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Premises Liability:

Focus on the facts

By Christopher Marlowe

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When handling negligent security cases, don't get bogged down by irrelevant details, such as crime statistics or your client's rap sheet. You need to build your case around the evidence that the defendant's security measures were inadequate.

No violent crime occurs in a vacuum. There is always a relevant backstory that you must discover before building your civil case against any possible defendants. Plaintiff attorneys use terms like notice, foreseeability and preventability to fight technical legal defenses, but you need to focus on the real foundation of a negligent security case: Why did this crime occur, why to your client and why at this particular location?

One of the greatest challenges in advancing a negligent security case is sticking to a few key issues that the jury should consider at the close of evidence. Jury selection is already a complicated process; it is even more so in negligent security cases because many potential jurors nave a hard time ascribing liability to anyone other than the intentional tortfeasor. You do not want to create additional challenges for yourself, such as arguing that all crime can be prevented under all circumstances. The focus should remain on one property on one particular day.

Be reasonable about what you are arguing the defendant failed to do in your case. In a premises case with a long history of violent crime, inadequate lighting, poorly designed property layout, absence of security personnel, no CCTV systems, and managers who were completely distracted while your client was attacked, liability would be relatively easy to prove. But usually, the defendant has not done everything wrong. The fact that the defendant did a few things right does not negate fatal and preventable security flaws. Ultimately, your job is to prove that what happened on the defendant's property was preventable then and there.

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Prior criminal history

Do not be surprised if the intentional tortfeasor in your case has an extensive criminal history. A man who killed his ex-wife at an apartment complex after she divorced him may have previous restraining order violations and battery convictions. The robber who carjacked and killed your client at an ATM may have been released recently from prison for a similar offense. Such people often are referred to as "motivated offenders." The defendant's goal is to convince the jury that once the evildoer has fixated on someone or something, nothing will stop him or her. Alternatively, if the offender is believed to have been

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Meds & Prescription Errors:

Where's George Bailey When You Need Him?

By Sam McGee

A young George Bailey is working at Mr. Gower's pharmacy in the town of Bedford Falls. While scooping ice cream for future wife Mary, George finds the telegram. Mr. Gower's son has died suddenly of influenza. George heads to the back of the store, offering to help Mr. Gower with anything at all. While there, he realizes Mr. Gower has filled capsules with poison rather than medicine. Unsure what to do, he runs to his father, who is tied up with town miser, Mr. Potter . Upon his return, Gower is angry the capsules have not been delivered as promised. He slaps George in his bad ear, injured while saving the life of his younger brother, future war hero Harry. In his defense, George informs Mr. Gower what he has done, that his distraction and grief have almost caused the death of a sick child. The aging pharmacist embraces young George and confesses later in a prayer, "I owe everything to George Bailey."

In the last few years I have had occasion to represent plaintiffs – usually estates – in medication or prescription error cases. Whenever I encounter one of these cases I find myself asking a question that could be asked for many reasons: Where's George Bailey when you need him?

Types of Cases

Medication and prescription error cases can happen in many ways in many contexts. Some cases can be relatively obvious. For example, it is disturbingly common for patients to be prescribed medications to which they have a known allergy or where the drug is directly contraindicated by another medication or medical condition known to the prescribing medical provider. The classic cases, for example, would be the administration of penicillin in a hospital setting where the patient is known to be allergic. This mistake causes approximately 400

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deaths in the United States each year. Another relatively obvious case in hospital or long-term care settings is when a patient receives someone else's medications. I recently resolved a case where the staff of an assisted living facility administered my client both her medications and those of her roommate. This resulted, essentially, in a double dose of blood pressure medications, causing the client's blood pressure to plummet.

Other cases can be more subtle. For example, we have found medication errors in cases where the error itself was not the ultimate cause of injury. In one such case, an assisted living resident fell six times in fourteen days,

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STLA Executive Board Members

President's Message

Randy Hall

"Client" is a Sterile Word.

We just recently completed a medical malpractice trial in Alabama. A beloved mother, wife and a human being that we never knew was lost due to the negligence of another. We spent ten days with perhaps the most sincere clients I have ever met. We learned, first hand, about their hurts, their agony, their struggles and how deeply they loved this person. It was only through their words that we came to know who we really represented. Five years later, the still unhealed hurt in their eyes opened a window into their souls. It was the same window I had looked through so many times before. Over the course of this trial, they evolved from our clients to our friends. They became "our people."

These were people of a different color, culture and socioeconomic background from us. While they had to borrow money to purchase their suit for trial, we had the luxury of choosing between one of the five we had brought for trial. Our education was post graduate; theirs was, at best, 10th grade. Our words were multi-syllabic; their words simple, yet meaningful, and I dare say, the more powerful. For a season, we became of the same mind and understanding of the universal language of right and wrong.

As the week went on, our exhaustion was displaced by our compassion and driven desire to see justice. These people didn't choose this early death. They didn't choose the courthouse. They didn't choose to be turned away from the locals, only to find a lawyer who lived 600 miles away. Their total reliance upon us brought to bear that the courtroom was a world they, as most others, never knew existed. It brought to mind the great chasm between life and justice that we, as trial lawyers, have a responsibility to fill.

Over the course of the trial, time and time again we were thanked for our willingness to take their case, for our extended travel from our own in-tact families and for fighting for their rights. As the case progressed, my attention was focused on my next day, my next witness and the strategies we developed. This single-mindedness caused me only cursorily to acknowledge their words of respect, admiration and thanks. Indeed, the true import of what they were trying to communicate did not register in my heart until, after the verdict was announced, we saw their tears. In retrospect, I hope they were unable to see my lack of attention to what they were trying to tell us.

People, or perhaps more succinctly, less fortunate people, are the lifeblood of what we do. They come and go in our lives. Only for a moment are they the most important thing in our lives. Win, lose or draw, we go on to the next trial, and they go home with the same harm tethered only by our success, or lack thereof, in the courtroom. We meet them, learn everything we can about them and spend time with them. But do we ever really take the time to empathize with their station in life? Or are we so engrossed in the battle that we sterilize the fact that, indeed, each of us is a mere breath away from being just like them? And while we refer proudly to them as our clients, do we, in our hearts, acknowledge them as people? Our people?

Every time I step in front of a jury, I am reminded of how blessed I am to be an advocate for those who suffer at the hands of others. This particular trial resounded the words of my mentor, Bruce Munson, "Being a lawyer is a privilege, not a right." It is a place where I am fortunate enough to find, meet and interact with people who truly need me—people whose lives I can impact for the better. This privilege implies a responsibility to continue to learn, grow and maximize my God-given talent. It demands that I violate the Golden Rule outside the courtroom and, in fact, empathize with "my people."

I am embarrassed to say that I am guilty of the very indictment that I propose in this letter. My message is clear: yes, we have clients, but we represent people. People who need us; who rely on us; in whose lives they place their unabashed trust. It is a high calling. One to be taken seriously. One to be counted, indeed, as a privilege, not a right. And it is one that deserves thanking those who have emboldened our lives to take on such a task. Call someone today and thank them for how they have made you a better lawyer. And tell "your people" thank you for allowing you to exercise the privilege of being their lawyer. I think I'll call my people first. Then I'll call my mom. Then I'll extend a thank you to each and every one of you who is a member of this organization for, in fact, making me a better lawyer.

For those of you who are coming to Hawk's Cay, I'll see you there. For those of you who are not, you will be missed. I hope to see you at Mardi Gras. Go Hogs Go!

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STLA News, Updates & Events

Hawks Cay Resort in the Flordia Keys

STLA Fall Retreat

This year the Fall Retreat, which is for STLA members and their guests, will be held on October 9 through October 13 at Hawks Cay Resort in the Florida Keys. Hawks Cay is located about two hours south of Miami, Florida, which is the closest airport. If you have never been to the Florida Keys, you are in for a treat. We will start Wednesday night with a reception from 6 p.m. until 8 p.m. sponsored by Alliance Medications, MediVisuals and Robson Forensic, three of our loyal exhibitors at our Mardi Gras Conference every year. On Thursday, you will be on your own to enjoy Hawks Cay. They have many water sports such as fishing, sailing, snorkeling, scuba diving and swimming with the dolphins. You may just want to relax around the many pools or their beach. Several people told me if we were down there, we had to do the clambake on their beach, so on Thursday from 7 p.m. till 9 p.m., we will have a clambake. On Friday morning starting at 8 a.m., there will be a buffet breakfast for STLA members which Terry Taylor and Forge Consulting will sponsor. Starting at 9 a.m., we will have a short CLE with Gary Roberts of West Palm Beach doing a 1-hour talk on ethics. Hank Didier from Orlando and Michael Haggard from Coral, Florida will also speak. Following the CLE, there will be a board meeting. Friday afternoon, you are on your own again. Starting at 5 p.m., we will take a bus to the home of Michael Haggard, who has invited everyone to his home for a reception followed by dinner. Saturday is a free day until around 6 p.m., at which time, we will board a 60-foot catamaran for a beautiful sunset cruise in the Keys. We will be back in plenty of time for dinner, and there are some fine restaurants at the resort and others close by. The dress code for the entire retreat is casual.

2014 Mardi Gras Conference

The 2014 Mardi Gras Conference will be held February 26 through March 2 at the JW Marriott in New Orleans, Louisiana. On Wednesday night at 6 p.m., we will kick-off the event with a reception hosted by the JW Marriott. CLE will start Thursday and Friday mornings at 8 a.m. and on Saturday at 9 a.m. As it is difficult to sit through CLEs until 5 p.m. after a relaxing lunch in New Orleans, this year we will conclude each day at around 1:30 p.m. That gives you the whole afternoon to enjoy one of New Orleans' many famous restaurants. The CLE chairs for this year will be John Romano from West Palm Beach, FL, Tommy Malone from Atlanta, GA, Vince Glorioso from New Orleans, LA, Gibson Vance from Montgomery, AL, Peter Perlman from Lexington, KY and Howard Nations from Houston, TX. With these outstanding attorneys as your CLE Chairs, this should be one of our best CLE programs yet. On Friday night, we will have the WarHorse Banquet at the Windsor Court Hotel. If, on Saturday morning, you would like to ride on a float in the Mardi Gras Parade, that can be arranged through the Krewe of Tucks. On Saturday afternoon, there will be what has become, a highlight of the conference, a crawfish boil. Bob Shepherd with MediVisuals out of Richmond, VA started this tradition about 5 years ago. The conference will conclude with the balcony on Bourbon Street from 7 p.m. until 1 a.m. This year's balcony will not be a costume party but you are encouraged to wear a mask. Currently there are plans for a party on Thursday night at the hotel to watch some of the parades that pass in front of the JW Marriott.

Membership Contest

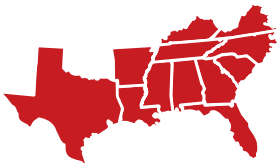
In 2013, STLA President Randy Hall, wants to increase membership by at least 50 new members. On March 14, an email was sent to all STLA members with details of a contest created to help us achieve this goal. This contest is open to all regular members and board members. The person bringing in the most new members for 2013 will have his or her hotel room/tax paid for. The person bringing in the second highest number of new members will receive two tickets to the WarHorse Dinner/Banquet. In order to win, you must bring in at least 5 new members and, in case of a tie, the person that brought in the first new member will win. If you know someone who you think would make a good member and be active in our organization, let me know via email with his/her name and physical mailing address. I will get a membership application out to them in the mail.

If you have any questions, give me a call at: 850-926-4599.

Gary and Diane Gober

Gary Gober's Lifetime Achievement Award

Gary and I have just returned from a luncheon at the Tennessee Association for Justice's Annual Meeting, where Gary received the TAJ Lifetime Achievement Award. After a rousing introduction, there was a short slideshow of Gary, from baby boy in Brooklyn to childhood and teen years in Chattanooga to Harvard and Vanderbilt Law, plus photographs of Gary with Stanley Preiser and Mel Belli. There were even photos of our wedding, travels and grandchildren. Then Gary took the microphone, and as you can imagine, passionately urged all the lawyers there to continue to "punch holes in the darkness" to meet the challenges facing attorneys in Tennessee and around the country to achieve justice for their clients. He asked them to do as he plans to continue to do . . . fight the fight every day until victory is yours. — ***Diane Gober***



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Maximizing Damages in Tractor-Trailer Cases

By Frank L. Branson

Each year, more people die in truck crashes than in crashes involving planes, trains, ships and interstate buses combined. Yet, the carnage continues unchecked, year after year. A closer look into virtually any truck wreck reveals rampant drug use, systemic mechanical problems, poor training, lack of sleep, sketchy qualifications and dubious ethics.

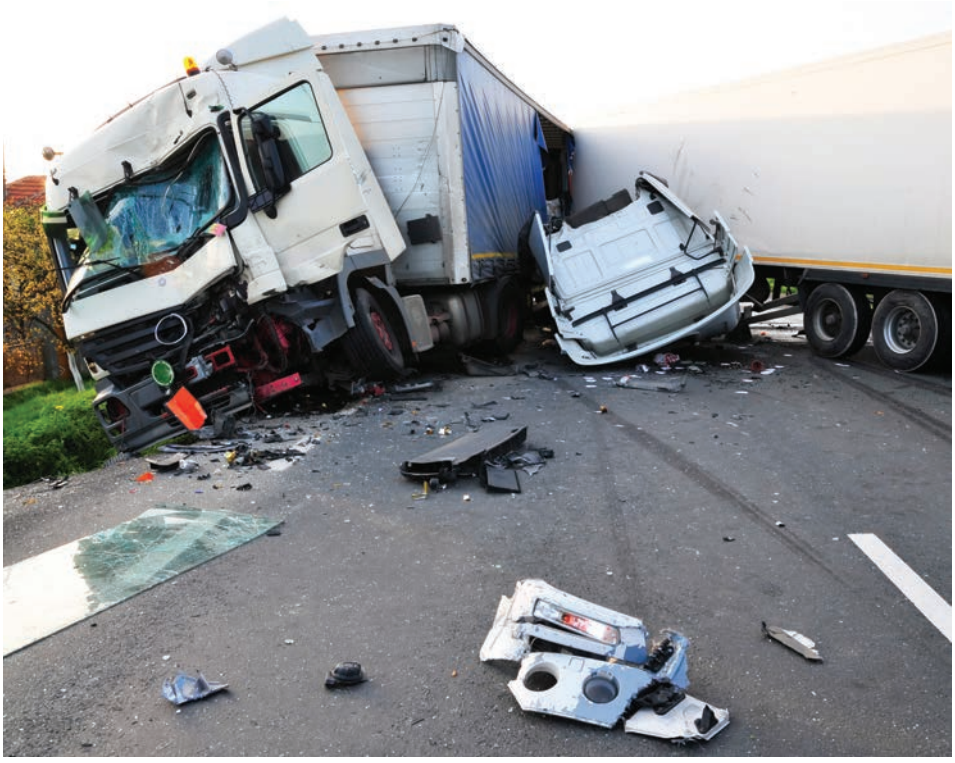
The best place to begin is with an investigation of the vehicles and the truck wreck scene. Get the trucking company's commitment to preserve the truck for your inspection or file a motion for a temporary injunction if the trucking company will not make this commitment. You will need to move quickly to photograph and preserve: (i) all damage to exterior and interior of the vehicles, (ii) tire tread depth and condition, (iii) any items found in the truck, including beer cans, pornography, bills of lading, log books, and procedure manuals, and (iv) "black box" electronic recorder data from the vehicles. Filaments in lights on the vehicle may also be important because they can be examined by experts to determine whether the lights were on at the time of the wreck. Brake lines and fluid levels may be important if you suspect a brake malfunction. If you suspect issues with the vehicles' lights, brakes, or other mechanical or electrical issues at the time of the wreck, bring in additional experts to look at those issues. Be sure to send a letter requesting the preservation of the driver logs and request a copy within 6 months of the accident, or they may be destroyed.

The scene of the wreck may get altered before trial, and skid marks and other physical evidence at the scene may disappear with the first rain. Depending on the size of the case, you will want to have this work done by an accident reconstructionist at an early stage. Contact the investigating officer, tow-truck driver and witnesses early. Contact all witnesses listed in the police reports and do not assume that their potential testimony is accurately listed in the reports. A satellite photograph of the scene may also be a good idea.

The next step is investigating the owner's policies regarding the operation of the trucking fleet. You will need to find out whether there is a safety director, what kind of fleet safety program is in place, what type of maintenance program is in place, what types of drivers are hired, what type of screening of drivers is done, what insurance covers the tractor and trailer and how the drivers are paid. If the drivers are paid by the load, there may be an attitude that the trucks must roll regardless of the shape they are in.

Look for violations of federal and state statutes that may be negligence per se. The most complete set of regulations for truckers is the Federal Motor Carrier Safety Regulations ("FMCSR") issued by the Federal Highway Administration. These are reprinted in a paperback volume, often referred to as the "Truckers' Bible." These regulations cover qualifications of drivers, drug and alcohol testing, rules of the road, hours of service, insurance and inspection and maintenance among other areas. See 49 C.F.R. §§ 391.11, 40.1 et. seq., 382.101 et. seq., 383.1, 392.1, 395.1, 387.1, 392.1, and 396.1.

Hours-of-service regulations are some of the most often-violated regulations. Many times, a driver cannot physically complete his haul on time unless he violates these rules. A trucker's fatigue can be caused by a lack of sleep before beginning a run, medical issues, alcohol, drugs or sleep disorders. Usually, though, the fatigue simply is the result of the number of hours the trucker has been on the road. With certain exceptions, the Federal Motor Carrier Safety Regulations strictly limit the number of hours that a trucker may be on the road. The general rule for "property-carrying" vehicles is that no motor carrier can permit or require any driver to drive, and no driver can drive: (i) more than 11 cumulative hours following 10 consecutive hours off duty, or (ii) for any period of time after the end of the fourteenth hour after coming on duty following 10 consecutive hours off duty. See 49 C.F.R. § 395.3(a). Motor carriers and their drivers also cannot drive for any period after: (i) having been on duty 60 hours in any seven consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or (ii) having been on duty 70 hours in any period of eight consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week. See 49 C.F.R. § 395.3(b).



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It is important to remember that the FMCSR imposes an affirmative duty on the motor carrier to require its drivers to adhere to the duties and prohibitions mandated by the FMCSR. Accordingly, "it shall be the duty of the motor carrier to require observance of" any duty "prescribed for a driver" and any prohibition "imposed upon a driver" by the FMCSR. 49 C.F.R. § 390.11. The FMCSR also creates a prohibition against "aiding and abetting violations," stating that "[n]o person shall aid, abet, encourage, or require a motor carrier or its employees to violate the rules of [the FMCSR]." 49 C.F.R. § 390.13. During your investigation, you should attempt to determine whether the motor carrier "aided and abetted" or "encouraged" unsafe practices by its drivers. For example, if the motor carrier pays by the load or requires aggressive delivery deadlines, then it may be encouraging unsafe hours-of-service, unsafe speeds and corresponding fraud in the driver's logs, which may provide your client with an "aiding and abetting" claim under 49 C.F.R. § 390.13.

After concluding your investigation, carefully formulate your plan of attack against the major players. The trucking company's driver and safety director may well have vulnerabilities. For the driver, you will want to find out about his past employment, his driving history, how often he inspects his truck, his medical history, his history of getting weight tickets and his CB handle. Is his CB handle "Dirty Harry," "Captain Crunch," or "The Grim Reaper?" For the safety director, you will want to find out about his training,

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By Elisabeth DeWitt & Bernard Walsh

The recent cases from the Supreme Court are ending a trend in case law. These days, plan language is king. So, how can plaintiff's attorneys protect their clients' recoveries and their own fees and costs? Here are a few tips to help you navigate the world of ERISA liens.

The first thing you should find out, of course, is whether or not the plan is governed by ERISA. ERISA governs employer-employee plans except where the employer is a government organization or a church organization. ERISA does not govern individual plans. If it is an employer-employee plan, you next look to funding. If the plan is funded by contribution from the employer and employee, it is a self-funded ERISA plan and pre-empts state law. If the plan is funded by purchased insurance coverage, it is a fully insured ERISA plan and is subject to state law. To determine funding status, you can look to the plan language in the Summary Plan Description (SPD). The funding mechanism described in the SPD will determine if the plan is self-funded or fully insured. You can also get an idea as to whether or not a plan is self-funded or fully insured by name and title of the plan. If the plan is a named employer group or titled an ASO (administrative services organization), then the plan is likely self-funded (federal law applies). If the plan is a named insurance carrier or is titled a HMO, POS, or PPO, then the plan is likely fully insured (state law applies).

The tips above are not necessarily dispositive of whether or not a plan is governed by ERISA, but they can give you an idea. What you really need to look at is both the SPD and the Master Plan Document (MPD). How do you get these important documents? You must request them from the plan administrator (not the Third Party Claims Administrator (TPA) or the recovery vendor (Rawlings, Ingenix, ACS, etc.)). The plan administrator is usually named on the administrative page in the Summary Plan Description. 29 U.S.C. §1024(b)(4) says, "The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." Make sure you get ALL of these documents. Most plan administrators or the recovery vendors will try to only provide you with the SPD and a claims summary. Accept those documents, but do not stop asking for the rest of your request (the full plan documents). Also make sure that if you do receive the MPD and the SPD that they match. Many times administrators will update the SPD and not the MPD. The MPD must say the same thing as the SPD. See ***Cigna v. Amara***, 131 S.Ct. 1866 (U.S. 2011).

If your request for ALL documents is ignored, the United States Code has afforded some penalties that may be assessed on the plan administrator. 29 U.S.C. §1132(c)(1)(b) states, "who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper." In other words, if the plan administrator does not comply with your request for the full plan documents within thirty days, penalties start tolling at $100.00 per day after the thirty days. These penalties can be increased to $110.00 per day under 29 CFR §2575.502(c)(1). See ***Leister v. Dovetail, Inc.***, No. 05-2115, (c. Dis. Oct. 22, 2009), where the court imposed $377,600.00 for 3,776 days of non-compliance and Huss v. IBM Medical and Dental Plan, No. 07 C 7028 (N.Dis.Ill Nov. 4, 2009) where the court imposed $11,440.00 in penalties for 104 days of non-compliance.

Now let us imagine that you have received all of the plan documents that were requested and it looks as though the plan is governed by ERISA. What can you do to save your client money and protect your fees and costs as well? Attack the plan language! The Supreme Court has stated that the plan language must identify a particular fund, from which the plan may recover, distinct and apart from the member's assets and that the plan language must identify the share of that fund to which the plan is entitled. Sereboff v. Mid Atlantic Medical Services, Inc., 126 S.Ct. 1869 (2006). The court in ***Popowski v. Parrott*** sets out a

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What can you do to save your client money and protect your fees and costs as well? Attack the plan language!

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By Jason D. Lazarus, J.D., LL.M., CSSC

Introduction

The receipt of personal injury proceeds by someone who is disabled can cause ineligibility for means-based tested government benefit programs. Medicaid[1] and SSI[2] are two such programs. However, there are planning devices that can be utilized to preserve eligibility for those who have become disabled due to injury. A special needs trust can be created to hold the recovery and preserve public benefit eligibility since assets held within a special needs trust are not a countable resource for purposes of Medicaid or SSI eligibility. The creation of special needs trusts is authorized by the Federal law.[3] A trust commonly referred to as (d)(4)(A) special needs trust, named after the Federal code section that authorizes its creation, is for those under the age of sixty five.[4] Another type of trust typically referred to as a (d)(4)(C) pooled special needs trust may be created for those of any age.[5] Pooled trusts are economical and are a great solution for personal injury settlements (not just small settlements). When deciding upon which type of trust to use, it is important to understand the differences between the trusts in terms of startup costs, ongoing costs and management. The different types of trusts for those on needs-based benefits will be discussed in greater detail below.

Public Benefit Programs Overview

There are two primary public benefit programs that are available to those who become disabled. The first is the Medicaid program and the intertwined Supplemental Security Income benefit. The second is the Medicare program and the related Social Security Disability Income/Retirement benefit. Both programs can be adversely impacted by a disabled injury victim's receipt of a personal injury recovery. Understanding the basics of these programs and their differences is imperative to protecting the disabled client's eligibility for these benefits.

Medicare and Social Security Disability Income (hereinafter SSDI) benefits are an entitlement and are not income or asset sensitive. Clients who meet Social Security's definition of disability and have paid in enough quarters can receive disability benefits without regard to their financial situation.[6] The SSDI benefit program is funded by the workforce's contribution into FICA (social security) or self-employment taxes. Workers earn credits based on their work history and a worker must have enough credits to get SSDI benefits should they become disabled. Medicare is a federal health insurance program. Medicare entitlement commences at age sixty-five or two years after the date of disability under Social Security's definition.[7] Medicare coverage is available again without regard to the injury victim's financial situation. Accordingly, a special needs trust ("SNT") is not necessary to protect eligibility for these benefits. However, the MSP may necessitate the use of a Medicare Set Aside.

Medicaid and Supplemental Security Income (hereinafter SSI) are income and asset sensitive public benefits that require planning to preserve. In many states, one dollar of SSI benefits automatically provides Medicaid coverage. This is very important, as it is imperative in most situations to preserve some level of SSI benefits if Medicaid coverage is needed in the future. SSI is a cash assistance program administered by the Social Security Administration. It provides financial assistance to needy aged, blind, or disabled individuals. To receive SSI, the individual must be aged (sixty-five or older), blind or disabled[8] and be a U.S. citizen. The recipient must also meet the financial eligibility requirements.[9] Medicaid provides basic health care coverage for those who cannot afford it. It is a state and federally funded program run differently in each state. Eligibility requirements and services available vary by state. Medicaid can be used to supplement Medicare coverage if the client has both programs. For example, Medicaid can pay for prescription drugs as well as Medicare co-payments or deductibles. Because Medicaid and SSI are income and asset sensitive, creation of a special needs trust may be necessary when a settlement is reached for someone receiving either or both of these public benefits.

Special Needs Trusts — The Differences

A special needs trust is a trust that can be created pursuant to federal law whose corpus or any assets held in the trust do not count as resources for purposes of qualifying for Medicaid or SSI. Thus, a personal injury recovery can be placed into a SNT so that the victim can continue to qualify for SSI and Medicaid. Federal law authorizes and regulates the creation of an SNT. The 1396p[10] provisions in the United States Code govern the creation and requirements for such trusts. First and foremost, a client must be disabled in order to create an SNT.[11] There are three primary types of trusts that may be created to hold a personal injury recovery and one type used when it isn't the injury victim's own assets, each with its own unique requirements and restrictions. First is the (d)(4)(A)[12] special needs trust which can be established only for those who are disabled and are under age 65. This trust is established with the personal injury victim's recovery and is established for the victim's own benefit. Second is a (d)(4)(C)[13] trust typically called a pooled trust that may be established with the disabled victim's funds without regard to age. The third is a trust that can be utilized if an elderly client has too much income from Social Security or a pension to qualify for some Medicaid based nursing home assistance programs. This trust is authorized by the federal law under (d)(4)(B)[14] and is commonly referred to as a Miller Trust. Lastly, there is a third party[15] SNT which is funded and established by someone other than the personal injury victim (i.e., parent, grandparent, donations, etc. . .) for the benefit of the personal injury victim. The victim still must meet the definition of disability but there is no required payback of Medicaid at death as there is with a (d)(4)(A) or (d)(4)(C).

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Since the pooled (d)(4)(C) trust and the (d)(4)(A) SNT are most commonly used with personal injury recoveries, I will focus on comparing these two types of trust. There are several significant differences between a (d)(4)(C) pooled trust and a (d)(4)(A) special needs trust. I will discuss these differences first starting with the (d)(4)(C) pooled trust. As a starting point, a disabled injury victim joins an already established pooled trust as there is no individually crafted trust document. There are four major requirements under federal law necessary to establish a pooled trust. First, the trust must be established and managed by a non-profit.[16] Second, the trust must maintain separate accounts for each beneficiary, but the funds are pooled for purposes of investment and management.[17] Third, each trust account must be established solely for the benefit of an individual who is disabled as defined by law, and it may only be established by that individual, the individual's parent, grandparent, legal guardian, or a court.[18] Fourth, any funds that remain in a beneficiary's account at that beneficiary's death must be retained by the trust or used to reimburse the State Medicaid agency.[19]

As for the differences from a (d)(4)(A) special needs trust, there are four primary differences. First, a (d)(4)(A) special needs trust can only be created for those under age 65. However, a (d)(4)(C) pooled special needs trust has no such age restriction and can be created for someone of any age. Second, a Pooled Special Needs trust is not an individually crafted trust like a (d)(4)(A) special needs trust. Instead, a disabled individual joins a Pooled Trust and a professional non-profit trustee pools the assets together for purposes of investment, but each beneficiary of the trust has his or her own sub-account. Third, a pooled trust is managed by a not-for-profit entity that acts as trustee overseeing distributions of the money. The non-profit trustee may manage the money themself

or hire a separate money manager to oversee investment of the trust assets. Fourth, at death the non-profit trustee may retain whatever assets are left in the trust instead of repaying Medicaid for services they have provided, as is the case with a (d)(4)(A) special needs trust.[20] By joining a pooled trust, a disabled, aged injury victim can make a charitable donation to the non-profit that manages the pooled trust and avoid the repayment requirement found within the federal law for (d)(4)(A) special needs trusts. Other than the aforementioned differences, it operates as any other special needs trust does with the same restrictions on the use of the trust assets.

With a (d)(4)(A) special needs trust, a trustee needs to be selected, unlike the pooled trust where it is automatically a non-profit entity. This provides some flexibility to the family or loved ones so they have a hand in the selection of the trust company or bank acting as trustee. However, it is important to have a trustee experienced in dealing with needs-based government benefit eligibility requirements, so that improper distributions are not made. Many banks and trust companies don't want to administer special needs trusts under $1,000,000.00 in trust assets which can make it difficult to find the right trustee. Most pooled special needs trusts will accept any size trust and the non-profit is experienced in dealing with those that are receiving disability-based public benefits. With the (d)(4)(A), there are no startup costs except the legal fee to draft the trust, which can vary greatly. The (d)(4)(C) pooled trusts typically have a one-time fee at inception which can range from $500 to $2,000, which is typically much cheaper than the cost of establishing a (d)(4)(A) special needs trust. Most trustees (pooled or (d)(4)(A)) will charge an ongoing annual fee which is typically a percentage of the trust assets. These fees vary between 1-3% depending on how much money is in the trust. A (d)(4)(A) will offer many investment choices for the funds held in the trust, while a (d)(4)(C) will have only one investment strategy.

The major limitation of all types of special needs trusts is that the assets held in trust can only be used for the sole benefit of the trust beneficiary. So in the case of a disabled injury victim that funds a pooled special needs trust with their personal injury recovery, those funds can only be used for their benefit. The disabled injury victim could not withdraw money and gift it to a charity or family. The purpose of the special needs trust is to retain Medicaid eligibility and use trust funds to meet the supplemental or "special" needs of the beneficiary. These can be quite broad, however, and include things that improve health or comfort, non-Medicaid covered medical and dental expenses, trained medical assistance staff (24 hours or as needed), independent medical check-ups, medical equipment, supplies, programs of cognitive and visual training, respiratory care and rehabilitation (physical, occupational, speech, visual and cognitive), eye glasses, transportation (including vehicle purchase), vehicle maintenance, insurance, essential dietary needs, and private nurses or other qualified caretakers. Also included are non-medical items, such as electronic equipment, vacations, movies, trips, travel to visit relatives or friends and other monetary requirements to enhance the client's self-esteem, comfort or situation. The trust may generally pay for expenses that are not "food and shelter" which are part of the SSI disability benefit payment. However, even these items could be paid for with trust assets but SSI payments could be reduced or eliminated. This may not be problematic if the disabled injury victim qualifies for Medicaid without SSI eligibility. However, many states grant automatic Medicaid eligibility with SSI so one has to be careful about eliminating the SSI benefit.

Conclusion

Each type of trust discussed above has advantages and disadvantages. Some think of pooled trusts as being appropriate only for a smaller settlement, which simply isn't the case. Some think of pooled trusts just for the elderly, which also isn't the case. In the right case, the pooled trust is a great alternative to a (d)(4)(A). Just the same, in some cases a (d)(4)(A) may be the best option because of its flexibility in selecting a trustee and customizable money management options. In the end, a special needs trust, be it pooled or a (d)(4)(A), must be considered because it will safeguard a disabled client's recovery from dissipation and protect future eligibility for needs-based public benefits. Just as importantly, the different types of trusts and their advantages and disadvantages should be considered carefully before making a decision, since special needs trusts are irrevocable, along with having substantial restrictions on how the money may be used. Creating a special needs trust for a disabled injury victim gives them the ability to enjoy the settlement proceeds while preserving critical healthcare coverage along with government cash assistance programs.

1 Medicaid is a needs based public benefit that provides basic health care coverage for those who are financially eligible. The Medicaid program is federally and state funded but administered on the state level. Services and eligibility requirements vary from state to state. The asset limit is $2,000 for single individuals and $3,000 for married couples for most Medicaid programs but the income limits vary by program and state. 2 SSI or Supplemental Security Income, administered by the Social Security Administration, provides financial assistance to U.S. citizens who are sixty five or older, blind or disabled. The recipient must also meet the financial eligibility requirements. 42 U.S.C. § 1382. 3 42 U.S.C. § 1396p (d)(4). 4 42 U.S.C. § 1396p (d)(4)(A). 5 42 U.S.C. § 1396p (d)(4)(C). 6 While most often we deal with someone who has a disability, Social Security Disability also provides death benefits. Additionally, a child who became disabled before age 22 and has remained continuously disabled since age 18 may receive disability benefits based on the work history of a disabled, deceased or retired parent as long as the child is disabled and unmarried. 7 SSDI beneficiaries receive Part A Medicare benefits which covers inpatient hospital services, home health and hospice benefits. Part B benefits cover physician's charges and SSDI beneficiaries may obtain coverage by paying a monthly premium. Part D provides coverage for most prescription drugs but it is a complicated system with a large co-pay called the donut hole. 8 Disability is defined the same way as for Social Security Disability benefits which is that the disability must prevent any gainful activity (e.g. employment), last longer than 12 months, or be expected to result in death. If someone receives disability benefits from Social Security they automatically qualify as being disabled for purposes of SSI eligibility. 9 An individual can only receive up to $552.00 per month ($829.00 for couples) and no more than $2,000 in countable resources. 10 42 U.S.C. § 1396p. 11 To be considered disabled for purposes of creating an SNT, the SNT beneficiary must meet the definition of disability for SSDI found at 42 U.S.C. § 1382c. 42 U.S.C. § 1382(c)(a)(3) states that "An individual shall be considered to be disabled for purposes of this title…if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or…last for a continuous period of not less than twelve months (or in the case of a child under the age of 18, if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or…last for a continuous period of not less than 12 months)." 12 42 U.S.C. § 1396p (d)(4)(A) provides that a trust's assets are not countable if it is "a trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c (a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter." 13 42 U.S.C. § 1396p (d)(4)(C) provides that a trust's assets are not countable if it is "a trust containing the assets of an individual who is disabled (as defined in section 1382c (a)(3) of this title) that meets the following conditions: (i) The trust is established and managed by a non-profit association. (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts. (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1382c (a)(3) of this title) by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court. (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this subchapter." 14 42 U.S.C. § 1396p (d)(4)(B). 15 Third party special needs trusts are creatures of the common law. Federal law does not provide requirements or regulations for these trusts. 16 42 U.S.C. § 1396p (d)(4)(C). 17 Id. 18 Id. 19 Id. 20 If the funds remaining in the trust at death are sufficient to repay Medicaid's payback right in full, many pooled trusts will distribute some portion of the remaining monies to the trust beneficiary's heirs. However, each pooled trust will have a different policy and the amount retained at death can vary greatly. It is very important to investigate how much is retained in this type of situation. Some trusts will only retain $5,000 while others may retain $50,000.

A Few Things You Should Know About the False Claims Act

By Chet Rabon & Marshall Walker

Many recent recoveries under the False Claims Act (FCA), 31 U.S.C. §3729, et seq., have been genuinely eye-popping. Just in the last 18 months, there have been 33 FCA settlements exceeding $25 million, including 13 that topped $100 million. Since 2009, approximately $15 billion has been recovered under in FCA cases, with the lion's share of recoveries coming from citizen-initiated qui tam lawsuits. In the largest of these, the rewards to Relators—who are represented by contingency fee lawyers—have been in the tens of millions. No wonder that more attorneys are trying to get into this practice area. However, the rules and procedures in this niche field are complex and technical and the waiting for results can seemingly take forever. Consequently, these cases just aren't for everyone, despite the Sirens' call.

What Is the False Claims Act?

The False Claims Act is a "bounty hunter" statute that permits a private citizen, called a "Relator," to sue on behalf of the federal government when that person has knowledge and evidence of fraud perpetrated against the government. Many states and a few municipalities and counties have their own versions of false claims acts.

FCA lawsuits are filed under seal. The defendant may not learn that it has been sued under the act for months or even years. While the case is under seal, the government is required to investigate the alleged fraud. Depending on the complexity and scope of the fraud, the government may continue to investigate the case for a lengthy period of time (often years) before deciding whether it considers the case to be meritorious and worthwhile. During this under-seal investigation phase, the Relator and their counsel may be invited to assist the government's investigation, or not, depending on many factors. These range from the enthusiasm (or lack thereof) of the government and investigators for the case to the experience (or lack thereof) of the government attorneys and investigators assigned to the matter. If the Relator is still employed by the defendant, they may be asked to wear a wire and secretly record conversations. It can be incredibly frustrating when government attorneys are not forthcoming with information about the progress of the case, particularly when counsel has invested hundreds of hours of time and thousands of dollars in costs and expenses. For Relator's counsel, the goal is to bring forth a well-developed case that is worthy of government intervention—something even more important during federal budget sequestration.

If the government elects to intervene, the likelihood of recovery increases substantially, since the defendant then faces significant damages, penalties and possible exclusion from government programs. If the government does not intervene, the Relator may still pursue the case through private counsel, though usually that is risky except in very strong cases or when otherwise warranted due to a very high potential recovery. Recoverable damages under the FCA are three times the damages to the government due to the fraud, as well as statutory penalties of up to $11,000 for each fraudulent claim. If the case is successful, the Relator receives between 15% and 30% of the government's recovery. Civil War Origins of the FCA

False Claims Act cases are often referred to as "Qui Tam" lawsuits, derived from the Latin phrase qui tam pro domino rege quam pro se ipso in hac parte sequitur. For non-Latin scholars, that translates more or less as "he who sues on behalf of the King, as well as for himself." The common law writ of qui tam originated in medieval England.

In the U.S., the concept of a qui tam action traces back to 1776. However, those earliest statutes are no longer in existence.[1] The first "real" False Claims Act was enacted during the Civil War to combat rampant procurement fraud against the government. President Lincoln became infuriated when he learned that unscrupulous contractors had sold worthless goods to the Union Army. Depending on whom you believe, the impetus for the False Claims Act was either the provisioning of soldiers with subpar clothing that fell apart when it rained, faulty rifles, sand instead of sugar, bad ammunition, spavined beasts and dying donkeys, moldy biscuits and so on. In the words of REO Speedwagon, "the tales grow taller on down the line."[2] Whatever the driving reason, in 1863 Congress passed a False Claims Act that became known as "Lincoln's Law," which punished wrongdoers with double damages and a $2,000 fine, and rewarded whistleblowers with a 50% bounty.

During World War II, Congress diminished the effectiveness of the FCA through amendments that drastically cut the Relator's bounty (a/k/a the "Relator's Share") and that imposed an onerous "government knowledge" bar. The amendments came as a result of individuals literally eavesdropping on federal grand jury proceedings and then rushing to file parasitic FCA suits based merely upon the information overheard. The 1943 amendments practically nullified the FCA, and the number of qui tam filings plummeted.

By the 1980's, fraud again had become prolific among defense contractors. Senator William Proxmire chided the guilty with his "Golden Fleece Awards" for $435 hammers and $640 toilet seats. The Defense Department told Congress that 45 of the largest 100 defense contractors were under investigation for multiple fraud offenses – including nine of the top 10.[3] As a result of time and circumstance, in 1986 the False Claims Act was revived, reinvigorated, and strengthened, championed largely by Iowa Senator Charles Grassley, but with massive bipartisan support. The FCA as we know it today is largely reflective of the 1986 amendments.

"A Posse of Ad Hoc Deputies"

The False Claims Act is intended to punish fraudsters, recover money stolen from the public till, deter others from committing fraud and reward brave whistleblowers. The False Claims Act achieves these goals very well, and undeniably is the single most important tool in the government's arsenal to fight fraud. In 1987, only 30 FCA actions were filed by Relators. By 2010, the number of Relator-filed actions had leaped to 575, with another 638 filed in 2011 and 647 in 2012. Since 1987, the government has recovered over $40 billion as a result of FCA filings, resulting in billions in awards paid out to Relators. Relator-filed FCA cases dominate the amount of recoveries and, despite the government intervening in only 20% of all cases filed, the amounts recovered when the government has intervened have accounted for nearly 97% of the total money recovered over the last four years.[4] In 1992, Judge Kenneth Hall, of the U.S. 4th Circuit Court of Appeals observed in regard to the FCA that "Congress has let loose a posse of ad hoc deputies to uncover and prosecute frauds against the government."[5] It seems that, over the years, the deputies have done rather well returning fraudulently obtained monies to the treasury and have not done too badly for themselves, either.

Basics of the FCA

In every FCA claim, there must exist some sort of false statement or claim or other fraudulent course of conduct. 31 U.S.C. §3729 broadly defines conduct that creates liability under the FCA. Liability arises not only when the defendant submits a false claim for payment or approval, but also when they cause the submission of false claims by others. An example is when a pharmaceutical company manufactures and distributes adulterated drugs, but the ultimate claims for payment are submitted by doctors, hospitals, or insurance companies which did not know that the drugs were tainted. Additionally, a defendant can be liable for making a "statement material to a false or fraudulent claim", among

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other acts. For liability to attach, a defendant must also have acted with the requisite scienter and "knowingly" have committed the wrongdoing. In this context, the term "knowingly" means that the defendant acted with "actual knowledge of the information," acted in "deliberate ignorance of the truth or falsity of the information," or acted in "reckless disregard of the truth or falsity of the information." Specific intent to defraud is not required.

In addition, the Relator must prove materiality and causation. That is, in general, that the defendant's false statements or fraudulent conducts were capable of influencing a payment decision and/or caused a payment. Damages are not a necessary requirement under the FCA, but usually are a practical necessity because liability for penalties alone is rarely substantial.

The FCA has a six-year statute of limitations, but a recent court opinion interpreting the Wartime Suspension of Limitations Act (WSLA) suggests that the reach back can be much further due to the conflicts in Iraq and Afghanistan.[6] The FCA also protects whistleblowers from retaliation by provisions allowing them to sue for reinstatement, two times back pay, interest, special damages, and costs and fees when whistleblowers are fired or retaliated for engaging in protected whistleblowing activity.

Beware the Trips and Traps

The FCA contains unique jurisdictional requirements and defenses. It is essential that an attorney have a thorough grasp of the statute and relevant case law before pursuing an FCA case. FCA lawsuits must meet the heightened requirements of Federal Rule of Civil Procedure 9(b), which requires pleading with particularity. Rule 9(b) challenges are frequently raised by defendants in FCA cases and can be quite challenging. For example, when the Relator has evidence of a drug company scheme to promote drugs for off-label uses, but does not have evidence connecting the off-label promotion to an increase in off-label prescribing by physicians and billing to government programs (i.e., causation), defeating the motion to dismiss may be virtually impossible, and perhaps such a case simply cannot be brought.

The FCA contains a "first-to-file bar," which bars a second FCA lawsuit when the issues alleged have been raised in a prior FCA suit. Thus, if an FCA Relator loses the race to the courthouse, his or her lawsuit will be subject to dismissal – even though there is no way to determine whether an earlier FCA lawsuit has in fact been brought, because the first case would typically still be under seal at the time a second Relator files their action. Sometimes, the second-to-file Relator will be able to join the first-to-file Relator's lawsuit, and potentially salvage a portion of the recovery.

Likely the most problematic defense in FCA cases is the "public disclosure bar." This bar jurisdictionally precludes lawsuits when the allegations in the lawsuit, or the transactions giving rise to the allegations, have previously been publicly disclosed in certain ways (e.g., through the news media). If public disclosure has occurred, the Relator's claims are barred unless the Relator is considered to be an "original source" of the information. To be an original source, the Relator (among other requirements) must have knowledge that is "independent of and materially adds to" the publicly disclosed allegations or transactions.

Failure to recognize these pitfalls and traps and the statutory requirements of filing an FCA action, can be fatal to the FCA case. It is not uncommon for an attorney who lacks FCA experience to sink a case by not recognizing and complying with the stringent requirements of the act and case law interpreting it.[7] Numerous cases have been dismissed for failure to plead fraud with particularity under Rule 9(b). Cases have been dismissed because documents filed by employee were so lengthy, so disorganized and so laden with cross-references and baffling acronyms that the pleadings could not alert either the court or contractors to the principal contested matters.[8] Cases have also been dismissed for failure to disclose relevant information sufficiently before filing the FCA suit.[9]

Government Intervention Matters and So Does Careful Case Selection

As noted, the goal of every FCA case is to so thoroughly investigate, research and prepare the case that the government will elect to intervene. When cases are intervened, there is a high likelihood of a recovery for the Relator and their contingent fee counsel. By contrast, when the government does not intervene, the likelihood of a recovery becomes almost miniscule and, in fact, approximately 80% of declined cases are not pursued after the declination letter is issued.[10] Further, when cases are declined, the identity of the Relator – who might still be employed with a defendant – is exposed and their job security is put at risk. Sometimes this can be ameliorated by naming the Relator in the Complaint as "John Doe" or "Jane Doe."

Informed case selection therefore is crucial. Most cases without actual documentary evidence in one form or another will likely not succeed. Attorneys handling FCA cases should be highly selective in their case selection and not risk lessening their credibility with the government by bringing each and every case that comes through the door. The vetting process for an FCA case can take significant time, generally much greater than other cases. Often, it may take upwards of a hundred hours or more just to adequately study a potential FCA case and determine its merits. This is particularly true in complex cases or cases in which the potential client has thousands of documents.

The Long and Winding Road

Common misconceptions among attorneys not experienced with FCA cases include the belief that they involve a limited amount of work on the front end, that all that is required is to file a basic lawsuit which will result in the government taking over the case. Further, that at some point in the future, the government will obtain a large recovery with consequent large payouts to the Relator and their counsel—or that the government "does all the work." When reading the headlines about a whistleblower being paid $96 million on a $600 million recovery and knowing that government intervention occurred, it is easy to think that might be the case. Although many of the FCA cases that make headlines are the $100 million (or larger) cases, those cases are not reflective of the majority of FCA results. The median FCA recovery in Relator-initiated cases, as of 2006, was $784,597, and the median Relator's share was $123,885.[11]

Approximately half of all successful cases result in recoveries of $2 million or less, and the average Relator's Share in those cases is about 16%, of which about half goes to fees and taxes. Further, the average successful case will take about 38 months to reach conclusion, and there is no reward at all in about 80% of all cases filed.[12]

The case which resulted in a $96 million reward in 2010 took more than 7 years to reach its conclusion after the whistleblower brought the claim to her attorneys. The firm that handled the case sunk thousands of hours of time and tens of thousands of dollars in expenses before bringing home a successful result in partnership with the government. The stress on Relators during those years can be very taxing.[13] Most Relators do not bring FCA cases simply for the money, and many report having second thoughts having endured the process. Whistleblowing is simply "not for wimps," nor should attorneys be taking these cases thinking they will result in quick and easy money.

Conclusion

The False Claims Act, and the body of case law interpreting this law, presents substantial challenges to lawyers unfamiliar with its technicalities and nuances. This statute, and other similar measures such as the IRS and SEC whistleblower programs, are rife with minefields for counsel new to this complex area of law. Jumping through all the right hoops, and dotting all "i's" and crossing all "t's", in a False Claims Act case is not all that simple. The consequences of getting it wrong are dire for a Relator and their counsel. Because of the possibility of large recoveries in the right case, the temptation to take on the unfamiliar and bring an FCA lawsuit – on the chance it might pan out, however dubious the claim or the evidence – can be strong. Lawyers seeking to get into this practice area and who are evaluating such cases for the first time should consider associating experienced FCA counsel.

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1 *See Christina Orsini Broderick, Note, Qui Tam Provisions and the Public Interest: An Empirical Analysis, 107 Colum. L. Rev. 949, 952 (2007).* ***2*** *REO Speedwagon, Take It on the Run (Epic Records 1980).* ***3*** *The False Claims Reform Act of 1985, S. Rep. 99-345, at 2 (1986).* ***4*** *See U.S. Dept. of Justice, Fraud Statistics – Overview: October 1, 1987 – September 30, 2012, available at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.* ***5*** *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center, 961 F.2d 46, 49 (4th Cir. 1992).* ***6*** *United States ex rel. Carter v. Haliburton Co., 710 F.3d 171, 178–79, 181 (4th Cir. 2013) (holding that the WSLA suspends statutes of limitations for fraud committed against the government during times of war, regardless of whether war was formally "declared").* ***7*** *See, e.g., United States ex rel. Beauchamp v. Academi Training Center, Inc., 2013 U.S. Dist. LEXIS 39620, *53–*57 (E.D. Va. March 21, 2013) (dismissing plaintiff's claims regarding a "weapons qualifications scheme" under the public disclosure bar because the relator did not make the required voluntary pre-filing disclosure to the government).* ***8*** *See, e.g., United States ex rel. Garst v Lockheed-Martin Corp., 328 F3d 374 (7th Cir. 2003) ("Complaints like this are pestilential, and the district court showed great restraint in wading through four iterations plus one 'more definite statement' before giving up.").* ***9*** *See, e.g., United States ex rel. Ackley v. IBM, 76 F. Supp. 2d 654, 669 (D. Md. 1999) ("[T]here remains no competent evidence demonstrating that Ackley voluntarily disclosed the relevant information to the Government before filing suit and, in consequence, the first two counts of his suit must fail for lack of subject matter jurisdiction.").* ***10*** *Taxpayers Against Fraud, Whistleblowing 101: How to do Good and Do Well…and Survive to Tell the Tale, at 6, available at http://www.taf.org/node/455.* ***11*** *U.S Gov't Accountability Office, GAO-06-320R, Information on False Claims Act Litigation 13 (2006).* ***12*** *Taxpayers Against Fraud, supra note 10, at 6, 8.* ***13*** *Aaron S. Kesselheim, et al., Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies, 362 N. Eng. J. Med. 1832 (2010).*

Florida's Switch from Frye to Daubert:

Not a Substantial Change in the Admissibility Determination of Expert Witness Testimony

By Sara W. Calabrese & Bernard F. Walsh, Esq.

Preface

The Daubert standard is replacing the Frye standard in many states for determining the admissibility of expert witness testimony. The purpose of this article is to further an understanding of both tests and how they are used effectively.

Introduction

On July 1, 2013, Florida House Bill 7015 will effectively change the standard of admissibility of expert witness testimony under the Florida Evidence Code.[1] In passing the bill, the Florida Legislature formally adopted the standard set forth in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993) and abandoned the standard set forth in ***Frye v. United States***, 293 F. 1013 (D.C. Cir. 1923).[2]

Though the Supreme Court decided Daubert in 1993, Florida courts declined to follow the decision because they considered the Daubert standard more lenient and less reliable than the Frye standard.[3] However, a 2005 Virginia Law Review study concluded the practical results on the admissibility of expert testimony are essentially the same regardless of what standard a jurisdiction follows.[4]

Judges construing the admissibility of expert testimony under the Frye standard have unwittingly been using the Daubert reliability factors to aid their decisions.[5] Therefore, the recent legislative change will not substantially affect how trial judges address the admissibility of expert witness testimony.

The Frye Standard

The Frye standard applies only to expert testimony based on "new or novel scientific" principles or procedures.[6] For the testimony to be admissible, the principles and the procedures "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[7] General acceptance hinges on the quality and quantity of the evidence supporting the principles and procedures; majority support alone is insufficient.[8]

In ***Ramirez v. State***, the Florida Supreme Court specified the process by which a trial judge must evaluate expert witness testimony under Frye.[9] First, the trial judge must determine whether the testimony is relevant; will the testimony "assist the jury in understanding the evidence or determining a fact in issue."[10] Second, the trial judge must determine whether the scientific principles and procedures underlying the expert's testimony meet the Frye general acceptance test.[11] General acceptance must be proven by the proponent and by the preponderance of the evidence.[12] Third, the trial judge must determine whether the expert is qualified to testify on the issue in question.[13] The expert testimony is admitted if it meets these tests, and then it's up to the jury to evaluate its weight and credibility.[14] The standard of review of a Frye determination is de novo.[15]

Expert testimony that is "pure opinion" or testimony that does not involve novel scientific evidence does not have to meet the Frye test to be admissible.[16] Pure opinion testimony is based only on the expert's personal experience and training and is presumptively admissible as long as it is relevant and the witness is qualified to present the opinion.[17] "Frequently, there does not appear to be an obvious distinction between expert testimony which is pure opinion and that which is subject to Frye."[18]

The Daubert Standard

In Daubert, the court held the Federal Rules of Evidence superseded the common law in interpreting evidence; however, the common law still provides interpretive guidance to the courts.[19] Rule 702 of the Federal Rules of evidence requires expert testimony be relevant to the case in issue and derived from the scientific method.[20] The trial judge performing a Daubert admissibility evaluation acts as a "gate-keeper," screening evidence to ensure only reliable scientific testimony is admitted.[21]

The court enumerated a number of factors to guide trial judges in performing a Daubert reliability evaluation.[22] The factors were not intended as a dispositive test or exhaustive checklist; some factors may not apply in all cases and additional factors may be considered.[23]

First, the trial judge should consider whether the expert's theory or technique was "derived from the scientific method" or more specifically, through "hypothesis testing."[24] Second, the trial judge should review the rate of error of the expert's technique and evaluate what standards exist to control its operation.[25] Third, the judge should note whether the expert's theory or technique were subject to peer review and publication as this increases detection of flaws.[26] Finally, consistent with Frye, the court must consider whether the expert's theory or technique is generally accepted in the relevant scientific community.[27] Other rules of evidence are also important to consider in the admissibility analysis including Rules 703, 706 and 403.28 The standard of review of a Daubert ruling is abuse of discretion.[29]

In ***Kumho Tire Co., Ltd. v. Carmichael***, the Supreme Court held the Daubert test applies to an expert's pure opinion testimony in addition to scientific knowledge.[30] If the expert's testimony is supported only by his personal experience and training and is unsupported by independent analysis, it is automatically excluded regardless of the witness's qualifications.[31]

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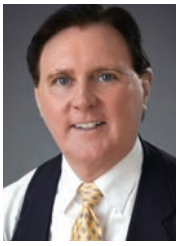

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Reconciling Daubert and Frye

Upon evaluation of the two tests and the case law interpreting them, it is difficult to distinguish how evidence is reviewed for admissibility under the Frye and Daubert standards.

Goal of the Standards

The goal of both standards is the same: to prevent scientifically unreliable testimony from being admitted into evidence and prejudicing the jury's decision.[32] The goal of Daubert was not necessarily to create a new admissibility test, but to bring awareness of the problem of unreliable "junk science" to the judiciary.[33]

Role of the Trial Judge and the Burden of Proof

The trial judge's charge as gatekeeper under Daubert is the same role the trial judge maintained under Frye and requires the same duties.[34] While both tests require the trial judge review the evidence supporting the reliability of the expert's testimony, the burden of proof is on the proponent of the evidence.[35] The difference between the two standards is the level of proof the proponent must demonstrate to the trial judge.[36]

Under Frye's general acceptance, the proponent must demonstrate a threshold showing that the relevant scientific community recognized the expert testimony to be reliable.[37] The proponent need only provide the trial judge with a basis for knowing what the scientific community believes and generally accepts.[38] Thus, the trial judge was able to defer to the opinions of scientists in the pertinent field in evaluating the reliability of expert testimony; familiarity with the scientific method was not required.[39] Daubert, however, requires the proponent go an extra step and prove the merit of the scientific basis underlying the expert witness testimony.[40]

Both standards require the trial judge develop an understanding of the scientific evidence, but neither requires the trial judge become an expert.[41] Rather, Daubert requires the proponent of the evidence provide the trial judge with more complete information to demonstrate the validity of the science.[42] "Pertinent evidence based on scientifically valid principles will satisfy [this] demand."[43] This additional information empowers trial judges to reject suspect expert testimony as unreliable when it lacks the proper foundation in the scientific method.[44]

The move to the Daubert standard will likely have the greatest effect on the admissibility of pure opinion testimony and testimony based on standard scientific techniques.[45] Frye only applied to opinions based on new or novel scientific techniques.[46] Therefore, testimony of this type was not subject to the general acceptance reliability review.[47] Under Daubert, the proponent of pure opinion testimony will have to demonstrate to the trial judge something more than the expert's personal experience and training to support the opinion.[48] Furthermore, the proponent will also have to provide evidence for the basis of the standard scientific technique in order to demonstrate its validity and reliability.[49] The trial judge still may exclude the testimony if there is "too great an analytical gap…between the existing data and the expert's conclusion."[50]

Method of Evaluating Admissibility and Reliability

The Frye method of evaluating the admissibility of expert testimony is the same as the Daubert method. Under both tests, the trial judge must determine: (1) if the expert is qualified to offer the opinion, (2) whether the testimony is relevant to an issue in the case under consideration and (3) whether the expert testimony is reliable.[51] Under Frye, reliability is based on general acceptance in the relevant scientific community of the underlying scientific principle and the testing procedures.[52] Under Daubert, reliability is based on a number of factors, including Frye's general acceptance standard.[53]

Florida courts interpreting Frye have used the Daubert factors as a method to evaluate the general acceptance standard.[54] Peer review and publication of scientific methods are indications of general acceptance.[55] Scientific theories and techniques are rarely peer reviewed and published if they are not developed through hypothesis testing and error rate calculation.[56] Furthermore, Florida courts have instructed expert witnesses to use hypothesis testing and error rate calculation in developing their opinions and have cited to scientific treatises to support this instruction.[57]

Evaluating Conflicting Expert Witness Testimony

As part of the reliability analysis, House Bill 7105 requires the expert witness testimony be "based upon sufficient facts or data." [58] Oftentimes, experts reach different conclusions when scientific facts are in dispute.[59] However, the trial judge is not to decide which version of the facts is the correct version and it is inappropriate to exclude expert testimony on this basis.[60]

An expert opinion should not be excluded solely because of the existence of other conflicting opinions or because it required application of scientific judgment in forming the opinion.[61] Scientists may disagree on the same scientific issues, but this goes to the weight not the admissibility of their opinion.[62] "Trial courts must resist the temptation to usurp the jury's role in evaluating the credibility of experts and choosing between legitimate but conflicting scientific views."[63] "To involve judges in an evaluation of the acceptability of an expert's opinions and conclusions would convert judges into fact-finders" to an extent not contemplated by Florida's Frye jurisprudence."[64]

Conclusion

Florida's shift from the Frye standard to the Daubert standard will not substantially change the legal analysis judges use to evaluate the admissibility of expert witness testimony. The goal of the trial court will be the same; to admit only relevant and reliable expert witness testimony. The method of reviewing expert testimony for admissibility will also be the same. Finally, admissibility will still be within the discretion of the trial judge.

The shift to Daubert will increase the burden of proof on proponents of expert witness testimony. This additional burden will provide trial judges additional tools and force of law to reject junk science and require expert testimony be based on the scientific method. This will not impose additional responsibility on trial judges, because they are already implicitly reviewing novel science for reliability under Frye using the Daubert factors.

__1__ Florida Statute §90.702 was amended to read: "Testimony by experts: If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if: (1) The testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and (3) The witness has applied the principles and methods reliably to the facts of the case." Florida Statute §90.704 was amended to read: "Basis of opinion testimony by experts. The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." __2__ 2013 Fla. Sess. L. Serv. ch. 2013-107 (West). __3__ Brim v. State, 695 So. 2d 268, 271-272 (Fla. 1997). __4__ Edward K. Cheng and Albert H. Yoon, Does Frye or Daubert Matter? A Study of Scientific Admissibility, 91 Va. L. Rev., 471-513 (Mar. 18, 2005) (evaluating removal rates to federal court when states switched from Frye to the Daubert standard concluded no statistical difference in number of cases filed under Daubert or Frye standard). __5__ Stephen Mahle, The Impact of Daubert v. Merrell Dow Pharmaceuticals, Inc., on Expert Testimony: With Applications to Securities Litigation, Fla. B.J. 36, 41 (March, 1999). __6__ Brim, 695 So. 2d at 271-272. __7__ Frye, 293 F. at 1014 __8__ Brim, 695 So. 2d at 272. __9__ Ramirez v. State, 651 So. 2d 1164, 1167 (Fla. 1995). __10__ Id. at 1167. __11__ Id. at 1167-1168. __12__ Id. at 1168. __13__ Id. __14__ Id. __15__ Brim, 695 So. 2d at 274. __16__ Marsh v. Vaylou, 977 So. 2d 543, 548 (Fla. 2007). __17__ Id. __18__ 1West's Fla. Prac. Series Evidence § 702.1 (2013). __19__ Daubert, 509 U.S. at 587-588. __20__ Id. at 590. __21__ Id. at 596-597. __22__ Id. at 593-595. __23__ Id. at 593. __24__ Id. at 590, 593. __25__ Id. at 593-594. __26__ Id. at 593-594. __27__ Id. at 594. __28__ Id. at 595. __29__ General Electric v. Joiner, 522 U.S. 136, 139 (1997). __30__ Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 157 (1999). __31__ Id. __32__ Brim, 695 So. 2d at 271; Daubert, 509 U.S. at 589. __33__ Edward K. Cheng supra n.4 at 474; Kumho, 526 U.S. at 157, 159 (Scalia, concurring). __34__ Manuel Real, Daubert-A Judge's View-A Reprise, SK042 ALI-ABA 447, 470 (2005). __35__ Ramirez, 651 So. 2d at 1168; Bourjaily v. United States, 483 U.S. 171, 171-176 (1987). __36__ Berry v. CSX Transp., Inc., 709 So. 2d 552, 557 n. 4 (Fla. 1st DCA 1998); Julia Luyster, Frye and Daubert Challenges: Unreliable Options vs. Unreliable Science, 26 No. 2 Trial Advoc. Q. 29 (Spring 2007). __37__ Berry, 709 So. 2d at 555. __38__ Id. __39__ Id. at n. 4. __40__ Id. __41__ Daubert, 508 U.S. at 601 (Rehnquist and Stevens concurring in part and dissenting in part). __42__ Berry, 709 So. 2d at n. 4. __43__ Daubert, 509 U.S. at 597. __44__ Id. at 590. __45__ Marsh, 977 So. 2d at 548 (medical causation testimony is standard witness testimony). __46__ Brim, 695 So. 2d at 271-272. __47__ Id. __48__ Kumho Tire, 526 U.S. at 157. __49__ Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77, 81 (1st Cir. 1998). __50__ Kennedy v. Collagen Corp., 161 F.3d 1226, 1230 (9th Cir. 1998). __51__ Stephen Mahle, Expert Testimony in Florida Courts, http://www.daubertontheweb.com/florida_overview.htm (accessed June 18, 2013). __52__ Frye, 293 F. at at 1014. __53__ Daubert, 509 U.S. at 593-595. __54__ Mahle, supra n. 5, at 41. __55__ Id.; See Williams v. State, 710 So. 2d 24 at 44 (Fla. 3d DCA 1998); Berry v. CSX Transportation, Inc., 709 So. 2d 552 at 569 (Fla. 1st DCA 1998) (Cope concurring in part and dissenting in part). __56__ Mahle, supra n. 5, at 39. __57__ Id.; See Brim, 695, So. 2d at 270 citing Committee on DNA Forensic Science & Commission on DNA Forensic Science, National Academy of Sciences, The Evaluation of Forensic DNA Evidence, (Prepublication copy) at 6-24-6-26 (1996); Berry, 709 So. 2d at 556 citing David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, Modern Scientific Evidence: The Law and Science of Expert Testimony, § 1-3.3 (1997)(herein Modern Scientific Evidence). __58__ Fla. Stat § 90.702(1) (2013). __59__ 28 U.S.C.A. §702 (2011) (See Comment to Year 2000 Amendment). __60__ Id. __61__ Milward v. Acuity Specialty Products Group, Inc., 639 F.3d 11, 22 (1st Cir. 2011); Lee Gunn & Samuel Harden, Daubert Enters Florida Courtrooms, FJA Annual Convention (June 13-14 2013, St. Petersburg, FL). __62__ Id. __63__ Marsh v. Valyou, 977 So. 2d 543 at 549 (Fla. 2007). __64__ Id. at 549-550 citing Rodriguez v. Feinstein, 793 So. 2d 1057, 1060 (Fla. 3d DCA 2001)

Physician Re-Direct Examination:

Focus on Context and Science to Uncloak the Black Hat

By Jody V. McKnight

The goal of an insurance defense lawyer in a personal injury trial is to turn the jury's attention away from the Defendant's bad acts, and make the story of the case about the credibility and believability of the Plaintiff and/or the Plaintiff's treating physicians; and to confuse the jury with a combination of scientific fact and fallacy.

A well prepared defense lawyer can make an honest and competent treating physician look uninformed and wrong, and an honest, significantly injured person appear to be dishonest and money motivated. Add a lawyer/doctor referral, and the juror is squarely focused on finding a reason not to award significant damages to an otherwise good, honestly injured person.

THE SAME FACTS:
Two Different Stories of the Case

One Perspective

"I hurt my back five years ago in an auto wreck. I went through some treatment with my family doctor and a physical therapist and got better. I had a lawyer because that accident wasn't my fault, and we settled the case. I was doing fine, no real symptoms in my neck or arm for two years, not having much if any pain, until THIS auto wreck. Now I am unable to function like I used to at home and at work. My life is not the same."— Injured Person

A Second Perspective

"The Plaintiff, who is suing Mr. Johnson for money, has had "degenerative disc disease" in his spine for many years, as indicated in past medical records, but didn't disclose or admit this to his doctors. Nor did he tell his doctors in THIS auto wreck that he had been previously diagnosed with a permanent medical impairment to his spine from his degenerative disc disease and injuries from his previous auto wreck, where his car was totaled; for which he received money from a lawsuit. So consider that when considering the opinions of the Plaintiff's doctor has given. His lawyers sent him to the doctor back then; and his lawyer did the same thing here. Ladies and gentlemen, we know what's going on here. Use your commonsense."— Defense Attorney, Mr. Black Hat

DEFENSE LAWYER CROSS EXAM:
A Familiar Scenario

The treating physician will have testified about the history obtained, examination, testing, findings, diagnoses, treatment recommendations, treatment administered, patient condition upon discharge if applicable, and will give opinions to a reasonable degree of medical certainty, that most probably, the patient's condition(s) and clinical intervention(s) were caused by the event giving rise to the lawsuit.

And then comes lawyer Black Hat's cross-examination:

DL: You would agree that you are an advocate for your patients; is that correct? (Yes)

DL: You obtain a past medical history when you first see a patient; is that correct? (Yes)

DL: And it is *crucial* for you to receive an accurate past medical history in order to properly form opinions on causation; is that correct? (Yes)

DL: And the sources of past medical histories can include the patient, correct? (Yes)

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DL: As well as from other doctors' records? (Yes)

DL: And it's your goal to keep detailed medical records, is that correct? (Yes)

DL: Because you understand that other doctors may rely on your records? (Yes)

DL: Let's talk for a minute about the anatomy of the spine. (Ok)

DL: The cervical spine has seven vertebrae; is that correct? (Yes, C1 to C7)

DL: That's C1 at the top and C7 on the bottom? (Yes)

DL: And in between the bones and vertebrae, there are discs? (Correct)

DL: And the disc is made up of a tough outer fibrous covering called the annulus fibrosis? (Yes)

DL: And the inside of the disc is called the nucleus pulposus? (Yes)

DL: And as people get older, the moisture in the disc dries out? (Yes)

DL: And that can result in disc space narrowing; is that correct? (Yes)

> ***A well prepared defense lawyer can make an honest and competent treating physician look uninformed and wrong, and an honest, significantly injured person appear to be dishonest and money motivated.***

DL: It can also result in bulging discs? (No, I don't agree with that)

DL: Do you agree that degeneration can result in osteophytes? (Yes)

DL: Do you agree that degeneration can result in herniated discs? (Yes, degeneration of the annulus could cause that)

DL: And do you agree that degeneration of the discs in a spine can result in pain? (Yes)

DL: And it can result in nerve root impingement? (Yes)

DL: And the natural progression of someone that has degenerative disc disease is for it to continue to progress with time; is that correct? (Yes, in general, but it varies, depending on each person's individual physiology. Some degenerate faster than others)

DL: Doctor, we are here over an auto accident that occurred on February 28, 2012, which he alleges is the cause of his neck and arm pain, and treatment for that pain, correct? (Yes, that's what I understand)

DL: Were you aware that the Plaintiff has been diagnosed with degenerative disc disease as far back as 2008?

DL: Doctor, let me show you Defendant's Exhibit 2. This is an MRI, dated January 1, 2009. Were you aware that the Plaintiff was treated for neck and arm pain from an auto accident that occurred in December 15, 2008, ten days prior to that MRI being taken? (No)

DL: Were you aware that the MRI showed the Plaintiff to have degenerative disc disease in his neck as far back as this study in 2008?

DL: And doesn't this degenerative disc disease take years to develop? (Yes)

DL: So it was probably there for a couple of years prior? (It's had to say, but calcium deposits build up over time).

DL: That January 1, 2009 MRI…it has findings at all levels of osteophytes and moderate to moderately severe foraminal stenosis of the foraminal canals, which is narrowing of those holes where the nerves run through? (Yes)

DL: And that's part of degenerative disc disease? (Yes)

DL: And at level C-6-7, there are more degenerative findings, but in addition, a bulging disc? (Yes)

DL: And it appears the Plaintiff was complaining of neck pain, radiating down his left arm as far back as 2008? (Yes)

DL: Have you seen his emergency room records from the 2008 auto wreck? (No)

DL Now doctor, let me show you what was previously marked as Plaintiff's Exhibit 2. Is that the MRI you ordered, dated March 10, 2012, following his auto accident with Mr. Johnson on February 28, 2012? (Yes)

DL: Doctor, is it your opinion to a reasonable degree of medical certainty, that most probably, the osteophytes and foraminal stenosis, and bulging disc pre-existed the 2012 accident with Mr. Johnson? (Yes)

DL: And looking at that March 10, 2012 MRI, would you agree there are no fractures noted? (Yes)

DL: And no swelling, hemorrhaging or bleeding? (Correct)

DL: And no torn ligaments? (Correct)

DL: With the exception of some more advanced foraminal stenosis/narrowing, at level C 4-5, as shown on the most recent MRI, would you agree that the findings are essentially the same? (Yes, that's a fair statement)

DL: Did the Plaintiff disclose to you during treatment that he filed a lawsuit against a Janet Billings on July 10, 2009, seeking money for neck and arm pain, permanent impairment to the cervical spine, and a chronic neck condition? (No, he never mentioned it)

DL: Is this something you would consider to be important information? (Yes)

DL: Did he disclose to you at any time that he claimed loss of enjoyment of life and alteration of lifestyle stemming from that 2008 wreck in the 2009 lawsuit?

DL: Are these past complaints and claims something you would consider to be important for you to know if one of your patients claimed to have a permanent injury

that pre-existed an accident that you are now testifying concerning causation on? (Yes, I suppose so).

DL: Because it is impossible for you to form opinions on causation without having an accurate past medical history, correct? (Yes).

DL: Doctor, please look at Defendant's Exhibit 3, which is your intake sheet on the Plaintiff, dated March 3, 2009, 4 days after the auto accident with Mr. Johnson, correct? (Yes)

DL: Does this appear to be the Plaintiff's handwriting, or do you know? (Not sure, but that would be normal for the patient to fill it out).

DL: Under the section entitled: "Significant Past Medical History," it has two lines, and those lines are left blank? (Yes, appears to be)

DL: So, the Plaintiff, who has had degenerative disc disease as far back as 2008, didn't disclose that to you? (No)

DL: And he didn't disclose that he had treatment for previous neck pain and arm pain, stemming from an auto wreck in 2008?

DL: Doctor, are you familiar with the concept of secondary gain? (Yes, that is when patients involved in suits exaggerate symptoms or take longer to recover, for attention, sympathy, or sometimes money from a lawsuit)

DL: Thank you doctor

Doctor Opinion Validity and Plaintiff Credibility

Following an effective cross-examination of this nature, the story of the case becomes about the validity of the doctor's causation opinions, and the credibility of the Plaintiff. The Plaintiff ends up being the one on trial, not the Defendant; and jurors perceive that *the Plaintiff is not playing by the rules*[1], for failing to disclose what appears to be conditions that would more likely than not, be in the Plaintiff's mind at the time of intake and treatment. This excites the reptilian[2] instincts of jurors and makes them feel that an award to such a Plaintiff would be unfair to the Defendant and dangerous for them to take part in the Plaintiff's apparent ruse. Jurors then spend the rests of the trial looking for reasons to minimize compensation to the Plaintiff…that is, until the real story is told.

As a general rule and logical syllogism:(a) the person with *more information*, is able to make more objective and informed decisions than the person with *less information*; and (b) the person with more information gives more reliable opinions due to having more information. By gathering a plethora of documents and information using litigation tools, the defense lawyer places himself in a superior position to bully a treating physician, who has limited his/her records for the limited purpose of treating the patient.

Simply having more documents and medical condition references makes the jury believe instinctively that somehow, the doctor's information is deficient; and in confusing concepts of "degenerative disc disease," "permanent impairment," and "chronic condition," from past injuries, it is made to appear that the past medical records are significant game changers.

The Real "Black Hat" Story: A lawyer using litigation tools with ambiguous and confusing medical terminology acts to minimize the Defendant's responsibility for the bad acts and "adds insult to injury."

The *medical context* of records and data gathering is for the purpose of treating, helping, and healing; and is done in a clinical setting in a defined time frame within clinically significant parameters to suit those purposes. This is very much *unlike* the *legal context* of records and data gathering, which involves subpoenas, deposition testimony, detailed interrogatories, and a team of paralegals. It's no wonder Mr. Black Hat has more documents that the treating physician! Moreover, Mr. Black Hat's purpose is not to help and heal. His purpose is to discredit the Plaintiff and minimize exposure for the Defendant, who is paying him to do so. Who is motivated by issues of "secondary gain?" Mr. Black Hat needs to look in the mirror.

In *Stage I* of the treating physician redirect the focus is on context and structure. *Stage II* of re-direct focuses on the intake and data gathering protocol of the doctor and bolsters Plaintiff credibility. *Stage III* clarifies scientific terminology and broadens the parameters of the Plaintiff's likelihood of having little or no symptoms prior to the insult by the Defendant.

Combined, the Stages of treating physician redirect examination outlined below help jurors understand that lawyer Black Hat is the one in the room not being forthright and honest. He is *not playing by the rules* with the jury by: a) taking the medical and legal systems of record and data gathering out of context, and b) mixing them to suit his and the Defendant's purpose of minimizing exposure. How dare Mr. Black hat even suggest that the Plaintiff, in the medical context, should have had or could have had the ability to garner together as much information for the initial treatment after a wreck, as Mr. Black Hat vacuumed up over a one-year period using *heavy-handed litigation tools!*

It refocuses the jury on the real story of the case…the story about defense lawyer Black Hat and the Defendant who have created harms and losses and, who now will go to great lengths to confuse the jury and obscure the truth.

STAGE I REDIRECT:
Focus on Context and Structure

PL: Doctor, do you or your staff use *legal subpoenas* to gather patient records? (No)

PL: Do you employ any legal assistants or paralegals in your medical office? (No)

PL: Do you bring your patients in and take their depositions? (No)

PL: I'm going to read you *Supplemental Interrogatory* number 7 that the Defendant and his lawyer sent to Mr. Smith in this case:

"Name every health care provider for the last ten (10) years from whom you have sought treatment, and describe with particularity the following: the initial onset of any illness, names, addresses, telephone numbers of doctors, treatment, resolution, the date the Plaintiff was able to resume normal everyday activities of daily living, etc…[3]

PL: Is there a difference between the information and document gathering protocol/system in the *medical context* of treating patients, as opposed to subpoenas, depositions, and detailed interrogatories, used in the legal context. (Yes)

STAGE II REDIRECT:
The Intake Sheet, a Source of Ambiguity and Confusion

PL: Doctor, would you please describe your *patient intake process* and how information and records are gathered in the *medical context*, in your *medical office?* (Intake sheet, interview re: history and symptoms, examination, testing, findings etc.)

PL: Do you order records from other doctor's offices on occasion if necessary? (Yes)

PL: When you gather medical information and records, what is your purpose in doing so? (To diagnose and treat the patient).

PL: Is your records and information gathering system/protocol *similar to other health care providers* and medical offices? (Yes)

PL: Is your records and information gathering protocol in the medical context, *within the standard of care* of the medical community? (Yes)

PL: Are you aware of any health care provider who uses subpoenas, depositions, or written interrogatories to gather records and information to treat patients? (No)

PL: Let's have a look at your intake sheet. As the Defendant's attorney pointed out a few minutes ago, there are two lines that follow "Significant Medical History." They are left blank.

PL: Is the term "Significant" capable of a number of meanings? (Yes)

PL: Does pain affect concentration? (Yes)

PL: Is this the first time an injured patient has left the Significant Past Medical History section blank? (No)

PL: From your standpoint, having known and treated Mr. Smith for _____ months/years, does the fact that this "Significant Medical History" section was left blank mean to you that Mr. Smith was being dishonest or attempting to withhold information? (No) [Note: some questions may get a "leading" objection; be prepared to rephrase if necessary].

PL: Based on your personal experience with Mr. Smith, has he been forthright and honest with you regarding information that you requested in this *medical context* of information gathering for the purpose of treatment? (Yes)

PL: Was he motivated to get better? (Yes)

PL: Did he, in fact, make improvement from the point of intake until you released him from care? (Yes)

PL: Did he make his appointments and follow your recommendations? (Yes)

PL: What residual problems was he left with when you released him from care?

PL: What history did he give you about what caused his symptoms? (Auto wreck one week prior)

PL: Is there anything on your intake sheet or anywhere else in your process that requests information and documents on past auto accidents, ones that pre-dated the most recent? (No)

PL: Mr. Black Hat showed you this document, indicating Mr. Smith had been involved in a previous auto accident, where he suffered a neck injury, what was that date? (1.5 years prior).

PL: What is your understanding as to how Mr. Smith was doing before this wreck? (Fine and functional)

PL: Are you satisfied that your system of gathering records in the *medical context* provided you with the information you needed to examine, test, diagnose and treat Mr. Smith? (Yes)

PL: Does it therefore surprise you that Attorney Black Hat has shown you documents that he gathered in litigation, that you have never seen before? (No)

Stage III REDIRECT:
Clarifying Scientific Fact and Fallacy

PL: Doctor is Degenerative Disc Disease a "disease" in the traditional sense? (Not really)

PL: Is it more of a degenerative process, the calcification, osteophytes, and etc.? (Yes)

PL: Do you think degenerative process is a better word for it? (Yes)

PL: Do most people over the age of 30 have what has been referred to as "degenerative disc disease?" Could you explain? (Yes, he explains)

PL: Does the fact that a person has degenerative issues, the foraminal stenosis, osteophytes, etc., mean he/she is necessarily in pain? (No. Pain depends on many factors.)

PL: Does the MRI picture tell the whole story about whether a person is or should be having symptoms? (Not really)

PL: Do you find that patients with horrible looking MRI scans have no symptoms or very little symptoms of pain? (True)

PL: Is someone with degenerative findings, this foraminal stenosis (hold up model showing nerves and vertebrae), osteophytes, more likely to have symptoms that would require clinical intervention than, for example, a teenager, with a young neck with no degeneration? (Yes)

PL: Has anything you have heard or seen today during your examination, changed your opinion to a reasonable degree of medical certainty, that most probably, Mr. Smith's symptoms and clinical treatment are most probably caused by the auto wreck of February 28, 2008? (No)

PL: Did Mr. Black Hat show you any documents showing that Mr. Smith had any treatment within _____ months/years prior to February 28, 2008? (No)

PL: What significance does that have to you? (That Mr. Smith was doing fine prior to the wreck; aggravation of non-symptomatic pre-existing condition)

PL: Thank you.

Conclusion

By making the distinction between records and data gathered in the *medical context*, as opposed to the *legal context* in Stage I redirect, the jury understands the systemic issue at play and has confidence in the doctor's system for his distinct purpose: to diagnose, treat and heal. The jury also understands more about litigation tools and understands the nuts-and-bolts of what has allowed Mr. Black Hat to have more documents; and therefore, the jury understands why the treating physician reasonably has never seen the documents passed to him/her by the defense lawyer. Stage II redirect bolsters credibility and shores up the validity of the doctor's opinion on causation; and Stage III redirect makes the jury understand that the attorney was either trying to pull the wool over the jury's eyes with confusing medical terminology; or, simply mistaken about the significance of those degenerative findings.

If it goes well, the jury will not be as concerned about the Plaintiff's credibility, or the validity of the treating physician's opinion; rather, the jury will see the case as the story of an honestly injured person being bullied by a defense lawyer, who has used the tools of litigation unfairly and obscured the truth with complex medical terms from past medical records to minimize the Defendant's exposure for the harms and losses caused by the Defendant's bad acts. That is where we want the jury when they go back to deliberate.

1 Friedman, Richard H., and Patrick A. Malone. Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability. Trial Guides LLC, 2006. ***2*** *Ball, David A., and Don C. Keenan. Reptile: The 2009 Manual of the Plaintiff's Revolution. Balloon Press, 2009.*
3 *Read aloud the complete supplemental interrogatory and subsections related to medical history, symptoms, treatment, names of doctors, etc. Take your time.*

The Dangers of Florida's Fashionable Ban on Texting While Driving Law, *F.S. 316.305 (2013)*

By Corey B. Friedman

The Dangers of Florida's Fashionable Ban on Texting While Driving Law, F.S. 316.305 (2013)

Benjamin Franklin is attributed for famously proclaiming that "[n]o man's life, liberty or fortune is safe while the legislature is in session." And, as of October 1, 2013, I'd like to suggest that Florida's roads are now exposed to that creed too.

Before we begin: in no way should this article be interpreted that I advocate texting while driving. The purpose of this article is to explain a dangerous, counterintuitive and costly social reaction to legislation under the façade of safety.

Texting while driving is viewed as one of the most dangerous types of distractions while behind the wheel of a motor vehicle. Arguably, this is because it involves "…manual, visual, and cognitive distractions simultaneously."[1] In fact, the National Highway Traffic Safety Administration reported that "text messaging creates a crash risk 23 times worse than driving while not distracted."[2] "This is largely because 'sending or receiving a text takes a driver's eyes from the road for an average of 4.6 seconds, the equivalent—at 55 mph—of driving the length of an entire football field.'"[3]

That information is sobering. But what if I could demonstrate to you that the social reaction (on a micro and macro level) to the enactment of this law actually increases harm? What if I could show you that the legislative findings actually reveal such information? Could you make room for the possibility that the roads are safer without this law and that insurance would be cheaper?

In the last quarter of 2010, the Insurance Institute for Highway Safety (IIHS), through the Highway Loss Data Institute (HLDI), issued a startling press release regarding the true effects of laws that ban texting while driving.[4] The study, which analyzed crash statistics in four states both before and after their no-texting-while-driving laws took effect, found that not only were there "…no reductions in crashes…[but],[i]n fact, such bans are associated with slight increase[s] in the frequency of insurance claims filed under collision coverage for damage to vehicles in crashes."[5]

The HLDI study found that what likely accounted for the increase in traffic crashes was that people were actively concealing their use of cellular phones while driving – knowing that its use, while driving, was against the law. This, in turn, led to them taking their eyes off the road for longer periods of time and created more of a distraction (and more of a danger).[6]

Florida drivers… get ready, get set, and get your helmets on because according to the above-cited study, statistics suggest that Florida's roads and highways are at-risk for up to a 12% increase in traffic crashes after F.S. 316.305 goes into effect on October 1, 2013. That's a potential for almost a 12% increase in traffic crashes! That's also a 12% increase in risk associated with driving in Florida, which you're apt to find as a rate increase in your next automotive insurance bill.[7]

Titled as "Florida Ban on Texting While Driving Law", F.S. 316.305 seeks to make texting-while-driving a secondary offense punishable as a non-criminal traffic infraction (a $30.00 fine plus court costs for first offense) with increased penalties for subsequent infractions[8] and adds to Florida's already-existing reckless driving statute[9]. The final bill analysis, used by the Florida House of Representatives, reveals some quirky tidbits of data worth mentioning, however.

For example, the analysis exposes that the Florida Department of Highway Safety and Motor Vehicles is "…unable to determine how many fatalities are a result of distracted driving as this information may or may not show up in a traffic report."[10] Perhaps this is important information to know going forward. Additionally, Florida's highways have been trending in a safer direction with fewer crashes without the implementation of a ban.[11]

Why are we implementing a law when, according to the final bill analysis, we aren't even sure that it'll be effective? And, why are we implementing a law when the statistical trend indicates that the roads are getting safer?

Oddly, and in somewhat of an ambiguous and contradictory fashion, the self-stated purposes of the law is to: "…improve roadway safety,…prevent crashes related to the act of text messaging,…reduce injuries… reduce health and automobile insurance rates, and property damage and to…authorize law enforcement officers to stop motor vehicles and issue citations as a secondary offense."[12] But, a deeper reading of the final bill analysis from the Florida House of Representatives reveals that our lawmakers were also aware of the above-referenced HLDI findings. The final bill analysis actually states that "[m]ost research shows that texting-while-driving is dangerous and increases a driver's crash risk. However, banning the practice may not only be ineffective, it may actually increase the crash risk if drivers respond by taking their eyes further from the road out of fear of being caught."[13]

The text of law specifically states under section (3)(a) that a person may not operate a motor vehicle while manually typing or entering multiple letters, numbers, symbols, or other characters into a wireless communications device or while sending or reading data in such a device for the purpose of nonvoice interpersonal communication, including, but not limited to, communication methods known as texting, e-mailing, and instant messaging.[14]

This statute is underinclusive. In essence, one could read an ebook while driving and not be in violation of this law because while reading an ebook does fall into "reading data" it is not doing so "…for the purpose of interpersonal communication." Furthermore, in subsection (3)(a) it states that "a motor vehicle that is stationary is not being operated and is not subject to the prohibition in this paragraph"[15]—which means that arguably you can engage in the panoply of above-mentioned prohibited activities while at a stop light, stop sign, or, well, while the vehicle is not moving.

This leads us to what I believe is the real issue: Is the problem texting-while-driving? Or, is the problem distracted driving (which texting-while-driving is one part of)? I think it's the latter.

Cited in the final bill analysis, "Distracted driving" is defined as "any activity that could divert a person's attention away from the primary task of driving," including but not limited to:

The problem with prohibiting distracted driving is that it would be almost universally impossible to come up with a law that would prohibit all types of

distractions while driving and if you think drafting that law is impossible, think about the myriad of legal nightmares that would come about in enforcing such a thing. We might as well also add to the above-list the prohibition of obnoxious billboard (if not all) advertisements and Amber Alert highway messages (which, by the way, take me longer to read than a text message).

As mentioned above, some proponents of highway safety have even sought to ban talking on the phone while driving citing it as (obviously) another type of distracted driving. Radical supporters find little or no difference in delayed reactions between the use or non-use of a hands-free device. This, compared to having a conversation with a passenger, who is physically present in the vehicle, sheds some light on the nuanced relationship between distraction and reaction. For example, if a driver is having a conversation with someone who is physically present in the vehicle, there are non-verbal cues of communication that are present between the dynamic of those two individuals—which make speaking with a passenger (present in the vehicle) much safer than speaking on a telephone. In other words, while a driver and passenger are talking, the driver is constantly consciously and subconsciously perceiving the passenger's reactions to the shared environment. If the passenger were to perceive a danger, likely the distracted driver would be alerted to this via the reaction or actions of the passenger. This is not so when the person on the other end of the conversation is not physically present in the automobile and unable themself to perceive stimuli in the shared environment.

Subsections(3)(b)(1)-(7) list an array of exceptions. For example, the law doesn't apply to "[those] performing official duties" such as emergency vehicle operators and law enforcement or fire service professionals. The law does not apply if someone is "[r]eporting an emergency or criminal or suspicious activity to law enforcement authorities", which, by the way, I have never been able to send a text message or email to emergency personnel. The law does not apply to received messages that are "[r]elated to the operation or navigation of the motor vehicle" or, safety related information, or even use of a handheld device for navigation purposes. Finally, the law does not apply when one is "[c]onducting wireless interpersonal communication that does not require reading text messages, except to activate, deactivate or initiate a feature or function." What?!

How are our eagle-eyed law enforcement personnel who have been given the ability to stop you for an improper use of a mobile device while driving, going to be able to distinguish the difference between an accepted use versus an impermissible use? Does this law give law enforcement carte blanche to stop your vehicle when there is an ominous glowing screen emitting and reflecting light on our faces and windows?

The statute is internally inconsistent. In subsection (2)(d), the statute (and the stated intent of the legislature) is to "[a]uthorize law enforcement officer to stop motor vehicles and issue citations as a secondary offense to persons who are texting while driving." But the statute under section (5) states that:

Enforcement of this section by state or local law enforcement agencies must be accomplished only as a secondary action when an operator of a motor vehicle has been detained for a suspected violation of another provision of this chapter…[17]

I'm confused. Why would the legislature's intent be to authorize law enforcement officers to stop motor vehicles for those things which law enforcement was already able to stop the drivers of those motor vehicles for?

Further, in subsection (3)(c) the statute supplements the Florida rules of evidence by expressly authorizing the use of a "user's billing records…, or the testimony of or written statements from appropriate authorities receiving such messages" in the event of a crash that results in death or personal injury so as to "determine whether a violation of [the statute] has been committed."[18] But wasn't this information already discoverable under Florida's liberal discovery rules? Also, isn't this information already admissible for most purposes?

So why have this law? Perhaps it's a "feel-good" law (i.e., the legislature is taking a stance on an issue and sending a message to Floridians and the rest of the country that safety is a concern). And, without a doubt, that's a good thing. But when the statistical data actually abases the legislature's intent, it likely demonstrates a flaw in our commonsense reasoning. "The paradox of commonsense, therefore, is that even as it helps us make sense of the world, it can actively undermine our ability to understand it."[19] In other words, the problem is that we always think we "know" the answer through the lens of "commonsense", when, in fact, we don't. And, when we think we know how to fix the problem, we either don't fix it or make it worse. The legislature is not immune to this axiom.

But, why enact a law under the guise of "safety" when statistical data indicates that reactions from the implementation of the law actually increase danger? Is Big Insurance somehow behind this? Are they championing for a law that legitimately appears to promote public safety which simultaneously increases risk that will be paid for by Florida drivers in the form of premium increases?

As a society, we've gotten rational to the point of irrationality about the notion of safety and this imparts unrealistic assumptions about life in the modern world. Accidents happen, and while no one wants to get injured or perish—or have that happen to others—we are sacrificing our freedoms in the name of "safety" as the legislature childproofs our roads.

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1 *HB 13 Final Bill Analysis, pg 4 citing NHTSA's specific list of distractions which can be found online at http://www.distraction.gov/content/get-the-facts/facts-and-statistics.html* ***2*** *Id.* ***3*** *Id.* ***4*** *Highway Loss Data Institute, September 28, 2010, Press release. Found at: http://www.iihs.org/news/rss/pr092810.html (last visited July 5, 2013).* ***5*** *Id.* ***6*** *Id.* ***7*** *Id.* ***8*** *HB 13 Final Bill Analysis, Page 1.* ***9*** *F.S. 316.192(2012).* ***10*** *Id.* ***11*** *Id.* ***12*** *Text of F.S. 316.305(2)(a),(b),(c), and (d) (2013) found within SB 52, 1st Engrossment.* ***13*** *HB 13 Final Bill Analysis, pg 4 (emphasis added)* ***14*** *Text of F.S. 316.305(3)(a)(2013) found within SB 52, 1st Engrossment.* ***15*** *Id.* ***16*** *HB 13 Final Bill Analysis, pg 3 citing Distraction.gov* ***17*** *Text of F.S. 316.305(5)(2013) found within SB 52, 1st Engrossment* ***18*** *Text of F.S. 316.305(3)(c)(2013) found within SB 52, 1st Engrossment* ***19*** *Watts, Duncan J., Everything is Obvious When You Know The Answer: How Common Sense Fails Us. Crown Business, Pg 27 (iphone edition) (2012).*

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By Kenneth Levinson

Painful as it may be to admit, a vital lesson on how to be successful in our cases was taught to us by a staunchly conservative Secretary of Defense: we need to know what we know, what we don't know and what we don't know we don't know. How often have we "known" our case for years, only to be surprised at trial? Haven't we all had a disappointing verdict where a juror afterward said, "We all wanted to know why the lawyers didn't talk about…?"

Focus groups can help prevent these missteps. There are many focus groups available depending on the particular goals of the lawyers, and a case will often benefit from different focus groups. I have conducted focus groups for other trial lawyers on cases from Arizona to Rhode Island, and we have always learned something valuable. For each type of focus group, we incorporate the latest in fields such as: cognitive science, decision making, psychology and persuasion. I share some of my experiences below.

1. Discovery Focus Group (They Want to Know What?)

Most of us have been led to believe that we need to know all the facts of a case to reap the most rewards from a focus group. Therefore, focus groups are conducted after discovery. In fact, I routinely get calls from lawyers—mere weeks before trial—asking me to conduct a focus group. It's not too late for certain focus groups, but waiting until the end is a missed opportunity to conduct more meaningful and beneficial discovery. Although we are all well-versed in the law on evidence and what comes in and what doesn't, can't we leave room for the possibility that what a non-lawyer (maybe someone like a juror) wants to know could actually be important to our case? I ask participants to imagine they are investigators with the sole job of finding the truth of the case. Who would you talk to, what would you ask, and what documents would you like to see? Whomever they want to question, I have a lawyer familiar with the case play that role, while the group asks questions they want answered. You would be surprised by the questions posed in our focus groups. Once the group has finished one witness, we ask from whom else they would like to hear. Discovery focus groups help us shape our discovery to benefit future jurors.

2. Just Because You Can ...

We are trained in law school to spot issues and potential causes of action. As plaintiff's lawyers, we are always looking for potential culpable parties to name. But that may not always be a prudent pursuit.

Michael Leizerman and Rena Samole have been at the cutting edge of broker and shipper liability (many of you were at Rena's fantastic presentation at the AAJ Chicago convention). There is no doubt that under many circumstances, naming a broker or shipper can be beneficial (more coverage, another faceless corporate defendant). However, after conducting a focus group on the subject, Michael and his client chose to voluntarily dismiss the shipper even after surviving a motion for summary judgment.

Another example involved a focus group I ran on a wrongful death case with Morgan Adams. Despite great feedback about naming a school bus company, a trucking company and their respective drivers, one of the participants had the following to say about the plaintiff suing the much less culpable defendant, "they are just throwing things against the wall to see what sticks." The lesson: just because you can name a party, doesn't mean you should. You may also gather information that needs to be presented in a very strategic way about why you may have named a particular defendant. This could also impact how you sequence your case to obtain the maximum percentage of liability against a certain defendant.

3. Does it Matter?

Many times a lawyer I work with "knows" a particular fact is a precious gift for her case. They tell me all about this great golden nugget that will clearly motivate the jury to keep adding zeros to the verdict. Maybe. Maybe the jury will say, "so what ?"

I worked on a case that dealt with a major collision involving a tractor trailer hauling hazardous materials. The plaintiff's attorney found regulations right on point that showed that the trucker shouldn't have been in the area of the crash, since he was carrying hazardous materials. However, the crash did not cause an explosion, nor did the dangerous materials cause the wreck or specifically cause any damages. The focus group participants were not interested in the hazardous materials related violations; they were outraged merely by other conduct of the driver. We learned we didn't need "extra" rules of the road for this case even though we had them.

4. Walk a Mile ...

As with the discovery deposition, inviting the participants to play different roles often yields wonderful results. Using psychodrama to put the case in action, I have them play the trucking company's safety director or hiring manager, and we discover what qualifications would they look for in a truck driver or what type of training they would want their driver to have. This is an excellent way to learn rules of the road that fall outside statutory or industry guidelines.

Another role I have the focus group undertake is that of the defendant truck driver. If we want to reframe the case into being about the defendant and his or her actions - and motivations- we need help finding what those actions or motivations might be. Expanding on this in a focus group allows us to explore attack points and weaknesses we can exploit in a deposition or at trial.

There are many focus groups available depending on the particular goals of the lawyers, and a case will often benefit from different focus groups.

5. Metaphorically Speaking

One of my favorite types of focus group I conduct is designed to learn what metaphors are triggered by a case. There are a number of insightful books that discuss how we think, often in deeply subconscious ways, metaphorically. For instance are we attacking, defending or shooting down a point made by a friend; thus triggering the war metaphor? Or should we reframe the discussion to a more cooperative encounter with the dance metaphor. Are we "out of sync," or are we "stepping on each other's toes"? After presenting the case facts to our group, we find the metaphors by asking participants to find images (from magazines, websites, etc.) they think are significant to the case. A few days later, we conduct extensive, hour-long, one-on-one interviews to learn more about the images they chose. The journey metaphor, which often involves images of a highway or an outdoor path, is great for damages (the road to recovery, how the injuries knocked the plaintiff off his path in life, the steps she has taken to deal with her new situation). Another example was discovered in an Iowa focus group I conducted that elicited many images of fancy racecars. Probing the meaning of the racecars, the common refrain was how much of a risk-taker the plaintiff was—he took a lot of chances. This ended up being hugely important for the case because the plaintiff loved racing cars for fun. Since the topic hadn't come up in discovery, and given the negative connotations viewed by the participants, the plaintiff's lawyer did not present this fact at trial, resulting in a very favorable verdict.

6. Make Your Case Sticky

One issue we deal with in every trial is how to ensure jurors take our case into the jury room with them. It's hard to persuade if the jury can't remember your key takeaways. One of my favorite books, "Made to Stick," lays out these six tips for making your case unforgettable: 1) simplicity; 2) unexpectedness; 3) concreteness; 4) credibility; 5) emotions; and 6) story.

Instead of rattling off economic statistics during his first presidential run, Reagan merely looked at the voters and asked, "Are you better off now than you were four years ago?" It was simple, unforgettable, credible, and tapped into the emotions of the time. One way I've helped make a case sticky is by asking participants what title they would give the case if it were a movie or a book. This is a great way to make your case theme unforgettable, simple, and concrete.

7. Cure the Curse

We've all been at a social event where we start discussing a case with other lawyers only to see non-lawyer spouses or friends glazing over because they can't follow along. Conversational etiquette aside, this provides us with a valuable lesson: terms, concept, and ideas that are second nature to lawyers are completely foreign to the vast majority of the public. "The curse of knowledge," an early 1990s psychological study, shows us the dangers it can pose to our cases. Half of the participants in the study (the "tappers") were asked to tap out a common song, such as "Happy Birthday," while the other half (the "listeners") had to guess the song based on the tapping. Despite using seemingly simple, everyday songs, there was a huge gap in the tappers' estimates of correct guesses and the listeners' actual guesses. The result of the study showed that people have a very hard time disconnecting from what we know (the tappers' knowledge of the song they were tapping). It's hard to imagine that someone might not know what we know. "Tap-tap-tap-tap-tap-tap" is so obviously "Happy Birthday!" Taking that lesson to our cases, we constantly have to be on the lookout for our "curse." This is especially true in trucking litigation; how many people know what "delta v," "vertical acceleration," or "stability control status" means?

Focus groups allow us to test our presentation and language to make sure we are not losing our audience (be it the jury or even the judge). Despite our best efforts, there are frequently blind spots in our cases. There may be a fact or witness we are missing. Or worse, we may be focusing on an issue that elicits a "so what?" from the jury. With the help of focus groups, we minimize those dangers to our cases, thereby maximizing our chances of victory. Focus groups are our opportunity to test the case and see how it plays with potential jurors. It's always nice to be reassured that some strategies work, but your aim here is to let the participants show you what's wrong—what's missing. This is where you learn what you don't know you don't know.

Top Ten Myths of Deferring Contingent Fees

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By Rick Ehrhart, JD & Leif Lundberg, LLM

With marginal income tax rates approaching or exceeding 50 percent, interest in tax deferral has spiked. Many trial lawyers are familiar with the opportunity and the advantages of investing fees pre-tax, tax-deferred.

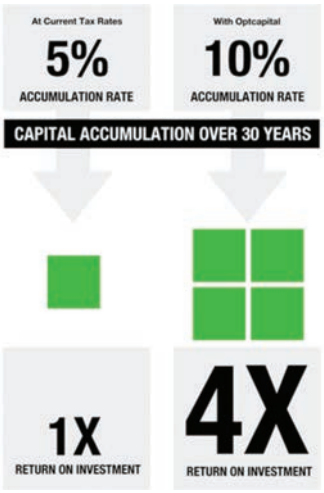
Instead of having only half their fees to invest and losing investment earnings to yearly taxation, fee deferral puts one hundred percent of the fees to work and compounds the fees at the pre-tax rate of return. As a result, lawyers accumulate greater capital, can borrow more at lower interest costs and improve their retention of key associates. But the conventional wisdom about fee deferral is fraught with misconceptions. Here are the ten most egregious myths.

Myth No. 1

There is no economic advantage to deferring fees. Whether you get paid now or later, you end up with the same amount of money.

Fee deferral fees harnesses two wealth advantages. When you invest pre-tax, tax-deferred, your fees grow at the pre-tax rate of return, rather than the after-tax rate. If investment earnings are taxed at fifty percent, a ten percent return is eroded to five percent.

By deferring, you would compound at the ten percent rate, and then pay taxes years later when you withdraw funds. One can reasonably expect to have fifty percent greater tax-paid wealth after ten years and one hundred percent after twenty years.

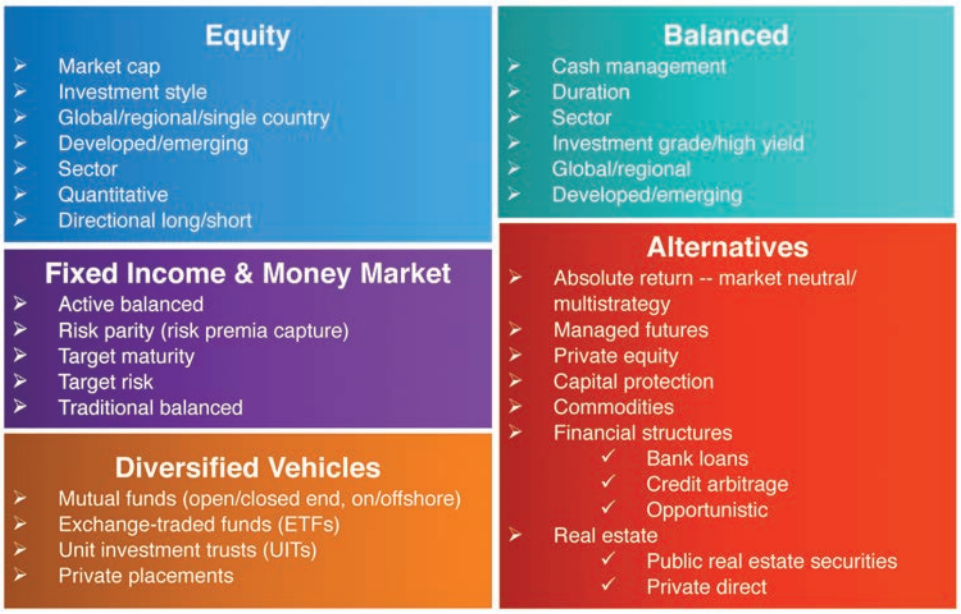


We are in a relatively high tax period with a progressive rate structure, and you may live in a relatively high tax state. By deferring, you have the opportunity to reduce your effective tax rate. This can occur by spreading your income to take advantage of lower tax rates at lower annual income levels. Or, you can simply wait to withdraw funds when, and if, federal tax rates decrease, or if you move to a lower tax state.

For example, if you deferred a $1 million fee from a fifty percent tax rate environment to a forty percent tax rate environment, you would save $100,000.

Myth No. 2

Deferrals must be structured as fixed annuities.



From a legal standpoint, fee deferral constitutes "nonqualified deferred compensation" (NQDC). NQDC is deferred compensation that is not "qualified" under the tax code, such as 401(k) plans and pension plans. NQDC is subject to its own tax rules, namely the constructive receipt and economic benefit doctrines.

Public corporations use NQDC to attract and retain executives. Executive NQDC is governed by the same tax rules as trial lawyer NQDC, except trial lawyer NQDC is exempt from the constructive receipt rules of Section 409A.In other words, trial lawyer NQDC is subject to less regulation than executive NQDC.

Executive NQDC is commonly structured with investment flexibility. There is no requirement that benefits be fixed. The prevailing model is to enable executives to invest their NQDC as they wish. Trial lawyers can have the same investment flexibility and opportunity for diversification. You or your investment adviser can execute most any strategy with NQDC.

Moreover, executives usually have some control over when they withdraw funds. While there is a prohibition against accelerating withdrawals before funds are scheduled to be available, it is permissible to postpone payments. 409A allows participants to postpone payments, as long as the election is made at least twelve months in advance and the postponement is for at least five years. This is commonly called the "12/5 Rule." To maximize flexibility and liquidity, NQDC is scheduled to be paid over five years, beginning in twelve months. Any amounts not elected for withdrawal are postponed (i.e., "roll forward") to the end of the line.

The chart to the right illustrates the withdrawal flexibility that NQDC allows. Because of the 12/5 Rule, it makes sense to divide a deferral amount into periodic payments over a five year period beginning in twelve months. You could elect, for example, sixty monthly payments, twenty quarterly payments or five annual payments. The chart below shows twenty quarterly payment buckets. Your buckets are credited with ***investment earnings***. Each quarter you can elect to withdraw all or part of the bucket due in twelve months. Any amount not withdrawn "rolls forward" to the end of the line.

Trial lawyers can have the same withdrawal flexibility.

Myth No. 3

The timing of payments cannot be postponed.

As discussed above, the law permits postponement, provided the postponement conforms to the 12/5 Rule.

Myth No. 4

The deferral agreement must be made with an offshore company.

Under the prevailing model, law firms enter into a deferral agreement (often called an "assignment agreement") where a specified amount of fees is paid by the defendant or the defendant's agent to an offshore assignment company, and the assignment company issues NQDC to the law firm. In most cases, the assignment company is a subsidiary of a life insurance carrier. Assignment companies are domiciled in "tax havens" to avoid tax cost on the assignment company's income.

The NQDC issuer can be domiciled in the U.S. without tax cost to the issuer.

Myth No. 5

The deferral agreement must be part of the settlement agreement, and the details of the deferral must be disclosed in the settlement agreement.

To avoid constructive receipt and current taxation, the law firm should make an irrevocable agreement to defer specified fees before there is a legal entitlement to a fee that is currently payable. The irrevocable agreement can be made with the client or with the third party NQDC issuer, who is the proxy for the client. It is critical, however, that the defendant or the defendant's agent (such as insurance company or qualified settlement fund ("QSF") pay the deferred fees to the NQDC issuer, so that the law firm is never in actual receipt of such amounts. This can be accomplished by a payment instruction to the defendant or the defendant's agent.

Myth No. 6

Deferred fees cannot be used to support borrowing.

While it is true that NQDC cannot be pledged as collateral for a loan, it is an asset that lenders consider when underwriting loans. By deferring fees, you avoid the immediate tax erosion and thereby double your borrowing base. There are security mechanisms that lenders can use to increase your borrowing capacity and lower your borrowing costs.

Myth No. 7

Every plaintiff/client is indifferent to fee deferral.

Whether your client cares about your fee deferral depends on whether the client's taxable income is affected. As a general rule, a service recipient, such as your client, can deduct compensation (your fees) when the compensation is taxable income to the service provider (you). This is commonly called the "matching rule" of Section 404.

Your client is not affected by the fee deferral, however, when either the settlement proceeds are not taxable income, such as compensation for personal injury, or the fee portion of the proceeds are not taxable income to your client such as with wage and hour cases or court awarded fees such as with class actions.

If, on the other hand, your client receives a taxable recovery, a deferral of the tax deduction may matter. The deductibility of attorneys' fees is not absolute, however, and you should analyze your client's particular tax situation to determine whether fee deferral would hurt or help your client. Even in cases of taxable recoveries, your client may prefer to defer the deduction.

Myth No. 8

The defendant has valid grounds to object to the deferral of fees.

The deferral of fees does not affect the defendant. For income tax purposes, the deferral does not affect the defendant's ability to deduct the amount paid to or on behalf of the plaintiff or the plaintiff's attorney. The defendant will, of course, insist that payment to the NQDC issuer discharges its obligations with respect to that portion of the settlement.

Myth No. 9

Class action or mass tort fees cannot be deferred.

This is a by-product of the myth that deferral agreements must be part of the settlement agreement (see Myth No. 5). The legal requirement is that an irrevocable agreement to defer specified fees be made before there is a legal entitlement to a fee that is currently payable. The irrevocable agreement can be made with the client or with the third party NQDC issuer, who is the proxy for the client.

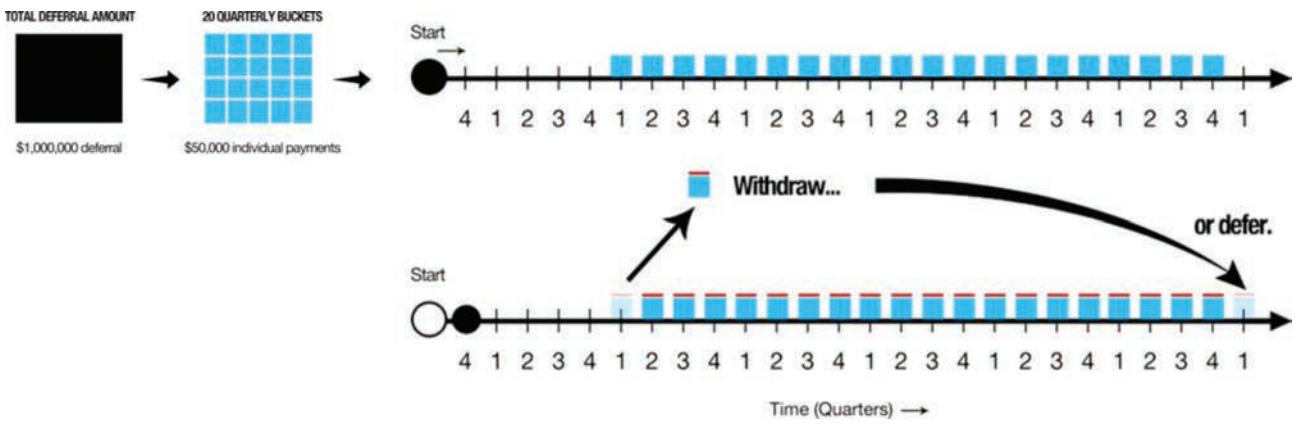
Myth No. 10

Law firms cannot use deferred fees to retain key associates.

Currently, few firms use deferred compensation to retain key lawyers. Because of the Section 404 matching rule (see Myth No. 7), law firm partners incur a tax cost when the firm defers the compensation payable to associates. For example, suppose the firm realizes a $10 million profit and wishes to provide associates with a $1 million deferred bonus in which an associate will vest if he or she remains employed by the firm for the next 4 years. If the firm paid the bonus currently, the partners would have $9 million of taxable income. By making the bonus deferred, the partners would have $10 million of taxable income.

The firm can avoid this tax cost by deferring fees of $1 million. The partners' taxable income would be only $9 million, and the retention compensation would not impose any tax cost on the partners.

Rick Ehrhart, JD, is President and CEO of Optcapital, LLC, a financial services firm located in Charlotte, NC. For three decades, he has been a leading advisor on tax-deferred, incentive compensation strategies. Leif Lundberg is Managing Director – Law Firm Markets at Optcapital. He has worked with Optcapital since 2000, advising Fortune 1000 companies, hedge fund managers and institutional investors on incentive compensation and law firms on the deferral of contingency fees and retention of key employees. Optcapital began in 1998 with a focus on providing innovative deferred and incentive compensation to executives of Fortune 1000 companies. Since then, it has expanded to law firms and hedge funds and today administers $3 billion of pre-tax, tax-deferred capital.



Warriors & Quiet Waters Southern Chapter

By Captain Jody Campbell

As some of you know, besides being the Executive Director of STLA, I have a guide service out of Shell Point, FL that takes folks fishing in-shore for trout, redfish, Spanish, flounder and tarpon. I have always donated about five trips a year to worthy causes. In March, I found out about an organization started in Bozeman, Montana called "Warriors and Quiet Waters." They take fishing veterans who have been wounded both physically and mentally. One of their founders moved to our area, and, one night, had a medical emergency. The Volunteer Fire Department and EMTs responded and rushed him to the hospital. About a week later, he paid a visit to the Fire Department to make a donation. Somehow, the organization he founded was brought up. These volunteer firefighters, who are mostly military veterans, and it didn't take them long to decide, that with all the great fishing we have in our area, they could do the same thing. Thus Warriors and Quiet Waters Southern Chapter was born. A board was formed, a 501C3 status was received, and they were on their way. Plans were to bring six soldiers from Ft. Benning, Georgia to our area and show them a good, both on the water and in our county. I got in touch with a buddy of mine who also guides and told him I planned to donate as many fishing trips as they wanted while they were here for the week. I asked if he would come along and help me. I knew what his answer was going to be before I asked. I contacted their board and told them that Captain David Fife and I wanted to take some of their members fishing. We spent three days on the water with three of the finest and bravest soldiers you would ever want to meet. One of the soldiers was 34 years old, had been to Iraq on four tours and was shot on two of the tours. He volunteered to go to Afghanistan, but they wouldn't let him go. In July, he got a medical discharge. We had medics on board the boat each day in case there was any type of medical emergency, and there was also a Sheriff's Office rescue boat available in case they needed to be taken to shore for any reason. We had three days of fantastic fishing — these three days were the most rewarding days I have ever spent on the water. The outpouring from our county was unbelievable. Rods, reels and tackle were donated by a local bait and tackle shop, bait was donated, gas for the boats was donated and a chef from Tallahassee got up a 4 a.m. and drove to the Volunteer Fire Department in St. Marks, FL to make them breakfast each morning. Churches, restaurants and individuals made sure they ate like kings while here. There was a going away banquet held the last night of their trip, and each of them got up to said a few words. All were so grateful and expressed how much fun they had. Six more of our brave soldiers are coming back in the middle of October, and Captain Fife and I are already planning where we will fish when they get here. One great thing about this organization is that there are no paid staff. All donations and monies raised from fundraisers go to making sure these guys/girls have an enjoyable week. I will continue to donate these trips and, as long as they want me to take these folks fishing, I will.

We spent three days on the water with three of the finest and bravest soldiers you would ever want to meet. One of the soldiers was 34 years old, had been to Iraq on four tours and was shot on two of the tours.

TRACTOR-TRAILER from page 4

qualifications and experience; the steps he takes to enforce fleet safety policies and procedures; and modifications to the policies and procedures since the wreck.

It is helpful pre-deposition to get the key documents from the trucking company. These include employment contracts, policies and procedures, employment handbooks, employment manuals, the driver's personnel file/driver qualification file, documents showing the purpose of the truck driver's travel, documents showing payment of money or benefits to the driver, the complete in-house investigation of the wreck, maintenance and repair records related to the truck, and fines, citations, and all correspondence between the trucking company, OSHA, DOT, ICC, or any other federal, state or governmental agencies related to the wreck.

The trucking company and its insurance company must understand that you will accept nothing less than top dollar for your case or there will be a trial. From the beginning, the case must be prepared as though it is going to trial. It's often said that cases prepared for trial settle, and that cases prepared for settlement are tried. Video and written settlement brochures are particularly effective tools of persuasion. One benefit of putting together settlement brochures is that it helps the victim's attorney focus on themes and evidence for trial. Video and written brochures allow the victim's attorney to collect and showcase the best evidence on liability and damages. We try to keep the length of the videotaped settlement presentations to no more than one hour, if possible, even in complex cases, due to short attention spans. You can also use introductions, transitions, and summaries in the video presentations to let the viewers know what is coming, remind them what they have seen, and to reiterate what they saw.

Computer-generated animations of the wreck can be included in the video settlement brochure to bring alive the wreck and to show the preventability and the horror of the wreck. Excerpts from videotaped depositions, news coverage of the wreck, and interviews of liability and damages experts, eye-witnesses, treating doctors, family members, employers and co-workers can be included to showcase the credible, persuasive testimony that will be presented to the jurors if the case is tried. Demonstrative evidence, medical illustrations, home movies, family photos, certificates, awards and diplomas can be included to highlight injuries, damages to family relations, accomplishments, and challenges that have been overcome by the victim. In most cases, the decision-maker with authority to settle the case has not actually attended the depositions, and the decision-maker has access only to written summaries of the depositions. Showing that decision-maker video clips of the actual witnesses confessing negligence or gross negligence removes any doubt about exactly what the jury will hear at trial and who the jury will hear it from.

Focus groups can be effective tools in maximizing damages, and we from time to time use them in our large cases. Focus groups allow you to "road test" messages and themes to determine whether they are persuasive and understandable and to gauge potential juror reactions to arguments and evidence. They allow you to identify information needed by the jury to understand a client's story and they help you translate legal terminology and concepts into terminology and concepts more easily understood by lay-persons. Using focus groups, you can test jurors' reactions to opposition arguments, gauge jurors' reactions to particular witnesses, determine optimum sequencing and emphasis for presentation of evidence and identify weaknesses and determine how to handle them. You also can determine reactions to the trial attorneys, reactions to particular pieces of demonstrative evidence, ranges of probability of prevailing on liability issues and ranges of damages likely to be awarded by jurors.

A truck wreck is more than just a large car wreck and it needs to be treated with a great deal of care and consideration. The 18-wheeler accident easily can become a truck wreck for the defense at the courthouse. The tools and strategies outlined here should allow you and the jury to begin seeing a truck wreck for what it really is: the inevitable result of systematic negligence and dangerous practices culminating in a pile of twisted metal with a "How's My Driving?" sticker buried somewhere in the middle.

NAVIGATING ERISA from page 6

distinction in plan language that is necessary for a plan to recover from a Covered Person. The court compares two different plans and the subrogation language in each. The United Distributors Plan says, "The Plan has a lien on any amount recovered by the Covered Person whether or not designated as payment for medical expenses. This lien shall remain in effect until the Plan is repaid in full. The Covered Person…must repay to the Plan the benefits paid on his or her behalf out of the recovery made from the third party or insurer." ***Popowski v. Parrott***, 461 F.3d 1367 at 1373 (11th Cir. 2006). The Mohawk Plan says, "If, however, the Covered Person receives a settlement judgment, or other payment relating to the accidental injury or illness from another person, firm, corporation, organization or business entity paid by, or on behalf of, the person or entity who allegedly caused the injury or illness, the Covered Person agrees to reimburse the Plan in full, and in first priority, for any medical expenses paid by the Plan relating to the injury or illness." Id at 1374. The United Distributors Plan says their lien comes from a distinct fund, i.e. the recover from a third party or insurer. This is good language that will be upheld. However, the Mohawk Plan does not identify a specific fund, only that if a recovery is made, they are to be reimbursed. It does not specify if it comes from the recovery itself or from the Covered Person's personal assets.

The recent decision in U.S. Airways v. McCutchen by the Supreme Court has made it clear that the Plan language is controlling. ***U.S. Airways v. McCutchen***, 569 U.S. ____ (2013) (slip op.). The language should be clear on whether or not the Plan recovery reaches to first party coverage, i.e. uninsured or underinsured motorist coverage. If the Plan is silent, it may not be able to reach such recoveries. Also, "If the plan is silent on the allocation of attorney's fees, in those circumstances, the common fund doctrine provides the appropriate default. In other words, if US Airways wished to depart from the well-established common-fund rule, it had to draft its contract to say so…". Id at 12. In short, make sure to read the Plan documents carefully to see if the Plan spells out exactly the Plan's recovery rights. Is there recovery a first priority over attorney's fees and costs? Does the Plan identify a fund separate and distinct from the Covered Person's personal assets? Does the Plan language overcome the "made whole" doctrine?

Ok. The plan is governed by ERISA, the plan administrator has sent you all the documents required, the plan language is solid as to first right of recovery, it identifies a fund separate and distinct from the covered person's personal assets, it overcomes the "made whole" doctrine and it overcomes the common fund doctrine. Is that the end? Have you been the best advocate for your client for nothing? Maybe not. When you settle a case and are requesting a final lien amount, you are negotiating with a recovery agent, not the plan administrator. The recovery agent is a person just like you. They probably have a large case load and are ready and willing to cut a deal. They sometimes have monthly or quarterly goals set by their employers to bring in recoveries and settle liens. Be up front and honest. Give them all the figures; total settlement, fees, costs, out of pockets, other liens, etc. If you are reducing your fees or waiving costs, let them know. Threats and animosity are great impediments to your ability to resolve these liens. Be personable and reasonable. Also, bad cases in your eyes can be good for you in negotiating ERISA liens. If some of the injuries claimed in this case are pre-existing, let them know. If there are liability issues that may reduce a recovery at trial, let them know. If there is limited liability and first party coverage, most recovery vendors are willing to accept a 50/50 split of the covered person's net recovery. Also, a three-way split is sometimes the default position for recovery vendors, i.e. one third for you, one third for your client, and one third for the plan.

Helpful Tips for Navigating ERISA:

- *Find out if the plan is governed by ERISA.*
- *Make sure your requests for ALL plan documents are honored. If not, start tolling the penalties.*
- *Does the plan language overcome principles of equity and the common fund doctrine? Does it reach to first party coverage? Does the language specify a particular fund from which the plan may recover?*
- *If all else fails, be forthcoming and professional with the recovery vendor to get the best outcome possible for your client.*

ERISA is not the end of the world for plaintiff attorneys. We all just have to be a bit more attentive to plan language and a bit more creative in our negotiation skills.

PREMISES LIABILITY from page 1

under the influence of drugs or alcohol, the defendant will argue that the offender lacked the capacity for rational thought necessary to appreciate security measures, even if they had been in place.

However, you can use the offender's criminal history to your client's advantage. A young client of mine was kidnapped and sexually assaulted at gunpoint by a serial rapist at a mobile home park. At trial, the defendant attempted to show that no level of security would have deterred or prevented the rape from occurring at the hands of such a monster. The defendant's critical error was assuming that a jury would concede that a potential serial rapist was incapable of being deterred from committing a crime anywhere.

There were several police reports of park residents complaining about peeping toms, vagrants sleeping under trees and aggressive, intoxicated men congregating on the property's edges. Management claimed it was unaware of any of these reports because they were not violent incidents. Six months before my client's assault, another attempted rape had occurred. This was the final proof that the defendant should have been on notice that a rape was foreseeable.

There was no question that the offender was motivated. But the question became whether reasonable security could have prevented the rape. To answer this, you should research other properties managed by the same defendant, such as high-end condominiums and apartments where few crimes were reported, but where security officers were hired. In this case, while management was hesitant to admit that paying security guards at the high-end communities bore any relation to crime prevention, former employees testified that for years they had begged management to have on-site security at the park to deal with the constant violent crimes and concerns about vagrancy and peeping toms. By comparing the premises at issue to the defendant's other properties, you can expose the defendant's knowledge that a crime was foreseeable.

Alternatively, your client may be the one who has a criminal history, which may suggest that he or she was a magnet for violent crime. Preventing the jury from hearing evidence of your client's prior involvement with the criminal justice system is a real challenge. Fundamental rules of evidence will help you prevent irrelevant facts from going before the jury. For example, in one case, an unknown assailant shot my client at his apartment complex. The client had a long history of drug offenses, was rumored to be affiliated with street gangs and was generally alleged to be a bad person by the police department's gang task force officers. But the only evidence that his shooting was a targeted hit was the existence of his criminal record. Defendants intentionally try to overwhelm the court with a mountain of bad character evidence so that the judge will not like your client or your case. By focusing on the threshold requirement that all evidence must first be competent then relevant, we were able to peel back the evidence one layer at a time to reveal that at the time of this incident, there was no link between the client's past and his shooting. Because the shooter in this case was a "John Doe," and there were no witnesses to the crime, the defendant was unable to identify any non-speculative theory behind the shooting. At the police officers' depositions, they opined that the shooting was drug-related, but they could not dismiss other reasons for why the client was shot.

Evidence Development

When you argue that your client's injuries could have been prevented through the use of reasonable security measures, the defendant will claim those measures are excessive or unnecessary. So what are reasonable measures, and how can you help the jury view the case through your eyes? You must first go to the crime scene and begin reviewing any security efforts that the defendant undertook.

A crucial part of evidence development in these cases is examining the premises and putting the security measures into context. For example, a client was stabbed to death in his aunt's apartment complex parking lot as he went to the vending machines near the community swimming pool. The complex gave a rent-free unit to a courtesy security officer who was also a local police officer and claimed to perform three daily patrols around the property with an enormous dog and a pistol. She also submitted observation reports to management. I was deflated by this proactive security regime until the officer and on-site managers were deposed.

Through public record requests, I obtained the officer's call schedule for her official police duties for the previous three years. The three daily patrols she claimed she conducted could not be reconciled with her documented obligations for the city police department. The nuisance crimes of vandalism and drug use at the community swimming pool were incompatible with her insistence that once she locked the common area amenities at night, the property was under control. And somehow her fellow officers failed to inform her of four robberies and a carjacking that occurred at the complex while she lived there. At trial, the plaintiff's counsel was able to expose this facade, and the jury found the complex was 100% liable.

In another case, my client was shot in the face at a gas station near the Miami-Dade County Fairgrounds during the annual fair. My first few visits to the property were unremarkable, so I wondered how we could convince any jury that this ordinary gas station should have employed security. So we waited to visit again until the next year's county fair. By comparing surveillance video from a normal Friday night with video from the same time and date during the following year's county fair, we were able to show the massive increase in foot and vehicle traffic during the fair. We did not advocate that there was anything wrong with the gas station itself, but we explained that for two weeks each year, it assumed an entirely different criminal profile, and increased security measures should have been deployed. Understanding your site will help you stay focused on the defendant's duty to appreciate the foreseeable risk and act on it.

Sometimes, when security is compromised, there will be a debate about whether armed or unarmed security was appropriate for a property. The jury is unlikely to punish a defendant for choosing unarmed over armed guards if the choice was based on intelligence and made after informed deliberations.

Other security decisions become central to the case. Premises owners and managers often use security vendors who make recommendations for protecting the property against crime. The vendor invariably will have suggested implementing the most comprehensive security system, but the defendant chose a lesser program due to cost. Driving a wedge between the vendor and the property manager becomes very important, and you can do this with the assistance of either entity's former employees. Defendants usually are not on the same page as their vendors about crime on the premises, the necessary remedies, or the rationale for the choices made.

Familiarity with crimes that occurred on the property is fundamental. Do not rely on crime statistics or grids. Read every police report from the property, going back at least three years from your client's assault. What may appear to be a simple property crime can yield the greatest notice and foreseeability witnesses. For example, a police report showing theft of a cell phone from a vehicle may appear trivial and unrelated on its face. However, the victim of that property crime often will have reported it to management and felt violated by that intrusion, especially if it happened more than once. The best witness regarding notice of on-premises crimes may be a robbery victim who constantly complained to management.

As the defendant tries to distract your attention from the core issues, refocus the case on specific criminal incidents and what the defendant failed to do in response to each. Make sure to use police reports when deposing the defendant. It will force them to admit repeatedly that they either did not know of the crime or that they did not make any changes in response to it. Specific crimes will help you show the jury that your case is not about crime generally or in the city where the property is located. It is about crime on this specific property.

Negligent security cases can consume thousands of hours from inception to conclusion. You must contend with both criminal and civil investigations, witnesses who may reasonably fear retribution, properties in crime-ridden areas and even clients whose presence at the time of the incident concerns jurors. To get past these difficulties, it is crucial to maintain your focus on proving that the defendant's security measures were inadequate.

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1 *Even in jurisdictions that do not permit inclusion of the intentional tortfeasor on the verdict fonn, such as Florida, jurors subconsciously factor in the fact that the civil defendant did not maim or murder your client-a criminal did.* ***2*** *Crime prevention through environmental design (CPTED) is a concept that in its most general application suggests that offenders can be deterred by the environment around them. Properties designed with security in mind will consider the layout of the property, lighting, access points. sight lines, and other factors. with the purpose of creating a space where the offender feels more vulnerable to detection or apprehension.* ***3*** *Slone v. Cornerstone Residential Mgt., LLC, No. 09-44419 CA 05 (Fla., Broward Co. Cir. June 24, 2011), affd, 2013 WI452878 (Fla. 4th Dist. App. Feb. 16, 2013).* ***4*** *The jury in this case returned a $1 .6 million verdict with 80 percent liability on the defendant.* ***5*** *Fed. R. Evid. 401 , 403, and 404 (and their state equivalents) will be the most commonly cited rules when disputes regarding your client's history become an issue. Whereas the plaintiff may introduce police reports from the property for notice purposes, the defendant will try to introduce the plaintiffs bad character evidence, which is usually not only irrelevant (Rule 401) but also hearsay.* ***6*** *Almaguer v. MIG Pines Dev., Ltd., No. 08-50972 CA 21 (Fla . • Broward Co. Cir., Mar. 25, 2010).*

MEDICATION & Rx ERRORS from page 1

the last fall being fatal. Although at first the case appeared to be simply a fall case, we discovered that the cause of the falls was a failure to administer prescribed medication. Another more subtle case discovered only in the context of prosecuting a case on a different theory involved discrepancies between the Controlled Substance Record (CSR) and Medication Administration Record (MAR) at a nursing home. Although a narcotic was clearly documented in the CSR to have been checked out from the pharmacy for the patient on numerous occasions, the MAR showed that the drug was not actually administered to the resident. This ultimately led to the discovery of numerous irregularities in the handling of narcotics in the facility, and an explanation for why the resident was in severe pain even while prescribed powerful painkillers.

Considering all of the possibilities, this topic is too broad to be covered adequately here. The focus of this article, therefore, is upon one particular common context for medication/prescription error: the facility-to-facility transfer.

Medication/Prescription Error During Facility Transfer

In the last few years, I have handled cases in which the following occurred:

In a hospital to nursing home transfer, the hospital discharge summary called for Hydrochlorothiazide, instead of Hydrocortisone. (As an Addison's Disease patient, Hydrocortisone was clearly required). The hospital's Medication Administration record, however, was correct. The nursing home looked only to the Discharge Summary.

In a similar transfer, the discharge summary and discharge orders were correct, as well as a document called "Medication Continuation Documentation" sent to the long-term care facility by the hospital. However, the FL-2 (a document submitted to Medicare/Medicaid for reimbursement purposes) was incorrect in that it deleted thyroid medication. The admitting facility filled out a document called "Medication Verification" incorrectly based on the FL-2, which the doctor (who had previously been right about the medications) unwittingly signed.

In yet another such transfer, the discharge orders were incorrect in that they called for a dosage much higher than the maximum allowable dosage for a medication. All other documentation was correct. The long-term care facility looked only to the incorrect document.

I have now encountered about every combination possible when it comes to which records are right and which are wrong. Discharge summary wrong, and everything else right. Discharge summary right and FL-2 wrong. The list goes on.

When it comes to the explanations you can expect to get from Defendants' employees, there is one absolute truth you can take to the bank: They will testify that they always rely upon the document that happens to be correct in your case, and that they never rely upon the document that happens to be wrong in your case. I once had two cases at the same time where each presented the exact opposite situation. In one case, the FL-2 was incorrect, and the discharge summary was correct. In the other, the FL-2 was correct and the discharge summary was wrong.

In the first case, of course, the testimony was that the FL-2 is just a document for Medicare/Medicaid reimbursement, and not a medical record at all. The admitting facility, therefore, always relies upon the discharge summary, if available, and the discharge orders if the discharge summary is not available. In the second case, of course, the testimony was that the FL-2 was the most timely and clear document, such that the admitting facility always relies upon it. Despite these blatant contradictions, there has always been an expert waiting in the wings to support whichever self-serving version of always was called upon at the moment.

In the end, there is usually a problem for both the discharging facility and the admitting facility. Although sometimes every document is wrong, the more common situation is that some are right and some are wrong. Thus, the discharging facility has a problem because it has issued some document that misstates a patient's medications. The admitting facility, on the other hand, has received inconsistent documents but has somehow decided to rely exclusively upon the incorrect one. This creates problems for them as well. First of all, they have a duty to reconcile these documents to make sure they are getting the medications correct. Second of all, they are providers of medical care and cannot pass the buck wholesale to the discharging facility or the physician. They should know, for example, that a patient with Addison's Disease needs hydrocortisone, or that an errant prescription is written for more than the maximum allowable dose of a medication.

Other parties are potentially liable as well. Frequently, the incorrect documentation, whatever it may be, has been signed by the attending physician at the discharging facility. This is certainly the case where the discharge summary or discharge orders contain inaccurate prescription information. On the flipside, the physician treating the patient at the admitting facility can be liable as well. Although a nursing home is bound to cry that all they do is follow orders, the same cannot be said of the physician giving the orders once the facility transfer has occurred. The amount of time a physician spends in a facility, or for that matter actually seeing the patients at a facility, can vary significantly depending upon the facility type (rehab, nursing home, assisted living, etc.). In some cases they may only go through charts with the nursing staff on a periodic basis, especially if they are the medical director of a large nursing home or assisted living facility. However, if they are the treating doctor for an Addison's Disease patient they should absolutely know that the patient needs hydrocortisone. If they are the treating physician for a patient, they should absolutely know if a certain prescription calls for several times the maximum allowable dose.

Finally, under the appropriate circumstances, the pharmacist may have liability as well. A pharmacist is likely to have limited access to a patient's medical records and therefore limited ability to catch the errors of others. However, pharmacists are professionals who are educated to exercise judgment to prevent these types of tragedies from occurring. Perhaps the strongest case of pharmacist liability is the dosage error. We have seen cases where the dose was several times the maximum allowable dose, often virtually guaranteeing death. In this situation, surely the pharmacist has the ability to stop the train before it wrecks. Sometimes an error in what drug is prescribed is ripe to be discovered by the pharmacist as well. In a recent case, the errant prescription called for a dosage amount that was simply not possible for the drug in question due to the doses in which it is manufactured. If the pharmacist does not catch such a problem, negligence has likely occurred. If the pharmacist does catch such an error and points it out to another party involved who in turn modifies the amount but fails to catch that the wrong drug is being prescribed, the case against that other provider has been bolstered.

The question of what category of defendant to name in what case is partly a matter of details and partly a matter of strategy. As for the details, the practice at different facilities and even the actual documentation may be different. For example, not every facility has the "Medication Verification" document referenced in one of the cases above. Until that document was filled out incorrectly and sent to the doctor, he was likely off the hook. When he signed that incorrect document, however, he arguably owned the facility's error in neglecting all of the documents that were right and relying upon the document that was wrong. As an example of the importance of strategy, however, we still declined to sue the doctor in that case. The long-term care facility was negligent in multiple additional ways, and certainly bore the lion's share of the culpability for the medication error. In that case, the treating doctor (whom we did not sue) became an excellent witness for us with regard to what duties the long-term care facility had to reconcile inconsistent documents, and which documents carried the most weight. That decision was a strategic one based upon the specific circumstances, but in many cases you will want to include all parties who have partial responsibility for the error. I am sure many of you have experienced the common situation where defendants who appear to have nowhere to go but to blame each other find some common ground so as to deprive the plaintiff of the advantage of defendants adverse to one another. If there has been a clear medication or prescription error, it is tougher for them to do that. In some of these cases, it is obvious that there has been negligence, and that said, negligence has caused a bad result. With the battlegrounds of negligence and causation gone, the only questions remaining may be which defendants bear how much responsibility. Defendants are often left with nowhere else to go. They therefore blame one another, and the plaintiff is in the enviable position of stepping out of the round room and letting the gunfight amongst defendants begin.

Conclusion

Medication error cases can range from the obvious to the often overlooked. Keep the possibility of such an error in mind as you evaluate and/or prosecute a case. Particularly when a facility transfer occurs and many documents travel between facilities, errors can occur which explain otherwise mysterious results. We can hope that there are enough George Baileys out there to catch poison pills before they are swallowed, but when errors do occur, we can be ready to recognize and address them.

New **STLA** Members

As you know, membership in the Southern Trial Lawyers Association is by invitation only, and thus the outstanding membership that we have! If there is someone you would like to invite to join, please send me an email with their name and mailing address, and I will put an application in the mail to them. If you would like to see a complete list of members, visit our Web site: www.southerntriallawyers.com.

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WHAT HAPPENS HERE, STAYS HERE...UNLESS IT SHOULDN'T

STLA Past President Gary Gober receiving the prestigious Lifetime Achievement Award from the Tennessee Association for Justice

U.S. Military Veterans showing off their catch after a day on the water with STLA Executive Director (and full time fishing guide) Captain Jody Campbell.