Dictum

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Outgoing Chair's Column

by Jeffrey Neu, Esq.

This has been a fantastic year for the Young Lawyers Division (YLD) of the New Jersey State Bar Association (NJSBA). The YLD's executive committee has been extremely active hosting events throughout the state over the past year. As a quick update, here are some of our recent events:

On April 1, the YLD held its monthly executive committee meeting. In these meetings we discuss recent events, upcoming events, and most importantly, how to improve the YLD so we can continue to better serve our young lawyers throughout the bar. These meetings are open to the entire YLD, and we would love to have you attend. If you are interested in becoming active in the YLD please consider attending these meetings in the future. They are held on the first Tuesday of every month at 6:30 p.m. at the Law Center.

During the evening of April 16, we co-sponsored an event with the Minorities in the Profession Section at the New Jersey Law Center. The panel, titled "Going From Surviving to Thriving in a Crowded Legal Marketplace: Building a Successful Solo, *Per Diem*, or Small Firm Legal Practices," was moderated by Rajeh A. Saadeh, Esq. and provided attendees with great advice on growing their practice.

On April 26, we held our annual Earth Day program. This year we conducted a beach cleanup in coordination with Beach Sweeps. The event took place in Belmar at the 16th Avenue site, and was a lot of fun. The cleanup was very successful and provided support to our local communities by helping to beautify our beaches. As is tradition, the Earth Day activity concluded with a gathering at Bar A.

On Law Day, May 2, we gathered at the Trenton Department of Justice to provide awards to the winners of our yearly YouTube Video Contest. Middle school and high school students from around the state submitted YouTube videos to the YLD celebrating the 350th anniversary of New Jersey becoming a colony. We were joined by the counsel to the attorney general, Deborah R. Edwards, and by the Honorable Glenn A. Grant, administrative director of the New Jersey courts. The awards ceremony took place in the Supreme Court of New Jersey after the yearly swearing in for new United States citizens.

During the evening of May 2, we held the First Annual YLD Smoke Out in Somerset. Young lawyers enjoyed an evening of cigars, hookah, hors d'oeuvres and camaraderie.

From May 14-May 16, the NJSBA held its Annual Meeting and Convention in Atlantic City. This is always a great opportunity to network with other young lawyers, as well as more seasoned attorneys, and

attend a range of continuing legal education programs presented by various NJSBA organizations, including the YLD. At the Annual Meeting and Convention we once again presented our YLD annual awards, including the Young Lawyer of the Year Award, and we swore in the division's 2014-2015 officers. Additionally, the YLD hosted a variety of events and parties, including the Young Lawyers Annual Party. The Annual Meeting and Convention is always a great experience.

I hope you have been able to attend some of the above events, but if you were unable to, I encourage you to participate in future division events and hope to see you in the coming months.

Jeffrey Neu, Esq. is the co-founder of Kuzas Neu and focuses his practice in the areas of Internet and technology law.

Inside this issue

The opinions of the various authors contained within this issue should not be viewed as those of the Young Lawyers Division, Dictum, or the New Jersey State Bar Association.

Editor's Column

Attorney Listservs—A Great Resource or an Unforeseen Pitfall?

by Amy L. Miller, Esq.

For several years now many of us have been the recipients of various attorney email blasts via attorney listservs. I am on the New Jersey State Bar Association's Young Lawyers Division's listserv, as well as the Family Law Section's listserv. Often attorneys will send out a request for a referral for experts or attorneys in other counties or states, job postings when hiring a new attorney or staff member, or other types of requests for general information. These requests through attorney listservs, in my opinion, provide us with the means of obtaining information in a quick and concise manner, while reaching a large audience of our peers. With little exception, there is often no adverse result from sending out these types of email blasts through our attorney listservs.

The problem arises when attorneys, especially young attorneys, publicize more substantive requests or questions on these listservs. For example, I have witnessed attorneys asking for opinions about judges. This, in and of itself, can be problematic on many levels. Do you want to be the attorney bad-mouthing a judge publicly, especially in such a broad forum? What happens when word of what you have asked, or if you are the responding person to the question then word of your response, travels back to the judge? While I cannot speak for other areas of practice, I know that in the family law community throughout this state something like this would spread quickly and would likely travel back to the judge. Even if you are making a general inquiry about a judge, rather than bad-mouthing him or her, is this really something you want to do publicly?

I have witnessed attorneys summarizing a case and a client's issues in minute detail. At some point, you should question whether what you are disseminating crosses the line in disclosing attorney-client privileged information. What you are publicizing on the listserv may also, unintentionally, include insight into your case strategy. Is this really something you want your adversary to learn of in advance of the depositions and the trial?

What about the attorney who is constantly asking questions, or responding to others, exhibiting a presence on the listserv on a daily, perhaps multiple times per day, basis? And what if one such attorney is an adversary on your case and finds time to pose poignant and thought-provoking views on the listserv but is incapable of responding timely on your case? I would hope that, first and foremost, we want to be viewed as excellent attorneys who advocate for our clients, rather than great 'thinkers' on the listserv, who in reality are not meeting our clients' needs.

In addition, as young lawyers we are trying to build our reputation, and demonstrate that, despite our young age and/or limited time practicing law, we are knowledgeable and skilled in our practice areas. So how do we demonstrate this when we put forth a question on a listserv that, for lack of a better term, may be characterized as a 'dumb' question? While we have all heard there is no such thing as a dumb question, the fact remains that if you are five years into practicing in your field and you put forth a question over your bar section's listserv that a first-year attorney should know the answer to, others will form an opinion of you based solely upon that question.

While I have tremendously enjoyed being part of these listservs, and I see incredible value in being able to read others' questions and responses, and sometimes even participate in these dialogues, I have found it is important to think carefully about posting anything before I decide to take that plunge. Often I will first reach out to my fellow attorney friends via a private email to see if they can assist me before I reach out to the entire legal community of a listserv. If this fails, then listservs can provide a wealth of information and may

be a great aid in helping to serve our peers in our legal field. We must just remember that, like in court, we want to think before we speak, and be sure of what we say since it will serve as a public representation of who we are professionally.

Amy L. Miller, Esq. is an associate at the firm of Haber Silver & Simpson, and focuses her practice in all areas of family and matrimonial law.

The Importance of Being Registered—Copyrights and Trademarks

by Bonnie C. Park, Esq.

A copyright attaches to a work of creative authorship the moment the author puts it in fixed form. A trademark obtains common law rights the moment the owner uses it in commerce. As these intellectual property rights attach quickly, many fail to register their works or marks in the United States Copyright Office and the United States Patent and Trademark Office, respectively. These individuals are missing out on a world of benefits and potentially inviting trouble down the road.

Even if a client does not contact you regarding their intellectual property, your clients may very well have a copyright or trademark issue lurking in their litigation or transactional matter. This is especially true of business and commercial clients. Being able to spot such issues and resolve any registration or infringement problems will help you provide full service to your clients.

This article focuses on five important reasons for federal registration of copyrights and trademarks, as well as issues regarding infringement, which not surprisingly is the predominant issue in this area of law. Of course, many other issues arise in the prosecution of copyright and trademarks by the owners than are addressed here. However, these issues and accompanying practice tips are good starting points for conversations with your clients about protecting their rights and dealing with infringement.

1. Public Notice of Nationwide Use

In registering a copyright or trademark, the owner will add the work or mark to a public and searchable database.[1] By doing so the owner is placing others on notice of the creation of the work and use of the mark. While registration is not a fail-safe measure, as mere notice of ownership of intellectual property does not by itself prevent all infringement, registration with its accompanying public notice will prevent most use by others. In addition, especially in the case of trademarks, owners will typically have a search of registered works and marks conducted before commencing registration in order to avoid problems.

In the case of trademarks, an owner's rights in an unregistered mark will be limited to the geographic area in which the goods and services are sold. Considering the prevalence of e-commerce in today's economy, a geographic limitation on trademark rights is not preferable. By registering the mark, the owner will enjoy the benefits of being able to enforce the mark throughout the country.

2. Additional Causes of Action and Access to Federal Courts

The Copyright Act,[2] governing copyrights, and the Lanham Act,[3] governing trademarks, are both federal statutes. The district courts have original jurisdiction for all civil actions involving copyrights and trademarks arising under these acts.[4]

In copyright cases, the district courts have exclusive jurisdiction and these cases cannot be brought in state courts.[5] For copyright infringement claims, copyright owners are required to register their works or the claims will be dismissed.[6] Without the availability to bring the claims in state courts, if a copyright author does not register the works, the owner will have difficulty in recovering.

Unlike copyright cases, district courts do not have exclusive jurisdiction in trademark cases.[7] Claims under the Lanham Act can be brought in the state courts along with the enforcement of common law (unregistered) trademark rights. Trademark infringement[8] and other (but not all) causes of action under the Lanham Act, however, do require that the mark be registered.

While trademark claims can be brought in both federal and state courts, the client's specific goals will determine the best forum. Federal judges deal with these matters with some frequency in their years on the bench and will be often be well versed in the Lanham Act. State judges generally do not hear many intellectual

property cases and may not be as familiar with the law in this area as their federal counterparts. On the other hand, state court certainly has benefits. Federal cases typically involve additional work and take longer to reach trial than state cases. A client may prefer a quicker and more cost-effective resolution for their problem, making state court the preferable choice.

3. *Prima Facie* and Conclusive Evidence

Copyright and trademark registrations provide a lighter burden of proof for plaintiffs. If a copyright is registered before or within five years of first publication of the work, the owner enjoys the benefits of *prima facie* evidence regarding the validity of the copyright or any of the facts stated in the registration certificate.[9] Similarly, a trademark registration on the principal register constitutes *prima facie* evidence of the validity, ownership, and exclusive use of the mark.[10] The burden then shifts to the defendant to overcome the *prima facie* evidence, which is no easy task. After five years of unopposed registration, a trademark also becomes incontestable, which raises this evidence from *prima facie* to conclusive.[11]

The availability of *prima facie* and conclusive evidence from copyright and trademark registrations certainly saves time and effort by removing the litigation of ownership and other issues. However, a copyright or trademark owner could potentially avoid litigation altogether. Having *prima facie* or conclusive evidence available can provide greater leverage to the owners in negotiating an early settlement.

4. Damages and Attorney's Fees

A substantial benefit to intellectual property owners is the potential for sizeable damage and attorney's fees awards, both of which are provided by the Copyright Act and the Lanham Act. Intellectual property constitutes an important part of the American economy and innovation.[12] Congress has demonstrated a strong policy in favor of the preservation of intellectual property rights by allowing substantial awards to be given to the owners. While the wisdom behind the imposition of such damage and fee awards is debatable, they are available to copyright and trademark owners. Having a registered work or mark can not only bring about large judgments through litigation, but can also provide leverage to obtain an early settlement.

As described above, copyright owners are required to register their works before they can bring lawsuits. A copyright owner can register the work after discovering infringement and then sue, but the damages are limited to actual damages. The Copyright Act provides an option for statutory damages of $750 to $30,000 for infringement, which can rise to $150,000 for willful infringement. An owner can always opt for actual damages if they are higher than statutory damages. Additionally, the act provides for attorney's fees to the prevailing party. A copyright owner is best served by registering the work as soon as it is published in order to secure these benefits.[13]

The Lanham Act does not provide for statutory damages for infringement in the same way the Copyright Act does. A trademark owner can obtain the defendant's profits, actual damages, and costs of the action for every claim brought under the Lanham Act, whether registered or not. Damages under the Lanham Act are equitable in nature and the courts may adjust the damages up to three times higher. The benefit to registered trademark owners is that these damages can be further trebled in the case of willful infringement. Attorney fees are available under the Lanham Act on all claims, but only in "exceptional cases."[14]

Courts are aware that the damages and fees described by the Copyright Act and the Lanham Act are substantial and may result in a windfall to the owner. To avoid such a result, courts will typically tailor damage awards in relation to the actual damage inflicted on the owner and the egregiousness of the infringement. The courts will no doubt ensure that the owners are justly compensated, but the Copyright Act and Lanham Act are not lottery tickets. When copyright and trademark owners learn about these large figures, their expectations may quickly become unreasonable. A bit of counseling early on regarding how the courts will actually award damages and fees will save much frustration down the line.

5. Assistance From U.S. Customs and Border Protection

U.S. Customs and Border Protection (USCBP) assists copyright and trademark owners by preventing goods bearing infringing works or marks from entering the country and the domestic stream of commerce. Owners can record their copyrights and trademarks with USCBP, which creates a database against which imported goods are checked and seized if infringement exists. Considering the tremendous impact on the

economy and consumer safety posed by piratical goods, an extra line of protection is certainly beneficial. USCBP can prevent problems before they occur by seizing such goods at the borders.[15]

To take advantage of this program, copyright and trademark owners must first register their works and marks. If intellectual property owners fail to register and miss out on recordation with USCBP, they can face additional problems of widespread importation and sales of counterfeit goods. This will not only harm them in their markets, but can also cause their intellectual property to lose value.[16]

Client Resource Considerations

Registering copyrights and trademarks does involve registration fees. Copyrights generally command smaller fees than trademarks, currently $35 for electronic filing,[17] but a client with many works can run up a substantial bill quickly. The fees for trademarks are currently $325 per mark per class of goods registered.[18] If a client sells a variety of goods and wants to register the business name and logo, for example, the fees can be significant. Additionally, recording copyrights and trademarks with USCBP involves a $190 fee per work for copyrights and per international class of goods for each trademark.[19] The registration and recordation fees can become cost prohibitive.

Registration of copyrights and trademarks does prevent serious costs for owners down the road. However, a client may resist registration because of the up-front fees. If the fees present an issue with a client, encourage the client to explore registration in phases. For example, registering the name of the business first and the logo later, or holding off on registering a class of goods that comprises a small percentage of the business, are ways to spread the costs. As registration will save significant litigation costs later, a plan for registering the client's portfolio of intellectual property will best protect the client's short-term and long-term interests.

A Final Word of Warning

Before taking on a client's registration project, contact an experienced intellectual property lawyer to guide you through the registration process, or refer the work out. Lawyers can find themselves embroiled in litigation, malpractice, or ethics issues if they certify to information in a registration application that turns out to be false, or if the registration does not fully protect the client. In particular, the Lanham Act employs very broad language regarding harm as a result of a trademark registration.[20] While the U.S. Copyright Office and U.S. Patent and Trademark Office have a wealth of helpful information on their websites, proceed with caution and get some guidance. ■

Bonnie C. Park, Esq. is a business and intellectual property litigator practicing in Hackensack.

Endnotes

1. U.S. Patent and Trademark Office, "Protecting Your Trademark: Enhancing Your Rights Through Federal Registration," available at: http://www.uspto.gov/trademarks/basics/BasicFacts.pdf.
2. 17 U.S.C. § 101 *et seq.*
3. 15 U.S.C. § 1051 *et seq.*
4. 28 U.S.C. § 1338(a).
5. *Id.*
6. 17 U.S.C. § 411(a); *Reed Elsevier, Inc., et al., v. Munchnick, et al.*, 559 U.S. 154 (2010).
7. 28 U.S.C. § 1338(a).
8. 15 U.S.C. § 1114(1).
9. 17 U.S.C. § 410(c).
10. 15 U.S.C. § 1057(b).
11. 15 U.S.C. § 1065.
12. Press Release, U.S. Chamber of Commerce, "New Study Demonstrates Importance of Intellectual Property Rights to American Jobs and Competitiveness," available at: http://www.uschamber.com/press/releases/2010/april/new-study-demonstrates-importance-intellectual-property-rights-american-jo.

13. 17 U.S.C. §§ 504-505.
14. 15 U.S.C. § 1117.
15. U.S. Customs and Border Protection, "Intellectual Property Rights," available at: http://www.cbp.gov/xp/cgov/trade/priority_trade/ipr/.
16. U.S. Customs and Border Protection, "Intellectual Property Rights Enforcement: How Businesses Can Partner with CBP to Protect Their Rights," available at: http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/ipr_guide.ctt/ipr_guide.pdf
17. U.S. Copyright Office, Fee Schedule, http://www.copyright.gov/docs/fees.html.
18. U.S. Patent and Trademark Office, USPTO Fee Information, http://www.uspto.gov/about/offices/cfo/finance/fees.jsp.
19. U.S. Customs and Border Protection, Intellectual Property Rights e-Recordation Application, https://apps.cbp.gov/e-recordations/.
20. 15 U.S.C. § 1120.

Motions for Medical and Temporary Benefits: A Primer for the Uninitiated

by Marc B. Samuelson, Esq.

Under New Jersey workers' compensation law a petitioner (the injured party) is permitted medical treatment,[1] temporary disability benefits (70 percent of their pay for the time an authorized physician places the petitioner out of work pursuant to statutory minimums and maximums)[2] and a final monetary award usually referred to as permanency.[3] It has been my experience as a lawyer whose practice is primarily in the area of workers' compensation that many attorneys do not fully realize a petitioner's right to seek medical treatment should a respondent fail in their statutory obligations. Although frequent workers' compensation practitioners tend to file motions seeking medical and temporary benefits, those who only practice workers' compensation on an occasional basis may not be aware of this option. This article will explore and outline those motions so that, as a practitioner filing such a motion on behalf of your client, you can adequately represent your client's needs.

Before filing any motion for medical and temporary benefits, a request for medical treatment must be made to a respondent's attorney or the workers' compensation carrier.[4] This applies to situations where no medical treatment has been provided or if the medical treatment provided has been prematurely stopped. Should medical treatment not be forthcoming, then a motion to compel treatment can be filed pursuant to the New Jersey Administrative Code[5] and Statutes Annotated.[6]

All motions for medical and temporary benefits should contain an affidavit from the petitioner, if possible, or from the petitioner's attorney if the petitioner is not available.[7] At a minimum the affidavit should include a description of the accident, the petitioner's injuries and any limitations, any treatment (or lack of treatment) that has been administered, and a statement regarding the petitioner's pain. The affidavit should also include a summary of the procedural process thus far. It must be explained that attempts have been made to obtain treatment from the respondent.

In addition, objective medical evidence should be attached as exhibits. Specifically, an independent medical evaluation report is usually needed.[8] That medical report must explain the causal relationship and the evaluating physician should explain that his or her opinions are "within reasonable medical probability..." The evaluating physician's opinions regarding the causal relationship, diagnosis, treatment recommendations and the legal standard, "within reasonable medical probability," should all be included in the affidavit. If possible, other medical records that detail the injury in question can be attached, but before doing so the attorney must first decide whether the documentation will help their argument or just be redundant and possibly annoy the court.

If a report cannot be obtained, you can cite to N.J.A.C. § 12:235-3.2(b)(3), which allows petitioners to file a motion for medical and temporary benefits without attaching a medical report. This permits petitioners to rely on the medical records of the respondent's own authorized treating physician, without having to attach them as exhibits.[9] This particular part of the New Jersey Administrative Code is very useful in situations where the respondent's own authorized doctor is recommending treatment but for a myriad of possible reasons the treatment is not forthcoming.

It is often difficult to determine which doctor to use for evaluating your petitioner and preparing a medical report. It is, therefore, important to select a doctor who has the proper board certifications and other qualifications to address the particular injury at issue. Scheduling and geographic considerations should also be considered, as many petitioners do not have easy access to transportation. If it is still difficult for your petitioner to see the doctor, you may consider calling the doctor's office to explain the situation, and perhaps the physician will draft a report on the petitioner's behalf.

In this situation, be sure to discuss the cost, as reimbursement of costs is at the judge's discretion, and there are statutory limitations regarding how much can

be reimbursed, with the exception of some latitude that is provided to the judge to increase the reimbursement above the limitation. The independent medical evaluation report of an evaluating physician is limited to $400, with testimony limited to an additional $400.[10] The independent medical evaluation of a treating physician is limited to $450.[11] Court testimony cannot be reimbursed for more than $300 per hour, or $2,500 in total.[12] Deposition testimony cannot be reimbursed for more than $300 per hour, or $1,500 total.[13] In the event your petitioner is seeking reimbursement of costs above these sums, be prepared to explain to the judge why higher costs should be reimbursed by either the respondent or even the petitioner, and thus why the judge should deviate from these statutory limitations.[14] A *quantum meruit* argument will be needed, and consequently an affidavit of services and possibly another motion may be needed to recover most or all of the costs expended.

In addition to the proper affidavits and supporting medical documentation, a notice of motion must be attached to the pleadings. A form of this notice of motion used by the New Jersey Division of Workers' Compensation can be found at http://lwd.dol.state.nj.us/labor/wc/forms/forms_index.html. In addition, this website, which is operated by the New Jersey Department of Labor and Workplace Development, contains numerous forms and publications that can assist an attorney litigating a workers' compensation claim. These documents include, but are not limited to, blank orders, pleadings and reference materials.

Once the notice of motion and supporting documents have been completed, they must be filed with the local workers' compensation office where the matter is venued. The Department of Labor and Workforce Development website contains the contact information for each New Jersey Division of Workers' Compensation office.[15] After the motion is filed, the respondent has 21 days after service of the motion, or 30 days after service of the claim petition (petitioner's initial pleading), to file an answer.[16] Service can be done via certified mail or personal service.[17] After the New Jersey Division of Workers' Compensation has received a copy of the notice of motion and supporting documents, a judge of compensation must peremptorily list the motion for a hearing within 30 days of filing.[18] If a respondent must obtain an independent medical evaluation report, he or she must schedule an evaluation 30 days after receipt of the motion and the report itself must be finished no later than 35 days after receipt of the motion.[19]

After the motion is filed, several things can occur. A judge can adjourn the matter if further medical documentation or other information is needed. A conference involving the parties and the judge can occur, which may include a recommendation by the judge or an agreement between the parties being reached. It is not uncommon for an order to be entered at this point. However, testimony can take place as well. Many judges prefer to have a conference prior to scheduling testimony. Some judges will expect the petitioner to be present, or at least available, on the first listing date. If you are unsure about whether or not your client should appear at the first listing, a simple respectful letter to the judge inquiring about his or her preference would be in order.

On some occasions, the first conference between the parties and the judge may be accompanied by an *in camera* review of the petitioner.[20] Depending upon what is revealed during this conference, the judge and your adversary may be able to begin discussing a resolution. *In camera* reviews are referred to as informal hearings in the New Jersey Administrative Code; practitioners frequently refer to them as 'look-sees.' Be sure to review the rules set forth in the New Jersey Administrative Code before an *in camera* review or informal hearing occurs.[21]

Anytime a motion for medical and temporary benefits is filed, be prepared to treat it as a trial. After the petitioner's testimony it is not uncommon for lay witnesses to follow and then medical experts. Sometimes witnesses are not available on the dates the matter is listed, so depositions are often conducted in those circumstances. However, at the same time depositions are not common in New Jersey workers' compensation cases and are at the discretion of the judge.[22] After testimony is taken, the judge has 15 days from the last date of testimony or after briefs are filed to render a reserved decision.[23] According to the administrative code, the parties must submit supporting briefs no later than 15 days after the hearing is over. Thus, if a judge requests that briefs are to be filed it allows the judges themselves an extra 15 days to render a decision.

Not to be overlooked is the issue of temporary benefits. As mentioned earlier, petitioners are entitled to 70 percent of their pay, subject to statutory maximums and minimums, which are found on the Division of Workers' Compensation website, specifically on the New Jersey Manufacturers' charts.[24] If the petitioner is not being paid the proper amount, ask them for as many pay stubs as possible. However, the 26 weeks prior to the injury is

the preferred timeframe.[25] This information can also be retrieved from the respondent. Once you have this information, compare it to the temporary benefits stubs available, assuming the petitioner was provided temporary benefits in the first place. Calculate the difference owed, if any, and request that amount in the notice of motion, as well as explaining this information and calculation in the affidavit. Keep in mind the petitioners who have multiple jobs, especially those who are injured while working their part-time job and thus are unable to work their full-time job. Under certain circumstances it may be possible to 'reconstruct' their wages.[26] Also, if there is no work to which the petitioner can return, he or she may not necessarily be entitled to temporary benefits.[27]

Although motions for medical and temporary benefits are designed to be heard quickly, sometimes the time frame set forth under N.J.A.C. § 12:235-3.2 is not quick enough. N.J.A.C. § 12:235-3.3 and N.J.S.A. § 34:14-15.3 allow for motions for "emergent medical care."[28] The biggest difference between these motions and those mentioned above is the time frame when action is to occur. Notice takes place by facsimile and one-day delivery service on the respondent's counsel.[29] If no answer was filed by an attorney, notice is to also be served upon the employer and if known, the employer's insurance carrier, by personal service or facsimile and one-day delivery service.[30] The pleadings themselves do not necessarily need an affidavit, but a 'statement' by the petitioner or the petitioner's attorney that a request for treatment was made and to whom it was made must be included.[31] The medical documentation must adhere to specific requirements as compared to the standard motion for medical and temporary benefits. In addition to what a standard motion requires, a motion for emergent medical care must include a statement that "the [p]etitioner is in need of emergent medical care," and any delay in treatment will "result in irreparable harm or damage." The evaluating physician must explain the specific nature of the "irreparable harm or damage."[32] The date of personal service, facsimile or one-day service shall be considered the date of service.[33] An answer must be filed by the respondent five days after the date of service.[34] Thereafter, respondents must have their independent medical evaluations conducted within 15 days of service.[35]

Motions for emergent medical care are to take precedence over all other listings.[36] The first conference between the parties must occur five calendar days after the respondent filed, or should have filed, his or her answer.[37] The judge handling the motion for emergent medical care (usually the supervising judge of compensation) is encouraged to use telephone conferences and afternoon hearings to resolve the motion.[38] The time frames of hearings and decisions are as follows: Should no medical evaluation be requested by the respondent, the judge shall schedule a hearing no later than five calendar days after the initial conference.[39] If the respondent does order a medical evaluation, testimony shall begin no later than five calendar days after the date of that medical evaluation.[40] A judge shall render a decision and issue an order no later than one day after the conclusion of trial.[41] Motions for emergent medical care are designed to be resolved quickly, and the attorney who filed the pleading should be prepared to take phone calls and appear in court on an expedited basis. Thus, it is very important to appropriately adjust your calendar.

Once the matter has been decided, the issue of fees must be addressed. Fees can be decided when the order for treatment has been entered, or this issue can abide until the end of the case. Generally, the petitioner's counsel cannot obtain a fee above 20 percent of all medical and temporary benefits paid as a result of the motion.[42] The fee itself is at the discretion of the judge, who must take into account the work put into the motion when making a determination. Currently, the maximum fee is $44,000 effective as of 2014, pursuant to the New Jersey Division of Workers' Compensation.[43] A judge may increase the fees in excess of the stated maximum, but the petitioner's counsel will need to provide an affidavit of services and possibly testimony to support this request.[44] As with costs, this is a *quantum meruit* argument and it is important to convey exactly how much work was needed and the time expended in connection with the motion.

Although the information outlined above cannot explain every possible scenario that can occur after a motion for medical and temporary benefits or for emergent medical care is filed, it should provide a solid groundwork in advocating for your client, while at the same time protecting yourself from accusations that you did not perform your duties in at least inquiring into the available medical and temporary benefits.

Marc B. Samuelson, Esq. is an associate at Richard L. Press & Associates and focuses his practice in the area of workers' compensation and Social Security disability.

Endnotes

1. N.J.S.A. § 34:15-15.
2. N.J.S.A. § 34:15-12(a)(b).
3. N.J.S.A. § 34:15-12(c).
4. *Andrechack v. Elmora Bake Shop*, 182 N.J. Super. 567 (App. Div. 1982).
5. N.J.A.C. § 12:235-3.2.
6. N.J.S.A. § 34:15-15 *et seq.*
7. N.J.A.C. § 12:235-3.2(b)(2).
8. *Ibid.*
9. N.J.A.C. § 12:235-3.2(b)(3).
10. N.J.S.A. § 34:15-64(1)(a).
11. N.J.S.A. § 34:15-64(2)(a).
12. N.J.S.A. § 34:15-64(2)(b)(i).
13. N.J.S.A. § 34:15-64(2)(b)(ii).
14. *Gromack v. Johnsmanville Products Corp.*, 147 N.J. Super. 131, 136; 370 A.2d. 882, 885 (App. Div. 1977). *See Quereshi v. Cintas Corp.*, 413 N.J. Super. 492; 996 A.2d. 465 (App. Div. 2010).
15. Retrieved from http://lwd.dol.state.nj.us/labor/wc/content/offices.html.
16. N.J.A.C. § 12:235-3.2(d).
17. N.J.A.C. § 12:235-3.2(a).
18. N.J.A.C. § 12:235-3.2(e).
19. N.J.A.C. § 12:235-3.2(g).
20. N.J.A.C. § 12:235-4.1.
21. N.J.A.C. § 12:235-4.1 to 4.17.
22. N.J.A.C. § 12:235-3.12(f)(3).
23. N.J.A.C. § 12:235-3.2(i).
24. Retrieved from http://lwd.dol.state.nj.us/labor/wc/forms/forms_index.html.
25. N.J.S.A. § 35:15-37.
26. *Katsoris v. South Jersey Pub Co.*, 131 N.J. 535 (1993).
27. *Cunningham v. Atlantic States Cast Iron Pipe Co.*, 386 N.J. Super. 423 (App. Div. 2006).
28. N.J.A.C. § 12:235-3.3.
29. N.J.A.C. § 12:235-3.3(c).
30. N.J.A.C. § 12:235-3.3(d)(1)(2).
31. N.J.A.C. § 12:235-3.3(b)(1).
32. N.J.A.C. § 12:235-3.3(b)(2).
33. N.J.A.C. § 12:235-3.3(f).
34. N.J.A.C. § 12:235-3.3(g).
35. N.J.A.C. § 12:235-3.3(h).
36. N.J.A.C. § 12:235-3.3(j).
37. N.J.A.C. § 12:235-3.3(l).
38. N.J.A.C. § 12:235-3.3(k).
39. N.J.A.C. § 12:235-3.3(n).
40. N.J.A.C. § 12:235-3.3(o).
41. N.J.A.C. § 12:235-3.3(q).
42. N.J.S.A. § 34:15-64.
43. Retrieved from http://lwd.dol.state.nj.us/labor/forms_pdfs/wc/pdf/Counsel_Fees_112113.pdf.
44. *Ibid.*

The Nuts and Bolts of New Jersey's Wrongful Death Act

by Jonas K. Seigel, Esq.

Every year, thousands of people are killed as a result of the negligence of others. These deaths may be the result of medical malpractice errors; nursing home neglect; unsafe premises and workplaces; or accidents involving planes, trucks, boats, and motorcycles. Unlike other personal injury claims, the wrongful death victim is no longer with us and fully understanding the circumstances that led up to accident is not always possible. To make matters more difficult, wrongful death suits often demand an immediate response in order to preserve or obtain evidence, involve several defendants, and require experts ranging from private investigators to economists. I have personally spent a substantial amount of time and money to later find out there is no viable claim. Additionally, friends, family, and coworkers of the decedent can quickly turn from valuable resources to frustrated and impatient obstacles during your quest to uncover the truth. In this article, I will provide a guide for lawyers on how New Jersey's Wrongful Death Act functions so that if you are ever met with a possible wrongful death case, you can have the confidence to answer the basic questions.

Who May Bring a Wrongful Death Claim?

New Jersey's Wrongful Death Act is found in N.J.S.A. 2A:31-4 and provides a cause of action for the decedent's heirs and dependents. If the decedent dies intestate (without a will), a family member must be appointed *administrator ad prosequendum* or the legal representative of the estate. He or she will be responsible for hiring the attorney and authorizing a settlement on behalf of the estate. If, however, the decedent dies testate and his or her will is probated, the action should be brought by the executor named in the will and qualifying. So it is vitally important to determine at the onset whether or not the decedent had a will.

When Should the Action be Brought?

In New Jersey, a wrongful death claim must be brought within two years of the death. There are few exceptions to this stringent and unforgiving rule, so documentation of the death certificate or medical records is crucial.[1] Do not simply rely upon the recollection of the decedent's friend or family member at the intake. This two-year statute of limitations becomes more of an obstacle in workplace deaths when there is uncertainty regarding the cause of death and only at a later time is it disclosed that chemicals (*e.g.*, asbestos) were the culprit.

What Type of Damages are Recoverable under the Wrongful Death Act?

The vast majority of wrongful death actions involve the decedent's family members, who have been injured emotionally and financially as a result of losing their loved one. Retaining an experienced economist is crucial to help fully understand the value of damages lost. Below are the damages recoverable to the surviving family members:

Loss of Financial Support: This is often the largest chunk of the recovery. The loss of financial support can be calculated by multiplying the decedent's income by the number of years he or she was expected to work. For example, if 35-year-old John Doe is earning $150,000 at the time of death and he was expected to work until the age of 65, his expected future loss would be ($150,000 x 30) $4,500,000. However, this number is regularly adjusted by the courts for inflation and discounted to reflect present value.

Loss of Companionship: This is the loss of the benefits that a spouse and the surviving family members are entitled to receive from the deceased, which may include cooperation, aid, and affection.

Loss of Household Services: This is the loss of work done in or outside of the home, which may include cooking, cleaning, landscaping, laundry, and other chores for which the decedent had been responsible.

Loss of Parental Guidance and Care to Dependents: This is the loss of advice, counsel, instruction, and training a parent would most likely provide to his or her children or dependents.

Medical and Funeral Costs: These represent ambulance, hospital, medical bills and funeral costs associated with the death.

In situations where the decedent is the child, damages for the loss of companionship, care, and financial support could be made by the parents for losses reasonably expected in anticipation of growing older and the parent's future reliance on their child. Also worth noting is that all damages resulting from a wrongful death case are immune from the creditors of the decedent.

What Types of Damages are Not Recoverable under the Wrongful Death Act?

Emotional Distress: Emotional distress is not recoverable; however, the law does provide a separate cause of action—negligent infliction of emotional distress, but requires: a) marital or intimate relationship between the plaintiff and the decedent; b) observation of death at the scene of the accident; and c) severe emotional distress.

Punitive Damages: Punitive damages are damages awarded for behavior deemed by recklessness, deceit, or malice on the part of the defendant. Such damages are awarded to punish the defendant, and would not be recoverable.

Pain and Suffering: Paining and suffering from the moment of accident to the moment of the decedent's death is not recoverable under the Wrongful Death Act. The Survival Act is found in N.J.S.A. 2A:31-1, and provides an action for damages for the decedent. This cause of action also provides for the value of the loss of enjoyment of life, the loss of earnings, and expenses incurred between the time of the accident and the time of death. The damages awarded in a survivorship cause of action will go to the decedent's estate, but unlike damages obtained as a result of a wrongful death claim, these damages are subject to attachment by creditors of the decedent.

What to Do if Faced With a Possible Death Case

If you meet with a family member of a decedent who you feel died as the result of someone's negligence or has died while working on the job, think about how you would want to be treated if your loved one was no longer alive. Be compassionate. Be sensitive. And be a good listener. Find out if other attorneys have been consulted, as this may be a sign that others passed on the case for some reason. But don't be discouraged if you are the 10th attorney to be consulted. My largest case was one that nobody else wanted.

If a retainer is signed, act fast to obtain and preserve evidence. Assure the family member that you cannot guarantee anything, other than the fact that you will work hard to get answers. Be comfortable telling the person that you may bring in another attorney to assist. (Once they learn that the fee is the same, rarely is there a problem.) And do not be afraid to ask for help. But beware, there are many personal injury and medical malpractice attorneys throughout the state, but few with the experience and patience to co-counsel and teach you the ropes if this is an area of interest. After all, we all have to start our legal careers somewhere, and I still have a great relationship with the attorneys who taught me. ■

Jonas K. Seigel, Esq. is the 2014 New Jersey State Bar Association Young Lawyer of the Year and a partner at Seigel Capozzi Law Firm LLC, which specializes in medical malpractice and personal injury law.

Endnote

1. N.J.S.A. 2A:31-3.

The Challenges of Bringing Suit Against a Day Care

by Domhnall Ó'Catháin, Esq.

Young practicing lawyers who are the parents of young children are always faced with the challenge of balancing career demands with child care needs during the workday. It is a difficult balance, often leading to such questions as: If I reduce my working hours to care for my children, how will it impact my career? If I leave the children with their grandparents, will they keep their promise to lock the cleaning supplies under the sink? Can I trust the nanny, who until she arrived in the United States drove on the left side of the road, to safely transport the children?

As a result of these concerns, many of us have decided to put our trust in day care centers. We have met the teachers, seen the curriculum of activities, and spoken to other parents. And the children were happy from the first day they started.

Everything is fine until you receive the dreaded phone call that the fingers of your little girl's left hand got caught in the door and she has been rushed to hospital. You do not want to sue the day care center, but you have co-pays, you had to take time off from work, and you are concerned about how the facility handled the situation. After the last follow up visit to the orthopedist, you make an appointment with a personal injury lawyer.

Being a lawyer yourself, you probably consider doing some research before talking to a personal injury lawyer about your legal options. If so, you will learn that the New Jersey Department of Children and Families has a manual that contains the state's licensing requirements for child care centers.[1] The requirements are extensive, with a particular focus on health, safety and educational programming.

The Department of Children and Family inspects every licensed child care center annually to assess compliance with the requirements set out in its manual. The inspection records are public documents, thus as a parent and/or an attorney, you have access to them. However, state annual inspections do not guarantee that the day care facility enforces the requirements consistently.

At a recent deposition in one of my client cases, which involved an injury at a day care center, the day care teacher had no knowledge of ever seeing the state manual of requirements when it was produced as an exhibit. The director of the center stated that the manual was available to the teacher even though the teacher was never made aware of it, and that it was stored in a back office.

Of course, even if the day care teacher had knowledge of the requirements and complied with those requirements, is that sufficient? In other words, is compliance with the state's requirement the minimum or maximum of care to be provided to our children?

Further challenges in determining whether or not a day care facility was negligent in causing the injury of a child are that the only individuals in control of the narrative, or the 'story' that is disseminated, are often the defendant day care employees. Consider the following facts from a case where a child was injured during a trip to a local park with his day care class:

The defendant day care center stated that the child was running when he tripped, fell and factured his elbow. The child insisted that he was permitted to climb unsupervised to a dangerous height, and fell on his arm, causing the fracture. When deposed, the child was confused and inconsistent. Nevertheless, the treating doctor stated that the child was telling the truth and could not have tripped, as alleged by the defendants, because he had no grazes on his knees or other parts of his body, which would have occurred if he tripped while running.

Who do You Believe?

You know when your child is telling the truth because you know the questions to ask and how to ask them. When taking a deposition of a five-year-old boy, whom you do not know, it can be different. Consider the following testimony:

Question: So, Johnny, do you know what it means to tell the truth?

Answer: (Indicating.)

Question: What does it mean?
Answer: You have to tell the truth
Question: So if I said that this table it red, am I telling the truth or am I telling a lie?
Answer: Lie.
Question: Lie.
Answer: Because you're telling it, it's really blue, but it's not – it's really blue, but it's not red.
Question: And is it good or bad to tell the truth?
Answer: Bad.
Question: Bad?
Answer: (Indicating)

Perhaps the biggest challenge in prosecuting a claim for day care negligence is that even if the injured child can establish a case of negligence against the day care center, it cannot overcome N.J.S.A. 2A:53A-7 (1959), New Jersey's Charitable Immunity Act. Generally, the act will provide immunity to a day care facility and its employees if: 1) the day care facility is a nonprofit that is organized exclusively for educational purposes, and 2) the child is a beneficiary of that education.

The courts have been very charitable to nonprofits. In *Bloom v. Seton Hall University*,[2] a student slipped and fell in a pub operated on the Seton Hall campus. The Appellate Division concluded that operating a pub was consistent with the education purpose of Seton Hall because "a campus experience ought to include opportunities to mature in an environment enriched... by diverse forms of social interchange."[3] Interestingly, by the time the case reached the Appellate Division, Seton Hall University replaced the pub with a coffeehouse.

In the end, the decision of whether or not to file a lawsuit for a child injured by the negligence of a day care center will often turn on whether or not the facility is a for-profit or nonprofit institution. If the defendant day care center can establish its nonprofit status and the injured child is a student, it will be challenging for the lawsuit to succeed. Nevertheless, be sure to refer the matter to a personal injury attorney with experience in the handling cases against day cares centers. ■

Domhnall Ó'Catháin, Esq. is an associate with Lesnevich & Marzano-Lesnevich, LLC where he practices personal injury law. His wife is a full-time attorney. Their children attend a nonprofit day care facility.

Endnotes

1. N.J.A.C. 10:122.
2. *Bloom v. Seton Hall University*, 307 N.J. Super. 487, 704 A.2d 1334 (App. Div.1998).
3. *Id*. at 492.

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856-769-9001
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TREASURER
JJ Uliano
732-229-3200
jjuliano@chamlin-rosen.com

SECRETARY
Marisa Trofimov
908-782-2900
Mtrofimov@denilaw.com

TRUSTEE (2-YEAR TERM)
Jonathan Lomurro
732-462-7170
jlomurro@lomurrolaw.com

TRUSTEE (2-YEAR TERM)
Brandon Minde
609-292-6830
brandon.minde@dca.state.nj.us

ABA REPRESENTATIVE (2-YEAR TERM)
Jessica Goldberg
917-747-2414
jgoldberg@pfwj.org

PARLIAMENTARIAN
Jonas Siegel
201-444-4000
jseigel@seigelcappozzi.com

DISTRICT I —ESSEX COUNTY
Amber Loughran
973-621-4576; 908-230-0377
amber.jernigan@gmail.com;
Amber.Jernigan@njecpo.org

DISTRICT I —ESSEX COUNTY
Michael Schewe
862-772-2800
MSchewe@podvey.com

DISTRICT II —MORRIS COUNTY
Dana Van Leuven
973-998-7999
dvl@osullivan-law.com

DISTRICT III —PASSAIC COUNTY
VACANT

DISTRICT IV —MONMOUTH COUNTY
Joshua Cheslow
732-972-1600
jfcheslow@drescher-cheslow.com

DISTRICT V —OCEAN COUNTY
Christopher Campbell
732-462-8700
ctc@ctc-lawfirm.com

DISTRICT VI —BERGEN COUNTY
Bonnie Park
973-508-9939
bcpark@gmail.com

DISTRICT VII —UNION COUNTY
Veronica Norgaard
veronica@wlg.com

DISTRICT VIII —HUDSON COUNTY
Meredith Friedman
973-602-3427
mfriedman@meyner.com

DISTRICT IX —MERCER COUNTY
Louis Greenfield
732-855-6012
lougreen2099@gmail.com

DISTRICT X —HUNTERDON COUNTY
Hyun Lee
908-534-7900
hlee@rotololawfirm.com

DISTRICT XI —SUSSEX AND WARREN COUNTIES
John Graves
973-512-4819
jgraves@spartafamilylaw.com

DISTRICT XII —BURLINGTON COUNTY
Victoria Schall
856-596-4100
vschall@nj-nursinghomeneglect.com

DISTRICT XIII —CAMDEN COUNTY
Arupa Barua
248-635-2432
baruo85@gmail.com

DISTRICT XIV —ATLANTIC AND CAPE MAY
Marc Samuelson
609-641-2900
marcsamuelson@richardpresslaw.com

DISTRICT XIV —ATLANTIC AND CAPE MAY
VACANT

DISTRICT XV —MIDDLESEX COUNTY
Lawrence Bullard
732-881-3473
lawrencebullard@gmail.com

DISTRICT XVI —GLOUCESTER, SALEM & CUMBERLAND
Justin White
856-691-2300
jwhite@testalawyers.com

DISTRICT XVI —GLOUCESTER, SALEM & CUMBERLAND
Meryl Pedersen
856-451-9100
mpedersen@vitalelawoffice.com

DISTRICT XVII —SOMERSET COUNTY
Rajeh Saadeh
908-864-7884
rsaadeh@rajehsaadeh.com

DISTRICT XVIII —GOVERNMENT ATTORNEYS
Christine Kim
609-633-7786
Christine.Kim@dol.lps.state.nj.us

DISTRICT XIX —CORPORATE ATTORNEYS
Jason Altschul
jason.m.altschul@gmail.com

DISTRICT XX —MINORITY ASSOCIATIONS
Victoria Mercer
victoria.mercer.81@gmail.com

DISTRICT XX —MINORITY ASSOCIATIONS
VACANT

LEGISTLATIVE COORDINATOR (NON-VOTING)
Josiah Contarino
8620219-0282
josiahcontarino@gmail.com

DICTUM EDITOR-IN-CHIEF
Amy L. Miller
973-966-6311
amy@haberandsilver.com

DICTUM ASSOCIATE EDITOR (NON-VOTING)
Jennifer M. Russoniello
973-966-6311
Jen@haberandsilver.com

AT-LARGE VOTING MEMBER
Michael Austin
201-802-9202
maustin@rmfmclaw.com;
mikeaaustin@gmail.com

AT-LARGE VOTING MEMBER
Blake Laurence
732-410-2384
blaurence@lomurrolaw.com

AT-LARGE VOTING MEMBER
Kate Carballo
516-946-8774
Kate.carballo@gmail.com

AT-LARGE VOTING MEMBER
Nicole O'Hara
nicole.ohara@gmail.com

AT-LARGE VOTING MEMBER
Joseph Bahgat
732-733-2385
joe@blawllc.com

LAW SCHOOL REPRESENTATIVE (NON-VOTING)
Mary Kate Zago
908-337-8532
marykatezago@gmail.com

AT-LARGE NON-VOTING MEMBER
Jesse Rodgers
973-822-1110
jrodgers@mklaw.us.com

AT-LARGE NON-VOTING MEMBER
VACANT

AT-LARGE NON-VOTING MEMBER
Andrew Smith
917-952-4226
asmith2@law.pace.edu
At-Large Non-Voting Member
Rachel Packer
rpacker@BlankRome.com