

RAWLE'S REPORTS

THE NATION'S OLDEST LAW OFFICE

RAWLE &
HENDERSON LLP



The Nation's Oldest Law Office
~Established in 1783~

www.rawle.com

Philadelphia, PA
215. 575. 4200
Fax 215. 563. 2583

New York City, NY
212. 323. 7070
Fax 212. 323. 7099

Long Island, NY
516. 294. 2001
Fax 516. 294. 2006

Marlton, NJ
856. 596. 4800
Fax 856. 596. 6164

Pittsburgh, PA
412. 261. 5700
Fax 412. 261. 5710

Harrisburg, PA
717. 234. 7700
Fax 717. 234. 7710

Wilmington, DE
302. 778. 1200
Fax 302. 778. 1400

Wheeling, WV
304. 232. 1203
Fax 304. 232. 1205

 @1783Rawle

Liens: A Practical Impediment to Resolution

You have looked at every angle of your case's strengths and weaknesses, tallied up the expenses to date, estimated the complicated calculus of damages and have finally arrived at a figure that could resolve your case...but have you considered the specter that looms over many personal-injury cases? Medical liens could sink your settlement if you have not factored for them appropriately.

In many circumstances the state and federal government, insurance companies and care providers can assert their rights against amounts recovered in personal-injury claims, either through settlement or awards at trial. Medical liens fall into two categories: statutory, such as under Medicare or ERISA health insurance plans; and contractual, under other insurance plans or agreements with individual medical care providers. Through the subrogation process, insurance providers can seek repayment for expenses they incurred in paying for a plaintiff's personal-injury accident treatment.

The dollar amount a lienholder is entitled to is not necessarily an immutable figure—often times a Plaintiff's attorney can get through to someone with the authority to accept a lesser amount. Giant bureaucracies such as Medicare and various health insurance entities are not known for expediency or communicativeness, but tenacious diligence will pay off. Of course, lienholders have their own interests to look after and may be simply unable to offer a reduction that will work, but depending on the circumstance, it can be of great assistance to—gently—remind the lienholder that if they refuse to lower their lien demand and that prevents the case from reaching settlement, they may well lower their lien repayment all the way down to zero percent if the case fails to resolve or resolves unfavorably to the plaintiff.

A few tips to keep in mind:

- Make a practice of routinely inquiring (or calendaring for later follow up) whether Medicare and/or Medicaid are involved at the very beginning of assuming representation in any case where a medical lien may be a factor, even in instances where you are not sure if they are applicable; much better to start the process of lien resolution or have confirmation that it will not be an issue than to be surprised down the road by an unexpected quirk.
- Always request the plan language of contractual liens: they are a tangle of legalese that your client's interests may be bound up in. The entity seeking repayment or subrogation may



Sarah J. Simkin

not have the right to repayment that they are asserting that they do depending upon the facts of the case.

- Lastly and most importantly: confirm any and all offers and agreements in writing. Oftentimes the best way for a Plaintiff's attorney to get an answer is through a direct call, but strongly encourage your opposing counsel to confirm any verbal agreement they are able to reach with a lienholder in writing immediately after their conversation. If a plaintiff agrees to accept x amount for a settlement with the understanding that their attorney has negotiated their repayment responsibility down $y\%$ of their medical lien, you cannot afford not to have that negotiation solidified.

Responsible lien management is not merely a best practice but an actual ethical obligation. The ABA Model Rules of Professional Conduct obligate a plaintiff attorney to notify

lienholders when funds are received, promptly deliver the portion of said funds the lienholder is entitled to and provide a full accounting upon request.

When you are on the defense side, the obligation to ensure liens are repaid does not rest with your client, but that does not take liens outside the purview of "your problem." The chunk they take out of your more-than-generous offer could reduce the dollar amount of what the plaintiff might ever actually see to a fraction that is not acceptable to them... perhaps even to the extent that they would rather take their chances at trial. As such, you must factor them into your case analysis. One possible strategy is to request that the lienholder be physically present, or at least available by phone, during negotiations. This enables real-time lien-reduction discussions. Depending upon the circumstance, it may be possible to obtain a court order compelling the lienholder's participation.

Sarah J. Simkin is an associate in the **Pittsburgh** office of Rawle & Henderson LLP. She focuses her practice in civil litigation, insurance defense, and commercial motor vehicle matters. She earned her J.D. from Boston University School of Law and her B.A. from the University of Pittsburgh. Sarah is admitted to practice in Pennsylvania and West Virginia, as well as the U.S. District Court for the Western District of Pennsylvania and the U.S. District Court for the Southern District of West Virginia.

Sarah can be reached directly at (412) 261-5715 • ssimkin@rawle.com

DISCIPLINARY BOARD OF PA SUPREME COURT



Patrice S. O'Brien

Patrice S. O'Brien has been appointed as a **Hearing Committee Member serving the Disciplinary Board of the Supreme Court of Pennsylvania**. Her three-year term began July 1, 2019. Hearing Committee Members serve as volunteers to conduct hearings and act as a formal reviewing body to determine if a case can move forward in pursuit of a particular course of discipline.

Patrice has practiced as a civil trial lawyer for over 30 years in the areas of medical malpractice, products liability, catastrophic loss and premises liability in the Mid-Atlantic region. She is Of Counsel to the Firm in our Philadelphia office. She received her undergraduate degree from Delaware Valley College, *magna cum laude*, in 1983, and law degree from Columbus School of Law at Catholic University in 1986. For 10 years, Patrice was the captain of Rawle &

Henderson LLP's race team for the annual Komen Philadelphia Race for the Cure, helping to raise funds to find a cure for breast cancer. For the last three years, she has participated in the review of breast cancer research applications for the U.S. Department of Defense. Patrice served a two-year term as co-chair of the Medical-Legal Committee of the State Civil Litigation Section of the Philadelphia Bar Association.

Patrice can be reached directly at: (215) 575-4222 • pobrien@rawle.com

Updates to Delaware Discovery Rules

The Delaware Court of Chancery and the Delaware Superior Court recently amended rules 26, 34 and 37 of their procedural rules to conform more closely to their federal counterparts. Rule 26 was amended “to expressly incorporate proportionality considerations consistent with the Federal Rules.” In particular, rule 26(c)(2) has been amended “to reference cost allocation as a means to address discovery burdens.” The rewritten rule encompasses the idea that “the burden or expense” of a discovery request can “outweigh its likely benefit.”

This language replaces language from the prior rule that said discovery can be limited if it is “unduly burdensome.” Instead, the new rule takes a more direct approach, affirmatively asserting that discovery must be proportional with the expected benefits of discovery, outweighing their cost.

In addition, the Delaware Courts have periodically instructed parties to avoid lengthy general objections in responding to interrogatories and requests for production. The amendment to rule 34(b) codifies this instruction. When objecting, a party must state their grounds “with specificity” and further state whether the party “will withhold any responsive material on the basis of an objection.”

The Delaware Court of Chancery is a court of limited jurisdiction and hears only cases sounding in equity and

those corporate cases assigned to it by statute. Most of Rawle & Henderson LLP’s commercial and tort litigation is before the Delaware Superior Court. Some of our attorneys had already begun to draft our objections and responses to discovery in conformity with the new guidelines based on comments Superior Court judges made at seminars and CLE panel discussions.

Rawle & Henderson LLP’s Delaware office is prepared to comply with these new rules and offer any guidance as to how these rules could lessen the burdens and costs of discovery for our clients.

We will continue to monitor updates from all of the Delaware courts as well as comments from its judges regarding the burdens and expenses imposed by excessive discovery requests and objections.

The Chancery Court Rules became effective July 1, 2019. The Superior Court Rules became effective August 1, 2019. The amended rules can be found on Rawle & Henderson LLP’s website, www.rawle.com.



**Laura Bower
Braunsberg**

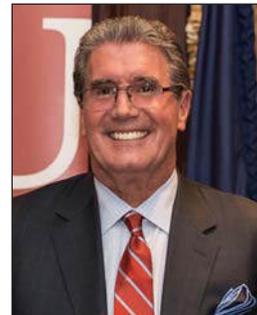
Laura Bower Braunsberg is an associate in the **Wilmington, Delaware** office of Rawle & Henderson LLP. She concentrates her practice on commercial litigation, property damage, personal injury, commercial motor vehicle matters, and casualty and premises liability. She earned her J.D., *cum laude*, from the University of Virginia School of Law in 2010. While attending law school, Laura served as an Editor for the *Virginia Law Review* and as President of the National Trial Advocacy Team. She earned her B.A., *magna cum laude*, in Philosophy, Japanese, and East Asian Studies from Macalester College in 2006. Laura serves on the American Mock Trial Association Board of Directors and is the Head Coach for the University of Delaware Mock Trial team. She represents victims of domestic violence through Delaware Volunteer Legal Services and children in foster care through the Office of the Child Advocate. She is the BARBRI Evidence lecturer for the Delaware Bar Exam. She taught the Delaware Evidence lecture for BARBRI at the Widener University Delaware Law School in June 2019. Laura is admitted to practice in Delaware, as well as the U.S. District Court for the District of Delaware and the U.S. Court of Appeals for the Third Circuit.

Laura can be reached directly at (302) 657-2134 • lbraunsberg@rawle.com

Rawle's Reports is a monthly client newsletter of Rawle & Henderson LLP with recent case law updates. If you would like hard copies of past issues, or would like to request PDF copies from us, please email info@rawle.com. Past issues are also available and downloadable from our website, www.rawle.com.

AIG TRANSPORTATION CONFERENCE

Jack Snyder, a partner in our Philadelphia office, spoke at the **AIG Transportation Education Conference** in June 2019. Jack was a panelist for the session “*Nuclear Verdicts: Reality, Predicting & Preventing.*” He discussed strategies to combat large settlements and verdicts in commercial truck accident cases. The seminar, held at Loews Hotel in Philadelphia, covered a variety of additional topics related to transportation litigation, including economic and regulatory issues, worker fatigue, safety issues regarding drug and alcohol use, risk assessment, insurance carrier decisions, workers’ compensation issues, and cyber security.



Jack Snyder

Jack is Chair of the Catastrophic Loss Group. He focuses his practice on the defense of high exposure matters, primarily in the areas of product liability, construction, industrial, fire and explosion, security and transportation. He is regularly retained in cases with demands in the hundreds of millions of dollars, often only weeks or months before trial, to try a case to verdict. In the last 20 years, Jack has been involved in the area’s most high profile cases, including *In re: Market Street Collapse Litigation*, which was the longest civil trial in Philadelphia County history; the Ride The Ducks International case arising out of the collision of a tug-driven barge and a tourist duck boat on the Delaware River; and the Tropicana Casino & Resort Parking Garage Collapse case, which involved multiple deaths and garnered national attention. He recently successfully completed a 5-month trial in Seattle, WA, that involved 5 deaths and serious injuries and included 44 plaintiffs. He is a member of the American Board of Trial Advocates. Jack is also Chair of the Firm’s Medical Professional Liability Section. A Philadelphia native, Jack was a Scholar-Athlete at St. Joseph’s University and the Captain of the basketball team. He earned his J.D. from Temple University School of Law and is admitted to practice in Pennsylvania, New Jersey and New York. Rated AV by Martindale-Hubbell, Jack has been selected as a Pennsylvania Super Lawyer for 16 consecutive years. In 2017, he was selected as a “Philadelphia Top Lawyer” by the *Philadelphia Business Journal*.

Jack can be reached directly at (215) 575-4220 • jsnyder@rawle.com

CONSTITUTION PROGRAM

Scott F. Griffith, a partner in our Philadelphia office, presented a program on the **U.S. Constitution** to students and teachers at **Philadelphia’s Holy Cross Parish School** in May 2019. The Constitution Program is presented annually by Rawle & Henderson in partnership with the **Women for Greater Philadelphia** (www.womenforgreaterphiladelphia.org), stewards of Laurel Hill Mansion in East Fairmount Park. Scott and the students engaged in lively discussion regarding a number of timely issues related to the Constitution, including legalization of marijuana, the wedding cake case in which a bakery refused to make a cake for a gay couple, and the sugar tax in Philadelphia. In addition, Scott talked about the 1803 U.S. Supreme Court case *Marbury v. Madison*, which established the principle of judicial review.

Scott concentrates his practice in the areas of environmental, toxic and mass torts, product liability, professional liability, and white collar criminal defense. A seasoned trial attorney, Scott has tried over 60 civil and criminal matters to verdict. A 1987 graduate of Hofstra University (B.A., Literature) and a 1993 graduate of the Temple University School of Law, Scott is admitted to practice in Pennsylvania, New Jersey and New York, as well as in the U.S. District Court for the Eastern and Middle Districts of Pennsylvania, the U.S. District Court for the District of New Jersey and the U.S. Court of Appeals for the Third Circuit. He has been admitted pro hac vice in Delaware and West Virginia. Scott was recently awarded a BV Distinguished rating from Martindale-Hubbell as selected by his peers. He has been selected to serve as Pennsylvania State Chair on the Council on Litigation Management.



Pictured above: Scott Griffith speaks to students of Holy Cross Parish School at the 2019 Constitution Program.

Scott was recently awarded a BV Distinguished rating from Martindale-Hubbell as selected by his peers. He has been selected to serve as Pennsylvania State Chair on the Council on Litigation Management.

Scott can be reached directly at: (215) 575-4323 • sgriffith@rawle.com