INBRIEF

Current Developments in Maine Law

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Health Record Audit Trails: How Useful is the Metadata that is Associated with a Patient's Health Record?

By Jennifer A.W. Rush, Esq.

Gone are the days when your doctor carried a manila folder into the exam room with her, shuffling through it to find the last office visit note or your current list of medications. Paper charts have been replaced by electronic health records, or "EHRs," which are now in wide use in hospitals and medical practices around the country. Now, doctors carry their laptops everywhere with them, retrieving and creating health information with a click of a button. We are slowly catching up with what this technology has to offer, and the problems it creates, when it is used in litigation. By now, we have all heard about electronic discovery. In fact, almost every time we request a medical record, we are engaging in a form of electronic discovery because the "record" can no longer be photocopied from a chart on a shelf, but must be transferred from

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an electronic format into a format that is compatible with production. Not being able to inspect the original paper chart at a deposition and instead trying to determine if everything has been printed from the computer is a task to which all those who litigate injury claims have become accustomed. We are also mindful of the fact that what the physician or nurse sees on the screen when viewing a patient's record looks markedly different from the format in which it is printed. Moreover, information in the EHR changes over time in ways that information in a paper chart cannot. Added to these changes is the fact that with EHRs, there is "information about the information" – metadata about the record that never existed with paper charts and is kept in an "audit trail." We are beginning to see routine requests for the "audit trail" associated with the EHR, and the benefits and problems that these requests bring to litigation are just beginning to surface.

A. What is an "audit trail"?

An audit trail can be defined in basic terms as a "record that shows who has accessed a computer system, when it was accessed, and what operations were performed." Brodnik, Melanie, et al., *Fundamentals of Law for Health Informatics and Information Management.* Chicago, IL: AHIMA, 2009, 215. Pursuant to the Health Insurance Portability and Accountability Act (HIPAA), medical providers who use EHRs must have systems in place to review and audit access to records, as well as prevent unauthorized access. 45 C.F.R. §§ 164.308(a)(1)(ii)(D), (a)(3)(i), 164.312(1)(b). Compliance with HIPAAs requirements is routinely obtained through the use of audit trails, which track the information required by HIPAA and provide a mechanism for determining if there has been a security breach.

One of the problems is that there are a variety of different vendors of EHRs and thus, a variety of different formats for audit trails. If you are using audit trails in litigation, you cannot count on the audit trail from Hospital X to look anything like, or contain the information contained within, the audit trail from Hospital Y. EHR certification requirements mandate that the following data be recorded in an audit trail: type of action (additions, deletions, changes, queries, print, copy); date and time of event; patient identification; user identification; and identification of the patient data that is accessed. *Health Information Technology: Standards, Implementation Specifications, and Certification Criteria for Electronic Health Record Technology,* 2014 Edition; Revisions to the Permanent Certification Program for Health Information Technology, Final Rule (September 4, 2012). Beyond these basic requirements, there is a wide variety of information recorded among different EHR vendors.

B. How are audit trails used in litigation?

Audit trails are not part of the "patient record" and should not be automatically produced when there is a request for the record. Instead, they must be specifically requested and the validity of the request must be analyzed on a case-by-case basis. The request for an audit trail, like any other discovery request, is subject to Maine Rule of Civil Procedure 26's requirement that the request be "reasonably calculated to lead to the discovery of admissible evidence."

As everyone involved in litigation knows, Rule 26's standard is a broad one. Nonetheless, there is a duty on the part of the individual making the request to at least articulate why the audit trail might provide admissible evidence in the case.

By far, the most common use of audit trails is in medical malpractice actions. For example, if there is a question of when a physician viewed an x-ray report, or a lab result, the audit trail may be able to provide that information. This may have a significant impact on the liability of the medical provider. If the timing of a particular chart entry is important to the prosecution or defense of a case, then the audit trail may be able to shed light on that issue. In any personal injury case where the plaintiff's compliance may be an issue, audit trails may be able to reveal information regarding how many times the patient changed or failed to show for his appointment, for example. Moreover, if the plaintiff's presentation at a specific office visit is important and the chart does not identify the nurse who admitted the patient, then the audit trail should contain that information and lead to the identity of a potentially key witness.

C. Audit trails cannot be used in a vacuum; they require explanation.

In general, audit trails make poor witnesses and are simply launching pads for additional discovery. They are indecipherable to most people, inconsistent between medical practices, and often unreliable. When justifying their request for an audit trail, requesting parties often argue that the trail will tell them exactly what information was accessed and modified by what user, and when, but in reality the story told by an audit trail is rarely that straightforward. The audit trail seldom reveals the substance of the information that was changed or added. We also know that even though they are supposed to do so, system users often fail to "log off." For example, if a physician and a nurse happen to be in the emergency department exam room at the same time, they may both enter information into the computer but will use only one person's log-in information.

A case example involving Northshore University Health System provides an excellent example of why the use of audit trails should be approached with caution. In that particular case, the parties had already spent an extraordinary amount of time and resources on the production of the EHR and the plaintiff held a fair amount of suspicion regarding the accuracy, completeness, and reliability of the HER itself. Chris Dimick, *EHRs Prove a Difficult Witness in Court,* Journal AHIMA (Set. 24, 2010). When it came time to producing and dissecting the audit trail, even more suspicion arose, even though the explanations for the purported inconsistencies were explained by technology and completely outside of the hospital's control.

By way of background, when audit trails are printed, they look like Excel documents. One column will include the patient's identifier, which is usually a unique combination of letters and numbers assigned to that specific patient. Sometimes, however, an individual patient will have several different identifiers that are unique to the hospital admission or the type of care received. Radiology departments, for example, usually use their own electronic record systems that interface with the patient's other electronic records. Another column, or columns, will provide one or more date stamps, depending on the vendor of the EHR. Additional columns will identify the user of the record by name, a unique code, or both. The general description of the portion of the record accessed will be provided in another column, but the description is generally not specific enough to provide true substantive information. For instance, the description may be "VITALS GRAPHIC I&O REPORT," which will reveal that the user viewed the patient's

record of volume input and output, but does not tell us what information on that I&O report was viewed. Or, the entry may simply read "NURSES NOTES PROGRESS NOTE REPORT," which tells us absolutely nothing about what progress note during a multi-day admission was viewed by the user at that particular time.

Another column in the audit trail will indicate the "action," which is where Northshore University Health Systems ran into problems. The "action" is usually described by one word – query, modify, accept, view, etc. As with most audit trails, Northshore's audit trail's use of the word "accept," meant different things depending on the type of record and the circumstances. It could mean that the record was pended, filed, shared, or actually accepted by a physician. Chris Dimick, *EHRs Prove a Difficult Witness in Court*, Journal AHIMA (Set. 24, 2010). This became a problem when the audit trail documented an "accepted" physician order that did not appear in the EHR. Northshore did not erase the order from the record or withhold it from production as one might infer, however. Instead, "accepted" in that particular instance meant that the order was "pended." Because the order was never executed, it never appeared in the EHR even though it appeared, from the audit trail, as though it was an "accepted," or final, order. *Id.*

There have been other cases were time stamps have proved unreliable. In one case, the audit trail produced by a hospital showed that the user opened dozens of documents within the same second. The IT department demonstrated that it was physically impossible to open all of the documents at the same time, and likewise physically impossible to view them all at the same time. The best explanation provided by the IT department was that when one document was opened, the system showed all the documents in that "batch" or grouping as having been opened. The audit trail in that instance proved meaningless when trying to sort out whether a specific person actually viewed a specific document.

D. Practical implications in litigation.

Parties who request and use audit trails must be aware that although they may prove useful in some cases, they will, invariably, require explanation. At a basic level, the parties must become educated on what the information in the various columns means, and whether it is reliable. If the audit trail comes from a hospital, then the hospital may need to produce a member of its IT department for a deposition. Smaller medical practices, however, may not employ anyone who possesses enough knowledge about the audit trail to provide litigants with meaningful information. After all, the audit trail was not designed to be used in litigation. It is a compliance tool that enables medical providers who use EHRs to meet the requirements set forth by HIPAA. In these cases, parties may need to go to the source – the vendor of the EHR – or hire experts in order to give meaning to the information in the trail.

The added time and cost associated with this discovery is not warranted in every case. By the time the parties have concluded that the information in the audit trail justifies the added burden, however, the medical provider may have changed vendors for its EHR, archived the trail (which can make the data even more incomprehensible), or otherwise lost or destroyed the data that the parties seek. Accordingly, at least in medical malpractice actions where the health provider is a party, a well-crafted litigation hold letter in lieu of an automatic discovery request for the audit trail makes practical sense. Parties must also remember that audit trails contain protected health information. Accordingly, requests for audit trails that are maintained by non-parties must be accompanied by a Court order or a valid release that is signed by the patient. Moreover, litigants should not be surprised if health care providers require subpoenas in addition to patient releases before they will produce audit trails; the obligation on the part of a provider to produce the audit trail, as opposed to some other method of "accounting of disclosures" is not well-defined under HIPAA regulations.

In summary, we are just beginning to understand the potential uses and burdens that are associated with the metadata attached to EHRs. The request for this metadata is not subject to the Rules of Civil Procedure alone, but must be analyzed within the framework of HIPAA and IT considerations. One thing is for certain, the change from paper records to electronic health records means that litigants must change their practices in how they request, interpret, and use medical records. And, in cases where the audit trail is a relevant source of information, this change will mean added cost and burden to litigants.

"GONE ARE THE DAYS WHEN YOUR DOCTOR CARRIED A MANILA FOLDER INTO THE EXAM ROOM WITH HER, SHUFFLING THROUGH IT TO FIND THE LAST OFFICE VISIT NOTE OR YOUR CURRENT LIST OF MEDICATIONS. PAPER CHARTS HAVE BEEN REPLACED BY ELECTRONIC HEALTH RECORDS, OR "EHRS"."

The Continuing Duty to Defend: Does it End at Dismissal of the Covered Claims?

BENJAMIN N. DONAHUE

By: Benjamin N. Donahue, Esq.

When a complaint or counterclaim includes a set of allegations that can easily be separated into two categories—those that clearly fall outside the scope of coverage and others that create the possibility of coverage—an insurer, in theory at least, is required to defend only the latter. But in practice, the two can rarely be separated and an insurer is often obligated to provide a defense to all counts, even if the potentially-covered allegations are frivolous or inconsequential.

In this situation, eliminating the allegations that trigger the duty to defend, either by settling covered claims directly with the plaintiff or through a successful motion to dismiss, is frequently on the minds of insurers and their coverage counsel. Assuming that one of these mechanisms can be utilized to the insurer's advantage, however, the question remains: will the duty to defend disappear with the potentially-covered claims or does it endure until a final, non-appealable judgment? Although this question has frequently been addressed in other jurisdictions, Maine courts have not, until a recent decision written by Magistrate Judge John Rich, III, in *Lighthouse Imaging LLC v. OneBeacon Am. Ins. Co.*, 2:13 CV-237-JDL (D. Me. June 25, 2014), had the occasion to weigh in.

The original complaint in I*nStyte Med. Technologies, Inc. v. Lighthouse Imaging, LLC*, 2014 WL 958886 (E.D. Pa. March 11, 2014), the underlying case on which the OneBeacon coverage dispute was based, set forth claims for negligence, negligent misrepresentation, breach of contract, fraud, and breach of fiduciary duty—all arising out of allegedly defective product development. Based on these allegations, the insurer declined to provide a defense, citing a number of exclusions from coverage. A declaratory judgment action ensued.

The day before oral argument was scheduled on cross-motions for summary judgment in the coverage case the defendant's motion to dismiss was granted on all but the breach of contract claims in the underlying case. Because the remaining breach of contract claims clearly fell outside the scope of coverage, the declaratory judgment court was required, if it found that the dismissed claims obligated the insurer to provide a defense, to determine whether the duty to defend was ongoing—i.e., it continues until a final, non-appealable judgment—or whether the duty to defend ends when all potentially-covered claims are dismissed from the case.

At the outset, after concluding that the dismissed claims did trigger the duty to defend, the court rejected the argument posed by the insurer that a dismissal is tantamount to amending the complaint, stating:

> [a] court's ruling on a motion to dismiss fewer than all of the claims asserted in a complaint does not "amend" the complaint or create a new complaint. The complaint is a document that remains unchanged, even after some of its claims have been dismissed.

It declined, however, to adopt the rule proposed by the insured that, after the claims that trigger the duty to defend have been dismissed, the obligation continues until a final determination has been reached.

The court recognized that Maine law requires an insurer to defend when the underlying claims would not survive a motion to dismiss, but it concluded that this principle does not support the insured's contention that the duty to defend continues *after* the court in the underlying action dismissed the same, leaving "no potential that the facts ultimately proved could result in coverage."

This analysis provides the legal framework for an insurer to escape the duty to defend when a frivolous and inconsequential tag-along claim, frequently negligence or negligent infliction of emotional distress, is alleged—often for the sole purpose of dragging an insurer into a case. Its usefulness in litigation, however, will likely remain limited for a variety of reasons. First, an insured's attorney may be hesitant, for ethical and the obvious financial reasons, to file a motion to dismiss the covered claims and excuse the insurer from the case. Second, an insurer may not have the right to intervene in the case and file a motion to dismiss the covered claims itself if the insured's attorney refuses to do so. And finally, plaintiffs are extremely wary of partial settlements that dispose of only the covered claims—covered claims often cannot be disentangled cleanly so as to leave only the uncovered claims and the consequences that such an agreement can be devastating to the remaining allegations.

Nevertheless, insurers should remain aware of this option should the opportunity to limit the duty to defend arise.

Workers' Compensation– Law Court and Appellate Division Decisions

STEPHEN W. MORIARTY

By: Stephen W. Moriarty, Esq.

The vanished employee.

With the return of the Appellate Division opinions from the Maine Supreme Judicial Court in workers' compensation claims have become increasingly rare. A highly unusual factual situation recently prompted the Court to accept a case for appellate review.

In *Johnson v. The Home Depot U.S.A., Inc.*, 2014 ME 140 (December 11, 2014), the employee had sustained an occupational injury in January 2009 and the compensability of the claim was subsequently recognized in a Consent Decree. Although benefits were initially paid at a 50% rate, they were increased to 100% following surgery. In March 2012 the employee abruptly disappeared and has not been seen or heard from since. The Probate Court appointed her daughter as a temporary conservator with the power to act on the employee's behalf in workers' compensation proceedings and to receive and deposit weekly benefit checks. Following the employee's disappearance, the employer filed both a Petition for Review and a Petition for Forfeiture based upon the failure to have attended a §207 exam. Because the employee's whereabouts were unknown, the petitions were served upon her attorney of record by certified mail.

The presiding hearing officer granted the Petition for Review and ordered that payment of benefits be suspended until such time as the employee reappeared and sought a resumption of benefits. The Appellate Division affirmed, and the Law Court accepted the employee's appeal for review. In affirming the decision of the Division, the Court held that service of the petitions upon the attorney of record was acceptable "in this highly unusual situation" and that the Board committed no error in ruling that service of the petitions had been properly made. On the more substantive issue, the Court noted that neither the Act nor the WCB Rules address an employer's obligation to continue to pay benefits when an injured worker has disappeared. Notwithstanding the lack of specific authority, the Court found that the hearing officer's decision was entitled to legal deference as it was reasonable under the circumstances and not contrary to the purposes of the Act. The Court described the decision as a "thoughtful and compassionate solution in light of these difficult circumstances", and denied the employee's appeal.

Steve Hessert represented the employer in litigation before the Board, and Kevin Gillis argued the case on appeal.

Dependent status.

At the time that he sustained a compensable personal injury the employee was unmarried and without dependents. He later married and had a child, and ultimately died as a possible consequence of his injury. His widow filed a Petition for Award of Compensation – Fatal seeking death benefits pursuant to the provisions of §215. The presiding hearing officer denied the petition on the grounds that at the time of the injury the employee was not married and his child had not yet been born.

> "NEITHER THE ACT NOR THE WCB RULES ADDRESS AN EMPLOYER'S OBLIGATION TO CONTINUE TO PAY BENEFITS WHEN AN INJURED WORKER HAS DISAPPEARED."

In *Foley v. Thermal Engineering International, Inc.,* App. Div. No. 15-2, the Division upheld the denial of the claim. The clear language of §102(8) requires the existence of dependency status at the time of an occupational injury, and the Division held that §102(8) and §215 were interrelated portions of a broader statutory scheme. The Division held that no entitlement to dependent's benefits exists unless the petitioner was a statutory dependent at the time of the injury. Note that in *Cribben v. Central Maine Home Improvements,* 2000 ME 124, 754 A.2d 350, the Law Court had previously held that a child born after the date of injury but prior to the date of death did not qualify as a statutory dependent.

Extending the statute of limitations.

In 1981 the employee was diagnosed with lung cancer and stopped working that same year. He passed away in 1999. His estate filed petitions pursuant to the Occupational Disease Law in April 2011, more than twenty years following the date of injury. The statute of limitations was raised as a defense, and by virtue of the date of injury the provisions of §95 of the former Act applied to the claim.

In response to the raising of the statute of limitations, the estate cited that portion of former §95 which entitled an employee to file a petition within a reasonable time if a failure to have filed earlier was due to a mistake of fact regarding the cause and nature of the injury. The applicable version of former §95 contained an ultimate ten-year statute of limitations, and the presiding hearing officer ruled that the petition filed more than 20 years following the date of injury was untimely.

In *Zeitman v. W. W. Osborne, et al.,* App. Div. No. 15-1, the Division vacated the decision of the hearing officer and ruled that the reasonableness of the time of filing must be measured from the point at which the claimant becomes aware of the nature and cause of the injury, and not from the date of injury itself. Once awareness exists, a claimant then has a reasonable period of time in which to file a petition.

For injuries occurring on or after January 1, 1993, §306 of the current Act sets forth the statute of limitations, and subsection (5) provides as follows:

> If an employee fails to file a petition within the limitation period provided in subsection 1 because of mistake of fact as to the cause and nature of the injury, the employee may file a petition within a reasonable time, subject to the 6-year limitation period provided in subsection 2.

The current statute therefore suggests that a "reasonable time" may not exceed six years, but leaves unanswered the issue of whether the six year period begins to run at the point of discovery of a mistake of fact or as of the date of injury. The language of §306(5) is sufficiently different from that former §95 as to suggest that the six-year period is the ultimate statute of limitations even when a mistake of fact may have existed.

Rejection of reinstatement offer.

Section 214(1)(A) provides that if a genuine offer of reasonable employment is extended by the employer and if it is rejected without good and reasonable cause, an employee forfeits benefits for the duration of the refusal. In *Burby v. Fraser Papers, Inc.,* App. Div. No. 14-33, the Division rejected an argument that the grounds for refusing an offer must be related to either the employment or the occupational injury. In this proceeding a §312 examiner had determined that the employee suffered from an adjustment disorder with associated depressive and anxiety features, and found that it would not be in the employee's best interests to return to work for the pre-injury employer. Even though the grounds for the refusal of the offer were unrelated to the injury itself, the Division found that the employee nevertheless had good and reasonable cause to reject the offer of reinstatement, and that the presiding hearing officer had appropriately acted within his discretion in so ruling.

Conflicting §312 opinions.

In some cases more than one §312 examiner may be appointed, typically in cases involving multi-faceted injuries. In such cases the examiners may reach opposing conclusions regarding work capacity. In *Lindeman-Cibelli v. Maine Medical Center,* App. Div. No. 14-32, one examiner was appointed to assess the employee's physical condition and another to assess her psychological condition. The hearing officer adopted the opinion of the examiner who found that there was no work capacity.

The Division upheld the hearing officer and ruled that the hearing officer had adequately set forth his reasons for the acceptance of one opinion over the other, and that it would be inappropriate for the Division to substitute its own judgment. The opinion affirms the broad range of discretion that hearing officers may exercise in resolving disputes, even where the assessments of §312 examiners are involved.

Durational limits.

The employee sustained a low back injury on November 17, 2000 and a left shoulder injury on June 17, 2001. Soon after he was taken out of work as the result of low back symptoms and benefits for total incapacity were initiated. The benefits continued until 2010 and all Board filings in the interim referenced only the low back injury.

Following litigation in 2010 the Board determined that the employee was only partially incapacitated on the basis of the 2000 low back injury and that the degree of permanent impairment fell below the prevailing threshold. The employer then sought to cease payment of benefits based upon expiration of durational limit. At the same time the employee filed a Petition for Award for the 2001 left shoulder injury. The presiding hearing officer denied the petition and found that benefits paid during the previous decade had been based upon disability attributed to both injuries, and that the durational limit had expired.

In *Olsen v. International Paper,* App. Div. No. 14-29, the Appellate Division reversed and held that there had never been any prior litigation or determination with respect to the 2001 left shoulder injury, and that the hearing officer should not have summarily concluded that the employer's previous payments were based in part upon the 2001 injury. The matter was remanded to the Board for a determination of the entitlement with respect to that injury.

In this decision the Division recognized that every injury potentially has a life and entitlement period of its own, and that it cannot be assumed that payments made on the basis of one injury necessarily establish that disability was partially attributable to an entirely different injury. Accordingly, the durational limit for one injury will not necessarily apply to another in the absence of litigation in which the appropriate issues have been raised and determined.

What's In a Name? - A Practical Lesson On Name Selection

By: Darya I. Haag, Esq.

DARYA I. HAAG

When a local credit union decided to launch its mobile banking program a couple of years ago, the question "How should we name it?" was on the staff members' to-do list. The decision was made in favor of a catchy phrase that drew a strong association with the credit union's new service. The credit union conducted its own investigation and determined that no other credit union in Maine is using the same name. Having concluded that the name is available, the credit union began to promote its mobile banking program under the new name, including online and in print, and released a software application under this name for download and use by the credit union members.

The credit union members were pleased with the new service and everything was running smoothly until two years later when the credit union received a letter from an out-of-state law firm. The letter demanded that the credit union immediately cease and desist from using the name of its mobile banking program. Even though no one in Maine was using the same name, it turned out that a Massachusetts credit union had registered this name with the United States Patent and Trademark Office ("USPTO") as a mark long before the credit union adopted the same name for its program. As the owner of a federally registered mark for the same services as offered by the local credit union, the Massachusetts credit union had a legal right to seek to enforce its exclusive rights in this name in Maine.

Faced with a choice of either paying the Massachusetts credit union a license fee for the right to continue using the same name or changing the name completely, the credit union chose the latter. This time the credit union relied on Norman, Hanson and DeTroy to guide it through the process of name selection, availability assessment, and putting the applicable protection mechanisms in place. The credit union also had to spend time and resources on responding to the Massachusetts credit union's legal counsel and on removing the original name from all of its print and online contents, including its mobile app. Fortunately, the Massachusetts credit union did not seek monetary compensation for the local credit union's prior use of the mark.

This experience demonstrates how choosing a new name – for a service or for a product – is a very important decision that should be handled with care. If someone has already started using a name that is the same or confusingly similar to the name adopted by another, the senior user may assert claims of trademark infringement against the junior user, especially if the senior user has registered the name as a mark with the USPTO. Remedies for infringement range from cease and desist orders to monetary damages, and in some cases even attorneys' fees. This is one of the reasons why it is always best to conduct a full trademark search before adopting a new name, especially the name of a business, product or service which will surely require a lot of effort and investment, and that will be burdensome to change down the road. A trademark search also helps to show how strong or weak the desired name is based on how many uses of a similar mark there are. Of course, the reverse is also true. Careful selection, protection, and enforcement of one's trademarks generate consumer recognition, strengthen reputation and accumulate goodwill, which in turn will surely foster growth and success.

"THIS EXPERIENCE DEMONSTRATES HOW CHOOSING A NEW NAME - FOR A SERVICE OR FOR A PRODUCT - IS A VERY IMPORTANT DECISION THAT SHOULD BE HANDLED WITH CARE."

Recent Decisions From The Law Court

By: Matthew T. Mehalic, Esq.

MATTHEW T. MEHALIC

Umbrella Policy Does Not Provide UM Coverage

In *Dickau v. Vermont Mutual Insurance Co.*, 2014 ME 158 (Dec. 31, 2014), James Poliquin of Norman, Hanson & DeTroy, LLC, successfully advocated on behalf of Vermont Mutual Insurance Company that an insured's umbrella policy did not extend to uninsured/underinsured (hereafter "uninsured") motorist coverage. The insured, James Dickau, was operating a motorcycle and was involved in an accident caused by the other driver. Dickau's motorcycle policy provided $250,000 of uninsured motorist coverage. Dickau also had an umbrella policy providing liability coverage up to $1 million per occurrence. The at fault driver had a liability policy with a policy limit of $100,000. Dickau settled his claim against his uninsured motorist carrier for $150,000. He then sought to recover against his umbrella policy by filing a declaratory judgment action against Vermont Mutual.

In the declaratory judgment action, Dickau argued that the umbrella policy provided uninsured motorist coverage, and that, if the policy did not under the terms, Vermont Mutual was obligated to provided up to $1 million in uninsured motorist coverage pursuant to statute. Both parties filed motions for summary judgment and Vermont Mutual prevailed on its motion in the Superior Court. Dickau appealed to the Law Court.

Affirming the Superior Court's judgment in favor of Vermont Mutual, the Law Court first identified the mandatory nature of uninsured motorist coverage in Maine pursuant to 24-A M.R.S.A. § 2902. The Court also identified the minimum limits required for uninsured motorist coverage and an insured's ability to reduce the uninsured limits to the minimum limits as set for in the financial responsibility statutes, 29-A M.R.S.A. § 1605.

The Court continued by distinguishing true excess policies from umbrella policies. The former extending a policy limit for an underlying primary policy covering the same risk, and the latter extending coverage over more than one primary policy, "such as homeowners' insurance, automobile insurance, boat insurance, aircraft insurance, general liability insurance, and the like."

Addressing the contention that the Vermont Mutual umbrella policy provided uninsured motorist coverage the Court looked to the policy language. Specifically, the Court pointed to the language of the policy excluding from coverage any **"Personal injury** to [the insured] or a relative who is a resident of [the insured's] household" and "[a]ny claim for Uninsured/Underinsured Motorists Coverage(s) as defined in any **primary** policy described in the Declarations." In holding that the Vermont Mutual umbrella policy did not include uninsured motorist coverage the Court was clear that umbrella policies could provide uninsured motorist coverage if the contracting parties chose to include language establishing the coverage.

Addressing the contention that under Maine's uninsured motorist statue the umbrella policy is required to provide uninsured motorist coverage the Court looked to precedent regarding statutory interpretation in order to give effect to the Legislative intent. The Court pointed to the plain language of the statute and the fact that nowhere in section 2902 did the Legislature expressly state that it applied to umbrella policies. Rather, the section "states that it applies to 'polic[ies] insuring against liability arising out of the ownership, maintenance or use of any motor vehicle . . . with respect to any such vehicle registered or principally garaged in this State.'"

Dickau's argument about statutory requirement also made a distinction between minimum recovery statutes and full recovery statutes, which the Court rejected. Dickau argued that minimum recovery statutes "– which require insurers to carry only a minimum level of UM insurance (generally to comply with the state's financial responsibility statute) – do not apply to umbrella policies because these statutes are intended to allow an injured person only the recovery to which he would be entitled if the at-fault party carried the minimum coverage required by statute." In contrast, full recovery statutes "– which require UM coverage in an amount equivalent to the entire amount of bodily injury liability coverage for which the insured's policy provides – do apply to umbrella policies because they are intended to afford an injured person with damages to the extent of the insured's policy limits." The Court's rejection of this line of argument was based on the fact that for the first thirty years Maine was a minimum recovery state and it was not until 1999 that full recovery

language was added to the statute. However, despite the change, the Legislature did not broaden the class of policies to which section 2902 applied. "Instead, it has maintained the parameters of UM coverage as applying to policies 'insuring against liability arising out of the ownership, maintenance or use of any motor vehicle.'"

Finally, Dickau argued that use of the phrase "motor vehicle insurance policies" in section 2902, included any policy that contained any provision for any coverage of a motor vehicle, including umbrella policies. The Court refused to expand on section 2902 as urged by Dickau. The Court recognized that doing so would require it to "ignore the history of insurance law, set aside the meaning of well-established terms of art, and reject the counsel of dozens of decisions from other jurisdictions." The Court pointed to the fact that umbrella policies apply to a variety of situations where liability may exist outside the context of automobile accidents, such that umbrella policies could not be "motor vehicle insurance policies." The Court also looked at the financial responsibility statutes contained in 29-A M.R.S.A. §§1601 and 1605, pointing to the fact that there was no express requirement that an individual have an umbrella policy, or any other form of excess, secondary, or supplemental policy. The Court found that it would be illogical for it to hold that the Legislature placed mandatory UM coverage requirements on a completely voluntary form of insurance. Therefore, the Court held that umbrella policies are not "motor vehicle insurance policies" as used in section 2902 and affirmed the judgment in favor of Vermont Mutual.

Vehicle Operator Is Not Absolved Of Liability For Collision With Bicyclist

In *Semian v. Ledgemere Transportation, Inc.*, 2014 ME 141 (Jan. 13, 2015), the Law Court reviewed on appeal a jury verdict against Ledgemere Transportation in the amount of $750,000 finding it liable for injuries to Semian sustained when she was riding her bicycle. Ledgemere argued that pursuant to 29-A M.R.S.A. § 2070, it could not be held liable to a cyclist who passes a motorist on the right. Ledgemere also argued that the Superior Court erred in declining to instruct the jury on 29-A M.R.S.A. § 2063(2), which prescribes the circumstances when a cyclist must ride on the right side of a way. The Law Court affirmed the jury verdict and found no error on the part of the Superior Court Justice.

The facts were that the Ledgemere bus was stopped at an intersection in Ogunquit and was straddling the straight and right-turn lands. Semian believing the bus was going straight continued riding past the bus on the right. However, the bus turned right and struck Semian.

After the close of evidence at trial, Ledgemere moved for judgment as a matter of law based on 29-A M.R.S.A. § 2070(6), which provides in pertinent part, "A person operating a bicycle or roller skis may pass a vehicle on the right at the bicyclist's or roller skier's own risk." Ledgemere argued that it could not be held liable because the statute absolved it of any liability. The Court held that section 2070 by itself "does not insulate a motorist from liability" under the circumstances. Looking to other statutes in the context of equine activities, agritourism, and skiing, where individuals are absolved from liability, the Court held that had the Legislature meant section 2070 to insulate a vehicle operator from liability it would have specifically stated so in the statute. The Court also looked to 29-A M.R.S.A. § 2060(1-A) which prohibits a motorist passing a cyclist from turning right unless the turn can be made with complete safety. Giving section 2070 the interpretation advocated for by Ledgemere would render second 2060(1-A) superfluous. "Instead, section 2070 is best seen as a recognition of the risk that a cyclist creates to her safety when she passes a motorist on the right, and it confirms for a fact-finder the relevance of a cyclist's own responsibility in the event of an accident."

Finally, the Court held that the Superior Court did not err in refusing to instruct the jury on 29-A M.R.S.A. § 2063, and it did not err in denying Ledgemere's motion for a new trial for failing to instruct the jury. Section 2063 only provides when a bicyclist must ride on the right portion of the way as far as practicable under certain enumerated circumstances. It does not provide where a bicyclist should ride his or her bike when one of the enumerated circumstances does not exist. Because none of the enumerated circumstances in section 2063 existed in the case, it was not error to refuse the requested instruction.

"THEREFORE, THE COURT HELD THAT UMBRELLA POLICIES ARE NOT 'MOTOR VEHICLE INSURANCE POLICIES' AS USED IN SECTION 2902 AND AFFIRMED THE JUDGMENT IN FAVOR OF VERMONT MUTUAL."

NH&D Attorneys Designated as "Lawyer of the Year"

Norman, Hanson & DeTroy is proud to announce that five of its attorneys have been designated by *Best Lawyers* as the "Lawyer of the Year" for 2015 for the greater Portland area. We congratulate the following attorneys for having achieved this impressive recognition.

Robert W. Bower, Jr.
Labor Law

Jonathan W. Brogan
Personal Injury Litigation – Defendants

Kevin M. Gillis
Workers' Compensation Law – Employers

John R. Veilleux
Insurance Law

Russell B. Pierce
Professional Malpractice Law – Defendants

NH&D Attorneys Listed As New England "Super Lawyers"

Norman, Hanson & DeTroy is proud to announce that that the 2015 edition of *New England Super Lawyers* and the 2015 *New England Rising Stars* has recognized several of our attorneys for inclusion in the publication. We congratulate each of these attorneys for this accomplishment.

2015 New England Super Lawyers

Jonathan W. Brogan
Personal Injury Defense: General

Peter J. DeTroy
Personal Liability: Defense

Kevin M. Gillis
Workers' Compensation

David L. Herzer, Jr.
Personal Injury Defense: Medical Malpractice

Stephen Hessert
Workers' Compensation

John H. King, Jr.
Workers' Compensation

Theodore H. Kirchner
Personal Liability: Defense

William O. LaCasse
Workers' Compensation

Mark G. Lavoie
Personal Injury Defense: Medical Malpractice

Thomas S. Marjerison
Personal Injury Defense

Russell B. Pierce
Professional Liability

James D. Poliquin
Insurance Coverage

2015 New England Rising Stars

David A. Goldman
Insurance Coverage

Joshua D. Hadiaris
General Litigation

Kelly M. Hoffman
General Litigation

Matthew T. Mehalic
Civil Litigation: Defense

Jennifer A.W. Rush
Personal Injury Defense:
Medical Malpractice

Doris V. Rygalski
Estate Planning

John R. Veilleux
Personal Injury Litigation:
Defense

NHD Helps Maine's Credit Unions Defeat Frivolous Patent Claim Shakedown

In 2014, virtually all of Maine's credit unions received demand letters from Automated Transactions LLC ("ATL"), as the licensee of the patent owner, alleging that the use and operation of ATMs infringed certain patents on remote terminal technology. As part of this shakedown strategy, ATL threatened to sue the credit unions unless they paid a fee for a license in the technology. These patents were of dubious validity, so ATL deliberately set the fee at less than what it assumed would be the costs to defend the threatened lawsuit – this cost is referred to as "nuisance value" in the legal profession. Businesses will often pay the license fee because the patent trolls strategically set cost of the license lower than the cost of litigation to encourage settlement.

But with the assistance of NHD and the Maine Credit Union League, Maine's credit unions decided join forces and fight. The credit unions took a calculated risk – the patents were validly issued and they could have been locked in long-term litigation; there was also a possibility that they might lose and be forced to pay damages. However, the strategy of joining an existing group defense, coordinated and facilitated by Adrian Kendall of League counsel Norman, Hanson & DeTroy, paid off.

"The joint defense group's coordinated and aggressive defense forced ATL to dismiss all of its cases involving the group members, and all credit union members have now received releases and covenants not to sue from ATL and the ATM patent holder," said NHD member Adrian Kendall.

Kendall explained, "The joint defense group's aggressive defense forced ATL to dismiss all of its cases involving the group members and all Credit Union members have now received releases and covenants not to sue from ATL and the ATM patent holder. This victory is just another great example of what Maine's Credit Unions can accomplish when they work together to do the right thing."

This success, which has received national attention through the Credit Union National Association, comes on the heels of the Maine Credit Union League's work last year to support state patent troll legislation that thwarts this type of patent assertion, an effort in which NHD also assisted the League.

Maine Credit Union League President John Murphy said, "This has been an issue that has caused significant concerns to Maine credit unions over the past year and, it is gratifying to see the litigation ruled in our favor. We appreciate the hard work of all involved."

"THE JOINT DEFENSE GROUP'S COORDINATED AND AGGRESSIVE DEFENSE FORCED ATL TO DISMISS ALL OF ITS CASES INVOLVING THE GROUP MEMBERS."

New "Of Counsel" Attorney: Robert P. Cummins

ROBERT P. CUMMINS

We are pleased to announce that **ROBERT P. CUMMINS** has joined the firm as "Of Counsel" and will practice in the area of civil litigation. Bob joined the United States Marine Corps following high school and after discharge attended Purdue University where he was awarded a BSEE with Distinction. He obtained his Juris Doctor from the DePaul University College of Law where he served on the Law Review. He is licensed to Maine, Illinois, and Colorado and has been admitted to practice before the United States Supreme Court and various United States Courts of Appeal and District Courts. His more than five decades as a civil and criminal trial lawyer include service as vice president and trial counsel of Motorola and as trial counsel in a number of landmark civil and criminal cases.

Bob has served on numerous boards, committees, and commissions dedicated to the enhancement of the legal profession through the creation, implementation, and enforcement of rules of conduct and disciplinary enforcement for judges and lawyers. For example, Bob served on the Illinois Supreme Court Committed on Character and Fitness and as a member of the Illinois Attorney Registration and Disciplinary Commission Review Board. He was appointed by the Illinois Governor as Chairman of the Illinois Judicial Inquiry Board where he served for eight years. He is a founder of the Lawyers' Assistance Program and the Legal Clinic for the Disabled.

Bob served as Chairman of the American Bar Association Standing Committee on Professional Discipline and as Co-Chairman of the ABA Committee which created the ABA Standards for Imposing Lawyer Sanctions. Bob is a member of the Board of Directors of the American Judicature Society and served as a member of the Society's advisor to the ABA Standing Committee which created ABA Model Rules for Judicial Conduct. He is a recognized expert in matters of attorney and judicial conduct and has taught and lectured as an adjunct professor at various law schools around the country. He has directed, co-directed and lectured at numerous conferences, symposia, and seminars dealing with trial practice and matters of judicial and attorney conduct. When inducted as a Laureate of the Academy of Illinois Lawyers, Bob was described as exemplifying the best of the legal profession as a trial lawyer, a counselor for the helpless and victimized, a teacher, and as a model for anyone who might wonder whether law can be practiced on a daily basis in the best and most honorable traditions of the profession.

New Member: Daniel P. Riley

DANIEL P. RILEY

We are pleased to announce that Dan Riley has joined the firm as a member in January 2015. Dan graduated from Siena College, cum laude, in 1985 with a B.A. in Political Science and played on the men's rugby team. After graduating from college,

Dan served as a United States Navy deep sea diving officer and continued his rugby career on the All Navy rugby team. Following his Navy service, Dan attended the University of Maine School of Law, graduating in 1993.

Dan has over twenty years of experience representing clients as legislative counsel before the Maine legislature and the United States Congress. His lobbying practice has included the representation of a variety of industries and trade associations with a particular emphasis on the energy sector. Dan has been involved in most of the major legislative initiatives since the restructuring of the electricity markets here in Maine in the late 1990's.

In addition to his legislative and government relations practice, Dan has broad experience representing candidates and political action committees on campaign finance issues before the Commission on Governmental Ethics and Election Practices. He served as Counsel to the Maine Republican Party and as State Counsel to the last two Republican presidential campaigns and is a member of the Republican National Lawyers Association.

Dan served as the Chair of the Government Affairs Practice Group of Lex Mundi, an international association of law firms. He is the sole member of the National Association of State Lobbyists representing the state of Maine. Dan has been listed in Best Lawyers in America for his government relations practice since 2007 and was the Lawyer of the Year for that practice area in 2013.

In addition to his legal practice, Dan serves on the Board of Directors of the Maine State Chamber of Commerce and has served on the Steering Committee of The Nature Conservancy's Corporate Conservation Council of Maine since 1998. He has also served on the Board of Directors of the Maine Chapter of the Coastal Conservation Association since 1998 and has served as CCA's pro bono legislative counsel for over fifteen years.

Dan is an avid hunter and fishermen and enjoys skiing, sailing and golf. He lives in Kennebunk with his wife, Dr. Julia Riley, and their two yellow Labs, Irish setter and Maine coon cat.

New Associate: Shane T. Wright

SHANE T. WRIGHT

We are pleased to announce that Shane Wright joined the firm in January, 2015, as an associate attorney. Shane is a native of Pittsfield, Maine and a graduate of Maine Central Institute. He graduated from Colby College in 1994 with a B.A. in History and a minor in Education. Prior to law school, Shane spent several years in Washington, D.C. working on Capitol Hill for both Senator Susan Collins and for the House of Representatives Committee on Education and the Workforce. Shane also has experience in the manufacturing arena, having worked as the Production Manager at Pittsfield Woolen Yarns Co., Inc., a family-owned and operated textile mill founded in 1947.

Shane graduated from the University of Maine School of Law cum laude in 2005. While in law school, he served as an Articles Editor of the Maine Law Review and spent a summer interning for the Honorable Paul L. Rudman of the Maine Supreme Judicial Court. Following law school, Shane clerked for the Honorable Warren M. Silver of the Maine Supreme Judicial Court and served as an associate at a respected central Maine firm prior to joining Norman, Hanson & DeTroy.

Shane lives in Freeport with his wife and two sons. In his free time, Shane enjoys outdoor activities with his family such as snowshoeing, hiking, swimming, and fishing.

Kudos

Congratulations to **CHRIS TAINTOR, DAVE GOLDMAN,** and **DARYA HAAG** on their recognition for pro bono work by the Maine Supreme Judicial Court through the Katahdin Council Recognition Program. The Katahdin Council Recognition Program was created by the Maine Supreme Judicial Court in response to a proposal by the Justice Action Group to focus the public's attention on the critical role that pro bono plays in maintaining a vibrant civil justice system.

JIM POLIQUIN and **NORMAN, HANSON & DeTROY** received a Citizen Award at the annual Portland Police Department's award ceremony for providing pro bono legal services to obtain Federal and State Line of Duty Benefits for the family of Sgt. Robert Johnsey, who died as the result of the accidental discharge of his service weapon. The case went through several appeals under the Public Safety Officers' Benefits Act at the Department of Justice.

LINDSEY SANDS has been selected again this year as one of the Top 40 Under 40 Litigation Lawyers in Maine by the American Society of Legal Advocates (ASLA). ASLA is a nationwide organization that recognizes exceptional legal talent and promise among the next generation of litigation lawyers. This recognition is given to less than 1.5% of lawyers overall nationwide. We also congratulate **LINDSEY** on the birth of her son, Nicholas Clark Sands, who joined his parents and excited two year old brother on January 16, 2015.

MARK LAVOIE gave a presentation at the Carey Medical Center with Ted Westerfield of Medical Mutual Insurance Company on the advantages and pitfalls of electronic health records. The talk will be presented to other hospitals on request free of charge.

DEVIN DEANE was selected as one of the twelve members of the Inaugural Maine State Bar Association Leadership Academy. The Academy is an eight-month leadership training program designed to foster the professional growth and enhance the leadership skills of a diverse group of rising young attorneys who have been practicing for less than ten years. The mission of the program is to promote and encourage leadership and professionalism by identifying present and future leaders who are members of the association and by providing them with a program designed to develop leadership skills, foster camaraderie, and expose them to leaders in the legal, business, government communities.

STEVE MORIARTY has been appointed to the Planning Board of the Town of Cumberland.

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Return Service Requested

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