PROFESSIONAL LIABILITY DEFENSE
QUARTERLY
VOLUME 12 | ISSUE 1 | 2020

Inside This Issue

PLDF SPONSOR

DEFENSE PROGRAM
MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY
Specifically Designed for Defense Firms | Available in 15 states

Duty of Mental Health Providers to Warn and/or Protect Third Party Victims: The *Tarasoff* Standard

Anthony S. Cottone | *Byrne Legal Group*

The facts of the cases are always unfortunate and often tragic. A patient receives mental health treatment from a psychiatrist, therapist, counselor, or another provider. Sometime thereafter, they are discharged and go on to commit an awful offense that leads to serious injury or even death. Lying in the background of these heart-wrenching and emotional stories is the issue of whether the provider who treated the patient (or the provider's institution) owed a duty to do something that would have prevented the act. This is a question that is extremely difficult to answer, and raises a conflict between emotions, the law, the practice of medicine, and public policy. many states have constructed statutes, commonly known as *Tarasoff* statutes, that address this issue. This article will address the duties imposed upon mental health professionals in these scenarios, provide some brief history, and discuss the implications of how this legal duty plays out in various forms.

— Continued on next page

Letter from the President

Lisa Tulk | *Kessler Collins, P.C.*

Greetings PLDF Members! I hope everyone had a lovely holiday season and has had a roaring start to 2020.

I write to you at present from an airport on my way back from the PLDF Board of Directors' annual winter working retreat, this year held just outside of Ft. Myers, Florida. As always, the Board was glad to have the opportunity to get together in person and set aside several days to discuss things we can do to deliver as much value to our membership as possible.

One concern raised during this year's retreat, however, was whether our members are both aware of and fully taking advantage of the current programs and

— Continued on page 22

The ***Professional Liability Defense Quarterly*** is the official publication of the Professional Liability Defense Federation (PLDF). It is published quarterly as a service to its members.

Manuscript Policy

PLDF Members and other readers are encouraged to submit manuscripts for possible publication in the *Professional Liability Defense Quarterly*, particularly articles of practical use to attorneys, claims professionals, risk managers, and insurance professionals. Manuscripts must be in article form. No compensation is made for articles published. All articles submitted will be subjected to editing and become the property of the *Professional Liability Defense Quarterly*, unless special arrangements are made.

Statements or expression of opinions in this publication are those of the authors and not necessarily those of the Professional Liability Defense Federation, Editors, or staff. Letters to the Editor are encouraged and welcome, and should be sent to the Professional Liability Defense Federation office in Rochester, Illinois. The PLDF reserves the right to publish and edit all such letters received and to reply to them.

Professional Liability Defense Quarterly, First Quarter 2020, Volume 12, No. 1, Copyright © 2020 Professional Liability Defense Federation. All rights reserved. Reproduction in whole or in part without permission is prohibited.

Professional Liability Defense Federation
PO Box 588 • Rochester, IL 62563-0588
309-222-8947

Sandra J. Wulf, CAE, IOM, Managing Director
sandra@pldf.org

Sara Decatoire, CAE, IOM, Deputy Director
sarad@pldf.org

Editors

Donald Patrick Eckler, Editor in Chief
Pretzel & Stouffer, Chartered
deckler@pretzel-stouffer.com

Louie Castoria
Kaufman Dolowich & Voluck LLP
lcastoria@kdvlaw.com

Sean Pierce
Harbuck Keith & Holmes LLC
spierce@hkh.law

Lisa Tulk
Kessler Collins, P.C.
ltulk@kesslercollins.com

Tarasoff v. Regents of the University of California

The seminal case which lead to the body of law addressing a mental health providers' duty to third party victims was *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976). This case involved a graduate student of the University of California, Berkeley, who, after being spurned by his love interest, Tatiana Tarasoff, dove deep into depression and triggered his mental illness. He sought treatment from a psychologist at UC Berkeley in 1969, and during his counseling sessions, verbally expressed an intent to kill Ms. Tarasoff. The psychologist requested campus police to intervene and detain the student, opining that he was suffering from paranoid schizophrenia. The student was involuntarily committed, but was later released after returning to what appeared to be his baseline. After this detainment, the student stopped seeing his psychologist, and ultimately murdered Ms. Tarasoff. Neither Ms. Tarasoff or her family was notified of the threats made by the student to his psychologist, and the family filed a wrongful death suit against the psychologist and various university employees.

The trial court sustained a demurrer for failure to state a valid claim against, among others, the therapists and the university. To that point, the common law was clear that, as a general rule, a person did not owe a duty to control the conduct of another. Ultimately, the case was heard by the California Supreme Court, which acknowledged that a defendant has traditionally only owed a duty to control the conduct of another person, or to warn of such conduct, where the defendant bears "some special relationship" to the dangerous person or the potential victim. The California Supreme Court held that such a special relationship exists between a therapist and his patient, and so a duty to exercise reasonable care to protect potential victims of that patient exists, despite that the third party was not their patient.

Specifically, the Court held "[w]hen a doctor or a psychotherapist, in the exercise of his professional skill and knowledge, determines, or should determine, that a warning is essential to avert danger arising from the medical or psychological condition of his patient, he incurs a legal obligation to give that warning."

The Court further held that "the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins."

Impact of the *Tarasoff* Decision

There were heavy criticisms of the California Supreme Court's holding, not the least of which implicated the very practice of mental health professionals and their reputation in the community. The practice of psychiatry depends largely on the confidentiality between a patient and a psychiatrist, and to upset that confidentiality severely impacts both the psychiatrists delivering care as well as the patients being treated. How can patients be treated completely when they know a psychiatrist may be required to disclose what was once meant to be held in the strictness of confidence? How can psychiatrists treat their patients in the best possible way if their clients cannot trust that everything they say will not be disclosed to others? How does a mental health professional choose what actions to take in the face of so many competing interests in the face of potential grave consequences?

With the holding in *Tarasoff*, the line on deciding when a psychiatrist would

> Specifically, the Court held "[w]hen a doctor or a psychotherapist, in the exercise of his professional skill and knowledge, determines, or should determine, that a warning is essential to avert danger arising from the medical or psychological condition of his patient, he incurs a legal obligation to give that warning."

need to disclose such information appeared subjective. Failures to disclose patient confidences and warn third parties could come with catastrophic results, not to mention significant liability. Too much disclosure runs afoul of breaches of privacy and confidentiality.

It was clear from the outset of the *Tarasoff* ruling that there was a need for more explicit interpretation of the third-party duties imposed on mental health providers. Many states began codifying and/or adopting this duty, with some legislatures providing more clarity than others.

Codification of the Duty to Warn and/or Protect

Today, 29 of our 50 states have adopted a mandatory duty to warn and/or protect. 17 states have a "permissive" duty to warn and/or protect, which allows for disclosure or consultation with colleagues or attorneys in cases of uncertainty. Ten of those states that recognize the duty to warn and/or protect are not based in statute, but in case law. Only four states have not recognized such a duty.

As you will see, the differences in the manner with which the duty to warn and/or protect is adopted into a state's jurisprudence has significant impact on mental health professionals and their practice.

Mandatory Reporting

California

It is only right to begin our assessment of *Tarasoff* statutes in the state where the duty began. California's duty to warn statute was first implemented in the wake of *Tarasoff* in California Civil Code § 43.92. This initial iteration of the statute established that the duty to warn would arise when the patient communicated to "a psychotherapist" a serious threat of physical violence against a reasonably identifiable victim or victims. Subsection (b) of the statute stated that "[i]f there is a duty to warn and protect under the limited circumstances specified above, the duty shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency."

This statute did not have the desired effect of clarifying the ambiguities of *Tarasoff*. Over time, when the duty arose and how the duty is discharged became more expansive and harder to define.

Most notably, in the case of *Ewing v. Goldstein*, 15 Cal. Rptr. 3d 864 (Ct. App. 2004), the duty was greatly expanded when the California Court of Appeals ruled that a duty arose when a family member of a patient discloses to the mental health professional that there was an imminent risk of violence against another. This ruling significant expanded the duty to warn, taking it from a duty imposed by communication from the patient to the therapist, to now include communication about the patient from a third party.

Additionally, the statute was being interpreted to impose both a duty to warn and a duty to protect. Therefore, the only way to discharge the duty when such communication was made was to warn the potential victim or victims. Anything less imposed liability, and any other reasonable efforts to protect the victim and control a dangerous scenario short of explicit warning did not help a psychotherapist defendant.

In 2006, California Civil Code § 43.92 was amended in an attempt to make clear that there was no separate "duty to warn", and that reasonable efforts to protect a victim were sufficient. However, this amendment still did not seem to clarify the ambiguity, and so in 2013, a new revision was passed which added a subsection clarifying that there is no "duty to warn and protect", just a "duty to protect." This provided the protection that mental health professionals needed, in allowing appropriate judgments to be made about what is the best course of action to protect a potential victim in the limited circumstances the statue presents.

Colorado

Colorado's duty to warn statute is codified in C.R.S. § 13-21-117. The statute defines the duty in subsection (2)(a) and states:

> A mental health provider is not liable for damages in any civil action for failure to warn or protect a specific person or persons, including those identifiable by their association with a specific

— Continued on next page

> location or entity, against violent behavior of a person receiving treatment from the mental health provider, and any such mental health provider must not be held civilly liable for failure to predict such violent behavior except where the patient has communicated to the mental health provider a serious threat of imminent physical violence against a specific person or persons, including those identifiable by their association with a specific location or entity.

Note here that this statute would take the "identifiable person" language and extend it to people identifiable "by their association with a specific location or entity." This is unique and significant, especially considering Colorado's tragic experience with mass shootings. This language extends potential plaintiffs in duty to warn cases to those victims whose assailant made a threat to a specific location, such as a public place or a school. Compared to other jurisdictions, this is a more expansive view of the class of persons the duty can be owed to.

Finally, the statute makes clear how the duty to warn can be discharged. The mental health professional must make "reasonable and timely efforts to notify the person or person, or the person or persons responsible for a specific location or entity, that is specifically threatened, as well as to notify an appropriate law enforcement agency or to take other appropriate action, including but not limited to hospitalizing the patient." Clearly, Colorado has implemented a very high duty to warn, which includes not just warning to the person or location, but notification to law enforcement or to hospitalize the patient. In comparison to California, Colorado's duty to warn comes with more strict and expansive parameters.

Virginia

The Commonwealth of Virginia dealt with the *Tarasoff* standard initially in 1995 in the case of *Nasser v. Parker*, 249 Va. 172 (1995). This wrongful death action alleged negligence on the part of a psychiatrist and psychiatric hospital who failed to warn a victim of the release of her former boyfriend from the hospital after a voluntary commission, who had threatened to kill her and had a prior history of violence against women who rejected him. After discharge, the patient shot the victim and then turned the gun on himself. The case was dismissed on demurrer on the grounds that none of the defendants "took charge" of the patient, such that a duty to warn would have been imposed. On appeal, the Virginia Supreme Court disagreed outright with the holding in *Tarasoff*, stating that "a doctor-patient relationship or a hospital-patient relationship alone is not sufficient, as a matter of law, to establish a "special relation". *See id.* at 180.

In keeping with its aversion to the broad duties set forth in the *Tarasoff* standard, the Virginia General Assembly enacted a *Tarasoff* statute in 2010. While the statute did find a special relationship between a psychiatrist and a patient, it bolstered protections of mental health providers and narrowed the scope of the duty to warn.

Va. Code 54.1-2400.1, titled "Mental health service providers; duty to protect third parties; immunity" states as follows:

> A mental health service provider has a duty to take precautions to protect third parties from violent behavior or other serious harm only when the client has orally, in writing, or via sign language, communicated to the provider a specific and immediate threat to cause serious bodily injury or death to an identified or readily identifiable person or persons, if the provider reasonably believes, or should believe according to the standards of his profession, that the client has the intent and ability to carry out that threat immediately or imminently.

The statute further provides immunity to mental health providers from civil liability, most notably, in failing to predict violence in a situation that does not meet the statutory definition. That is to say, where a patient makes an overt statement of specific and immediate threats of serious bodily harm to and identifiable person.

This statute provides well defined and strong protection for mental health providers in the face of the broader views of the *Tarasoff* standards in other jurisdictions.

Permissive Reporting

Florida

Florida provides a duty to warn on a "permissive" basis. In Florida's iteration of the *Tarasoff* duty, the psychiatrist "may" disclose confidential patient communications to warn a potential victim and "must" disclose patient communications to communicate the threat to law enforcement.

The statute, Fla. Stat. § 456.059 states:

> Notwithstanding any other provision of this section . . . when . . . [s]uch patient has communicated to the psychiatrist a specific threat to cause serious bodily injury or death to an identified or a readily identifiable person; and . . . [t]he treating psychiatrist makes a clinical judgment that the patient has the apparent

> intent and ability to imminently and immediately carry out such threat, the psychiatrist may disclose patient communications to the extent necessary to warn any potential victim and must disclose patient communications to the extent necessary to communicate the threat to a law enforcement agency.

This statute also, uniquely, then shifts the burden of potential liability to the law enforcement agency by stating, "[a] law enforcement agency that receives notification of a specific threat under this section must take appropriate action to prevent the risk of harm, including, but not limited to, notifying the intended victim of such threat or initiating a risk protection order."

However, prior to the statute's current language, the permissive duty arose when a patient made an "actual threat to physically harm" a victim or victims, and the psychiatrist made a clinical judgment that the person had "apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat". Additionally, the previous language of the statute was a pure permissive duty, stating that the psychiatrist "may disclose patient communications" to the potential victim "or to communicate the threat to a law enforcement agency." It is clear that the legislature found it necessary to impose some aspect of a "mandatory" duty, by changing the language related to informing law enforcement agencies.

A few things to note. First, only a psychiatrist is identified as the person who owes the duty or can be held immune. Second, that psychiatrist can use their "clinical judgment" in determining whether the duty arises. And finally, this statute sets up a scenario wherein a psychiatrist would almost always inform law enforcement alone, so as to satisfy their duty, protect themselves from breaches of patient confidentiality, and shield themselves from liability to a potential third party.

Case Law

Some states only have judicially created duties to warn and, while still helpful, these jurisdictions' lack of a codified duty can cause ambiguity and unpredictability for practitioners.

Pennsylvania

The Commonwealth of Pennsylvania does not have a *Tarasoff* statute but does recognize the duty to warn. The seminal case on the issue is *Emerich v. Philadelphia Ctr. For Human Dev., Inc.,* 720 A.2d 1032 (1998). This case dealt with a very familiar set of facts, where a woman was killed by an ex-boyfriend with a past history of violence. On the day of the victim's death, the assailant spoke to his counselor who recommended he go to the hospital after telling the doctor he planned to kill his ex-girlfriend. The assailant refused hospitalization. The victim called the counselor shortly thereafter, and the counselor warned her not to go to their apartment. She ignored the warning and was shot and killed.

The case was initially dismissed by the trial court and affirmed by the Superior Court, finding that Pennsylvania did not recognize a duty of mental health professionals to warn third parties. The state Supreme Court also affirmed, but only in these limited circumstances where it found that the defendant did discharge his duty to "warn" the victim.

Specifically, the Supreme Court recognized that when a patient "has communicated . . . a specific and immediate threat of serious bodily injury against a specifically identified or readily identifiable third party . . . and . . . determines . . . that his patient presents a serious danger of violence to the third party" then the duty to exercise reasonable care to protect "by warning" the third party exists. *See id*. Since the defendant did "warn" the victim in this case, the Court chose to "leave for another day the related issue of whether some broader duty to protect should be recognized in this Commonwealth." It further made no efforts to clearly establish, in such a scenario, what other steps, or what form of warning, would suffice to discharge this duty.

It is unlikely that these questions will be answered until the legislature acts to implement a clear statute, or the Court is called upon to rule on a similar issue. And, therein, we see the difficulty in this area of law without legislation. The mental health professional, tasked with a grave scenario which may impose a duty to warn a third party in jurisdictions such as the Commonwealth of Pennsylvania, is in a legal quagmire with little clear guidance upon which he or she can rely.

No Duty to Warn/Protect

Some states have no duty to warn and/or protect in situations as outlined in the *Tarasoff* case. Those states are Maine, North Carolina, North Dakota, and Nevada. North Carolina and Maine, through case law or statute, have affirmatively rejected the *Tarasoff* duties. North Dakota and Nevada simply have no jurisprudence on the duty. However, as a mental health professional, it is far more comforting knowing your legislature and/or courts have outwardly rejected the duty as opposed to never having addressed whether the duty exists. One can imagine scenarios in North Dakota and Nevada where the right case comes

— Continued on next page

along that a Court must then address the issue as a case of first impression. Defense of such claims will lead to significant litigation and be left to persuasive authority and amici.

Conclusion

The *Tarasoff* standard is now well-known in the mental health community, and educational institutions attempt to teach mental health providers about their duties and responsibilities in situations as described above. However, as illustrated, the protections, the circumstances, the duty owed, and the manner with which that duty must be discharged, vary greatly from state to state. In many respects, this duty remains a moving target for mental health professionals.

The existence of a *Tarasoff* statute can often help the defense of a negligence claim in these scenarios. Particularly, some of the stronger statutes, such as the Virginia's, provide immunity provisions that shield mental health professional from liability should the very specific scenario laid out by the statute not be met. And as such, many cases addressing a duty to warn in Virginia end in favor of the mental health provider.

However, where the duty is not as well-defined, either by statute or by case law, litigation could survive longer, and the matter may require vastly more resources. Not to mention the fear that a mental health professional's very reasonable clinical judgment may expose them to significant liability. It is important to note that the American Psychiatric Association (APA) has written numerous amicus curiae briefs in duty to warn cases, and if you are faced with defending such an action, you should not hesitate to reach out for discussion and potential advocacy.

In today's world with robust debate between the link between violence and mental health, the mental health profession must be able to expand and progress without fear of their reasonable clinical judgments being the subject of litigation. Providers having knowledge of this area of professional liability are quite important, as is competent and zealous advocacy from the defense bar so that the mental health providers can continue to safely and confidently perform the invaluable services they provide our communities. ■

About the **AUTHOR**

Anthony S. Cottone (Tony) primarily defends healthcare clients including national hospital organizations, healthcare institutions, small practice groups, specialized treatment facilities, and individual healthcare providers in a large range of litigation matters including professional liability, board investigations, commercial litigation, employment litigation, and general liability matters. Mr. Cottone may be reached at acottone@byrnelegalgroup.com.

Don't be a Victim of LATE NOTICE: Report!

Laura Zaroski | *Arthur J. Gallagher & Co.*

The number one reason that carriers deny coverage under a claims made and reported policy is Late Notice. Over the years I have watched too many insureds play amateur coverage lawyer, and take it upon themselves to decide whether an "incident" does or does not constitute a "Claim" as defined by their policy. The danger of such dabbling is that down the road, these insured's may find out that the incident they decided not to report, did indeed rise to the level of a "Claim". At that time, they may tragically learn that the applicable reporting period has since passed, and an otherwise covered Claim has now been denied based upon late notice. I counsel clients all the time to take advantage of the policy they have purchased! Do not hesitate to put a carrier on notice of what is, what may be, or what could evolve into a "Claim" as defined within your claims made and reported policy.

I understand that Insureds are often hesitant to report claims. This hesitation is often based on the belief (or hope) that the incident at issue "has no merit or will not evolve into anything serious." Further, many insureds worry that reporting a claim or potential claim will be counted against them at renewal when the underwriters are reviewing their account. Simply put, making a determination that a matter "won't amount to anything" is dangerous business.

In today's litigious environment, even meritless matters often take years to get dismissed and may incur significant defense costs to reach the point of dismissal. Therefore, do not consider the alleged merits of the claim when determining if a matter should be reported to the carrier. With respect to whether reporting potential claims or circumstances to the carrier results in a black mark

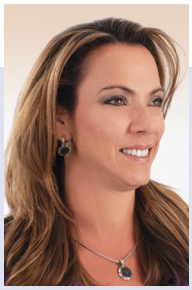
against you, most carriers indicate that they do NOT count such notices against the insured at renewal, but rather appreciate that the Insureds are diligent in reporting such incidents and understand the benefit to report such potential/actual claims.

The situation that I have seen over and over again is where an Insured receives notice of an administrative action or demand letter, and believing that it has no merit, the Insured decides to handle it internally rather than report it to the carrier. The mindset is that meritless actions go away without litigation (right?). I have also seen clients that are embarrassed to report a claim, and therefore, instead choose to attempt to quietly handle it themselves. Six months after receipt and response to the letter/action, the insured receives a lawsuit. At that time, the Insured tenders the lawsuit to their carrier. The carrier reviews the timeline and notices that during the six month lag time between notice to the insured and notice to the carrier, the prior policy period has expired and the Insured is now four months into the current policy period. As a result of the failure to timely report, both the prior carrier denies coverage (as the Claim was reported after their Policy Period expired) and the current carrier denies coverage (as the Claim was made prior to their current Policy Period). To make matters even more painful, even if the prior and current carrier are the same, coverage can potentially be denied under both policies due to the late reporting (Ouch…).

I understand that Insureds are busy running their businesses and that tendering notice of an action to a carrier can often fall through the cracks. Late notice often happens because the person who receives or knows about the claim is not the same person that knows that they have insurance that might cover that claim. In order to avoid such situations, Insureds need to be vigilant about putting mechanisms in place to make sure all notices funnel through the right corporate representative to ensure that timely notice can be made and otherwise valid insurance is not forfeited.

TAKEAWAY

Don't be a victim of a late notice denial. The power to avoid such denials are 100% in the insureds' control. When in doubt—Report! And don't hesitate to consult with your broker who should help guide you as to when and how to report an actual or potential Claim under your claims made and reported policy. ■



About the **AUTHOR**

Laura Zaroski is the Managing Director of *Gallagher's Law Firms Practice* and is responsible for the placement of Lawyers Professional Liability Insurance, Management Liability Insurance, and Risk Management services for Gallagher law firm clients. Her primary focus is mid-size to large law firms. Ms. Zaroski may be reached at laura_zaroski@ajg.com.

I Don't Have to Produce These, Do I? "At Issue" Waiver of Privileged Communications

Alice Sherren | *Minnesota Lawyers Mutual Insurance Company*
Donald Patrick Eckler | *Pretzel & Stouffer, Chartered*

The attorney-client privilege is foundational to the practice of law. It is for this reason that we have written on this issue so frequently in our column addressing legal malpractice issues. See *"Tripartite Relationship Minefield: Lack of Cooperation Disclosure,"* PLDF Quarterly, Volume 10, Issue 2, *"Privilege Update: Attorneys' Bills/Internet Transmission,"* PLDF Quarterly, No. 9, Issue 2, and *"Tribe's Trump Tweet: A-C Privilege and Confidentiality,"* PLDF Quarterly, Vol. 8, Issue 4. To protect both the client and attorney, it is essential to ensure those communications will be shielded from discovery.

The unique relationship among insurers, insureds, and counsel complicates the determination of when attorney-client privilege should apply. The analysis differs depending on whether the communications arise 1) in the defense of the insured or 2) in the defense of the insurer in a coverage action, whether initiated by the insured or the insurer. This column will discuss attorney-client privilege in the context of coverage actions between an insurer and an insured.

In *In re: Mt. Hawley Insurance Company*, 829 S.E.2d 707, 709 (2019), the Supreme Court of South Carolina answered the following certified question from the United States Court of Appeals for the Fourth Circuit:

— Continued on next page

> Does South Carolina law support application of the "at issue" exception to attorney-client privilege such that a party may waive the privilege by denying liability in its answer?

The Court held that "a denial of bad faith and/or the assertion of good faith in the answer does not, standing alone, place a privileged communication 'at issue' in a case such that the attorney-client privilege is waived." *Id*. at 718. We will review the facts of the case, the reasoning of the court, and the implications for counsel and insurers.

The Coverage Dispute

The *Mt. Hawley* case involved a bad faith claim by an insured against an insurer. Mt. Hawley issued an excess commercial general liability policy to Contravest Construction Company ("Contravest"). *Id*. at 709. Contravest constructed a development and then was sued by the homeowners' association for allegedly defective construction. *Id*. at 709-710. Mt. Hawley refused to defend the lawsuit against Contravest, which Contravest contended Mt. Hawley should have defended. *Id*. Contravest ultimately settled with the plaintiff in the underlying case. *Id*.

Contravest and the underlying plaintiff then sued Mt. Hawley for bad faith, breach of contract, and unjust enrichment. *Id*. Mt. Hawley removed the case to federal court based upon diversity jurisdiction. *Id*. Contravest issued discovery to Mt. Hawley seeking claims files which contained communications with counsel. *Id*. Mt. Hawley objected, asserted attorney-client privilege, and provided a privilege log. *Id*. The district court overruled the objections finding that the communications were put "at issue" by Mt. Hawley's denial of liability in the bad faith action and there was an "implied" waiver. *Id*.

Mt. Hawley filed a writ of mandamus to the Fourth Circuit and the certified question was issued to assist it in resolving the issue because the scope and application of attorney-client privilege in a diversity case is a question of South Carolina state law. *Id*.

The South Carolina Supreme Court's Reasoning

As an initial matter, it is important to note that the South Carolina Supreme Court recognized the rather typical, but competing, principles that nearly every court has adopted: the need for liberal discovery and the importance of the attorney-client privilege. *Id*. at 712. With respect to waiver of the privilege, which can only be done by the client who holds the privilege, the Court stated "[s]uch waiver must be 'distinct and unequivocal.' As a result, when a party asserts an implied waiver of privilege, 'caution must be exercised, for waiver will not be implied from doubtful acts.'" *Id*.

To resolve the tension between these competing policies in the context of a coverage dispute, the Court considered three approaches to "at issue" waiver of otherwise protected attorney-client communications. *Id*. at 711 citing *Bertelsen v. Allstate Ins. Co.,* 796 N.W.2d 685, 702 n.6 (S.D. 2011) and *Restatement (Third) of the Law Governing Lawyers § 80*. The first approach holds that whenever a party seeks judicial relief, the party impliedly waives the privilege. *Independent Productions Corp. v. Loew's, Inc.*, 22 F.R.D. 266, 277 (S.D.N.Y. 1958). As bad faith is a tort under South Carolina law, the application of this approach would result in the extension of the crime-fraud exception to alleged violations of tort law. *Id*. at 713-714 citing *Nichols v. State Farm Mut. Auto. Ins. Co*., 306 S.E.2d 616, 619 (S.C. 1983); *Cedell v. Farmers Ins. Co. of Wash*., 295 P.3d 239, 245-46 (Wash. 2013). The court rejected this approach. *Id*.

The second approach rejects the implied waiver altogether and looks at whether the client asserting the privilege has interjected the issue into the litigation and whether the claim of privilege, if upheld, would deny the inquiring party access to proof needed to fairly resist the client's own evidence on that very issue. *Id*. at 714; *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co*., 32 F.3d 851 (3rd Cir. 1994); see generally C. Mueller & L. Kirkpatrick, Modern Evidence § 5.30 (1995); C. Wolfram, Modern Legal Ethics § 6.4.7 (1986). *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash. 1975). The court also rejected this approach. *Id*.

The third approachseeks to balance the need for disclosure against the need for protecting the confidentiality of the client's communications on the facts of the individual case. *Id*. at 715; *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444, 447 (S.D.Fla.1980); *Black Panther Party v. Smith*, 661 F.2d 1243, 1271-72 (D.C.Cir.1981); *Elia v. Pifer*, 977 P.2d 796 (Ariz.Ct.App.1998). The *Mt. Hawley* Court adopted this case-by-case approach, as articulated by the Arizona Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Lee*, 13 P.3d 1169 (Ariz. 2000).

In *Lee*, the insurer was sued by a class of individuals who claimed their uninsured and underinsured motorist claims had been denied. *Id.* at 715. The insurer contended that it relied on the advice of counsel in making the coverage determinations, but was not arguing that the reliance on counsel was evidence of good faith. *Id*. In overruling the objections and ordering production of the communications, the Court held that "*The advice of counsel defense is impliedly one of the bases for the defense [the*

Given the variety of rules adopted across the country on this issue, counsel should try to ascertain the standard for waiver that applies in the jurisdictions in which they practice and potentially take steps to protect communications from being disclosed should litigation ensue.

insurer] maintain[s] in this action. [The insurer has], therefore, impliedly waived the attorney-client privilege." *Id*. (emphasis in original). The *Lee* court concluded that "in [cases in] which the litigant claiming the privilege relies on and advances as a claim or defense a subjective and allegedly reasonable evaluation of the law—but an evaluation that necessarily incorporates what the litigant learned from its lawyer—the communication is discoverable and admissible." *Id*. at 715.

The Court concluded its opinion by emphasizing that an insurer does not waive privilege by simply defending a bad faith lawsuit. *Id*. at 717. Rather, the Court adopted the *Lee* approach that an insurer waives the privilege over claims materials if it based its claim denial on (1) a good-faith belief that the law supported the denial and (2) its subjective belief following a legal evaluation. *Id*. The Court then added the additional requirement that the party seeking waiver of the attorney-client privilege make a *prima facie* showing of bad faith. *Id*. Whether the plaintiff presented *prima facie* evidence in this case was beyond the question presented to the Court.

Lessons for Counsel

Both coverage counsel providing advice to an insurer on coverage issues and counsel defending an insurer on bad faith claims could be affected by this decision. The simple solution for coverage counsel is to be correct on the initial coverage evaluation, but sometimes there is a close question or counsel is incorrect. What steps should counsel take to protect communications with an insurance client?

The answer to that question will often rest on the legal position taken in the bad faith action. Under the rule adopted by the South Carolina Supreme Court, waiver occurs only when, in addition to *prima facie* evidence of bad faith, the insurer asserts that its claim denial was the result of a reasonable belief that the law permitted the decision and a subjective belief based on a legal evaluation. In states that employ this rule, coverage counsel may decide, and it is possible that insurers will ask, that coverage evaluations be committed to writing with less frequency so that they cannot be discovered later.

Though this decision is limited to South Carolina and to the context of a tort action for bad faith, it portends broader lessons for counsel representing all manner clients and in all types of actions. Assiduously guarding communications with the client is fundamental to an attorney's role in representation of a client. Given the variety of rules adopted across the country on this issue, counsel should try to ascertain the standard for waiver that applies in the jurisdictions in which they practice and potentially take steps to protect communications from being disclosed should litigation ensue. In most contexts, attorneys assume that their communications are confidential and will remain so. However, courts across the country seem increasingly prepared to erode the protections of the attorney-client privilege.

The *Mt. Hawley* Court adopted the "middle of the road" approach between implied waiver which requires almost automatic production on the one hand and whether the party has injected the issue into the case which typically shields communications on the other. How the rule in *Mt. Hawley* will be applied and whether it will be more broadly adopted remains to be seen. Until then, counsel and carriers should proceed with caution in communicating, and when communications are in writing it should be assumed that they will be produced in any subsequent bad faith litigation. ■

About the **AUTHORS**

Alice M. Sherren is a Claim Attorney with *Minnesota Lawyers Mutual Insurance Company*. Ms. Sherren directs the defense of LPL claims and speaks on risk management and ethics matters. Ms. Sherron may be reached at asherren@mlmins.com.

Donald Patrick Eckler is a partner at *Pretzel & Stouffer, Chartered*, in Chicago. Mr. Eckler defends doctors, lawyers, architects, engineers, appraisers, accountants, mortgage and insurance brokers, surveyors and others. Mr. Eckler may be reached at deckler@pretzel-stouffer.com.

SCOTUS to Decide the Constitutionality of the Consumer Financial Protection Bureau's Structure

Matthew E. Selmasska | *Kaufman Dolowich & Voluck, LLP*

On March 3, 2020, the U.S. Supreme Court will hold oral argument in *Seila Law LLC v. Consumer Financial Protection Bureau*, to decide whether the vesting of substantial executive authority yielded by the CFPB, an independent agency led by a single director, violates the separation of powers under the Constitution. The Court will also decide—if the CFPB's structure is found unconstitutional—whether the for-cause removal provision can be severed from the Dodd-Frank Wall Street Reform and Consumer Protection Act, the legislation creating the CFPB. Under existing law, the president may only remove the CFPB director for cause. *See* 12 U.S.C. § 5491(c)(3). Congress created the CFPB in the wake of the 2008 financial crisis as a means of enforcing federal consumer protection laws and protecting consumers from unfair, deceptive, and abusive acts and practices. In this vein, attorneys who regularly practice collection work can find themselves under the CFPB's purview. The agency is the brainchild of U.S. Senator Elizabeth Warren (D-MA), currently a Democratic presidential candidate.

The question on the constitutionality of the CFPB's structure is not new, as both the U.S. Court of Appeals for the D.C. Circuit and the U.S. Court of Appeals for the Ninth Circuit have addressed this issue. *Seila Law* is on appeal from the Ninth Circuit. Both courts held the agency's existing structure constitutional. One sitting justice on the Supreme Court, Justice Brett Kavanaugh, may have already tipped his hand. In *PHH Corp. v. CFPB*, then Judge Kavanaugh authored a panel opinion for the D.C. Circuit holding that the CFPB's structure is unconstitutional. The D.C. Circuit then held a rehearing *en banc*, upholding the constitutionality of the agency. Judge Kavanaugh dissented and characterized the agency as "a headless fourth branch of the U.S. government." *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 165 (2018) (Kavanaugh, J. dissenting).

If the Supreme Court finds the CFPB's structure unconstitutional, it will then have to decide whether the entire agency must be struck down or whether the for-cause removal provision regarding the agency's director is severable from the rest of the Dodd-Frank Act. A decision is expected from the Court in May or June of 2020. ■

About the **AUTHOR**

Matthew E. Selmasska is an associate at *Kaufman Dolowich & Voluck, LLP* and specializes in consumer financial services, commercial litigation, professional liability defense, and complex insurance coverage disputes. Mr. Selmasska may be reached at mselmasska@kdvlaw.com.

Discovery Requests in the Age of Electronic Medical Records: Ensuring Compliance with the HITECH Act and Related Laws

Nicole C. Freiler and **Megan B. Kelleher** | *Burns White, LLC*

In medical malpractice cases, Plaintiff's attorneys are becoming increasingly aggressive in their approach to discovery related to Electronic Medical Records (EMR) and audit trails related thereto. However, the rigorous demands of the Plaintiff's bar are not necessarily in line with the formal requirements of the law, creating potential conflict related to what must be produced in response to a request, and the format in which it must be made available. The purpose of this article is to examine the application of the Health Information Technology for Economic and Clinical Health Act (HITECH Act), and various states' Rules of Civil Procedure related to the production of electronically stored information, when addressing discovery requests related to EMRs and audit trails in the context of medical malpractice litigation.

The HITECH Act

The Health Information Technology for Economic and Clinical Health Act (HITECH Act), part of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 13001 *et seq.*, 123 Stat. 115, an economic stimulus bill under then-President Obama, is a federal law establishing standards and requirements for the electronic transmission of certain health information. The HITECH Act was intended to encourage physicians, hospitals, and other healthcare entities to expand their practice of exchanging protected healthcare information electronically in order to cut down on the costs

of healthcare. *See United States ex rel. Sheldon v. Kettering Health Network*, 815 F.3d 399, 403 (6th Cir. 2016). Ironically, issues related to the discovery of EMR and audit trail information are serving to drive up the costs associated with healthcare litigation.

Specifically, healthcare providers were given monetary incentives for demonstrating "meaningful use" of electronic health records from 2011 to 2015, after which time penalties have been enforced for failure to demonstrate such meaningful use. Among other things, the HITECH Act was intended to create transparency and strengthen enforcement of the previous HIPAA standards by allowing patients to request an audit trail showing all disclosures of their electronic health information. *See* Stephen Redhead, Cong. Research Serv., R40537, The Health Information Technology for Economic and Clinical Health (HITECH) Act (2009).

In practice, if a covered entity, including healthcare providers and hospitals, has implemented an electronic medical record (EMR) system, the HITECH Act provides the patient the right to obtain his or her medical records in an electronic format, or to designate a third party to obtain his or her medical records. 42 U.S.C. § 17935(e). Conversely, covered entities are responsible for implementing technology and software systems in order to protect an individual's EMR, as well as any other protected health information. The entity must have in place some technology to track any activity concerning a patient's file. Pursuant to 45 CFR § 170.210, "the date, time, patient identification, and user identification must be recorded when electronic health information is created, modified, accessed or deleted…" In order to monitor the activity of a file or record, covered entities must "implement hardware, software, and/or procedural mechanisms that record and examine activity in information systems that contain or use electronic protected health information. *Id.* at § (b). Essentially, these mechanisms that monitor and log activities concerning the EMR are "audit trails."

Among other things, the HITECH Act was intended to create transparency and strengthen enforcement of the previous HIPAA standards by allowing patients to request an audit trail showing all disclosures of their electronic health information.

Audit trails must contain specific information in order to track activity concerning the file: "[t]he date, time, patient identification, and user identification must be recorded when electronic health information is created modified accessed, or deleted; and an indication of which action(s) occurred and by whom must also be recorded." *Id.* A unique identification must be created for each user in order to keep track of any activity and identify the user who initiated the activity. 45 CFR § 164.312(a)(2)(i).

The HITECH Act is clear and unequivocal with regard to what is required of an audit trail. The statute strictly provides only for the creation of an audit trail including the date, time, patient ID, and user ID, at any time the health information is created, accessed, modified, or deleted. Although the individual patient may be allowed access to his or her medical records, such access is qualified. Section 17935 "does not provide a blanket right of access to one's medical records, but to 'an accounting of disclosures' of 'protected health information' described in 45 CFR § 164.528 (which contains numerous exceptions to even that right of access)." *Isaacs. v. Dartmouth Hitchcock Medical Center*, 2012 WL 2088821 (D. N.H. 2012); *see also* 42 U.S.C. § 17935(b)(1)(A); 68 FR 8334-01, 8355-56 cmt. G1c (Feb. 20, 2003).

Rules Related to Production of Electronically Stored Information

In addition to the standards set forth in the HITECH Act, discovery related to EMRs and audit trails necessarily implicates states' rules of civil procedure related to the production of electronically stored information. When determining the scope of permissible electronic discovery, many states apply a proportionality standard. In Pennsylvania, for example, the following factors are considered: (i) the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake; (ii) the relevance of electronically stored information and its importance to the court's adjudication in the given case; (iii) the cost, burden, and delay that may be imposed on the parties to deal with electronically stored information; (iv) the ease of producing electronically stored information and whether substantially similar information is available with less burden; (v) and any other factors relevant under the circumstances." *See PTSI, Inc. v. Haley*, 71 A.3d 304, 316 (Pa. Super. 2013) (citing the 2012 Explanatory Comment preceding Pa. R.C.P. 4009.1). Furthermore, Pennsylvania's Rule of Civil Procedure 4011 bars discovery that causes "unreasonable annoyance,

— Continued on next page

embarrassment, oppression, burden or expense to the deponent or any person or party."

Texas courts apply a similar proportionality standard, weighing the burdens imposed upon the producing party against the benefits of production. *See* Tex. R. Civ. P. 192.6. Florida courts also consider proportionality with regard to requests for electronically stored information. In determining any motion involving discovery of electronically stored information, the Florida courts must limit the frequency or extent of discovery otherwise allowed by the rules of civil procedure if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from another source or in another manner that is more convenient, less burdensome, or less expensive; or (ii) the burden or expense of the discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. Fla. R. Civ. P. 1.280(d)(2).

In California, the Rules of Civil Procedure permit a court to limit the frequency or extent of discovery of electronically stored information—both reasonably accessible and not reasonably accessible—if the court determines that any of the following conditions exist:

- The ESI is obtainable from another source that is less burdensome, expensive or more convenient;
- The ESI sought is unreasonably cumulative or duplicative;
- The requesting party has had ample time and opportunity to discover the information sought; or
- The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested ESI in resolving these issues.

CCP §§ 2031.060(f); 2031.310(g).

Massachusetts Courts take a somewhat different and more proactive approach. In Massachusetts, a party has a right to demand an "ESI Conference" with the opposing party. Mass. R. Civ. P. 26(f)(2)(A). Topics addressed at an ESI conference include:

- Any issues relating to preservation of discoverable information;
- The form in which each type of information will be produced;
- What metadata, if any, should be produced;
- The time within which the information will be produced;
- The methods for asserting or preserving (a) claims of privilege and/or work product protection and (b) the confidential and/or proprietary status of information;
- Whether allocation among the parties of the expense of production is appropriate; and
- Any other issue related to the discovery of ESI.

Mass. R. Civ. P. 26(f)(2)(C). An ESI plan is to be filed with the court within fourteen (14) days of the conference. *Id.* Thereafter, the court may order discovery of inaccessible electronically stored information if the party requesting discovery shows that the likely benefit of its receipt outweighs the likely burden of its production, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. Mass. R. Civ. P. 26(f)(4)(C). The court may also set conditions for the discovery of inaccessible electronically stored information, including allocation of the expense of discovery. Mass. R. Civ. P. 26(f)(4)(D). The court may also limit the frequency or extent of electronically stored information discovery, even from an accessible source, in the interests of justice. Factors bearing on this decision are similar to those considered in other states, and include the following:

- Whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive;
- Whether the discovery sought is unreasonably cumulative or duplicative;
- Whether the party seeking discovery has had ample opportunity by

> Unfortunately, in the context of litigation, Plaintiffs' attorneys generally do not limit their request to the information required to be maintained in accordance with the HITECH Act or the rules of proportionality. Further, EMR systems are generally designed to be compliant with the HITECH Act, not the whims and demands of the Plaintiff's bar.

discovery in the proceeding to obtain the information sought; or

- Whether the likely burden or expense of the proposed discovery outweighs the likely benefit.

Mass. R. Civ. P. 26(f)(4)(E).

Dealing with EMR and Audit Trail Discovery Requests in the Context of Medical Malpractice Litigation

Unfortunately, in the context of litigation, Plaintiffs' attorneys generally do not limit their request to the information required to be maintained in accordance with the HITECH Act or the rules of proportionality. Further, EMR systems are generally designed to be compliant with the HITECH Act, not the whims and demands of the Plaintiff's bar. To that end, demands are frequently made for more detailed audit trails, which include the precise portions of the medical record accessed, as well as the specific activity performed when the chart was accessed. Requests may also be made for the specific computer or terminal from which the EMR was accessed. However, under both the HITECH Act, and the proportionality standards set forth in most states' Rules of Civil Procedure, hospitals and other healthcare providers are not required to create an audit trail that does not exist, and are not required to implement systems that track more information than that which is required by the Act. This, however, often frustrates Plaintiff's counsel and, in some instances, leads to unnecessary discovery and motion practice.

If your practice involves the representation of hospitals and/or other healthcare providers, it is important that you and your clients understand how to manage requests for EMR and audit trail information. First and foremost, it is vital that your clients have systems in place that accurately track and store the information required by the HITECH Act. Additionally, hospitals and other healthcare providers should have policies and procedures in place related to the maintenance and storage of EMR and audit trail information.

Hospitals and healthcare providers must also be cognizant of the impact that transition to new or different EMR systems may have on the storage of data, including audit trail information. Prior to making a transition from one EMR system to another, it is imperative that hospitals and healthcare providers take steps to ensure that EMR from the old system is preserved and remains accessible after transition to a new system. This includes audit trail data that may need to be accessed years after the transition is completed. Failure to do so can result in spoliation arguments and possible sanctions in relation thereto.

An additional issue often encountered with regard to the production of audit trails is that they are not necessarily intended to be printed, analyzed, and used in the context of litigation. As such, they often include multiple pages of columns that may be difficult to decipher, particularly in the context of litigation. This can frustrate counsel, leading them to believe that something is being hidden in the records, either intentionally or unintentionally.

In addition, all employees should be generally familiar with the Act, and the fact that each entry into a patient's EMR is logged and tracked; employees should be reminded that they must have a legitimate basis for entering a current or former patient's EMR.

From a litigation practice perspective, attorneys must be aware of both the requirements of the HITECH Act and their state or local rules related to the production of electronically stored information. They must also be familiar with their hospital's EMR systems, and their policies and procedures related thereto. It is critical that the appropriate objections to overzealous, unreasonable, and harassing request related to EMR and audit trail information be lodged and preserved, and that attorneys be prepared to educate the court and the Plaintiff's attorney as to what is and, more importantly, what is not required to be maintained in compliance with the HITECH Act. ■

About the AUTHORS

Nicole C. Freiler is Of Counsel in the Healthcare and Long-Term Care Litigation Group of *Burns White, LLC*, where she focuses her practice on defending medical professionals, healthcare institutions, and non-profit organizations. Ms. Freiler is a member of the firm's Rapid Response and Incident Management Team, working with a group of skilled attorneys who serve as the front line of defense and support in protecting clients facing police or regulatory investigations, including sexual misconduct, physical abuse, and neglect. Ms. Freiler may be reached at ncfreiler@burnswhite.com.

Megan B. Kelleher is an Associate in the Healthcare and Long-Term Care Litigation Group of *Burns White, LLC*, where she focuses her practice on defending medical professionals, healthcare institutions, and nursing homes. Ms. Kelleher may be reached at mbkelleher@burnswhite.com.

"Signs" of the Times: An End to "Long-Haired Freaky People Need Not Apply"?

Sean C. Pierce | *Harbuck Keith & Holmes LLC*

Coming on the heels of United Parcel Service, Inc.'s seminal case on pregnancy discrimination, *Young v. United Parcel Service, Inc.,* 135 S. Ct. 1338 (2015), the world's largest package delivery company was recently also ensnared in a religious discrimination claim. UPS agreed to pay $4.9 million and provide other relief to settle a class-action religious discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC). The suit was resolved with a five-year consent decree entered in Eastern District of New York on December 21, 2018. *EEOC v. United Parcel Service, Inc.,* Civil Action No. 1:15-cv-04141.

The EEOC alleged UPS prohibited male employees in supervisory or customer-contact positions, including delivery drivers, from wearing beards or growing their hair below collar length. The EEOC also alleged that UPS failed to hire or promote individuals whose religious practices conflict with its appearance policy and failed to provide religious accommodations to its appearance policy at facilities throughout the U.S. The EEOC further alleged that UPS segregated employees who maintained beards or long hair in accordance with their religious beliefs into non-supervisory, back-of-the-facility positions without customer contact.

These claims fell within the EEOC's animosity to employer inflexibility as to religious "dress and grooming" practices, examples of which include wearing religious clothing or articles (e.g., a Muslim hijab (headscarf), a Sikh turban, or a Christian cross); observing a religious prohibition against wearing certain garments (e.g., a Muslim, Pentecostal Christian, or Orthodox Jewish woman's practice of not wearing pants or short skirts), or adhering to shaving or hair length observances (e.g., Sikh uncut hair and beard, Rastafarian dreadlocks, or Jewish peyes (sidelocks)).

The EEOC filed this suit to end those longstanding practices at UPS, alleging that they violated Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating against individuals because of their religion, and requires employers to reasonably accommodate an employee's religious beliefs unless doing so would impose an undue hardship on the employer. The EEOC claimed UPS's strict (i.e., inflexible) appearance policy has operated to exclude Muslims, Sikhs, Rastafarians, and other religious groups from equal participation and advancement in the workforce for many years.

Under the terms of the consent decree, UPS will pay $4.9 million to a class of current and former applicants and employees identified by the EEOC. As of press time, the EEOC was still seeking class members for that settlement. In addition to the monetary relief, UPS will amend its religious accommodation process for applicants and employees, provide nationwide training to managers, supervisors, and human resources personnel, and publicize the availability of religious accommodations on its internal and external websites. UPS also agreed to provide the EEOC with periodic reports of requests for religious accommodation related to the appearance policy to enable the EEOC to monitor the effectiveness of the decree's provisions.

What the U.S. Supreme Court Says

Religious discrimination cases have been on the rise in recent years and employers need to be prepared for them. The U.S. Supreme Court has shown no hesitation in taking up cases of religious discrimination and accommodation. The seminal case is *EEOC v. Abercrombie & Fitch Stores, Inc.,* 135 S.Ct. 2028 (2015). That U.S. Supreme Court case held that a rejected applicant for employment must only show that his or her need for religious accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of the applicant's need. The applicant, a practicing Muslim, consistent with her understanding of her religion's requirements, wore a headscarf while interviewing for a position with a retailer. However, she was rejected in accordance with the employer's "Look Policy," which banned all headgear, religious or otherwise, from being worn on duty. Otherwise, she appeared qualified for the position, according to the interviewer. The employer failed to engage in the interactive accommodation process and was found liable for its failure to do so and rejection of the applicant out of hand.

What the EEOC Says

The EEOC takes the position that Title VII prohibits the treatment of applicants or employees differently based on their religious beliefs or practices (or lack thereof) in any aspect of employment; harassment of employees on the basis of their religious beliefs or practices (or lack thereof) (or the

Religious discrimination cases have been on the rise in recent years and employers need to be prepared for them. The U.S. Supreme Court has shown no hesitation in taking up cases of religious discrimination and accommodation.

religion or religious beliefs of people with whom the employee associates); the denial of a requested reasonable accommodation of an applicant or of an employee's sincerely-held religious belief or practice (or lack thereof) if the accommodation will not impose more than a *de minimis* cost or burden on the employer's business operations; and retaliation against an applicant or employee who has engaged in protected activity related to religion.

UPS Is Not Alone

UPS is not alone. Just in 2019, the EEOC achieved several substantial settlements in religious discrimination cases. Halliburton agreed to pay $275,000 and to submit to a three-year consent-decree for national origin and religious discrimination on behalf of Syrian and Indian nationals in the Northern District of Texas (*EEOC v. Halliburton Energy Services, Inc.,* Civil Action No. 3:18-cv-01736). The EEOC also successfully pursued claims against Century Park Associates, LLC, d/b/a Garden Plaza of Greenbriar Cove, an assisted living facility in Tennessee, who agreed to pay $92,000 and submit to a two-year consent decree, after requiring two employees to work on their Sabbath in violation of their religious beliefs. The two employees, members of the Seventh-Day Adventist Church, observe the Sabbath from sundown Friday to sundown Saturday. Although the employees offered to work on Sundays, Century told the employees they had to agree to work on Saturdays as part of a new work schedule. When the two employees refused to work on Saturdays due to their religious beliefs, Century asked them to resign, which they did. *EEOC v. Century Park Associates, LLC, d/b/a Garden Plaza at Greenbriar Cove*, Civil Action No. 1:17-cv-00231, in the Eastern District of Tennessee.

Hospitals have been particularly attractive targets. The EEOC settled for $75,000 with Saint Thomas Health (part of Ascension) in the Middle District of Tennessee after the system demanded that an employee receive a flu shot despite his religious beliefs (in *EEOC v. Saint Thomas Health*, Civil Action No. 3:18-cv-00978). The EEOC also settled for $74,418 with Memorial Healthcare in the Eastern District of Michigan after it refused to hire a medical transcriptionist because of her religious beliefs against receiving flu shots and refusing to accommodate those beliefs (*EEOC v. Memorial Healthcare*, Civil Action No. 2:18-cv-10523). The EEOC settled for $40,000 with American Medical Response of Tennessee, Inc. in the Western District of Tennessee after it refused to continue to allow an employee who was a Jehovah's Witness to take Sundays off to worship (*EEOC v. American Medical Response of Tennessee*, Civil Action No. 2:17-cv-02725).

It is worth remembering that a $300,000 settlement and consent decree occurred in 2016 when the EEOC sued Saint Vincent Health Center, a part of the Allegheny Health Network, claiming that the hospital had unlawfully fired six employees who were denied a religious exemption from the hospital's mandatory flu vaccine policy (Civil Action No. 1:16-cv-234 in the Western District of Pennsylvania), a hot topic in the midst of flu season and a coronavirus pandemic. The Saint Vincent case was particularly damaging for the employer because it had granted 14 vaccination exemption requests based on medical reasons while denying all religion-based exemption requests.

Even before there were biometric privacy laws in some states, religious discrimination cases were premised on them. In *EEOC v. Consol Energy, Inc.*, 860 F.3d 131 (4th Cir. June 12, 2017), the Fourth Circuit Court of Appeals affirmed a $586,861 jury verdict ($150,000 in compensatory damages and close to $450,000 in economic damages) against Consol Energy in a religious discrimination case brought by the EEOC. The employee had worked as a general inside laborer at the companies' mine in Mannington, W.V., for over 35 years when the mining companies required employees to begin using a newly installed biometric hand scanner to track employee time and attendance. The employee informed company officials that he believed that submitting to biometric hand scanning violated his sincerely-held religious beliefs as an Evangelical Christian. He also wrote a letter to company officials explaining his beliefs about the relationship between hand-scanning technology and the "Mark of the Beast" and the Anti-Christ discussed in the New Testament's Book of Revelation, and requesting an exemption from the hand scanning

— Continued on next page

based on his religious beliefs. The EEOC successfully proved that the employee was forced to retire (under protest) because the companies refused to provide any reasonable accommodation for his religious objection to the hand scanner, when they did so for other employees, including those with hand injuries.

And the House Loses

The EEOC is neither always right nor always successful, however. You are much less likely to hear of the EEOC's losses, but they have occurred as well. In *EEOC v. North Memorial Health Care, Inc.*, 2019 U.S. App. LEXIS 4112 (8th Cir. Feb. 11, 2019), the EEOC alleged that North Memorial engaged in retaliation by rescinding the conditional offer of employment to a nurse who is a Seventh Day Adventist. The District Court granted the employer's motion for summary judgment and the Eighth Circuit affirmed the District Court's ruling on appeal.

Despite learning that a registered nurse working night shifts in the employer's facility was required to work eight-hour shifts every other weekend, the employee did not disclose nor volunteer that her religion would prevent her from working from sundown on Fridays to sundown on Saturdays. The employer gave the employee a conditional offer of employment as a registered nurse, which she accepted. When the employee went to the hospital to complete her pre-employment paperwork, she disclosed for the first time her work-related restrictions due to her religion. The employee stated that she would find replacements for her on Friday nights when she was unable to work. However, the employer rescinded the offer of employment, and offered the opportunity for the employee to apply to other positions that would not require working every other weekend.

The Eighth Circuit explained that the rule for disparate treatment claims based on a failure to accommodate a religious practice was straightforward, i.e., an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions. The Eighth Circuit found that the employee did not complain that the employer unlawfully refused to accommodate; rather, she requested an accommodation, and it was undisputed that the employer's practice was to consider such requests on a case-by-case basis (i.e., make the effort and do their part in the interactive process). After she made the request and no mutually acceptable accommodation was reached, the employer had exhausted its obligations under Title VII and her case was dismissed.

In *EEOC v. JBS USA, LLC*, 2019 U.S. Dist. LEXIS 168558 (D. Colo. Sept. 30, 2019), the EEOC brought an action alleging that the employer, a meat packing company, discriminated against its several hundred Muslim employees on the basis of religion by engaging in a pattern or practice of retaliation, discriminatory discipline and discharge, harassment, and denying its Muslim employees reasonable religious accommodations. The EEOC alleged that the employer failed to accommodate the Muslim employees' need to leave the production line to pray at or near sundown. The employees and JBS were unable to come to an agreement, leading to the suspension and termination of a large number of Muslim employees.

The Court found that the EEOC was unable to show that workers suffered adverse employment actions as a result of the employer's asserted policy of denying prayer breaks. The Court reasoned that there was no evidence that any reprimanded employees were ultimately suspended or terminated as a result of verbal or written warnings. The Court held that the EEOC failed to prove its claim that the employer's discipline policy constituted an unlawful pattern or practice of discrimination. The Court further determined that the EEOC's claims that the employer disciplined Muslim workers more harshly than their non-black, non-Muslim colleagues during Ramadan in 2008 were without merit. The Court also ruled that the EEOC failed to establish that the employer's actions resulted from pretext or any discriminatory animus.

The Court opined that it would not draw an inference of discrimination based on the employer's actions because the evidence, as a whole, did not indicate that the employer was motivated by bias as opposed to other factors, such as the employer's credible and legitimate concern about work stoppages from the employees walking out during Ramadan. Because the Court found that the employer disciplined employees for engaging in a work stoppage, the Court opined that the employer did not seek to retaliate for the Muslim employees' accommodation requests.

Conclusion

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees based on religion. The law requires employers to provide reasonable accommodation for an employee's sincerely-held religious beliefs and practices, unless doing so would cause an undue hardship. Employers who have dress codes, uniform policies, or appearance/grooming policies must consider all requests for accommodation based on sincerely-held religious beliefs. In most cases, allowing employees to wear certain clothing or wear their hair in a certain manner will not cause undue hardship. In the UPS

case above, having a beard did not affect any employee's ability to interact with customers. The policy was simply based on UPS's preference. Therefore, the employer had a legal responsibility to provide accommodation to its policy for employees whose religion mandates growing a beard. That being said, a grooming requirement, such as shaving beards, may be necessary for a job. For example, an employer may require all workers to shave long beards if employees work with equipment that could catch their beard and lead to severe injury or death. However, a food services employer should allow employees whose religion requires them to have long beards the accommodation of wearing a beard net. Remember, it is illegal for employers to retaliate against an employee for requesting a religious accommodation. Always consider all accommodation requests, and never take negative employment action against an employee for requesting an accommodation. ■

About the **AUTHOR**

Sean C. Pierce is one of the founding attorneys of *Harbuck Keith & Holmes LLC* and practices across Alabama and the Southeast from its Birmingham office. Mr. Pierce is rated AV Preeminent® by Martindale-Hubbell and has over 18 years of experience in handling labor and employment, professional liability (including E&O, D&O and malpractice), and cyber security and data privacy and protection claims and cases on behalf of his clients, with an emphasis on complex litigation and class actions. Mr. Pierce may be reached at spierce@hkh.law.

SURVEY OF LAW POTPOURRI

Editor's Note: We received a substantial number of case summaries from across the country from the Legal Committee and are in the process of editing those to publish them in the Survey of Law. We received only a few from other committees and we are publishing those here so that the effort of those authors is recognized If we receive sufficient submissions from the other committees to justify publication, we will publish them as originally intended.

EMPLOYMENT PRACTICES LIABILITY

Sex Discrimination Claim by Accused Sexual Harasser Survives Motion to Dismiss

Robert G. Chadwick, Jr. | *Seltzer, Chadwick, Soefje & Ladik, PLLC*

In *Menaker v. Hofstra University*, the plaintiff, a male former tennis coach, sued Hoftstra for sex discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), the New York State Human Rights law, and the New York City Human Rights Law, after being terminated in response to a sexual harassment allegation by a female student. The U.S. District Court for the Eastern District granted the university's motion to dismiss. The plaintiff appealed.

The Second Circuit reversed. The Court held that "[w]here a university (a) takes an adverse action against an employee, (b) in response to allegations of sexual misconduct, (c) following a clearly irregular investigative or adjudicative process, (d) amid criticism for reacting inadequately to allegations of sexual misconduct by members of one sex, these circumstances support for a *prima facie* case of sex discrimination."

The Second Circuit further held that "[w]here (a) a student files a complaint against a university employee, (b) the student is motivated, at least in part, by invidious discrimination, (c) the student intends that the employee suffer an adverse employment action as a result, and (d) the university negligently or recklessly punishes the employee as a proximate result of that complaint, the university may be liable under Title VII" under the "cat's paw" theory.

Based upon these two tests, the Second Circuit found the plaintiff's complaint sufficiently stated a claim for sex discrimination. ■

Menaker v. Hofstra University, 935 F.3d 20 (2nd Cir. 2019)

Perceived Obesity Discrimination Claim Survives Summary Judgment Under Washington Law

Robert G. Chadwick, Jr. | *Seltzer, Chadwick, Soefje & Ladik, PLLC*

In *Taylor v. BNSF*, the plaintiff, a job applicant, was denied employment as an Electronic Technician based upon an initial medical exam which cited his body mass index (BMI) over 40. The plaintiff sued under the Washington Law Against Discrimination (WLAD). The U.S. District Court for the Western District of Washington granted summary judgment in favor of BNSF on the plaintiff's claim of disability discrimination on account of his perceived disability. The plaintiff appealed.

The Ninth Circuit certified to the Washington Supreme Court the following question: "Under what circumstances, if any, does obesity qualify as an "impairment" under

— *Continued on next page*

the [WLAD]…?" On July 11, 2019, the Washington Supreme Court answered that "obesity always qualifies as an impairment" under the WLAD. *Taylor v. Burlington N.R.R. Holdings, Inc.*, 444 P.3d 606, 608 (Wash. 2019).

With the Washington Supreme Court opinion in hand, the Ninth Circuit found the district court had erred in granting summary judgment to BNSF. The court specifically found a reasonable jury could find (1) the plaintiff was perceived to have a disability (obesity); (2) that he was able to perform the essential functions of the job; and (3) that the perception of his disability was a substantial factor in BNSF's decision to deny him employment. ■

Taylor v. BNSF, No. 16-35205, 2020 WL 496312 (9th Cir. Jan. 30, 2020).

About the **AUTHOR**

Robert G. Chadwick Jr. is a managing member of *Seltzer Chadwick Soefje & Ladik, PLLC*, and is based in the firm's Dallas office. He is Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization. Mr. Chadwick may be reached at rchadwick@realclearcounsel.com.

HEALTHCARE MALPRACTICE

Physician-Patient Relationship is Not Necessary to Maintain Medical Malpractice Action Under Minnesota Law

Nicholas Rauch | *Larson King*

In *Warren v. Dinter*, the Minnesota Supreme Court examined whether or not a physician-patient relationship was necessary to assert claims for medical malpractice. In this case, Warren was a 54-year-old female who presented to a health clinic and complained of abdominal pain, fever, and chills. The nurse practitioner on duty ordered a series of tests, which showed that Warren had an unusually high level of white blood cells. The results led the nurse practitioner to believe that Warren had an infection and required hospitalization. The nurse practitioner contacted the local hospital and spoke with the on-call physician, Dinter. Each provider was employed by a different healthcare system. Both providers spoke over the phone to determine if hospitalization was necessary. Dinter disagreed that hospitalization was necessary and opined that the rise in white blood cells may have been caused by Type-2 diabetes. After seeking an additional opinion from a colleague, the nurse practitioner also agreed that hospitalization was unnecessary. The nurse practitioner diagnosed Warren with Type-2 diabetes, prescribed her pain medication, and scheduled a follow up appointment. Three days later, Warren was found dead in her home. An autopsy revealed that the cause of death was sepsis, caused by an untreated staph infection.

Warren's son brought this suit against Dinter and his healthcare system, alleging that Dinter was professionally negligent in Warren's treatment regarding his advice against Warren's hospitalization. Dinter moved for summary judgment, arguing that he owed no duty to Warren because he merely provided his thoughts on hospitalization and never provided treatment to her as a patient. The district court granted Dinter's summary judgment and held that the relationship between Dinter and the nurse practitioner amounted to an informal conversation between two colleagues that did not create a physician-patient relationship with Warren. Warren's son appealed this ruling to the Minnesota Court of Appeals, who affirmed.

The Minnesota Supreme Court reviewed this issue, recognizing that other jurisdictions have held that a physician-patient relationship is a necessary element for all healthcare malpractice claims. The Minnesota precedent on this issue showed that when a patient-physician or attorney-client relationship did not exist, the Court's analysis focused on the foreseeability of harm without regard to the medical or legal relationship. The Court reaffirmed their previous rulings in *Skillings v. Allen*, 173 N.W. 633 (Minn. 1919) and *Molloy v. Meier*, 679 N.W.2d 711 (Minn. 2004) that a duty arises, between a physician and a non-patient, when a physician provides medical advice and the non-patient reasonably relies on that advice. The physician's duty arises from the foreseeability of harm. The Court reasoned that this same duty applied to a physician's advice to not admit Warren to the hospital, as it was foreseeable that Warren would rely on the overall decision. Two dissenting judges disagreed and argued that it was not reasonably foreseeable that Warren would rely on Dinter's opinions during a short phone call, in which Warren was not a party. The Court disagreed and held that, when making patient admission decisions, all hospitalists have a duty to abide by the applicable standard of care regardless of the patient-physician relationship. Applying this ruling, the Court reversed the decision of the Court of Appeals and remanded for further proceedings. ■

Warren v. Dinter, 926 N.W.2d 370 (Minn. 2019).

Licensing Board Had Authority to Discipline Retired Psychologist with Expired License

Nicholas Rauch | *Larson King*

In *Matter of Thompson*, the Minnesota Court of Appeals reviewed whether the current language of the Minnesota Psychology Practice Act (MPPA) allowed the Board of Psychology to discipline a licensee when his license to practice was expired. Thompson was first licensed in 1985 as a psychotherapist. From 2003 to 2005, Thompson treated a 16-year-old female patient. In 2016, when the patient was an adult, the Minnesota Board of Psychology received multiple complaints that she was sexually abused by Thompson during her years of treatment. The Board conducted an investigation and served Thompson's attorney with notice of a contested hearing. The notice was served on May 30, 2017, while Thompson's license was active. However, on June 30, 2017, Thompson's license expired. On August 2, 2017, Thompson's attorney appeared before the Board and asserted that he did not have authority to accept service on Thompson's behalf. The Board personally served Thompson on August 4, 2017. Thompson and his attorney made multiple attempts to dismiss the proceeding by arguing that the Board lacked jurisdiction over the action because Thompson's license was expired and that the proceeding was time-barred. The Administrative Law Judge (ALJ) recommended that the Board proceed with a disciplinary hearing.

In October 2018, after a three-day evidentiary hearing, the ALJ issued a final recommendation concluding that the Board satisfied its burden of proof in regards to its factual allegations. In December 2018, the Board issued an order to revoke Thompson's license to practice psychology. Thompson appealed this order to the Minnesota Court of Appeals. Thompson argued that the Board did not have authority to discipline him because his license had already expired before the Board personally served him with notice of the contested case hearing. Thompson also argued he could not be disciplined because he was not an "applicant" or "licensee", as defined by Minn. Stat. § 148.941 (2019). As an issue of first impression, the Court examined whether or not Thompson was a "licensee" when the Board personally served him with notice of the contested case hearing and when the board imposed discipline.

> The Court held that the rules regarding license termination indicate that the Board's disciplinary authority was meant to extend to psychologists whose licenses have been terminated or expired.

Minn. Stat. § 148.941 provides the Board with authority to impose discipline on "an applicant or licensee…" if they engaged in statutorily defined misconduct. "Licensee" is further defined as "a person who is licensed by the board." Minn. Stat. § 148.89, subd. 4 (2019). However, the MPPA does not further elaborate on this definition. The Board argued that Minn. Stat. § 148.941 should be interpreted to allow the Board to discipline licensees for conduct occurring while licensed, even if their license is terminated or expired. The Court reasoned that, although the MPPA does not expressly define this scenario, other rules regarding license termination allow the Board to retain jurisdiction over a licensee if the Board subsequently served the licensee with notice of a disciplinary hearing. (See Minn. R. 7200.3200-.3400 (2019)). The Court held that the rules regarding license termination indicate that the Board's disciplinary authority was meant to extend to psychologists whose licenses have been terminated or expired. Therefore, the Court determined that Thompson was a licensee when he was served with notice of a contested-case hearing and the Board's jurisdiction extended to when it imposed discipline. ■

Matter of Thompson, 935 N.W.2d 147 (Minn. App. 2019).

About the **AUTHOR**

Nick Rauch is an attorney at *Larson King* in St. Paul, Minnesota where he focuses on medical malpractice, medical licensing liability, and trucking and transportation claims. He is licensed in Minnesota, Iowa, North Dakota, and the Standing Rock Sioux Tribal Court. Nick also serves on the PLDF Healthcare Malpractice Claims Committee. Mr. Rauch may be reached at nrauch@larsonking.com.

Practicing Well: Mapping Well-Being Goals

Patty Beck | *Minnesota Lawyers Mutual Insurance Company*

January is a time when lawyers and legal professionals think about goals for the year—billable hour targets, CLE presentations, volunteer commitments, etc. It is also a time for setting personal goals for the year. The top New Year's Resolutions typically relate to diet, exercise, and spending more time with family and friends. These are all fantastic well-being goals, but despite how basic they may seem, life experience shows us how difficult it is to achieve them (studies also show that most people give up before February). Research suggests this is due, in large part, to the goals being too vague (i.e., "eat healthy" and "exercise more"), people getting discouraged if they don't see quick results, and making goals that we are not truly invested in achieving. So, what can we do?

Map it out! To be successful, you need a game plan with specific ways to reach your goals. Start by spending 15 minutes identifying goals you are passionate about and concrete ways to achieve them. Equally important is tracking your progress—how else do you know whether you are on pace to reach your goal? Bonus tip: maximize your success by finding ways to achieve multiple goals with the same activity. Below is an example of how I applied this strategy to my two main goals for the year: 1) exercise at least two days per week, and 2) take at least two trips with my husband.

Exercise was never difficult for me growing up because I was always involved in year-round sports. As an adult, it has become extremely difficult to maintain a consistent workout schedule given my personal and work commitments. To address this, I plan to run at least one race each quarter this year so that I am always training for something (and thereby required to workout a few days per week). I am currently registered to run a half marathon, 10M, 10K, and a few 5Ks this year. For anyone who participated in the morning jogs during the 2019 Annual Meeting in Chicago, you know this goal is a big one for me!

Regarding traveling with my husband, my wedding gift to him was a map of the MLB baseball parks with the promise of visiting them throughout our lives. We were married two years ago and, spoiler alert: we have not visited a single one despite always saying, "we should do that!" So, on January 1, I reviewed the Minnesota Twins schedule and asked my husband to pick two stadiums that he wants to see the Twins play at this year. After a bit of debate, he picked the Los Angeles Angels stadium and the Detroit Tigers stadium. Now for the bonus —after he made those selections, I researched available races being held during those weekends, and am now registered to run a 10K in Los Angeles and a 5K in Detroit!

As I write this, it is officially February and I am still working toward these goals (and am optimistic in my ability to achieve them!). I picked goals that are challenging, fun, and that I genuinely care about. I am also tracking my progress on a white board in my house where I can watch my progress develop each week.

Although people frequently set their goals at the beginning of the year, well-being is something you can (and should) work toward throughout the entire year. If you find that setting a goal for the entire year is too daunting, set it on a quarterly, monthly, or even a weekly basis. If you set a goal and give up on it, don't be defeated—set a new goal with a different way to reach it. Small changes yield the greatest success, so get your game face on and map out your well-being goals! ■

Although people frequently set their goals at the beginning of the year, well-being is something you can (and should) work toward throughout the entire year. If you find that setting a goal for the entire year is too daunting, set it on a quarterly, monthly, or even a weekly basis.

About the AUTHOR

Patty Beck is a Claim Attorney with *Minnesota Lawyers Mutual Insurance Company*, where she manages litigation involving legal malpractice claims, advises attorneys facing existing and potential ethical dilemmas, and resolves complex pre-suit malpractice claims on behalf of MLM insureds. She is Co-Chair of the MSBA's Well-Being Committee and frequently speaks on topics related to ethics, legal malpractice, and attorney wellness. Ms. Beck may be reached at pbeck@mlmins.com.

PLDF Amicus Program: a Little-Used Appellate Luxury

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

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

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

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

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

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

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

PLDF is proud of its amicus participation to date. *See Frederick v. Wallerich*, 907 N.W.2d 167 (Minn. 2018) (addressing whether multiple acts by the same lawyer trigger separate LPL claims); *Villani v. Seibert*, 639 Pa. 58, 159 A.3d 478 (2017) (ruling a statute allowing a cause of action for wrongful use of civil proceedings does not infringe on the judiciary's constitutional power); and *Guzick v. Kimball*, 869 N.W.2d 42 (Minn. 2015) (holding the plaintiff's expert's affidavit of merit was insufficient to establish proximate causation). Let's add to the list.

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

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

offerings which make the PLDF a truly different group than some of the other professional liability organizations we all belong to.

For starters, membership in the PLDF is free for claims professionals, which provides industry members access to PLDF publications such as the *Professional Liability Defense Quarterly* and the new PLDF *Survey of Law*, year-round practice committee events, reduced price attendance at the Annual Meeting, and opportunities to obtain CE/CLE credit across numerous jurisdictions. Multiple claims professionals have told me that they find working with PLDF's members valuable as it serves not only as an indication of competence within the defense sphere, but also provides a greater measure of assurance that defense counsel will maintain the level of accountability insurers demand. Others enjoy the opportunity that attending the Annual Meeting gives them to spend time with counsel they already work with, and scout for prospective counsel among attorney attendees without being subjected to the "feeding frenzy"-type atmosphere that they have encountered at gatherings of other defense-oriented groups. Nearly one-third of the PLDF's more than 500 members are industry professionals, and we are always happy to welcome more.

For defense counsel, membership in the PLDF provides not only the same benefits as to insurance industry members, but additionally provides access to a dedicated network of professional liability defense counsel and claims professionals across the country—a hugely valuable resource both for members seeking competent counsel in other states and as a source of referrals from other members—for a reasonable annual fee.

Among some of the subtler benefits of PLDF membership, however, is the nearly unparalleled access to opportunities to assume leadership roles, publish high-quality articles in the PLDF's highly-regarded *Quarterly*, and develop and present panels at the Annual Meeting. For both industry and attorney members alike, firms and carriers generally like to see their representatives engaging in activities which substantially contribute back to the professional liability community. PLDF members may contribute original articles of interest for inclusion in the *Quarterly* at any time by submitting them either to Sandra Wulf (sandra@pldf.org) or to the *Quarterly*'s Editor-In-Chief, Pat Eckler (deckler@pretzel-stouffer.com). The call for speaker proposals for the Annual Meeting was issued on January 22nd, and all members are encouraged to put together a panel on a topic of interest and submit it to Sandra Wulf by March 2, 2020 for consideration for inclusion in this year's upcoming Annual Meeting in Nashville. Any members interested in either leading one of the PLDF's eight practice area committees or getting involved as a director of the PLDF will have their opportunity this summer to do so, as we will begin soliciting applications for new leaders (who will take office at the Annual Meeting) at that time. For presentations which you may not want to designate for the Annual Meeting, members should always feel free to contact the leaders of their practice committee to perhaps consider hosting a committee-level presentation instead.

Members can also take advantage of the publicity opportunities being active in the PLDF can provide. Published articles in the *Professional Liability Defense Quarterly* are posted in searchable form on the PLDF website, and are frequently republished on the PLDF LinkedIn page. And speaking of the PLDF LinkedIn page, we are always looking for reasons to celebrate our members. If you have a recent case of interest, a big litigation victory, or other news which you would like to share with a larger audience, please let Sandra Wulf know!

Another resource which goes—surprisingly—largely underused is the PLDF's amicus program. If you have a case on appeal with questions of law important to the professional liability defense bar, why not submit it to the PLDF for consideration of an amicus brief? With dedicated funding set aside for the program, the PLDF is able to give you a little extra muscle at the appellate table to try and help shape the law surrounding the professional liability issues that are common to its member's practices.

Finally, as many members who regularly attend the Annual Meeting can attest, the PLDF offers remarkable opportunities to develop long-lasting professional and personal relationships as well as receive high-quality CE/CLE in a fun environment. When I first attended the Annual Meeting, it was mostly to see what the PLDF was about and meet my annual education requirements. But I, like others, quickly realized that the Annual Meeting was a great opportunity to meet new defense counsel and industry professionals, spend quality time with claims professionals I already work with, and develop a national network of other attorneys I trust enough to refer clients to when they require counsel in jurisdictions where I do not practice (and become part of that network for other member to use). Many attendees return year after year, and the Annual Meeting has proven to be a "can't miss" event on many calendars.

There are additional benefits to membership that I am sure I am overlooking. In fact, I regularly ask active members both what drew them to the PLDF initially and what spurred them to get actively involved in the organization and nearly every time I get an answer I didn't expect. The common thread, however, seems to be that membership is valuable

but, like most things worth having, what you get out of it tends to correlate with what effort you put in. Members who take advantage of the opportunities offered by the PLDF seem, at least anecdotally, to reap the most benefit from membership.

On that note, I encourage each of you to take full advantage of the benefits your PLDF membership offers, and to let me, your committee leaders, or any other member of the PLDF board know if there is anything we can do to make your membership more valuable to you. I would also suggest that if you find value in the PLDF that you encourage other professional liability colleagues to consider joining as well. Our goals as an organization include raising the bar for the professional liability defense community, and we are always pleased to be able to extend that reach to new members.

With that, I will sign off for now. I wish the best of luck to each of you in the new year, and I hope to see each of you at the Annual Meeting September 30 – October 2 in Nashville!

About the **AUTHOR**

Lisa Tulk of *Kessler Collins, P.C.* in Dallas is the current President of PLDF. Her practice focuses on the counseling and defense of architects, engineers, financial advisory firms and accountants. Ms. Tulk may be reached at ltulk@kesslercollins.com.

Professional Liability Defense Federation
2019-2020 Members of the Board of Directors & Staff

Lisa Tulk
President
Kessler Collins, P.C.

Donald Patrick Eckler
President Elect
Pretzel & Stouffer, Chartered

Andrew R. Jones
Treasurer
Furman Kornfeld & Brennan, LLP

Kathleen V. Buck
Secretary
Minnesota Lawyers Mutual Insurance Company

David C. Anderson
Collins Einhorn Farrell P.C.

Thomas D. Jensen
Lind, Jensen Sullivan & Peterson, P.A.

Peter J. Biging
Goldberg Segalla, LLP

Glen R. Olson
Long & Levit LLP

Louie Castoria
Kaufman Dolowich & Voluck LLP

Paul Ruiz
Adventist Healthcare

Dan Church
Morrow Willnauer Church, LLC

Molly Teigen
Minnesota Lawyers Mutual Insurance Company

Keira Goral
QBE North America

Jason Jobe
Immediate Past President
Thompson Coe Cousins & Irons, LLP

Sandra J. Wulf, CAE, IOM
PLDF Managing Director

Sara Decatoire, CAE, IOM
PLDF Deputy Director

PROFESSIONAL LIABILITY
DEFENSE FEDERATION
PO Box 588 | Rochester, IL 62563-0588