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I have come to learn more than one could imagine about Sir Isaac Newton in the past year. The obsession really started a few years back when I got to see the movie “Gravity” followed by the movie “Interstellar.” Both are great works of art with hidden Easter eggs and layers of depth that can only be discovered through constant re-watching. Ironically, both films explore not only the power of Gravity but the complications that can arise in the absence of it. History credits Newton with this discovery. Perhaps it is the world’s greatest accidental revelation.

While most know of, or have been told, the story of Newton and the apple, history shows that he was a man of many laws. He worked in many areas of mathematics and physics. He developed his theory of gravitation at the ripe old age of 23. Twenty years later, in 1686, he presented his three laws of motion in the “Principia Mathematica Philosophiae Naturalis.” It is the Third law that I find most intriguing. “For every action there is an equal and opposite reaction.”

It is helpful to keep this in mind when crafting legal arguments. As lawyers, it is important to understand the “counter argument,” the “opposite viewpoint.” While it may seem that we have the superior position, Newton’s 3rd reminds us of the equal opposite reaction. This certainly helps us better inform our clients.

NJDA is here to help you understand the opposite side. In April, look for our Premises Liability CLE seminar/webinar. It will be our first ever webinar. In June, look for our joint seminar with the Middlesex County Bar Association as we tackle issues relevant to Young Lawyers. We will host our 51st Convention in Hershey, PA, from June 22-25, 2017. It is sure to be fun for all so save the date and bring your family. The convention will feature Hershey Park, WaterPark, Golf, Shopping, Restaurants, 5-6 CLE credits and FUN.

As we head into 2017, we want to encourage you to get involved. Join us, write an article, participate on a committee, follow us on Twitter, like us on Facebook, and find us on LinkedIn.

CHAD M. MOORE, ESQ.
Similar to “Uncovering Fraud in the Referral Relationship”, New Jersey Defense, Volume 29, Issue 3, April 2014, this article examines a healthcare provider’s fraudulent scheme with a personal injury lawyer. Discovery produced in a civil action brought under the New Jersey Insurance Fraud Prevention Act (IFPA) from a now closed, undercover, criminal investigation by the FBI and the Office of the Insurance Fraud Prosecutor (OIFP), revealed the schemes set forth in both articles. This article outlines a kickback scheme described by a healthcare provider, identified herein as “Dr. A”, with a personal injury lawyer, referred to herein as “Attorney B”; and analyzes valuable corroborative evidence of follow-the-money financial records discovery.

According to Dr. A, Attorney B was the largest source of patient referrals to Dr. A’s offices. In Attorney B’s first meeting with Dr. A, Attorney B told him for every patient referred to Dr. A, Dr. A needed to send five MRI scans to a North Jersey MRI facility. When Dr. A could not send enough MRI scans to the North Jersey MRI facility, Attorney B told Dr. A in the second meeting, “why don’t you just pay me for the patients.” Dr. A agreed to pay an initial price of $1,200 in cash per patient. In the beginning, Dr. A and Attorney B met once a month, but the monthly cash amount was so large- $20,000 to $40,000- that Attorney B wanted to meet twice a month.

Attorney B also suggested alternative kickback methods to reduce the exchange of cash. By way of example, Attorney B told Dr. A to write checks to a company doing marketing for Attorney B under the guise of the marketing company doing advertisements for Dr. A’s offices. Dr. A admitted he did not hire Attorney B’s marketing company for advertising. Rather, the “advertising” payments reduced Dr. A’s “final tally” to Attorney B for purchased patients. Attorney B also told Dr. A to write a donation check to a certain church. Attorney B also gave Dr. A a “credit” against the per-patient kickback amount he owed to Attorney B for each patient Dr. A referred to a North Jersey hospital for procedures, with the credit amount varying with the procedure.

Financial records discovery in the defense of a personal injury case where Attorney B originally represented the plaintiffs and then referred the plaintiffs to Dr. A corroborated Dr. A’s proffer testimony. Subpoenas of Dr. A’s corporate bank records showed cash generation through check cashing alone in excess of $850,000. Bank records also disclosed fifteen checks for either $4,500 or $5,500 made payable from Dr. A’s entities to Attorney B’s marketing company totaling $76,500, as well as an $18,000 “donation” check to a church made payable from Dr. A’s office. Subpoenas of Attorney B’s marketing company’s bank records revealed that Dr. A was not the only healthcare provider writing checks in furtherance of Attorney B’s kickback scheme.

Although less commonly used in defending personal injury cases than in affirmative actions brought under the IFPA, financial records discovery can be just as relevant. Moreover, regardless of the action, it is a basic principle of our jurisprudence that we construe the rules liberally in favor of broad discovery. See Payton v. N.J. Tpk. Auth., 148 N.J. 524, 525 (1997); Jenkins v. Rainner, 69 N.J. 50, 56 (1976) (“Our court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts.”); Interchemical Corp. v. Uncas Printing & Finishing Co., Inc., 39 N.J. Super. 318 (1956) (“The discovery rules…inaugurated a permanent open season on facts.”); Catalpa Inv. Grp., Inc. v. Zoning Bd. of Adjustment, 254 N.J. Super. 270, 273 (Law Div. 1991) (“…pretrial discovery is afforded the broadest possible latitude and extends not only to relevant information but also to any information that might lead to the discovery of relevant information.”). Under R. 4:10-2(a):

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action whether it relates to the claim or defense of any other party…It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.


In State v. McAllister, 184 N.J. 17, 19 (2005), the Supreme Court recognized the legitimate need to obtain financial records discovery in fraud cases:
Crimes involving corruption and fraud depend on secrecy and misinformation. Those who commit them, when confronted, hide behind walls of silence, making detection difficult. See Addonizio, supra, 53 N.J. at 135, 248 A.2d 531 (recognizing that “a direct inquiry” of offender “is not likely to be productive”); United States v. Alexandro, 675 F.2d 34, 43 (2d Cir.) (acknowledging need for “special investigative techniques to uncover insidious corruption”), cert. denied, 459 U.S. 835, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982). The State’s inability to investigate and prosecute such offenses corrodes the public’s faith in its government. Furthermore, the same technology that raises Orwellian concerns of governmental heavy-handedness also enables criminals to conduct clandestine financial transactions quickly and easily.

Cf. Alexandro, supra, 675 F.2d at 43 ("Modern crime fighting methods . . . often are the only means of discovering breaches of the fundamental mandate of one’s office.").

McAllister, 184 N.J. at 39.

Financial records discovery is necessary to unearth cash generation and expose hidden kickback methods, such as sham payments for “advertising” and “donations.” This type of discovery of kickback arrangements is relevant to establishing both the treating doctor’s positional bias in defending a personal injury lawsuit and the broader scheme in an affirmative IFPA suit. Sophisticated fraud schemes require financial records discovery to break through the secrecy, misinformation and walls of silence occurring before law enforcement action and to corroborate evidence obtained thereafter.

Michael A. Malia, Esq., LL.M., a member of Pringle Quin Anzano’s Insurance, Healthcare and Financial Fraud Litigation Practice Group, investigates, litigates and tries to verdict lawsuits involving sophisticated fraud schemes. Mr. Malia is the Chair of the Fraud and ADR Committees for the New Jersey Defense Association and also serves on the Board of Directors. He can be reached at (732) 280-2400 or mmalia@pringle-quinn.com.
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The City of Philadelphia amended its Fair Practices Ordinance (Ordinance) on January 23, 2017, to prohibit employers from inquiring about an applicant’s wage history during the hiring process. The law is the first of its kind adopted by a city in the United States and takes effect on May 23, 2017. The Ordinance is based upon the Philadelphia City Council’s belief that “[i]n Pennsylvania, women are paid 79 cents for every dollar a man makes.” Based upon these and other “findings” by the Council, the Ordinance is designed to narrow the gender wage gap.

UNLAWFUL EMPLOYMENT PRACTICES

To that end, the Ordinance creates several new unlawful employment practices, including:

• inquiring about or requiring disclosure of a prospective employee’s wage history;
• conditioning employment or consideration for an interview on disclosure of wage history;
• relying on wage history—at any stage in the employment process—to determine wages for the new hire; and
• retaliating against a prospective employee for failing to comply with a wage history inquiry or otherwise opposing an act outlawed by the Ordinance.

The Ordinance also requires employers to post notices referencing the new requirements. These notices will be available from the Philadelphia Commission on Human Relations.

EXCEPTIONS

The Ordinance excludes actions by employers or employment agencies authorized by a federal, state, or local law allowing disclosure or verification of wage history for employment purposes. The Ordinance also allows employers to rely on wage information knowingly and willingly disclosed by the prospective employee.

THE BOTTOM LINE:

New Jersey employers with Philadelphia employees must review hiring procedures and protocols, including their job applications, to remove any reference to a candidate’s prior salary or wages. In addition to obtaining the new posting (when it becomes available), employers should train human resources personnel, internal recruiters, and hiring managers about these new unlawful practices. That a private right of action is now available to candidates/employees under the Ordinance increases the risk of litigation if Philadelphia employers fail to proactively review and revise existing hiring policies and procedures.

Mark Saloman is a partner in FordHarrison LLP’s Berkeley Heights, New Jersey office and Co-Chair of the Firm’s Non-Compete & Trade Secrets practice group. If you have any questions regarding the Fair Practices Ordinance or other labor or employment issues, please contact Mark at (973) 646-7305 or msaloman@fordharrison.com.
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Many of us who have tried cases of alleged injury resulting from accidents with automobiles have offered to the jury photographs of showing only slight damage to the vehicles involved. For several years the court has charged the jury as suggested in Brenman v. Demello, 191 N.J. 18 (2007). This article suggests retrospectively that the charge to the jury, the “Brenman charge,” is flawed, with the effect of providing a boon to plaintiffs.

In Brenman, the attorney for the defense suggested at the start of the trial and in closing argument that plaintiff likely had not been injured because there had been minimal damage to her car. Not surprisingly, the jury agreed. On appeal the issue was the evidentiary admissibility of the photographs when there had been no expert opinion to support the inference urged by the defense. ATLA-NJ filed a brief as amicus curiae in a vigorous effort to preclude the use of photographs without expert testimony and thus to preclude the jury from employing the obvious premise that a slight impact usually means no more than a slight physical insult.

The appellate court agreed that the photographs were good and relevant evidence, even without their being evaluated by an expert. Adopting language of the trial court, the Court wrote: “Juries are entitled to infer [without expert testimony] that which resides squarely in the center of everyday knowledge: the certainty of proportion and the resulting recognition that slight force most often results in slight injury and great force most often is accompanied by great injury.” 191 N.J. at 32. The opinion to that point was a victory for common sense.

Wait! The Court then wrote that the judge at trial should “remind” the jury that “some bad accidents result in serious injury.” 191 N.J. at 36. Huh? The suggestion in Brenman later was incorporated into the Model Jury Charges, Civil, § 5.34. Although our jurisprudence approves a court’s giving a “limiting instruction” or a “cautionary instruction” where appropriate, it struck many of us odd that the trial court should be instructed to “remind” the jury that there are exceptions to that which resides “at the center” of the jury’s common knowledge.

Consequently, your author has searched cases in New Jersey looking for another case in which the trial court “reminded” the jury that things are not always what they seem or reminded the jury of anything. We found only twenty published cases that included the phrase “remind the jury.” In only five of those cases did the court at trial “remind” the jury in the act of charging it with the law. In those five cases the reminders were respectively:
that defendant is representing himself; (2) of previously-given instruction concerning the process of deliberation; (3) of the right of the accused not to take the stand; (4) that its verdict should be based only on testimony; and (5) that plaintiffs had been invitees.¹

In no case was the trial court required to remind the jury, or did remind the jury, that there are events “outside the heartland of common knowledge.” In no other case was the trial court directed by an appellate court to remind the jury of anything, much less to tell the jury to assume a fact; such as the “fact” that sometimes small damage can coincide with big injury. Your author has reviewed the entire corpus of the Model Jury Charges, Civil. In no other proposed charge is the jury instructed to assume a specific fact, much less to assume a premise or conclusion regarding the anatomical effect of forces. The admonition in Brenman is unique.

The “reminder” imposed by Brenman requires the trial court to give an opinion otherwise correctly reserved for a biomechanical expert. The opinion in Brenman makes reference to no data or study suggesting that a “minor” accident may result in “serious” injury. What force, applied along what axis, what vector, under what ameliorative circumstances, constitutes a “minor” accident, is not delineated in the opinion. Should the proposition urged by the court be that an accident generating only slight acceleration or deceleration of a victim’s body in some rare circumstance has produced serious injury, then one may reasonably question the grounds upon which the court reaches that proposition or why that rarity, among all other peripherally relevant events a jury could contemplate, should be mentioned by the judge. Is the court espousing anecdote? Is such event so unusual as to be not worthy of mention to the jury?

We all may easily imagine uncommon circumstances in which an accident with minimal damage to the vehicles could produce serious injury, such as where an unrestrained occupant strikes the windshield. Conversely, we all have read of accidents where the car has been demolished and the occupant has emerged unharmed. Why then should it be necessary for the court to remind a jury, in broad and vague language, of such a relatively rare event?

Some would conclude that in effect the “reminder” acts as a thumb on the scale of justice. In compensation, in opening statement or in closing argument, in a case where photographs show slight damage to motor vehicles, a defendant’s attorney may wish to recite for the jury the very eloquent language of Brenman, reprinted above, language that invokes knowledge reposed in the heartland of common sense, the heartland occupied by us all.


Michael J. McCaffrey has been certified by the Supreme Court of New Jersey as a Civil Trial Attorney since 1992. He received a B.A. (philosophy) from Rutgers University in 1978 and was graduated from the Indiana University School of Law, Bloomington, where he was selected through a writing competition to serve on the Indiana Law Journal.
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OFF-LABEL PROMOTION OF DRUGS AND MEDICAL DEVICES: IS THE FDA LISTENING?

BY JODI SYDELL ROSENZWEIG, ESQ.

TRUTHFUL AND NON-MISLEADING SPEECH AND THE FIRST AMENDMENT

In November 2016, the Food and Drug Administration (“FDA”) held hearings on its regulations governing manufacturer communications about unapproved uses of FDA-approved medical products. See Manufacturer Communications Regarding Unapproved Uses of Approved or Cleared Medical Products, Docket No. FDA-2016-N-1149, 81 FED. REG. 60299 (Sept. 1, 2016) (“Notice”). Unapproved, or off-label, uses of drugs and medical devices include treatment of indications (i.e., symptoms or conditions), uses in patient populations (e.g., pediatric or geriatric patients) and use at doses that are different than those approved and identified in FDA-approved labeling. Physicians can legally prescribe drugs and medical devices for off-label use; however, relying on the misbranding provisions of the Federal Food, Drug and Cosmetic Act (“FDCA”), the FDA often refers manufacturers for criminal prosecution for off-label promotion.

FDA restrictions on truthful and non-misleading speech promoting lawful off-label use have been the subject of recent successful First Amendment challenges. In the Notice, the FDA did not reference the case law, but requested feedback on the impact of off-label communications on public health and various policy issues. See 81 FED. REG. 60302-303. Due to concerns about its failure to address the First Amendment issue, the FDA added a memorandum to the docket. Memorandum, Public Health Interests and First Amendment Considerations Related to Manufacturer Communications Regarding Unapproved Uses of Approved or Cleared Medical Products (Jan. 2017), available at https://www.regulations.gov (Docket No. FDA-2016-N-1149) (“FDA Memorandum”).

This article includes a review of off-label use and promotion and a summary of First Amendment case law with commentary on the analysis in the FDA Memorandum.

OFF-LABEL USE AND PROMOTION

Under the FDCA, pharmaceutical companies may not introduce misbranded drugs or medical devices into interstate commerce. 21 U.S.C. § 331(a). A drug or device is misbranded if its labeling fails to include “adequate directions for use,” 21 U.S.C. § 352(f), defined as “directions under which the lay[person] can use a drug [or device] safely and for the purposes for which it is intended,” 21 C.F.R. §§ 201.5, 801.5. Objective intent may be “shown by labeling claims, advertising matter, or oral or written statements.” 21 C.F.R. §§ 201.128, 801.5. When it decides a manufacturer’s off-label promotion constitutes evidence that a drug or device is intended for an unapproved use, the FDA may refer the matter for criminal prosecution – a misdemeanor for misbranding or felony for fraudulent misbranding. See 21 U.S.C. § 333(a).

Clinical studies frequently support off-label use of medical products. According to the American Medical Association (“AMA”), “[u]pto date, clinically appropriate medical practice at times requires the use of pharmaceuticals for ‘off-label’ indications.” Memorandum of the AMA House of Delegates, Resolution 820, Off-Label Use of Pharmaceuticals (Sept. 21, 2005). “Off-label use is widespread … and often is essential to giving patients optimal medical care[.]” Buckman Co. v. Plaintiffs’

Although content-based restrictions on speech are subject to heightened judicial scrutiny, Sorrell v. IMS Health, Inc., 564 U.S. 552, 565-66 (2011), the FDA contends that because manufacturers have economic motivations to distribute medical products, a lesser intermediate standard applies. See FDA Memorandum at 23-25 (citing Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557 (1980)). In Central Hudson, the Court held that commercial speech involves lawful activity and is not misleading, the government may impose restrictions so long as the regulation serves a substantial governmental interest, “directly advances” the interest, and is “not more extensive than necessary to serve that interest.” 447 U.S. at 566. In contrast, under Sorrell’s heightened scrutiny, “[c]ontent-based regulations are presumptively invalid.” Sorrell, 564 U.S. at 571 (quoting R.A. V. v. St. Paul, 505 U.S. 377, 382 (1992)).

In Sorrell, the Court invalidated a Vermont statute restricting the disclosure and use of pharmacy records that revealed physicians’ prescribing practices and precluded pharmaceutical detailers from using the information to market their drugs. The Supreme Court stated, “Speech in aid of pharmaceutical marketing, ..., is a form of expression protected by ... the First Amendment.” 564 U.S. at 557. Although heightened scrutiny governs content- and speaker-based restrictions, the Court noted the outcome would be the same under Central Hudson’s commercial speech inquiry. Id. at 571-72. The Court did not define heightened scrutiny.

The FDA maintains restrictions should only apply to manufacturers due to their “economic motivation related to product distribution.” FDA Memorandum at 25. Noting that manufacturers “are best positioned to conduct the research and gather information necessary for premarket review[,]” the FDA suggests that pending evaluation, they may rely on insufficient or incomplete data to support unapproved uses, exposing patients to risks. Id. The FDA’s reasoning is circular. Because manufacturers are best positioned to provide thorough truthful and non-misleading information, restrictions fail to advance the government’s substantial interest in preventing harm to public health.

Moreover, the FDA fails to cite the Supreme Court’s subsequent opinion in Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015). There, the Court held laws, like the statute in Sorrell, that are content-based on their face are subject to strict scrutiny, which requires that the Government prove “the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” Id. at 2228, 2231. Caronia and Amarin were decided before Reed.

In Caronia, the Second Circuit vacated the conviction of a pharmaceutical sales representative, holding “[t]he government’s construction of the FDCA’s misbranding provisions to prohibit and criminalize the promotion of off-label drug use by pharmaceutical manufacturers is content- and speaker-based and, therefore, subject to heightened scrutiny.” 703 F.3d at 164-65. The court also applied the lesser standard, noting “the government cannot justify a criminal prohibition even under Central Hudson’s less rigorous intermediate test.” Id. at 164, 165-68.

The Caronia court observed that off-label promotion in general involves lawful activity (off-label use) and is not false and misleading, and the promotion in the case was not false or misleading. 703 F.3d at 165, 167. Further, because off-label use is lawful, precluding truthful off-label promotion did not directly advance the proffered governmental interests – promoting “drug safety and public health,” “preserving the effectiveness and integrity of the FDCA’s drug approval process” and “reducing patient exposure to unsafe and ineffective drugs.” Id. at 166-67. The court...
explained, “The government’s construction of the FDCA essentially legalizes the outcome—off-label use—but prohibits the free flow of information that would inform that outcome.” Id. at 167. Finally, the court found the regulation more extensive than necessary to serve the government’s interests. Id. The court concluded:

[Even if speech can be used as evidence of a drug’s intended use, we decline to adopt the government’s construction of the FDCA’s misbranding provisions… as it would unconstitutionally restrict free speech. We construe the misbranding provisions… as not prohibiting and criminalizing the truthful off-label promotion of FDA-approved prescription drugs. … We conclude simply that the government cannot prosecute pharmaceutical manufacturers and their representatives… for speech promoting the lawful, off-label use of an FDA-approved drug.

Id. at 168-69. The FDA complains, without discussion, that the court limited its review to the constitutionality of the FDCA and did not address the FDA’s “implementation approach.” FDA Memorandum at 23. It also faults the court for failing to consider “multiple components of public health interests.” Id.

In Amarin, the court, following Caronia’s rationale, granted the manufacturer’s motion for a preliminary injunction after the FDA threatened a misbranding action based on off-label promotion. 119 F. Supp. 3d 196. The FDA argued that Caronia is fact-based and does not preclude misbranding actions where promotional speech constitutes evidence that drugs are intended for unapproved uses.6 Id. at 223-24. The court disagreed, holding that “[w]here the speech at issue consists of truthful and non-misleading speech promoting the off-label use of an FDA-approved drug, such speech, under Caronia, cannot be the act upon which an action for misbranding is based.” Id. at 226.

The FDA contends, “[T]he Second Circuit later confirmed that Caronia left open the government’s ability to prove misbranding on a theory that promotional speech provides evidence that a drug is intended for a use that is not included on the drug’s FDA-approved label.” FDA Memorandum at 22 (quoting United States, ex rel. Polansky v. Pfizer, Inc., 822 F.3d 613, 615 n.2 (2d Cir. 2016)). There is ample support for the holding that truthful and non-misleading speech promoting off-label use is protected by the First Amendment:

• The Amarin Court distinguished misbranding prosecutions based on promotional activity—e.g., rewarding doctors with vacations for off-label prescribing practices—where off-label promotional statements may be admissible on the issue of intent. 119 F. Supp. 3d at 228.

• In the cited dicta in Polansky, the court did not address whether the First Amendment precludes misbranding actions based solely on truthful and non-misleading speech. 822 F.3d at 615 n.2.

• The FDA subsequently settled Amarin and agreed “to be bound by the Court’s conclusion that Amarin may engage in truthful and non-misleading speech promoting the off-label use …, and under Caronia, such speech may not form the basis of a prosecution for misbranding.” Amarin, No. 1:15-cv-3588-PAE, Stipulation and Order of Settlement, ECF No. 84 (S.D.N.Y. Mar. 8, 2016).

• In United States v. Vascular Solutions, Inc.—where a medical device manufacturer was acquitted of misbranding charges—the court instructed the jury: “It is also not a crime for a device company or its representatives to give doctors wholly truthful and non-misleading information about the unapproved use of a device. If you find that [Defendant’s] promotional speech to doctors was solely truthful and not misleading, then you must find the Defendants not guilty of the misbranding offense.” No. 5:14-CR-00926, 2016 WL 1742175, at p. 6 (W.D. Tex. Feb. 25, 2016).

CONCLUSION

Despite its rejection of the First Amendment protection, the FDA concedes that “relevant, truthful, and non-misleading scientific or medical information regarding unapproved uses… may help health care professionals make better individual patient decisions.” 81 FED. REG. at 60301. The FDA has held hearings, is accepting comments (through April 19, 2017), and continues to provide guidance on its policies. Time will tell whether the FDA is listening.

1 A drug is also misbranded if its labeling is false or misleading or fails to include and prominently display required information; its container is misleading; or it is dangerous to health when used as prescribed, recommended, or suggested on the label. 21 U.S.C. §§ 352(a)-(n).


3 “CPGs” include recommendations that help clinicians make patient care decisions where there are no, or limited, approved treatment options, either because approved drugs or devices are not indicated for a condition or approved therapies have not been successful. Distributing Publications, 2014 Revised Draft Guidance at 14.

4 FDA restrictions on off-label promotion have long been the subject of successful First Amendment challenges. See, e.g., Washington Legal Found. v. Friedman, 13 F. Supp. 2d 51 (D.D.C. 1998) (holding off-label promotion via distribution of reprints of publications and continued medical education was protected by the First Amendment), appeal dismissed, Washington Legal Found. v. Henney, 202 F.3d 331, 336, 337 n.7 (D.C. Cir. 2000) (noting, where plaintiff no longer had a constitutional objection, “[i]n disposing of the case in this manner, we certainly do not criticize the reasoning or conclusions of the district court”); Thompson v. Western States Med. Ctr., 535 U.S. 357 (2002) (holding provisions that precluded pharmacies from advertising and promoting compounded drugs violated First Amendment).

5 It is content-based because it differentiates “favored speech” (speech about approved uses) from “disfavored speech” (speech about off-label uses), and it is speaker-based because it is targeted solely at manufacturers. Caronia, 703 F.3d at 164.

6 In Caronia, although the government argued the defendant’s off-label promotion was evidence that the drug was intended for unapproved uses, the government did not raise that argument at trial and prosecuted the defendant for his speech. 703 F.3d at 160-61.

Jodi Sydell Rosenzweig, Esq. is counsel at Drinker Biddle & Reath LLP in the Florham Park office. She devotes her practice to drug and medical device defense litigation and represents pharmaceutical companies in multicounty and multidistrict litigation before both the trial and appellate courts. Jodi can be reached at jodi.rosenzweig@dbr.com.
If you have read “O’Toole’s Couch” before, you may remember that I grew up in a three-family house that my grandfather and his brothers built. This home, on Chapman Place in Irvington, NJ, was occupied by my grandparents on the third floor, my aunt’s family on the second, and my parents, brother and I on the first. We also had several aunts and uncles who lived right across the street from us. “In the old days,” prior to the invention of television, families went to great lengths to establish their own rituals. We were no different. On New Year’s Eve, each family would bring two or three dishes to share, which always included my grandmother’s sauerbraten and my mom’s roast beef. My favorite of the plethora of desserts were my aunt’s wonderful rice pudding and my mom’s applesauce cake.

As midnight approached, my uncle would get out his mandolin, Mom would tune-up her violin, cousin Mary would play the piano, brother Joe would play the harmonica, and the rest of us had pots and spoons at the ready. When you added it all up, there was certainly a cacophony of sounds to ring in the New Year, concluded with everyone marching around the dining-room table. (At which time I made sure to get the last piece of applesauce cake!)

As we “kids” got older, routines changed, and we started to go out to restaurants on New Year’s Eve for dinner and dancing. Cousins and friends would gather at Mayfair Farms, or at the Coronet in Irvington, which had a great rock band. The Friar Tuck Inn in Cedar Grove, the Wayne Manor and Pal’s Cabin in West Orange were more of our favorites. These parties were a great bang for your buck, with relatively good food, four-hour open bar, live entertainment and a breakfast buffet. After over ten years of this ritual we started going to each other’s houses, alternating at different homes each year.

Advance forward to more recent times, when Sunny and I started a Progressive Dinner Party on New Year’s Eve. Five couples participate, visiting four different homes. The first stop is for appetizers and cocktails. The second home serves soup and salad. The third couple provides the entrée and the fourth house is for champagne to toast in the New Year, and desserts. It is a great way to celebrate because you get to see each other’s homes decorated for the holidays. The evening flies by as we walk from home to home, and there seems to be less time for drinking. Also, each couple is pleased to only be responsible for one course.

When Sunny and I return home, usually around 2 a.m., we always have a drink together and talk about some milestones of the past year. We also try to make one New Year’s Resolution that we might be able to keep, and doesn’t include weight loss, which is always a constant concern in January. (Years ago I decided it might be easier to get taller rather than lose weight. Unfortunately, that never worked out.)

With respect to future alternatives, we have heard excellent reviews of the Morristown “First Night” event. It sports a full complement of shows, choirs, bands and specialty acts. Several of our friends have raved about it, and it is especially well-suited to families with young children.

Albeit a bit late, Sunny and I would like to take this opportunity to extend our wishes to you for a happy, healthy and prosperous New Year!
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SHANNON DOBEL
JOHN GENTILE
MICHAEL B. KELLY
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UPCOMING EVENTS

APRIL 27
PREMISES LIABILITY SEMINAR/WEBINAR
4 p.m. – 6 p.m.
Hoagland Longo Moran Dunst & Doukas
New Brunswick, NJ

MAY 19-20
DRI ATLANTIC/ NORTHEAST REGIONAL MEETING
Ocean Place Resort & Spa
Long Branch, NJ

JUNE 1
YOUNG LAWYERS COMMITTEE JOINT SEMINAR WITH MIDDLESEX COUNTY BAR ASSOCIATION YOUNG LAWYERS DIVISION
5 p.m. – 7 p.m.
Hoagland Longo Moran Dunst & Doukas
Followed by Networking Event at Mike’s Courtside

JUNE 22-25
51ST ANNUAL CONVENTION
The Hotel Hershey
Hershey, PA

NOVEMBER 10
WOMEN AND THE LAW
8:30 a.m. – 12:30 p.m.
APA Hotel Woodbridge
Woodbridge, NJ

NOVEMBER 21
AUTO LIABILITY SEMINAR
8:30 a.m. – 1:00 p.m.
APA Hotel Woodbridge
Woodbridge, NJ

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