PLM

Professional Liability Magazine

Emerging developments, decisions, and defense strategies

Technology's Impact on Attorney Communications

The New Don't Ask, Don't Tell

Using Salary History in Job Negotiations

Q&A

When a Lawyer Needs a Lawyer

Defining "Sex" in Title VII Cases

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Table of Contents

When Lawyers Need a Lawyer

A look at malpractice and other litigation in the legal industry

Malpractice lawsuits, and other forms of litigation, are an unfortunate part of any professional industry — including the legal field. Matt Marrone, Goldberg Segalla partner, talks about his experience defending lawyers, legal malpractice trends, and best practices to help attorneys avoid future lawsuits.

Q: How long have you been defending lawyers, and how much of your practice is devoted to it?

A: For nearly 15 years. It varies from year to year, but on average it probably accounts for about two-thirds of my time. I also defend insurance agents and brokers.

Q: Which matters are more challenging to defend: cases against lawyers or insurance agents?

A: Both are very challenging for different reasons. In legal malpractice cases, the facts can vary significantly from one matter to the next. One day we might be defending a matrimonial lawyer whose client didn't like the property settlement agreement she entered into. The next we are representing a debt collecting law firm in a class action lawsuit alleging violations of the Fair Debt Collection Practices Act. And that's just a very small sample of the wide variety of matters we see. The issues in cases against insurance agents tend to be more predictable. By the same token, judges often don't understand the insurance issues involved in cases against insurance agents, and that can make them more difficult to defend, because we're trying to educate the judge while defending our client. Judges better understand the issues involved in legal malpractice cases, but that's a double-edged sword. Sometimes it makes judges more willing to dismiss merit-less cases, but other times the judges are harder on lawyers than we would expect.

Q: Do people hate lawyers as much as all of the jokes would suggest?

A: I don't think so. But I do think jurors hold lawyers to higher standards.

Q: Are lawyers difficult clients?

A: That's often the first question I'm asked when I tell people I defend lawyers for a living. In the vast majority of cases, not at all. Quite the contrary, in fact. Generally speaking, our attorney clients like to be more actively involved in formulation of defense strategy than other clients, but we welcome that. Lawyers who have dealt with the clients who are now suing them often have a far better understanding of the relevant issues than we do, and their input is extremely valuable. But, there have been a few situations where our attorney clients have insisted on a litigation strategy that we disagree with, and that has made for some uncomfortable situations. Those are few and far between.

Q&A

Q: What's the most challenging legal malpractice case you've ever had to defend?

A: Any case involving allegations of intentional conduct — fraud, theft, deceit — is difficult. It raises coverage issues with the lawyer's insurance carrier, but more importantly, often triggers an ethics, and sometimes a criminal, investigation. I've been involved in a few cases where my client was simultaneously facing a civil malpractice suit, an ethics investigation, and a federal criminal investigation. Those cases are difficult for many reasons. Yes, they are very challenging to defend. But they also give you an up-close and personal view of the emotional toll these cases can take on the lawyer, their family, their firm partners, and their client.

Q: Have you noticed any trends in legal malpractice cases over the last few years?

A: We are seeing more claims against trust and estate attorneys, which is consistent with the most recent ABA study findings. As baby boomers continue to age and pass wealth down to their heirs, we will see increased opportunities for trust and estate lawyers to become entangled in various issues and disputes related to the estate planning process. That will lead to more claims being asserted against those lawyers. In addition, we are seeing more situations where an attorney is involved in a business or real estate transaction, and that attorney is viewed as the "guarantor" of the soundness of the deal. It runs completely contrary to the law — which specifically holds that an attorney is not a guarantor of a transaction — but that doesn't stop people from suing lawyers over business deals gone bad, claiming they thought the deal was fair because a lawyer was involved. These claims are often being asserted by both clients and parties who the lawyer didn't even represent.

Q: Do you have any advice you can provide to lawyers to avoid malpractice lawsuits?

A: First and foremost, choose your clients carefully. You don't have to sign up every client who walks through the door. There are certain red flags to look out for — such as the client firing previous lawyers, thinking they know more about the law than you, or having unrealistic expectations. Those are signs that you may not be able to provide this client what they are looking for, or that the relationship may end badly. In that same regard, don't dabble. If you are a personal injury attorney, think twice before you do estate planning. Expectations for lawyers are so high these days that it's very difficult to be a general practitioner. Also, try to have a good bedside manner with your clients. If they feel like you are communicating and being honest with them, and they trust you, they are less likely to sue you. Lastly, we all make mistakes. Some of the best lawyers get sued for malpractice. Make sure you have malpractice insurance with a limit commensurate with the size of matters you are handling, so if you do get sued, you are protected. If you think you've made a mistake that could lead to a lawsuit, tell your carrier.

Q: Have you heard any good lawyer jokes lately?

A: A doctor and a lawyer are talking at a party. Their conversation is constantly interrupted by people describing their ailments and asking the doctor for free medical advice. After an hour of this, the exasperated doctor asks the lawyer, "What do you do to stop people from asking you for legal advice when you're out of the office?"

"I give it to them," replies the lawyer, "and then I send them a bill."

The doctor is surprised, but agrees to give it a try. The next day he prepares bills for all the people he talked to the night before. When he goes to put them in his mailbox, he finds a bill from the lawyer.

What Is the Meaning of "Sex?"

By Madeline S. Baio

Today, we understand that the word "sex" in the English language means more than just gender as in "male" and "female." It also connotes behavioral characteristics that relate to sex such as sexual identity and sexual orientation.

But what did the 88th Congress have in mind when it enacted Title VII of the Civil Rights Act of 1964 prohibiting discrimination in employment on the basis of "sex?" Back then, "sexual orientation" was not a term recognized in English dictionaries, nor was "sexual discrimination."

In a landmark decision issued on April 4, 2017, the Seventh Circuit Court of Appeals became the first federal appellate court to hold that discrimination in employment based on a person's sexual orientation is prohibited by Title VII. For Chief Judge Diane Wood, writing for the majority of the court, the inclusion of sexual orientation discrimination in Title VII's prohibitions is a natural extension of the teachings of the Supreme Court "as well as the common sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex." (*Kimberly Hively v. Ivy Tech Community College of Indiana*)

The case stems from an EEOC charge filed by Kimberly Hively, an openly gay part-time adjunct professor, who accused her employer, Ivy Tech Community College, of failing to promote her to a full-time position and ultimately refusing to renew her part-time contract due to her sexual orientation. After receiving a right to sue letter, Hively, proceeding without counsel, filed suit in the Northern District of Indiana to which the college responded with a motion to dismiss. The basis of the motion was that sexual orientation is not a protected class under Title VII. The district court agreed as did a somewhat reluctant panel of the Seventh Circuit — which commented that the difficulty extracting gender nonconformity claims from sexual orientation claims has led to a "confused hodge-podge of cases." Hively, now represented by counsel from Lambda Legal Defense & Education Fund, appealed to the court for rehearing *en banc.*

Discrimination on the Basis of Sexual Orientation Is a Comparable Evil

In her majority opinion, Judge Wood acknowledged that the drafters of Title VII may not have considered sexual orientation as a class to be protected by the statute. However, as Justice Scalia wrote in the Supreme Court's *Oncale* decision, which brought same-sex harassment within Title VII's prohibitions, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislature by which we are governed."

Judicial Interpretive Updating as a Means to a Just End

Concurring in the result, Judge Richard Posner advocated what he termed "judicial interpretive updating" so as to give fresh meaning to Title VII by "infusing it with vitality and significance" in order to reflect the current shift in political and cultural attitudes toward homosexuality.

Dissent: Strict Construction Precludes Judicial Updating

The dissenters, Judges Sykes, Bauer, and Kanne, insisted that the court's role in statutory interpretation requires an objective inquiry that looks for the meaning the statutory language conveyed to a reasonable person at the time of enactment. Finding no one in the 88th Congress would have intended or anticipated Title VII's application to sexual orientation discrimination claims, the dissenters would have affirmed the district court's dismissal of the claim leaving any "updating" to the legislature.

Hively's Impact on the LGBT Landscape

Although the Seventh Circuit was split, the *Hively* decision is a huge step forward in the recognition of rights for members of the LGBT community. Compared to the societal shift that was reflected in the Supreme Court's 1967 decision in *Loving v. Virginia* — which outlawed restrictions on interracial marriages — the *Hively* decision is another expression of our society's continued effort to embrace diversity, promote tolerance, and become more inclusive. But it is only one of many legal battles that are being fought on this front.

In the case of *Evans v. Georgia Regional Hospital*, a panel of the Eleventh Circuit recently affirmed dismissal of hospital security guard Jameka Evans' claim of sexual orientation discrimination. Evans has petitioned the court for rehearing *en banc*.

In the case of *Mathew Christiansen v. Omnicom Group*, a panel of the Second Circuit ruled that it was bound by precedent that Title VII does not cover sexual orientation. Christiansen has not yet sought rehearing *en banc* but filed an unopposed motion for an extension of time until April 28, 2017 in which to do so.

Although it is difficult to predict when, the issue should eventually make its way up to the Supreme Court. It is possible that the Supreme Court will allow more circuit courts to weigh in before tackling the issue. SCOTUS' recent refusal to hear *Grimm v. Gloucester County School District* — which challenges a school district's policy requiring students to use bathrooms according to their birth gender — may be a signal of the High Court's intent to take a wait-and-watch approach. Stay tuned as this landscape changes almost daily.

Liability for Violence in the Workplace Is Not Unlimited

By Joanne J. Romero

In a world of ever-increasing liability faced by commercial realty and property management professionals and their clients, the recent decision by the First Department in *Faughey v. New 56-79 IG Assoc. L.P.* is cause for a sigh of relief because it affirmed that liability for the acts of third parties is limited even when such acts have tragic consequences for tenants.

In *Faughey*, David Tarloff — a former patient of a doctor in one of the psychiatric suites residing in an office building — tragically murdered Kathryn P. Faughey, another doctor who worked in the same psychiatric suite, in what turned out to be a targeted and premeditated attack. Building surveillance video showed that Tarloff walked past the doorman, rolling a suitcase behind him, saying that he was there to see another doctor on the premises. Tarloff walked into Dr. Faughey's office, confirmed she was alone, and attacked her with a meat cleaver.

Normally a landlord has a common-law duty to take minimal precautions to protect tenants from foreseeable harm. The scope of a landlord's duty is defined by past experience and the "likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the [tenant]." (*Maheshwari v. City of New York*) Moreover, the landlord's negligent conduct must be the proximate cause of his injury, such as in the case where an intruder gains access to the premises through a negligently-maintained entrance. (*Kowalczyk v Two Trees Mgt. Co., LLC*)

The court in the *Faughey* case held that the defendants had no duty to protect Dr. Faughey from the violent act of patients such as Mr. Tarloff because his murderous rampage was not foreseeable given the absence of prior violent activity by him or other third parties in the building. The court also noted that "any claims that the doorman was negligent in failing to recognize Tarloff's suspicious behavior was not a proximate cause because it was still not foreseeable that Tarloff was about to engage in a murderous rampage. Tarloff's conduct was a superseding cause severing the causal chain." Moreover, additional precautions would not have deterred the attack which was planned and premeditated.

While there may be no duty to protect in this instance, commercial realty and property management professionals need to keep in mind that their duty is not static. While defendants in this case had no duty to protect Dr. Faughey, now that the violent act occurred in their building with very tragic consequences, they are essentially on notice that such violent acts have and can occur on the premises — and their duty has thus expanded such that they must, going forward, take additional precautions to ensure that such a tragedy does not occur again.

It is not clear what precautions would be sufficient, as the court noted that it was speculative that additional security measures such as keeping office doors locked after hours, or installing an office buzzer or intercom would have prevented Tarloff from killing Dr. Faughey. However, this is not to say that the landlord (or property manager) would necessarily face liability in any future attack given that the inquiry as to proximate cause is a fact-specific one.

Don't Ask, Don't Tell: Restrictions on Applicant Salary History Inquiries Gain Steam

By Caroline J. Berdzik

It is common practice for employers to ask job applicants to disclose wage history either on the job application or during the interview process. Employers maintain that this information is necessary as part of the recruiting process and evaluating candidates. However, some believe this practice has perpetuated gender wage inequality.

In response, certain states and localities have recently enacted legislation that prohibits employers from inquiring about an applicant's salary history during certain parts of the hiring process. Most recently, the New York City Council approved a bill that would prohibit NYC employers from inquiring about an applicant's salary history during all stages of the employment process.

NYC joins several states and cities, including Massachusetts, California, Philadelphia, Pittsburgh, Washington D.C., and New Orleans, which have all taken some measure to limit an employer's ability to rely on an applicant's past salary information when making an offer of employment and/or completely prohibit employer inquiries of applicant salary history. Other states, such as Texas and Maryland, have pending legislation on the issue.

Not surprisingly, other states have been met with resistance when similar bills were introduced. For example, in Virginia, a bill that would have prohibited employers from asking interviewees for their salary history was rejected by the House Commerce and Labor Committee. Additionally, the New Jersey State Senate failed to override Governor Christie's conditional veto of a similar bill.

Even some bills that have been enacted now face significant and viable legal challenges. Philadelphia's wage equity law, which is set to go into effect on May 23, 2017, has been challenged by the Philadelphia Chamber of Commerce. In April 2017, the Chamber of Commerce filed a lawsuit in federal court seeking an injunction to prevent the law from coming into effect, arguing it is invalid based on protection of freedom of speech.

At the federal level, in September 2016, H.R.6030 (aka "Pay Equity for All Act of 2016") was introduced to the U.S. House of Representatives, but was not enacted. The Pay Equity for All Act of 2016 would have allowed the U.S. Department of Labor to assess huge fines against employers who violated the law by asking questions about an applicant's salary history.

There are nuances that differ between each state and city's version of the salary inquiry restrictions and the associated penalties for violations. However, this type of legislation only will heighten sensitivities to gender discrimination claims and will likely result in an increase in equal pay claims. All employers would be well advised to evaluate their hiring processes with an employment attorney to ensure their practices are in compliance and to limit potential exposure.

New technology provides both opportunities and obstacles for attorneys looking to grow their practice and transform client communication.

Expanding the Privilege

A "Fair Report" on Recent Developments in Attorneys' Use of Electronic Media in Their Practice

Jason L. Ederer

As the legal profession continues to adjust to the exponential technological advancement which continues apace around it, electronic dissemination of information — whether through email press releases, attorney and/or firm blogs, or on social media — has become the norm for both the provision of quick analysis on pending cases or recently rendered decisions.

Indeed, information can now reach a broader public than ever dreamed of: current and prospective clients, colleagues in the legal profession or in other industries, or even the press itself. But, the high level of electronic information changing hands these days can often leave attorneys open to defamation claims against themselves individually, or their law firms. Due to the unique situation that a blog post or an emailed press release often presents to a court — with a mixture of statements that could be construed as both fact or opinion — the line for what constitutes defamation or what can be properly (and legally) characterized as a fair report of a judicial proceeding has often been blurred. This leaves firms and attorneys open to defamation claims or the like from a larger group of potential plaintiffs than they ever could have envisioned.

But there is hope yet. While initially stringent in their application of the fair reporting privilege in defamation cases against attorneys and their firms, courts have begun to take a softer, more pragmatic approach in applying the defenses to these claims — allowing attorneys to take greater creative license in their approach to posts and releases than ever before.

Defamation and the Fair Reporting Privilege

Defamation is defined as the making of a false statement of fact which "tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace." (*Sandals Resorts Intl. Ltd. v Google, Inc.*) The basic elements of a claim for defamation based on a writing, throughout the United States, mirror the elements outlined under New York case law. Thus, to establish defamation via libel under New York law, a plaintiff must prove five elements: a written defamatory factual statement [of and] concerning the plaintiff, publication to a third party, fault, falsity of the defamatory statement, and special damages or per se actionability.

Normally there are several defenses which are available to defendants in defamation cases. However, courts have examined two defenses in particular which have factored in prominently to the defense of defamation in these types of cases against attorneys or their firms:

- Statements which are "non-actionable opinion"
- Statements which are protected by the "fair reporting privilege"

In particular, the fair reporting privilege — which has actually been codified by numerous states — shields defendants from liability "against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding." (*Tacopina v. O'Keeffe*)

Now, what constitutes a fair and true report of a judicial proceeding has certainly evolved throughout the years. Of course, the privilege defense came of age in an era when reporters and journalists sought to "just cover the news" without fear they'd end up in a lawsuit as a result of their reporting. The defense has taken on a clear new prominence for attorneys alleged to have defamed others through their electronic writings and "reporting" on important judicial matters of the respective day. It is and remains a key argument for attorney and firm dissemination of case results (either theirs, or the results of other interesting cases in their fields) or press releases quickly and easily, without risking potential defamation claims. A couple of recent cases highlight and appear to expand the privilege.

Defending a Case Update Email

In *Universal Gaming Grp. v. Taft Stettinius & Hollister*, the plaintiff was an owner and operator of electronic video game machines which allowed customers to play video poker and blackjack. Under Illinois statutory law, operators of this type of equipment are required to be licensed by the Illinois Gaming Board, which conducts background investigations on applicants seeking such licenses. Universal Gaming had been licensed since 2012. The defendants — a law firm and one of its attorneys — specialized in gaming law, particularly on cases before the Board, and, according to the complaint, had clients within the gaming industry who competed directly with the plaintiff.

The plaintiff's claims arose out of an email from the defendants commenting on a settlement agreement between Universal Gaming and the Board, after the Board had alleged that certain conduct by one of Universal Gaming's employees resulted in the non-renewal of its operating license. Specifically, in July of 2014, the Board adopted a motion to deny the annual renewal of Universal Gaming's operating license because, according to written notice and, eventually, a settlement agreement between the parties, " ... Plaintiff's employee ... failed to properly identify a referring 'finder' of a putative location for an agreement for the placement of video gaming terminals, and thus [the Board] alleged [Plaintiff] did not demonstrate its qualification and suitability for 2014 licensure."

Universal Gaming responded in kind, filing a complaint against the Board for declaratory and injunctive relief, and submitting a request to the Board for an administrative hearing to contest the notice of denial. The Board granted the request, and subsequently found that the plaintiff had established a prima facie case as to its suitability for renewal of its license. Later that summer, Universal Gaming and the Board entered into the aforementioned settlement agreement which made "no finding of wrongdoing by any [Plaintiff] employee."

The agreement provided that the aforementioned employee was to resign, and that Universal Gaming (and the employee in question) would pay "a $50,000 fine to the [the Board] for [the employee]'s alleged conduct in regard to the allegations as set forth in the

(cont.)

Notice of Denial." Universal Gaming also agreed to "enhance its compliance policies," and to "implement additional procedures for training video gaming location 'finders,'" noting that "any finder in the future that pays or uses an undisclosed sub-finder in violation of [Plaintiff's] policies and the [the Board's] practices will be promptly terminated." The Board then agreed to close its investigation on the subject.

The defendant attorney, on behalf of the firm, sent an email blast discussing the settlement to the firm's gaming clients and others in the industry. The email contained the subject heading "Cook County Tax, Settlement Agreements & Disciplinary Complaints" and began with the salutation "Clients & Friends." Apparently, under a separate heading, the attorney wrote that for educational purposes the firm's gaming clients should review the content of the email, and proceeded to provide a "brief description" of two settlements reached by the Board — including Universal Gaming's settlement.

In describing the settlement agreement, the attorney noted that the agreement indicated that one of Universal Gaming's employees failed to properly identify a referring finder of a prospective use agreement, but refused to speculate on the particular facts of the behavior which actually caused the problem. Additionally, the email noted the $50,000 fine to be paid jointly by Universal Gaming and the employee and the agreed-to compliance procedure enhancements. In sum, the email blast noted that those operators which had struggled in the past with Universal Gaming's sales agents would no longer have such issues, and also implored those recipients not to engage in this type of behavior that resulted in the settlement, which was greater than "the cost of doing business."

After catching wind of the email blast, Universal Gaming sued the firm and the attorney who authored the post, alleging defamation, commercial disparagement, and violation of the Illinois Deceptive Trade Practices Act. In the complaint, the plaintiff alleged that the email contained false statements disparaging their company, had been sent "to the majority of the video gaming industry" — including the plaintiff's competitors — as well as to "hundreds of existing and potential video gaming locations with which [Plaintiff was] seeking to

enter into use agreements for the placement" of video gaming terminals. Universal Gaming alleged that "defendants tarnished or sought to tarnish [Plaintiff's] reputation" with prospective clients by sending the email.

The defendants, Taft Stettinius & Hollister, filed a motion to dismiss the complaint, arguing that it failed to state a viable claim for relief and that, specifically with respect to the defamation claim, dismissal was warranted because the statements in the Jenson email were true, the email stated an opinion, the email was "capable of being innocently construed," and the complaint did not meet the "higher standard" for pleading a claim of defamation per se.

In response, the plaintiff argued, among other things, that the complaint stated viable claims for relief. However, in February of 2015, the trial court dismissed all counts of the complaint with prejudice and Universal Gaming, after clearing several procedural hurdles, appealed.

On appeal, the plaintiff argued that the email made a clear statement that one of Universal Gaming's employees violated the Board's rules, and that dismissal should not have been granted because there were pleaded actionable, demonstrably false statements which were neither protected opinion nor capable of an innocent construction. Further, the plaintiff argued its complaint met the higher pleading standard for pleading defamation per se.

However, after outlining the proper elements to be pleaded in order to state a defamation and, more specifically, a defamation per se claim, the court — in addition to finding that several of the challenged statements in the email were non-actionable statements of opinion — agreed with Taft Stettinius & Hollister's argument that the statements were a "fair report" of the content of the settlement agreement itself.

Specifically, the court noted that to the extent the plaintiff complained that the email falsely stated or implied that one of Universal Gaming's employees had violated the Board's regulations, that this was substantially true and borne out by the agreement's text.

Perhaps even more notably, while truth is a complete defense to a claim of defamation, the court also put forward and applied the concept of substantial truth, i.e. that "allegedly defamatory material is not actionable even where it is not technically accurate in every detail[]" This, the court found, was the reason a defamation claim relying on reporting that "statements indicating that [Plaintiff]'s employee violated [the Board's] regulations was not actionable."

It was substantially true that the settlement agreement "indicated" misconduct by one of the plaintiff's employees, even though the settlement made no explicit finding of wrongdoing. The court also found — even though Universal Gaming's license was never suspended, and was renewed — this did not mean that it was "demonstrably false" that the employee misconduct actually occurred, especially because a reasonable person could infer that the agreed-to remedial measures "indicated" the Board believed something more nefarious had occurred.

The holding here suggests that the author of an email or a blog post would not be liable for such a defamation claim going forward *even if* they put some creative license on their posting, so long as the facts are reported in a way which is substantially true. This type of decision was also echoed in 2016 in a number of other jurisdictions including the Second Circuit and U.S. District Court for the Eastern District of Texas. As such, it appears the defense has expanded from the "just cover the news" days for attorneys.

When is a Defense Required?

But does an attorney even need to put forward the defense of a fair report privilege to avail himself or his firm of it? In *Argentieri v. Zuckerberg*, a California appellate court recently answered that such pleading was not required, finding that the defense applied to an electronic writing by an attorney, whether raised or not, and arrived at a similar decision for the attorneys in question. There, the plaintiff was an attorney for another plaintiff in that plaintiff's lawsuit against Facebook and Mark Zuckerberg. That lawsuit was dismissed on the grounds that it was a "fraud on the court" and that plaintiff therein had fabricated and spoliated evidence.

Following dismissal, Facebook and Zuckerberg sued the plaintiff's attorney, Argentieri, asserting claims for malicious prosecution and deceit in violation of New York Judicial Law section 487, and alleged that Argentieri and the other lawyers "conspired to file and prosecute a fraudulent lawsuit against Facebook and [Zuckerberg], based on fabricated evidence, for the purpose of extorting a lucrative and unwarranted settlement." The defendant also alleged that Argentieri knew that the lawsuit was a fraud, yet continued to pursue it anyway.

In an emailed press release on the same day the action was filed, Facebook's general counsel stated it was "said from the beginning that [plaintiff's] claim was a fraud" and that the company "would seek to hold those responsible accountable." The release closed by stating that the law firms named in the malicious prosecution complaint, including Argentieri, "knew [plaintiff's lawsuit] was based on forged documents yet they pursued it anyway." However, despite the triumphant-sounding email press release, in December 2015, the New York Appellate Division unanimously reversed the trial court's ruling and ordered that Facebook and Zuckerberg's complaint be dismissed.

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Argentieri consequently sued Facebook, Zuckerberg, and the general counsel for defamation based on the statement provided to the press. The complaint asserted a single cause of action for defamation per se, based on the statement in the emailed press release, and specifically alleged that the portion of the statement representing that the other named law firms knew the underlying matter was based on forged documents and pursued it anyway was untrue and defamatory on its face. The defendants argued on a motion to strike the complaint that stated the plaintiff could not prove defamation because the press release constituted an opinion rather than an actionable statement of fact and was, in any event, true, but did not specifically raise the fair and true reporting privilege as set forth under California law.

The trial court granted the motion to strike, concluding that the email press release constituted protected activity under California's anti-SLAPP statute, and that the plaintiff could not establish a probability of prevailing on the merits of his defamation claim because of, among other things, California's fair and true reporting privilege (Civ. Code, § 47, subd. (d)). Argentieri appealed, arguing that the court's reliance on this privilege was error because it should not have been applied and respondents had not asserted the privilege in their motion to strike.

In agreeing with the trial court and upholding the striking of Argentieri's defamation complaint, the appellate court noted that, under California's Fair and True Reporting Privilege, a "fair and true report in, or a communication to, a public journal, of … a judicial … proceeding, or … anything said in the course thereof" is protected and absolutely privileged, regardless of the defendants' motive for making the report.

Under California law, to be "fair and true," the report must "[capture] the substance, the 'gist' or 'sting' of the subject proceedings" as measured by considering the "natural and probable effect [of the report]" "on the mind of the average reader." Similar to the Illinois court's decision, the court acknowledged that the defendant was entitled to a certain degree of "flexibility/literary license" in this regard, and that the privilege applies even if there is a slight inaccuracy in details.

Brushing aside any concerns of due process violations in invoking the fair reporting privilege, noting that if Argentieri's legal arguments on appeal were correct, it would in any event reverse the judgment on those grounds even though the privilege was not invoked earlier. The court also held that, in context, the email press release was a "fair and true" report of that proceeding, because "[i]t essentially asserted that respondents sought to hold accountable the named lawyers for [plaintiff] because they knew [plaintiff's] case was based on [a forged document]." Because this was "the gist of their malicious prosecution action" and was not "so great a distortion as to render it unfair or untrue," the court concluded that the privilege should apply to the defendants in spite of not having been invoked by them previously.

So Where Does This Leave Us?

While reinforcing the care with which attorneys and firms need to continue to review the content to be posted on blogs or in press releases for their veracity or pure opinion *prior to posting*, the cases herein represent positive developments for the continued evolution of electronic sources to provide unfettered reporting on cases, be it as a way to attract business or share expertise or analysis.

And, while courts initially may have resisted the expansion of the fair reporting privilege in providing a defense for attorneys in the situations outlined above, it appears we have now entered an era of expanding such rights in an effort to protect the free dissemination of this type of information.

Because, I guess, in the end, what's fair is fair. Right?

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Upcoming Speaking Engagements

Goldberg Segalla attorneys are invited to speak and present nationwide. Join members of our Professional Liability team at upcoming conferences on directors and officers insurance, errors and omissions coverage, and long term care.

Peter J. Biging
Vice Chair,
Professional Liability Practice Group

D&O Liability Insurance ExecuSummit
Tuesday, May 16
Uncasville, CT

Matthew S. Marrone
Partner,
Professional Liability Practice Group

E&O Liability Insurance ExecuSummit
Tuesday, June 6
Uncasville, CT

Caroline J. Berdzik
Co-Chair, Employment and Labor
Practice Group

Long Term Care ExecuSummit
Tuesday, June 27
Uncasville, CT

Goldberg Segalla is a law firm more than 300 lawyers strong, with 18 U.S. offices. Founded in 2001, the firm has earned numerous distinctions that place it among many of the largest and longest-established law firms in the world.

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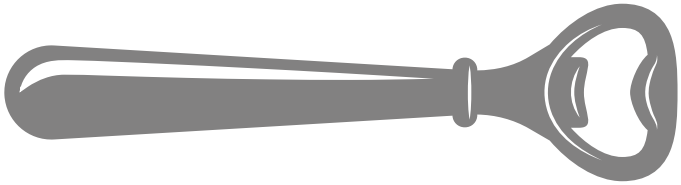
Top Five NYC Dive Bars for Discussing Professional Liability

By Joseph A. Oliva

New York City, the Big Apple to some and home to millions, has everything. People from all over the world come to New York to simply experience "it." Whether you're looking to catch a show on Broadway, visit some of the best museums in the world, taste a diverse and (sometimes) decadent range of food, or chat about professional liability coverage with the locals, New York has something for everyone.

Now, while some who visit and live in New York will want to ensure they experience the Jean Georges, Daniels, Up And Downs, or Lavos of the world, there are millions who enjoy the out-of-the-way dive bars filled with unique patrons telling stories about the Big Apple. And as lawyers, you may even find your next client sitting right next to you at a bar where if a beer spills, it just soaks into the counter.

So, while some of the best dive bars are gone from the city landscape, we offer these five hot spots and dive bars where you may run into a celebrity, meet a professional liability professional, or just fully experience all of what New York has to offer.



1 Doc Holliday's
Location: Alphabet City

Alphabet City was once on every parent's list as where their kids were not allowed to hang out. Today, the Lower East Side is cool and full of young professionals hanging out at Doc's after work. Decorated with Lynyrd Skynyrd and Allman Brothers t-shirts, license plates, and snow sleds, walking through Doc's saloon door entrance is like stepping back in time, but into a slightly different reality. At Doc's, everything is sticky — the bar, the seats, and the tables. A small pool table sits in the back and there is always a game to be had. The bartenders are young and like to drink along with their patrons. No food is served either — instead the local pizza joint delivers.

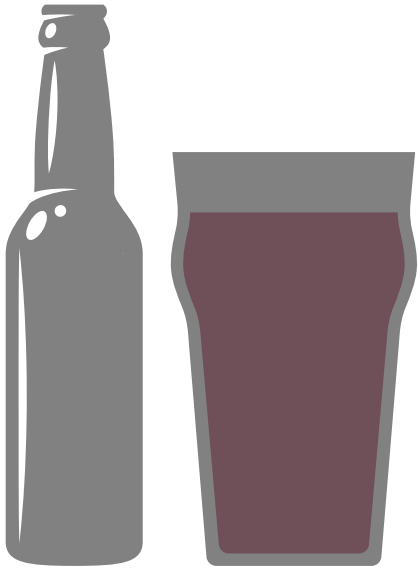
2 Snafu
Location: East 47th Street

Snafu is home to a diverse crowd, with people from 21 to 80 hanging out around the bar. It's not uncommon to find bankers chatting with construction workers, or lawyers challenging the locals to a friendly game of pool. It is narrow and tight, with drinks selling for $5 and $7 — a bargain in NYC. There is a DJ blaring tunes at all times, a disco ball hanging from the ceiling, and a smoke machine making it just a little difficult to see who you're talking to. The back of the bar has an upstairs "lounge" with sticky couches, a projector always showing some sort of sporting event, and never-ending popcorn. The downstairs area has a foosball table and a pool table where "sharks" await their next victim.

Top 5

3 Mudville
Location: Tribeca

Mudville 9 is a “slightly grown-up” sports bar — a slightly chic place where financial district types and lawyers stop by for non-domestic beer and all you can eat wings. Of the five bars on this list, Mudville may be the best place for professional liability discussions as it is blocks from the State and Federal Courthouses, City Hall, Tammany Hall, Wall Street, and headquarters of various insurance companies. It is also down the block from another NYC classic, Ecco, an old-world Italian saloon, where your clients and competitors will be sure to be holding court.



4 Jeremy’s Ale House
Location: Financial District

The original Jeremy’s moved to its current location as real estate developers took its original home in what looked like an old garage. The decor is the same, with various articles of clothing hung from the ceiling. The bar is loud, the beer is cold — and served in liability-free Styrofoam cups — and it sits near one of the most historical areas of NYC, the South Street Seaport.

5 Spring Lounge
Location: NOHO

NOHO, once part of Little Italy, is now a hip neighborhood full of old tenement buildings that have been converted into high-priced apartments. The Spring Lounge has gone by many names over the years — having been renamed three times since it opened in the 1920s. Today, locals refer to Spring Lounge as “the shark bar” because of the large stuffed sharks on display when you enter. The bar’s website provides the sage proverb: “Life is Short, Drink Early,” and it serves PBR — a non-intimidating, hipster beer — on draft.

Pennsylvania Superior Court Upholds Verdict, Ruling Against Defense Ipse Dixit Argument

Tillery v. Children's Hospital of Philadelphia
(Superior Court of Pennsylvania, February 28, 2017)

In *Tillery v. Children's Hospital of Philadelphia*, Pennsylvania's intermediate appellate court upheld a medical malpractice verdict in favor of the plaintiffs. The defendants raised multiple issues on appeal with the lead argument being that the plaintiffs' experts' opinions were based solely on their own experience and expertise rather than scientific or empirical evidence.

The *ipse dixit* argument can be very strong and persuasive where supported with a strong factual record that establishes no scientific or medical support for the opinions except the *ipse dixit* of the expert (*Ipse dixit* is a bare assertion resting on the authority of an individual, in other words, it is because the expert says so).

Unfortunately for the defense in this case, the Superior Court did not agree that the plaintiffs' opinions lacked basis, noting that the experts relied upon medical literature, diagnostic studies, reports of other professionals, as well as their own research and experience.

IMPACT: Challenging plaintiff expert testimony as lacking scientific and/or medical support can be difficult in medical malpractice cases, but a strong cross examination focused on the data/literature from which the expert derives his/her opinions can prove fruitful in some instances.

— Sean T. Stadelman

Professional Liability Coverage Only Extends to Claims With a Breach of Professional Duty

Madison Mutual Insurance Company v. Diamond State Insurance Company
(7th Circuit, March 21, 2017)

At issue was whether a homeowners' insurer or professional liability insurer was obligated to provide their mutual insured a defense. In 1999, Dr. William and Wendy Dribbens purchased a house at Heartland Oaks. The property seller retained Geraldine Davidson, a Heartland Oaks resident and developer, as a real estate broker. On the land purchased by the Dribbens, a dam was constructed to make a lake in the center of the development. However, during the sale of the property, Davidson allegedly failed to disclose that the original owners/developers had not obtained a permit authorizing the dam's construction. In 2006, the Dribbens filed suit against Davidson for the non-disclosure, which amounted to fraudulent concealment and consumer fraud. Diamond State Insurance Company (Diamond State), which provided Davidson with a professional liability errors and omissions policy, agreed to defend Davidson. The matter was ultimately arbitrated in her favor.

In 2011, the Dribbens brought suit against Davidson and her husband, their neighbors, alleging harassment and slander arising out of a variety of events. Madison Mutual Insurance Company, the homeowner insurance carrier, provided a defense to the Davidsons. Madison also tendered the suit to Diamond State on the basis that the factual allegations of the 2011 suit supported a claim against Ms. Davidson in her professional capacity relating back to the non-disclosure. Diamond State refused the tender on the basis that the 2011 suit did not arise out of Davidson's professional services as a real estate broker. Madison then initiated a declaratory judgment action seeking a ruling that Diamond State had the duty to reimburse for defense costs incurred in connection with the 2011 suit. The Illinois federal district court granted summary judgment in Diamond State's favor.

On appeal, Madison argued that the 2011 suit related to the conduct in the 2006 suit with respect to Davidson's professional services as a real estate broker, thereby triggering coverage under the Diamond State policy. Notably, the Diamond State policy was provided on a "claims made and reported basis" and its notice period ended in 2008. However, due to the policy's "awareness clause," Madison argued Diamond State should be deemed to have received timely notice of the 2011 suit as well. The Seventh Circuit rejected Madison's arguments. Although allegations in the 2011 suit stated Davidson was a real estate broker, nowhere was it alleged that she breached her professional obligations as a broker. To the extent the 2011 suit alleged the Davidsons owed the Dribbens a duty of care, the duty was not professional in nature — but rather to act as reasonable neighbors.

IMPACT: *Madison v. Diamond State* is an instructive ruling as to the parameters of risk covered by various types of liability policies. Although professional services were mentioned in the complaint, the court saw through the window dressing and found that the gravamen of the subsequent complaint really had nothing to do with the rendering of professional services.

— Colin B. Willmott

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Professional Liability Magazine

Emerging developments, decisions, and defense strategies

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