JUSTLAW

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HOW TO SUCCESSFULLY MARKET

[Your Small Firm]

By Henry "Hank" Didier

Remember the days when lawyers needed only to practice law? Today, marketing your firm is essential to survival in the face of increased competition and shrinking demand. But, marketing takes both time and a firm grasp of skills and techniques most lawyers know little about, including SEO, graphic design and branding.

As most small firms don't have a budget to retain a consulting firm to do the job for them, a basic understanding of marketing principles is necessary. With this knowledge and some dedication of resources, many small firms can achieve a level of continuity and visibility on which to build.

The marketing landscape is continually changing in drastic and progressive ways for the legal industry. Strategic marketing efforts employed in the legal channel often include branding, advertising, web development, social media, public relations and analytics. It is best to understand each segment and how it applies to you and your firm, while crafting and carrying out a plan for your firm.

Goals:

Like any professional or personal project, it is crucial to set goals for productivity. Marketing can help increase brand awareness, inquiry/intake calls, referrals, and your reputation as the expert in your industry. A good marketing strategy will take some time to create and even more time to implement. Give yourself 6 month increments to set goals and achieve them. This allows you to stay focused and be flexible. Also, keep in mind that a good strategy can adapt and adjust slightly according to the progress and the needs of the business.

Branding:

There are a few basic rules to keep in mind while branding your firm.

- *Keep it simple – For the sake of your team as well as the consumer*
- *Make it memorable – First impressions will have a lasting impact*
- *Remain consistent – Brand recognition is a proven technique; Make it easy for your clients and leads to identify you*
- *Differentiate yourself – Establish something unique and appealing about your firm*

Remember to think long term by continually building onto your brand and establishing a solid foundation for doing so successfully. Leverage your awards and recognitions by making them public and accessible knowledge. Allocate time and budget to create the perfect logo. Start with several options, layouts, and colors. Narrow them down and get the opinion of your team and close circles. Branding should be comprehensive and consistent in all areas of your practice across print advertising, website, social media and other visible channels.

Advertising:

Advertising remains one of the more traditional forms of marketing, and if implemented strategically, can contribute greatly to the success of the firm in the following ways:

- *Establish and maintain brand awareness*
- *Increase referral business*
- *Generate direct client calls*
- *Advance your reputation among the legal community (including your opposing counsel)*

When creating your ad plan, keep in mind the end goals of your business plan and who you are reaching, whether that is business to consumer, or business to business target audiences. Always incorporate your geographical targets including statewide, regional, or national audiences. As budget is generally the largest factor when determining if or how much to advertise, keep in mind that consistency is key to success. A three-month minimum ad run is recommended.

Keeping up to date with marketing trends is crucial to the success of your advertising strategy. From things like graphic design (are you minimalist or flashy?) and current news that may pertain to your areas of practice, research what consumers are looking for and how they are finding that information. Today for example, that search is taking place primarily online. From there, referrals play a big role, but your potential client is doing a Google search on an attorney for their potential case. With this knowledge, you can determine the amount of emphasis to place on SEO, blogging, and social media marketing concepts.

Ethics and Compliance:

As an attorney, it is crucial that you understand and abide by the rules and regulations including the American Bar Association Model Rules of Professional Conduct and your own state's Bar advertising guidelines. Rules differ when marketing to consumers versus marketing to other attorneys. When marketing to either, your branding should remain consistent, but your message should be tailored to your audience. Be sure to submit your ads to your Bar for review before placement to ensure all ads comply with the rules and guidelines, and make sure all proper disclaimers are present on ad.

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Online & Social Media Marketing:

It is wildly evident how online marketing has erupted in popularity for both the consumer and the business owner. More than half of web users are accessing sites from their mobile phones, making it easier, quicker and more efficient for consumers to find what they want anytime, anywhere. Online marketing offers a variety of options that can combine to support a distinct strategy. It is important to tap into each area, to create a comprehensive online presence.

Create a social profile for your consumers where it is relevant. Facebook, Twitter, LinkedIn, YouTube, Pinterest and Google+ are all platforms where legal content is searched and read. While your consumer may be more active on one site versus another, it is always a good idea to remain active on all sites. This includes sharing new content (from another credible source or your own created content), sharing pictures and quotes, acknowledging holidays and posting about your niche practice areas. Keep in mind, it is always acceptable to branch out and share relevant and valuable content pertaining to other areas of law, even if it is not specific to yours. As a legal professional, it is all applicable. Aside from the general social media platforms, make sure you have a complete profile on the

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President's Message

Let's Expose the New Brand of Lawyer…

Randy Hall

Set forth below is the actual text of a letter that I recently posted to a defense attorney. The background facts of what occurred are self-evident from the text of the letter.

Dear Mr. Doe:

For some reason, even after having suffered your ill-mannered tirade, I feel compelled to extend the dignity and respect that gentlemen typically offer to each other and apologize to you and your client. Any reasonable person would readily conclude that these were circumstances that were totally out of my control. Unfortunately, under federal law, you are unable to board an airplane without photo identification. Had you listened for even a moment, you may have learned accordingly. I left you a voice mail at 8:02 a.m. and followed that with an email to your assistant, Angie, at 8:19 a.m., after I called the other attorneys in the case. You have refused to provide me with your cell phone number, thus my efforts to reach you were limited to your office number, not by my choosing, but yours. Be that as it may, please inform Dr. Smith that I am sorry for the inconvenience caused by the break-in of my car, theft of my wallet, briefcase and entire file in this case. I had no inkling that burglars would be bold enough to enter my locked garage and break into my locked car. Likewise, I apologize to you, as well.

With that said, in the future, please refrain from referring to me directly and to others as "an idiot," "hung over" and a "stupid {expletive}." While I dearly love my mother, I find your reference vulgar and perhaps better suited for a bar room brawl between individuals with less education than yourself. And for your information, no, I didn't stay out late last night and consume alcohol such that I was "so hung over I couldn't take the deposition." Perhaps you should consider changing the batteries in your crystal ball, as I am at a total loss as to how you could make such factual allegations when you live 400 miles away. Furthermore, until you come to Little Rock and view my home and neighborhood, please refrain from any further insult to my home and neighborhood as a "slum." As a matter of fact, my address is #1 Heritage Park Circle, North Little Rock, Arkansas. I invite you to sign on to Google Earth and judge for yourself if you consider my neighborhood a "slum." Finally, if in the future you feel compelled to lodge what I can find no better description of than juvenile, and for that matter, slanderous insults about me and my character, refrain from calling my associates, as you may direct any and all further comments you are able to muster about me directly to me. All I ask is that next time, you have the courage to do so in person.

Amazingly, every single lawyer in this case has treated me with dignity and respect in a very unfortunate situation ….except for you. In that vein, you have clearly excepted yourself, as my resources informed me you eventually would, and nothing further need be said in this regard. Again, I am truly sorry for the inconvenience. If you or Dr. Smith incurred reasonable travel expenses, I will be more than happy to reimburse you both to that extent. I warmly extend the same apology and offer to the other attorneys in this case, as well.

Sincerely, Randy Hall

There is a "new brand" of lawyer (or is it a defense?) that has emerged. His (by all means, consider my male reference as gender neutral) disposition ranges from that of obtuse to that of a belligerent, profane bore. His professionalism is non-existent. There are no courtesies; he is rude and condescending. He does not hesitate to insult my client and their cause. He objects to every single interrogatory and request for production as being "overly burdensome" resulting in costly motions, court time and delay only to relent on the eve of sanctions. He does not hesitate to misrepresent, by omission, facts to me, and in many cases, the court. He survives by threat and intimidation. He is the person for whom my parents had divergent theories on how to handle. (I'll be advocating for my mother's method in this column).

Past Presidents

Lawrence J. Smith, LA	1988
Frank L. Branson, TX	1989
Ward Wagner, Jr., FL	1990
John F. Romano, FL	1991
Sam Svalina, SC	1992
Monty L. Preiser, WV	1993
Howard Nations, TX	1994
Vincent J. Glorioso, Jr., LA	1995
G. Robert Friedman, TX	1996
Thomas William Malone, GA	1997
John E. Appman, TN	1998
W. Coleman Allen, Jr., VA	1999
R. Ben Hogan, III, AL	2000
Bruce D. Rasmussen, VA	2001
Lawrence B. Friedman, FL	2002
Richard M. Shapiro, FL	2003
Gary Gober, TN	2004
O. Fayrell Furr, Jr., SC	2005
Howard Spiva, GA	2006
Gary Green, AR	2007
Adam Malone, GA	2008
Eric Romano, FL	2009
J. Marvin Mullis, Jr., SC	2010
Chris Glover, AL	2011
Maria Glorioso, LA	2012

Is this a new defense? Or is it a new brand of attorney that has permeated into our profession like MRSA into an ICU ward? Either way, it demeans our system of jurisprudence and our profession. Do these lawyers think they are above our rules of ethics and common principles of decency? Is there no sense of professional courtesy? Is this a cover for their own inadequacies? Quoting my dad, "how did these turds get into the punch bowl?"

We probably all have one or more new brand lawyers in our scope of practice. I find it difficult to avoid such discourteous tactics when faced with the prospect of having to deal with such a person. However, there are methods aside from lowering the bar. Here they are:

1. Kill them with kindness while making them look like a fool. The above letter serves as the best example. I copied this letter to my client and all other counsel on the file. It gave my otherwise meek client the fortitude to continue the case; it created a bond between myself and the other three defense lawyers on the file. It effectively ostracized this attorney from the other defense lawyers. My dad always told me, "...best cut the wild steer from the herd so he will be easier to catch"

2. Build your file before the court with appropriate motions, letters and communications that become part of the record. There is an attorney in Arkansas who used to possess a red, pre-inked stamp with the single word "BULLCRAP". He would routinely indicate his disapproval of offers of settlement, motions and other matters with this stamp and return them to me laden with his "red stamps" on the face of the document. Having tired of this tactic, I attached a letter of settlement with his red insults in response in a mediation report to the court. Post salutation, my letter had one line: "I enclose herewith Mr. Smith's response to my attempt to follow the court's orders." This time he called directly to voice his total "anger and surprise" that I would share his tactic with the court. His tactic stopped.

3. Share information with other attorneys on your list serve. In Arkansas, we have a new brand lawyer who, according to him, has no trial space for the next five years. His defense tactic is to delay, delay, delay. Through the constant sharing of calendars, conduct and representations on our list serve, we have effectively stopped his tactics. Likewise, sharing examples of these repetitively abusive tactics among cases by the same lawyers tends to educate our judges. Hence, they deal with such issues succinctly on the front end. Interestingly enough, the above letter got out and was ultimately posted on the Missouri Trial Lawyers List Serve. The response was amazing; over 150 posts were made that reported similar conduct by this same lawyer. There was talk of an intervention. This particular attorney was reported to the Missouri Bar Association. The point is, this new brand lawyer has suffered a complete change of conduct towards both me and my client.

4. Report such conduct to your Committee on Professional Conduct. I have only reported one attorney to our committee in over 25 years of practice. While I did not make a friend by doing so, the conduct stopped. Unfortunately, I believe that with the massive influx of attorneys, we are a lot like doctors, barbers and sushi restaurants… there is a bad one on many street corners. We have a duty to police our own. The rules are clear. Why do we hesitate to eradicate these cancerous individuals?

5. Set the example. When I went to law school, there was a class on professionalism in the practice of law. Not ethics; professionalism. Those classes, at least at my alma mater, are no longer being offered. I presume it's now up to us to set the bar high. Youngsters are watching us. They model us. They mimic us. Set a good example. Voice your displeasure and the reasons why for this conduct. Don't allow the "new brand" lawyer to replicate.

My message is this: Older lawyers, assume your responsibility to teach the younger ones; younger lawyers, respect your elders. They always know best.

The Mardi Gras CLE program is going to be awesome. Come and hear the best of the best! Bring a young lawyer with you. See you in New Orleans.

New Website!

(This was an email that you should have received. If you didn't receive it, your STLA emails are going into a junk mail file or we don't have your correct email address.)

Dear Colleagues and Friends,

I am proud to announce that the improvements to the STLA website are complete and ready for your enjoyment and perusal. Some of the changes are as follows;

a) A total facelift of the page
b) Photos of the current officers
c) A link to the website of all our current vendors and supporters
d) An interactive area where judgements and successes may be posted
e) A link to our application for membership such that it may be printed from the website
f) A list serve for members only
g) A link to find any and all past JUSTLAW newsletters
h) A link to find the current brochure for the Mardi Gras conference

Randy Hall, President, STLA

Resetting your system password

By default, your account was created with a system password. To create your own password, you will have to reset your password first. To do so, visit *southerntriallawyers.com/login*. There you will see a login form asking for an email address and password. To reset your password, simply click "Forget?" and the form will ask for your email address. Submit your email address, and shortly thereafter, you will receive an email explaining how to reset your password to the one you would like to use.

Verifying or Changing Your Public Profile

Once you are able to login to the website, you have the ability to change your STLA public profile. You can do so by visiting *southerntriallawyers.com/profile* and clicking "Edit Profile."

Submitting a Verdict or Other News

Once you have logged in, you will see a banner in the right side column of the site inviting you to submit your recent verdict. Or, you can go directly to *southerntriallawyers.com/submit*. On that page, you will be prompted for a title and description to submit. Once submitted, we will review your submission and publish it shortly.

Exciting New Feature: Mailing List Server

With the implimentation of this server, whenever you send an email to mailinglist@southerntriallawyers.com, your email will be distributed to all STLA members. This provides for a great communication tool for all. Your primary email address has been added to the system, so there is no required setup. If you have not already, you should be receiving a welcome message that includes your password and links to managing your subscription.

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A Primer on Medicare Set Aside Self-Administration

By B. Josh Pettingill, MBA, MS, MSCC

(Medicare Set Aside Consultant Certified by the International Healthcare Commission)

The purpose of this article is to provide guidance to attorneys and injury victims for self-administered Medicare set aside (MSA) accounts. In administering MSAs, funds may only be used to pay for future Medicare covered, injury related medical expenses of the plaintiff. The Center for Medicare and Medicaid Services' (CMS) guidelines indicate that the set aside funds should be placed in an interest-bearing account and may be either professionally administered or self-administered (Ref: 10/15/04, Memo Q 2).

The obligation to administer MSA funds begins as soon as the attorney releases the settlement proceeds to the plaintiff. The plaintiff has the option of funding the MSA with a single lump sum out of the settlement proceeds or with future periodic payments using a structured settlement annuity (Ref: 7/23/2001 CMS Memo). When a set aside is funded with a lump sum, Medicare begins to pay for injury related health care as soon as the account is totally exhausted. When a set aside is funded with an annuity, Medicare begins to pay for injury related health care when there is "temporary exhaustion" each year.

With an annuity funded MSA, there are two components of the set aside. The first component is the "seed money" which is used to cover the first 1-2 years' worth of qualified medical expenses. The second component is future periodic payments from the annuity. One year from the anniversary date of the settlement, the annuity payments will start to pay into the set aside account. When the funds are temporarily exhausted in any given year, Medicare begins paying for treatment related to the injuries. During this time of temporary exhaustion, the plaintiff will be responsible for any co-payments and deductibles. If the funds are not all spent in a given year the remainder is carried over to the next year (Ref: 4/22/03 CMS Memo). With annuity funding, it functions much like a yearly insurance deductible The MSA report should indicate the breakdown of the seed money, annuity payments and timeframe of the payments. The duration of the annuity payments is based on the pre-determined life expectancy of the individual, which may be less than normal life expectancy.

We recommend that attorneys issue separate checks from their trust account to fund a lump sum MSA, one for the MSA amount and one for the balance of the settlement proceeds. The check should be written to the plaintiff with the subject referencing: John Doe Medicare set aside Account or John Doe MSA Account. To take it a step further, some attorneys actually request the defendant issue a separate check to seed or fully fund the MSA account. If the MSA is being funded with a structured settlement, the annuity will also be funded by the defendant with the seed being included in the cash paid at settlement.

Prior to releasing any settlement monies, attorneys should also have the plaintiff sign a separate document indicating they understand what their obligations are for self-administering the MSA account. Synergy offers an MSA consultation which includes a separate waiver for the plaintiff to sign indicating they understand the MSA obligations and are willing or not willing to create a set aside account. Attorneys do not have to hire an expert to advise and prepare such a document but it is the prudent way to ensure all parties are protected.

After settlement and after establishing an MSA, Medicare may refuse to pay for any medical expenses related to the injury until the amount set aside for future medical expenses is properly exhausted. To insure compliance, there are certain steps that should be followed with administration of the MSA account.

Establishing the MSA Account

The Medicare set aside funds must be placed in an interest-bearing checking or savings account and be funded by either a lump sum or via seed money, with future annual payments from an annuity. The funds cannot be placed into stock, bonds, mutual funds or any other types of investments. We recommend a checking account be established with a debit card for reasons to be explained below. It is not the responsibility of the personal injury attorney to oversee or assist in the process of establishing a self-administered MSA account. The plaintiff is responsible for opening the account. This account must be a dedicated account for qualified medical expenses and not commingled with any other non-MSA funds.

Note: If the MSA is being funded with an annuity, then a direct deposit form should be completed and sent back to the life insurance company issuing the annuity. This will ensure the annuity payments go directly to the MSA account and are not mailed directly to the plaintiff.

Use of the Funds in the MSA Account

The plaintiff can use funds in the Medicare set aside account only for qualified medical expenses resulting from the accident, which would otherwise be paid for by Medicare. Funds in the MSA account cannot be used to pay for non-Medicare covered medical services. The best gauge for determining what the funds should be used for is the Medicare set aside report that was completed by the independent company or MSA specialist. This report should have a life care plan with a line itemization of medical treatment, prescription drugs, durable equipment and other services covered by the MSA account.

The plaintiff may also use the MSA account to pay for the following costs that are directly related to the MSA account: document copying charges, mailing fees/postage fees, any banking fees related to the account and income tax on interest income from the set aside account (Ref: WCMA Reference Guide 2013). Any interest earned on the MSA funds must be retained and used for qualified medical expenses.

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Fee Schedule and Bill Pay for the MSA Account

The MSA analysis is either prepared based on the usual and customary fee schedule for liability cases or on the state's worker's compensation fee schedule for worker's comp cases. The MSA administrator will not be able to pay Medicare rates for services paid for out of the MSA. In the real world, doctors have the freedom to charge whatever rates they desire. It is important that the plaintiff attempt to negotiate with their providers for the lowest possible cost. This is easier said than done. With an MSA, the plaintiff essentially becomes a private payer for all Medicare covered treatment related to the accident until exhaustion. The injury victim must also explain to their providers that Medicare should not be billed for accident related treatment once their case has resolved.

Accounting and Attestation of the MSA Account

The administrator must maintain accurate records of all expenditures from the Medicare set aside account. The plaintiff may also want to keep a receipt of each and every payment made, as an added precaution. Using a checking account debit card from the segregated MSA account is an easy way to keep an accurate accounting. Anytime the injury victim goes to treat with a provider, they simply use the debit card to pay for the qualified medical expense. If the account balance ever gets down to zero, they can print out the bank statements to send to Medicare.

The plaintiff will need to submit a final accounting ledger within 60 days of the MSA funds being depleted. The annual and final accounting should include evidence of all the expenditures from the Medicare set aside account. For liability MSAs, the accounting only has to be done upon the account balance reaching zero. In worker's compensation cases, there are annual reporting requirements. The purpose of these account filings is for Medicare to confirm the MSA funds have been spent appropriately.

Once an MSA account has been completely exhausted and assuming the funds have been spent properly, the plaintiff has met their obligation to protect Medicare's interests. They can then start to submit bills to Medicare again. At that time, the plaintiff should send a final attestation to Medicare as proof the funds were spent appropriately. The current address for sending final accounting on MSA accounts is:

Medicare Secondary Payer Recovery Center
Attention: MSP-Medicare Set Aside
Reconciliation (NGHP)
P.O. Box 138832
Oklahoma City, OK 73113

For worker's compensation cases, the annual self-attestation should continue through depletion of the account. It is important that the plaintiff understands and complies with these reporting requirements. The self-attestation letter must be signed and forwarded to CMS' Medicare contractor no later than 30 days after the end of each year (beginning with one year from establishment of the MSA account). We recommend the administrator keep these records indefinitely, in the event Medicare ever audited the file.

If there were funds in the account used to pay for items other than qualified medical expenses related to the accident, Medicare may deny coverage for the injury related treatment until the misappropriated amount is replenished. For example, if the plaintiff purchased a hot tub or season tickets to their favorite sports team with MSA funds, they would have to replenish their account with an amount equal to what was improperly used and then spend that money on injury related Medicare services before Medicare would cover future injury related treatment.

Terminating the MSA Account

The MSA account is closed once the plaintiff passes away. In the event, the plaintiff dies before the funds in the Medicare set aside account are exhausted, the MSA account should remain open for at least 6-12 months from the date of death to enable any outstanding, qualified medical bills be paid. After all of the outstanding medical bills have been paid, any funds remaining in the Medicare set aside account are payable to the plaintiff's beneficiary or subject to the appropriate State probate laws.

It should be noted that most of the above referenced guidelines come directly from the CMS memorandums relevant to worker's compensation cases. Another helpful tool for administering MSA accounts is the, Worker's Compensation Guidebook, Here is a link to the book:

http://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Downloads/March-29-2013-WCMSA-Reference-Guide-Version-13-copy.pdf

Conclusion

Although Medicare allows a plaintiff to self administer the MSA account, it can be a daunting task and potentially create significant liability. If the plaintiff elects to self administer their account, they must have both the financial and medical administration competency to do so. There are no "Medicare set aside police" monitoring set asides but if the MSA is improperly administered; it can lead to a loss of coverage for injury related Medicare covered services.

Attorneys should explain to their injury victim clients the intricacies of self-administration and let them make an informed decision before opting to self-administer. Professional administration is the recommended method to ensure full compliance with Medicare Secondary Payer requirements and to eliminate any possibility of the plaintiff ever losing their Medicare coverage. There is an additional cost for professional administration but with that cost, comes the peace of mind that health coverage will never be jeopardized.

Synergy offers a Medicare set aside administration program through the use of a formal trust agreement administered by a corporate trustee and a separate professional Medicare set aside administrator. With a Medicare set aside Trust, the plaintiff has a professional trustee that has a fiduciary duty paired with a set aside Administrator, who handles managing the set aside funds and reporting to CMS. Administrative fees/expenses for administration of the MSA and/or attorney costs specifically associated with establishing the MSA cannot be charged to the set aside arrangement (Ref: 5/7/04 Memo). Therefore, the professional administration costs must be paid for by the injury victim.

CMS Policy Memorandums available at:

http://www.synergymsa.com/resources/library/cms-memos/

Trial Lawyer Creates Teaching Initiative from Personal Tragedy

Gives Colleagues Tools to Make Driving Safer

By Wayne Hogan

President, Terrell Hogan Law Firm

THE CASEY FELDMAN MEMORIAL FOUNDATION

Trial lawyer Joel Feldman and his wife, Dianne Anderson, suffered a devastating tragedy on July 17, 2009 when a distracted driver took the life of their 21 year-old daughter Casey, a promising journalist, while in a crosswalk on her way to her summer job in Ocean City, New Jersey. Casey was about to enter her senior year at Fordham University when her life was cut short.

Joel and Dianne founded The Casey Feldman Memorial Foundation and the End Distracted Driving Initiative (EndDD.org) to honor their daughter's memory and save lives. They collaborated with traffic safety experts, psychologists and other experts to create the End Distracted Driving presentation for teen drivers. Interactive and engaging, it teaches teens the dangers and consequences of distracted driving, shows them the victims of distracted driving and explores strategies to combat it.

Joel and Dianne, both attorneys in Philadelphia, generously shared their educational presentation with 60 for Safety and the trial lawyers of the Injury Board nationwide, so they could present it in their communities. In April 2012, our law firm was one of many that visited local high schools to get the message out during Distracted Driving Awareness Month. Since 2012, 140,000 people across the country have experienced the End Distracted Driving presentation. It was so well received that our firm decided to offer it year-round.

EXPANDING TO THE WORKFORCE

The presentation did more that educate the students; it taught me. It dawned on me that this problem was also about me, my law partners and our staff and most adults. As I dug into the facts, I realized just how dangerous talking on the phone while driving is, and that we lawyers, even we trial lawyers who investigate such accidents and represent the victims, are not immune to distraction and its dangers. I now have a message on my phone, "I'm driving now so I can't take your call. Please leave a message." And, taking the next logical step, we, as a law firm, adopted a policy against driving while communicating with these devices. How could we ask students to stop doing something that we were still doing?

Moved to action by Joel and Dianne's initiative, we decided to build on their good works and develop a presentation for adult drivers in our community. Since January 2013, our firm has delivered the workforce presentation to multiple employers, civic groups and non-profit organizations. Audiences, which include managers and supervisors, are surprised to learn that, if they are in a crash, their employer can be liable if they are making a work-related communication even if on their own phones in their personal vehicles.

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The workforce presentation explores the legal and business consequences of distracted driving that causes injury or death, including civil liability, punitive damages, productivity loss, brand damage and criminal charges, to name a few. We explain that prosecutors across the country are now bringing manslaughter charges when texting while driving causes death. As a result of the presentations, employers are adopting policies to stop, or at least diminish, distracted driving by their employees. Of course, we stress that this requires training, monitoring, enforcement, updating and retraining, but that is the reasonable care expected in implementing and maintaining safety programs.

EDUCATION IS THE ANSWER

In 2012 distracted driving claimed 3,328 lives and injured 421,000 people. It remains a huge threat to public safety and reminds me of the incremental changes in crashworthiness, as early measures proved helpful but insufficient: first lap belts, then front-seat three-point harnesses, then rear-seat three-point harnesses and then airbags. Today it is a broadly accepted fact that properly designed, operational second-collision systems save lives. Trial lawyers played a major role in bringing about those and many other life-saving changes.

Someday, driving without distraction will be viewed the same way. We are taking steps, but we have a long way to go; Florida's anti-texting law just went into effect and it is only a secondary offense with a $30 fine.

For now, education is the answer. Thanks go to Joel and Dianne, The Casey Feldman Memorial Foundation and EndDD.org for helping trial lawyers take the lead on this important public safety issue and for giving us the tools to teach others about the importance of not driving distracted. Doing this honors Casey's memory and will save lives.

For more information about the program, including how to become a volunteer presenter, visit: The Casey Feldman Memorial Foundation and EndDD.org.

> ***And, taking the next logical step, we, as a law firm, adopted a policy against driving while communicating with these devices. How could we ask students to stop doing something that we were still doing?***

SMALL FIRM MARKETING from page 1

sites dedicated to lawyers and consumers seeking legal counsel. This includes Avvo, Lawyers.com, FindLaw.com, and others where recognition can be achieved.

Creating and maintaining an editorial calendar is one, if not the, most important component to your online marketing plan. Be sure to establish a calendar for the creation and release of your content. Seek out timely/newsworthy topics as well, and jump on opportunities to be a part of a relevant conversation. A recommended calendar will have 1-2 pieces of content per month. These do not necessarily have to be highly technical and peer reviewed pieces. You can tap into a more relaxed (but still high quality) piece of writing. 500 words is a great length - long enough to make a full point, and not too long where you lose the reader.

After creating a piece of content, share it across all of your social media sites, send it out in your newsletter, and create some buzz around the topic. This part of the strategy will not only continually contribute to your SEO rankings, but it will let the consumer know that your firm is active and engaged in certain aspects of the legal field. Allow the staff in your firm to contribute to the content production, as well. Blogs and articles do not have to come only from the partners or the marketer in your firm-a variety of voices and topics is a positive thing. It is also a good idea to use several forms of content; aside from written articles, incorporate video blogs, infographics (images with statistics and short informational text) and images.

Your website should be nothing less than exemplary. It plays into every aspect, including the ability for consumers to find and learn about your firm and form their first impressions. Your layout should be user-friendly, clean, organized and should always scale to your mobile phone (any experienced designer can ensure this happens). Establishing and following a budget for your site design is crucial, as it can get pricey. Template-based sites offer affordable design services and often can meet the needs for a small firm.

Public Relations:

Create press releases on newsworthy topics to help establish your firm as a resource to the media. These should be written more formally and include quotes, statistics, and pictures if available. Establish relationships with press contacts both online and with personal contact. Use networking events in your local community, LinkedIn and contacts you meet each day to establish yourself as a resource for the legal industry.

Public relations also reaches beyond media relations. Make public speaking a part of your public relations plan, as well. Whether you speak at a local Rotary club or an annual legal conference, all of these opportunities serve to raise the profile of your firm and put you in direct contact with clients or referral sources. Think about your area of expertise and what aspects would make for an interesting, informative and timely speech. Draft a short summary/pitch, send it out to the executive director or conference chairman, and follow-up periodically.

Philanthropy:

It is important to always give back to the community. Whether you volunteer to speak, contribute an article or sponsor an event for a great cause, keep this as a part of your overall strategy. Most successful firms participate in causes and events multiple times throughout the year. More important than the increased visibility, philanthropy also gives your firm a way to get involved and work together for a bigger purpose, and conveys the character and commitment of the firm.

Analytics:

Document your web traffic, connections and standings before your plan begins. For online growth, keep a monthly tally of new fans and connections, monitor how many opens your blogs receive, and review your website analytics (Google Analytics is highly recommended). If you are running ads, track your lead intake and your traffic back to the site.

A marketing plan takes both persistence and patience. Always keep your eyes open for opportunities and your goals in mind, and evaluate your progress in attaining those goals every month. If outside help is needed to kick-start or maintain your plan, make the investment for you and the longevity and success of your firm.

Hank Didier is founding partner of Didier Law Firm, a complex litigation practice, and ERG Law Firm, a BP Settlement Program practice. He serves on the Board of Governors for the Southern Trial Lawyers Association.

Using Building Codes In Residential Swimming Pool Wrongful Death Cases

By Jon R. Hawk

THE PROBLEM

From Memorial Day through Labor Day 2013, at least 202 children between the ages of one (1) and fourteen (14) drowned in a swimming pool or spa in the United States.[1] A United States Consumer Product Safety Commission report published in May 2013, provides annual estimates for years 2010 through 2012 relating to the emergency department's treatment of submersion injuries.[2] According to this Report, sixty-six percent (66%) of the reported fatalities and seventy-eight percent (78%) of the treated injuries involved children younger than five (5) years of age.[3] Unfortunately, children between the ages of one (1) and three (3) represented sixty-four percent (64%) of treated injuries for years 2010 through 2012, and sixty-seven percent (67%) of the reported fatalities for years 2008 through 2010 involved children younger than fifteen (15) years-of-age.[4]

The Consumer Product Safety Commission, urges individuals to visit www.poolsafely.gov for vital, lifesaving information regarding the prevention of drownings in and around pools and spas. Our civil justice system should seek to do more to protect children, the most vulnerable members of society, from these horrific drowning accidents.

Alarmingly, drowning ranks fifth (5th) among the leading causes of unintentional injury and/or death in the United States.[5] The Center for Disease Control states that the main factors that increase an individual's risk of drowning are (i) a lack of swimming ability, (ii) a lack of barriers to prevent unsupervised water access, (iii) a lack of close supervision while swimming, (iv) location, (v) failure to wear life jackets, (vi) alcohol use, and (vii) seizure disorders.[6] Most drowning victims ages one (1) through four (4), regrettably, drown in home swimming pools.[7] This Article attempts to provide an overview of very basic issues involving the prosecution of a wrongful death case involving the drowning death of a minor child in a residential swimming pool.[8]

CHOOSING THE RIGHT DEFENDANT

Various state laws, concerning negligence and contributory negligence, can make the prosecution of a civil wrongful death case for the drowning of a minor child a challenging and time consuming process.

There are numerous possible defendants in a residential swimming pool drowning case. First, the homeowner can be a possible defendant. A homeowner obviously has certain legal duties governing the maintenance and operation of a residential swimming pool. However, the majority of states label social guests as licensees. Typically, under this standard, the homeowner does not owe the same duty of care to a licensee as to an invitee. Usually, the homeowner must act willfully or wantonly in order to be held liable for a child licensee's death. Due to this high standard, the homeowner's conduct often must be deliberate, and the homeowner must have an intention to harm the child victim or have an utter indifference to or conscious disregard of the safety of the child victim.[9]

The Georgia Court of Appeals held that a child being supervised by her mother at the time of a drowning could not bring a wrongful death action for negligent supervision because the mother was properly supervising the child.[10] In that case, the Court of Appeals did not address the issue of whether the child was a licensee or an invitee. The fact that the parent of the child was present at the time of the child's injury warranted the affirmance of the trial court's grant of summary judgment.[11]

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Due to the fact that the law can be challenging in premises liability cases for social guests or licensees and in situations where a parent is exercising proper supervision, it is necessary to find other possible defendants where the legal standard is not as onerous. It is the Author's opinion that attorneys, by bringing these wrongful death cases, can work to create a safer environment for children who live in close proximity to residential swimming pools.

Along with a homeowner, a builder of a residential swimming pool can be held liable for negligent construction. In Georgia, there is an eight (8)-year statute of limitation for negligent construction. Under O.C.G.A. § 9-3-51, any deficiencies in connection with improvements to real property are subject to a lawsuit, and the plaintiff has eight (8) years to file such a lawsuit. Therefore, a pool that is constructed with deficiencies can be the subject of a lawsuit eight (8) years from the date of construction.[12] Importantly, in order to be successful in a wrongful death action against a builder, it is critical that a plaintiff find building codes that the builder did not comply with during the construction of the residential swimming pool. The Standard Swimming Pool Code 1994 § 315.2.1.9 states as follows;

Although the building codes are fairly uniform, it is surprising how few contractors are even aware of the applicable codes.

Where a wall of the dwelling serves as part of the barrier, one of the following shall apply:

1. *All doors with direct access to the pool through that wall shall be equipped with an alarm which produces an audible warning when the door and its screen are open. The alarm shall sound continuously for a minimum of thirty seconds immediately after the door is opened and be capable of being heard throughout the house during normal household activities. The alarm shall automatically reset under all conditions. The alarm shall be equipped with the manual means to temporarily deactivate the alarm for a single opening. Such deactivation shall last no more than 15 seconds. The deactivation switch shall be located at least 54 inches above the threshold of the door.*
2. *The pool shall be equipped with the power safety cover which complies with ASTM F 1346-1991.*
3. *Other means of protection, such as self-closing doors with self-latching devices, which are approved by the administrative authority shall be accepted so long as the degree of protection afforded is not less than the protection afforded by 1 or 2 described.*[13]

A large number of residential swimming pools use the wall of the dwelling to serve as one of the barriers to the pool. As a result, many of these dwellings do not meet the codes cited above. In addition, incredibly, most pool alarms that comply with the above standard cost a mere $50.00. Thus, a compelling point to be made is that $50.00 can save a child's life.

The pool contractor should be aware of this code and at the very least educate the homeowner about this code. Accordingly, the municipality or county that inspects the construction of the pool should inform the homeowner if these measures were not taken.

Most swimming pool contractors install pools in various counties throughout the State of Georgia. Although the building codes are fairly uniform, it is surprising how few contractors are even aware of the applicable codes. For instance, Section 316 of The Standard Swimming Pool Code states that all pools, whether public or private, shall be provided with a ladder or step for both the deep and shallow ends of the pool. A common error made by municipalities or counties is that swimming pools are not inspected after they are completely filled with water and in operation as required by the code.

CONCLUSION

When a client calls with a residential swimming pool injury or death, many lawyers will assume that the only viable claim is a claim against the homeowner's insurer. This is a difficult claim because most victims are social guests or licensees. However, with proper investigation of local building codes, a significant case can be brought against other parties that may be responsible for the victim's injury or death. There are numerous other building codes that are applicable to the construction of swimming pools, and this Article does not purport to be an exhaustive survey of all possible theories of liability. It is up to the lawyer investigating a wrongful death case to thoroughly study the building codes and find a qualified expert witness to do a site inspection as soon as possible. Taking these actions can transform a very difficult premises liability case involving a licensee or social guest, into a negligent construction case that will, hopefully, bring justice to the family of a drowning victim.

Jon R. Hawk, is a trial lawyer and a partner at Sell & Melton, L.L.P. He is rated "AV" by the Martindale-Hubbell Law Directory, which is the highest rating of legal ability and general ethical standards. Mr. Hawk was named a "Georgia Rising Star 2005 and 2006" in Law & Politics and Atlanta Magazine. Mr. Hawk has been a presenter and speaker at Continuing Legal Education Seminars throughout the state of Georgia. He is a member of the Georgia Trial Lawyers Association, the American Association of Justice, and the Southern Trial Lawyers Association.

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Records Retrieval & Summarization

Often overlooked ways to increase efficiency, reduce cost and zero in on critical medical evidence faster.

By David Benge & Terry Taylor

Some components of the trial preparation process are less than glamorous, but have a substantial impact on your ability to reach a successful case outcome. One often overlooked area for significant improvement is the retrieval and review of records that are critical to the case. This article explores traditional and modern retrieval and review practices. It also identifies the potential impact these processes have on firm efficiency, cost and the likelihood that critical evidence will be found sooner in the trial prep process.

Traditional Process for Obtaining Records

1. *Request authorization from patient or serve subpoena to obtain medical or other related records*
2. *Identify all facilities visited by the plaintiff*
3. *Contact custodian of records to determine the required request form*
4. *Request records from the custodian*
5. *Issue check for prepayment (Follow up every three to five days with custodian to request records by phone or email)*
6. *Wait to receive records electronically or by mail.*
7. *Scan records received by mail and convert to PDF to make documents searchable*

The traditional process for obtaining records often requires valuable staff time to be spent tirelessly following up with providers. Instead of spending time on administrative tasks, your time, or your paralegals time, could be better spent on higher value activities that directly relate to the outcome of the case.

Alternatively, an increasing number of law firms have taken a more modern approach to the retrieval of records and eliminated this tedious task for their staff by outsourcing this function to experts who have relationships with record custodians nationwide.

Modern Process for Obtaining Records

1. *Request authorization from patient or have retrieval service serve subpoena to obtain medical or other related records*
2. *Identify all facilities visited by the plaintiff*
3. *Enter order via an online nationwide retrieval service web-portal*
4. *Receive records back from retrieval service in a searchable electronic format*

By outsourcing this function, firms benefit by saving staff time and that reduction in cost comes with the added benefit of receiving all records electronically in a searchable format. This gives your staff the ability to identify more efficiently the critical medical evidence with the use of a keyword search across all records, from all facilities, simultaneously.

Once the records are in hand, the real work begins.

Now that the records are accessible, how do you quickly cut through the mountains of paper, disks, or electronic files to more rapidly identify information that is critical to the case? The process of organizing, analyzing, and summarizing records in a complex case is often still done manually by many firms with a paper record review, various programs, formats and tools. However, when you look across the table, defense firms are moving to more sophisticated tools every day. You now have those same tools available for your use.

Traditional Organization & Summarization Process

Review Documents

Highlight Relevant Information

Create Notes

Organize Notes

Create Summary

Retrieve Information

Repeat

The traditional method of reviewing records generally consists of multiple steps. Often, during the process new information is discovered that changes the course of the review, as well as information that must be recovered from the records. Unfortunately, when this change in direction occurs, it often means that some steps must be repeated to get an accurate view of the information contained within the totality of the records.

Additionally, the traditional process often involves reviewing the documents, highlighting the relevant information, and retyping this information into a software program such as Microsoft Word or Excel. Once in this program, the information is static, and not easily manipulated to focus in on critical information, such as all of the records from a specific facility, or in a specific date range, without additional formatting by you or your staff. Just as in the retrieval process, the lack of flexibility creates inefficiencies that can increase the staff time required, and can prohibit staff from spending time on more valuable activities.

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Modern Organization & Summarization Process Using Web-Based Tools

Review Documents & Create Notes Simultaneously

Organize Notes & Create Summary

Retrieve Information

Using these tools, users were able to find all three documents in an average of 14 minutes, as opposed to an estimated 117 minutes with traditional paper-based review methods.

Electronically reviewing records using modern, web-based tools allows for the review and note creation steps to be created simultaneously. This eliminates the need to retype information found in paper documents and enables the user to simply highlight the area of text on the page that is pertinent to the case, after which, the text is automatically copied into a dynamic note field. By combining these steps, efficiency is enhanced, and frustration by the user is reduced, especially when the user is not required to key difficult medical terminology.

In a recent user study by ABI Document Support Services, users of this technology were able to review and create summary notes on 45 pages of medical records in an average of 39 minutes using modern organization and summarization tools designed for the legal industry, as opposed to an estimated average of 134 minutes in traditional methods.

Once notes are created using modern web-based tools, the flexibility of how that information can be used and accessed in the future improves dramatically. In the same study referenced above, users were challenged to find three specific documents in a stack of 250 pages of medical records. Using these tools, users were able to find all three documents in an average of 14 minutes, as opposed to an estimated 117 minutes with traditional paper-based review methods.

Three Benefits of Modern Record Review Tools

1. ***Increase Efficiency.*** *Find the critical information contained within the records faster using OCR search tools, and create summaries based on multiple variables (date-of-service, provider or keyword) in a matter of minutes, not hours.*
2. ***Reduce Cost.*** *Review and create dynamic notes in a single step, then sort and filter those notes in seconds. These combined steps can reduce staff time spent in subsequent reviews of the records by 50% or more.*
3. ***Eliminate the Urgency.*** *Find a specific document in minutes, not hours.*

Conclusion

Although oftentimes a function such as record retrieval and review is a lower-level, administrative task, it has direct impact on your bottom line, and the outcome of your case.

Take for example a recent study conducted by CLM Advisors, an independent research organization who interviewed 21 executives regarding records retrieval and review best practices. The study found that 95% of the defense claims executives surveyed believed that records review and summarization has a material impact on claim management effectiveness and outcomes. Forty-three percent of those executives concluded that adjuster negotiation is the most significantly enhanced activity resulting from thorough medical review. It's clear that the defense sees material value in this area.

Change is difficult, but with change often comes the potential for progress and positive results. To identify opportunities for improvement now, make reviewing this area a priority and reap the benefits for many cases to come.

Florida's Limitation on Juror Rehabilitation

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By Pedro P. Echarte

In ***Matarranz v. State***, — So.3d —, 2013 WL 5355117 (Fla. 2013), the Florida Supreme Court narrowed the increasingly broad discretion exercised by trial courts when ruling on challenges for cause during jury selection, reaffirming a rule the Court set forth more than 50 years ago. In the intervening decades, Florida trial courts (as decisions in the district courts of appeal show) have deviated significantly from that precedent. Matarranz reasserts the Court's insistence on impartial jurors, limiting the ability of trial courts to empanel a juror whose statements cast doubt on his or her neutrality. The reasoning underlying the decision implies the rule applies equally to civil and criminal trials.

Half a century ago, ***Singer v. State***, 109 So.2d 7, 22 (Fla. 1959), held that a potential juror must be removed from the panel if there is "any reasonable doubt" as to whether that juror possesses the state of mind necessary to render an impartial verdict. Reviewing a line of precedent stretching back to 1860, the Court said that whether a juror is impartial turns not on whether the juror is totally ignorant of the events underlying the controversy but on whether "the juror's conceptions are not fixed and settled, nor warped by prejudice, but are only such as would naturally spring from public rumor or newspaper report, and his mind is open to the impressions it may receive on the trial… ." Importantly, the Court noted that "a juror's statement that he can and will return a verdict according to the evidence" does not establish his competence if he has already revealed that he is closed-minded.

Since Singer, trial courts have seemingly applied the rule loosely, allowing jurors who initially reveal some fixed bias or prejudice—and thus raise doubts as to their impartiality—to be rehabilitated during voir dire. Juror rehabilitation is the practice of questioning a prospective juror who initially expresses some improper bias or prejudice to determine whether the juror can follow the law as instructed and base her decision solely on the evidence presented at trial by setting aside her preconceived ideas, biases, or prejudices. The aims of having an impartial jury panel are, of course, to ensure that verdicts are based solely on the evidence presented at trial and the law recited by the court, and to ensure public confidence in the outcomes produced by our system of justice. Matarranz revisits the tension inherent in insisting impartiality while also ensuring that claims of juror bias are real as opposed to a pretext for dodging jury duty.

In Matarranz, a man appealed his convictions for first-degree murder and burglary on the basis that the trial court improperly failed to strike a prospective juror for cause after the prospective juror initially indicated she could not be impartial in the case. During voir dire, the prospective juror said she had been the victim of a burglary and that her cousin had been the victim of fraud. Because of this, she suggested she was unsure whether she could be impartial. Subsequently, the trial judge asked the juror a series of questions aimed at rehabilitating the juror. In response to the questioning, the juror flatly said, "I don't think I could be fair," that she might "lean" toward the prosecution, and that her past experience stayed with her and "brings back bad memories… ." Nonetheless, the judge persisted and finally got her to give a one-word "yes" answer to the question of whether she could be fair. The lawyers then followed up with their own questions and the defense was forced to use a peremptory challenge to strike the juror.

The Florida Third District Court of Appeal affirmed the trial court's refusal to remove the juror for cause, but the Florida Supreme Court reversed, holding that the prospective juror's responses during voir dire raised sufficient doubt as to whether she could be impartial in the case. Recognizing the problems associated with the broad discretion given to trial courts and the practice of juror rehabilitation, the Court distinguished between firmly held feelings based on prior life experiences and misunderstandings regarding the judicial process based on a lack of familiarity with the law. The Court held that the latter are "ripe for discussion and redress through rehabilitation," while the former are not: "Assurances of impartiality after a proposed juror has announced prejudice is questionable at best."

The Court emphasized that the sort of prejudice revealed in the case was not a moral failing of the juror's but simply a fact of life—one which challenges-for-cause is meant to ameliorate: "This Court is keenly aware of the unique biases, prejudices, predilections, predispositions and viewpoints that each of us possesses and that cannot be altered or undone by the court or counsel over the course of voir dire. These proclivities may be neither wrong nor perverse. Rather, they are realities of human nature, and their existence underscores the logic upon which our judicial system provides courts with the power to remove prospective jurors for cause."

Interestingly, the Court relied heavily on its decision in a civil case, ***Johnson v. Reynolds***, 97 So. 591 (Fla. 1929)—a suit for ejectment from real property. In Reynolds, the Court raised doubt as to whether a trial court can find a prospective juror to be impartial after he initially expressed such bias or prejudice, but recanted it a short time later. The juror in that case said during voir dire that "he was afraid he could not render a fair verdict because of his friendly relations with plaintiffs' attorney." Although the man later he said he would be fair, the Supreme Court said that claim did not overcome his earlier (perhaps more candid) statement:

> *It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful*

Matarranz revisits the tension inherent in insisting impartiality while also ensuring that claims of juror bias are real as opposed to a pretext for dodging jury duty.

questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?

Id. at 599.

The right to trial by an impartial jury is a fundamental notion of the American legal system and a guaranteed right under both federal and Florida law. This right has been a cornerstone of our legal system since the founding of the nation, the importance of which is demonstrated through the broad and lengthy voir dire afforded to litigants in Florida courts. The improper use of and reliance upon juror rehabilitation threatens not only the impartiality of our juries, but also the public's confidence in the judicial system.

Matarranz appropriately limits the scope of when a juror can be rehabilitated after expressing some indication of bias or prejudice that is not based on some simple misunderstanding of the law or judicial process—i.e., the sort of prejudice that could be overcome by reasoned discussion unlike that which might arise from having been victimized or from a friendship. As the Court articulated nearly a century ago in Reynolds, it is difficult to imagine a situation where "reasonable doubt" regarding a juror's ability to serve impartially is eliminated by the juror simply stating that he or she can be impartial and follow the law after, after only moments before expressing some improper a bias or prejudice. Matarranz offers a seemingly straight-forward method for determining the appropriateness of juror rehabilitation—i.e., only those feelings and emotions founded in a basic misunderstanding of the law can be addressed through rehabilitation.

Civil no less than criminal trial lawyers in Florida should be aware of the implications Matarranz (as well as Reynolds and Singer) have on jury selection and specifically the practice of juror rehabilitation. A juror who reveals a firm lack of ability to be impartial for some emotional reason—even a morally blameless one like having been a crime victim or having a friend involved in the litigation—cannot be coaxed into being "fair" through more questioning.

Legal Marketing in a Tech-Driven World

By Ken Hardison

Did you know that the average adult spends more than 5 hours a day online, on non-voice mobile activities or with other digital media compared to 4.5 hours of watching television?

As you may have guesses, the biggest growth segment is mobile. Adults are spending an average of 2 hours, 21 minutes per day on non-voice mobile activities, including mobile internet usage on phones and tablets. This is longer than they will spend online on desktop and laptop computers, and nearly an hour more than they spent on mobile last year.

The time people are spending with mobile represents a little more than half of TV's share of total media time, as well as more than half of digital media time as a whole. The bulk of mobile time is spent on smartphones, at 1 hour, 7 minutes per day, but tablets are not far behind. Feature phones account for relatively little time spent on non-voice media activities, since few have robust Internet capabilities.

There is disagreement, though, about actual time spent with mobile devices. In 2012 it was estimated that daily usage for adults in the U.S. was from just under an hour up to two hours. And this daily usage has increased in 2013. There is more agreement among research firms on actual time the same population spends on tablets. Tablet users are spending a solid 2 hours or more per day with their devices.

It is estimated that U.S. adults will spend 44.4 percent of their overall media time with digital this year, including 19.8 percent on mobile—compared to 19.5 percent on laptops and PCs. Time spent with mobile phones and tablets, excluding voice calls, had risen from 13.5 percent of all media time last year, and has nearly tripled since 2011.

This shift from desktop to mobile, whether smartphone or tablet, is happening across several activities, including social networking and digital video viewing. And tablets are key to the trend. As social networking and video reach plateaus in terms of share of total desktop time (around 29% and 19%, respectively), these activities are growing more quickly on smartphones, and especially tablets. The share of all tablet time spent with video, for example, will nearly double this year, from 10% to 19%.

So what does this mean for you in terms of your marketing strategy?

This is definitely the time to reevaluate the time and money you are spending on television advertising. This is also the time in which you need to optimize your marketing for mobile. Mobile devices not only have subject lines, but they also feature pre-headers as well. The pre-header is essentially an extension of the subject line. In Gmail the pre-header is on the same line as the subject, it is just not in bold text. In Outlook the pre-header is on the second line, below the subject line. This is something to take into consideration when sending out emails. The mobile user is reading at a much faster rate, so there is less time to grab their attention. The pre-header may be a good place to get them interested.

As always, times are changing and in order to maximize your marketing dollar and stay ahead of the completion, we must change our marketing strategies and tactics.

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A Tale of Two Cities: As Written by the United States Supreme Court

By Trevor Rockstad & Martin Crump

It is the best of times and it is the worst of times. Following a pair of Supreme Court preemption rulings, it is now the best of times for manufacturers of generic drugs, while it is the worst of times for consumers injured by generic drugs and the attorneys who seek to represent them. Examining the practicalities of the near complete immunity the Court has bestowed on generic drug manufacturers, a Dickensian framework has arisen in which the level of injustice is hard to accept.

While most readers will be familiar with the Supreme Court's opinions in ***PLIVA, Inc. v. Mensing***[1] and ***Mutual Pharmaceutical Co. v. Bartlett***,[2] a brief synopsis is appropriate. In Mensing, the Court held that state law failure to warn claims arising from injuries caused by a generic drug were preempted. The Court reasoned that, pursuant to the federal statutes and regulations governing generic drugs, the manufacturer is prohibited from changing the labeling, including the warnings, on a generic drug. Therefore, the Court reasoned, the generic manufacturer cannot be held liable for failure to change the warning to comply with duties that are imposed on it by state law.

In Barlett, the Court handled the issue of generic preemption in the context of a design defect claim. The Court held that state law design defect claims that turn on adequacy of a drug's warnings are preempted by federal law under the reasoning of Mensing. The Bartlett opinion was not as devastating as it could have been, as the Court offered a fairly limited holding and did not hold that all design defect claims are preempted. On the other hand, the Court did not make it clear that design defect claims are not preempted. However, at this point, suit against the manufacturer of a generic drug is comparable to an uphill battle in roller skates.

Manufacturing and marketing generic drugs is unequivocally profitable. According to a 2013 investment analysis performed at the Henry B. Tippie School of Management, the generic drug market in 2011 was $242 billion and is projected to grow to $400 billion by 2016.[3] Once a drug goes off patent, the generic manufacturers will capture approximately 80% of the market for that drug.[4] The patents on 120 different branded drugs were scheduled to expire in 2013, which will serve as manna from heaven for the generic drug industry. The "manna" analogy is appropriate due to the fact that the generic manufacturers have done absolutely nothing to earn the profits that they will reap from these drugs. They simply wait around until the drug falls off the patent cliff and then capitalize.

To be clear, there is nothing wrong with the existence of generic drugs. In fact, they're a blessing to the public, as these drugs can be sold at a much lower price. However, selling generic drugs is immensely profitable due to the fact that the generics do not have to devote the same resources to research and development, marketing or regulatory affairs as do the brand manufacturers. The groundwork has been laid – they just have to manufacturer and sell the drug. Making their business more profitable, many generic manufacturers have moved production overseas, where costs are cheaper. The Indian government claims that 20% of all generic drugs worldwide are produced in India.[5] An example of the profitability of selling generic drugs is Sandoz, a subsidiary of Novartis, which enjoyed a profit margin of 19.2% in the United States in 2012.[6] Even more impressive, TEVA boasted a profit margin of 21.09 in 2012.[7] To put these profit margins in context, Exxon Mobil's quarterly profit margin in September 2013 was 7%.[8] Following the preemption decisions discussed above, selling generic drugs has suddenly become even more attractive, as there is no longer any risk involved in the business. There is simply no excuse for such a profitable industry to be exempted from liability for harm their products cause.

So, it is clearly the best of times for the generic drug industry. And it is the worst of times for those injured by a generic drug, as there is no right to recovery against the manufacturer. However, the injustice does not end there. Continuing in our Dickens-esque theme, it is the poor, elderly, and disabled that truly get the bottom of the boot of generic preemption. For example, many Medicare prescription drug plans require use of generics unless a physician finds it is medically necessary that the patient be on a more expensive drug.[9] As another example, the Mississippi Division of Medicaid requires that no more than two of a covered patient's prescriptions be name-brand drugs.[10] Further, and more relevant to this discussion, Mississippi Medicaid will not pay for a name-brand drug if a generic is available.[11] Therefore, people on these programs, who will rarely be in a position to choose to pay more for a name brand drug, will almost always be deprived of their right to recover if they are injured by a prescription drug.

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It is obvious the generic manufacturers benefit from Medicare and Medicaid requirements that generic drugs be used. These requirements also produce a financial benefit to the federal and state governments. However, who will pay for treatment of the elderly and poor when they are injured by a defective generic drug? If they are on Medicare or Medicaid, it will be the federal or state government, and in light of the Supreme Court's preemption jurisprudence, there will be no settlement from which these programs can subrogate. In the end, it is only the generic drug manufacturers that benefit from generic preemption.[12] Everyone else loses.

Fortunately, there is good news on the horizon. The FDA recently proposed a rule that would allow generic drug manufacturers to unilaterally change the labeling on the drugs they sell.[13] While the authors are not fully versed on the proposed rule, the rule should eliminate the current preemption framework, if it goes into effect. Nonetheless, the rule is not yet effective and it is important for all trial lawyers to stay alert on this issue. If the proposed rule does go into effect, the period between Mensing and the rule's effective date should be remembered as an example of the dangers that imperil the constitutional right to a jury trial, and the injustice these dangers can impose on the unknowing public.

There is simply no excuse for such a profitable industry to be exempted from liability for harm their products cause.

1. *131 S. Ct. 2567 (2011).* ***2.*** *133 S. Ct. 2466 (2013).* ***3.*** *Generic Drug Manufacturers, Lawrence Epperly, Henry B. Tippie School of Management (April 23, 2013).* ***4.*** *Id. at *7.* ***5.*** *An Insider's View of Generic Drug Pricing, David Lazarus, Los Angeles Times (March 25, 2013).* ***6.*** *Id. (citing IBISWorld consulting report).*
7. *https://ycharts.com/companies/TEVA/profit_margin.*
8. *http://ycharts.com/companies/XOM/profit_margin.*
9. *http://www.medicare.gov/Pubs/pdf/11136.pdf.* ***10.*** *Miss. Admin. Code Title 23, Part 214, Rule 1.6(E).* ***11.*** *Miss. Admin. Code Title 23, Part 214, Rule 1.8.* ***12.*** *The name-brand manufacturers that own many of the generic manufacturers also benefit, but that is a discussion for another article.* ***13.*** *https://s3.amazonaws.com/public-inspection.federalregister.gov/2013-26799.pdf*

STLA Loses Another Past President Sam Svalina – 5th President of STLA in '92

Samuel L. Svalina
(July 2, 1935 – November 16, 2013)

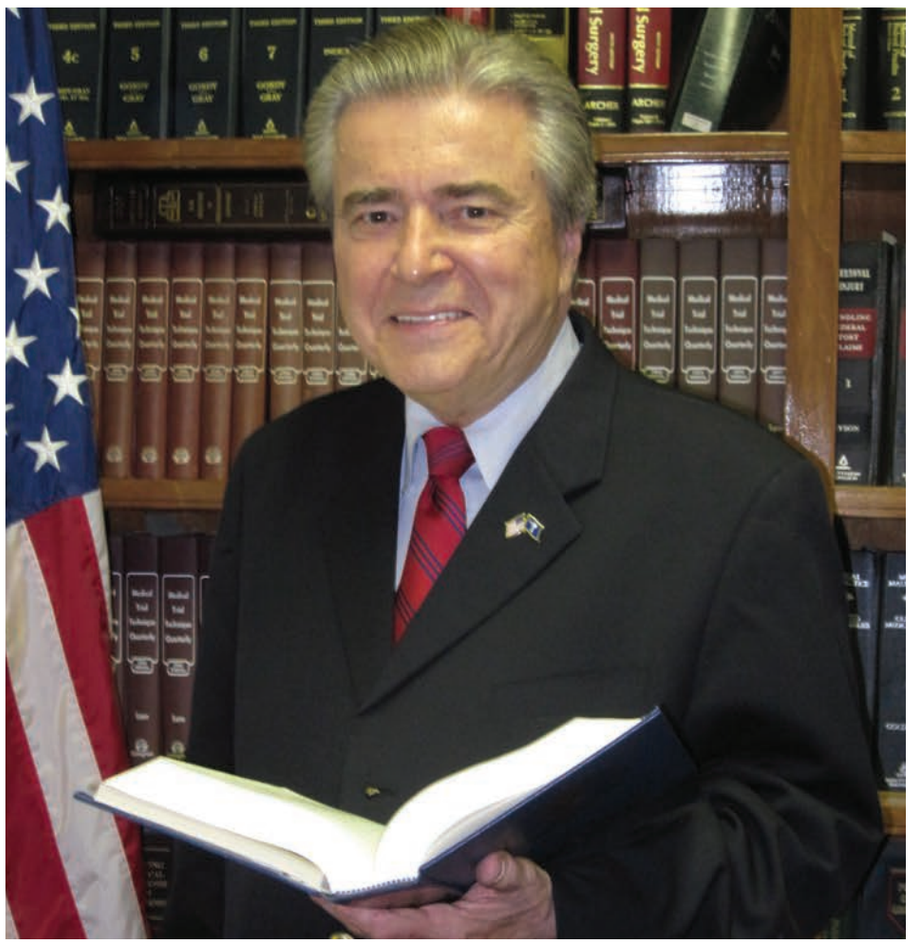
Samuel "Sam"Lawrence Svalina, 78, of Beaufort, South Carolina, died peacefully at the Cleveland Clinic on November 16, 2013, after a well fought battle with kidney cancer.

Sam was born on July 2, 1935 to his parents Genevieve Gaskowski Svalina and Nicholas Svalina of Chicago, Illinois. After his mother's death, he was raised by his maternal aunt, Jane Perkwas, who is 95 years old and still resides in Chicago. His surviving sisters are Nancy Larson and Kathy Berry, both of Tampa, Florida. Sam was predeceased by his wife, Diana Popoff Svalina, their daughter, Linda Svalina, and his brother, Nicholas Svalina.

Surviving Sam is his son, Samuel "Sammy" S. Svalina, and his grandchildren, Samuel Tristan Svalina, and Sophia Lynn Svalina of Bluffton, South Carolina.

Also surviving Sam is his fiancé of 21 years, Alyce B. Walsh, and her children, Bryan Patrick Walsh, Teresa Anne Starling and her two children, Dustyn Michael Velez and Sydney Grace Starling all of Beaufort, South Carolina. Sam graduated from John Marshall Law School in Chicago, Illinois in 1959, and was admitted to the Illinois state bar the same year. He served as Assistant Corporation Counsel for the City of Chicago from 1959 to 1967, and also during this time headed the Democratic Party of South Chicago Precinct for the election of John F. Kennedy in 1960. Sam served as the president of the South Chicago Bar Association from 1966 to 1967. In March 1968, Sam moved to Beaufort, South Carolina with his wife Diana and son Sammy. He was admitted to the South Carolina Bar the same year and began practicing law as an associate at the law firm of Dowling Dowling Sanders and Dukes, P.A. Upon his arrival to the low country, Sam instantly enjoyed the friendships he made and learning how to practice law in the small beautiful town of Beaufort. Sam practiced with the Dowling firm for 20 years, and eventually became a named partner. In 1988, Sam left the law firm of Dowling, Sanders, Dukes, Novit and Svalina to establish his own practice, Svalina Law Firm, P.A., with his son and partner, Sammy Svalina.

Throughout his illustrious career as a trial lawyer, Sam was actively involved in a number of organizations and served as President of the South Carolina Trial Lawyers Association (1994–1995) and the Southern Trial Lawyers Association (1992–1993), as Vice Chairman of the Association of Trial Lawyers of America Military Law Section, and Chairman of the Beaufort County Democratic Party from 1996–1999. Sam was board certified in Civil Trial Advocacy by the National Board of Trial Advocacy and was admitted to practice in the U.S. District Court Northern District of Illinois, U.S. District Court Southern District of Georgia, U.S. District Court District of South Carolina, 4th Circuit U.S. Court of Appeals, and the United States Supreme Court.



He also was a member of the Melvin Belli Society, South Carolina Association for Justice, Injured Workers Advocates, American Bar Association, Beaufort County Bar Association, and a Fourth Degree member of the Knights of Columbus. Sam was well known throughout the community for his patriotism, loud voice and unyielding personality. He was the quintessential "small town lawyer" and was willing to help anyone that walked through the door of his office. Sam passionately believed in the pursuit of justice and the importance of defending the rights of those unable to defend themselves.

While some might remember him for his zealous representation of clients in the court room and winning large verdicts, those that knew him best will remember his heart of gold and willingness to go to great lengths to assist people as a matter of principle with no discussion of a fee.

Visitation will be from 2:00 to 5:00 p.m. on November 24, 2013, with prayer service at 4:30 p.m. at the Copeland Funeral Home in Beaufort, South Carolina, and a reception for close family and friends following at the Tides Lounge at the Holiday Inn . Funeral services will be at 10:30 a.m. on November 25, 2013 at St. Peter's Catholic Church on Lady's Island, South Carolina. Burial will follow immediately thereafter at Beaufort Memorial Gardens. In lieu of flowers, the family requests donations be made to Lowcountry Legal Volunteers at P.O. Box 2496, Bluffton, SC, 29910, in hopes that they can continue Sam's lifetime mission to bring justice to our community's most vulnerable citizens.

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Life Care Plans & Cynical Juries

Life Care Plan Basics

By J. Penn Crawford

Life care plans are utilized in catastrophic injury cases which include, but are not limited to, spinal cord injuries, amputations and traumatic brain injuries. Where the client has catastrophic injuries, future care will be necessary to minimize the extent of the client's disability and maximize the scope of the client's residual ability. The life care plan puts together a total picture of all of the care that will be needed to regain as much of the individual's pre-injury functioning as possible along with the associated costs and schedule.

The plan should identify what aids to independent function are potentially available to the client, such as medical services, rehabilitation services, drugs, medical devices, equipment, therapies, evaluations, procedures and home modifications or living alternatives, along with how much it will cost and how frequently the services will be needed. The plan needs to take into account the nature and extent of the client's disability, the unique needs of the individual, the capacity and potential of the person with the disability, the effects of aging and the continued progression of the client's disability over time. Other overlooked factors include the secondary effects of catastrophic injury, such as depression and complications from physical injury, such as bed sores, future falls and infection, which can often lead to the need for additional therapy and care. These are effects that the life care plan seeks to eliminate, but they can and often do happen, and few plans survive fully intact once contact is made with reality.

In addition to the life care plan narrative, it is important to display a summary of the life care plan in easily navigable tables. A portion of a typical life care plan summary may often resemble the following:

CATEGORY : THERAPIES

SERVICE OR PRODUCT	PURPOSE	SUPPLIER	INIT./ TERM	FREQUENCY	UNIT COST
OCCUPATIONAL THERAPY	INTERMITTENT THERAPY AS NEEDED	REHAB FACILITY A	2012 TO 2013	AS NEEDED	($1,440.00) Periodic Replacement Cost
PHYSICAL THERAPY	INTERMITTENT THERAPY 2 X WEEK X 3 MONTHS	REHAB FACILITY B	2012 TO 2037	1 X 2 YEARS	$5,184.00 Periodic Replacement Cost
POOL THERAPY/ JOIN FEE	STRUCTURED EXERCISE 1 X ONLY	REHAB FACILITY B	2012 TO 2012	1 X ONLY	$50.00 Periodic Replacement Cost
POOL THERAPY	STRUCTURED EXERCISE YEARLY	REHAB FACILITY B	2012 TO 2037	YEARLY	$360.00 Yearly Cost
INDIVIDUAL COUNSELING	ADJUSTMENT ISSUES 1 X WEEK X 6 MONTHS	REHAB FACILITY C	2012 TO 2013	1 X ONLY	$3,250.00 Periodic Replacement Cost
INDIVIDUAL COUNSELING	ADJUSTMENT ISSUES 2 X MONTH X 6 MONTHS	REHAB FACILITY C	2013 TO 2013	1 X ONLY	$1,500.00 Periodic Replacement Cost
INDIVIDUAL COUNSELING	ADJUSTMENT ISSUES 12 SESSIONS	REHAB FACILITY C	2014 TO 2037	AS NEEDED	($1,500.00) Periodic Replacement Cost

CATEGORY : DRUGS & SUPPLIES

SERVICE OR PRODUCT	PURPOSE	SUPPLIER	INIT./ TERM	FREQUENCY	UNIT COST
SENNA TABLETS (OTC)	BOWEL PROGRAM/ 2 X DAY	PHARMACY A	2012 TO 2037	YEARLY	$80.30 Yearly Cost
LEXAPRO 10 MG (RX)	ANTI-DEPRESSANT/ 1 X DAY	PHARMACY A	2012 TO 2037	YEARLY	$1,284.80 Yearly Cost
ALPRAZOLAM 2 MG (RX)	TREATMENT OF ANXIETY 1/2 TAB 2 X DAY	PHARMACY A	2012 TO 2037	YEARLY	$131.40 Yearly Cost
METHYLPHENIDATE 10 MG (RX)	ENHANCE CONCENTRATION1 TAB 2 X DAY	PHARMACY A	2012 TO 2037	YEARLY	$51.10 Yearly Cost
OXYCODONE 30 MG (RX)	PAIN MANAGEMENT 1 TAB 4 X DAY	PHARMACY A	2012 TO 2037	YEARLY	$1,372.40 Yearly Cost
AMBIEN 10 MG (RX)	SLEEP AID 4 TABS/WEEK	PHARMACY B	2012 TO 2037	YEARLY	$260.00 Yearly Cost
MECLIZINE 25 MG (RX)	NAUSEA DIZZINESS AS NEEDED	PHARMACY B	2012 TO 2037	AS NEEDED	($12.32) Periodic Replacement Cost

CATEGORY : EVALUATIONS

SERVICE OR PRODUCT	PURPOSE	SUPPLIER	INIT./ TERM	FREQUENCY	UNIT COST
NEUROPSYCHOLOGICAL EVALUATION	DETERMINE STATUS/ TREATMENT REQUIREMENTS	DOCTOR A, PHD	2012 TO 2012	1 X ONLY	$1,720.00 Periodic Replacement Cost
NEUROPSYCHOLOGICAL EVALUATION	DETERMINE STATUS/ TREATMENT REQUIREMENTS	DOCTOR A, PHD	2013 TO 2018	1 X 2 YEARS	$1,720.00 Periodic Replacement Cost
NEUROPSYCHOLOGICAL EVALUATION	DETERMINE STATUS/ TREATMENT REQUIREMENTS	DOCTOR A, PHD	2018 TO 2037	1 X 5 YEARS	$1,720.00 Periodic Replacement Cost
PSYCHOLOGICAL EVALUATION	EVALUATE/ SPINAL CORD STIMULATOR	HOSPITAL A	2012 TO 2012	1 X ONLY	$270.00 Periodic Replacement Cost

It is advantageous to clearly display and briefly explain each aspect of the life care plan in the above manner to supplement the life care plan narrative. This condenses each aspect of the plan for opposing counsel, judges and, most importantly, jurors. In addition to cost figures for each individual service, a figure showing the total cost of the client's life care plan should appear at the end. Clear itemization of everything included in the plan is essential to ensure that a jury can see and understand exactly how an expert arrived at the total cost of the plan. In addition to explaining the costs and describing the services, your experts should also spend a good portion of their time explaining why each medical intervention is needed for the plaintiff.

While is it necessary to develop a plan which will provide the client with all the care that he or she will require, a life care planner must also be very careful not to include equipment, treatments or therapies which could be labeled as unnecessary or overly expensive. The best approach is to refer to the life care plan as a "minimum life care plan" to minimize the risk of any part of the plan being viewed as unnecessary. In addition to exercising caution by taking this approach, the life care planner should also educate the jury on items that could become necessary but have not been included in the current plan. To convince skeptical jurors that this plan is the floor, it may be necessary to show them the ceiling with items that may be needed in the future that were not requested.

The overall goal of the life care plan is to restore as much of the client's pre-injured life as possible. In order to do this, the plan should take into account the client's full medical history including any pre-existing conditions, their physical state, their mental condition, their life activities before the injury and, of course, every post-injury condition. Ultimately, the life care plan should be able to answer the age-old juror question of "what good will the money do?"

The Experts

The Life Care Planner: Though it is ultimately up to the client's medical doctors to determine what is medically necessary for the client, it is still necessary to have a life care planner or rehabilitation counselor. The planner should know the client's medical history cold and be able to communicate the plan to the treating doctors and address any concerns. Communication and organizational skills are a must to effectively coordinate all of the treatment, equipment, home modifications, therapies, pharmaceutical drugs, medical devices and support care. The life care planner is the communications director for the entire plan. While it is very important for the planner to be able to consult closely with the medical experts, it is also essential that the planner be able to communicate on a level that the client's family, and ultimately the jury, will understand and trust. The life care planner should make home visits to assess the needs of the client in the client's everyday environment in order to determine what modifications need to be made to the client's home. The entire family should be included in this process to ensure all concerns are addressed and that the planner is aware of each and every limitation and how it affects the client in his or her everyday life.

The Medical Doctors: As important as the life care expert is, remember that in most every state, only a medical doctor can testify as to the reasonableness and necessity of each element of the plan. Recall, too, that life care plans bring together a number of treatments and specialties. It is unlikely that one doctor will be able to testify to the reasonableness and necessity of each element of the plan. For example, an orthopedic surgeon will not be able to sign off on the need for quarterly neurological testing for the client any more than a neurologist will be able to weigh in on the need for a future ankle surgery. The correct doctors must be lined up and sign off on the plan.

The Economist: An economist is often utilized to explain to the jury how to give the present value of future damages, which is an issue that varies from jurisdiction to jurisdiction and is often a source of confusion for jurors. An economist can also be helpful if part of the plan is struck by the judge. The economist can alter the cost and recalculate the reduction to present value if and when part of the plan is struck. Permanent injuries will often open the door to a diminished earning capacity over the life time of the plaintiff. The economist will be helpful in determining and testifying to this figure. With rare exception, an economist who is not familiar with catastrophic personal injury cases should not be used.

For each expert used, a background check should be done to verify their credentials, to determine how often they have appeared in court and to learn if they have ever been barred from testifying in any court. Consider what their likely jury appeal is based on factors such as their physical appearance, manner of speech and ability to engage an audience. The venue of the trial is also an important factor here because regional differences can create potential biases depending on how well a particular expert may be perceived by a particular audience of jurors. How well an expert will respond to attacks from the defense is also something that should be taken into account. Anticipate attacks and test experts to see how they respond to likely attacks on not only their qualifications and methodology, but also their credibility.

Identifying and Dealing with Defense Attacks

The defense approach to life care plans seems to be shifting. Under the old approach, the defense would hire their own rebuttal life care planner and doctors to rebut parts of the plaintiff's plan. Typically, the defense would simply come up with a minimalist life care plan with fewer treatments that were often quoted at prices that were difficult to find in the real world. These plans often unreasonably relied upon the implication that unqualified family members could do the work for free, disregarding their own lives for the entirety of the plan. Though this method is still in use, there appears to be a new line of thought for the defense.

Under the new approach, the defendant does not hire a life care planner to testify. If hired the life care planner serves only as a consultant to assist the defense attorney in poking holes in the plan and preparing to cross examine the plaintiff's experts. The defense thought process is that hiring a life care planner implicitly acknowledges the need for the life care plan and that plaintiff's counsel will simply highlight the areas of agreement between the experts and refer to those areas as "undisputed." Additionally, the defense life care expert will likely have to admit that the plaintiff is entitled to the "best care available." The defense thinking is that hiring their own life care planner will unnecessarily create a "floor" where there would be none otherwise. Instead of giving credibility to the plaintiff's life care plan by rebutting it with a defense expert, they will simply highlight any items that look or sound like overreaching by the plaintiff and point out the economic incentive the plaintiff has to overreach. The defense wants to leave the jury with the impression that the plaintiff's side has simply hired a professional line up of witnesses who all make their living testifying in these lawsuits and only want to make the number on the board as large as possible.

The above approach is far more likely to be used in the case of a brain injury than the case of an amputee. The more visible your client's injuries are, the more difficult it will be for the defense to use this approach. Where the injuries are not obvious, counsel should highlight every objective sign of injury from the property damage to the testing that cannot be faked. The same principles of case sponsorship and polarization that are used in your other personal injury cases come into play here. Another time to anticipate this approach is when there is a serious question about liability. In addition to polarizing the case and identifying all of the experts who sponsor your theory of the case, the plaintiff can highlight the lack of response from the defense. Let the jury conclude that the defense does not have any rebuttal experts because they could not find any to rebut. A detailed plan that explains to the jury what the service is that is being provided and why that service is necessary puts the jury in the best place to understand the plan well enough to withstand the defense's attacks. A life care plan that is reasonable, detail oriented, and well thought out will answer the "what good will the money do?" which is a question that most jurors carry with them and will fill in with their own imaginations if it is not clearly, thoroughly, and reasonably answered for them.

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USERRA: Protecting America's Service Members From Reemployment Discrimination In The Workplace

By Joe Napiltonia

Unlike many countries, the United States employs an entirely volunteer military with over 1.4 million active duty members.[1] Yet another 1.1 million serve in the National Guard and Reserve forces.[2] Since September 11, 2001, nearly 900,000 of these "citizen soldiers" have been recalled to active duty, straining relations with their employers and jeopardizing their civilian jobs. Moreover, the sheer operational tempo by which service members are routinely called up, including back-to-back deployments overseas, has made many employers leery of hiring National Guard and Reservists. At the same time, service member complaints alleging discrimination in the workplace have increased substantially in the last several years.[3]

While an increase in complaints of discrimination against service members is disheartening, a powerful federal law is available to protect them if applied correctly by an advocate. In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA)[4] "to encourage service in the uniformed services, to minimize disruption by providing for the prompt reemployment of those who have served, and to prohibit discrimination against those who serve or have served."[5] USERRA cases can generally be divided into three categories: (1) failure to re-employ, (2) discrimination in the hiring and promotion process, and (3) harassment. This article will focus on reemployment claims.

USERRA enjoys several advantages over comparable employment discrimination statutes. A bona fide service member whose employer runs afoul of the law is entitled to recover back pay, front pay, liquidated damages (or double the compensatory damages for a willful violation), reasonable attorneys' fees, litigation costs, and injunctive relief.[6] No statutory limitations period limits the time within which to bring a claim for relief.[7] Importantly, because USERRA provides that "[n]o fees or court costs shall be charged or taxed against any person claiming rights under [USERRA],"[8] a Rule 68 Offer of Judgment is inapplicable in a USERRA case. Likewise, a service member cannot be held liable for his employer's attorneys' fees and costs if he does not prevail.[9]

Practitioners who routinely handle Title VII employment discrimination cases are keenly familiar with the burden-shifting framework first announced in ***McDonnell Douglas Corp. v. Green***.[10] Under this approach, once a plaintiff sets forth a prima facie case, the burden then shifts to the employer to proffer a legitimate, non-discriminatory reason for the adverse employment action. Once that occurs, the burden then returns to the plaintiff to prove that the proffered reason was a mere pretext. Under USERRA, however, once a plaintiff sets forth a prima facie case, the burden of production and persuasion shifts entirely to the employer and remains with the employer for the duration of the case. Moreover, pretext is inapplicable in a USERRA case because a plaintiff must only prove that an adverse employment action was motivated, in part, by his or her military service.[11] This very low standard makes it extremely difficult for an employer to prevail on summary judgment.[12]

In a case alleging failure to reemploy a service member, five criteria must be satisfied. First, the plaintiff must demonstrate that he or she temporarily left a job to perform military service.[13] Second, the plaintiff must give his or her employer "reasonable notice" of any upcoming military service.[14] Third, the plaintiff must demonstrate that he or she has not been absent from any one employer for a period of five years.[15] Fourth, the plaintiff's discharge from military service must be under "honorable conditions."[16] Fifth, the plaintiff must make a timely application for reemployment, which is determined by the duration of military service.[17] If a service member is hospitalized or convalescing from an injury or illness incurred while on duty, the deadline to apply for reemployment can be extended for up to two years.[18] When calculating the deadline for an application for reemployment, obtaining a copy of the service member's military orders is imperative.[19]

The next step is to determine what position a returning service member is eligible for. USERRA requires that a service member be re-employed in the same position he or she would have attained if continuously employed, or a position of like seniority, status and pay.[20] The latter is known as the "escalator position." If no such position is available, the employer must make all reasonable efforts to find the service member any position that most closely approximates his or her pre-service position.[21] The employer is also required to retrain the service member at its own expense, if doing so would qualify the returning service member for another position.[22]

In many cases, an employer is not even aware that its actions run afoul of federal law, as some provisions of the law are counter-intuitive. For example, an employer cannot require a service member to provide any documentation *prior to* performing military service.[23] It can only require

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In many cases, an employer is not even aware that its actions run afoul of federal law, as some provisions of the law are counter-intuitive.

documentation upon a service member's application for reemployment.[24] The seven documents an employer can request are listed in 20 C.F.R. § 1002.123(a). Nor can an employer require additional paperwork before agreeing to reemployment. In one case, I represented a service member who had been employed as a commercial truck driver. When he informed his employer during the reemployment process that he had been injured in the line of duty, his employer demanded that he provide a "doctor's note" demonstrating he was fit to perform his job. The defendant employer argued that an inquiry into the employee's physical condition was appropriate because the employee's ability to physically do the job was at issue. The defendant also argued that USERRA required an employee to be "qualified" for his job and thus a request for medical documentation from the plaintiff was appropriate.

The District Court disagreed and denied defendant's motion for summary judgment, explaining:

> *'…The Sixth Circuit recently interpreted this provision to mean that USERRA's requirements supersede even routine "return-to-work procedures' that 'are applicable to all individuals regardless of military service'(citation omitted). Consequently, any efforts by Defendant to impose requirements that go beyond those outlined in USERRA—even if they were general 'company policy' and were not imposed on Plaintiff specifically—cannot serve as a condition on Plaintiff's reemployment under § 4312.*

Brown v. Prairie Farms Dairy, Inc., 872 F. Supp. 2d 637, 643 (M.D. Tenn. 2012). The employer could, however, have re-employed Plaintiff, sent him out to a company doctor for a fitness evaluation, and *then* terminated him for cause the next day.[25] The old adage, "the devil is in the details" could not be truer than in this case. To effectively represent their clients, practitioners representing service members must not only know the intricate provisions of USERRA, but how the courts have interpreted those provisions.

Even in light of USERRA's liberal provisions, an employer can still escape liability under certain circumstances. One defense is for an employer to show that a service member is not eligible for protection. I rarely see this defense, which is technical in nature and requires an astute defense counsel to wade through USERRA's complexities to prove the defense. Another more common defense is for an employer to demonstrate that it would have taken the same action regardless of the employee's military status. In the reemployment context, for example, an employer can escape USERRA liability by showing that it had a bona fide reduction in force that would have affected the returning service member. Another all-too-common defense tactic is for the employer to launch a smear campaign discrediting the service member in order to argue that he or she had performance issues and was refused reemployment for cause. But this defense can often be easily defeated through aggressive discovery of the employment records of other employees or "comparators." Plaintiff's counsel must cast a wide net during discovery and be prepared to fight any attempt by the defendant employer to narrow the scope of potential comparators.

In ***Bobo v. UPS***, 665 F.3d 741 (6th Cir. 2012), Walleon Bobo, a member of the U.S. Army Reserve, alleged he was terminated in part because of his employer's anti-military animus. The defendant employer argued that it would have taken the same action regardless of Bobo's military status because he violated company policy by fraudulently signing his subordinates' safety check ride forms even though he did not perform the safety check rides. Bobo admitted he violated the company's safety policy, but offered evidence that many other non-military supervisors had engaged in the same conduct but were never terminated. The District Court granted summary judgment in favor of the employer. On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed, holding that "[d]iscriminatory motivation may be inferred from a variety of considerations, including…disparate treatment of certain employees compared to other employees with similar work records or offenses."[26]

As Bobo demonstrates, even a service member who has violated company policy or engaged in misconduct may be entitled to relief under USERRA. If other similarly situated employees committed similar acts of seriousness, but were not adversely affected, you can still get to a jury on the substantive issue of whether the service member's military status was a motivating factor in the company's adverse employment action.

Unfortunately, complaints by service members have become more and more prevalent as the wars in Iraq and Afghanistan wind down. However, USERRA provides significant protection to our brave, deserving citizen soldiers. After all, as Teddy Roosevelt said to a group of Illinois Veterans in 1903: "A man who is good enough to shed his blood for his country is good enough to be given a square deal afterwards."[27]

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1. *www.defense.gov/about/* ***2.*** *Id.* ***3.*** *See USERRA Annual Report to Congress (July 2012), available at: www.dol.gov/vets/programs/userra/2011USERRAreport.pdf* ***4.*** *38 U.S.C. §§ 4301-4335 (1994)* ***5.*** *38 U.S.C. § 4301* ***6.*** *20 CFR § 1002.312* ***7.*** *20 CFR § 1002.311* ***8.*** *38 U.S.C. 4323(h)(1)* ***9.*** *Id. It is also inappropriate for a U.S. District Court Clerk to charge a filing fee, which is currently $400. When litigating these cases, I first file a motion to waive the filing fee. This gives me an early opportunity to educate the court on the many pro-service-member provisions in USERRA, making it distinctly different from other employment-related laws.* ***10.*** *411 U.S. 792 (1973)* ***11.*** *38 U.S.C. § 4311(c)(1)* ***12.*** *USERRA also clarifies that any other law, policy, agreement, practice, or other matter providing greater or additional rights to a service member is not abrogated by USERRA, but rather is complemented by the law. See 38 U.S.C. § 4302(a). Before filing suit, it is therefore important to investigate any State laws that may apply. For example, Massachusetts provides for non-economic damages to a service member whose employer discriminates against him or her on the basis of that individual's military status. See Mass. Gen. Laws ch. 151B, § 4.1D (2012).* ***13.*** *See 38 U.S.C. § 4313(a)(2)(A) (defining the rights guaranteed by § 4312).* ***14.*** *38 U.S.C. § 4312(a)(1). Notice may be either written or verbal. Whether notice is reasonable depends on the situation. For example, service members who are deploying for one year generally know about that deployment well in advance. In contrast, because of the logistics in transporting a fallen service member's body back to the United States and making burial arrangements, service members called upon to perform in military funerals are often informed the day before the funeral. Admittedly, only a few hours' notice may pose a hardship for the employer, but it pales in comparison to a fallen service member's incredible sacrifice.* ***15.*** *38 U.S.C. § 4312(a)(2). Be careful, USERRA exempts eight specific categories of service from this computation. See 38 U.S.C. § 4312(c).* ***16.*** *38 U.S.C. § 4304(2). This classification can sometimes be tricky. In one notable USERRA case, Major Brian Petty, a member of the Tennessee National Guard, resigned "for the good of the service" in lieu of a General Court Martial after he was found making alcohol in his tent and enjoying the company of a female enlisted soldier while deployed overseas. Petty was employed as a Metro Nashville police officer and was initially denied reemployment on the basis that the circumstances surrounding Petty's discharge disqualified him from reemployment under USERRA. The Sixth Circuit Court of Appeals disagreed, holding that Petty's separation from military service was classified as "under honorable conditions," which Congress has made clear suffices to qualify him for USERRA benefits. See Petty v. Metro. Gov't of Nashville-Davidson County, 538 F.3d 431, 441 (6th Cir. 2008).* ***17.*** *38 U.S.C. § 4312(e). If the period of service was for fewer than 31 days, a service member must report back to work after military service on his or her next regularly scheduled work day after safely traveling to his or her residence and taking an additional eight-hour period to rest. See 38 U.S.C. 4312(e)(1)(A)(i). If the service member's period of service was 31-180 days, he or she has 14 days to submit an application for reemployment. See 38 U.S.C. 4312(e)(1)(C). If a service member's period of service was 181 days or more, he or she has 90 days to submit an application for reemployment. See 38 U.S.C. 4312(e)(1)(D).* ***18.*** *38 U.S.C. 4312(e)(2)(A)* ***19.*** *If possible, an attorney should consult with his client's military command to assist in making the calculation to ensure that a timely application for reemployment has been made. Even if the service member did not make a timely application for reemployment,that does not automatically forego his or her reemployment rights. The law looks to the employer's company policy to see how other employees treated who fail to report to work on time are treated.* ***20.*** *See 38 U.S.C. § 4313(a)(2)(A).* ***21.*** *See 38 U.S.C. § 4313(a)(4)(A).* ***22.*** *Id.* ***23.*** *38 U.S.C. § 4312(f).* ***24.*** *Id.* ***25.*** *See 38 U.S.C. 4316(c).* ***26.*** *665 F.3d at 754.* ***27.*** *http://en.wikiquote.org/wiki/Theodore_Roosevelt*

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2013 Fall Retreat, Ducks Key, Florida

On October 9 through 13, members of Southern Trial Lawyers spent four days at the beautiful Hawks Cay Resort in the Florida Keys. With about 60 people in attendance, on Wednesday evening, we opened the conference with a reception at the resort. On Thursday, attendees were free to spend the day by the pool, go fishing, play golf, swim with the dolphins or just relax and read a good book. That evening, everyone enjoyed a clam bake at the hotel. Friday morning, we had a short CLE with speakers that included: Gary Roberts, Michael Haggard, Eric Buchanan and Jose Baez. The CLE was followed by a meeting of the Board of Governors, and later, a two hour sunset cruise on a 66 foot catamaran. Despite the rough conditions we were able to go out and enjoy a gorgeous sunset and return with nobody getting seasick. Plus, we returned with the same amount of people we went out with. Saturday was, again, a free day and a lot of people just relaxed by the pool. The retreat ended on Saturday night with vans taking everyone to the beautiful home of Michael Haggard, which overlooks the bay at Ducks Key. Michael and his wife hosted a reception and wonderful dinner, and everyone was treated to another beautiful sunset.

2014 Mardi Gras Conference
NOLA, February 26th

STLA members enjoying the Welcome Reception.

Mike Haggard speaks about negligent security cases during the CLE program.

Hawk's Cay Resort in Duck Key, the site of the 2013 Fall Retreat.

Jose Baez, lead defense attorney for Casey Anthony, shares his insight and perspective about the case.