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LAW DAY

Advancing the Rule of Law Now

Thursday, April 29, 2021

See insert

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OF NOTE

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Law Day 2021
Advancing the Rule of Law Now

By Ann Burkowsky

The Nassau County Bar Association (NCBA) and the Nassau County Women's Bar Association (NCWBA) will present this year's Law Day celebration—Advancing the Rule of Law Now, which explores the importance of the rule of law and its role to ensure order and justice within our society—on Thursday, April 29, 2021, at 5:00 PM via Zoom. Due to COVID-19, this is the first year that the Law Day celebration will not be held in person, as to ensure the health and safety of honorees and guests.

The NCBA and NCWBA will welcome Keynote Speaker Dr. Sally Roesch Wagner and recognize three special honorees for their dedication and commitment to the legal community.

Keynote Speaker Dr. Sally Roesch Wagner

In addition to being awarded one of the first doctorates in the country for her work in women's studies, Dr. Sally Roesch Wagner is an accomplished author of both the young reader's book, We Want Equal Rights: How Suffragists Were Influenced by Native American Women, and the anthology, The Women's Suffrage Movement, a look at the 19th century women's rights movement with a forward written by American Journalist and Social Political Activist Gloria Steinem.

As a historian of the suffrage movement, Dr. Wagner is the founder of one of the first college-level women's studies programs in the United States and has taught women's studies courses for over 50 years. She currently serves as an adjunct faculty member in the Syracuse University Renee Crown University Honors Program.

Dr. Wagner has been featured on numerous media outlets, including CNN Special Report: Women Represented, CNN's Quest's World of Wonder. She has also been quoted in the New York Times, Washington Post, Smithsonian, Nation, and Time Magazine, among others. In 2020, Dr. Wagner was selected as a New York State Senate Woman of Distinction, and one of "21 Leaders for 21st Century" by Women's E-News in 2015.

Dr. Sally Roesch Wagner

Liberty Bell Award

The Liberty Bell Award is presented to a non-lawyer who has strengthened the American system of freedom under the law by heightening public awareness, understanding and respect for the law.

The 2021 recipient for this award is the League of Women Voter s of Nassau County (LWVNC), a nonpartisan political organization that encourages active participation in government. Through education, advocacy, and the power of women, the LWV is able to influence public policy and defend democracy.

See LAW DAY, Page 20

NCBA Annual High School Mock Trial Tournament

By Jennifer C. Groh

One of the highlights of the Bar year is the annual Mock Trial Tournament for high school students. The long-running program has helped further the students' understanding of trial advocacy and the legal system and has perhaps sparked a future career aspiration or two.

In past years, the hallways of the Nassau County Supreme Court have echoed with the excited voices and footsteps of 600 students from nearly 50 schools across Nassau County. Like so many other events this past year, the COVID-19 crisis forced the re-thinking and re-imagining of this annual competition.

On February 24, the Mock Trial tournament began, albeit virtually, thanks to the dedication of the NCBA members who volunteer their time to serve as attorney advisors for the 40 teams entered in the competition this year, as judges for the seven rounds that make up the competition, and as Chairs who oversee the running of the tournament each year.

The final round in April will determine the Nassau County champion which will go on to the statewide finals in May, also to be held virtually. The Mock Trial Tournament Chairs are Hon. Marilyn K. Genoa, Peter H. Levy, and Hon. Lawrence M. Schaffer, and the Administrator is Jennifer C. Groh, Director of the Nassau Academy of Law.

Jennifer C. Groh is the Director of Continuing Legal Education for the Nassau Academy of Law at the Nassau County Bar Association. The Nassau Academy of Law hosts CLE programs throughout the year. For additional information, contact Jennifer at jgroh@nassaubar.org or (516) 747-4077.

FOCUS:
HOSPITAL AND HEALTH LAW

Proper Use of Management Services Organizations: The Devil Is in the Details

Andrew P. Nitkewicz and Matthew J. Grasso

One of the many things the COVID-19 global pandemic has taught us is the importance of our medical professionals and the great value of their time. The demands on medical professionals, especially physicians, have never been more daunting. Yet, despite the strain on physicians in the business of healing and saving lives, the burdens of running a medical practice—the business of medicine—also remains constant.

Unlike many other businesses where corporate investors and private equity backers can provide almost unrestricted support in running a business, the medical profession is highly regulated and control by the licensed professional is mandatory. One tool being utilized by many physicians to enable them to run a successful medial practice while affording them the time to concentrate on patient care, is the engagement of a management services organization ("MSO"). But given the prohibition of the corporate practice of medicine, among other restrictions, the details of the physician-MSO relationship are vital.

MSOs and Corporate Practice of Medicine

MSOs are entities that are separate from the health care companies and are contracted to run the day-to-day aspects of the practice. For example, MSOs rent space, purchase or lease equipment, keep records of the accounting and payroll, contract with vendors, etc. Essentially, MSOs allow doctors to focus on the medical side of their businesses without worrying about their day-to-day administrative needs. Over the last decade, the use of MSOs has become more prevalent in the medical field. On the surface, these arrangements seem ideal, the doctors can focus on medicine while the MSOs handle the daily functions of running the office. However, any healthcare provider contemplating a relationship with an MSO must be fully informed of the regulations surrounding such a relationship, and fully aware of the ramifications of breaching these regulations.

In order to protect patients and the integrity of the medical profession, New York strictly regulates the business relationship between physicians and nonphysicians. One major method of regulation is through the prohibition of the corporate practice of medicine. It is deemed professional misconduct for a medical professional to share profits earned in connection with a medical service with a nonmedical professional in New York.[1] This arrangement, known as fee-splitting, is proscribed by Education Law § 509-a. Members of a professional service corporation (PC) may share these profits,[2] but PCs may be organized only by licensed members of the same profession.[3] Similarly, Business Corporation Law § 1508 requires directors and officers of PCs to be authorized by law to practice that profession.[4]

Understanding this prohibition is important when contracting with MSOs because the slightest mistake could lead to an arrangement that could be deemed the corporate practice of medicine. Under Education Law § 6511, punishments for professional misconduct include censure and reprimand, suspension, revocation, or annulment of the professional license, limitations on issuance of a further licenses, additional education, public service, or a fine up to $10,000.[5]

With statutes as unforgiving as those that govern fee-splitting and the corporate practice of medicine, the line between the MSO and physician must be clearly defined and abided by. But what happens when that line blurs? In 2019, this very issue was taken on by the New York Court of Appeals.

Carothers v. Progressive Insurance Company [6]

The plaintiff in *Carothers* was a PC owned by a radiologist, Andrew Carothers. The PC entered into an agreement to lease MRI equipment and facilities from a nonprofessional company. The fees for the MRI equipment were alleged to be exorbitant to the point that it would have been cheaper for the PC to buy the equipment outright.

It was claimed that Carothers' oversight of the PC was virtually nonexistent. Specifically, it was alleged that Carothers was not involved in evaluating or disciplining employees; his executive secretary (a nonphysician) was the person tasked with contacting referring physicians; and there was a lack of quality control at the PC, with Carothers reviewing only 79 out of 38,000 reports—many of these reports were alleged to be inadequate due to the advanced age of the MRI machines.

Further compounding these issues were allegations with respect to the PC's handling of its finances. While Carothers opened a bank account for the PC, doing so was seemingly the extent of his involvement in the PC's financial matters. It was claimed that Carothers's executive secretary wrote the checks on behalf of the PC and that oftentimes, these checks were written to herself, or to the owner of the MRI leasing company, and were used for lease payments on a car and water bills for a house in Las Vegas. It was claimed funds from this account were wire transferred to overseas accounts—reaching as much as $12.2 million. Eventually, insurance carriers ceased paying the PC's no-fault claims, and the PC closed at the end of 2006.

The PC sued the defendant insurance carrier, among others. "The jury found that the defendants had proved that plaintiff was 'fraudulently incorporated.'"[7] Thus, under *Mallela*,[8] insurance carriers could withhold payment.[9] The jury also found that Carothers did not engage in the practice of medicine through plaintiff in 2005-2006.

Ultimately, the Court of Appeals ruled that "*Mallela* does not require a finding of fraud for the insurer to withhold payments to a medical service corporation improperly controlled by nonphysicians."[10]

In its decision, the Court wrote that the term "fraudulently incorporated" may be misleading, explaining that "a corporate practice that shows 'willful and material failure to abide by' licensing and incorporation statutes may support a finding that the provider is not an eligible recipient of reimbursement without meeting the traditional elements of common-law fraud."[11]

Further, the Court explained that while fee-sharing arrangements are not a defense to a no-fault action, this case went beyond splitting fees; this was total control by nonphysicians.[12] The Court echoed the view that "the common law in New York has long

See PROPER USE, Page 21

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Proper Use…

Continued From Page 7

recognized the need to ensure that providers of professional services are not unduly influenced by unlicensed third parties who are free of professional responsibility requirements and may disregard patient care in operating a 'corporation…organized simply to make money.'"[13]

Finally, the Court in *Carothers* reiterated the *Mallela* rule "that insurers may 'look beyond the face of licensing documents to identify willful and material failure to abide by state and local law,' such as actual ownership or operation of the practice by an unlicensed individual."[14] Thus, "the jury's finding that [the PC] was in material breach of the foundational rule for professional corporation licensure—namely that it be controlled by licensed professionals—was enough to render plaintiff ineligible for reimbursement."[15]

Avoiding Ramifications of *Carothers*

Physicians should be mindful of the ramifications of the *Carothers* decision. This awareness is especially important for physicians who wish to enter into agreements with MSOs. While the standard for fraudulent incorporation set forth by the Court is "willful and material," it is best to remain vigilant of the possible ramifications.

To best avoid these pitfalls, Physicians should be sure to remain heavily involved in the medical side of the business, while also keeping track of its finances. MSOs should be used to aid in the day-to-day operations of the business, but physicians should not allow those nonprofessionals involved in the MSOs to hold themselves out as representatives of the PC. In *Carothers*, for example, the executive secretary was tasked with contacting referring physicians on behalf of the PC. Similarly, the PC's tax returns were prepared using a separate nonphysician's telephone number as the contact. Ultimately, balance is key.

Carothers should be a cautionary tale for many physicians. While not explicitly about MSOs, *Carothers* details (often to extremes) how a business arrangement between a PC and a nonprofessional can quickly drift into the realm of professional misconduct. As the utilization of MSOs, and other methods of business administration, increase in popularity, it is important to draft agreements properly, and make sure clear boundaries are set. The consequences of a failure to do so are serious, as New York continues to make it clear that there is not much leeway when it comes to the unauthorized practice of medicine and fee-splitting.

Be Aware of Limitations

It is imperative that physicians understand the limitations to these arrangements. One key limitation is that they must maintain control over the medical side of their businesses. A physician who cedes too much control to a nonphysician may face the suspension or revocation of his license, as well as a possible fine. Doctors may contract with MSOs to provide back-end services, but payments to these MSOs cannot be based on the services rendered, nor can they relate to any actual medical treatment. For example, payment should not be based on a percentage of total revenue. Rather, flat fees are preferable.

Similarly, another potential danger for physicians who enter into an agreement with an MSO is that if it is determined that the arrangement constitutes fee splitting, the contract may be unenforceable. Courts have held that they will not hear complaints from parties who enter into an illegal professional/nonprofessional arrangement.[16] Finally, physicians who enter into agreements with MSOs may also come across issues with insurance companies who have may be legally permitted to refuse reimbursement if the health care provider circumvents the State licensing requirements.

MSOs can be extremely helpful to physicians so as to allow them to concentrate on patient care, as opposed to administrative issues. Consequently, more physicians are utilizing the MSO model, and their rise in prevalence is an overall benefit to the industry. But, as with all increasingly popular aspects of business, it is important not to rush into any agreements, and to fully understand the consequences of the decision.

1. Educ. Law § 509-a.
2. *Id.*
3. Bus. Corp. Law § 1507 (a).
4. Bus. Corp. Law § 1508.
5. Educ. Law § 6511.
6. *Andrew Carothers, M.D., P.C. v. Progressive Ins. Co.*, 33 N.Y.3d 389 (2019).
7. *Carothers*, 33 N.Y.3d, at 400.
8. *State Farm Mut. Auto. Ins. Co. v. Mallela*, 4 N.Y.3d 313 (2005).
9. See *Carothers*, at 404.
10. *Id.*, at 394.
11. *Id.*, at 405.
12. *Id.*, at 406.
13. *Id.*, at 404.
14. *Id.*, at 405.
15. *Id.*, at 406.
16. *Linchitz Practice Mgmt., Inc. v. Daat Med. Mgmt., LLC*, 165 A.D.3d 908 (2nd Dept. 2018) (holding that "[w]here the parties' arrangement is illegal 'the law will not extend its aid to either of the parties … or listen to their complaints against each other but will leave them where their own acts have placed them").

Fugitive…

Continued From Page 11

far into sadness" making him "TV's only existential success."[12] Janssen has a remarkable way of seamlessly blending into any crowd, yet still standing-out.

Act IV

In 1962, Roy Huggins, when making his pitch to the network, made it clear Kimble's odyssey would eventually end:

> *This will be a series which will be brought to a planned conclusion, that conclusion being of course Richard Kimble's release from his predicament and the ultimate salvation of justice.*[13]

During its fourth season, *The Fugitive* came to a close with a two-part episode where Kimble confronts the one-armed man. At the time of its airing on August 29, 1967, the finale titled *The Judgement Part II* was the then-highest rated program in television history.[14] It was a fitting tribute to a national sensation that had a real-life impact.

F. Lee Bailey believed *The Fugitive* created a climate receptive to his efforts on behalf of Sam Sheppard[15]. The series ended just one year after the second trial. But was it "a slap in the face of the American judicial system"?[16] Thankfully, Leonard Goldenson, the president of ABC and a lawyer himself, didn't think so.[17]

The Fugitive was in tune with the spirit of the 1960's. Seen by millions of viewers every week; the show was as thoughtful as it was suspenseful. Blending solid dramatic story-telling with fine acting, it was also a running commentary influencing the way in which many Americans came to see the law.

This was the heyday of the Warren Court. Each term the Supreme Court would issue, with seeming regularity, a decision expanding the rights of the accused, including Sam Sheppard. For the better part of four years, *The Fugitive* dramatically expounded the idea that the innocent were being unjustly convicted.

The Fugitive no doubt effected public attitudes toward law enforcement. The audience despised Gerard. By contrast, the uplifting portrayal of Dr. Kimble improved the image of Dr. Sheppard and other defendants. If someone of the caliber of Dr. Kimble could be sentenced to death for a crime he didn't commit, how many others are wrongly languishing in jail or on death row.

It would be presumptuous to believe that a television program paved the way for the Warren Court's rulings on criminal procedure. But it's not inconceivable that public opinion, influenced by popular entertainment, played some role. Millions of Americans, each empathizing with the plight of the fictional Dr. Kimble, came to the conclusion that something was amiss.

Epilogue

The following decade, witnessing rising crime rates, saw the pop-culture pendulum swing in the opposite direction. *Dirty Harry*, starring Janssen's old Army buddy Clint Eastwood, would come to embody the law-and-order positions of Richard Nixon. The character played as a rallying cry against the Warren Court's expansive view of the Constitution.

But Kimble's story continues to fascinate. *The Fugitive* has stood the test of time. In the words of novelist Stephen King, it was "groundbreaking television" making it "absolutely the best series done on American television."[18] More than that, it serves as a meditation on American justice and the way in which the law is administered in our country. Richard Kimble represents the dramatis personae of natural law.

The author would like to dedicate this article to Ms. Ann Burkowsky, whose insight was an inspiration in the writing process.

1. This distinct talisman, which organized an episode into a four-act structure with a concluding epilogue, was present in The Fugitive and in all series by executive-producer Quinn Martin.
2. Ed Robertson, *The Fugitive Recaptured*, 32 (1st Ed. 1993).
3. Roy Huggins quoted in Robertson, supra. 186.
4. Id. 78.
5. Arnie Rosenberg, *F. Lee Bailey says 'Fugitive' was Sam Sheppard*, (August 7, 1993) at http://www.baltimoresun.com.
6. Sheppard Murder Case/Encyclopedia of Cleveland at www.case.edu.
7. *Sheppard v Maxwell*, 384 U.S. 333 (1966).
8. Sheppard Murder Case/Encyclopedia of Cleveland, supra.
9. Mel Proctor, *The Official Guide to The Fugitive*, 78 (1st Ed. 1995).
10. Robertson, supra 22.
11. Id. 30.
12. People Magazine, Television's 50th Anniversary, 67 (Summer 1989).
13. Huggins, supra 188.
14. Entertainment Weekly, 58 (February 19/26, 1999). The episode was the most watched show in television history until the 1981 episode of Dallas which revealed who shot J.R. Ewing, which in turn was superseded by the final episode of *M*A*S*H** in 1983.
15. Allen Pussey, *April 13, 1963: Sam Sheppard seeks a new trial*, (April 1, 2018) at https://www.abajournal.com.
16. Robertson, supra 13.
17. Id.
18. Stephen King, *introduction* in Robertson, supra xi.

NCBA Building Manager Hector Herrera Recognized by Nassau County Supreme Court

Photo by Dan Bagnuola

On Tuesday, February 23, Nassau County Administrative Judge St. George honored NCBA Building Manager Hector Herrera with a Special Recognition Award for his "dedication to excellence" and commitment to the Nassau County Courts and legal community.