



# LEGAL INSIGHTS

A Publication of Havkins Rosenfeld Ritzert & Varriale, LLP

## CONSTRUCTION CORNER

### New York Court of Appeals Reiterates Requirement of Specific Safety Standard to Sustain Claim under Labor Law § 241(6)

By Gail L. Ritzert

On October 21, 2010, the New York Court of Appeals, in *Gasques v. State of New York*, 2010 N.Y. Slip Op 7416 (2010), reiterated the requirement that the plaintiff plead and prove an Industrial Code provision that sets forth a specific safety standard in order to succeed with his or her claim under Labor Law § 241(6).

As you have read in this column previously, in order for a plaintiff to be entitled to hold a defendant statutorily liable under Labor Law § 241(6), the plaintiff must prove not only that the he or she is within the class of persons protected by the statute, but that his or her injury was proximately caused by a violation of an Industrial Code provision that sets forth a specific standard of conduct. See *Rizzuto v. L.A. Wenger Construction Co.*, 90 N.Y.2d 343 (1998). In support of a claim under Labor Law

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### Managing Risk in Your Daily Clinical Practice with Proper Charting—A Dental Professional’s First Defense

By Sean P. Dwyer and Shanna R. Torgerson

In the practice of dentistry, the key to avoiding a lawsuit is managing risk. Many malpractice claims against dental professionals have a common thread that is spun from mistakes committed time and again by practitioners—but the foundation of every malpractice claim is the patient’s chart. The chart will become either a practitioner’s most formidable weapon or her worst nightmare depending on how well the course of treatment is documented. Many defensible malpractice claims have been lost not because of any shortcoming in the practitioner’s treatment skills, but rather, simply because the dental professional failed to adequately chart.

Every dental professional has room for improvement in his or her charting technique. Here are a few basic tips regarding charting that every dental practitioner should take to heart when honing his or her charting skills:

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## Extension of Deadline for Medicare Secondary Payer Reporting Requirements

By Jonathan A. Judd

Medicare has become much more aggressive about protecting its right to reimbursement in personal injury settlements. Legislation has been enacted to minimize the possibility that Medicare benefits are paid where there is another source of payment for the plaintiff's medical expenses.

The Medicare Secondary Payer Statute (MSP), enacted in 1980, provides that Medicare will be a secondary payer in the event that insurance or some other source is available to pay medical costs for a Medicare beneficiary. Primary payers include workers' compensation plans, certain group health plans, products liability insurance, no-fault insurance, automobile liability insurance and general liability insurers, including entities with self-insured retentions. The MSP rule applies where a primary payer covers the payment of a judgment or settlement related to a claim made by a Medicare beneficiary for past or future medical expenses. In such cases, Medicare would be considered the secondary payer of the benefits, and, if it paid for medical care for the plaintiff, it would have a right to recover at least some of the settlement monies paid by an insurer or other responsible entity.

Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) amends the MSP rule. Enforcement of

the MSP has historically been lax because Medicare did not closely monitor when a personal injury suit by a Medicare beneficiary resulted in the beneficiary receiving a settlement or judgment. As a result, Congress passed the MMSEA in an attempt to reduce federal health care expenditures by ensuring that funds paid by primary payers, including those used to settle personal injury lawsuits, were disclosed and the government has an opportunity to recover the health care payments it made. The MMSEA is applicable to group health plans, liability insurers, (including self-insurers), no-fault insurers and workers' compensation carriers.

The MMSEA does not create any new payment requirements. However, it imposes stringent new reporting requirements bearing draconian sanctions for failure to comply so as to

ensure that the primary payers issue the payments mandated by the existing law.

Although these reporting requirements were slated to go into effect on October 1, 2010, the Centers for Medicare and Medicaid Services (CMS) recently extended the date on which reporting must begin until January 1, 2011. This means that, as of that date, insurers will be required to provide to Medicare certain information about Medicare beneficiaries who have obtained verdicts or settlements in personal injury and wrongful death claims.

The new requirements in section 111 mandate that, when paying claims for personal injuries, private payers, which MMSEA refers to as Responsible Reporting Entities (RREs), are required to determine whether a plaintiff is a Medicare beneficiary. If so, the RRE must report to CMS the beneficiary's coverage under settlements, judgments or other payments from liability insurance, no-fault insurance or workers' compensation. Failure to comply with the mandatory reporting requirements can result in a fine of \$1,000 per day per claimant.

The MSP and section 111 provide that an RRE making a payment directly to a Medicare beneficiary pursuant to settling a personal injury claim is generally required to report to and reimburse Medicare in two situations: (1) when medical expenses previously incurred by the beneficiary are claimed or paid as part of the settlement, or (2) if the RRE agrees to assume an ongoing responsibility for the payment of medical expenses for the beneficiary.

The obligation to report arises at the time of the settlement or judgment. However, if there is an ongoing responsibility for payments, an additional report is required: RREs would then need to report when they first assumed ongoing responsibility for a claimant's medical expenses and again when their obligation to pay the claimant's medical expenses terminated.

To help facilitate the process of ensuring that all Medicare beneficiaries are accounted for, RREs should ensure that they have procedures in place pursuant to which they can determine whether the plaintiff is eligible for Medicare. Defense counsel should demand information about possible Medicare coverage as soon as possible in the litigation to assist the RREs in fulfilling their reporting requirements and provide the insured with all of the information it needs to file a report with CMS.

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On November 3, 2010, I had the privilege of moderating “Ticketing: Managing the Keys to the Kingdom” at *Billboard Magazine’s* 7th Annual Touring Conference in New York. The ticketing panel, which tends to be contentious—particularly with regard to the advent of paperless ticketing and the role of the primary versus the secondary markets—was uncharacteristically calm this year. The panel seemed united in interest with regard to discussing ways to improve the customer experience and the ability to sell more tickets to live music and other events (a nonessential luxury item) in a soft economy.

The panelists, made up of nationally recognized ticketing executives, included Nathan Hubbard, of Ticketmaster; Chris Tsakalakis, president of Stub Hub; Jeff Kreinik, vice president of marketing of Front Gate Tickets; David Butler, president of Paciolan; Lynsie Camuso, president of ShowClix; and David Goldberg, an “independent ticketing consultant” who has had a long history in the e-commerce and the ticketing industries. The group opined on topical challenges in the ticketing industry such as setting prices, the presence of service fees, the need for transparency to the customer and the effect of the recession on the live music business, particularly with respect to the prospect of “distressed” inventory.

Given the challenge of the soft economy, the panel focused on opportunities to enhance ticket sales presented by social media such as Facebook and Twitter and the use of mobile technology. According to the panel, harnessing social networking and mobile technology is essential, particularly in order to reach the important under age 30 demographic. The panel identified solutions to benefit artists, venues and promoters (and, presumably, ticket sellers). They all agreed that the ticketing industry had barely “scratched the surface” of the ability to monetize social networking and mobile technology. The panelists concurred that there was still more “headroom” to be explored.

One technological tool that the panel embraced is based upon technology that facilitates “mining” customer data from the ticketing transaction via “cookies.” A “cookie” is a small amount of data, including an anonymous unique identifier, that is sent to a browser from a Web site’s computer that is then stored on the host computer’s hard drive. Simply put, and despite their seemingly cute name, “cookies” are used to collect and compile certain statistical data that can then be used to track the movements of consumers and to profile them. Based upon the information gathered and the profile created, the critical data can be used to facilitate targeted marketing based upon the consumer’s prior purchases.

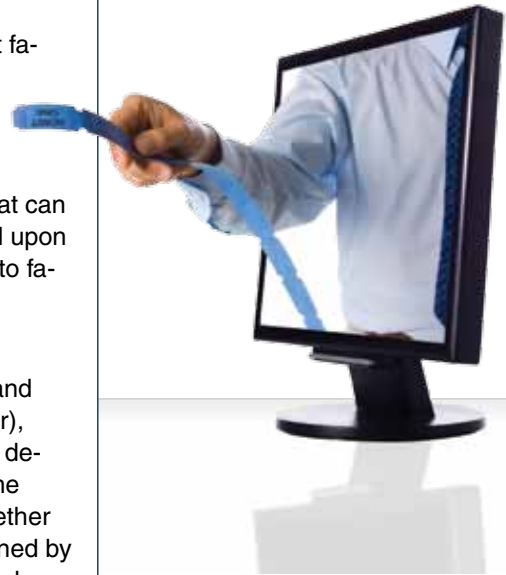
With respect to questions of whether obtaining such data from customers who made online ticketing purchases was problematic based on privacy grounds (and whether it was consistent with the panel’s consumer conscious theme this year), and whether the artist, the venue or the promoter “owned” that data, the panel demurred. Some panelists, however, noted that consent is obtained and that some sites allow customers to create their own profile. This begs the question of whether this data, arguably “the keys to the kingdom” as much as the ticket itself, is owned by the artist, venue, promoter, ticketing company or someone else. Who can sell, share or retain that valuable information is likely to be a topic of further discussion for the ticketing industry.

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## A Report from the Billboard Touring Conference: Managing the Keys to the Kingdom—and Whose Kingdom Is It Anyway?

By Carla Varriale



## Sex, Lies and Fiduciary Duty: Appellate Court Rejects Attempt to Invoke New York's "Anti-Heart Balm" Statute

By Carla Varriale

New York is one of several states that has a so-called "anti-heart balm" law. Since 1935, this law has banned lawsuits initiated by people who claim, among other things, alienation of affections, seduction and breach of contract to marry. Civil Rights Law Section 80 precludes suits by the lovelorn, with the exception of such claims that are based upon a breach of a fiduciary duty. This exception is often invoked, although not successfully, in the context of claims against a cleric engaged in a formal counseling relationship with a congregant.

In *Spielman v. Carrino and Grace Gospel Church of Suffolk, Inc.* (October 10, 2010), the New York's Appellate Division, Second Department determined that the breach of fiduciary duty exception did not apply in an action brought by two sisters (and co-plaintiff Steven Spielman, derivatively) who alleged that they were seduced by the same pastor while he was their counselor. The plaintiffs sued to recover money damages for assorted causes of action, including breach of fiduciary duty, intentional infliction of emotional distress and negligent supervision. A motion to dismiss the complaint in lieu of answering based on the failure of the plaintiffs' pleadings to state a cognizable cause of action, among other things, was denied by the Supreme Court, Suffolk County (Whelan, J.).

The Appellate Division, Second Department unanimously reversed the denial of the motion to dismiss and held that the fiduciary duty exception did not apply. The court acknowledged that "de facto control and dominance" in the relationship, an essential element of a breach of fiduciary duty claim, was undone by the allegations set forth in the plaintiffs' own pleadings. The court focused on the plaintiffs' admissions in their pleadings that they



broke off respective affairs with the pastor when they discovered he was involved with both of them, noting that these admissions unraveled any contention of vulnerability or that the plaintiffs were somehow incapable of self-protection, as required in order to trigger the fiduciary duty exception. The court continued:

As the Court of Appeals has recently stated in the context of similar allegations, in order to demonstrate the existence of a fiduciary duty between a cleric and congregant in a formal counseling relationship, there must be characteristics of "de facto control and dominance" in the relationship (*Doe v. Roman Catholic Diocese of Rochester*, 12 N.Y.3d 764, 765, quoting *Marmelstein v. Kehillat New Hempstead: Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15, 21 [internal quotation marks omitted]). A relationship is marked by de facto control and dominance where the congregant is "uniquely vulnerable and incapable of self-protection" (*Doe v. Roman Catholic Diocese of Rochester*, 12 N.Y.3d at 766, quoting *Marmelstein v. Kehillat New Hempstead: Rav Aron Jofen Community Synagogue*, 11 N.Y.3d at 22). The Appellate Division further determined that although both sisters alleged facts which they contend made them uniquely vulnerable, they acknowledged that they ended the relationship with the offending pastor when they learned of his duplicity.

The Appellate Division further rejected the plaintiffs' vicarious liability claims against the church, noting that the defendant pastor clearly acted outside the scope of his employment. Thus, the plaintiffs could not hold the church vicariously liable for intentional infliction of emotional distress. Likewise, the court determined that the plaintiffs failed to state a cause of action for negligent supervision and that cause of action should also be dismissed.

### Contact

Carla Varriale and Gregg Scharaga represented the defendant, Eastern District Association of the Evangelical Free Church of America, Inc., which was sued after the decision was rendered by the Supreme Court, Suffolk County.

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## INSURANCE COVERAGE CORNER

### Injured Party's Insurance Law Section 3420(a) Rights Not Extinguished by an Insured's Untimely Notice

By Abbie Havkins

Recently, in *Continental Ins. Co. v. Atlantic Casualty Ins. Co.*, 603 F.3d 169 (2d Cir. 2010), the United States Court of Appeals for the Second Circuit opined as to whether an injured party's separate right to notify and sue an insurer for satisfaction of a default judgment against the insured pursuant to New York Insurance Law Section 3420(a) could be extinguished due to an insured's untimely notice to its insurer. Historically, an injured party did not possess a cause of action against the insurer of a tortfeasor because there was no privity of contract between the injured party and the insurer. The New York State Legislature enacted New York Insurance Law Section 3420(a) to provide such a cause of action. See *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 354 (2004).

Insurance policies invariably contain a provision which obligates an insured to provide timely notice of a claim to its insurer. Whether notice is timely varies with the particular facts and with each policy, but most policies contain an "as soon as practicable" or similar type of clause. As is often the case, this clause is open to interpretation. In addition, all New York insurance policies must contain certain provisions which are favorable to the insured and to judgment creditors. See N.Y. Insurance Law § 3420(a). One of these required provisions allows an injured party with an unsatisfied judgment against an insured party to sue the insurer for satisfaction of the judgment. See N.Y. Insurance Law § 3420(a)(2). Whether an insured's untimely notice to its insurer invalidated an injured party's right to sue the insurer directly, pursuant to Section 3420(a)(2), was the primary issue in a case decided by the Second Circuit on April 29, 2010.

While installing a new roof on a house, employees of a roofing contractor inadvertently started a fire. Continental Insurance Company, the insurer for the residence, paid the homeowners approximately \$640,000 for damages resulting from the fire. Five months after the fire, the roofing contractor sent notice of the claim to its liability insurer, Atlantic Casualty Insurance Company, and two days later, Continental sent Atlantic a separate notice of claim. Atlantic denied both claims. After obtaining a default judgment against the roofing contractor, Continental, as a judgment creditor in subrogation, sued Atlantic seeking a




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**The Court concluded that denying an injured party its statutory right due to the neglect of the insured makes little sense where an injured party acting with due diligence cannot ascertain the identity of or notify the insurer.**

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declaration that Atlantic was responsible for the default judgment. The District Court granted summary judgment to Atlantic holding that Continental could not bring a direct action against Atlantic because the roofing contractor's untimely notice of claim to Atlantic deprived Continental of the ability to give subsequent notice to Atlantic. See *Continental Ins. Co. v. Atlantic Casualty Ins. Co.*, No. 07 Civ. 3635 (DC), 2009 U.S. Dist. LEXIS 47481 (S.D.N.Y. Aug. 13, 2009). On appeal, the Second Circuit rejected the District Court's analysis, although it affirmed the judgment of the District Court on separate grounds.

The Court agreed with Continental's position that Section 3420(a) allowed it to give Atlantic independent notice of its claim, in spite of the fact that Atlantic's insured previously provided untimely notice of the claim. The Court stated that, with the enactment of Section 3420, an injured party is statutorily entitled to an independent right of recovery against the tortfeasor's insurer. Specifically, the Court cited subsection (a) (2) of Section 3420 which, as discussed above, permits an injured party with an unsatisfied judgment against an insured party to sue the insurer for satisfaction of the judgment in some circumstances.

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The Second Circuit found that the critical issue is whether the injured party pursued his rights to notify the insurer “with as much diligence as was reasonably possible” under the circumstances. See *Malik v. Charter Oak Fire Ins. Co.*, 877 N.Y.S.2d 114, 118 (2d Dep’t 2009). The reasonableness of an injured party’s notice is governed less rigidly than that required of an insured. *Id.* (citing *GA Ins. Co. v. Simmes*, 704 N.Y.S.2d 700, (3d Dep’t 2000)). The Court concluded that denying an injured party its statutory right due to the neglect of the insured makes little sense where an injured party acting with due diligence cannot ascertain the identity of or notify the insurer. Moreover, permitting an injured party to provide notice to the insurer, despite the untimely notice of the insured, ultimately serves the underlying purpose of Section 3420(a).

The Second Circuit reasoned that notice from an insured and notice from an injured party must be evaluated under different standards. While an insured party stands in privity with its insurer due to the contractual relationship, an injured party, despite its best efforts, may not be able to ascertain the identity of the insurer. Therefore, while an insured’s five-month delay in providing notice to its insurer violates the “as soon as practicable” provision of the insurance contract, the same delay does not necessarily render an injured party’s notice to an insurer untimely. After the insured provided notice to Atlantic, Continental provided notice a few days later as soon as it discovered the insurer’s identity. Thus, the Court concluded that Continental effectively preserved its right to sue Atlantic, and such right was not lost simply because its notice followed the insured’s untimely notice to Atlantic.

The significance of this decision may extend beyond its fairly narrow holding. The decision applies a pragmatic test to the question of whether the injured claimant’s delay in providing notice was reasonable. While many New York decisions hold that insureds and additional insureds have the same rights, duties and obligations under an insurance policy, if courts follow the Second Circuit’s pragmatic approach announced in *Continental*, it is likely that additional insureds may be held to a lesser standard than named insureds with regard to other conditions in an insurance policy.

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## CONSTRUCTION CORNER

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§ 241(6), plaintiffs will typically cite a string of Industrial Code provisions that have been allegedly violated by the defendants. It is the obligation of defense counsel to not only make sure that the provisions cited set forth a specific standard of conduct, but also that the provision applies to the task being performed by the plaintiff when the accident occurred. See *Rizzuto, supra*; *Buckley v. Columbia Grammer Preparatory, et al*, 44 A.D.3d 263, 841 N.Y.2d 249 (1<sup>st</sup> Dep’t 2007); *Kim v. D&W Shin Realty Corp., et al*, 47 A.D.3d 616, 852 N.Y.S.2d 138 (2d Dep’t 2008).

In *Gasques, supra*, the plaintiff sustained a crush injury to his hand when the motorized scaffold he was working on continued to move, trapping his hand between the external motor control and bridge to which the scaffold was affixed. In support of the claim asserted under Labor Law § 241(6), the plaintiff alleged that the defendant violated Industrial Code section 12 NYCRR § 23-1.5(c)(1). The Court of Appeals, in affirming the Appellate Division’s dismissal of the plaintiff’s claim, held that 12 NYCRR § 23-1.5(c)(1) “does not set for a specific standard to conduct and therefore cannot serve as a predicate for a Labor Law § 241(6) claim.”

In defending against Labor Law 241(6) claims, we commonly see plaintiffs relying on Industrial Code sections that simply set forth a general standard of care or safety. When a plaintiff relies on a provision which sets for a general standard of conduct as the only proximate cause of plaintiff’s injury, the defense must pursue a motion for summary judgment seeking a dismissal of the plaintiff’s Labor Law §241 (6) claim.

Remember, your ability to have a plaintiff’s Labor Law § 241(6) claim dismissed is not lost simply because the plaintiff has pleaded a violation of a specific standard set forth in the Industrial Code. It is incumbent upon defense counsel to re-search each Industrial Code section allegedly violated to determine whether the courts have held it sufficiently specific to invoke liability under Labor Law § 241(6). Counsel must also investigate whether the violation alleged was the proximate cause of the plaintiff’s alleged injury. Good investigation and a thorough review of the plaintiff’s medical records often provide ample evidence that the mechanism of injury was not the result of the alleged code violation. It is essential that you and your counsel work together to maximize your defenses and minimize your potential exposure.

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## CO-OP/CONDO CONNECTION

### Appellate Division Holds that Cooperative's Rules and Regulations Apply to Nonjudicial Foreclosure Sale

By Jarett L. Warner

Given the state of the economy and the real estate market, a novel issue with little precedent has arisen: When a bank forecloses on the sale of shares appurtenant to a cooperative apartment and conducts a public auction, is the successful bidder subject to the approval of the cooperative's board of directors and must the bidder otherwise comply with the cooperative's governing documents? That was precisely the issue raised in *LI Equity Network, LLC v. Village in the Woods Owners Corp.*, 2010 N.Y. Slip Op 07514 (2d Dep't October 19, 2010).

In *LI Equity*, the plaintiff LI Equity Network, LLC commenced an action in the Supreme Court, Suffolk County against the cooperative corporation, Village in the Woods Owners Corp., and the bank that had conducted a public auction of the cooperative shares, Washington Mutual Bank (WAMU). LI Equity alleged in its pleadings that although it was the successful bidder at a cooperative foreclosure auction held by WAMU, Village in the Woods refused to provide it (or a proposed third-party assignee) with a cooperative application and advised LI Equity that it would not approve LI Equity for the sale. LI Equity sought specific performance for a closing on the shares and monetary damages. Simultaneously, with the commencement of its action, LI Equity moved the court to stay Village in the Woods from selling the shares at another public auction.

The trial court granted LI Equity's motion, directing the closing of title of the premises and staying the auctioneer from proceeding with another foreclosure sale. In its decision, the trial court incorrectly found that a foreclosure proceeding is an action in equity, which triggers the equitable powers of the court and that "the court may exercise its equitable powers to set aside a judicial sale only where fraud, collusion, mistake or overreaching casts suspicion on the fairness of the sale." The trial court reasoned that a cooperative board of directors could not "prevent a court-ordered foreclosure sale by claiming some inherent right to impose private conditions such as approval of

**When a bank forecloses on the sale of shares appurtenant to a cooperative apartment and conducts a public auction, is the successful bidder subject to the approval of the cooperative's board of directors and must the bidder otherwise comply with the cooperative's governing documents?**

the purchaser on a court-ordered sale which requires the sale to the highest bidder for a fair and valid consideration." Village in the Woods then appealed to the Appellate Division, Second Department.

The Appellate Division, Second Department stated in its decision that "[t]he relationship between the shareholder/lessee of a cooperative corporation and the corporation is determined by applying the usual rules of contract interpretation to the controlling documents, including the proprietary lease." *Consolidated Resources, LLC v. 210-220-230 Owner's Corp.*, 59 A.D.3d 579, 581, 873 N.Y.S.2d 694, 696 (2d Dep't 2009).

In *Consolidated Resources*, an original purchaser of a cooperative apartment pledged her proprietary lease and shares to the plaintiff as security for a loan and then defaulted on the loan. As a result, the original purchaser attempted to assign her lease and shares to the plaintiff. However, the Appellate Division noted that the proprietary lease stated that "neither the pledge nor any transferee of the pledged security shall be entitled to have the shares [of the cooperative apartment] transferred of record on the books of the [cooperative apartment], not to vote such shares, nor to occupy or permit the occupancy by others of the apartment', unless the consent of the cooperative corporation is obtained . . ." 59 A.D.3d at 581, 873 N.Y.S.2d at 696. Accordingly, the Appellate Division, Second Department held that "because the pledge violated the terms of paragraph 17(a) of the proprietary lease, the plaintiff was not entitled to have the cooperative corporation issue a new proprietary lease and stock certificates to it and have the shares of stock with respect to the apartment transferred to it on the books of the cooperative corporation . . ." 59 A.D.3d at 582, 873 N.Y.S.2d at 696.

In *Hochman v. 35 Park W. Corp.*, 293 A.D.2d 650, 741 N.Y.S.2d 261 (2d Dep't 2002), the cooperative tenant pledged the shares of his unit to a creditor as collateral, which the creditor took possession of when the tenant defaulted. The cooperative corporation issued a new stock certificate and proprietary lease to the creditor. Subsequently, after the tenant was able to satisfy the debt, the cooperative corporation refused to agree to redeem the tenant's cooperative shares. The Appellate Division held that the cooperative's proprietary lease governed the terms of the reconveyance.

In coming to its decision in *LI Equity*, the Appellate Division, Second Department noted that the public auction of the shares constituted a nonjudicial

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## CO-OP/CONDO CONNECTION

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sale under Article 9 of the Uniform Commercial Code (UCC) and that the auctioneer conducted the sale pursuant to the provisions of the “Terms of Sale,” which were assented to by prospective bidders by executing a “Memorandum of Sale.” Item 6 of the Terms of Sale stated that the apartment was sold “as is” and subject to, among other things, the by-laws, rules, regulations, procedures, resolutions and offering plan of Village in the Woods. Village in the Woods’ proprietary lease stated that the premises must be used only as a private dwelling for the lessee(s) and members of their family and that should a bank foreclose on an apartment, it must sell the apartment to an individual. Further, over 10 years prior to LI Equity’s purported purchase, Village in the Woods enacted a rule that individuals who purchase an apartment must live there for at least a year.

The Appellate Division held that LI Equity was subject to the approval requirements of Village in the Woods and that Village in the Woods properly exercised reasonable business judgment when it applied its approval requirements to the proposed sale. It held that the UCC mandates that every aspect of a disposition of collateral by a secured party may be done by one or more contracts and on any terms and that, here, the “Terms of Sale” clearly stated that “[t]he apartment is sold . . . subject to the . . . by-laws; rules, regulations, procedures, resolutions, Offering Plan, charges, fees and any amendments thereto . . .” In this case, the purchaser, LI Equity, was not an individual.

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## Managing Risk in Your Daily Clinical Practice

### FROM PAGE 1

#### Never Amend or Alter Charts

This sounds academic, and, while most dentists know this most important concept, it often is ignored, and, when violated, the results are disastrous. In a typical malpractice case, the plaintiff’s attorney will base his or her case on what is recorded (or not) within the patient’s chart. Chart entries that are physically altered or deleted are a gold mine for an attorney seeking to undermine the credibility of a practitioner and to create suspicion in the minds of a jury. Altering records, even with the most innocent of intentions, may not only be a sanctionable violation of professional conduct, but it can equally open the practitioner to punitive damages at trial.

If correction of a chart entry is necessary, remember this advice:

- Never use paper correction fluid or similar devices on charts.
- Cross out the underlying entry with hash marks so that it is readable and initial all corrections.
- Do not make entries in the margins of a chart. If a chart entry needs to be continued onto a new sheet, make a notation that reflects a continuation on the preceding page.
- Do not make important notes and treatment notes on physical portions of the patient’s chart that may be considered outside the chart or create suspicion (e.g., a folder, Post-it note).

#### Carefully Chart if a Patient Becomes Noncompliant

A poor result will always be subject to “Monday morning quarterbacking.” But, noting the patient’s refusal to see a specialist is the general dentist’s all-inclusive defense. Any act that occurs after the referral, and which arguably could have been addressed by the specialist, potentially exonerates the general dentist.

In making the chart notation of noncompliance with a referral, the use of a specific name of a referral is more persuasive and credible. For example, “Pt referred to Dr. Smith” is more powerful than “Pt should see periodontist.” This is especially true if Dr. Smith is in a position to offer helpful testimony on your behalf that timely prophylactic treatment would have prevented any damage.

Typically, the patient’s failure to follow specific recommendations can turn into the basis for a malpractice suit in which the patient claims that the practitioner failed to recognize or address chronic problems or conditions. For example, periodontal problems are a recurring area of patient neglect. Often well-executed dental procedures are compromised by poor oral hygiene, continued smoking, failure to regulate medical conditions, or failure to follow specific post-treatment instructions. Many practitioners will chart the first few instances of neglect, but then gradually forget or omit these important entries as treatment progresses. A quick referral to previous charting is an efficient alternative: “pt. again warned as per note of 10-4-10.” If the October 4 entry contains a complete list of explanations, then this shorthand entry is a perfectly appropriate method.

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## Managing Risk in Your Daily Clinical Practice with Proper Charting

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### Note Alternative Treatment Plans and Recommendations

Once a malpractice suit is underway, a common claim that typically finds its way into the litigation is that the patient alleges that the dentist failed to explain other treatment modalities and that she would have chosen a different option had the alternatives been properly presented. This encompasses one aspect of informed consent, which legally requires that the patient understand the “advantages, disadvantages, risks and alternatives” for each procedure. This regularly abbreviated as “ADRA.” Only then can a patient choose which method is preferable.

Understandably, the voluminous charting of a lengthy dialogue on the risks and alternatives of treatment may be impractical and time consuming. But, by utilizing “ADRA,” the dentist minimizes charting and simultaneously fulfills his or her legal obligations. If later called upon during a lawsuit to explain the particulars discussed with the patient, the dentist is free to detail the lengthy discussion that preceded the patient’s choice of carefully explained options.

Another time-sensitive charting tip is to liberally use the word “etc.” when describing patient options. Plaintiffs’ attorneys love to limit a dentist to the literal and rigid reading of the record. For example, if three options are outlined, then a jury is hard pressed to believe a fourth alternative was reviewed. A practical alternative is to employ the notation “etc.” at the end of entries. It allows the author to expound on the many tangibles reviewed during the visit.

### Update the Patient’s Medical History at Each Visit

Without exception, dental practitioners routinely take a comprehensive health history in the initial visit or work-up. Most dentists, however, rarely inquire about the patient’s health as the professional relationship continues over months or even years. As a health care provider held to a higher standard of care, the burden of updating a patient’s medical history lies with the dental practitioner and not the patient. “The patient never told me!” is simply not a defense—particularly when the practitioner does not chart appropriately or, worse, never asks the question in the first instance.

The importance of maintaining timely and accurate updates on medical history can not be understated. There may be significant gaps of time between visits for a typical dental patient. During these periods, a patient may be consulting with other physicians, diagnosed with serious medical conditions, or prescribed medications of which the practitioner must be

aware. In actual charting, “NCMH” is a helpful abbreviation to designate “No Change in Medical History.” If there is any question about a medical condition, the dentist should be notified and the hygienist/assistant should chart accordingly.

### Make and Chart Follow-Up Calls

The best method to demonstrate in your charting that you truly care about your patients is follow-up telephone calls, especially following difficult or invasive

procedures. The question often is asked whether you or the staff should perform this function. A good rule of thumb is this: If the procedure concluded as planned, then it is safe to allow a staff member to contact the patient. If the results were substandard or unexpected, then the dentist should take it upon himself to contact the patient. Examples of the latter would include excessive bleeding, buccal or lingual paresthesia, unacceptable prosthetics (in your opinion) or any other situation where your “gut” tells you something is not optimal.

Regardless of who telephones, certain events always should be recorded: date, specific time, place, speaker; any pain or unexpected complications; the office/answering service telephone number; and a reminder that the dentist is always available.

When the outcome is less than favorable, the record should be informative. The dentist should institute follow-up calls and draft the self-defensive entry with an eye toward litigation. Irrespective of the final outcome, a jury will look more kindly upon the practitioner who demonstrates compassion. At the same time, a dentist can reduce the risk of the patient actually filing a lawsuit and, if the matter ultimately ends in litigation, minimize damages. Depending upon the result and the patient’s response, more than one telephone follow-up may be needed. This is one area where “more is better.” Well-documented serial calls best show your effort to assist the patient.



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## Managing Risk in Your Daily Clinical Practice with Proper Charting

FROM PAGE 9

### Chart Positive Statements and Critical Communications by the Patient Using Quotation Marks

Going hand-in-hand with the follow-up, always keep in mind the power of using quotation marks to reflect patient statements in the record. Blame it on our media-oriented culture, but juries seem to absolutely believe entries made in quotation marks. While other parts of your chart may be scrutinized or subject to varied interpretations, the quoted portions seem time after time to be inviolate and unquestioned. Armed with this knowledge, the savvy dentist can use this tool to her or his advantage.

Recording patient quotes during the follow-up telephone call after an invasive or important procedure and during subsequent office visits can be particularly helpful. Even though the patient may be experiencing expected post-operative discomfort, it is important to note the overall prognosis. A note that adds, "Pt says she knows that this will eventually help me eat better" is good defensive dentistry and can work wonders in establishing the credibility of your charting.

Quotations can also be utilized to reflect critical discussions with the patient and to confirm the patient's understanding of these conversations. For example, if a patient has repeatedly failed to follow a practitioner's referral to see a specialist, a remark by the patient that "I know but I don't have the time to go" recorded in quotes can serve the defense of the practitioner.

### Review Charting Made by Other Staff

Many charts will typically contain four separate authors: hygienist, assistant, receptionist/office manager and dentist. The hygienist and assistant must always chart before the dentist. Equally important, the dentist must read and review what is written before he or she begins charting. If the dentist is assisted by a staff member in making chart entries during treatment, then the record should be reviewed by the dentist for accuracy and completeness.

The practitioner should also pay attention to the terminology and charting methods of his or her staff. Staff members often work for other practitioners and learn different charting methods before becoming your employees. Make sure that every staff member utilizes the same words, phrases and abbreviations. Again, the best audit of the record occurs when you, the dentist, chart last.

### Spend Extra Time Charting Poor Results

As a general concept, unsuccessful results occur to each dentist several times a year. While this, by itself, is not malpractice, it nevertheless may form the basis for a civil or dental board complaint. Too often, the practitioner records these consequences with the same nonchalance as routine matters. When a worst-case scenario occurs, special rules apply. Therefore, consider these alternatives:

- Take a quiet moment in private to collect your thoughts first and then chart.
- Consult with other office staff that may provide additional or helpful information. Include front office/reception staff who may have heard comments made by the patient or who may have been the recipient of the patient's dissatisfaction. Use quotation marks for patient comments.
- Carefully draft final notes. Take time in constructing your note.
- In serious matters, consider seeking counsel from your attorney or seek guidance from your malpractice carrier, not a colleague. Avoid the temptation to discuss these matters with fellow practitioners. Unlike attorney-client discussions, no privilege attaches to these stray conversations. During your deposition, you may be asked to identify all persons who have any knowledge of these events, or with whom you have communicated. When you identify your colleague, he or she may be the next person forced to testify against you. Any soul-searching remarks, such as "Between you and me, I sure wish I had never treated her," may end up being raised down the road. Even innocent comments can be twisted to appear as admissions. Of course, the above admonition does not apply to potential referral discussions with specialists. These communications are for the legitimate purpose of the patient's continued dental care and should be charted.

Good patient charting is a skill that every dental practitioner needs to master and improve continuously throughout his or her career. While even the most perfect charting technique will not avoid a malpractice suit, if such a claim does arise, the practitioner who exercises diligence in recording the patient's treatment has already won the day for his or her defense.

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## HRRV DECISIONS OF INTEREST

**Successful Motion for Summary Judgment on a Slip and Fall Case**

*Pierce v. 975 Walton LLC and SG2 Management LLC*  
Supreme Court, Bronx County  
Index No. 302720/07  
August 18, 2010

**F**aith Pierce sought money damages for the personal injuries she allegedly sustained when she slipped on a ramp in the lobby of the premises located at 975 Walton Avenue, Bronx, New York, on February 27, 2007. The plaintiff asserted that water had accumulated on the ramp causing her to fall. She alleged that the owner of the property, 975 Walton LLC and its management company, SG2 Management LLC, were negligent in the ownership, operation, maintenance and control of the premises, among other allegations including actual and constructive notice of the defective condition.

At the close of discovery, we moved for summary judgment on behalf of the owner and management company outlining that the plaintiff's allegations were unsubstantiated. In the motion, we presented an argument that the plaintiff offered no evidence regarding the creation of the alleged condition, or proof that 975 Walton LLC or SG2 Management LLC had actual or constructive notice of water on the ramp. The plaintiff was also not able to identify the cause of her fall other than to speculate that the area was wet, despite never seeing or feeling any wetness before or after the accident.

At her deposition, the plaintiff testified that on the date of accident, she was on her way to the grocery store when she was involved in an accident on a ramp located within the north side of the lobby of 975 Walton Avenue sometime between 10:00 and 11:00 a.m. The plaintiff exited her apartment on the second floor and took the elevator to the first floor/lobby level. After exiting the elevator, she walked less than twenty steps to reach the ramp. She could not recall the last time that she had been on the ramp prior to the accident occurring, but thought it was the afternoon before. At the time of the incident, the plaintiff was pushing a shopping cart, and she testified that she "just started to slip and couldn't catch myself."

The plaintiff insinuated that since she saw a mop and bucket in the lobby that the ramp must have been wet; however, her testimony was to the contrary. In fact, the plaintiff admitted that the area she traversed from the elevator to the ramp was dry, and she was not able to identify what she slipped on, if anything, even though she was looking straight ahead and



down at the time of her accident. The plaintiff was unable to articulate how she knew the area was wet since she did not see wetness on the ramp either before or after her fall. In fact, the bottom of her shoes and clothes remained dry after the fall.

The defendants produced a security officer who witnessed the accident for a deposition. The security officer testified that the ramp and floors were dry at the time of the accident, and that the defendants were unaware of any prior accidents or complaints related to any wet condition on the ramp.

Judge Kenneth L. Thompson Jr. issued a decision granting the defendants summary judgment. Judge Thompson opined that there is no evidence in the record that the defendants had received complaints regarding water accumulation or evidence that there was an accumulation of water in the area, coupled with the plaintiff's testimony that she did not notice any water prior to her fall.

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## HRRV DECISIONS OF INTEREST

## HRRV Prevails on Motion to Compel Plaintiff to Submit to Functional Capacity Testing

*Cristiano v. York Hunter Services, Inc.*  
 Supreme Court, Kings County  
 Index No. 18928/02  
 August 25, 2010

In a Labor Law case with significant allegations of personal injury and disability, part of HRRV's defense strategy included having the plaintiff submit to a Functional Capacity Evaluation, which is an increasingly common series of tests that objectively measure a person's ability to perform certain tasks. The test is highly probative on the issue of whether a plaintiff is able to be gainfully employed. The plaintiff objected to the defendant's demand for the test and filed a motion for a protective order, arguing that the test lacked scientific validity. Specifically, the plaintiff submitted that there were no reported cases in which a Functional Capacity Evaluation withstood a *Frye* hearing, at which a threshold determination about the admissibility of the expert testimony is to be made.

Citing several reported decisions, including one from the Appellate Division, Fourth Department, *Fleiss v. S. Buffalo Ry. Co.*, 291 A.D.2d 848, 849 (4th Dep't 2002), HRRV responded by arguing that the test was generally accepted in the scientific community. Justice Herbert Kramer of the Supreme Court, Kings County denied the plaintiff's motion and ordered him to submit to the requested examination. Justice Kramer held that the ruling of the Fourth Department was controlling in light of the absence of contrary authority from the Appellate Division, Second Department, in which Kings County is located. This decision was profiled by the *New York Law Journal* as a Decision of Interest on September 27, 2010 (page 17).

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