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Full Disclosure Keeps Attorney Out of Hot Water

LITIGATION NEWS

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Litigation Section

The Litigation Section is often the vanguard of changes in today's litigation environment, influencing the course of the law and the adversary system for the benefit of the public and the trial bar. The goal of *Litigation News* is to advance the art of advocacy by informing litigators of Section activities and other news of professional interest.

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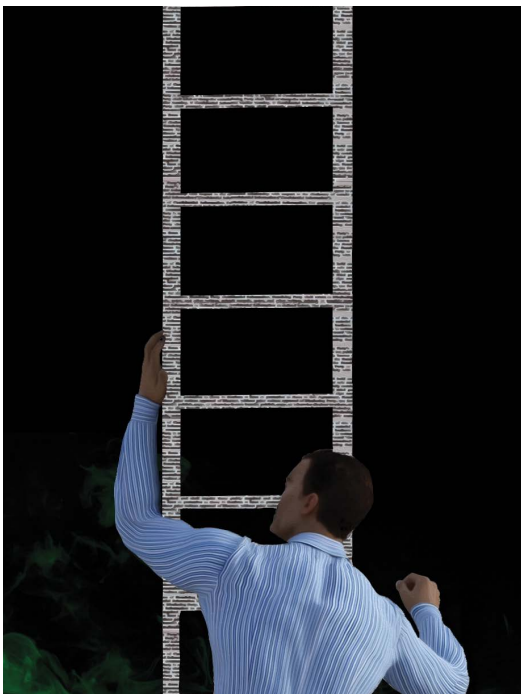

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COLUMNS

DEPARTMENTS

Drone Data-Mining: Coming to a Home Near You

By John M. McNichols, *Litigation News* Associate Editor

The U.S. military made headlines in January 2020 for killing Iranian General Qassem Soleimani with a missile launched from an unmanned aircraft, or "drone." But General Soleimani was hardly the only prominent figure killed via drone strike during the war on terror. Valued for their ability to conduct military operations remotely and autonomously—greatly reducing the risk to American servicemembers—drones have been one of the most notable developments in military technology over the past two decades.

At the same time, their potential civilian and commercial uses have not gone unnoticed. The same unmanned aircraft that can deliver a surface-to-air missile over the mountains of Afghanistan is equally capable of delivering packages in the residential neighborhoods of Scarsdale or Boise. Unsurprisingly, therefore, companies have eagerly explored potential civilian applications for drones, prompting concerns about having such powerful technology under purely private control. Even so, over the past decade, the U.S. government seems to have diminished regulation and expanded access.

What Is a Drone?

A drone is any pilotless aircraft. More formally known as "unmanned aerial vehicles" or "unmanned aircraft systems," drones have existed in varying forms since Venice's war for independence from the Hapsburg Empire in 1849, when Austrian soldiers used balloons to drop bombs on their adversaries. The term "drone"—a reference to a male worker bee—dates to the 1930s and the U.S. military's development of the "Queen Bee" biplane, which could be flown under radio control for artillery target practice. Modern drones differ from their predecessors not merely through advances in aviation technology—many of today's drones are helicopters—but also through the adoption of robotics and artificial intelligence, which allow them to operate autonomously rather than under direct remote control by a human user.

Drones have recently come to be used in a wide range of civilian roles. When coupled with internet-of-things connectivity, drones' ability to collect and convey aerial observation data in real time has made them invaluable for airborne surveillance and photography, traffic and weather monitoring, forest management, and agriculture.

The next wave appears to be delivery services. Multiple companies, including Zipline, UPS, and Google-affiliated Wing, have moved beyond the testing stage and begun actual product deliveries using drones. Although capabilities are currently limited to relatively small packages and short distances—Amazon Prime Air, for example, proposes to cap package size at five pounds

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and limit delivery to a 10-mile radius of an order fulfillment center—the development of a pilotless delivery mechanism has proven particularly fortuitous during the COVID-19 pandemic, as it has allowed the delivery of test kits, personal protective equipment, and even vaccines while greatly limiting the potential for person-to-person transmission.

What Are the Laws and Regulations Governing Drones?

Before 2016, Federal Aviation Administration (FAA) regulations prohibited the use of drones for commercial purposes without a special waiver from the agency, which could be time-consuming and costly to acquire (mere hobbyist or recreational flights, however, required no such waiver). Such restrictions began to loosen in 2016, when the FAA issued its initial rules authorizing commercial drone flights. Those rules still contained some fairly strict operational limitations, including that drones be smaller than 55 pounds, remain within the visual line of sight of the operator at all times, and not be flown over people or during nighttime hours.

The FAA Reauthorization Act of 2018 directed the FAA to update its commercial drone rules to pave the way for consumer deliveries. The ensuing regulatory changes have relaxed some of the initial restrictions. In late 2020, for example, the FAA issued new rules allowing commercial drone flights at night and over populated areas. Still in place, however, is the requirement that drones always remain within view of a human operator, which significantly limits their range of travel and—more importantly—inhibits the use of fully autonomous operations and thus keeps drones from capturing the full range of their capabilities. While industry advocates have pushed for lifting this restriction as well, the FAA has suggested that new rules allowing out-of-sight operation are still several years away—hardly the first time regulation has failed to keep pace with technological innovation.

Meanwhile, states and municipalities have their own laws, which vary considerably and can either encourage or discourage drone use. In Arizona, for example, state law makes operating a drone in "dangerous proximity" to a person or property a criminal misdemeanor but prohibits cities and towns from imposing any stiffer penalty for irresponsible drone use. Idaho and Texas specifically prohibit the use of drones for, among other things, stalking wild game. Among the least restrictive states is South Carolina, which has not enacted any statewide law or regulation governing drone use, relying instead on the federal regulatory scheme.

What Are the Potential Concerns about Drones?

As commercial drone use continues to expand and neighborhood drone deliveries come closer to becoming an everyday event, individual citizens' encounters with drones are certain to grow exponentially. Drone crashes and their resulting property damage—and even potential loss of life—may become regular events. Critics, however, have focused less on drones' physical risk to persons and property than on their implications for personal privacy. Given that modern drone technology involves sensors and GPS navigation, the same drone that can deliver a package to a residential neighborhood is equally capable of scanning the houses in the neighborhood for physical clues about the potential appeal of products or services—e.g., roof repair or the installation of aluminum siding—which may in turn enable targeted marketing much the same way as one's internet browsing history.

In some respects, the potential for data mining of drone-derived information is not categorically different from what is already occurring. Google Maps, for example, offers photographic images of essentially any building or residence it has mapped. But the potential invasiveness of drones appears to raise the stakes for privacy advocates. When the City of Baltimore ran a broad-brush aerial surveillance program to track potential criminal behavior, obtaining overhead video imagery of more than 90 percent of the city, the U.S. Court of Appeals for the Fourth Circuit ruled that its data collection amounted to a warrantless search in violation of the Fourth Amendment. While Baltimore's program relied on manned rather than unmanned aircraft, drones are no less capable of conducting the same surveillance and likely could do it at far lower cost with fewer human staffing expenditures.

Modern drones differ from their predecessors through the adoption of robotics and AI, which allow them to operate without a human user.

But more importantly, the Fourth Circuit's holding was specific to the fact that the party collecting and accessing the imagery was a government actor. No such issue emerges where the data collection is conducted by a private company, such as one of the many retailers eager to get into the burgeoning field of drone commerce.

At present, federal regulations on drone operation do not contain specific prohibitions or restrictions on the gathering of aerial surveillance data, notwithstanding the fact that the FAA lifted its previous restriction on commercial overflights of populated areas. While some states and municipalities have proactively taken steps to prohibit the use of drones for certain data-collection purposes, nationwide regulation on this issue has yet to be implemented. LN

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BY KELSO L. ANDERSON, *LITIGATION NEWS* ASSOCIATE EDITOR

Need a Lawyer? There's an (Unauthorized) App for That

A service helping drivers hire lawyers to fight traffic tickets amounts to the unauthorized practice of law, according to at least one state supreme court. But ABA Litigation Section leaders have mixed opinions as to whether such a service actually involves the practice of law and further reason that recent trends favor broader consumer accessibility to legal services outside of traditional law firms.

App-Based Legal Assistance

In *Florida Bar v. TIKD Services, LLC*, the defendants, a Florida-based limited liability company and its CEO, operated a website and mobile application that provided assistance to drivers who received traffic tickets. A driver could create an account on the defendants' website, agree to the defendants' terms of service, and upload a picture of his or her ticket. The defendants would review the ticket and determine whether they should provide any services to the driver.

The terms of service included authorization for the defendants to hire and pay for counsel on a flat-fee basis regardless of the outcome of a case. If the defendants accepted the ticket, they would charge the driver a percentage of the ticket's value and send the driver's information to a licensed attorney with whom the defendants contracted to provide traffic ticket defense to their customers. Drivers could reject an attorney's representation, however, and vice versa. If a driver chose to accept representation, the attorney would communicate directly with the driver and handle all aspects of the driver's defense.

The defendants paid all fees associated with defending the ticket, including court costs and fines assessed. The defendants did not guarantee a favorable result for drivers and provided a full refund if points were levied against a driver's license.

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What Constitutes the Unauthorized Practice of Law?

On the foregoing facts, the Florida Bar sought to enjoin the defendants from engaging in what it deemed was the unauthorized practice of law. According to the bar, the defendant company used its website and advertisements to represent itself to the public as qualified to provide legal services. A referee was appointed to consider the bar's petition and concluded that, pursuant to Florida Bar Rules 4-1.8(f) and 4-5.4(d)—which govern third-party payment of attorney fees—the defendants were not engaged in the unauthorized practice of law. Therefore, the referee granted summary judgment in favor of the defendants.

The Florida Supreme Court reversed on appeal. Quoting the state constitution for its authority to "regulate . . . the practice of law . . . [,]" the court further cited its own precedent for the proposition that it may define "what constitutes the practice of law." Next, in dicta, the court observed that conduct amounting to the practice of law changes as business and society changes. Citing its own precedent from *State ex. rel Florida Bar v. Sperry*, the court explained that if the "giving of advice and counsel and the performance of services in legal matters

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for compensation . . . affect[s] important rights of a person under law," then such advice and such services constitute the practice of law.

Applying the four-factor test from *Sperry*, the court concluded that the defendants were engaged in the unauthorized practice of law. As to the first *Sperry* factor, the court noted that the defendants had the potential to "substantially affect" the quality and timeliness of representation that a driver receives. The court observed that the defendants were advertising to the public and soliciting drivers with legal problems, yet as nonlawyers could miss critical deadlines that could affect a driver's rights.

Second, the court noted that although the defendants collected fees from clients to pay court costs and fines, they were not a law firm and thus were not required to hold such moneys in a trust for a driver/client to ensure the funds would be available to satisfy those obligations.

Third, the court observed, an inherent conflict exists when nonlawyers such as the defendants procure income from providing legal services, because financial interest may conflict with the legal obligation to act on behalf of the driver/client. Relying on *Florida Bar v. Consololidated Business & Legal Forms, Inc.*, the court concluded that collecting income from the provision of legal services is a prime example of the unauthorized practice of law. The court also cited its recent opinion in *Florida Bar re: Advisory Opinion – Medicaid Planning Activities by Nonlawyers* for the argument that accepting payment for legal services provided is tantamount to the practice of law, particularly where the legal services provider controls the attorney-client relationship.

Fourth, and finally, the court stated that because the defendants were not licensed attorneys, they lacked the training to ensure the lawyers they contracted with were of high quality. Yet the defendants' advertisements promised a "cost-effective alternative to hiring" legal representation, as if using the defendants' services were a proxy for, or equal to, hiring one's own attorney.

A Dissenting View

The dissent concluded that the defendants were not engaged in the unauthorized practice of law, but instead offered a business proposition to drivers who received traffic tickets. The dissent distinguished *In re Advisory Opinion – Medicaid Planning Activities by Nonlawyers* as inapposite, because unlike in that case, here the driver—not the defendant—controlled the attorney-client relationship. Further, the dissent stated, the harm identified in *Consololidated Business & Legal Forms, Inc.* was not present, given that the referee found that the defendants' services were actually convenient and helpful to drivers.

A Growing Trend?

Litigation Section leaders are divided as to whether the defendants were engaged in the unauthorized practice of law in *TIKD Services*.

"[The defendant's] business model seems well-suited for small dollar items such as routine traffic tickets," reasons Michael S. LeBoff, Newport Beach, CA, cochair of the Section's Professional Liability Litigation Committee. "The business model would not translate to other areas of law," he surmises, "but in this instance, I believe more consumers are likely to forgo any legal assistance, rather than go through a traditional attorney-client relationship where the client must search for his or her own lawyers, then pay the lawyers hundreds of dollars per hour with no guarantee of the result."

Offering a different perspective, another Section leader expressed understanding of how the court reached its conclusion. "The court is very protective of the public's perception of lawyers," opines John M. Barkett, Miami, FL, cochair of the Section's Ethics & Professionalism Committee. "Its precedents allowed it to say, quite comfortably, that when a nonlawyer controls the delivery of legal services and handles the money associated with the representation, that nonlawyer is engaged in the unauthorized practice of law. Based on the court's precedents and the facts that were presented, I can understand how the court reached its conclusion," Barkett states.

Even so, Barkett is among those Section leaders who predict that allowing third-party providers to deliver legal services is part of a growing trend to make such services accessible to the public. "I know that Arizona has just begun an experiment with allowing third parties to have a financial interest in a law firm," he offers. "I believe that Utah and Washington are also experimenting with different models to allow nonlawyers to provide certain legal services to clients."

Echoing Barkett, J. Dalton Courson, cochair of the Section's Access to Justice Committee, observes that "the traditional legal model is not working to meet the needs of certain clients in certain practice areas. The recent moves in Utah and Arizona to permit nonlawyers to appear in court under certain conditions seem part of the same trend." LN

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Failure to Follow Ethics Rule Voids Fee-Splitting Agreement

By Rachel A. Harris, *Litigation News* Contributing Editor

A fee-splitting agreement between two law firms did not comply with state bar rules, prompting the reversal of a $390,000 award in a dispute over how to divide $3.16 million in contingency fees. The decision underscored the long-held principle that attorneys must strictly comply with ethics rules when entering into fee-splitting agreements. ABA Litigation Section leaders agree this ruling is a stark reminder to carefully review state rules when entering into referral and other fee arrangements.

The dispute in *Harmon Parker, P.A. v. Santek Management, LLC* arose from an agreement between two law firms—Gerber Law Group and Harmon Parker, P.A.—to serve as cocounsel for a driver rendered quadriplegic from a car accident. The firms agreed to split a 40 percent contingency fee on a 75/25 basis on the first $1 million recovery, and 50/50 on any recovery exceeding $1 million.

The case settled at mediation for $8 million, resulting in $3.16 million total attorney fees. Harmon prepared a closing statement allocating only $1.28 million to Gerber—$390,000 less than the $1.67 million called for by the firms' agreement. Gerber assigned its rights to the additional fee to Santek Management LLC, which sued Harmon for the deficiency. Santek argued that Harmon breached the agreement because Gerber never agreed to modify it.

The jury found Harmon breached the agreement but awarded no damages. However, the trial judge entered a directed verdict awarding Gerber the $390,000 deficiency plus prejudgment interest. Harmon appealed.

Florida's 2nd District Court of Appeals reversed the lower court's ruling and held that both Gerber and Harmon had failed to comply with Florida Bar Rule 4-1.5(f)(4)(D) relating to contingency fee contracts "in several material respects."

Specifically, the court explained that the firms failed to (1) detail what services each firm would provide; (2) specify that "each lawyer assumes joint legal responsibility for the representation"; (3) file a petition for court approval within 10 days of execution; and (4) have all counsel verify and sign the petition. The underlying approval of the petition by a lower court judge did not change the appellate court's analysis. "Indeed, [Florida Bar Rule 4-1.5(f)(4)] expressly provides that approval of the petition does not bar subsequent inquiry," the majority reasoned.

The majority also relied on a Florida Supreme Court decision, *Chandris, S.A. v. Yanakakis*, which held that contingent fee agreements that violate Florida's ethics rules are void because the requirements governing these contracts are necessary to protect the public interest, and to allow noncompliance would "constitute a competitive disadvantage to members of The Florida Bar who do comply with the rules." The majority concluded that the fee-splitting agreement between Gerber and Harmon was void as against public policy and, thus, unenforceable. Because there was no claim for quantum meruit, the court reversed the $390,000 awarded to Gerber and directed the trial court, on remand, to enter judgment in Harmon's favor.

Litigation Section leaders agree that a few precautions can protect firms entering fee-splitting arrangements. "The key is to comply with the letter of the rule," counsels John M. Barkett, Miami, FL, cochair of the Section's Ethics & Professionalism Committee.

A simple, yet often overlooked, precaution is to regularly review form agreements for compliance. "A lot of attorneys take old contracts, swap out a few details, and move forward without having scrutinized the contract in years," explains Michael S. LeBoff, Newport Beach, CA, cochair of the Section's Professional Liability Litigation Committee.

However, attorneys need to "be very cautious in terms of what they are putting in agreements and making sure they comply with all technicalities, even if they disagree with the rule or it doesn't make any sense," LeBoff advises. "It's important for attorneys to stay abreast of changes to each state's rules and to regularly review their fee-splitting agreements for compliance," agrees Laura K. Lin, San Francisco, CA, cochair of the Ethics & Professionalism Committee.

The decision is also a reminder that attorneys cannot contract around fundamental rules. "The ethical rules are fundamentally important, and we should expect the court to be watchdogs for those. While we certainly want courts to uphold freedom to contract, that freedom is not without limits," Lin explains. LeBoff agrees, noting "if the courts did not enforce ethics rules, there would not be a reason for attorneys to comply." Finally, even though the case did not involve a complaint by a client that the fee was excessive or otherwise improper, Section leaders believe it was proper for the court to step in. "It is important for courts to speak up and underscore how critical these rules are, if we really want courts to not just enforce the rules but to champion them," concludes Lin. LN

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How to Ethically Respond to Negative Online Reviews

By Andrew K. Robertson, *Litigation News* Contributing Editor

Lawyers receiving a negative online review now have additional guidance for deciding whether or how to respond. In Formal Opinion 496, the ABA Standing Committee on Ethics and Professional Responsibility sets forth best practices for attorneys to address criticism while fulfilling ethical duties to clients. ABA Litigation Section leaders caution that there is no one-size-fits-all solution, however.

ABA Model Rule of Professional Conduct 1.6 generally prohibits attorneys from disclosing any information relating to a client's representation or that could lead to the discovery of confidential client information without client consent unless an exception to the rule applies. Rule 1.6(b)(5) allows a lawyer to disclose confidential information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client" or in response "to allegations in any proceeding concerning the lawyer's representation of the client." The committee concluded that a negative online review was not a "controversy" under Rule 1.6(b)(5) due to its informal nature and that "a public response [would] not be reasonably necessary" to establish the lawyer's claim or defense.

The committee suggested several courses of action that would comply with the duty of confidentiality. First, lawyers "may request the host of the website or search engine to remove the post." In making the request, the committee advised, attorneys may inform the host of certain facts, if applicable, such as that the poster is pretending to be a client, that the post is inaccurate, or that the poster is not a client. However, the committee reiterated that no confidential client information may be disclosed without client consent.

Second, lawyers can simply not respond, as responding may escalate and highlight the negative review.

Third, the attorney may request to take the conversation offline. The committee cautioned that the lawyer may risk further negative posts if he or she is unable to assuage the poster's concerns, however.

Fourth, a lawyer may respond to reviews from nonclients by stating that the poster has never been a client. But if the post is from an opposing counsel or former opposing counsel, or a former client's friend or family member, and it relates to an actual representation, informed client consent is required before the attorney discloses any confidential information. The committee explained, "Even a general disclaimer that the events are not accurately portrayed may reveal that the lawyer was involved in the events mentioned, which could disclose confidential client information." Accordingly, the committee advised attorneys "to discuss the proposed content of the response with the client or former client."

Lastly, if the poster is a current or former client, attorneys may not respond online other than "to acknowledge that the lawyer's professional obligations do not permit a response." The committee provided the following statement as an example: "Professional obligations do not allow me to respond as I would wish." Additionally, the committee recommended that lawyers seek the advice of counsel before responding offline.

"I think the ABA's recommendations of best practices are excellent—firms and lawyers will be better off if they follow them," praises Cassandra B. Robertson, Cleveland, OH, chair of the Appellate Subcommittee of the Section's Civil Rights Litigation Committee. "When lawyers feel hurt or threatened by a negative review, they are not in a good position to be able to neutrally respond," notes Robertson.

"The ABA's best practices are absolutely good conflict resolution practice," agrees David D. Moore, Sylva, NC, cochair of the Civil Rights Litigation Committee. "However, there may arise some issues with applying a broad approach to dealing with negative online reviews—there's not a one-size-fits-all solution," Moore observes. "One thing that must be considered is whether the lawyer who is the target of a negative online review is a small-town lawyer whose practice involves domestic spats, or a big-city lawyer who does transactional work. A negative online review could be more damaging to a small-town lawyer's reputation than a big-city lawyer's," cautions Moore.

Section leaders recommend that lawyers collaborate with their firm to put together an appropriate response that is attuned to the disgruntled poster, if necessary. "It should be up to the firm because the firm acts as a collective. Any issues that the individual attorney may have with how the firm decides to respond can be resolved internally," advises Moore.

"Prospective clients can be influenced by online reviews, but they don't care about the specifics of what happened with the former client," Robertson adds. "Instead, they want to see that the lawyer is caring and responsive, and treats former clients with respect. I recommend responding with empathy and an invitation to discuss the matter privately," concludes Robertson. LN

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Appellate Court Strikes Down Award of Attorney Fees

By Benjamin E. Long, *Litigation News* Team Editor

The bar to obtain attorney fees for vexatious conduct is high, a state supreme court has cautioned. The decision overturned a lower court's fee award of $237,440 despite evidence that the litigation was filed for the purpose of delay and was filed after the limitations period ended. ABA Section of Litigation leaders advise that because courts are reluctant to award attorney fees, practitioners seeking them should develop compelling grounds.

In *River Ridge Development Authority v. Outfront Media, LLC, et al.*, River Ridge sued to prevent Outfront Media from constructing several roadside billboards near a business park known as the River Ridge Commerce Center. During the litigation, the Indiana Department of Transportation designated the road near the proposed billboards a scenic byway, which prevented construction of the billboards. River Ridge immediately dismissed its lawsuit.

Outfront Media and other defendants then moved for attorney fees, arguing that River Ridge sued merely to buy time until the scenic byway designation. Additionally, Outfront Media contended that River Ridge acted in bad faith by opposing the fee motion on the grounds that the trial court lacked jurisdiction to award attorney fees despite precedent to the contrary.

The trial court agreed and ordered River Ridge to pay $237,440.63 in attorney fees. It reasoned that "the timing of the dismissal, with prejudice, is more than coincidental. It is disconcerting." The trial court also found that River Ridge acted in bad faith by litigating claims that it knew were time barred because River Ridge had not petitioned for judicial review within 30 days of the billboard permits being granted, as required under Indiana law.

It concluded that River Ridge's conduct was "in bad faith, obdurate, harassing, and fully supports assessing costs and attorney fees." The trial court relied on three exceptions to the American Rule, which requires each party to pay its own attorney fees: (1) Indiana's General Recovery Rule, which allows fees awards when a party's claims or defenses are "frivolous, unreasonable, or groundless" or when a party litigates in bad faith; (2) the obdurate behavior exception, which permits fees awards for a "baseless claim" and when conduct is "vexatious and oppressive in the extreme and a blatant abuse of the judicial process"; and (3) the court's own inherent authority to sanction parties.

The Indiana Supreme Court concluded that the trial court abused its discretion in awarding fees. Regarding Indiana's General Recovery Rule and the common law obdurate behavior exception, the court explained that both theories require the fee-seeking party to be the "prevailing party." Since River Ridge voluntarily dismissed its lawsuit, Outfront Media did not win on the merits and was thus not a "prevailing party."

As to the court's inherent sanctions power, the court explained that it could only be invoked upon a finding "that a party has acted in bad faith and such conduct is calculatedly oppressive, obdurate, or obstreperous." In other words, "the law does not insulate a party that behaves in extreme bad faith before voluntarily dismissing its complaint."

The court held that this standard had not been met and distinguished losing on the merits from bringing a case with no supporting facts whatsoever, with only the latter justifying a bad faith finding.

Though River Ridge had failed to timely seek judicial review, the court found that it had defensible arguments, including that the zoning and billboard permits were ultra vires and void, and issued without the requisite authority. The court further found no evidence that suggested River Ridge knew the scenic byway designation would ever be made when it filed its complaint. Lastly, it held that though River Ridge's jurisdictional argument was unsupported, it was just one argument out of many and did not evidence a pattern of behavior that would warrant an award of fees.

"Under their inherent authority, courts are able to preserve the integrity of the judicial process," notes John M. Barkett, Miami, FL, cochair of the Litigation Section's Ethics & Professionalism Committee. "The bar for awarding attorney fees in derogation of the American Rule requires bad faith conduct. That showing was simply not made in this case," observes Barkett.

"Courts are generally hesitant to award sanctions or attorney fees," comments Michael S. LeBoff, Newport Beach, CA, cochair of the Section's Professional Liability Litigation Committee. "You really need compelling grounds to be successful on such a motion," he explained. Practitioners should proceed with caution. "Be sure you have a sufficiently developed fact basis when making your motion," LeBoff advises. "You must be very logical and not allow emotions or frustrations with opposing counsel to dictate your decision. One worry beyond not having your motion granted is if it draws a motion for sanctions or fees against you in response," he warns. LN

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+ Quest to Reclaim Stolen Pissarro Masterpiece Turns *Erie*
+ NFL Sued for Discrimination by Former Head Coach
+ Florida Supreme Court Rules ABA's CLE Programs Improperly Impose Quotas

AND MORE . . . BY HON. ORAN F. WHITING (RET.), *LITIGATION NEWS* ASSOCIATE EDITOR

U.S. SUPREME COURT

First Amendment

The Supreme Court heard argument about the scope of religious expression rights under the First Amendment in connection with Boston's rejection of a request to fly a flag embraced by some Protestant churches at City Hall to celebrate Boston's Judeo-Christian heritage as well as Constitution Day. The Court will also address whether the city's actions constituted an unconstitutional expansion of the government speech doctrine. *Shurtleff v. City of Boston*, No. 20-1800.

Choice of Law—*Erie* Doctrine

In a case involving the attempted recovery of an Impressionist masterpiece stolen at the beginning of World War II, the Supreme Court will opine on choice of law when a federal court hears state law claims brought under the Foreign Sovereign Immunities Act. At issue is whether the federal court should apply the state's choice-of-law rules to determine what substantive law governs the claims at issue, or instead use federal common law to choose the source of the substantive law. In the underlying case, the heir of the painting's original owner sued the country of Spain and a museum in possession of the painting, asserting conversion, unlawful possession of property, and other common law claims under California state law, seeking both damages and the return of the painting. *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 20-1566.

U.S. DEPARTMENT OF JUSTICE

The Justice Department has filed the latest in a series of civil forfeiture complaints in federal court concerning the use of funds obtained through alleged embezzlement and fraud from PrivatBank in Ukraine, in violation of federal money-laundering statutes. The department alleges in its most recent complaint that branches of PrivatBank were involved with a web of entities created to launder portions of misappropriated funds. *United States of America v. The Promissory Note*, No. 1:22-cv-20238.

U.S. DISTRICT COURTS

Southern District of New York: Discrimination—Section 1981

A former National Football League (NFL) head coach has filed a class action discrimination complaint against the NFL and three teams. Brian Flores's comprehensive complaint alleges discrimination in hiring and in the hiring process, disparate treatment, unequal compensation, and retention. At the time of filing, Flores was still being considered for head coaching jobs in the *NFL. Flores et al. v. National Football League et el.*, No.1:22-cv-00871 D.

District of Columbia: Environmental

The U.S. District Court for the District of Columbia ruled the Biden administration did not sufficiently take climate change into account when it auctioned oil and gas leases of more than 80 million acres in the Gulf of Mexico. The court held the U.S. Department of the Interior violated the 1970 National Environmental Policy Act by acting "arbitrarily and capriciously in excluding foreign consumption from their greenhouse gas emissions." *Friends of the Earth et al., v. Haaland et al.*, No. 21-2317.

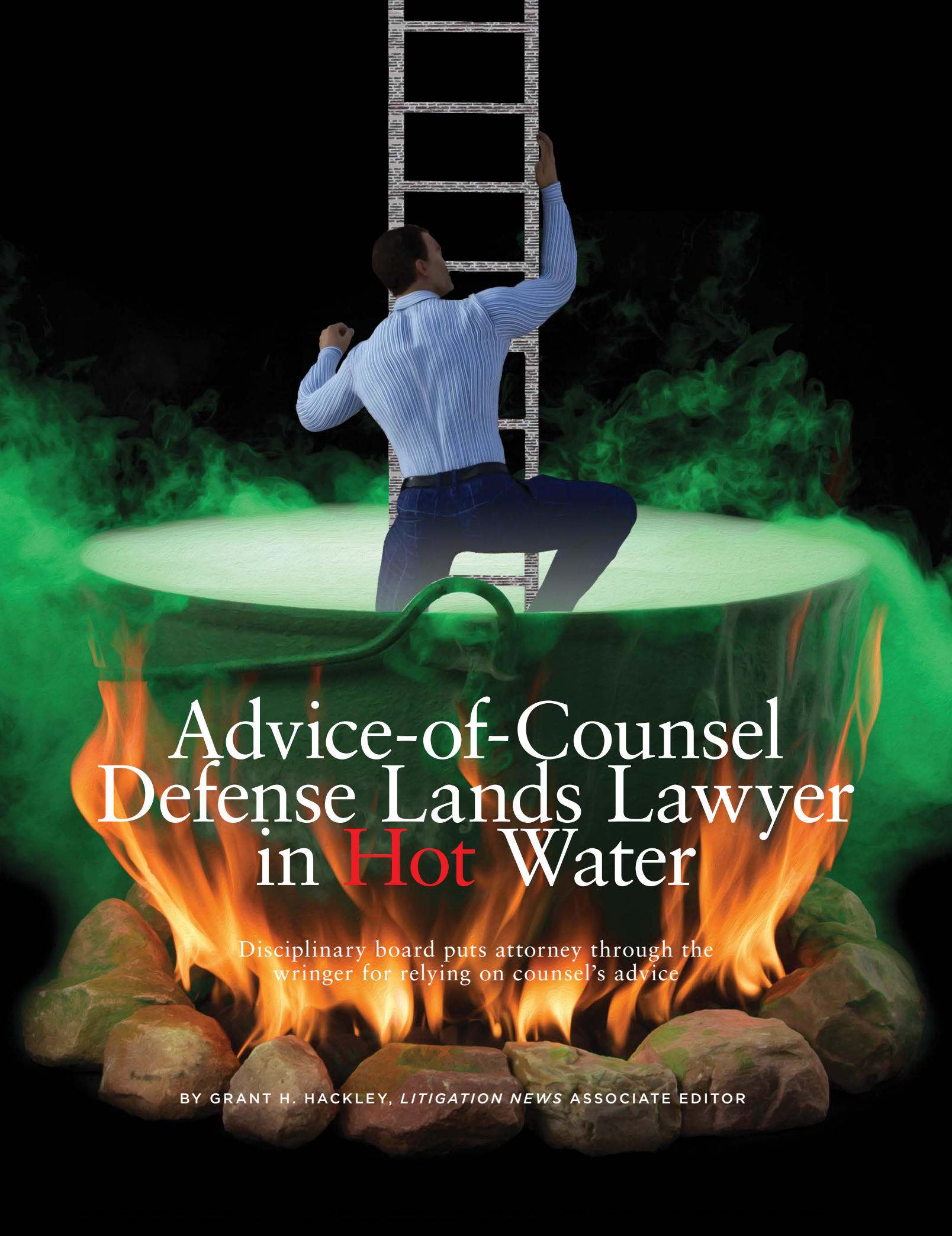
STATES

Colorado: Fourth Amendment—Searches and Seizures

The Colorado Supreme Court recently affirmed an appellate court ruling holding that the Colorado Springs Police Department's use of an adjustable camera mounted on a utility pole across the street from a fenced-in suspected drug house constituted a warrantless search violating the Fourth Amendment. The court highlighted the three-month duration, continuity, and nature of surveillance as determinative of a violation. *People v. Tafoya*, No. 20SC9.

Florida: Equal Protection

The ABA's continuing legal education (CLE) programs improperly impose "quotas" on panels that "smack of stereotyping or naked balancing," according to a recent Florida Supreme Court ruling. The ruling affirmed a lower court decision banning Florida lawyers from receiving CLE credit for programs requiring diversity among panelists. *In re Amendment to Rule Regulating the Florida Bar* 6-10.3, No. SC21-284.



Advice-of-Counsel Defense Lands Lawyer in Hot Water

Disciplinary board puts attorney through the wringer for relying on counsel's advice

BY GRANT H. HACKLEY, *LITIGATION NEWS* ASSOCIATE EDITOR

A lawyer who relied on another lawyer's advice found himself hauled before his state's disciplinary board, facing suspension of his law license for not disclosing anticipated bonuses to his creditors in bankruptcy. In *Florida Bar v. Herman*, the state bar brought an ethics complaint against an experienced trial attorney, alleging he misled a bankruptcy court and his creditors in violation of state ethics rules. While the attorney was ultimately exonerated, ABA Litigation Section leaders suggest that this is a cautionary tale and that—for lawyers especially—honesty is always the best policy.

Questions Arise Following Bankruptcy Disclosures

Peter Herman was licensed to practice law in Florida in 1982 and had worked at his firm for more than 30 years. Though he had the title of director at the firm, he was not an equity partner and did not have a contract of employment. He was paid W-2 wages and received an annual discretionary bonus, determined by the firm's compensation committee.

During his time at the firm, Herman was engaged in a separate business, Equity Ventures, LLC. To fund that endeavor, Herman personally guaranteed a loan of $6.8 million. The Equity Ventures deal was unsuccessful, though, and the creditor obtained a deficiency judgment of $4.5 million on the loan Herman had guaranteed. The creditor aggressively pursued collection of the judgment, and Herman was forced to file for Chapter 7 bankruptcy protection.

After commencing the bankruptcy proceeding, but before he filed his financial disclosures with the bankruptcy court, Herman prevailed in two large civil contingency-fee cases, for which his firm was entitled to attorney fees. Herman anticipated a significant year-end bonus out of the $10 million his firm had earned. However, the amount of his bonus was indeterminate and dependent on the discretion of his firm's compensation committee.

Because the bonus was not guaranteed, Herman disclosed in bankruptcy only his ordinary salary and an estimated bonus based on his typical end-of-year discretionary bonus, approximately $65,000–$70,000. The creditor learned of the $10 million fee and objected to the bankruptcy discharge, pointing to Herman's failure to disclose his anticipated—and potentially much larger—bonus on his interest in the $10 million fee.

The bankruptcy court held a trial, after which it denied the petition for discharge of Herman's debt. It concluded that Herman had a "level of sophistication" as a seasoned trial attorney, and he "acted with intent to hinder, delay or defraud" his creditors and the bankruptcy trustee when he failed to disclose the interest in the $10 million fee. The U.S. District Court for the Southern District of Florida affirmed the bankruptcy court's Findings of Fact and Conclusions of Law and referred the matter to both the U.S. Attorney for the Southern District of Florida and to the Florida Bar to determine whether further action was warranted.

Advice of Counsel Defense Initially Falls Flat

The Florida Bar filed a disciplinary action against Herman, alleging violations of Florida Rules of Professional Conduct. Among other things, the Bar alleged that Herman had committed an act that was unlawful or contrary to honesty and justice, had made false statements to a tribunal, had obstructed another party's access to evidence, and had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. The Florida Supreme Court referred the matter for appointment of a referee to conduct and oversee disciplinary proceedings and to make a report and recommendation to the court.

> "It is always in the interest of attorneys facing litigation against them[selves] individually to seek the advice of counsel."

In the disciplinary proceeding, Herman relied on an advice-of-counsel defense. Uncertain whether to disclose his anticipated bonus in the bankruptcy proceeding, Herman had explained the circumstances to his bankruptcy counsel, an experienced debtor's attorney. The bankruptcy attorney had represented insolvent debtors for decades in legal matters. The bankruptcy attorney had further investigated the underlying facts, going so far as to interview members of Herman's firm's compensation committee about the methodology for distributing bonuses and Herman's reasonable expectation of receiving a bonus on the $10 million fee. He had also researched relevant case law and provided those cases to Herman to support not disclosing the anticipated bonus.

The bankruptcy attorney ultimately advised Herman that he did not have to disclose the anticipated bonus in the bankruptcy proceeding because it was not discretionary and not vested in Herman at the time that he filed the bankruptcy petition. Herman had expressly relied on the bankruptcy attorney's opinion to that effect in signing his bankruptcy disclosures.

The referee in the disciplinary proceeding found Herman's explanation unavailing, concluding disciplinary precedent held that attorneys in Florida were not entitled to rely on an advice-of-counsel defense in ethics proceedings. The referee recommended that the Florida Supreme Court find Herman guilty of professional misconduct and suspend his law license for a period of 18 months. The bar objected, arguing that the suspension was too lenient. Instead, it requested disbarment.

Good Faith Reliance on Advice Sufficient to Avoid Sanction

The Florida Supreme Court reviewed the report and recommendation and issued an opinion and order, remanding the matter back to the referee for further proceedings and issuance of an amended report. The supreme court noted that the "reason an advice of counsel defense is usually unavailable in Bar discipline proceedings is that the Bar rules themselves charge Florida lawyers with knowledge of the rules and of 'the

standards of ethical and professional conduct prescribed by this court.'" But here, the supreme court noted, Herman was not acting as a lawyer in the particular matter for which discipline was sought, nor was the particular underlying issue for which he was seeking advice of counsel related to the standards of ethical and professional conduct. Rather, Herman had been a client seeking legal advice on a complicated and disputed issue of bankruptcy law.

Following the remand, the referee held further proceedings and issued an amended report and recommendation, reversing his prior decision and finding that Herman had appropriately relied on the advice of counsel in determining whether to disclose his anticipated bonus. The referee found that Herman had acted in good faith after full disclosure of all relevant facts, and that the bar had failed to demonstrate with clear and convincing evidence that he had acted with intent to defraud his creditors. This time, the referee recommended no discipline, and the Florida Supreme Court adopted his report and recommendation.

Competent Counsel Is Key

Practicing law is complicated. Nevertheless, the very first rule of professional responsibility, ABA Model Rule 1.1, requires that a lawyer provide "competent representation." Inherent in this concept of competent representation, recognized by the comments to the Model Rule, is that a lawyer should have the knowledge and skill of a general practitioner. Moreover, a licensed attorney is charged with knowledge of the rules of professional responsibility. But what about a niche practice area? And what about the client who also happens to be a lawyer?

"Rule 1.1 requires competence," states David B. Seserman, Denver, CO, cochair of the Section's Solo & Small Firm Committee. "We have to either possess a level of competence ourselves or associate with someone who has that competency," he advises, suggesting that he believes Herman did the right thing in this case. "He, in good faith, sought advice about something he knew nothing about," Seserman continues. "[Herman] did not hide from his bankruptcy counsel his expectation" in the $10 million fee.

"He Who Represents Himself Has a Fool for a Client"

A predicate to the analysis in *Herman* is that the attorney facing disciplinary sanctions was seeking advice as a client in an area of law unrelated to his day-to-day practice. "It is always in the interest of attorneys facing litigation against them[selves] individually to seek the advice of counsel," notes Tiffany A. Rowe, Washington, DC, cochair of the Section's Professional Liability Litigation Committee. "Herman may have been a practicing civil litigator for 30 years, but he knows very little about bankruptcy, a very complex area of law," says Rowe.

Indeed, Herman's own bankruptcy attorney had testified that Herman was a "babe in the woods" and was "not knowledgeable about even the most basic of bankruptcy matters." Rowe explains that "here, the question was not a general legal proposition." Rather, "he should be entitled to use the advice of counsel to defend this complex issue."

"I believe it is a best practice to consult with counsel where an ethical violation arises," Rowe concludes, "the same as any law firm would consult their ethics and compliance counsel."

Herman's Extenuating Circumstances

Section leaders believe that the Florida Supreme Court ultimately did the right thing in *Herman*. "Herman was accused of fraud. He did not have the intent to defraud," explains Seserman. "He did not hide anything from his bankruptcy attorney. He went to a lawyer, he had a question about how he should disclose this information, and his lawyer—who conducted due diligence—said he should not," Seserman elaborates.

The specific circumstances supported the ultimate outcome, observes Rowe, who points out that "[t]he facts and case law were in [Herman]'s favor." She suspects that when Herman was seeking the advice of his bankruptcy counsel, he may not have even considered the ethical implications of deciding wrongly on the question of whether to disclose the interest in the $10 million fee to the bankruptcy court.

"This is not a case where Herman [himself] was practicing law," Seserman notes. "He was not representing anyone and was relying on counsel."

When Herman was seeking the advice of his bankruptcy counsel, he may not have even considered the ethical implications of deciding wrongly on the question of whether to disclose the interest in the $10 million fee to the bankruptcy court.

In this sense, "a client-lawyer should not be considered differently than any other client," Rowe posits. Nevertheless, "the facts reiterated in this opinion suggest to me that [Herman] and his counsel fully considered the issue and made disclosures they believed in good faith to be accurate and appropriate."

Seserman agrees, even if he might have acted differently himself. "I'm a trial lawyer—I believe in full and complete disclosure of all the facts," he states. Despite this, "[Herman] did not have a reasonable anticipation of receiving the bonus—that's a factual finding that you have to accept, even if you don't agree with it," he chides. Accordingly, Herman did not have to disclose it here and could rely on the advice-of-counsel defense.

How Far Can the Advice-of-Counsel Defense Go?

Lawyer-clients would be wise to consider themselves held to a higher standard than the average client, Section leaders conclude. "I do not think this

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case answers the broader question of whether an attorney can rely on the advice-of-counsel defense to say 'I should not be disciplined,'" asserts Seserman.

"[Herman] didn't go to a lawyer to create a cover story [for unethical conduct]. That's not what occurred, and that's not what the court found," he emphasizes, predicting the outcome would have been different had Herman been merely seeking a favorable legal opinion that he was permitted to hide the interest in the $10 million fee. Accordingly, attorneys should not take this case to suggest that they can hide behind the advice-of-counsel defense in all situations, Seserman advises.

Rowe notes that "there will always be instances where affirmative defenses like this are overused or stretched." The case here, though, "is different than seeking counsel regarding questionable conduct in order to still receive the benefit of that act, but avoid ethical issues by bending the rules," she clarifies.

Setting a Higher Bar

Ultimately, lawyers are held to extremely high ethical standards across the board, Rowe reiterates. She suspects Florida's high court saw the *Herman* case as a vehicle to reinforce how high those ethical standards are—especially when a lawyer is representing another lawyer.

"The attorney should have very frank discussions with the client lawyer," she counsels. The representing lawyer should "do some extra diligence on ethical violations claims and take a step back from the case law in the substantive area," Rowe advises. She suggests that the representation be conducted with a potential future disciplinary review in mind. "Look at the matter from an ethical perspective and confirm that the matter is handled not only in a legally defensible manner, but also at a separate and often higher standard," she concludes.

Seserman agrees. Although the outcome "depends on the facts and circumstances of each case," he says, at the end of the day, "I think this case says that lawyers are subject to a different standard." LN

RESOURCES

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- Theresa Gronkiewicz, "Twelve Tips to Help You Avoid Disciplinary Proceedings," *Ctr. for Professional Responsibility* (2020).
- Thomas G. Wilkinson Jr. and Douglas B. Fox, "ABA Issues Guidance on Lawyers' Duties Regarding Clients' Fraudulent, Criminal Behavior," *Ethics & Professionalism* (June 8, 2020).
- Brian Spahn, "Advice of Counsel: Impact on Attorney-Client Privilege and Waiver," *Corp. Counsel* (Dec. 28, 2018).
- Florida Rules of Professional Conduct.
- ABA Model Rule of Professional Conduct 1.1: Competence.

Court Online: Virtually Normal

By Mark A. Flores, Litigation News *Associate Editor*

After more than 260,000 virtual court events involving more than 2.7 million participants conducted during the COVID-19 pandemic, the New Jersey Supreme Court has decided that the "framework for the future of court operations" is online. The court recently issued an order outlining the ways in which technology can "provide expanded options for access, participation, timeliness, and justice." ABA Litigation Section leaders predict that courts will begin to adopt similar positions across the country, and that virtual proceedings—with all their benefits and pitfalls—will become part of every litigator's day-to-day practice.

Identifying When Virtual Proceedings May Be Appropriate

The New Jersey Supreme Court's order sets forth several new parameters. First and foremost, judges will have the discretion to conduct court proceedings virtually or in person moving forward in generally all civil matters and certain criminal proceedings. However, some prescribed categories will default to one format or the other.

For example, unless an individual party can present facts and circumstances that would otherwise require an in-person hearing, the following matters will be handled virtually: routine motion arguments, criminal initial appearances, hearings involving criminal defendants already in state custody, small claims trials, uncontested guardianships, uncontested divorces, and other routine civil hearings.

By contrast, criminal jury trials will proceed in person, while appellate arguments, sentencing hearings, juvenile delinquency proceedings, evidentiary hearings, and other non-routine proceedings will generally proceed in person unless all parties consent to a virtual hearing.

The court explained that it considered both the pros and cons for litigators, parties, and jurists in categorizing types of proceedings. Although virtual hearings can sometimes result in reduced time and cost, as well as "fewer scheduling conflicts and requests for continuances," the court noted that key stakeholders have pointed to the importance "of bringing parties together in person at certain critical junctures, including settlement conferences and proceedings that involve especially serious penalties or consequences."

Recognizing the competing interests and "the evolving nature of court operations," the court noted it will review the provisions of the order moving forward.

Increasing Access Through Virtual Proceedings

Litigation Section leaders see the New Jersey framework as a blueprint for expanding virtual proceedings nationwide, which may come with several advantages. For example, Rachel Pereira, Washington, DC, cochair of the Section's Access to Justice Committee, believes virtual judicial proceedings have opened up access to proceedings for a segment of the population that might otherwise have difficulty getting to the courthouse.

"Videoconference and remote court proceedings have benefit," Pereira asserts. "Remote proceedings allow people to participate without having to take time off work and allow low-income litigants with commuting issues or child-care issues to be able to have greater access without the burden that would have been caused otherwise."

However, Pereira notes that the expansion of virtual proceedings presupposes that the litigants and parties have access to a stable internet connection and technology, which could prove expensive. She proposes that courts consider providing a "hotspot system" or some other technology that individuals can borrow to access a judicial videoconference. "I'm not a technology guru," Pereira remarks, "but if libraries can loan computers to people, certainly courts can do it."

Other Section leaders agree that allowing courts more flexibility to utilize virtual proceedings will increase citizen access to the judicial system under the right circumstances. "I anticipate that courts will continue to offer virtual hearings and trials as an alternative—rather than as the sole option—even when regular in-person proceedings resume," predicts Adrian K. Felix, Miami, FL, cochair of the

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Section's Judicial Intern Opportunity Program. "It is important to remember that in-person hearings do not have an insignificant time and cost burden, particularly for individuals, so having a viable alternative to that should be an overall positive," he affirms.

Increasing Efficiency Through Virtual Proceedings

More virtual proceedings will also lead to a more efficient court system overall, according to Felix. "For example, the administrative side of scheduling hearings is easier because lawyers can fit more on their calendars when travel is not involved," he notes. "And that, in addition to reducing costs associated with traveling, allows litigation cases to be moved along faster, which in turn helps with judges' caseloads and overburdening of the system in general," Felix concludes.

Potential Setbacks in a Virtual Environment

While there are many tangible benefits to taking court online, Section leaders recognize that plenty of kinks still exist in virtual litigation. Courts must address these issues before proceeding with a more aggressive implementation of virtual litigation moving forward, according to both Pereira and Felix.

One potential downside is the limited ability for litigators to engage in confidential communications with clients who may be in a separate physical location. "If there is no provision for attorney-client communication that can occur when appearing separately remotely, there is less communication," Pereira observes. "The quality of care that our clients experience when there is no private space to speak can be difficult, and not having the ability to communicate confidentially can cause a hardship to the types of communications received," she warns.

Another issue is that it may be more difficult to communicate through nonverbal cues, which are typically easily visible during in-person hearings but not always readily ascertainable on a small box in a videoconference. "One of the main limitations and jurist perspective is just the ability to pick up on and react to nonverbal communications," Felix stresses. "Body language can be as important as verbal communications and a static camera often hides or limits the things we may otherwise spot in person."

Virtual Litigation Is Here to Stay

The New Jersey Supreme Court's predilection toward virtual proceedings in civil motion practice and even certain criminal proceedings likely signals a new reality nationwide, according to Section leaders: Virtual hearings will not disappear post-pandemic.

"As the saying goes, necessity is the mother of invention, and the COVID-19 pandemic has forced courts and lawyers to pivot and find a workable alternative to in-person hearings and trials," Felix offers. "So now, having spent the better part of two years refining a virtual alternative, and recognizing the efficiencies that have come with it, I do not see courts or lawyers simply abandoning the option in favor of in-person proceedings," he opines.

Likewise, Pereira believes virtual hearings are here to stay and expects some growing pains along the way. "Recognize how incredibly difficult it is to shift methods, particularly when our judicial system is set up on precedent," she states. "Moving away from what we have always done is the antithesis of our profession, and I understand why it might be difficult."

That said, Pereira recognizes virtual litigation as a viable part of attorneys' everyday practice moving forward. "I like the idea so long as we can recognize the challenges ahead and address them," she concludes. "Address the challenges and then what a wonderful world it could be." LN

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- Ronza J. Rafo, "Efficient lawyering in virtual court," *GPSolo Mag.* (Aug. 13, 2021).

Think Privilege Attaches? Think Again

Companies' public relations departments often send press releases to legal before publication to ensure nothing in the release will cause future legal harm. But at least one court has held this type of run-it-by-the-lawyer communication is insufficient to secure privilege protection in a subsequent legal action. *Presnell Privileges*'s Todd Presnell reviews the U.S. District Court for the Eastern District of Louisiana's decision in *Slocum v. International Paper Co.* In this class action, an explosion in a paper mill coated a local town in black liquid. Within hours, the local communications manager sent a draft statement via email to the company's communications leaders and two in-house counsel, inserting "PRIVILEGED ATTY CLIENT COMMUNICATION" in the email's subject line. One of the in-house counsel responded that the edits "look good." Later facing a motion to compel, the communications manager filed a declaration, attesting the email to counsel sought advice on potential legal implications of the draft statement. The court compelled production, noting modern corporate counsel have become involved in all facets of the enterprise and are copied on every communication that might be seen as having some legal significance, regardless of whether it is ripe for legal analysis. The court also took issue with the simultaneous communication to both lawyers and nonlawyers, finding that the primary purpose of the communication was not for legal advice because it served both business and legal purposes. Presnell advises companies to be aware that courts view in-house lawyers' communications skeptically, especially when nonlawyers are also on the communication. How could the result have been different? Presnell suggests a separate email to in-house counsel, a specific request for legal advice in the email's content in addition to the privilege designation in the subject line, and in response to the motion to compel, a declaration from in-house counsel explaining the early need for legal advice.

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Remanding ADA Cases to State Court

California's Unruh Act imposes automatic state law liability and additional damages for violations of the federal Americans with Disabilities Act (ADA). To discourage serial filers, the California legislature enacted reforms, including higher fees and additional procedural requirements, which resulted in plaintiffs moving their cases to federal courts. *Understanding the ADA*'s William Goren covers the U.S. Court of Appeals for the Ninth Circuit's examination of supplemental jurisdiction over Unruh Act claims in *Arroyo v. Rosas*. In *Arroyo*, the district court granted the serial plaintiff's unopposed summary judgment motion on the ADA claim but declined jurisdiction of the Unruh Act claim. The Ninth Circuit concluded that retention of supplemental jurisdiction over ADA-based Unruh Act claims threatens to undermine California's reforms and deprives state courts of their critical role. However, given the late date at which the district court declined jurisdiction, the Ninth Circuit held it had abused its discretion in dismissing the plaintiff's Unruh Act claim. The lower court had already resolved the merits of the ADA claim—implicating automatic liability under the Unruh Act—leaving only the ministerial task of entering judgment on the state law claim. For federal litigants in states with anti-discrimination statutes, particularly those with heightened pleading requirements, Goren advises defense counsel immediately remand at least the state law claim to state court. While defendants typically prefer federal court, he suggests they may be better served in such cases by removing the entire case to state court through supplemental jurisdiction over the federal claim.

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Don't Wait to Get Investigated—Provide Nursing Space Now

Employers can avoid federal liability by providing appropriate spaces for lactating employees. Covering the U.S. Department of Labor's settlement with Labcorp, *Ohio Employer Law Blog*'s Jon Hyman notes Labcorp erred by offering a common space to an employee requesting a private place to express milk, resulting in her being interrupted twice. Under the settlement, Labcorp agreed to provide private space, with signage to ensure intrusion-free experiences, at its more than 2,000 locations nationwide. Hyman reminds employers the Fair Labor Standards Act requires them to provide reasonable break time for nursing employees for one year after a child's birth, each time the employee needs to express milk. Employers must provide a private space, other than a bathroom, that is shielded from view and free from intrusion. It need not be a dedicated space but must be available when requested. Likewise, a temporarily converted spaced is sufficient if it meets the privacy standard. Lactation breaks may be unpaid or paid, provided the employer treats breaks for non-lactation purposes the same. Quoting Wage and Hour Division District Director Richard Blaylock: "Employers who fail to provide designated space as the law requires are creating a barrier for women willing and ready to return to the workforce."

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Fat Joe's Evidentiary Challenge

When is a duplicate a "duplicate" under federal evidence rules? *EvidenceProf Blog*'s Colin Miller reviewed the U.S. District Court for the Southern District of New York's decision in *Elliott v. Cartagena*, a copyright infringement case arising from Fat Joe's song "All the Way Up." After Eric Elliott requested payment or credit for his contribution to the song, he and Fat Joe had a meeting during which Elliott signed a piece of paper and received a $5,000 check. When Elliott later sued based on claims he is the coauthor and co-owner of the song, Fat Joe moved for summary judgment, arguing the paper Elliott signed released all copyright claims. Fat Joe could not produce a signed copy of the paper; instead, he had only an unsigned draft. He also submitted a sworn declaration that he printed and brought the unaltered draft to the meeting with Elliott. Miller believes the court erred in analyzing the case under Federal Rule of Evidence 1003, which provides that duplicates are admissible unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate. He points out that Rule 1001(e) defines "duplicate" as "a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original." As such, photocopied or scanned copies of the executed contract would qualify, but unsigned drafts would not. However, Miller notes, the court went on to find the original executed contract had been lost or destroyed, such that Rule 1004(a) would allow its contents to be proven through secondary evidence, such as the draft contract.

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The Roberts Court on Class Actions

Under Chief Justice Roberts, the U.S. Supreme Court has released on average more than two class action decisions annually since 2010. Reviewing Richard Freer's paper, "The Roberts Court and Class Litigation: Revolution, Evolution, and Work to be Done," *Jotwell*'s Jasminka Kalajdzic concludes Freer provides a compelling account of the Roberts Court's engagement on class action issues by dividing its decisions into three categories: (1) revolutionary cases—in *Wal-Mart Stores, Inc. v. Dukes*, the Court eschewed 35 years of precedent by requiring district judges to undertake rigorous evidentiary analyses relating to class certification and heightening the commonality requirement, resulting in expensive certification processes and increased denials of class certification; (2) evolutionary cases—Freer documents the evolution of the Court's decisions in fraud-on-the-market class actions, creating new hurdles for shareholder plaintiffs to certify classes by adding a requirement that a corporation's misrepresentation had a share price impact; and (3) work to be done—the Roberts Court has left unanswered important questions in three areas of class action jurisprudence: the relationship between statutory and constitutional standing in Rule 23 cases, mootness issues raised by unaccepted full value settlement offers, and the use of cy pres remedies in class settlements. According to Kalajdzic, "Freer confirms the prevailing view among class action scholars that the Roberts Court has been active on class action issues and has made certification more difficult."

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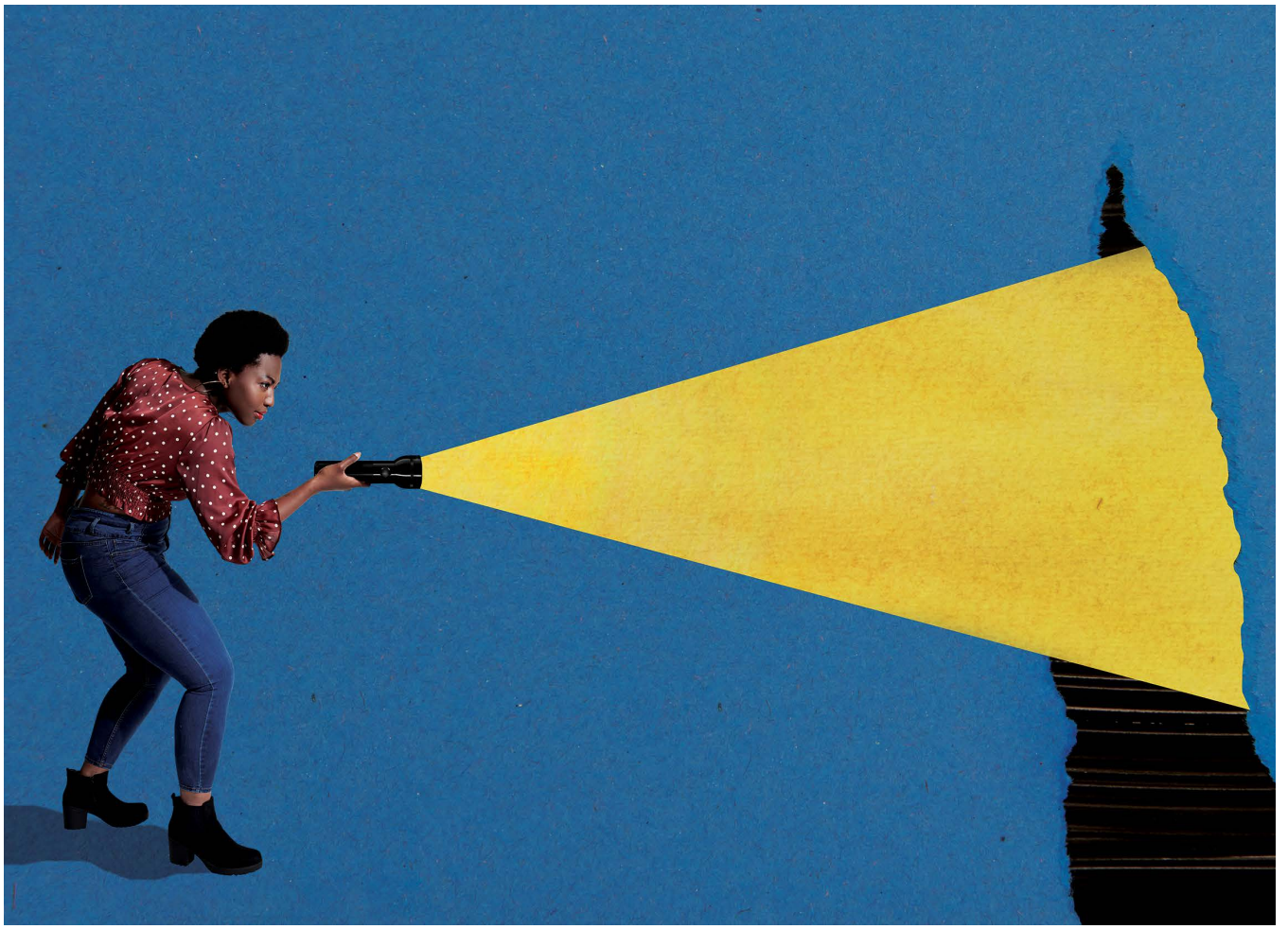
Lindsay Sestile, Litigation News *Associate Editor, monitors the blogosphere.*

Third-Party Discovery: Getting What You Need

By Hon. Karen L. Stevenson, *Litigation News* Associate Editor



In civil cases, whether it involves intellectual property or an employment dispute, essential information is often in the possession of individuals or companies that are not parties to the lawsuit. The Federal Rules of Civil Procedure allow for service of subpoenas to obtain discovery from nonparties. In practice, however, getting needed discovery from third parties can prove challenging. Here are some tips to master the process.

Know the Rules

Rule 45 of the Federal Rules of Civil Procedure governs nonparty discovery. Read it carefully. Under Rule 45, a court-issued subpoena is needed to command a nonparty "to whom it is directed to . . . attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody or control; or permit the inspection of premises[.]" Rules 33 (interrogatories), 34 (production of documents and things), and 36 (requests for admissions) pertain only to discovery by a party to the lawsuit from another party. Neither interrogatories nor requests for admission may be used to obtain discovery from a third party.

Rule 45(a)(1)(C) provides that a subpoena commanding attendance at a deposition can include a command to produce documents. Alternatively, the document requests can be listed in a separate subpoena. A deposition may not be necessary, for example, when seeking cell phone records from a communications provider or documents from an entity where the documents can be readily authenticated with a custodian of records declaration. But typically, testimony is needed from witnesses with percipient knowledge of key events.

When the subpoena requires a third party to appear at a

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deposition, it is essential to include a subpoena for that witness to also produce documents in the witness's possession, custody, and control that pertains to the subject matter of his or her testimony. Before a subpoena that seeks production of documents is served on the person to whom it is directed, a notice and copy must be served on each party.

Start Early

Do not wait until the final weeks of the fact discovery period to pursue third-party discovery. Obtaining third-party discovery often takes longer than expected. It can take weeks to negotiate production and deposition dates for nonparties. Typically, the parties will disclose any significant nonparty witnesses in the Rule 26(f) Joint Report. But sometimes nonparty witnesses are identified only as party discovery progresses.

A Rule 45 subpoena must be personally served. Locating the nonparty witness may take time and may even require some investigation. The witness may have changed jobs or moved. Once served, will the witness have his or her own counsel, or will he or she be represented by counsel for one of the parties? If the witness already has counsel, is counsel authorized to accept service of the subpoena on the witness's behalf?

The FRCP allow for service of subpoenas to obtain discovery from nonparties. In practice, however, getting needed discovery from third parties can prove challenging.

District courts typically set firm discovery deadlines in the case management schedule. If you have to request an extension to complete third-party discovery, you will need to persuade the court that you have been diligent in seeking the third-party discovery well before the deadline.

Get Documents Before the Deposition

The rules allow one deposition of a witness of no more than seven hours, unless otherwise agreed by the parties or ordered by the court. If you get documents after the witness has completed his or her testimony, it is unlikely that the court will grant a motion to reopen the deposition, especially if you did not ask for the documents before the deposition. Don't risk it. Subpoena the documents at the same time the subpoena for testimony is issued and set a production date well in advance of the deposition. This will allow time to review the materials and prepare to question the witness, as well as time to resolve any motion to compel or motion to quash filed by the witness.

Avoid Undue Burden on Nonparties

The scope of permissible discovery under Rule 45 is the same standard set out in Rule 26(b): Information must be relevant to the claims and defenses in the action and proportionate to the needs of the case. While the scope of discovery is broad for parties and nonparties alike, Rule 45(d)(1) provides particular protection for a person subject to a subpoena. A party or attorney issuing a subpoena "must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Further, a nonparty may serve written objections to the production requests either before the time for compliance or 14 days after service of the subpoena. If objections are made, then the party that issued the subpoena may move to compel compliance. The nonparty may move to quash or modify a subpoena. The court must quash or modify a subpoena that imposes undue burden on a person.

Be Strategic about What You Ask For

When preparing the subpoena, give careful thought to the requests for production. Anticipate objections and draft the requests accordingly. Avoid overly broad language. Carefully review the issues in the case and this witness's involvement before requesting "All DOCUMENTS . . ." on a particular issue. It may be wiser (and less objectionable) to ask for "DOCUMENTS sufficient to show . . ." and then identify the specific issue. Include a temporal limitation on the requests. Identify the time frame of this witness's involvement and ask for documents in and around that period. If three years of information will be sufficient, do not ask a nonparty to search for ten years of records or records spanning the nonparty's entire career in a field. If the court has entered a protective order in the case, include a copy with the subpoena so that the witness understands that confidential information can be protected.

When representing a nonparty who moves to quash based on undue burden, it is critical that the witness show the specific nature of the burden that the subpoena imposes. Get a declaration outlining in as much detail as possible the time, expense, and disruption to the nonparty's regular affairs that compliance with the subpoena would require.

When representing the party seeking to compel compliance with the subpoena, if it appears the nonparty's objections have merit as to overbreadth or relevance, help the court help you by suggesting ways the subpoena can be modified to be less burdensome. Unless the subpoena is far afield in seeking information from the witness, there is a good chance that the court will require the nonparty to produce some of the requested documents in compliance with the subpoena. It is rarely an "all-or-nothing" analysis. To get what you need in third-party discovery, know the rules, start early, and be reasonable. LN

RESOURCES

- Saran Q. Edwards, "Getting Paid to Comply with Rule 45," *Pretrial Prac. & Discovery* (Mar. 30, 2020).
- Mark A. Romance, "Five Tips Representing Non-Party Served with a Subpoena," *Commercial & Bus. Litig.* (Nov. 26, 2019).
- *Nikonov v. Flirt NY, Inc.*, 338 F.R.D. 444 (S.D.N.Y. 2021).

The Costs of Cost Shifting

By Brian A. Zemil, *Litigation News* Associate Editor

The 2015 amendments to the Federal Rules of Civil Procedure marked a turning point in the evolution of electronic discovery. The amendments propelled litigants into an era of proportional discovery and, through Rule 26(c)(1)(B), authorized courts to shift discovery costs to a requesting party making overly burdensome demands. While the advisory note cautions that the change "does not imply that cost shifting should become common practice," responding parties are increasingly moving for courts to shift costs to protect them from the undue burden or expense of conducting discovery.

These disputes highlight the limits on a party's duty to cooperate and the need for upfront negotiation of comprehensive discovery protocols regarding electronically stored information (ESI), including how available technologies, such as technology-assisted review (TAR), should be considered and used. Cost shifting should be considered a last resort to protect a party from the expense of excessive and marginal discovery demands.

Rule 26(f) requires the parties to cooperate in formulating ESI protocol. Sedona Conference Principle 6 recognizes that the "responding parties are best suited to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own [ESI]." These two competing guidelines reflect the crossroads between autonomy and cooperation in selecting discovery protocols.

Competent counsel is fundamental to a client's ability to exercise independence during negotiation. An attorney must understand a client's information systems and electronic documents while also keeping "abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." ABA Model Rule 1.1, cmt. 8. This knowledge enables counsel to negotiate a protocol identifying what technologies the parties will use to conduct ESI discovery, such as TAR. Cooperation does not, however, require capitulation, and when a requesting party insists the responding party utilize a specific technology disproportionate to the case, Rule 26(c)(1)(B) authorizes a court to issue an order protecting a responding party from undue burden by allocating "expenses for the disclosure or discovery."

The decision in *Lawson v. Spirit AeroSystems* provides instructive guidance on which Rule 26(b)(1) proportionality factors may influence a court to grant or deny a motion to shift costs when a requesting party presses the responding party to utilize TAR. Lawson, the former Spirit CEO, sued his prior employer for nonpayment of funds pursuant to his retirement agreement. Spirit claimed Lawson was not entitled to the retirement funds because he violated a noncompete agreement by consulting with a "competitive business." After the parties had difficulty "meeting and conferring productively," the court entered an ESI protocol using traditional e-discovery methods involving keyword searches and custodian interviews.

The process yielded a large data set, but a low responsiveness rate. Lawson then pressed Spirit to utilize the TAR process on the same data. Spirit argued that the new request was burdensome because it would cost $600,000 without a likelihood of improved responsiveness rates. The court "raised the possibility" of ordering a TAR on the condition that the requesting party bear the cost of the review. Spirit conducted the TAR and moved to shift the costs for the TAR process.

The court examined Rule 26(b)(1)'s proportionality factors "to determine whether the discovery request imposes an undue burden or expense such that allocating expenses under Rule 26(c)(1)(B) is warranted." When the court examined whether the discovery sought information "at the very heart of the litigation," the court found the TAR process that Lawson demanded, based on three earlier sampling efforts, added minimal value. The court found that Lawson stubbornly pursued continued discovery despite knowing that the TAR process would likely produce "marginal (if any) relevan[t] documents" while Spirit already spent "hundreds of thousands of dollars" on the same data set using non-TAR technologies. Ultimately, the court found that the TAR-related costs were disproportionate to the needs of the case. In a subsequent decision, the court awarded Spirit over $750,000 to satisfy the TAR-related costs and attorney fees to protect the company from incurring the undue burden and expense.

The *Lawson* decision highlights how critical it is for litigants to develop a comprehensive ESI protocol earlier in a case to avoid costly downstream disputes over litigation about litigation. Counsel must work closely with clients to independently evaluate the efficacy of TAR and other technologies to advance the ability to conduct discovery with a meaningful degree of autonomy. When litigants reject using a certain technology, like TAR, the parties should disclose in the protocol what collection process they considered and explain why they determined what was and what was not appropriate. A well-negotiated protocol will protect against a requesting party's unilateral attempts to insist on a previously rejected technology mid-discovery that may yield marginal results. It may also reveal when a cost-shifting request is appropriate to shield a responding party from undue burden and expense. LN

RESOURCE

- *Lawson v. Spirit AeroSystems*, No. 18-1100-EFM-ADM, 2020 U.S. Dist. LEXIS 106817 (D. Kan. June 18, 2020), *aff'd*, No. 18-1100-EFM, 2020 U.S. Dist. LEXIS 221260 (D. Kan. June 24, 2020).

The Dead Cannot Join Litigation

By Josephine M. Bahn, *Litigation News* Associate Editor

In a case of first impression, the U.S. Court of Appeals for the Ninth Circuit held that when a person is deceased and no estate is opened, there is no Article III standing to name him or her as a party. The court in *LN Management, LLC Series 5664 Divot v. JPMorgan Chase Bank, N.A.* held that the dead lack the required capacities a litigant must have to establish a case or controversy. ABA Litigation Section leaders observe that the court was concerned about a paper adversary and the impact suing a dead person would have on the living.

Kit Dansker bought a home in 2003 with an $83,000 mortgage. The mortgage was then sold to Fannie Mae. Dansker died in 2009, and her property was sold in foreclosure to a management company. The mortgage holders challenged that foreclosure, arguing that it violated federal foreclosure rules. In 2013, the management company filed a quiet title action in state court against Dansker and the successor to the original mortgage holder. A few months after it filed that action, the management company filed a suggestion of death and moved to name the Estate of Dansker as a defendant, even though "no one had effectuated any probate action."

The district court held that Dansker had been fraudulently joined and denied a request to substitute Dansker's estate, reasoning that the foreclosure had removed her right to the property.

On appeal, the Ninth Circuit noted that the management company had not identified a representative of Dansker's estate. Instead, it sought to serve an alleged beneficiary of Dansker's estate as if she had been a representative. The court observed that while the management company had known of Dansker's death for five years, it had neither found an estate representative nor made any effort to have one appointed. The "Estate of Kit Dansker" only had meaning insofar as the machinery of court had been set into motion for a representative, it reasoned, and without any, the management company's request to name the estate was "clearly improper."

The court then turned to the propriety of naming a dead person as a party in the absence of an open estate and found it "self-evident" that the dead cannot be sued or sue. The court distinguished cases where attorneys either did not know the opposing party was deceased or made a mistake as they raced to meet a court deadline. Because those cases revolved around whether substituting an estate was the proper procedure, those substitution questions did not apply. "In all events," the court said, "the consensus of our sister courts is unanimous: you cannot sue a dead person."

It reasoned that there were "sound logical reasons" not to allow suits against the dead, including an injustice occurring against the deceased, injustices against the living, and a potential deprivation of the living's due process rights—the latter being what could occur in the instant case.

Litigation Section leaders distinguish litigants that are deceased at the outset of an action from those that die during the course of the litigation. "Courts don't like manufactured controversies or straw disputants," notes William T. Hangley, Philadelphia, PA, cochair of the Section's Federal Practice Task Force. "It's a life and death difference, in the one case there is an actual dispute with an actual person. If that person dies, there are procedures for continuing (in some instances), but we know the controversy was already there. In the Dansker situation, there is either no controversy with a Dansker or an attempt to moot one by fighting with a paper adversary," Hangley suggests.

The court was also concerned with potential outcomes a case against a deceased person could have against the living. "The court was obviously troubled by the failure of the management company to know the difference between a dead person and an estate, who have no legal existence, and the executor or representative of an estate (or next of kin), who is a live person, a proper party with a residence for jurisdictional purposes, and who can litigate or defend the financial interests of the deceased," notes Jeffrey J. Greenbaum, Newark, NJ, cochair of the Section's Federal Practice Task Force.

"Heirs of a dead person could be harmed if a plaintiff sues a dead person rather than a court-appointed personal representative of the deceased's estate. Indeed, where a party sues only a dead person, there are likely to be basic notice issues—as heirs of an estate or the estate's personal representative may end up having no notice that a litigant is attempting to secure the property of the deceased," says Marco A. Pulido, Costa Mesa, CA, member of the Section's Appellate Practice Committee. LN

RESOURCES

- *Kenneth House v. Mitra QSR KNE LLC*, No. 18-1778 (4th Cir. 2019).
- *LN Mgmt., LLC Series 5664 Divot v. JPMorgan Chase Bank, N.A.*, No. 18-15402 (9th Cir. 2020).

Digital versions of both Civil Procedure stories, including links to resources and authorities, are available at http://bit.ly/LN-civpro.

Schools Cannot Regulate Student Speech Made Off Campus

By Leslie R. Snider, *Litigation News* Contributing Editor

The U.S. Supreme Court has held that public schools generally cannot regulate student speech made outside of school-owned or school-operated property. Public schools may have sufficient interests to regulate off-campus student speech in some circumstances, but the student's First Amendment rights prevailed over such interests in this case. ABA Litigation Section leaders categorize the decision as progressive and long overdue, and necessary to ensure that the full scope of student constitutional rights are protected.

After a student failed to make her high school's varsity cheerleading team, she posted a picture of herself to Snapchat captioned "[f]*** school f*** softball f*** cheer f*** everything" with her middle finder raised. The student was disciplined for allegedly violating school and team policies regarding use of foul language and tarnishing of the image of the school.

The student sued the school district in the U.S. District Court for the Middle District of Pennsylvania, raising three claims under 42 U.S.C. § 1983. The district court granted summary judgment in favor of the student, ruling that the student's post was "off-campus speech," "had not caused any actual or foreseeable substantial disruption of the school environment," and thus was not subject to discipline. As a result, the student's speech was protected by the First Amendment. The Third Circuit Court of Appeals affirmed, even while recognizing that its ruling conflicted with prior applications of U.S. Supreme Court precedent.

The Supreme Court affirmed, holding that while school districts may have a special interest in regulating some off-campus student speech, those interests were not sufficient to overcome this student's First Amendment rights. The Court noted that the student's post was made from a location outside of school grounds and outside of school hours. The post came from a private device to a closed Snapchat group, and it did not identify the school or any of its administration or staff.

The Court rejected the school district's proffered interests of teaching good manners and preventing disruption, noting that the student spoke outside of school on her own time and that the impacts of the post within the classroom were minimal and short-lived. It was also unmoved by the school district's claimed interest in maintaining cohesion among the school's cheerleading squad.

Public schools' ability to regulate student off-campus speech should be limited. "Many schools argue they have the long arm authority to regulate off-campus speech, even to the extent to when students are on their own time and devices," explains Dr. Jonathan W. Peters, Athens, GA, chair of the First Amendment Subcommittee of the Litigation Section's Civil Rights Litigation Committee. "Students in out-of-school settings are not second-class citizens and should enjoy the same First Amendment rights as those not in school," he opines.

"A school's ability to control speech should not be extended to a student's every waking hour, meaning they would not be afforded the same speech protections as every other American," agrees Frank D. LoMonte, Gainesville, FL, professor and director of the Brechner Center for Freedom of Information at the University of Florida College of Journalism and Communications, who submitted an amicus brief in *B.L.* and is a former leader in the ABA's Forum on Communications Law.

Students should have the right to express themselves, even when it is offensive to others. "The world needs to start paying attention to individual freedoms and how lack of access to such freedoms affects the world we live in," states James D. Abrams, Columbus, OH, member of the Section's Access to Justice Committee. "Vulgar language may be offensive to some but could be part of another's everyday vernacular," Abrams contends. "Having the option to bypass social media posts containing vulgar language does not rise to the same level of harm as being compelled to hear vulgar language when subjected to the confines of a classroom," asserts Abrams.

Nonsignatories May Enforce Arbitration Agreement

By Kelso L. Anderson, *Litigation News* Associate Editor

The U.S. Supreme Court has held that a company that did not sign an arbitration agreement may nevertheless invoke the doctrine of equitable estoppel to compel arbitration in *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA et al.* The case involved an international arbitration governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. According to ABA Litigation Section leaders, the Court's interpretation brings the United States in line with other jurisdictions allowing nonsignatories to enforce an arbitration agreement, which should make the United States an attractive forum for foreign parties.

In *GE Energy Power*, ThyssenKrupp Stainless USA, LLC, entered into three contracts with F.L. Industries, Inc., for construction of cold rolling mills. All the contracts had identical arbitration clauses stating, in part, that "all disputes arising between both parties in connection with or in performance of the Contract . . . shall be submitted to arbitration for settlement." Subsequently, F.L. Industries entered into a subcontractor agreement with GE Energy, and ThyssenKrupp was acquired by Outokumpu Stainless. After motors designed for the mills failed, Outokumpu Stainless sued GE Energy Power.

GE Energy Power moved to dismiss the case and compel arbitration based on 9 U.S.C. § 205, which provides for removal where an arbitration or award emanates under the convention. Reasoning that under the convention, both the plaintiff and the defendant were parties to the arbitration agreement, the U.S. District Court for the Southern District of Alabama granted the plaintiff's motion.

The U.S. Court of Appeals for the Eleventh Circuit concluded that the convention required the parties to "actually sign an agreement to arbitrate. . . to compel arbitration." The Eleventh Circuit reasoned that under the convention, equitable estoppel could not be invoked by a nonsignatory to compel arbitration. Since GE Energy Power had not signed the agreement, the Eleventh Circuit reversed.

On further appeal, the U.S. Supreme Court held that the convention does not conflict with the principle of equitable estoppel to enforce arbitration agreements by nonsignatories. Citing Chapter 1 of the Federal Arbitration Act (FAA), the Court reasoned that state law principles of equitable estoppel apply to allow nonsignatories to enforce arbitration agreements. Further, the Court noted that Section 203 of the FAA grants federal courts jurisdiction over actions arising under the convention.

The Court found nothing in the convention addressing nonsignatory enforcement or precluding enforcement of arbitration agreements by reference to state law—which the FAA expressly allows. The Court concluded that the "silence is dispositive because nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines."

"There is a certain fairness in what the court has done," concludes Henry R. Chalmers, Atlanta, GA, cochair of the Section's Alternative Dispute Resolution Committee. The defendant "was seeking to enforce the underlying agreements and reap all of the benefits available to it under them, yet it also sought to deprive its adversary of the very procedural protections the defendant agreed to include in those documents," Chalmers observes.

The holding makes the United States a favorable forum for resolution of international arbitration agreements, according to Section leaders. "By the Court's estimation, this decision brings U.S. international arbitration law in line with other major jurisdictions for arbitration regarding enforcement of awards against nonsignatories," states Betsy A. Hellman, New York, NY, cochair of the Section's Alternative Dispute Resolution Committee. According to Hellman, the Court's ruling "should enhance the attractiveness of the United States as a forum for enforcement of international arbitration awards."

The Court was also following a central tenet of the convention, which "was to give awards respect and make them enforceable from nation to nation, not to place limitations on their enforcement," opines Mitchell L. Marinello, Chicago, IL, cochair of the Section's Alternative Dispute Resolution Committee.

Cannabis Contracts: Caveat Emptor?

By Susan F. Dent, *Litigation News* Associate Editor

When the subject matter of a contract involves a Schedule 1 substance such as cannabis, federal courts cannot enforce performance or order remedies. The U.S. District Court for the District of Oregon highlighted an unexpected risk of contracting for cannabis-related services: a lack of federally enforceable remedies. Indeed, as the court raised this issue sua sponte, ABA Litigation Section leaders and industry professionals see this ruling as a reminder to always consider the impact of inconsistent state and federal policies when counseling on cannabis industry matters.

In *J. Lilly LLC v. Clearspan Fabric Structures International, Inc.*, a cannabis company signed an equipment lease agreement and a construction contract that provided that the defendant construction company would lease to the cannabis company a large greenhouse for cultivating marijuana plants. The construction company hired a subcontractor to construct the greenhouse for the cannabis company. The subcontractor's work was allegedly subpar, resulting in leaks, holes in the roof, and ventilation system issues.

After unsuccessfully attempting repairs, the cannabis company found the entire greenhouse unsuitable for housing a cannabis crop and sued. It alleged breach of contract and breach of warranty against the construction company, with an added negligence claim against the subcontractor, and sought $5.4 million in lost profits damages.

The construction company moved for summary judgment on the lost profits claim.

Noting that neither party raised the issue of illegality of contractual subject matter, the court ordered all parties to brief the issue of whether a federal court sitting in diversity can award a party lost profits generated from the sale of marijuana.

Relying on both the Controlled Substances Act (CSA) and the Supremacy Clause of the U.S. Constitution, the court found that, under current federal law, it cannot.

The court first reasoned that the CSA designates cannabinoids as a "Schedule 1" substance and criminalizes its sale and surrounding activities in support of sale, such as those contemplated in the contracts at issue. The court also concluded that the Supremacy Clause supports a finding that the CSA applies to, and is superior to, state law which may permit the sale and distribution of cannabis. Accordingly, the court declined to enforce the cannabis-related contracts.

ABA leaders and industry attorneys agree that this ruling highlights an oft-overlooked issue in cannabis-industry contracts: legality of enforcement and availability of remedies upon breach.

"This ruling is a perfect example of why special drafting considerations need to be taken into account when cannabis-industry contracts are being negotiated and entered into," says Jacqueline Z. Fox, Denver, CO, an ABA member who practices cannabis law. "The industry takeaway from this ruling should be to increase each respective party's attention towards general cannabis contract-drafting strategies and to further push marijuana-related litigation towards state courts. Given the underlying nuances involved in various aspects of everyday matters within the cannabis industry, traditional boilerplate contracts are inherently susceptible to error," advises Fox.

Drafting strategies can minimize contract enforceability risks. "First, include forum-selection and choice-of-law clauses for your respective state court," suggests Fox. "This ensures that litigation stays in marijuana-friendly state court, thus reducing the possibility of federal courts sua sponte raising unclean hands or other federal illegal-

ity issues." Fox also suggests including a severability clause. "Even if a court finds your provision in violation of the CSA, the remainder of the contract will still remain in effect, thus providing the opportunity for other means of recovery," she notes.

"There are always intricacies with contract drafting," notes Lisa J. Dickinson, Spokane, WA, cochair of the ABA's TIPS Cannabis Law and Policy Task Force. "The arena for litigating these clauses is wide open right now, and I look forward to seeing the law evolve accordingly."

Court Affirms Hotel Is Not Responsible for Snorkeling Death

By Ashlee E. Hamilton, *Litigation News* Contributing Editor

As the hospitality industry continues to recover, a federal appellate court has held that a guest's drowning was not caused by any breach of duty of care by the resort. In *Baum-Holland v. Hilton El Con Management, LLC*, the plaintiffs accused a resort of negligence after a guest died while snorkeling. When presented with a dispute regarding the cause of death, the court affirmed summary judgment in favor of the resort. ABA Litigation Section leaders advise the hospitality industry to warn patrons and get releases of liability as it continues to navigate the COVID-19 pandemic.

A doctor and his family were vacationing at a resort in Puerto Rico. While snorkeling near a small uninhabited island, the doctor suddenly became unresponsive. The doctor's family members, employees of the resort, and other guests administered CPR, but he was pronounced dead upon arriving at the local hospital.

The doctor's family sued the resort in the U.S. District Court for the District of Puerto Rico, alleging failure to warn of dangerous sea conditions, failure to give timely and appropriate aid, and failure to provide safety gear. The plaintiffs alleged drowning as the doctor's cause of death based on evidence of fluid in his sinus and lack of oxygenation. But other evidence suggested that, based on his obesity, untreated hypertension, and atherosclerosis, the doctor had suffered a heart attack.

Granting summary judgment for the hotel, the district court held that the plaintiffs failed to "submit evidence that establishes a duty of care that was breached by [the resort]." Specifically, they did not present evidence that it was "foreseeable that [the doctor's] event was bound to occur or that the doctor would have survived if first aid were provided by [the resort]." The court also found that a release of liability signed by the doctor waived the plaintiffs' claims.

On appeal, the U.S. Court of Appeals for the First Circuit affirmed, holding that the district court properly resolved any conflicting evidence regarding the cause of the doctor's death. It found that "[a]ppellants have not met their burden of showing that it is more likely than not that [the resort's] alleged failure to warn [the doctor] of the ocean conditions caused [the doctor's] death by drowning." The court did not address the signed release because it affirmed summary judgment on other grounds.

"Typically, in a summary judgment hearing, judges defer factual matters to the jurors," notes John S. Austin, Raleigh-Durham, NC, cochair of the Litigation Section's Trial Practice Committee. "However, in this case, it appears that the plaintiffs failed to produce sufficient evidence showing that the doctor drowned," he says.

"Plaintiffs did not submit evidence that would permit a reasonable inference that the doctor would have survived if first aid had been administered to him by the resort rather than administered by the doctor's friend, who had lifeguard and CPR trainings," explains Angela Foster, North Brunswick, NJ, cochair of the Section's Trial Evidence Committee.

As the COVID-19 pandemic continues, Section leaders suggest the hospitality industry might learn lessons from *Baum*. For instance, hotels should consider revising their release forms. "Signing a release or assumption of risk requires that the plaintiff must have known that there was a risk of the same sort of injury that the plaintiff actually suffered and that the plaintiff voluntarily took on that danger in participating in the activity," advises Foster.

In addition, hotels should provide adequate warnings of the risks involved in certain activities. In the COVID-19 context, this may involve warning hotel patrons of the risk of infection. "The hospitality industry may want to look into releases related to people being in closer contact and violating social distancing. If people want to participate in certain activities, it would be good for the release to warn people about coming within six feet of each other," comments Austin.

Court Dismisses Without Hearing in Qui Tam Action

By Benjamin E. Long, *Litigation News* Team Editor

A federal appeals court confirmed that a False Claims Act (FCA) lawsuit may be dismissed without first giving the claimant an in-person hearing. Federal law affords claimants only "an opportunity for a hearing" on a motion to dismiss. ABA Litigation Section leaders caution that practitioners should be sure to explicitly request a hearing if they want one.

The FCA outlaws the making of false claims for payment against the United States. To help enforce the law, the FCA allows third parties who are aware of such false claims, called relators, to file a qui tam lawsuit against the alleged offender. If successful, relators may get a percentage of any amount recovered.

Once a relator files a qui tam action, the government can review the claim and decide whether it will prosecute the lawsuit. If the government does not intervene, the relator may prosecute the action. Whether or not it chooses to intervene, the government may move to dismiss the case at various points in litigation, but the relator must be notified of the motion and be given "an opportunity for a hearing on the motion."

In *Chang v. Children's Advocacy Center of Delaware*, a relator filed a

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qui tam action in the U.S. District Court for the District of Delaware alleging that the defendant had misrepresented material facts when applying for government funding. The government declined to intervene, and the relator proceeded with prosecuting the claim. The government later moved to dismiss the action to limit its litigation costs associated with monitoring and investigating the case.

The relator filed an opposition to the motion but did not request a hearing. The court dismissed the case without conducting an in-person hearing or issuing any written opinion. The relator appealed to the U.S. Court of Appeals for the Third Circuit, arguing that the FCA requires an automatic in-person hearing before dismissal and that he would have met his burden of proof had that hearing been held.

The Third Circuit explained that "the FCA and the [Delaware FCA (DFCA)] provide[] relators an 'opportunity for a hearing' when the government moves to dismiss," and relators must "avail themselves" of that opportunity by requesting one. The court observed that most other jurisdictions had interpreted this language to mean that "an in-person hearing is unnecessary unless the relator expressly requests a hearing or makes a colorable threshold showing of arbitrary government action." Finding those cases to be persuasive, it concluded that "the dismissal provisions in the FCA and DFCA do not guarantee an automatic in-person hearing in every instance."

"This situation is similar to the right to a jury trial in federal court," opines William E. Weinberger, Los Angeles, CA, cochair of the Litigation Section's Corporate Counsel Committee. "In certain instances you have a right to a jury trial in federal court, but you need to request that jury trial. Here the relator may have had the right to a hearing, but he simply failed to exercise that right by not requesting that hearing," observes Weinberger.

The court's decision was appropriate because of how the FCA addresses the necessity of hearings on motions to dismiss. "Because of how broad the guideline is, when the court did not automatically grant a hearing in this case, it did not create a due process issue," offers Sean O'D. Bosack, Milwaukee, WI, cochair of the Section's Corporate Counsel Committee.

"Different jurisdictions and even different judges in the same jurisdiction have different practices regarding whether they generally grant oral arguments on motions. Not only should practitioners request oral arguments if they want them, but if there is any kind of relevant evidentiary issue, they should also point that out to the court and ask for the opportunity to present the necessary evidence at a hearing," Bosack advises. LN

Digital versions of all News & Analysis stories, including links to resources and authorities, are available at http://bit.ly/LN-nas.

Mental Health, Mindfulness, and the Business of Law

By Daniel S. Wittenberg, *Litigation News* Associate Editor

Working professionals continue to struggle with mental health issues caused or exacerbated by COVID-19. Certainly, no sector has been spared the emotional impact of the pandemic, although legal professionals and staff have been particularly struck by the extensive feelings of loneliness, loss, and strain brought on by pandemic-related struggles. Addressing these issues is paramount. Law firms are increasingly offering mental health initiatives, and attorneys are becoming more forthright in tackling their concerns. But there is still some way to go.

By the Numbers

Attorneys and staff have long battled depression and substance abuse. Self-destructive tendencies like overworking have been the norm to the detriment of attorney wellness. During the past few years, awareness toward finding ways to address these issues has increased. Unfortunately, reports show some lost ground in these areas.

According to ALM's *2021 Mental Health and Substance Abuse Survey*, law firm attorneys and staff reported an increase in mental health troubles across the board from prior years. The ALM report surveyed more than 3,200 law firm attorneys and staff. Of respondents, 37 percent said they felt depressed in the prior year, an increase of nearly 6 percent compared with the information from the 2020 report; 71 percent of respondents indicated experiencing anxiety, up 7 percent over the prior year; and 14 percent noted they have a different mental illness, up over 2 percent from the previous year.

When questioned about the impact of the pandemic on their mental health, 70 percent of respondents said the pandemic made it worse. Isolation was the largest harmful influence on mental health. Almost 51 percent of those who took the survey said they felt isolated. When asked what is causing their mental health to suffer, 35 percent said isolation, 14 percent said working remotely, and 12 percent indicated disruption of routine.

"My firm is generally a good place to work. COVID really threw things off, and I've felt pretty isolated working from home," stated one respondent in an article published recently in the *American Lawyer*. "If anything, I'd describe the experience of the past year as total isolation with no boundaries between work and personal life. No amount of Zoom 'happy hours' or 'coffee chats' can overcome that," the respondent told the *American Lawyer*.

According to ALM's survey, 61 percent of respondent lawyers feel as if they "can't disconnect," up from 58 percent the previous year. "I am expected to be on 24/7," another

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respondent in the *American Lawyer* article lamented. "I get calls and emails all night and over the weekend, and late night and weekend deadlines have become the norm. It is starting to ruin my personal relationships. Pre-COVID, similar concerns applied, but it wasn't as bad."

A Centers for Disease Control and Prevention (CDC) report from last year also showed an increase in anxiety and depression in adults during the last half of the year. During those months, the percentage of adults with symptoms of anxiety or depression increased to 41.5 percent from 36.4 percent, the report said, and the percentage of those reporting they needed—but weren't able to get—mental-health counseling or therapy also rose to 11.7 percent from 9.2 percent.

The report, based on a national survey administered by the CDC's National Center for Health Statistics and the U.S. Census Bureau, found that young adults (those up to 29 years old) saw the biggest increase in the percentage experiencing symptoms of anxiety or depression. The survey also found that between late January and early February 2021, more than two in five adults experienced symptoms of anxiety or depression, while one in four reported they didn't receive the counseling or therapy they needed.

Mindfulness teaches us to increase the time between a stimulus and reaction, and reminds us that while we have no control over external activity in the world around us, we have control over our reactions to it.

Addressing the Issues

Law firms have been paying increasing attention to the issue of lawyer well-being. In response to the August 2017 report issued by the ABA's National Task Force on Lawyer Well-Being, more than 170 law firms, legal departments, and governmental agencies signed the ABA's well-being pledge. Reed Smith, one of the first firms to sign the pledge, launched its Wellness Works initiative in 2018 to help the workforce "manage stress, achieve work-life balance, develop healthy habits, and attain positive mindfulness."

Large law firms continue to roll out firmwide initiatives while providing flexibility for their local offices to adapt their programs as they see fit. Almost 55 percent of legal professionals recognized their firm's efforts to mitigate mental health concerns, and nearly 63 percent of the ALM survey respondents reported feeling that these efforts were sincere.

Mindfulness

Why is wellness such an issue in the legal profession? Case-critical deadlines, unpredictability of client demands, and the conflict-based nature of the legal system all create stress and compound the amygdala response (fight, flight, or freeze) signals being sent to the brain.

According to Jeffrey H. Bunn, Chicago, IL, mindfulness is crucial for today's lawyers. Mindfulness is a way of thinking. It teaches us to increase the time between a stimulus and reaction. It further reminds us that while we have no control over external activity in the world around us, we have control over our reactions to it. Mindfulness practice can help lawyers recognize that agitated state of mind and shift to a healthier one. For lawyers, mindfulness is a powerful tool.

Bunn believes law firms can have both successful practices and healthy lawyers by running their businesses *mindfully*. Bunn also makes a business case for mindfulness, saying in a LinkedIn article that it will "improve employee health awareness, resulting in lower insurance expenses. It will allow lawyers to better serve their clients by increasing their self-confidence and providing them with greater clarity of purpose." Mindfulness will also help firms retain employees increase employee satisfaction, resulting in lower turnover expenses. Moreover, Bunn added, "mindfulness programs can qualify for CLE credit."

Michelle Wimes, Kansas City, MO, posited in an *ABA Journal* article that mindfulness practices "not only help us to focus and increase our capacity to think more clearly but also help us to act more intentionally by raising our awareness of our emotions in any given moment." Wimes, who considers mindfulness programs one facet of a firm's overall wellness and diversity strategy, further wrote that "[b]y regulating our emotional responses, we can decrease the occurrence of bias and our natural tendency to employ stereotypes and unconscious expectations in our interactions with others."

Finding a New Normal

Despite losing ground in the battle against mental health issues following the COVID-19 outbreak, firms and legal professionals should not be discouraged. Returning to a new normal will inevitably represent another period of adjustment for attorneys and staff. How firms continue efforts to alleviate mental health concerns could have substantial consequences for the well-being of their employees in the long run.

"It's great that firms are prioritizing wellness," agreed Anne Brafford, Orange County, CA, in a *San Francisco Attorney Magazine* article, "but to truly make a difference for the legal profession, larger issues need to be addressed." Brafford stated, "If we really want well-being over the long term, it will need to be an institutional change industry-wide. We have to keep the innovation and interest going so it doesn't peter out." LN

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Judges Can Read: Argue Without Your Notes!

By Hon. Mark A. Drummond (Ret.), *Litigation News* Associate Editor

When you ask someone out for a date, do you use notes? When someone criticizes you, do you ask for time to jot a few things down before responding? Of course you don't. I realize cases are more complex, but great advocates can argue without every word being read off a legal pad.

A recent article about Damian Williams, U.S. Attorney for the Southern District of New York, sparked the idea for this column. The author outlined Mr. Williams's skill in the courtroom and noted that he "became known as one of the few prosecutors [in his office] who appeared before juries without notes." The article detailed Mr. Williams's delivery of an opening statement "detailing the story of a powerful politician who had become blinded by greed." The author observed, "Mr. Williams's statement would run 22 pages in the official transcript. He used no notes."

During the pandemic, I coached over 100 attorneys through NITA. Remote advocacy has spawned more rote reading. The notes are read directly off the screen. Even worse are multiple monitors. With the side monitor, I get the "mugshot" view, when down below I get the "drone" view, and when above (the worst) I get the "up the nostrils" view. This is not good for you or the judge. The judge is not the

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face on the screen. The judge is that little lens next to the green dot.

Instead of notes, the judge should be on full screen "speaker view," eye level right in front of you so, as you talk to that lens (the judge), your field of view includes the judge. You see if the judge is flipping papers—meaning you may need to pause—or if he or she has a quizzical look that you may need to explore. So what tools can we use to stop reading in the remote world and the courtroom?

Mind-Body Connection

Sir John Gielgud was known for waiting to learn dialogue until he had stage direction. He needed to know where he would be on stage when delivering lines. This is the mind-body connection.

To make this connection, I do start with the written word. However, I say it out loud as I am writing. Why? We tend to write in a different manner than we speak. If I just sit at my desk and write in silence, I am wordier. My sentences are more complicated. I do not use the best words. "Know"—a word with power that I would use while speaking—suddenly becomes the more passive "aware of" on the written page.

Saying it out loud while I write results in better phrasing. If I write in silence, I do not get the rhythm or the natural pausing I use when speaking. Great advocates know that silence is their friend. Silence helps with emphasis and retention. The great pianist Artur Schnabel said, "The notes I handle no better than many pianists. But the pauses between the notes—ah, that is where the art resides!"

Use Your Phone

Once you finished writing while saying it aloud, grab your phone and start dictating segments that you can repeat easily. Leave enough silence between each segment so that you can say it back out loud before the next one. My largest line load on stage was as the narrator in the play version of *A Christmas Story*. I used this technique. Every day, while driving, my phone was with me, and I was practicing dialogue.

As advocates, we do not need to be as word perfect as actors. I am not urging that. However, these methods help you remember your major points, the rhythm, and the pausing. Abandoning notes and delivering perhaps only 80 percent of your words well is better than reading 100 percent of your words off a legal pad.

Create Your Memory Palace

Moonwalking with Einstein recounts the author's journey from reporting on the 2005 U.S. Memory Championship to winning it the next year. Speed cards require participants to memorize the order of a deck of cards. One method is to assign a visual to each card. The visualization *Moonwalking with Einstein* may represent, say, the three of clubs. It is easier to remember a crazy parade of pictures marching past than 52 individual cards.

We remember pictures better than we remember words. After writing the words as I speak, I then convert the written words into bullet points. Those bullet points are turned into pictures or visualizations. A picture is truly worth a thousand words.

For example, if the plaintiff did not go to a hospital immediately after the accident, in my notes I would draw a building, put a hospital cross on it, and then with a red pen draw a circle with a line through it over the hospital.

I then take my pictures and put them into my memory palace. Your memory palace is a visualization of a building you know very well—usually your own home. This technique works not only for opening or closing but also for witness examinations.

I remember the cross examination from a dart-out case decades ago. My client was fortunately driving very slowly when the plaintiff ran out from behind a parked car. So I visualized walking into my home and the floor is not wood. It is asphalt. The plaintiff is lying there. Her three friends surround her and shout:

"Sara, do you want us to call an ambulance?!"

"Sara, do you want us to take you to the ER?!"

"Sara, do you want us to take you home?!"

Sara responds, "No!" to each. Then one asks, "Well, what do you want?!" Sara jumps up, exclaims, "I want to go to McDonald's!" and pulls out the largest McDonald's sack you have ever seen. The wilder you make it, the better you remember it.

To be clear, I had notes at trial, but I could set them aside and concentrate on the judge or the witness.

Cheat

To be clear, I had notes at trial. With these methods, I could set them aside and concentrate on the judge or the witness. When finished, I would ask for a moment, check my notes, and clear up anything I had missed.

Another great method is to use the exhibits or visuals that you create as your notes. You know your case. You've lived with it. All you need are cues to make your next point. Just order the exhibits and use them as cues for questions or argument. Finally, on flip charts I would write "stealth notes" in faint pencil that only I could see as cues for my next point.

These methods will help you avoid the judge peering over the bench and intoning, "Mr. Drummond, if you're just going to read what you've written on that legal pad, just hand it on up here—I can read." LN

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- Joshua Foer, *Moonwalking with Einstein* (Penguin Press 2011; reprinted 2012).

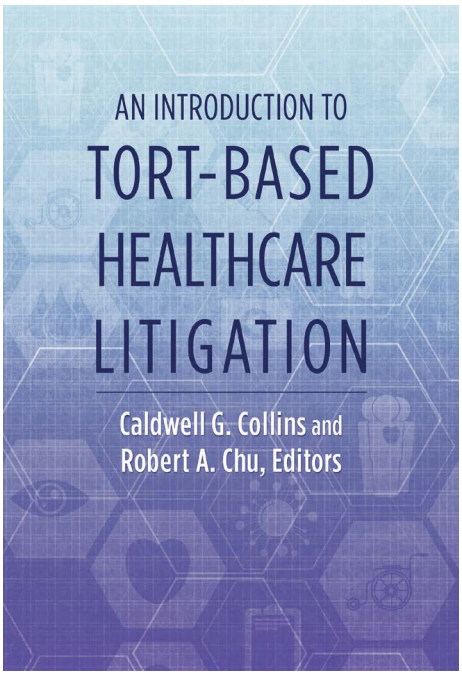
Note to Readers:
This is the third column I have done for the South Texas Pro Bono Asylum Representation Project (ProBAR). If you are interested in assisting, visit https://bit.ly/LN473-probar.

BOOK REVIEW

Flattening the Learning Curve for Healthcare Litigation

By Aubrey Eyrolles, *Litigation News* Contributing Editor

Tort-based healthcare litigation is a niche practice area, and the learning curve can be very high for new litigators, or even more seasoned practitioners who might be new to the subject matter. *An Introduction to Tort-Based Healthcare Litigation*, written by several members of the ABA Litigation Section Health Law Committee and edited by Caldwell G. Collins and Robert A. Chu, gives a great introductory snapshot of various types of tort-based healthcare cases and specialized considerations that litigators will encounter while preparing for trials in this area.



According to Kimberly Grant Silvus, the author of the chapter on experts, difficulties can arise when "[a] lawyer is suddenly supposed to draw on a liberal arts degree in literature or history and look at an injured person, identify the specialty of medicine responsible for the injury, spar in some intelligible meaningful manner with experts on the other side in a deposition, confidently present her experts at trial, spar again with the experts for the other side—this time with an audience—and then distill the immensely complicated medicine in a persuasive comprehensible narrative for a jury." Books and treatises with a thorough overview on the practice area are thus extremely valuable for new practitioners, particularly those with no scientific or technical backgrounds.

An Introduction to Tort-Based Healthcare Litigation is an excellent resource in that regard. Within the book's relatively short 134 pages, the authors cover considerations for litigation in several categories. Each of these chapters includes an overview of that specific area of litigation, the causes of action, possible defenses, and damages.

The book begins with a generalized discussion on medical malpractice litigation. It then delves into three specific subsets of tort-based healthcare litigation: long-term care, pharmaceutical product liability, and medical devices. The chapter on long-term care litigation explains the highly fact-specific nature of long-term care litigation and the specialized knowledge needed for the types of injuries that long-term care residents experience. The chapter on pharmaceutical product liability litigation outlines the Federal Drug Administration's drug approval process. Finally, the chapter on medical device litigation examines the "heavy overlay" of federal regulations that create unique theories and defenses that are not present in general products liability law.

Detailing the importance of some of the more technical details related to tort-based healthcare litigation are the chapters on statutes of limitation, certificates of medical merit, venue, and privilege. The chapter on medical experts advises on how to find the best experts and attack the credibility of opponents' experts. Other chapters address procedural and jurisdictional issues like removal, personal jurisdiction, and federal multidistrict litigation.

While no book could cover the entire universe of tort-based healthcare litigation, this book is an excellent resource for any attorney new to tort-based litigation in the healthcare field. The authors' discussion of each topic includes references to a multitude of statutes and case law from various jurisdictions, which makes the book a great starting point for finding additional statutes and precedent for each category of tort-based healthcare claims.

The book is written in a way that makes it easy to understand these complex topics. It feels accessible and understandable even for the least healthcare-oriented attorneys. Another great feature of the book is that it is written from a position-neutral stance, which gives practitioners the ability to consider the issues regardless of which side of the "v" they are on. It provides the reader with practical knowledge and an understanding of how all the pieces of a case need to come together.

Overall, *An Introduction to Tort-Based Healthcare Litigation* is a worthwhile read for any lawyer who needs to learn the basics in this field. It is also a great resource for law students who are considering tort-based healthcare litigation as a career path but are curious as to whether they will enjoy the practice area. The book describes the type of work that practitioners in this area do on a day-to-day basis, and it is incredibly rare to find resources that give an understanding of the full scope of a given practice area. LN

An Introduction to Tort-Based Healthcare Litigation is available at http://bit.ly/LN473-tort-healthcare.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Lessons in Resiliency from a Lawyer Under Fire

By Joseph P. Beckman, *Litigation News* Associate Editor

Several weeks ago, I handed in my quarterly column. Two developments since that time caused me to beg the higher-ups at *Litigation News* to put that piece on the back burner in favor of this one, which I hastily composed past deadline.

One development I suspect may resonate with many of our readers: Russia's invasion of Ukraine. The second is much more personal: my recent trip to my sister's house to spend a week providing "respite care" to our 93-year-old mother.

What do these disparate events have to do with a wellness column? I think, after six hours of reflection as I drove home to Chicago, they prompted me to get out of my own head and look at well-being from a different perspective.

War . . . What Is It Good For . . .?

The rejoinder to this call is, of course: "Absolutely nothing . . . Say it again, y'all." That statement is true, particularly if you are living (or trying to live) in the war zone.

So how does this war impact the well-being of those of us who are thousands of miles from the battlefield and not at

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imminent risk of grievous bodily harm? It affords the opportunity for us—if we choose to take it—to better see the big picture and reconnect with our humanity.

Those of us who choose to follow the near constant news reports can witness and—if we choose—empathize with the powerful emotions that accompany a wide range of often traumatic human experiences. We see the horrors that man is capable of inflicting on his fellow man. We see the impact of politics and the political/economic calculus of cynical and opportunist leaders on the lives of ordinary people.

(This is not an "invasion," according to the Kremlin. It is "laughably" presented to ordinary Russians as a "special military operation" designed to rid Ukraine of "Nazism." By the time this piece appears in print, we will know much more about the results of this "special operation." The wellness lessons are likely the same, however—whether "good" or "evil" prevails when peace returns.)

As lawyers, we sometimes feel we have the weight of the world upon us. That sense of responsibility can (and often does) drive us to do our best work. It can also cause us to feel overwhelmed and out of gas.

What we might learn, and apply to our own lives, is the strength of human spirit. Ukraine's army, with assistance from thousands of ordinary Ukrainians, has risen to the occasion. The Ukrainians have stalled and repelled (at this writing the last week of March) an invasion by a numerically superior invading force. This has frustrated Russia, which has switched to siege tactics, including long-range artillery and missile attacks on civilian targets and institutions.

Ukraine's leaders have demonstrated an amazing emotional (and admirable tactical) response. While it may be an overstatement to say they are "taking [Russian supplied] lemons and making lemonade," the emotional tone they have struck, at least in my view, is no small part of their success to this point in both rallying the Ukrainian people and frustrating Russia from achieving the goals of its unprovoked invasion.

There is a lesson in perseverance here if you look for it. Ukraine's president Volodymyr Zelenskyy has a law degree but went into entertainment. A comedian and former TV star, he leveraged his fame in an unlikely ascent to Ukraine's top elected office, naming his political party after the fictional party of which he was a member on his popular *Servant of the People* TV show. (Hmm . . . that feels like a vaguely familiar path to office in these times.) Prior to the invasion, his approval rating as president was in the 20 to 30 percent range. At this writing, it is over 90 percent.

Sometimes How You Frame the Problem Opens the Path to the Solution

Zelenskyy has astutely leveraged social media to rally his people in a manner that is frank and authentic. At the same time, he includes an emotional component that has deeply affected many in the West who had historically been reluctant to get involved.

He has proved to be a thorn in the side of Vladimir Putin, who has reportedly ordered multiple assassination attempts. While Zelenskyy does not, at least from my quick review, elect to leverage his comic chops to outright dismiss these attempts on his life, he responds to them in what is a healthy way—he acknowledges their existence, yet he pushes ahead despite obstacles that might cause someone whose resilience muscles are less developed to run away.

Russia, by contrast, has criminalized protests and attempted to censor media coverage. Compared with the approach of its adversary, this feels more like "The Emperor's New Clothes" psychological approach.

What Does This Have to Do with Me?

As lawyers, we sometimes feel we have the weight of the world upon us. That sense of responsibility can (and often does) drive us to do our best work. It can also cause us to feel overwhelmed and out of gas.

Putin, despite a near iron grip on public discourse, is often photographed at the end of a long table, a dozen or more feet away from his subordinates. His current romantic partner and their children are in a bunker in a remote part of Russia. Reports say he has every meal "poison tested."

By contrast, Zelenskyy is winging it, meeting people via Zoom while moving about to avoid attempts on his life. I respectfully submit that Zelenskyy's self-awareness, candor, and authenticity is not only the path that is easier to root for and respect. It is also the emotionally healthier one.

An Emotional Reaction to Adversity from Another Perspective

The reason for my drive to Chicago was to provide respite care to my 93-year-old mother so that my sister (an ER charge nurse by training) and her husband could get a week of vacation. They moved Mom into their townhouse, which has a small elevator, after she fell and broke her hip last September.

Thankfully, Mom has avoided the family's predisposition to Alzheimer's. Instead, her body is breaking down, something of which she is acutely aware. The need to relearn mobility, and the attendant loss of control, has been difficult emotionally.

Her situation is nowhere near as precarious as Zelenskyy's. As I write this, however, I am conscious of the possibility (if not the likelihood) that one (or both) of the two may no longer be with us by the time this column appears in print.

My conversations with my mother have been, as always, delightfully varied and analytical. One change in Mom is that, as the years have sapped her physical vitality, she has evolved into a more emotionally phlegmatic being. (That is not something I have typically witnessed over a lifetime surrounded by strong-willed women of Italian extraction!)

As with Zelenskyy, Mom seems at peace with where her journey has taken her. Both have, for entirely separate reasons, discovered the ability to, as Chevy Chase told Danny Noonan in *Caddyshack*, "just be the ball."

There is a lesson, or maybe just a perspective, we can take from one (or both) of these examples. Would that type of quiescence be a benefit to you personally and, by extension, a benefit to your clients and those you love?

As I proof my editor's suggested revisions a week after submitting this column, my sense is the two have inspired me to strive to "be the ball." LN

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countdown

WHEN LAWYERS NEED LAWYERS

01 ABA Model Rule 1.1 requires that a lawyer provide competent representation to a client, which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

02 Pursuant to the competent representation rule, when a lawyer is faced with an issue or area of law that is outisde his or her regular practice, he or she should associate with another lawyer who specializes in that area.

03 If a lawyer is handling his or her own personal legal issue as opposed to that of a client, and the issue is outside the scope of his or her day-to-day practice, it is advisable to seek competent counsel in that area of law.

04 Competent representation may serve as the foundation for an advice-of-counsel defense to negate a finding of wrongful intent.

05 Typically, to successfully assert an advice-of-counsel defense, the accused party must show good faith in seeking counsel, complete disclosure of relevant facts, and reasonable reliance on the advice provided.

06 Some state bar organizations hold that attorneys are not entitled to rely on an advice-of-counsel defense because bar members are required to know and understand all applicable rules of ethical and professional conduct.

07 A showing of good faith reliance on advice from a lawyer unrelated to the particular matter in which bar discipline is sought can be used to successfully assert an advice-of-counsel defense in certain disciplinary proceedings.

08 Lawyers are held to a higher ethical standard than the average client and should conduct themselves accordingly.

09 A lawyer in the role of client should take care to select competent counsel in the area of law at issue and ensure that all relevant facts and circumstances are disclosed to his or her counsel.

10 A lawyer representing another lawyer should conduct extra due diligence, with respect to both substantive legal claims and any ancillary ethical concerns.

Each issue of *Litigation News* features 10 tips on one area within the field of litigation. This list complements the article by Grant H. Hackley that appears on page 10.

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