MondayMonday

Malpractice Has No Appeal

October 27, 2014

Is there some special bone or some particular gene in the bodies of PI lawyers that makes them do what they do? We don't know, but if you had to ask us they all seem to share a strangely reoccurring malady, ADHD. We don't presume to be anything more than an amateur psychologist in this diagnosis, but all the symptoms seem to fit.

In the universe that is the blogosphere, interesting nuggets of thought appear. Like this, from an ADHD sufferer: Normal people have a "mental secretary" that sorts out 99% of the nonsense of the day, deleting the "crap" and making sure their mind is working on a "huge clean whiteboard." People with ADHD, however, enjoy no such concierge. If an idea comes in the "front door," it immediately gets written on the white board, "in bold, underlined red letters," randomly dispossessing whatever was there to make room for the new arrival.

Many of the lawyers we meet are either driven or driven to distraction. Yet, we posit, they may all be suffering from the same problem and just handling it differently. As the blog noted, those with ADD "rely heavily on routine" to get through the day, as an ingrained habit frequently escapes such distraction.

Perhaps, however, this ADHD can be a good thing. The writer describes something he calls "hyperfocus." When something clicks, we close our minds and "NOTHING can distract us . . . short of a tornado." Sound familiar? Ask your significant other the next time you're on trial.

We make this final suggestion: Get help, which may include medication. Why? A final word from our anonymous blogger: "Imagine a steadicam for your skull." Awesome.

Last week's *Grace v. Law*, 2014 NY Slip Op 07089 (Ct. Appls. 10/21/14) has us reviewing a legal malpractice case because, as Judge Abdus-Salaam duly noted, it is one of first impression for the Court. The question is one, we would think, would have come to the Court's attention before: "What effect does a client's failure to pursue an appeal in an underlying action have on his or her ability to maintain a legal malpractice lawsuit?" Here's the answer.

Plaintiff retained Defendants to bring an administrative proceeding against the VA and an opthamologist for failing to properly diagnose neovascular glaucoma, which eventually left him blind in one eye. Had it been properly diagnosed, the blindness might have been prevented. When that proceeding became delayed, Defendants recommended that Plaintiffs retain new counsel to bring a malpractice action, which they did. The new attorneys brought a Federal Tort Claims action against the VA hospital, only to find out that the doctor was not employed by the VA, but was an employee of a local university instead, one which new counsel already represented. Defendants then renewed their representation. Eventually, Defendants brought a third-party action against the doctor and the university, only to have it dismissed as time-barred. On advice of Defendants that they were now unlikely to succeed on the VA claim which remained and that it would be costly, Plaintiffs discontinued their action against the VA.

Plaintiffs now bring a legal malpractice action against Defendants and their new counsel as well. But, say Defendants all, Plaintiff is estopped for he failed to appeal the decision in the underlying action, leaving the right/wrong question open.

The answer: Was the Plaintiff "likely to succeed" on the underlying appeal? If not, it wasn't necessary as a precursor to the malpractice suit.