VOLUME 9 ISSUE 1

PROFESSIONAL LIABILITY DEFENSE QUARTERLY

WINTER 2017

INSIDE THIS ISSUE:

SPECIAL POINTS OF INTEREST:

- Eighth Annual Meeting Plans are Underway—Contact Christine Jensen To Get Involved
- Two Amicus Cases are Pending Decision
- Energetic Board Meeting Held in January in Phoenix
- Industry Members: Mention PLDF to Your Panel Counsel

SURVEY OF OPTOMETRIC MALPRACTICE DEVELOPMENTS, BY THOMAS D. JENSEN, ESQ.

Professional liability claims are occasionally brought against optometrists when eye damage or loss follows optometric care. We review here a summary of the status of this litigation.

Three specialties address eye healthcare. An optometrist examines eyes for refractive error, recognizes (but does not treat) diseases of the eye, and fills prescriptions for eyeglasses and contact lenses. An optometrist's scope of practice differs from opticians and ophthalmologists. The optician is an artisan qualified to shape lenses, fill prescriptions, and fit frames. An ophthalmologist is a physician who specializes in the medical and surgical management of eye disease and injury. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 486, 75 S. Ct. 461, 463 (1955).

Optometric Scope of Practice

Optometry is a branch of health care that deals with the diagnosis and measurement of the optical system including the prescription of certain medicines and corrective lenses. Sam A. Macke, *Negligence of Optometrist*, 16 Am. Jur. Proof of Facts 3d 49, 56 (1992). (In other words, optometrists treat vision disorders; ophthalmologists, on the other hand, treat disorders of the eye itself.) *Id.* In evaluating standard of care compliance, optometric examinations should include the following: taking of a history, performance of visual acuity measurements, use of a ophthalmoscope[1] to examine the interior portion of the eyes, use of a phoropter to examine the retina, subjective examination of the eye, use of a muscle balance examination to evaluate near and distant vision, and a glaucoma[2] test. *Id.*, at 62-63. Examinations may also employ a tonometer (used to measure intraocular pressure), retinoscope (used to measure vision accuracy), fundoscope (used to gain a two-dimensional view of the back of the eye), or a biomicroscope (a slit lamp to enlarge the eye's interior structures). *Id.*, at 64-65. Diseases that are also discoverable by proper optometric examination include brain tumors, diabetes, kidney disorders, hypertension and infections. *Id.* at 66.

Duties of Optometrists

The following deviations from the standard of care my subject the optometrist to liability: failure to obtain informed consent, failure to take accurate history, failure to conduct appropriate examinations, failure to recognize pathological disease, failure to recognize cataracts, amblyopia, strabismus, nearsightedness, farsightedness, astigmatism, presbyopia, or retinal detechment,[3] failure to prescribe or fit proper corrective lenses leading to falls, vehicular collisions, or

Continued on next page

WORKING WITH EXPERT WITNESSES: TIPS THAT ARE NOT IN THE CIVIL RULES, BY: LOUIE CASTORIA, ESQ., AND FREDERICK J. FISHER, J.D., CCP

Insurance defense attorneys inhabit a confusing world in which even the "routine case" may need an expert witness for trial or a consultant to help with an early evaluation for settlement purposes. The legal precedents, regulations, and such don't often say what the profession's standard of care in the community is in the exact situation.

For the past six years I have been writing a quarterly column on avoiding errors and omissions ("E&O") exposures for *National Underwriter Property & Casualty 360* magazine and its predecessor, *American Agent & Broker*. The column explains to insurance professionals the looking-glass world that we lawyers inhabit, and in which brokers and agents occasionally find themselves. Looking back on those columns, there are themes that emerge from the cautionary tales of actual court decisions over those years.

Continued on page 4

OPTOMETRIC MALPRACTICE, CONT'D

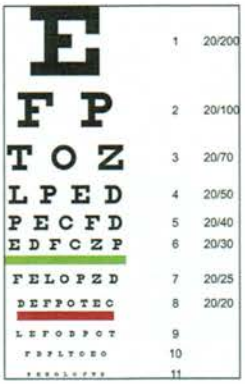
Conclusion

Health care malpractice claim professionals and counsel will fit right in to the adjustment or defense of optometric professional negligence claims. Expert witness recruitment, affidavit of merit scrutiny, limitations defense enforcement, and causation defense development preparations all carry over to these claims. Learn the diseases and science and you are good to go.

Endnotes

1. Ophthalmoscope is used to evaluate the back of the eye to determine if the retina, macula and fovea are normal.
2. Glaucoma is related to optic nerve damage often caused by elevated pressure within the eye. A floater is a small piece of eye protein that is loose within the main chamber of the eye.
3. Retinal detachment occurs when a tear develops in the back of the eye that can fill with fluid and cause the retina to pull away from the back of the eye.
4. LASIK stands for Laser-Assisted in Situ Keratomieusis.

Thomas D. Jensen is with **Lind Jensen Sullivan & Peterson,** P.A., in **Minneapolis, Minnesota.** Tom defends professionals, products, insurers, and farmers in Minnesota, North Dakota, and Wisconsin. A co-founder of PLDF, he can be reached at tom.jensen@lindjensen.com, or at tjensen@mediatorminnesota.com. Also visit Tom at www.malpracticedefense.org.



TIPS FOR WORKING WITH EXPERTS, CONT'D

My co-author, Mr. Fisher, has spent the past 41 years engaged in the claim resolution process and/or in providing insurance to other professionals—in other words, inhabiting the looking glass we lawyers sometimes overlook at our peril.

Here are our collective thoughts about the rules on experts that aren't in the procedure books.

1.Earlier is better. Standard-of-care issues in a case should be framed as early as possible. This may often be accomplished in as little as ninety days from the opening of the file. The issues can be defined, and the needs for expert testimony can be assessed, as can the kind of expert(s) who should be engaged. In a given case these might include a standard-of-care expert, as well was tax, reconstruction, environmental, human resources, and other experts. All it takes is some informed forethought. It costs little, sometimes nothing, to get an early "curbside" consultation.

2. How much information is enough? The tricky part is having *enough* information about the case to allow a consultant to assist in suggesting investigation or discovery that the case needs, based on standard industry practices, without waiting for the results of formal discovery. By that time the proverbial horse is out of the barn. Do industry organizations have online resources about the subjects at issue? What are the applicable governmental or self-regulatory authorities? Who are the reliable "heavy hitters" among experts in the specific area?

A lawyer sees a new complaint that has been filed in court and starts thinking, "Affirmative defenses." An industry consultant sees the same complaint and starts thinking, "Where are the records that will prove or disprove the allegations or the claimed damages?" In this context, the "looking glass" is a telescope—the lawyer and the expert look through different ends of the tube.

What the lawyer provides to the consultant or expert is equally important. While we all want the perfect case and the strongest expert opinion, life doesn't deal us a royal flush every time, if ever. Honesty is still the best policy, and an honest opinion that recognizes the shortcomings in the case as well as its strengths will be more credible to a judge or jury. (Those shortcomings, if recognized up front, can often be diminished in importance through counter-arguments on lack of causation and damages.)

Experts, whether formally retained or just providing initial observations, should be provided with evidence for the downside of a case as well as the upside. This prevents "unwanted surprises" and is often a catalyst for a creative solution

3. Whose case is this? When the time to retain an expert or consultant is nigh, it's also time to clarify two closely-related issues: (a) Who is retaining the expert? (b) Who is paying the expert? Many experts' standard fee agreements recite that they are being hired by the law firms. That is a half truth. Just as a general contractor may hire a soils subcontractor, the subcontractor's work is being performed for the benefit of the developer or owner. In the legal milieu, it's the client's case, not the lawyer's.

Lawyers should be clear that when they "hire" an expert they are doing so on behalf of the client, and are acting as agents to effect that hiring. Experts may want to have the law firm "on the hook" for their bills, but the proper paying party is the client, or perhaps the client's liability insurer. Establishing in writing from the outset who the expert is really working for, and who is really responsible to pay the bills, can

"Lawyers should be clear that when they 'hire' an expert they are doing so on behalf of the client, and are acting as agents to effect that hiring."

***PLDQ*'s Spring 2017 Issue**

We encourage member submission of articles pertinent to professional liability claims administration, defense trial advocacy, or professional liability substantive law. The manuscript deadline for the next issue is:

May 1, 2017.

TIPS FOR WORKING WITH EXPERTS, CONT'D

avoid a lot of divisive communications down the road.

4. Free parking. It costs little or nothing to "park" an expert, meaning an initial retention as a consultant that makes the expert unavailable to opposing parties. The expert's work can be put on hiatus after the "curbside" opinion, and reactivated when later needed.

The "curbside" opinion will often be in the form of questions that outline information that needs to be obtained from a variety of sources, including discovery. Once obtained, the conclusions drawn from the information may moot the need to litigate or may require that gearing up for trial.

A few extra insights can make a world of difference in a case, with fewer surprises and regrets as to what "might have been done."

5. The good, the bad, and the ugly. Lawyers are advocates, and as such try to paint the best picture of the facts for their clients. It's a good strategy in front of a jury or arbitrator, but not with an expert. The *non-confidential* information about the case that the other side is going to learn anyway should not be kept from an expert. Otherwise, a strongly favorable expert opinion can tumble like a house of cards on cross-examination. It can ruin your whole day, not to mention the case.

Sometimes, your expert can do you an immense favor (if hired early) by identifying a truly hopeless case—one that should be settled before the other side realizes just how good their case is. But he or she can only do that with an accurate knowledge of the facts.

A caveat: the attorney's opinions about the case and confidential communications with the client should not be given to an expert, or they may become discoverable. There are ways to get damaging information to an expert without breaching the attorney-client or work-product privileges.

6. The Scouts' Motto. Be prepared for the unexpected, and be flexible. We develop our own narrative of a case early in its life span. How often we reach snap judgments—the case is a "dead bang loser," a "bunch of B.S.," or a "cake walk." We become committed to those perceptions in our early reports to clients. Changing our evaluations can be like a loaded oil tanker trying to make a 90-degree turn.

Major shifts in case evaluations are preferable before most of the budgeted defense fees and costs have been incurred, for obvious reasons. A consultant's timely input can aid defense counsel and the liability insurer in avoiding a change in the case's evaluation based on factors outside counsel's legal training and expertise, long before the courthouse steps are in sight.

Every case is really three different cases: the one that walks in the door and about we form our initial impressions, the one we learn about through discovery, and the one that the judge, jury, or arbitrator hears at trial. It is, after all, completely new to those who decide its outcome. An early consultation helps assure that the first case's trajectory is straight and true, and may need only minor mid-course corrections.

We've all heard the lesson since childhood: a stitch in time saves nine.

Louie Castoria is a partner with **Kaufman Dolowich Voluck** in **San Francisco**. He defends financial and professional services clients in venues throughout California and in the FINRA arbitration forum. Louie chairs PLDF's Miscellaneous Professional Liability Committee, and can be reached at lcastoria@kdvlaw.com.

Frederick J. Fisher started his career in professional liability claims adjusting that included auditing, risk management services, and TPA work. He then founded ELM Insurance Brokers and served as CEO for 20 years. Frederick operates **Fisher Consulting Group** in **El Segundo, California**, and can be reached at fjfisher@fishercg.com.

> "Major shifts in case evaluation are preferable before most of the budgeted defense fees and costs have been incurred, for obvious reasons."

Professional Liability Defense Federation 2017 Members of the Board of Directors


Tim Gephart
MLM


Erin Higgins
Conn Kavanaugh


Chris Block
Marshall Dennehey


Andy Countryman
Carlock Copeland


Lisa Tulk
Kessler Collins


Paul Ruiz
Gen Re


Walter Price
Huie Fernambucq


Mark Gende
Sweeny Wingate


Tom Jensen
Lind Jensen


Jason Jobe
Thompson Coe


Doug Holthus
Mazanec Raskin


Andrew Jones
Furman Kornfeld


Pat Eckler
Pretzel Stouffer


Jonathan Ziss
Goldberg Segalla


Christine Jensen
Managing Director