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EDITOR IN CHIEF – JEFFREY A. CRAPKO

WHAT'S INSIDE

Letter from the Chair

by: Marcy Tayler

Hello Fellow Litigation Section Member:

I hope this letter finds you all well and enjoying Summer....finally!

Your Litigation Section Governing Council has been very busy planning a fantastic Summer Conference at the Crystal Mountain Resort the weekend of July 22, 2016. The program begins with a cocktail reception at the Crystal Mountain resort where you can relax, unwind and mingle with fellow section members in a beautiful resort setting. On Saturday, Thomas Mauet will present his dynamic, practice-based program: "Trial Evidence: Artistry & Advocacy in the Courtroom." As most litigators are aware, Thomas Mauet has been recognized as one of the most influential writers in the field of litigation, having authored eight best-selling books on litigation and evidence based technique. His expertise in the art of trial advocacy is internationally recognized. The Litigation Section is excited to offer this program to the Section and encourages all of you to attend. Please also note that Litigation Section members enjoy a discounted seminar rate. Register online at http://e.michbar.org. The registration deadline is July 18, 2016.

And, although we are hoping to enjoy every minute of a very lovely Summer, we are also beginning, in conjunction with ICLE, to plan a fall seminar "Evidence Basics: Introducing and Objecting." This seminar, to be held at the Inn at St. John, in Plymouth Michigan will include both local attorneys with a particular expertise in evidence and Judges to instruct on everything from admitting evidence to impeachment to hearsay and objections. The Litigation Section is sponsoring the luncheon for all attendees. This awesome seminar is planned for October 14, 2016, so mark your calendars and plan to attend.

In addition to planning instructive seminars and programs for Section members, the Section is also committed to taking a proactive approach to monitoring and reviewing proposed changes to the court rules and other pending legislation that might impact and affect litigators. The Section will also continue to produce the Litigation Journal. Please watch for calls for articles as the Journal provides an excellent opportunity for section members to publish articles which may be of interest to litigators. We hope you enjoy this edition of the Journal and the excellent articles submitted by our members.

And, it goes without saying that the Litigation Section welcomes and encourages your participation in Section Events and Seminars. There are also many leadership opportunities available on Governing Council. If you are interested in a Governing Council position, please give me a call and I will answer your questions and make every effort to get you involved.

I have enjoyed serving the Section as your Chair and I look forward to seeing many of you at our fantastic Summer Conference and/or the next Litigation Section Event!

All the Best,

Marcy Tayler

Chair

Litigation Section, State Bar of Michigan

Data Breaches: A Problem for Attorneys Too

*by: Dante Stella and Sherrie Farrell**

Attorneys frequently overlook the relationship between ethical obligations and unintended data disclosures in litigation. Michigan Rule of Professional Conduct 1.6(b) requires that Michigan attorneys protect their clients' confidences.[1] Many people think of data breaches primarily as malicious thefts by outsiders of sensitive information: personal health information, personally identifiable information, trade secrets, or intellectual property. Recent, headline-grabbing incidents have also shed light on collateral impacts to companies and their employees. Consistent with their professional obligations, attorneys should take steps to ensure that their role *conducting litigation* does not lead to similarly damaging disclosures of sensitive information.

Not Just "Company" Information Anymore

First, the distinction between company data and personal data is breaking down as companies roll out Bring Your Own Device ("BYOD") programs in which company business is conducted on personal devices. A longer-standing trend, though, is the introduction of personal information into *company* systems. The Sony Pictures data breach of 2014 emphasized the point. That breach, perpetrated by a hacker group identified with North Korea, divulged a large amount of Sony Pictures' sensitive data, including release schedules, entire films, employee information (such as the Social Security numbers of 47,000 employees), and salary information. This generated embarrassment and expense for the company,[2] and it caused an international incident. But the types of *business* data divulged were not novel.

Certain aspects of the Sony breach implicated executives (and the company) in more personal ways. For example, Amy Pascal was a successful executive who greenlighted the movie *The Interview* and was one of two executives singled out for special retribution. *All* of her Sony email ended up on WikiLeaks. Some of this was within the range of business communications but had a salty and private nature: fiery exchanges with producers and comments about actors that might better have been kept under wraps. Then there were more personal discussions of things like the President's taste in movies. But the worst of it from a personal standpoint was exposure of her notes-to-self and personal emails sent to and from Sony accounts.[3] The hack even exposed to the public emails confirming her Amazon purchases, and one gossip site picked them up and ruthlessly and tastelessly analyzed her shopping.[4]

But this use of company systems for personal business is hardly unique, though it often goes unnoticed. The authors of this article have handled scores of internal investigations, responses to external ones, and civil suits involving major company-wide data collections and observe that, without fail, business systems contain vast amounts of personal information that has zero value to the legal matter (if not to the business itself). Some is personal identifying information: copies of passports, social security cards, and tax forms. Other data potentially would be protected by privacy statutes. Even communications carried out solely within company systems can reflect highly sensitive information, exhibit business-inappropriate content, or otherwise prove extremely embarrassing if revealed to others. Problematic external activities include online purchases, web browsing histories and cached files, correspondence with spouses (or paramours), pornography, letters to businesses or

government units, and any number of things whose authors and recipients would like to keep under the closed lid of a laptop. This material frequently ends up on company computers *despite* restrictive IT policies, and some common situations are:

1. Where small businesspeople mix business and personal items on the same machine, often because they have access to only one computer;
2. Where executives are above the pay grades monitored by IT or HR staff; and
3. Where employees only have access to *company* email at work.

For this reason, it is safe to assume that any machine could give rise to a Sony-style situation, should its contents be unexpectedly divulged.

Why Should Attorneys Care?

Your reaction as an attorney might be: "So what? Employees are not our clients, and they were warned that their personal information shouldn't have been on there." This misapprehends two key concepts: (1) that to the extent they are involved in a case due to their business capacity, employees *are* clients, and (2) that there is little upside in pushing the limits of "knowledge" and client/employee roles under MRPC 1.6(b). And for preserving client relationships, it is often beneficial to entertain the notion (even if sometimes fictional) that the privacy interests of clients and their closely-held businesses are perfectly aligned.

Litigation and investigations provide plenty of opportunities for personal business to get loose and wreak havoc both within and outside the scope of the matter in which a client is producing documents. The risks arise from extrinsic forces, strategic errors, and systemic neglect – not one-off mistakes in a document review. Here, MRPC 1.1 also comes into play – requiring that attorneys understand how to proceed – or seek out and work with people who do.[5]

Problem 1: seizure of devices. If a government authority seizes a computer and examines it, that authority (a prime example being the U.S. Department of Justice) frequently has the legal ability to examine *any potential crime* that comes to light in the data – not just the question that started the investigation. For example, a price-fixing investigation can take a detour to investigation of mail and wire fraud. This presents the risk of surprise prosecution; adverse publicity is a secondary effect.

Mitigation: data governance. Because government seizures can occur with little warning, the only real prevention lies in limiting what goes on a company's data systems. You personally may not be qualified to fully instruct a client on exactly what should be committed to communications, what should be on a computer, and how long it should be there. Consider reaching out to someone who can provide that instruction. But every attorney is capable of providing at least basic guidance on separating business from pleasure on company devices. And because the conduct of personal business in the workplace is unavoidable, employers should provide outlets for personal communications such that they do not take up space on company systems or create unnecessary risks to the enterprise.

Problem 2: data dumps. The use of "data dumps" to fulfill discovery requirements – trying to pull privileged material and unleashing the rest on the other side – often unloads large amounts of non-business information on an adversary (and sometimes brings about sanctions as a result). Without an adequate protective order in place, that information might be released directly to business personnel or the public. With most conventional confidentiality orders, there is no mechanism to retrieve *non-relevant* material.[6] When sensitive, non-relevant information in employee's company email accounts is disclosed, it can increase risks in the current lawsuit, give opposing counsel a road map for a future suit and future discovery, potentially provoke a suit by the employee, or cause reputational damage to the client (not in the least because things protected by confidentiality orders can still get out by virtue of motion practice and discussions in court

opinions). All confidentiality orders prohibit use of confidential documents in other cases, and most protective orders call for the return or destruction of confidential documents at the end of the case. But no protective order provides for (or could provide for) the erasure of opposing counsel's memory. Data dumps are equally dangerous in government investigations due to the "investigation creep" described above, and the fact that when an investigation is made public, plaintiffs in a related civil suit may seek documents given to the government.

Mitigation: appropriate care and client control. Clients have an overriding desire to save money, often so much that they overlook hazards. If your client is inclined to do a data dump, you should consider whether your client is sufficiently informed to make a decision to do that. Clients are not focused on (or remember) what might be lurking on their computers, and some of the problematic content may be difficult to identify on a "quick look." Likewise, clients often do not appreciate that "data dumps" can actually backfire and provoke expensive court-ordered re-dos, or worse, discovery sanctions because judges conclude that these dumps violate the dictates of state and federal rules governing document production.[7]

Problem 3: careless use of newer legal technologies. If misused, exciting technologies like predictive coding (popularized by the *Da Silva Moore* case),[8] can amount to a more sophisticated version of a "data dump." Do not get carried away with the amount of relevant material captured without understanding the extent and nature of the "extra" documents that often figure into productions guided by TAR.

Mitigation: read the manual. Companies that sell legal technology are clear on the point that they are not qualified to advise on the use of these systems and that responsibility for proper use lies with you. If you cannot personally defend how you chose to do something (whether to the client or to a court), cannot call on someone at your firm who can,[9] or cannot otherwise call on a consultant who can guide the underlying process in a defensible manner, you should be circumspect about deploying advanced technologies.

Problem 4: breaches in your firm. Although attorneys can be sophisticated about the law, they are often under-sophisticated when it comes to data security. This, coupled with holding large quantities of sensitive data from multiple clients (especially trade secrets and other technical information), can make law firms targets. Recently, even big-name firms have become victims of hacking aimed at gaining information for insider trading.[10] And the widely-publicized "Panama Papers" data breach also dramatically highlighted the vulnerabilities and impact all law firms face in this digital age. That Panamanian law firm breach resulted in an unprecedented leak of, among other things, more than 11.5 million documents and 4.8 million emails that detailed financial information and attorney-client communications.[11] Although the full impact of the breach of confidential and sensitive information is still emerging, including the implications for privilege in future matters, the episode shines a bright light on law firms' vulnerabilities in the face of increasing litigation and business threats.

Mitigation: increase data security. Attorneys have the most control over how they store sensitive client information and should make sure that data is appropriately password-protected and encrypted – and that physical files are adequately secured. Beyond controls, cyber security and data breach best practices always include robust training for employees. This training typically focuses on how to spot and avoid outside threats to the organization. Equally important, however, is the guarding against inside threats – posed by employees and other actors inside the organization. As with all organizations, and over time, it may be impossible to completely eliminate the threat of data breaches. But there is no reason to make life easy for hackers.

Problem 5: closing the loop with opposing counsel. You do not know what your adversary will do with

your client's data once you produce it. There is an equal danger of information being accidentally disclosed or stolen, particularly where your adversary's practice is to print out materials, proliferate them among staff or to unencrypted computers, or to store them in places where they can be hacked, such as the cloud. How you *produce* information also bears on its security. Documents produced in native format may be easily misused or retransmitted, whether accidentally or on purpose.

Mitigation: ask the question. It does not hurt to ask the other side what data protection measures they are taking in support of a confidentiality order. Likewise, there is no legal barrier to including data security provisions and representations/warranties in protective orders (or data protocols in more complex cases). Receiving parties may not always agree to them, but in case where there is doubt, such provisions are worth pursuing. And when you are considering potential production formats, consider what is required to meet the baseline requirement of being "reasonably usable"[12] without multiplying the risks of disclosure or proliferation.

Conclusion

Attorneys and law firms should not sit on the sidelines of data security, especially where company computers can be expected to contain irrelevant content of an embarrassing or personal nature that should be kept out of circulation – whether in litigation or beyond. As an attorney, you can counsel clients on the proper use of company resources, be mindful of how you conduct document productions, and make sure that data is kept under proper lock and key.

ENDNOTES

1 *Accord* ABA Model Rule of Professional Conduct 1.6(a).

2 *See* "Sony Cyberattack, First a Nuisance, Swiftly Grew Into a Firestorm," *New York Times* (December 30, 2014), http://www.nytimes.com/2014/12/31/business/media/sony-attack-first-a-nuisance-swiftly-grew-into-a-firestorm-.html? r=0 (retrieved on June 1, 2016).

3 *See, e.g.,* "Future of Sony's Amy Pascal questioned after hacked email revelations," *Los Angeles Times* (December 11, 2014), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-sony-amy-pascal-apologizes-20141212-story.html (retrieved on June 1, 2016).

4 *See* summary in "About That Amy Pascal Shopping List," *New York Magazine* (April 21, 2015), http://nymag.com/thecut/2015/04/about-that-amy-pascal-shopping-list.html (retrieved on June 1, 2016).

5 *Accord* Comment 8 to ABA Model Rule of Professional Conduct 1.1 (requiring attorneys "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology")* (emphasis added).

6 Contrast mechanisms for "clawbacks" of *privileged* information. *See, e.g.*, Fed. R. Civ. P. 16(b)(3)(B)(iv) (clawback agreements); Fed. R. Evid. 502 (giving force to such agreements and providing other resolution mechanisms).

7 *See SEC v. Collins & Aikman Corp., et al.,* No. 1:07-CV-2419, 2009 WL 94311, *12 (S.D.N.Y. Jan. 13, 2009) (1.7 million documents dumped by SEC); *Felman Production, Inc. v. Industrial Risk Insurers,* No. 3:09-0481, 2010 WL 2944777 at *4 (S.D. W. Va. July 23, 2010) (sanctions issued for production, 30% of which was admittedly irrelevant).

8 *See generally Da Silva Moore v. Publicis Groupe et al.,* 287 F.R.D. 182 (S.D.N.Y. Feb. 24, 2012).

9 *See* MRPC 1.1(a).

10 *See, e.g.,* "Hackers Breach Law Firms, Including Cravath and Weil Gotshal," *Wall Street Journal* (March 29, 2016), http://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504 (retrieved June 1, 2016).

11 *See, e.g.,* "What to Know About the 'Panama Papers' Leak," *Time Magazine* (April 4, 2016), http://www.time.com/42880302/panama-papers-leak-vladin (retrieved June 1, 2016).

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SBM State Bar of Michigan | LITIGATION SECTION

Summer Conference:

Trial Evidence: Artistry & Advocacy In the Courtroom

DATE: July 22–24, 2016

LOCATION: Crystal Mountain Resort, 12500 Crystal Mountain Dr, Thompsonville

COST: $160 Section Members; $195 General

REGISTRATION: online or by mail form

EVENT registration deadline: July 18, 2016

LODGING reservation deadline: June 22, 2016

Information about lodging reservations here

Our Presenter – *Thomas A. Mauet*

Thomas A. Mauet is the Milton O. Riepe professor of law and director of Trial Advocacy at the University of Arizona College of Law in Tucson, Arizona. He is this generation's most influential writer in the field of litigation, contributing 34 editions of eight best-selling books to the legacy of litigation training in the United States and abroad. Professor Mauet's
expertise in the art of advocacy is internationally recognized. He received the Richard S. Jacobson Award for excellence in teaching trial advocacy from the Roscoe Pound Institute. He served as the Howrey Professor of Trial Advocacy at George Washington University National Law Center and as a faculty member of the Harvard Law School Trial Advocacy Workshop.

His academic experience is balanced by his years in practice as an Illinois state attorney and a U.S. attorney. He was a private litigator in Chicago and has served as judge pro tempore of the Superior Court of Pima County, Arizona.

The 10th Anniversary of Woodard v. Custer: Where We've Been and Where We're Going

*by: Anthony D. Pignotti & Mitchell C. Jackson**

This year marks the 10-year anniversary of the seminal Michigan Supreme Court decision in *Woodard v. Custer.*[1] In *Woodard*, the Court sought to bring clarity to the qualification requirements set forth in MCL § 600.2169 with respect to an expert witness who intends to offer testimony on the applicable standard of care in a medical malpractice action. MCL § 600.2169 was aimed at providing clear guidelines for expert qualifications with the core principle being the notion that the expert's qualifications should essentially mirror those of the defendant physician – a seemingly straightforward principle that has proven to be relatively confounding in practice.

In the ensuing 10 years since the *Woodard* decision was issued, the courts have provided further guidance relative to the requirements of MCL § 600.2169; however, they have also raised novel questions regarding the statute's meaning.

It is critical for practitioners to keep abreast of these developments, as selecting an expert who turns out to be unqualified can have grave consequences. It is a trap for the unwary that could result in dismissal of a case, entry of default judgment, or unexpectedly discovering that an expert is precluded from testifying on the eve of trial.

As we embark on the decennial anniversary of *Woodard,* these issues are becoming increasingly salient as the number of specialties, subspecialties, and board certifications continue to grow each year, and as the courts have taken a renewed interest in reexamining the statute in ways that could significantly reshape the statutory landscape.

The Expert Qualification Requirements of MCL § 600.2169

In the context of a medical malpractice action, expert testimony is necessary to establish the applicable standard of care and to demonstrate that the medical professional at issue complied with or deviated from that standard.[2] The proponent of expert testimony in a medical malpractice case must demonstrate that the proposed expert is qualified under MRE 702, MCL § 600.2955 and MCL § 600.2169.[3]

The requirements of MCL § 600.2169(1) govern the specific professional and medical specialty qualifications that an expert witness must possess before he or she may offer testimony regarding the applicable standard of care. The statute specifically requires that a proposed expert's qualifications must "match" those of the defendant health professional. For instance, if the defendant practices within a particular medical specialty, the proposed expert must spend the majority of his or her professional time practicing or teaching within the "same specialty" as the defendant. If the defendant is board-certified in a particular specialty, the statute requires the proposed expert to be "board certified in that specialty."

Woodard v. Custer

Prior to the 2006 *Woodard* opinion, the Michigan Court of Appeals interpreted the "matching" requirements of MCL § 600.2169 to only apply at the general specialty and board-certification levels. In some instances, the Court of Appeals further interpreted the statute to not apply to "subspecialties." That all changed, however, with *Woodard.* In that case, the Michigan Supreme Court held that the "matching" requirements of

MCL § 600.2169 do apply to medical subspecialties, as well as board certification in medical subspecialties. *Woodard* thus marked a monumental shift in medical malpractice litigation and significantly altered the manner in which MCL § 600.2169 should be interpreted by practitioners and construed by the Courts.[4]

The Changing Landscape Since Woodard

In the years immediately following *Woodard*, several cases arose that tested *Woodard's* holdings. In the year immediately following *Woodard*, the Court of Appeals issued an opinion in *Reeves v. Carson City Hospital.*[5] In that case, the Court of Appeals addressed what specialty and board certification an expert witness had to "match" in a medical malpractice action against a board-certified family medicine physician who was practicing emergency medicine at the time of the incident at issue. Relying on *Woodard,* the Court of Appeals held that the one most relevant specialty was emergency medicine since that was what the board-certified family medicine physician defendant was practicing at the time of the incidents at issue. The Court further held that in order to testify regarding the applicable standard of care, the plaintiffs' expert had to specialize in emergency medicine and must have devoted a majority of his or her practice during the year preceding the incident at issue to the active clinical practice of, or the instruction of students in, emergency medicine.

Just a month later, in *Gonzalez v. St. John Hospital & Medical Ctr.,*[6] the Court of Appeals applied *Woodard* to a case involving allegations of medical malpractice against a general surgery resident who was practicing general surgery at the time of the incidents at issue. Utilizing the test set forth in *Woodard,* the Court ultimately held that since a resident practicing general surgery could potentially become board certified in that specialty, the one most relevant specialty was general surgery. In reaching that holding, the Court of Appeals specifically noted that "there is no difference between a defendant physician who is board certified in a specialty but is practicing outside that specialty at the time of the alleged malpractice and a physician, like [the resident], 'who can potentially become board certified' and is practicing in a specialty but is not board certified in that specialty."[7]

Later that same year, the Court of Appeals applied *Woodard* in the case of *Robins v. Garg,*[8] in which claims of medical malpractice were brought against a general practitioner, but were supported by the expert testimony of a board-certified family practitioner. The Court, relying on *Woodard,* held that because a general practitioner could not potentially become board-certified in general practice, a medical doctor practicing general medicine is not a specialist and the provisions of MCL § 600.2169(1)(a) do not apply. Looking to how family practice is defined in medicine, the Court ultimately held that because a board-certified family practitioner specializes in "general practice," such a physician is qualified under MCL § 600.2169(1)(c) to offer standard of care testimony against a general practitioner.

A year later, in *Wolford v. Duncan,*[9] the Court of Appeals was faced with the issue of determining what qualifications a physician's assistant expert is required to have under MCL § 600.2169 in order to offer standard of care testimony against a physician's assistant practicing under a physician who specialized in family practice. Looking to *Woodard,* the Court of Appeals held that because the terms "specialist" in MCL § 600.2169(1)(a) and "general practitioner" in MCL § 600.2169(1)(c) only apply physicians, those sections could not possibly pertain to other health professionals, like physician's assistants. The Court of Appeals then held that only MCL § 600.2169(1)(b) applies to expert witnesses who intend to offer standard of care testimony against physician's assistants. In other words, in order to offer standard of care testimony against a physician's assistant, an expert witness must devote a majority of his or her professional time to the

active clinical practice as a physician's assistant or the instruction of students in the practice as a physician's assistant; the specialty of the supervising physician is not pertinent.

Recent Interest in MCL § 600.2169 and *Woodard,* and Unanswered Questions

Over the course of the past couple years, the Courts have begun identifying new, unresolved issues regarding the requirements of MCL § 600.2169 and the implications of *Woodard.* For instance, in the 2015 case of *Jones v. Botsford,*[10] the Court of Appeals raised a number of questions with respect to the requirements of MCL § 600.2169 that it perceives to be left unanswered by *Woodard.* The ultimate issue before the Court of Appeals was whether an Affidavit of Merit filed pursuant to MCL § 600.2912d was appropriately stricken. In discussing that issue, however, the Court of Appeals significantly analyzed *Woodard* in addressing whether the plaintiffs' attorney's beliefs regarding the one most relevant specialty were reasonable. In analyzing that issue, the Court of Appeals identified several new issues that it believes have gone unanswered by *Woodward* and its progeny.

First, the Court of Appeals identified the issue of whether board certifications must be issued by the same board. For instance, in *Jones,* the defendant physician was board-certified in family medicine, had a certificate of added qualification in the subspecialty of geriatric medicine (which was issued by the *family medicine* board), and the one most relevant medical specialty was geriatric medicine. The plaintiffs' proposed expert witness, however, was board-certified in internal medicine and had a certificate of added qualification in the subspecialty of geriatric medicine (which was issued by the *internal medicine* board). While virtually every aspect of MCL § 600.2169 was satisfied, the one issue identified by the Court of Appeals was that the certificates of added qualification were issued by two separate boards. Although that issue was not actually before the Court of Appeals, the Court of Appeals identified it as a potential issue that needs to be resolved for future cases.

Additionally, the Court of Appeals identified a second potential issue of whether the relevant board-certifications have to be issued by the same physician-certifying organization. In *Jones,* the Certificates of Added Qualification in Geriatrics were issued by two separate Boards – the American Board of Family Medicine and the American Board of Internal Medicine – both of which fall under the larger organization of the American Board of Medical Specialties. Further, both the American Board of Family Medicine and the American Board of Internal Medicine identify geriatric medicine as a subspecialty of their respective specialties. The *Jones* Court also noted, however, that there is a separate organization – the American Board of Physician Specialties – which recognizes geriatric medicine as its own distinct medical specialty and issues board certifications in geriatric medicine. While it was not ultimately faced with this issue and, thus, did not have to decide it, the Court of Appeals did identify the potential issue of whether an expert witness with a board certification in a medical specialty in which the defendant physician is board certified may offer standard of care testimony if the experts' board certification was issued by a different organization than that issuing the certification to the defendant physician. This second scenario also seems to include the question of whether a board-certified allopathic physician may offer standard-of-care testimony against a board-certified osteopathic physician of the same medical specialty.

An additional question was recently resolved in *Rock v. Crocker,* which was just decided by the Michigan Supreme Court.[11] There, the Supreme Court was faced with the issue of whether the Court of Appeals erred in holding that, if the defendant is a board-certified specialist, MCL §

600.2169(1)(a) only requires an expert to be board certified in that same specialty at the time of the alleged malpractice, and not at the time of trial. Stated more generally, the Court had to decide when an expert who intends to offer standard-of-care testimony against a defendant physician has to satisfy the requirements of MCL § 600.2169.

In that case, the defendant physician was board certified in orthopedic surgery, which was determined to be the most relevant medical specialty at the time of the events at issue. Similarly, the plaintiffs' proposed expert was board-certified in orthopedic surgery at the time of the events at issue. The issue with the plaintiffs' proposed expert, according to the defendant physician, was that the expert was not board-certified at the time that he intended to offer standard of care testimony at trial. The Court of Appeals decided that the qualification requirements of MCL § 600.2169 apply at the time of the events at issue, and not at the time of the anticipated standard of care testimony. In its June 6, 2016 Opinion, the Supreme Court affirmed the judgment of the Court of Appeals with respect to this issue and specifically held that "the board certification requirement [of MCL 600.2169] applies at the time of the occurrence that is the basis for the action, not the time of testimony.[12]

Practice Pointers

The 10 years since *Woodward* have proven that the precise requirements of MCL § 600.2169 are still under debate. While the Courts have continued *Woodard's* efforts to bring clarity to the requirements of MCL § 600.2169, new unsettled issues continue to emerge. Nevertheless, there are a number of best practices that practitioners can employ in light of the guidance that has been provided by the courts over the past 10 years in order to ensure compliance with the settled requirements of MCL § 600.2169:

1. Identify the one most relevant medical specialty by looking at the care provided by the defendant health professional during the incidents at issue.

2. Determine if the defendant health professional was board certified in the one most relevant specialty, which could also include subspecialties.

3. Ensure that the expert witness who is called upon to offer standard of care testimony is board certified in the one most relevant specialty, if the defendant health professional is board certified in that specialty.

4. Ensure that the expert witness who is called upon to offer standard of care testimony devoted a majority of his or her practice during the year preceding the incident at issue to the active clinical practice of or the instruction of students in the one most relevant medical specialty.

5. If the defendant health professional was board certified in the one most relevant medical specialty, ensure that the expert witness who is called upon to offer standard of care testimony maintained the same board certificate at the time of the occurrence of the incidents at issue.

Ultimately, practitioners must carefully consider and address these issues in order to avoid the potentially catastrophic consequences of selecting an unqualified expert.

ENDNOTES

1 476 Mich. 545; 719 N.W.2d 842 (2006).

2 *Locke v. Pachtman,* 446 MIch. 216, 223 (1994).

3 *Clerc v. Chippewa Co. War Mem. Hosp.,* 477 Mich. 1067 (2007). MRE 702 and MCL § 600.2955 both set forth requirements regarding the reliability of expert testimony and are not the focus of this article.

4 For a more detailed analysis of *Woodard*, see "Expert Witness Standards in a Medical Malpractice Action," Michigan Bar Journal, February 2009, p. 30 by Cheryl A. Cardelli and Erik J. Warsow.

5 274 Mich. App. 622 (2007).

6 275 Mich. App. 290 (2007).

7 *Gonzalez,* 275 Mich. App. at 303.

8 276 Mich. App. 351 (2007).

9 279 Mich. App. 631 (2008).

10 310 Mich. App. 192 (2015).

11 _____ Mich. _____; _____ N.W.2d _____ (2016) (Docket No. 150719).

12 *Id.,* p. 18.

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Fry v. Napoleon Community Schools: Exhaustion Requirements Under the IDEA

*by: Micheal R. Dorfman**

The United States Supreme Court has recently asked the Obama administration whether it should take up a case from the Sixth Circuit that deals with issues presented in the case *Fry v. Napoleon Community Schools, et al.*[1] The issue presented in *Fry* is whether the Individuals with Disabilities Education Act ("IDEA") requires families to first exhaust administrative procedures under the IDEA when they are suing under the Americans with Disabilities Act of 1990 or the Rehabilitation Act of 1973.

The Sixth Circuit Court of Appeals recently held in *Fry* that, based on the statutory language in IDEA, families must first exhaust IDEA proceedings "when the injuries alleged [in the ADA or Rehabilitation Act complaint] can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA."[2]

Facts of the Underlying Case

E.F. was born with spastic quadriplegic cerebral palsy, which significantly impairs her motor skills and mobility.[3] In 2008, E.F. was prescribed a service dog.[4] Over the course of the next year, E.F. obtained and trained with a specially trained service dog, a hybrid goldendoodle named Wonder.[5] Wonder helps E.F. by increasing her mobility and assisting with physical tasks such as using the toilet and retrieving dropped items.[6] In October 2009, when Wonder's training was complete, Napoleon Community Schools (the "School") refused permission for Wonder to accompany her at school.[7] There was already an IEP in place for E.F. for the 2009-2010 school year that included a human aide providing one-on-one support.[8]

In a specially-convened IEP meeting in January 2010, School administrators confirmed the decision to prohibit Wonder, reasoning in part that Wonder would not be able to provide any support the human aide could not provide.[9] In April 2010, the School agreed to a trial period, to last until the end of the school year, during which E.F. could bring Wonder to school.[10] During this trial period, however, Wonder was permitted to be with E.F. not at all times or to perform some functions for which he had been trained.[11] At the end of the trial period, the School informed the family that Wonder would not be permitted to attend school with E.F. in the coming school year.[12]

The family began homeschooling E.F. and filed a complaint with the Office of Civil Rights at the Department of Education under the ADA and § 504 of the Rehabilitation Act.[13] Two years later, in May 2012, the Office of Civil Rights found that the School's refusal to permit Wonder to attend with E.F. was a violation of the ADA[14] At that time, without accepting the factual or legal conclusions of the Office of Civil Rights, the School agreed to permit E.F. to attend school with Wonder starting in fall 2012.[15]

However, the family decided to enroll E.F. in a school in a different district where they encountered no opposition to Wonder's attending school with E.F.[16] The family filed suit against the School on December 17, 2012, seeking damages for the School's refusal to accommodate Wonder between fall 2009 and spring 2012.[17] The family alleged the following particular injuries: denial of equal access to school facilities, denial of the use of Wonder as a service dog, interference with

E.F.'s ability to form a bond with Wonder, denial of the opportunity to interact with other students at school, and psychological harm caused by the defendants' refusal to accommodate E.F. as a disabled person.[18] The claims were brought under Title II of the ADA, § 504 of the Rehabilitation Act (which prohibits discrimination based on disability in "any program or activity receiving Federal financial assistance").[19]

The District Court granted the School's Motion to Dismiss based on the pleadings (failure to exhaust administrative remedies) and the family appealed.[20]

IDEA

The IDEA is a federal law that outlines standards and procedures for accommodations and services provided to disabled children by schools whose disabilities cause them to need "special education and related services."

One of the purposes of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education [("FAPE")] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living."[21]

> The IEP outlines "the child's present levels of academic achievement and functional performance[,] . . . measurable annual . . . academic and functional goals,' measurement criteria for meeting those goals, and the 'special education and related services and supplementary aids and services . . . and . . . the program modifications or supports for school personnel that will be provided for the child" to make progress in achieving the goals.'[22]

"The IEP is created by an IEP team, which includes the child's parents, at least one of the child's regular education teachers, at least one of the child's special education teachers, and a representative of the "local education agency"[23] who is qualified in special education, knowledgeable about the general curriculum, and knowledgeable about the local education agency's resources."[24]

Exhaustion Under IDEA

"Under the IDEA, 'plaintiff's must exhaust IDEA [resolution] procedures if they seek separate 'relief that is also available' under IDEA, even if they do not include IDEA claims in their complaint."

To resolve any disagreements between a school and a family, any party can present a complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE[25] to such child, including disputes over the content of the child's IEP.[26] In Michigan, a complaint is filed with the Michigan Department of Education. Within 15 days of receiving the family's complaint, the school district must hold a preliminary meeting with the parents and school's IEP team to give the school district an opportunity to resolve the claims in the complaint. If the complaint is not resolved within 30 days then the timeline for a due process hearing begins. The matter is heard by an administrative law judge, who conducts an impartial hearing and issues a decision within 30 days. This decision may then be appealed to federal district court.

Why Exhaustion is Required

Requiring exhaustion of administrative procedures prior to filing suit under the IDEA has clear policy justifications: "States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for

fairly resolving conflicts under the Act. Federal courts – generalists with no expertise in the educational needs of handicapped students – are given the benefit of expert fact finding by a state agency devoted to this very purpose."[27]

"The exhaustion requirement was intended 'to prevent courts from acting as ersatz school administrators and making what should be expert determinations about the best way to educate disabled students."[28]

Overlap with other Statutes

The IDEA's substantive protections overlap significantly with other federal legislation and constitutional protections, and so this policy justification would be threatened if parties could evade IDEA procedures by bringing suit contesting educational accommodations under other causes of action.[29]

As explained by the Sixth Circuit Court of Appeals, the exhaustion requirement makes sense because it "preserve[s] the primacy of the IDEA gives to the expertise of state and local [educational] agencies" on educational matters.[30]

However, going through due process is not simple and can be quite costly for families who can typically ill-afford the legal fees attached to representation during the hearing. Additionally, hearing officers find favor of the schools at a disproportionate rate in Michigan.

When the issues in the lawsuit do relate to the provision of the child's education, and can be remedied through IDEA procedures, "waiving the exhaustion requirement would prevent state and local educational agencies from addressing problems they specialize in addressing and require courts to evaluate claims about educational harms that may be difficult for them to analyze without the benefit of an administrative record."[31]

"Exhaustion is required at a minimum when the claim explicitly seeks redress for a harm that IDEA procedures are designed to and are able to prevent – a harm with educational consequences that is caused by a policy or action that might be addressed in an IEP."[32] "In such a situation, the participants in IDEA procedures will answer the same questions a court would ask, and they have a chance of solving the child's and the child's parents' problem before the parents and their child become plaintiffs."[33]

The Sixth Circuit held that the text of the IDEA exhaustion requirement clearly anticipates that the requirement will apply to some ADA and Rehabilitation Act claims.[34] It was further held that "instead, at minimum, the exhaustion requirement must apply when the cause of action 'arise[s] as a result of a denial of a [FAPE]' – that is, when the legal injury alleged is in essence a violation of IDEA standards."[35]

Financial Remedies

The Sixth Circuit has held that "exhaustion is not required when the injuries alleged by the plaintiffs do not "relate to the provision of a FAPE" as defined by the IDEA, and when they cannot "be remedied through the administrative process" created by that statute.[36]

The issue that may be addressed by the United States Supreme Court is if a plaintiff has financial damages (and/or pain and suffering) which can not be remedied through the administrative process, can they bring suit under another overlapping statute without first exhausting their remedies under IDEA?

ENDNOTES

1 *Fry v Napoleon Cmty. Schs.,* 788 F.3d 622 (6th, 2015)

2 *Id.*

3 *Id. at 624.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 20 U.S.C.S § 1400(d)(1)(A).

22 *Id.* (citing § 1414(d)(1)(A)(i)).

23 Usually the local public school district. § 1414(d)(1)(B).

24 § 1414(d)(1)(B).

25 FAPE is defined in IDEA as an education provided in conformity with the student's IEP. 20 U.S.C.S. § 1415(b)(6)(A).

26 20 U.S.C.S. § 1415(b)(6)(A).

27 *Fry* at 626 (quoting in part *Crocker v. Tenn. Secondary Sch. Athletic Ass'n,* 873 F.2d 933, 935 (6th Cir. 1989)((analyzing substantially similar provisions of the IDEA's predecessor statute). The IDEA calls for highly fact-intensive analysis of a child's disability and her school's ability to accommodate her. The procedures outlined above ensure that the child's parents and educators, as well as local experts, are first in line to conduct this analysis.

28 *Fry* at 626 (quoting *Payne v. Peninsula Sch. Dist.,* 653 F.3d 863, 876 (9th Cir. 2011) (en banc), overruled on other grounds by Albino v. Baca, 747 F.3d 1162 (9th Cir.2014) (en banc)).

29 *Id.*

30 *Fry at 627.*

31 *Id.*

32 *Id.*

33 *Id.*

34 20 U.S.C. § 1415(l).

35 *Id. (quoting Payne v Peninsula Sch. Dist.,* 653 F.3d 863,876 (9th Cir. 2011))

36 *Id. (quoting F.H. ex rel. Hall v. Memphis City Sch.,* 764 F.3d 638, 644 (6th Cir. 2014); see *S.E.,* 544 F.3d at 642.

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Educate, Explore and Engage: *Pointers to Prepare Your Clients for Facilitative Mediation*

*by: Richard A. Glaser, Richard A. Glaser PLLC**

At its annual meeting last year, the Alternative Dispute Resolution (ADR) Section of the State Bar of Michigan, mediators swapped stories about successful outcomes and frequent frustrations. A common complaint was the lack of preparedness of the parties, leading to the perception that clients who were better educated about the process and what to expect made for more efficient mediations and higher success rates.

This article is offered as a reminder to counsel not only to prepare yourself for mediation, but to assure your client is ready to participate by implementing the following themes: Educate your client; Explore with your client, and Engage your client.

A. EDUCATE YOUR CLIENT ABOUT THE PROCESS

The client will be a more effective participant when she knows what to expect, what the objective is, and how to achieve it. Sometimes we find that attorneys don't fully explain to their clients the distinctions among litigation, arbitration, case evaluation and facilitative mediation, let alone the different techniques that mediators employ.

Explain the following features of facilitative mediation:

- It is not final and binding;
- The mediator has no power to punish;
- The mediator has solely one function – to help the parties settle;
- Plenary (common) sessions and private (caucus) sessions;
- The process is confidential;
- No information disclosed or statements made are admissible in court.

The reason for the last two points is to encourage candor. Positions may be taken, concessions made, values attached and even apologies offered in order to facilitate the negotiation without fear that they will later undermine the client's case.

Nonetheless, the client can expect gamesmanship, frustration, maybe some anger (e.g., when the client hears the opponent's opening offer/demand), and more than a little disappointment along the way. The client should expect the opponent and his counsel will be having similar reactions in their caucus room. Educate the client that the success rate for mediation is high and the general feedback from parties is that the process was worthwhile, even if not immediately successful.

Be patient.

Educate the client about your mediator. If you have not worked with this mediator before, educate yourself about her techniques. During the pre-session telephone conference, you can ask questions directly to the mediator in order to then properly educate your client. Advise the client to be prepared for the mediator to express confidence in and be a champion for his case, and then come back to poke holes and cast doubt about its value. The mediator is not being duplicitous, but is playing devil's advocate as she is no doubt doing in the other room. The client would come to realize that on his own, but will be more comfortable and engaged if prepared for the process through your role-playing in advance of mediation.

As part of the role-playing preparation, educate the client about how the opponent is assessing the case and placing values on its different issues. Prepare a game plan for reaching a realistic settlement value, and then prepare Plan B. Even before the client asks, and certainly before the mediator raises it, educate the client about the cost, distraction and risks of not settling through mediation and proceeding to trial.

Emphasize that the mediation is not about trial lawyer advocacy or vanquishing the opponent. Resolving a dispute is good your client and for you. Abraham Lincoln observed: "As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." As counsel, your best service is to help the mediator help the clients to settle their case. The battle will resume if you cannot settle through mediation.

B. EXPLORE THE CLIENT'S FEARS AND EXPECTATIONS

Explore with the client the recesses and crevices of the case and her feelings about it and the other side. As counsel, you might sense such hostility and distrust that the plenary session should be truncated or the process would be better served by starting the day in separate sessions. But don't gravitate to that conclusion too quickly. Explore further. How can we work to restore enough trust to negotiate effectively? You might also learn that your client has unreasonable expectations about the prospect of salvaging a relationship with the opponent.

This exercise is not to prepare the client for some cathartic experience. It is partially to assure that you as lawyer do not learn an important obstacle or lever for the first time during the mediation; although it is not necessarily a bad thing if you do.

A favorite example with a happy ending was the case between a small family-owned supplier of automotive components to Tier One suppliers (Co. "A"), and a multinational manufacturer of consumer goods (Co. "B"), who wanted to try out its product expertise in the automotive market. In the second year of the relationship, B terminated the contract; A cried foul and sued for breach. The divisive forces of litigation took hold, positions hardened, and the chances for constructive dialogue between the parties diminished.

Within the first hour of mediation during the plenary session, A's young, second generation CEO voiced his belief that B, who had come to the dance with A, must have met someone else there (a competitor of A) and went home with that more attractive partner. This was the first anyone in the room, including A's CFO and its counsel, had heard about these suspicions.

B sincerely apologized for any misunderstanding, and explained that its project team had realized that the automotive market was outside of B's core competency. Thus, B severed the relationship as best it could under the contract and without causing too much disruption to A's supply chain. A, who had interpreted this break-up as a cynical version of "Really, it's not you, it's me," requested a one-on-one meeting with B's executive, and the case settled before lunch.

This "happy ending" example contains several lessons for preparing the client for mediation. While the spontaneity of A's revelation may have spurred the candid discourse that led to settlement, without counsel's advance awareness and ability to prepare, we can imagine scenarios how it instead could have gone badly with a good opportunity missed.

The role of "apology" should never be underestimated, even in a business dispute. Explore with the client whether an apology from the opponent would be meaningful, or whether one from the client would be forthcoming if helpful to the process. Attention to the details of empathy – having you and your client step into other side's shoes – can pay important dividends.

As the mediator, I learned from this example the potential of the plenary session where the parties, rather than their counsel, are actively engaged. The example also illustrates the value of alternative settings for negotiation in addition to the plenary and caucus sessions. The client should be prepared to understand how separate discussions between the clients, with or without counsel, or with or without the mediator, can break through barriers and facilitate progress.

Other areas to explore are sensitive topics or "hot buttons" about which the mediator should be aware, including any cultural customs or protocols. Inadvertent offense by the mediator or the other side can impede progress.

And, of course, does the client have full discretionary authority or is there a necessary stamp of approval (*e.g.,* from a governing board) in order to seal the deal? Understand the procedures and how long it takes so everyone is on the same page before starting the session.

Review in advance with the client the elements of a prospective settlement agreement, including the boilerplate that is often taken for granted. Some parties will have predispositions or regulatory requirements about confidentiality and disclosure of settlement terms that can throw a wrench in the works if not raised until all other terms have been hammered out.

C. ENGAGE THE CLIENT TO ACTIVELY PARTICIPATE

While not literally so, facilitative mediation affords your client's most meaningful "day in court" to tell its story, unrestrained by the rules of evidence and risks of cross examination. Plus, as shown by the above example, the benefits can be immediate. Rehearse the client's story. Review the contexts in which it might be most effectively presented. Is this a situation where the client's message should be conveyed face-to-face (most likely), or is the parties' relationship so strained that it will be better communicated with the mediator's deft touch?

Remind the client that her target audience is not the mediator, but the other side, which presents another opportunity to exercise empathy. Simply to ask the client how the adversary is likely to react to the client's message probably will not yield a helpful response. Explore with more probing and specific questions.

- How did the dispute get started?
- Why did it accelerate or fester?
- Was it through neglect, or is there an antagonist?
- Who is viewed here as the victim, and why?
- What might have been done to avoid the divide and its deepening?
- What are the benefits and downsides of settling?
- Whose interests are served by continuing the fight, and why?
- What is needed in a settlement to satisfy the interests at stake?

These types of questions may not have much use or relevance to how the issues will be presented at trial, but they are central to the mediation process. By asking your client to answer these questions thoughtfully from both her and the opponent's perspective, empathy is actively cultivated and common ground should come to the surface. These will be the building blocks for a productive mediation.

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