Dictum

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Chair's Column

by Jonathan Lomurro, Esq.

What a year 2012 was! But wait until you see 2013. Last year, we taught, we networked, and we partied.

In July, we held the 25th Anniversary Gala at the Oyster Point Hotel in Red Bank, an event attended by the young and the old, the practicing and the retired, and litigants and judges. It was our first summer gala and was a fitting pre-kickoff celebration. We also held the Annual Summer Associates and Legal Writing Program at the Law Center.

In August, we teamed up with the New Jersey Institute for Continuing Legal Education and put together four how-to Tuesday webinars. Each of these webinars focused on young lawyer continuing legal education and included young lawyer speakers teamed with senior attorneys. We are in the process of preparing the next set of how-to Tuesday webinars, and look forward to working with new young lawyers who wish to lecture.

September marked the official kickoff of the 2012-2013 year. Our kickoff BBQ was held at the Law Center, and it was a tremendous success. The event was a combination of the usual introductory kickoff of the Young Lawyers Division (YLD) and the NJSBA's open house. It provided a perfect opportunity for members of the YLD to network with each other and then see what other section memberships were available to them. The joint event demonstrated how the NJSBA supports the YLD and allows members opportunities to grow within the association. Remember, the current YLD member is the future NJSBA leader.

September also was the kickoff of our new YLD Mentoring Program, teaming young lawyers with experienced lawyers for assistance in learning the practice and managing their work-life balance.

In October, we held our annual Far Hills Races BBQ.

In November, we were tasked with assisting the state bar association deal with the aftermath of Hurricane Sandy. Blake Laurence, Esq., the YLD's district representative to the American Bar Association, worked with the Federal Emergency Management Agency (FEMA) and the state bar association to create the phone assist system that is still helping the victims of the storm.

When December came around we did not slow down. We collected clothing for the charity Hire-For-Attire at our annual Brew-Ho-Ho. Further, we took up arms against the suggestion of a *pro bono* requirement being forced upon already suffering law students as a requirement to being able to practice law in the state of New Jersey.

We are now hard at work to provide you with the best 2013 possible.

I invite all young lawyers to take advantage of the programing, networking, and fun. ■

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Editor's Column
Disaster Preparedness?

by Jaime Ackerman, Esq.

Let's face it, no matter how 'ready' you think you are, when it comes down to it there's no way to really be prepared when disaster strikes.

Before the storm you can have your stashes of batteries and flashlights, your bottles of water, your supplies of food. Maybe you even have backpacks loaded with days' worth of clean clothes and food stored in the hall closet, just in case you have to make a hasty getaway.

We thought we were prepared too. That lasted until around 7 the night of the hurricane. Then we heard the snap, crack, BOOM!

Not one, not two, but three trees came down on my house. They crushed the roof, ripped through the attic, collapsed my bedroom ceiling to the floor and punched through the living room wall, while we were home, awake, and fortunately, just one room over. I had to drive our four-year-old to my parents' house in the height of the storm, with the wind whipping around us and trees snapping as we so agonizingly slowly made our way to somewhere with four solid walls and a tree-free roof. The drive should have only lasted three minutes, but it was probably the longest 20 minutes of my life. I couldn't shake the images from my head or the thought that if it had just been a few hours later, I would have been in lying in bed, asleep when the ceiling collapsed—right onto my side of the bed.

As I hid in my childhood room, trying to pull myself together, my son grabbed a flashlight and personally inspected every room before reporting back that everything was safe. Moments later, the lights went out. We had no way of knowing then that the power would not return for 13 days.

When you hear the expression, "everything will seem better in the morning," they really weren't talking about seeing the wreckage your new house had become overnight. As we stood outside our home, all the neighbors came by to check on us. The first words out of everyone's mouths were, "Thank God you weren't home." Upon learning we were there, after the initial jaw drop and shaking of the head, the next response was always, "Then you were really lucky. I can't believe I'm talking to you right now." They also weren't referring to stepping into what used to be your bedroom, treading over beams, downed lighting fixtures and hunks of ceiling, to see if you can rescue your kid's favorite stuffed animal off of what can no longer be considered your bed. (It was safe, and the harrowing experience was totally worth it after seeing the look on his face when he was reunited with his prized possession.)

The days and weeks that followed were a blur. Even though my access to information those first couple weeks was pretty much limited to what I could glean from Facebook, Twitter, and the occasional Internet search, it was amazing seeing people from across the country come together to support everyone here in Jersey. I could talk about how crews from Ohio were working on our power lines, or how guys from Verizon in Maryland were trying to get phones up and running. But since this article has been about my experience in the storm, I'll just say how incredible and humbling it was to see how people were supporting us.

When we couldn't get a tree service to come out to the house to get the trees out of the house so we could secure it, a girl I haven't spoken to since high school hooked us up with her neighbor, who immediately schlepped down from Succasunna to work on our place. After it was clear everyone in our neighborhood, except for the three-block stretch where my parents live, would have their power back, my in-laws drove down from Maine with generators, flashlights, lots of clean warm clothes, and 60 gallons of gas. We found someone who was literally selling generators off the back of his truck to get my parents' house lit and warm. Our insurance company has been amazing to work with, and more responsive than we ever could have hoped.

I had friends who would call once a day just to tell me a silly story about some drunk guy they encountered on the way to work or something their kid did that morning, just to give me a couple of minutes to think about something else. After hearing, "Hey, that's what insurance is for" so many times I wanted to scream, I had offers from people who said they were willing to come down and punch the next person to utter those words to me. It may have been a joke, but it was an oddly comforting one.

I found camaraderie in the strangest places, from tough-as-nails defendants in some of my cases, who were similarly affected by the hurricane. And we still speak once a month to check in on each other's homes and to wish each other well.

It's now been several months since the storm hit. For most people, life went back to 'normal' as soon as their power came back on. For us, and other people badly affected by the storm, 'normal' will still take some time to achieve.

Maybe the rebuild on our home will start this week, if the weather holds out. If this week is different from the past three, where we were assured the crew was going to show up. And from the time they start how long do we have to wait for the work to be finished? Depending on the estimate, it'll be two to three months, no, three to four months, or maybe more like five months before we can go home.

There is just no way to be 'prepared' for something like this. Sometimes the best you can do is just get through it, and some days are better than others. ■

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Support Modifications in a Disastrous Economy: How Long Must You Suffer?

by Carmen Diaz-Duncan, Esq.

Support modification motions have long been regarded as among the most challenging and difficult of applications to present to a court. This sentiment is even more appropriate in the current economic climate. While New Jersey commenced this year boasting a reduction in the unemployment rate, from 9.4 percent in Jan. 2010, to 9 percent in Jan. 2012, we are not out of the woods.[1] Economic indicators appear to forecast improved financial days ahead; however, there is no way to predict when or if these changes will occur. In the meantime, we must deal with the influx of clients appearing at our office doors seeking relief from support obligations they can no longer meet.

As we all know, the plights of some clients are more genuine than others. Accordingly, current case law imposes upon the payor seeking a reduction in support the tremendous burden of proving a *prima facie* showing of changed circumstances, precisely to ensure that only truly afflicted individuals are afforded relief from the courts. The questions posed today are: How do we set our client's legitimate change of circumstances apart from the throngs of litigant's who are crying wolf? What can be done for the client earning $80,000 per year, yet who is obligated to pay support based upon the $400,000 he was earning two years ago working on Wall Street? How do we prove that our client's changed circumstances legitimately deserve relief?

Permanent vs. Temporary Change in Circumstances

The primary and most effective challenge to a support modification motion is to dispute the permanency of the change in circumstance. The seminal case of *Lepis v. Lepis* clearly requires the establishment of a *prima facie* showing of changed circumstances before an obligor's support obligation can be modified.[2] Further, this illusive change of circumstance must be such that it substantially impairs the payor's ability to pay the existing support obligation.[3] This concept of impossibility almost always hinges upon whether the change in circumstance is permanent. However, there is no bright line rule by which to measure when a changed circumstance has endured long enough to be deemed permanent, thus justifying a modification of a support obligation.[4] Rather, we are left with only a few cases that give us discouraging insight into circumstances deemed to embody temporary changes of circumstances rather than permanent.

For example, in *Larbig* the Court rejected the self-employed obligor's claims of changed circumstances where the motion for modification was filed *20 months* after the execution of the property settlement agreement and entry of the judgment of divorce.[5] Likewise, in *Donnelly v. Donnelly*, the court found the obligor failed to demonstrate his alleged change in circumstances was anything but temporary, where he filed his second *Lepis* motion *nine months* after the denial of his first *Lepis* motion (which was filed and a year and four months after the entry of the judgment of divorce).[6]

On their face, these cases appear to suggest that obligors must suffer unreasonably indefinite periods of decreased earnings before a court will consider a permanent change of circumstances to have occurred. A more critical reading of these cases, however, supports the thesis that it is not the length of the change of circumstance that matters, but rather what the obligor has done during this time, that influences a court's determination of permanence.

Although the self-employed obligor in *Larbig* provided evidence to the court to support his claim of decreased earnings spanning 20 months, the court paid particular attention to the fact that during these same 20 months the obligor hired a new chief financial officer, who "re-did" the books for the corporation, increased office space, hired new staff and doubled his travel and

entertainment expenses.[7] In *Donnelly*, the court noted that during the same period of time the obligor claimed he was earning only $80,000 per year, an amount almost equal to his total support obligation, he acquired a new vehicle at a cost of $58,000; purchased a new home for $785,000, (subject to a mortgage of $600,000); and remarried, spending approximately $15,000 on the wedding and honeymoon. Given these facts, the court's determinations suddenly seem more appropriate, notwithstanding the duration of the alleged change of circumstances.

Quality of Time vs. Quantity of Time

Clearly, the duration of the changed circumstance is not nearly as important as is the quality of the obligor's conduct during that period of time. Our job, as practitioners, is to highlight for the court the precise conduct and actions undertaken by the payor that prove the change of circumstances is both actual and legitimate. You will be hard pressed to find a judge willing to reduce a support obligation where the payor has just returned from a two-week European vacation or recently purchased a new luxury vehicle while bemoaning his or her fate. Rather, judges need to see that the party seeking relief has undertaken actual efforts to improve their situation before seeking the court's intervention.

For W-2 employees who have lost their previous job and have been unable to find another, one thing is key: The litigant must provide the court with evidence proving he or she has earnestly and aggressively tried to secure alternate employment. A litigant who provides the court with a detailed list of the 200 jobs he has applied for over the last six months stands a far better chance of attaining relief than the litigant who simply submits a certification claiming to have applied for various jobs without success.

For self-employed litigants who have experienced a reduction in income due to a decline in business, the litigant must demonstrate to the court that the circumstances were not voluntarily induced or fabricated. A litigant who provides the court with documentation evidencing he or she has sold assets or liquidated retirement savings to make ends meet stands a far better chance of attaining relief than does the litigant whose reduced income is the result of a reduction in work hours.

Above all, we must remember, not all motions are filed in good faith. The courts are flooded with litigants crying wolf, seeking to reduce their support obligation based upon a feigned or self-created change in circumstance. However, it is the actual facts of each and every case, the efforts and actions taken by each individual litigant, that weigh heavily on the ultimate determination to be made. As practitioners, it falls to us to convey our client's actions and efforts in a clear and concise manner, to advocate the quality of our client's conduct rather than the length of the change in circumstances. ■

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Endnotes

1. According to the United States Department of Labor, www.bls.gov.
2. 83 N.J. 139, 157 (1980).
3. *Id*. at 157.
4. *Larbig v. Larbig*, 384 N.J. Super. 17, 23 (App. Div. 2006).
5. *Id*. at 22.
6. 405 N.J. Super. 117, 128 (App. Div. 2009).
7. *Supra*, 384 N.J. Super. at 22.

Admissibility of Construction Expert Testimony: File in New Jersey or Somewhere Else?

by Matthew H. Sontz, Esq.

Most construction cases are local in nature, and litigants will find themselves in the state court where the project is located or in arbitration, depending on the parties' contract. A prospective plaintiff may, in certain circumstances, find itself with a choice of forum—federal or state court in New Jersey or New Jersey state court versus another state court. If presented with those choices, which is better in construction cases? The answer, or course, is it depends.

One factor to consider is how stringent a particular forum will be toward the admissibility of expert testimony. Most construction cases will require expert witnesses. Experts will likely be needed to evaluate, among other things, delay, disruption, non-conforming work, deficient design, damages, etc. The admissibility of such testimony may make or break a plaintiff's case in construction litigation. The standard for expert testimony and its admissibility differs between federal and state courts, and between individual states.

N.J.R.E. 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

State v. Kelly[1] gave the basis for the admission of expert testimony, which includes the requirement that such testimony be sufficiently reliable.

To show reliability, New Jersey follows *Frye v. U.S.*,[2] which has become known as the *Frye* standard, and requires a demonstration of general acceptance among the scientific community. In New Jersey, there are three ways to show general acceptance: 1) by expert testimony as to general acceptance, 2) by authoritative scientific and legal writings indicating the scientific community accepts the premise, and 3) by judicial opinions indicating the expert's premises have gained general acceptance.[3]

The federal standard for admission of expert testimony is different than the New Jersey standard. Federal Rule of Evidence 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.

This standard is a codification of *Daubert v. Merrell Dow Pharmaceuticals*[4] and its progeny, which moved away from *Frye* and the general acceptance test. *Daubert* focuses instead on factors to determine admissibility, of which general acceptance is merely one such factor. Other factors include, but are not limited to, whether the theory or technique can be or has been tested, whether the theory or technique has been subjected to peer review and publication, whether there is a known or potential rate of error, and whether there is an existence and maintenance of standards governing the technique's operation.[5] Many states have followed the federal courts in moving away from *Frye* and toward *Daubert*.

Daubert appears to be, at least in practice, a more stringent standard for admitting expert testimony than *Frye*. Based on that perception, plaintiffs may find New

Jersey state courts a more receptive forum for expert testimony on elements that are difficult to prove in construction cases, such as delay, disruption, and damages.

In the 2000-2002 report of the Supreme Court Committee on the Rules of Evidence, a proposed change from *Frye* to *Daubert* was rejected because *Daubert's* factors and their application were not "well-defined."

In 2008, a change to *Daubert* was proposed again to prevent forum shopping, and on the basis that *Daubert* was now more defined.

In the 2007-2009 Supreme Court Committee on the Rules of Evidence, the proposed change to *Daubert* was again rejected.

It appears that the dichotomy of *Frye* verse *Daubert* in New Jersey state court, versus federal court and certain other states, will remain for the foreseeable future. A practitioner should consider the differing evidence rules for the admission of expert testimony in determining where to bring a construction case if a choice of forum presents itself. ■

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Endnotes

1. 97 N.J. 178 (1984).
2. 293 F. 1013 (D.C. Cir. 1923).
3. *See State v. Harvey*, 151 N.J. 117, 170 (1997).
4. 509 U.S. 579 (1993).
5. *See Daubert*, 509 U.S. 579 (1993).

Recent Developments in New Jersey Law: Social Media and More

by Fernando M. Pinguelo, Esq. and Chris Borchert

From MySpace and Facebook to Twitter and LinkedIn, online social networking platforms have radically changed the way we share, store and consume information. Today, users can tap social media outlets for everything from big data storage to daily deals and discounts; and, with recent advances in phone and tablet technology, accessing online content remotely has never been easier.

As a result, state legislatures and courts are beginning to take notice of the far-reaching implications of social and other cyber-related media. In New Jersey jurisdictions, key cases and statutes have emerged that address these broad legal implications. In fact, in 2011, New Jersey enacted the nation's most comprehensive anti-cyber bullying law—the Anti-Bullying Bill of Rights Act. It is no secret that today's social media platforms are characterized by wide-ranging functionality, and so lawyers of all practices must stay current on the laws and cases relating to social and cyber media. What follows are a few notable cases that caught our attention.

Social Media and School Speech

In *J.S. ex rel. Snyder v. Blue Mountain School District*,[1] a student created a parody MySpace profile of her principal, which contained adult language and sexually explicit content. Although the profile was created at the student's home on a computer owned by her parents, the school nevertheless suspended her for 10 days for twice violating the school's disciplinary code (false accusation about a school staff member and a copyright violation of its computer use policy for misappropriating the principal's photograph from the school website). The student's parents filed a Section 1983 action against the school district, claiming violation of free speech rights, due process rights, and state law.

Takeaway: *Applying the Tinker standard, the Third Circuit found that the MySpace page did not substantially disrupt the operation of the school, nor could school officials have reasonably forecasted a substantial disruption. The court also found that the speech did not make its way on campus sufficiently to classify it as 'school speech.'*

Social Media and Juror Bias

In *U.S. v. Fumo*,[2] the Third Circuit considered whether the district court had erred in its refusal to grant the defendant a new trial on the grounds of a jury's exposure to extraneous information, and the purported prejudice and partiality that may have resulted. The defendant claimed that a juror who posted comments relating to the case on his Facebook and Twitter accounts brought widespread public attention to the jury's deliberations, creating a "cloud of intense and widespread media coverage...and [the] public expectation that a verdict [wa]s imminent[,]" thereby violating his Sixth Amendment right to a fair and impartial trial.

Takeaway: *A trial court's jury instructions before and at the close of a trial should include instructions not to communicate information to anyone by any means, including social media, about the case. The Third Circuit found no plausible theory for how the defendant suffered any prejudice, let alone substantial prejudice, from the juror's Facebook and Twitter comments.*

Social Media and Shield Law Protections

In *Too Much Media v. Hale*,[3] the defendant, a self-described journalist, posted Internet messages about Too Much Media, LLC (TMM), a company that produced software used in the adult entertainment industry. Specifically, the defendant alleged that a breach in TMM's software exposed the personal information of TMM customers who believed they were accessing pornographic websites anonymously. Claiming she had conducted a probe on the alleged breach, the defendant posted that TMM violated New Jersey's identity theft protection laws, threatened people who questioned its conduct, and profited from the alleged

breach. TMM sued, alleging the defendant's posts were defamatory and made in a false light. When TMM sought to depose her during discovery to ascertain her alleged sources, the defendant moved for a protective order, asserting she was a reporter entitled to protection under New Jersey's Shield Law.

Takeaway: *While New Jersey's Shield Law affords broad protections to news media, including non-traditional news outlets such as blogs, a self-appointed newsperson is not necessarily a reporter entitled to Shield Law protections. Those seeking to invoke the privilege must demonstrate that the means by which they disseminate 'news' is similar to traditional news sources, such as newspapers, magazines, etc.*

Social Media and Employment

In *Pietrylo v. Hillstone Restaurant Group*,[4] the plaintiffs, who were employed as servers at a restaurant owned by the defendant, created a MySpace group to "vent about any BS we deal with at work without any eyes spying in on us." The group was created as a private group, and invitations were required to join. Central to the case is the fact that an invited employee, who was an authorized user of the group, accessed the page for one of the restaurant managers and later provided the password to another manager. When managers learned that comments disparaged the restaurant and its managers and customers, they terminated the plaintiffs' employment. The plaintiffs filed suit, alleging violations of federal and state stored communications statutes, wrongful termination, and invasion of privacy.

Takeaway: *Content found on blogs and public social networking profiles that employees generate may still enjoy the benefit of protected privacy when restrictions on access are implemented. Employers should exercise caution when asking for access to private employee information.*

Cloud Computing and Legal Ethics

While cloud computing (*i.e.*, the delivery of computing and storage capacity as a service to users over the Internet) can offer significant benefits to lawyers in managing their practices, particularly solo and small firm practitioners for whom flexibility and cost control are a must, attorneys must take careful steps before employing Internet or cloud-based software programs or using remote sites to store client-related information. In Advisory Committee on Professional Ethics Opinion 701 (April 2006), the New Jersey Advisory Committee on Professional Ethics addressed the ethical implications associated with cloud-based data storage.

Takeaway: *The ethical issues underlying the use of cloud services are the duty of confidentiality owed to clients and the duty to serve competently. Attorneys must take reasonable, affirmative steps to ensure the confidentiality of client information that travels over the Internet or other network. This obligation includes assuring to a reasonable extent that a third-party cloud services provider is aware of the lawyer's obligation of confidentiality, and of its own obligation, whether by contract, professional standards, or otherwise, to assist in preserving confidentiality.* ■

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Endnotes

1. *J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 650 F. 3d 915 (3rd Cir. 2011).
2. *U.S. v. Fumo*, 655 F. 3d 288 (3rd Cir. 2011).
3. *Too Much Media v. Shellee Hale*, 206 N.J. 209 (2011).
4. *Pietrylo v. Hillstone Restaurant Group* (D.N.J. 2008).

The Modern-Day Mobile Lawyer's Manifesto: Your Law Office is All Around You (Part Four)

by Michael J. P. Schewe, Esq.

This is the fourth part of a series dealing with the ever-changing way we practice law. The first three parts of this series appeared in previous *YLD Dictum* issues. This is the fourth and final installment, and the second part of the segment dealing with the ever-increasing mobility of lawyers. Assuming you have already made the jump to a paperless law office (no more need to carry around those pesky, 50-pound Redwells), you may be tempted to practice law outside the office.

Call Forwarding

Working from anywhere is useless if your office falls apart while you are gone. Call forwarding allows me to, using the web, direct calls to go to me (or, if I am unavailable, to someone else) so clients always have a friendly voice greeting them when they call. Well, almost always friendly; admittedly, the occasional client call at 6:10 a.m. on a Sunday is not met with the same level of enthusiasm as 10 a.m. Monday morning (in the interest of full disclosure, that early morning weekend call regarded a family emergency and the client was very impressed I picked up in his or her time of need).

The most-cited gripe of dissatisfied clients is inaccessibility, so I prefer to go overboard with being accessible. In my opinion, if a client gets used to hearing your voice when they call, it will go a long way to building a strong attorney-client relationship and, after the matter ends, having that satisfied client send referrals your way.

Security

I would be remiss if I wrote an article about mobile lawyering without discussing mobile security. Let me be perfectly clear, mobile lawyering brings with it great freedom, but without proper precautions it also carries great peril. If a hypothetical graphic designer has her laptop stolen, she loses her work product and creative goodies, but, as a lawyer our stakes are higher. We get sued for malpractice. If you neglect your security protocols, you have opened yourself up to an ethics complaint or malpractice suit. That said, let me run through some of my favorite mobile safety tips.

Basic

Your office laptop should be accessible to one, and only one person—you. To achieve this goal, my laptop requires a fingerprint scan or, if that malfunctions an absurdly hard password. Your workstation, in whatever form, should be the same. Unfortunately for your sanity, your phone should be the same way. I realize that cell phone passwords or 'password swipes' are unbelievably tedious and annoying (especially when combined with a power-saving display time out), but just remember they are not half as annoying as responding to an ethics complaint or malpractice suit when someone steals your phone and accesses sensitive client data or information.

Backup

An easy way to avoid major pain and suffering is to: 1) backup 2) everything 3) all the time (or as close to all the time as possible). Windows 7 has built-in data backup and restore, for whatever that is worth, and the Professional or Ultimate Windows 7 editions even allow you to backup to a network drive. In addition to whatever protection Windows 7 offers, everything I scan into the computer is digitally filed, then uploaded to my practice management software (the cloud), which is a backup of my data off-site. Then, every Friday, I backup my entire hard drive to two external hard drives, at least one of which is not kept or carried with my laptop (it doesn't do you any good to backup if you lose your laptop and backup at the same time).

Therefore, if my laptop is stolen, I can reload my data from the external hard drive onto another computer, unless my office burns down, in which case I can use the external hard drive at my home. If my laptop is stolen, my office is destroyed, and my residence is burglarized in the same day, I can still restore my

data through my practice management software in the cloud. If my cloud (SaaS) provider is also destroyed as a result of a cyber-terror attack at the very moment my laptop is stolen, my office burns down and my residence is burglarized, I think the Attorney Ethics Board will understand. I may go a bit overboard, but I think it is important to backup your client data in at least three different and secure places.

Technology has made backing up your data extremely affordable. Web-based practice management software or other online digital storage providers usually have a low monthly fee (or no fee). Dropbox offers 50 gigabytes for $19/month or $199/year. As for your third backup, you can get a one terabyte external hard drive for about $60. I read recently (but I cannot remember where) that a gigabyte of storage 20 or so years ago cost $50,000. Today, our $60 terabyte of storage means that a gigabyte of storage costs about six cents.

LastPass

As I mentioned earlier in this series, this is not a sponsored article, but I feel that part of sharing useful information is sharing experiences with actual products, as opposed to leaving you to guess what I am talking about (by the way, if anyone is interested in what products I was describing ambiguously in any of the other segments, just reach out to me and I will gladly tell you what they are).

That said, when it comes to time-saving security products, LastPass is top of the class. LastPass solves two of our biggest security headaches: 1) we hate making 'good' passwords, (a.k.a. passwords that serious hackers cannot figure out in 20 minutes), and 2) we hate having multiple passwords because we can't remember all of them. Enter LastPass. LastPass (in its non-premium form) affixes to your browsers so that when you start your computer, you sign in once to LastPass (you still have to remember one hard password) and, from that time on, LastPass auto-fills your saved login information to any saved webpages. I recommend you set LastPass to sign off when you close your browser. This helps you avoid the next person using your computer having unfettered access to all of your sensitive information.

I know what you're thinking: "I already have my browser/computer auto-fill my passwords." Great, you have opened yourself up to a major security risk. When you have your browser save your login information, you make it that much easier for a hacker to steal the information. I am not a computer hacker but, essentially, having your browser auto-fill information means that you have saved it *in your browser*. So, if someone has accessed your computer, they only need to hack into the computer's browser, which is significantly easier than hacking your brain.

Even if you don't use auto-fill through your browser and enter usernames and passwords manually, if a hacker has managed to access your IP address and/or computer screen (like if you are mobile-lawyering on your local Starbucks' unsecured network), they can see what you are typing into the username and password fields. LastPass stores all your information securely, and when it auto-fills your information or automatically logs you in, it does so in an encrypted format (meaning a hacker cannot 'see' you typing those fields in unless he's sitting behind you, and I can't help you there).

Another great feature of LastPass is that when you register for a site the first time, especially a site where you do not want to use personal information or common usernames/passwords, LastPass can auto-generate secure passwords and instantly save them. This way you get a secure password you never have to remember. If the movie "A Beautiful Mind" was based on your life, maybe you don't care about software that remembers complicated passwords; but, if you're like the rest of us, LastPass is a wonderful tool.

For a small sum—about $12 a year—you can extend LastPass goodness to your smartphone. It latches onto your Dolphin Browser HD and performs the same function for your mobile web-browsing. LastPass is an incredible time saver. I estimated (non-scientifically) that LastPass has saved me over five hours of wasted time per month dealing with usernames and passwords (and that's not counting the dreaded and inevitable time I used to spend clicking "did you forgot you password?").

Lookout Mobile Security

What's better than security? Free security. For zero dollars, Lookout Mobile Security will: 1) backup your mobile phone's data, 2) block malware and other unhealthy phone problems and, 3) its most awesome feature, if your phone is stolen it helps you track it down by emitting an alarm and using GPS to pinpoint its location. When you notify Lookout your phone has been stolen, the phone will lock and, if absolutely necessary, remotely wipe itself of all potentially client-sensitive information. All good things. Point, click, download.

Https

But wait, isn't it http? Simple answer—it was. Again, I am no master of technology, but evidently using https for web browsing increases security. Why? Who cares.

Facebook has a setting to achieve this: Look in Account Settings>Security Setting>Secure Browsing (why do they hide these things?!). And some browsers allow you to set the preference of https (when available) for your browsing experience. This is a 'just do it' moment. Be aware of https, and utilize it wherever possible (until the hackers figure that out, then we will use httpss, I guess).

That's all I have for now. As always, if you have any questions about things written in this article or previous segments in this series, please do not hesitate to contact me. ■

Michael J. P. Schewe is the COO and managing attorney of ScheweLaw, LLC with a practice in New Jersey and New York focusing on employment, immigration, family, criminal and municipal court law.

Understanding New Jersey Auto Insurance Policies

by Jonas K. Seigel, Esq.

As a personal injury attorney and consumer advocate, I am amazed by the number of clients I meet with who do not understand their auto insurance policy, or the coverage options they chose. Generally, no one is familiar with the "Tort Threshold" section of their policy, and everyone should be. All too often the client receives a crash course in auto insurance law as a result of being injured in an accident; by that time, they are stuck with the policy and coverage choices they made, or were made on their behalf.

Auto insurance in the state of New Jersey is mandatory, yet the vast majority of clients I speak with are shocked to learn how poorly protected they are, as well as their loved ones. More shocking to them, is when they learn of the types of injuries they need to suffer from in order to be compensated for the negligent actions of a careless driver.

In this article, I will highlight the most important provisions of an insurance policy so that you, your loved ones, and your clients can make better decisions and be better protected.

Types of Auto Insurance Policies

There are three types of policies available in New Jersey: the standard policy, the basic policy, and the special automobile insurance policy (SAIP). The type of policy you choose is one of the most important decisions you can make in protecting yourself and your family members.

The standard policy should be the policy selected because it provides the following options:

1) No limitation on lawsuit vs. limitation on lawsuit tort thresholds

The no limitation on lawsuit option allows you to be compensated for pain and suffering for *any* injury suffered by you, your spouse, children, and other relatives living with you and not covered by another auto policy. In other words, the no limitation on lawsuit option does not limit your right to sue, and I strongly recommend making this choice. The limitation on lawsuit option, on the other hand, strips away the legal rights of yourself, your spouse, children, and other relatives living with you and not covered by another auto policy. Under the limitation on lawsuit option, to obtain compensation or file a lawsuit against the negligent driver, you or your loved must sustain one of the injuries listed below:

- Death
- Dismemberment
- Significant disfigurement or scarring
- Displaced fracture
- Loss of a fetus
- Permanent injury (permanent injuries occur when a body part or organ does not heal to function normally and will not heal to function normally regardless of further medical treatment based on objective medical proof)

2) Bodily injury (BI) liability coverage

BI liability coverage is the amount of money your own insurance company will pay to a person injured by you, a family member, or anyone permitted to drive your car. I strongly recommend purchasing as much coverage as you can afford. BI liability coverage protects your:

- Property
- Assets (*e.g.*, savings and pensions)
- Current and future income

3) Property damage (PD) liability coverage

PD liability coverage is the amount of money your own insurance company will pay for the property damage caused by you, a family member, or anyone permitted to drive your car.

4) Personal injury protection (PIP)

New Jersey is a 'no fault' state, which means regardless of fault, your own insurance company pays your medical bills. PIP is the portion of your policy that pays for treatment from medical providers. PIP can also cover lost wages and the value of services you are no longer able to perform (*e.g.*, shoveling snow, household chores, and caring for loved

ones) as a result of your injury. The standard policy provides for $250,000 of coverage. Health Insurance can be elected as primary instead of PIP, but your health insurance company may not cover auto accidents or all family members; it may include a high deductible; and if you do recover money damages, you may have to reimburse your health carrier for all medical bills paid on your behalf. Therefore, I strongly recommend you elect PIP as primary and never purchase less than the standard policy amount of $250,000.

5) Uninsured (UM)/underinsured motorist (UIM) coverage

UM coverage protects you and your family members if injured by a hit and run driver or an uninsured motor vehicle. UIM coverage protects you and your family members with the difference between the negligent driver's BI liability coverage and your own UIM coverage. For example, if you or a family member suffered a catastrophic injury by Negligent Driver (ND) and ND has BI liability coverage of $15,000 (the minimum amount required by law) and you have UIM coverage of $500,000, you could accept the $15,000 from ND's insurance company and seek $485,000 from your own insurance company (the difference between ND's policy and your own UM/UIM coverage).

For the reason demonstrated in the example above, it is vitally important that the UM/UIM coverage purchased is of the same amount as your BI liability coverage. Certain insurance companies are notorious for raising your BI liability coverage and leaving your UM/UIM coverage at a lesser amount.

6) Collision and comprehensive coverage

Collision coverage is the amount of money your own insurance company will pay if you cause damage to your own vehicle. It could be obtained as a result of your own negligence or in lieu of making a PD liability claim against the negligent driver. Comprehensive coverage is the amount of money your own insurance company will pay to you if your motor vehicle is stolen or damaged as a result of an action not covered under collision coverage (*e.g.*, damage as a result of a flood, fire, or vandalism).

The basic policy should never be selected, because your options are limited as follows:

(a) Limitation on lawsuit option: Only the no limitation on lawsuit option is available.
(b) Bodily injury (BI) liability coverage: None.
(c) Property damage (PD) liability coverage: Provides a maximum of $5,000.
(d) Personal injury protection (PIP): Provides for only $15,000 of medical treatment.
(e) Uninsured (UM)/underinsured motorist (UIM) coverage: None.
(f) Comprehensive and collision coverage: Not provided for.

7) Special Automobile Insurance Policy

A special automobile insurance policy (SAIP) is auto insurance available to federal Medicaid recipients only and provides emergency room hospital care and catastrophic treatment only.

Conclusion

I hope this article helps you in choosing the correct automobile insurance policy and coverage options. I cannot stress enough the importance of selecting the standard auto policy and the no limitation on lawsuit option, as well as purchasing the highest amount of UM/UIM and BI liability coverage you can afford. Unfortunately, auto accidents happen, so now is the time to act. I understand that much of what I recommend may cost more money, but personal injury law is the only area of law I practice, and I have yet to meet a client who was completely happy with their auto policy—especially after learning that a few more dollars each month could have changed their life or the life of a loved one.

Remember, you have the right to change your coverage and policy limits at any time; it does not matter if you are near your renewal date. But regardless of whether you are ready to make any changes to your auto policy today, do your due diligence and never rely on a salesperson or insurance company representative. Understand that the more money you save, the more benefits you are likely to forfeit, and as the old saying goes, you usually get what you pay for. ■

Jonas K. Seigel is the chair of the Bergen County Young Lawyers Division and a partner at Seigel Capozzi Law Firm LLC in Ridgewood, which specializes in personal injury and medical malpractice.

Commentary:
Extending the Fresh Complaint Theory to Domestic Violence Cases

by Daniel P. Bajger, Esq.

The admission of hearsay evidence under the fresh complaint theory stems from a general assumption: If a woman is raped, she may turn to others for support or protection. Accordingly, when a victim in New Jersey confides in someone after the immediate shock that follows an episode of sexual abuse, her statements are admissible at trial due to the fresh complaint hearsay exception. By contrast, if the same statements were made regarding physical (not sexual) abuse, they are inadmissible. This dichotomy is untenable.

Take, for instance, cases where a victim suffers from battered woman's syndrome. Unless her comments to a police officer or confidante regarding an incident of abuse constituted excited utterances, they are hearsay. It is of no moment that she was effectively beaten into silence by a pattern of unremitting domestic violence.

The evidentiary gap engendered by the arbitrary sexual and physical abuse distinction is patently clear. This yawning chasm could nevertheless be filled by the fresh complaint theory.

Arbitrarily restricting the scope of this useful doctrine to sexual abuse is unnecessary; the full panoply of legal protections should be afforded to victims of physical abuse, too. It is, therefore, a logical evidentiary progression to extend the fresh complaint theory into the domestic violence realm.

Although the fresh complaint principle is a widely recognized common law construct, it was never codified in the New Jersey Rules of Evidence. The idea derives its genesis, at least in part, from N.J.R.E. 803(c)(2), a hearsay exception, which renders admissible excited utterances that were made under the stress of some rousing occurrence. There are three discrete derivations of the doctrine. One theory, the least frequently used, permits evidence of a fresh complaint to be admitted to rehabilitate a victim's character and credibility after it was assailed by counsel for the defendant.

Another fresh complaint theory simply mirrors the excited utterance hearsay exception, permitting statements that were made under the excitement of an incident without any opportunity to fabricate or deliberate. Under this hearsay exception, the victim's statements are admissible even if she never testifies.

The final theory affords the most flexibility—and therefore the most potential—to victims of domestic violence. It attaches when the fresh complaint was not made under the excitement of a particular occurrence, or before there was an opportunity for a declarant to ponder and fabricate. Instead, if a victim confides in someone within a reasonable time after a sexual assault, her statements are admissible. The purpose of this doctrine is to ensure that the jury does not erroneously assume the victim failed to inform anyone that she was raped. Such an assumption would inevitably undermine a victim's credibility.

This third theory, however, is not without limitations. In fact, if a victim's statements were made well after a sexual assault transpired, they cannot be offered as proof of the matter contained in them. The statements are only admissible as they relate to dispelling the inference that the victim was silent. They must additionally be the product of "general non-coercive questioning." That being said, once these factors are satisfied, the theory could be rehydrated and planted firmly in the substrate of the physical abuse domain.

Even though there is no instance where a court specifically applies the theory to a case involving domestic violence, the Appellate Division has drawn parallels between the two spheres. The following quote, from *State v. Ellis*,[1] a case that discusses the admissibility of expert testimony regarding battered woman's syndrome, provides one noteworthy example:

> There is no question that expert testimony concerning the Battered Woman's Syndrome

> can be introduced in a criminal proceeding. But its application is limited to explaining a victim's reactions or late reporting of the events and not as evidence that the crime occurred… *This use is similar to proof of a fresh complaint in a sexual assault case.*

The preceding quote focuses mainly on expert testimony, not statements by a victim, but the opinion nevertheless suggests that applying the fresh complaint doctrine to cases involving battered women is possible. It melds the two concepts.

Dr. Lenore Walker, a prominent writer on battered woman's syndrome and author of *The Battered Wife's Dilemma: Kill or be Killed*,[2] describes a battered woman as someone who is party to a relationship that is characterized by physical abuse and battering cycles. Walker describes three separate stages: the tension-building stage, an acute battering incident, and extreme contrition. This cycle can be repeated numerous times, causing a woman to suffer grave physical and psychological effects. As a consequence, a battered woman will often avoid acknowledging that the abuse occurs.[3]

As stated by the New Jersey Supreme Court in *State v. Kelly*,[4] "battered women, when they want to leave the relationship, are typically unwilling to reach out and confide in their friends, family, or the police, either out of shame and humiliation, fear of reprisal by their husband, or the feeling they will not be believed."

With this in mind, expanding the fresh complaint theory is essential to protect victims of domestic violence who summon the courage to contact law enforcement officials well after an assault occurs. A victim's own words should be admissible to demonstrate that she did eventually report a physical assault, even if it was not immediately after the event happened.

This argument garners support from *State v. Hill*,[5] a New Jersey Supreme Court case that is referenced in the *Ellis* opinion. In *Hill*, the Court discussed the intrinsic link between sexual offenses and domestic violence offenses. Justice Robert Wilentz, writing for a unanimous court, stated that "the entire area concerning sexual offenses committed against women only recently has been examined from the perspective of the rights of the woman-victim." The opinion then references *State v. Kelly*, a case in which the subject of battered woman syndrome is discussed in great detail. This cross-citation highlights the parallels between physical and sexual abuse. And the emphasis in both circumstances is on the "rights of the woman-victim," according to the *Hill* Court.

In light of the manifold similarities between physical and sexual abuse, I believe courts should adopt the fresh complaint theory in all instances of domestic violence, and especially when it comes to a victim who suffers from battered woman's syndrome. Delayed reporting, I feel, should not be tantamount to silence under the law. ■

Daniel P. Bajger is an assistant prosecutor with the Sussex County Prosecutor's Office.

Endnotes

1. 280 N.J. Super. 533 (App. Div. 1995).
2. 32 Hastings L.J., 895, 897-911 (1981).
3. *See Battered Women, A Psychosociological Study of Domestic Violence* 60 (M. Roy ed. 1977).
4. 97 N.J. 178, 195 (1984).
5. 121 N.J. 150 (1990).

The Dangers of Unchecked Personal Problems

by John G. Koufos

(Editor's Note: On June 17, 2011, 34-year-old Brick attorney John Koufos left the scene of an accident where a 17-year-old pedestrian walking along Route 35 was seriously injured. Initially, a friend and coworker took the blame for the incident. Koufos was sentenced to six years in prison for leaving the scene of an accident with serious bodily injury, hindering apprehension and witness tampering.)

Helping others is why many of us entered the profession of law, and we carry our clients' problems, causes, and emotions as we carry our burden to protect them. In the process, we often forget or neglect to work on ourselves, and suffer from depression, alcoholism, substance abuse, and other stress-related issues. Young lawyers carry a unique burden with the poor economy, skyrocketing law school tuitions, cost of living, and the competition of the market. These burdens lead many of us to become jaded, depressed, and hopeless in our careers, which turns into problems in our personal lives. As lawyers, we often do not ask for help because we are trained problem-solvers who believe we can outthink our issues, and as young lawyers we often feel we can never show others our human weaknesses because someone will think we cannot hack it. So many of us mask these problems until something forces us to deal with them. I was one of them, and because I did not get help from outlets like the New Jersey Lawyers Assistance Program (NJLAP) sooner, I am writing this article as a prisoner at Bayside State Prison.

Before I made myself a prisoner and forfeited everything I worked for, I was someone to be professionally proud of—a certified criminal trial attorney, partner in a firm, college professor with state and county bar participation, high-profile cases, *pro bono* work, mentoring, and the list goes on. However, my personal life had spiraled out of control and became unmanageable, but like so many of us, I threw myself into work. My professional successes masked my personal problems, including a 20-year battle with alcohol (after all, how could I be a real alcoholic with all these professional accolades?). The alcohol and work was intended to mask my well-hidden emotional problems from a particularly brutal childhood. Working 80-100 hours per week and drinking in between led to a string of failed personal relationships, which, of course, I was too weak to confront, so I worked harder. After all, no one with this successful of a career could *really* be an emotionally broken alcoholic, right? The problem must be with everyone else, who were probably just attacking me because of my success, right?

Like so many who overcompensate while using the crutch of substances, I substituted my personal happiness for professional accolades, and meaningful relationships for the happiness of a satisfied client. I was a full-blown high-functioning alcoholic, and justified my disease with a compelling 'war story,' a sleight-of-hand trick to ensure no one saw the real me. Like most addicts, I was adept at dodging challenges to my alcohol abuse in my personal life, and would belittle those who tried to help me as unaccomplished, jealous, or unable to understand the burden I carried for my clients. I became a terrible man to almost everyone in my personal life because my mind focused only on work and alcohol to mask my unaddressed fears and insecurities. One person, who my addiction and unmanaged post-traumatic stress disorder drove away, told me, "Your job can't love you back." That kind of logic was too real for me, and forced me to look in the mirror (which was too painful), so I avoided it.

If any of this sounds even remotely familiar, you too may be suffering from psychological or substance problems. If you are unsure, do not give yourself a chance to talk your way out of help. Contact NJLAP, and they will confidentially help you; or seek professional help or the counsel of a sober friend, or even me. Do not make the mistake that I, and so many addicts, have made. How we think affects how we feel, which affects our actions. Psychological and substance problems affect our think-

ing, and will lead to disastrous consequences. Sober, yet broken in every way, I am living proof that there is hope in treatment and recovery. However, years of neglect led to self-destruction, and now a guilt and remorse I must live with forever.

It is said that whatever you put before your recovery is the first thing you will lose. As I sit in my tiny cell (initially with a stereotypically giant cell mate nicknamed Bonecrusher, and now with a frightening violent offender) trying to deal with all the pain I caused, I wish I would have participated in NJLAP and rehabilitation programs years ago. Use my failures as an addict as your blueprint for recovery, and use my story as a cautionary tale of the destructive power of psychological and substance issues. I cannot change my horrible choices, the damage I have caused, or my unending remorse and guilt. Yet my story may change one of you by motivating you to take the critical first step toward recovery, and save you from this sort of fate.

Despite the negative jokes surrounding the profession of law, lawyers, in my experience, are largely helpers. What we give our clients, and our ability to do so, is priceless. We must learn to help ourselves, too. The practice of law gave me everything, but my inability to help myself destroyed it. If this article helps you on the road to helping yourself heal, then it will serve as the most precious thing I can do for the profession. You have the tools for recovery at your disposal. Now you need the courage to use them, and you are *not* alone. ■

John G. Koufos was formerly a partner at Koufos & Norgaard, LLC.

There's Room at the Inn

The Marie Garibaldi Inn of Court for Alternative Dispute Resolution (ADR) has been functioning for many years as the sole inn of its type in the world. The participants are outstanding members of the ADR and complementary dispute resolution (CDR) community.

The inn's meetings at Dolce in Basking Ridge are continuing legal education-accredited and offer opportunities for networking and education. Each meeting begins with a cocktail half hour, followed by a buffet dinner and a program. At least one ethics program is slated for each year.

The Marie Garibaldi Inn of Court prides itself on its diversity of advocates and neutrals. It is a place to meet, learn and enjoy an evening with premier lawyers and former members of the Judiciary. Inquiries about the inn should be directed to Robert Margulies, Esq., executive director of the inn, at 201-333-0400 or rem@mwhlawfirm.com. We look forward to seeing you.

by Barbara Weisman, Esq.

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