VOLUME 5, ISSUE 1

PROFESSIONAL LIABILITY DEFENSE QUARTERLY

WINTER 2013

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BURNING DOWN THE HOUSE: DEFENDING UNDER AN ERODING LIMITS POLICY

BY: JAMES J. SIPCHEN, ESQ. AND DONALD PATRICK ECKLER, ESQ.

With increasing frequency policies of insurance providing coverage to professionals have limits that are eroded by the defense costs expended. David L. Brandon, *Burning Issues: The Representation of Insureds Under Burning Limits Policies Raises a Host of Ethical Issues*, 27 L.A. Lawyer, p. 30 (2004). These policies, called, among other things, "burning limits," "depleting," and "defense within limits," create incentives for plaintiffs, defendants, and defense counsel which are starkly different than traditional policies. For defense counsel, these incentives can create ethical quandaries that must be identified early in order to be dealt with properly or avoided altogether. This article will identify the unique challenges of handling a case under this kind of policy, discuss the relevant ethical requirements that govern such situations, and provide some practical advice to practitioners.

The Basics of the Tripartite Relationship

Any discussion of the ethics of defense counsel, must begin here. For the uninitiated, the tripartite relationship is the relationship between the insurer, the insured, and defense counsel retained by the insurer to defend the insured. "[The] so-called tripartite relationship has been well documented as a source of unending ethical, legal, and economic tension."[1] The majority of jurisdictions hold that counsel retained by the insurer to represent the insured has two clients, both the insurer and the insured.[2] A minority of jurisdictions reject the dual client relationship rule and hold that counsel retained by an insurer only represents the insured. In these jurisdictions

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A LEGAL MALPRACTICE PITFALL: CONFLICTS OF INTEREST

BY: DOUG HOLTHUS, ESQ. AND ANDREW GOOD, ESQ.

It is axiomatic that all attorneys have a specific and ongoing fiduciary duty of loyalty to their clients. Outside of a continuing and obvious duty to the court and the law, an attorney's loyalty and independent judgment are essential factors in establishing and maintaining an attorney-client relationship.[1] However, when an attorney's loyalty becomes conflicted, potential causes of legal malpractice as well as violations of disciplinary rules arise.

A simple yet seemingly often overlooked pitfall to which attorneys and law firms occasionally fall victim are conflicts of interest which arise, even unwittingly, in the representation of clients. The American Bar Association's Model Rules of Professional Conduct ("Model Rules") establish the pertinent guidelines attorneys must abide when considering potential and obvious conflicts of interest. Actions by an attorney which violate these rules can lead to disciplinary actions and malpractice claims. This article will serve to provide an overview of the Model Rules relating to the malpractice pitfalls associated with conflicts of interest.

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DEFENDING UNDER AN ERODING LIMITS POLICY, CONT'D

there is no tripartite relationship.[3] However, whether in a dual client or single client jurisdiction, the paramount duties of defense counsel are ultimately owed to the insured as if defense counsel was retained by the insured and not the insurer. Keeping these basic principles in mind is essential to an attorney's defense of any insured, but particularly necessary to properly and ethically represent an insured under an eroding limits policy.

Special Considerations for Parties Under Eroding Policies

Under a traditional policy of insurance, the plaintiff and the insured are generally uninterested in the defense activities being undertaken and their cost. However, when a policy of insurance is eroding with defense costs, the plaintiff and the insured are acutely and jointly concerned with the defense costs being expended because with every dollar of defense that is expended, the money available to provide an indemnity payment is reduced. As a result, eroding policies may sometimes create the effect of driving the plaintiff and insured together to settle cases early, particularly in cases in which the exposure to the insured is at, near, or exceeds the policy limit, even when their are good defenses to liability available to the insured. *See* Brandon, *supra,* p. 32. Conversely, where the plaintiff and the defendant have very divergent views of the case and the exposure involved making agreement to a settlement unlikely, these policies present unique challenges and even some traps for the unwary defense lawyer as the case progresses.

From the insurer's perspective eroding policies limit exposure by placing a cap on the amount that will be expended in defending the case. This cap can create a conflict between the insurer and the insured and place the defense attorney in the middle of this dispute. Avoiding, or reducing the effect of such a conflict, must be a chief concern of a defense attorney assigned a case which has an eroding limits policy.

Keeping the Insured Informed – Some "Must Do's" for Defense Counsel

In the context of defending under an eroding limits policy it is essential for the defense attorney to obtain the active engagement of the insured from the outset. Ian Corzine, *Burn, Baby, Burn: The Role of 'Defense Within Limits' Liability Policies In Construction Defect Litigation*, p. 17 (www.westcorzine.law.com). Sometimes defendants, and even professionals like the ones often defending under eroding limits polices, see defense and indemnity issues as problems solely for the insurer and the attorney retained by the insurer. It is important to disabuse the insured of this attitude when an eroding limits policy is involved and alert the insured to what may be at stake in the litigation. Indeed, among the most basic obligations of an attorney is to apprise the client of the status of the case. While perhaps not adopted *in toto*, every state's rules of professional conduct have some version of ABA Model Rule 1.4, which states:

> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

In furtherance of the obligations imposed under Model Rule 1.4, defense counsel should advise the client from the outset of the engagement the nature of the client's policy of insurance and its effect on the availability of indemnity.[4] Correspondence should be drafted in a manner that conveys information as part of the lawyer's defense obligation to the insured, not in a way to mistakenly suggest to the insured that the attorney is providing coverage advice. In fact, it may be advisable for the defense attorney to specifically advise in writing that the attorney's representation is limited to the defense of the case and does not include advice on insurance coverage issues. This will assist in preventing a common misconception among insureds that appointed defense counsel's role is to advise on all issues including coverage.[5] This discussion should include the possibility that the personal assets of the insured may be exposed to pay either defense costs or indemnity should the limits of the policy be exhausted. In order for this discussion with the insured to be meaningful, the attorney should provide an estimated budget of the cost of the activities through the trial of the matter so that the insured can appreciate the limits available relative to the costs of defense. *See* Corzine, *supra,* p. 19; Brandon, *supra,* p. 32. Emphasis on this budget being only an estimate should be included to temper expectations that the budget should be relied upon as being fixed, given that the vicissitudes

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Please let us know of appeals in your jurisdictions implicating important professional liability issues that might have national significance.

"From the insurer's perspective eroding policies limit exposure by placing a cap on the amount that will be expended in defending the case."

DEFENDING UNDER AN ERODING LIMITS POLICY, CONT'D

of litigation could easily raise, or lower, the costs.

An initial analysis of the liability defenses available in a case, their relative chances of success, and the costs of pursuing certain defenses, particularly if experts will need to be engaged to mount that defense, should also be analyzed. Juxtaposed against the costs of the liability defense, the defense attorney should include an analysis of the maximum exposure that could be faced by the insured in a "worst case scenario" in order to provide substance to the insured of the effect that the eroding nature of the policy can have on the insured and potential defenses that can be undertaken. Armed with this information, the insured can then meaningfully participate in deciding the appropriate course of action based upon the insured's risk tolerance and financial condition. As the litigation moves forward, it is also advisable for defense counsel to keep the insured informed as to the defense costs incurred to date, the effect of those costs on the eroding policy limits, any changes in expected costs of defense going forward, and any other significant changes in the litigation impacting the insured's exposure.

Additional issues may arise in eroding limits situation where there is no excess policy. Specifically, there may be an issue as to whether excess coverage is triggered when payment of defense costs exhausts the primary policy's eroding limits. Douglas A. Richmond, *Rights and Responsibilities of Excess Insurers*, 78 Den. U.L. Rev. 29, 85 (2000). If the excess policy is a following form policy, coverage may be triggered under these circumstances. *Id*. at 86. Conversely, a true stand alone excess policy may not be triggered by payment of defense costs as part of the limits. *Id.* Again, being careful not to take a definitive position on coverage, it may still be advisable for defense counsel to make the insured aware of the issue, suggest that the insured place any excess carrier on notice of the primary policy's eroding limits, and advise the insured to seek the independent advice of coverage counsel on this issue.

At the same time discussions are occurring between defense counsel and the insured, the insurer must also be advised of the situation that the case presents. This can often be done in the same correspondence, with separate discussions had when needed, but ultimately for the protection of the defense attorney, these discussions and any decisions made should be memorialized in correspondence. Carefully drafted and timely correspondence reminding the insured and the insurer of the discussions had at the outset and during the course of a case can prove very useful later in a case when it is claimed that advice as to the precarious nature of the particular case was not identified earlier.

The Added Wrinkle: The Settlement Consent Provision

Policies of insurance issued to professionals often have settlement consent provisions. Such provisions typically require the insured to consent before any settlement is reached in the litigation, even if the insurer is willing to meet the plaintiff's demand. It bears mentioning that disagreement and conflict can often arise between an insured and the insurer when the insured wishes to withhold consent and the insurer wishes to settle. Very often, the insured's policy provides the insurer with the right to recoup fees from the insured if the insured insists on withholding consent and recovery in the litigation is ultimately over and above the demand. While the mechanics of these type of "hammer clauses" and the respective obligations of the insured and insurer under such clauses are beyond the scope of this article, the defense lawyers should be prepared to explain to the insured the potential consequences of withholding consent if and when the insurer has exercised its rights under the "hammer clause."

In context of the liability defense, defense counsel's correspondence to the insured should contain a discussion of the requirement that no settlement can be made without the consent of the insured. Professionals are often convinced they have done nothing wrong and are, at the outset, outraged that they have been sued and are determined to fight to the end. While they have that right, and that should be explained, the risk that the insured is undertaking and the personal exposure the insured could face should even the most effective defense be unsuccessful should be explained. It frequently occurs that after the first wave of righteous indignation has passed and the realities of the situation have been internalized, that an insured becomes much more amenable to settlement. This is precisely the kind of effect that Rule 1.4 envisions and is essential for the effective defense of the insured under an eroding limits policy.

Perfect Storm: Low Limits, High Exposure, and Potential Liability Defenses

Often a professional liability defense practitioner will find himself or herself representing a client with an eroding limits policy that has low limits, exposure that outstrips those limits, and potential liability, but also defenses that may, but not for certain, will defeat the claim. It is in this situation that the defense attorney must be particularly careful to meticulously advise the insured and the insurer of the difficulties faced. It may be advisable that with the correspondence setting forth the situation, that the defense attorney include a written consent form for the insured to execute. That consent form should provide that the defense attor-

PROFESSIONAL LIABILITY DEFENSE QUARTERLY
is published by:
Professional Liability Defense Federation
1350 AT&T Tower
901 Marquette Avenue South
Minneapolis, MN 55402
(612) 481-4169

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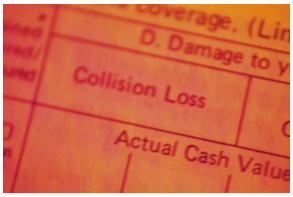

DEFENDING UNDER AN ERODING LIMITS POLICY, CONT'D

ney is permitted to seek settlement for the then remaining limits of the policy of insurance. If at any point when the defense attorney recommends settlement the insured declines to consent, this should be memorialized in writing to both the insured and the insurer.

This should be done for several reasons. First, it gives the insured the opportunity to reconsider the situation. Second, it advises the insurer of a fact that the insurer is entitled to be aware of and satisfies a duty to the insurer in a dual-representation jurisdiction to be made so aware. Third, from the defense attorney's perspective, such practice may have the effect of removing the defense attorney from an even more difficult situation should an insurer decide to invoke a "hammer clause." A "hammer clause" is a provision which allows the insurer to seek the defense costs from the insured should the insured decline to settle at a level approved by the insurer. Because the invocation of a hammer clause creates a conflict between the insurer and the insured, it is essential that the defense attorney not be involved in the insurer's application of the "hammer clause" and the defense attorney should decline to provide any advice to the insurer on its use.

In addition to advising the insured of the limitations of the policy involved, the defense attorney should also, as early as he or she is aware, advise counsel for the plaintiff of the eroding nature of the policy. Defense counsel should do so even prior to plaintiff's attorney requesting such information in discovery. Advising plaintiff's counsel about the eroding limits will often have the effect of obtaining the cooperation of counsel for plaintiff in reducing defense activities which could erode the policy further than what is warranted and place counsel for plaintiff in the position to seek an early and reasonable settlement. *See* Brandon, *supra,* p. 32. In the difficult case, it may also be useful to advise the court of the eroding nature of the policy as the court may, in view of this situation, provide the parties an opportunity for early resolution and not require activities that it might normally require early in a case which would only have the effect of eroding the limits of the policy and making the case more difficult to settle.

Exposure of Personal Assets of the Insured

As with any defense of an insured, every effort must be made to avoid exposure of the insured's personal assets. Just as in defending under a traditional policy in which there is the potential of excess exposure, the defense attorney's top priority should be to minimize the risk of exposure of the insured's personal assets. However, despite the best efforts of defense counsel to defend the insured, the exposure of the insured's personal assets is sometimes inevitable. That exposure could result from the amount of money claimed by the plaintiff being so far in excess of the policy, the absence of meaningful liability defenses, and refusal of the plaintiff to settle within the available policy limits, that there is simply no way for the insured to escape personal liability. As set forth above, informing counsel for plaintiff of nature of the policy of insurance should be done early on in the case and that often will have the effect of causing counsel for plaintiff to demand the remaining limits of the policy to settle the case.

If the plaintiff has made a demand for the remaining policy limits, it is sometimes the case that the weakness of the insured's liability position compared to the potential exposure is such that the insured should make a request to the insurer to offer settlement for the remaining policy limits to avoid exposure of personal assets. Failure of defense counsel to make an appropriate recommendation in this situation could subject the defense attorney to criticism and even liability should the insured's personal assets be exposed later on in the litigation and a request for settlement on terms within the policy limits was not made. Because of the reluctance of defense counsel to request the payment of policy limits, it is in this situation that the loyalties of the defense attorney are tested most closely and it is in this situation that the defense attorney must be mindful that the ultimate duties and loyalties are owed to the insured. Where the plaintiff and the insured both make a demand for payment of the policy limits and the insurer has refused, defense counsel should strongly consider suggesting to the insured of the right to seek personal counsel to protect his or her interests *vis-a-vis* the carrier.

Sometimes, however, not even the remaining policy limits are enough to satisfy the plaintiff. In this situation, specific advice must be provided to the insured, as early on in the case as possible, that the plaintiff is targeting the insured's personal assets and will not accept the policy limits as a settlement. Under such circumstances, it is advisable for defense counsel to advise the insured to seek the advice of a financial advisor knowledgeable on the subject of asset protection. It is important for the defense lawyer to be very clear to the insured that this type of advice is not part of the defense obligation (as is the case in most insurance defense situations). Sober evaluation of the exposure involved may often bring the insured around to the possibility that contribution to the settlement is likely the best alternative than eroding the policy completely, thereby leaving the insured with neither money from the insurer for defense nor indemnity in the event of a judgment. The earlier this evaluation is given the better, as no shock is so jolting as that which comes late in litigation when the insured must contribute substantially to a settlement effort after so much

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> "In addition to advising the insured of the limitations of the policy involved, the defense attorney should also … advise counsel for plaintiff of the eroding nature of the policy."

DEFENDING UNDER AN ERODING LIMITS POLICY, CONT'D

was expended on defense.

When the Limits are Gone

In the unfortunate situation where the limits of the eroding policy have been exhausted, the insurer will most likely advise the insured and defense counsel that it will no longer be paying for the defense. In such a situation, defense counsel must remember that just because the insurer's duties to the insured have ceased, his or her duties as counsel have not. In such a situation, defense counsel has two distinct choices: (1) move to withdraw and obtain the court's permission to not longer represent the client, or (2) negotiate a new representation and fee agreement with the client going forward. Corzine, *supra,* p. 18. If the attorney is going to withdraw, he or she should comply with the jurisdiction's rules regarding withdrawal of counsel. *See, e.g.,* Ill. S.C.R. 13.

If the attorney is going to continue representation under the second option, a new written agreement should be negotiated *immediately* and before attempting to bill the client for post-insurance defense work. *See, e.g*., Ill. R. Prof. Conduct 1.5. Regardless of which path the attorney pursues, he or she should carefully document the course of action taken with the client, including status as the client's attorney, and in the event of withdrawal, the need for the client to obtain new counsel or appear *pro se,* as well as upcoming court deadlines in the litigation.

Conclusion

Fraught with perils, a defense attorney should be acutely aware of the issues to be contended with in handling a case under an eroding policy. The keys to ethically defending cases under eroding policies of insurance are to be constantly attuned to the insured, to whom the defense attorney's duties are ultimately owed and to provide an evaluation of the case to the insured and the insurer at an early stage. The failure to undertake these actions can lead to acrimony with both the insured and the insurer, which could lead to losing the insurer as a client, and, worse yet, potential liability exposure for the defense attorney for breaching duties to the insured. The best rule of the thumb for avoiding such pitfalls is found in ABA Model Rule 1.4 itself – keep the client informed about all aspects of the case.

Endnotes

1. *State Farm Mut. Auto. Ins. Co. v. Tarver*, 980 S.W.2d 625, 633 (Tex. 1998) (Gonzales, J., dissenting).
2. *See* Restatement of The Law Governing Lawyers, §§ 26(1) and 215; Illinois Rules of Professional Conduct Rule 1.7; ABA Model R. 1.7(b), c. 10, and R. 1.8(f); *Waste Management v. International Surplus Lines Ins. Co.*, 144 Ill. 2d 178 (1991); *Nandorf v. CNA Ins. Cos.*, 134 Ill. App. 3d 134 (1st Dist. 1985); *Cincinnati Ins. Co. v. Wills*, 717 N.E.2d 151, 161 (Ind. 1999); *Nezley v. Nationwide Mut. Ins. Co.*, 296 N.E.2d 550, 561 (Ohio App. 1971); *Goldberg v. American Home Assur. Co.*, 439 N.Y.S.2d 2, 5 (N.Y. App. Div. 1st Dep't 1981); *Lieberman v. Employers Ins.*, 419 A.2d 417, 424 (N.J. 1980); *Bogard v. Employer's Cas. Co.*, 210 Cal. Rptr. 578, 582 (Cal. App. 1985); *McCourt Co., v. FPC Properties, Inc.*, 434 N.E.2d 1234, 1235 (Mass. 1982).
3. *See Atlanta Int'l Co. v. Bell*, 448 N.W.2d 804 (Mich. Ct. App. 1989); *In The Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 299 Mont. 321, 333-34 (Mont. 2000); *Higgins v. Karp*, 687 A.2d 539, 543 (Conn. 1997); *Continental Cas. Co. v. Pullman, Comley, Bradley, & Reeves*, 929 F.2d 103 (2d Cir. 1998); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989); Colorado Bar Ass'n Formal Ethics Opinion 91 (1993); *Safeway Managing General Agent v. Clark & Gamble*, 985 S.W.2d 166, 168 (Tex. App. 1998); *Gibbs v. Lappies*, 828 F. Supp. 6, 7 (D.N.H. 1993); *Givens v. Mullikin ex. rel. McElwanney*, 75 S.W.2d 383, 386 (Tenn. 2000); *Finley v. Home Ins. Co.*, 975 P.2d 1145, 1153 (Hawaii 1998).
4. Shaun McParland Baldwin, *Legal and Ethical Considerations for 'Defense Within Limits' Policies*, 61 Def. Counsel J. 89, 99 (1994).
5. Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, § 29.13, p. 305 (5th ed. 2000).

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> "Fraught with perils, a defense attorney should be acutely aware of the issues to be contended with in handling a case under an eroding policy."

CONFLICTS OF INTEREST, CONT'D

Model Rules of Professional Conduct

The American Bar Association's Model Rules of Professional Conduct address those "conflicts of interests" to which attorneys are susceptible and discuss how an attorney should handle a conflict. The general rule for conflicts of interest is stated under Model Rule 1.7. Pursuant to Model Rule 1.7(a), "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A concurrent conflict of interest exists when the representation of a client is *directly adverse* to another client or the representation presents a "significant risk of materially limit[ing]" the attorney's responsibilities to another client, either former or current. Nonetheless, representation of a conflicted party may still be undertaken if the attorney obtains written informed consent and the representation is (1) not prohibited by law, (2) does not involve representing opposing parties during litigation, *and* (3) the lawyer "reasonably believes" he or she can provide competent and diligent representation to both parties.

The process that an attorney must follow in addressing a potential conflict of interest is further explained

***PLDQ*'s SPRING 2013 ISSUE**

We encourage member submission of articles pertinent to professional liability claims administration, defense trial advocacy, or professional liability substantive law. The manuscript deadline for the next issue is **May 1, 2013**.

CONFLICTS OF INTEREST, CONT'D

under Rule 1.7, comment ¶ 2. Specifically, the Rule notes:

> "[r]esolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a), [i.e. concurrently interested clients], and obtain their informed consent, confirmed in writing."

Informed consent is "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[2]

In addition to this specific process discussed under Rule 1.7, Model Rules 1.8 through 1.14 provide further guidance in specific situations. Model Rule 1.8 also considers the situation posed by concurrent conflicts. The Rule provides guidance to attorneys in dealing with specific conflicts, including conflicts that can be resolved through a client's knowing and intelligent consent. For example, Rule 1.8(a) provides that "a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:" (1) the transaction and terms are fair, reasonable, and fully disclosed in writing that the client understands; (2) the client is advised in writing to seek advice from outside counsel and has a reasonable amount of time to do so; *and* (3) the client gives informed consent in writing pertaining to the essential terms of the transaction and the lawyer's role, and the consent is signed by the client. If any of the situations listed within Rule 1.8 apply to one lawyer in a firm, it shall apply to all of the lawyers at the firm. [3]

Model Rule 1.9 addresses an attorney's duty to a former client and the conflicts that may arise with new or current representation of other clients. Specifically, a lawyer should not represent a new client if their interests are materially adverse to either a former or current client that was or is represented in a same or similar matter, unless written consent is obtained. Furthermore, representation should not be had if the attorney obtained information protected by [Model] Rules 1.6 and 1.9(c) that is material to the matter. Although, representation can be provided so long as the matters between the adverse parties are not the same or similar and the attorney has not acquired confidential information. [4]

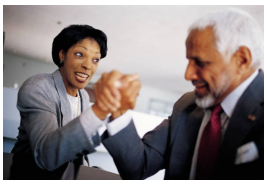
As for the remaining Model Rules, each provides specific instances of conflicts of interest and discusses how an attorney may properly handle such situations. For example, Model Rule 1.10 considers the imputation of conflicts between one attorney to all other attorneys within the same firm. Model Rule 1.11 deals with conflicts of interest for former and current government officers or employees. Model Rule 1.12 pertains to the possible conflicts associated with former judges, arbitrators, mediators or other third-party neutrals, and Model Rule 1.13 addresses conflicts associated with or caused by the representation of an organization. Also, while not directing addressing conflicts, Model Rule 1.14 considers the specific instances of an attorney's representation of a client with diminished capacity.

As stated within the various Comments to the Model Rules, an attorney owes great deference to client loyalty and the failure to resolve any conflicts of interest can hinder or destroy that loyalty. As a result of such conflicts, attorneys may be susceptible to professional sanctions and the possibility of civil lawsuits.

A Malpractice Pitfall

According to a recent American Bar Association survey, conflicts of interest and failure to obtain informed consent make up 10.7% of all legal malpractice claims in the United States.[5] Notably, the ABA survey included conflicts of interest whether the attorney knew of it or not. While the guideline and recommendation remedies for avoiding such malpractice pitfalls are established within the Model Rules, there has been and will always be instances of litigation over conflicts of interest. However, following the guidelines and recommendations of the Model Rules will undoubtedly reduce litigation in these areas and provide for a better defense.

In *Disciplinary Counsel v. Cowden*, 131 Ohio St. 3d 272, 963 N.E.2d 1303 (2012), two attorneys, Mr. Cowden and Mr. Nagorney, were found to have violated multiple Disciplinary Rules of the Code of Professional Conduct. In 1997, Technology Strategies, Inc., "Old TSI," began to experience financial difficulties and as a result, in 1999, the president of Old TSI, Mr. Stuffleben, retained Mr. Cowden to "obtain advice about the viability of the company." 963 N.E.2d at 1306. Mr. Cowden negotiated a series of forbearance agreements with Huntington National Bank and introduced Mr. Stuffleben to two of Mr. Cowden's clients that worked for Hockey Stick Investments, a venture-capital company. *Id*. Notably, Mr. Cowden owned a one-third interest in Hockey Stick. *Id*. Mr. Cowden recommended that both parties enter into a "secured-party" sale with Huntington National Bank "to maintain Stuffleben's debt, maintain control of the company, and obtain an infusion of capital." *Id*. This sale



" … conflicts of interest and failure to obtain informed consent make up 10.7% of all legal malpractice claims in the United States."

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CONFLICTS OF INTEREST, CONT'D

involved Old TSI's assets being foreclosed on by Huntington and then sold to TSI Holdings Limited ("TSI Limited"). *Id*. Of interest, TSI Limited was wholly owned by Hockey Stick. *Id*. As a result of such, the assets were then sold to TSI Holdings, Inc. ("New TSI"). *Id*. The "plan would reduce [Mr.] Stuffleben's personal guaranty to the bank from $1.1 million to $250,000 and reduce his ownership interest from 94 percent of Old TSI to 64 percent of New TSI." *Id*.

Mr. Cowden "negotiated the terms of this secured-party sale as counsel for Old TSI, New TSI, and Hockey Stick." However, prior to this transaction taking place, Mr. Cowden instructed Mr. Stuffleben to consult with another attorney, Mr. Vilsack, regarding the transaction, in apparent recognition of his own conflict of interest. 963 N.E.2d at 1306-07. However, by this time, the terms of this transaction were already agreed to by the parties. 963 N.E.2d at 1307. Of further interest, Mr. Cowden was seeking to recruit Mr. Vilsack to become a member of his firm. *Id*. At the closing of the secured-party sale, Mr. Cowden represented Old TSI and Hockey Stick, and Mr. Vilsack represented New TSI. *Id*. A few months later, TSI Limited defaulted on the payments to Huntington National Bank, which rendered a judgment against Mr. Stuffleben. *Id*.

In December 2000, New TSI began experiencing financial difficulties and was in need of further working capital. *Id*. Mr. Nagorney, a partner of Mr. Cowden's firm, was instructed to draft a factoring agreement between New TSI and Ganzcorp Investments, which was another client of Mr. Cowden's firm. *Id*. Not only was Ganzcorp a client of Mr. Cowden, he also owned a 7.5 percent interest in the company. *Id*. Unaware of this relationship, Mr. Nagorney represented New TSI and the factoring agreement was presented to Mr. Stuffleben. *Id*. Hesitant to offer personal guarantees for the transaction, Mr. Nagorney instructed Mr. Stuffleben execute the agreement as the "deal could not be completed without the personal guarantee." *Id*.

In March 2001, Mr. Cowden advised Mr. Stuffleben that he would need to retain new counsel as he had a conflict of interest. *Id*. Further, he advised that Hockey Stick Investments would no longer provide investment capital to New TSI. *Id*. Shortly after this, Mr. Nagorney demanded Mr. Stuffleben and New TSI pay $151,900.53 to Ganzcorp as a result of the factoring agreement that Mr. Nagorney drafted while representing his former client, New TSI. *Id*. Consequently, new counsel was retained to represent Ganzcorp against the parties for breach of the factoring agreement. *Id*. Mr. Nagorney discussed the confidential contents of that agreement with the new counsel for Ganzcorp. *Id*. A judgment and lien was later obtained against New TSI with Mr. Nagorney as counsel seeking "to collect the judgment and the costs of obtaining it from his former client – New TSI." *Id*.

Upon hearing disciplinary complaints against Mr. Cowden and Mr. Nagorney, the Supreme Court of Ohio found that Mr. Cowden violated: (1)DR 1–102(A)(6) "prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law"; (2) DR 5–101(A)(1): "prohibiting a lawyer from accepting employment if the exercise of the lawyer's professional judgment will be or reasonably may be affected by the lawyer's personal interests"; (3) DR 5–104: "prohibiting a lawyer from entering into a business transaction with a client if they have differing interests unless the client has consented after full disclosure"; and (4) DR 5–105(A): "requiring a lawyer to disclose potential conflicts of interest before accepting employment that is likely to compromise the lawyer's independent judgment on a client's behalf." 963 N.E.2d at 1307-08. Mr. Nagorney was found to have violated (1) DR 1–102(A)(6), (2) 5–105(A), and (3) DR 4–101(B)(2): "prohibiting a lawyer from using a confidence or secret of a client to the disadvantage of a client." 963 N.E.2d at 1308. After reviewing the conduct of both attorneys, the Ohio Supreme Court suspended Mr. Cowden from practicing law in Ohio for one year and Mr. Nagorney for six months. 963 N.E.2d at 1309. However, the suspensions were stayed on the condition that both attorneys commit no further acts of misconduct.

In addition to *Disciplinary Counsel v. Cowden,* courts across the United States are finding that attorneys with conflicts of interest must be disqualified from representation and as such, disciplinary matters are likely to arise. For example, in *Filippi v. Elmont Union Free Sch. Dist. Bd. of Educ.*, 722 F. Supp. 2d 295 (E.D.N.Y. 2010), the court determined a substantial conflict of interest warranted disqualification of an attorney who was an associate of a firm that represented the plaintiff-employee. Specifically, defendants moved to disqualify plaintiff's counsel because an associate at their law firm was also acting as the Vice President of the defendant Board of Education. 722 F. Supp. 2d at 298. Although it was noted that the associate was not an attorney for the school, she nevertheless owed a duty of loyalty to the plaintiff as an associate of the firm representing her and was in fact "privy to confidential" communications. 722 F. Supp. 2d at 305. Filippi's counsel argued that the associate's position with their firm did not establish an attorney-client relationship and as such, there was no conflict of interest. 722 F. Supp. 2d at 304. However, the court determined that the associate did have a conflict of interest. *Id*.

As such, the court had to examine whether that associate's conflict was imputed to her firm. 722 F. Supp.

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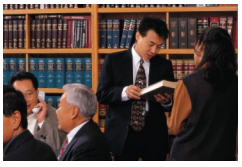
" … courts across the United States are finding that attorneys with conflicts of interest must be disqualified from representation … "



CONFLICTS OF INTEREST, CONT'D

2d at 307. The court noted that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein." Rule 1.10(a); *see also Hempstead Video,* 409 F.3d at 133 ("An attorney's conflicts are ordinarily imputed to his firm based on the presumption that 'associated' attorneys share client confidences."). *Id*. Thus, the court concluded that disqualification was necessary to prevent the conflict of loyalties due to the associate's position with her firm and acting as the Vice President of the Board of Education. 722 F. Supp. 2d at 309.

More recently, the United States Court of Appeals for the Eleventh Circuit determined that an attorney's representation of both a physician and the physician's former patient, in the context of a discrimination action against various hospital official defendants, required his disqualification. In *McGriff v. Christie*, 477 F. App'x 673 (11th Cir. 2012), plaintiff's counsel had accepted representation of a physician's patient after having previously represented the physician in a malpractice lawsuit instituted by the same patient. 477 F. App'x at 676. Counsel repeatedly assured the patient that there was no conflict of interest as the physician had done nothing wrong in the malpractice suit and that there was no malpractice claim against the doctor. 477 F. App'x at 676. Nevertheless, the court determined that the attorney's representation of the physician and the former patient required disqualification under the rules addressing conflicts of interest where the patient "advised counsel that she wanted him to file claims against all parties involved in her treatment at the hospital, including the physician." 477 F. App'x at 677. The Court of Appeals also noted that "[i]t is clear, as the district court found, that there was a [']previous attorney-client relationship[']between Counsel and the [patient], and that Counsel's representation of [patient] and [the doctor was] [']not only logically and materially related, but the two involved exactly the same events, and both involved the present litigation.[']" 477 F. App'x at 678.

The foregoing cases only show a small glimpse of litigation involving conflicts of interest and the potential disciplinary consequences. These cases reflect a consistency across the United States regarding how courts view such violations and how attorneys must handle them. As evidenced by the above case law, conflicts of interest continue to occur. However, the Model Rules provide the necessary guidelines that an attorney can reference and follow in order to prevent these violations and/or disciplinary actions from happening.

Conclusion

It seems inevitable that, notwithstanding all best efforts, even unintended violations of the Model Rules pertaining to conflicts of interest will continue to occur. Beyond the continuing and obvious duty to the courts and the law, attorneys will always have a continuing obligation of loyalty to their clients. The Model Rules provide attorneys the guidelines to abstain from or validly pursue conflicts of interest.

Endnotes

1. ABA Model Rule 1.7- comment [1].
2. Model Rule 1.0(e).
3. ABA Model Rule 1.8(k).
4. ABA Model Rule 1.9(b).
5. http://www.americanbar.org/publications/law_practice_home/law_practice_archive/lpm_magazine_webonly_ webonly07101.html.

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"Model Rules provide the necessary guidelines that an attorney can reference and follow in order to prevent these violations … "

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PSYCHIATRIC/PSYCHOLOGICAL MALPRACTICE SURVEY

BY: THOMAS D. JENSEN, ESQ.

We survey here the status of mental health care professionals' malpractice claim exposures in non-sexual transference circumstances. (Transference claims are reviewed in 3 *Professional Liability Defense Quarterly*, p. 5 (Summer 2011)).

Duties of Care

The practice of psychiatry has come a long way from the ancient practice of confining persons with aberrant behavior in institutions or asylums. It has been recognized that mental illness may be caused or intensified by institutionalizing mental patients. Emerging from these roots, the science and profession of psychiatry has burgeoned into a multifaceted social institution. The practice of psychiatry is no longer limited to the institutionalization of the mentally ill. Professionals in the practice of psychiatry and psychology now offer an innumerable variety of remedial therapies to the troubled and ailing souls of modern society. *Paddock v. Chacko,* 522 So. 2d 410, 414 (Fla. App. 1988). In other words, the science of psychiatry represents the penultimate grey area. Numerous cases underscore the inability of psychiatric experts to predict, with any degree of precision, an individual's propensity to do violence to oneself or others. *Id*., at 414-15 (refusing to impose a duty on a psychiatrist to force a patient into care when the patient had already surrendered herself to the custody of her father and was willing to do whatever he directed), *accord Topel v. Long Island Jewish Med. Ctr.,* 55 N.Y.2d 682, 684, 446 N.Y.S.2d 932 (1981) (noting that the "line between medical judgment and deviation from good medical practice is not easy to draw" particularly in cases involving psychiatric treatment).

In other words, the diagnosis of mental cases is not an exact science. "As yet the mind cannot be X-rayed like a bone fracture. Diagnosis with absolute precision and certainty is impossible. … It has been recognized that insanity is difficult of detection, and frequently is cunningly concealed." *St. George v. State*, 283 App. Div. 245, 248, 127 N.Y.S.2d 147 (1954) (finding no cause of action against state hospital in the release of a patient who murdered others shortly thereafter, based upon an honest error in judgment and concern about the extension of liability). Thus,

> "[t]he prediction of the future course of a mental illness is a professional judgment of high responsibility and in some instances it involves a measure of calculated risk. If a liability were imposed on the physician or the state each time the prediction of future course of mental disease was wrong, few releases would ever be made and the hope of recovery and rehabilitation of a vast number of patients would be impeded and frustrated."

Centeno v. City of New York, 48 App. Div. 2d 812, 814, 369 N.Y.S.2d 710 (1975) (involving a patient's suicide which occurred after he was permitted to return home). A faulty diagnosis, however, can form no basis for a cause of action because in and of itself it results in no damage. Only when it leads to injurious delay in receiving proper treatment or leads to the administering of improper treatment that causes damages can a negligent diagnosis form the grounds for relief. *Speer v. United States,* 512 F. Supp. 670, 675 (N.D. Tex. 1981) (involving a plaintiff who unsuccessfully alleged husband's suicide was due to psychiatric care of defendant physician).

Due to the inherent uncertainty of mental health judgment, liability may be imposed only when the decision by the mental health professional is such a substantial departure from accepted professional judgment, practice or standards, as to demonstrate that the person actually did not base the decision on such a judgment. *West v. Macht,* 237 Wis. 2d 265, 614 N.W.2d 34 (App. 2000). The concept of due care in evaluating psychiatric problems must take into account the inevitable difficulty in reaching a definitive diagnosis, and the therapist who uses proper psychiatric procedures may not be found negligent even though the diagnosis is incorrect. *Gordon v. Milwaukee County,* 125 Wis. 2d 62, 370 N.W.2d 803 (App. 1985).

The law does not require a psychiatrist to achieve success in every case. *Schrempf v. State*, 66 N.Y.2d 289, 295, 496 N.Y.S.2d 973 (1985) (involving negligent release from confinement; the claim cannot stand when all physicians agreed the decision to place the patient on outpatient status was consistent with acceptable standards of practice). A psychiatrist owes patients that duty of care that a reasonably prudent psychiatrist would exercise under the same or similar circumstances. *Omer v. Edgren*, 38 Wash. App. 376, 685 P.2d 635 (1984) (also characterizing the physician-patient relationship as fiduciary in nature). Similarly, psychologists have a duty to diagnose mental disease properly and to apply proper treatment. *Zagaros v. Erickson,* 558 N.W.2d 516 (Minn. App. 1997). The mental health therapist's employer may be found liable on grounds of respondeat superior and negligent supervision. *E.g., Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986).

Courts generally refuse to impose liability for psychiatric malpractice unless there is something more than a mere error in judgment. *Krapivka v. Maimonides Med. Ctr.,* 119 App. Div. 2d 801, 804-05, 501 N.Y.S.2d 429 (1986); *Ibguy v. State,* 261 App. Div. 2d 510, 690 N.Y.S.2d 604 (1999) (noting that a psychotherapist

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PSYCHIATRIC/PSYCHOLOGICAL MALPRACTICE, CONT'D

may not be held liable for a mere error in judgment); *Matter of Rivera,* 287 App. Div. 2d 318, 731 N.Y.S.2d 160 (2001) (involving a claim for psychiatric negligence resulting in patient escape barred by mere error in judgment rule). An unsuccessful result does not mean the psychiatrist has committed malpractice. *Gowan v. United States,* 601 F. Supp. 1297 (D. Or. 1985). In New York, when a psychiatrist chooses a course of treatment after a proper examination and evaluation, within a range of medically accepted choices, the doctrine of professional medical judgment will insulate such psychiatrist from liability. *O'Sullivan v. Presbyterian Hosp.,* 217 App. Div. 2d 98, 100, 634 N.Y.S.2d 101 (1995).

Sometimes claimants seek to recover in mental health cases on a *res ipsa loquitur* theory. *Res ipsa loquitur* has been approved for use when a mental health patient leapt from an open window in a psychiatric ward when the psychiatrist knew of his suicidal tendencies and took no preventative measures. The doctrine may be used when the plaintiff (decedent) had some role in the outcome when the role is not the "responsible cause." *Meier v. Ross General Hosp.,* 69 Cal. 2d 420, 427, 71 Cal. Rptr. 903 (1968). However, *res ipsa loquitur* may not be used in an electroshock therapy injury case when it could not be shown such injuries would not ordinarily follow if due care had been exercised. *Farber v. Olkon,* 40 Cal. 2d 503, 254 P.2d 520 (1953).

Many claims contexts involve release-from-confinement decisions by psychiatrists that may lead to patient suicides or third-party injuries. *E.g., Bell v. New York City Health and Hospitals Corp.,* 90 App. Div. 2d 270, 456 N.Y.S.2d 787 (1982) (involving attempted suicide and affirming a breach of the standard of care in releasing a psychiatric patient from the hospital in the absence of a careful medical examination); *Cohen v. State,* 51 App. Div. 2d 494, 382 N.Y.S.2d 128 (1976) (affirming plaintiff's wrongful death recovery because a first year resident allowed the decedent to leave the hospital on the day of his suicide since a qualified psychiatrist was not actively supervising the case and the patient had known suicidal tendencies). Other law teaches, however, that there is no liability for the suicide of another in the absence of a specific duty of care. *Paddock v. Chacko,* 522 So. 2d 410, 415 (Fla. App. 1988).

A group foster home psychologist had a duty to prevent a resident from engaging in violent behavior when the psychologist was aware of the resident's violent behavior but had limited authority to set goals for residents and impose consequences for inappropriate behavior. *Stuedemann v. Nose,* 713 N.W.2d 79 (Minn. App. 2006) (adding that the psychologist had no duty to prevent the resident from leaving home because the statute involved prevented physical restraints). In the voluntary outpatient context, however, the duty of psychiatric care providers to control the actions of a patient who is a threat to himself or others is limited. *Cerbelli v. City of New York,* 600 F. Supp. 2d 405, 420-21 (E.D.N.Y. 2009) (ruling that although "no bright-line rule exists," outpatient health care providers generally owe their patients—and the public at large—a duty to take reasonable measures within their power to prevent foreseeable harm).

Claims akin to psychiatric or psychological malpractice also appear in the case law. *See, e.g., Horak v. Biris,* 130 Ill. App. 3d 140, 474 N.E.2d 13 (1985) (recognizing cause of action for social worker malpractice); *Doe v. Board of Education,* 453 A.2d 814 (Md. App. 1982) (school psychologists dismissed from lawsuit alleging negligence in student's testing and placement recommendations; educational malpractice claims are not actionable). A minister who counseled church members on their interpersonal dysfunctions was an unlicensed mental health practitioner and was subject to suit. *Odenthal v. Minn. Conference of Seventh Day Adventists,* 649 N.W.2d 426 (Minn. 2002).

Duties to Non-Patients

Cases hold that non-patients may not maintain a psychiatric malpractice claims out of concern for the consequences of burdening mental health professionals with a duty of care beyond that owed to the patient. *See, e.g., Althaus v. Cohen,* 562 Pa. 547, 756 A.2d 1166 (2000) (involving parents who sued their child's psychiatrist when the daughter recanted claims of sexual abuse); *J.A.H. v. Wadel & Associates, P.C.*, 589 N.W.2d 256 (Iowa 1999) (involving son who sued his mother's therapist alleging loss of the mother's love).

Other cases hold that non-patients may sue a mental health provider in some circumstances. *See, e.g., Sawyer v. Middlefort,* 227 Wis. 2d 124, 595 N.W.2d 423 (1999) (involving parents who sued their daughter's counselor when they were falsely accused of sex abuse). The negligent failure to diagnose or properly treat psychiatric conditions may constitute a cause of harm to the patient or third parties if it can be shown with proper diagnosis and treatment the patient's condition and behavior could have been corrected or controlled. *Schuster v. Altenberg,* 144 Wis. 2d 223, 424 N.W.2d 159 (1988). Oftentimes the cases turn on whether the "special relationship" test of the Restatement is satisfied. *See, e.g., Semler v. Psychiatric Inst.,* 538 F.2d 121 (4th Cir. 1976) (upholding a duty owed to one killed from release of a psychiatric patient in violation of a court's commitment order on grounds the order created a special relationship); *Caldwell v. Idaho Youth Ranch, Inc.*, 968 P.2d 215, 219 (Idaho 1998) (holding no special relationship existed when no court order prevented release of psychiatric patient and

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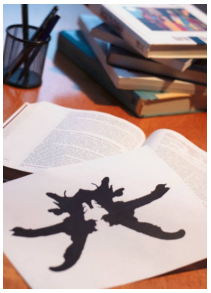
"Many claims contexts involve release-from-confinement decisions by psychiatrists that may lead to patient suicides or third-party injuries."



PSYCHIATRIC/PSYCHOLOGICAL MALPRACTICE, CONT'D

defendant facility had release discretion).

In cases of serious harm to known targeted victims, when the mental health provider learns that a patient poses a serious risk of danger to a particular person he or she bears a duty to exercise reasonable care to try to protect the foreseeable victim. *See, e.g., Tarasoff v. Regents of the Univ. of California,* 17 Cal. 3d 425, 551 P.2d 334 (1976).

Evidentiary Issues

Mental health care malpractice claims incorporate the familiar requirements for expert opinion support unless a common knowledge or similar situation is presented. *See, e.g., Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885, 891 (1999) (holding that under Nebraska law causation for a plaintiff's mental suffering must be established by expert testimony particularly in view of plaintiff's prior psychiatric history). Some cases qualify for the common knowledge exception. *See, e.g., Hammer v. Rosen,* 7 N.Y.2d 376, 198 N.Y.S.2d 65 (1960) (holding plaintiff need not call an expert witness to prove case when plaintiff was beaten by the psychiatrist). Thus, expert opinion is required on causation to tie the psychiatrist's conduct to plaintiff's alleged injuries or symptoms; the common knowledge doctrine does not apply when the issue is whether the patient's problems are caused by malpractice or preexisting problems. *Singh v. Lyday,* 889 N.E.2d 342 (Ind. App. 2008).

Plaintiff's standard of care and causation expert averments must meet clear standards. *See, e.g., Betty v. City of New York,* 65 App. Div. 3d 507, 884 N.Y.S.2d 439 (2009) (finding that plaintiff's expert's conclusory affidavit filed against the psychiatrist's summary judgment motion in a negligent release case was insufficient to avoid dismissal). And the corroborative forensic opinion must align with the defendant's specialty to ensure foundation. *See, e.g., Ozugowski v. City of New York,* 90 App. Div. 3d 875, 877, 935 N.Y.S.2d 613 (2011) (ruling that an internist and cardiologist's opinion of psychiatric malpractice was without foundation); *but see Rogers v. Okin,* 478 F. Supp. 1342, 1385 (D. Mass. 1979) (ruling non-psychiatrists may offer expert testimony on forced medication practices of defendants because medication orders are not within the exclusive province of psychiatrists).

A psychologist may not opine on a psychiatrist's compliance with the standard of care. Psychology may be a field related to psychiatry insofar as psychological testing is concerned, but psychology is not a field of medicine related to psychiatry. *See Cross v. Lakeview Ctr., Inc.,* 529 So. 2d 307, 310 (Fla. App. 1988); *accord, Capellupo v. Nassau Health Care Corp.,* 2009 WL 1705749 (E.D.N.Y. 2009) (noting that a licensed psychologist is not competent to testify as to the psychiatric standard of care in an involuntary commitment case); *McDonnell v. Nassau*, 129 Misc. 2d 228, 230, 492 N.Y.S.2d 699 (1985) (noting that "at bottom psychiatry is a medical discipline whereas psychology is not"; licensed psychologist is not competent to testify as to standard of care breach by a psychiatrist).

Under New York's rule, a claim cannot be made out when nothing more is shown than a difference of opinion between competing parties' experts on liability. *See Darren v. Safier,* 207 App. Div. 2d 473, 474, 615 N.Y.S.2d 926 (1994) (involving negligent release of patient).

Limitations Statutes

Of course each state's law must be scrutinized in evaluating limitations statute defenses. Rules typical to professional liability contexts seem to be in play across the country. For example, tolling issues appear occasionally. *See, e.g., Hammer v. Rosen,* 7 N.Y.2d 376, 198 N.Y.S.2d 65 (1960) (tolling statute of limitations during the period of plaintiff's insanity). But plaintiff's need for psychiatric treatment will not toll the running of the statute of limitations when plaintiff realized the psychiatrist's treatment involving sexual acts was wrong at an earlier point in treatment. *A. McD. v. Rosen,* 423 Pa. Super. 304, 621 A.2d 128 (1993). The limitations statute may be tolled when defendant psychiatrist intentionally concealed his sexual relationship with plaintiff's spouse. *Doe v. Finch,* 133 Wash. 2d 96, 942 P.2d 359, 360 (1997). The continuous treatment doctrine will not serve to toll the running of the limitations statute when a single act of negligence is known to the patient in the course of care. *Langner v. Simpson,* 533 N.W.2d 511 (Iowa 1995) (holding that plaintiff's psychiatric malpractice claim was barred by Iowa's two year statute). A psychologist providing marriage counseling is not a practitioner of the healing arts and a professional liability case is not a "medical malpractice" action under the state's shorter limitations statute. *Richards v. Lenz,* 539 N.W.2d 80 (S.D. 1995).

Other Claim Nuances

A patient's suicide may not be a superseding intervening cause in a psychiatric malpractice case when the suicide was foreseeable. *Champagne v. United States,* 513 N.W.2d 75, 81 (N.D. 1994). The intentional act of suicide may not reduce the defendant psychiatrist's negligence finding in a comparative fault jurisdiction because the intentional act was a foreseeable risk created by the negligence. *White v. Lawrence,* 975 S.W.2d 525 (Tenn. 1998).

Emotional distress damages are recoverable in a psychiatric malpractice case even if the plaintiff is not in the zone of danger or feared physical injury because the test of negligent infliction of emotional distress law does not carry over to psychiatric malpractice cases. *Corgan v. Muehling,* 167 Ill. App. 3d 1093, 522

"A psychologist may not opine on a psychiatrist's compliance with the standard of care."

PSYCHIATRIC/PSYCHOLOGICAL MALPRACTICE, CONT'D

N.E.2d 153 (1988).

Evidence that a nurse knew a psychiatrist committed boundary violations and drank at work did not create reasonable cause for the nurse to believe he abused other patients so as to trigger the vulnerable adult act reporting. *Wall v. Fairview Hosp.,* 584 N.W.2d 395 (Minn. 1998).

In Wisconsin, the Patient's Rights statute applicable to mental health patients admitted to treatment facilities provides two causes of action: (1) one for patients whose rights have been violated and suffered damages, and (2) one for patients who do not suffer damages but who rights were willfully, knowingly or unlawfully violated by the doctor or institution. *Schaidler v. Mercy Med. Ctr.,* 209 Wis. 2d 457, 563 N.W.2d 554 (1997).

Helpful Authorities

W.T. O'Donohue & E.R. Levensky, *Handbook of Forensic Psychology* (Elsevier Academic Press 2004).

American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000).

G.O. Gabbard, *et al., Treatment of Psychiatric Disorders* (American Psychiatric Press 2d ed. 1995).

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Managing Director's Message

The PLDF Board of Directors met January 31 - February 1 at The Peninsula Hotel in Chicago to plan for the future. We had a very productive meeting and are all very excited about the future of PLDF. One of the things we discussed is how to improve our *Professional Liability Defense Quarterly*. We are adding this column from me, the Managing Director, to update you on what is going on in our group; it will also have news about our members. This would include a change in firms, a new position in your company or firm, a new leadership position, a recent award or honor, or any other special news about you or your firm. The tricky part is there is no column without news. You have to send me the information. PLDF is all about our members. We are here for you, so if you give me the scoop, I can put it in our newsletter for all to see and read about.

We are excited about our Annual Meeting this year. With much discussion on this subject and careful attention given to you our members and your feedback from last year, we have made some exciting changes I think you will appreciate. I will be mailing you some details soon so you can put it on your calendar and plan to join us this year. The comment I hear more than any other is "[t]his group is so unique and special." We have grown so much yet we still remain with a singular focus and that is professional liability defense and nothing more. We are not trying to be like anyone else; we like who we are. The seminar is so great because we can be interactive with our presenters and we can meet many other professionals who do just what we do all over the country in a small, intimate setting.

We are planning for more of that relationship building this year which many of you also requested. Stay tuned and watch your mailbox.

Christine S. Jensen
Managing Director
Professional Liability Defense Federation

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