

American Bar Association



The BRIEF

Tort Trial & Insurance Practice Section
Spring 2016 Vol. 45 • No. 3



ETHICAL LIMITS IN SETTLEMENT NEGOTIATIONS

Also in This Issue:

Workers' Compensation
Alternative Benefit Plans
Federal Preemption in
Aviation
Aviation Litigation in
Foreign Venues
Mistakes in Mediation
Legal Malpractice and
Statutes of Limitations

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The Brief Editorial Policy

The Brief is the American Bar Association's magazine for lawyers practicing tort and insurance law. It is published quarterly by ABA Publishing for the Tort Trial & Insurance Practice Section (TIPS) of the ABA. TIPS brings together plaintiffs attorneys, defense attorneys, and insurance and corporate counsel for the exchange of information and ideas. *The Brief* facilitates these goals by exploring all aspects of tort and insurance law, including the many facets of trial practice essential to our profession.

As tort and insurance lawyers, we have an obligation to understand and improve all aspects of our liability and adversary systems. Increasing concerns about their efficacy and validity challenge us to respond. We must evaluate and improve these processes in order to provide all who deal with our legal system an effective means of resolving their problems.

Through publication of articles relating to important developments in tort and insurance law and practice, *The Brief* seeks to enhance the quality of law delivered by its readers as well as to stimulate thought, discussion, and action to improve the basic tort and insurance systems that are at the heart of our way of law.

The ideas expressed in *The Brief's* articles do not necessarily reflect the official policy of the Tort Trial & Insurance Practice Section or the ABA and should not be so construed. The editorial board encourages expression of the considered opinions of our contributors, some of which are controversial and will not necessarily meet with agreement from all of our readers. We do, however, strive for balance and always attempt to cover all sides of an issue or provide the opportunity for a timely response.

We seek to publish articles that are lively, insightful, and pertinent to our readers. We encourage the submission of original manuscripts, outlines for proposed articles, suggestions and comments on developments in tort and insurance law, and other material of interest to both plaintiffs and defense lawyers who practice and litigate in the areas of tort and insurance law and to insurance professionals. We also publish "Practice Tips" and "Trial Tips" that give practical, how-to advice on practice and litigation matters.

A complete manuscript (or an outline of a proposed article) should be forwarded (preferably by email) to the editor-in-chief, with a copy to the managing editor at ABA Publishing. Members of *The Brief's* editorial board review suitable proposals. If a manuscript is accepted for publication, it will be edited by ABA Publishing. Please send manuscripts to **Todd B. Seelig**, Editor-in-Chief, Pennsylvania Department of Labor & Industry, 110 North 8th St., Suite 400, Philadelphia, PA 19107-5157; 215-560-2488; fax: 215-560-5290; email: wjseelig@gmail.com; and to **Jane Harper-Alport**, Managing Editor, *The Brief*, American Bar Association, ABA Publishing/Periodicals, 321 North Clark Street, Mailstop 20.1, Chicago, IL 60654-7598; 312-988-6046; fax: 312-988-6135; email: jane.harperalport@americanbar.org.

We encourage and welcome your submissions and ideas.

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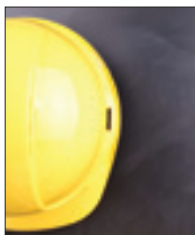


Understanding Ethical Limits on Attorney Behavior in Settlement Negotiations: A Practical Approach

By Christopher J. Brasco, Lee M. Brewer, Maureen P. Taylor, and Adam M. Tuckman

In the heat of negotiations, attorneys need to be mindful of various pitfalls and strike a balance between zealous advocacy and inappropriate conduct. **12**

TIP: Consideration of how the cultural norms governing negotiations intersect with your ethical obligations as counsel is an eye-opening exercise that should inform your future settlements.



Are Workers' Compensation "Alternative Benefit Plans" Authorized by State Opt-Out Schemes Covered by ERISA?

By Michael C. Duff

Alternative plans potentially shift costs through undercompensation of workplace injuries by less generous private plans to federal programs and may transfer compensability disputes regarding workplace injuries to federal courts. All of these considerations are triggered if alternative benefit plans are covered by ERISA. **22**

TIP: Do not assume that a benefit plan established as an alternative to workers' compensation is uncontestedly covered either by ERISA or by state workers' compensation.



Uniting Plaintiff, Defense, Insurance and Corporate Counsel to Advance the Civil Justice System



The Future of Federal Preemption in Aviation

By Jeffrey Ellis and Vincent C. Lesch

Whether federal regulation of aviation preempts state common law claims in accident cases has become a hotly contested issue in the federal courts—one on which the Supreme Court has yet to rule.32

TIP: A lawyer litigating an aviation claim without a good understanding of preemption is like Dorothy trying to get back to Kansas without her ruby slippers.

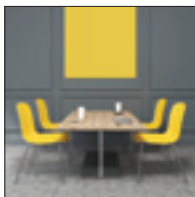


Litigating Aviation Cases in Foreign Venues

By Ricardo M. Martínez-Cid and Lauren L. Barrington

The increase of filing in or dismissal to foreign venues of cases arising from overseas airplane crashes and cases involving foreign plaintiffs is a trend in aviation litigation, and navigating the potential pitfalls can prove difficult for the unprepared attorney.41

TIP: Lawyers handling aviation cases in foreign venues must be cognizant of many legal and practical issues that may not arise in U.S. venues.



Most Common Mistakes in Mediation

By M. Gino Brogdon Sr.

Timing and preparation—for counsel, client, and mediator—are critical to avoid mediation missteps. Focus on the decision makers and understand that the element of surprise is overrated.50

TIP: Because more than 90 percent of civil cases settle, it behooves a good lawyer to make mediation as important as trial when it comes to preparation.



For Whom the Statute Tolls: Determining When a Legal Malpractice Claim Is Time-Barred

By Peter J. Biging and Jason L. Ederer

The accrual of a claim for legal malpractice for statute of limitations purposes can be tied to a variety of factors of which every lawyer should be aware.56

TIP: Potential legal malpractice claims can be lurking or even reignited depending on lawyer conduct at what is otherwise perceived as the conclusion of the representation.



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Attitude and Courage: The Time for Advocacy Is Now

G. Glennon Troublefield



As winter slips into hibernation, I am back at my desk waging a courageous battle with rule books, deposition transcripts, and a smattering of TIPS meeting materials, all of which bid for the remaining unclaimed real estate on my desktop. I would like to believe that I will emerge victorious one day, but life as chair of the Section can be busy at times, and documents simply pile up. Not to be one who gives up a worthy fight, I press forward, clear my desk, and offer this third installment for *The Brief*. One of our great past Section chairs said to me one day with a twinkle in his eye, "Have some fun with *The Brief* articles." He was correct, but forgot to mention the humbling reality that limited real estate in *The Brief* exists for my views from the "chair." Hence—a moment of truth.

The Importance of "Old-Fashioned" Advocacy

We live in a time when politics, pundits, and ideological caretakers occupy center stage in our daily conversations about the moral compass of our country. Cable news outlets on any given day greet you with a stable of network anchors and campaign strategists, each taking turns to wax poetic about exit polls, government gridlock, and presidential politics. In recent months, the passing of Antonin

Gregory Scalia, associate justice of the United States Supreme Court, opened a floodgate of political commentary about judicial vacancies.

Debate about the politics of filling U.S. Supreme Court vacancies can wait another day. There is, however, an important part of the national conversation about Justice Scalia that gets overlooked. Inasmuch as commentators speak of Justice Scalia's unique contribution to the Court, his rise began when he was a practicing attorney and a contributing member of the ABA. Justice Scalia served as chair of the ABA's Section of Administrative Law in 1981 and 1982 and chairman of the Conference of Sections in 1982 and 1983. Filling out his ABA credentials are positions he held as Senior Fellow of the ABA Section of Administrative Law and his appearances in many ABA activities. Justice Scalia is remembered by fellow ABA members not only for his ideological acumen, but also for his advocacy to improve the profession through his zeal for the rule of law.

When I think of other giants of our legal profession who have been part of the ABA, I go no further than many of the prodigious advocates, politicians, and judiciary members who have left their mark in TIPS. Dignitaries such as U.S. Senator Edmund S. Muskie (a former member of the TIPS Council) and Professor Robert B. McKay,

both deceased, graced our meetings with their dexterous comments and passionate views about the importance of preserving the civil jury trial system in the United States. Their style of advocacy serves as an indelible reminder to all of us, especially members of TIPS, of the importance of remaining actively engaged in our profession regardless of our ideological opinions about the tort and insurance law system.

Our call to arms rests in the TIPS bylaws. The Section's bylaws waste little time laying out our brand of advocacy as a leading national bar association. Article I, Section 2 proclaims that the purposes of TIPS "shall be to promote the objectives of the [ABA]; and, to serve those involved in Tort and Insurance Law by bringing together lawyers of diverse background and practice by providing leadership, inspiring professional excellence and improving the civil justice system." Similarly, Articles II through IX, as well as the TIPS Strategic Long Range Plan, define the manner in which our members shall govern a variety of topics ranging from the duties of Council to our interaction with the greater ABA. The strategic plan sets forth goals and strategies to position TIPS as a major influence and source of proposed policies on tort trial and insurance practice issues. The bylaws and strategic plan urge our membership not to shy away from

commenting on or proposing policies on tort trial and insurance laws as part of the overall mission of TIPS.

The Clarity of Our Mission Remains Absolute

My reference to the TIPS bylaws and strategic plan is intentional to highlight their significance to the lexicon of our mission as members of this Section. The bylaws are influenced by ABA Goal I, which announces that the mission of the ABA is to “provide benefits, programs and services that promote members’ professional growth and quality of life.” The missions of both the ABA and TIPS embrace the concepts of creating a forum for CLE programs and publications to educate members, nonmembers, and the public about our practice areas (Goal 1, Strategy 4 of the Long Range Plan). I want to restate these missions for the benefit of a small handful of critics who take potshots at the value of ABA and Section involvement. The critics overlook the shared clarity of thought and commitment by the collective leadership of TIPS to service the legal profession and members-at-large. Active membership in TIPS elevates substantive conversations about emerging issues from the tort trial and insurance fields beyond common assumptions about the challenges faced by trial lawyers and litigation managers. This is a significant benefit of membership in the ABA and TIPS.

The Courage of Our Convictions

Many bar association leaders have been thrust into an environment in which calls for the financial stability of the ABA are slightly overtaking the urgency to increase membership. Members of TIPS’s leadership know this all too well. TIPS’s leaders continue to feel the squeeze of campaigns to massage the importance of Association

membership balanced against pressures to remain fiscally stable. For TIPS, our leadership continues to invest in infrastructure improvements by offering new programs, creating new entities such as the Cybersecurity Task Force, and turning our attention to the Section Conference, to name a few. Investments such as these emerged directly from thinking in nontraditional ways. Nonetheless, such infrastructure investments carry with them the need to keep in mind the fiscal prudence required to sustain growth without exhausting resources. Thankfully, our past and present leadership had the courage of their convictions to ensure that TIPS remains both relevant to our membership and financially sound. TIPS continues to operate in a manner befitting a premier national organization. Our support for CLE programs and publications during this bar association year reflect the Section’s commitment to service members, even in the face of financial adversity or a small chorus of naysayers.

Before I close, I want to mention several visionaries who had the courage of their convictions. Let me start with Nelle Harper Lee, who passed away on February 19. An American novelist, Harper Lee blessed us with *To Kill a Mockingbird*, which won the Pulitzer Prize in 1961. Anyone who has been immersed in the pages of her novel experienced a special brand of advocacy. She wrote about the courage of attorney Atticus Finch as seen through the eyes of his daughter, Jean Louise Finch. Atticus’s courage reminds me of the resolve displayed by a small but extremely influential handful of TIPS leaders who helped create both the TIPS Leadership Academy and the National Trial Academy (the latter of which was established jointly by TIPS and the American Board of Trial Advocates). These initiatives emerged

from the vision of our TIPS leaders to identify future leaders of TIPS and improve trial advocacy within the profession. As a tribute to the courage and foresight displayed by this particular group of TIPS leaders, I leave you with this from Atticus Finch: “I wanted you to see what real courage is, instead of getting the idea that courage is a man with a gun in his hand. It’s when you know you’re licked before you begin but you begin anyway and you see it through no matter what.” Sleep well, Nelle. ■

TIPS CALENDAR

The following calendar highlights important upcoming dates in TIPS. For additional and updated information, visit the calendar at the TIPS website: www.americanbar.org/groups/tort_trial_insurance_practice/events_cle.html

JUNE

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An Early View of 2016: Law Firm Performance

Free Teleconference; CLE credit NOT available
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Information: 312-988-5463

AUGUST

4-7

ABA Annual Meeting

Westin St. Francis Hotel, San Francisco, CA
Information: 312-988-5672

OCTOBER

19-23

TIPS Fall Leadership Meeting

Hotel Del Coronado, Coronado, CA
Information: 312-988-5672

NOVEMBER

3-4

Aviation Litigation Committee Meeting

Ritz-Carlton Hotel, Washington, DC
Information: 312-988-5708

9-11

Fidelity and Surety Law Fall Meeting

Fairmont Hotel, Chicago, IL
Information: 312-988-5708

Fidelity and Surety Law Committee: The Right Place to Be

By Gary J. Valeriano

The Fidelity and Surety Law Committee (FSLC) serves as the national resource for fidelity, surety, and construction law practitioners; company claim professionals; and accountants, engineers, and consultants who work with attorneys and claims professionals in responding to fidelity and surety claims and the concerns of the construction industry. By providing opportunities for its members to stay abreast of current developments in fidelity, surety, and construction law—including claim handling practices—while at the same time providing opportunities for networking, social interaction, and professional growth, the FSLC is the right place to be for legal, business, and social activities. The result is one of the most active and successful committees in TIPS.

A successful committee begins with members willing to give their time to support committee activities. The core of the FSLC leadership is composed of the committee's vice-chairs, past chairs, and those who volunteer to serve

in committee leadership positions. The FSLC currently has around 80 vice-chairs who are engaged in all aspects of committee leadership activities. FSLC's seven divisions (Past-Chairs Liaison; Communications; Law; Membership/Inclusion; Budget & Finance; Sponsorship, Exhibitors, Liaison & Social (SELLS); and Community Service) provide not only the structure for the committee's activities, but also an entry point for membership involvement and a ready pool of volunteers to work on FSLC projects.

Among the most active FSLC divisions are the Law Division, the Membership/Inclusion Division, and the Communications Division. The Law Division is broken down into 11 subdivisions based upon substantive areas of the law: fidelity bonds, performance bonds, payment bonds, miscellaneous bonds, construction, bankruptcy, indemnity, extracontractual liability, alternative dispute resolution, underwriting and risk management, and international. Each subdivision is cochaired by three to four members, who work with about a dozen other members. In addition to keeping the membership apprised of current developments in the law, the Law Division, through the work of its subdivision members, develops topics for new publications as well as topics for continuing legal education (CLE) programs. The

current Law Division cochairs are Doug Wills, John Sebastian, Bruce Corriveau, and Patricia Wager.

The Membership/Inclusion Division is responsible for maintaining the committee's membership and attracting new members. In recent times, this division has had three cochairs, which always includes one or more company claims professionals and a member of our young professionals group. By including the perspectives of company claims professionals and young professionals in this division's leadership, the FSLC has been greatly successful in increasing its membership. FSLC Membership/Inclusion Division cochairs are Scott Olson, Ivette Gualdrón, and Cindy Rodgers-Waire.

The Young Professionals Subdivision of the Membership/Inclusion Division has succeeded in welcoming newer attorneys, claims professionals, and consultants to the FSLC and getting them involved in the committee's affairs at an early point in their careers. The subdivision was formed to help members in their 20s and 30s maximize both their FSLC involvement and benefits. Early, meaningful involvement in FSLC issues and activities translates into a long-term commitment to the committee and its membership. Participation in the Young Professionals Subdivision serves as a springboard to further participation in the FSLC at large, either as

Gary J. Valeriano is a senior partner in the Los Angeles office of Anderson, McPharlin & Connors, LLP, where he chairs the firm's Fidelity and Surety Practice Group. He is the chair of TIPS's Fidelity and Surety Law Committee and can be reached at gjv@amclaw.com.

a speaker or author, or by taking a leadership role in the committee.

The FSLC is renowned for the volume and quality of its publications. This year, in addition to publishing three issues of the committee newsletter, the FSLC has published three books, a variety of articles for submission to Section publications, and other program materials. The responsibility for our publications—newsletters, books, articles, and electronic media—falls to the Communications Division. This division, cochaired by Carol Smith, CharCretia DiBartollo, and Matt Horowitz, is divided into six subdivisions: *FSLC Newsletter*; *Tort Trial & Insurance Practice Law Journal (TIPS Journal)*; *The Brief*; Social Media, Presentation Technology, Email Communications, and Website (SPEW); CLE Teleconferences & Webinars, and Book Marketing.

The FSLC publishes information of interest to members via the committee's newsletter. Each newsletter includes committee news, hotline cases, practice tips, articles, and other content of interest to FSLC members. The executive editor of the *FSLC Newsletter* is Chris Ward, who is aided by three editors-in-chief, Todd Braggins, Omar Harb, and John Sebastian.

The FSLC regularly contributes to the "recent developments" issue of the *TIPS Journal*. This year, our chapter was edited by Carol Smith, Marc Domres, Carleton Burch, Carlos Garcia, Shannon Briglia, James Knox Jr., Justin Owen, Albert Alikin, and Adam Cornett. Our authors were assisted in gathering the past year's fidelity and surety cases by the Surety Association of America's (SAA) Fidelity and Surety Case Summaries, authored by Robert Duke, the SAA's general counsel, and Edward G. Gallagher, a past FSLC chair. The SPEW Subdivision is chaired by Mark Krone, whose responsibilities include the FSLC's website and all other matters involving electronic



PHOTO: ISTOCK

communications.

The FSLC also is well known for its CLE programs, which for the 2015–2016 bar year began in November 2015 with our traditional Fall Fidelity Program. This year the FSLC presented a comprehensive one-and-one-half-day program in Washington, D.C., on the ABA/TIPS book *Annotated Commercial Crime Insurance Policy, Third Edition*. The program, cochaired by Toni Scott Reed and Carleton Burch, was held in conjunction with the Fidelity Law Association's annual meeting and involved over 40 speakers and authors. The FSLC conducted presentations on the significant provisions of the various commercial crime policies available to insureds and provided each attendee with a copy of *Annotated Commercial Crime Insurance Policy, Third Edition*.

The FSLC Midwinter Meeting returned to the east coast and New York's Waldorf-Astoria in January 2016. After a day of leadership and business meetings, the midwinter CLE programs began with a split session on Thursday involving both a construction program and a fidelity program. Shannon Briglia and Larry Lerner headed the

well-received construction program, "Nuts and Bolts: The Essentials for the Surety Construction Practitioner."

Dominique Sena-DiDonato and Matt Horowitz cochaired the fidelity program, "Mediating the Complex Fidelity Claim: How to Get It Right." The program dealt with different stages of a financial broker-related claim, focusing on its mediation.

Jarrold Stone and Eric Mausolf cochaired the surety program at that meeting, "The Law of Payment Bonds: The Update and Tips from the Pros." This program offered an update of a presentation from few years before and is the subject of another great ABA/TIPS publication, *The Law of Payment Bonds, Second Edition*.

The FSLC's Spring Program, "Surety Takeover from Default Through Dispute Resolution," will be held May 4–6 at the La Quinta Resort & Club in La Quinta, California. Brett Divers and Blake Wilcox will cochair this day-and-a-half program, offering presenters that will include experienced surety practitioners and surety company professionals. The program will focus on all the legal

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Editorial Board Member: John P. Browning



John Browning is a new addition to the editorial board of *The Brief*, having joined in the fall of 2015. He is a long-time ABA member who recently made a commitment to years of service by graduating from the TIPS Leadership Academy. An active vice-chair for several TIPS general committees, John also is a member of the editorial board of the *Tort Trial & Insurance Practice Law Journal*.

In serving on *The Brief* board, John has found a way to give back to the profession in a way that directly benefits people who share his love for client advocacy. “I found my life path in the law, and more specifically by being an advocate for those businesses that have been sued for injuries or damages they did not cause. I did not know growing up that this is where I would end up, but being an unshamed advocate for those who had been wrongfully accused was a trait recognized even at an early age.”

Following graduation from law school, John clerked for a trial court judge in Mobile, Alabama, and later went to work at

an insurance defense firm where he tried as many as seven jury trials in one year. He later joined Burr & Forman LLP in the firm’s Mobile office and continued his successes in the courtroom, assisting the firm’s clients whenever trial work was required. He remains passionate not just about his clients’ needs, but also about ensuring that the next generation of lawyers—practicing on both sides of the bar—are able to experience as successful a career in trial advocacy as he has.

Despite this passion, John has found it difficult to communicate to a broader audience about what he has seen as an inability for young lawyers to be trained as trial lawyers (instead of corporate “litigators”) in the legal market as it exists today. “Living in a midsize city on the Gulf Coast, it has been difficult to find ways to contribute on a national scale,” he says. “TIPS, in general, and working with groups like *The Brief* board, specifically, is now giving me that opportunity.”

In speaking of the benefits of *The Brief*, John continued, “*The Brief* offers a way for lawyers of both sides of the bar to learn about where the practice of law is taking us. It is not a place for those who have ‘been there and done it’ or who want to show off their accolades (like other legal publications). *The Brief* looks ahead by highlighting topics of legal interest that are ‘hot’ or innovative, from a discussion on the difficulties of insuring against cybercrimes

to practice tips for young lawyers about how to be the best and brightest in their field.”

All in all, John believes that “good lawyering” is not only about productivity at the office (though he acknowledges that is important to those who employ you); it is about being a good partner, friend, spouse, parent, and advocate for those who depend on you for help.

“God has given us all talents,” John says. “It is up to us to use those talents in a way that is intended for the betterment of the world we leave behind when we’re gone.” In this vein, John serves on the Mobile Public Library Board, is a member of the Mobile Downtown Alliance (working to attract development and create a livable downtown in Mobile), and is the immediate past chief volunteer officer (CVO) of the YMCA of South Alabama. He is active in his church and also has sat on the leadership boards of other nonprofits and civic organizations.

John is happily married to his wife, Margaret Sue, and is the father of a four-year-old daughter, also named Margaret Sue (it’s a Southern thing). He enjoys playing golf, watching college football (Roll Tide!), and deer hunting when he gets the chance.

John is a partner at the Mobile office of Burr & Forman LLP, a full-service firm with offices in Alabama, Mississippi, Tennessee, Georgia, and Florida. He can be reached at john.browning@burr.com. ■

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TIPS NOTES

Update on the Latest Programs and Events in Your Tort Trial & Insurance Practice Section

ABA 2016 Midyear Meeting Recap

TIPS participated in the 2016 ABA Midyear Meeting in February in beautiful San Diego with over 50 business meetings; one free CLE program, “Hot Topics for Corporate Counsel and Litigation Managers—What’s in Your Litigation Toolbox?”; a complimentary reception for local TIPS members; and the TIPS Welcome Reception, where the Section’s Pursuit of Justice Award was presented to San Diego County Superior Court Judge Joan P. Weber.

Other Midyear highlights include the TIPS Standing Committee on Outreach to Law Students’ mock interview program held at the Thomas Jefferson Law School; the Law in Public Service Project, “Vetting for Vets,” a résumé writing and interview workshop for veterans, and the Section’s annual brunch for members of the ABA House of Delegates.

Section Leadership Nominated for FY 2016–2017

The following slate of officers for fiscal year 2016–2017 Section leadership was nominated by the TIPS Council during the 2016 ABA Midyear Meeting in San Diego:

Chair-Elect (one-year term, then will automatically become Section Chair for 2017–2018):

Holly M. Polglase, Boston, Mass.

Vice-Chair (one-year term): Roy A. Cohen, Morristown, N.J.

Financial Officer-Elect: Gregory M. Cesarano, Miami, Fla.

Section Representative to the ABA House of Delegates (three-year term): Michael W. Drumke, Chicago, Ill.

Council Members, Class of 2019 (five to be elected, each to serve a three-year term):

- Daniel G. Acosta, Albuquerque, N.M.
- Kermit Kendrick, Birmingham, Ala.
- Jennifer Shepard Kilpatrick, Chicago, Ill.
- Joel Wiley Mohrman, Houston, Tex.
- Christopher Nolan, New York, N.Y.

Nominees will be officially elected by TIPS members at the Section Business Meeting on August 7, 2016, to be held at the 2016 ABA Annual Meeting

In addition to TIPS’s appreciation for the support of its Premier Section Sponsor Thomson Reuters and Section Sponsors DecisionQuest, MDD Forensic Accountants, and Atlas Legal Research, the Section is very grateful to Schwartz Semerdjian Cauley & Moot LLP, Mulligan Banham & Findley, and Robson Forensic for sponsoring TIPS events at the ABA Midyear Meeting.

in San Francisco, California. Terms of each office will begin immediately, which for the Section will effectively begin the 2016–2017 fiscal year.

Procedures for additional nominations. According to Section bylaws, at any time prior to July 1, additional nominations may be submitted for one or more of the elected offices to be filled at the Annual Meeting. Not fewer than 50 Section members in good standing, of whom not more than 24 are residents of any one state, may file a nominating petition (which may be in multiple parts), signed, with names and addresses. All such petitions must be accompanied by the written consent of persons so nominated. Petitions may be sent by regular mail to the Section chair at:

G. Glennon Troublefield, Chair
c/o Mary Ann Peter, Section Director
Tort Trial & Insurance Practice Section
American Bar Association
321 N. Clark St.
Chicago, IL 60654-4746 ■



Charles J. Stoia, chair of TIPS’s Self-Insurers and Risk Managers Committee, moderates the program “Hot Topics for Corporate Counsel and Litigation Managers—What’s in Your Litigation Toolbox?” with a panel featuring TIPS members Dick Semerdjian, Anthony J. Sbarra Jr., and William Kruse in San Diego on February 4.

2016 ABA Annual Meeting

San Francisco, California • August 4-7, 2016

Join the Tort Trial & Insurance Practice Section at the ABA Annual Meeting, August 4-7, in San Francisco for a host of excellent CLE programs conducted by leading lawyers, judges, academics, and industry experts.

Brief descriptions of TIPS-sponsored CLE programs are offered here. TIPS will offer these programs at no charge to Annual Meeting attendees. Consult the TIPS brochure and the TIPS website at www.americanbar.org/groups/tort_trial_insurance_practice.html for additional and updated information, including seminar speakers, or call 312-988-5672.

Access the ABA Annual Meeting website and registration at <http://americanbar.org/calendar/annual.html> for pricing and registration information for ABA CLE programs other than the TIPS programs described below.

THURSDAY, AUGUST 4, 2016

10:30 AM-12:00 PM

FREE CLE PROGRAM,
WESTIN ST. FRANCIS HOTEL

It Could Be the Ballgame—Deposition and Trial Insights and Warnings for Preparing, Taking, and Defending Rule 30(b)(6) Corporate Witnesses

- TIPS Committee main sponsor: Commercial Transportation Litigation
- TIPS Committee cosponsors: Automobile Litigation, Products Liability, and Trial Techniques

The deposition testimony of a company representative can be some of the most pivotal evidence in a case, whether the dispute involves a tractor-trailer crash; a defective product such as an automobile, swimming pool, or medical device; the improper design of a roadway or construction of a building; or termination of an employee. Plaintiffs counsel use these depositions to obtain key concessions that they can use to persuade a jury that the company acted wrongly. For both plaintiffs and defense counsel, it is imperative to understand not only how to prepare for these depositions, but also how to deal with testimony the witness gives both before and at trial. This program will address presentation of the 30(b)(6) witness from deposition through trial from the plaintiff and defense perspective. Starting with discovery testimony, the panelists will discuss vital preparation steps for the deposition, and when the trial is scheduled, how they deal with the corporate witness's testimony through motions in limine and in the courtroom.

1:30 PM-3:00 PM

FREE CLE PROGRAM,
WESTIN ST. FRANCIS HOTEL

Business and Human Rights: Effective Global Supply Chain Management Is an Important Critical Risk Mitigation Tool for Businesses

- TIPS Committee main sponsor: Corporate Counsel
- TIPS Committee cosponsors: Business Litigation, International Law, and Toxic Torts and Environmental Law

Many U.S. businesses have a presence overseas today, whether through production or extraction facilities abroad, or subsidiaries and/or contracts with foreign entities for the production of goods, extraction of raw materials, or creation of widgets for use in the production of goods in the United States. It is crucial that in-house and outside counsel know how to navigate and avoid the risks associated with supply chain management.

A number of U.S. laws—federal and state—regulate and hold companies accountable for their involvement in environmental and/or human rights violations that occur in their supply chains. This has many implications for U.S. companies, ranging from brand management to costly outlays required to remedy damages or defend against litigation.

This program will focus on informing counsel—both in-house and outside—and business leaders about the issues their clients may face in connection with global supply chains as well as the necessary due diligence to avoid litigation, sanctions, failure to meet reporting requirements, and a tarnished brand.

3:30 PM-5:00 PM

FREE CLE PROGRAM,
WESTIN ST. FRANCIS HOTEL

Emerging Issues in Trial Practice Now and in the Next 10 Years

- TIPS Committee main sponsor: Business Litigation

In celebration of being in San Francisco, the innovation center of the United States, this program analyzes current practice issues facing litigators and issues litigators may face during the next 10 years. A panel of experts will address challenges involving document production that include recordings, videos, “unstable” documents constantly updating, the rise of interactive social media communications, and changes in the discovery rules to address proportionality; evidentiary issues that include authenticating documents generated by computers and robots, use of evidence available only in digital form, and use of video chat recordings and other technologies; and advocacy techniques, today and tomorrow—what trials may look like in the future.

FRIDAY, AUGUST 4, 2016

8:30 AM-10:00 AM

FREE CLE PROGRAM,
WESTIN ST. FRANCIS HOTEL

Minefields in the Modern Employee Handbook

- TIPS Committee main sponsor: Employment and Labor Law

Panelists will address key aspects, important issues, and common pitfalls of the modern employee handbook, including a discussion of misclassification, the impact of legalization of marijuana, same-sex marriage/LGBT rights, expanded disability and leave rights (including paid sick leave), and the increasing need for bring-your-own-device and social media policies. Presenters also will discuss how to deal with and interpret the often conflicting rulings by the NLRB on wage and hour and other issues affecting employee policies in employee handbooks.

9:00 AM-12:00 PM

FREE CLE PROGRAM,
WESTIN ST. FRANCIS HOTEL

The Cases You Can't Win: A Case Study in Practical Claims Handling

- TIPS Committee main sponsor: Title Insurance Litigation

This program will cover practical claims handling and tactics, focusing on issues that arise for those claims that are not susceptible to amicable resolution; where the claimant fails to recognize the problematic aspects of the claim; when facing an unrealistic property valuation; when dealing with inept or aggressive counsel for the insured; and breakdowns in communication between the parties to the claim.

The program will also include a "Title Case Law Update" presentation, and may be approved for one hour of ethics credit.

10:30 AM-12:00 PM

FREE CLE PROGRAM,
WESTIN ST. FRANCIS HOTEL

Dealing with Data Breach: Not "If" But "When"

- TIPS Committee main sponsor: Intellectual Property Law

This program will address the hot topic of data breach from a variety of perspectives by bringing together presenters from diverse fields: legal counsel, insurer staff, and cyber security professionals.

10:30 AM-12:00 PM

FREE CLE PROGRAM,
WESTIN ST. FRANCIS HOTEL

Volkswagen Emissions Scandal: The Regulatory and Litigation Response, One Year Later

- TIPS Committee main sponsor: Toxic Torts and Environmental Law

One year after the U.S. and California Environmental Protection Agencies publicly announced that they had strong evidence to show that Volkswagen violated federal law by installing software in many of its diesel vehicles to circumvent federal emissions standards, this program will provide a litigation and science update. Among topics the expert panel may address are the federal and state agencies' investigatory response to environmental violations and consumer fraud, including criminal or civil sanctions; class action litigation seeking remedies for consumer fraud and any environmental harm; and the science and engineering behind Volkswagen's "defeat" device.

1:30 PM-3:00 PM

FREE CLE PROGRAM,
WESTIN ST. FRANCIS HOTEL

Defending the Indefensible: Navigating the Strategic and Ethical Landscape of Defending Clients Who Have Engaged in Indefensible Conduct

- TIPS Committee main sponsor: Professionals', Officers', and Directors' Liability
- TIPS Committee cosponsor: Insurance Coverage Litigation

On occasion, lawyers are presented with clients who have engaged in either clearly indefensible conduct or conduct that in the circumstances otherwise presents enormous challenges to defend, and in the process presents himself, his partners, or his company with major exposure. For example, a fatigued pilot ignores standard safety procedures and crashes a plane with scores of passengers; a professional accused of malpractice openly admits or has documents in his file evidencing substantial deviations from the accepted standard of care; investigation reveals that a supervisor accused of sexual harassment has sent a number of inappropriate emails and text messages; or documentation of a transaction leading to loss reveals that material misrepresentations were made and efforts were made to conceal the fraud for years. When such a scenario occurs, a number of issues and concerns immediately are brought into play, including coverage concerns, ethical concerns, regulatory issues, and how to possibly find a way to avoid or mitigate the potential exposure presented in the face of such challenging circumstances. All of these issues notwithstanding, there can very often be ways to mount a successful defense against such claims, either avoiding exposure altogether or dramatically mitigating the exposure. In this presentation, a panel of lawyers who are regularly called upon as "go to" lawyers in these most dire circumstances, along with an ethics expert, will discuss their secrets and strategies for defending these claims, while navigating the moral, ethical, regulatory, and other issues presented.

1:30 PM-3:00 PM

FREE CLE PROGRAM,
WESTIN ST. FRANCIS HOTEL

The Art of Storytelling: Developing a Strong Theme for Your Trial

- TIPS Committee main sponsor: Trial Techniques
- TIPS Committee cosponsors: Automobile Litigation and Business Litigation

Great trial lawyers will tell you that developing the theme of your case is one of the most important aspects of a trial. Every case has a story, and a clear theme will help you tell that story and guide the fact finder in understanding the bigger picture of the case as he or she considers the specific evidence presented. This program will provide practical tips for developing a strong trial theme that will ultimately make you more persuasive and your case most compelling. In addition, the program will feature real-time electronic devices that will enable participants to instantly see the power and impact of powerful themes developed during the workshop.

ILLUSTRATION: ISTOCK



UNDERSTANDING ETHICAL LIMITS ON ATTORNEY BEHAVIOR IN SETTLEMENT NEGOTIATIONS

A PRACTICAL APPROACH



By Christopher J. Brasco, Lee M. Brewer,
Maureen P. Taylor, and Adam M. Tuckman



In the American legal system, the adversary system has long been the norm for resolving conflicts. An impartial arbiter decides who wins or loses based on competing presentations of fact and law. Beyond the debate about the virtues of such an adversarial system in modern society,¹ there is little room for disagreement on one requirement: as it presently exists, the adversarial system can only function as an engine for justice if deceitful conduct by its participants is prohibited.²

Limits on Adversarial Behavior in an Adversarial System

Safeguards woven into the legal system help preserve the integrity of the adversarial process. State and federal rules of procedure foster equal access to information and an opportunity to present a litigant's case fairly and openly. Similarly, rules of evidence establish a consistent set of standards for litigants to present their conflicting views of the facts to the neutral decision maker.

Just as importantly, public trust in the adversarial system is encouraged by the ethical codes governing the conduct of lawyers. As officers of the court, lawyers have a special obligation during their representation of clients to protect the judicial proceeding from false statements of law or fact, bribery, intimidation, destruction of evidence, and other similar conduct that undermines the adversarial process.³

Deception is unethical and not tolerated in our judicial proceedings. But do the same ethical obligations bar dishonesty and unfairness during the “horse-trading” conducted by lawyers in settlement negotiations? To some practicing lawyers, the answer may not be readily apparent. There may be an assumption that negotiation norms contemplate, and indeed reward, the use of misdirection, concealment, and some level of deception. Recognizing that the process of settlement negotiations has its own ethos, one commentator has noted that “to mislead an opponent about one’s true settling point[] is the essence of negotiation.”⁴

Popular culture has even waded into this conundrum. In “The Wheeler-Dealer” episode of *The Brady Bunch*, Mr. Brady and Greg had to deal with the ethical limits of “gilding the lily” when reselling Greg’s first car—a lemon he had just bought from an unscrupulous friend. At first, Greg misinterpreted his dad’s advice on caveat emptor, and his negotiation tactics pushed the ethical boundaries. But upon reflection, Greg thought better of his methods and decided not to complete a sale based on deceit. The legal system, however, has chosen not to entrust the regulation of ethical conduct to each individual negotiator’s conscience.

Although the ethics rules implicitly recognize the vagaries of settlement negotiations, not all conduct is acceptable. Indeed, there are definite limits on lawyer conduct in settlement negotiations. At its most basic level, the general rule adopted across all jurisdictions forbids lawyers during settlement negotiations from making materially false statements or concealing essential information under circumstances warranting disclosure. Despite the relatively straightforward appearance, the difference between an unethical material misrepresentation or omission and generally accepted settlement posturing is not always easily discernible to the untrained eye. Fortunately, there are many sources of guidance for the attorney seeking a better understanding of his or her ethical obligations to clients and third parties during the process of settlement negotiations.

In the sections below, this article will explore the specific ethics rules that govern lawyer conduct in settlement negotiations, the framework established by case law and ethics opinions for distinguishing unethical deceit from “settlement bluster,” and the sanctions applied to redress deceitful conduct during settlement negotiations. For lawyers who are found in violation of the ethics rules for conduct during negotiations, the consequences are severe. The available sanctions not only reach the attorney in disciplinary proceedings, but also may impact the settlement itself. The article will conclude with some practical tips for lawyers on how to be zealous advocates for clients in negotiations without engaging in deceitful communications that may lead to severe punishment.

Ethics Rules Preserving the Integrity of the Negotiation Process

What attorney conduct during settlement negotiations is unacceptable? The answer is best understood in the context of the rules governing the integrity of the judicial process. Model Rule of Professional Conduct 3.3 expressly provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal or fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting in illegal, criminal, or fraudulent conduct by a client. Model Rule 3.3 further prohibits the lawyer from offering any evidence the lawyer knows to be false and imposes on the lawyer a duty to disclose to the tribunal controlling legal authority known to the lawyer and not disclosed by opposing counsel, if that authority is directly adverse to the position of the lawyer’s client. The rule also provides that the lawyer shall not fail to disclose to the tribunal a material fact, knowing that the omission is reasonably certain to mislead the tribunal. But there is an exception for instances where disclosure is protected by a recognized privilege or is otherwise prohibited by law.



TIP

Consideration of how the cultural norms governing negotiations intersect with your ethical obligations as counsel is an eye-opening exercise that should inform your future settlements.

Model Rule 3.4 is, likewise, designed to ensure fundamental fairness in the litigation process. This rule expressly prohibits the lawyer from unlawfully obstructing the other party's access to evidence and precludes the lawyer from unlawfully altering, destroying, or concealing a document or other material having potential evidentiary value, or from counseling or assisting another person in doing any such act. The rule further provides that a lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. Further safeguarding the integrity of the judicial process, the rule also precludes frivolous discovery requests and prohibits the lawyer from alluding, in trial, to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by the evidence. Finally, Model Rule 3.4

bars a lawyer from stating an opinion, in trial, as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

Model Rule 8.4 also shields the judicial process from deceitful conduct. Model Rule 8.4 precludes a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The rule further prohibits a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer and otherwise bars conduct that is "prejudicial to the administration of justice."

The Model Rules' protections against deceitful conduct while representing a client extend beyond the courtroom and cover all interactions with others, including the conduct of attorney-negotiators in the settlement process. The rule addressing attorney-negotiators most directly is Model Rule 4.1:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.⁵

The official comments to Model Rule 4.1 suggest how the rule applies to settlement negotiations. Comment [1] states that a lawyer is "required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." Comment [2] provides that the rule applies to statements of fact. What is a statement of fact? The comment says it depends on the circumstances

in which the statement is made. However, the drafters of the rule recognized that under "generally accepted conventions in negotiation," certain types of statements ordinarily are *not* taken as statements of material fact. Such statements include estimates of price or value placed on the subject of a transaction, a party's intentions as to an acceptable settlement of a claim, and the existence of an undisclosed principal, except where nondisclosure of the principal would constitute fraud.⁶

These prohibitions apply with equal force in the context of all types of settlement negotiations, regardless of whether the negotiations are conducted privately among the parties or with the assistance of a neutral such as a judge or mediator. American Bar Association (ABA) Formal Opinion 06-439 states that "the ethical principles governing lawyer truthfulness do not permit a distinction to be drawn between the caused mediation context and other negotiation settings." Except for Model Rule 3.3, which is applicable only to tribunals, "the ethical prohibitions against lawyer misrepresentations apply equally in all environments."⁷ The Model Rules do not require a higher standard of truthfulness in any particular negotiation contexts; nor is a lower standard of truthfulness warranted because of the uniqueness of the mediation process.

In 2002, when the ABA Litigation Section published Ethical Guidelines for Settlement Negotiations, it likewise underscored the need for lawyers to adhere strictly to ethical standards in the context of settlement negotiations. Guideline 3.3.1 states that a lawyer must comply with the rules of professional conduct and applicable law during the course of settlement negotiations and must not knowingly assist or counsel the client to violate the law or the client's

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fiduciary or other legal duties owed to others. Guideline 4.1.1 provides that a lawyer “must not knowingly make a false statement of material fact (or law) to a third person” in the course of negotiating or concluding a settlement.

Settlement negotiations can occur at any time in a legal dispute. In many circumstances, the parties compromise before the dispute matures into full-blown litigation. Yet, even early settlements without judicial intervention or oversight are expected to be conducted with “candor and integrity with respect to all material representations.”⁸

Drawing the Line between Plundering and Posturing

Employing a particularly fitting metaphor, one court portrayed settlement communications as “a dance of nuance and strategy, of cajolery and intimidation, of exaggeration and minimization.”⁹ In a setting that presumes lawyer-negotiators will be partners in a well-orchestrated dance before a compromise is reached, there is one fundamental question: which statements during the dance might amount to a misrepresentation or omission that would violate Model Rule 4.1(a), and which statements are recognized as commonplace settlement bluster?

Lawyers may not knowingly lie about material facts that result in justifiable reliance, but may engage in settlement posturing and hyperbole. At its most basic level, Model Rule 4.1(a) represents a bright-line prohibition against knowing, affirmative misstatements of law or fact. The rule has been described by ethics commentators as endorsing “a simple proposition: although lawyers are supposed to be zealous partisans of their clients, they must draw the line at lying. . . . Rule 4.1(a) recodifies the traditional rule that a lawyer’s word is his bond.”¹⁰

Nevertheless, not all misdirection by lawyers during settlement discussions amounts to an ethical violation. Rather, a misstatement “must involve a fact or the law that is *material* to the negotiation.”¹¹ A “fact is material to a negotiation if it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the settlement.”¹²

THE CONCEPT OF MATERIALITY HELPS DISTINGUISH ACCEPTABLE NEGOTIATION TACTICS FROM UNETHICAL MISREPRESENTATIONS OR OMISSIONS OF FACT OR LAW.

Thus, the key to determining materiality is whether or not the opposing lawyer might justifiably rely on that misrepresentation and alter his or her settlement position.¹³ As the court in *State-wide Grievance Committee v. Gillis* explained, “The ethics cases suggest that lawyers have a responsibility to limit their traditional duty of zealous advocacy when the lawyer knows that her statements or other conduct will be acted upon without the usual check of an opposing advocate. . . . Again the crucial distinction turns on the concept of reliance.”¹⁴

The concept of materiality helps to distinguish acceptable negotiation tactics from unethical misrepresentations or omissions of fact and law. The ethics rules and the courts acknowledge that negotiations in an adversarial system ordinarily involve some level of posturing and puffery, but such statements are not material facts upon which the other party can reasonably rely when evaluating a proposed settlement.¹⁵ According to the comments accompanying Model Rule 4.1, “[e]stimates of price or value placed on the subject of a transaction and a party’s

intentions as to an acceptable settlement” are ordinarily considered negotiation posturing and not statements of material fact.¹⁶ In other words, a party would not be justified in relying on statements by opposing counsel that emphasize or deemphasize the strengths or weaknesses of his or her client’s case, or characterizations regarding his or her client’s settlement position.¹⁷

As an example of acceptable negotiation behavior, ABA Formal Opinion 06-439 explains that it would be permissible for a lawyer to maintain that his or her client will not resolve a dispute for less than \$200 when, in reality, the client is willing to accept \$150. In addition, the ABA has taken the view that a negotiator buying goods or services may overstate the availability of alternative sources of supply to leverage a better deal with the seller.¹⁸ Another illustration of settlement bluster can be found in *Gillis*, a disciplinary action arising from a personal injury lawyer’s settlement communications with insurance companies.¹⁹ The lawyer wrote a settlement demand claiming that his client “has been unable to participate in any activity which requires the slightest bit of physical exertion due to the injuries suffered.”²⁰ Although the disciplinary board contended that the lawyer’s statement regarding restricted physical activity was a misrepresentation of the client’s physical condition, the court held that the statement was mere hyperbole that did not, and otherwise could not, have any effect on an experienced insurance adjuster reviewing the claim.²¹

In contrast to negotiation posturing and puffing, ABA ethics opinions provide several examples of statements made by lawyers during settlement negotiations that would falsely represent a presently existing material fact and thus result in a potential ethical violation. One ABA ethics opinion²² concludes that “a party’s actual bottom line or the settlement authority given to a lawyer is a material fact.” Consequently, a lawyer negotiating a settlement potentially could be sanctioned for affirmatively misrepresenting the actual limits of settlement authority granted by his or her client. The ABA ethics opinions note that a lawyer may decline to give the client’s bottom line without violating the rules, but once the lawyer speaks concerning his or her limits of settlement authority, the lawyer cannot lie or misrepresent the client’s true position.²³ As another example of a material misrepresentation, ABA Formal Opinion 06-439 explains that an attorney-negotiator makes a materially false statement of fact by declaring that a supporting document or witness will be presented at trial when the document does not exist, or the witness cannot, or will not, provide the testimony characterized by the lawyer. Similarly, in one recent employment discrimination case, a federal court concluded that it was a violation of Model Rule 4.1 when an attorney knew he was relying on an expert’s misleading and inaccurate measure of damages during settlement negotiations “to extract a favorable settlement.”²⁴

A failure to disclose material information may amount to an implicit misrepresentation of fact. In addition to prohibiting affirmative misrepresentations, case law and ethics rules suggest that a lawyer could be sanctioned for nondisclosure of material facts in circumstances when silence equates to a positive misrepresentation or

when the lawyer is under a legal duty to disclose.²⁵ This rule has been described as a narrow obligation²⁶ in light of the lawyer’s counterbalancing obligations of client loyalty (Model Rule 1.2), diligence (Model Rule 1.3), and confidentiality (Model Rule 1.6) during settlement negotiations. Nevertheless, the courts and ethics

lawyer consummating a settlement without disclosing knowledge of material false evidence obtained in a deposition;²⁹ and a lawyer failing to disclose to the settlement judge and opposing party the existence of an additional fee arrangement with the lawyer’s client that could have impacted approval of the settlement.³⁰

MISDIRECTION MAY BE ASSUMED BEHAVIOR, BUT THE LAW IMPOSES DEFINITE LIMITS ON DECEITFUL CONDUCT, AND THE PUNISHMENT CAN BE VERY HARSH ON BOTH LAWYER AND CLIENT.

opinions have identified certain situations in which the lawyer’s duty of candor to others justifies sharing material information even though the client might achieve a more favorable settlement without the disclosure.

Generally, the circumstances addressed by the courts and ethics rules requiring disclosure involve an imbalance of material information that reasonably cannot be cured by the opposing party, making the settlement process unfair. The most extreme circumstances involve the death of one’s client. A lawyer involved in negotiations cannot conceal the client’s death. Courts have repeatedly held the client’s death to be a material fact to settlement, because continuing communications with opposing counsel or the court would constitute an implicit misrepresentation that the client still is alive.²⁷ Another ethical violation, although a less obvious one, is concealing the full extent of existing insurance policies that may satisfy a judgment when the information previously supplied by the lawyer indicates less coverage.²⁸ Other instances of nondisclosure deemed to be ethics violations include a

It must be noted, however, that the courts and ethics opinions have not recognized a duty of total candor to others that would require disclosure of all information that the lawyer has reason to believe the opposing party does not have, if it might impact a decision to settle.³¹ It has been the view of courts and the ABA that a failure to disclose is not unethical conduct when a lawyer knows that the opposing party will be conducting its own investigation of the facts;³² when a lawyer does not disclose the existence of an ongoing, ancillary dispute involving his or her client and another party regarding the same general subject matter;³³ when a lawyer does not inform the other party that the statute of limitations has run on the client’s claim;³⁴ and when a lawyer does not prevent an adversary from relying on faulty information coming from another source.³⁵

Remedies and Sanctions for Redressing Deceitful Conduct

Misdirection may be assumed behavior by many negotiating lawyers, but the law imposes definite limits on deceitful conduct, and the

punishment can be very harsh on both the lawyer and the client. It may result in settlements being set aside or in litigation sanctions—sometimes against both the client and the lawyer. The lawyer can be subject to disciplinary action, even disbarment, and can also find himself or herself the defendant in a fraud suit.

Setting aside settlement agreements. When deceitful negotiations lead to a settlement, the party who later discovers the deceit has two choices: (1) set aside the settlement agreement and go back to square one, or (2) affirm the agreement and file a separate fraud action. Parties who have already accepted the settlement tend to choose the latter. But this choice limits their recovery to the fair compromise value at the time of settlement³⁶—in other words, the settlement value had there been no deception by the opponent and opposing counsel. If a party wants to recover the full award a jury might have given, the choice is rescinding the settlement. That is the lesson of *Exotics Hawaii-Kona, Inc. v. E.I. duPont de Nemours & Co.*

The *Exotics* case involved commercial growers settling claims against DuPont for selling a defective fungicide that destroyed their plants. When they learned after the settlement that DuPont had withheld scientific information (certain test results) that might have made their claims more valuable, they decided not to rescind the settlement but to affirm it instead and sue for fraud. That was an appropriate choice, according to the court, but the plaintiffs lacked the proof they needed to establish their damages in the fraud suit. The plaintiffs' expert witnesses had failed to discuss "specific settlement factors" and how those would have been affected by the scientific information that had been withheld.³⁷ Unless the plaintiffs could prove

what they would have settled for had there been no fraud, DuPont was entitled to and received summary judgment.

If a settlement has been put on the record but no payment has been made, it may be more likely to be set aside. That happened in *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*³⁸ There the plaintiff died after the mediation statement was submitted, but the mediation occurred before the plaintiff's counsel learned of the death, which was unrelated to the lawsuit. Once the attorney learned of the death, however, he kept it to himself, failing to reveal it to the court—or to opposing counsel—until after the \$35,000 settlement had been put on the record at a pretrial conference. Then, as the two attorneys were walking to the elevator after the conference, he happened to mention casually that his client had died. Defense counsel had agreed to the settlement based largely on what a good witness he expected the plaintiff to make, and he argued successfully that the settlement was void.

The *Virzi* court examined the rules in the Model Code (in effect in Michigan at the time) and the Model Rules (then just adopted by the ABA) and determined that the plaintiff's counsel had an ethical duty to disclose his client's death, as it "would have had a significant bearing on defendants' willingness to settle."³⁹ Quoting from a *Louisiana Law Review* article, the court cautioned that "[a]nother lawyer . . . who deals with a lawyer should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar."⁴⁰

Litigation sanctions. Even when no settlement results from deceptive behavior, it can still result in consequences, both for the client and for the attorney. For instance, in *Ausherman v. Bank of America Corp.*, the conduct of the plaintiffs'

attorney in a class action led to several complaints in the class action itself.⁴¹ Finally, the court ordered the plaintiffs and their counsel to show cause why monetary sanctions should not be imposed against the attorney and/or his clients. While the resulting \$8,649.25 sanction was just against the attorney and just for discovery abuses, his settlement conduct was referred to a disciplinary committee of the court, and the discussion of his less-than-truthful settlement letter merits attention.

Ausherman's attorney had initiated a class action lawsuit based on vague information allegedly from a former client who told him that an employee of the bank, "John Doe #1," was selling credit reports through an elusive "John Doe #2" in a scheme supposedly masterminded by "John Doe #3." The attorney wrote to the bank and offered to settle for \$1.875 million and to provide the identity of "John Doe # 3," which he claimed not to know but to have made confidential arrangements to learn upon settlement. Not surprisingly, the bank did not take him up on this offer, and discovery later proved that his statement about these "confidential arrangements" was simply not true. As he explained in his deposition, "That was language put in there for the purposes of settlement bluster."⁴²

The court chose not to include this admitted lie as a reason for the monetary sanction (which was based only on his refusal to comply with court-ordered discovery), but instead to refer the misconduct to the disciplinary committee.

The offending attorney in *Ausherman* asserted the defense that the statements in his settlement letter were inadmissible under Federal Rule of Evidence 408. This rule, however, would make his statements inadmissible only if used to prove liability or the invalidity of a claim. Based on treatises and

precedent examining Rule 408, the court reasoned that such statements were admissible for several other purposes, and they would be admitted to evaluate the attorney's conduct in that case.

Disciplinary action against the attorney. Under facts similar to those in *Virzi*—a client who died during settlement negotiations and an attorney who hid the death from opposing counsel—the Supreme Court of Minnesota suspended an attorney indefinitely, with no right to petition for reinstatement for at least a year. The underlying

settlement in question resolved a mechanic's lien, leaving a dispute between the contractor (Schumack) and the subcontractor (Drake) about the quality of the work to be decided in later litigation. But apparently the owner's (Cedar Island's) counsel forgot about the second dispute during settlement negotiations, and the subcontractor's counsel failed to remind him. Later recalling the second dispute, the owner then sued both the subcontractor and its counsel, and the claims against the attorney went to trial. One claim

in connection with a settlement. That was the mistake made by one of the defendants in *Slotkin v. Citizens Casualty Co. of New York*, which followed a state court action filed on behalf of a brain-damaged infant and his parents against a hospital.⁴⁵ That litigation settled for \$185,000, after the hospital and its primary insurer assured the plaintiffs' counsel that the limit on insurance coverage was \$200,000. This was wrong; another \$1 million was available on an excess policy. Still, the attorney went so far as to stipulate on the record that there was only \$200,000 of insurance coverage.

A few days after the settlement was entered into the record, the primary insurer's vice president, who had attended the trial, told the counsel for the hospital about the excess coverage. This should not have been a surprise to any of the attorneys or to the insurer's vice president, as all of them had received letters about the case from an attorney for the excess insurer. Nevertheless, the hospital's attorneys treated it as news and reported to the court that there really was \$1.2 million in coverage available. The court had not yet entered an order, so it immediately called a conference. Should they retry the case, with the excess insurer involved? The plaintiffs' counsel rejected reopening the case and chose instead to have the settlement approved, with the understanding that the plaintiffs would then pursue the hospital and the insurers for fraud.

The fraud action was filed in federal court and resulted in a \$680,000 jury verdict for the plaintiffs, which turned into a short-lived victory for the defendants when the judge granted a judgment notwithstanding the verdict. The court reasoned that the plaintiffs knew of the excess insurance before the final order affirming the settlement, yet they

COURTS WILL NOT HESITATE TO DEAL WITH EGREGIOUS CONDUCT THAT INVOLVES LYING.

case in *In re Petition for Disciplinary Action against Lyons* was against a credit reporting agency that had erroneously reported the plaintiff's death.⁴³ But when the plaintiff really died between the settlement conference and the first offer to settle, the plaintiff's attorney merely reported him as "hospitalized," a characterization he maintained for more than three months. Even under the "clear and convincing evidence" standard required for lawyer discipline, such misconduct was found to be "serious" and warranting sanctions. The Supreme Court of Minnesota found the attorney's disciplinary history—he had been subject to discipline on seven previous occasions—to be an aggravating factor when affirming the recommended penalty.

Civil lawsuits against the attorney. Instead of merely filing a bar complaint after less-than-truthful settlement negotiations, opponents may actually file new litigation against both the opposing party and its counsel. That occurred in *Cedar Island Improvement Ass'n v. Drake Associates, Inc.*,⁴⁴ an unpublished Connecticut decision. The

was that the attorney had violated the Connecticut version of Model Rule 4.1 by failing to disclose that the quality-of-work dispute between the subcontractor and the contractor was still ongoing.

In this matter, the attorney prevailed for two reasons: (1) the quality-of-work dispute was never hidden from the owner's counsel, who in fact already knew that litigation between the contractor and subcontractor was planned; and (2) the silence of the subcontractor's attorney during negotiations did not equal an affirmative misrepresentation of a material fact. The court pointed out that the contractor-subcontractor dispute had never come up in the discussion over settling the mechanic's lien. Had the issue arisen and the subcontractor's attorney remained silent, that silence could have been the equivalent of misrepresenting a material fact, the court said. But here the facts simply didn't justify finding a violation of Rule 4.1.

Courts will not hesitate to deal with more egregious settlement conduct, however, especially when it involves *lying to the court*

insisted on executing the settlement, which was seen as a waiver of the federal action. On appeal, the Second Circuit disagreed. According to the Second Circuit, New York law gave the plaintiffs a choice: either rescind the settlement agreement or ratify it and sue for damages resulting from the fraud.⁴⁶ The plaintiffs had taken the second option, and they had won a jury verdict. The Second Circuit reinstated the \$680,000 jury verdict and declared it to be jointly and severally against the primary insurer, its vice president, and the attorneys for the hospital. Interestingly, the plaintiffs had originally agreed to settle for less than the misrepresented limit of coverage, \$200,000.

How Zealous Advocates Can Avoid the Pitfalls of Deceit

As shown above, the controlling rules and decisions try to fashion a duty of candor to fit the context of settlement negotiations. This measured approach attempts to leave room for the skilled negotiator to work zealously for his or her client without engaging in knowingly deceitful conduct, which would be sanctionable. In the heat of negotiations, attorneys can strike the balance between zealous advocacy and inappropriate conduct by considering the following:

1. If opposing counsel or a tribunal asks a question about a factual matter, answer truthfully or decline to answer—never lie.
2. Beware of providing information about the client's bottom line. Even if asked by a tribunal, remember that disclosure is not required.
3. Do not morph a negotiation goal (such as receiving no less than \$100,000 in settlement) into a false statement of fact (e.g., saying, "I have no authority to settle for \$100,000").

4. Do not morph an *opinion* into a false statement of fact (e.g., saying, "we have an expert witness who will testify that your client's medication caused my client's heart failure" when your opinion is really "we have a strong expert who will raise serious issues about your client's medication").
5. Understand that a reviewing court will be interested in the fairness of the settlement and will likely scrutinize the conduct of counsel during negotiations.

In sum, be aware of the various pitfalls discussed above, and tread carefully in the minefields of negotiations! ■

Notes

1. See Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57 (1998); Marvin E. Frankel, *Some Comments on Our Constitutionalized Adversary System by Monroe H. Freedman*, 2 CHAP. L. REV. 253 (1999); John S. Dzienkowski, *Lawyer in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45 (1996).

2. See *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993) ("Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. . . . Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process.").

3. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.3; *Shaffer Equip. Co.*, 11 F.3d at 457 ("[L]awyers, who serve as officers of the court, have the first line task of assuring the integrity of the process.").

4. Paul Rosenberger, Note & Comment, *Laissez-Fair: An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators*, 13 OHIO ST. J. ON DISP. RESOL. 611, 615 (1998).

5. For a chart showing how particular jurisdictions have adopted Model Rule 4.1, see *State Rules Comparison Charts*, ABA, www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html (follow "Model Rule 4.1" hyperlink) (last updated May 6, 2014).

6. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2.

7. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-439 (2006).

8. *Ausherman v. Bank of Am. Corp.*, 212 F. Supp. 2d 435, 449 (D. Md. 2002).

9. *Cedar Island Improvement Ass'n v. Drake Assocs., Inc.*, No. CV075002871, 2009 WL 415991, at *3 (Conn. Super. Ct. Jan. 28, 2009).

10. *Ausherman*, 212 F. Supp. 2d at 446 (quoting 2 GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 37.2 (3d ed. 2000)).

11. *Id.* at 449 (emphasis added); see also ABA Formal Op. 06-439 ("Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact nor law.").

12. *Ausherman*, 212 F. Supp. 2d at 449.

13. *Statewide Grievance Comm. v. Gillis*, No. CV030479677S, 2004 WL 423905 (Conn. Super. Ct. Jan. 28, 2004).

14. *Id.* at *13.

15. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 ("Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact."); *Ausherman*, 212 F. Supp. 2d at 446 ("Patently, certain aspects of the process unavoidably involve statements that are less than completely accurate, such as posturing or puffery, . . . all of which are thought to encompass representations that are not 'material.'"); N.Y. Cnty. Lawyers' Ass'n, Op. 731 (2003) ("Puffery and exaggeration, which have long been prevalent in settlement negotiations,

[are] not prohibited conduct *per se.*”).

16. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2.

17. ABA Formal Op. 06-439.

18. *Id.*

19. 2004 WL 423905.

20. *Id.* at *3.

21. *Id.* at *11–13.

22. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-370 (1993).

23. *Id.*

24. *In re Filosa*, 976 F. Supp. 2d 460, 461, 465–66 (S.D.N.Y. 2013).

25. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-439 (2006).

26. Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 Ky. L.J. 1055 (1999).

27. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-397 (1995); *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507 (E.D. Mich. 1983); *In re Rosen*, 198 P.3d 116 (Colo. 2008) (en banc); *Ky. Bar Ass'n v. Geisler*, 938 S.W.2d 578 (Ky. 1997).

28. See *Slotkin v. Citizens Cas. Co. of N.Y.*, 614 F.2d 301 (2d Cir. 1979) (attesting that lawyer represented “to the best of his knowledge” there was only \$200,000 in potential insurance coverage despite having documents identifying a \$1,000,000 excess policy); *State ex rel. Neb. State Bar Ass'n v. Addison*, 412 N.W.2d 855 (Neb. 1987) (disciplining lawyer for negotiating a reduction of a hospital lien knowing that the hospital was under the false impression that only two insurance policies could be a source of recovery when, in fact, there were three insurance policies in force).

29. *Kath v. W. Media, Inc.*, 684 P.2d 98 (Wyo. 1984).

30. *In re Fee*, 898 P.2d 975 (Ariz. 1995).

31. See *Statewide Grievance Comm. v. Gillis*, No. CV030479677S, 2004 WL 423905, at *13 (Conn. Super. Ct. Jan. 28, 2004).

32. *Id.*

33. *Cedar Island Improvement Ass'n v. Drake Assocs., Inc.*, No. CV075002871, 2009 WL 415991 (Conn. Super. Ct. Jan. 28, 2009).

34. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-387 (1994).

35. N.Y. Cnty. Lawyers Ass'n, Op. 731 (2003).

36. *Exotics Hawaii-Kona, Inc. v. E.I. duPont de Nemours & Co.*, 172 P.3d 1021, 1042 (Haw. 2007).

37. *Id.* at 1049.

38. 571 F. Supp. 507 (E.D. Mich. 1983).

39. *Id.* at 511.

40. *Id.* at 512 (quoting Alvin B. Rubin, *A Causerie on Lawyer's Ethics in Negotiations*, 35 LA. L. REV. 577, 589 (1975)).

41. 212 F. Supp. 2d 435 (D. Md. 2002).

42. *Id.* at 440.

43. 780 N.W.2d 629 (Minn. 2010).

44. No. CV075002871, 2009 WL 415991 (Conn. Super. Ct. Jan. 28, 2009).

45. 614 F.2d 301 (2d Cir. 1979).

46. Just as in the discussion above of *Exotics Hawaii-Kona, Inc. v. E.I. duPont de Nemours & Co.*, 172 P.3d 1021, 1042 (Haw. 2007).

Fidelity and Surety Law Committee (continued from page 7)

and practical issues concerning a surety takeover.

The FSLC is also committed to offering CLE programs via webinar, and this year we presented two. “Cryptocurrency—Losses and Coverage,” presented by Robert Warchola, Kevin Baker, and Mark Krone in December 2015, dealt with the nuts and bolts of virtual currency and explored insurance policy coverage for losses related to such currency.

The second webinar, “Probate Bonds: What You Need to Know,” was presented by Sharon Sergeant, David Dreifuss, and Jeffrey Frank on March 16. This online program was designed for entry-level and experienced attorneys and claim professionals, as well as general practitioners, who are interested in understanding this complex area of law.

A big part of the FSLC's ongoing commitment to the community is the yearly designation of a charity or nonprofit by the committee chair. This year, I have chosen Homes for Our Troops (HFOT), whose mission is to build specifically adapted homes for severely injured veterans across the nation to enable them to recapture their lives. Empowered by the freedom of a mortgage-free and specially adapted home, these veterans can focus on their recovery and returning to their life's work of serving others. Learn more about HFOT at www.hfotusa.org. In supporting HFOT, as it has done for nonprofit and charity organizations designated in past years, the FSLC provides a booth for the organization at each of its CLE meetings. In addition, the FSLC will host a golf tournament benefitting HFOT

at the FSLC Spring Meeting in La Quinta.

At the Spring Program, the FSLC will wrap up the committee's social and business calendars, and my year as chair, with our vice-chairs dinner and business meeting, where I will pass the gavel to my successor, Adam Friedman, who in turn will pass his responsibilities to Toni Scott Reed, FSLC chair-elect.

If you have questions and want to learn more about the FSLC or how you can get involved, please contact our Membership/Inclusion Division cochairs, Scott Olson at solson@suretec.com, Ivette Gualdron at ivette.gualdron@zurichna.com, or Cindy Rodgers-Waire at crodders-waire@wclaw.com. Also contact me if you would like to join or have questions about our committee. I am always available at gjv@amclaw.com. ■

Why TIPS?

TIPS frequently profiles its members—from leaders to new young lawyers—in *The Brief*, asking them to comment on why they have become active in the Section. TIPS prides itself on bringing together attorneys from **plaintiffs, defense, and insurance practices**. This edition highlights three TIPS leaders from New Orleans, Louisiana.



Marlo Orlin Leach
Leach & Lowe LLC
Atlanta, Georgia

Why TIPS? “Networking, business and professional development, and friendships. When I first joined TIPS over 10 years ago, I reluctantly did so at the behest of one of my senior partners. Off I went to Napa, California, to attend a TIPS meeting, knowing very little about the organization and no one at the meeting. By the end of the weekend, I knew TIPS was for me, but not because I immediately received referrals, or was given instant positions in leadership. I joined and became active because everyone I met went out of his or her way to make me feel welcome and as if I had known them for years. They took the time to learn about me, introduce me to other members, and educate me about TIPS. Since that time, I have met many outstanding attorneys, received case referrals, and referred cases to other Tipsters. Membership has given me the opportunity to be involved in leadership positions, improve my trial skills, and make lasting friendships. Now, as I leave large firm practice for the first time and start my own firm, I know TIPS will be there to support me every step of the way. Thank you, TIPS!”

Marlo Orlin Leach is the managing member of Leach & Lowe LLC in Atlanta, Georgia. She defends corporations and businesses in cases involving contract and business disputes, product liability, premises liability, and construction litigation. She also manages national coordinating counsel programs for companies facing multijurisdictional litigation.



Michael S. Neuren
Administrative Office of the Courts of Georgia
Atlanta, Georgia

Why TIPS? “In 1988, my wife, Linda, was invited to work on a committee when TIPS met in Orlando for the Section’s Fall Meeting. I planned to play at the parks. We were adopted by Neil Shayne, a plaintiffs lawyer from Long Island, and soon became part of his family. He mentored Linda while we visited glacier fields in Alberta, diners in Massachusetts, and places in between. Through him we met another Neil adoptee, Steve Lesser, whose family we have watched grow up.

“At the Annual Meeting in 1994 during a redundantly delicious meal in the French Quarter, Walter Beckham offered his vision of what technology could do for the Section. I shared his vision, so I joined TIPS myself and—with Larry Schiffer, Hervey Levin, John Pavlou, and others—formed the Technology Committee. We dragged the ABA into launching its first website. Starting from a news article, we worked with and against some very smart, powerful lawyers to defeat a really bad proposed House of Delegates resolution governing technology contracts.

“Through TIPS, we’ve done great work, had fun, and become close friends with top trial lawyers, academics, experts in regulation, reinsurance, admiralty, labor, and animal law—because TIPS is family.”

Michael Neuren is a recovering lawyer focusing on court automation issues for the Judicial Council/Administrative Office of the Courts of Georgia in Atlanta for over 20 years. He is a member of the TIPS Technology Committee and the Section Conference Task Force. Michael also is the proud husband of former TIPS chair, Linda Klein, president-elect of the ABA.



Garrett L. Pendleton
American International Group
Atlanta, Georgia

Why TIPS? “At its core, TIPS is a volunteer organization where lawyers can give back by donating their time and talents in myriad ways to better our communities and our profession. As an ancillary benefit, it is what TIPS gives back that keeps active members of the Section returning.

“I found my ABA home in TIPS in 2002 as a law student. When I was heavily involved in the ABA’s Law Student Division, TIPS gave me the opportunity to head up a law student writing competition through its Task Force on Outreach to Law Students. From that initial involvement, I was able to pursue an array of TIPS leadership opportunities through the Membership Committee, Aviation and Space Law Litigation Committee, 2010–2011 Leadership Academy, Law in Public Service Committee, and Revenue Enhancement Committee. In the process of giving back, I gained a national network diverse in experience, geography, practice focus, and personalities. Perhaps more importantly, I also formed relationships with trusted peers, confidants, advisors, and mentors, many of whom are my dearest friends. The professional and personal rewards of TIPS abound!”

Garrett Pendleton is with AIG Aerospace in Atlanta, Georgia, which provides insurance products for airlines, aerospace products manufacturers, space launch vehicles, satellites, airports, industrial aid and general aviation.



**Are Workers' Compensation
"Alternative Benefit Plans"
Authorized by State Opt-Out
Schemes Covered by ERISA?**

By Michael C. Duff



W

orkers' compensation is a century-old system in which employees are provided benefits for work-related injuries in lieu of tort damages irrespective of the fault of their employers. In exchange for what is essentially strict liability, employers receive insulation from traditional tort damages, and employees' benefits are limited to periodic indemnity payments and payment for all reasonable and necessary medical expenses. These benefits are established and defined primarily by state statutes, though there are some federal workers' compensation systems applicable to certain categories of workers such as federal employees and longshore and harbor workers. The workers' compensation "system" has been in continuous existence since 1911.

Originally, many workers' compensation systems were "elective" and employers were permitted not to participate in the statutory scheme. This voluntariness resulted from concern at the state level that the U.S. Supreme Court might invalidate statutes on due process grounds. Eventually nearly all states moved to mandatory systems after the Court upheld the constitutionality of the workers' compensation model in *New York Central Railroad v. White*.¹ Some states delayed in adopting mandatory systems, and one state, Texas, never did and remains entirely elective.

The era of near-universal, mandatory workers' compensation systems concluded when, in 2013, Oklahoma permitted by statute employers to opt out of workers' compensation.² The change was part of an effort facilitated by workers' compensation lobbying groups like the Association for Responsible Alternatives to Workers' Compensation (ARAWC), a development widely reported by news organizations, and especially by reporters Howard Berkes and Michael Grabell, of National Public Radio and ProPublica, respectively. One of the more subtle but critical issues emerging in the debate surrounding the wisdom or lawfulness of state-sanctioned, opt-out programs has been whether "alternative benefit plans" authorized under the programs are, or would be, covered by the Employee Retirement Income Security Act of 1974 (ERISA).

This issue is thorny, subtle, and important. Imagine workers' compensation benefits paid from an employer benefit plan that also provides vacation pay. This "alternative" plan would be a kind of hybrid—both a workers' compensation and a vacation benefit plan. If the combination of the two plans creates an

ERISA plan, it would arguably no longer be subject to state regulation because of ERISA preemption. Under ERISA, state laws "relating to" ERISA-eligible plans are preempted.³ Because ERISA itself does not contain any *substantive* requirements for benefit levels—it merely requires that plans deliver what they promise to deliver—ERISA preemption is substantively empty. Handling payment of benefits under an ERISA plan means that employers would in effect be released from complying with any state-mandated substantive level of workers' compensation benefits. While an alternative plan *might* provide benefit levels that are substantively commensurate with state levels, it would not be required to do so as a matter of law. In effect, a previously mandatory benefit—one that was provided in exchange for relinquishment of tort rights—will have been converted to a discretionary benefit of the type ERISA was meant to regulate.

States that *have* authorized (Oklahoma), or are *considering* authorizing (Tennessee), alternative benefit plans argue, and even declare within the text of opt out statutes and bills, that alternative plans under their schemes are necessarily covered by ERISA.⁴ However, the conclusion, though plausible, seems debatable given the significant impact that widespread employer opt-out could have on the national employee benefit landscape and the self-interested nature of an involved state's declaration.

Surprisingly, there is no definitive legal authority on the question of whether such alternative plans are, or would be, covered by ERISA. One federal appellate court case, *Hernandez v. Jobe Concrete Products, Inc.*,⁵ a handful of Texas trial-level cases, and a two-decades-old Department of Labor "Information Letter"⁶ hold that such plans *are* covered by ERISA. However, all of that contextually weak authority arose in a period in which there was no sense that alternative plans might threaten to supplant traditional workers' compensation systems. In effect, different questions were being answered than the one being asked now. Will alternative benefit plans systematically deprive injured workers of adequate benefits for work-related injuries, thereby creating the potential for some federal involvement in an area that has historically been *exclusively* a matter of state regulation? Alternative plans create the potential for shifting costs through undercompensation of workplace injuries by less generous private plans to federal programs, and may additionally transfer



TIP

Do not assume that a benefit plan established as an alternative to workers' compensation is uncontestedly covered either by ERISA or by state workers' compensation.

disputes over the compensability of workplace injuries to federal courts.⁷ All of these considerations are triggered if alternative benefit plans are covered by ERISA.

Alternative Benefit Plans as ERISA Plans

The definition of an ERISA-covered plan is extremely broad:

[T]he terms “employee welfare benefit plan” and “welfare plan” mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title⁸

Alternative benefit plans

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probably qualify as ERISA plans under this definition as plans “established” or “maintained” for the purpose of providing participants or beneficiaries “medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, [or] death.” However, “[t]he precise coverage of ERISA is not clearly set forth in the Act,” and when questions of statutory ambiguity arise, courts customarily give deference to the reasonable views of the secretary of labor, who is specifically authorized to define ERISA’s “accounting, technical, and trade terms.”⁹

The Workers' Compensation Exemption

Under ERISA, certain kinds of “employee welfare benefit plans” are exempted from ERISA coverage: “The provisions of this subchapter shall not apply to any employee benefit plan if . . . such plan is maintained solely for the purpose of complying with applicable *workmen's compensation laws* or unemployment compensation or disability insurance laws.”¹⁰

It might be argued that under this provision opt-out plans are, like traditional workers' compensation plans, excluded from coverage by ERISA. Opt-out proponents contend, however, that the purpose of maintaining an alternative benefit plan is precisely *not* to comply with a “workmen's compensation law.”¹¹ However, there is a logical conundrum at play around that negative purpose. It is arguably a “workmen's compensation law” that permits an opt-out plan to “comply” with a workers' compensation law by authorizing opt-out in the first place. In other words, state opt-out authorization is arguably itself a “workmen's compensation law,” and seeking state permission to opt out (or to opt in in the case of Texas) sounds like a form of compliance.¹² Furthermore, in Oklahoma the opt-out

law was enacted as part of a tripartite statute also containing the former “traditional” workers' compensation law and new statutory provisions pertaining to the arbitration of workers' compensation cases. In this context, it is not difficult to argue that the opt-out law is in effect a “workmen's compensation law” subject to the ERISA exemption.

Definitions: “Workmen's Compensation Law” and “Solely” Workmen's compensation law.

Definitional problems are obviously presented by the relevant statutory language. The first problem is to determine what is meant by a “workmen's compensation law,” a phrase that is not defined in ERISA. The Congress of 1974 would likely have understood such a law as a state statute mandating periodic indemnity benefits representing a percentage of a worker's wage at the time of injury, payment of reasonable and necessary medical expenses, and directing that delivery of such benefits be the “exclusive remedy” for work-related injuries, the exclusivity representing a quid pro quo for employers' near-absolute liability under such a statute.¹³ Indeed, exclusivity is at the heart of the essential Grand Bargain between employers and employees: employees' exclusive remedy from their employers for work-related injury is workers' compensation.¹⁴ The understanding for decades has been that workers' compensation is a substitute for important or even quasi-fundamental tort rights.¹⁵ It is very difficult to believe that ERISA's drafters would have failed to adjudge an alternative benefit plan a “workmen's compensation” plan if the result would have been to deprive an injured worker of *any* statutory workers' compensation benefit.

Moreover, an alternative benefit plan created under an opt-out law that retained the exclusive remedy

rule might well have seemed to the ERISA drafters and enactors to be on its face a plan maintained to comply with a “workmen’s compensation” law. For example, Oklahoma’s opt-out statute both authorizes employers to opt out of workers’ compensation and continues to immunize those opt-out employers from tort suits.¹⁶ Other proposed opt-out schemes do not appear to retain the exclusive remedy rule,¹⁷ and employers with plans under such arrangements would commonly be liable in tort suits. Opt-out statutes eschewing exclusivity, accordingly, may have looked less like “workmen’s compensation” laws to ERISA’s drafters.

Solely for the purpose of complying—defensive application. The workmen’s compensation exemption also states that in order to escape ERISA’s coverage, a plan must be maintained “solely” for the purpose of complying with a workmen’s compensation law. Most court interpretation of the exemption’s meaning of “solely” has occurred in “defensive” contexts. States in such cases were *defending* some portion of their workers’ compensation statutes against ERISA preemption challenges through which employers were attempting to escape statutory workers’ compensation coverage, and the involved states were attempting to *prevent* the escape.¹⁸

States in “defensive” cases were arguing that the workers’ compensation exemption saved various workers’ compensation provisions from preemption. In *Employers Resource Management Co. v. James*, for example, the Fourth Circuit considered a challenge to the Virginia workers’ compensation statute.¹⁹ An employee suffered a work-related injury and became potentially entitled to benefits under a joint employer’s employee welfare benefit plan if he were to prevail in an arbitration. Instead of participating in the arbitration, the

employee filed a workers’ compensation claim. The joint employers resisted the Virginia Workers’ Compensation Commission’s attempts to assert jurisdiction over them. Eventually, the joint employers filed a complaint in federal district court seeking a ruling that the commission lacked jurisdiction over the workers’ compensation claim because their plan provided

their independent ERISA plan. We disagree. ERISA does not preempt plans; it preempts laws. When the state law only requires an employer to create a separate workers’ compensation plan, as in this case, the law necessarily relates to an employee benefit plan “solely for the purpose of complying with applicable workmen’s compensation laws.”²⁰

To escape ERISA’s coverage, a plan must be maintained “solely” for the purpose of complying with a workmen’s compensation law.

employees benefits exceeding those provided by traditional workers’ compensation and was therefore an ERISA plan. Accordingly, the joint employers contended the workers’ compensation claim was preempted by ERISA. The crux of the issue became whether the commission could continue to require the joint employer’s putative ERISA plans to provide the same financial security assurances to state authorities as were required under traditional workers’ compensation plans. The court looked closely at the workers’ compensation exemption:

Appellants propose a narrow interpretation of this language, based on Congress’s use of the word “solely” to modify the above-stated operative phrase, that would effectively preempt any plan that combines elements of ERISA and state workers’ compensation laws. In effect, Appellants argue that ERISA preempts Virginia from directing employers to keep their workers’ compensation coverage outside of

In other words, the employers attempted to argue that because the plan combined both ERISA and workers’ compensation benefit components it was not maintained “solely” for the purpose of complying with a workers’ compensation statute. The commission, for its part, was facing a situation in which employers could simply combine workers’ compensation benefits with other “ERISA” benefits and escape the workers’ compensation statute in its entirety because the plans in question were not created or maintained “solely” for the purpose of complying with a workers’ compensation law. The commission resisted the attempt, and the court agreed that ERISA could not preempt a workers’ compensation statute, which was the basis of the commission’s demand for posting of a security bond.

In coming to this conclusion, the *Employers Resource* court relied heavily on the Supreme Court’s opinion in *Shaw v. Delta Air Lines, Inc.*²¹ In *Shaw*, the employer challenged under ERISA two New

York laws, a disability law and a human rights law. With respect to the disability law, the same ERISA exemption provision applicable to workers' compensation laws was at issue. While the Court found that only "separately administered disability plans maintained solely to comply with the Disability Benefits Law are exempt from ERISA coverage under § 4(b)(3)," it went on to announce an important caveat:

This is not to say, however, that the Airlines are completely free to circumvent the Disability Benefits Law by adopting plans that combine disability benefits in-

presumptively preserved.²³

Solely for the purpose of complying—offensive application. Present opt-out debates illustrate the workers' compensation exemption in an "offensive" context. States enacting opt-out wish to *facilitate* rather than oppose employer escape from the workers' compensation statute. Not surprisingly, little authority on the workers' compensation exemption exists in this facilitative posture. States are not in the habit of creating laws that are not to be complied with. Texas, the only opt-out state during the post-ERISA period from 1974 through

workmen's compensation laws or unemployment compensation or disability insurance laws.²⁵ If the plan did not fall within the exemption, it was covered by ERISA and properly removable to federal court. The Fifth Circuit agreed with the employer's argument that because Texas did not require employers to provide workers' compensation insurance, either by subscribing to the state plan or by offering an equivalent alternative, the plan was not (and logically could not have been) maintained solely for the purpose of complying with Texas workers' compensation law. The court speculated, "Jobe has

The deep question presented by *Hernandez* is whether alternative plans are de facto workers' compensation substitutes and, if they are, whether the fact that they may also superficially exist for another purpose should be sufficient to deem them covered by ERISA.

rior to those required by that law with other types of benefits. Congress surely did not intend, at the same time it preserved the role of state disability laws, to make enforcement of those laws impossible.²²

What cases like *Employers Resource* and *Shaw* emphasized is the legitimacy of a state's historic sphere of responsibility in workers' compensation and disability law, as recognized by the drafters of ERISA. The courts have refused to allow employers to tactically create plans for the purpose of evading explicitly protected state laws through artificial use of the term "solely." Other cases have been strongly in accord with the general view that state workers' compensation police power must be

2013—when Oklahoma enacted its opt-out statute—is exclusively where facilitative authority may be located. Only *one* appellate court in Texas has addressed the issue.

In *Hernandez*, Hernandez brought a suit in state court against his former employer, Jobe Concrete Products, after he suffered an on-the-job injury.²⁴ After Jobe successfully removed the case to federal court, the district court issued a judgment dismissing Hernandez's complaint and compelling arbitration between the parties. On appeal, Hernandez challenged the subject matter jurisdiction of the district court. The central challenge was whether the employer's plan fell within the workers' compensation exemption because it was "maintained solely for the purpose of complying with applicable

undoubtedly created and maintained its plan in order to avoid the high cost of insurance under the [Texas Workers' Compensation Act], and in an effort to limit its liability in the absence of such insurance."²⁶

The case is notable in a number of respects. First, the *Hernandez* court was unable to cite *any* appellate authority, federal or state, in support of its conclusions. The court was required to cite Texas trial-level decisions because there had been no appellate court authority on the question.²⁷ Second, the court implicitly acknowledged that a *requirement* to provide an alternative plan *might* amount to a requirement by a state to provide workers' compensation insurance, bringing such a plan within the exemption. Third, the court read

Shaw in an extremely cramped manner.

With respect to the first point, it is not surprising that the *Hernandez* court was unable to cite supporting authority. Texas was at the time the only opt-out/opt-in—in any event “elective”—jurisdiction. Virtually all other states required employers either to carry workers’ compensation insurance or to self-insure. Thus, in no other state could an “offensive” case have arisen. Texas is also unique because employers have historically enjoyed presumptive nonsubscriber status. Employers need only notify their employees and state authorities that they decline to participate in the workers’ compensation system.²⁸

The *Hernandez* court followed the reasoning from the trial-level cases it cited. Obviously, if an employer is not required to comply with a workers’ compensation statute at all, one may argue that the employer could not have established a plan solely to comply with the statute. However, *Hernandez*, like most of the trial courts before it, failed to consider carefully the implications of deeming all elective plans ERISA plans. The deep question presented is whether alternative plans are de facto workers’ compensation substitutes and, if they are, whether the fact that they may also superficially exist for another purpose should be sufficient to deem them covered by ERISA. The Jobe plan’s classification as an ERISA plan deprived *Hernandez* of both a workers’ compensation and a tort remedy.²⁹ He was forced to accept the plan’s coverage for his injuries and, if they were inadequate, to resort to other public benefits systems or to charity. If Texas courts recognized these possibilities at the time, they certainly did not discuss them.

Texas employers are in a position to argue that they did not adopt alternative plans solely for

the purpose of complying with a workers’ compensation law because there is no workers’ compensation law with which they must comply. Indeed, Texas employers need not even carry alternative plans and can choose to “go bare,” exposing themselves to the possibility of a tort suit (though that risk may be significantly reduced if they also compel employees to sign arbitration agreements as a condition of hire). In an opt-out system like Oklahoma’s, on the other hand, employers are vulnerable to the argument that they are in fact complying with a state workers’ compensation law by following rules for opt-out. Were the employer not to follow the opt-out rules, it would be required by the state to purchase workers’ compensation insurance,³⁰ and the *Hernandez* court seemed to hint at that possibility.

Third, with respect to *Shaw*, the case said much more than that the workers’ compensation exemption “will apply only to plans which are both separately administered and maintained solely to comply with state law.”³¹ *Shaw* also made clear that a state could require an employer to create a separately administered workers’ compensation plan:

A State may require an employer to maintain a disability plan complying with state law as a separate administrative unit. Such a plan would be exempt under § 4(b)(3). The fact that state law permits employers to meet their state-law obligations by including disability insurance benefits in a multibenefit ERISA plan does not make the state law wholly unenforceable as to employers who choose that option.³²

In other words, if a state did not authorize an employer to create an alternative benefit plan outside of traditional workers’

compensation, it *would* be able to *compel* an employer *both* to pay workers’ compensation benefits through such an ERISA plan *and* to separately maintain the workers’ compensation portion of the plan in a discrete administrative unit. As previously mentioned, a state could prevent an artful escape from its workers’ compensation system through the manipulation of preemption. *Hernandez* significantly underread *Shaw*.

Additional Observations Concerning Legislative History

Shaw recognized that the primary legislative purpose of ERISA was to facilitate “national uniformity in benefit plan regulation in part to make it easier for employers to offer benefits free of patchwork local regulation. Congress feared that burdensome, overlapping regulation would discourage employers from providing benefits at all.”³³ With that overriding legislative purpose in mind, it is difficult to agree that Congress would have countenanced an interpretation of ERISA permitting traditional state workers’ compensation benefits to casually blur and dissolve into federal ERISA welfare benefit plans. Two principal arguments in support of this conclusion are the lack of national uniformity likely to be brought on by a significant opt-out movement, and the litigation and cost shifting occasioned by a widespread opt-out development.³⁴

With respect to the lack of national uniformity, whatever one may think about the underlying merits of opt-out, if ERISA preemption applies to alternative benefit plans, they will likely multiply in some states and not in others. For example, some authors are already contending the opt-out movement will concentrate in the South, raising the specter of a regional race to the bottom.³⁵ It may be a significant challenge for businesses to deal with what is

likely to be a confusing patchwork of occupational disability plans, a development that would be at odds with ERISA's underlying purpose and premises.³⁶ Congress's primary concern when it enacted ERISA was "to ensure that plans would be able to meet their obligation to participants and their beneficiaries. One of the most important ways in which ERISA advances this objective is by protecting plans from regulatory requirements that vary from state to state—or even from city to city."³⁷ While it may be true that Congress believed that federal preemption would establish that uniformity, it should not be doubted that the objective was the uniformity, not the preemption.

With respect to cost shifting, there are obvious vehicles by which costs may be shifted from the states to the federal government. First, if opt-out plans are covered by ERISA, disputes under the plans will be heard in federal courts.³⁸ Regardless of the merits of those claims, many claims may be brought. This increase in federal docketing activity will have its costs. Second, as opt-out plans proliferate and result in a higher rate of denial of work-related injury claims, more injured individuals will apply, and possibly be found eligible for, Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits. Workers' compensation to SSDI cost shifts have been causing difficulties even under present law,³⁹ and it seems questionable to impose additional costs without a very clear indication that such was the intent of the Congress of 1974.⁴⁰ A third area of cost shifting, only beginning to be understood, concerns Medicare set-aside obligations. Alternative benefit plans mandating lump sum settlements of claims completely terminate the legal obligation of the employer at settlement, including the requirement to pay future medical

expenses. The question of whether Medicare's interests can be adequately protected in the context of such settlements is an open one.⁴¹

The question accordingly is whether the Congress of 1974 would have meant for the workers' compensation exemption *not* to apply to opt-out plans in light of risks such as these. I think the answer is no.

The Welfare and Pension Plans Disclosure Act of 1958. James Wooten, law professor at the State University of New York in Buffalo, and preeminent historian of ERISA, observes that the riddle of "solely" is not best answered by ERISA, a point missed in the prior authority cited in this article.⁴² ERISA's Section 4(b), the workers' compensation exemption, is found verbatim in the Welfare and Pension Plans Disclosure Act of 1958 (WPPDA).⁴³ Section 4(b) of the WPPDA stated, "This act shall not apply to an employee welfare or pension benefit plan if . . . such plan was established and is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation disability insurance laws[.]"⁴⁴

Accordingly, the workers' compensation exemption language in the WPPDA, like the subsequent language in ERISA, exempted only plans created or maintained "solely" for the purpose of complying with workmen's compensation laws. However, several preliminary bills leading up to the final version of WPPDA omitted the "solely" requirement. In other words, any "workmen's compensation" plan was subject to exemption.⁴⁵ The Senate version of the bill never contained the "solely" limitation. The House version of the bill also did not contain it until May 5, 1958.⁴⁶ The House bill omitted the limitation until a very late iteration of the bill.⁴⁷ Thus, the limitation was inserted during an 11-day

period, 48 years ago, for reasons that are as yet unclear. (The author of this article is currently researching the question with Professor Wooten.)

WPPDA preemption was much narrower than Section 514 of ERISA.⁴⁸ Whereas ERISA preempts any law relating to any employee benefit plan not excluded under the workmen's compensation exemption,⁴⁹ WPPDA read as follows:

The provisions of this Act, except subsection (a) of this section, and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.⁵⁰

The distinction between WPPDA and ERISA preemption is important. Under weak WPPDA preemption, an employer might have sought to avoid WPPDA simply by paying employee benefits from a plan that also paid workers' compensation benefits. In the context of weak preemption, it would have made perfect sense for the WPPDA conference committee to agree to the House of Representatives' language making clear that only plans created "solely" for the purpose of complying with workmen's compensation laws were excluded from coverage by the new federal statute. The addition dealt in advance with the argument that the new federal scheme could not be "held" to conflict with state worker's compensation law. If a plan had been enacted "solely" to comply with a workmen's

compensation law, fine—it was beyond the reach of the federal statute. Otherwise, it could be regulated. The limitation would have discouraged evasive enactment of hybrid plans to escape federal regulation. However, weak preemption meant that workers' compensation plans could not be negatively

Direct Reference to ERISA Plans

A final irony is that state opt-out laws like Oklahoma's and the prior proposed law in Tennessee may themselves be preempted to the extent they "relate to" ERISA plans. Indeed, state laws referencing ERISA plans may be preempted *simply on the basis of that reference*.⁵³

history, it would be surprising if the secretary were to interpret ERISA's ambiguous, technical "workmen's compensation" statutory language in a manner inconsistent with these employee-protective goals. Furthermore, the hybrid workers' compensation plans at issue bear little or no resemblance to the

It is hard to accept that ERISA or WPPDA drafters would have imagined that benefit plans created to deliver workers' compensation benefits would later be found to have fallen within their federal benefits statutes meant to address fraud and abuse.

impacted by the "solely" limitation. Federal regulation of hybrid benefit plans would not oust a state from simultaneous regulation of the plan under its workers' compensation laws.

The legislative record is certainly devoid of evidence that "solely" was included under the WPPDA to facilitate conversion of traditional state workers' compensation plans to hybrid plans subject to federal regulation. The zeitgeist of early benefit regulation generally was to go slow and effect limited impacts on traditional state spheres of regulation. Indeed, the statute preserved some state latitude even within the contemplated federal objects of employee pensions and welfare benefits, reporting, and disclosure.⁵¹ Furthermore, given the speed with which the sweeping ERISA preemption provision was ultimately enacted in the summer of 1974,⁵² it is difficult to imagine that the ERISA statute's architects foresaw, or had any intentions with respect to, the interplay of ERISA preemption and a single word within a WPPDA exclusion they do not appear to have explicitly considered.

States cannot have it both ways. Either state opt-out laws are workers' compensation laws, in which case they are excluded from ERISA coverage; or, if they say anything at all about how the alternative plans are to operate, they are directly referencing federal ERISA-regulated employee benefit plans, in which case the opt-out laws themselves are preempted.

Of course, it seems generally odd for a state legislature to attempt to determine in advance that any particular plan is, in fact, an ERISA plan. Even intuitively such a designation suggests the need for a federal role, and in fact the Supreme Court has said it is for the secretary of labor to define ERISA's "accounting, technical, and trade terms."⁵⁴ Ultimately, the secretary of labor would be considering the underlying purposes of ERISA in resolving ambiguous categorizations of benefit plans. "In enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds."⁵⁵ In light of this

underfunded, discretionary multi-employer welfare plans that were at the heart of the commencement of federal employee benefit legislation.⁵⁶

Conclusion

It is a venerable canon of statutory construction that the plain language of a statute should not be applied if it would lead to absurd results.⁵⁷ Prior federal employee benefits statutes drew a clear line between discretionary employee benefits and mandatory workers' compensation benefits that originate from a historical trade-off between employers and employees—a quid pro quo of statutory for common-law tort rights. The types of benefits that were in jeopardy in the late 1950s through the mid-1970s, when ERISA was enacted, were multiemployer health and welfare plans that had grown enormously in the late 1940s and early 1950s and which became "a fertile environment for mismanagement and corruption."⁵⁸

It is very hard to accept that the drafters of ERISA, or of WPPDA, would have imagined that benefit

plans predominately created or maintained for the purpose of delivering workers' compensation benefits would in later epochs be found to have fallen within their federal benefits statutes meant to address fraud and abuse. In fact, the only way the conclusion can be reached is by completely ignoring the underlying purposes of the statutes and tortuously relying on the word "solely," a term thrown into incredible service by the gargantuan pull of ERISA preemption. "Solely" was a carryover term from

Given the ambiguity of the term "solely," the administrator of pension and welfare benefit programs of the Department of Labor could avoid entirely the risk of results of the kind mentioned in the preceding paragraph by simply issuing an opinion letter clarifying the meaning of "workmen's compensation" laws.⁶⁰ A reasonable filling of a gap in this hazy and complex regulatory area would almost certainly be upheld by the federal courts.⁶¹

Of course, it is easy to cry out that the sky is falling. However, it

6. Information Letter from U.S. Dep't of Labor to Howard Klein (Sept. 2, 1994).

7. See 29 U.S.C. § 1132.

8. *Id.* § 1002.

9. *Massachusetts v. Morash*, 490 U.S. 107, 113, 116 (1989) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981); *Udall v. Tallman*, 380 U.S. 1, 16 (1965)).

10. 29 U.S.C. § 1003(b)(3) (emphasis added).

11. See generally BILL MINICK, PARTNERSOURCE, *OPTIONS TO WORKERS' COMPENSATION: PUBLIC POLICY ANALYSIS* (2015), available at www.partnersource.com/media/25227/options%20to%20workers%20compensation%20-%20public%20policy%20analysis.pdf.

12. See *Gibbs v. Serv. Lloyds Ins. Co.*, 711 F. Supp. 874, 878 (E.D. Tex. 1989); *Foust v. City Ins. Co.*, 704 F. Supp. 752, 753-54 (W.D. Tex. 1989).

13. See *N.Y. Cent. R.R. v. White*, 243 U.S. 188 (1917).

14. 82 AM. JUR. 2D *Workers' Compensation* § 54 (2015).

15. See Michael C. Duff, *Worse Than Pirates or Prussian Chancellors: A State's Authority to Opt-Out of the Quid Pro Quo*, 17 MARQ. BENEFITS & SOC. WELFARE L. REV. (forthcoming 2016).

16. OKLA. STAT. tit. 85A, § 209(A).

17. See S. 721, 109th Gen. Assemb., Reg. Sess. § 50-10-108(a) (Tenn. 2015).

18. ERISA Section 514, 29 U.S.C. § 1144, provides in broad terms that ERISA supersedes any and all state laws insofar as they relate to any employee benefit plan. "State laws" include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." ERISA § 514(c)(1).

19. 62 F.3d 627 (4th Cir. 1995).

20. *Id.* at 632.

21. 463 U.S. 85 (1983).

22. *Id.* at 108.

23. See, e.g., *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008); *Ciampi v. Hannaford Bros.*, 681 A.2d 4 (Me. 1996).

Workers' compensation costs are rapidly approaching \$100 billion per year.

a prior statute that had been given no previous judicial gloss so as to activate the canon of substantial reenactment.⁵⁹

To allow hybrid "alternative benefit plans" to escape state workers' compensation systems simply because they were not created or maintained (one suspects tactically) "solely" for the purpose of complying with a state workers' compensation law, where the purpose for the insertion of the term under a *prior* statute is unknown is, in context, absurd. At minimum, such an interpretation will create a great deal of uncertainty in the short term about the structuring of employee benefits systems. In theory, the absurd interpretation could even result in a national benefits "race to the bottom," as unregulated alternative benefit plans pay fewer and fewer benefits and thus become ever more attractive to the cost-cutting activities of states mired in a battered economy.

should not be forgotten just how pervasive, yet ubiquitous, workers' compensation systems have become. Workers' compensation costs are rapidly approaching \$100 billion per year. The original implementation of workers' compensation statutes occurred very quickly from roughly 1910 to 1920, when over 40 states established workers' compensation laws. When a great deal of money is at stake, events can unfold very, very quickly. And therein lies the danger. ■

Notes

1. 243 U.S. 188, 255 (1917).

2. OKLA. STAT. tit. 85A, §§ 201 *et seq.*

3. See *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987).

4. See OKLA. STAT. tit. 85A, § 211(B)(5); S. 721, 109th Gen. Assemb., Reg. Sess. § 50-10-106 (Tenn. 2015).

5. 282 F.3d 360 (5th Cir. 2002).

24. *Hernandez v. Jobe Concrete Prods., Inc.*, 282 F.3d 360 (5th Cir. 2002).

25. *Id.* at 362.

26. *Id.* at 363.

27. *Id.* (citing *Rojas v. DAJ Enters., Inc.*, No. EP-00-CA-313-DB, 2001 WL 682223, at *3 (W.D. Tex. Mar. 6, 2001); *Guilbeaux v. 3927 Found, Inc.*, 177 F.R.D. 387, 393–94 (E.D. Tex. 1998); *Pyle v. Beverly Enters.-Tex., Inc.*, 826 F. Supp. 206, 209–10 (N.D. Tex. 1993)).

28. See *Workers' Compensation Resources for Employers*, TEX. DEP'T OF INS., www.tdi.texas.gov/wc/employer (last updated Mar. 2, 2016).

29. See *Rodriguez v. Pacificare of Tex., Inc.*, 980 F.2d 1014 (5th Cir.) (holding state tort claims preempted by ERISA), *cert. denied*, 508 U.S. 956 (1993).

30. See OKLA. STAT. tit. 85A § 203.

31. *Hernandez*, 282 F.2d at 362 n.2.

32. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 108 (1983) (citation omitted).

33. See Brian P. Goldman, Note, *The San Francisco Health Care Security Ordinance: Universal Health Care beyond ERISA's Reach?*, 19 STAN. L. & POL'Y REV. 361, 373 (2008) (citing *Shaw*, 463 U.S. at 99).

34. See Congressional Letter to Thomas E. Perez, Sec'y, U.S. Dep't of Labor (Oct. 20, 2015) (estimating \$12 billion in costs being shifted from workers' compensation to the Social Security Disability Insurance system each year), available at <https://assets.documentcloud.org/documents/2465674/letter-from-federal-lawmakers-to-labor-on.pdf>.

35. See David B. Torrey, *The Opt-Out of Workers' Compensation Legislation in the Southern States*, Paper Presented before MCLE New England (Nov. 20, 2015), available at www.davetorrey.info/files/Torrey.MCLE_Mass_Opt-out.10.26.15final.pdf.

36. See *Shaw*, 463 U.S. at 98.

37. Brief of the American Benefits Council *et al.* as *Amici Curiae* in Support of Respondent at 17–18,

Gobeille v. Liberty Mut. Ins., No. 14-181 (S. Ct. Oct. 20, 2015), available at www.scotusblog.com/wp-content/uploads/2015/10/14-181-bsac-American-Benefits-Council-et-al.pdf.

38. See 29 U.S.C. § 1132.

39. See NICK BUFFIE & DEAN BAKER, CTR. FOR ECON. & POLICY RESEARCH, *RISE IN DISABILITY PAYMENTS: ARE CUTS TO WORKERS' COMPENSATION PART OF THE STORY?* (2015), <http://cepr.net/documents/rising-disability-payments-2015-10.pdf>.

40. See Congressional Letter to Thomas E. Perez, *supra* note 34.

41. Jennifer C. Jordan, *Opt Outs to Workers' Compensation: The Real Disconnect in What Is Being Said and What Is Being Implemented*, LEXIS-NEXIS LEGAL NEWSROOM (Jan. 22, 2016), www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2016/01/22/opt-outs-to-workers-compensation-the-real-disconnect-in-what-is-being-said-and-what-is-being-implemented.aspx.

42. Interview with James Wooten, Professor, State Univ. of N.Y. (Jan. 2016).

43. Pub. L. No. 85-836, 72 Stat. 997 (1958) (repealed 1974); see 29 U.S.C. § 1031.

44. WPPDA § 4(b)(2), 72 Stat. at 998.

45. H.R. 487, 85th Cong., 1st Sess. (1957); H.R. 4653, 85th Cong., 1st Sess. (1957); H.R. 6513, 85th Cong., 1st Sess. (1957); H.R. 6650, 85th Cong., 1st Sess. (1957); H.R. 7607, 85th Cong., 1st Sess. (1957); H.R. 8004, 85th Cong., 1st Sess. (1957).

46. H.R. 12338, 85th Cong., 2d Sess. (May 5, 1958).

47. H.R. 12176, 85th Cong., 2d Sess. (Apr. 24, 1958).

48. 29 U.S.C. § 1144.

49. *Id.* § 1003(b).

50. WPPDA § 10(b), 72 Stat. at 1003.

51. See James A. Wooten, *A Legislative and Political History of ERISA Preemption*, 15 J. PENSION BENEFITS 15, 16–17 (2008).

52. See JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY* 264–70 (2004).

53. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 (1992) (striking down District of Columbia law that “specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is preempted”).

54. *Massachusetts v. Morash*, 490 U.S. 107, 116 (1989) (citing ERISA § 505, 29 U.S.C. § 1135).

55. *Id.* at 115 (citing *Cal. Hosp. Ass'n v. Henning*, 770 F.2d 856, 859 (9th Cir. 1985), *modified*, 783 F.2d 946 (9th Cir.), *cert. denied*, 477 U.S. 904 (1986); *Private Welfare and Pension Plan Legislation: Hearings on H.R. 1045 et al. before the Subcomm. on Labor of the H. Comm. on Education and Labor*, 91st Cong. 470–72 (1970) (testimony of secretary of labor concerning mismanagement of 22 pension and welfare funds); 120 CONG. REC. 4279–80 (1974) (remarks of Rep. Brademas); *id.* at 4277–78 (remarks of Rep. Perkins); 119 CONG. REC. 30,003 (1973) (remarks of Sen. Williams)).

56. WOOTEN, *supra* note 52, at 91.

57. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (rejecting literal interpretation of Federal Rule of Evidence 609(a)(1) because it would produce absurd result); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (refusing to adhere to plain meaning of an immigration statute because it would have impacted adversely on clergy members).

58. WOOTEN, *supra* note 52, at 45.

59. See *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974) (reasoning that where words in an amended section of a statute have been previously construed under a pre-amendment statute containing the same words, the words are ordinarily to be construed in the new statute in the same way as in the prior construction).

60. ERISA Procedure 76-1, § 3, 41 Fed. Reg. 36,281 (Aug. 27, 1976).

61. See *Barnhart v. Walton*, 535 U.S. 212 (2002).

THE FUTURE OF FEDERAL PREEMPTION IN AVIATION

By Jeffrey Ellis and Vincent C. Lesch

As most practitioners in the tort field know, preemption defenses can be a key issue in determining the ultimate outcome of a claim. This is particularly true with respect to aviation claims.

Whether federal regulation of aviation safety preempts state common-law claims in aviation accident cases has become a hotly contested issue in both the federal district courts and courts of appeal. Although most circuit courts have recognized and accepted the applicability of this defense in the context of operational and piloting issues, the U.S. Supreme Court has yet to rule.

The Third Circuit, which was the first circuit to recognize the preemption defense in the operational and piloting context, is once again taking the lead and considering whether the defense applies to products liability design claims.¹ Given the importance of these matters to any aviation practitioner and the possibility that this preemption issue could soon be ripe for Supreme Court review, it is important to understand

the fundamental concepts of federal preemption, how the Supreme Court has applied these concepts in other fields, and how this concept may be applied to emerging technologies such as unmanned aircraft systems.

An Overview of Federal Preemption

Any summary of the concept of federal preemption starts with the supremacy clause of the United States Constitution: “[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”² The supremacy clause empowers Congress to invalidate, i.e., preempt, any state law, regulation, or action through federal legislation.³ Thus, the touchstone for any preemption analysis must always be congressional intent.⁴

Congressional intent to preempt state law can be expressed either explicitly in the language of the statute, or implicitly.⁵ Importantly, these two categories are not mutually exclusive, and Congress’s inclusion

of express preemption language as to certain portions of state law does not mean implicit preemption arguments cannot also be made.⁶ Implicit preemption frequently arises when there is conflict preemption and can even result in preemption of an entire “field.”

Conflict preemption comes in two different sub-forms. The first is when “compliance with both state and federal law is impossible.”⁷ The second form of conflict preemption occurs when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁸ For the sake of simplicity, these two types of conflict preemption can be referred to as impossibility conflict preemption and obstacle conflict preemption, respectively.

Most relevant to the discussion here, field preemption occurs when Congress intended to foreclose any state regulation in an entire area or field, regardless of whether state law in that area was consistent or inconsistent with federal law.⁹ This intent can be inferred from a federal regulatory framework “so pervasive . . . that Congress left no room for the States to supplement it” or where there is a “federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”¹⁰ As noted earlier, it has long been recognized that the touchstone of any field preemption analysis is the intent of Congress. In preemption cases, and particularly those involving fields that the states have traditionally occupied, the Supreme Court will assume that Congress did not intend to supersede the states’ historic police powers, unless that was the clear and manifest intent of Congress.¹¹

Summary of Supreme Court Preemption Case Law

The Supreme Court has not yet taken up the issue of preemption in regard to aviation torts, and only rarely addressed the idea of field preemption in the aviation context.¹² The Court, however, has otherwise been very busy with preemption in other fields and contexts. These rulings are important to understand and will inform how the Supreme Court might rule if and/or when it further considers the preemption defense in aviation cases.

The auto industry and obstacle conflict preemption. The automotive industry and federal regulation of its safety posed a preemption question meriting the Supreme Court’s review in *Geier v. American Honda Motor Co.*¹³ The question presented to the Court was whether the plaintiff’s state common-law tort action, premised on Honda’s failure to include airbags, was preempted by the National Traffic and Motor Vehicle Safety Act of 1966 and the Department of Transportation’s (DOT’s) implementing regulations requiring

airbags in some, but not all, vehicles.¹⁴

After rejecting both express preemption and savings clause arguments,¹⁵ the Court determined that state “no airbag” suits were conflict preempted because they were an obstacle to Congress’s and the DOT’s objectives.¹⁶ In so holding, the Court clarified that, despite previous dicta that seemed to indicate to the contrary, the presence of an express preemption clause, even in tandem with a savings clause, does not bar the ordinary workings of implied preemption.¹⁷ The relevant regulatory history showed that the DOT had carefully considered which kinds of passive restraints should be installed in vehicles and ultimately decided to require any of a variety of restraints to achieve an optimal level of safety. The Court held that this decision by the DOT preempted any state court judgment requiring specifically airbags, because any such state requirement would be contrary to the DOT’s, and thus Congress’s, objective of achieving a mix of restraints for optimal safety.

In so holding, the Court was also careful to note that the DOT’s submission that obstacle preemption should be found was entitled to “some weight.”¹⁸ A formal agency statement of preemptive intent, however, was not a prerequisite to finding a conflict, as it might be for a finding of field preemption.¹⁹

Ship design field preempted. The maritime shipping industry is another heavily federally regulated and preempted field that the Supreme Court addressed in *United States v. Locke*.²⁰ After the *Exxon Valdez* oil spill in Alaska, the state of Washington enacted numerous laws and regulations governing oil tankers, despite the Supreme Court’s previous holdings that oil tanker design and construction was impliedly field preempted by federal law.²¹ The relevant federal statute, the Ports and Waterways Safety Act of 1972 (PWSA), had been amended by the Oil Pollution Act of 1990 since the Court’s previous ruling, but a unanimous Court held that the PWSA still preempted the entire field of tanker vessel “design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning.”²² The presumption against preemption was “not triggered when the State regulates in an area where there has been a history of significant federal presence,” and Congress has legislated in the field of international shipping “from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme.”²³ While a savings clause in the PWSA allowed certain regulations to be subject only to conflict preemption principles, much of Washington’s regulatory scheme was field preempted by the Court’s broad finding.²⁴

Recreational boating safety not field preempted. One of the leading implied field preemption holdings of recent times is the Court’s searching analysis of the



TIP

A lawyer litigating an aviation claim without a good understanding of preemption is like Dorothy trying to get back to Kansas without her ruby slippers.

recreational boating safety field in *Sprietsma v. Mercury Marine*.²⁵ After ruling out both express and implied conflict preemption of the plaintiff's state products liability complaint, the Court addressed the question of whether the entire field of recreational boating safety was preempted by the Federal Boat Safety Act of 1971 (FBSA) and subsequent Coast Guard regulatory action.²⁶ Unlike previous situations where the Court found field preemption, like in *Locke*, the FBSA did not command the Coast Guard to issue regulations on any aspect of boating safety, but merely left the issuance of regulations up to the Coast Guard's discretion. This discretion indicated to the Court that Congress did not have the necessary "clear and manifest" intent to preempt the entire field of judge-made common law as it relates to boating safety.²⁷ In so holding, the Court also noted that finding state judge-made common-law claims preempted required a more searching analysis than did the preemption of state positive laws and regulations.²⁸ Overall, the *Sprietsma* decision seemed to reinforce the Court's reluctance to find field preemption.

Medical devices and conflict preemption of state common-law tort duties. The medical field

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has generated numerous Supreme Court preemption decisions, but the express preemption question in *Riegel v. Medtronic, Inc.* is of particular interest.²⁹ In *Riegel*, the question was whether the plaintiff's numerous state common-law claims challenging the safety and effectiveness of a device were expressly preempted by the Medical Device Amendments of 1976 (MDA) and the Food and Drug Administration's (FDA's) premarket approval of that device.³⁰ The Court found these state law tort claims expressly preempted, and refused to allow state juries to substitute their judgment for the FDA's rigorous and device-specific premarket approval. Instead, the Court held that state law claims for damages could only be premised on a violation of FDA regulations, i.e., "parallel claims."³¹

This broad immunization of premarket approved medical devices against state common-law tort claims holds important parallels for many field preemption cases, despite the fact that its holding stemmed from a finding of express preemption. The defendants in *Sik-kelee v. Precision Airmotive Corp.*, for example, seek a similar outcome in their arguments to the Third Circuit—namely, to have federal regulations replace state common-law tort duties in the analysis of a products liability claim.³²

The pharmaceutical industry, labeling claims, and an agency's preemption opinion. The Supreme Court returned to the issue of preemption in the medical field when it took up *Wyeth v. Levine* in 2009.³³ While the litigants abandoned their field preemption arguments before the Supreme Court, the rulings this case generated on implied preemption and statutory interpretation are valuable to any preemption analysis. At issue in *Wyeth* was whether the FDA's drug labeling judgments and regulations preempted state law products liability and failure

to warn claims.³⁴ *Wyeth* argued both conflict preemption theories: either complying with both federal and state requirements on labeling was impossible or the state requirements were an obstacle to the federal requirements' purpose.³⁵ The Court ultimately rejected both arguments and found that the plaintiff's claims remained viable.³⁶

In regard to the implied conflict obstacle arguments, the Court carefully examined the purpose of Congress in enacting the Federal Food, Drug, and Cosmetic Act (FDCA) and disregarded the FDA's position on the preemption of the claims in question. In particular, the Court found that Congress's failure to add an express preemption clause despite its awareness of state law failure to warn claims meant that Congress did not see such claims as an obstacle.³⁷ Despite its previous holdings that an agency's views were entitled to "some weight," the Court also disregarded the FDA's 2006 opinion that claims like the plaintiff's were preempted.³⁸ The FDA had changed its longstanding position that state law claims complemented its efforts, and the Court's own analysis of the FDA's statutory mandate led the Court to disregard the FDA's new pro-preemption position.³⁹ The Court went on to clarify that, absent special authority to preempt delegated by Congress, an agency's explanation of state law's impact on the federal scheme is only entitled to weight in accordance with "its thoroughness, consistency, and persuasiveness."⁴⁰

Railroad products liability and field preemption. The Supreme Court also recently revisited a previously preempted field in *Kurns v. Railroad Friction Products Corp.* and demonstrated the power that a broad statement of field preemption can have even 85 years later.⁴¹ The plaintiff in *Kurns* brought state law defective design and failure to warn claims

against manufacturers of locomotive parts that included asbestos. The Court, in a majority opinion authored by Justice Thomas, found that these claims fell within the preempted field that was previously defined as “the design, the construction and the material of every part of the locomotive and tender and of all appurtenances.”⁴² Justice Thomas’s opinion rejected the plaintiffs’ efforts to distinguish their claims from the preempted field and declined to find that statutory amendments since the original 1915 statute changed the analysis. The broad preemptive scope of locomotive field preemption covered all state regulations, common-law duties, and standards of care related to locomotive equipment, regardless of their purpose or aim.⁴³ *Kurns* is instructive of how influential a broadly worded field preemption finding can be in cutting off all types of claims.

State laws and immigration field preemption. Federal preemption of state statutes in the immigration field was addressed by the Court using field preemption principles in *Arizona v. United States*.⁴⁴ The Court declared three of four challenged immigration enforcement statutes preempted: two based on implied conflict preemption and one on implied field preemption. The finding of field preemption was based on previous Supreme Court precedent from the 1940s finding the entire field of “alien registration” preempted by federal statutory directives designed to act as a “harmonious whole.”⁴⁵ Even complementary or parallel state regulations were held foreclosed by Congress’s preemption of the entire immigration field.⁴⁶

Interestingly, the more pointed comments on field preemption arose in a dissent by Justice Scalia addressing field preemption’s interplay with conflict preemption. According to Justice Scalia, the majority’s conflict preemption

analysis heavily borrowed from field preemption rationales, and in reality was a field preemption finding in disguise.⁴⁷ Therefore, while the majority holdings for field preemption in *Arizona v. United States* appear as fairly straightforward extensions of *stare decisis*, examination of the dissents demonstrates a tension about when field or con-

sky laws, survived field preemption because they protect state citizens from the unscrupulous collusion or securities practices of any business, not just those of pipelines that happen to also do business in the preempted interstate/wholesale field.⁵² The Court stressed that limiting its precedent in this way preserved state law when possible,

SCOTUS rulings in *Wyeth* on implied preemption and statutory interpretation are valuable to any preemption analysis.

lict preemption are best utilized and what rationales should be held exclusively applicable to each.

The boundaries of field preemption and natural gas pricing. Lastly, the Court recently addressed how broadly previous findings of field preemption could stretch in relation to the natural gas industry. In *Oneok, Inc. v. Learjet, Inc.*, a group of large retail purchasers of natural gas sued their interstate pipeline suppliers, alleging a violation of state antitrust laws.⁴⁸ The defendant pipelines argued that such claims were preempted by the Court’s previous finding that “Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce.”⁴⁹

After a detailed recitation of federal legislation and Supreme Court involvement with natural gas regulation, Justice Breyer, writing for the majority, refused to read the Court’s previous holding broadly enough to include the plaintiffs’ antitrust claims in the preempted field.⁵⁰ Instead, the only state laws or state law claims preempted would be those “aimed directly at” interstate purchasers and the prices of wholesales for resale.⁵¹ Laws of general application, like antitrust statutes or blue

and prevented states from losing the ability to legislate in any area that in any way affected interstate natural gas producers, purchasers, or the price of natural gas.⁵³ The Court also carefully rejected arguments relying on two past natural gas preemption cases that were centered on implied conflict, not field, preemption as inapplicable to the case at hand.⁵⁴ In general, the opinion comes across as attempting to limit the scope of implied field preemption and to avoid making broad field preemption just for the sake of simplicity.⁵⁵

Preemption of Aviation

Congressional intent to preempt state laws governing aviation can be traced to the very first aviation legislation that it enacted less than a generation after the Wright brothers’ first flight. The congressional hearings that led to the passage of the 1926 Air Commerce Act clearly demonstrate an intent for aviation safety to be exclusively and uniformly regulated at the federal level.

One of the witnesses who testified at these early hearings was William MacCracken Jr., the chairman of the American Bar Association Committee on the Law of Aeronautics. It was noted

that his committee had assisted Congress in drafting the bill and “solving the legal problems that have been presented.”⁵⁶ In explaining the legal framework of the proposed legislation, MacCracken stated: “There were two things that were of controlling importance. One was that there should be *exclusive* regulatory power in the Commissioner to the end that there might be *uniformity* throughout the States.”⁵⁷

MacCracken also emphasized the absolute necessity of exclusive federal regulation when he was questioned by members of the congressional committee reviewing the issue:

Mr. Burtness: Mr. MacCracken, the men responsible for the drafting of this bill, then, do feel that there would be objections to concurrent jurisdiction on the part of the State Government?

Mr. MacCracken: *Absolutely. There is no question about that.*⁵⁸

In 1944, the Supreme Court considered the preemption of a state’s personal property tax law as applied to commercial aircraft.⁵⁹ Justice Jackson authored a concurring opinion in that case which has been frequently cited to describe the federal role regarding aviation regulation:

Congress has recognized the national responsibility for regulating air commerce. Federal control is *intensive* and *exclusive*. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.⁶⁰

In 1948, the Supreme Court majority echoed Justice Jackson’s statements in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*:

Congress has set up a *comprehensive* scheme for regulation of common carriers by air. . . . We find no indication that the Congress either entertained or fostered the narrow concept that air-borne commerce is a mere outgrowth or overgrowth of surface-bound transport. . . . [A]ir commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, *uniform* and *exclusive* regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past.⁶¹

As aviation rapidly continued to develop, Congress determined that its prior aviation legislation needed to be amended so as to centralize control over aviation in the Federal Aviation Administration (FAA). In so doing, it continued to express its intent and understanding that federal law should exclusively govern. As was the case with respect to earlier federal aviation legislation, the legislative history of the 1958 Federal Aviation Act⁶² clearly evidences congressional intent to exclusively regulate matters of aviation safety at the federal level.

According to its legislative history, the purpose of the 1958 Act was to create one uniform system of air space management so as to “eliminate divided [federal] responsibility and conflicts of interest” and “avoid duplication of effort and

a division of [federal] authority that could result in further confusion.”⁶³ In a report accompanying the 1958 Act, Stuart Tipton, president of the Air Transport Association, explained, “*aviation is unique* among transportation industries in relation to the Federal Government—it is the only one whose operations are conducted *almost wholly* within the federal jurisdiction, and are subject to *little or no regulation* by the States or local authorities.”⁶⁴

The foregoing Senate report further sets forth that transferring all safety and rulemaking to a single federal agency (i.e., the FAA) was necessary because “aviation safety is essentially indivisible” and “experience indicates that the preparation, issuance, and revision of regulations governing matters of safety can best be carried on by the agency charged with the day to day control of traffic, the inspection of aircraft and service facilities, and certification of pilots and related duties.”⁶⁵ Congress concluded that the only means to effectuate such a uniform and exclusive system of regulation was to vest “full safety rule making authority” in one federal agency headed by an administrator with “plenary” (complete) authority to make and enforce safety regulations governing, among other things, the design and operation of civil aircraft.⁶⁶

The Supreme Court considered the scope of preemption intended by the 1958 Act in *City of Burbank v. Lockheed Air Terminal, Inc.*⁶⁷ The specific issue before the Supreme Court was whether the 1958 Act, as amended by the Noise Control Act of 1972, implicitly preempted a local ordinance that sought to control aircraft noise by regulating the time periods in which jet aircraft could take off from the Hollywood-Burbank Airport. The Supreme Court concluded that the local ordinance was preempted by federal law.⁶⁸

Justice Douglas, writing for the

majority, reasoned that although the control of noise is within the police power of the states, the “pervasive control” of aviation safety and flight operations at the federal level left “no room for local curfews or other local controls.”⁶⁹ In other words, the holding in *Burbank* is that state or local law that purports to regulate aircraft noise is preempted because it falls within the scope of an area of law that is exclusively regulated at the federal level, i.e., aviation safety and flight operations.

The Supreme Court explained in *Burbank* that the 1958 Act “requires a delicate balance between safety and efficiency” and that the “interdependence of these factors requires a *uniform and exclusive* system of federal regulation if the congressional objectives underlying the [1958 Act] are to be fulfilled.”⁷⁰ Although the four-justice dissent believed that this local ordinance fell outside the scope of federal preemption, they nonetheless agreed with the majority that the scope of the 1958 Act’s implied preemption of state law extended to “all aspects of air safety.”⁷¹

Aviation preemption and tort claims. The application of aforesaid preemption principles to aviation tort claims has not yet been the subject of a Supreme Court ruling. However, the issue has been addressed by numerous federal courts of appeal. In this regard, the two most significant decisions to date are generally considered to be the Tenth Circuit’s 1993 decision in *Cleveland v. Piper Aircraft Corp.*⁷² and the Third Circuit’s 1999 decision in *Abdullah v. American Airlines, Inc.*⁷³

In *Cleveland*, the Tenth Circuit addressed a tort claim involving an alleged design defect in a Piper Super Cub whose design had been certified by the FAA. The defendant argued that the FAA’s certification precluded a jury from using state common law to hold

the product defective. The Tenth Circuit rejected that implied preemption argument because it found that the “plain language” of the 1958 Act “suggests” that Congress did not intend the Act to have a “general preemptive” intent.⁷⁴ While the court recognized that Congress did intend for some uniformity in the aviation field, it concluded that this objective did not extend to common-law tort suits because the 1958 Act contained a “remedies” savings clause, a reference to federal standards

Abdullah explained that courts (like the Tenth Circuit in *Cleveland*) that have focused on Congress’s use of the enigmatic phrase “minimum standards” in the 1958 Act are wrong to do so because that ambiguous term does not establish that Congress actually intended to empower the states to promulgate their own individual “higher” standards. The Third Circuit cited to many of the same legislative history sections and Supreme Court decisions cited herein and stated that there is nothing in the 1958

Since 1958, Congress has clearly intended to exclusively regulate matters of aviation safety at the federal level.

being “minimums,” and an express preemption provision that did not pertain to safety standards.

Abdullah was decided six years after *Cleveland* but did not involve a product defect claim. Instead, it addressed the preemption issue in the context of a claim involving negligent piloting. Specifically, the Third Circuit considered an interlocutory appeal presenting the following certified question: “Does federal law preempt the standards for air safety, but preserve State and Territorial damage remedies?”⁷⁵

The Third Circuit answered both questions in the affirmative and held that a state or territory cannot use common-law liability standards to impose liability on an airline.⁷⁶ Instead, in order to establish liability, a plaintiff must establish a violation of a federal safety standard. If, however, a violation of the federal scheme can be established, the Airline Deregulation Act of 1978 (ADA) does not preempt a plaintiff’s “right” to recover using a state or territorial damage remedy.⁷⁷

The Third Circuit’s decision in

Act, 1978 ADA, or their respective legislative histories that either mentions or implies that the individual states were to be given any power whatsoever to regulate aviation safety.⁷⁸

The Third Circuit also explained in *Abdullah* that the 1978 ADA was intended only to eliminate federal economic regulation of the airlines. The legislative history of the 1978 ADA contains no basis to conclude that Congress intended to change the preexisting scheme of safety regulation of flight operations, which had long been recognized by both Congress and the Supreme Court to vest exclusive control of aviation safety in the federal government.

More than 10 years after *Abdullah* was decided, the Tenth Circuit recognized that its prior preemption analysis in *Cleveland* was erroneous.⁷⁹ It cited to *Abdullah* when it revisited its decision in *Cleveland* and held that its finding of no preemption was incorrect. In so holding, the Tenth Circuit also cited to the Supreme Court’s decision in *Burbank* and stated:

Based on the FAA's purpose to centralize aviation safety regulation and the comprehensive regulatory scheme promulgated pursuant to the FAA, we conclude that *federal regulation occupies the field of aviation safety* to the exclusion of state regulations. The FAA was enacted to create a "uniform and exclusive system of federal regulation" in the field of air safety.⁸⁰

Not surprisingly, there is still vigorous debate over precisely where the boundary lines for federal preemption should be drawn. In this regard, there is now pending another interlocutory appeal in the Third Circuit that addresses how its prior holding in *Abdullah* should be applied to a design defect claim similar to what the Tenth Circuit addressed in *Cleveland*. That appeal, *Sikkelee v. Precision Airmotive Corp.*, is from a decision issued by a federal district court in the Third Circuit which seems to have reluctantly concluded that the Third Circuit's prior holding in *Abdullah* required dismissal of a design defect claim when the design is certified by the FAA.⁸¹ Whether this decision finally triggers Supreme Court review remains to be seen, but it is carefully monitored by all those whose practice involves aviation torts.

Pending issue: the *Sikkelee* question. In the *Sikkelee* appeal, the parties framed their arguments to address the question of *Abdullah's* preemptive scope and whether aviation design defect cases are preempted. The plaintiff-appellant wishes to distinguish general aviation, specifically general aviation design defect cases, from *Abdullah's* preemption holding in the commercial aviation safety field. In addition, the plaintiff submits that the FAA's design approval in the form of a type certificate should not immunize a manufacturer from future design defect liability. The

defendant-appellee, on the other hand, contends *Abdullah's* reasoning mandates that federal design standards preempt state standards of care in design defect cases, and that a type certificate from the FAA is conclusive proof that a manufacturer complied with those standards. The Third Circuit heard extensive and lively oral argument on these issues in June 2015⁸² and then requested that the FAA submit a statement to the court setting forth its opinion.

The FAA advised the Third Circuit that it believes the Federal Aviation Act of 1958 "impliedly

preempts the field of aviation safety with respect to substantive standards of safety."⁸³ It explained that the Act "requires the Department of Transportation, through the FAA Administrator, to impose uniform national standards for every facet of aviation safety, including the design of aircraft and aircraft parts."⁸⁴ The FAA then stated:

[F]or every new aircraft, aircraft engine, or propeller, the FAA makes a determination that it meets federal standards at the time of the product's design by issuing a type certificate. Thus, while the Act, by virtue of the clause saving common law remedies, does not preempt state tort suits, it is federal standards that govern state tort suits based on design defects in aviation manufacturing.⁸⁵

The FAA then opined that its determination that an aircraft, aircraft engine, or propeller design complies with federal standards plays an important role in

determining whether the manufacturer in fact breached a duty owed to the plaintiff but does not create a per se bar to suit. It summarized its view as follows:

Where the FAA has expressly approved the specific design aspect that a plaintiff challenges, any claim that the design should have been different would conflict with the FAA's application of the federal standard and therefore be preempted. On the other hand, where the FAA has left a particular design choice to a manufacturer's discretion, and no

other conflict exists, the type certificate does not preempt a design defect claim applying federal standards.⁸⁶

The FAA also expressed the view that its position on preemption was entitled to significant weight from the court because it was consistent with the agency's position 20 years prior in *Cleveland* and because the agency possesses specialized expertise in the area of aviation safety.⁸⁷

The FAA's view was challenged by the plaintiff-appellant in *Sikkelee* and largely agreed with by the defendant-appellee. The plaintiff distinguished this case from the preempted field of commercial aviation in cases like *Abdullah*, and argued that this general aviation products liability case was more like the situation in *Wyeth*. She also argued that the government's position that type certificates led to conflict preemption was without precedent in either the courts or previous FAA opinions. The defendant reiterated that the FAA's

The arguments and the Third Circuit's ruling in *Sikkelee* will influence litigation in other circuits.

consistent position on preemption is correct and in line with the holding in *Abdullah* and the position that the FAA espoused in *Cleveland*.

How the Third Circuit will rule remains to be seen, but it is expected that irrespective of the result, this issue will continue to be litigated in other circuits and that litigation most likely will be influenced by the arguments and result reached in *Sikkelee*.

Emerging technologies. As the preemption issue is developed further in the aviation transport field, it will be interesting to see how these decisions influence or determine how preemption will be applied to emerging technologies like unmanned aircraft systems (UAS), otherwise known as “drones.” Various state government entities have begun to enact ordinances regulating the use of UAS, and this has prompted the FAA to issue a “UAS Fact Sheet” intended to serve as a guide for state and local governments seeking to regulate this new technology.⁸⁸

The FAA fact sheet summarizes well-established legal principles as to the federal responsibility for regulating the operation or flight of aircraft, which includes, as a matter of law, UAS. The FAA also states that it is responsible for “ensur[ing] safety of flight, and safety of people and property on the ground” as a result of the operation of aircraft, and that “[s]ubstantial air safety issues are raised when state or local governments attempt to regulate the operation or flight of aircraft” including UAS in the national airspace.⁸⁹ The fact sheet provides examples of state and local laws affecting UAS for which consultation with the FAA is recommended and those that are likely to fall within state and local government authority.

The fact sheet notes that the FAA requires federal registration of UAS in order to operate a UAS and that the federal registration

requirement is “exclusive”—i.e., “no state or local government may impose an additional registration requirement on the operation of UAS in navigable airspace without first obtaining FAA approval.”⁹⁰ The FAA surmises that a “‘patchwork quilt’ of differing restrictions could severely limit the flexibility of FAA in controlling the airspace and flight patterns, and ensuring safety and an efficient air traffic flow.”⁹¹ As support for its argument, the FAA cites to field preemption case law:

A navigable airspace free from inconsistent state and local restrictions is essential to the maintenance of a safe and sound air transportation system. See *Montalvo v. Spirit Airlines*, 508 F.3d 464 (9th Cir. 2007), and *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989); see also *Arizona v. U.S.*, 567 U.S. ___, 132 S. Ct. 2492, 2502 (2012) (“Where Congress occupies an entire field . . . even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.”), and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386–87 (1992).⁹²

However, the FAA has not yet expressed any final opinion as to what the specific limits of the preempted field actually are. The boundaries of where federal law preempts state regulation regarding UAS are yet to be clearly defined, and further litigation will obviously need to address these issues.

Conclusion

As the case law develops in all these interrelated areas, it can be expected that the courts will define the boundaries of preemption in a way that considers and/or addresses all the issues set forth herein.

Given the obvious interrelationship

of all these different aspects of aviation transport and technology, the practitioner would be well served to monitor development in all these areas of the law and expect that a good deal of additional litigation is likely to follow. ■

Notes

1. *Sikkelee v. Precision Airmotive Corp.*, No. 14-4193 (3d Cir. argued June 24, 2015).

2. U.S. CONST. art. VI, cl. 2.

3. See *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015).

4. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

5. *Oneok*, 135 S. Ct. at 1595 (citing *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002)).

6. See *Sprietsma*, 537 U.S. at 65 (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)).

7. *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989).

8. *Id.* at 101 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

9. *Oneok*, 135 S. Ct. at 1595 (citing *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012)).

10. *Arizona*, 132 S. Ct. at 2501 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

11. See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

12. See *Wardair Can., Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1 (1986); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); see also *infra* text accompanying notes 67–73.

13. 529 U.S. 861 (2000).

14. *Id.* at 864–65.

15. *Id.* at 867–74.

16. *Id.* at 876, 886.

17. *Id.* at 869–74.

18. *Id.* at 884.

19. *Id.* at 884–85.

20. 529 U.S. 89 (2000).

21. *Id.* at 94 (citing *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978)).

22. *Id.* at 111.

23. *Id.* at 108.

24. *Id.* at 111–12.
25. 537 U.S. 51 (2002).
26. *Id.* at 68.
27. *Id.* at 69.
28. *See id.* at 69–70 (citing *Cipolone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992); *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).
29. 552 U.S. 312 (2008).
30. *Id.* at 315.
31. *Id.* at 330.
32. Brief of Appellee at 45–46, 48, *Sikkelee v. Precision Airmotive Corp.*, No. 14-4193 (3d Cir. argued June 24, 2015).
33. 555 U.S. 555 (2009).
34. *Id.* at 563.
35. *Id.* at 564.
36. *Id.* at 581.
37. *Id.* at 574–75.
38. *Id.* at 575–76 (citing Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934–35 (Jan. 24, 2006)).
39. *Id.* at 579–81.
40. *Id.* at 577.
41. 132 S. Ct. 1261 (2012).
42. *Id.* at 1266 (quoting *Napier v. Atl. Coast Line R.*, 272 U.S. 605, 611 (1926)).
43. *Id.* at 1269–70 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)) (noting that states can effect regulation and govern conduct by the award of damages). The Court also justified its broad reading of its own precedent by referencing express preemption cases, where states’ “requirements” are often interpreted to include their common-law duties. *Id.* (citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008)).
44. 132 S. Ct. 2492 (2012).
45. *Id.* at 2502 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 72 (1941)).
46. *Id.* The FAA recently relied on this language to advise state and local authorities considering regulating drones that they are almost certainly preempted from doing so, especially without FAA consultation. *See infra* text accompanying notes 88–92.
47. *Arizona*, 132 S. Ct. at 2519–20 (Scalia, J., concurring in part and dissenting in part).
48. 135 S. Ct. 1591 (2015).
49. *Id.* at 1594 (quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 305 (1988)).
50. *Id.* at 1599 (“Petitioners’ arguments [for preemption of state law antitrust claims] are forceful, but we cannot accept their conclusion.”).
51. *Id.* at 1599–1600.
52. *Id.*
53. *Id.* at 1600–01.
54. *Id.* at 1601–02 (citing *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988); *FPC v. La. Power & Light Co.*, 406 U.S. 621 (1972)).
55. *See id.* at 1601 (“Petitioners and the dissent argue that there is, or should be, a clear division between areas of federal and state authority . . . [b]ut that Platonic ideal does not describe the natural gas regulatory world.”).
56. *Bureau of Civil Air Navigation in the Department of Commerce: Hearings on H.R. 10522 Before the H. Comm. on Interstate and Foreign Commerce*, 68th Cong., 2d Sess. 54–55 (1924) (statement of William MacCracken Jr., Chairman, ABA Commission on the Law of Aeronautics) [hereinafter *Hearings on H.R. 10522*]; *see also* CIVIL AERONAUTICS: LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926, at 30 (1928).
57. *Hearings on H.R. 10522, supra* note 56, at 55 (emphasis added).
58. *Id.* at 63–64 (emphasis added).
59. *See Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944).
60. *Id.* at 303 (Jackson, J., concurring) (emphasis added).
61. 333 U.S. 103, 105, 107 (1948) (emphasis added).
62. *See* 49 U.S.C. §§ 40101 *et seq.*
63. H.R. REP. NO. 85-2360 (1958), reprinted in 1958 U.S.C.C.A.N. 3741, 3744, 3747.
64. S. REP. NO. 85-1811, at 5 (1958) (accompanying S. 3880, 85th Cong., 2d Sess.) (emphasis added).
65. *Id.* at 11, 27.
66. H.R. REP. NO. 85-2360.
67. 411 U.S. 624 (1973).
68. *Id.* at 625–26.
69. *Id.* at 638.
70. *Id.* at 638–39.
71. *Id.* at 644.
72. 985 F.2d 1438 (10th Cir. 1993).
73. 181 F.3d 363 (3d Cir. 1999).
74. *Cleveland*, 985 F.2d at 1442.
75. *Abdullah*, 181 F.3d at 364.
76. *Id.* at 364–65.
77. *Id.* at 364–65, 375–76.
78. *Id.* This analysis is consistent with prior Supreme Court precedent holding that the use of the words “minimum standards” does not furnish a “litmus-paper test” for resolving issues of preemption. Instead, the Supreme Court has held that where “it is sufficiently clear that Congress directed the promulgation of standards on the national level,” the States cannot regulate the same subject. *See Ray v. Atl. Richfield Co.*, 435 U.S. 151, 168 n.19 (1978).
79. *See US Airways, Inc. v. O'Donnell*, 627 F.3d 1318 (10th Cir. 2010).
80. *Id.* at 1326 (emphasis added).
81. *Sikkelee v. Precision Airmotive Corp.*, 45 F. Supp. 3d 431 (M.D. Pa. 2014), *appeal filed*, No. 14-4193 (3d Cir. Oct. 21, 2014).
82. The audio recording of this argument can be accessed at www2.ca3.uscourts.gov/oralargument/audio/14-4193JillSilleev.PrecisionAirmotiveCorp.mp3.
83. FAA Letter Brief at 2, *Sikkelee*, No. 14-4193 (3d Cir. argued June 24, 2015).
84. *Id.*
85. *Id.*
86. *Id.* at 3.
87. *Id.* at 9.
88. FAA OFFICE OF THE CHIEF COUNSEL, STATE AND LOCAL REGULATION OF UNMANNED AIRCRAFT SYSTEMS (UAS) FACT SHEET (Dec. 17, 2015), available at www.faa.gov/uas/regulations_policies/media/UAS_Fact_Sheet_Final.pdf.
89. *Id.* at 1–2.
90. *Id.* at 2.
91. *Id.*
92. *Id.* at 2–3.

LITIGATING AVIATION CASES IN FOREIGN ★ ★ ★ ★ ★ VENUES

By Ricardo M. Martínez-Cid
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One clear trend in U.S. aviation litigation has been an increase in the filing in or dismissal to foreign venues of cases arising from overseas airplane crashes and cases involving foreign plaintiffs. Preparing and handling these cases can prove difficult for the unprepared attorney. Numerous considerations must be accounted for in addition to those normally associated with domestic aviation cases, and pitfalls abound. This article discusses some common issues that practitioners may face when handling cases filed in or dismissed to foreign venues, including personal jurisdiction, forum non conveniens, and practical

considerations such as counseling foreign clients, negotiating confidentiality orders, and taking depositions in foreign jurisdictions.

Establishing Personal Jurisdiction over Foreign Defendants

With the recent changes in the law applicable to personal jurisdiction (discussed below), it is likely that more and more cases will be filed in foreign venues. Recently, the Supreme Court revisited general jurisdiction in *Daimler AG v. Bauman*¹ and specific jurisdiction in *Walden v. Fiore*.² Personal jurisdiction takes one of

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TIP

Lawyers handling aviation cases in foreign venues must be cognizant of many legal and practical issues that may not arise in U.S. venues.

two forms: (1) general jurisdiction, arising from affiliations with the forum state that render the party essentially at home there, regardless of where the actions giving rise to the case occur; or (2) specific jurisdiction, dependent upon the connection between the forum and underlying controversy, i.e., the suit arises out of or relates to the party's contacts with the forum.

In both cases, the Supreme Court found that exercising jurisdiction would violate the due process clause. *Daimler, Walden*, and their predecessors *Good-year*³ and *Nicastro*⁴ emphasize that the Supreme Court is “increasingly [focused] on the ‘relationship among the defendant, the forum, and the litigation,’ i.e., specific jurisdiction, [and] general jurisdiction [has] come to occupy a less dominant place in the contemporary scheme.”⁵ As a result, it is becoming increasingly difficult for plaintiffs to convince courts to exercise general jurisdiction over international defendants.

Daimler AG v. Bauman. *Daimler* is a general jurisdiction case. In the U.S. District Court for the Northern District of California, Argentinian citizens sued Daimler AG, a German company, for

violations of the Alien Tort Statute and Torture Victim Protection Act by one of Daimler's Argentinian subsidiaries. Personal jurisdiction over Daimler was predicated upon the California contacts of Mercedes-Benz USA (MBUSA), a Daimler subsidiary. Neither Daimler nor MBUSA were incorporated or had a principle place of business in California. The district court granted Daimler's motion to dismiss for lack of jurisdiction. The Ninth Circuit reversed, upholding the assertion of personal jurisdiction because MBUSA was Daimler's agent for jurisdictional purposes, and did sufficient business in California to answer any lawsuit filed there. Holding that “[e]xercises of personal jurisdiction so exorbitant . . . are barred by due process constraints on the assertion of adjudicatory authority,” the Supreme Court reversed the Ninth Circuit.⁶

The Supreme Court found error in the Ninth Circuit's focus on the amount of transactions between California consumers, MBUSA, and Daimler. The Court was unconcerned with the amount of MBUSA's sales within California. Instead, it looked to whether Daimler was “at home” in California. The Court reasoned that the Ninth Circuit's approach would permit courts to confer general jurisdiction upon any international corporation with substantial, continuous, and systematic business activities within the forum state, rather than looking to whether the corporation was at home there.

To determine whether a corporation is “at home” in a forum state, courts typically look to its place of incorporation and principle place of business. The *Daimler* Court did note, however, that in “exceptional” cases, a corporation's relations to a state in which it is neither incorporated nor has its principle place of business “may be so substantial and of such a nature as to render the corporation at

home in that State.”⁷ The Court did not provide examples of the types of exceptional circumstances that provide an exception to the general rule for determining a corporation's “home” beyond pointing to *Perkins v. Benguet Consolidated Mining Co.*⁸

After *Daimler*, expect defendants to contest general jurisdiction more often. For example, in *Air Tropiques, SPRL v. Northern & Western Insurance Co.*,⁹ the U.S. District Court for the Southern District of Texas applied *Daimler* to hold that a St. Kitts insurance company, NWIC, was not subject to Texas general jurisdiction. NWIC's Texas subsidiary had administrative offices in Texas, had a Texas phone number, and made insurance adjustment and denial determinations from the Texas office, but that was not sufficient to create general jurisdiction over NWIC. The court said that “[the subsidiary] is ‘at home’ in Texas, but its Texas contacts cannot create general jurisdiction over NWIC.”¹⁰

Post-*Daimler*, some courts remain reticent to grant boilerplate motions to dismiss for lack of general jurisdiction. In *Barriere v. Juluca*,¹¹ the U.S. District Court for the Southern District of Florida denied an Anguillan corporation's motion to dismiss for lack of jurisdiction. The case centered on a negligence claim arising from an injury at an Anguillan resort of a U.S. citizen plaintiff domiciled in Texas but lacking connections to Florida. The defendant failed to file any affidavits, testimony, or documents supporting its motion. The court distinguished *Daimler* by looking to the Anguillan corporation's extensive marketing within Florida, its sales office within Florida, and its relationship with a codefendant subsidiary that was at home in Florida. The court found that to deny general jurisdiction “would effectively permit foreign corporations to freely solicit and

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accept business from Americans in the United States and at the same time be completely shielded from any liability in U.S. courts from any injury that may arise as a result.”¹²

Another recent case has also declined to extend *Daimler*. In *Otsuka Pharmaceutical Co. v. Mylan Inc.*,¹³ Otsuka sued Mylan Inc., Mylan Pharmaceuticals Inc. (Mylan Pharma), and Mylan Laboratories (Mylan Labs) (collectively,

real property in New Jersey. But, like Mylan Inc., it had registered to do business in New Jersey and had appointed an in-state agent for service of process. It held a wholesale distribution license for New Jersey, and generated annual revenues in excess of \$50 million from sales in that state. Mylan Pharma had also litigated in over 30 cases in the district.

Mylan Labs, on the other

exceptional case because at least two of the Mylan entities (Mylan Inc. and Mylan Pharma) had consented to personal jurisdiction by registering to do business and appointing a registered agent in New Jersey.

Mylan Inc. and Mylan Pharma asserted that *Daimler* allowed jurisdiction to exist only in a corporation’s place of incorporation and principal place of business, or under

As a result of the Supreme Court’s rulings in *Daimler* and *Walden*, it is becoming increasingly difficult for plaintiffs to convince courts to exercise general jurisdiction over international defendants.

Mylan) in the U.S. District Court for the District of New Jersey. Otsuka was a Japanese company. Mylan Inc. was a Pennsylvania corporation with its principle place of business in Pennsylvania. Mylan Pharma was a West Virginia corporation with its principle place of business in West Virginia. Mylan Labs was an Indian subsidiary of Mylan Inc.

The three Mylan entities each had connections to New Jersey. Mylan Inc., although it did not maintain a permanent, physical presence in New Jersey, registered with the state of New Jersey to transact business as a foreign profit corporation, identified an in-state registered office, and designated an in-state agent for service of process. Mylan Inc. also held a New Jersey distribution license, and generated annual revenues in excess of \$100 million from its sales in that state. Finally, it had actively litigated, as both a plaintiff and a defendant, in over 30 cases in the District of New Jersey.

Mylan Pharma likewise did not have any manufacturing plants, corporate offices, facilities, or other

hand, had not registered as a foreign corporation in New Jersey or appointed an agent for service of process. It did hold a wholesale distribution license in New Jersey, and did generate revenue attributable to sales in New Jersey. Mylan Labs had been involved in at least three cases in the District of New Jersey.

Otsuka argued that the Mylan defendants’ numerous contacts with the District of New Jersey sufficed to subject each of them to the general personal jurisdiction of the court. Mylan argued that the connections were insufficient for purposes of obtaining personal jurisdiction given the U.S. Supreme Court’s decision in *Daimler*.

The court recognized *Daimler*’s finding that a defendant’s “place of incorporation and principal place of business” were seemingly the exclusive bases for finding a corporate defendant at home, although it noted that the *Daimler* Court left open the possibility of “exceptional” cases.¹⁴ Nonetheless, the *Otsuka* court found that it did not have to determine whether the litigation constituted such an

other exceptional circumstances that did not exist in their case. The court disagreed and determined that *Daimler* did not preclude its consent to jurisdiction finding.

With respect to Mylan Labs, however, the court found that personal jurisdiction did not exist. Mylan Labs was not authorized to do business in New Jersey and had not appointed a registered agent in that state, and Otsuka had failed to demonstrate that Mylan Labs had purposefully directed any relevant conduct toward the forum.

Walden v. Fiore. *Walden* dealt with specific jurisdiction. In the U.S. District Court for the District of Nevada, the plaintiffs brought a *Bivens* action¹⁵ against a Georgia police officer alleging that he improperly seized their cash. The plaintiffs planned to fly from Puerto Rico to Nevada with a stopover in Georgia. In Puerto Rico, TSA agents stopped and searched the plaintiffs at the airport. They found \$97,000 in cash. The plaintiffs explained they were professional gamblers, and the cash was the gambling bank from their winnings in San Juan. In Georgia,



Officer Walden and a DEA agent approached the plaintiffs, used a drug-sniffing dog to perform a sniff test, and seized the cash despite the plaintiffs' providing the same explanation for its source. Officer Walden then helped draft an affidavit to show probable cause for forfeiture of the funds.

The plaintiffs alleged that Walden's affidavit was false. Walden moved to dismiss claiming lack of personal jurisdiction. The district court granted the motion. On appeal, the Ninth Circuit held that the district court could properly exercise jurisdiction because Walden submitted the affidavit with knowledge that it would affect persons in Nevada. The Supreme Court reversed, holding that specific jurisdiction requires minimum contacts between the defendant and the forum state.¹⁶

First, the Court clarified *Burger King Corp. v. Rudzewicz*,¹⁷ stating a plaintiff cannot be the only link between a defendant and the forum. Instead, the relationship between a defendant, the forum, and the litigation must arise out of contacts the defendant creates with the forum state. The unilateral activity of the plaintiff is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum state to justify specific jurisdiction. Second, the defendant's "minimum contacts" must be with the forum state, not with persons who reside in the forum state. While the defendant does not need to be physically present in the state, physical entry into the state through an agent, goods, mail, or some other means is relevant contact.¹⁸

Goodyear Dunlop Tires Operations, S.A. v. Brown. *Goodyear* considered both North Carolina's specific jurisdiction to adjudicate out-of-state injuries and general jurisdiction over a corporation's subsidiaries. North Carolina

residents were killed in France during a bus crash, the cause of which was determined to be a defective Goodyear tire. The decedents' parents brought suit in North Carolina state court against Goodyear USA, an Ohio corporation, and three of Goodyear's international subsidiaries. The subsidiaries were not registered to do business in North Carolina; they had no office, employees, or bank accounts in North Carolina; they did not design, manufacture, or advertise their tires in North Carolina; they did not solicit business in North Carolina; and they did not sell or ship any tires to North Carolina. Still, a small fraction of the subsidiaries' tires were distributed in North Carolina by other Goodyear USA affiliates. The Supreme Court held that the subsidiaries' "attenuated connections" to North Carolina fell short of "the continuous and systematic general business contacts' necessary to empower North Carolina to entertain [the] suit."¹⁹

J. McIntyre Machinery, Ltd. v. Nicastro. In *Nicastro*, the Supreme Court attempted to limit *Asahi's* "stream of commerce" theory of specific jurisdiction.²⁰ *Nicastro* brought suit in New Jersey state court against a British manufacturer, J. McIntyre, for negligent design and manufacturing. *Nicastro* asserted jurisdiction based on the fact that J. McIntyre hired a U.S. distributor. The state court held that the British company was subject to jurisdiction in New Jersey based on the "stream-of-commerce theory," even though it had never advertised in, sent goods to, or in any relevant way targeted New Jersey, because it knew or reasonably should have known that its products, which were distributed through a nationwide distribution system, might be sold in any of the 50 states.

The Supreme Court disagreed and reversed. The Court found that

"it is not enough that the defendant might have predicted that its goods will reach the forum State."²¹ Instead, the defendant must "purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."²² The Court noted that the defendant had no office in New Jersey, did not pay taxes or own property there, and did not advertise in or send any employees to the state. The Court recognized that the defendant agreed to sell machines in the United States, that its officials attended trade shows in several states (but not New Jersey), and that up to four machines ended up in New Jersey, but found that these facts did not show that the defendant "purposefully availed itself of the New Jersey market."²³

The Supreme Court's opinion examined *Asahi's* two divergent opinions related to stream-of-commerce jurisdiction: (1) the Court's opinion holding that a "finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum state" (i.e., purposeful availment);²⁴ and (2) Justice Brennan's concurring opinion that a court could find jurisdiction based on mere foreseeability that a product *could* enter the forum or if fairness demanded it.²⁵ The *Nicastro* plurality rejected Justice Brennan's rationale, stating that due process necessitated a defendant's purposeful availment of the forum state for jurisdictional purposes.²⁶

The *Nicastro* concurrence by Justice Breyer argued against retooling jurisdictional doctrine, as jurisdiction could be denied under the existing stream-of-commerce theory.²⁷ Some courts have considered Justice Breyer's opinion to be the holding of the *Nicastro* case because he concurred in the judgment on the narrowest of grounds.²⁸ Today, courts in Oregon and the Fifth Circuit have accepted

Breyer's concurrence as the binding opinion of the Supreme Court and refused to narrow their stream-of-commerce theory of specific jurisdiction.²⁹ A New Mexico state court of appeals determined that "[b]ecause *J. McIntyre Machinery* did not produce a majority opinion . . . pre-*Asahi* case law utilizing the approach set forth in *World-Wide Volkswagen* remains binding."³⁰

The U.S. District Court for the Middle District of Florida has likewise declined to apply *Nicastro's* purposeful availment of the specific forum requirement. The court in *Hatton v. Chrysler Canada, Inc.*, determined that all that is required

dismissed following a forum non conveniens (FNC) motion. Under FNC, a U.S. court may dismiss a case if the moving party can show that an adequate alternative forum exists and that the private interests of the parties and the interests of the public favor the alternative forum.³⁴ Determination of a defendant's FNC motion is at the court's discretion, and defendants have the burden of proof "as to all elements of the [FNC] analysis."³⁵ The threshold burden is to prove the defendant's proposed alternative forum is able and available to accept jurisdiction over the entire case, i.e., subject matter and all par-

choose to stay the U.S. case under the FNC doctrine (as opposed to dismissing it), allowing the U.S. court to retain jurisdiction while sending the case to the alternative forum to be litigated.³⁷ Should the alternative forum refuse to accept jurisdiction, the U.S. court will reopen the case.

Local law and responding to international difficulties. When facing an FNC motion, plaintiffs should obviously be familiar with the laws of their forum state. For instance, Florida Rule of Civil Procedure 1.061(a)(1) requires that the alternative forum possess "jurisdiction over the whole case, including all of the parties." In the case of *Ramalho v. Rolls-Royce*,³⁸ we successfully defeated Rolls-Royce's FNC motion utilizing this rule. The court there dismissed the FNC motion solely because of the "inclusion as a defendant of a now-defunct Florida limited liability company." The court concluded that a condition precedent of an adequate forum did not exist, and dismissed the FNC motion. Pursuant to the same rule, it is also incumbent on the defendant to file its motion to dismiss for FNC within 60 days after service of process.

As the FNC analysis continues, a defendant's offer to ease potential difficulties associated with its proposed choice of forum can push the court to grant a dismissal. In *In re Air Crash Disaster over Makassar Strait, Sulawesi*,³⁹ the court dismissed a products liability claim to Indonesia, in part because the U.S. manufacturer defendant promised to produce evidence at the Indonesian court's direction. Of course, if the defendant can offer to produce evidence in another jurisdiction, the plaintiff may also eliminate difficulties by securing the testimony of foreign witnesses by deposition or by securing their attendance through letters rogatory. As stated by the U.S. District Court for the

A case may be dismissed if the moving party can show that an adequate alternative forum exists and private and public interests favor that forum.

for personal jurisdiction is that the corporation delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state.³¹ The corporation does not have to both place a product in the stream of commerce that ends up in the forum state *and* do something more to purposely avail itself of the forum state's market specifically in order for the forum state to exercise personal jurisdiction over the corporation.³² In *Hatton*, the court determined that because the defendant had assembled the product for a company that then nationally distributed the product, the defendant had purposely availed itself of the protections of those states, including the state of Florida.³³

Forum Non Conveniens

Yet another way a case can end up in a foreign venue is after being

ties.³⁶ It has been our experience that defendants will almost always file an FNC motion in cases involving an international defendant, an international plaintiff, and/or an accident that occurred internationally. A handful of topics relevant to FNC motions are discussed below.

International law. It is important to be familiar with international law when responding to an FNC motion. It may be useful to retain an expert on the law of the defendant's proposed forum. For example, according to the law of many Latin American countries, once a plaintiff has chosen a jurisdiction, that court does not have discretion to refuse to hear the case, and all other courts have lost jurisdiction. These "blocking statutes" prevent defendants from seeking transfers to a different jurisdiction because the plaintiff has already chosen the forum. A hesitant U.S. court aware of these statutes may



Violations of the rules and regulations of foreign jurisdictions may result in sanctions by the foreign bar association or its equivalent.

Southern District of New York in *Carlenstolpe v. Merck & Co.*, “deposition evidence . . . is commonplace in the many international trials routinely occurring in this court,” and because “it is plaintiff here who has the burden of proof . . . to the extent that deposition testimony rather than live testimony could be prejudicial, plaintiff and not defendant is the main victim of the prejudice.”⁴⁰

Sources of proof. Defendants must allege that the relevant sources of proof are predominantly in the jurisdictions proposed, and offer proof that such sources are “critical, or even relevant” to the issues to be litigated.⁴¹ The defendant’s burden is to be specific—not simply to list whatever witnesses might potentially be asked to testify, but to identify their importance and the likelihood that their testimony will be necessary.⁴² The defendant should give the court sufficient information to permit an appraisal of the convenience of the witnesses and parties.⁴³

Counseling Foreign Clients

Before counseling foreign clients or foreign referral attorneys, check the local bar rules and other requirements for practicing in the foreign jurisdiction. Each country has unique rules and regulations, violations of which may result in sanctions by the foreign bar association or equivalent thereof. Some things are permitted in the United States but prohibited in foreign jurisdictions, and vice versa. Only by following the more restrictive

rules can an attorney avoid potential violations.

Procedurally, countries vary substantially. For example, each country has a protocol for representing minors. Further, in the United States, it is the personal representative of the decedent’s estate who has the authority to retain an attorney to bring claims on the decedent’s behalf. Here, this person is usually the spouse, parent, or child of the decedent. In many other countries, the number of people who are able to retain an attorney and bring claims is far broader. In some foreign jurisdictions, *any* person who received financial support from the decedent is within his or her legal right to retain an attorney and institute a suit on behalf of the decedent. It is imperative that the correct parties sign the attorney’s retainer agreement.

Negotiating Confidentiality Orders

Successful litigation of airline crashes often turns on demonstrating products liability. This places great emphasis on the defendant’s design and manufacturing choices. Through discovery, the plaintiffs’ lawyers become privy to the internal communications and planning processes of the defendant’s product development department. As a result, defendants use restrictive protective/confidentiality orders to restrict access to documents produced in discovery.

With respect to any protective/confidentiality order, the plaintiffs’

counsel should ensure that the burden to show good cause for maintaining a document as confidential stays with the defendant.⁴⁴ Defendants tend to overdesignate and protect undeserving documents. If the plaintiffs’ counsel objects to the designation of a document as confidential, the burden must be on the defendant to justify the document’s protection. This saves plaintiffs time and aggravation.

Depositions in Foreign Jurisdictions

Ostensibly, Federal Rule of Civil Procedure 28(b) is a lenient, easy-to-follow rule. It allows depositions in foreign countries pursuant to a treaty or letter of request before a person authorized to administer oaths by the foreign jurisdiction or the court. In practice, it is much easier to arrange for the witness to come to the United States to give depositions because each country has its own unique deposition procedures.

For example, depositions in Japan, Switzerland, and Germany may require governmental authorization. Many defendants argue that Russia, China, and Brazil prohibit taking depositions altogether.⁴⁵ Regardless of the country, depositions outside the United States require advance planning, compliance with immigration and treaty requirements, and an understanding of the local law.

If you must travel to take a foreign deposition, start early. There is virtually no way to go forward with an unwilling foreign witness, and a witness who has last-minute misgivings can frustrate weeks of planning. It is imperative to raise the issue and seek stipulations from opposing counsel that overseas witnesses will appear voluntarily. Some countries have specific immigration procedures and visas for lawyers seeking to take depositions. Failure to comply with the procedure

can result in penalties that will stop the deposition.⁴⁶ Many countries also have frequent holidays and generous vacation periods, making scheduling difficult.

Many countries have signed agreements with the United States regarding international discovery. For signatory countries, letters of request must comply with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Fifty-seven countries have signed on to the Convention. For countries in the western hemisphere, the Inter-American Convention on Letters Rogatory may apply to the request. Of course, when a treaty applies it is necessary to check the applicable state's ratification language for reservations.

Finally, if you must travel to a foreign country to take a deposition, you may need to arrange to take a U.S.-based court reporter with you, as these reporters are familiar with U.S. law regarding the admittance of evidence in U.S. courts. If you use a foreign court reporter, speak with him or her beforehand to ensure that he or she is familiar with the U.S. litigation process. Finding a dependable U.S.-style deposition service abroad can save you a good deal of money, but using the wrong service can kill your case.

Applicable Products Liability Law

As stated, airline crash litigation often hinges on products liability claims. Under limited circumstances, victims' lawyers have a powerful but often overlooked tool to keep defendants accountable: the Hague Convention on the Law Applicable to Products Liability. When applicable, the treaty can require U.S. law to be applied by a foreign jurisdiction or assist in defeating an FNC motion.

The Convention entered into force on October 1, 1977. As stated

in its introductory text, the Convention's purpose is to "establish common provisions on the law applicable, in international cases, to products liability," and applies to claims against manufacturers⁴⁷ in cases that are brought in any of the signatory countries. To date, only 14 European countries have signed and/or ratified the Convention.⁴⁸ If an incident is related to one of these signatory countries, a review of the Convention is essential.

Determining the applicable law is important because the Convention applies the law broadly. The chosen law is applied to determine:

1. the basis and extent of liability;
2. the grounds for exemption from liability, any limitation of liability and any division of liability;
3. the kinds of damage for which compensation may be due;
4. the form of compensation and its extent;
5. the question whether a right to damages may be assigned or inherited;
6. the persons who may claim damages in their own right;
7. the liability of a principal for the acts of his agent or of an employer for the acts of his employee;
8. the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability;
9. rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.⁴⁹

If neither the place of injury nor the victim's residence applies, the Convention provides that "the applicable law shall be the internal law of the State of the

principal place of business of the person claimed to be liable, unless the claimant bases his claim upon the internal law of the State of the place of injury."⁵⁰ In other words, victims are given a choice between the law of the defendant manufacturer's residence and that of the accident's location. When an attorney's investigation supports a claim against a U.S.-based manufacturer, the choice of U.S. law is clear.

Case Studies

The following examples illustrate the intricacies of international aviation cases filed both domestically and abroad. The cases are emblematic of the unique strategies and procedures utilized by international aviation litigants.

The Bashkirian/DHL collision.

We were able to use the Hague Convention on the Law Applicable to Products Liability to our advantage in the case involving the July 1, 2002, midair collision of Bashkirian Airlines and DHL flights. Actions arising from the crash near Überlingen, Germany, between a Bashkirian Airlines' Tupolev and a DHL Boeing B757 were ultimately heard and ruled on in Spain. Prior to filing in Spain, the victims' families filed suit in New Jersey federal court against various U.S. companies responsible for the design and manufacture of the airborne traffic collision avoidance system (TCAS) aboard both aircraft. The defendants filed an FNC motion, arguing that Spain was a more convenient forum for adjudication of the action. The New Jersey court agreed and dismissed the action.

The plaintiffs then filed a complaint in Spain against Honeywell International and Aviation Communication and Surveillance Systems LLC (ACSS). The Spanish action sought to hold Honeywell and ACSS responsible under U.S. law for defectively designing, manufacturing, testing,

inspecting, marketing, selling, supporting, servicing, and maintaining the TCAS system. Thus, even though the defendants successfully dismissed the U.S. action in favor of litigation in Spain, they were unable to avoid the application of U.S. law. Because Spain is a signatory to the Hague Convention on the Law Applicable to Products Liability, the Spanish action was governed by U.S. law as to liability and damages.

In March 2010, the Spanish court ruled in favor of the plaintiffs, finding liability against the U.S. manufacturers. The court applied New Jersey and Arizona law as the plaintiffs requested, and awarded amounts unprecedented by Spanish standards. The Spanish court found the U.S. companies jointly and severally liable for an eight-figure verdict.

TAM Linhas Aéreas Flight 3054. On July 17, 2007, TAM Linhas Aéreas Flight JJ3054 crashed while attempting to land at Congonhas-São Paulo Airport in Brazil. The Airbus aircraft overran the runway, crossed a major thoroughfare during rush hour, crashed at high speed into a TAM Express warehouse adjacent to a gas station, and exploded. There were 187 people on board: 181 passengers and six crew members. All passengers and crew were killed in the crash, in addition to 12 people on the ground. Flight 3054 has the highest death toll of any aviation accident in Latin America, and the highest death toll of any accident involving an Airbus A320 anywhere in the world.

The plaintiffs brought suit in the U.S. District Court for the Southern District of Florida against multiple defendants, namely TAM as the carrier and Airbus as the designer and manufacturer of the aircraft. The plaintiffs alleged that Airbus negligently advised operators that its aircraft could be safely operated with one inoperative thrust reverser and

that Airbus provided inadequate and confusing instructions to operators regarding the proper way to operate an aircraft with an inoperative thrust reverser. Most of the plaintiffs were residents and citizens of Brazil. However, one passenger killed in the crash was a resident of Miami, Florida, at the time of the accident.

Extensive damages and liability discovery proceeded in the case. Subsequent to the filing of the plaintiffs' complaints, TAM settled with all of the plaintiffs. Shortly thereafter, Airbus and other manufacturing defendants filed an FNC motion to dismiss the case to Brazil, arguing that Brazil was the more convenient forum. Despite the fact that the remaining defendants took sweeping advantage of the U.S. forum to request documents, receive information, and take depositions from all of the plaintiffs—information they were not entitled to under Brazilian discovery law—the court dismissed all of the cases to Brazil. The district court held that an analysis of the public and private interest factors weighed heavily in favor of litigating the cases in Brazil.

The plaintiffs appealed the dismissal order to the Eleventh Circuit Court of Appeals.⁵¹ The Eleventh Circuit held that the district judge did not abuse his discretion, as Brazil was an adequate and available forum for the noncitizen plaintiffs. Although the remaining litigation was concerned with the manufacturer defendants' U.S. conduct, the court determined that the cost of translating and accessing Brazilian materials coupled with Brazil's interest in litigating the case outweighed the benefits to the plaintiffs and the U.S. court system to try the case in Florida.

The dismissal of the lone U.S. citizen's claim was also upheld. The court was unmoved by the "deference" *Piper Aircraft Co. v. Reyno*⁵² suggests U.S. plaintiffs be granted

in forum selection so as to avoid denying citizens access to their own court system. In light of the perceived difficulty the defendants would have in compelling third-party witnesses and documents from Brazil, it was determined that the district court did not abuse its discretion. After the dismissal was upheld, the plaintiffs brought suit in Brazil against Airbus. The case is proceeding there.

Conclusion

Preparing cases filed in foreign venues is a complex and time-consuming challenge. None of the traditional difficulties found in domestic litigation are absent—it is simply that in handling an international case, counsel must be prepared to deal with a number of issues that may derail a case. Litigating these cases requires a great deal of time, money, and expertise. A petitioner is well served to consider this at the outset of representation, before thousands of dollars are spent, to maximize the potential for success. ■

Notes

1. 134 S. Ct. 746 (2014).
2. 134 S. Ct. 1115 (2014).
3. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).
4. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).
5. *Daimler*, 134 S. Ct. at 758 (footnote omitted) (citation omitted).
6. *Id.* at 751.
7. *Id.* at 761 n.19.
8. 342 U.S. 437 (1952) (allowing an Ohio plaintiff to bring suit against a company that was incorporated in the Philippines and relocated to Ohio even though the claim was not based on the corporation's activities within Ohio).
9. No. H-13-1438, 2014 WL 1323046 (S.D. Tex. Mar. 31, 2014).
10. *Id.* at *11.
11. No. 12-23510-CIV, 2014 WL 652831 (S.D. Fla. Feb. 19, 2014).
12. *Id.* at *8.

13. No. 14-4508 (JBS/KMW), 2015 WL 1305764 (D.N.J. Mar. 23, 2015).

14. *Id.* at *6–7.

15. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 386 (1971).

16. *Walden v. Fiore*, 134 S. Ct. 1115, 1119–21 (2014).

17. 471 U.S. 462 (1985).

18. *Walden*, 134 S. Ct. at 1122.

19. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2852, 2857 (2011).

20. See *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty.*, 480 U.S. 102 (1987).

21. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011).

22. *Id.* (alteration in original) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

23. *Id.* at 2790.

24. *Asahi*, 480 U.S. at 112.

25. *Id.* at 116–17 (Brennan, J., concurring in part and in the judgment).

26. *Nicastro*, 131 S. Ct. at 2790–91.

27. *Id.* at 2791–94 (Breyer, concurring in the judgment).

28. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .” (internal quotation marks omitted)).

29. See *Graham v. Hamilton*, No. 3:11-609, 2012 WL 893748 (W.D. La. Mar. 15, 2012); *Willemsen v. Invacare Corp.*, 282 P.3d 867 (Or. 2012).

30. *Sproul v. Rob & Charlies, Inc.*, 304 P.3d 18, 33 (N.M. Ct. App. 2012).

31. 937 F. Supp. 2d 1356, 1365–66 (M.D. Fla. 2013).

32. *Id.* at 1365.

33. *Id.* at 1366.

34. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2d Cir. 2002).

35. *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43–44 (3d Cir. 1988).

36. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258–59 & n.27 (1981).

37. See *Delgado v. Shell Oil Co.*,

890 F. Supp. 1324, 1375 (S.D. Tex.

1995) (holding that if a Guatemalan court dismissed the action for lack of subject matter jurisdiction, the plaintiff could return to the U.S. court).

38. No. CACE10029273 (Fla. 17th Cir. Ct. 2012).

39. No. 09-CV-3805, 2011 WL 91037, at *1 (N.D. Ill. Jan. 11, 2011).

40. 638 F. Supp. 901, 907 (S.D.N.Y. 1986); see also *Reid-Walen v. Hansen*, 933 F.2d 1390, 1397 (8th Cir. 1991) (“Any foreign witness testimony may be taken, if possible, by deposition or other means.”); *Overseas Programming Cos. v. Cinematographischue Commerz-Anstalt*, 684 F.2d 232, 235 (2d Cir. 1982).

41. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988), quoted in *Lony v. E.I. DuPont de Nemours & Co.*, 935 F.2d 604, 612 (3d Cir. 1991).

42. See *Cont’l Airlines, Inc. v. Am. Airlines, Inc.*, 805 F. Supp. 1392, 1396 (S.D. Tex. 1992) (“Where . . . the moving party has merely made a general allegation that certain witnesses are necessary, without identifying them or the substance of their testimony, the motion must be denied.”).

43. See *Reid-Walen*, 933 F.2d at 1397 n.10.

44. For example, it may make sense to include the following provision:

If the Parties are unable to resolve the dispute, the Party claiming confidentiality shall have thirty (30) days from the date they were notified of the challenge to the designation to file with the Court a motion for protective order. All documents initially designated as Confidential Material shall continue to be subject to this Stipulated Confidentiality Agreement until the Court rules otherwise. If the Party claiming confidentiality does not file a motion for a protective order with respect to documents to which a disagreement over confidentiality has arisen within this thirty (30) day period, it shall be deemed to have withdrawn its designation, and it shall produce copies of such documents without the Confidential Material designation if so requested.

45. U.S. DEP’T OF STATE FOREIGN

AFFAIRS MANUAL, 7 FAM 920 (2013), available at www.state.gov/documents/organization/86740.pdf.

46. For example, foreign attorneys taking depositions in Japan must apply for a “special deposition visa” at the Japanese embassy or a Japanese consulate in the United States. The bilateral treaty governing the taking of depositions in Japan restricts the deposition location to the U.S. embassy in Tokyo or the U.S. consulate in Osaka. The embassy has one room for depositions. The consulate has two rooms.

47. Though the term “manufacturer” is used throughout this article for simplicity, the Convention applies to a broader class. Specifically, the Convention applies to the following persons:

- (1) manufacturers of a finished product or of a component part;
- (2) producers of a natural product;
- (3) suppliers of a product;
- (4) other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product.

It shall also apply to the liability of the agents or employees of the persons specified above.

Convention on the Law Applicable to Products Liability art. 3, Oct. 2, 1973, 1056 U.N.T.S. 187.

48. Belgium, Croatia, Finland, France, Italy, Luxembourg, Montenegro, Netherlands, Norway, Portugal, Serbia, Slovenia, Spain, and the Former Yugoslav Republic of Macedonia.

49. Convention on the Law Applicable to Products Liability, *supra* note 47, at art. 8.

50. *Id.* at art. 6.

51. *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321 (11th Cir. 2011).

52. 454 U.S. 235, 257 (1981).

Most Common Mistakes in Mediation

By M. Gino Brogdon Sr.



Mediation is the most popular dispute resolution tool in civil litigation. The main reasons for such broad appeal include efficiency and certainty. Mediation costs a fraction of most jury trials and provides a more satisfactory result for all parties much sooner. Mediation is also more attractive than a trial because it is collaborative in that it allows the parties to join forces as the architects of the outcome. While most times neither architect is necessarily happy, both have gotten most of what each wanted and have avoided significant risk of trial.

Unlike the mediation process, a jury trial is adversarial by nature and forces the parties to place their litigation hopes and goals in the hands of 12 strangers. More often than not, jurors are ill-equipped to resolve the case in a manner providing more satisfaction to both sides than could be achieved in mediation. Depending on the judge's and the lawyers' skill and experience as well as many other factors affecting the civil docket, juries are often left with too little time to consider too little evidence with insufficient understanding of the legal framework. This worrisome and often unavoidable combination of hurdles greatly compromises the jury's ability to do true justice.

Time constraints and overrun court dockets push time management to the top of many judges' lists of concerns regarding jury trials. The result is that many judges desperately attempt to balance scarce time management against the litigants' rights to a fair, well-run, timely trial.

These challenges facing juries and litigants often produce unpredictable verdicts and, at times, simply the wrong result. In recent years, the real chance of an aberrant verdict has prompted litigants to mediate cases in numbers never seen before. This migration to mediation highlights the great importance of proper preparation, presentation, and negotiation in the mediation process.

While not an exhaustive list by any means, the following is an examination of some of the most common missteps made by lawyers and litigants in the mediation process. The primary purpose is to continue the mediation conversation and to enhance efforts to improve mediation results.

While Not Everything, Timing Is Very Important

Like a good joke, a well-timed mediation is much more likely to succeed.

There is no magic to when a mediation should happen. There are however natural points in the litigation journey at which mediation should be considered.

These junctures include the following:

1. Before filing suit;
2. After the answer is filed;

3. After written discovery has been exchanged;
4. After key fact depositions have occurred;
5. After discovery depositions of experts;
6. Before and after dispositive motions have been filed;
7. After close of discovery; and
8. On the eve of a trial date.

The uncertainty present at the various junctures in litigation prompts parties to consider settlement rather than risk an adverse outcome at trial. While there are no quick and dirty answers to when a case should be mediated, it is certain that counsel should know as much as there is to know about the key components of a case before mediation has commenced. Too often counsel enter the mediation process leaving crucial questions unanswered or, worse yet, decide to save expense and forgo depositions, document discovery, or other items, which leaves holes in the case. This drastically affects the value of the case and the settlement leverage in the mediation.

It is imperative that counsel on either side fully discover and understand the pertinent facts and issues in the case. Counsel on either side cannot afford to mediate a case without a solid understanding of the case. This lack of understanding hinders the parties' decision-making strength, compromises the mediator's effectiveness in this process, and skews the settlement possibilities and results. It is imperative for all counsel to carefully consider the timing of a mediation so as to avoid waste of time and money and to maximize the chances of settlement. While mediation can be too early, it's never too late.

Preparation for Mediation Generally

Salvation and damnation live in the details. If you don't get in there, you are damned. If you do, then you are saved.

Savvy real estate gurus often chant that the three most important factors in their business are "location, location, and location." Like location in real estate values, understanding of the case and preparation for mediation can determine the outcome. Oddly, some lawyers still view extensive preparation for mediation as wasteful and unnecessary. Others approach mediation with skepticism and treat it as simply an opportunity for one party to steal a pretrial peek at his or her opponent's case.¹ Still others simply submit the case to mediation with the intention to work through the issues during the mediation. All of these approaches compromise the chances of success at mediation.

Many will find this final example to be unbelievable. Most will find this example unacceptable. Too often certain lawyers simply take their client's word about life before the incident that is the subject of



TIP

Because more than 90 percent of civil cases settle, it behooves a good lawyer to make mediation as important as trial when it comes to preparation.

the lawsuit. In a road wreck case, unprepared lawyers simply rely on the client to confirm that the client had no prior auto accidents, similar injuries, surgeries, treatments, diagnoses, or criminal history. The lawyer presents medical records from the date of the accident and proclaims the client's pristine history in the opening session. Ordinarily, the defense lawyer waits until the caucus and presents the mediator with multiple prior injuries, claims, and lawsuits; she also shows certified copies of felony convictions. Embarrassed, the plaintiff's lawyer tucks his trial tail between his legs and settles the case for a fraction of its potential value. If certain pertinent facts were accessible before the mediation, this result is unacceptable.²

It is imperative that counsel learn everything there is to know about the client and the case before the mediation. When one side demonstrates to the other a strong grasp of the facts and issues in the case, settlement negotiation strength is maximized.

For most lawyers, preparation for the mediation is a given. These lawyers review the right depositions, documents, and other evidence to familiarize

themselves with the strengths and weaknesses of the case. Some, however, rest satisfied with a general understanding of the case without understanding the details and nuances of the case. These evidentiary and factual nooks and crannies are the essence of the strengths and weaknesses in the case and harbor the keys to success and failure. Counsel must explore these areas and be well prepared to address the good, the bad, and the ugly at the mediation. Ethics require quality preparation and performance, and the client deserves the complete commitment of his or her counsel to achieving maximum value at mediation.

While some parties enter mediation in bad faith, most cherish the opportunity to settle the case and take the process seriously. However seriously the parties and counsel approach this amazing process, the parties have little chance of getting maximum results absent proper preparation of the case before the mediation and effective presentation of the same during the mediation. Failure in this regard greatly reduces the chances of settlement and compromises the settlement amount.

Failure to Prepare the Client for Mediation

A smart man listens carefully to the sounds that offend his ears.

Participation in mediation is a novel experience for most plaintiffs and an integral business reality for most defendants and insurance companies. Many plaintiffs are unsure as to whether the process will be adversarial, how long it will last, what to wear, what to say, or even whether the parties will be in the same room. These unknowns raise anxiety and likely complicate the plaintiff's initial posture for settlement decisions. Most are more comfortable with more information and thus more likely to make good decisions when they understand

the nuts and bolts of the mediation process. These include where people sit in the group opening session, who gets to speak, whether the client will be questioned, and the tedious nature of the caucus portion of the mediation. These logistics can and should certainly be explained fully to the plaintiff and any family or friends before the mediation date.

The most glaring gap in client preparation is the lawyer's failure to prime the client for hearing the opponent's critical comments and observations in the case. Skillful mediators often open the mediation by cautioning the parties about hearing critical comments regarding the case and against taking personal offense to opposing positions taken in the mediation process. This expectation adjustment should be done by counsel for both sides before the client ever sets foot in the mediation room. Rarely should the lawyers leave this for task for the mediator alone.

Without proper premediation preparation, many plaintiffs react very negatively when they hear defenses that blame the plaintiff for his or her own injuries or accuse the plaintiff of feigning injury, doctor shopping, exaggerating his or her case, and many other sins. Some plaintiffs choke on their responsive outrage, which hinders their ability to make good business decisions. Counsel should always prepare the client for hearing the worst of facts and positions paraded by the other side. Counsel should also encourage the client to focus on making smart business decisions rather than an emotional one regarding settlement despite the emotional fever prompted by the opposing posture in the mediation. Experienced mediators often urge parties to make business decisions that make sense rather than those that feel good.

Counsel should also prepare the client for posturing by the client's

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own lawyer. Integral to the negotiation process, most lawyers make statements regarding case value and strength and take positions calculated to maximize settlement outcomes. These valuations and statements include high initial settlement demands, evaluations of crucial evidence, and heightened predictions regarding jury verdict range. "The jury will give a \$10 million verdict!" says the lawyer. This statement is intended to further convince the insurance adjuster about the substantial value of the case. The plaintiff is also listening and is vulnerable to becoming committed to those numbers. The danger sets in when the plaintiff believes these numbers and becomes hardened on his or her position regarding settlement.

Counsel must prepare the client for the realistic settlement and verdict ranges and prepare the client to not take too seriously statements and maneuvers in mediation to enhance the ultimate settlement amount.

Failure to Prepare the Mediator

The gods cannot answer those who choose not to pray.

Mediators are most effective when they have the best understanding of the case. The job of preparing the mediator rests squarely on counsel's shoulders. The most common tools to educate and prepare the mediator include a premediation statement, a premediation conference with the mediator, and educating the mediator during the caucus portion of the mediation.

Regardless of the size of the case, counsel should send a premediation statement except in very limited circumstances. This allows the mediator to start the mediation with a grasp of the legal and factual issues in the case as well as an understanding of the parties' settlement history and posture. The

mediator undoubtedly will do a better and more cost-effective job in the mediation if he or she has time to consider and study the case before the mediation begins. This is especially true in cases involving complex legal, medical, business, or construction issues. Understandably, many lawyers harbor concerns about cost and forgo a premediation statement. However, the mediator has less time to learn and understand the nuances in the case when the parties are anxiously waiting for the mediator's attention

in their respective rooms. There simply is no downside to preparing the mediator before the mediation commences.

The premediation statement is an effective tool to prepare the mediator. A well-done premediation statement addresses every essential element of the claims as well as any viable defenses. An incomplete, inaccurate, or misleading premediation statement does more harm to the process than good. Too often lawyers submit a premediation statement that generally introduces the mediator to the issues but neglects to address important defenses or inadequately addresses disputed areas of the case. Equally troubling, some counsel provide woefully incomplete statements, damages assessment, or causation evidence in the premediation statement, thereby misleading the mediator and ensuring an avoidable hiccup in the settlement negotiation. This same lack of understanding or organization shines through to the opposing side and dilutes any concern that the case would be competently tried. There is no substitute for careful

gathering, consideration, and organization of the mediation documents and pertinent testimony and presenting an accurate summary of the same before the mediation commences.

The most underutilized opportunity to educate the mediator is the easiest and simplest one. Most mediators welcome a premediation conference in person, via e-mail, or by phone. Oddly, many litigants hardly ever take advantage of these opportunities. Such a premediation conference is especially important

The most underutilized opportunity to educate the mediator is a premediation conference, which most mediators welcome.

where peculiar or difficult relationships exist between counsel and his or her client or between the opposing lawyers. Difficult clients, lofty expectations, mistrust between lawyer and client, or strained relations between opposing counsel often stall or threaten a mediation before it begins if the mediator has not been adequately warned and prepared to handle the same. Most skilled mediators have strategies and techniques to lessen the impact of these factors on the effort to resolve the case. Ultimately, a well-prepared mediator can give the parties the best opportunity to settle the case.

Whether to Present the Case at the Opening Session

Show me yours, and I'll show you mine.

Many lawyers struggle with whether to make a presentation during the opening general session of the mediation. Such struggle is a recognition of risks that an opening presentation may sour the parties before negotiations begin. On the other hand, it can prove to be a mistake to forgo a presentation

during the opening session. The decision to conduct or forgo an opening presentation is very case specific.

A presentation of some depth is usually more helpful than harmful in moving the case toward settlement. Many remain concerned that they surrender an advantage by making any substantive remarks about the case. The risk of compromising trial strength is low.³ The benefits are much more likely.

More often than not the lawyers understand their opponent's view of the case and have eliminated most surprises. Each side has taken into account the most important facts in the case and the hurdles in the way of victory at trial. Addressing the same in the opening session sheds light on the crux of the litigation disagreement. The opening presentation is often the only opportunity for the lawyers to talk directly with the other side's client outside of a deposition or examination at trial. The collaborative environment of a mediation allows both sides the best opportunity to digest the sometimes thorny opposing view of the case. The presentation itself is also helpful to the mediator in focusing on the parties' pressure points in the mediation.

For the most part, both counsel can least afford to forgo making a presentation at the mediation if settlement is in the best interests of the parties. It is also an important opportunity to correct or address any misstatements or misrepresentations made by opposing counsel regarding the issues and crucial evidence in the case. Ethically counsel is bound to maximize the opportunity if the same serves the client's best interests. This does not mean that either counsel should give the case away or unnecessarily reveal precious trial strategies. However, oftentimes the opposing side has a limited opportunity to hear and appreciate their opponent's view of the case except for a

full-bodied presentation of the case at mediation.

The low risk of strategy compromise is greatly outweighed by the likelihood of greater understanding of the strengths and weaknesses of the case by the opponent. Thus, counsel should sparingly forgo making a statement of some sort during the opening session of the mediation.

Focusing on the Decision Makers

He who preaches to the choir suffers when the plate is passed.

In a case with insurance coverage, the plaintiff⁴ and the insurance

and energy presenting photos, deposition testimony, and other file materials to the mediator. Admittedly, habits are hard to break in that lawyers are accustomed to presenting the case to a judge.⁵ However, it is clear that the mediator has no ultimate power regarding settlement. The focus must be on the decision maker.

For example, the effort to convince must focus on the adjuster where defense counsel's arguably sanitized version of the case led the adjuster to conclude that the case was defensible or not a significant concern for trial. The plaintiff's presentation may be more true to the

More than any other mistake, lawyers present the case to opposing counsel or the mediator rather than to the decision makers.

adjuster are the most important people in the room because each holds the ultimate power to settle the case. Both have heard the case presented only through the skew of their counsel. Both need to hear a less favorable perspective that many times includes a discussion of subjects that are truly difficult to digest. At the end of the day, both need to be convinced that settling the case is the best option. Despite these truths, many lawyers either neglect or completely ignore the plaintiff and the insurance adjuster at mediation during the initial presentation.

More than any other cited mediation mistake, lawyers present the case to the opposing counsel or to the mediator rather than to the decision makers. Some lawyers never even make eye contact with the plaintiff or look in the adjuster's direction when addressing the most salient parts of their case. Whether by PowerPoint, by summary, or in dramatic closing argument style, many lawyers spend their attention

facts and may change the adjuster's opinion of the case. The onus rests on plaintiff's counsel to convince the adjuster that the case has real merit. This cannot be done if the adjuster is left out of the mediation presentation and begins the settlement conversation as an outsider.⁶

Defense counsel should not assume that plaintiff's counsel has revealed to the plaintiff all of the soft spots in the case. Too often the plaintiff has been coddled or protected regarding the vulnerabilities in the plaintiff's case. As a result, the plaintiff will have confidence that victory is certain at trial. Defense counsel must carefully address the case to the plaintiff with an eye toward readjusting the plaintiff's expectations both for trial and for settlement at mediation.⁷ This cannot be done unless the presenting lawyer makes the plaintiff the focus of the presentation. Ultimately, the plaintiff and the adjuster must be the audience and the focus of the opening presentations.

The Element of Surprise Is Overrated

Most folks can swallow bad news, but nearly all choke on surprise.

For the most part, mediation is where the parties lay out their cards on the discussion table. Lawyers have discovered the salient facts in the case and have fully evaluated their positions and likelihood of success at trial. Adherence to the discovery rules has all but eliminated the element of surprise.⁸ However, surprise raises its thorny head during mediation.

The best examples of surprise are medical bills, photos, and last-minute affidavits presented for the first time at mediation. The insurance company has gone through an evaluation process that takes into account lawyers' analysis and the hard evidence, which includes medical bills and testimonial evidence. In many cases, the amount of medical bills or nature of the photos will largely determine the value of the case. Surprise is unsettling to the surprised party and disruptive of the settlement process when either counsel presents at mediation a new set of bills or other evidence that greatly affects the value of the case. This nearly ensures that the case will not settle because evaluative process isn't built for these kinds of surprises. The safest and most successful approach to mediation is to avoid surprises and to present the most complete case at mediation.

Conclusion

"When everything is said and done, there is nothing left to do or say."—Darryl Dawkins

Mediation is the preferred opportunity to resolve most cases in a manner that serves the interests of all parties. All gain certainty. All suffer disappointment. All gain closure. All avoid risk. All rest in the satisfaction of being the architects of the resolution. Counsel should treat this special opportunity with utmost care and appropriate

attention. Such attention requires adequate preparation of all participants and will yield maximum settlement results. Mediation is the key and the answer in most civil litigation. There usually is no legitimate excuse for forgoing mediation. ■

Notes

1. This skepticism is neither fluff nor misplaced. Unfortunately some litigants use the mediation process as a tool to simply obtain additional discovery.

2. The vast majority of lawyers never commit these transgressions. The disturbing reality is that some mishandle cases in this fashion. One lawyer guilty in this regard is too many where the client's one bite at the apple hangs in the balance.

3. Full disclosure has certain risk that includes surrender of trial strategy advantages. A common scenario is where the defense has performed surveillance on the plaintiff who claims to have a debilitating back injury. The surveillance tape shows the plaintiff chopping wood and roller skating. The plaintiff has testified that he never chopped wood or engaged in any other physical activity because of constant pain and the debilitating injury. The defense holds the surveillance tape as work product, anticipating revealing the same when the parties reach an impasse in the mediation. The defense does not mention this tape in the opening mediation statement

with hopes of breaking an impasse later. When the negotiations stall later in the mediation, the defense faces a dilemma as to whether to reveal the tape with hopes to shake loose a settlement or to suspend the mediation and impeach the plaintiff with the tape at trial and obtain a defense verdict. These choices are in-the-moment judgment calls with no ready answers.

4. In many mediations, the plaintiff is accompanied by a spouse, an adult child, a friend, or a minister. It is imperative that the mediator and defense counsel determine who is the real decision maker. The mediator has the best opportunity to determine this through observation during caucus.

5. This is especially tempting where the mediator is a former judge.

6. Sometimes the adjuster may be offended when plaintiffs counsel addresses only the defense counsel or the mediator.


7. At times, the mediator is the best choice to address certain soft spots that could inflame one side or another and push settlement far away. Items such as contributory negligence, value of life, impeachment items, surveillance evidence, punitive damages facts, and others must be handled very carefully. Often the mediator is the better choice to handle discussion of these items.

8. Some litigants continue to ignore the discovery rules in litigation, which further compromises settlement prospects.

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FOR WHOM THE STATUTE TOLLS DETERMINING WHEN A LEGAL MALPRACTICE CLAIM IS TIME-BARRED

BY PETER J. BIGING AND JASON L. EDERER

The question of whether a statute of limitations has run on a claim for legal malpractice can be surprisingly complicated. The work assignment for which the attorney was specifically engaged may be long ago completed, and yet a number of factors can lead to a ruling by a court that the representation has, in fact, not been concluded. Alternatively, for some other reason the accrual date on which to begin calculating the running of the statute of limitations may be deemed tolled. In fact, it is not at all uncommon to be presented with a situation in which, from the attorney's perspective, the engagement has concluded, but from the client's perspective, he or she is still dealing with his or her lawyer about the matter. Where a letter confirming the completion of the representation and termination of the lawyer's engagement has been sent, the issue can be relatively straightforward. But what about when there is no such letter, and there has been no work done for several years, but the lawyer acknowledges fielding periodic phone calls from the client and discussing issues related to that engagement? Where a letter from a client to the lawyer expressly firing the lawyer has been sent, this also makes the job of determining when the engagement has concluded fairly simple. But what about the situation where a letter highly critical of the lawyer has been sent, but the lawyer is not expressly and explicitly fired, and the lawyer decides the best response is no response? Where the lawyer also ceases all work for the client, has that representation been concluded for statute of limitations purposes?

How the courts generally go about resolving these questions can differ from state to state, and the relevant facts with regard to the specific accrual issue before the court are going to be critical to the determination of the result in each case. However, a review of recent court decisions regarding determination of the accrual date of a legal malpractice claim provides some useful insights. This article will discuss what to look for, the arguments that can be expected to be made, complicating factors, and the current trends in the law in this area.

PHOTO: ISTOCK

Statutes of Limitations and Tolling: A Primer Determining accrual of a legal malpractice cause of action.

The statute of limitations for a legal malpractice claim throughout the United States differs, depending on the jurisdiction. In most jurisdictions, the limitations period has been codified by state statute. In a number of states, the statute of limitations is three years.¹ In other states, the statute of limitations could be shorter, running as little as one or two years, or significantly longer, in some cases running as many as six years.² While determining the actual length of the statute of limitations is easy, the trick comes in figuring out when the statutory period begins running.

Recently, in *Mashaney v. Board of Indigents' Defense Services*, the Kansas Supreme Court discussed the four theories that can be applied to determine when the statute of limitations should begin to run.³ While the discussion focused on Kansas law, the summary is actually an excellent starting place for considering the issue overall. The four theories are:

1. The occurrence rule—[pursuant to which] the statute begins to run at the occurrence of the lawyer's negligent act or omission.
2. The damage rule—[pursuant to which] the client does not accrue a cause of action for malpractice until he suffers appreciable harm or actual damage as a consequence of his lawyer's conduct.
3. The discovery rule—[pursuant to which] the statute does not begin to run until the client discovers, or reasonably should have discovered, the material facts essential to his cause of action against the attorney.
4. The continuous representation rule—[pursuant to which] the client's cause of action does not accrue until the attorney-client relationship is terminated.⁴

New York and a number of other jurisdictions apply the occurrence rule.⁵ What is significant about the occurrence rule is that it starts the clock running at the time of the commission of the malpractice regardless of whether the injury is identified or has not made itself apparent until much later.

The damage rule was presumably developed in an effort to address this problem, and is applied in a number of states as well.⁶ The problem with this rule is that if you wait until harm has actually occurred, even that may not manifest itself immediately or it may not manifest itself as a result of legal malpractice. For this reason, a number of states apply the dual accrual rule.

Under the dual accrual analysis, courts apply both an occurrence rule, which bases the running of the statute of limitations on the date the act or omission giving rise to the claim occurred, and something else, like discovery of the malpractice, or termination of the attorney-client relationship, and uses the later of the two dates to determine the accrual date.⁷

Still other jurisdictions apply the discovery rule, under which a cause of action for legal malpractice accrues when the plaintiff has information sufficient to alert a reasonable person to the fact that he or she has a potential cause of action.⁸

Tolling. After identifying the applicable accrual rule, the inquiry doesn't necessarily end there. This is because even after a claim for legal malpractice has accrued, it may be tolled for a number of reasons, including fraud and concealment of the malpractice.⁹

Additionally, depending on the jurisdiction, the claim can be tolled (or perhaps more properly be deemed not to have started running) where the lawyer or firm has continued to represent the client even though the alleged malpractice has long since occurred, and even where there is no allegation that the malpractice was concealed.¹⁰ But it should be noted that the longer the limitations period for a claim of legal malpractice, the less inclined a state is to utilize a tolling device such as the continuous representation doctrine to save a claim—indeed, certain states use a statute of repose, as opposed to a statute of limitations, which cannot be tolled in any manner.¹¹

Sorting it out. In many cases, the accrual date for a legal malpractice claim is easily identified, commencing with either the end of an action for which the firm represented the client, the withdrawal of the firm from representation of the client in a pending matter, the request of the return of a client's file, or the formal substitution of counsel by the client. However, in some instances the severance of the relationship or the end of a matter is not necessarily so clear cut, with work by the firm and communications with the client instead gradually tapering off, the firm aiding in the transition over to substituted counsel (and still billing for legal work being done on the client's file), or even the continued representation of the client by the firm in other, unrelated matters. In these circumstances, even where representation appears to have effectively ceased for a lengthy period of time or a matter *appears* to be over, plaintiffs counsel have nonetheless argued, often successfully, that the relationship continued, and thus avoided a statute of limitations bar. This is a ground on which a substantial number of battles have been fought, and the area that remains the most elusive to definitively nail down. While the issue will be expected to be the situs of many future battles to come, and there is no clear, defining rule to apply in all circumstances, a review of recent court decisions is instructive.

It Ain't Over till It's Over: Recent Decisions Providing Further Definition

When has the representation ended such that the accrual period for a malpractice claim can be determined to have started? Recent cases reveal that a number of factors will be involved in the determination.



TIP

Potential legal malpractice claims can be lurking or even reignited depending on lawyer conduct at what is otherwise perceived as the conclusion of the representation.

Is the client an individual, or an individual operating in a *representative capacity*? A recent decision in California suggests that the accrual issue can be complicated when the client is the representative of an estate. In *Kelly v. Orr*, a California appellate court concluded that the state's one-year statute of limitations for legal malpractice claims was tolled until the date the plaintiff alleged the defendants ceased representation of the plaintiff's predecessor trustee, even though the plaintiff arguably was aware of the alleged malpractice long before he became trustee.¹² In 1999, Beverly Clark executed a trust, designating her brother-in-law as trustee after her death and the plaintiff as successor trustee on the brother-in-law's resignation. Clark died in 2002, and her brother-in-law served as trustee until he resigned in 2008. However, before the plaintiff had an opportunity to assume the role of successor trustee, Clark's daughter allegedly

"seized control" of the trust and its assets, becoming the de facto successor for her uncle as trustee. She then retained the defendants as her counsel and allegedly acted on their legal advice throughout the time she served as trustee, paying their legal fees from the trust's assets.¹³

The plaintiff alleged that, as a result of the defendants' negligent legal advice, Clark's daughter misappropriated assets and caused over \$300,000 in harm to the trust. In January 2012, the plaintiff attempted to remove Clark's daughter as trustee in favor of the plaintiff. However, allegedly on the defendants' advice, Clark's daughter ignored the notice of removal and continued on as trustee until March 22, 2013, when she finally resigned as trustee and relinquished control of the trust's assets. Less than a year after the plaintiff replaced her, in February 2014, the plaintiff sued the defendants for professional negligence in connection with legal advice they gave to Clark's daughter while the trust was under "her control." The trial court dismissed the claim as time-barred, however, noting that the plaintiff knew of the claim as early as, and no later than, 2012, as he had maintained at that time that he was successor trustee.¹⁴

The appellate court reversed and reinstated the plaintiff's claim. In its decision, the court disagreed with the defendants' argument that tolling would be improper because there was no "continuous representation of [the plaintiff], or [Clark's daughter], regarding any matter, let alone the same specific subject matter" and that the plaintiff's 2012 notice of removal, among other things, effectively ended the defendants' representation of Clark's daughter, as trustee, and began the running of the limitations period.¹⁵ In so doing, the court noted that under California law, successor trustees stand in their predecessors'

shoes with respect to legal malpractice claims against the predecessors' attorneys. Therefore, it was sufficient for the plaintiff to plead that the defendants continuously represented Clark's daughter as trustee through February 27, 2013, less than one year before the plaintiff filed suit, on issues relating to "trust management."¹⁶ Specifically, the court found that the defendants' representation of Clark's daughter in connection with the 2012 notice of removal "was intertwined with their representation of [Clark's daughter] as trustee, including their counsel on whether [she] could serve as trustee."¹⁷ The court also found that there was no basis to conclude the defendants' attorney-client relationship with Clark's daughter ended when the plaintiff tried to remove her as trustee in 2012, as the defendants continued to represent Clark's daughter as trustee long after the plaintiff took steps to remove her.¹⁸

When has the harm truly been incurred? In 2015, a Vermont Superior Court considered this issue in the context of alleged legal malpractice during the course of a guardianship proceeding. In *Molleur v. Bucknam*, the plaintiff had been appointed as guardian of his granddaughter in 2001, due to her parents' substance abuse issues.¹⁹ On March 4, 2011, the Vermont Supreme Court affirmed the denial of the plaintiff's previous petition to terminate the parental rights of the child's father, but reversed the trial court's decision allowing the plaintiff's guardianship to continue, and remanded the case to the trial court for an order transferring custody of the granddaughter to her father "within an appropriate time."²⁰ In late 2014, the plaintiff sued his former attorneys for their alleged negligent handling of the guardianship case, arguing that the true damages from his claim for legal malpractice were not "discovered" until the granddaughter

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was transferred out of his custody. The former attorneys moved to dismiss, arguing the claim was time-barred, and the court granted the motion in April 2015. Shortly thereafter, the plaintiff filed a motion to amend his complaint and for reconsideration, arguing that the continuous representation rule applied because the defendants ceased representing him less than three years before he filed the action. The defendants moved to dismiss again.²¹

In again granting the defendants' motion, the court noted that Vermont has a three-year statute of limitations for legal malpractice claims, which accrues when the plaintiff discovers the alleged injury and the existence of a cause of action. The court agreed with the defendants' argument that the plaintiff knew of the "injury, its cause, and the existence of a cause of action" on March 4, 2011, when the Supreme Court issued its decision transferring the guardianship back to the child's father.²² Thus, the court found, the plaintiff reasonably should have learned of the correct burden imposed on him in his guardianship proceedings, the alleged underlying negligence, and the related cause of action for legal malpractice on that date as well. The court found that even though the plaintiff may not have experienced the full effects of the injury until the granddaughter was actually transferred out of his custody, this did not render the three-year statute of limitations inapplicable. The plaintiff therefore had three years from the date of the issuance of the supreme court decision in which to bring his legal malpractice claim, and the court found the claim to be time-barred.²³

Has the representation actually ceased? A recent decision in Michigan suggests that even work conducted in transitioning the client over to new counsel could amount to a continuation of the

representation. In *Nagle v. Hertz Schram, P.C.*, the plaintiff sued his former attorneys for malpractice based on their alleged negligent representation in two separate lawsuits, alleging that the attorneys failed to pursue discovery that would have led to better settlement figures for the plaintiff.²⁴ In 2007, the defendants agreed to represent the plaintiff in two Tennessee lawsuits precipitated by the disclosure of apparent misrepresentations made during the course of a transaction for the purchase of the

terminated by one party or the other, "subsequent events can result in continued representation."²⁷ In this case, the court determined that the attorneys in question provided further legal services in one of the matters and billed for those services after that date, "reigniting the representation."²⁸ Specifically, in the course of transitioning the files back to the client in August 2010 and thereafter, the firm had actually billed for the transitioning work done. The court noted that the defendants' invoices supported

WORK CONDUCTED IN TRANSITIONING A CLIENT TO NEW COUNSEL COULD BE HELD TO BE CONTINUATION OF THE REPRESENTATION.

plaintiff's steel, one in state court and the other in federal district court. However, when the attorney-client relationship between the plaintiff and the defendants "sour[ed]," the plaintiff stopped paying his legal bills, and by July 2010, the plaintiff owed approximately \$100,000 in legal fees.²⁵ On August 10, 2010, the plaintiff sent his accountant to the firm's office to pick up the company's files. Before handing over the files that day, the firm presented the accountant with a letter transferring the files of all of the plaintiff's matters back to the plaintiff. Motions to withdraw were then made and granted on August 9, 2010, and August 23, 2010, respectively. On August 6, 2013, the plaintiff brought his malpractice case. The circuit court granted summary judgment in the defendants' favor in the malpractice case based on the claim's untimeliness, and an appeal was taken.²⁶

The appellate court reversed, noting that while Michigan has a two-year statute of limitations for legal malpractice claims, even when representation has been

"transitioning" activities performed *in a professional capacity*, for the benefit of the plaintiff. The court found that the defendants therefore continued to "serve" the plaintiff professionally, acting as the plaintiff's counsel even *after* physically transferring the files to the plaintiff's accountant.²⁹ Because, as the court observed, a legal malpractice claim does not accrue until the defendant "discontinues serving the plaintiff in a professional . . . capacity as to the matters out of which the claim for malpractice arose," the court concluded this tolled the statute of limitations.³⁰

While this decision presents a cautionary tale, the federal district court for the Southern District of New York seemingly went in another direction with regard to when representation had ceased. In *Rohe v. Bertine, Hufnagel, Headley, Zeltner, Drummond & Dohn, LLP*, the plaintiff claimed that the trustee of his trust made a series of investments that resulted in complete losses and that he did not find out about the losses until the trustee's death in 2013.³¹ In December 2014, the plaintiff

commenced a lawsuit against his attorneys for legal malpractice and breach of fiduciary duty based on their knowledge of, and failure to alert him to, the trustee's faulty transactions. After discovery, the defendants moved for summary judgment, arguing that the claims were time-barred; the plaintiff argued in opposition that the claim was saved by the continuous representation doctrine.³²

The court agreed with the defendants, finding the three-year statute of limitations applicable and that the continuous representation doctrine did not apply. The court noted that the defendants were the plaintiff's personal attorneys for nearly 30 years, and had represented him in a number of matters that involved his family's trusts and estates work, including the preparation of a trust agreement benefiting his daughter in 2009. The plaintiff produced several documents "relevant to the existence and scope" of a professional legal relationship with the defendants from after 2009 which, among other things, included proof of "discrete legal tasks" done by the defendants for the plaintiff through 2013, copies of annual account statements for his trust received by the defendants through 2014, and letters and faxes from the trustee regarding the trust's investments, on which the defendants were copied, well into 2011.³³ However, the parties had never entered into a retainer agreement. As such, the court opined that in cases involving work on specific projects without a retainer agreement that explicitly anticipated further tasks, New York courts have generally found the continuous representation doctrine inapplicable.³⁴ The court refused to credit the letters and accounting statements on which the defendants were copied as "indicia" of continuing legal work, noting that the defendants were nothing more than "passive recipients" of same.³⁵

Even telephone calls after 2009 were not credited with tolling the claim, because the court found that no legal tasks or services were provided in conjunction with those calls. With no retainer agreement and only sporadic legal work done for the plaintiff, the court found that the last legal task done for the plaintiff was the preparation of the 2009 trust.³⁶ Therefore, the claim was time-barred.

While the above case was decided favorably for the defendant lawyers in part due to the absence of a written retainer agreement, the existence of a written retainer agreement can more often prove helpful to the attorney charged with legal malpractice. This was highlighted in *Crabbe v. Suisman Shapiro Wool Brennan Gray & Greenberg, P.C.*, in which the plaintiff alleged that the defendants committed legal malpractice in the

terms and conditions of the dissolution were carried out, assisting in post-judgment paperwork, and filing post-judgment motions for contempt constituted a continuing representation that toll[ed] the statute of limitations" for her legal malpractice claim.³⁹

The court agreed with the defendants and dismissed the claim. In so doing, the court stated, "[R]epresentation continues for the purposes of the continuous representation doctrine until either the formal or the de facto termination of the attorney-client relationship."⁴⁰ Here, the retainer agreement explicitly provided for representation as ending with a judgment in connection with the marriage dissolution. The court found that the April 22, 2010, judgment of dissolution "itself inherently constituted a conclusion to the proceedings for which [the

A WRITTEN RETAINER AGREEMENT CAN PROVE HELPFUL TO AN ATTORNEY CHARGED WITH LEGAL MALPRACTICE.

course of their work handling her divorce.³⁷ The plaintiff claimed that her ex-husband had misappropriated marital funds and that the defendants had "negligently failed to act reasonably and promptly to cure the actions of her ex-husband and to restore to the plaintiff her fair share of assets" in not pursuing contempt and sanctions against him.³⁸ The dissolution of marriage was entered on April 22, 2010. The plaintiff filed her legal malpractice complaint on November 3, 2013. The defendants moved for summary judgment on the grounds that the complaint was time-barred by the three-year statute of limitations for such actions. While not disputing the claim's untimeliness, the plaintiff argued that "the defendants' services in making sure the

defendants were] hired (with the necessary consequence that there no longer was an opportunity for [the] defendant[s] to mitigate any harm that might have resulted from [their] conduct)."⁴¹ While the conclusion of litigation "might allow for motions to reargue, appeals, or other matters that might impact the finality of a decision," the court held that the April 22, 2010, judgment concluded the defendants' representation of the plaintiff for the underlying matter, and claims relating to events before that date were barred by the applicable statute of limitations.⁴²

The *Crabbe* court mentioned, without elaboration, a possible de facto termination of a relationship between attorney and client. When would a de facto termination occur

though? In *Champlin v. Pellegrin*, the New York Appellate Division decided a case involving a question of when the lack of communication between lawyer and client is sufficient to constitute the “constructive” end of the relationship.⁴³ After acknowledging that the statute of limitations on a cause of action for legal malpractice in New York is three years, the court stated that the plaintiff’s claims accrued, at the latest, on October 7, 1997, three years after the underlying action the defendant firm had handled for the plaintiff—which was the subject of the malpractice claim—had been marked by the court as “disposed.”⁴⁴ The plaintiff then waited 16 years to sue for malpractice, but argued the claim was tolled by the continuous representation doctrine because he hadn’t been put on “notice” of the fact that he was no longer represented by the defendant.⁴⁵

In rejecting this argument, the court noted that, while it may have been true that formal notice of the cessation of the representation had never been given, the parties agreed that “there were no communications between them from 1994 until 2011, when plaintiff purported to discharge defendant from representing him.”⁴⁶ In rejecting the plaintiff’s tolling argument, the court concluded that “[t]he more than 16-year lapse in communications from defendant was sufficient to constitute reasonable notice to plaintiff that defendant was no longer representing him.”⁴⁷

Was the conduct alleged to have caused the legal malpractice claim a “continuing wrong” or a “continuing tort”? In *Thomas v. Cook*, the Mississippi Court of Appeals explained the difference.⁴⁸ In this case, the plaintiff hired the defendant in 2006 to represent him before the Tennessee Board of Law Examiners in a hearing to “show cause” why the plaintiff’s psychiatric condition should not

keep him from obtaining his law license. As part of the representation, the plaintiff authorized the defendant to speak to the two doctors, who found him to be unstable, about their diagnoses. After obtaining affidavits from the doctors, the defendant convinced the board that the plaintiff was fit to practice law.⁴⁹

About six months later, in May 2007, the plaintiff notified one of the doctors that he planned to sue her and her clinic for medical malpractice, which he did in October 2007. In March 2008, an attorney with the defendant’s law firm filed an answer on behalf of the doctor and her clinic, and the defendant filed a motion to appear in the case pro hac vice shortly thereafter. The plaintiff immediately informed the defendant that he did not have the plaintiff’s permission to represent his adversaries in a “substantially related legal matter” but never moved the court to have the defendant disqualified, waiting nearly three years to finally make a motion.⁵⁰ The circuit court ruled the plaintiff had waived his right to do so. Thereafter, citing the “emotional toll of [the defendant’s] continued adverse representation,” the plaintiff announced that he no longer wanted to pursue his medical malpractice claim, and the court dismissed the case.⁵¹ Two years later, in February 2013, the plaintiff filed a new action, this time suing not only the doctors but also the defendant and his law firm, alleging legal malpractice.⁵²

All four defendants successfully moved to dismiss based on the claim’s untimeliness, i.e., that it was beyond the three-year statute of limitations. On appeal from the dismissal, the circuit court agreed, noting that the plaintiff’s three years to sue began in April 2008, when he was notified the defendant had been admitted pro hac vice—putting his February 2013 complaint well beyond

the April 2011 deadline. The circuit court rejected the argument that the defendant’s representation was a “continuing tort” stretching the statute of limitations to March 2011, when the plaintiff withdrew his medical malpractice suit, finding the alleged “continuing ill effects of [the defendant’s] decision to represent [the doctors]” were not enough for the continuous representation doctrine to apply.⁵³

The plaintiff again appealed, and the court of appeals affirmed. The court noted that instead of alleging the defendant was negligent in his representation of the plaintiff, the plaintiff was really alleging the defendant had breached the standard of conduct by representing the plaintiff’s adversaries in the medical malpractice suit. In any event, the court held that the claim could not be deemed to have been tolled because “[a] continuing tort sufficient to toll a statute of limitations is occasioned by *continual unlawful acts*, not by continual ill effects from an original violation.”⁵⁴ Because the court found that any alleged distress the plaintiff experienced during the three years of litigating against the defendant was part of the “continual ill effect” of the defendant’s decision to take on the adverse representation in the first place, this meant he was alleging a *continuing wrong*, not a continuing tort. Therefore, the court found that the limitations period was *not* extended until March 2011. Because the alleged breach was known to the plaintiff by April 2008, almost five years before he sued the defendant, his legal malpractice claim (such as it was) was time-barred.⁵⁵

What do the documents indicate about the continuation or termination of the representation? In *Town of Amherst v. Weiss*, another recent New York decision, it can be seen that the continuous representation question can be a tricky one for the courts to resolve on summary

judgment when the documentation isn't in place.⁵⁶ In this case, the plaintiff town hired the defendant attorneys in early 2001 to investigate the possibility of bringing charges against one of its employees. The defendants performed legal work on the plaintiff's behalf and represented the plaintiff at a hearing that resulted in the employee's termination. However, the defendants improperly commenced the hearing, requiring a second hearing that again resulted in the employee's termination. When the employee challenged the termination, the plaintiff again retained the defendants to represent it. Thereafter, the plaintiff sued the defendants for legal malpractice, alleging their negligence led to the nullification of the first hearing. As there was no dispute that the legal malpractice claim accrued in June 2001 and that the complaint was filed well after the statute of limitations would have run in June 2004 but for any applicable tolling of same, the trial court granted the defendants summary judgment on the grounds that the claim was time-barred.⁵⁷

On appeal, the New York Appellate Division reversed, finding that a triable issue of fact existed as to whether the continuing representation doctrine applied to toll the statute. The court noted that even though there were two subsequent hearings regarding the original hearing, the subsequent hearings resulted from the original error. Moreover, even though there were three separate retainer agreements, the court could not say, as a matter of law, that the defendants' acts were not sufficiently interrelated so that representation on the two subsequent hearings was not part of a continuing, interconnected representation of performing the overall task of the original proceeding: terminating the plaintiff's employee. The court opined that even though there were gaps in the provision of legal services by

the defendants, there was a triable issue of fact as to whether these gaps were "merely . . . period[s] absent expectations, rather than . . . period[s] when representation formally ended."⁵⁸ Notwithstanding the fact that the defendants had correctly noted that the continuing representation doctrine requires that there be "continuing trust and confidence in the relationship between the parties," the appellate court concluded that there were

absent a signed consent to change attorney form, there is no better evidentiary support for the end of a relationship than something on firm letterhead formally ending the relationship with the client. As can be seen above, the gradual end to the attorney-client relationship or a transition over to successor counsel that is not deemed a "pure transition" can create uncertainties that can be exploited to argue for a toll to apply.

WHEN TERMINATING A CLIENT RELATIONSHIP, RETAIN DOCUMENTATION TO THAT EFFECT ON FIRM LETTERHEAD.

triable issues of fact with regard to whether that trust was lost.⁵⁹

Interestingly, in reaching this conclusion, the court noted that the plaintiff had received an unsolicited letter from an attorney suggesting the defendants had committed malpractice and offering to represent the plaintiff in recovering the money spent as a result. However, the plaintiff never consulted with that attorney, nor did it institute any legal malpractice action during the pendency of the defendants' representation. And even though the plaintiff had solicited a proposal from a second attorney for representation in connection with the employee's challenge, "consultation with a second attorney for representation on the same legal matter does not terminate the first attorney-client relationship."⁶⁰ By opting to retain the defendants, the plaintiff evidenced an intent to continue the relationship.

Conclusion

Reviewing these cases, several conclusions can be drawn. First, attorneys and their firms must keep track of their communications with clients. If you are terminating a relationship with a client,

Perhaps most importantly, if there is any question whether you've been terminated, or whether your services provided pursuant to the initial retention have been completed, it may be best to try and figure it out sooner rather than later. You never know what that client who retained you 10 years ago thinks about your attorney-client relationship with him or her, or what the impact of your fielding periodic calls from the client over the years may have on determination of a legal malpractice accrual date. It just makes sense to leave less up to chance (or, perhaps more applicable, a potential question of fact open) in a field that, while developing in both statutory and case law, continues to be rife with disagreements about the termination of relationships and when tolling should apply. As Hemingway might have said had he been writing about lawyers instead of the Spanish Civil War, "Ask not for whom the statute tolls, as it may toll for you."

Notes

1. See, e.g., *Lehman v. Payne*, 615 F. App'x 172, 173 (5th Cir. 2015) (referencing MISS. CODE ANN. § 15-1-49);

K.A. Holdings Ltd. of N.Y. v. Chagaris, 583 F. App'x 192 (4th Cir. 2014) (citing N.C. GEN. STAT. § 1-15(c)); Parr v. Rosenthal, 34 N.E.3d 1275, 1280 (Mass. App. Ct. 2015) (citing MASS. GEN. LAWS ch. 260, § 4); O.K. Petroleum Int'l, Ltd. v. Palmieri & Castiglione, LLP, No. 2014-04791, 2016 N.Y. App. Div. LEXIS 957, at *2 (Feb. 10, 2016) (citing N.Y. C.P.L.R. § 214(6)).

2. See, e.g., Kelly v. Orr, 196 Cal. Rptr. 3d 901, 904 (Ct. App. 2016) (citing CAL. CIV. PROC. CODE § 340.6) (one year); Hayenga v. Gilbert, 342 P.3d 1279, 1281 (Ariz. Ct. App. 2015) (citing ARIZ. REV. STAT. ANN. § 12-542) (two years); Mosier v. Moliator, 40 N.E.3d 405, 412 (Ill. App. Ct. 2015) (citing 735 ILL. COMP. STAT. 5/13-214.3) (up to six years).

3. 355 P.3d 667, 673 (Kan. 2015).

4. *Id.* (quoting Pancake House, Inc. v. Redmond *ex rel.* Redmond, 716 P.2d 575, 579 (Kan. 1986)).

5. See, e.g., Britton v. Girardi, 185 Cal. Rptr. 3d 509, 517 (Ct. App. 2015) (“Section 340.6 states two distinct and alternative limitation periods: One year after actual or constructive discovery, or four years after occurrence (the date of the wrongful act or omission), whichever occurs first.”); Haskell v. Hastings, No. CV-09-689, 2010 Me. Super. LEXIS 120, at *18 (Sept. 28, 2010) (“[T]he general rule . . . is that the statute of limitations for legal malpractice begins to run at the moment a negligent act takes place[.]”); Yardeny v. Tanenbaum, 18 N.Y.S.3d 349, 349 (App. Div. 2015) (“The three-year statute of limitations on a cause of action alleging legal malpractice begins to run when the malpractice is committed, not when the client discovers it.” (citations omitted)).

6. See, e.g., Coilplus-Alabama, Inc. v. Vann, 53 So. 3d 898, 906–07 (Ala. 2010) (“[A] cause of action . . . accrues at the time the plaintiff first suffers

legal injury or damage.”); Hayenga, 342 P.3d at 1281 (“A legal malpractice claim accrues when the plaintiff ‘has sustained appreciable, non-speculative harm or damage as a result of such malpractice and . . . knows, or in the exercise of reasonable diligence should know, that the harm or damage was a direct result of the attorney’s negligence.”); Reynolds v. Trout Jones Gledhill Fuhrman, P.A., 293 P.3d 645, 648 (Idaho 2013) (“[S]ome damage is required because it would be nonsensical to hold that a cause of action is barred by the statute of limitations before that cause of action even accrues.”); Graora v. Fletcher Tilton & Whipple, 31 N.E.3d 78 (Mass. App. Ct. 2015) (“[W]hen the cause of action is based on an ‘inherently unknowable wrong,’ the action ‘may not accrue until the person injured knows or in the exercise of reasonable diligence should know the facts giving rise to the cause of action.’”).

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7. See, e.g., *Tautkus v. Saunders*, No. 323209, 2015 Mich. App. LEXIS 2180, at *9 (Nov. 19, 2015) (“[C]laims of legal malpractice accrue ‘within two years from the date the attorney discontinues serving the client or within six months after the client discovers or should have discovered the claim, whichever is later.’”); *Wingates v. Gallagher*, No. 12-CV-15842, 2015 Ohio Misc. LEXIS 7518, at *8 (Ct. Com. Pl. Aug. 27, 2015) (“[A] cause of action for legal malpractice begins to accrue when the cognizable event occurs or when the attorney-client relationship terminated, whichever is later.”).

8. See, e.g., *Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC*, No. 14CA0900, 2015 Colo. App. LEXIS 916, at *22 (June 18, 2015) (“[A]n action in legal malpractice cases accrues when the plaintiff learns ‘facts that would put a reasonable person on notice of the general nature of damage and that the damage was caused by the wrongful conduct of an attorney.’”); *Vossoughi v. Polaschek*, 859 N.W.2d 643, 652 (Iowa 2015) (“The cause of action accrues when the client sustains an actual, nonspeculative injury and has actual or imputed knowledge of the other elements of the claim.” (footnote omitted)); *Thomas v. Cook*, 170 So. 3d 1254, 1261 (Miss. Ct. App. 2015) (“[T]he limitations period begins to run when the client ‘learns, or through reasonable diligence, should have learned, of the negligence of the lawyer.’”).

9. *Pulieri v. Boardwalk Props., LLC*, No. 9886-CB, 2015 Del. Ch. LEXIS 37, at *33 n.98 (Feb. 18, 2015) (“[T]olling exceptions include the doctrines of (1) fraudulent concealment, (2) inherent[ly] unknowable injury, and (3) equitable tolling.” (alterations in original)); *Carlson v. Fish*, 31 N.E.3d 404, 415 (Ill. App. Ct. 2015) (“Under the fraudulent concealment doctrine, the statute of limitations will be tolled if the plaintiff pleads and proves that fraud prevented discovery of a cause of action.”); *Graora*, 31 N.E.3d at n.3 (“The plaintiff’s argument that the statute of limitations was tolled due

to the defendant’s fraudulent concealment of the facts underpinning the present malpractice action falters due to the plaintiff’s failure to present any evidence of concealment, active or otherwise, by the defendant.” (citation omitted)); *Pickett v. Gallagher*, 159 So. 3d 587, 591 (Miss. Ct. App. 2014) (“In cases of fraudulent concealment, ‘the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.’”).

10. See, e.g., *Best Choice Fund, LLC v. Low & Childers, P.C.*, 269 P.3d 678, 684 (Ariz. Ct. App. 2011); *Kelly v. Orr*, 196 Cal. Rptr. 3d 901 (Ct. App. 2016); *Truong v. Glasser*, 103 Cal. Rptr. 3d 811, 817 (Ct. App. 2009); *Nelson v. Cascino Vaughan Law Offices, Ltd.*, No. 1-14-1710, 2015 Ill. App. Unpub. LEXIS 2566, at *8–9 (Nov. 10, 2015); *Foley v. Schwartz*, 943 N.E.2d 371, 380 (Ind. Ct. App. 2011); *Spilios v. Cohen*, 647 N.E.2d 1218, 1220 (Mass. App. Ct. 1995).

11. See, e.g., *Rodriguez v. Nolan*, No. 1-14-1622, 2015 Ill. App. LEXIS 2224, at *8 (Sept. 30, 2015) (“Illinois courts do not recognize a continuous representation argument, and the [six-year] statute of repose may not be tolled in an attorney malpractice action merely by the continuation of the attorney-client relationship.”); *Lamet v. Levin*, 39 N.E.3d 136, 140 (Ill. App. Ct. 2015) (“The statute of repose in a legal malpractice case begins to run as soon as an event giving rise to the malpractice claim occurs, regardless of whether plaintiff’s injury has yet been realized.”); *Carlson v. Houk*, No. A14-0633, 2014 Minn. App. Unpub. LEXIS 1171, at *4 (Nov. 17, 2014) (“No published case in Minnesota has ever explicitly applied the continuous-representation doctrine to toll the [six-year] statute of limitations in a legal-malpractice lawsuit.”).

12. 196 Cal. Rptr. 3d 901.

13. *Id.* at 902–03.

14. *Id.* at 903.

15. *Id.* at 907.

16. *Id.*

17. *Id.* at 908.

18. *Id.* at 908–09.

19. No. 251-9-14, 2015 Vt. Super. LEXIS 20, at *1–2 (Apr. 1, 2015).

20. *Id.* at *2–3.

21. *Id.* at *3–4.

22. *Id.* at *5–6.

23. *Id.* at *6.

24. No. 320137, 2015 Mich. App. LEXIS 1753 (Sept. 17, 2015).

25. *Id.* at *3.

26. *Id.* at *9–11.

27. *Id.* at *17.

28. *Id.*

29. *Id.* at *24–25.

30. *Id.* at *19–20.

31. No. 14-cv-9641, 2016 U.S. Dist. LEXIS 11347, at *3–5 (S.D.N.Y. Feb. 1, 2016).

32. *Id.* at *9–11.

33. *Id.* at *6–9.

34. *Id.* at *18.

35. *Id.* at *21.

36. *Id.* at *19.

37. No. KNLCV136018315S, 2015 Conn. Super. LEXIS 2231 (Aug. 24, 2015).

38. *Id.* at *1–2.

39. *Id.* at *2.

40. *Id.* at *3 (alteration in original).

41. *Id.* at *3–4.

42. *Id.* at *4.

43. 974 N.Y.S.2d 379 (App. Div. 2013).

44. *Id.* at 379.

45. *Id.* at 380.

46. *Id.*

47. *Id.*

48. 170 So. 3d 1254 (Miss. Ct. App. 2015).

49. *Id.* at 1257.

50. *Id.* at 1257–58.

51. *Id.* at 1258.

52. *Id.*

53. *Id.* at 1259.

54. *Id.* at 1261 (alteration in original) (emphasis added).

55. *Id.*

56. 993 N.Y.S.2d 396 (App. Div. 2014).

57. *Id.* at 400.

58. *Id.* at 399–400 (alterations in original).

59. *Id.* at 400.

60. *Id.*

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