



Riding the E&O Line

The newsletter of the
Professional Liability Committee

8/10/2018

Volume 10, Issue 1



LawyerGuard®
The only DRI-Sponsored
Professional Liability Program
for Defense Firms

Learn More >

Committee Leadership



Chair
Seth L. Laver
Goldberg Segalla LLP
Philadelphia, PA



Vice Chair
Melody J. Jolly
Cranfill Sumner & Hartzog LLP
Wilmington, NC

Editors



Tom (T.J.) D'Amato
D'Amato Law Corp
Orinda, CA



Kyle M. Heisner
Marshall Dennehey Warner
Philadelphia, PA



Kathryn S. Whitlock
Hawkins Parnell Thackston & Young
Atlanta, GA

[Click here to view entire Leadership](#)

In This Issue

Leadership Note

From the Chair..... 2
By Seth L. Laver

Feature Articles

Tripartite Relationship: Insurers Suing Panel Counsel
Lawyers 3
By Bruce Wallace

Competency and Wellbeing: A Conversation Starter for a
Legal Culture Free from Alcohol and Substance Abuse..... 4
By Thomas J. D'Amato and Christopher Whang



dri™ Dividends
Member Reward Program

Reward yourself!



Leadership Note

From the Chair



By Seth L. Laver

Members of the DRI Professional Liability Committee's steering committee gathered in Chicago on June 7–8, 2018, for the committee's annual fly-in meeting. This meeting provides opportunities to address important issues, to coordinate leadership goals, to assess weaknesses and to develop action items. Just as important, the meeting provides a chance for members of the PL community from across the country to meet, to build friendships and to compare notes. It is a great event.

For those that could not participate, and as a refresher that those who attended, a brief overview may be helpful. The first topic of our discussion was an evaluation of the 2017 PL seminar. 2017 Seminar Chair Penny Diehl provided us with a recap of last year's seminar, including a discussion of the attendance, panel counsel meetings, logistics, pros and cons.

Next, Zandra Foley and Bruce Wallace led a discussion of the committee's planning for the 2018 PL seminar. The session topics are terrific as is the proposed slate of presenters. We are encouraged by the tentative list of potential panel counsel meetings, which always drives attendance. We are hopeful that the 2018 PL seminar will be the best attended and most meaningful seminar yet.

With respect to our efforts to develop PL webcasts, we opted to enlist the help of Scott Neckers, who was promoted to Webcast Chair. Scott and his team will consider new webcasts to create for 2018 and beyond. He undoubtedly will lean upon committee members and others to contribute content for the webcasts.

Laura Dean led a discussion on the [2018 Annual Meeting](#), to be held in San Francisco beginning on October 17. The PL Committee will again partner with the Lawyers' Professionalism and Ethics Group to present a CLE at the Annual Meeting. There will also be a committee-wide business meeting and dinner, along with other opportunities to network, earn CLEs and otherwise build your brand.

Membership Chair and Vice Chair, Jon Harwood and Andrew Carroll, respectively, co-presented the committee's efforts to maintain and develop membership. Of course, the clearest path to grow membership is by providing

terrific content and opportunities for members. We've checked that box year after year but we continue to develop new initiatives for communicating DRI's benefits and enticing more contributors. We welcome your ideas about membership.

Kate Whitlock and T.J. D'Amato and Kyle Heisner (remotely) reported on the many publication opportunities available. Especially taking into account the online communities' page—which Andrea Schillaci addressed at the meeting—there is plenty of room for content and authors are needed: short case alerts, updates, more comprehensive evaluations or insights are always needed. Please contribute.

In short, the PL fly-in meeting represents somewhat of a microcosm of the committee: good lawyers, who genuinely like each other, who are committed to developing novel ways to defend the professional liability community. Thank you to those who joined us in Chicago and thank you to those that are interested in a larger, more fulfilling role. On behalf of the steering committee leadership, we welcome your thoughts, comments and suggestions.

Seth L. Laver is a partner in Goldberg Segalla whose practice primarily involves professional liability defense and employment litigation. He represents attorneys, design professionals, and accountants in professional negligence claims. Seth is Chair of DRI's Professional Liability Committee and the editor of Professional Liability Matters, a blog focusing on the professional liability community.

Feature Articles

Tripartite Relationship: Insurers Suing Panel Counsel Lawyers



By Bruce Wallace

Recently, South Carolina joined the ranks of jurisdictions that allow insurers to sue their panel counsel when the counsel allegedly commits malpractice in representing the insured. Answering a certified question from the U.S. District Court, the South Carolina Supreme Court in *Sentry Select Ins. Co. v. Maybank Law Firm, LLC* held that an insurer can bring a direct malpractice action against its panel counsel even though the insured is not harmed by panel counsel's alleged negligence.

Briefly, the insurer in *Sentry Select* hired panel counsel to represent a driver in a motor vehicle accident. Counsel represented the settlement range was seventy-five thousand to one hundred twenty-five thousand dollars. Thereafter, counsel failed to answer requests to admit, which are deemed admitted under South Carolina law. As a result of this failure, the insurer settled the claim for nine-hundred thousand dollars. Arguing the panel counsel's failure to answer the requests to admit increased the settlement amount of the case, the insurer sued.

South Carolina's Supreme Court recognized a direct action under these circumstances, but limited the right of action "only for the breach of [counsel's] duty to his client, when the insurer proves the breach is the proximate cause of damages to the insurer." The Court further held the right of action does not exist if there is any conflict between the insured and the insurer created by panel counsel's alleged negligence. In so holding, South Carolina joined the majority of states allowing insurers to initiate a direct action. However, while a majority of states allow the claim, the underlying theories of liability in these jurisdictions vary. In addition to the duty-to-insured-damages-to-insurer theory espoused by South Carolina, there are three additional theories of liability: insurer as co-client, third-party beneficiary, and equitable subrogee.

Insurer as Co-Client

States like California have found the insurer can sue panel counsel because the insurer is a co-client to whom counsel owes a fiduciary duty. In *Golf Ins. Co. v. Berger, Kahn, Shaf-ton, Moss, Figler, Simon & Gladstone*, 79 Cal.App.4th 114 (2000), the California Court of Appeal put it quite simply: "[c]ounsel retained by an insurer to defend its insured has

an attorney-client relationship with the insurer." *Id.* at 127. In *Berger, Kahn*, the California Court of Appeal considered whether the insurance company could sue the law firm that was first retained by the insured, but later approved and retained by the insurer pursuant to the terms of the underlying insurance contract. After finding that an attorney-client relationship existed under the circumstances presented, the court analyzed whether the insurer could bring a direct action against the attorneys. Quoting an earlier California case, the *Berger, Kahn* court said,

We conclude that where the insurer hires counsel to defend its insured and does not raise or reserve any coverage dispute, and where there is otherwise no actual or apparent conflict of interest between the insurer and the insured that would preclude an attorney from representing both, the attorney has a dual attorney-client relationship with both insurer and insured.

Id. at 129.

Based, again, on this dual-attorney client relationship, the *Berger, Kahn* court found the insurer could sue the panel counsel "so long as there existed no conflict of interest in the dual representation." *Id.*

Insurer as Third-Party Beneficiary

States like Arizona have found the insurer can sue panel counsel because the insurer is a third-party beneficiary of the attorney's services to the insured. Analogizing other professional malpractice actions involving damages incurred by third-party non-clients, Arizona's Supreme Court in *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593 (Az.S.C. 2001), observed, "[i]f design professionals cannot escape liability to foreseeably injured third parties who, although lacking privity, are harmed by a designer's negligence, we cannot see why lawyers should not likewise be held to a similar standard." *Id.* at 601. Turning to the question of the insurer's position in relation to panel counsel, the Arizona court found that, because insured's interests in underlying litigation often coincide with the insurer's interests, the "lawyer's duties to the insured are often discharged for the full or partial benefit of the nonclient." *Id.* at 602.

Insurer as Equitable Subrogee

States like Michigan resolved the question slightly differently than the foregoing decisions. Although no attorney–client relationship exists between panel counsel and the insurer, Michigan allows a direct action based on principles of equitable subrogation. Recognizing “to hold that an attorney–client relationship exists between insurer and defense counsel could indeed work mischief,” the Michigan Supreme Court in *Atlanta Int’l Ins. Co. v. Bell*, 475 N.W.2d 294, 297 (1991), applied the doctrine of equitable subrogation, thus “permit[ing] one party [the insurer] to stand in the shoes of another [the insured].” *Id.* at 298. The Court was careful to note that subrogation “cries out” to place the loss for the attorney’s misconduct on the proper party—the attorney. *Id.*

While the theories undergirding the right to sue differ, a majority of states now allow some form of direct action by the insurance company against its panel counsel.

Practitioners representing panel counsel must identify the underlying theory and determine, like in South Carolina and Michigan, whether a conflict of interest existed that may defeat a claim by the insurer, or whether some other defense exists based on the unique relationship between insurer, insured, and panel counsel.

Bruce Wallace is a Member of Nexsen Pruet, a law firm with offices in North and South Carolina. Bruce practices in the Torts, Insurance, Products litigation group (TIPS). Representing banks, insurers, and corporate clients in litigation gives Bruce a healthy perspective about today’s complex business world. Bruce represents a variety of insurers, corporations, and institutional clients in real estate litigation, bad faith and coverage issues, professional liability, corporate owner disputes, as well as fiduciaries in probate, trust, and estate litigation. He can be reached at 843-720-1760 and bwallace@nexsenpruet.com.

Competency and Wellbeing: A Conversation Starter for a Legal Culture Free from Alcohol and Substance Abuse



By Thomas J. D’Amato and Christopher Whang

Every year, thousands of enthusiastic and ambitious students enter law school with the prospect of becoming practicing lawyers.

They enter with purpose and excitement as to what they want to accomplish. School begins to consume every aspect of law students’ life. Everything from the Socratic method, the competitive grading, the workload, internships, journals, networking and even socializing with peers will cause students to lose sleep and consume enormous amounts of caffeine. In time, most, if not all, of these students experience a large amount of stress, and doubt themselves and what they really want to do with their legal education, if they finish at all.

Most practicing attorneys likely believe that the rigorous nature of law school shapes great attorneys and is a rite of passage every member of the bar must go through to enter this prestigious field. Such is the nature of law school and law practice. Unfortunately, for most students they will experience some level of anxiety and depression. And for too many, the path toward alcohol and substance abuse,

and a career long struggle with professional competence, is paved during these formative years.

In a 2014 survey by the American Bar Association of 15 law schools around the country, 89.6 percent of students stated they have had a drink of alcohol in the last 30 days. 21.6 percent reported binge drinking at least twice in the past two weeks. See Substance Abuse and Mental Health Toolkit for Law Students and Those Who Care About Them, ABA and CoLAP.

Law students Adam Wheeler and Aidan Campbell, in a 2016 article, stated that alcohol use is “ubiquitous within the legal profession.” See Wheeler, Adam; Campbell, Aidan, *Alcohol and Law School, in Our Own Words*, Ultravires, The Independent Student Newspaper of the University of Toronto, Faculty of Law, <http://ultravires.ca/2016/03/alcohol-law-school-words/>. The excessive use, they stated, seemed to be their welcoming into the legal profession *culture*. As they continued in their legal education, they found that alcohol seemed almost a requirement to network, socialize, and ultimately obtain jobs. It is perceived that to succeed at law firms, it is expected that students consume

alcohol. Wheeler's and Campbell's testimony is corroborated by Business Insider, who labeled Big Law networking and summary associate programs as "one long fraternity party for entertaining law school recruits." See Polantz, Katelyn, *Alcoholism is a Serious Problem for Law Firms*, Business Insider, July 29, 2017, <http://www.businessinsider.com/alcoholism-is-a-serious-problem-for-law-firms-2017-7>.

In early November 2017, Florida State University Law School instituted a new policy banning alcohol on all school-sponsored events. An FSU law student "bemoaned the new policy, writing, "The legal job market is tough and now our parent institution is making it even harder for us to connect with the legal community throughout our state. Hopefully this does not affect job placement." See Zaretsky, Staci, *Law Students Think Alcohol Ban Will Affect Job Placement*, *Law School Ranking*, Abovethelaw, Nov. 13, 2017, <https://abovethelaw.com/2017/11/law-students-think-alcohol-ban-will-affect-job-placement-law-school-ranking/?rf=1>.

As law students become accustomed to this culture, alcoholism often progresses as law students become practicing attorneys. Nearly 70 percent of practicing lawyers are likely to have an alcohol problem at some time during their career. Approximately 21 percent of employed attorneys qualify as problem drinkers. Approximately 20 percent of lawyers suffer substance abuse. See 2014 Comprehensive Survey of Lawyer Assistance Programs, ABA Commission on Lawyer Assistance Programs. Still, firms embrace and welcome this alcohol culture. Some firms still celebrate happy hours, on and off premises, as time-honored traditions. See Polantz, Katelyn, *Alcoholism is a Serious Problem for Law Firms*, Business Insider, July 29, 2017, <http://www.businessinsider.com/alcoholism-is-a-serious-problem-for-law-firms-2017-7>.

Alcohol in moderation and in the right context such as after-work happy hour or the celebratory drink, can be acceptable and harmless. However, the legal profession often *neglects* mental health and consequences of the attorneys that *do* struggle with alcoholism and this culture. Lawyers are generally estimated at being twice as likely to commit suicide than the general public. Practicing lawyers rank the highest in depression when compared to 104 other highly educated professionals. The most frightening statistic: less than 0.1 percent of lawyers admit their depression and substance abuse.

It is not simply chance and "stress" that causes attorneys to struggle with mental health issues. It is caused by the culture surrounding the legal profession. Law school causes enormous stress, anxiety, and depression by itself. The

legal culture, some argue, forces these struggling future attorneys to consume alcohol in copious quantities and in high frequency. Failing to do so may lead to lost networking opportunities, potential internships and associate positions. Alcohol soon becomes the primary coping method for students. As law students, Wheeler and Campbell state, it seems that law students begin consuming more alcohol and are justified in doing so because alcohol is "ubiquitous within the legal profession." See Wheeler & Campbell, *supra*. As law students continue to develop into attorneys, they further embrace the culture of alcohol. They perceive that abstaining from alcohol prevents attorneys from appealing to partners, reaching potential promotions, and being involved in sought-after cases.

While it may be impossible to change the nature of law schools, although some are trying, we cannot accept status quo of the alcohol culture; and those already in the profession need to lead the way. Not all networking events should involve alcohol. Alternative forms of networking events are not only possible, but arguably better at finding talented and ambitious law students. At one California law school, a Civil Procedure professor held early morning pickup basketball at the school's gym. The professor invited not only students but associates and partners at his firm or other firms. No alcohol was involved. Students met attorneys, phone numbers and email were exchanged, and relationships were built.

Challenge yourself, your team and your firm. Make time for networking and relationship building, with aspiring and new lawyers, in ways that are less dependent on alcohol. For the sake of our profession and the safety of our fellow attorneys, now and in the future, we must direct focused attention to this culture change.

Thomas J. (T.J.) D'Amato is the founder of D'Amato Law Corporation, a California litigation firm with extensive experience in professional liability, business, real estate and general civil litigation. In addition to his work in the trial courts, Tom represents clients in administrative hearings and disciplinary proceedings. Tom is a past Member of the DRI Board of Directors and served in leadership positions on DRI's Professional Liability, Lawyers Professionalism and Ethics, and Public Service Committees. Christopher Whang is an attorney with D'Amato Law Corporation.