CATA News

Spring 2011

Cleveland Academy of Trial Attorneys
www.clevelandtrialattorneys.org

In this issue:

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News

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Cover photo taken by Frank Strack

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President's Message

As I begin writing this Message, there are 637 days, 2 hours, 19 minutes and 23 seconds left in the Mayan calendar. I am told that when that particular clock runs out, it will be the "end of times." Or, it might just be the *beginning* of the "end of times." I have also been told that the "end" is something to fear. Unless, of course, it is to be welcomed and embraced. Then again, December 21, 2012 might just turn out to be a regular old day, with the sun rising in the east and setting in the west and nothing but the daily grind in between.

One thing I know for certain is that I'm not ready to pack it in just yet. I still have things I want and expect to accomplish, both before and after 12/21/12. Personally, I'd like to help my middle son become a bar mitzvah – too many deposits already paid and too much Hebrew memorized to leave him hanging. And my eldest is just about old enough to drive and someone has to teach him how to merge into traffic and parallel park. God knows I can't let my wife – a.k.a. "The Sideswiper" – do it. Also, I want to bench press twice my weight on my 50th birthday and maybe go streaking just once.

Professionally, I still have some clients who need me to see their cases through to settlement or verdict. There's a little girl, for example, with beautiful eyes and cerebral palsy who needs my help if she is going to reach her full potential. And there is a woman who wants to know how a hospital with a renowned cardiac surgery program could have ripped her mother's heart in half while wheeling her in to surgery. There are others, too, some of whom will have answers and some of whom may still be waiting in line for the courthouse when the Mayan calendar ends.

To be sure, there are signs the end is near. I'm not talking about earthquakes and tsunamis, sunspots, or birds dying in big numbers. I'm talking about Ohio Senate Bill 129 and about H.R. 5 pending in the U.S. House of Representatives. The former would bestow immunity upon emergency room doctors and nurses for their negligence. The latter is more comprehensive and would limit contingency fees for lawyers representing victims of medical negligence.

The Ohio bill isn't just bad for injured people. It is bad for all Ohioans. It is an open invitation for the worst of the worst doctors to move to Ohio. And it inevitably will increase taxes, as the extraordinary costs of care for catastrophically injured people will now be borne by the public instead of the folks whose carelessness is to blame. The limits placed on contingent fees in malpractice cases by H.R. 5 address – according to the Bill – "the conflicts of interest" inherent in such arrangements. Huh? I've always thought that the contingent fee is the only fee that aligns the lawyer's interest with that of his or her client. Just who has a greater incentive to win a case for a client: a lawyer who gets nothing for losing or one who gets paid the same, win, lose or draw? Make no mistake, this Bill has nothing to do with helping victims and has everything to do with fattening the bottom lines of well-heeled and well-connected insurance companies.

This is not the first time victims and their advocates have faced bad legislation and doomsday prophesies. It is merely the most recent. If these bills become laws, those of us who are true believers, zealots, and warriors will survive. It's what we do, and it's who we are. We may have to get leaner and meaner; we may have to work smarter and help each other more; we may have to make a bit less

money. But we will survive.

That said, we don't have to lie down and take it. There remains much that can be done to attempt to head off these proposals and others like them. Many of our members already are engaged in the battle, but it is essential that each of us does something. And there is plenty that can be done. Whether it's contacting former clients and urging them to call their representatives, joining OAJ in its lobbying efforts, writing letters to the editor, or donating money, what we do now is critical.

If the world ends on December 21, 2012, so be it. But shouldn't we at least hedge our bets and proceed as if there will still be victims to help and lawyers to help them after the Mayan calendar runs out – just in case? ■

Kathleen J. St. John
Editor

Donna Taylor-Kolis
Editor

Message from the Editors

Well, folks, Spring is finally here, and the end of the CATA presidential cycle is upon us. Having worked on this newsletter this year with CATA president, Brian Eisen, we cannot say enough about his dedication to, and enthusiasm for, this newsletter.

But Brian's leadership is only one component of what makes this newsletter, and this organization, work. We are pleased to have had so many of our members submit substantive articles and supply us with their Verdicts & Settlements, or their civic and charitable activities for our Beyond the Practice feature. We hope that you will find the articles in this edition of the CATA News to be helpful in your practice, or perhaps just entertaining.

Special thanks go to our wonderful designer, Joanna Eustache. Not only did Joanna take the striking photo of the Terminal Tower that was on the cover of the Winter edition, but her unerring eye for detail and design has made her a real pleasure to work with. We are also grateful to Joanna's employer, Copy King, for putting this publication together for us at an affordable cost.

Of course, this publication (and the color illustrations) would not be possible without our advertisers. So, please make sure you patronize them and let them know you saw their ad in the CATA News.

Also, please feel free to call, write, or email us with any suggestions you have for future issues. This edition focuses on a wide variety of topics – from pleading and discovery issues, to medical terminology, subrogation, taxation of medical records, and social media marketing for attorneys – just to name a few. If you would like to see any particular topic in future editions, please let us know.

We also want to remind you to visit the CATA website at www.clevelandtrialattorneys.org. If you have expert depositions, expert reports, or briefs to share, please send these materials by mail or email to Rose Graf at rgraf@nphm.com or at the following address:

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Materials may be sent in e-trans format, .pdf format, or on disk or hard copy.

Finally, we would like to thank Frank Strack and Lillian Rudiy at Nurenberg, Paris for their behind-the-scenes contributions to the CATA News and to CATA generally. Frank has been tasked, *de facto*, with updating addresses and other content on the website, and he also is the photographer of the lovely photo that graces the cover of this edition. Lillian is our detail person, who handles numerous clerical functions. Without their assistance, this newsletter would be a much rougher production!

Happy reading, and we hope to see you at the Annual CATA Dinner on Friday, June 24, 2011. Gerry Spence will be speaking, so you won't want to miss it! ■

Your Editors,

Kathleen J. St. John and Donna Taylor-Kolis

The Gerry Spence Experience

John R. Liber II is pleased to announce that celebrated **Trial Lawyer Gerry Spence** will be our guest *both* as the keynote speaker for the **Annual Meeting and Awards Dinner on Friday, June 24, 2011**, and to lead a morning seminar the following day – **Saturday, June 25, 2011**. This is an incredible opportunity to spend time with and learn from this icon from Jackson Hole, Wyoming. He is without a doubt one of America's great trial lawyers who believes in "training lawyers for the people." Mr. Spence is a frequent television commentator, having served as a legal consultant to NBC television; is the author of sixteen nationally published books; was inducted into the American Trial Lawyers Hall of Fame; and is the founder of the Trial Lawyers College.

The Annual Meeting and Awards dinner will be held on **Friday, June 24, 2011 at The Club @ Marriott Key Center,** with the **Reception from 5-6**, **Dinner beginning at 6:00 p.m.,** and the **program featuring Gerry Spence scheduled to begin at 7:00 p.m**. The theme of his speech will be: **"The End of the Road for Trial Lawyers?"**

The next day, from 9:00 a.m. to noon, (Saturday, June 25, 2011), Mr. Spence will again be the featured speaker on the topic of **"How to Select a Winning Jury."** Location and specifics of this program will be announced shortly.

For information, please contact: Nancy Burroughs (440-285-3008)/nburroughs@tddlaw.com.

Melanie Hirsch is the Brayton-Thornton attorney at Public Justice.

Jack Landskroner is Vice President of the Public Justice Foundation and a principal in Landskroner Grieco Madden, LLC.

Claire Prestel is a staff attorney at Public Justice.

Public Justice is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable in courts. In 2009, Public Justice launched an Iqbal Project to prevent misuse of the Supreme Court's recent pleading decisions. To contact Public Justice with questions about Iqbal, please email iqbal@publicjustice.net or call 202-797-8600.

Pleading After *Iqbal* And *Twombly*

by Melanie Hirsch, Jack Landskroner, and Claire Prestel

The Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*[1] and *Ashcroft v. Iqbal*[2], re-formulated the test for deciding motions to dismiss under the Federal Rules of Civil Procedure. Instead of applying the well-known standard from *Conley v. Gibson*[3], which said that a motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief," federal courts must now determine whether a complaint states a claim that is "plausible on its face."[4] The meaning and significance of this plausibility requirement has become one of the hottest topics in federal litigation.

This article will summarize *Twombly* and *Iqbal* and then turn to two important questions that have arisen since the Supreme Court's decisions: (1) what effect, if any, do *Twombly* and *Iqbal* have in state courts; and (2) what exactly does it mean for a federal-court claim to be "plausible."

I. *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*

In *Bell Atlantic v. Twombly*, the Court considered a putative class-action complaint alleging that the "Baby Bells" had conspired to exclude competitors from the market for local phone and high-speed Internet service.[5] The putative class in *Twombly* included all local telephone or high-speed Internet consumers from 1996 to the present.[6] In an opinion written by Justice Souter, the Supreme Court held, 7-2, that the complaint's bare allegations of a conspiracy were "legal conclusions" insufficient to survive a motion to dismiss.[7] The Court also held that under Rule 8, the plaintiffs' complaint had to include enough "factual matter" to provide "plausible grounds to infer an [illegal] agreement" and that the complaint's allegations of parallel conduct failed this test because, in light of the unique history of the telecommunications industry, such conduct could "natural[ly]" be explained by legal, self-interested behavior on the part of the Baby Bells.[8] In the course of reaching these conclusions, the Court held that *Conley's* "no set of facts" language had often been misinterpreted and had "earned its retirement."[9]

At the same time, *Twombly* reaffirmed another key aspect of the *Conley* decision—that the principal purpose of pleading is nothing more than to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[10] The Court also explicitly rejected the notion that it was applying a "'heightened' pleading standard" or requiring "heightened fact pleading of specifics."[11] And it affirmed the continuing validity of the model complaints found at the end of the Federal Rules.[12] Those complaints state claims in a simple and straightforward fashion, and they "illustrate the simplicity and brevity that [the] rules contemplate."[13]

Two years after *Twombly*, the Supreme Court addressed pleading again in *Ashcroft v. Iqbal*. The plaintiff in *Iqbal* was a Pakistani citizen and Muslim who was detained after September 11, 2001, and who alleged that he was deprived of various constitutional protections while in federal custody.[14] In particular, he alleged that Attorney General John Ashcroft and FBI Director Robert

Mueller "adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion or national origin."[15]

The Supreme Court held, 5-4, that Iqbal's complaint should have been dismissed under *Twombly's* "plausibility" standard, which it extended to all civil cases.[16] In an opinion written by Justice Kennedy, the Court summarized *Twombly's* standard as based on "two working principles."[17] First, district courts need not accept a complaint's "legal conclusions" as true, although factual allegations should be accepted as true.[18] The Court described a conclusory allegation as one that "amount[s] to nothing more than a 'formulaic recitation of the elements'" of a claim,[19] and while it held that such allegations need not be taken as true, it also recognized that they may appropriately form the "framework" for a complaint.[20]

Second, a complaint must "state a plausible claim for relief."[21] To determine whether a complaint states a plausible claim, a judge may draw on his or her "judicial experience and common sense."[22] The Court explained that plausibility is "not akin to a 'probability requirement,'"[23] and it described the plausibility inquiry as a "context-specific task."[24]

Within days of the *Iqbal* decision, defendants in consumers' rights, workers' rights, and civil rights lawsuits began moving to dismiss those cases, claiming that *Twombly* and *Iqbal* changed federal law in numerous dramatic ways. While some of these "*Twiqbal*" motions have been granted, others have been denied, and one federal judge described the rush of citations to *Iqbal* as "Pavlovian," in that too many defendants reflexively filed even meritless motions to dismiss.[25] The same judge commented that *Twombly* and *Iqbal* are being "seriously overread[]" in some defendants' motions and that they are far from a "get out of jail free" card.[26]

II. Applications of *Twombly* and *Iqbal* in State Courts

One of the major questions that has emerged since *Twombly* and *Iqbal* is the extent to which the decisions apply in state court. The straightforward answer is that, because the Supreme Court's decisions interpret the Federal Rules of Civil Procedure, they are not binding on state courts interpreting their own rules. However, this has not stopped defendants in state court actions from attempting to impose the overly broad misinterpretation of these cases into state court pleading and practice.

Although *Twombly* and *Iqbal* interpret only the Federal Rules, defendants in Ohio and elsewhere have nonetheless begun to argue that state courts should adopt plausibility pleading. Before turning to arguments being made in other states, it should be noted that while some Ohio appellate courts have cited *Twombly* or *Iqbal* (although not in formally published opinions), the Ohio Supreme Court has never cited, let alone approved or adopted, either decision. Indeed, in the years since *Twombly*, the Ohio Supreme Court has confirmed that "Ohio generally is a notice-pleading state," with heightened pleading standards applied only in certain limited circumstances "where policy considerations so warrant."[27]

Ohio has preserved its pleading standard requiring that a dismissal on a motion to dismiss can only occur when it appears beyond a doubt that plaintiff can prove no set of facts entitling plaintiff to relief.[28]

In Ohio, as in other states, defendants' call for adoption of *Twombly* and *Iqbal* should be rejected. The flaws in defendants' logic are aptly demonstrated by the thorough analysis of the Washington Supreme Court in *McCurry v. Chevy Chase Bank, FSB*.[29] The defendants in *McCurry* argued that Washington should interpret its rules of procedure in accordance with *Twombly* and *Iqbal*—and the court soundly rejected that argument.[30]

In doing so, the *McCurry* court made two key points. First, it noted that the plausibility standard "is predicated on policy determinations specific to the federal trial courts," namely concerns about discovery costs forcing settlements.[31] The court found no reason to believe that "these policy determinations hold sufficiently true in the Washington trial courts to warrant such a drastic change in court procedure."[32] Indeed, as Professor Arthur Miller has pointed out, the available empirical data indicate that the discovery-abuse rationale fails to hold water even in federal court: in a recent survey conducted by the Federal Judicial Center, more than half of respondents reported that discovery costs had no effect on the likelihood of settlement in their cases and that the costs and extent of discovery were the "right amount" in proportion to their clients' stakes.[33]

Second, the *McCurry* court explained that it would be inappropriate for the court "to effectively rewrite CR 12(b)(6) based on policy considerations," since the "appropriate forum for revising the Washington rules is the rule-making process."[34] In that process, far more so than before a court, "policy considerations [can] be raised, studied, and argued in the legal community and the community at large."[35]

Other state supreme courts—although not all—have similarly rejected defendants' calls to apply *Iqbal* and *Twombly* to their state procedural rules. The Arizona Supreme Court reaffirmed its notice pleading standard in *Cullen*

v. Auto-Owners Ins. Co.,[36] which "dispel[led] any confusion as to whether Arizona has abandoned the notice pleading standard under Rule 8 in favor of the recently articulated standard" in *Twombly*.[37] The court emphasized that the United States Supreme Court's proclamations did not affect Arizona procedure, since "this Court has the final say in the interpretation of procedural rules" and no rule changes had been proposed.[38] Put another way, state courts simply "are in no way bound by federal jurisprudence in interpreting our state pleading rules."[39]

III. The Meaning of "Plausibility Pleading"

After *Iqbal*, it is clear that "plausibility pleading" is now the rule for all civil cases in federal court. What is not clear, however, is what the Court meant when it said that a claim must be "plausible." Plausibility is now the governing standard for motions to dismiss, but the *Iqbal* Court had only this to say about it:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with

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Sidebar: Notice Pleading Remains The Law In Ohio

by Kathleen J. St. John

Although *Iqbal* and *Twombly* have been cited in several Ohio appellate decisions, the courts' references to these cases do not represent a change in Ohio's liberal notice pleading standards.

It has long been held that Ohio is a notice pleading state, and that a plaintiff is generally not required to plead operative facts with particularity.[1] Under Ohio's Civ. R. 8(A), a complaint need only consist of a short and plain statement of the claim that gives the defendant fair notice of the plaintiff's claim and the grounds upon which it is based.[2] Outside of a few exceptions, such as workplace intentional tort or a negligent hiring claim against a religious institution, the complaint need only contain "brief and sketchy allegations of fact to survive a motion to dismiss under the notice pleading rule." [3]

Under Ohio law, moreover, the standard for granting a motion to dismiss under Civ. R. 12 (B) (6) continues to be a difficult one to meet. "A trial court may not grant a motion to dismiss for failure to state a claim upon which relief may be granted unless it appears 'beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.'"[4] In ruling on a motion to dismiss, the court must presume all factual allegations to be true and must draw all reasonable inferences in favor of the non-moving party. [5] "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss."[6]

The Ohio appellate decisions that have cited *Twombly* and/or *Iqbal* do not alter the foregoing principles of Ohio law. Indeed, all such decisions *also* cite the long-settled principles of Ohio law as mentioned above. Thus, to the extent that Ohio courts have cited *Twombly* or *Iqbal*, they have treated these decisions as being consistent with existing Ohio law, and *not* as signaling a new era of pleading in Ohio.

For instance, in *Parsons v. Greater Cleveland Regional Transit Authority*,[7] although the court cited the *Twombly* "plausibility" standard, it affirmed the trial court's denial of the defendant's motion to dismiss because "we cannot say beyond doubt that [the plaintiffs] can prove no set of facts entitling them to relief. That is all that is required at this stage of the proceedings."[8]

At least one Ohio appellate judge has expressly noted that the heightened pleading requirements of *Iqbal* and *Twombly* do not represent Ohio law. In *Miller v. Thyssenkrup Elevator Corp.*,[9] the Eighth District Court of Appeals affirmed the trial court's denial of the political subdivision defendant's (CMHA's) motion for judgment on the pleadings, despite CMHA's contention that it was entitled to be given notice under a heightened pleading standard. Although the majority rejected this contention without reference to *Iqbal* or *Twombly*, Judge Christine T. McMonagle – dissenting on the ground that the appeal was not taken from a final appealable order – expressly noted that the *Iqbal/Twombly* standard does not govern state court rulings in Ohio. Judge McMonagle stated:

> CMHA appeals a denial of its Civ. R. 12(C) motion to dismiss, arguing that for public policy reasons, this court should adopt what is perhaps a heightened pleading standard articulated in two U.S. Supreme Court cases: *Bell Atlantic Corp. v. Twombly* (2007), 550 U.S. 544, 127

> a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief."[40]

Despite the lack of clarity in *Iqbal*, there are compelling reasons to believe that the "plausibility" standard is a lenient one. As an initial matter, the unchanged language of Rule 8 still requires only "a short and plain statement of the claim." Furthermore, the Court in *Twombly* emphasized that a "complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely" and cited the proposition that "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations."[41]

Moreover, in *Erickson v. Pardus*, an often-overlooked case decided shortly after *Twombly*, the Supreme Court re-affirmed that "[s]pecific facts are not necessary" and that notice pleading remains the rule.[42] *Erickson* also described the pleading standard, even after *Twombly*, as "liberal."[43]

In another recent case that is useful for comparison, the Supreme Court held that even under the heightened, *more*-than-plausible pleading standard imposed by the Private Securities Litigation Reform Act (PSLRA), a plaintiff's theory of liability need not be more compelling than competing inferences in order for the plaintiff's

> S.Ct. 1955*** and *Ashcroft v. Iqbal* (2009), __U.S.___, 129 U.S. 1937**** The Ohio Supreme Court has not (and legally need not) adopt this standard and the law remains that Ohio is a notice pleading state.[10]

Notably, no Ohio appellate case that has cited *Iqbal* or *Twombly* has affirmed or reversed a lower court's decision by applying a stricter pleading standard than would otherwise apply under Ohio's notice-pleading standard.[11] Thus, appellate court references to *Iqbal* and Twombly should not be construed as hailing a new and stricter pleading era under the Ohio Rules of Civil Procedure. ■

End Notes

1. *City of Cincinnati v. Beretta U.S.A. Corporation*, 95 Ohio St.3d 416, 2002-Ohio-2480, ¶29.
2. *Illinois Controls, Inc. v. Langham* (1994), 70 Ohio St.3d 512, 526, 1994-Ohio-99, 639 N.E.2d 771.
3. *Vinicky v. Pristas*, 163 Ohio App.3d 508, 2005-Ohio-5196, 839 N.E.2d 88, ¶6; *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063.
4. *Ogle v. Ohio Power Company*, 180 Ohio App.3d 44, 2008-Ohio-7042, ¶3 (quoting *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus).
5. *Beretta*, at ¶5.
6. *York*, 60 Ohio St.3d at 145.
7. 8th Dist. No. 93523, 2010-Ohio-266.
8. *Id.* at ¶15.
9. 8th Dist. No. 94352, 2010-Ohio-5011.
10. *Id.* at ¶37.
11. As of the drafting of this sidebar, in April of 2011, a LEXIS search of Ohio cases produces eleven decisions that cite *Twombly, Iqbal*, or both. Two of these decisions have nothing to do with pleading standards, but cite *Twombly* for other reasons. *Szuch v. King*, 6th Dist. No. E-09-069, 2010-Ohio-5896, ¶115 (dissenting judge cites the intermediate appellate court's decision in *Twombly* for its statement of the law on conspiracy); *Grace v. Mastruserio* (1st Dist.), 182 Ohio App.3d 243, 2007-Ohio-3942, n.30 (citing Justice Stevens' dissent in *Twombly* on a discovery issue). Four more of these decisions either affirm an order denying the defendant's motion to dismiss or for judgment on the pleadings, or reverse an order granting a motion to dismiss, based on Ohio's notice pleading standards. *Fink v. Twentieth Century Homes, Inc.,* 8th Dist. No. 94519, 2010-Ohio-5486, ¶¶28, 38 (affirming denial of motion to dismiss); *Miller, supra* (affirming denial of motion for judgment on the pleadings); *Parsons, supra* (affirming denial of motion to dismiss); *Gallo v. Westfield National Ins. Co., 8*th Dist. No. 91893, 2009-Ohio-1094, ¶¶14, 23, 25 (reversing, in part, the trial court's order granting a motion to dismiss, because the complaint "satisfie[s] the liberal notice pleading requirements set forth in Civ. R. 8"). Two other decisions affirm dismissals of pro se complaints that fail under any standard of pleading. *Cirotto v. Heartbeats of Licking County*, 5th Dist. No. 10-CA-21, 2010-Ohio-4238 (volunteer sues charitable organization for gender and religious discrimination because the organization did not follow through on plans to create a paying position for him); *Williams v. Ohio Edison,* 8th Dist. No. 92840, 2009-Ohio-5702 (after having default judgment entered against her on a creditor's claim in an action filed in Summit County, *pro se* plaintiff sues creditor and its attorneys in Cuyahoga County for fraud and collusion; this case also involved a heightened pleading standard due to the allegations of fraud). The remaining three decisions also fail to usher in a new era in pleading. *Vagas v. City of Hudson*, 9th Dist. No. 24713, 2009-Ohio-6794 was an affirmance of an order granting the City's motion to dismiss under circumstances where the complaint would not have survived under any pleading standards. *Boske v. Massillon City School Dist.*, 5th Dist. No. 2010-CA-00120, 2011-Ohio-580 was an action against a school district, a guidance counselor and several officials for failing to prevent the plaintiff's eighth grade daughter from having a physical relationship with a male teacher. Although the appellate court affirmed the lower court's denial of the motion for judgment on the pleadings as to most of the appellants, it reversed as to the superintendent as there were no allegations in the complaint suggesting that his conduct would rise to the level of culpability necessary for an exception to immunity to apply to him. Finally, in *State ex rel. Dann v. American International Group, Inc.*, Cuy. Cty. C.P. No. 633857, 2008 Ohio Misc. LEXIS 320, the trial court denied the defendants' motion to dismiss the plaintiff's Valentine Act claim, finding that the *Twombly* standard did not apply, and that "[t]he appropriate standard of review to be applied in this case is specified by *Conley v. Gibson* (1957), 355 U.S. 41, 78 S.Ct. 99***, which holds that a rule 12(B)(6) motion will not be granted 'unless is appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Id. at 45-46." *Id.* at *6.

complaint to survive a motion to dismiss.[44] The same must necessarily be true under the more lenient standard that applies to non-PSLRA complaints, as several courts have now held.[45]

As the lower courts have wrestled with the meaning of "plausibility" after *Iqbal*, they have produced a number of statements that are useful to practitioners. For example, as Judge Wood explained in *Swanson*, plausibility "does not imply that the district court should decide whose version to believe, or which version is more likely than not. . . . As we understand it, the Court is saying instead that the plaintiff must give enough details . . . to present a story that holds together."[46] The ultimate question is "*could* these things have happened, not *did* they happen."[47] As phrased by an Ohio district court, "the term 'plausible' is to be understood in a peculiarly narrow sense, and does not refer to the likelihood that the plaintiff will be able to prove a particular allegation. Rather, the Court meant the term to refer to the plausibility of the plaintiff's legal theories, when considered in light of the factual allegations in the complaint."[48]

Not only is the plausibility standard a liberal one, but several post-*Iqbal* decisions from the lower courts—including from the Sixth Circuit and Ohio district courts—emphasize that *Twombly* and *Iqbal* did not alter numerous well-established principles that favor plaintiffs on motions to dismiss. For example:

- The complaint still must be construed in the light most favorable to the plaintiff,[49] and the court must make "reasonable inferences in favor of the non-moving party."[50]
- Since plaintiff's factual allegations are assumed to be true,[51] the court is not "permitted to weigh or disbelieve . . . factual allegations in the motion to dismiss context."[52]
- General allegations are permissible at the pleading stage[53]; detailed factual allegations are not required, because "[i]f the Court were to require Plaintiffs to have all evidence available to them before they file their complaint and to set forth that evidence in the complaint, the well-established rules and processes of discovery would be rendered utterly unnecessary."[54]
- Plaintiffs may still plead facts "on information and belief."[55] Furthermore, "[e]videntiary support is simply not necessary at this stage in the proceedings, and the Court does not read *Iqbal* and *Twombly* to impose that requirement on plaintiffs. . . . [D]efendants have seized upon these cases and, as here, contend that they stand for the proposition that a plaintiff must essentially present a fully developed factual record in his complaint. This is, indeed, an over-reading of the cases."[56]
- Courts remain cognizant of informational asymmetry between plaintiffs and defendants and that plaintiffs cannot yet plead specific facts; often, "the defendants are in control of such information or it is otherwise unavailable to the plaintiffs,"[57] or the evidence defendants claim is missing from the complaint is "uniquely in [the defendants'] possession."[58]
- Plaintiffs need not disprove alternative explanations at the pleading stage.[59]
- Every complaint must be considered as a whole, not piece-by-piece.[60]

Conclusion

At the time of this writing, only about twenty months have passed since the Supreme Court decided *Ashcroft v. Iqbal*, and lower courts are continuing to struggle with how to apply the decision. But regardless of what, exactly, has changed after *Iqbal*, courts should also bear in mind what has stayed the same.■

End Notes

1. 550 U.S. 544 (2007).
2. 129 S. Ct. 1937 (2009).
3. 355 U.S. 41, 45–46 (1957).
4. *Twombly*, 550 U.S. at 570.
5. See 550 U.S. at 550–51.
6. *Id.* at 550.
7. *Id.* at 564.
8. *Id.* at 556, 566.
9. *Id.* at 561–63.
10. *Id.* at 555 (quoting *Conley*, 355 U.S. at 47); *see also, e.g., Maty v. Grasselli Chem. Co.*, 303 U.S. 197, 200 (1938) ("Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants. They should not raise barriers which prevent the achievement of that end.").
11. *Twombly,* 550 U.S. at 569 n.14, 570.
12. *See id.* at 565 n.10.
13. Fed. R. Civ. P. 84.
14. *See* 129 S. Ct. at 1942.
15. *Id.*
16. *Id.* at 1953.
17. *Id.* at 1949.
18. *Id.*
19. *Id.* at 1951.
20. *Id.* at 1950.
21. *Id.*
22. *Id.*
23. *Id.* at 1949.
24. *Id.* at 1950.
25. *Madison v. City of Chicago*, No. 09 C 3629 (N.D. Ill. Aug. 10, 2009) (Shadur, J.)
26. *Id.* at 2, 11.
27. *Fletcher v. Univ. Hosps. of Cleveland,* 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147, 150; *see also LaNeve v. Atlas Recycling, Inc.,* 119 Ohio St.3d 324, 2008-Ohio-3921, 894 N.E.2d 25, 30 (noting that Ohio's rules "establish[] 'notice pleading,' which supports pleading constructions allowing for substantial justice") (citation omitted).
28. *Volbers-Klarich v. Middletown Management, Inc.*, 125 Ohio St.3d 494, 2010 Ohio 2057, at ¶¶11-12 citing *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St. 2d 242.
29. 233 P.3d 861 (Wash. 2010).
30. *See id.* at 862–64.
31. *Id.* at 863.
32. *Id.*
33. Arthur Miller, *From* Conley *to* Twombly *to* Iqbal:

A Double Play on the Federal Rules of Civil Procedure, 60 Duke L.J. 1, 64–65 & n.259 (2010) (citing FJC survey).

34. *Id.* at 864.
35. *Id.*
36. 189 P.3d 344 (Ariz. 2008).
37. *Id.* at 345.
38. *Id.* at 347.
39. *Colby v. Umbrella, Inc.*, 955 A.2d 1082, 1086 n.1, 1090 (Vt. 2008) (emphasizing intent to continue relying on *Conley* standard and describing complaint as "a bare bones statement that merely provides the defendant with notice of the claims against it. Its purpose is to initiate the cause of action, not prove the merits of the plaintiff's case") (citation omitted); *see also Roth v. DeFeliceCare, Inc.,* 700 S.E.2d 183, 189 n.4 (W. Va. 2010) ("Under West Virginia law . . . this Court has not adopted the more stringent pleading requirements as has been the case in federal court and all that is required by a plaintiff is 'fair notice.'").
40. 129 S. Ct. at 1949 (citations omitted).
41. *Id.* at 556 (citations omitted).
42. 551 U.S. 89, 93 (2007) (purpose of Rule 8 is "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests") (quoting *Twombly*, 550 U.S. at 555) (internal quotation marks omitted); *see also Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) ("The factual allegations in the complaint need to be sufficient to give notice to the defendant as to what claims are alleged.").
43. 551 U.S. at 94.
44. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007).
45. *See, e.g., Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (under *Twombly* and *Iqbal*, plaintiff's inferences need not be "more compelling than the opposing inferences").
46. 614 F.3d at 404.
47. *Id.*
48. *Boroff v. Alza Corp.*, 685 F. Supp. 2d 704, 707–08 (N.D. Ohio 2010) (citations omitted); *see also Redinger v. Stryker Corp.,* No. 5:10 CV 104, 2010 WL 1995829, at *3 (N.D. Ohio May 19, 2010) (defendant's arguments, while "relevant to whether Plaintiff can ultimately *prove* his claims," did not demonstrate that plaintiff's claims were not plausible) (emphasis added).
49. *Fritz,* 592 F.3d at 725; *McKinney v. Bayer Corp.*, --- F.Supp.2d ----, 2010 WL 3834327, at *4 (N.D. Ohio 2010).
50. *Augenstein v. Coldwell Banker Real Estate LLC,* --- F. Supp. 2d ----, 2010 WL 4537049, at *1 (S.D. Ohio 2010).
51. *Segal v. Fifth Third Bank, N.A.,* 581 F.3d 305, 308 (6th Cir. 2009); *McKinney*, 2010 WL 3834327, at *4.
52. *Ferron v. Metareward, Inc.*, 698 F. Supp. 2d 992, 999 (S.D. Ohio 2010).
53. *Fritz,* 592 F.3d at 725–26.
54. *Lefker v. I-Flow Corp.*, No. 1:10-CV-00350, 2010 WL 4806771, at *4 (S.D. Ohio Nov. 17, 2010).
55. *Lewis v. Taylor,* No. 1:10-CV-00108, 2010 WL 3785109, at *2–*3 (S.D. Ohio Sept. 21, 2010).
56. *Id.* at *3.
57. *Hiles v. Inoveris, LLC*, No. 2:09-cv-53, 2009 WL 3671007, at *3 (S.D. Ohio Nov. 4, 2009).
58. *Pasqualetti v. Kia Motors America, Inc.*, 663 F. Supp. 2d 586, 601 (N.D. Ohio 2009).
59. *See Foust v. Stryker Corp.,* No. 2:10-cv-00005, 2010 WL 2572179, at *4–5 (S.D. Ohio June 22, 2010) ("The fact that Plaintiff's hip replacement could have failed for multiple reasons is not relevant at this stage in the pleadings.").
60. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009); *Auto Chem Labs., Inc. v. Turtle Wax, Inc.*, 3:07cv00156, 2010 WL 3860660, at *3 (S.D. Ohio Feb. 13, 2010) (considering claim "in light of all of [plaintiff's] factual allegations" and stating that defendant's focus on one allegation "is too narrow").

Speaking Objections At Depositions: A Roundtable Discussion

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Editor's Note: *Recently, Ellen Hobbs Hirshman [EHH] hosted a "roundtable" conference call with three plaintiffs' lawyers, one defense lawyer, and a judge, to discuss obstructionist tactics during depositions, and how to handle them. The plaintiffs' attorneys were Gerry Leeseberg [GL] of Leeseberg & Valentine in Columbus, Ohio; Steve Collier [SC] of Connelly, Jackson & Collier, in Toledo, Ohio; and Toby Hirshman [TH] of Linton & Hirshman in Cleveland, Ohio. The defense attorney was Bill Bonezzi [BB]of Bonezzi, Switzer, Murphy, Polito & Hupp in Cleveland, Ohio. The judge was Richard McMonagle [JRM]of the Cuyahoga County Court of Common Pleas. Here are some of their insights. Special thanks go to Laura Ware, who acted as Court Reporter for this conference call.*

EHH: We're discussing how to deal with speaking objections and inappropriate conduct in depositions. Let's start by talking about the type of conduct we encounter in our day-to-day practices. Gerry, why don't we start with you.

GL: Oh, boy. You know, I think I've matured, and most of the attorneys I've practiced with and against have matured, to the point where speaking objections are not as big a problem as they used to be.

I find myself being guilty of speaking objections when I encounter defense counsel who I believe is intentionally attempting to distort the record. It often occurs with my clients who are unsophisticated. I find myself having to jump in to stop what I consider to be a distortion of my client's testimony.

The concern is that it's difficult after a deposition has been completed to supplement a client's testimony with an affidavit clarifying what they've said. Especially in federal court, not so much in state court, that is really frowned upon. And unless you've got a clean and accurate record, that deposition is often used against us in motions for summary judgment, motions in limine, and things of that nature.

So I do find myself, on occasion, being almost forced to engage in speaking objections, to clarify the record, where defense counsel is supposedly reiterating what my client or my expert testified to, and mischaracterizes it as a predicate to the next question. And by doing

so, confuses the issue and confuses what the next answer to the question will be.

And I guess I'm not that concerned about being dragged in front of the court on these occasions because I'll be able to defend my conduct in light of what defense counsel is doing.

TH: Perhaps I'm not as mature as Gerry, because I seem to run into speaking objections from defense counsel fairly frequently. There are certain lawyers who are repeatedly guilty of it. It's usually a situation where they decide that the facts aren't beneficial to them so they attempt to steer testimony in one direction or another by making objections that are calculated to suggest an answer. You can make your objections to their objections. Sometimes that's effective in putting them in line, sometimes it's not.

So I see it as an occasional problem, but when it's a problem it can be a significant one. And if you don't grab it by the horns, it can change the complexion of the case in a significant way. The question is how do you deal with that.

EHH: Now, Gerry suggested he doesn't confront speaking objections as much, while Toby and I encounter them quite frequently. As Toby suggested, when we do confront them, they have distorted and sometimes ruined what could have been a very productive deposition.

So I'm wondering if anybody else encounters these types of talking objections which suggest an answer, and are clearly inappropriate.

GL: Ellen, I didn't mean to suggest I don't run into the problem. I do. It's exactly on the occasions Toby was talking about. It seems like the better the deposition is going, the more you run into the problem from defense counsel.

And they do it for exactly the reasons Toby pointed out. When they make an objection, it's almost like a red flag they pick up and wave in front of their witness, saying, "Okay, understand that I've got a problem with this question so I want you to think about it." And if that's not sufficient, they even add an explanation to their objection to help the witness understand exactly what their concern is about the question.

SC: I think sometimes depositions can bring out the worst in an attorney. When you see your case going down the drain, whether you're plaintiff or defense, you have this desire to prevent that from happening. Unfortunately, it results in some of the conduct that was just discussed.

I think it can range from the very simple "If you know" instruction – to which the witness usually responds, "Oh, I don't know" --

GL: What a coincidence.

SC: -- to the long speaking objection Gerry spoke of, which I think is more problematic when it's a predicate to a question and is not factually correct. But both these kinds of objections are problematic. If a witness, such as a doctor, is ready to give you an answer that is very helpful, and he is instructed, "Doctor, only answer if you know," all of a sudden he may not know.

One way I try to confront this – particularly if I know the attorney and know that this might be a problem – is by telling the expert witness at the beginning of the deposition, "Look, I don't want you to answer any question you don't know, and if you don't know the answer to a question, you can say that and this will prevent your lawyer from having to remind you of that during the deposition." It's not foolproof, but at least it's something to help out, particularly if you're making a record for the Court at a later time.

BB: I have noticed that the older or more experienced the defense counsel is, the less likely they are to object. Maybe it's because younger or less experienced individuals feel they have to try to control the deposition, or that they have to show their physician or their client that they're in charge.

However, as a defense attorney, I have also noticed that there are certain defense lawyers from certain law firms who constantly interrupt, interrupting the flow and the thought process of the individual. It's done for a couple of reasons. One of them, which I find wrong, is that they don't prep their witness well enough beforehand, so they interrupt and try to stop the flow of good questioning to make up for their lack of preparation.

The important thing is how you get around it. I don't spend a great deal of time arguing with people in depositions anymore. I just don't think it's worth it. There are times you would like to jump right in and say something to disrupt the flow because you know you're getting pounded. But, at the same time, those are the facts of the case. You

have to deal with them and see how your witness is going to operate under pressure anyway.

But the fact of the matter is, we're all going to continue to encounter speaking objections with certain attorneys, and I'm not sure how to stop it.

EHH: Steve has suggested one way to deal with these kinds of objections is to make a comment at the beginning of the deposition that, "I only want you to answer questions you know the answers to." Another thing you can do, that I've done in some cases, is to explain at the outset, "Your counsel may object from time to time, and your counsel knows that it's inappropriate to make talking objections, or to suggest an answer in his objections. So if he objects, he'll probably just be saying the word 'objection.' And unless he or she instructs you not to answer, you go ahead and answer the question."

It doesn't always work, but it's one thing I've tried.

SC: If there are a lot of interruptions, I usually remain calm and at the end just say, "Have you said everything you want to say now? Because I'm going to start speaking, and when you were speaking I did not interrupt, and I would appreciate the same courtesy from you."

What I'm trying to do at that point is create a record. I'm not going to go to the Court very often, but when I do I'd like to have the record reflect very specific conduct where I'm remaining calm, doing what you're supposed to do, and the other side is constantly interrupting or leading.

Because if you're going to go to the Court, you don't want to go crying wolf. You want to go there only when you have a very good record.

JRM: This is interesting because it sounds like an echo that I've been hearing for 30 years. We've had untold amounts of alleging unprofessionalism, codes of conduct, and everything, and it still seems to be the same dilemma. I appreciate what Mr. Bonezzi said about how the lawyer can lessen the impact of these kinds of objections or the number of times they occur. But I believe that occasionally the Judge would be interested in hearing about this misconduct – particularly if it is extreme.

The question is, how do you get to the judge? Most judges I'm familiar with insulate themselves from deposition disputes because they have their staff attorneys. So to get this misconduct before the judge, you have to pass through the filter of the staff attorney, which isn't easy.

I think one thing that can be done is to have a video taken of the deposition. I'm not sure whether you do this routinely, or whether it's feasible to do in all cases.

TH: I've often thought that with certain attorneys it might be necessary to at least have a tape recorder available, even if you don't intend to videotape the deposition. This would be useful not only for speaking objections, but in those rare instances when an attorney becomes abusive. If you have a tape recorder there, at least you can put it on the table and say, "Listen, from now on I'm tape recording this, and you can continue in your present behavior or you can stop."

JRM: When the record is so sterile, they can make a comment that, when you read it, does not seem all that serious. You're right, Toby, when you get a video of it, or if it's recorded, that can make a difference.

BB: I think it does. I think that often when it's not on video there are shenanigans that take place, but once there's a video that's providing the information for all to see, it just doesn't take place any longer.

GL: The problem is each deposition is expensive, and we're not even sure when the problem is going to arise. To incur the expense of video-taping every deposition across the board on an annual basis is like trying to kill an ant with a sledgehammer.

One of the problems that we have is once the speaking objections have taken place the damage is done and the witness's response has been shaped accordingly. The question then arises, what relief, what sanctions, am I entitled to from the Court?

And I would like to hear what the Judge has to say, but I personally have never filed a motion for sanctions against an attorney for engaging in that conduct. I've just tried to stop it through the different means already mentioned – with varying degrees of success. But I've never filed a motion for sanctions, and I'm not sure if one would be granted, or, if granted, what the sanctions would consist of.

JRM: I've never seen one, and I imagine that normally most of these problems are settled and long gone and forgotten. In most instances, we wouldn't want to be bothered with something like that, which is

being critical of the parties. We just want to see who's ready to go to trial.

EHH: Gerry just brought up a good point. In Cuyahoga County we have local rules that give us some recourse by specifically prohibiting speaking objections. I know Lake and Summit counties have similar local rules, and the Federal Rules also deal with this problem.[1] And some judges have some very specific rules about appropriate conduct in depositions, and about not making talking objections in the presence of the deponent.

Which leads to the question Gerry raised. How many of us ever bother to move the Court to get involved? As Gerry says, usually the cat's out of the bag and they've already destroyed what would have been a brilliant deposition by plaintiff's counsel. Right?

TH: The other side of the coin is the comment Gerry made when he started – that sometimes the talking objection is absolutely essential to prevent abusive questioning. So when a judge is confronted with this question, it's not a one-sided question. He has to get to the heart of the matter, as to what the interactions were and what the real situation was in the deposition.

And my guess is, Judge, that's not always an easy matter to ferret out.

JRM: No. You can't. That's why I like the video idea. You know, there's a little sign on my desk that says, "There's three sides to every story: yours, mine, and the facts." And everybody is going to have their version of what really went on and their description of the other party, which can't be fully understood from the written record.

And actually, I'm trying to look up our local rule here as we're speaking.

EHH: Local Rule 13, right?

JRM: Is it 13? Yeah. "Decorum. Opposing counsel and the deponent shall be treated with civility and respect, and the questioner shall not engage in repetitive, harassing or badgering questioning. Ordinarily, the deponent shall be permitted to complete an answer without interruption by counsel."

"Speaking objections which refer to the facts of the case or suggest an answer to the deponent are improper and shall not be made in the presence of the deponent."

I'm just looking for a sanction here. "Where a witness, party or counsel violates any of these rules at a deposition, the Court may order sanctions or other remedies, including those sanctions available under Ohio Rule of Civil Procedure 37."

So, you know, if you bring them to us, we're supposed to follow these rules. I just haven't seen this.

BB: But, Judge, what is the sanction? Putting aside what the rules may call for, what is the pragmatic sanction for something like this? Everything is already done, everything is on the record, the testimony is in. What exactly is going to be done, ultimately? Because you certainly aren't going to be able to strike the questions or the answers.

JRM: Well, I think you could. I think you could say, "Look, this is improper. This is not the way it's done. Do it over."

SC: I guess my other suggestion would be that you may not be able to undo what's already happened, but if the Judge says, "If I find that conduct in the future, you are going to be removed as counsel, you are going to be limited in some way," that is the type of thing that would be a cure – if anything would.

JRM: Of course, money always slows people down, if you want to penalize somebody with a sanction. But, to be honest with you, I've never seen this happen. I've been here for 33 years, and we just figured the attorneys settle these problems themselves.

SC: In my experience, we've been taught that judges don't want to be bothered with these, and that's the main reason they don't come to the courts' attention. I've only made a motion once, and on that occasion I created a very detailed record. I'd anticipated I might be making a motion, so all of my conduct during the deposition was letter perfect. I did not interrupt anybody, and I had this long record that – even without a video – you look at it and say, "Boy, that doesn't look very good."

GL: Steve, you're a consummate gentleman and professional. I'd like to know how you respond to abusive tactics by a defense attorney who makes statements about a question, or the predicate to a question, distorts or mischaracterizes your expert's or your client's testimony, or uses compound questions where the answer is going to be damning simply because of how the question is phrased.

SC: The rules do allow you to stop the deposition. If opposing counsel is being abusive, or harassing, or whatever, I have at least threatened to stop the deposition before. Once, when a doctor was being deposed, I started to pack up to leave, and the doctor told his attorney, "Wait a second. I don't want to have to come back here for another deposition. Can't we work this out?" So we took a break, and it didn't happen against the rest of the deposition. I don't do that all the time. That's a rare circumstance. But I think if it gets to that point – particularly if you're taking the deposition of the defendant or the defendant's expert – it's a useful tactic.

GL: I'm talking about when you're defending a deposition, Steve. Opposing counsel is engaging in abusive tactics, and distorting the record in questioning your client, and your client is unsophisticated, and no matter how much preparation is easily misled.

SC: I would say one of the two things that you suggested. I don't think you're guilty of a speaking objection then because, as I read the rules, you're allowed to prevent harassment from taking place. So your options are either to do that and clarify what you're doing on the record, or to stop the deposition and try to get the Court involved at that time, if possible.

And sometimes the mere threat cures the situation. But I'm not suggesting that it works all the time.

TH: I think sometimes in that situation the speaking objection is essential. If you are truly dealing with dishonesty on the other side, in terms of rephrasing the facts as previously stated by the witness, sometimes you can shame people into changing the way they construct the question.

Sometimes that's pretty effective, and I think you have to do it under those circumstances.

SC: One of the other things we have to deal with are the constant objections from the other side. We know they're not required. Rule 32(d)(3) sets forth the ones that are required or would otherwise be waived.

I think the constant objections are usually a sign of the objecting attorney's insecurity. As we age, or evolve, or whatever you want to call it, you realize that all those objections may not be necessary and you get the confidence not to do it as much.

TH: Yeah, but in the situation Gerry is describing what you're really objecting to is the form of the question, isn't it? It's an inappropriate question; you're inserting facts that shouldn't be there. And I think that objecting to these kinds of questions is allowable under any of these rules.

BB: Let me ask a question. How often do you really encounter this type of problem? I guess I'm looking at it from my point of view, because I do nothing but medical malpractice. And, I really don't see these kinds of problems much, other than the occasional situation. Most of the time the attorneys opposite me are folks like you, Toby, or Steve, or Gerry, or Ellen, who are strong enough within your own personalities to control the situation in a way that is acceptable to everyone in the room, including the witnesses.

All you have to do is speak to the individual who is doing whatever it is that is causing the problem, and most of the time the problem will be corrected. Am I right or wrong in that?

GL: I think you're absolutely right, Bill. I've seen young lawyers complain about a defense lawyer doing

something, and I say, "Well, what did you do about it? And if you didn't do anything about it, as long as you let them do it, they're going to continue to do it."

This is the converse of what Steve was saying. It's a manifestation of their insecurity; they're not confident in the correctness of their position, so they don't do anything to intercede. I think it's absolutely imperative that you know the rules inside and out so that you have them as your weapon and as your moral high ground.

But invariably, when you get to the pressure points in an important deposition of a defendant or a defense witness, even counsel with whom you've got a lot of experience who are, themselves, experienced and sophisticated, will start to fidget and will try this tactic.

But, I think you're exactly right, Bill. It's really a question of how do we respond to try to bring it under control and make sure it doesn't continue. Or, if it's going to continue, to make a clear and proper record so that at least the threat of obtaining a sanction is there.

SC: Along those same lines, I remember one of my first videotaped depositions for trial. I was nervous and the attorney on the other side objected to every opinion question. And I'm thinking, well, I even had this written out and I know this is right, but I'm still wondering, did I do this right or is this whole thing blown?

That doesn't happen to me anymore. They object to opinion questions, I go right on. But in the earlier days that can really be problematic for a young lawyer, and I think that's probably why it's done sometimes.

BB: I think you're right.

EHH: And I think the true sign of professionalism is to be able to sit there and keep your mouth shut when things aren't going well.

SC: That's hard to do. I mean, it's hard for me to do, too. You almost wish the witness could hear your thoughts, "Can't you see that I am dying inside because of the way you're answering the question?"

BB: We've all been there.

SC: But Bill is right, at some point in time the facts are the facts. And I think we've been through it enough that you say, "You know what, my livelihood, the essence of me, isn't going to live or die in this deposition."

BB: I've also found when I go back into something and I see that somebody is objecting strenuously, I literally will mark that area for trial purposes because I know somehow I've just hit on something. I may not recognize it at that moment, but hopefully by the time of trial I will, because that's when you object. When there's something really important. And if it's not important, you're not going to object.

EHH: I think we're at the point where we're going to have to wrap this up. But I would be curious to know if any other judge has ever confronted these issues, and, if not, are they open to dealing with them? And if they are willing to deal with them, how do we get them past the staff attorney?

SC: Judge, what about the idea of having one judge appointed in each jurisdiction to handle discovery disputes, instead of the judge handling the case?

JRM: That probably is not a bad idea because it gets the judge assigned to the case out of the mix and it becomes a more independent ruling. The parties can't feel, "Gee, this judge is going to hate me through the rest of the trial because look what I pulled."

SC: It would also be good to have that judge serve as a sort of clearinghouse for all complaints. He would begin to see a pattern with certain attorneys.

JRM: Well, we've had our Eighth District Judicial Conference recently, and won't be having it for another year. I'm the head of it, and this wouldn't be a bad topic for discussion there. Because this is a recurring complaint over the years, but nobody ever gets the judges involved. It's something to think about because at the Eighth District Judicial Conference, you have a great amount of the bar there and all the judges are there, and when everyone puts their heads together on these kinds of issues, you get some great recommendations. ■

End Notes

1. *See* Cuy. Cty. C.P. Loc. R. 13; Lake Cty. C.P. Loc. R. V(E)(1); Summit Cty. C.P. Loc. R. 17.02; Fed. R. Civ. P. 30 (c)-(d); N.D. Ohio Loc. R. 30.1.

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Subrogation, Survival, And Wrongful Death Actions – How To Protect Wrongful Death Damage Recoveries From Unwarranted Subrogation Claims

by Brenda M. Johnson

You represent the estate of a woman who, despite heroic medical efforts, died as a result of a tragic auto accident. Those heroic medical efforts, however, were not without cost – and the bills have been paid by the decedent's employer's health insurance plan. There's a survivor claim, of course, for the medical expenses, but the decedent's husband and children have a right to wrongful death damages as well, and, as is often the case, the tortfeasor's insurance will not cover the full value of the survivor claim *and* the wrongful death claims. The plan has informed you that it has a right of subrogation it intends to exercise over any recovery you make against the at-fault driver. And, of course, because it is an employee benefit plan, ERISA is implicated.

This not-uncommon scenario presents a number of questions. The first, of course, involves the scope of the insurer's potential subrogation claim. Is it limited to the survivor action, or can the insurer reach amounts recovered for the wrongful death claim as well? And if the subrogation claim is limited to the survivor action, can you protect the amounts available for settlement simply by allocating any available settlement amounts to the wrongful death claim?

The answer to the first question is that any subrogation right the insurer may have will extend no farther than the survivor action. The other questions, however, are much more complicated. While subrogation rights have limits, your power to allocate settlement proceeds to a wrongful death claim in order to avoid subrogation is limited as well. If not done correctly, you may find yourself in a situation in which a federal court determines that the *entire* settlement amount is vulnerable to a subrogation claim, regardless of whether wrongful death claims were involved. The good news, however, is that a few simple steps will go a long way to protecting your client – and you – from overreaching on the part of subrogated health care insurers.

I. The Insurer's Rights Have Limits …

A basic tenet of subrogation is that an insurer cannot succeed to any right that its insured did not have in the first instance, and Ohio law is consistent with this.[1] Ohio's wrongful death statute does not allow for recovery of the decedent's medical expenses; moreover, "damages awarded . . . do not flow to the estate, but are to be distributed directly to the beneficiaries."[2] Moreover, it is well-established that Ohio's wrongful death statute "creates a new cause or right of action distinct and apart from the right of action which the injured person might have had," and is intended "to compensate others for death resulting from injuries," not to compensate for the injuries themselves.[3]

So, as a general rule, an insurer has no subrogation right under Ohio law to any

amounts recovered in the wrongful death claim, since the wrongful death claim is not a claim originally held by the insured decedent. Federal courts, in turn, follow the same rule when determining whether an ERISA plan has a subrogation right against amounts recovered after an insured's death – namely, that the plan's subrogation rights extend only to those claims for which the estate can recover, and not to those that are personal to wrongful death beneficiaries. In *Atteberry v. Memorial-Hermann Healthcare Sys.*,[4] for instance, the Fifth Circuit held that death benefits paid to an employee's estate only gave rise to a subrogation interest in the estate's survival claim, and did not extend to wrongful death claims that were personal to the surviving family members. Similarly, in *Liberty Corp. v. NCNB National Bank of S.C.*[5] the Fourth Circuit observed that an ERISA plan that required an insured to reimburse the plan for medical benefits paid on his behalf did not create a subrogation right in a wrongful death claim where, as is the case in Ohio, the wrongful death claim belongs to the beneficiaries, and not the insured's estate.[6]

II.…But So Does Your Ability To Allocate Settlement Funds To The Wrongful Death Claim.

While the wrongful death claim is not subject to subrogation, there's no getting around the fact that a survivor claim for medical expenses exists if medical care was provided to the decedent, or that such a claim could well be subject to subrogation. Thus, the question becomes whether it is possible to minimize or avoid the insurer's subrogation claim by crafting a settlement with the tortfeasor that allocates nothing (or a *de minimis* amount) to the survival claim. The answer to this question depends very much on how the settlement is crafted, and the extent to which the insurer is given notice of any relevant probate court proceedings involving approval of the settlement and allocation of its proceeds.

Not surprisingly, federal courts have held that "[a]n ERISA plan participant can not unilaterally allocate settlement proceeds to something other than medical expenses in order to evade subrogation . . .."[7] Where the plan participant is deceased, however, there can be no unilateral allocation of the proceeds, since any settlement and allocation must be approved by the probate court. This, in turn, places you and your clients in a favorable position if you simply follow some basic rules.

First, put the health care insurer on notice of any probate court proceedings involving approval of your settlement. Even if the health care insurer declines to participate in the probate proceedings and instead takes its claims to federal court, federal courts generally will not disturb a damage allocation made by a probate court when the insurer has been given notice and an opportunity to participate in the state probate court proceedings. In *Caterpillar, Inc. v. Wilhelm*,[8] for example, the U.S. District Court for the Central District of Illinois granted summary judgment against a self-insured health plan when the plan had been given ample notice of probate court proceedings, but chose not to participate.[9] And though it technically did not reach the issue, the Eighth Circuit's opinion in *Administrative Comm. of the Wal-Mart Stores, Inc., Associates' Health and Welfare Plan v. Soles*[10] supports this as well. In that case, the Eighth Circuit held that Wal-Mart's federal challenge to a state probate court-approved settlement was time barred; however, the dissenting judge observed that any recovery Wal-Mart could have made would have been limited to those amounts that the probate court had allocated to the survival action.

Second, make sure that the settlement agreement and, to the extent you can control it, the probate court's order approving the settlement, address the wrongful death and survivor claims separately, and draw a clear distinction between the amounts allocated to each – otherwise, a federal court may find sufficient ambiguity in the settlement to allow for a subrogation claim against the entire settlement amount. In *Diamond Crystal Brands, Inc. v. Wallace*,[11] for instance, the district court allowed a plan to recover the full amount it had paid in pre-death medical costs from settlement amounts that had been allocated to a wrongful death claim when the settlement agreement indicated the settlement sum was for all claims, even though the sum was later allocated in the agreement between the survivor and wrongful death claims. And in *McInnis v. Provident Life & Accident Ins. Co.*,[12] the Fourth Circuit similarly allowed recovery against a wrongful death settlement when the probate court order approving the settlement was ambiguous as to whether the settlement was for "all claims" or simply wrongful death claims.

Wallace appears to have involved a settlement that had not been submitted for probate court approval, and *McInnis*, for reasons discussed further below, has other distinguishing characteristics. Nevertheless, both opinions underscore the significance that settlement language (and the language of probate court orders) can play in protecting a wrongful death allocation from subrogation claims. Any indication that a lump sum is being tendered in settlement of all claims, or is being approved as a settlement for all claims, could be grist for a challenge and should be avoided as much as possible.

IIII. And Let's Not Forget The Specter of Preemption – And How It Can Be Dispelled.

Placing the insurer on notice of any probate court proceedings involving approval of your carefully crafted settlement should go a long way to protecting your clients' rights to a wrongful death recovery. This article would not be complete, however, if it did not address the tendency among plans to argue that ERISA preempts state wrongful death laws (and, consequently, the presumption that the plan's rights stop where the wrongful death claim begins). This tactic owes its existence to two Fourth Circuit opinions addressing a unique aspect of North Carolina wrongful death law that, as the following will show, is not duplicated in Ohio law. As a result, the argument for preemption that has worked (albeit under factually limited circumstances) under North Carolina law would not apply in a case governed by Ohio's wrongful death statute.

North Carolina has a hybrid wrongful death/survivor statute that provides for recovery by the estate of the damages the decedent could have recovered if she had lived, and then combines them with the wrongful death claims available to beneficiaries.[13] This statute, in turn, includes what amounts to an antisubrogation provision, in that it provides that the amount recovered under the statute "is not liable to be applied as assets, in the payment of debts or legacies, except as to . . . reasonable hospital and medical expenses not exceeding [an amount currently set at $4500] incident to the injury resulting in death."[14]

Liberty Corp. v. NCNB National Bank of S.C.[15] is the first opinion in which the Fourth Circuit addressed the effect of this statute on an ERISA plan's subrogation rights. *Liberty* involved an auto case where the insured incurred substantial medical bills before dying of his injuries. A court-approved settlement was reached that obligated the tortfeasor to pay $1,500,000 "to be distributed as hereinabove set forth pursuant to the North Carolina Wrongful Death and Intestate Succession Acts."[16] The estate fiduciary then offered to pay the self-insured employer $1,160, which at the time was the maximum that could be reimbursed to a health care provider under the statute. The plan filed an action for recovery in federal court in which it argued (among other things) that North Carolina's wrongful death law fell within ERISA's broad preemption clause because it affected the plan's ability to exercise its subrogation rights.

The Fourth Circuit rejected this argument, largely because it looked to the settlement at issue as having been *solely* for the wrongful death claim. After acknowledging the notorious breadth of ERISA preemption, the court also noted that preemption still has limitations:

> ERISA preemption is "conspicuous for its breadth" and not limited to "state laws specifically designed to affect employee benefit plans." Despite the breadth of this preemption, however, "some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."[17]

The court then concluded that the effect of North Carolina's law on the plan was "too tenuous" because the plan was never subrogated to the wrongful death claim, and the settlement was solely of the wrongful death claim.[18]

Only one year later, a different panel of the Fourth Circuit addressed the issue again, in *McInnis v. Provident Life & Accident Ins. Co.*[19] In that case, the estate fiduciary entered into a court-approved settlement in which the probate court held that the settlement total (which was an undifferentiated amount) was "in the best interest of the Estate . . . and the beneficiaries. . . ."[20] Shortly thereafter, the estate submitted a claim for nearly $60,000 in medical bills to the decedent's health care plan. The plan refused to pay unless the fiduciary entered into a subrogation agreement. The estate then brought an action against the plan for benefits, arguing that any subrogation agreement would be contrary to North Carolina's law.

On these facts, the Fourth Circuit held that ERISA did, in fact, preempt North Carolina's limit on the payment of medical costs, but did so by deciding that the *McInnis* settlement, unlike the *Liberty* settlement, comprised both survivor and wrongful death claims. Acknowledging the holding in *Liberty*, the court determined that it was presented with different circumstances in *McInnis*:

> The court [in *Liberty]* found that the claim under North Carolina's wrongful death statute belonged not to the plan participant or to his estate, but rather to his beneficiaries. While disposition of assets belonging to the beneficiaries of a plan participant may "relate" to a plan, we concluded that its relation to the plan was too "tenuous, remote, or peripheral," and thus the beneficiaries' claims would not be governed by ERISA. We were careful to note, however, that if the damages were recovered "by or on behalf of the same person [plan participant] whose medical expenses it had paid . . . [then] the conflict between the state law and the ERISA plan must be resolved in favor of the plan and therefore in favor of preemption." **Thus, the**

> **answer to the question of whether a claim under North Carolina's wrongful death statute belongs to the deceased plan participant or to a beneficiary of the decedent defines the line between remoteness and relatedness under our *Liberty* decision. Our inquiry in this case, then, is directed to the question of whose damage claim is at issue.**[21]

After noting that survival claims traditionally belong to the decedent's estate, whereas wrongful death claims belong to the beneficiaries, and that "the damages recovered as settlement clearly included those belonging to [the decedent] and her estate," the Fourth Circuit held that the facts were distinguishable from those in *Liberty*, and that on those specific facts ERISA preempted North Carolina's wrongful death statute to the extent it purported to limit the plan's subrogation rights.[22]

Ohio's wrongful death statute does not purport to include survival claims, and Ohio does not have any type of antisubrogation law that would be implicated in our case. Accordingly, the Fourth Circuit's analysis in *Liberty* and *McInnis* does not support any kind of preemption argument with respect to Ohio law, or the law of any state with a traditional wrongful death statute. Indeed, it is hard to see how it would support a preemption argument in any state with a traditional wrongful death/survivor statutory framework.[23] ■

End Notes

1. *See, e.g., State Dep't of Taxation v. Jones* (1980), 61 Ohio St.2d 99, 100 ("In a broad sense, one person is subrogated to certain rights of another person *where he is substituted in the place of such other person so that he succeeds to those rights of the other person*" (emphasis added; *citing Aetna Cas. & Sur. Co. v. Hensgen* (1970), 22 Ohio St.2d 83)).
2. *Sallach v. United Airlines, Inc.* (10th Dist. 1997), 121 Ohio App.3d 89, 93 (Dreshler, J., concurring).
3. *Karr v. Sixt* (1946), 146 Ohio St. 527 (syllabus at ¶¶ 1, 2).
4. (5th Cir. 2005), 405 F.3d 344.
5. (4th Cir. 1993), 984 F.2d 1383.
6. *See Liberty Corp.*, 984 F.2d at 1388-1389 ("This right [to a wrongful death claim] was never subrogated.").
7. *Moore v. Blue Cross & Blue Shield of the Nat'l Capital Area* (D.D.C. 1999), 70 F. Supp.2d 9, 39 (citing *Chitkin v. Lincoln Nat'l Ins. Co.* (S.D. Cal. 1995), 879 F. Supp. 841); see also Wright v. Aetna Life Ins. Co. (11th Cir. 1997), 110 F.3d 762, 765 n. 3 (allocation of damages in settlement agreement not binding on subrogated insurer that was not a party to the agreement; "To hold otherwise would allow [the insured and the tortfeasor] to control [the insurer's] reimbursement rights.").
8. (C.D. Illinois, Sept. 20, 2009), No. 08-CV-2020, 2009 U.S. Dist. LEXIS 92620.
9. *Id.* at *8-*10 ("Caterpillar could have intervened in the state court settlement to protect its interests … but it chose not to intervene or appeal and instead waited to file this claim in federal court.").
10. (8th Cir. 2003), 336 F.3d 780.
11. (N.D. Ga. Feb. 16, 2010), No. 1:07-CV-3172, 2010 U.S. Dist. LEXIS 48684.
12. (4th Cir. 1994), 21 F.3d 586.
13. *See* N.C. Gen Stat. § 28A-18-2(a).
14. *Id.*
15. (4th Cir. 1993), 984 F.2d 1383.
16. *Id.* at 1385.
17. *Id.* at 1388 (citations omitted)
18. *Id.* at 1389-90.
19. (4th Cir. 1994), 21 F.3d 586.
20. *Id.* at 587.
21. *Id.* at 589 (citations omitted; emphasis added).
22. *McInnis*, 21 F.3d 586 at 590.
23. That being said, there is at least one case in which a federal district court in Arkansas (perhaps unsurprisingly) held that ERISA broadly preempted Arkansas' traditional wrongful death statute, and permitted Wal-Mart's self-insured health plan to subrogate against a wrongful death recovery. *See In re Estate of Allen v. Wal-Mart Stores, Inc., Associates' Health and Welfare Plan* (E.D. Ark. 2002), 196 F. Supp.2d 780. Even so, the persuasive value of this opinion is questionable. There is no indication that it has been relied on as persuasive authority. Moreover, though no appeal was taken from this opinion, there is good reason to believe that the district court's opinion would not have survived review in the Eighth Circuit based on *Administrative Comm. of the Wal-Mart Stores, Inc., Associates' Health and Welfare Plan v. Soles* (8th Cir. 2003), 336 F.3d 780, where the lone dissenter would have allowed Wal-Mart to proceed with a reimbursement action that the rest of the panel deemed to be time-barred, but would have limited Wal-Mart's subrogation rights to those amounts that the state probate court had allocated to survival claims (as opposed to wrongful death).

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Rule In, Rule Out: A Malpractice Lawyer's Introductory Guide to Diagnostic Tests

by Brian Eisen

If you've handled more than a few medical negligence cases, you probably have examined a defense expert on the concept of differential diagnosis. You may even have managed to get one of these hired guns to admit that potentially lethal conditions "in the differential" must be "ruled out," just as David Ball says you should do. Perhaps you thought you had the expert on the ropes. But just as you went in for the knockout punch – showing that some diagnostic test should have been done but wasn't or was done but should not have been relied upon – the witness began jabbering about the "sensitivity" and "specificity" of the proposed test or its "positive" or "negative predictive value." Suddenly, you were the one reeling, trying to avoid the haze of confusion that often accompanies such terms. If only your corner man (or maybe just your paralegal) had reached for this issue of the CATA News instead of the towel, you might not have been counted out.

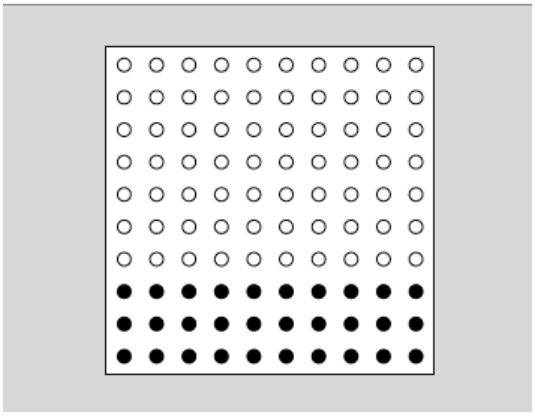
There are many terms used to describe or explain the usefulness of diagnostic tests or studies. This article describes some of the basics, both in text and in picture form, so that you may stand a better chance when squaring off with one of these experts.

The *sensitivity* of a diagnostic test is a measure of how good the test is at correctly identifying those individuals with the condition or disease at issue. Accordingly, when calculating sensitivity, only sick people (those with the condition or disease) are considered. *Sensitivity* answers the question, "if we tested only the sick people in this population, what percentage of them would the test correctly identify?"

The *specificity* of a test is a measure of how good the test is at correctly identifying those individuals who do not have the condition or disease; in other words, those who are well. Accordingly, when calculating specificity, only well people are considered. *Specificity* answers the question, "if we tested only the people who are well (those who don't have the condition or disease at issue), what percentage of them would the test correctly identify?"

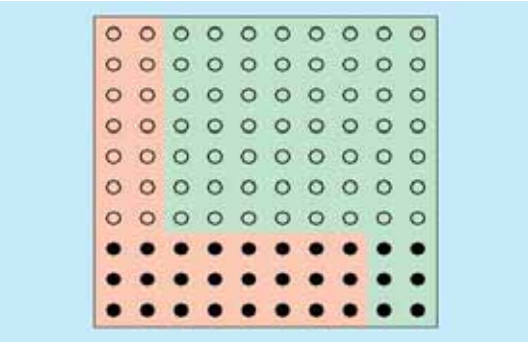
If you're feeling woozy again, it may help to look at a few illustrations. Here, I have borrowed liberally (how else would a trial lawyer borrow?) from a terrific article published in 2003 in the British Journal of Medicine.[1] We start with a hypothetical population of 100 people (to keep the metaphor moving, let's call them boxers), of whom 30% have a given condition (let's call it athlete's foot).

Our population may be represented as follows:



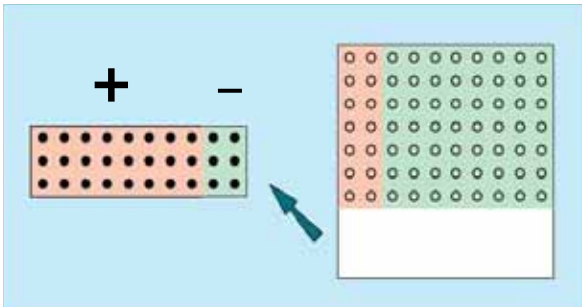
○ Is a boxer without athlete's foot
● Is a boxer with athlete's foot

Now, let's say our diagnostic test is a simple urine test.[2] Our test might yield the following results:



Boxers shaded in green have tested negative
Boxers shaded in pink have tested positive

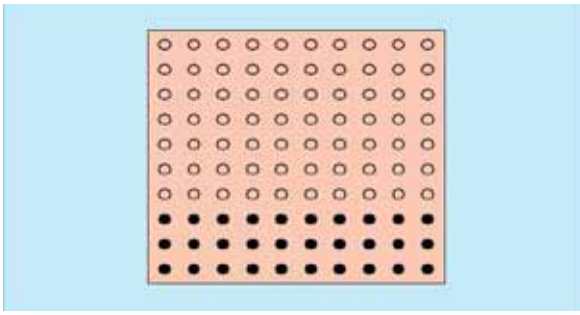
Since sensitivity is concerned only with individuals who are sick (have athlete's foot), then only these individuals are considered:



Of those with athlete's foot, the test correctly identified 24/30 = Sensitivity of 80%

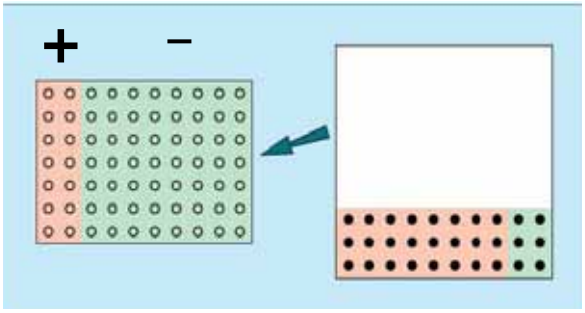
So, when a defense expert tells you that a test that was negative is "sensitive" and therefore reasonably could be relied upon to "rule out" a lethal condition, it is important to find out exactly <u>how</u> sensitive. A test with 80% sensitivity will fail to identify 20% of the individuals who actually have the condition. In other words, it is <u>falsely negative</u> 20% of the time (False Negative = 1-Sensitivity). This may be fine for ruling out benign conditions – athlete's foot springs to mind -- but would not be for an acutely life-threatening condition.

High sensitivity is often touted as the key to a good diagnostic test. But high sensitivity alone is not enough. Indeed, a test with 100% sensitivity may be useless:



This test is 100% sensitive. It achieves this distinction by <u>always</u> being positive. This test would never miss a boxer with athlete's foot, but it would be useless, as it would simply identify as "sick" everyone in the population. Good for various creams, sprays, and powders; bad for diagnostic utility.

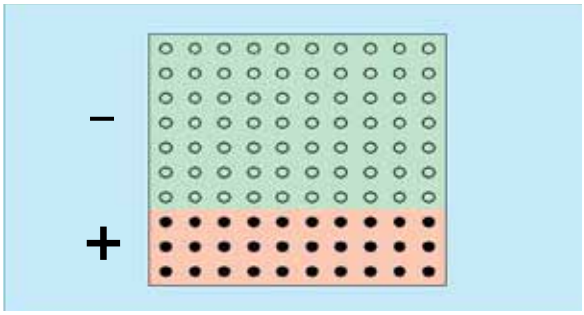
Now, let's consider specificity. Since specificity is concerned only with individuals who are well (those who do not have athlete's foot), only well individuals are considered:



Of those with who do not have athlete's foot, the test correctly identified 56/70 = Specificity of 80%

So, when a defense expert claims that it was reasonable not to treat a patient for a condition even though a test came back positive for that condition, it is important to know the specificity of the test. A test with high specificity will have very few false positives (False Positive = 1–Specificity). Accordingly, a positive result for a dangerous condition may justify treatment when the test has high specificity, even if the treatment itself carries significant risk. On the other hand, a test with a low specificity will generate many false positives and may not justify higher risk treatments. For example, a mammogram showing a mass in the breast is not very specific for breast cancer. In most cases, therefore, it would be inappropriate to begin chemotherapy without additional, more specific testing.

An ideal diagnostic test would be both 100% sensitive and 100% specific and would be illustrated as follows:



Only people with athlete's foot test positive, and only those without athlete's foot test negative.

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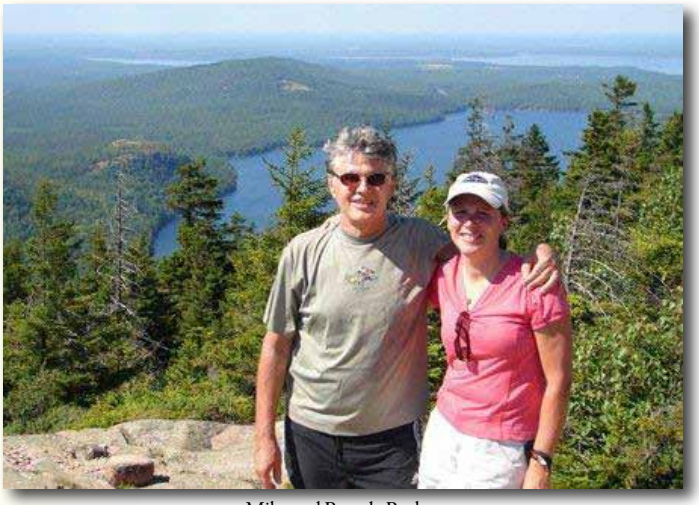
Beyond The Practice: CATA Members In The Community

CATA members continue to be active in, and recognized for, their good work in the community. Here are some of the recent activities in which CATA members are involved.

Mark Barbour

Mark Barbour of the **Barbour Law Firm** is serving his second year as treasurer of the Bay Rockets Association, a community fund-raising group for the athletics program at Bay Village High School.

Michael Becker of **The Becker Law Firm** and his wife Beverly Becker are the founders of Mike's Kids, A Becker Family Private Foundation. The foundation provides assistance – through services, equipment, education, special care, and respite support – to children with special needs and their families.



Mike and Beverly Becker

The organization serves physically and/or mentally challenged children, including those with learning disabilities. The foundation also provides educational materials and seminars to help parents of special needs children maximize available resources, and to assist medical providers in finding ways to prevent or minimize perinatal morbidity. The foundation is strongly supported by The Becker Law Firm. Additional information about the foundation can be found at www.mikes-kids.org.

Cathleen Bolek of **Bolek Besser Glesius LLC** has been volunteering at the Family Room at University Hospitals. The Family Room, opened in 2006 by the Ronald McDonald Foundation, is located near the NICU, and provides a place of respite for patients' families, offering them free coffee and snacks, a play area for children, a comfortable sitting room, a computer terminal, and a telephone. The room is open from 9:00 a.m. to 9:00 p.m., seven days a week, as long as volunteers are available to staff it. Bolek and a group of friends, on a rotating schedule, have been staffing the room on Sunday evenings since it opened. About this activity, Bolek writes: "Some evenings, the room is quiet. Sometimes, the room is busy with visitors looking for a free snack. More often, the room is used by those facing every parent's worst nightmare. We provide them with quiet comfort. We make them fresh coffee. We listen when they talk. And we go home and count our many blessings."

In February, **Jack Landskroner** and his law firm, **Landskroner-Grieco-Madden, LTD**, gave away gun locks as part of the Landskroner Foundation for Children's "love a kid,

Attorneys at Landskroner-Grieco-Madden, LTD

lock a gun" campaign. The event was held at Richmond Mall, as part of the "Play it Safe" program put on by the National Council of Jewish Women ("NCJW"). Since the inception of the program, the Landskroner Foundation has given away close to 3750 free gun locks in the hope of making homes safe.

Christopher M. Mellino and **The Mellino Law Firm, LLC,** recently awarded scholarships to three eighth grade students at the Lakewood Catholic Academy in Lakewood, Ohio, through The Social Justice Scholarship program. This program was started in the summer of 2006 by the Mellino Law Firm working with the school's principal, Maureen Arbeznik. The program invites all of the school's eighth graders to participate in volunteer activities that promote social justice. The school's faculty then chooses nine finalists who, with the oversight

of teacher Sue Seeds, give an oral presentation about their experiences to a panel of judges. This year's social justice finalists were involved in a variety of volunteer activities, including collecting diapers or making blankets for newborns of low-income families, working with special needs kids at Youth Challenge, visiting a veterans' home, sharing time and a therapy dog with residents of a nursing home, organizing a drive to collect hats and mittens to be distributed through the Westside Catholic Center, reading stories written by family members to an uncle injured in a car accident that left him in a persistent vegetative state, volunteering with autistic

Chris Mellino presents awards for The Social Justice Scholarship program.

teens, and collecting cleaning supplies for the use of families temporarily living at the Ronald McDonald house. This year's first, second and third prize scholarship winners were Carolyn Kraus, Mary Timmons and Anna Riddles. The other finalists were Jack O'Malley, Erin Stefancin, Audrey Dahill, Grace Mullen, Emily Rouse and Grace Powers.

Patrick Murphy of **Dworken & Bernstein Co., L.P.A.,** served as the Executive Director of Cleveland's 144th Saint Patrick's Day Parade held downtown on March 17, 2011.

Patrick Murphy and granddaughter Breck

Murphy, a member of the Parade Committee for over 27 years, reports that this year's parade was a rousing success. According to Murphy, Cleveland's parade is the 3rd largest of its kind in the country, behind New York City and Savannah, Georgia. Each year a theme is chosen to demonstrate Irish Heritage to the Greater Cleveland Community. This year's theme was "Irish Heritage Sites" – a term given to historical and cultural attractions in Ireland as established by the Irish National Office of Public Works.

David M. Paris

David M. Paris of **Nurenberg, Paris, Heller & McCarthy Co., L.P.A.** is one of two recipients of the 2011 Distinguished Alumni Awards given by the C/M/LAW Alumni Association. (This year's other recipient is the Honorable Melody J. Stewart of the Eighth District Court of Appeals.) Paris, who has been the managing partner of his firm for the past decade, has devoted countless hours to organizations that protect the right to jury trial. He is a past president of CATA and has received this organization's Distinguished Service Award. He has been recognized by his peers in virtually every publication rating lawyers, including the Best Lawyers in America. In 2006 he was invited into membership in the exclusive International Academy of Trial Attorneys. In 2010 he was presented with a Distinguished Alumnus Award by Cleveland State University. Paris and his firm are generous contributors to the Cleveland Marshall College of Law where they have an endowed scholarship and have sponsored the Plaintiff's Table in the new trial courtroom. Under Paris' leadership, his firm has been involved in numerous philanthropic efforts throughout Northeastern Ohio, including Habitat for Humanity, the Make a Wish Foundation, the Motorcycle "Ride for Kids" raising funds for the Pediatric Brain Tumor Foundation, Youth Challenge, Race for the Cure, The Gathering Place, Jewish Big Brothers/ Big Sisters and a host of others. The Annual Recognition Luncheon, where Paris and Judge Stewart will be honored, will be held on May 26, 2011 at 11:30 a.m. at the Grand Ballroom of the Renaissance Cleveland Hotel.

Nicholas E. Phillips of **Phillips, Mille & Costabile Co., L.P.A.** was recently appointed by the Ohio Supreme Court to the Board of Bar Examiners beginning April 1, 2011. Phillips is also working with the county's Community Emergency Response Teams ("CERTs") as the chair of the Cuyahoga CERT Association. Most cities in Cuyahoga County have a CERT, and there are an estimated 4500 to 5000 volunteers in Cuyahoga County. The volunteers are trained to assist police and fire during emergencies. Phillips is also the volunteer director of the North Royalton CERT which has over 150 volunteer members. ■

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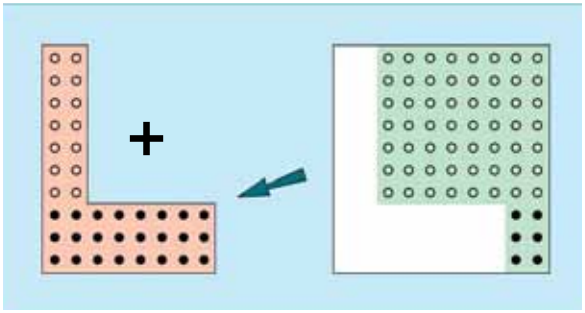
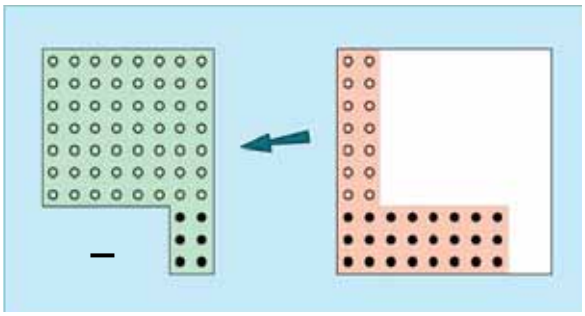
The whole point of a diagnostic test is to use it to make a diagnosis. (Brilliant, I know.) It is important, therefore, to know the probability that a given test will lead to the correct diagnosis. Neither sensitivity nor specificity gives us this information. Two other, related concepts instead must be considered: *Positive Predictive Value* and *Negative Predictive Value*.

Positive Predictive Value ("PPV") refers to the chance that a positive test will be correct. We therefore look only at individuals with positive tests:



Of those who tested positive for athlete's foot, 24 out of 38 boxers actually had the condition. PPV=24/38 = 63%

Negative Predictive Value ("NPV") refers to the chance that a negative test will be correct. We therefore look only at individuals with negative tests:



Of those who tested negative for athlete's foot, 56 out of 62 boxers did not have the condition. NPV=56/62 = 90%

Note that both PPV and NPV are affected by the prevalence of the disease in the population being studied. This makes intuitive sense. The more prevalent a disease is, the greater the likelihood that a positive test for it will be correct and the greater the PPV. Similarly, the less prevalent the disease, the greater the likelihood that a negative test will be correct (since so few people have the disease) and the greater the NPV.

The PPV of our test for athlete's foot likely would be much higher (and the NPV lower) in a roomful of boxers than it would be in the general population or in a population comprised of the fastidious lawyers reading this article. Since so few lawyers have athlete's foot (or athlete's anything for that matter), a negative test has a greater chance of being correct, even if the test is as bogus as Albert Abrams' Dynomizer.[3]

Accordingly, when a defense expert tells you it was reasonable to rely on a negative diagnostic test to eliminate a diagnosis from the "differential" because the test has a high negative predictive value, it is important to extract from the expert her source for the claim of a high NPV. If it comes from a study of a population with a particularly low prevalence of the condition, the quoted NPV may not bear any relationship to the NPV as applied to your client. For example, a study showing a high negative predictive value of a screening test for H1N1 influenza in the general population during the summer may tell us nothing useful about the negative predictive value of that test when run on patients presenting to an emergency department with chills, fever, and body aches in the midst of flu season.

Although many medical experts describe diagnostic tests by their sensitivity, specificity, PPV, and NPV, others use *Likelihood Ratios*. Likelihood Ratios ("LRs") are more useful for clinical decision-making, as they tell us how many times more (or less) likely patients with the disease or condition are to have a particular test result than patients without the disease or condition.

In our athlete's foot example, the LR would be the ratio of the probability of a positive urine test in boxers with athlete's foot to the probability of a positive test in boxers without athlete's foot. Note that this is the same as saying the ratio of the sensitivity to false positives. In other words, LR can be described as follows:

Likelihood Ratio=Sensitivity/False Positives=Sensitivity/(1-Specificity)

A likelihood ratio greater than one indicates that the test is associated with the presence of the disease, whereas a ratio less than one indicates that the test is associated with the absence of the disease. Generally, a likelihood ratio of 10 or greater is considered sufficient evidence to "rule in" a condition and a ratio of .1 or less is considered good enough to "rule out" a condition.

In our athlete's foot example, with a sensitivity of 80% and a specificity of 80%, the LR would be .8/(1-.8) = 4.0. This means that if the athlete's foot test is positive, it is four times more likely that the boxer has the fungus than that he is fungus-free. It isn't a ten, but if the boxer is nearby, we can with reasonable confidence declare that there is a fungus among us.

One of the beauties of the likelihood ratio is that it can be used in clinical practice, where it is important to determine

how a particular test predicts the risk of a given disease or condition. Sensitivity and specificity cannot do this. Neither can positive or negative predictive values. But a physician who is armed with a study showing the likelihood ratio of a particular test can use that ratio to determine the actual odds that her patient has a disease or condition, provided that she can make an estimate of the "pre-test probability" the patient has that condition. That pre-test probability is often merely the prevalence of the condition in the population to which the patient belongs. The conversion from pre-test probability and likelihood ratio to post-test probability can be accomplished through a mathematical calculation or, more simply, by reference to a published nomogram.[4]

Getting an expert to admit to the "rules" of differential diagnosis is nice. But it is only the beginning. Any seasoned expert can make that admission and still defend bad care by claiming that the right tests "ruled out" the condition that ultimately injured or killed your client. By understanding the concepts outlined above and asking the right questions, you may be able to deliver the knockout blow of showing that a particular diagnostic test cannot reasonably justify a decision to forego further evaluation. ■

Cheat Sheet

	High	Low
Sensitivity	Good for "screening" tests; few false negatives; good for "ruling out" a condition if test is negative; if specificity is low, positive test may be useless	Many false negatives; positive test may still be useful for "ruling in" a condition if specificity is high
Specificity	Few false positives; good for "ruling in" a condition if test is positive	Many false positives; negative test may still be useful for "ruling out" a condition, if sensitivity is high
PPV	Helpful for "ruling in" a condition if test is positive, especially if the prevalence of the condition is low	Not helpful
NPV	Helpful for "ruling out" a condition if test is negative and prevalence of the condition is high	Not helpful
LR	The higher the LR, the more likely the patient has the condition	The lower the LR, the more likely the patient does not have the condition

End Notes

1. Loong, TW. Understanding sensitivity and specificity with the right side of the brain. *BMJ* 2003 Sep 27;327(7417):716-9.
2. I'm not sure why we would need a urine test to diagnose athlete's foot, but just roll with it, okay?
3. Albert Abrams was an early 20th century "doctor" who built a contraption called the "Dynomizer," which was touted (by Abrams) as a machine capable of diagnosing any disease from a single drop of blood.
4. The replication of the nomogram – called "Fagan's Nomogram" – is beyond the scope of this article, but trust me; I've looked at it, and it really is easy to use. *See* Fagan TJ. Letter: Nomogram for Bayes theorem. N. Engl. J. Med. 1975; 293: 257.

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The Physician's Duty Of Loyalty

by David A. Kulwicki

Physicians owe their patients a duty of loyalty that emanates from the common law and the AMA Code of Ethics. This duty of loyalty can be used by plaintiff's counsel in two contexts: (1) to prevent a treating physician from offering harmful opinions about your client; and (2) as a basis to procure the physician's assistance in litigation.

A physician's duty of loyalty arises out of the nature of the patient-physician relationship. Physicians owe a fiduciary duty to their patients by virtue of the patient-physician relationship.[1] The physician-patient relationship is a fiduciary one based on trust and confidence and obligates the doctor to exercise good faith.[2] This duty includes a duty of loyalty to the patient.[3] The duty of loyalty is broader than the limited evidentiary patient-physician privilege set forth at R.C. 2317.02.[4] It emanates from the physician's Code of Ethics, upon which the patient has a right to rely.[5]

The AMA Code of Ethics states that, as part of a physician's responsibilities to his/her patient, "[p]hysicians should advocate for patients in dealing with third parties when appropriate."[6] Many specialty boards have their own Codes of Ethics that may contain more specific directives relative to specialists' responsibilities to their patients in medical-legal matters. For example, the American College of Surgeons mandates that surgeons must serve as effective advocates for their patients' needs and "have an obligation to testify in court as expert witnesses."[7] Other state courts have also recognized the duty.[8]

I have successfully used the duty of loyalty to defuse defense counsel's efforts to secure unfavorable opinions from my clients' treating physicians. On occasion, defense counsel will seek to depose one of the plaintiff's treating physicians because the physician charted some unfavorable information or simply because the treater is known to be defense-oriented. At trial, defense counsel will highlight the unfavorable testimony with the wince-inducing lead-in: "The patient's own doctor says...." There is a certain injustice inherent in the argument that the treater's negative opinions are to be trusted because he/she is the *plaintiff's* doctor and therefore implicitly unbiased. Experienced trial attorneys recognize that many physicians are biased against their own patients' litigation goals. Further, R.C. 2317.02 waives any testimonial privilege, thus making treating physicians' opinions seemingly fair game.

Faced with this situation recently, I developed a hardball strategy that was effective in keeping treating physicians from voicing harmful opinions against my client. The situation first arose in the context of a delay-in-diagnosis case. The patient died at the conclusion of two hospitalizations from an undiagnosed infection. A few days after the first hospitalization, the patient was admitted to another hospital with a markedly worsened infection that proved fatal. During the second hospitalization, the patient was seen by several infectious disease consultants, including Dr. X – a well-known defense-oriented witness in cases involving infectious disease issues. Defense counsel asked to depose Dr. X, with the obvious intention of eliciting harmful causation opinions.

Before the deposition, I wrote a letter to the treating physician's counsel invoking the "duty of loyalty" as follows:

> This letter will confirm that you advised me that you would be representing Dr. X relative to his deposition in the above-referenced matter. I am writing to confirm that my client authorizes Dr. X to appear for deposition for purposes of relating his involvement in [the subject hospital admission]. However, my client does not authorize Dr. X to discuss [the patient] with any other parties to this litigation or their attorneys outside of the deposition setting. Further, my client does not authorize Dr. X to offer opinions regarding the negligence of other care providers, causation, prior or subsequent treatment, or anything other than what he saw and what he did.
>
> I will object to any question posed to Dr. X that seeks expert opinions from Dr. X that are not related to his own care of the patient. For instance, I will object to any question that seeks his opinion regarding whether any of the current defendants in this litigation or other care givers complied with accepted standards of care while caring for [the patient]. Likewise, I will object to any question soliciting his opinion about [the patient's] cause of death. I will object to any such opinions that go beyond Dr. X's involvement in [the patient's] care for several reasons: (1) [my client] has not authorized him to do so as required by HIPAA; (2) Dr. X has not been provided with all information available in this case, including past medical records or deposition testimony; (3) Dr. X has not been identified as an expert witness by any party; (4) it is apparent from Dr. X's involvement as a neurology consultant that he is not qualified to render opinions relative to standards of care applicable to the other care givers involved in [the patient's] care; and (5) the duty of loyalty prohibits him from acting as an expert witness against his own patient.

A physician's duty of loyalty arises out of the nature of the patient-physician relationship. Physicians owe a fiduciary duty to their patients by virtue of the patient-physician relationship. *Lownsbury v. Van Buren* (2002), 94 Ohio St.3d 231. The physician-patient relationship is a fiduciary one based on trust and confidence and obligates the doctor to exercise good faith. *Id*. This duty includes a duty of loyalty to the patient. *Hammonds v. Aetna Casualty & Surety Co*. (N.D. Ohio 1965), 243 F.Supp. 793 (interpreting Ohio law). The duty of loyalty is broader than the limited evidentiary patient-physician privilege set forth at R.C. 2317.02. *Wargo v. Buck* (1997), 123 Ohio App.3d 110. It emanates from the physician's Code of Ethics, upon which the patient has a right to rely. *Hammonds*. Potential tort liability can attach if the physician violates the patient's privacy or the duty of loyalty owed to the patient.

Dr. X can avoid any tortious misconduct by limiting his testimony to what he charted, what he observed, and what he did in the course of his care and treatment of the patient, and by abstaining from any of the following: meeting with any defendant or their counsel outside of the deposition, reviewing the autopsy or records from the earlier admission, offering any causation opinions outside the bounds of his care or offering any standard of care opinions relative to any care giver.

I wrote a similar letter to defense counsel, but added that I would consider any questions that went beyond the bounds of the doctor's own care tantamount to a tortious inducement to breach the physician's fiduciary duties to my client, citing *Hammonds, supra*. The strategy worked. Defense counsel's enthusiasm for this deposition was severely dampened and the treating physician refused to play the part of defense expert.

In writing such a letter, be mindful that the letter might be discovered by defense counsel. Since Dr. X's silence was encouraged through privileged communications with his own counsel, my role in obtaining that result was not revealed. If the treating physician had not been represented, I would have written him a more circumspect letter and asked him/her to have their counsel contact me to discuss the lawful parameters of the deposition.

The duty of loyalty is an inherent part of the physician's duty to his or her patient. Given the duty, it seems obvious that the physician should not be used to offer opinions outside the bounds of his/her treatment that are adversarial to the patient. Nonetheless, this issue arises all too often. It is counsel's job to educate the treater and his counsel about these ethical considerations. ■

End Notes

1. *Lownsbury v. Van Buren* (2002), 94 Ohio St.3d 231.
2. *Id.*
3. *Hammonds v. Aetna Casualty & Surety Co.* (N.D. Ohio 1965), 243 F.Supp. 793 (interpreting Ohio law).
4. *Wargo v. Buck* (1997), 123 Ohio App.3d 110.
5. *See Hammonds.*
6. AMA Opinions on the Patient-Physician Relationship, E-10.01.
7. American College of Surgeon's Code of Professional Conduct, at preamble, V(E) (rev. June 2003).
8. *Piller v. Kovarsky*, 194 N.J. Super. 392, 476 A.2d 1279 (App. Div. 1984); *Sorensen v. Barbuto*, 177 P.3d 614 (Utah 2008).

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The Taxman Cometh – Your Medical Records Requests

by John R. Liber II [1]

When the media is not directing its attention to the crisis in Japan or Charlie Sheen's personal problems, here in Ohio the attention is directed at our new governor's belt-tightening budget, and what is getting cut and by how much. While it is unlikely that we will hear any time soon the politically suicidal issue of raising taxes, do not be fooled into believing that our government is not going to look for new ways to apply the existing tax structure. Take your garden variety medical records request, for example.

Since Tax Commissioner Opinion, *Opinion No: 91-0017* (1991), medical records services have had to charge customers (us) sales tax on the medical records we obtain for our clients. This will normally take care of any records obtained from larger institutions like hospitals and nursing homes, as well as through records depositions. But what about the smaller individual physicians or physical therapy offices? When you pay your $35.00 flat fee for the 4 pages of records, are you sure that you have been charged sales tax? **Beware,** for as many firms are now discovering through Tax Commission audits, any records that were obtained without sales tax being charged are subject to **use** taxes.

The Ohio Supreme Court, in *Emery Industries v. Limbach,*[2] set forth the applicable standard for deciding this issue. *Limbach* addressed whether a tangible paper good, such as an industrial design report, photograph, or a will prepared by an attorney, is subject to taxation.

Ohio taxes retail sales.[3] "Sale" includes transactions in tangible personal property and certain specified services.[4] R.C. 5739.01(B) excludes "professional, insurance, or personal service transactions which involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made." If there is no professional, insurance, or personal service, the entire transaction is taxable.[5] The Court in *Limbach* elaborated on what constitutes an "inconsequential charge." It held that "where the overriding purpose of the purchaser is to obtain tangible personal property produced by the service, the transfer of the property is a consequential element of the transaction and the entire transaction is taxable."[6] However, "[i]f the purchaser's overriding purpose is to receive the service, the transfer of the personal property is an inconsequential element of the transaction, and the entire transaction is not taxable.[7]

The Court in *Limbach* provided several examples:

> Some examples illustrate the correct application of the true object test. When one hires an attorney to draft a will, he seeks the distribution of his estate at his death. When one engages an accountant to issue an audit opinion, he seeks a review of his finances and a report of his financial standing. Documents are important in both instances because the probate court will not accept the lawyer's word regarding the decedent's bequest, but must see the document. A bank will not accept the accountant's oral version of the client's financial condition, but must see the tangible evidence of the accountant's investigation. The tangible will and the tangible balance sheet are concrete, documentary proof of the testator's desire and the loan applicant's financial status. However, the overriding purpose of each client was something

beyond the documents-the distribution of a decedent's estate or the quantification of an ongoing estate. The professional's skill accomplished this; the transferred paper documented the details of the service.

This contrasts with the hiring of a photographer to provide a photograph. Even though a prospective purchaser may seek an accomplished photographer, he wants a photograph. He is seeking property. The overriding purpose of the client in the will transaction is the service of the lawyer to accomplish the distribution of the client's estate at death. The overriding purpose of the purchaser in hiring the photographer is to obtain a picture to depict something.[8]

In *Opinion No: 91-0017* (1991), the Tax Commission applied *Limbach* to medical records and found that the same are taxable. The opinion concerned a taxpayer who contracted with various hospitals throughout the United States for the purpose of providing copies of medical records to third party requestors. The Commissioner, citing *Limbach*, found that because the "overriding purpose" of the requestors was to obtain copies of specific medical records, this created the sort of personal or professional service in which tangible personal property was *consequential*. Accordingly, it was taxable.

The practical application is mostly administrative. Be sure to have whomever at your office is charged with records requests flag any invoices where sales tax is not charged. The appropriate sales tax must then be applied (in Cuyahoga we are at 7.75%), paid to the Ohio Treasurer per the ordinary course and charged to the client as a case expense. Be sure to disclose this either in your fee agreements, or any other disclosure you provide to your clients that explains fees, costs, expenses and other details of the professional relationship.

And also beware, the taxman may call and pay you a visit to review your records on these transactions. Be prepared for an assessment for unpaid use taxes going back a year or more. Due to the novelty of the issue, we have yet to see any penalties assessed. But if they are, we will be sure to notify the CATA listserve. ■

End Notes

1. Ilya Batikov, a third year law student at Cleveland Marshall, assisted in the research and drafting of this article.
2. (1989), 54 Ohio St.3d 134, 539 N.E.2d 608.
3. *See* R.C. § 5739 *et seq.*
4. *Limbach*, 53 Ohio St.3d at 135.
5. *Id. quoting* R.C. § 5739.01(b).
6. *Id.*
7. *Id.*
8. *Id.* at 139.

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Social Media Marketing for Attorneys

by Andrew Thompson and Jamie Ginsberg

I. Why attorneys should use technology to generate business

> *More snow, ugh…Takin' the kids to school, then to the grocery store…I just became the Mayor of Circle K in Bedford Heights on foursquare!…I haven't seen you since 5th grade, how r ya doin?…LMAO, Charlie Sheen is WINNING!*

Do these phrases sum up your impression of social media? If so, you probably think your law practice has no place in the social media world. Many trial lawyers believe that social media is a waste of time and ignore it completely. Others have become comfortable using social media, but only in their personal lives. A careful barrier has been constructed for these lawyers between "Professional Attorney" and "Facebook friend." The attorney thinks that if any information trickles over that barrier, the result could be disastrous. A third group of attorneys can point to a firm website, dormant business Facebook page, partially completed LinkedIn profile, and a Twitter account with no followers as evidence that social media does not attract new clients.

If you fall into any of these groups, it might be time to change your perspective about social media as a way to increase your business. The most effective way to generate business for a law firm is still word-of-mouth referrals. Most attorneys with a large caseload can point to a loyal referral network as a source of their business. A recent ABA survey of 1,000 adults showed that "trusted sources are the most popular primary way for consumers to find a lawyer.… Forty-six percent of the respondents say they would ask a friend, family member or colleague for a lawyer referral, while 34 percent say they would contact a lawyer they know or whom they have used before."[1] Former clients, other attorneys, law school classmates, friends and family are all potential referral sources.

How do most of these potential referral sources communicate with each other? Social media. Word-of-mouth referrals are no longer verbal, but typed into status updates, Tweets, and blogs. iPads, iPhones, Blackberrys, and other devices have made participation in social media easy and convenient. According to the statistics maintained by Facebook's advertising system, there are about 139.5 million active Facebook users who are 18 years or older in the United States. Within 50 miles of Cleveland, there are over 1 million people on Facebook. The average Facebook user has approximately 130 friends. If someone needs a referral to an attorney, and they want to ask a group of friends for a recommendation, many of them will do so through some form of social media. If you want to get that case, it is important to establish a presence in the social media community and join the conversation.

Although a social media strategy requires using many different online tools, the primary goal is the same for all of them. You should strive to make friends and connections (hopefully the building blocks of your future referral network), provide valuable information (allowing you to become a resource), and stay involved in the conversation. You should also knock down that barrier referenced above, and let your personality come through. Don't be afraid of blending your personal interactions on social media with your work connections. People are more likely to read your information and pay attention to you if you don't constantly beat them over the head with a sales pitch. The key is relationship building. If you build your network and contribute knowledge to the community, your value will increase proportionally. People will connect with you, and those connections will lead to case referrals.

II. Elements of a Social Media Strategy

There are many different "tools" you can use to implement a social media strategy. Almost every effective plan should include a LinkedIn profile, Facebook page, Twitter account, and a YouTube channel. Depending on the content you are creating, and the amount of time you are willing to commit, a blog can also be a critical piece to the strategy. Below is a brief description of each of these tools.

LinkedIn – LinkedIn is probably the most familiar social media site for attorneys. It is generally considered the "professional" Facebook. Many attorneys who ignore other social media sites have profiles on LinkedIn. However, many of those profiles are incomplete. To expand your network, fill in all of your relevant information, including all schools you attended and previous jobs you have held. You can join groups, such as alumni organizations, and participate in relevant discussions. Establish a link to every person in your current law firm. The biggest case your firm settles this year might not come from your connections, but from your assistant's connections. LinkedIn has evolved from being an online resume bank to being a source for credible information. By remaining active on LinkedIn, posting status updates, answering questions (or even asking questions), you can gently "touch" your network and give them a reminder that you are there as a resource in your field.

Blogs – A blog can be a critical tool in your social media strategy for establishing yourself as an expert. Before you start a blog, however, you must be committed to create new content on a regular basis, usually at least once a week. The most difficult part of blogging for attorneys is remembering that you are not writing a series of legal research memos or briefs. Remember to keep it short, sometimes just posting a link to a news item or a single paragraph. You can't expect people to regularly read your content if it takes them 20 minutes to get through a post. It is also important to write in your own voice, removing any unnecessary legalese.

The primary goal of a blog is to provide your network with valuable information, allowing you to become a resource. You should determine your target audience, whether it is other lawyers or potential clients, and give them regular doses of helpful material in your area of expertise. People within your network will soon think of you when they need answers.

Twitter – Twitter has become one of the fastest growing sources of information immediately available to people. For your law firm, Twitter is a great way to contribute knowledge and share information. With the proper strategy, you can quickly get a large group of followers from the Cleveland area. Once you have an audience, start sharing valuable information. Provide links to your other social media content, such as your blog, Facebook, or LinkedIn status updates. Do not limit your content to legal information; you can also share information or engage in conversations relating to other areas you are passionate about.

You might find that Twitter can help you develop lasting relationships the "old-fashioned" way – personal meetings. If you have cases in other cities, tell your Twitter followers the next time you will be traveling near them. A contact in your network may meet you for coffee or a drink. These meetings can be for expanding your referral network and generating new cases, and would not be possible without your ongoing involvement in the social media conversation.

Facebook – Most people reading this article already have a Facebook account. A huge number of potential referral sources also have Facebook accounts. An effective social media strategy can help build a bridge between you and these referrals. The first step is to create a business page for your firm and let everyone in your network know that it exists. Each person that "Likes" your page will thereafter be exposed to status updates from your firm. Let people know what new cases you are handling, provide links to blog posts, or comment on relevant local news items. An occasional post from your firm page reminds your network that you are there, and identifies the areas in which you can be a resource. Most people check their Facebook pages on a daily basis. If they see interesting content from you or your firm once or twice a month, you will be at the front of the line the next time someone asks them if they know a good attorney.

YouTube – Videos can be a dynamic way to reach an audience, and utilizing internet sources such as YouTube can provide a cost-effective way to spread your message. YouTube has a massive user base, dynamic features that enable you to share, comment and respond to videos, and you can easily share the videos you post on other sites such as Facebook or blogs. If your law firm utilizes television advertising, a YouTube channel is a great place to upload a digital version of your commercials. You can also post more informal videos, introducing the lawyers in your firm or discussing information that you would otherwise write about in your blog. Potential clients may be more likely to hire attorneys if they can see them and watch them discuss an issue, since they feel like they know them.

Poor quality videos can have the opposite effect, however, so pay attention to production value. Good lighting and a steady camera go a long way to creating a watchable video. If you are unsure about what you are doing, hire a professional to make sure you set up the videos properly.

Make sure that your marketing efforts are fully integrated when you utilize these different "tools." For example, when you post a new blog entry to your website, make sure that it is automatically sent as a link on Twitter. The videos you upload onto YouTube should also be shared on Facebook. Promote your social media links throughout your network. Invite your Twitter followers to "Like" your Facebook page, and provide a quick and easy link. Your email signature should include links to all of your social media contacts. If the people you interact with in your practice are also involved in social media, you want it to be easy for them to find you. Over time, your network will expand and your pool of potential referrals will grow.

An integrated approach to social media sites will also improve your firm's search engine optimization ("SEO"), particularly if you regularly blog about your areas of practice. Utilization of appropriate key words in your blog will help move your firm's website higher in the results of a Google search, particularly if that content is shared with your LinkedIn profile, Facebook page, Twitter account, and YouTube channel. Embed your videos on your firm's website; this will increase the links between your website and YouTube. An effective social media strategy can eliminate the need for expensive SEO consultants. The ability to drive traffic to your website may, on its own, be a good enough reason to dive into the world of social media.

III. Implementing your Social Media Strategy

Once you decide which tools to use, the first step toward implementation of a social media strategy should be the adoption of a social media policy to distribute to every individual in your firm. A social media policy sets guidelines for appropriate behavior, while at the same time encouraging participation. Appropriate boundaries in the use of social media are necessary to protect confidentiality, comply with copyright and intellectual property laws, and present the proper image of your firm. There are several examples of such policies available online. You should review and adopt a policy for your firm before you execute your marketing strategy.

It is also important at the outset to set goals relating to your strategy. What do you want to accomplish? You must be able to measure success to determine if you are getting a return on your investment. Track your time and expenses devoted to social media activities, and at certain intervals review your progress. It is important for your social media activities to complement, not compete with, your work commitments. Check each facet of your strategy to see if your network continues to grow, if you are getting positive feedback, and most importantly whether you are starting to get case referrals. If you set specific goals, you will be able to adjust your strategy when and if it is necessary.

The most difficult part of implementing the strategy is creating content. I'm online, I distributed my social media policy to my employees, I set my goals – now what do I write? Remember, you are not advertising, you are providing valuable information to your network so you and your firm will become a resource. Be creative and figure out what your network needs to know.

If you are trying to directly reach potential clients, think about what questions a new client asks you on their first visit to your office. Who pays my medical bills? Should I give the insurance adjuster a statement over the phone? The answers to questions like these can be the subject of your blog posts. If your network is comprised of other attorneys, share information about important legal decisions, results of cases handled by your firm, or experiences you have during trial. People will follow you if you provide useful material.

To be effective, you must generate or share content on a regular basis. Make your social media strategy a part of your daily routine. Initially, if you don't schedule time, you will procrastinate and find excuses to ignore your network. Spend a few minutes each day, either early in the morning, during your lunch break, or in the evening after you put your kids to bed, and check Facebook, LinkedIn, and Twitter. Add a new connection, "Like" someone's post, Tweet a link that will be interesting to your network, or type a new status update. Set up a schedule to write on your blog. If necessary, write a few blog posts on the weekend, and schedule them to post at regular intervals throughout the week. These few minutes a day will keep you involved with your network, and will improve your relationships. Your involvement in social media will eventually evolve into a regular part of your routine, and you will no longer need a schedule.

IV. Don't Be Afraid To Ask For Help

If you are not involved with social media on a non-professional basis, it will be almost impossible for you to create and implement an effective social media strategy for your firm. In this case, you should almost certainly hire a social media consultant to help you set up your firm's presence online and provide training to you and your employees. Unlike the cost of other advertisements, which run for a limited duration, the investment in an effective social media strategy provides you with the ability to create and maintain relationships that will last for the rest of your career.

We look forward to seeing you online. ■

End Notes

1. Http.//www.abajournal.com/news/article/, March 23, 2011, "How People Find Lawyers: Referrals Are Popular, Blogs Not So Much, Poll Finds," Debra Cassens Weiss.

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Using the Media to Your Client's Advantage in Civil Matters

By David R. Grant, Esq.

How many times have you read or heard media reports about a case and thought, "Why don't my clients' claims ever get media attention?" Well, unless your client's claim is already a high profile case, the media is not going to come looking for you. You will need to approach the media yourself to alert and inform them.

Worse yet, how many times have you seen the ravaging effects of decades of anti-plaintiff propaganda? It is time to start being more proactive and make the media work for you and your clients, rather than for the insurance industry and the Chamber of Commerce.

There are many considerations as to how, when and why to publicize your cases for the benefit of your clients and, indirectly, yourself. It goes without saying that, above all else, your client's interests and informed consent must be of paramount concern. Even if you are only sharing matters of public knowledge, your client may not want you drawing attention to it.

Only if your client consents should you consider how best to serve your client's interests, and, secondarily, those of your practice, through media publicity. Given the instant news age we live in, these decisions often must be made quickly.

This article presumes that you have first determined that media publicity is in your client's best interest and that you have obtained your client's informed consent. This article is only focused on pre-suit and pre-trial publicity since a myriad of additional considerations arise with trial publicity.

I. Press Releases

Most media outlets depend on information from law enforcement or direct notification from interested parties to learn about potential news stories. Circulating a well-crafted press release is the primary way to give this notification. A press release provides an opportunity to structure the message you want to share – although the message the media ultimately uses may be different.

You have no idea and cannot control what other news stories cross a reporter's desk each day. Therefore, no matter how well-crafted your press release, there is no guarantee that it will get any attention. Most matters attorneys seek to publicize are not time-sensitive. As a result, your release might be placed on a back burner until the media sees fit to run it. Additionally, your release may intrigue them enough to gather some preliminary information from you, then embark on their own investigation before reporting on it.

A. Why Issue a Press Release?

Press releases are a cost-effective and easy method to get your client's matter talked about and provide marketing benefits as well. It is always amazing to hear readers' comments on news articles on the Internet. While you need to read them with a thick-skin – understanding that some anti-plaintiff individuals comment on every litigation news article – these comments are a free and invaluable way to get a sense of how your client's case and your message are received. Think of it as an abbreviated and free focus group.

Publicity for your client's case may also prompt

otherwise unknown and undiscoverable witnesses to contact you.

Additionally, if done correctly and with some careful thought, a press release provides you with an opportunity to begin shaping the discussion and framing the issues.

Press releases can also be used to disclose a notable verdict or settlement.[1]

B. What to Include (and Not Include) in a Press Release?

There are some universal guidelines to follow when drafting a press release. First, be selective in when you issue a press release. It should be newsworthy and not an overt, self-applauding ad. Second, keep it to one page. Third, be sure to include the name and contact information for whom they should contact to learn more (this is often set out in an upper corner so as not to clutter the text of the release). Fourth, the title and first few lines should give the reader a quick sense of what the release is about and why it is important news. Fifth, include some basic who, what and when information. Think about keeping the reader's interest by including information the reader will want to know. Consider including links to where they can obtain public, non-privileged documents or information related to the matter. Sixth, do not exaggerate, do not use exclamation marks, do not insert your opinion and avoid using superfluous or dramatic adjectives. Think of it as being informative rather than editorial or opinionated.

Once this information is in the press release, you need to work on crafting your message. There should be an indication as to why your client's story is significant to the reporter's audience. Let the media outlet know if it is new information on a story that already received media attention. That fact, alone, may pique their interest to run a follow-up story. Plus they will know they already have certain information, photos, and possibly videos on the subject from their prior story.

Perhaps the most important step is to begin developing a theme for your case in terms that will make the audience want to root for your client. Think in terms of "Reptile" theory[2] and "Rules of the Road"[3] approach. Much like trial themes, any theme that could be twisted to suggest that the plaintiff is undeserving or the lawyer greedy should be avoided at all costs. This may be easier said than done. One way is to share your draft with co-workers (uninvolved in the case and preferably non-lawyers) and ask them to give you feedback, especially any negative feedback.

Be mindful not to overstate or over-promise in your press release. If you cannot back up what you claim, you will lose credibility with reporters and it could pose other problems for you with your opposing side.

Incorporate terms that will increase search engine optimization (SEO). This is important because, in addition to circulating your press release to television and print media outlets, you can also post it to your firm's website. A press release drafted with SEO in mind will help direct internet traffic to your site and increase your visibility. Consult your firm's IT personnel or website designer for guidance. Keep in mind, however, that you want to keep legal jargon and terminology to a minimum. A press release is extremely short-lived and may not be picked up and reported on. By linking it to your website and using SEO, you will improve its longevity and effectiveness.

C. How to Circulate a Press Release

Once your press release is finalized, begin circulating it by email. The website of each media outlet will give the email address where press releases should be sent. Often, however, the recipient will be an assistant who gets flooded with releases. It helps if you also identify and send it to a specific news reporter. After sending it, make a follow-up call to ensure they have seen it and understand why you feel it is a matter of interest to their audience.

Tom Merriman, a former investigative reporter, and now an attorney with Landskroner, Grieco & Madden, recommends that developing a relationship with specific reporters can be beneficial. You can do this by occasionally calling and sharing possible stories that may be of interest to them. They may not take many of your stories, but it will improve your chances of a positive response when you do send a press release on a noteworthy issue. If you have developed a relationship with a particular news outlet or reporter, consider giving them an advance copy so that they have an opportunity to report on the story before their competitors.

The nature of the press release may dictate to what type of media and in what geographical area you should circulate it. Do not overlook media outlets like the Associated Press, from whom many other news organizations publish stories. Also consider circulating it to various Internet bloggers.

Be aware of the timing of your press release. Although most press releases by attorneys are not time-sensitive, if it involves a very newsworthy, topical item make sure it is received before noon, if not sooner. You cannot send it to the media at 3:00 p.m. and expect it to hit the local news that evening.

In addition to circulating it to the media, remember to post it to your firm's website and consider circulating it to existing and former clients, referral sources and co-counsel.

D. Final Considerations on Press Releases

Remember to notify your client that a press release has been issued, and consider advising them that, if contacted by anyone from the press, they should direct them to address all questions to you. Discuss the press release with your client in advance and make sure they understand and agree with the message you are trying to convey. That way if they happen to respond to press inquiries without your knowledge or involvement, there is a greater likelihood they will stay on point.

Be persistent. You may circulate multiple press releases before a media outlet runs one of your stories. Following and applying some of the considerations mentioned above should help.

II. Press Conferences

A press conference is a method to get your client's story on television, radio or in the paper. It is a voluntary presentation of information to the media. You decide how it will be presented, who will present it and what information and message you want to present. In short, you contact the media to notify them of the date, time, place and topic of the conference. At the conference, a (usually brief) presentation is made, then it is opened to reporters' questions.

Press conferences for most civil litigation matters generally fall into one of two types. First, is an open press conference, where all press are invited to attend. Often the location will be at the attorney's offices – provided there is adequate space for all attendees and equipment. At an open press conference there may be multiple news outlets in attendance with or without cameras, but most certainly with recording devices. This type of conference has the advantage of efficiency as only one conference needs to be scheduled and conducted. It also may generate more probing questions because one reporter's question may spark inquiries by others.

Tom Merriman suggests that a more effective method may be to schedule individual conferences with various news outlets. These conferences can be staggered to run, say, thirty or sixty minutes apart. This allows a one-on-one interview approach with each outlet, and often results in more in-depth reporting and a better opportunity to get your message across.

A. Considerations for Conducting a Press Conference

Regardless of the format you choose, the following are some considerations to help make your conference productive and effective.

First, before calling a press conference determine what your goals are and whether they can be achieved by a press conference. You should have a good reason for holding a conference, such as talking about something that has not been covered in the press or providing a counter-point to something that has been covered.

Second, invite the press through a press release or separate media alert. In addition to the traditional television, newspaper and radio outlets, inviting certain local bloggers may help spread your message on the Internet. The urgency of the topic will dictate how many days or hours in advance you notify them. Once set, do not change the time or location unless absolutely necessary.

Third, before the start of the conference be sure to have copies of certain materials available for attendees to take, such as copies of your business card, press release, complaint and appropriate photographs (on CD or 8"x10"). Be ready to welcome attendees at least fifteen minutes before the scheduled start time as they will need time to set up. You should have them sign a guest book so you know who is in attendance. Begin on time or certainly no later than ten minutes after the scheduled start time.

Fourth, consider whether any visual aids will help convey your message, provide impact and respond to questions. Television media, in particular, are driven by visual content. For example, if you are aware of video footage, let them know whose footage it is so that they can obtain it. Also, be mindful of the backdrop and the image it conveys for your conference.

Fifth, consider whether to have your client(s) present. This will depend on numerous factors, not the least of which is whether they will make a good appearance. If your client(s) are present, you can expect them to be asked questions. It is not uncommon for the edited segment to include more of your client speaking than you speaking. For this reason, preparing your client in advance is crucial. Make sure they understand and agree with the overriding message that you want to accomplish through the press conference. You do not want to give mixed or unclear messages. Prepare your client for topics they can expect to be asked about and how they might (concisely) respond in a way that supports and does not detract from your message. Make sure that if a question is asked that you have not prepared them for, they allow you to answer it instead. This should go without saying – only one person speaking at a time and only one person answering a question.

Sixth, your initial remarks should introduce you and the people with you as well as address the basic who, what, and when information. Much like a press release, your opening comments should give a clear and concise statement of why

this matter is important. Use simple, powerful, quotable lines to bolster the theme of your message. You can read from a written statement if necessary to ensure your words are carefully selected, or practice making a statement from a brief outline or notes. The length of your introductory remarks will depend on the topic, but the more concise the better and usually no more than ten minutes. After you are finished, ask for any questions.

Seventh, you are the one who called the conference and you are in charge – so act that way. Through your opening remarks, you have an opportunity to control the tone from the start. Do not bring up anything you are not prepared or able to discuss. If questions go into areas you do not want to address, be prepared to return to the topic by saying, "that's an interesting point (or question), but we are here today to discuss ..." or "we are not prepared to discuss that matter at this time." Also, since you are in charge you have the right to end the conference when you feel enough questions have been answered. Remember, *you are always on the record*.

Eighth, keep your theme in mind and repeatedly weave it into your press conference – through your introductory statement and your responses to questions. Often what airs is a very small segment of the footage taken. By hitting your theme and addressing the underlying concepts, you will increase the odds that whatever brief segment is ultimately played will include your message.

Ninth, depending on the matter being discussed, you may be able to whet their appetite for additional press conferences and ongoing stories if you do not address all issues in one press conference. If it is a matter of ongoing interest to the reporter, knowing they have your cooperation and can contact you in the future to set up another client interview or get additional questions answered will be welcomed.

Tenth, at all times maintain your credibility and that of your client and case. Always be honest and do not exaggerate or say something that you do not have evidence of or a reasonable belief the evidence will support. If you do not yet have concrete proof of a particular fact, consider prefacing certain comments with "we believe" or "it is our position that."

Eleventh, if your press conference results in a newspaper article or television segment, contact the media outlet to see if you can secure permission to share a link to it on your website.

Finally, any article or segment from

your press conference that is posted on the media's website will likely have a comment section. Again, this is an opportunity for free layperson feedback on the issues in your case and will allow you to develop and hone your theme long before you reach a jury.

III. Fielding Calls From The Media

Occasionally a matter you are working on may generate unsolicited media interest that results in a phone call from a reporter or segment producer. Much like press releases and press conferences, handling calls from the media provides an opportunity to advance your client's interests and, secondarily, your reputation in the community.

Be aware that the reporter is often under very short time frames (often as little as an hour or two), so, if you are willing to talk with them, take or return their calls promptly. If you are asked about matters of public record, such as statements in pleadings, you likely do not need to secure your client's consent in advance – although it is still advisable to make sure your client does not mind you sharing public, non-privileged information. Anything beyond what is contained in public records, however, cannot be addressed without first having obtained client consent. If you are unable to answer the reporter's question at that moment, say so. If you need to check something before answering, do so, then promptly call with the answer.

Like press releases and conferences, it is important to get your message across and reinforce that theme with your comments.

Lastly, never forget that *you are always on the record*.

IV. Ethical Considerations

Again, first and foremost is to ensure you have obtained your client's consent before the disclosure of any privileged information – and probably even with non-privileged information. Also, since this article is only focused on pre-suit and pre-trial publicity, additional restrictions that may arise with trial publicity are not addressed.

Rule 3.6 of the Ohio Rules of Professional Conduct is the most on-point rule addressing publication of your client's information.[4]

There are a few additional rules that should be kept in mind (and certainly adhered to) when dealing with the press. For instance, Rule 1.6 concerns maintaining the confidentiality of information;[5] Rule 4.1 requires truthfulness in statements to others;[6] Rules 7.1 through 7.4 discuss communications and advertisements about legal services; and Rule 8.2(a) restricts comments about judicial officers and candidates.[7] ■

End Notes

1. While we are on the subject, remember to publicize your results to your fellow trial attorneys through this newsletter and through the CATA, OAJ and AAJ listserve. Provided there are no settlement agreement restrictions on doing so, and that your client consents, this is another means by which you help other attorneys (and their clients) who may be handling similar matters. It also serves to let others know of your experiences for potential referral and co-counsel arrangements.
2. See *Reptile: The 2009 Manual of the Plaintiff's Revolution.* By David Ball and Don Keenan. Balloon Press (2009).
3. See *Rules of the Road: (Second Edition) A Plaintiff's Guide to Proving Liability.* By Rick Friedman and Patrick Malone. Trial Guides, LLC (2010).

   Rule 3.6 reads:

   > "(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer *knows* or *reasonably should know* will be disseminated by means of public communication and will have a *substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.
   >
   > (b) Notwithstanding division (a) of this rule and if permitted by Rule 1.6, a lawyer may state any of the following:
   >
   > (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
   >
   > (2) information contained in a public record;
   >
   > (3) that an investigation of a matter is in progress;
   >
   > (4) the scheduling or result of any step in litigation;
   >
   > (5) a request for assistance in obtaining evidence and information necessary thereto;
   >
   > (6) a warning of danger concerning the behavior of a person involved when there is reason to *believe* that there exists the likelihood of *substantial* harm to an individual or to the public interest;
   >
   > (7) in a criminal case, in addition to divisions (b)(1) to (6) of this rule, any of the following:
   >
   > (i) the identity, residence, occupation, and family status of the accused;
   >
   > (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
   >
   > (iii) the fact, time, and place of arrest;
   >
   > (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
   >
   > (c) Notwithstanding division (a) of this rule, a lawyer may make a statement that a *reasonable* lawyer would *believe* is required to protect a client from the *substantial* undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this division shall be limited to information necessary to mitigate the recent adverse publicity.
   >
   > (d) No lawyer associated in a *firm* or government agency with a lawyer subject to division (a) of this rule shall make a statement prohibited by division (a) of this rule." (Emphasis in original).

   Official Comment 4 states that the subjects listed in division (b) are not intended to be exhaustive, although other subjects not listed in (b) my be subject to division (a).
5. Rule 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule." (Emphasis in original).
6. Rule 4.1 states: "In the course of representing a client a lawyer shall not *knowingly* do either of the following: (a) make a false statement of material fact or law to a third person." (Emphasis in original).
7. Rule 8.2(a) "A lawyer shall not make a statement that the lawyer *knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judicial officer, or candidate for election or appointment to judicial office." (Emphasis in original).

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Pointers From The Bench: An Interview With Judge Thomas Pokorny

by Christopher Mellino

For this issue CATA asked **Judge Thomas Pokorny** for his input on what Plaintiffs' lawyers could be doing to better help our clients at trial. Judge Pokorny has been a visiting judge since 2008 and presides over 15 - 25 civil cases a year. Prior to becoming a lawyer he was a school teacher. After becoming a lawyer he practiced primarily criminal defense, but also represented plaintiffs in personal injury cases. He became a judge in 1987.

Judge Pokorny's view of the litigation climate we are in is that it is part of a cyclical trend. Driving this trend is the economy and the public's skepticism of people bringing lawsuits. He believes there is a prevailing attitude today that we all have to "suck it up" and make sacrifices, even those that may have been injured by someone else's negligence.

The judge thinks that as a whole we are doing a good job for our clients but when pressed for some advice to better help our clients he offered the following. In voir dire we need to be more comfortable about asking for money and to make jurors comfortable with the idea that money is going to be the only way for them to right the wrong that happened. He suggests telling the jury a specific amount your client is seeking.

Also in voir dire when the McDonalds coffee case is brought up, and in his experience it comes up often, don't defend it or fight it. Instead, ask the jurors if they can think of another instance of that happening besides that case. Make it an irrelevant aberration.

Prepare your opening statement so that the jury knows you are serious, professional and committed to the case. Judge Pokorny has seen too many lawyers waste this opportunity to create a positive first impression. The opening will set the tone for the rest of your case and a sloppy or unprepared opening tells the jury all they need to know about your case.

Another suggestion is to remember the importance of storytelling in the direct exam of your witnesses. It is the best way to have the jury recall what was said by that witness. Also the judge believes that not enough attention is paid to whether prospective jurors have experienced the same or similar injuries as your client. If a juror has had a similar injury and has not been compensated for that injury, or did not even seek compensation for that injury, then that does not bode well for your client. This is a good juror to use a peremptory challenge on, or if you didn't have enough challenges and they are left on the jury, don't have your client testify about injuries that the jurors would consider trivial.

He recommends bringing in experts live whenever possible. A short concise direct examination of the expert focusing only on the main points is best. Have confidence that your main points will carry the day. Otherwise the expert's testimony will get watered down with too many details and be ineffective.

Finally, in closing argument he advises that lawyers practice being comfortable talking about money, asking for money and telling the jury an exact amount you believe is fair and reasonable and specifically why your client is entitled to that amount.

Judge Pokorny believes that generally we are doing a good job for our clients and in many cases the results our clients receive are beyond our control. However these are some things we can work on and do better which will improve our clients' chances of getting a fair result. ■

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Verdict Spotlight

Donna Taylor-Kolis

A little known fact in our city is that sometimes The Cleveland Clinic delivers really bad medical care. Sometimes it is so bad it defies explanation. But try explaining that to a jury whose members are indoctrinated several times a day with the Clinic's multimillion dollar media campaign.

Convinced by its own hype, the Clinic refused to settle a case brought by a nine-year-old boy and his parents after the boy was treated for a year for a psychiatric condition that he didn't have, while the neurologic condition he *did* have went undiagnosed and untreated. After an 8 day trial, the jury returned a verdict against the Cleveland Clinic Foundation ("CCF") and awarded damages of $590,000 to the boy, $200,000 to his mother and $100,000 to his father. The case was tried by CATA member Christopher Mellino.

Christopher Mellino

In 2006, the boy, Jared Hyams, began walking with a slight limp. He saw his own pediatrician and several specialists at CCF who could find nothing wrong. As the limp progressively worsened, the boy's father took him to the Clinic's emergency department where a work-up was done and the boy was diagnosed with Dystonia, a neurologic movement disorder. He was given an appointment to follow up with a specialist. The specialist ignored the diagnosis of Dystonia and instead diagnosed a psychiatric condition called conversion disorder.

As a result of this diagnosis, Jared was referred to the Cleveland Clinic Rehabilitation Hospital as a day patient. By this time he needed crutches to help him walk. His attending doctor at the Day Hospital enforced a treatment plan on him that consisted of taking away his crutches and forcing him to do sit-ups and push-ups when he fell or lost his balance. His parents were persuaded by the doctors to use similar punitive measures at home to "snap Jared out of it" and get him to walk normally.

After 30 days at the hospital Jared was no better. So the Clinic put Jared back in school – but not before going to the school and meeting with the principal, teachers and school nurse and advising them that Jared had a psychiatric condition and that he could walk normally if he chose to do so. The Clinic came up with a "school re-entry plan" that included not allowing Jared to use crutches or other assistive devices, and instructing that Jared was not to be given any assistance in walking and that if he fell he should not be helped up. The school was told to treat Jared like any other kid, including regular participation in gym class.

The parents repeatedly questioned the diagnosis and took Jared to many specialists. They also tried hypnosis, faith healers, martial arts – anything to get Jared to snap out of it. But everyone they went to blindly followed the specialist's diagnosis of a psychiatric problem.

After a year, a blood test was done that proved Jared had a genetic form of Dystonia. By this time his physical condition had deteriorated to such an extent that he was in a wheelchair and his parents were caring for most of his needs, including dressing and bathing him.

The primary defenses were that Dystonia is a bad disease for which there is no cure, that Jared's long term prognosis was not affected by the delay in diagnosis, and that Jared already had psychological and emotional problems before the limp began. The Clinic concentrated much of its efforts at trial on assassinating the character of Jared's parents and siblings, all of whom had received counseling and are or were taking anti-

anxiety or antidepressant medications.

Plaintiffs' counsel took the advice given by Judges Russo and Ambrose in the last newsletter and, within the first five minutes of jury selection, told the prospective panel about all the conditions the family had been treated for or were on medications for. Throughout trial, Chris argued that Jared's preexisting condition, as well as his family's conditions, should have made CCF *more* careful, not *less* careful.

Plaintiffs also relied on several lay witnesses to talk to the jury about how Jared was treated at school by the administrators and the other kids, and about the impact that had on him, rather than relying on the testimony of doctors or other expert witnesses.

The case is *Jared Hyams et al. v. Cleveland Clinic Foundation, et al.*, Cuyahoga County Case No. CV-07-636016, Judge Deena R. Calabrese presiding. The verdict was returned on February 22, 2011. Congratulations to Chris for a job well-done for deserving individuals. ■

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ **Settlement:** _____

Counsel for Plaintiff(s): _____
Law Firm: _____
Telephone: _____

Counsel for Defendant(s): _____

Court / Judge / Case No: _____

Date of Settlement / Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____
_____
_____
_____
_____

Experts for Plaintiff(s): _____
_____
_____

Experts for Defendant(s): _____
_____
_____

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CATA Verdicts & Settlements

Editor's Note: *The following verdicts and settlements submitted by CATA members are listed in reverse chronological order according to the date of the verdict or settlement.*

Brian Powell v. ThyssenKrupp Safway, Inc., et al.

Type of Case: Workplace Intentional Tort (new statute)

Settlement: $165,000, plus satisfaction of BWC lien

Plaintiff's Counsel: Jonathan D. Mester, Nurenberg, Paris, Heller & McCarthy Co., LPA, (216) 621-2300

Court: Cuyahoga County, Case No. 709107, Judge John Sutula

Date Of Settlement: April 5, 2011

Damages: Economic damages of $75,000 - $80,000

Summary: Plaintiff fell through an unguarded open platform while working on a scaffolding dismantling project, and sustained four fractured ribs and a right scapula fracture, and would require right scapula surgery in the future.

Plaintiff's Expert: Dr. Harry Hoyen (Treating Physician); Raymond D. Richetta, Ph.D.; Phillip H. VanKuiken

Defendants' Expert: None

William Sims and Sims Nissan v. Nissan North America, Inc.

Type of Case: Administrative Protest of Proposed Termination of New Motor Vehicle Dealership Franchise pursuant to Ohio Dealer Act (R.C. Chapter 4517)

Verdict: Motor Vehicle Dealers Board Decision March 14, 2011, approving Report and Recommendation of Hearing Examiner

Plaintiffs' Counsel: Christopher M. DeVito and Alexander Kipp, Morganstern, MacAdams & DeVito Co., LPA, (216) 687-1212

Defendant's Counsel: Elizabeth McNellie of Baker & Hostetler (Columbus, Ohio)

Court: Ohio Motor Vehicle Dealers Board/Hearing Examiner David Blaugrund, Case No. 09-12-MVDB-364-D

Date Of Verdict: March 14, 2011

Insurance Company: Self Insured

Damages: Reimbursement of Attorney Fees, Witness Expenses, and Other Costs during the administrative proceeding (over $200,000) and all future appeal costs of attorney fees and expenses incurred pursuant to R.C. 4517.65

Summary: On March 14, 2011, the Ohio Motor Vehicle Dealers Board ("Board") approved a Hearing Examiner's Report and Recommendations sustaining the termination protest of Mr. William Sims and Sims Nissan, preventing the manufacturer Nissan North America, Inc. ("Nissan") from closing the Sims Nissan dealership, which has been operating since 2001 in Warren, Ohio. Ohio's Dealer Act requires the manufacturer to establish "good cause" before it can terminate a new motor vehicle franchise. (R.C. 4517.54). The Dealer Act enumerates a non-exhaustive list of nine (9) factors which must be considered and balanced before the Board makes a decision. (R.C. 4517.55). The Dealer Act also establishes that a manufacturer's performance standards must be reasonable and consider the existing circumstances. An unreasonable performance criteria, as a matter of Ohio law, is NOT good cause to terminate a dealership.

Nissan argued that the Sims Nissan dealership failed to meet the manufacturer and industry standard sales performance criteria of the Mid-West Region average, comprised of approximately 13 states. Sims Nissan countered with evidence that the local market conditions of the General Motors Lordstown facility, which manufacturers the Chevrolet Cruze and employs thousands locally, negatively affects its ability (and all other competing domestic and import manufacturers in Trumbull County) to sell new motor vehicles at the Region average. The hearing examiner held it was NOT reasonable for Nissan to ignore the local market conditions of the GM Lordstown facility and the high level of Chevrolet registrations.

The Sims Nissan v. Nissan North America, Inc. Board decision is significant because it establishes that Nissan and all other manufacturers cannot rotely apply their sales performance criteria average and ignore local market conditions. The decision also holds that many other dealership operations (warranty repairs, customer pay service, used car sales, leasing, rentals, parts sales, etc.) must be balanced against the manufacturers' sole desire to sell more vehicles.

Plaintiffs' Expert: Dr. John Matthews, Ph.D. in Quantitative Analysis (Madison, Wisconsin) providing statistical analysis, market review, and automotive industry practice

Defendant's Expert: Sharif Farhat of Urban Science Applications, Inc. (Detroit, Michigan)

Wayne Elesky v. Progressive Insurance Company

Type of Case: Motor Vehicle Accident - Uninsured Motorist Insurance

Verdict: $191,000

Plaintiff's Counsel: David M. Paris and David A. Herman, Nurenberg, Paris, Heller & McCarthy Co., LPA, (216) 621-2300

Defendant's Counsel: Michael Shanabruch

Court: Cuyahoga County, Case No. 722375, Judge John O'Donnell

Date Of Verdict: March 11, 2011

Insurance Company: Progressive Insurance Company

Damages: Herniated L5-S1 Disc

Summary: Our client was a 53 year old tow truck operator. While walking toward the back of his truck to unload a disabled vehicle, he was hit by an unidentified passing motorist who fled the scene. He sought initial emergency room treatment and obtained an MRI that showed a herniated L5-S1 disc. He continued working and did not follow up with a physician for 8 months. He eventually made a workers' compensation claim which was allowed for a herniated L5-S1 disc. About 10 months after the accident, his doctor took him off work and he made an uninsured motorist claim under his employer's policy. At first, coverage was denied claiming that there was no independent corroboration of the hit and run motorist or physical contact with him. Suit was filed and during discovery defense learned that just 6 months before the accident the plaintiff had been released from prison after serving a 17 year sentence for kidnapping. The defense also learned from his prison infirmary records that he had a 12 year history of low back pain and radicular symptoms into his right leg, despite 2 negative EMGs. The treating doctor testified, consistent with his expert report, that the disc was caused by the accident; that he would need surgery; and the estimated cost would be about $20,000. However, because the doctor's expert report did not use the term "permanent", the court applied a narrow interpretation of Local Rule 21.1 and struck all testimony as to future disability and pain and suffering. Trial was 1 ½ days and consisted of 2 witnesses, plaintiff and his doctor.

Plaintiff's Expert: Dr. Todd Hochman

Defendant's Expert: None

Baby Doe v. ABC Hospital

Type of Case: Birth Injury

Settlement: $2,500,000.00

Plaintiff's Counsel: Pamela Pantages, The Becker Law Firm, (800) 826-2433

Defendant's Counsel: Confidential

Court: Ohio County Outside of Cuyahoga

Date Of Verdict: March 1, 2011

Insurance Company: Confidential

Damages: Bilateral brachial plexus injuries

Summary: Mother with multiple risk factors for shoulder dystocia was not informed of potential risks of vaginal delivery and was not offered an elective cesarean. Instead, labor was induced and managed by residents who failed to assure that an attending obstetrician was present for the delivery, notwithstanding a one-hour second stage. A severe shoulder dystocia occurred. Delivery note clearly stated resident's use of traction followed by 180-degree rotation followed by more traction resulting in permanent bilateral brachial plexus injuries.

Plaintiff's Experts: Lawrence Borrow, M.D.; Daniel Adler, M.D.; Larry Forman; John Burke, Ph.D.; Kevin Yakuboff, M.D.

Defendant's Expert: Joseph Bruner, M.D.

Margarita Karpov, Administratrix of the Estate of Dmitry Karpov, Deceased, et al. v. Net Trucking, et al.

Type of Case: Motor Vehicle Accident

Verdict Against Net Trucking only: $15,201,645.80 in total

Plaintiffs' Counsel: Peter H. Weinberger and Stuart Scott, Spangenberg, Shibley & Liber, LLP, (216) 696-3232

Court: U.S. Dist. Ct. Northern Dist. of Indiana, Case No. 1:06-CV-195 TLS, Judge Theresa L. Springman

Date Of Verdict: December 6, 2010

Damages: $6,721,657.00 as compensatory damages for Dmitry Karpov's wrongful death; $2,119,997.20 as compensatory damages for Margarita's personal injury claim; $6,359,991.60 for punitive damages. ($15,201,645.80 in total).

Summary: This case arises from a motor vehicle collision on the Indiana Turnpike which occurred on August 21, 2005. Plaintiff Margarita Karpov was a passenger in a car driven by her husband Dmitry Karpov. Their car slowed behind a number of vehicles in the eastbound lane of the turnpike which had all slowed to traverse through a construction zone. A truck owned by Defendant Net Trucking, Inc. and driven by Defendant Stanislaw Gil, entered the construction zone at a high rate of speed, never slowed down, and struck the vehicle behind the Karpov vehicle. The truck then careened into

the Karpov vehicle, and struck four more vehicles. Dmitry was killed and Margarita was seriously injured. There were a number of fatalities involving occupants of the other vehicles. Defendant Gil was indicted on multiple counts of reckless homicide to which he pled guilty and for which he is presently incarcerated.

Plaintiffs' Expert: Brendan Patterson, M.D.

Mr. W v. Dr. Doe, et al.

Type of Case: Medical Malpractice / Wrongful Death / Alteration of Medical Records

Settlement: Confidential

Plaintiff's Counsel: Brian N. Eisen, Todd E. Gurney, and Romney Cullers, Greene & Eisen Co., LPA, (216) 687-0900

Court: Northwest Ohio Court of Common Pleas

Date Of Settlement: December 2010

Summary: Mrs. W had a routine arthroscopic knee surgery at an ambulatory surgical facility. The treating surgeon and the anesthesia team failed to pay close attention to the medications Mrs. W was taking. As a result, they administered medications during the procedure that interacted with Mrs. W's medications and caused her to go into respiratory arrest.

During the course of discovery, Plaintiff found that a key document in Mrs. W's medical records had been altered. After amending the Complaint to add a claim for spoliation of evidence (and seeking punitive damages), Plaintiff hired a forensic document examiner and a computer forensic analyst to inspect the computer of one of the defendant-physicians. The defendant-physician refused to permit the inspection, however, claiming that it would result in the disclosure of confidential medical records of third-party patients that were stored on the computer.

At an evidentiary hearing before the trial court, Plaintiff's expert explained that the standard protocol in the industry for this type of computer forensic analysis ensures that no confidential information will be viewed during the inspection. The trial court therefore ordered production of the computer, and the defendant-physician took an immediate appeal. The Sixth District Court of Appeals affirmed the trial court's order, and the Ohio Supreme Court refused to accept a subsequent appeal. Shortly after the computer was analyzed, a confidential settlement was reached.

Julie D v. ABC Hospital, et al.

Type of Case: Medical Malpractice

Settlement: Confidential

Plaintiff's Counsel: Brian N. Eisen and Todd E. Gurney, Greene & Eisen Co., LPA, (216) 687-0900; and James M. Tuschman, Barkan & Robon, Toledo, Ohio

Court: Northwest Ohio Court of Common Pleas

Date Of Settlement: December 2010

Summary: Julie D was 25 weeks pregnant when she presented to the Labor and Delivery department of her local hospital with a headache and vision problems. Immediately, the nursing staff suspected pregnancy-induced hypertension ("Pre-Eclampsia"). When a laboratory test showed protein in Julie's urine, the diagnosis should have been made. Unfortunately, Julie's obstetrician never saw that test result, and an unsupervised L.P.N. was put in charge of Julie's care and did not report the result.

Julie's pre-eclampsia went untreated for several hours and progressed to full-blown eclampsia. She eventually had a seizure and collapsed in the hospital. An emergency C-section was performed and the baby's life was saved. The seizures, however, caused Julie to suffer permanent neurologic deficits.

The defense took the position that treatment of Julie's pre-eclampsia would not have prevented her seizures, and that Julie's injuries were not a proximate result of any negligence. After all of the defense experts were deposed, a confidential settlement was reached just prior to trial.

Ruthie Marzullo, et al. v. J.D. Pavement Maintenance, etc., et al.

Type of Case: Slip and Fall on negligently applied sealcoating

Verdict: $300,000.00

Plaintiffs' Counsel: Todd Petersen and Susan Petersen, Petersen & Petersen, (440) 279-4480

Defendants' Counsel: John Gannon

Court: Cuyahoga County, Case No. CV-09-695025, Judge Deena R. Calabrese

Date Of Verdict: November 29, 2010

Insurance Company: Cincinnati Insurance

Damages: Traumatic hip injury ultimately requiring hip replacement

Summary: Plaintiff left work for a scheduled appointment. As she walked across the lot, she slipped and fell on a freshly sealcoated patch of newly laid asphalt. New asphalt is not supposed to be sealed for at least 30 days. Contractor did not wait. Caused patch to be unreasonably slippery.

Plaintiffs' Experts: Loren Shapiro, Ph.D. (Psychologist);

Samuel Samuel, M.D. (Pain Management), Wael Barsoum, M.D. (Orthopedic Surgeon); John Burke, Ph.D. (Economist)

Defendants' Experts: Kim Stearns, M.D. (Orthopedics); David C. Preston, M.D. (Neurologist)

Lisa Green, Individually and as Administrator of the Estate of Sheena M. Green, Deceased v. Dominique George, et al.

Type of Case: Wrongful Death/Dramshop

Settlement: $850,000.00

Plaintiff's Counsel: Jonathan D. Mester, Nurenberg, Paris, Heller & McCarthy Co., LPA, (216) 621-2300

Court: Cuyahoga County, Case No. 697927, Judge Nancy A. Fuerst

Date Of Settlement: November 9, 2010

Insurance Company: AMCO Ins. Co.

Damages: Wrongful death of 23 year old single mother with minor child and parents

Summary: Decedent was a 23 year old single mother who went out at night with two girlfriends to the "Gotcha Inn" in Cleveland. MVA occurred during the ride home. Decedent, who was a passenger in car driven by her friend, Dominque George, died as a result of the MVA. Ms. George, who was intoxicated at the time, was sentenced to prison as a result of decedent's death. Plaintiff pursued wrongful death action against Ms. George and a dramshop action against the Gotcha Inn. The evidence developed in discovery showed that Ms. George had not consumed any alcohol prior to arriving at the Gotcha Inn; that the first drink she was served was a "free pour" of about 8 ½ to 9 ounces of straight Absolute vodka; and that the second drink she was served was a Tanqueray of the same size as, or larger than, the first drink. Prior to serving the second drink to Ms. George, the bartender remarked to her and her friends that they looked "f****d up." After the accident, a part owner of the bar contacted Ms. George and offered her money or a letter of recommendation for her sentencing if she would say that she and her friends were already drinking before they arrived at the Gotcha Inn. Plaintiff sought punitive damages because of this, and a motion for summary judgment on the punitive damages issue was pending at the time of the settlement. A settlement was reached with the Gotcha Inn for $850,000, which benefitted the decedent's minor child and decedent's parents.

Plaintiff's Experts: Robert J. Belloto, Jr., Ph.D. (Toxicologist); David W. Boyd, Ph.D. (Economist)

Defendants' Expert: None

Cobb v. Shipman

Type of Case: Medical Malpractice

Verdict: $13,900,000.00

Plaintiff's Counsel: Michael M. Djordjevic , James S. Casey, and Peter Marmaros, Djordjevic, Casey & Marmaros, LLC, (330) 376-6766

Defendant's Counsel: Joe Farchione

Court: Trumbull County, Ohio

Date Of Verdict: October 21, 2010

Insurance Company: Pro Assurance

Summary: At the time of trial, Plaintiff was a 10-year old girl, previously diagnosed with HIE and C.P. In the week prior to trial, all Co-defendants other than the obstetrician settled with Plaintiffs. The obstetrician, Dr. Shipman, chose not to participate in settlement discussions and opted for trial.

After three weeks plus of trial, the jury awarded a total of $13.9 Million against Dr. Shipman. This is the largest verdict in Trumbull County history.

Experts: Over 30 experts identified as between Defendants and Plaintiffs. Contact Plaintiffs' Counsel for details.

Daniel Sichko v. Jacob Graddy

Type of Case: Motor Vehicle Accident

Verdict: $69,500.00

Settlement: Confidential

Plaintiff's Counsel: Jarrett J. Northup, (216) 771-4050

Defendants' Counsel: Michael Tyminski

Court: Ashtabula County, Case No. 2008-CV-00993, Judge Alfred Mackey

Date Of Verdict/Settlement: March 4, 2010

Insurance Company: Allstate

Damages: Chronic lower back strain

Summary: Moderate impact rear end motor vehicle accident resulting in a disputed chronic lower back injury.

Plaintiff's Expert: Plaintiff's primary care doctor, James Chillcott, M.D.

Defendant's Expert: None ■

Application for Membership

I hereby apply for membership in The Cleveland Academy of Trial Attorneys, pursuant to the invitation extended to me by the member of the Academy whose signature appears below. I understand that my application must be seconded by a member of the Academy and approved by the President. If admitted to the Academy, I agree to abide by its Constitution and By-Laws and *participate fully in the program of the Academy*. I certify that I possess the following qualifications for membership prescribed by the Constitution:

1. ***Skill, interest and ability in trial and appellate practice.***
2. ***Service rendered or a willingness to serve in promoting the best interests of the legal profession and the standards and techniques of trial practice.***
3. ***Excellent character and integrity of the highest order.***

In addition, I certify that no more than 25% of my practice and that of my firm's practice if I am not a sole practitioner, is devoted to personal injury litigation defense.

Name_____**Age:**_____

Firm Name:_____

Office Address:_____**Phone No:**_____

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Professional Honors or Articles Written: _____

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Date:_____**Applicant:**_____

Invited:_____**Seconded By:**_____

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Please return completed Application with $125.00 fee to: **CATA, c/o George E. Loucas, R.Ph., J.D.**
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