—not procedural rights. The court agreed but nevertheless opined that merely asserting a violation of a substantive right conferred by the FDCPA did not guarantee standing.

In *Brunett v. Convergent Outsourcing, Inc*, Brunett sued over a collection letter advising that a forgiveness of more than $600 in debt would require that Convergent Outsourcing report the forgiveness to the Internal Revenue Service as taxable income. Brunett alleged that the letter statement gave rise to a violation under §1692e because the amount of forgiveness would not have amounted to $600. The court noted that Brunett had conceded in deposition testimony that she had not made any payments as a result of the letter; had not had her credit

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impacted from the letter; and that the letter "had not injured her." Instead, Brunett simply stated that the language in the letter "confused" her. The court described that a confused debtor could be injured *if* the confusion lead to some sort of negative result (i.e., a payment on something not owed or payment on a lower interest rate instead of a higher rate), but that "the state of confusion is not itself an injury." In a line that would make noted trash talker Philip Rivers proud, when rejecting Brunett's argument that the letter was "intimidating" enough to give rise to standing, the court stated that "[a]ttaching an epithet such as 'intimidation' to a letter does not show that injury occurred. Talk is cheap, but where's the concrete harm?"

In *Spuhler v. State Collection Service Inc.*, the Spuhlers alleged that a collection letter failing to mention if an amount due would increase from the accrual of interest was misleading and therefore in violation of §1692e and §1692f. The court rejected the Spuhlers' argument that such alleged FDCPA violation was "enough—by itself—to establish a concrete injury necessary for standing." Citing to other companion cases, the court explained that "for a concrete injury to result from a dunning letter's exclusion of a statement about accruing interest, that exclusion must have detrimentally affected the debtor's handling of debts." The court thus determined that a plaintiff, and here, the Spuhlers, had no standing where "record contains no evidence that the absence of a statement about interest had any effect on how the Spuhlers responded to the letters or managed their debts."

Similar to *Spulher*, in *Bazile v. Finance System of Green Bay Inc.*, Bazile alleged FDCPA liability stemming from a collection letter which stated that a "total balance of the debt, without indicating whether that amount may increase with the accrual of interest." Bazile took the position that the failure to include this information was misleading and did not provide the amount of the debt in violation of the §1692g and §1692e. The Court noted that a "plaintiff must do more than allege an FDCPA violation to establish standing; she must also show personal harm." Unlike the *Spuhler* matter, the Court determined that the allegations in Bazile's Complaint *may* have been enough to sufficiently give rise to a "concrete injury," but that an evidentiary hearing was required to determine if the "lack of information about accruing interest detrimentally altered her choice about how to respond to and repay her debts."

Each of the above cases reveals the Seventh Circuit's strong rebuff to the recent trend of enterprising FDCPA plaintiffs' attorneys filing complaints on behalf of plaintiffs whom, while they may be the recipient of *potentially* violative collection letters, did not suffer any true injury. Although the FDCPA is the most common target for these types of actions, defense attorneys in all areas of the law should take notice that the Seventh Circuit has closed the door to the courthouse. These decisions may also open the door for other courts to follow suit. Of course, just as quarterbacks must account for defensive coordinators developing a new blitz scheme, defense attorneys should keep a watchful eye for how plaintiffs' attorneys will try to avoid the new protections set out by the Seventh Circuit. ■

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"Don't Answer That" Impermissible Tactics by Adverse Counsel During a Remote Deposition (and How to Respond)

Andrew R. Jones and **Daniel Butler** | *Furman Kornfeld & Brennan LLP*

COVID-19 has forced Americans to adapt in nearly every personal and professional facet of their lives. In terms of the pandemic's impact on the legal world, there is no greater evidence of COVID-19's mark than the ZOOM deposition. What was once a novelty has now become the norm, for better or worse. Attorneys of all ages and levels of experience (both professionally and technologically) have now become familiar with ZOOM and Skype to assist in litigation, including remote depositions. Attorneys now participate in depositions from their own homes, with the witness, court reporter, and translator (if needed) also located in their respective homes or offices. Consequently, it

is now a rarity for any two parties, or even the witness and her attorney, to be in the same deposition room, at the same time, in the era of COVID-19. These issues are exacerbated by that fact that, in professional liability matters generally and legal malpractice in particular, depositions are frequently full day or even multi-day events.

Some of the impact from the "new normal" of ZOOM depositions has been predictable—shorter lunch breaks, earlier start times, attorneys speaking over each other due to the internet lag, dogs barking in the background—but others have not been as predictable, nor as harmless. The physical separation amongst parties and attorneys has made attorneys more brazen in offering speaking objections and explicitly instructing a client not to answer a question during a deposition. In a recent deposition we participated in, adverse counsel told his client to "not answer that question" concerning how often the Plaintiff, a laborer, would work the day after it snowed (he claimed to have tripped and fell due to snowy conditions at a job site from the night prior).

What is the reason behind this? Is it easier to tell one's client, "don't answer that" from the comfort of one's own home instead of physically in a room, face-to-face, with multiple adverse parties? While state rules may differ slightly, the vast majority provide for only a limited set of circumstances in which an attorney can offer a speaking objection or explicitly instruct her witness to not answer a question.

Speaking Objections

Taking New York for example (most states have very similar guidelines), 22 NYCRR 221.1 provides:

Is it easier to tell one's client, "don't answer that" from the comfort of one's own home instead of physically in a room, face-to-face, with multiple adverse parties? While state rules may differ slightly, the vast majority provide for only a limited set of circumstances in which an attorney can offer a speaking objection or explicitly instruct her witness to not answer a question.

a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer, before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the CPLR.

b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

The following objections are allowed per CPLR 3115: (b) errors which might be obviated if made known promptly; (c) disqualification of person taking deposition; (d) competency of witnesses or admissibility of testimony; and (e) form of written questions. Absent some truly unusual factors, there are no other circumstances in which a party can offer a speaking objection! We repeat—there are no other circumstances in which a party can offer a speaking objection to a question at a deposition!

Instructing a Witness Not to Answer a Question

There is an even narrower scope concerning when it is appropriate to instruct a witness not to answer a question. In New York, as in many other states, there are generally only four scenarios where a witness can be instructed *not* to answer a question:

1) Attorney-Client Privilege

The attorney-client privilege attaches "(1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the cli-

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ent, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except if the protection is waived." *United States v. Bein*, 728 F.2d 107, 112 (2nd Cir. 1984) (citation omitted). Privileged material is given absolute immunity to discovery. *See* CPLR 3101(b); *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377 (1991).

ZOOM depositions may or may not be the "norm" in a post-COVID-19 world, but remote depositions and virtual court appearances are here to stay in light of the broad exposure that all attorneys have had to the experience in the past year.

2) Doctor-Patient Privilege

CPLR 4504 provides that "unless the patient waives the privilege, a person authorized to practice medicine… shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." Like the attorney-client privilege, the doctor-patient privilege belongs to the patient and applies unless waived in some manner. *See* CPLR 4504(a).

3) Fifth Amendment Right

"[A] blanket refusal to answer questions based upon the Fifth Amendment privilege against self-incrimination cannot be sustained absent unique circumstances, and . . . the privilege may only be asserted where there is reasonable cause to apprehend danger from a direct answer." *Chase Manhattan Bank, Natl. Assn. v. Federal Chandros*, 148 A.D.2d 567, 568 (2nd Dept. 1989) (citation omitted).

4) Palpably Irrelevant/ Unduly Burdensome

Generally, a deposed witness is required to answer all questions posed unless the question is palpably irrelevant. *Mora v. Saint Vincent's Catholic Med. Ctr.*, 800 N.Y.S.2d 298, 300 (Sup. Ct. N.Y. Co. 2005) (citations omitted). Information is palpably irrelevant when it does not directly relate to the opposing party's claim. *See Hertz Corp. v. Avis*, 106 A.D.2d 246, 485 N.Y.S.2d 485 (1st Dept. 1985). In other words—unless the question centers on privileged information, could incriminate a witness, or is "palpably" irrelevant or "unduly" burdensome—fire away! Your question is appropriate, and the deponent is required to answer it.

Practice Tips

When taking a deposition, be prepared for the witness' attorney to offer impermissible speaking objections and to instruct her client to not answer a question. Make sure that before a deposition begins, one is aware of the best contact information for the judge presiding over the case (and the law clerk's phone number and email address). Do not hesitate to call a judge for a ruling if counsel defending the deposition is engaged in unsavory or illegal tactics. Most judges are accessible during the day and can clear this situation up. If the judge is not available, indicate on the record that the question will be marked for a ruling and circle back to it later. Do not back off a question just because counsel instructed her client not to answer it. An easy way to rectify this, without involving the judge at first, is to have a hard copy print out of the exceptions listed above (or print out this article!). Push back on the attorney's speaking objection or direction not to answer, knowing that one is armed with the only scenarios in which counsel's actions *could* be deemed permissible. The record will support your position in the event this dispute will be marked for a judicial ruling—and chances are, the attorney will back off when she knows that you know the law!

ZOOM depositions may or may not be the "norm" in a post-COVID-19 world, but remote depositions and virtual court appearances are here to stay in light of the broad exposure that all attorneys have had to the experience in the past year. It will be easier to depose witnesses from different locations, and "loop in" an attorney who otherwise may not have been able to attend an in-person deposition. Accordingly, attorneys may continue to bend the rules as it concerns speaking objections and directives to witnesses concerning not answering questions at depositions, in light of the more relaxed nature of a webcam deposition. So long as one is armed with the above information, including the narrow set of circumstances in which an attorney can appropriately object to a question, and the more limited scenarios in which one can direct a witness not to answer a question, one is prepared to push back on this improper behavior—either in person, or in front of a webcam.

If you have any questions about taking or defending depositions, or about

legal malpractice, in general, please contact **Andrew R. Jones, Esq.** or **Daniel Butler, Esq.** at *Furman Kornfeld & Brennan LLP*. ■

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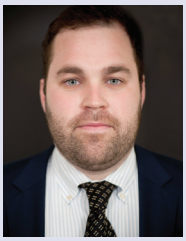

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PLDF Amicus Program: a Little-Used Appellate Luxury

"Two are better than one, because they have a good return for their labor."
— Ecclesiastes 4:9

In general, is it better to have two separate appellate briefs supporting your client's or insurer's position, or merely one? The answer is obvious. Yet the Professional Liability Defense Federation Amicus Program is insufficiently called upon by our industry members for no-cost appellate help. We encourage our industry members to take a second look at the benefits the program offers, and to call upon the membership for assistance. Here is the background.

Appellate courts routinely give permission for industry, professional and other groups to submit appellate briefs that address broader or transcendent issues going beyond the facts of the case on appeal. Termed *Amicus Curiae* briefs (Latin for "friend of the court"), the focus of the argument in the brief should address reasons supporting a party's desired outcome based upon the larger issues. Amicus participation avoids the risk that decisions made by courts in a vacuum (i.e., application of the law to the mere facts of the case on appeal) without consideration of the larger context may create unwanted jurisprudential ramifications.

Potential benefits to the party involved are obvious. The court will be able to consider: risks of unintended consequences associated with the other side's advocacy, policy issues raised by the parties' advocacy, historical perspectives on the development of the law, and the effect on other persons or entities who are not parties to the action but whose interests could be affected by the court's ruling. All the while the amicus advocate is supporting the outcome advanced by the party's advocate.

Professional liability claims present fertile ground for amicus assistance. Statutes of limitation triggers, affidavit of merit technicalities, but-for and other causation nuances, scope of duty (e.g., privity), punitive damages, expert foundation, and myriad issues affecting specific professions, offer opportunities to have courts view the parties' dispute from the perspective of the particular profession's participation in the development of the law.

It is no secret that attorneys must market their services through presence-building activities. Appearing as counsel for the Professional Liability Defense Federation as amicus in a state or federal appellate court provides excellent published opinion publicity drawing attention to counsel's professional negligence defense expertise. Law firm homepage and personal web-bio placement, and social media exposure, spread the word about the amicus advocate's talent, corroborated by respect shown for it by leading courts who invited counsel's participation.

The clients, their risk managers and insurers, value amicus participation because it improves the chance of a "win" in the case at bar, and potentially in future cases if the defense outcome sought is adopted and has wider applicability.

PLDF is proud of its amicus participation to date. *See Frederick v. Wallerich*, 907 N.W.2d 167 (Minn. 2018) (addressing whether multiple acts by the same lawyer trigger separate LPL claims); *Villani v. Seibert*, 639 Pa. 58, 159 A.3d

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478 (2017) (ruling a statute allowing a cause of action for wrongful use of civil proceedings does not infringe on the judiciary's constitutional power); and *Guzick v. Kimball*, 869 N.W.2d 42 (Minn. 2015) (holding the plaintiff's expert's affidavit of merit was insufficient to establish proximate causation). Let's add to the list.

When a request for amicus assistance is received, the PLDF Amicus Committee will review the request and discuss whether the issue involved is one the federation as a whole should address. If so, PLDF members in the jurisdiction will be contacted to learn if they are interested in serving as amicus counsel. An assignment requires the lawyers defending the claim to alert amicus counsel of the issues involved, where help is desired, deadlines, and other technical details necessary to perfect the filing. Amicus counsel should not be expected to read the trial or motion hearing transcript, exhibits, etc. The task is to prepare a legal policy argument having a tie to the facts and law on appeal. PLDF can offer participating counsel a small attorney's fee plus printing and filing fees. Counsel should view the Amicus Program opportunity as a marketing, not fee generating, endeavor.

We urge our industry members to call upon PLDF for assistance with your appeals. Two are better than one. And the return on labor for client, insurer, and counsel on PLDF amicus appeals, should be good. ■

My First Jury Trial . . . During a Pandemic!

Lisa D. Angelo | *Murchison and Cumming, LLP*

It was the end of October 2020. Courts had been shut down since March due to the nationwide COVID-19 pandemic. Los Angeles County was allowing some in-person hearings but only preference trials were being considered for a jury—if they had previously been demanded, and if enough jurors were available. Orange County was open for trials at the Presiding Judge's discretion. My real estate fraud case, which had been pending for four years, was called on Friday, October 23, 2020. Naturally, we believed our case would be continued since there was no major rush to go to trial, particularly during a pandemic. While my case had been on the docket for four years, there were other cases that had been pending for longer, or that had other issues that could have taken precedence over our case. Nonetheless, because we answered "ready" on March 13, 2020—the Friday before California's Governor shut down the State on Monday, May 16, 2020—we were next in line for a jury trial when one of the large courtrooms typically used for complex cases became available.

Much to our surprise, the court ordered the parties in our case to appear the following Monday, October 26, 2020, for trial and jury selection. So long as a criminal case did not need the jurors on Monday, the panel that was summoned to appear for jury duty would be sent to our courtroom and we would start our selection. Needless to say, I did not get much sleep that weekend.

Voir Dire, Jury Selection & The Socially Distant Courtroom

In my career, I have tried cases in federal and state criminal and civil courts, on both coasts and in-between, and I have seen all types of jury selection processes. Every court and every judge has its or her own way of handling this process…don't they? This time, however, was very different.

Due to the pandemic, it was anticipated that more than the usual number of jurors would claim a "hardship" to get out of jury duty. Thus, in an effort to streamline *voir dire*, prospective jurors were given a "hardship questionnaire," so they could be pre-qualified for jury service before *voir dire* began. Unfortunately, and as an unintended consequence, instead of streamlining jury selection, the questionnaire afforded prospective jurors with the opportunity to opt-out of jury duty for nearly any reason. Unlike the days when jurors were grilled on the particulars of their inability to "perform their civic duty," this time, if a juror had so much as a sniffle, day care concerns, work concerns, or simply an 'I don't feel comfortable being here' concern, the juror was free to leave if he or she signed a hardship questionnaire. After the panel began rapidly depleting, even before the *voir dire* actually started, it was decided that counsel would conduct preliminary *voir dire* of jurors who claimed hardship on their questionnaire. We also called down for a second panel of forty jurors for the next day so we could repeat the entire process. Jury selection ended up being the lengthiest process I had ever gone through for a civil non-complex trial. Eventually, we had a "pre-qualified" non-hardship panel of fifty to sixty jurors and the real *voir dire* process finally began.

Due to "social distancing," we could only *voir dire* eighteen jurors at a time. The court's clerk placed red tape on every fifth seat in the jury box and

In order to make the courtroom "open to the public," which it most certainly was not, the daily court sessions were "live streamed" on the court's website for free.

throughout the gallery so jurors would know where to sit and would remain at least six feet apart from each other at all times. The department had four long counsel tables between the well and the gallery. In the middle of the second row of counsel tables was an Elmo for exhibits. Only one attorney could sit at each six-foot long table. Since there were two attorneys for both sides, our clients (Plaintiff and Defendant) were not permitted to sit at counsel tables. More shocking, neither Plaintiff nor Defendant could sit in the courtroom and observe jury selection and *voir dire* because (as our judge reminded us every day) only a certain number of people could be together in the courtroom at all times. In other words, the seats our clients would have normally occupied had to go to a prospective juror instead during *voir dire* in order to accommodate eighteen jurors in the room along with counsel, the judge and courtroom staff. As we also soon realized, when nearing the end of our jury selection process, we could only have one alternate juror if we wanted to reserve the other two seats for our clients (Plaintiff and Defendant). If we had two or three alternates, our clients would have to watch the trial from a computer on the court's live stream.

In order to make the courtroom "open to the public," which it most certainly was not, the daily court sessions were "live streamed" on the court's website for free. Before courtroom proceedings began each day, our judge placed a preliminary order on the record that went something along the lines as this:

> …FOR TODAY'S PROCEEDINGS THE COURT IS AGAIN GOING TO MAKE THE FINDING THAT THERE IS AN OVERRIDING INTEREST IN LIMITING PARTICIPATION OF THE MEMBERS OF THE PUBLIC DUE TO THE COVID-19 VIRUS. THIS OVERRIDING INTEREST REQUIRES THE COURT TO COMPLY WITH SOCIAL DISTANCING GUIDELINES. AS A RESULT OF COMPLYING WITH THE SOCIAL DISTANCING GUIDELINES, IT REQUIRES THE COURT TO LIMIT THE NUMBER OF PEOPLE WHO CAN PARTICIPATE IN THESE PROCEEDINGS FROM THE PUBLIC.
>
> THE COURT HAS CONSIDERED OTHER ALTERNATIVES, SUCH AS, MAYBE MOVING TO ANOTHER COURTROOM TO ACCOMMODATE MEMBERS OF THE PUBLIC WHO MAY HAVE AN INTEREST IN THIS CASE. THAT AT THIS STAGE OF THE PROCEEDINGS THE COURT WILL NOT MOVE TO A LARGER COURTROOM BECAUSE THE COURT HAS NOT HAD ANY INDICATION THAT MEMBERS OF THE PUBLIC WISH TO OBSERVE THE PROCEEDINGS IN THIS CASE.
>
> FURTHER, THE COURT IS LIVE STREAMING THESE PROCEEDINGS. SO AS A RESULT OF THE LIVE STREAMING, THE COURT IS PROVIDING PUBLIC ACCESS. SO THE COURT WILL FIND THAT THE OVERRIDING INTEREST OF PUBLIC SAFETY OUTWEIGHS OR REQUIRES THE COURT TO LIMIT THE NUMBER OF PARTICIPANTS IN THE COURTROOM, AND CURRENTLY THE COURT DOES NOT HAVE AVAILABLE SEATS OPEN TO THE PUBLIC.
>
> I'LL ASK THE COURT CLERK TO LET STAFF KNOW THAT THE COURT DOES NOT HAVE SEATS AVAILABLE TO THE PUBLIC AND TO HAVE STAFF ADVISE THE COURT IF MEMBERS OF THE PUBLIC WISH TO VIEW THIS TRIAL IN PERSON. IF THE COURT GETS THAT INFORMATION, THE COURT WILL REVISIT THIS DECISION TODAY…

It was agreed that both sides would give "mini-openings" as opposed to the judge reading a "statement of the case" to the jurors. Because our courtroom was not our judge's courtroom, and had been remodeled to accommodate for "social distancing," we had to decide where to stand and how to present our arguments to the jury. Plaintiff's counsel was tall, at least 6'1, so the jury was able to see him fairly well wherever he stood in the courtroom. Most of the time, he stood up at counsel's table with his back to the judge. Since I was at least a foot shorter, my ability to see all the jurors and their ability to see me, was a little more challenging. I decided the best way to be seen and heard was to stand in the well, directly in front of the judge, but with my back to him. I asked for a podium, but alas, one could not be found until the second round of *voir dire*. For the first eighteen jurors,

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I spoke to them from two bankers boxes placed on top of counsel table. My notes were partially on the box and partially on a nearby table. In the past, I would have a jury consultant seated at counsel table during this process. Of course, with a limited number of people allowed in the courtroom, an in-person jury consultant was not possible.

We went through two packs of eighteen jurors before we used all our preemptory and cause challenges, so we had to repeat our mini-openings and *voir-dire* questions twice. Each time was great practice for our actual opening statement which would finally be able to go forward on the fourth day of trial and after three full days of jury selection.

Wearing Masks and Building a Relationship with the Jury

It did not take long before I learned that the best mask to wear during trial is a plain blue surgical mask. The material is thin, the sides are not too tight around the face and my voice could project better than if I wore a cloth mask. Two masks were certainly not an option if I wanted to be heard. I was grateful for my Lasik eye surgery, which still allowed me to not have to wear glasses so I did not have to worry about wearing my mask high up on my nose so that the eyeglasses did not fog up. While not very stylish, the blue surgical mask was also easier to breathe in and would not allow me to get hot throughout the course of the day. I never thought I would get used to wearing a mask all day, every day—but I did. I also learned very quickly that this trial was not going to be about style, comfort and charm. Rather, building a relationship with the jury I worked so hard to select, was going to be my biggest challenge. Incidentally, I did try to wear a face shield in lieu of a mask so the jury could see more of my face and expressions when I spoke. Unfortunately, my courthouse had a "no shield" and "mask only" policy.

As such, my goals each day were simply to be heard, be seen—in whole or in part—and get my client heard, seen and understood. With my client seated in the far back corner of the gallery, behind all the jurors, and my back to two-thirds of the jury most of the time while I questioned witnesses each day, these goals were serious challenges. Even getting the testifying witness in the witness box seen and heard by jurors seated in the far corners of the courtroom was a challenge. After the first couple of witnesses testified, it was decided that a TV monitor would have to be set up for some of the jurors to get a closer look at the testifying witnesses. Indeed, "where to stand" was actually an ongoing issue throughout the course of the three-week trial. Being 5'1, I often wondered where my place in the courtroom should be in order to best be seen and heard and to not block the juror's line of sight to the Judge or to the testifying witness in the witness box. Did I really want to stand by the Elmo with my back to two-thirds of the jury who were seated throughout the gallery as I questioned witnesses? For opening and closing arguments, was it better to stand in the well, with my back to the judge? If I stood there, at least everyone could see half my face behind my mask, I would not block the testifying witness and perhaps the jury could hear most of what I said…so long as spoke up, projected loud enough through my mask and kept it interesting. Of course, I was limited to where the microphones were stationed. One day I tried to ask questions of a witness while seated from counsel's table, but I knew almost as soon as I started, that was the wrong thing to do. Alas, it was a little hit or miss the first few days.

The only jurors who consistently got to see the front-side of the trial attorneys were the three jurors who were lucky enough to get a seat inside the jury box. Everyone else, typically saw the back of my neck and whatever color jacket I wore each day. For these reasons, I wore neutral colors, nothing flashy, I had my hair pulled up, away from my face and attempted to appear the exact same way, every day, for all three weeks. The process was exhausting, but I did not want to distract the jury from anything other than the evidence and testimony that was being presented each day. If two-thirds of the jury could not see me, I did not think it was fair for the three jurors in the box who had the best view of everyone, to see something the others could not.

Incidentally, there was no such thing as a "sidebar," or "may we approach" to discuss a particular objection or document outside earshot of the jury due to social distancing. If the judge had to talk to counsel outside the presence of the jury, the entire jury had to leave the courtroom and wait in the hallway. Needless to say, objections, legal argument over exhibits, questions were minimal as we did not want to annoy the jury.

Trying a Case in the Dark

When asked how it is to try a case in a mask to a jury that is also masked and scattered about a large courtroom, I analogize it to trying a case in the dark. ***In retrospect, I wonder if this is the better way to try a case to a jury?***

Instead of focusing on whether a juror's smile meant something, whether good or bad, all I could focus on was the evidence that I planned to get admitted each day, the testimony I planned to elicit and how I could possibly get my message across without knowing whether people liked it or not. Trying to guess what the jury was thinking, whether it liked my expert, whether it liked me or my client, was hopeless. One day, I was cross-examining a witness and I told

(what I believed) was a pretty good off-the-cuff joke. All I heard in response to my effort was radio silence. Did the jury laugh? If it did, I could not hear the jurors. Did the jury not laugh at all because I lost the jurors and did not know it? Did the jurors smile, but I could not see their smile because they were behind me or because they were masked? And what about body language? I could not count on body language because everyone was, for the most part, uncomfortable. Indeed, wearing a mask all day is not comfortable. The seats in the courtroom were not comfortable. (One juror even brought in a seat cushion after the first week.) The temperature in the courtroom was not always comfortable either.

After the verdict was read and we went to talk to some of the jurors who waited for us in the hallway, I learned that in fact…they had laughed at my joke during the trial, I just did not hear them. I also learned that despite the fact that they could not see my client every day, they did like her…a lot. One juror became emotional as she talked to my client—the Defendant—who had wrongly stood accused of fraud for four years.

So, what can I offer about having tried a case during the middle of a nationwide pandemic? Not much more than I could offer when talking about any other case. Every trial has its punches that we have to roll with, doesn't it? Whether it is a judge who has particular rules or styles we are not used to, a witness that turns on us, or we have to figure out how to fix a mess on the spot. Or a smiling juror who can be smiling because she hates us, or is smiling because she loves us. At the end of the day, each trial is like trying a case in the dark—we just may not realize it. But not being able to second guess yourself and remaining completely oblivious as to whether something we did each day worked or did not work—does that have an overall positive affect on performance, confidence and outcome? I think so. ■

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Bullies In the Schoolyard and Beyond: Avoiding and Defending Federal Bullying Claims Against Schools and School Leaders

Christopher J. Conrad | *Marshall Dennehey Warner Coleman & Goggin*

Bullies are everywhere. Anyone reading this page who survived childhood can surely attest to this. And any parent or guardian reading this page who has or cares for school-aged children certainly knows that the bullies have not gone away. In "Preventing Bullying" factsheet for 2020, the Center for Disease Control and Prevention ("CDC") states that bullying is "a form of youth violence and an adverse childhood experience" and defines bullying as "any unwanted aggressive behavior(s) by another youth or group of youths, who are not siblings or current dating partners, that involves an observed or perceived power imbalance, and is repeated multiple times or is highly likely to be repeated." And the CDC notes that bullying "may inflict harm or distress on the targeted youth including physical, psychological, social, or educational harm."

Bullying in school today is not quite what we remember from our own childhoods, however. Sure, the mean comments, pushing and shoving, stealing of personal belongings and occasional fights in the hallways and school yard still occur as they always have (for me, Ralphie from "A Christmas Story" and his daily run-ins with bullies Scut Farkus and Grover Dill always come to mind). Yet, with the ubiquity of social media and how it pervades almost every aspect of our children's lives, the opportunity is there for bullies to target their peers 24/7, both in and out of school, in person and online. Indeed, the CDC recognizes that in addition to the common types of bullying we know (physical, verbal, social/emotional and damage to personal property), "[b]ullying can also occur through technology, which is called electronic bullying or cyberbullying."

In reviewing data from the prior year, the CDC stated in its 2020 factsheet that about 1 in 5 high school students report-

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ed being bullied on school property, and more than 1 in 6 high school students reported being subjected to cyberbullying. Also according to the CDC, nearly 14% of public schools reported that bullying is a discipline problem occurring daily, or at least once a week. Reports of bullying are highest in middle schools (28%), followed by high schools (16%), combined schools (12%), and primary schools (9%). And reports of cyberbullying are highest in middle schools (33%) followed by high schools (30%), combined schools (20%), and primary schools (5%).

Because bullying remains a troubling reality for our children, schools and school personnel are, for the most part, particularly attuned to bullies, and in responding to reports about bullying. Many schools today have formal anti-bullying policies and complaint reporting procedures in place, and school personnel are being trained on how to respond to and investigate bullying complaints, as well as how to counsel both the victim and the bully. Yet, students and their caregivers often feel that their schools are not sufficiently responsive to their complaints, or that schools are not doing enough to prevent bullying altogether. This in many cases leads to federal litigation against the school entities and their administrators and personnel, and this litigation customarily takes several forms.

The Civil Rights Bullying Complaint Under 42 U.S.C. §1983

Quite often when bullying-related lawsuits are filed at the federal level, they are brought through §1983, typically as Procedural Due Process, Substantive Due Process and/or Equal Protection claims under the 14th Amendment. Section 1983 is a preferred and attractive mechanism for plaintiffs because in addition to being able to sue the school entity itself, plaintiffs also are able to sue school officials and employees in their official and individual capacities for money damages. Of course, §1983 allows for fee-shifting to the prevailing party, which is enticing to attorneys as well.

These cases often involve a similar fact pattern: the parents or guardians claim their child was regularly bullied and harassed by other students; that the school and its personnel knew or should have known about the bullying and harassment but failed to take appropriate action; and that the school's failure to adequately address the bullying and harassment of students, according to its formal policy or otherwise, resulted in harm to the student that was tantamount to a violation of the student's 14th Amendment rights.

Monell-style claims against the school entity itself often accompany the Due Process and Equal Protection claims as well. It is common to see in these suits an allegation or separate count that a school's policy, practice, or custom was the "moving force" behind the Constitutional violation, or that a school administrator with supervisory authority and personal involvement in the bullying investigation failed to employ a specific supervisory practice or procedure to correct a known unreasonable risk of Constitutional harm, i.e., to prevent bullying.

These cases usually turn on whether the plaintiff can show the school and its personnel were "deliberately indifferent" to the student's rights, or, in the context of a Substantive Due Process claim, whether the school's action, or failure to act, "shocks the conscience." And, in addition to any substantive defenses to the claims that might be available, individual school officials and employees may enjoy qualified immunity if they can show that the performance of their discretionary functions (e.g., the manner by which they conducted a bullying investigation) does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known.

The ability for schools to prevent bullying (or defend against bullying claims) occasionally can be even more daunting, particularly in cases when a creative lawyer advocates for the 1st Amendment rights of the bully. For example, in *Norris v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12 (1st Cir. 2020), a high school suspended a sophomore student plaintiff because she anonymously posted a sticky note on a mirror in girls' bathroom that stated "THERE'S A RAPIST IN OUR SCHOOL AND YOU KNOW WHO IT IS." The note did not identify the alleged rapist or victim by name. School personnel investigated the note after another student brought it to them. School personnel believed they determined who the intended target of the note was and concluded the note constituted bullying under the school's policies, which warranted a three-day suspension of the student. The student and her parents filed suit and sought preliminary injunctive relief, arguing in part that the school's intent to suspend the student violated her 1st Amendment free speech rights. The trial court granted the student preliminary injunctive relief, concluding in part that the note was tantamount to political speech as it was a criticism of how the school handled sexual assault. On appeal, the First Circuit affirmed, albeit on slightly different grounds, reasoning the "sticky note communicated its message in written words and so it plainly constitutes 'pure speech,' which 'is entitled to comprehensive protection under the First Amendment." *Id.* at 24. In relying upon a litany of United States Supreme Court 1st Amendment cases, the First Circuit also reasoned that the school was unlikely to succeed on the merits of the case, because the "sticky note contained no speech that could be viewed as 'offensively lewd' or indecent'…

The ability for schools to monitor and discipline a student for online activity (cyberbullying or otherwise) can be very challenging, particularly when the activity occurs off school premises, not during school hours, and while using a personally-owned device, and consequently disciplinary overreach by school personnel, even with good intentions, occasionally leads to 1st Amendment claims under §1983 as well.

nor did it reference any drug use… [and] a sticky note posted by a student in a student bathroom is not reasonably viewed as school sponsored." *Ibid.*

The ability for schools to monitor and discipline a student for online activity (cyberbullying or otherwise) can be very challenging, particularly when the activity occurs off school premises, not during school hours, and while using a personally-owned device, and consequently disciplinary overreach by school personnel, even with good intentions, occasionally leads to 1st Amendment claims under §1983 as well. By way of illustration, in *B.L. v. Mahanoy Area Sch. Dist.*, 964 F. 3d 170 (3rd Cir. 2020), a disgruntled cheerleader who failed to make the varsity squad as a sophomore vented her frustrations by posting a rude photo and comments about the team to her Snapchat account one Saturday while visiting a local store. Unsurprisingly, this post quickly made its rounds through school and was reported to the cheerleading coaching staff, who swiftly removed the student from the JV squad for the year for violating team rules.

The student and her parents appealed to school district administrators and the school board to overturn the decision, but to no avail. So, they turned to §1983, and filed suit claiming her suspension from the team violated her 1st Amendment rights; that the school and team rules she was said to have broken were overbroad and viewpoint discriminatory; and that those rules were unconstitutionally vague. The trial court and later the Third Circuit agreed, concluding that the student's snap and commentary, however vulgar, were protected speech. Specifically, the Third Circuit found that the snap was "off campus" speech that fell outside of the school context, reasoning the speech did not take place in a school-sponsored forum, or in a context that "bears the imprimatur of the school," nor was it a case in which the school operated the online forum. "Instead, B.L. created the snap away from campus, over the weekend, and without school resources, and she shared it on a social media platform unaffiliated with the school." *B.L.* 964 F. 3d at 180. Consequently, the Third Circuit concluded the school could not discipline the student for her snap.

Still, the result of *B.L.* may have been different if the student's snap and comments involved bullying, threats of violence, or harassment toward another student: "Nor are we confronted here with off-campus student speech threatening violence or harassing particular students or teachers. A future case … involving speech that is reasonably understood as a threat of violence or harassment targeted at specific students or teachers, would no doubt raise different concerns and require consideration of other lines of First Amendment law." *B.L.*, 964 F. 3d at 190. "[O]ur opinion takes no position on schools' bottom-line power to discipline speech in that category. After all, student speech falling into one of the well-recognized exceptions to the First Amendment is not protected." *Ibid.*

The Title IX Bullying Complaint

Claims under Title IX of the Education Amendments of 1972 ("Title IX") find their way into federal bullying lawsuits as well, and they often go hand-in-hand with §1983 claims. This is not surprising. Sex-based bullying is prevalent. In 2020, the CDC reported that about 30% of female high school students, and 19% of male high school students, experienced bullying at school or electronically in the prior year. No child is immune from bullying, regardless of sex.

Title IX expressly states that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). In any Title IX case, a plaintiff must prove that he or she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program (i.e., a public school); that the program receives federal assistance (most public schools do); and that the exclusion was on the basis of sex. And in the context of a bullying case in particular, a plaintiff must prove that the sexual harassment was severe, pervasive, and objectively offensive; and that the school district had actual knowledge of the sexual harassment.

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In any Title IX case, a plaintiff must prove that he or she was excluded from participation in, denied the benefits of, or subjected to discrimination in an educational program (i.e., a public school); that the program receives federal assistance (most public schools do); and that the exclusion was on the basis of sex.

Like the §1983 cases, Title IX cases very often turn on the "deliberate indifference" standard. For example, when schools take little to no action, or ineffective action, in response to a bullying complaint and as a consequence fail to prevent the harassment, Title IX plaintiffs can prevail. Also, in cases when schools have policies or take action that allow students of one sex to be particularly more vulnerable to harassment or bullying (e.g., only punishing the conduct when the bully is caught in the act), courts will find the school was "deliberately indifferent" to bullying and peer harassment. Deliberate indifference is a lofty standard, however, and schools and school personnel may avoid Title IX liability even if the harm to the harassed student ultimately is not averted, as long as they responded reasonably to the perceived risk. As the Sixth Circuit in *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000) explained, schools are "not required to 'remedy' sexual harassment nor ensure that students conform their conduct to certain rules." Rather, the school "must merely respond to known peer harassment in a manner that is not clearly unreasonable.'" *Ibid.*

The Due Process Complaints Under IDEA and §504

Bullying claims can manifest as well in administrative due process complaints brought on behalf of an eligible child with a disability under the Individuals with Disabilities Education Act ("IDEA") and/or §504 of the Rehabilitation Act of 1973 ("§504"). These cases, particularly on appeal on federal court, also may include related claims under the Americans with Disabilities Act ("ADA"). In very broad terms, Hearing Officers, Administrative Law Judges and federal courts (on appeal) hearing these cases frequently are tasked with determining whether a school has denied a student the right to a Free Appropriate Public Education ("FAPE").

In its August 20, 2013 "Dear Colleague" Letter, the U.S. Department of Education's Office of Special Education and Rehabilitative Services made clear that "any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied." Likewise, in its October 21, 2014 "Dear Colleague" Letter, the U.S. Department of Education's Office for Civil Rights ("OCR") stated that the "bullying on any basis of a student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services can result in the denial of FAPE that must be remedied." OCR also explained in its 2014 Letter that when it is tasked with investigating bullying claims, and whether the conduct resulted in the denial of a FAPE, it will consider whether (1) a student was bullied based on a disability; (2) the bullying was sufficiently serious to create a hostile environment; (3) school officials knew or should have known about the bullying; and (4) the school did not respond appropriately. Hearing officers and courts may consider these factors too. Thus, in evaluating whether a school responded appropriately to bullying of a student with special needs, the tribunal will consider whether, and to what extent, the bullying adversely affected the student's ability to access a FAPE or, stated otherwise, whether the student was denied a FAPE as a consequence of bullying.

There must be direct link between bullying and a child's receipt of FAPE in order successfully prove bullying as an IDEA/§504/ADA claim in this context. The fact that the student was bullied does not necessarily constitute a violation unless the bullying prevented the student from deriving a meaningful benefit from his or her education. In *Shore Reg'l Bd. of Educ. v. P.S.*, 381 F. 3d 194 (3rd Cir. 2004), for example, the Third Circuit explained that a child's "legitimate and real fear" of an educational placement caused by bullying can render that placement inappropriate. Evidence used to establish this "legitimate and real fear" may include documentation of persistent abuse, documentation of psychological diagnoses that are directly attributable to that abuse, and expert testimony directly linking the child's mental state to the provision of a FAPE.

Tips for Avoiding Bullying Litigation

1. Schools and school leaders should develop and implement a thorough

and comprehensive anti-bullying/cyberbullying policy and complaint reporting policy that satisfy federal and state standards.

2. Schools and school leaders should train their personnel on how to identify students who may be the victim of bullying, and how to respond to and investigate complaints of bullying.

3. When school personnel are notified of a bullying complaint (either through a formal reporting process, or even less formally), they must conduct a prompt, thorough and complete investigation. At a minimum, school personnel must interview the victim, the bully, and any key witnesses, and review surveillance video and social media activity (when appropriate).

4. School personnel should offer and provide counseling and other services to the victim, and any other students who in some way may have been adversely affected by the bullying.

5. School personnel should administer discipline when appropriate and take reasonable steps to prevent the bullying from recurring (e.g., separating the bully and victim in school and school-sponsored activities).

6. In the case of an eligible student who receives services through an Individualized Education Plan ("IEP") or §504 Service Plan, the school should reconvene the student's IEP/§504 team and determine whether the bullying has adversely affected the student and the student's access to education, and evaluate whether the Plan should be revised or updated to address the student's needs.

Litigation as a result of bullying is sometimes unavoidable, no matter how proactive and responsive a school and its personnel may be in responding to a bullying complaint. Right or wrong, some students and parents will be dissatisfied with the school's response to the complaint, no matter the outcome. Still, if the school is proactive and responsive, and follows the tips recommended above, they and their personnel will be in a much better position to mount a successful defense to bullying claims. ■

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Christopher J. Conrad is a shareholder in the Camp Hill, PA office of *Marshall, Dennehey, Warner, Coleman & Goggin, PC*, and he is a member of the firm's Professional Liability Department. As part of his practice, Mr. Conrad defends school districts, intermediate units, charter schools and other academic institutions in employment and civil rights litigation and in all phases of special education litigation, from administrative due process hearings to federal court appeals. Mr. Conrad is a 1998 graduate of The Pennsylvania State University and a 2001 graduate of The Pennsylvania State University Dickinson School of Law. He is admitted to practice law in federal and state courts in Pennsylvania, New Jersey and Maryland. He can be reached at CJConrad@MDWCG.com.

Legal Malpractice Cases by Insurers Against Insurance Defense Counsel: When the Tripartite Relationship Becomes a Bermuda Triangle for Defense Counsel

W. Barry Montgomery | *KPM Law*

The Nature of the Tripartite Relationship

Most insurance carriers and insurance defense counsel are familiar with the "tripartite" relationship. This term describes the relationship and duties owed among an insurer, its insured, and the defense attorney hired by the insurer to defend the insured. The insured becomes the client of the defense counsel in that counsel agrees to defend and protect the insured in exchange for compensation from the insurer just as if the insured had directly retained counsel. Retained defense counsel also assumes well recognized ethical obligations to the insured. The insurance policy typically provides that the insurer will pay for the defense and related expenses while requiring the insured to cooperate with the insurer and with retained defense counsel to defend against the claim and/or lawsuit. Policies almost always grant the right of control of defense of the claim or lawsuit against the insured to the insurer (to varying degrees). The insurer owes duties to cover the expenses of defending such claim or suit and to indemnify the insured for liability for damages, up to the policy limits. The policy typically reserves to the insurer the right to decide how and when to settle such claims, with some exceptions.

This article explores what appears to be a recent national trend of insurers su-

— *Continued on next page*

ing the assigned defense counsel for legal malpractice committed while defending the insured. We will summarize the legal basis for such legal malpractice lawsuits by insurers against retained counsel as employed by various jurisdictions.

The very nature of the tripartite relationship carries with it inherent potential ethical conflicts of interest, especially if the insurer claims that defense counsel engaged in "dual" representation (in other words, the attorney was hired to protect the interest of both the insured and the insurer). For example, many insurers require defense counsel to follow litigation guidelines crafted and approved by the carrier. However, ABA Model Rule 1.8(f) provides that an attorney cannot accept payment of fees from a third party (insurer) unless the client consents and the third party does not interfere with counsel's professional judgment. Moreover, an attorney cannot use information obtained from his client (the insured) during the representation of that client to the client's disadvantage. See ABA Model Rule 1.8(b). In a typical tripartite relationship, defense counsel cannot provide information gained from the insured to the insurer if such information might jeopardize coverage. Such potential inherent conflicts in the tripartite relationship have long been noted by the courts. See *San Diego Navy Fed. Credit Union v. Cuims Ins. Soc'y*, 162 Cal.App.3d 358, 208 Cal. Rptr. 494 (1985).

Do Insurers Have Standing?

The most common argument against allowing malpractice actions by insurers against retained defense counsel is that the insurer is not in privity of contract with the attorney with respect to the attorney's representation of the insured. See *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So.2d 1378, 1379 (Fla. 1993). Nevertheless, as discussed below, even in the absence of a direct contractual relationship, courts across the country have found various avenues allowing recovery by insurers against counsel that fail to protect the joint interests of the insurer and the insured.

1. The Dual Representation or "Co-Clients" Theory

The majority of courts allow insurers to bring direct actions against defense counsel retained for the insured on the theory that the tripartite relationship results in both the insurer and the insured becoming "co-clients" of the firm in the absence of a conflict of interest. See *Home Indem. C. v. Lane, Powell, Moss & Miller*, 43 F.3d 1322 (9th Cir. 1995)(Alaska law); *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss & Gladstone*, 79 Cal App. 4th 114, 1235 (2000); *Carolina Cas. Ins. Co. v. Sharp*, 940 F.Supp. 2d 569 (N.D. Ohio 2013) (Ohio law); *ACE Am. Ins. Co. v. Sandberg, Phoenix & Von Gontard, PC*, 900 F.Supp. 2d 887 (S.D. Ill. 2012)(Illinois law); *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444 (Minn. 2002); *Spratley v. State Farm Mut. Auto Ins. Co.*, 78 P.3d 603 (Utah 2003); *Nev. Yellow Cab Corp. v. Eighth Judicial Dist Court ex rel. City of Clark*, 152 P.3d 737 (Nev. 2007). These jurisdictions reason that the interests of the insured and the insurer are so aligned that (again, assuming no conflict) the relationship between the insurer and the firm it retains permit a legal malpractice claim by the insurer against a breaching defense attorney. The close alignment of the interests of the insurer and insured is key to this analysis. For example, both the insurer and the insured want to avoid litigation if possible as it is expensive for the insurer and inconvenient and invasive for the insured. Obviously, both the insurer and the insured want to avoid a judgment against the insured. However, the "dual representation" theory jurisdictions have denied such rights to pursue defense counsel to excess insurers reasoning that their interests are not as closely aligned to the insured as are the interests of the primary insurers. See *Cont'l Cas. Co. v. Pullman, Cornley, Bradley & Reaves*, 929 F.2d 103 (2nd Cir. 1991); *Essex ins. Co. v. Tyler*, 309 F.Supp.2d 1270 (D. Colo. 2004).

2. The Intended Third Party Beneficiary Doctrine

Other courts around the country have recognized the right of primary insurers to sue defense counsel for malpractice but under the rationale that the insurer is a non-client beneficiary of the attorney's services to her client (the insured). See *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593 (Ariz. 2001); Gen. Sec. Ins. Co., 357, F.Supp. 2d. 951 (E.D. Va. 2005); *Stewart Title Guar. Co. v. Sterling Sav. Bank*, 311 P.3d. 1 (Wash. 2013); *State & City Mut. Fire Ins. Co. v. Young*, 490 F.Supp.2d 741 (N.D.W.Va. 2007)(West Va. Law). Both theories of liability necessarily depend on the existence of a duty of care running from the retained attorney to the insurer that assigns him or her, and that there is no conflict of interest that threatens the attorney's ability to represent the insured. *See Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 951, 956 (E.D. Va. 2005)(Virginia law). See also Cal. R. Prof. Conduct 1.7 (attorney must obtain informed written consent from each client where significant risk exists that lawyer's responsibilities to or relationships with another client will be materially limited). When the insured has a contractual a duty to the insurer to cooperate in the defense of a lawsuit and the retained counsel has agreed to defend the insured and abide by the insurer's litigation guidelines, there is a shared intent to benefit the insured thus

making the insurer a beneficiary of the attorney's services to the insured (client).

3. The Theory of Equitable Subrogation

Other courts that have declined to apply a dual representation rationale have noted that the tripartite relationship between insured, insurer, and defense counsel is rife with potential conflict. Such courts have declined to expand the parameters of the attorney-client relationship in the defense counsel-insurer context to avoid detracting from the attorney's duty of loyalty to the insured. The interests of the insured and the insurer "frequently differ, accordingly, courts have consistently held that the defense attorney›s primary duty of loyalty lies with the insured, and not the insurer." See *Atlanta Int'l Ins. Co. v. Bell,* 475 N.W.2d 294, 298 (Mich. 1991). Yet to completely absolve a negligent defense counsel from malpractice liability would not rationally advance the attorney-client relationship. Moreover, absolving negligent assigned defense counsel from malpractice claims by an insurer might erode the quality of legal services rendered to insureds.

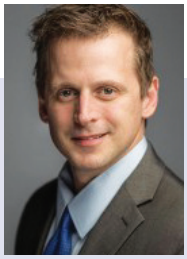
Courts applying this analysis have decided to allow the insurer to sue defense counsel for malpractice under the theory of equitable subrogation. See *Am. Centennial Inc. Co. v. Canal Inc. Co.*, 843 S.W.2d 480 (Tex. 1992); *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294, (Mich. 1991). The Michigan Supreme Court allowed a malpractice action by the insurer based on the doctrine of equitable subrogation. This doctrine allows the insurer to stand in the shoes of the insured to sue the defense counsel as such a doctrine "best serves the public policy underlying the attorney-client relationship." *Id.* at 297. Such an arrangement upholds public policy concerns protecting the attorney client-relationship between defense counsel and insured while properly imposing the cost of malpractice where it belongs.

Public Policy

The public policy reasons for permitting insurers to sue defense counsel are obvious, and have been invoked by various courts under the various liability theories. Permitting an insurer to sue the attorney it retains can promote enforcement of the attorney's obligations to the insured/client. See *Restatement (Third) of the Law Governing Lawyers* § 51 cmt. g (2000). Both insurer and insured often share a common interest in developing and presenting a strong defense to a claim that they believe to be unfounded as to liability, damages, or both. Because the insurer rather than the insured is typically required to satisfy a judgment resulting from the firm›s negligence, the insured rarely has any incentive to bring a claim for malpractice against the retained firm.

Therefore, the failure to recognize a cause of action by the insurer serves the interests of no one except the attorney or firm that committed the malpractice. Insulating attorneys from liability for malpractice in that scenario could diminish the quality of services rendered by attorneys in the tripartite relationship. Permitting the insurer to sue the attorneys, moreover, comports more readily with the understanding among both lawyers and insurers that the lawyer›s services are ordinarily intended to benefit both the insurer and the insured when their interests coincide as they almost always do. Accordingly, despite the fact that the tripartite relationship among insured, insurer, and defense counsel contains rife possibility of conflict, nearly all courts have concluded that the cost/benefit analysis weighs in favor of recognizing an insurer›s legal malpractice claim against the lawyer or law firm it retains to represent an insured.

Also, allowing insurers to sue negligent defense counsel properly allocates the loss to the appropriate insurer, generally the malpractice carrier for the at fault attorney. Insurers that retain approved counsel require them to follow well-reasoned litigation guidelines and will assess risk of loss based on not only the exposure of the individual underlying claim but also on the assumption that assigned counsel will at least meet the standard of care in representing the insured. When assigned counsel breaches the standard of care, the insurer that retained that counsel should be able to seek relief from the malpractice insurer that wrote the risk that ultimately caused or least contributed to the underlying adverse judgment (the malpractice of defense counsel). Proper allocation of the loss among the involved carriers serves the broader public policy holding the insurers accountable for the risks the assumed. ■



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Practicing Well: Write it Down!

Patty Beck | *Minnesota Lawyers Mutual Insurance Company*

It's hard to believe that it has been a whole year since "COVID" became part of the world's daily vocabulary. When we first began working from home, I spoke with a lot of lawyers who instantly focused on the positives of this dramatic change. People shared their delight at having more time to exercise and engage in hobbies while enjoying the slower pace of their morning routines.

Lately, however, my conversations with friends and colleagues have changed where people have shared that "COVID life" is beginning to wear on them. People miss chatting with colleagues in the breakroom and the experience of walking into someone's office to strategize about a case plan. The once thrilling neighborhood walking trail has become monotonous. Even eating has become a challenge in finding new recipes or restaurants to enjoy. I have experienced this exhaustion and grappled with the unsettling feeling of being in a "rut" some days as a result, and a lot of folks have said they have experienced the same. So what can we do?

A few months ago, I made a list of things I need in order to maintain my mental health. I wrote about spending time with family and friends and the hobbies that bring me joy like seasonal decorating, building furniture and décor for our home, and cooking/baking.

I also learned that it's not enough to simply identify what I need—I wrote down ideas for how to regularly experience the items on my list. For example, I now have standing virtual coffee/lunch dates with friends and colleagues each week, Wednesdays are reserved for Hallmark movie nights with my parents, weekend mornings are for "me time" which might entail a trip to my local craft store or cozying up with my coffee and a good book, and each weeknight my husband and I have dinner and watch Wheel of Fortune together (I'm aware that I basically lead the life of an 80-year-old, and I love it!).

The reason I decided to write everything down is because when life gets busy, I don't always recognize when I'm feeling "off" or "down." Sometimes it takes my husband asking if I'm okay before I notice that I'm not. When that happens, I've been able to look at my list and see what I've been missing (and better yet, I immediately have a plan for how to get out of my "rut" and get back to doing the things that I love).

I encourage you to take a few minutes and simply think about what you need to stay healthy and happy. Once you have your ideas, write them down and include concrete ways for how to achieve them. Then keep the list handy so that you can see it, especially on days when you might not realize that you need to.

As always, if you are struggling in any way with stress or mental health, please talk to someone. I assure you that now, more than ever, you are not alone! Contact your state's confidential lawyer assistance program, a mental health professional, or even a friend. It truly is remarkable how many good things can come from reflecting and talking about your life! ■

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 Well-Being Committee and frequently speaks on topics related to ethics, legal malpractice, and attorney wellness. Ms. Beck may be reached at pbeck@mlmins.com.

Our Mission

The Standard of Care PLDF

Professional Liability Defense Federation's mission is to enhance the stature and effectiveness of professional liability defense professionals through education, training and the exchange of information.

Join Us in Music City!

We cannot wait to get back together with you again in person and have already begun planning for our Annual Meeting. Please mark **October 6 – 8, 2021** on your calendar and make plans to join us in Nashville.

The Annual Meeting will feature exceptional education programs, great tours, a wonderful dinner in Music City and a fantastic opportunity to mix and mingle with old (and new!) friends and colleagues from across the country. We can't wait to see you there!

Annual Meeting Sponsorship

We are excited to once again offer an opportunity for your firm to participate in this special event. With your firm by our side, we're sure to have a successful event. Please review the Annual Meeting Sponsorship Opportunities available here: http://bit.ly/PLDFAnMtgSponsor2021 and contact our staff to secure your sponsorship.

Exhibit Opportunity

We will also offer opportunities for vendors to participate in the Annual Meeting in Nashville. Please feel free to share this link to our Exhibitor Opportunities: http://bit.ly/PLDFAnMtgExhibitOpp with the vendors you work with. ■

be presented virtually will likely be on the schedule this year and we will again have a packed program on the full range of professional liability issues. We hope that you plan to join us in Nashville.

In addition to the annual meeting planning, the *PLDF Survey of Law* will be published shortly. This publication, in its second year, will feature over 60 professional liability case summaries from around the country. It is a valuable tool that allows practitioners and claims professionals alike to keep abreast of the trends in in the applicable law around the country.

Finally, we are pleased to announce a new committee has formed: the School Leaders Liability Committee. This committee is chaired by Christopher Conrad and will focus on best practices for defending the wide variety of claims and suits that are brought against school districts, school board members, administrators and employees. The first publication of this committee is in this edition of the *Quarterly* and illustrates the importance and timeliness of the issues that this committee will address which will include claims by students, parents and employees for violations of civil rights under the 1st and 14th Amendments of the United States Constitution and Title IX, special education due process claims under the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973, and employment discrimination and retaliation claims under Title VII, ADA, ADEA, FMLA, and related state statutes. If you or any of your colleagues practice in this area, please encourage them to join this unique committee. ■

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Pat Eckler is at partner at *Pretzel & Stouffer* in Chicago where he handles a variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents professionals, businesses and tort defendants. Mr. Eckler may be reached at deckler@pretzel-stouffer.com.

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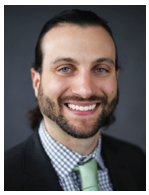

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