An Interview with Center Chair Steve Puiszis

Recently, Steven M. Puiszis, chair of the DRI Center for Law and Public Policy, recently spent time with DRI Director of Public Policy Tim Kolly to discuss innovation within the Center, changes in the practices of law, technology—and baseball.

Tim Kolly: Let's get a little personal information first. What induced you to study and practice law? Were there other lawyers in the family?

Steve Puiszis: My undergrad degree is in accounting, but after working as an auditor during my last year of college, I realized my career goals lay elsewhere. There are no other lawyers in my family, but an old friend was a state prosecutor and after several discussions with him about cases he tried and his experiences as a trial attorney, I decided to go to law school. I volunteered at the Cook County State's Attorney's Office during my second and third year of law school and began trying felony bench trials under the supervision of a prosecutor during my last year of law school. I was hired by the Cook County State's Attorney's Office and began trying criminal matters soon after I was licensed. Learning to try a criminal case is a great experience for any trial attorney because it forces you to think on your feet in front of a jury without reams of deposition transcripts. You learn to listen and watch witnesses, a lost art. I've seen many trial lawyers write out examinations based on what a witness said in the deposition. At trial, because they are so focused on the next question on their list, they miss what a witness said, or how the witness said it, and the jury's reaction to it.

TK: What have been the biggest changes in the profession that you have seen since you started practicing?

SP: I remember a time when lawyers did not have computers and smart phones, so it has to be technology. Technology is rapidly changing how we live, work, communicate, and interact with one another. And the speed of technological change is only increasing. We now have an ethical duty to be competent with the technology that we use in the practice of law. Some lawyers tend to think that duty hinges on data, cyber security, and protecting our clients' information from inadvertent or unauthorized access or disclosure. While technological competence certainly includes these things, the concept is far broader and includes knowing the technology that our clients use to manufacture their goods or deliver their services, the technologies we use to run our practices, and related disciplines such as e-discovery, social media, and presentation technologies used in courtrooms.

The other major change is a fundamental shift in the balance of power between law firms and their clients. When I first started practicing, the relationship was one-sided, that is, the power was in the hands of the lawyer. How lawyers are regulated in the United States, in fact, is premised on the notion that clients need protection from (some) attorneys. You can see that for instance in the conflict of interest provisions found in the rules of professional conduct. Today, however, lawyers and law firms are viewed by some clients as just another vendor of services. Outside client guidelines are increasingly becoming the center of lawyers' and law firms' relationships with their clients. While this may be preferable from a client's perspective, these guidelines are creating significant risk management issues for law firms. The indemnity provisions found in many of these guidelines not only keep law firm general counsel up at night, but they have also captured the attention of professional liability insurers, given that the risk they create is not something insurers are willing to cover. Some have even suggested that outside counsel guidelines threaten the professional independence of lawyers. The Solicitors Regulation Authority in the UK, for instance, commissioned an independent research study of the issue. That study was published in *Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms*, Smith & Vaughan (2015). (Available at http://sra.org.uk.) The study suggests that outside counsel guidelines "amount to the privatization of professionalism" in which "clients blur the lines of lawyer governance and control." The study found no correlation between the size of a law firm and the ability to resist them, and concluded that the indemnification provisions in outside counsel guidelines "build up systemic risk in the legal profession," which could "lead to significant liability, the risk of law firm collapse and a resultant undermining of the strength of the profession." We are approaching a time when the legal profession may need to have an open dialogue with clients about the issue to search for a middle ground where we can accommodate the clients' needs without jeopardizing the stability of law firms representing them.

TK: Attorneys talk about the dramatic changes that took place during the '07–'08 economic crash. Are those changes lasting, temporary, or evolving?

SP: The changes that were triggered by the great recession have fundamentally altered the legal marketplace and will continue to evolve over time. Certain practice areas have been taken completely in-house by many corporations as a way to reduce their legal costs and are not likely to return. Tech startups such as Rocket Lawyer and Legal Zoom have entered the marketplace and provide further competition for many traditional practice areas. The good news for our members is that there will always be a need for good trial attorneys. Technology will trigger new practice areas and will create new legal issues that will have to be addressed in the near future.

TK: You were named chair of the DRI Center for Law and Public Policy in October, the only such center in the country dedicated to research and advocacy on behalf of the defense bar and the civil justice system. Why is the Center important?

SP: DRI, its sister organizations, and our state and local defense organizations like the Illinois Association of Defense Counsel do a great job of responding to issues as they arise and educating their members on new decisions and issues. But the Center is unique in that it can focus not only on emerging issues, but also anticipate future issues of national importance and prepare and coordinate a response to them for all members of the defense bar. Providing resources and helping to assist with the response to attempts to enact Asset Freezing Orders legislation in the District of Columbia, Alabama, New Jersey, and other states is one example of the value provided by the Center. Developing our whitepaper on court funding, *The Economics of Justice*, for use by our members and SLDOs is another important example. DRI's response last year to the ABA's consideration of alternative business structures (ABS) is another. Because we anticipate the ABS issue will rise again, the Center has formed a working group to research and address issues surrounding ABS.

DRI's members are busy with their day-to-day practices, and the dynamics of the current economic marketplace are requiring they provide added value to their clients. That means the demands on lawyer's time are greater than ever. Lawyers have a hard enough time staying current let alone worrying about future issues, which is one reason why the Center is increasingly important.

TK: The Center is now in its fifth year and has innovated in a number of ways. Tell us about them.

SP: For a number of years the Center has conducted a series of national polls relating to our system of civil justice on a range of topics, including jury service, the perception of our civil justice system, the adequacy of court funding, class action reform, mandatory arbitration, and judicial independence issues. The results of those polls have become the subject of news articles, publications, and congressional hearings. Members of the Center have provided testimony before Congress on legislative reforms and before Civil Rules Committees on procedural rule changes. The Center has a robust amicus program that advocates on issues of national importance to the defense bar before the United States Supreme Court. The Center has developed white papers on judicial independence and court funding issues, and it is now considering globalization issues that will impact our members and the clients that they represent. We are looking at the possibility of flash polling issues as they emerge, which can provide the Center with even greater flexibility to use the poll results to support our members' interests.

TK: Can you provide an example of such a flash poll topic?

SP: While it's a bit tongue-in-cheek, one possibility is to ask how a person would feel about receiving legal services from someone who never graduated from law school?

TK: What is your vision for the Center?

SP: To be the voice of the defense bar on issues of national importance to our members; to provide needed resources that will benefit all members of the defense bar; to customize assistance to our members at each point in their careers; and to demonstrate the value of DRI to our members and SLDOs.

TK: From the DRI polls, there seems to be a real lack of awareness of the workings of the judiciary by the general population. To what do you attribute that? Court decisions can have just as great an impact on the everyday life of citizens as actions of the president or the Congress. Given the critical impact of court rulings, how do you overcome that disinterest and lack of awareness by citizens?

SP: There are several reasons for this lack of awareness. Civics has not been taught in our school system for years and there is a general lack of knowledge about various aspects of our state and federal democratic institutions, including our courts. Some persons have never served on a jury and their knowledge of our civil justice system is limited to what they have seen on TV or in movies. This lack of awareness is heightened in major metropolitan areas where the average voter has limited information about the judges on a ballot.

To overcome this, we have to do a better job of educating the public about the role of the judiciary, the importance of judicial independence, and how the lack of adequate court funding can impact the lives and businesses of all of us. Imagine how people would react if probate or divorce proceedings had to be suspended for several months due to a lack of court funding? The Center's Judicial Task Force has developed whitepapers, PowerPoints, and other resources on these issues that can be used by our members to accomplish this public education task.

TK: People are surprised when you tell them that less than two percent of cases are tried before a jury. One of the Center's focuses is on preservation of the jury trial. Why is the jury trial so important?

SP: Sometimes we forget that the right to a jury trial in both criminal and civil matters is a constitutional right guaranteed by the Sixth and Seventh Amendments of the Bill of Rights. We fought a war of independence, at least in part, to have a system of justice free from the influence of the executive branch—then, the King of England. Jury trials are a unique feature of American democracy and perform an important civic and educational function in our society. A jury represents that so-called community in the courtroom, which allows citizens to participate in the process of governing, educates them about the operation of our civil and criminal justice system, and provides a means to resolve disputes peacefully.

TK: As a Chicagoan, do you think the Cubs will win it all again?

SP: I was born and raised on the south side of Chicago and I am a life-long White Sox fan. My firm represents the White Sox, and because of an immunity statute in Illinois, I likely tried the last "foul ball" case in Illinois, which involved a wicked line drive off the bat of newly minted Hall of Famer Tim Raines when he played for the White Sox. That case was one of the most enjoyable trial experiences I have ever experienced. That being said, I only root against the Cubs when they play the White Sox.

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ersonally involved in the project at hand. is issue, which is relatively uncommon, ay arise when a claimant, realizing that e best design professional to provide n expert report or to execute an affidavit of merit may be one who was actually involved in the project, obtains and rves an affidavit of merit from that design ofessional. As the litigation unfolds, owever, the probability of that design professional being brought into the case (even nder simple contribution or common law demnity theories) increases substantially, and thus the expert may face the possibility of having rendered an opinion (or ecuted an affidavit of merit) in a case in hich he or she later faces exposure based n his or her own services on the project.

It appears that state affidavit of merit atutes are completely silent on this specific issue, although New Jersey's affidavit merit statute explicitly forbids experts ving a financial interest in the outcome a matter from executing an affidavit of erit. N.J.S.A. 2A:53A-27. Even without thority explicitly forbidding a person volved in the underlying project from ecuting an affidavit of merit, as the litition unfolds, should the expert be named a defendant, it can be argued that a eviously executed affidavit of merit has ow become substantively deficient. This otential issue appears to have received ry little attention, and it is thus far from ttled. Regardless, best practices would rongly suggest that when retaining an pert, defense counsel should steer clear any experts who participated in the esign process in any way; such experts ould potentially be named as defendants the litigation, and any affidavits of merit epared by such professionals could be bject to attack. Furthermore, defense ounsel should also investigate whether n expert executing an affidavit of merit ainst his or her design professional client a potential defendant in the litigation and tack such an affidavit of merit on those ounds when it is possible.

e Constitutionality of ffidavit of Merit Statutes

he issue of constitutionality, while solved in most jurisdictions, is noneeless interesting. Most states' affidat of merit statutes have been upheld as constitutional, such as in 2002, when the Supreme Court of Arizona held that Arizona's affidavit of merit statute did not infringe on a party's fundamental right to sue for damages, implicate a suspect class, or violate the equal protection and separation of powers clauses of the state's constitution. *Bertleson v. Sacks Tierney, P.A.*, 60 P.3d 703 (Ariz. 2002).

Other statutes have faced more creative constitutional arguments and similarly been upheld. In 2000, the Supreme Court of Georgia upheld the constitutionality of Georgia's affidavit of merit statute, rejecting a plaintiff's argument that the statute, originally titled the Medical Malpractice Reform Act of 1987, was unconstitutional because it "referr[ed] to more than one subject matter or contain[ed] matter different from what is expressed in the title thereof," in violation of Article III, Section V, Paragraph III of the state's constitution. *Lutz v. Foran*, 427 S.E.2d 248, 251–52 (Ga. 1993). The court reasoned that the 1997 amendments that renamed the statute effectively mooted the plaintiff's argument. *See Minnix v. Dep't of Transp.*, 427 S.E.2d 248, 251 (Ga. 2000).

Others states' affidavit of merit statutes, however, have not fared as well. In 2012, the Supreme Court of Arkansas declared Arkansas' affidavit of merit statute unconstitutional. *See Summerville v. Thrower*, 253 S.W.3d. 415, 420–21 (Ar. 2007). A similar fate befell Washington's affidavit of merit statute, which was held unconstitutional in 2009 after the Washington Supreme Court held that the statute "unduly burden[ed] the right of access to courts and violate[d] the separation of powers." *Putnam v. Wenatchee Valley Med Ctr.*, 216 P.3d 374, 377 (Wa. 2009) (holding the affidavit of merit statute that applied only to medical malpractice actions was unconstitutional); *see also State ex rel. Wyoming Ass'n of Consulting Engineers & Land Surveyors v. Sullivan*, 798 P.2d 828 (Wy. 1990) (striking down the Wyoming Professional Review Panel Act, Wyo. Stat. §§9-2-1801 *et seq.*, as unconstitutional, on the grounds that it violated the equal protection guarantees of Wyoming's constitution).

Conclusion

Affidavit of merit statutes applying to claims against design professionals remain in force in 15 states. If read carefully, these statutory requirements may provide a useful opportunity for defense counsel to secure the dismissal of professional negligence claims asserted against their clients.

Affidavit of merit statutes have generally been enacted as part of tort-reform efforts to "weed out" cases of limited or no merit, and they require those parties asserting professional negligence claims against design professionals to provide some measure of expert support for their claims at an early stage of the litigation, rather than merely "hoping" that discovery will reveal a basis for their allegations. Affidavit of merit requirements vary in scope and application, so experienced defense counsel must be familiar with the statute of each state in which he or she practices. Failure to explore the possibilities for an early dismissal may not only prolong the matter and prove costly for a client, but also constitute an abdication of defense counsel's professional duty of care to his or her design professional client. FD

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Any baseball fan knows that it takes a lot to make it to the World Series and then win it—a team has to avoid injuries, get hot at the right time, and have the baseball gods smile on them—like the rain delay in last year's World Series. Everything fell into place for the Cubs last year. They have a lot of great talent on that team and one of the best managers in baseball. So, the Cubs have to be one of the favorites heading into this season. Nothing would give me greater pleasure than to see a subway series in Chicago with the White Sox winning the series in a game seven.

Steven M. Puiszis is a partner and serves as the deputy general counsel of Hinshaw & Culbertson LLP in Chicago. He is a highly experienced trial and appellate lawyer, who is a member of Hinshaw's Lawyers for the Professions Practice Group, counseling lawyers and law firms on professional liability, ethics, and professional responsibility matters. He serves as Hinshaw's privacy officer and has served as the head of the firm's Electronic Discovery Response Team. Mr. Puiszis also was the president of the Illinois Association of Defense Trial Counsel.
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