SUPREME COURT OF NEW JERSEY
COMMITTEE ON ATTORNEY ADVERTISING

PRINCIPAL OFFICE
ADMINISTRATIVE OFFICE OF THE COURTS
RICHARD J. HUGHES JUSTICE COMPLEX
PO BOX 037
TRENTON, NJ 08625-0037
(609) 815-2900 ext. 51930
FAX (609) 376-3092

CAROL JOHNSTON, ESQ.
SECRETARY

December 21, 2017

E. Drew Britcher, Esq.
Britcher Leone, LLC
175 Rock Road
Glen Rock, NJ 07452

Re: CAA Docket No. 01-2017

Dear Mr. Britcher:

The Committee on Attorney Advertising considered your inquiry. You asked whether you may, consistent with the rules governing attorney advertising, engage the services of a marketing company that will use "geo-fencing" or "geo-targeting" techniques to deliver digital advertising for your law firm to persons in or from a certain geographical area.

Smart phones and similar devices often transmit their location, which enables a marketing company to target the user of the device. The law firm can specify a geographical area, such as a pharmacy, hospital, courthouse, office building, sports arena, or the like, and erect a "fence" around it ("geo-fencing"). Whenever a person with an active location-transmitting smart phone enters the fenced-in area, the law firm's ad will "pop up" or otherwise appear on a website visited by that person on his or her phone.

The marketing company also offers to send digital advertising to smart phones and similar devices based on the phone's IP address (the unique ID number assigned to every device that provides location information) ("geo-targeting"). The company states that it can further sort the recipients of digital ads by income, gender, and age.

Internet users are generally aware that ads that appear on websites they visit are somehow targeted to them. Real estate agents are likely to display advertising on websites about vacation properties; personal injury lawyers are likely to display advertising on websites providing information about whiplash or other injuries common to motor vehicle accidents. Techniques such as geo-fencing and geo-tracking try to reach an audience that may be receptive to the lawyers' message, though if the user does not transmit a location or does not browse on the device at that time, the ad will never appear to that user.

Rule of Professional Conduct 7.3 provides:

> (a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).
>
> (b) A lawyer shall not contact, or send a written or electronic or other form of communication to, a prospective client for the purpose of obtaining professional employment if:
>
> (1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or
>
> * * *
>
> (4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or
>
> (5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by regular mail to a prospective client in such circumstances . . . .

Law firms would employ geo-fencing and geo-targeting techniques to present advertising to people who, based on their location, may be in need of certain legal services. A wills and estates lawyer may target people at a funeral home, a personal injury lawyer may target people seeking medical care, or an elder law lawyer may target people at a nursing home. Each of these targeted and tailored communications concerns a "specific event," which is broadly construed to "include situations, conditions or occurrences which now, or in the future will, give rise to a cause of action." CAA Opinion 12 (January 1992). Communications to prospective clients regarding a "specific event" are governed by *Rule of Professional Conduct* 7.3(b)(5).

Rule of Professional Conduct 7.3(b)(5) prohibits "unsolicited direct contact with a prospective client concerning a specific event." The Committee differentiates between digital ads that appear on a website the targeted person is browsing on his or her device, such as Facebook or the Weather Channel, and more traditional "direct" communication, like an email message sent to a recipient. The Committee finds that an attorney whose ads appear adjacent to the content of the website the internet user is visiting is not engaged in "unsolicited *direct* contact" with the recipient. Rather, the attorney is making indirect contact via the website that the recipient has opened and is viewing; the attorney advertising is secondary to the user's chosen website and the user is not forced to view the ad, it merely appears above or to the side.

There may be some types of "pop-up" ads that significantly interfere with the user's visit to the chosen website by, for example, requiring the user to watch them for a designated period of time before allowing the user to reach the chosen website. The Committee finds these types

of ads to be substantially equivalent to other forms of "direct contact" with the user and they are prohibited by *Rule of Professional Conduct* 7.3(b)(5).

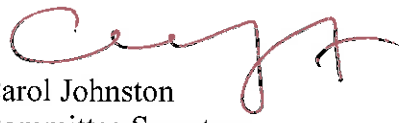
Rule of Professional Conduct 7.3(b)(4) prohibits lawyers from making "unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event." This prohibition is intended to provide the prospective client with some breathing space to adequately consider whether the lawyer is an appropriate fit for the person's legal needs and to prevent lawyers from overreaching. Targeted communications from a lawyer after a mass-disaster event carry a certain authority and convey the impression that the lawyer is aware of the vulnerable recipient's legal needs and is offering a solution. If a digital ad were specially-tailored to victims of a mass-disaster event and the geo-fencing or geo-targeting techniques were designed to deliver that ad to victims, the Committee finds that the effort may violate *Rule of Professional Conduct* 7.3(b)(4). The startling presence of such a targeted and specific advertisement on a vulnerable user's digital device at such a time and place – even if the ad is presented adjacent to the chosen website – is substantially equivalent to "direct contact" with the recipient.

Rule of Professional Conduct 7.3(b)(1) prohibits any contact, direct or indirect, with a prospective client when the "lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer." There are geographical areas within which at least some of the targets of digital advertising are reasonably likely to be in a compromised physical, emotional, or mental state. These areas include, but are not limited to, emergency rooms, hospitals, urgent care centers, funeral homes, police stations, and courthouses. Presenting advertisements to people in such areas would violate this *Rule*.

Thank you for making this inquiry of the Committee.

Very truly yours,

COMMITTEE ON
ATTORNEY ADVERTISING



Carol Johnston
Committee Secretary
For the Committee

c: Jonathan M. Korn, Chair (via email)

-- *N.J.L.J.* ---
(June --, 2017)
Issued by ACPE, CAA, & UPL June 21, 2017

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS
COMMITTEE ON ATTORNEY ADVERTISING
COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the Supreme Court of New Jersey

ACPE JOINT OPINION 732
CAA JOINT OPINION 44
UPL JOINT OPINION 54

Lawyers Participating in Impermissible Lawyer Referral Services and Providing Legal Services for Unregistered Legal Service Plans – Avvo, LegalZoom, Rocket Lawyer, and Similar Companies

The Advisory Committee on Professional Ethics received an inquiry from a bar association requesting a formal opinion on "whether it is ethical for lawyers to participate in certain online, non-lawyer, corporately owned services that offer legal services to the public." Inquirer stated that three companies (Avvo, LegalZoom, and Rocket Lawyer) are soliciting New Jersey lawyers to provide legal services to customers of the companies. The inquiry was jointly considered by the Advisory Committee on Professional Ethics, Committee on Attorney Advertising, and Committee on the Unauthorized Practice of Law. The Committees find that New Jersey lawyers may not participate in the Avvo legal service programs because the programs improperly require the lawyer to share a legal fee with a nonlawyer in violation of *Rule of Professional Conduct* 5.4(a), and pay an impermissible referral fee in violation of *Rule of Professional Conduct* 7.2(c) and 7.3(d). The Committees further find that LegalZoom and Rocket Lawyer appear to operate legal service plans through their websites but New Jersey lawyers may not participate in these plans because they are not registered with the Administrative Office of the Courts in accordance with *Rule of Professional Conduct* 7.3(e)(4)(vii).

Inquirer asked four specific questions:

1. Does a lawyer's participation in these services constitute impermissible fee sharing with nonlawyers in violation of *Rule of Professional Conduct* 5.4(a)?

2. Does participation in these services interfere with a lawyer's independent professional judgment in violation of *Rule of Professional Conduct* 5.4(c)?

3. Are Avvo, LegalZoom, and Rocket Lawyer impermissible attorney referral services in violation of *Rule of Professional Conduct* 7.2?

4. Do the services violate *Rule* 1:28A-2, which requires lawyers to establish an IOLTA account in which to hold client funds until they are earned, by having a nonlawyer company hold such funds instead and/or by allowing a nonlawyer company to have direct access to a lawyer's trust or bank accounts?

The Committees reviewed the websites and public information posted on the internet by Avvo, LegalZoom, and Rocket Lawyer, and considered written responses provided by the companies setting forth their positions on the ethical issues. Avvo offers, on its website, two legal services products: Avvo Advisor and Avvo Legal Services. Through Avvo Advisor, users may purchase a 15-minute telephone conversation with a lawyer for a flat fee. The user pays the fee to Avvo, Avvo contacts participating lawyers, and the first lawyer who responds to Avvo gets the job. Users can also select a lawyer from the Avvo profiles of participating lawyers. After the telephone conversation is completed, Avvo electronically deposits the flat fee into the lawyer's bank account and then withdraws a "marketing fee" (currently $10, about 25% of the $39.95 flat fee for the legal consultation). Avvo suggests that the deposit be made into the lawyer's trust account, and the withdrawal be taken from the lawyer's operating account.

Through Avvo Legal Services, users may purchase various legal services for fixed fees paid to Avvo, such as an uncontested divorce or a green card application. Participating lawyers provide these services to the user. When the services are completed, Avvo deposits the fees into the lawyer's bank account and then withdraws a "marketing fee" in set amounts that vary according to the fee charged for the specific legal service.

LegalZoom offers what appear to be legal service plans to users through its website. For Business Advantage Pro, users pay a monthly flat fee subscription and receive legal advice on limited business matters. For Legal Advantage Plus, users pay a monthly flat fee and receive legal advice on various matters such as estate planning, family law, and tax. Under both plans, users receive "unlimited" 30-minute consultations with lawyers. Users may make appointments with participating lawyers or request to receive a phone call from the "first available" lawyer. Users may receive additional services directly from participating lawyers at a discounted fee rate. The "Join Our Attorney Network" page of the LegalZoom website states that lawyers do not pay LegalZoom to participate; the monthly subscription fees are retained by LegalZoom.

Rocket Lawyer offers what appear to be legal service plans to users for a monthly flat fee; subscribing users receive limited legal advice on document-related matters, such as

enforcing a legal document (called "document defense"). Users also receive a "free" 30-minute consultation with a lawyer, and can use the "ask a lawyer" section of its website for legal advice. Participating lawyers do not pay Rocket Lawyer but agree to offer a discounted fee for additional services; Rocket Lawyer retains the monthly subscription fees.

The Committees find that the LegalZoom and Rocket Lawyer websites appear to offer legal service plans to paying subscribers, rather than an attorney referral service. *Rule of Professional Conduct* 7.3(e)(4) governs legal service plans. That *Rule* permits a "bona fide organization" to "recommend[], furnish[,] or pay[]" for legal services to its "members or beneficiaries" under certain conditions. If the organization is for profit, the legal services cannot be rendered by lawyers "employed, directed, supervised or selected by it . . . ." *RPC* 7.3(e)(4)(i). The participating lawyers must be separate and apart from the bona fide organization and cannot be affiliated or associated with it. *RPC* 7.3(e)(4)(ii) and (iii). The member or beneficiary must be recognized as the client of the lawyer, not of the organization. *RPC* 7.3(e)(4)(iv). The member or beneficiary must be entitled to select counsel other than that furnished, selected, or approved by the organization for the matter (though the switch in counsel may be at the member's or beneficiary's own expense). *RPC* 7.3(e)(4)(v). Participating lawyers must not have any cause to know that the organization is in violation of applicable laws, rules, or legal requirements. *RPC* 7.4(e)(4)(vi). Lastly, the organization must register its plan with the Supreme Court (Administrative Office of the Courts, Professional Services). *RPC* 7.4(e)(4)(vii).

LegalZoom submitted a response that stressed that its employees do not provide legal advice or assistance; it merely offers prepaid legal service plans. It stated that it contracts with a New Jersey law firm to provide legal consultations for its members and pays this law firm a monthly capitated fee per plan member in New Jersey.

Rocket Lawyer submitted a response, including its Service Provider Agreement. It stated that it offers prepaid legal service plans through independent lawyers who are not employees of the company. The Service Provider Services Appendix A states that participating lawyers are paid an undisclosed sum by Rocket Lawyer for participation in the "Q&A Service."

The LegalZoom and Rocket Lawyer offerings appear to be legal service plans, as they "furnish" and "pay for" limited legal services through outside participating lawyers to "members" who pay a monthly subscription ("membership") fee. Members select lawyers from the respective websites; participating lawyers are not officially affiliated with LegalZoom or Rocket Lawyer; and members become clients of the participating lawyer. As of the date of this Joint Opinion, however, neither organization has registered a legal service plan with the Administrative Office of the Courts. Therefore, New Jersey lawyers may not provide legal services to members of these unregistered legal service plans.

The Avvo plans do not meet the definition for legal service plans; they are pay-for-service plans. There are no "members or beneficiaries" to whom legal services are "furnished" and "paid for" through a legal service plan.

As noted above, Inquirer asked four questions. The first question asks whether lawyers who participate in these programs are engaged in impermissible fee sharing in violation of *Rule of Professional Conduct* 5.4(a) ("[a] lawyer shall not share legal fees with a nonlawyer"). The

Committees find that the Avvo business model violates *Rule of Professional Conduct* 5.4(a). The participating lawyer receives the set price for the legal service provided, then pays a portion of that amount to Avvo. The label Avvo assigns to this payment ("marketing fee") does not determine the purpose of the fee. *In re Weinroth*, 100 *N.J.* 343, 349-50 (1985) (referral fee was disguised as a credit for future legal services to client; law firm was aware that client intended to forward that amount to the nonlawyer who referred the firm the case); *In re Maran*, 80 *N.J.* 160 (1979) (improper referral fee to a doctor took the form of an inflated medical bill). Here, lawyers pay a portion of the legal fee earned to a nonlawyer; this is impermissible fee sharing, prohibited under *Rule of Professional Conduct* 5.4(a). *See also In re Bregg*, 61 *N.J.* 476 (1972); Joint ACPE Opinion 716/UPL Opinion 45 (June 2009).

The Committees further find that the monthly subscription fees paid by consumers to LegalZoom and Rocket Lawyer for the "free" consultations with lawyers do not violate this *Rule*. Those monthly subscription fees are not paid to the lawyers providing the service; the lawyers have not shared their legal fees. In legal service plans, members pay membership fees to the plan and, in return, get access to limited legal services by participating lawyers. Participating lawyers usually are paid a lump per-capita amount by the plan for providing the limited-scope legal services to plan members who select them.

The second question presented by Inquirer asks whether these services unduly interfere with the lawyer's professional judgment in violation of *Rule of Professional Conduct* 5.4(c). This *Rule* provides that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Inquirer suggested that Avvo directs or regulates the lawyer's professional judgment because it "defines the scope of the legal services offered, receives payment from clients, sets the fee and pays lawyers only when legal tasks are completed." The Committees disagree. Avvo does not insert itself into the legal consultation in a manner that would interfere with the lawyer's professional judgment.

As for LegalZoom and Rocket Lawyer, Inquirer suggested that lawyers may be constricted in the service they provide for clients in the limited phone consultations. Again, however, this is the nature of legal service plans. Members get a limited consultation with participating lawyers and if the member needs more, they can retain the lawyer separately (usually at a discounted rate).

The third question presented by Inquirer asks whether the companies offer impermissible attorney referral services. *Rule of Professional Conduct* 7.2(c) provides in relevant part:

> A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; . . . and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

Rule of Professional Conduct 7.3(d) provides:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by the client except that the lawyer may pay for public communications permitted by *RPC* 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

Accordingly, the *Rules* prohibit a lawyer from giving anything of value to a person for recommending the lawyer's services, or compensating or giving anything of value to a person or organization to secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client. *RPC* 7.2(c); *RPC* 7.3(d). Both of these *Rules* provide that lawyers may, however, "pay the reasonable cost of advertising" or "public communication."

The Committees find that the "marketing fee" that lawyers pay Avvo after providing legal services to clients is not for the "reasonable cost of advertising" but, instead, is an impermissible referral fee. The fee "bears no relationship to advertising." ACPE Opinion 481 (May 1981); Joint ACPE Opinion 716 / UPL Opinion 45 (June 2009). Rather, it is a fee that varies with the cost of the legal service provided by the lawyer, and is paid only after the lawyer has completed rendering legal services to a client who was referred to the lawyer by Avvo.

Lawyers may "advertise" by placing an ad on the Avvo website or participating in other parts of the website without paying this "marketing fee." Lawyers may pay a set, flat amount for *potential* client inquiries or "leads" that may or may not result in retention of a client for a specific matter, but they may not pay a fee in exchange for referral or retention of a client for a specific case. CAA Opinion 43 (June 2011). This service offered by Avvo is a lawyer referral program that does not conform to the requirements of *Rule of Professional Conduct* 7.2(c) and *Rule of Professional Conduct* 7.3(d). Accordingly, New Jersey lawyers may not participate in the program.

The Committee on Attorney Advertising has issued several opinions on the distinction between "advertising" and an impermissible referral service. *See, e.g.*, CAA Opinion 13 (October 1992); CAA Opinion 43 (June 2011). Because the companies at issue in those opinions did not charge a fee for each case a lawyer received (as opposed to inquiries or "leads"), the opinions focused on whether the companies were making improper statements or restricting information about the participating lawyers. When the lawyers pay a fee to the company based on the retention of the lawyer by the client or the establishment of an attorney-client relationship, the answer to the inquiry is simple: the company operates an impermissible referral service.

LegalZoom and Rocket Lawyer offer what appear to be legal service plans through a different business model. Participating lawyers do not pay referral fees to those companies.

The fourth question raised by Inquirer asks whether payment of the legal fee by the user to Avvo violates *Rule* 1:28A-2, which requires lawyers to maintain a trust account registered with the IOLTA program. Avvo holds the legal fee until the services are performed and then electronically transfers the monies to the law firm bank account.

In New Jersey, lawyers are not required to hold advance payment of fees in their trust account absent an agreement with the client; while that is the better practice, they may deposit such monies in their operating account. *In re Stern*, 92 *N.J.* 611 (1983); Michels, K., *New Jersey Attorney Ethics*, § 8:4-3a, p. 126-27 (Gann 2017). The arrangement by Avvo does not violate *Rule* 1:28A-2.

The Committees notified Avvo, LegalZoom, and Rocket Lawyer that they were considering whether New Jersey lawyers may, consistent with the rules governing attorney ethics and advertising, participate in their programs, and requested written responses setting forth their position. In its response, Avvo claimed to be serving a public purpose of improving access to legal services. The Committees acknowledge that improving access to legal services is commendable, but participating lawyers must still adhere to ethical standards.

Avvo stated that it is not recommending or referring lawyers to potential clients. The Committees disagree; Avvo is connecting its users to the lawyers who have signed up with Avvo to provide those specific services. Avvo asserted, in essence, that all lawyers licensed in a jurisdiction are listed on its pages and, conceivably, a user could select any lawyer, even those who do not participate in this service, by merely finding that lawyer's contact information on its site and reaching out directly to that lawyer for representation. Avvo is conflating its two services – the attorney-referral service and the attorney-directory service. Only those lawyers participating in the "Avvo Legal Services" plan can provide users with the requested legal services. It is irrelevant that other lawyers can be found on the general lawyer directory.

Avvo claimed that the "marketing fee" is not a referral fee but an advertising cost, and because the "marketing fee" is a separate transaction, there is no improper fee sharing. The label and timing of the fee does not transform it into an advertising cost. This fee varies depending on the cost of the legal service provided, which is inconsistent with the essential elements of an advertising cost. Avvo defended the varying amounts of its "marketing fees" by stating that in the online market, bigger-ticket services should have bigger-ticket fees. It stated that it spends more to advertise the range of services and takes a bigger payment processing risk for more expensive services. The Committees are not convinced that the sliding scale of fees for legal services rendered bear any relation to marketing.

Avvo asserted that its marketing scheme is commercial speech that must be tested against the intermediate scrutiny standard applied to First Amendment commercial speech. The Committees are not restricting Avvo's marketing; the focus of this Joint Opinion is on the for-profit lawyer referral program and sharing of a legal fee with a nonlawyer. The First Amendment does not protect lawyers who seek to participate in prohibited attorney referral programs or engage in impermissible fee sharing.

Avvo further asserted that fee sharing is only unethical if it compromises the lawyer's professional judgment. The Committees acknowledge that concerns about independent professional judgment undergird the prohibition on sharing legal fees with nonlawyers. But the precedent in New Jersey, in case law, opinions, and the language of the *Rule of Professional Conduct* itself, do not restrict the prohibition to situations where there is a clear connection between the fee sharing and the lawyer's professional judgment. *See, e.g., In re Weinroth*, 100

N.J. 343, 349-50 (1985) ("The prohibition of the Disciplinary Rule is clear. It simply forbids the splitting or sharing of a legal fee by an attorney with a lay person, particularly when the division of the fee is intended to compensate such a person for recommending or obtaining a client for the attorney"). Sharing fees with a nonlawyer is prohibited, without qualification.

Avvo acknowledged that what it calls its "pay-per-action" model may look like a referral fee. It asserted that its model is permitted because the user chooses the lawyer, no "runners" are involved, and there is no element of deception in the Avvo website. The prohibition on for-profit referral fees or sharing legal fees with a nonlawyer does not depend on whether deception is involved; as noted above, it is unqualified.

One need not parse the Avvo website to determine if the language used improperly restricts choice or directs users to a particular lawyer. Avvo charges a pay-per-legal-service fee, which is a hallmark of an attorney referral service.

The Committees reviewed advisory opinions about Avvo-type companies issued by other states. Ohio found that the "marketing fee" was not payment for advertising but, rather, a referral fee because the amount is based on a percentage of the fee for rendering legal services. Supreme Court of Ohio, Board of Professional Conduct, Opinion 2016-3 (June 3, 2016).

> Even where a business model states that it does not engage in impermissible fee splitting because the fees are separated into two different transactions or are called a "marketing fee" or similar term, fee splitting with a nonlawyer likely occurs. Such fees are not traditional advertising fees, as outlined in Adv. Op. 2001-2. Unlike advertising fees that are fixed amounts and paid for a fixed period of time, these "marketing fees" are a percentage of the fee generated on each legal service completed by the lawyer. Therefore, a fee-splitting arrangement that is dependent on the number of clients obtained or the legal fee earned does not comport with the Rules of Professional Conduct.

South Carolina found that the arrangement violates *Rule of Professional Conduct* 5.4(a), improper fee-sharing, and *Rule of Professional Conduct* 7.2(c), improper referral fee. South Carolina Ethics Advisory Opinion 16-06 (July 14, 2016). As for fee-sharing, South Carolina stated:

> In the situation described above, the service collects the entire fee and transmits it to the attorney at the conclusion of the case. In a separate transaction, the service receives a fee for its efforts, which is apparently directly related to the amount of the fee earned in the case. The fact that there is a separate transaction in which the service is paid does not mean that the arrangement is not fee splitting as described in the Rules of Professional Conduct.
>
> A lawyer cannot do indirectly what would be prohibited if done directly. Allowing the service to indirectly take a portion of the attorney's fee by disguising it in two separate transactions does not negate the fact that the service is claiming a certain portion of the fee earned by the lawyer as its "per service marketing fee."

South Carolina further found that the payment by the lawyer to the company is not payment for the cost of advertisement but, rather, a referral fee. It stated:

> The service, however, purports to charge the lawyer a fee based on the type of service the lawyer has performed rather than a fixed fee for the advertisement, or a fee per inquiry or "click." In essence, the service's charges amount to a contingency advertising fee arrangement rather than a cost that can be assessed for reasonableness by looking at market rate or comparable services.
>
> Presumably, it does not cost the service any more to advertise online for a family law matter than for the preparation of corporate documents. There does not seem to be any rational basis for charging the attorney more for the advertising services of one type of case versus another. For example, a newspaper or radio ad would cost the same whether a lawyer was advertising his services as a criminal defense lawyer or a family law attorney. The cost of the ad may vary from publication to publication, but the ad cost would not be dependent on the type of legal service offered.

Pennsylvania also found impermissible fee-sharing. Pennsylvania Bar Association, Legal Ethics and Professional Responsibility Committee Formal Opinion 2016-200 (September 2016). It stated:

> The manner in which the payments are structured is not dispositive of whether the lawyer's payment to the Business constitutes fee sharing. Rather, the manner in which the amount of the "marketing fee" is established, taken in conjunction with what the lawyer is supposedly paying for, leads to the conclusion that the lawyer's payment of such "marketing fees" constitutes impermissible fee sharing with a non-lawyer.

Pennsylvania further found that the "marketing fee" was not the "usual cost of advertising" within the meaning of *Rule of Professional Conduct* 7.2(c). It stated: "The cost of advertising does not vary depending upon whether the advertising succeeded in bringing in business, or on the amount of revenue generated by a matter."

In sum, the Committees find that the Avvo website offers an impermissible referral service, in violation of *Rules of Professional Conduct* 7.2(c) and 7.3(d), as well as improper fee sharing with a nonlawyer in violation of *Rule of Professional Conduct* 5.4(a). LegalZoom and Rocket Lawyer avoid those problems but appear to be offering legal service plans that have not been registered pursuant to *Rule of Professional Conduct* 7.3(e)(4)(vii). New Jersey lawyers may not participate in the Avvo legal service programs. In addition, New Jersey lawyers may not participate in the LegalZoom or Rocket Lawyer legal service plans because they are not registered with the New Jersey Supreme Court (Administrative Office of the Courts).

NOTICE TO THE BAR

ATTORNEY ADVERTISING OF AWARDS, HONORS, AND ACCOLADES THAT COMPARE A LAWYER'S SERVICES TO OTHER LAWYERS' SERVICES – REMINDER FROM THE COMMITTEE ON ATTORNEY ADVERTISING

The Supreme Court Committee on Attorney Advertising has received numerous grievances regarding attorney advertising of awards, honors, and accolades that compare a lawyer's services to other lawyers' services. Examples of such awards, honors, and accolades are: "Super Lawyers," "Rising Stars," Best Lawyers," "Superior Attorney," "Leading Lawyer," "Top-Rated Counsel," numerical ratings, and the like. The Committee issues this Notice to the Bar to remind lawyers that they may refer to such awards, honors, and accolades only when the basis for the comparison can be verified and the organization has made adequate inquiry into the fitness of the individual lawyer. Further, whenever permissible references to comparative awards, honors, and accolades are made, Rule of Professional Conduct 7.1 requires that additional language be displayed to provide explanation and context.

As a preliminary matter, a lawyer who seeks to advertise the receipt of an award, honor, or accolade that compares the lawyer's services to other lawyers' services must first ascertain whether the organization conferring the award has made "inquiry into the attorney's fitness." Official Comment to Rule of Professional Conduct 7.1. "The rating or certifying methodology must have included inquiry into the lawyer's qualifications and considered those qualifications in selecting the lawyer for inclusion." In re Opinion 39, 197 N.J. 66, 76 (2008); *see also* Committee on Attorney Advertising Opinion 42 (December 2010). This inquiry into the lawyer's fitness must be more rigorous than a simple tally of the lawyer's years of practice and lack of disciplinary history. Pursuant to Rule of Professional Conduct 7.1(a)(3)(ii), the basis for the comparison must be substantiated, bona fide, and verifiable.

The Committee has reviewed numerous awards, honors, and accolades that do not include a bona fide inquiry into the fitness of the lawyer. Some of these awards are the result of popularity contests – the lawyer "wins" the award when enough people email, telephone, or text their vote. Other awards are issued for a price or as a "reward" for joining an organization. Still others are generated based in large part on the participation of the lawyer with the conferring organization's website. For example, a lawyer can enhance his or her "rating" with the organization by endorsing other lawyers, becoming endorsed in return, responding to questions from the public about legal matters on the organization's website, and the like. Factors such as the payment of money for the issuance of the award; membership in the organization that will issue the award; and a level of participation on the organization's Internet website render such awards suspect. Lawyers may not advertise receipt of such awards unless, as a threshold matter, the conferring organization made adequate and individualized inquiry into the professional fitness of the lawyer.

When an award, honor, or accolade meets this preliminary test, the lawyer must include additional information when referring to it in attorney advertising, whether that advertising be a website, law firm letterhead, lawyer email signature block, or other form of communication. First, the lawyer must provide a description of the standard or methodology on which the award, honor, or accolade is based, either in the advertising itself or by reference to a "convenient, publicly available source." Official Comment to RPC 7.1. Second, the lawyer must include the name of the comparing organization that issued the award (note that the name of the organization is often different from the name of the award or the name of the magazine in which the award results were published). RPC 7.1(a)(3)(i). Third, the lawyer must include this disclaimer "in a readily discernible manner: 'No aspect of this advertisement has been approved by the Supreme Court of New Jersey.'" RPC 7.1(a)(3)(iii). All of this additional, accompanying language must be presented in proximity to the reference to the award, honor, or accolade.

Further, when the name of an award, honor, or accolade contains a superlative, such as "super," "best," "superior," "leading," "top-rated," or the like, the advertising must state only that the lawyer was included in the list with that name, and not suggest that the lawyer has that attribute. Hence, a lawyer may state that he or she was included in the list called "Super Lawyers" or "The Best Lawyers in America," and must not describe the lawyer as being a "Super Lawyer" or the "Best Lawyer."

Lastly, the Committee has reviewed numerous law firm advertising that includes badges or logos of comparative awards (such as the yellow "Super Lawyers" badge) but does not include the required additional information in a discernible manner in proximity to the reference to the award. Every reference to such an award, honor, or accolade – even when it is in an abbreviated form such as the badge or logo – must include the required accompanying information: (1) a description of the standard or methodology; (2) the name of the comparing organization that issued the award; (3) the statement "No aspect of this advertisement has been approved by the Supreme Court of New Jersey." Only the description of the standard or methodology can be presented by reference (with the statement that the standard or methodology can be viewed at that website or hyperlinked page). The other required information must be stated on the face of the advertising, readily discernible and in proximity to the reference to the award. The accompanying information cannot be buried at the bottom of a page, or in tiny print, or placed outside the screen shot on a website.

For example, a reference to the Super Lawyers accolade should provide:

> Jane Doe was selected to the 2016 Super Lawyers list. The Super Lawyers list is issued by Thomson Reuters. A description of the selection methodology can be found at www.superlawyers.com/about/selection_process_detail.html. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.

Lawyers who seek further assistance as to compliance with the rules governing attorney advertising may make inquiry of the Committee on Attorney Advertising. See Court Rules 1:19A-3 and 1:19A-8.

/s/ Jonathan M. Korn

Jonathan M. Korn
Chair, Committee on Attorney Advertising

Dated: May 4, 2016

-- *N.J.L.J.* --

(November , 2015)

Issued by ACPE October 30, 2015

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

OPINION 729

Lawyers May Not Threaten Sanctions for Noncompliance When Sending a Subpoena *Duces Tecum* by Mail

The Advisory Committee on Professional Ethics received an inquiry from a lawyer who asked whether, consistent with the *Rules of Professional Conduct*, he may include language threatening sanctions for noncompliance when he sends a subpoena *duces tecum* by mail. As sanctions may only be imposed when the subpoena is served personally, and not by mail, Inquirer suggested that such a threat may be "a false statement of material fact or law to a third person" in violation of *Rule of Professional Conduct* 4.1(a)(1). The Committee agrees that subpoenas sent by mail should not include language threatening sanctions. The Committee declines to find that such language is, in all cases, a "false statement" but it warns lawyers that including this threat in subpoenas that are mailed is, at a minimum, inaccurate and misleading.

A subpoena for taking of depositions and/or the production of documents in a civil action must be issued and served "as prescribed by Rule 1:9." *R.* 4:14-7(a). *Rule*

1:9-3 requires that subpoenas be served personally. Failure to obey a subpoena is deemed contempt of court. *R.* 1:9-4. When a subpoena is sent by ordinary mail instead of being served personally, a recipient who fails to obey the subpoena cannot be deemed in contempt of court as the court lacks personal jurisdiction over the recipient.

Parties and witnesses may reach an agreement regarding mailed subpoenas. Such an agreement, however, does not provide a court with contempt power for failure to comply with a mailed subpoena. "The service of document subpoenas by mail may be an effective way of conducting discovery when all involved are willing to cooperate . . . [but] [m]ail service is not an effective manner of serving a subpoena on an unwilling non-party under the New Jersey Rules of Court . . . ." *NJ Cure v. Estate of Robert Hamilton*, 407 *N.J. Super.* 247, 250 (App. Div. 2009).

The Committee is aware that it has become common and longstanding practice for lawyers to include language in a subpoena stating that the recipient can be considered in contempt of court and face sanctions if he or she does not comply. Such language is accurate when the subpoena is served personally. If the subpoena is mailed, failure to comply does not subject the recipient to sanctions since the sender would need to take an interim step – personally serve the subpoena – prior to seeking sanctions.

The Committee does not find that the threat is a "false statement" under *Rule of Professional Conduct* 4.1(a), but it hereby provides notice to the bar that the language misstates what the immediate consequences are for the recipient of a mailed subpoena. Going forward, lawyers who intentionally include such language in mailed subpoenas, threatening the recipient with sanctions for noncompliance, may be violating *Rule of Professional Conduct* 8.4(c) (conduct involving misrepresentation).

125 N.J. 2 (1991)
592 A.2d 527

MARY CHENG LIN WANG, AS ASSIGNEE OF RONALD FIORI, AND THERESA FIORI, HIS WIFE, RICHARD FIORI, AND WILLIAM D. FRANKS, PLAINTIFFS-RESPONDENTS,

v.

THE ALLSTATE INSURANCE CO., AN INSURANCE COMPANY LICENSED TO DO BUSINESS IN THE STATE OF NEW JERSEY, FRANK METZGER, AND NEW JERSEY MANUFACTURERS INSURANCE CO., AN INSURANCE COMPANY LICENSED TO DO BUSINESS IN THE STATE OF NEW JERSEY, DEFENDANTS-APPELLANTS, AND THE ABC AGENCY (FICTITIOUS NAME), A CORPORATION OR PROPRIETORSHIP PROVIDING INSURANCE SERVICE TO THE PUBLIC, JOHN DOE (FICTITIOUS NAME), AND RICHARD ROE (FICTITIOUS NAME), DEFENDANTS.

The Supreme Court of New Jersey.

Argued February 25, 1991.
Decided June 26, 1991.

3 *3 *David J. D'Aloia* argued the cause for appellants The Allstate Insurance Co., and Frank Metzger (*Saiber, Schlesinger, Satz & Goldstein,* attorneys; *David J. D'Aloia* and *Dorothy J. Nemetz,* on the briefs).

Edward B. Deutsch argued the cause for appellant New Jersey Manufacturers Insurance Co. (*McElroy, Deutsch & Mulvaney,* attorneys; *William T. McElroy,* of counsel; *Moira E. O'Connell,* on the briefs).

Gary C. Algeier argued the cause for respondents (*Rand, Algeier, Tosti & Woodruff,* attorneys; *Ellen S. Bass,* on the brief).

The opinion of the Court was delivered by O'BRIEN, J.A.D. (temporarily assigned).

This appeal concerns the duty of insurance companies and their agents to advise their insureds, on renewal of a homeowner's policy, of the potential inadequacy of their personal liability coverage.

I

4 On February 3, 1983, Mary Cheng Lin Wang sustained substantial personal injuries when her car collided with a tree *4 allegedly because two dogs ran into the roadway in front of her. One of the dogs was owned by Ronald, Theresa, and Richard Fiori, and the other by William and Dorothy Franks. In January 1985, Wang instituted suit for damages for her personal injuries against the Fioris and the Frankses because of their failure properly to control their dogs.

Both the Fioris and the Frankses had homeowner policies containing liability coverage for bodily injury and property damage. The Fioris had purchased their home for $17,500 in 1963, at which time they obtained their homeowner's policy from defendant The Allstate Insurance Co. (Allstate) through its agent, defendant Frank Metzger. The policy contained "family" liability coverage in the amount of $25,000. The Frankses purchased their home for $49,000 in 1977, at which time they obtained their homeowner's policy from defendant New Jersey Manufacturers Insurance Co. (NJM), a direct provider. Their policy too contained personal liability coverage in the amount of $25,000. Both policies had been renewed over the years, with the $25,000 limit in each for personal liability coverage remaining unchanged and were in effect when Wang suffered her injuries.

The Fioris and Frankses notified their respective insurance carriers, Allstate and NJM, of the Wang suit. Each carrier conceded coverage, assigned counsel, and provided a defense for its insured. Because of the substantial injuries claimed by Wang, the potential liability of the Fioris and the Frankses exceeded the liability coverage in their homeowners' policies and they retained personal counsel. Both insurance carriers agreed to deposit their policy limits with the Clerk of the Superior Court. Hence, by separate orders dated April 12, 1985, $25,000 was deposited with the Clerk on behalf of the Fioris and $25,000 was deposited on behalf of the Frankses, creating a fund in the total amount of $50,000.

Because Wang's counsel considered the deposited sum inadequate to compensate for her injuries, settlement negotiations were
5 begun with personal counsel for the Fioris and Frankses. *5 Counsel for Wang met with the Fioris and their personal attorney on March 25, 1986. According to a certification of Wang's counsel, the Fioris informed him they had "never received any information regarding increasing their liability coverage from either Allstate or Mr. Metzger," and they had "relied on Metzger's expertise and knowledge regarding available insurance coverages and the limits of coverage appropriate in determining their insurance needs." On November 25, 1985, Wang's counsel had met with the Frankses and their personal attorney, at which time Mr. Franks told him he had received no information or advice from NJM suggesting that he increase his liability coverage, characterized in the certification as "unusually low." Franks further said he "had no expertise in the area of insurance and [NJM] had been recommended to him as a carrier which could adequately meet his insurance needs." Based on that information, Wang's counsel concluded that the Fioris and Frankses had viable causes of action against their respective insurance carriers under the standards set forth in *Rider v. Lynch*, 42 N.J. 465, 201 A.2d 561 (1964), and other cases establishing the duty owed by brokers and insurance companies to their insureds.

Negotiations continued, culminating in a settlement agreement in March 1987. Under the terms of that agreement, judgments were to be entered in favor of Wang and against the Fioris and Mr. Franks in the sum of $600,000 plus prejudgment interest. Mrs. Franks chose not to be a party to the proposed settlement agreement and thus negotiations concerning the Frankses were with Mr. Franks only. For their part, the Fioris and Mr. Franks would assign to Wang any claim or cause of action they had against their insurance carriers, Allstate and NJM, and any agents of those carriers. In consideration for the assignments, Wang agreed to forbear from execution on the consent judgment and, upon conclusion or settlement of her suit as assignee against the insurance carriers, she would provide the Fioris and Mr. Franks with a warrant for satisfaction of the judgment.

6 *6 In March 1987, Ronald Fiori, his wife, Theresa, and their son, Richard (an additional insured under the Allstate homeowner's policy), executed separate assignments to Wang, for all claims, demands and causes of action against Allstate and its agent. Each assignment describes the acts of Allstate and its agent as

> includ[ing] their willful, wanton and intentional violation of my rights under a policy issued for protection from personal liability for damages arising from an occurrence, including a failure to provide appropriate, adequate and professional advice and counsel relating to the terms of renewal of the insurance policy issued to me for coverage on my home, including liability for negligent acts of me and my family, and for the failure to properly counsel and advise regarding the need or advisability to increase liability coverage limits and the failure to put my interest, as the policyholder and client, ahead of their own self-interest; which actions were unreasonable, wrongful, negligent, a breach of duty, a violation of the implied covenant of good faith and fair dealing, and a breach of fiduciary duty, and resulted unnecessarily in uninsured exposure, and underinsured status, and potential personal liability to me[.]

Each assignment incorporates the terms of the settlement. In addition, each of the Fioris agreed to cooperate

> as reasonably may be required of me in any case which may be brought by Ms. Wang involving said insurance coverage; said cooperation includes testifying at deposition and/or trial, but is not limited solely to those facets of cooperation.

On April 8, 1987, Mr. Franks signed an identical assignment.

All the settlement negotiations culminating in the execution of the assignments in March and April 1987 were conducted without the knowledge of Allstate and NJM or the lawyers who had been assigned by the carriers to represent the insureds. However, Wang's counsel and personal counsel for the Fioris and the Frankses decided that the terms of the settlement should be discussed in a conference before the court. Thus, on June 9, 1987, the attorney for Wang, private counsel for the Fioris and Mr. Franks, as well as counsel assigned by Allstate and NJM, who were of record in the Wang suit against the Fioris and the Frankses, appeared before the assignment judge to discuss the terms of the settlement. At that conference, the Fioris and Mr. Franks agreed to provide their respective carriers with a release of the covenant to defend and investigate. In return, counsel
7 assigned by the insurance companies agreed *7 to provide substitutions of attorney in favor of the insureds' personal counsel, who would in turn affix their consents to the proposed consent judgments.

On November 19, 1987, Mr. Franks executed a release and indemnification agreement to NJM. Mr. Franks acknowledged in the release that NJM had fully and properly performed its obligations under the policy, and had retained competent legal counsel to defend him against those claims. He further acknowledged that NJM and assigned counsel had properly and fully investigated and defended the lawsuit and prepared his defense in time for the trial which had been scheduled for June 15, 1987. The

release contained a further acknowledgment that NJM and the assigned counsel had not been informed of the negotiations leading to the settlement or execution of the assignment until one week prior to the status conference on June 8, 1987. In consideration of the release, the NJM designated counsel executed a substitution of attorney in favor of Franks' personal attorney. Allstate did not obtain a similar release from the Fioris; nonetheless counsel assigned by Allstate to represent them apparently gave their personal counsel a similar substitution of attorney.

Pursuant to the settlement, the court entered separate consent orders for judgment on March 4, 1988, against the Fioris and Mr. Franks, each in the amount of $600,000 plus prejudgment interest in the amount of $194,983.87, for a total of $794,983.87 plus costs. The orders provide that both judgments represent joint and several liability for the entire amount of the judgment for all defendants except Dorothy Franks. The record does not disclose the disposition of the case as to her. By separate order of March 4, 1988, the court released to Wang the $50,000 deposited with the Clerk, together with any interest it may have earned.

II

8 Wang, as assignee of the Fioris and Mr. Franks, filed a six-count complaint in the Chancery Division against Allstate, *8 Metzger, NJM, and three fictitious parties, seeking reformation of the insurance policies "to provide personal liability coverage limits in an amount sufficient to insure against personal exposure for the losses sustained by plaintiff." The complaint also seeks compensatory damages, attorneys' fees, interest, and costs.

The first count identifies the parties and sets forth the facts of Wang's accident and injuries, and her lawsuit, the insurance policies issued by Allstate and NJM, and the terms of the settlement of Wang's suit. It further states that the settlement was entered into in good faith and that the amount of the consent judgments represent reasonable and fair compensation for Wang's injuries. It also alleges that when the Fioris and Mr. Franks purchased their insurance, "it was their intention that their personal liability coverage carry limits sufficient to adequately protect them against exposure to personal liability for third party losses" and that that intention had continued through each renewal, "giving due consideration to the appreciated value of their homes, inflationary trends, and the increasing recoveries of tort victims." It further alleged that Allstate and NJM "did not adequately protect the Fioris and Mr. Franks from personal exposure to liability and accordingly, did not provide the coverage intended by" them. The complaint alleges that as a proximate result of that conduct the Fioris and Franks were exposed to personal liability for Wang's injuries.

The second count is against only Allstate and Metzger and asserts that the Fioris relied on the knowledge and expertise of Metzger, "who held himself out to the public as an insurance broker knowledgeable about policies of insurance and available coverage, and the amounts of coverage appropriate to insure adequate protection against liability losses." It then alleges breach of the following duty:

> In his capacity as an insurance broker, Metzger owed the Fioris a duty to advise them of the limits of insurance coverage necessary to protect their interests, including, but not limited to a duty to periodically and regularly
> 9 advise them of a need to increase the limits on that insurance coverage in light *9 of the appreciated value of their home, inflationary trends in the area, and increased recoveries being awarded to tort victims.

The third count alleges breach of that same duty by Allstate. The fourth count asserts similar allegations concerning NJM. The fifth count asserts a breach of fiduciary duty, and the sixth count alleges a breach of a duty of good faith and fair dealing.

NJM filed an answer, a third-party complaint against Mr. Franks for indemnification, and a counterclaim against Wang. Allstate also filed an answer.

III

Before any discovery had been conducted, Allstate, Metzger, and NJM moved to dismiss the complaint for failure to state a claim on which relief can be granted. While the motions refer to *Rule* 4:6-2(c), they actually sought dismissal under *Rule* 4:6-2(e). In response, Wang filed the certification of her attorney and the documents executed pursuant to the settlement. Pursuant to *Rule* 4:6-2(e), the court treated the motion as one for summary judgment.

Defendants' motion set forth three bases:

> (1) plaintiff irrevocably released the insureds from liability, thereby terminating the insurers' obligation to pay; (2) the insurers had no legal duty to review and advise the insureds continuously as to the sufficiency of coverage; and (3) New Jersey law prohibits assignments of tort claims.

Before the Chancery Division, Wang's counsel argued that the form of settlement used in this case had been sanctioned by us in *Griggs v. Bertram*, 88 N.J. 347, 443 A.2d 163 (1982). He described the alleged duty as "simply at some point during the course of this insurance broker's relationship with the Fioris [he would] at least advise them there's inflation, verdicts are going up, you might at least think about increasing liability coverage on your home."

The court found defendants did not have the duty alleged by Wang. Concluding that no prior case had established a duty as Wang alleged, the court stated:

10 > *10 I don't find that there is decisional authority that supports that suggestion that the Court ought, on its own to create a new super duty applicable in these situations where there is an unfortunate tort that creates horrible injuries as apparently was the case with Miss Wang and for which, unless somebody like a court after the fact raises the insurance limit she will be left uncompensated for the injuries that she suffered. I say it's for a different and higher court to decide that this super duty does exist and the Court finds there is no decisional authority for its extant and declines to create it itself and on Point Two grants summary judgment.

As a separate and independent basis for dismissal of the complaint, the Chancery Division also found that the irrevocable release granted to the insureds by Wang resulted in their having no legal liability to her, in effect discharging the insurance companies. It did not decide whether the assignment was barred as being an assignment of a tort claim.

The Appellate Division reversed the judgment and remanded. Because it disagreed with the Chancery Division's conclusion on the two points decided, the Appellate Division addressed all three points defendants had raised. The court concluded that the assignment of the claims against the insurance companies, whether denominated tort or contract, did not violate public policy because the assignments had been made to a party who has been injured to the same extent as the insured by the insurance company's or agent's inaction, stating: "In effect, the assignee is asserting his or her own claim to which has been added an assurance that the insured will not separately hold the defendant liable."

Although recognizing that *Griggs* involved the virtual abandonment of an insured by a carrier, the Appellate Division observed that an assignment similar to those used here had been used in *Fireman's Fund Insurance Co. v. Security Insurance Co.*, 72 N.J. 63, 367 A.2d 864 (1976), in which the carrier had been found to have breached the implied covenant of good faith and fair dealing by not considering an offer to settle for an amount in excess of its policy limit. The Appellate Division concluded that the conduct of the insurance carriers as alleged in this case was sufficient to authorize the insureds to enter into that type of
11 settlement with Wang. It further *11 concluded that that procedure did not violate the "no action" clause of the policy, which generally precludes suit against the carrier before the insured's obligation has been fully determined by final judgment or by agreement among the claimant, the insured, and the carrier.

Concerning the existence of the duty alleged by Wang, which the court characterized as "[t]he harder issue in this case and one of first impression in the public liability area," the Appellate Division framed the issue as, "whether at the time of the reissuance of a policy an agent has a duty to inform the insured at best generally concerning the inadequacy of the former coverage." It then observed that plaintiff alleged the negligence of the insurance companies and the agent in failing to inform of the need to increase liability coverage despite three factors: "the appreciated value of their [homes], inflationary trends in the area, and increased recoveries being awarded to tort victims." The Appellate Division concluded: "On the pleadings alone we cannot say that no duty exists under the principles of *Rider v. Lynch*, 42 N.J. 465, 476, 201 A.2d 561 (1964), *Sobotor v. Prudential Property & Cas. Ins. Co.*, 200 N.J. Super. 333, 341, 491 A.2d 737 (App.Div. 1984), and their progeny." The court recognized that the weight of out-of-state authority tended to negate liability, citing *Hardt v. Brink*, 192 F. Supp. 879, 880-881 (W.D.Wash. 1961); *Jones v. Grewe*, 189 Cal. App.3d 950, 956-957, 234 Cal. Rptr. 717, 720-721 (1987); *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 544 (Minn. 1989); *Fleming v. Torrey*, 273 N.W.2d 169, 171 (S.D. 1978), but concluded that "the issue should be determined here only on a full record."

IV

We granted the insurance companies' and Metzger's petitions for certification, ___ N.J. ___ (1990), and now reverse the
12 Appellate Division and reinstate the judgment of the Chancery Division dismissing the complaint. We conclude there is *12 no

common law duty of a carrier or its agents to advise an insured concerning the possible need for higher policy limits upon renewal of the policy. If such a duty would be in the public interest, it is better established by comprehensive legislation, rather than by judicial decision. Because of those conclusions, we find it unnecessary to decide whether the insureds' hybrid claims against the carriers are legally assignable and whether the settlement terms, including the assignments agreed upon without participation by the carriers, violated the "no action" provisions of the policies. Nor need we address the effect of the terms of the settlement on the liability of the insurance carriers. Although the Chancery Division adopted as a separate basis for summary judgment the contention that the carriers were fully released as a result of the settlement, we express no opinion on that proposition. We therefore turn to the duty alleged by Wang.

A

Wang's brief suggests neither that carriers or agents should be responsible for reviewing every insured's personal circumstances and on that basis make personalized insurance coverage recommendations, nor that carriers should provide coverage that will protect an insured against any eventuality — an insurance policy "without limits" as described by one of the carriers. Nor does Wang seek to establish a new and expansive duty. Rather, she argues that defendants breached previously-recognized duties of care owed by insurance companies and/or their agents. She contends that

> [i]nsurance agents, who hold themselves out as having expertise in the area of insurance, owe some duty to their insureds to advise them of basic trends in insurance protection and to periodically advise them, in general terms, of the need to continually review the adequacy of their coverage as economic conditions change.

The seminal case in this jurisdiction concerning a broker's liability to an insured is *Rider v. Lynch, supra*, 42 N.J. 465, 201 A.2d 561, in which we said:

13 > *13 One who holds himself out to the public as an insurance broker is required to have the degree of skill and knowledge requisite to the calling. When engaged by a member of the public to obtain insurance, the law holds him to the exercise of good faith and reasonable skill, care and diligence in the execution of the commission. He is expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected. If he neglects to procure the insurance or if the policy is void or materially deficient or does not provide the coverage he undertook to supply, because of his failure to exercise the requisite skill or diligence, he becomes liable to his principal for the loss sustained thereby. [Id. at 476, 201 A.2d 561]

The duty ascribed to the broker in *Rider* was the foundation for the Appellate Division's decision in *Sobotor v. Prudential Property & Casualty Insurance Co., supra*, 200 N.J. Super. 333, 491 A.2d 737, in which the court ordered an automobile insurance policy reformed to increase the uninsured/underinsured motorist (UM/UIM) coverage because of the agent's failure to have provided the insured with the "best available" package of insurance, as the insured had requested. In dictum the Appellate Division said: "We see no reason why the duty owed by a broker to a client should differ from the duty owed by an agent. The difference between a broker and an agent lies in the duties and responsibilities owed to the insurance carrier, not to the insured." *Id.* at 337 n. 1, 491 A.2d 737. The Appellate Division concluded that a "duty arises when there is a *special relationship* between the insurance agent and the client which indicates reliance by the client on the agent." *Id.* at 338, 491 A.2d 737 (emphasis added).

A proliferation of cases dealing generally with the duty of brokers and agents to insureds concerning UM/UIM coverage followed, the majority of which involved renewal policies. See, *e.g.*, *Walker v. Atlantic Chrysler Plymouth*, 216 N.J. Super. 255, 523 A.2d 665 (App.Div. 1987); *Wasserman v. Wharton, Lyon & Lyon*, 223 N.J. Super. 394, 538 A.2d 1270 (App.Div. 1988); *Johnson v. MacMillan*, 233 N.J. Super. 56, 558 A.2d 24 (App.Div.), *rev'd on other grounds*, 118 N.J. 199, 570 A.2d 962 (1989). Other cases
14 address the duty in light of section 17(b) of The New Jersey Automobile Insurance Freedom of Choice and *14 Cost Containment Act of 1984, *L.* 1983, *c.* 362, and other statutory requirements. *See Dancy v. Popp*, 114 N.J. 570, 556 A.2d 312 (1989), *aff'g* 232 N.J. Super. 1, 556 A.2d 331 (App.Div. 1988); *Avery v. Arthur E. Armitage Agency*, 242 N.J. Super. 293, 576 A.2d 907 (App.Div. 1990); *Sikking v. Nelson*, 242 N.J. Super. 185, 576 A.2d 311 (App.Div. 1990). *But see Bruce v. James P. Mac Lean Firm*, 238 N.J. Super. 408, 570 A.2d 1 (App.Div. 1989), *aff'g* 238 N.J. Super. 501, 570 A.2d 49 (Law Div.) (agent has no affirmative duty to inform insured regarding UM/UIM coverage when insurer provides notice of availability of additional UM/UIM coverage by mailing of requisite statutory notices); *Pinto v. Garretson*, 237 N.J. Super. 444, 568 A.2d 119 (App.Div. 1989) (agent not liable for failure to communicate directly with insured to recommend purchase of additional UM/UIM coverage where insured

received the requisite statutory notice and specifically selected coverage options, and where coverage selection form clearly stated that insured should contact agent to inquire about higher limits of UM/UIM coverage); *cf.* Andriani v. New Jersey Mfrs. Ins. Co., 245 N.J. Super. 252, 584 A.2d 875 (App.Div. 1991) (no duty to inform on renewal of an automobile policy with minimum UIM coverage when the trial court found insurer notified insured of coverage rights and options and plaintiff never requested "the best insurance available").

B

Although we agree with the Appellate Division that the record in this case is sparse, it is not "devoid of any factual references other than those asserted in the pleadings by plaintiff." The record includes the settlement documents and the certification of Wang's counsel. Both the Appellate Division and we review the matter on the record made before the Chancery Division. While discovery had not yet begun when the motion was made, plaintiff responded with matters outside the pleadings which were not
15 excluded by the court and the motion then became one for summary judgment. Hence, our *15 review proceeds as one of a motion for summary judgment. See *Rule* 4:6-2(e).

The question of whether a duty exists is a matter of law properly decided by the court, not the jury, and is largely a question of fairness or policy. Strachan v. John F. Kennedy Memorial Hosp., 109 N.J. 523, 529, 538 A.2d 346 (1988). "The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solutions." Kelly v. Gwinnell, 96 N.J. 538, 544, 476 A.2d 1219 (1984); accord Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 583, 186 A.2d 291 (1962). Of course, the legal determination of the existence of a duty may differ, depending on the facts of the case.

We do not doubt that the principles of *Sobotor* and its progeny dealing with UM/UIM coverage may be applied to public liability coverage in a homeowner's policy. Nor do we exclude the possibility that there might be a set of circumstances under which the duty alleged in this case would arise, based on the "special relationship" found in the *Sobotor* case. However, in this case, no allegations of special relationship were contained in plaintiff's complaint, the assignments themselves, or the certification of Wang's counsel. As the Appellate Division noted, the assignment described the insurance carriers' dereliction as "[f]ailure to provide appropriate, adequate and professional advice and counsel relating to the terms of renewal of the insurance policy ... and for the failure to properly counsel and advise regarding the need or advisability to increase liability coverage limits."

In her complaint, Wang alleged that the duty breached by the insurers required them "to periodically and regularly advise [the insureds] of a need to increase the limits of [their] insurance coverage in light of the appreciated value of their home[s], inflationary trends in the area, and increased recoveries being awarded to tort victims." In the certification of Wang's counsel, he
16 simply reiterated the hearsay statements he had been *16 told by the Fioris and Mr. Franks. Hence the certification provides no evidence to support the allegations. *See* Murray v. Allstate Ins. Co., 209 N.J. Super. 163, 169, 507 A.2d 247 (App. Div. 1986) (affidavits must be limited to the affiant's personal knowledge of such facts as to which he is competent to testify and are admissible in evidence). *R.* 1:6-6.

The assignments required the Fioris and Mr. Franks to cooperate with plaintiff in maintaining her claim against the insurance companies. Neither the Fioris nor Mr. Franks, however, submitted an affidavit setting forth the circumstances under which their homeowners' policies had been renewed prior to February 3, 1983. They presented nothing to show the existence of any special relationship, such as that found to be a significant factor in the imposition of liability in the UM/UIM cases. Nor was the report of any expert presented to the Chancery Division, notwithstanding counsel's representation at oral argument before that court that evidence in the form of expert opinion could be presented. Plaintiff had every opportunity to submit any factual matters or expert opinion in defense against the motion, or to ask for additional time to present such material. See *R.* 4:6-2, *R.* 4:46-5(a). The absence of any affidavits from the insureds, as well as the statements attributed to them in counsel's certification, suggest there was no special relationship; rather that the policies had been routinely renewed, probably without any contact between the parties other than the issuance and receipt of the new policy and the issuance and payment of an invoice.

Accepting as true all the allegations in the pleadings, the statements in the assignments, and even the hearsay certification of Wang's counsel concerning the Fioris and Mr. Franks, we are left with the naked contention that when their homeowners' policies were renewed for the period including February 3, 1983, the day Wang was injured, Mr. Metzger and NJM had a duty to inform their insureds that $25,000 was inadequate to protect their assets from potential personal injury or property damage
17 claims because of the appreciated value of their *17 homes, inflationary trends in the area, and increased recoveries being awarded to tort victims. On the record in this case we are not prepared to find as a matter of law that insurance companies and their agents have such a duty.

That is not to say that a sound basis for the creation of such a duty may not be stated. We disagree with the insurers' contention at oral argument before us that fulfillment of such a duty would be impossible or even substantially inconvenient. In the present age of automation, a form of notice could certainly be generated and sent to an insured with the notice of renewal of his policy suggesting that the limits contained in the existing policy may be inadequate in light of inflation or other economic or social factors. In fact, such a notice would probably represent sound business practice. For example, in this case, the Fioris' policy had been in effect since 1963, when they purchased their home. Presumably, the fire and extended coverage portion of the homeowner's policy issued in 1963 was based on the purchase price of $17,500. The record does not reveal whether that coverage had been increased over the intervening years to reflect the obvious inflationary increase in the value of the home. In response to our inquiry at oral argument, counsel for Allstate told us that if the insurance company automatically increased fire and extended coverage limits, or suggested that insureds do so, that was because that coverage was based on market value coverage. However, if notice of such an increase in fire and extended coverage can readily be given to the insured, either as an accomplished fact or for an insured's decision to purchase, we see no reason why a similar notice could not be given with respect to personal-liability coverage. We recognize that insurance agents and their companies are not necessarily experts in the economy, and it may also be fair to say, as argued by the insurers, that any consumer is, or should be, aware of inflationary factors that have come to bear on all consumer products. However, an insurance company may be in a better position to relate those factors to insurance coverage than is the insured.

18 *18 The difficulty, however, with finding a duty to give such notice in the setting of a lawsuit, after the insured has become exposed beyond the policy limits is obvious. Initially, insurance companies have not been alerted to the existence of such a duty by prior case law or legislation so as to factor such a risk into premiums. *Rider, Sobotor,* and the many succeeding cases all deal with first-party UM/UIM coverage, not third-party liability coverage in a homeowner's policy. Furthermore, in those cases there usually was evidence of a special relationship, either in the form of an inquiry or request by the insured or a specific representation by the agent or broker. There is no such evidence in this case.

Moreover, the more recent UM/UIM cases consider statutory and regulatory dictates such as *N.J.S.A.* 39:6A-23 and *N.J.A.C.* 11:3-15.1 to 15.11 requiring insurance companies, brokers, and agents to provide written notice, a buyer's guide, and coverage selection forms for new automobile insurance, and *N.J.S.A.* 17:28-1.1, requiring minimum UM coverage and providing for increased coverage for UM/UIM as an option. We note that *N.J.A.C.* 11:3-15.6, establishing the minimum standard in preparation of the buyer's guide, requires that, after stating the required minimum coverages, the explanation of liability coverage must include the following:

> Higher limits of liability coverages are available at relatively low cost.
>
> If you cause an accident and don't have enough insurance to cover your legal responsibilities, you then are personally responsible and could lose some of your assets or spend years paying this debt.

There is no comparable statutory duty to notify or provide a buyer's guide or coverage selection form for a homeowner's policy. Of course, the Legislature could create such a duty. For example, *N.J.S.A.* 17:36-5.29 requires every homeowner's policy or other policy providing comprehensive personal-liability insurance to afford coverage against liability for payment of any obligation that the policyholder may incur to an injured domestic servant or household employee or the dependents thereof.

19 *19 Finally, it is difficult to fix the limits of such a proposed duty. The areas of potential liability are many and growing. Defining the scope of the duty would require us to address issues such as whether a broker or agent should be required to inform the insured of the availability of an umbrella policy to increase the coverage limits. Those and other difficult questions are best left to the legislative process. In that setting, such questions can be fully explored and debated with input from the public and the insurance industry before creation of such a duty.

V

We reiterate that the many variables arising out of such a duty suggest that its creation and limitations should more properly be the subject of full adjudication or legislation. In the limited context presented to us in this appeal, we are disinclined, as a matter of sound public policy, to announce an absolute duty, henceforth to be adhered to by all affected insurance companies. *See* Jackson v. Muhlenberg Hosp., 53 N.J. 138, 142, 249 A.2d 65 (1969).

The judgment of the Appellate Division is reversed, and that of the Chancery Division dismissing the complaint is reinstated.

For reversal and remandment — Chief Justice WILENTZ, Justices HANDLER, O'HERN and GARIBALDI, and Judges O'BRIEN, HAVEY and SHEBELL — 7.

For affirmance — None.

209 N.J. Super. 163 (1986)
507 A.2d 247

PEGGY ANNE MURRAY, PLAINTIFF-APPELLANT,
v.
ALLSTATE INSURANCE COMPANY, JOHN NAUGHTON, JOHN DOE I AND JOHN DOE II, DEFENDANTS-RESPONDENTS.

Superior Court of New Jersey, Appellate Division.

Argued February 13, 1986.
Decided March 25, 1986.

165 *165 Before Judges KING, SIMPSON and SCALERA.

Thomas J. DiChiara argued the cause for appellant (*Drazin and Warshaw,* attorneys, *Thomas J. DiChiara* on the brief).

John S. Voynick, Jr., argued the cause for respondents Allstate and Naughton (*Carpenter, Bennett and Morrissey,* attorneys, *John E. Keale,* of counsel, *John S. Voynick* on the brief).

The opinion of the court was delivered by SCALERA, J.S.C. (temporarily assigned).

In this case we are asked to hold that a personal injury claimant may sue a liability carrier for "bad faith" without an assignment of that claim from the carrier's insured. Plaintiff appeals from the Law Division judge's order granting summary judgment and dismissing the complaint. We reaffirm the principle expressed by us in *Biasi v. Allstate Ins. Co.* 104 *N.J. Super.* 155 (App.Div. 1969), certif. den. 53 *N.J.* 511 (1969), that the personal injury claimant may not sue the carrier to recover the excess verdict beyond the coverage without an assignment of the claim from the insured.

On January 1, 1982 plaintiff, Peggy Anne Murray, was involved in a motor vehicle accident when her car collided with a motor vehicle owned by William B. Olsen and operated by Thomas W. Olsen. As a result, plaintiff instituted a suit for personal injuries. At the time of the accident defendant Allstate had in effect a policy of insurance issued to William B. Olsen which covered the operation of the vehicle by Thomas W. Olsen. In accordance with the terms of the policy, Allstate tendered a defense to both Olsens.

166 *166 On June 14, 1984 a jury trial resulted in a verdict in favor of plaintiff and against Thomas W. Olsen only in the amount of $75,000. Allstate undertook to prosecute an appeal of that result on behalf of its insured. This court heard numerous motions addressed to that appeal of the tort action and ultimately entered an order which provided that,

> A stay of the judgment pending appeal is granted conditioned upon appellant's posting a supersedeas bond in the sum of $103,880. Plaintiff shall not be entitled to levy, execute or otherwise pursue the bond for any sums over and above the contractual obligation of the Allstate Insurance Company under appellant's automobile liability insurance policy unless and until Allstate's liability for an excess judgment is established in a "bad faith" suit.

Eventually defendant did file the bond required and the appeal proceeded. Ultimately this court affirmed the jury's verdict for $75,000.

During the pendency of the appeal of the tort action, plaintiff filed the instant suit against Allstate, its adjuster, Naughton, and several unidentified employees of Allstate identified as John Does. In that complaint, plaintiff essentially asserted that Allstate and its employees had "failed to negotiate [a settlement] in good faith on behalf of Thomas W. Olsen" thus entitling plaintiff to a judgment for the entire amount of the jury's verdict in the tort action plus "costs of suit and attorneys fees."[1]

Defendants brought a motion for summary judgment contending that they were entitled to a dismissal because plaintiff had not secured from Allstate's insured, Thomas W. Olsen, a written assignment to prosecute the claim. Plaintiff opposed the motion asserting a right to bring the action independent of any assignment and also submitted an affidavit by Thomas W. Olsen's
167 personal attorney in which he said that his client had *167 indicated a willingness to provide such an assignment. However, Olsen has since left the State and cannot be located. No assignment has been obtained. Following oral argument, the Law

Division judge granted defendant's motion for summary judgment, relying upon this court's decision in *Biasi v. Allstate Ins. Co.*, 104 *N.J. Super.* 155 (App.Div. 1969), certif. den. 53 *N.J.* 511 (1969).

Plaintiff here asserts that the trial court erred because,

> Point I . . . [T]he court erred when it refused to abide the appellate division's prior ruling on this matter in holding that the bad faith suit could be instituted.
>
> Point II The lower court erred when it held that plaintiff could not proceed in this matter unless it had a written assignment from the insured.
>
> Point III. [T]he court erred when it dismissed the plaintiff's complaint for failure to state a claim upon which relief can be granted.

I

Plaintiff contends that the entry of the interlocutory order of this court entered in the appeal of the tort action conclusively established her right to "file a bad faith suit against the defendant, Allstate, even though an assignment of rights had not been made." We disagree.

Aside from the fact that the language of the order simply does not support her conclusion, the law is not supportive of her position. There was no final order or judgment entered upon which this court acted in ruling on the procedural requirements of that appeal. *Credit Bureau Collection Agency v. Lind*, 71 *N.J. Super.* 326, 328 (App.Div. 1961). The merits of plaintiff's right to prosecute the bad faith suit simply was not part of that record and was not properly before this court for decision at that time. *Matter of Kovalsky*, 195 *N.J. Super.* 91, 99 (App.Div. 1984).

II

168 Plaintiff further asserts that her suit against defendants was dismissed improperly because she has a right to bring such a *168 suit as a third-party beneficiary, that the facts in *Biasi* are distinguishable and thus not apposite or controlling and further, that insofar as *Biasi* may be read to require a written assignment as a condition precedent, it does not correctly state the law in this area. (We note that plaintiff's complaint herein does not contain any allegation of a right as a third-party beneficiary).

In *Biasi v. Allstate Ins. Co.*, 104 *N.J. Super.* at 156-157, plaintiff won a judgment in an automobile accident case against Allstate's insured which exceeded the policy limits. Since the insured was unable to satisfy the amount of the judgment, plaintiff's attorneys suggested that the insured sue Allstate and also sent the insured an assignment of rights which would permit plaintiff to do so. The insured refused and plaintiff instituted suit against the insurance company. Allstate moved for summary judgment and offered an affidavit by its insured specifically indicating her complete satisfaction with Allstate's handling of her case and asserting, further, that she did not desire to sue Allstate nor did she want plaintiff to do so. In affirming the trial court's grant of that summary judgment the court observed,

> Plaintiff contends that a party injured in an automobile accident who recovers a judgment against another motorist, who caused the injury, for a sum in excess of the liability policy limits of defendant motorist's insurance coverage can, without holding an assignment from the insured, bring an action against the insurance company for breach of the latter's obligation to act in good faith in reference to negotiation of settlement of the claim prior to judgment. Plaintiff bottoms its contention upon the argument that plaintiff has a common law right to succeed to any claim arising out of the policy which the assured could prosecute against the insurance company.
>
> * * * * * * * *

The right of the assured to recover against the insurer for its failure to exercise good faith in settling a claim within the limits of a liability policy, as was adjudicated in Bowers v. Camden Fire Ins. Ass'n, 51 N.J. 62 (1968), is predicated upon the potential damage to the *assured* in being subjected to a judgment in excess of her policy limits and the consequent subjection of her assets to the satisfaction of such judgment. The damage is peculiarly to the assured by reason of breach of an implied condition of the policy contract. The injured third party is a
169 stranger in that sense. Moreover, public policy does not *169 mandate that the injured party in the accident should be deemed the intended beneficiary of the company's contractual duty to its policyholder to act in good faith regarding settlement.

Nor does *N.J.S.A.* 17:28-2 give the injured party such a right. It merely provides that the bankruptcy or insolvency of the assured against whom an injured party has recovered a judgment shall not release the insurance carrier and, in such an event, the injured party may file an action directly against the carrier under the terms of the policy for the amount of the judgment but "not exceeding the amount of the policy." This statute is not applicable to the present situation.

Under the circumstances here present we conclude that plaintiff does not have a legal cause of action against Allstate or the status to maintain the present suit. Therefore we find that the trial court properly entered summary judgment against her. See Duncan v. Lumbermen's Mutual Casualty Co., 91 N.H. 349, 23 A.2d 325 (Sup.Ct. 1941); Wessing v. American Indemnity Co. of Galveston, 127 F. Supp. 775 (D.C.W.D.Mo. 1955); Chittick v. State Farm Mutual Automobile Ins. Co., 170 F. Supp. 276 (D.C.Del. 1958); Murray v. Mossman, 56 Wash.2d 909, 355 P.2d 985 (Sup.Ct. 1960); Ammerman v. Farmers Insurance Exchange, 19 Utah 2d 261, 430 P.2d 576 (Sup.Ct. 1967). See also, Keeton, "Liability Insurance and Responsibility For Settlement," 67 *Harv.L. Rev.* 1136, 1176 (1954).

Atlantic City v. American Casualty Insurance Co., 254 F. Supp. 396 (D.C.N.J. 1966), relied upon by plaintiff is inapposite. In that case plaintiff did possess a partial assignment from the assured (Atlantic City) of its claim against the insurance carrier for the carrier's unreasonable refusal to settle. Thus, any discussion therein by the court as to the rights of the injured party to sue the insurance company without an assignment was dictum.

Unlike *Biasi,* here Olsen has not affirmatively indicated his approval of the manner in which Allstate had handled plaintiff's claim against him. (Indeed, plaintiff argues that there is evidence to indicate his express desire to do otherwise. But the attorney's affidavit is not competent evidence to support this conclusion. *R.* 1:6-6). However, the *Biasi* court clearly held that absent the insured's express consent, an injured judgment creditor may not maintain an excess suit against an insurance carrier under any of the theories advanced by plaintiff here. Whether the rationale be that of third-party beneficiary, a right accorded by statute, some judicially-fashioned common-law remedy or otherwise, a *sine qua non* is that the insured be dissatisfied and expressly and affirmatively take steps to prosecute such a claim or, by assignment, authorize another person to do so. Bourget v. Government
170 Employees *170 Ins. Co., 456 F.2d 282 (2nd Cir.1972); Annotation, "Right of Injured Person Recovering Excess Judgment Against Insured to Maintain Action Against Liability Insurer For Wrongful Failure to Settle Claim," 63 *A.L.R.*3d 677 (1975).

Plaintiff directs our attention to the case of Thompson v. Commercial Union Ins. Co. of New York, 250 So.2d 259 (Fla. 1971), in which the Supreme Court of Florida stands alone in upholding plaintiff's position here. We simply do not agree that its rationale is more persuasive than that elucidated by this court in *Biasi.* The extent of contractual duties are contained within the terms of the insurance policy including the monetary limits. Any right of action for recovery in excess of those limits, caused by a breach of that contract, inures only to the benefit of the primary parties to the contract and not to any stranger to that contract. Bourget, supra; *see* Turgeon v. Shelby Mut. Plate Glass & Cas. Co., 112 F. Supp. 355 (D.Conn. 1953). To hold otherwise would be to expose an insurer to suit in every instance where the judgment ultimately exceeds the policy limits notwithstanding the satisfaction of the insured that the insurer has fully performed its contractual duties. *Cf.* Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474 (1974). Such a rule would further unfairly restrict a carrier's ability to negotiate a settlement with a potential plaintiff without fear of reprisal through such an excess suit.

While it may be argued that financially irresponsible insureds will frustrate the ability of an injured party to be fully compensated when the judgment exceeds policy limits by failing to furnish the necessary authority for institution of suit, we think that such an argument is speculative at best. For example, in *Biasi,* the execution on the judgment was returned unsatisfied, indicating that the insured was not possessed of sufficient assets to pay the excess judgment. Yet, there the insured, when faced with an offer to have the injured party pursue her carrier (presumably without expense to her) expressly indicated her satisfaction with the

171 carrier's handling of the complaint and *171 refused to sign the assignment. In this case, we should expect no less than a like informed and express determination by Olsen.

Thus we reaffirm the rationale expressed in *Biasi* by this court and affirm the dismissal of plaintiff's complaint.

SIMPSON, J.A.D., dissenting.

I respectfully dissent from Part II of the majority's opinion in this case, relying principally as it does upon *Biasi v. Allstate Ins. Co.*, 104 *N.J. Super.* 155 (App.Div. 1969), certif. den. 53 *N.J.* 511 (1969), since that case is distinguishable and in my view the circumstances here present require reversal of the summary judgment dismissing plaintiff's complaint. A $75,000 judgment (plus prejudgment interest) upon a jury verdict has already been affirmed on appeal, with the unreported opinion noting that:

> Olsen admitted that the accident was his fault, and said in the course of direct examination by his own attorney that he received a summons for and pled guilty to careless driving.

As to the contention that the verdict was excessive, the court stated:

> Nor do we consider the quantum of the verdict as shocking the judicial conscience and warranting appellate interference. *Baxter v. Fairmont Food Co.*, 74 *N.J.* 588, 598-599 (1977).

Olsen's applicable policy limit was only $25,000. On the motion below, Allstate's counsel told the judge that $12,500 would have settled the case, although at oral argument before us he said the amount was $10,000. Since the verdict was not excessive, Allstate could have settled for 40 to 50% of the policy[1] and the verdict was six to seven and one half times such settlement figures.[2] The verdict was three times the $25,000 policy limit and it is clear that the extent of plaintiff's injuries and their causal
172 relationship to this accident were the principal *172 issues in the "hotly contested trial."[3] Whether there was a good faith effort by Allstate to settle on behalf of its insured, Olsen, is a fact question that should be decided at a plenary trial, *Rova Farms Resort v. Investors Ins. Co.*, 65 *N.J.* 474 (1974) — provided that plaintiff has standing to bring this action against Allstate.

In *Biasi*, the defendant insured refused to assign to the plaintiff her rights to recover from Allstate "damages for the judgment against [her]" in excess of her policy limits and said "I am completely satisfied with the way Allstate handled my case and I do not wish to sue Allstate nor do I want the Biasis to do so," 104 *N.J. Super.* at 157-158. The situation in the present case is quite different. As the majority has pointed out, Olsen's personal attorney said his client had indicated a willingness to provide such an assignment, but he has absconded and cannot be located. While it is true that *R.* 1:6-6 and *Evid.R.* 63 would preclude such a statement as hearsay evidence, it is also true that Olsen's previous statement would be admissible at trial if he is a witness — pursuant to *Evid.R.* 63(1). In any event, if Olsen's consent or assignment is crucial, the determination should not be made on a motion for summary judgment without at least an affidavit by the insured. In my view, however, the majority is incorrect in concluding that an assignment is a *sine qua non* to permit an injured party, such as plaintiff, to maintain an excess suit against the carrier. On the contrary, the action should be permitted *unless* the insured affirmatively objects as in *Biasi*.

The annotation cited by the majority, 63 *A.L.R.*3d 677 (1975) indicates that the cases around the country are split as to whether an injured party can recover in excess of the policy limits in the absence of an assignment from the insured. The rationale
173 precluding such an action is usually lack of privity or *173 rejection of the injured party's standing as a third party beneficiary of the insurance contract. In the light of present day automobile transportation conditions, and current insurance regulation, coverage, practice and procedures, application of such traditional common-law bars to an injured party's bad faith claim against an insured's carrier is no longer warranted. *Cf. Rosenblum v. Adler*, 93 *N.J.* 324 (1983); *Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358 (1960). The cited portion of the opinion in *Biasi* also includes the assertion that:

> Moreover, public policy does not mandate that the injured party in the accident should be the intended beneficiary of the company's contractual duty to its policyholder to act in good faith regarding settlement. [104 *N.J. Super.* at 159-160].

More persuasive to me is the reasoning in *Thompson v. Commercial Union Ins. Co. of New York*, 250 So.2d 259 (Fla. 1971), that mandatory automobile liability insurance is primarily for the protection of and benefit to third parties, and the right of an injured party to sue on a judgment in excess of the insured's policy limit on a bad faith claim (without an assignment by the insured) accords with public policy favoring compromise and settlement of controversies. New Jersey also views insurance as an instrument of a social policy that the victims of negligence be fully compensated. *Cooper v. Government Employees Ins. Co.*, 51 *N.J.* 86, 94 (1968); *cf. Breen v. Peck*, 28 *N.J.* 351, 357 (1958); *Deblon v. Beaton*, 103 *N.J. Super.* 345, 351 (Law Div. 1968). Such

a result further accords with an economic view of law deeming it essential that a defendant be made to pay damages and that they be equal to a plaintiff's loss. Posner, *Economic Analysis of Law*, (2d Ed. 1977) § 6.12 at 143.

Furthermore, my colleagues' concern about restricting a carrier's ability to negotiate "without fear of reprisal through such an excess suit" is unrealistic. Liability insurance policies invariably contain clauses requiring an insured's cooperation in defense of
174 a case and giving the carrier full control of the settlement of claims against the insured. The only fear a *174 carrier need have is that of an excess suit where it has not negotiated in good faith. In that respect, it should be irrelevant as to whether the injured party has an excess judgment assignment or not; and in any event, an excess claim should be actionable in the absence of an affirmative objection by the insured.

I would reverse the summary judgment and reinstate plaintiff's complaint.

[1] The counts against defendant Naughton were couched in terms of his individual failure to negotiate a settlement in good faith as the company adjuster assigned and, in terms of his failure to do so, because he "had a personal vendetta" against plaintiff's law firm. However, the dismissal of these counts has not been separately treated or argued, and we assume that such a cause of action has been abandoned. *R.* 2:6-2.

[1] 40% X $25,000 = $10,000 and 50% X $25,000 = $12,500.

[2] 6 X $12,500 = $75,000 and 7 1/2 X $10,000 = $75,000.

[3] Description of the trial in the unreported Appellate Division opinion affirming the judgment in *Murray v. Olsen*.

100 N.J. 368 (1985)
495 A.2d 857

LARRY A. STEMPLER, INDIVIDUALLY AND AS GENERAL ADMINISTRATOR AND ADMINISTRATOR AD PROSEQUENDUM OF THE ESTATE OF BARBARA ANNE STEMPLER, DECEASED, PLAINTIFF-APPELLANT

v.

E. ALLAN SPEIDELL, M.D., DEFENDANT-RESPONDENT, AND BARBARA CONKLIN, DONNA WILCHEK, JOHN DOE, JOE ROE, ABC, INC., DEF, INC., ETC., DEFENDANTS.

The Supreme Court of New Jersey.

Argued March 18, 1985.
Decided July 29, 1985.

370 *370 *William E. Schkeeper* and *Marc E. Lesser* argued the cause for appellant (*Kronisch and Schkeeper,* attorneys).

Susan M. Sharko argued the cause for respondent (*Shanley & Fisher,* attorneys).

Timothy L. Barnes submitted a brief on behalf of *amicus curiae* The Association of Trial Lawyers of America (*Barnes & Barnes,* attorneys).

The opinion of the Court was delivered by STEIN, J.

The issue in this medical malpractice and wrongful death action is whether the defendant's counsel, as an aid to discovery, has the right to attempt to interview decedent's physicians *ex parte* with respect to matters relating to the litigation.

I

The facts material to our resolution of this question are not disputed. In June, 1983, Larry Stempler, individually and as general administrator and administrator *ad prosequendum* of the Estate of Barbara Anne Stempler, deceased, brought this action against Dr. E. Allan Speidell and a number of fictitious defendants. An amended complaint identified two nurses as individual defendants.

Decedent consulted Dr. Speidell in August, 1981, complaining of pain, abdominal distension and constipation. Dr. Speidell
371 diagnosed a fecal impaction and referred decedent to the emergency room of St. Barnabas Medical Center. Decedent was *371 admitted to the hospital and treatment was initiated. Dr. Speidell was designated the attending physician. During the early morning hours of the day following her admission, Mrs. Stempler experienced difficulty breathing and failed to respond to stimuli. She was treated emergently for cardiac arrest. Dr. Speidell was notified and Mrs. Stempler was pronounced dead shortly after his arrival at the hospital that morning.

In preparing to defend the claims asserted against Dr. Speidell, his counsel ascertained that decedent had received medical care from a significant number of physicians and health care providers. Dr. Speidell's counsel requested that the plaintiff sign authorizations in order to induce such physicians and health care providers to release information concerning decedent to defendant's counsel. The plaintiff signed each of the authorizations, but only after plaintiff's counsel crossed out the portion of the text reading: "[T]his will further authorize you to discuss any and all information concerning any treatment by you or examinations performed by you concerning the undersigned." In its place, plaintiff's counsel inserted the following statement on each authorization form: "This does not authorize you to have any discussions concerning these records, my care or my claim, but is expressly limited to allowing you to provide copies or inspection of my records and x-rays."

On the assumption that the substituted language on the authorization forms would preclude direct interviews with the physicians who had treated decedent, defendant filed a motion with the Law Division to compel the plaintiff to execute unrestricted authorization forms. In support of the motion, defendant's counsel submitted an affidavit alleging that Dr. Clara J. Szekely, a psychiatrist who had treated decedent, advised the defendant's counsel that the restriction inserted in the authorization would prevent her from communicating with defendant's counsel concerning decedent. Specifically, the affidavit alleged that Dr.

Szekely believed her records would be unintelligible without her interpretation, and she would not provide copies of them.
372 According to defendant's counsel, Dr. Szekely was willing *372 to furnish a written interpretation detailing her records, but only if plaintiff authorized her to do so.

Plaintiff resisted the motion to compel unrestricted authorizations since they would permit defendant's counsel to interview personally decedent's treating physicians, a procedure that allegedly is not authorized by our Court Rules. Although plaintiff authorized treating physicians to provide access to decedent's medical records, plaintiff contends that depositions are the only appropriate means by which the physicians may furnish additional relevant, unprivileged information to defendant's counsel without creating an undue risk of disclosing confidential information not related to the litigation.

The Law Division judge granted the defendant's motion to compel plaintiff to furnish unrestricted authorizations. After the Appellate Division denied leave to appeal, this Court granted plaintiff's motion for leave to appeal. *R.* 2:2-2(b).

Although the right claimed by defendant's counsel to conduct personal interviews with decedent's physicians is cast in a nontestimonial discovery context, plaintiff's objections to the interviews have their roots in the testimonial patient-physician
373 privilege. *N.J.S.A.* 2A:84A-22.1 to -22.7.[1] Plaintiff concedes *373 that instituting suit extinguishes the privilege to the extent that decedent's medical condition will be a factor in the litigation. *N.J.S.A.* 2A:84A-22.4.[2] However, as to those elements of decedent's prior medical history that are not relevant to the litigation, plaintiff asserts the continued viability of the privilege, contending that unsupervised *ex parte* interviews with decedent's treating physicians do not afford as complete protection against disclosure of privileged material as would be provided by depositions upon oral examination. *See R.* 4:14.

Because such interviews would take place in a nontestimonial context, no statute or Court Rule expressly precludes defense counsel from interviewing decedent's treating physicians regarding confidential communications. Moreover, even if the testimonial privilege could be imputed to such interviews, no statute or rule expressly precludes *ex parte* interviews concerning unprivileged communications, and the initiation of suit abrogates the privilege as to medical conditions pertinent to the litigation. However, as was the case with decedent's psychiatrist, treating physicians are not likely to cooperate with defense counsel in the absence of authorization from the patient. Accordingly, defense counsel in this case sought to compel plaintiff to furnish written authorization for interviews with decedent's treating physicians. The issue before us is whether plaintiff should be compelled to authorize such *ex parte* communication between defense counsel and decedent's physicians, as an aid to
374 defendant's discovery, and if so, under what protective conditions. A resolution of this issue requires us to weigh the *374 interests protected by the patient-physician privilege and the physician's professional obligation of confidentiality against the interests advanced by permitting defense counsel to conduct *ex parte* interviews with decedent's physicians regarding those conditions pertinent to the claims asserted in the litigation.

II

The patient-physician privilege was not recognized at common law in New Jersey, Hague v. Williams, 37 N.J. 328, 334-35 (1962), nor was it recognized under the common law in other jurisdictions. State v. Dyal, 97 N.J. 229, 235 (1984); *McCormick's Handbook of the Law of Evidence*, § 98 (2d ed. 1972) [hereinafter *McCormick*]; 8 *J. Wigmore, Evidence*, § 2380 (McNaughton rev. 1961). Moreover, the original New Jersey Supreme Court Committee on the Revision of the Law of Evidence expressly rejected the adoption of the patient-physician privilege, State v. Dyal, supra, 97 N.J. at 235-36, citing *Report of the Committee on the Revision of the Law of Evidence to the Supreme Court of New Jersey, R.* 27, drafter's comment, at 71-72, and it has never been adopted as a Rule of Evidence by this Court. State v. Dyal, supra, 97 N.J. at 235-36; State v. Soney, 177 N.J. Super. 47, 57 (App.Div. 1980), certif. den., 87 N.J. 313 (1981). Thus, in New Jersey the privilege is of relatively recent statutory origin. *L.* 1968, *c.* 185 (codified at *N.J.S.A.* 2A:84A-22.1 to -22.7).

The testimonial privilege is justified because it encourages candid communication between patient and doctor without fear of unauthorized disclosures. *McCormick, supra*, § 98 at 213; *see J. Wigmore, supra*, § 2380a, at 828-29.

> It has been said that the purpose of the patient-physician privilege is to enable the patient to secure medical services without fear of betrayal and the unwarranted embarrassing and detrimental disclosure in court of information which might deter the patient from revealing his symptoms to the doctor to the detriment of his health. See Branch v. Wilkinson, 198 Neb. 649, 256 N.W.2d 307, 312 (Sup.Ct. 1977); State v. Staat, 291 Minn. 394, 192 N.W.2d 192, 195 (Sup.Ct. 1971). [State in Interest of M.P.C., 165 N.J. Super. 131, 136 (App.Div. 1979).]

375 *375 Critics of the privilege maintain that the vast majority of communications between patient and physician are not intended to be strictly confidential, and as to those that are, they argue that the absence of privilege would not deter patients from frank communication with their physicians because their primary concern is to secure proper medical attention. *J. Wigmore, supra,* § 2380a, at 829-30; *McCormick, supra,* § 105, at 225.

This Court previously has articulated the major factors that argue against a broad application of the patient-physician privilege:

> The inevitable effect of allowing the privilege * * * is the withholding of evidence, often of the most reliable and probative kind, from the trier of fact. To the extent that the privilege is honored, it may therefore undermine the search for truth in the administration of justice. *McCormick, supra,* § 105, at 226; 8 *Wigmore, supra,* § 2380a, at 830. Because the privilege precludes the admission of relevant evidence, it is restrictively construed. State v. Soney, supra, 177 N.J. Super. at 58; State in the Interest of M.P.C., 165 N.J. Super. 131, 136 (App.Div. 1979). Indeed, distinguished scholars have asserted that the privilege cannot be justified. *See, e.g.,* Chaffee, "Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?," 52 *Yale L.J.* 607 (1943); 8 *Wigmore, supra,* § 2380a, at 832. [State v. Dyal, supra, 97 N.J. at 237-38.]

Notwithstanding the concern that application of the patient-physician privilege may bar the admissibility of probative testimony, there is a clear recognition that, in general, a physician does have a professional obligation to maintain the confidentiality of his patient's communications. *See American Medical Ass'n, Principles of Medical Ethics,* § 9 (1957). This obligation to preserve confidentiality is recognized as part of the Hippocratic Oath. As this Court observed in Hague v. Williams, supra:

> The benefits which inure to the relationship of physician-patient from the denial to a physician of any right to promiscuously disclose such information are self-evident. On the other hand, it is impossible to conceive of any countervailing benefits which would arise by according a physician the right to gossip about a patient's health.
>
> A patient should be entitled to freely disclose his symptoms and condition to his doctor in order to receive proper
376 treatment without fear that those facts *376 may become public property. Only thus can the purpose of the relationship be fulfilled. [37 N.J. at 335-36.]

Accordingly, courts in other jurisdictions have held that the unauthorized extra-judicial disclosure by a physician of confidential information from a patient may be actionable. Hammonds v. Aetna Cas. & Surety Co., 243 F. Supp. 793, den'g reconsideration of 237 F. Supp. 96, 101-102 (N.D. Ohio 1965); Horne v. Patton, 291 Ala. 701, 287 So.2d 824 (1973); Wenninger v. Muesing, 307 Minn. 405, 240 N.W.2d 333 (1976) (dictum); Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920); Clark v. Geraci, 29 Misc.2d 791, 208 N.Y.S.2d 564 (Sup.Ct. 1960); Felis v. Greenberg, 51 Misc.2d 441, 273 N.Y.S.2d 288 (Sup.Ct. 1966); Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958); Smith v. Driscoll, 94 Wash. 441, 162 P. 572 (1917) (dictum); *see* Note, "Legal Protection of the Confidential Nature of the Physician Patient Relationship," 52 *Colum.L.Rev.* 383, 397-98 (1952) (questioning the utility of recognizing an action for physician's wrongful disclosure other than in judicial or quasi-judicial proceeding); Note, "Medical Practice and the Right to Privacy," 43 *Minn.L.Rev.* 943 (1959); Note, *"Roe v. Doe:* A Remedy for Disclosure of Psychiatric Confidences," 29 *Rutgers L.Rev.* 190, 192-93 (1975). *Contra* Quarles v. Sutherland, 215 Tenn. 651, 389 S.W.2d 249 (1965); *cf.* Collins v. Howard, 156 F. Supp. 322 (S.D.Ga. 1957) (complaint alleging wrongful disclosure of test results dismissed; no confidential relationship between physician and patient recognized in Georgia; however, even if there were, mere taking of blood sample does not establish patient-physician relationship).

In Hague v. Williams, supra, 37 N.J. 328, a case decided prior to the enactment of the testimonial privilege, plaintiffs' infant daughter died eight months after birth because of a congenital heart defect. When plaintiffs filed a claim under a life insurance contract naming the infant as insured and the father as beneficiary, the life insurance company interviewed defendant pediatrician who advised the insurer that the infant had had heart trouble since birth. Plaintiffs sought damages for the allegedly
377 unlawful disclosure of this information by *377 defendant, contending that he had never advised them of the congenital heart defect and that defendant had no right to disclose such information to the insurer without express authorization. *Id.* at 329-32.

Although this Court recognized that such a cause of action might be sustained in a proper case, it affirmed the trial court's dismissal of the counts of the complaint that sought damages for the unauthorized disclosure, concluding that the patient's right of confidentiality was not absolute but qualified:

> This is not to say that the patient enjoys an absolute right, but rather that he possesses a limited right against such disclosure, subject to exceptions prompted by the supervening interest of society. We conclude, therefore, that ordinarily a physician receives information relating to a patient's health in a confidential capacity and should

> not disclose such information without the patient's consent, except where the public interest or the private interest of the patient so demands. Without delineating the precise outer contours of the exceptions, it may generally be said that disclosure may, under such compelling circumstances, be made to a person with a legitimate interest in the patient's health. [*Id.* at 336.]

This judicial recognition that a physician could be held liable for a breach of the obligation of confidentiality adds weight to the argument that unsupervised interviews by defense counsel may not adequately protect the physician's interest in avoiding inadvertent disclosures that could be actionable. Thus, it is asserted that the physician's interest can be guarded only by requiring defendant's counsel to use depositions rather than informal interviews to obtain unprivileged information from plaintiff's physicians.

Defendant, however, argues that requiring the formality of depositions would impose unnecessarily cumbersome restrictions on his right to prepare for trial. He contends that an informal interview is the most appropriate way to ascertain whether any of plaintiff's physicians possess unprivileged information relevant to the defense of the litigation, arguing that in this context depositions are impractical, inefficient, and costly. Defendant maintains that it is unfair to restrict his counsel's access to potential witnesses when no comparable restriction is imposed upon plaintiff.

378 *378 **III**

Courts in our own state and throughout the country are sharply divided on the question. A number of courts in other jurisdictions have held that defendant's counsel should not be allowed to interview plaintiff's treating physicians *ex parte* but should be restricted to depositions. *Weaver v. Mann*, 90 F.R.D. 443 (D.N.D. 1981) (personal interviews not contemplated by Federal Rules of Civil Procedure (Fed.R.Civ.P.) and could lead to discouraging plaintiff's physicians from testifying); *Garner v. Ford Motor Co.*, 61 F.R.D. 22 (D.Alaska 1973) (no specific authorization of interviews contained in Fed.R.Civ.P.); *Wenninger v. Muesing, supra*, 307 *Minn.* 405, 240 *N.W.*2d 333 (depositions guard against unauthorized disclosure of information that is privileged or irrelevant and presence of patient's attorney protects physician from unwitting disclosure of confidential information); *Jaap v. District Ct. 8th J. Dist.*, 623 *P.*2d 1389 (Mont. 1981) (Montana Rules do not authorize personal interviews); *Anker v. Brodnitz*, 98 *Misc.*2d 148, 413 *N.Y.S.*2d 582 (Sup.Ct.), aff'd mem., 73 A.D.2d 589, 422 *N.Y.S.*2d 887 (App. Div. 1979) (New York Rules do not authorize interviews; difficult for physician to determine the extent to which patient's privilege has been waived because issue of legal relevancy is complex; therefore, rule requiring formal discovery will lessen number of suits against doctors for wrongful disclosure); *Cwick v. Rochester*, 54 *A.D.*2d 1078, 388 *N.Y.S.*2d 753 (Sup.Ct. 1976); *cf. Alexander v. Knight*, 197 *Pa.Super.* 79, 177 *A.*2d 142 (Super.Ct. 1962) (doctor owes patient a duty to refuse affirmative assistance to patient's adversary in litigation).

Those courts in other jurisdictions that have upheld the right of defendant's counsel to conduct informal interviews of plaintiff's treating physicians have done so because court rules do not prohibit such interviews and those interviews constitute a more efficient and less expensive method of trial preparation. *Doe v. Eli Lilly & Co.*, 99 *F.R.D.* 126 (D.D.C. 1983); *Trans-World*
379 *Investments v. Drobny*, 554 *P.*2d 1148 (Alaska 1976); *379 *see also Gailitis v. Bassett*, 5 *Mich. App.* 382, 146 *N.W.*2d 708 (Ct.App. 1966) (no reason given for allowing interview of plaintiff's physician); *Arctic Motor Freight, Inc. v. Stover*, 571 *P.*2d 1006 (Alaska 1977) (citing *Trans-World Investments v. Drobny, supra*).

Several of our unreported lower court decisions adhere to the rule that restricts defendant's counsel to deposition of plaintiff's physicians. Another unreported lower court decision, however, permits *ex parte* interviews of plaintiff's physicians, and compels the plaintiff's execution of unrestricted authorizations.

A recent opinion by our Appellate Division upheld defendant's right to interview *ex parte* plaintiff's treating physicians. In *Lazorick v. Brown*, 195 *N.J. Super.* 444 (App.Div. 1984), defendants in a medical malpractice action appealed from an order of the trial court barring two of plaintiff's treating physicians, one of whom had been interviewed by defendant's counsel, from testifying on defendants' behalf as either fact or expert witnesses. The plaintiff had been treated for an upper respiratory infection by defendants, Manrodt and Brown, who prescribed a penicillin derivative known as amoxicillin. Subsequently she came under the care of Drs. Galton and Needle. Plaintiff developed vasculitis, a severe systemic disease resulting in permanently debilitating injuries, which she contended was a reaction to improperly prescribed amoxicillin. *Id.* at 447-48.

Defendants moved to compel plaintiff to furnish authorizations for interviews with Drs. Galton, Needle, and other treating physicians, but the trial court denied the motion without a clear explanation for its ruling. It did not, however, foreclose the possibility of granting the motion at a future time. The doctors had not been asked to speak to defense counsel but apparently

were willing to do so. Defense counsel arranged a meeting with Dr. Galton and advised plaintiff's counsel by letter that he should
380 move for a protective order if he objected to the meeting. Plaintiff did not move for a protective order *380 but reserved the right to object at trial to the admission of any evidence generated by the interview with Dr. Galton. The meeting with Dr. Galton took place and both Dr. Galton and Dr. Needle later furnished written reports expressing doubt that amoxicillin was the cause of plaintiff's condition. The trial court excluded their testimony. *Id.* at 448-50.

In reversing, Judge Botter noted that neither the Court Rules nor the Rules of Evidence prohibit informal interviews by defense counsel for the purpose of obtaining unprivileged information from a potential witness. The Appellate Division observed that it would be unfair to bar the testimony of Drs. Galton and Needle since defendant had attempted to obtain a ruling on the issue and plaintiff had failed to move for a protective order. *Id.* at 450. In recognizing the right of defense counsel to conduct personal interviews with plaintiff's treating physicians, the court reasoned:

> The policy of law is to allow all competent, relevant evidence to be produced, subject only to a limited number of privileges. *See Evid.R.* 7. As stated in *Hague v. Williams*, 37 *N.J.* at 335, "society has a right to testimony and ... all privileges of exemption from this duty are exceptional." We do a disservice to these principles by creating restrictions on the right of parties to talk to potential witnesses. The weighing of policy has been done by the Legislature in the definition of privileges and the terms on which they are lost or surrendered. To speculate about sinister motives of attorneys and treating doctors and to establish additional limitations on the right to seek out evidence as a matter of policy would do mischief to the adversary system. It would be a mistake to say that all testimony of a treating doctor is so tainted because he conversed with his patient's adversary that his testimony must be excluded. Such a rule would inevitably impede the search for truth. Nor can we say that the justice system should pay this price so that the doctor-patient relationship will not be bruised. Defendants ought to have the same right of access as plaintiffs have to potential witnesses, even if they are treating physicians. [*Id.* at 456.]

IV

In resolving this issue, our objective is to accord adequate recognition to the competing interests that have been identified. Although this litigation involves claims for wrongful death and medical malpractice, the same interests would be present in other types of personal injury litigation.

381 *381 The defendant's expressed concern is for the right to interview decedent's treating physicians, rather than be restricted to the formality, expense, and inconvenience of depositions conducted pursuant to the Court Rules. An unexpressed interest, we assume, is the hope that one or more of these physicians might provide evidence or testimony that would be helpful to the defendant at trial. Unquestionably, defendant's counsel would prefer to seek out such evidence or discuss the prospect of such testimony in an *ex parte* interview rather than during a deposition attended by plaintiff's counsel.

The plaintiff's interest is twofold. The interest advanced as primary is the desire to protect from disclosure by the physician confidential information not relevant to the litigation and therefore still protected by the patient-physician privilege and the physician's professional obligation to preserve confidentiality. An equally if not more important interest of the plaintiff, although not specifically pressed before us, is the desire to preserve the physician's loyalty to the plaintiff in the hope that the physician will not voluntarily provide evidence or testimony that will assist the defendant's cause. *See* *Alexander v. Knight, supra*, 197 *Pa.Super.* at 79, 177 *A.2d* at 146 (Members of the medical profession "owe their patients more than just medical care for which payment is exacted; there is a duty of total care; that includes and comprehends a duty to aid the patient in litigation, to render reports when necessary and to attend court when needed. That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation."); *Hammonds v. Aetna Cas. & Surety Co., supra*, 243 *F. Supp.* at 799 (quoting *Alexander v. Knight, supra*, with approval). *Contra* *Doe v. Eli Lilly & Co., supra*, 99 *F.R.D.* at 128 ("As a general proposition * * * no party to litigation has anything resembling a proprietary right to any witness's evidence. Absent a privilege no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of allegiance.").

382 *382 The physician's interest focuses on prevention of inadvertent disclosure of information still protected by the privilege, since an unauthorized disclosure of such information may be unethical and actionable. Collaterally, the physician needs to be informed that he need not cooperate if he believes that would compromise his professional responsibilities.

In our view, these competing interests can be respected adequately without requiring the formality of depositions in every case. The Rules regulating pretrial discovery do not purport to set forth the only methods by which information pertinent to the litigation

may be obtained. Personal interviews, although not expressly referred to in our Rules, are an accepted, informal method of assembling facts and documents in preparation for trial. Their use should be encouraged as should other informal means of discovery that reduce the cost and time of trial preparation.

Since it is unrealistic to anticipate that decedent's physicians will participate in such interviews without plaintiff's consent, plaintiff's counsel should provide written authorization to facilitate the conduct of interviews. If such authorizations are withheld unreasonably, their production can be compelled, as in this case, by motion. However, conditions should be imposed in the authorizations, or in orders compelling their issuance, that require defendant's counsel to provide plaintiff's counsel with reasonable notice of the time and place of the proposed interviews. Additionally, the authorizations or orders should require that defendant's counsel provide the physician with a description of the anticipated scope of the interview, and communicate with unmistakable clarity the fact that the physician's participation in an *ex parte* interview is voluntary. This procedure will afford plaintiff's counsel the opportunity to communicate with the physician, if necessary, in order to express any appropriate concerns as to the proper scope of the interview, and the extent to which plaintiff continues to assert the patient-physician privilege with respect to that physician.

383 *383 Plaintiff may also seek and obtain a protective order if under the circumstances a proposed *ex parte* interview with a specific physician threatens to cause such substantial prejudice to plaintiff as to warrant the supervision of the trial court. Such supervision could take the form of an order requiring the presence of plaintiff's counsel during the interview or, in extreme cases, requiring defendant's counsel to proceed by deposition. We are satisfied that the flexibility afforded by our decision will permit trial courts and counsel to fashion appropriate procedures in unusual cases without interfering unnecessarily with the use of personal interviews in routine cases.

Notwithstanding this resolution, we deem the issue raised to be of sufficient complexity as to merit the prompt attention of the Civil Practice Committee, whose recommendation we will solicit with regard to the necessity for amending the Court Rules to deal with this issue more formally.

Accordingly, the order of the Law Division, as modified, is affirmed and the matter is remanded to that court for further proceedings not inconsistent with this opinion.

For modification and affirmance — Chief Justice WILENTZ, and Justices CLIFFORD, HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN — 7.

Opposed — None.

[1] *N.J.S.A.* 2A:84A-22.2 provides:

Except as otherwise provided in this act, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a crime or violation of the disorderly persons law or for an act of juvenile delinquency to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

[2] *N.J.S.A.* 2A:84A-22.4 provides:

There is no privilege under this act in an action in which the condition of the patient is an element or factor of the claim or defense of the patient or of any party claiming through or under the patient or claiming as a beneficiary of the patient through a contract to which the patient is or was a party or under which the patient is or was insured.

REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS*

CEJA Report 12 - A-04

Subject: Medical Testimony

Presented by: Michael S. Goldrich, MD, Chair

Referred to: Reference Committee on Amendments to Constitution and Bylaws (Mary W. Geda, MD, Chair)

In the mid-1980's, the Council on Ethical and Judicial Affairs issued Opinion E-9.07, "Medical Testimony," which addresses the physician's ethical obligation to provide evidence in court, the general qualifications necessary for those who testify, and the importance of honest testimony. The Council is undertaking a new report to provide greater guidance to physicians who testify in legal proceedings, building on prior AMA policy[1] and the efforts of other medical societies that currently engage in professional self-regulation related to the conduct of physicians who provide expert testimony.

A NEXUS BETWEEN PUBLIC NEED AND PROFESSIONAL EXPERTISE

The legal system adjudicates disputes and delivers decisions on such wide-ranging topics that it is impossible for the system to maintain expertise in all necessary areas. Therefore, the courts rely on experts such as engineers, actuaries, and others to help juries and judges render informed decisions. Because the medical profession possesses the experience and knowledge to address matters involving health and medicine, it is necessary for medical professionals to contribute their expertise to the courts. Without the contributions of physician witnesses, parties in dispute could not advance medical or health-related cases effectively, and the legal system would be more arbitrary and unfair.

While physicians' unique knowledge and skills qualify them to make important contributions to the legal system, they generally are not legally required to provide expert testimony in legal proceedings. Particularly at a time when professional liability is of great concern, physicians may view the adversarial nature of trials as contrary to professional collegiality and may eschew the role of medical expert. However, as members of a profession, physicians have a professional obligation to serve the needs of the public in settings where their expertise is required**.** Accordingly, the AMA encourages physicians' participation as "a matter of public interest" (H-265.994). The current ethical Opinion refers to a physician's obligation as citizen as advocated by *Principle VII*, which encourages physicians to participate in activities that contribute to the improvement of the community and the betterment of public health.

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* Reports of the Council on Ethical and Judicial Affairs are assigned to the reference committee on Constitution and Bylaws. They may be adopted, not adopted, or referred. A report may not be amended, except to clarify the meaning of the report and only with the concurrence of the Council.

SCIENCE IN THE COURTS

In addressing medical testimony, it is important to distinguish between physicians who provide medical testimony as fact witnesses or as expert witnesses. Generally, fact witnesses present factual findings or observations. In contrast, expert witnesses' testimony relies on specialized knowledge that is applied to the facts of a case to help explain them. Physicians who serve as both fact and expert witnesses in a single proceeding may be conflicted, as roles for each have different goals.

The presentation of medical evidence in the courtroom often is fraught with controversy.[2] Physicians deliver expert testimony against the backdrop of constant technological and scientific advances.[3] Theories once deemed heretical later gain acceptance: famous examples include William Harvey's revolutionary theory of blood circulation and Ignaz Semmelweis' theory of hand washing.[4,5] Even today, when much of medical science is based on evidence, some well-accepted medical practices have not been proven through standard scientific research.[6] The lines separating certainty from probability, or standard, innovative, and inappropriate practices can easily be blurred when complete scientific explanations are not available or when beneficial results cannot be assured.[7,8] This can impact not only professional liability litigation but also products liability litigation, such as cases related to the safety of pharmaceuticals or the effect of tobacco, where medical experts must consider evolving perspectives and contested evidence. Similarly, medical testimony in criminal proceedings can be challenged when it relies on the application of new technologies such as "DNA fingerprinting," as experts debate the validity of these advances.[9] Even physicians who testify on the basis of medical examinations of a person's physical or mental condition may present testimony that over time would be altered by medical advances.[10] Regardless of the nature of the legal proceedings, physician experts cannot eschew their role in explaining that medical science is inherently dynamic, and in many cases, uncertain.[11]

Given the ever changing nature of scientific knowledge, many attempts have been made to establish rules of procedures to govern the admissibility of scientific testimony and evidence.[12] For the better part of the last century, courts required that the scientific theory be sufficiently established so as to have gained general acceptance in the relevant field.[13] Subsequently, Federal Rule of Evidence 702 established a more liberal standard:

> 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 upon 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.[14]

This standard was interpreted further by the US Supreme Court in a case alleging that an anti-nausea drug for pregnant women had caused birth defects. In *Daubert v. Merrell Dow Pharmaceuticals* (1993), the court was particularly concerned with determining whether the cause of the birth defects could be proven, beyond proving that a duty of care existed and had been breached. The Supreme Court ultimately ruled that scientific testimony should be limited to evidence that is relevant and reliable. Four considerations were outlined to determine that expert testimony was not simply a subjective belief or mere speculation: the evidence set forth was based on scientific knowledge that has given rise to a testable and tested hypothesis; it had been subjected to peer review and publication; it is generally accepted within the relevant scientific community;

and known or potential rates of error are made known to the court.[15] All jurisdictions are not required to apply these guidelines, but many do.[16,5]

Overall, it is ethically important for physician expert witnesses to make clear whether a consensus exists on the scientific theories presented in testimony. When a physician renders expert testimony based on theories not widely accepted, he or she should describe the degree of existing consensus. It also is important that probabilities not be misrepresented as definitive conclusions.[17,18,19]

Evidence in professional liability cases

Conflict often arises in cases of professional liability in which expert witnesses inform the courts of standards of care and draw conclusions about whether deviation from these standards has resulted in harm. As historian James C. Mohr explains, "There can be no *mal*practice without established *practice*; physicians cannot be convicted of deviating from accepted standards if no accepted standards exist."[20]

The standard of care has been characterized as "that level of care, skill and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar [physicians]"[21]; more concisely, it is that standard which a "reasonable and prudent [physician] similarly situated would provide under similar circumstances."[22,23,24]

A physician testifying with regard to the standard of care must be mindful of examining a case according to the standard that prevailed at the time the event under review occurred. Moreover, there often are variations in medical practice that can give rise to disagreements between experts even though each approach is medically acceptable. If a medical expert knowingly provides testimony based on a standard not widely accepted in the profession, the witness should characterize it as such. Similarly, innovative treatments require careful presentation. Overall, expert witnesses should avoid inflammatory accusations to express differences of opinion. They also must not merely offer speculations but rather be able to substantiate claims that are made, for example, on the basis of experience, published research, consensus statements or evidence-based guidelines, recognizing that some evidence may be more authoritative.[7,16]

Unexpected medical outcomes can occur for many reasons other than deviations from the standard of care.[25] In fact, as described by the Institute of Medicine,[26] and further discussed in a recent CEJA Report,[27] patient safety and continuing quality improvement efforts are premised on the understanding that a majority of adverse events are attributed to factors other than negligence, such as flawed systems.[28] These distinctions often can be drawn only through honest and independent testimony.[24]

HONESTY AND INDEPENDENCE IN THE PROVISION OF MEDICAL TESTIMONY

Honesty is a core ethical value in medicine and, according to the *Principles of Medical Ethics* [II], its significance extends to all spheres of professional conduct,[29] and is the basis of the trust that is placed in physicians. AMA policy makes clear that honesty is the most salient ethical principle for physicians providing testimony in court [H-265.991, H-265.994, AMA Policy Database]. Moreover, false testimony can place physicians in contempt of court, and subject them to legal and professional sanctions.[30] Although the testifying physicians' services may have been sought primarily by one party, they testify to educate the court as a whole.

Testimony of the Treating Physician

The patient-physician relationship requires physicians to dedicate themselves to their patients' best interests; according to the *Principles of Medical Ethics*, "[A] physician shall, while caring for a patient, regard responsibility to the patient as paramount"[VIII].[29] When a physician is called upon to serve as a fact witness in his or her own patient's case, the treating physician witness must be committed to delivering an honest opinion. In other words, patient advocacy must be limited by the requirement of honesty. The patient's attorney must be the advocate who advances the patient's legal goals.[31] This important distinction requires those who testify as treating physicians to engage in continuous self-examination to ensure that their testimony represents the facts of the case.

Providing testimony in a legal proceeding involving a current patient can have a significant impact on the therapeutic relationship. If the physician is called upon to testify in a matter that could adversely affect the patient's medical interests, the physician should decline to testify unless ordered to do so, or unless the patient has given the physician permission to do so, despite the possible adverse effect. In the latter case, it may be advisable that the physician witness discuss with a patient the testimony that will be presented prior to the appearance in court.

When a legal case makes opponents of a patient and a treating physician, such as a medical malpractice case, the trust necessary to the maintenance of the therapeutic relationship likely will be eroded. In those instances, it is appropriate that the physician transfer the care of the patient.[32]

Testimony of the Non-Treating Physician

The opinions of non-treating physician experts must remain honest and objective, free from any undue influence. "An independent expert is not affected by the goals of the party for which she was retained, and is not reticent to arrive at an opinion that fails to support the client's legal position."[31] Avoiding undue influence as an expert once again involves self-examination to ensure that one's testimony is not biased by allegiance to any party in a legal proceeding.

Certain fee structures for the payment of expert witnesses have been identified as potentially constituting undue influence. Contingent fees create incentives to give testimony in support of specific legal outcomes, thereby interfering with witness objectivity and the imperatives for honesty and independence.[31] According to AMA policies, a physician is entitled to reasonable compensation for time and effort spent on medico-legal service, but it is unacceptable for a physician to accept fees contingent on the outcome of a case [H-265.994, H-265.997, H-435.970 AMA Policy Database]. Disproportionate compensation for witness activities also could influence physician testimony, and would create the appearance of indebtedness to the contracting party.

As to physicians whose incomes depend largely upon expert witness activities, no direct relationship has been shown between amount of service provided to the legal system and degree of influence upon one's testimony. However, two distinct scenarios are possible: physicians as experts may have an incentive to present biased and dishonest testimony to ensure future testifying opportunities. Alternatively, the honesty and independence of an expert may ensure his or her reputation for objectivity and help secure future work. When physicians choose to provide expert testimony, particularly in professional liability cases, ethical conduct requires that they be willing to evaluate cases objectively and derive an independent opinion. In instances when a physician's expertise appears to serve primarily the interests of one class of litigants, it is especially important that objectivity and impartiality be maintained, for example by drawing on others' research. In

summary, the onus rests upon individual physician witnesses to avoid any undue influence from financial incentives.[33]

MAINTAINING STANDARDS FOR MEDICAL TESTIMONY

Qualifications for Expert Witnesses

Federal Rule of Evidence 702 explains that a witness can qualify as an expert by knowledge, skill, experience, training, or education. There are concerns that this legal standard is insufficient to ensure that only qualified physician experts testify. Therefore, many have advocated for additional standards establishing minimum requirements for expert witnesses' credentials to ensure that opinions presented are thoroughly informed by knowledge or experience in the relevant field. Particular concerns surround medical liability litigation with regard to an expert's licensure, training and experience compared to that of the physician defendant. To address possible gaps in the standards set for acceptable witness testimony, many state and specialty societies have developed guidelines for expert witness qualifications in their respective states and specialties. The AMA also has developed model state legislation to set legal standards for expert witnesses, and has enacted policy supporting the dissemination of these guidelines in hopes of achieving their widespread adoption [H-265.995]. In light of the importance of qualifications, failure to accurately disclose one's applicable qualifications and misrepresentation of qualifications each constitute a form of dishonest testimony.

Professional Self-Regulation of Testimony

If physicians deliver dishonest or fraudulent medical testimony, they discredit physicians as a group, and endanger the public's trust in physicians. Moreover, testimony that rejects applicable standards of care without supporting scientific evidence undermines the public's understanding of medicine. Organized medicine has a role to play in protecting individual patients, defendant physicians, and society as a whole, from the negative effects of false or misleading medical testimony. Some state and specialty medical societies as well as licensing boards now engage in the review of medical testimony to assess claims of dishonest or false testimony. The Council on Ethical and Judicial Affairs, in a 2003 informational on its judicial function, also explained how it may review complaints against expert witnesses who are AMA members or applicants only if a court has determined that the expert committed perjury for false testimony or if a licensing board has imposed licensure sanctions.[34] Overall, such review of testimony is justified in part on the basis that testimony lies within the sphere of professional activities that are intrinsically linked to a physician's medical education and training.

Some commentators have expressed concerns that review of physicians' testimony may have a "chilling effect" that extends to credible expert witnesses.[35,36,37,38] However, review and any consequent adverse action against a physician is legally condoned only if it is conducted fairly and in good faith, as prescribed in Opinions E-9.10, "Peer Review," of the AMA' Code of Medical Ethics. In the case of *Austin v. American Association of Neurological Surgeouns,*[39] the US Curt of Appeals For the Seventh Circuit concluded that, having respected its own procedural requirements, the Association could suspend a member who had provided "irresponsible" testimony. The court further stated that "discipline by the Association, therefore, served an important public policy." Other medical societies that review their members' conduct as expert witnesses help fulfill the profession's commitment to uphold the principles of honesty and integrity in all aspects of physicians' conduct.

CONCLUSION

The legal system relies on medical testimony to render informed and fair decisions. Therefore, physicians serve an important function in the pursuit of justice when they apply their expertise in court. Legally and ethically, this function is strictly bound by the obligation to testify honestly. In this regard, organized medicine has an important role to play in ensuring that physician testimony is honest and reflects the full knowledge of the medical community. By engaging in the review of expert testimony and promoting qualifying standards for medical witnesses, physician organizations can lend their collective expertise to the legal system.

RECOMMENDATION

The Council on Ethical and Judicial Affairs recommends that the following be adopted and the remainder of the report be filed.

In various legal and administrative proceedings, medical evidence is critical. As citizens and as professionals with specialized knowledge and experience, physicians have an obligation to assist in the administration of justice.

When a legal claim pertains to a patient the physician has treated, the physician must hold the patient's medical interests paramount, including the confidentiality of the patient's health information, unless the physician is authorized or legally compelled to disclose the information.

Physicians who serve as fact witnesses must deliver honest testimony. This requires that they engage in continuous self-examination to ensure that their testimony represents the facts of the case. When treating physicians are called upon to testify in matters that could adversely impact their patients' medical interests, they should decline to testify unless ordered to do so or unless the patient has given the physician permission to do so, notwithstanding the possible adverse effect. It is appropriate for a treating physician to transfer the care of the patient if, as a result of legal proceedings, the patient and the physician are placed in adversarial positions, eroding the trust necessary to maintain the therapeutic relationship.

When physicians choose to provide expert testimony, they should have recent and substantive experience or knowledge in the area in which they testify and be committed to evaluating cases objectively, and deriving an independent opinion. Their testimony should reflect current scientific thought and standards of care that have gained acceptance among peers in the relevant field. If a medical witness knowingly provides testimony based on a theory not widely accepted in the profession, the witness should characterize the theory as such. Also, testimony pertinent to a standard of care must consider standards that prevailed at the time the event under review occurred.

All physicians must accurately represent their qualifications and must testify honestly. Physician testimony must not be influenced by financial compensation; in particular, it is unethical for a physician to accept compensation that is contingent upon the outcome of litigation.

Organized medicine, including state and specialty societies, and medical licensing boards have important roles to play in promoting the ethical conduct of physician witness activities. With careful attention to due process, these organizations can help maintain high standards for

medical witnesses by assessing claims of false or misleading testimony and issuing disciplinary sanctions as appropriate. (New CEJA/AMA Policy)

Fiscal note: Less than $500

REFERENCES

[1] AMA Policy H-265.xxx and BOT Report 5-A-98, and model legislation
[2] Umbright E. Missouri Supreme Court finds testimony of doctor's experts inadmissible. St. Louis Daily Record/St. Louis Countian. December 30, 2003.
[3] Kassirer JP, Cecil, JS. Inconsistency in evidentiary standards for medical testimony: Disorder in the courts. *JAMA*: Vol 288, No. 11. 1382-1387.
[4] Schultz SG. William Harvey and the circulation of the blood: The birth of a scientific revolution and modern physiology. *News in Physiological Sciences*. Vol. 17, No. 5, 175-180, October 2002.
[5] Fenner, GM. The Daubert handbook: The case, its essential dilemma, and its progeny. 29 Creighton L. Rev. 939. April, 1996.
[6] Noah L. Medicine's epistemology: Mapping the haphazard diffusion of knowledge in the biomedical community. 44 Ariz. L. Rev. 373. Summer, 2002.
[7] Gittler GJ, Goldstein EJC. The standard of care is not so standard. *Clinical Infectious Diseases* 1997;24:254-7.
[8] Hutchinson CT, Ashby DS. Daubert v. Merrell Pharmaceuticals, Inc: Redefining the bases for admissibility of expert scientific testimony. 15 *Cardozo L. Rev.* 1875. April, 1994.
[9] Anonymous. Science and technology: Fingering fingerprints. *The Economist*. Vol. 357, Iss. 8201. 89-90. Dec 16, 2000.
[10] Faigman DL, Wright AJ. The battered woman syndrome in the age of science. 39 *Arizona Law Review* 67. Spring, 1997.
[11] Garmisa SP. Doctor gets green light to testify about 'possibilities' behind diagnosis. Chicago Daily Law Bulletin. April 7, 2004.
[12] Linn, SA. Admissibility v. sufficiency: The dilemma of expert evidence in toxic tort cases. *Defense Counsel Journal*. April 1, 1999. Vol 66. No. 2.
[13] Annas GJ. Scientific evidence in the courtroom – The death of the Frye rule. NEJM. 1994;330:1018-1021.
[14] USCS Fed Rules Evid R 702 (2004). (Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937.)
[15] Carlson, R. 2002. *Evidence: Teaching Materials for An Age of Science and Statutes (5th Ed.)*. Matthew Bender & Co.
[16] Angell, M. Do breast implants cause systemic disease? Science in the courtroom. Vol 330(24) 16 June 1994, pp 1748-1749.
[17] Angell, M. Shattuck Lecture: Evaluating the health risks of breast implants: The interplay of medical science, the law, and public opinion. *NEJM* Vol 334(23) 6 June 1996, pp 1513-1518.
[18] Schuklenk U. Professional responsibilities of biomedical scientists in public discourse. *Journal of Medical Ethics*. Feb 2004, v30 i1 p53(8).
[19] Schwartz A. A "Dogma of Empiricism" revisited: Daubert v. Merrell Dow Pharmaceuticals, Inc. and the need to resurrect the philosophical insight of Frye v. United States. 10 *Harvard Journal of Law and Technology* 149.
[20] Mohr, J. C. 2000. "American Medical Malpractice Litigation in Historical Perspective." *JAMA:* Vol 283, No. 13.
[21] Connecticut General Statute § 52-184c (2003).
[22] Snow v. Bond 438 S.W. 2d 549.
[23] Studdert DM, Mello MM, Brennan TA. Medical malpractice. *NEJM* Vol 350: 283-292. January 15, 2004. Number 3.
[24] Finder, JM. The future of practice guidelines: Should they constitute conclusive evidence of the standard of care?. 10 *Health Matrix* 67 (2000).
[25] Danner D, Sagall EL. Medicolegal causation: A source of professional misunderstanding. 3 *American Journal of Law and Medicine* 303 (1977-1978).
[26] Corrigan J, Donaldson M, eds. *To Err Is Human: Building a Safer Health System*. Washington, DC: Institute of Medicine; 1999.
[27] CEJA Report 2-A-03, Ethical Responsibility to Study and Prevent Error and Harm in the Provision of Health Care.

[28] Thomas EJ, Studdert DM, Burstin HR, Orav EJ, Zeena T, Williams EJ, Mason HK, Weiler PC Brennan TA. Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado. Medical Care. 38(3). 2000. pp 261-271.
[29] Principles of Medical Ethics. 2002. In Council on Ethical and Judicial Affairs. *Code of Medical Ethics 2002-2003 Edition*. American Medical Association.
[30] E.g , Illinois perjury statute 720 Ill. Comp. Stat. Ann. 5/32-2(2001) states that in Illinnois, perjury is a "class 3 felony" punishable by monetary fines and imprisonment.
[31] Lubet S. Expert Witnesses: Ethics and Professionalism. 12 *Georgetown Journal of Legal Ethics* 465. Spring, 1999.
[32] Strasburger LH, Gutheil TG, Brodsky A. On wearing two hats: Role conflict in serving as both psychotherapist and expert witness. *American Journal of Psychiatry* 154:4, April 1997. pp 448-456.
[33] Hirsh BD, Dunn J, Wilcox DP. Medical experts compete to testify for malpractice plaintiffs. *Texas Medicine. Volume 86, May 1990. 26-27.*
[34] CEJA Report 5-A-03, Professional Self-Regulation and the Judicial Function of the Council on Ethical and Judicial Affairs.
[35] Andrews, M. "Making Malpractice Harder to Prove." *The New York Times*. December 21 2003.
[36] Victoroff MS. Peer review of the inexpert witness, or…Do you trust the chickens to guard the coop?. *Managed Care*. September 2002.
[37] Ellman S. Medical associations step up scrutiny of doctors who testify for medical malpractice plaintiffs. Broward Daily Business Review. Vol.03, No. 6-25, pg. 1.
[38] Glabman M. Scared silent: The clash between malpractice lawsuits and expert testimony. *Physician Executive*. July-August 2003 v29 i4 p42(5).
[39] Austin v. American Association of Neurological Surgeons, 253 F.3d 967.

State of New Jersey
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
PO BOX 381
TRENTON, NEW JERSEY 08625-0381

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

HAROLD J WIRTHS
Commissioner

MEMORANDUM

January 28, 2011

To: All Judges and Attorneys

From: Peter J. Calderone, Director and Chief Judge

Subject: Specialized Medical Expert Allowances

N.J.S.A. 34:15-64 provides an allowance schedule for reports and appearances by evaluating and treating physicians. A Task Force appointed by Bar Section Chair Jerry Rotella recognized that there are situations where petitioner attorneys must retain specialized medical experts that could not be retained under the evaluating or treating physician allowance limits. The Task Force, chaired by Marie Rose Bloomer, Esq. has recommended the following language for inclusion in the Court Rules:

> Where extraordinary and specialized medical causation or treatment in a particular case require the testimony of medical experts who do not regularly appear as evaluating physicians and are not case treating physicians, the petitioner may request that the Judge of Compensation authorize a maximum fee not covered by the general statutory evaluating and treating physician allowances. When represented by counsel, the petitioner's counsel shall represent that petitioner has been advised and has approved the need for a specialized medical expert with the understanding that the cost of the specialized medical expert would be assessed as a cost to the petitioner should the petitioner receive an award in the case.

This recommendation has been endorsed by the full Executive Committee of the Bar Section and reviewed and recommended by the Administrative Supervisory Judges.

I have accepted the recommendation for a Court Rule proposal. Pending the process to formally adopt a Court Rule, the above language shall be considered agency policy and may be implemented in appropriate cases.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5428-14T3

DEBORAH S. PSCHUNDER-HAAF,

Petitioner-Respondent,

v.

SYNERGY HOME CARE OF SOUTH JERSEY,

Respondent-Appellant.

Submitted October 25, 2016 – Decided November 30, 2016

Before Judges Yannotti and Gilson.

On appeal from the New Jersey Department of Labor, Division of Workers' Compensation, Petition No. 2009-33493.

Weber Gallagher Simpson Stapleton Fires & Newby, L.L.P., attorneys for appellant (Richard K. Tavani, on the brief).

Adam M. Kotlar, attorney for respondent.

PER CURIAM

Synergy Home Care of South Jersey (Synergy) appeals from a July 17, 2015 order, entered in a workers' compensation action, that required it to reimburse petitioner Deborah S. Pschunder-Haaf for the actual costs of her medical expert. The actual costs were

$800 for the expert's report and $4500 for the expert's testimony. We affirm because the imposition of actual costs was within the discretion of the compensation judge under N.J.S.A. 34:15-28.2.

This is the second appeal from this workers' compensation action. Our first decision was issued in 2015. See Deborah S. Pschunder-Haaf v. Synergy Home Care of South Jersey, No. A-3138-13 (App. Div. May 22, 2015) (2015 Decision). This appeal challenges the order entered following the remand from our 2015 Decision. Thus, we will only summarize the facts and proceedings relevant to the second appeal.

Pschunder-Haaf worked as a home health aide and she was employed by Synergy. In 2009, a patient fell on her causing injuries to her lower back, spine, neck, and head. Her injuries have required relatively extensive medical care and have caused derivative injuries.

In 2010, Pschunder-Haaf filed a workers' compensation claim, but Synergy denied that claim. The compensation judge ordered Synergy to provide Pschunder-Haaf with medical care and temporary wage benefits. Thereafter, the workers' compensation action involved protracted litigation, including numerous proceedings before compensation judges. During the workers' compensation proceedings, a pattern developed: the compensation judge would order Synergy to take certain actions, Synergy would fail to act,

Pschunder-Haaf would file a motion to compel, and the compensation judge would enter an order compelling Synergy to comply with earlier orders. In total, seven orders were entered compelling Synergy to comply with prior orders.

On February 25, 2014, a compensation judge entered an order following a hearing. In that order, the compensation judge (1) required Synergy to continue to pay for Pschunder-Haaf's medical care and temporary wage benefits; (2) awarded Pschunder-Haaf $5654.10 as reimbursement for the actual costs of her medical expert; (3) awarded Pschunder-Haaf $7500 in counsel fees; (4) imposed a $5000 sanction on Synergy; and (5) threatened to impose an additional $10,000 sanction if Synergy did not comply with the order within ten days. The $5654.10 in costs included $800 for a medical report and $4500 for the testimony of the medical expert.

Synergy appealed the February 25, 2014 order. In our 2015 Decision, we affirmed the order in part and remanded in part. Specifically, we affirmed (1) the requirement that Synergy pay Pschunder-Haaf for her medical treatments and temporary wage benefits; (2) the award of $7500 for counsel fees; and (3) the imposition of the $5000 sanction. We vacated the $10,000 sanction because that sanction exceeded the governing statute that capped a sanction at $5000. See 2015 Decision, slip op. at 13. We noted,

however, "the compensation judge on remand could impose a sanction, if warranted, pursuant to N.J.A.C. 12:235-3.16(h)(2)." Ibid.

With regard to the medical expert costs, however, we found that the compensation judge had failed to explain the basis for imposing the actual costs. In that regard, we pointed out that the costs for medical experts were limited by the governing workers' compensation statute. See N.J.S.A. 34:15-64(a) (listing the reimbursements of costs allowed in workers' compensation actions). Thus, we remanded the medical expert costs issue and directed the compensation judge to determine the reasonableness of those costs "in light of the relevant statutes and Division rules." 2015 Decision, slip op. at 13.

In June 2015, the parties executed a consent order that resolved all issues except for the cost of the medical expert's report and testimony. On remand, the compensation judge again awarded Pschunder-Haaf the actual costs she incurred for her medical expert, which were $800 for the report and $4500 for the testimony. The compensation judge initially explained her reasons for the award on the record at a hearing held on June 29, 2015, and then amplified the reasons for her decision in a written decision issued on July 23, 2015.

In the written decision, the compensation judge stated that the award of actual costs was authorized under N.J.S.A. 34:15-

28.2, which provides that when a party or counsel to a workers' compensation action fails to comply with an order in that action, "a judge of compensation may, in addition to any other remedies provided by law . . . impose costs . . . [and] impose additional fines and other penalties . . . ." The compensation judge also cited N.J.S.A. 34:15-64(c), which permits a compensation judge to award a fee for the services of an attorney or medical expert if necessary for the "proper presentation of the case."

On this second appeal, Synergy argues that the imposition of actual costs violated the limitations set forth in N.J.S.A. 34:15-64(a), and that there was no basis to compel reimbursement under N.J.S.A. 34:15-28.2. We disagree because the proceedings in this workers' compensation action justified the imposition of the actual costs for the medical expert.

We review a monetary award by a judge of compensation under an abuse of discretion standard and "[w]e will modify or set aside such an award only if it is manifestly excessive or inadequate . . . ." Akef v. BASF Corp., 305 N.J. Super. 333, 341 (App. Div. 1997). We also afford an agency's interpretation of its own statutes "substantial deference." In re Freshwater Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 341 (App. Div. 2005). We generally will not reverse an agency's determination "unless it was arbitrary, capricious or unreasonable, or violated legislative

policies expressed or implied in the act governing that agency." Silver v. Bd. of Review, 430 N.J. Super. 44, 58 (App. Div. 2013).

The amounts for costs, including witness fees, allowed in a workers' compensation action is generally governed by N.J.S.A. 34:15-64. That statute provides, in part, that a judge of compensation:

> a. [M]ay allow to the party in whose favor judgment is entered, costs of witness fees and a reasonable attorney fee, not exceeding [twenty percent] of the judgment; and a reasonable fee not exceeding $400 for any one witness, except that the following fees may be allowed for a medical witness:
>
> (1) (a) A fee of not more than $400 paid to an evaluating physician for an opinion regarding the need for medical treatment or for an estimation of permanent disability, if the physician provides the opinion or estimation in a written report; and
>
> (b) An additional fee of not more than $400 paid to the evaluating physician who makes a court appearance to give testimony; or
>
> (2) (a) A fee of not more than $450 paid to a treating physician for the preparation and submission of a report including the entire record of treatment, medical history, opinions regarding diagnosis, prognosis, causal relationships between the treated condition and the claim, the claimant's ability to return to work with or without restrictions, what, if any, restrictions are appropriate, and the anticipated date of return to work, and any recommendations for further treatment; and

> (b) (i) An additional fee of not more than $300 per hour, with the total amount not to exceed [$2500], paid to the treating physician who gives testimony concerning causal relationship, ability to work or the need for treatment; or
>
> (ii) An additional fee of not more than $300 per hour, with the total amount not to exceed [$1500], paid to the treating physician who gives a deposition concerning causal relationship, ability to work or the need for treatment.
>
> [N.J.S.A. 34:15-64(a).]

Here, the parties do not dispute that N.J.S.A. 34:15-64(a)(2) applies. Thus, the fees under that statute are limited to $450 for a medical report and $2500 for the expert's testimony.

N.J.S.A. 34:15-64(c) provides that

> [a] fee shall be allowed at the discretion of the judge of compensation when, in the official's judgment, the service of an attorney and medical witnesses are necessary for the proper presentation of the case. In determining a reasonable fee for medical witnesses, the official shall consider (1) the time, personnel, and other cost factors required to conduct the examination; (2) the extent, adequacy and completeness of the medical evaluation; (3) the objective measurement of bodily function and the avoidance of the use of subjective complaints; and (4) the necessity of a court appearance of the medical witness.

Here, the compensation judge failed to make findings in accordance with the factors set forth in N.J.S.A. 34:15-64(c) and,

thus, this statute would not justify the imposition of actual costs.

A separate statute found in N.J.S.A. 34:15-28.2, however, does afford the compensation judge discretion to award actual costs. N.J.S.A. 34:15-28.2 provides:

> If any employer, insurer, claimant, or counsel to the employer, insurer, or claimant, or other party to a claim for compensation, fails to comply with any order of a judge of compensation or with the requirements of any statute or regulation regarding workers' compensation, a judge of compensation may, in addition to any other remedies provided by law:
>
> a. Impose costs, simple interest on any moneys due, an additional assessment not to exceed [twenty-five percent] of moneys due for unreasonable payment delay, and reasonable legal fees, to enforce the order, statute or regulation;
>
> b. Impose additional fines and other penalties on parties or counsel in an amount not exceeding [$5000] for unreasonable delay, with the proceeds of the penalties paid into the Second Injury Fund;
>
> c. Close proofs, dismiss a claim or suppress a defense as to any party;
>
> d. Exclude evidence or witnesses;
>
> e. Hold a separate hearing on any issue of contempt and, upon a finding of contempt by the judge of compensation, the successful party or the judge of compensation may file a motion with the Superior Court for enforcement of those contempt proceedings; and

> f. Take other actions deemed appropriate by the judge of compensation with respect to the claim.
>
> [N.J.S.A. 34:15-28.2 (emphasis added).]

This statute expressly allows a compensation judge to impose "costs" when a party to a compensation action "fails to comply with any order of a judge of compensation or with the requirements of any statute or regulation regarding workers' compensation." Ibid. Significantly, N.J.S.A. 34:15-28.2 lists a series of costs, fines, penalties, and other sanctions that can be imposed in the appropriate circumstances. Accordingly, N.J.S.A. 34:15-28.2 permits a compensation judge to fashion remedies when a party "fails to comply with any order." Ibid.; see also Stancil v. ACE USA, 211 N.J. 276, 293 (2012) ("the statute specifically permits the court of compensation to impose additional assessments . . . as well as fines and penalties on the carrier." (internal citations omitted)). Thus, a compensation judge is permitted to impose actual costs when warranted.

Synergy's argument that N.J.S.A. 34:15-64 cannot be superseded by N.J.S.A. 34:15-28.2 is not supported by those statutes. Neither statute refers to the other statute. Instead, the statutes can be appropriately read separately. Here, the compensation judge found that Synergy should be responsible for the medical expert's actual costs because Synergy had repeatedly

failed to comply with prior orders. That finding is supported by the record and we do not find it to be arbitrary or capricious under the facts of this case. Nor is the imposition of actual costs inconsistent with the governing statutes.

Affirmed.