The ACLM's Participation in Legal Cases as an Amicus Party: A Retrospective by Miles Zaremski

I. INTRODUCTION

A noteworthy achievement on the occasion of the College's 50th anniversary since it formally came into being is the work of its *Amicus* Committee, notably under the guidance, direction and leadership of Miles Zaremski, JD, FCLM, one of the College's past presidents and the longest, active non MD – JD member of the College to date. In the **fifteen** cases in which the College has participated* ever since choosing to participate in its first one **eighteen** years ago, Miles has been the lead author in all of its *amicus* briefs. Of interest is that during Miles' year as president, the College participated as an *amicus* party in five cases. Over the years, others have assisted and worked with him, particularly Ila Rothschild; those within the College who have also done so have included Jay Gold, Maxwell Mehlman, Darren Mareiniss, Gary Birnbaum, and Bruce Brightwell.

The College's most recent effort, in the case of *Baxter v. State of Montana*, decided on December 31, 2009 by the Supreme Court of Montana, was of particular note. The Honorable Justice James C. Nelson, in his special concurrence, referenced an original thought put forth in the College's brief. Paragraph 15 of Section III, below, refers to this.

* There was a sixteenth case in which the College prepared and drafted a brief (other than by Miles), this one in 2009 before the 9th Circuit Federal Court of Appeals. However, due to technical reasons, the College requested that it be withdrawn. The court allowed this request.

II. CITATIONS

While brief descriptions of each case in which the College has participated are described below in Section III, the names of the cases, their legal citations and then the Westlaw (computerized legal research database) location for each of the College's briefs, or the brief in which it joined, are listed, below.

1. ***Daubert v. Merrell Dow Pharmaceuticals***, 509 U.S. 579 (1993); 1993 WL 13006290.

2/3. ***Dennis Vacco v. Timothy Quill*, and *State of Washington v. Harold Glucksberg***, 521 U.S. 793 (1997); 1996 WL 668827.

4. ***Pegram v. Herdrich***, 530 U.S. 211 (2000); 1999 WL 33589274.

5. ***Fenton v. UniHealth***, 120 S. Ct. 286 (1999) (motion for leave to file *amicus* brief in support of petition for *certiorari* granted; brief filed); 1999 WL 33639463.

6. ***Moran v. Rush Prudential HMO***, 230 F.3d 959 (7th Cir. 2000); brief filed in collaboration with the AMA, supporting Plaintiff-Appellant, 10-15-99 (no citation to brief available).

7. ***Exeter Medical Staff v. Board of Trustees***, 148 N.H. 492 (N.H. S. Ct. (2002)); (joined with the AMA & N.H. Med. Soc., 2001WL 36109234).

8. ***Oregon v. Ashcroft***, 368 F.3d 1118 (9th Cir. 2004); 2002 WL 32290872.

9. ***Kentucky Association of Health Plans v. Janie Miller, Commissioner, Kentucky Department of Insurance***, 538 U.S. 329 (2003); 2002 WL 31455503.

10. ***Cicio v. Vytra Healthcare***, 321 F.3d 83 (2d Cir. 2003), 385 F.3d 156 (2d Cir. 2004); (joined with AMA & Med. Soc. of the State of N.Y., 2002 WL 32360537).

11. ***Scheidler v. National Organization for Women, Inc./Operation Rescue v. National Association for Women***, 537 U.S. 393 (2003) (Dkt. Nos. 01-1118, 01-1119) (joined in with AMA, ACOG, Ca. Med. Assoc., Am. Soc. Reproductive. Med., Ill. St. Med. Soc.) (Westlaw citation to brief unavailable).

12/13. ***Aetna Health Inc. v. Davila, Cigna Healthcare of Texas, Inc. v. Calad***, 542 U.S. 200 (2004); 2004 WL 177023.

14. ***Alberto Gonzales, Attorney General, v. State of Oregon***, 546 U.S. 243 (2006); 2005 WL 1687165.

15. ***Robert Baxter v. State of Montana***, – P.3d –, 2009 WL 5155363, 2009 MT. 449; 2008 WL6484893.

III. CASE SUMMARIES (in order by year)

1. ***Daubert***

This case has become the progeny for determining the standards and qualifications to be used for the proffer of expert testimony in a federal courthouse. It has since been codified within the federal rules of evidence. Many states have similarly followed the dictates of the Supreme Court in this opinion. In its brief, the ACLM asked the nation's highest court to assume greater responsibility in defining an evidentiary threshold in order to ensure comparable treatment in evaluating the foundation of an expert's scientific testimony, no matter which court is applying the federal rules of evidence. The College urged the court to adopt certain criteria as a threshold, or floor, of reliability to determine the trustworthiness of the foundation of an expert's testimony.

2/3. ***Quill and Glucksberg***

These two consolidated cases (one from the 9th Circuit and the other from the 2d Circuit) presented the Supreme Court with the issue of whether the United States Constitution permitted within the scope of due process or equal protection a competent, though terminally ill patient's request to be aided in dying. The court, in a unanimous decision, said no to both theories, but suggested it should be up to the "laboratory of the states" to determine how such wishes can be recognized and carried out. The College advocated that a mentally competent adult in the end stages of a terminal disease owns the right to control end-of-life medical decisions. Concomitantly, the ACLM recognized that the state and society have a legitimate and compelling interest in ensuring that the right to control end-of-life treatment decisions is not abused by patients, their physicians and families, or interested third parties. To this end, strict protocols need to be established that all concerned must follow. Of particular note is that within its brief, and perhaps for the first time that any organization said it publicly in a brief, decisions at the end of life by a competent, though terminally ill person should not be cast with the nomenclature inclusive of "suicide," "assisted suicide" or "physician-assisted suicide." (The College carried these ideas forth when it filed its brief in *Baxter v. State of Montana,* Section III, para. 15, *infra*.)

4. ***Pegram***

This case focused upon whether or not the federal law, ERISA (Employee Retirement Income Security Act), covers certain parties, like a managed care plan or individual physicians, as fiduciaries, thus pre-empting them from state liability laws for professional negligence. More specifically, the issue addressed by the College was whether or not ERISA fiduciaries, *i.e*., whether or not they had or exercised any discretionary authority, control or had responsibility in the management or administration of the subject health care plan. Another issue addressed by the College was whether financial incentives offered private medical practitioners by a health care plan infringed upon the doctor-patient relationship, to the extent that the treating doctor must respond more to the mandates of the plan than to what the patient properly required. The court spoke about pure treatment decisions, eligibility decisions, and then "mixed eligibility and treatment decisions," the former and latter of which would place them outside of ERISA's preemptive reach.

5. ***Fenton***

The College filed a motion for leave to file an attached *amicus* brief in this case before the USSCt. It was joined in the brief by the American Academy of Emergency Medicine, and the American Academy of Emergency Medicine, California Chapter. This was a brief in support of a petition to grant certiorari by the Supreme Court. The issue pertained to overturning a decision by the California Supreme Court that erroneously interpreted and misapplied the federal Social Security Act's stated criteria for the reassignment of Medicare payments. The petition was denied.

6. ***Moran***

This case, decided by the Seventh Circuit Court of Appeals pertained to a plan participant in a medical benefits plan who brought an action in state court against an HMO seeking reimbursement for certain care, after the HMO denied the claim. The trial court granted summary judgment for the HMO on the grounds that ERISA (Employee Retirement Income Security Act) preempted the claim. The appellate court reversed, asserting that ERISA did not preempt the claim. Thereafter, there was a request for *en banc* hearing; that request was denied. The case was appealed to the USSCt, which affirmed the Seventh Circuit's decision (*see* 536 U.S. 355 (2002)) (Illinois statute requiring HMOs to provide independent review of disputes between primary care physician and HMO, and to cover services deemed medically necessary by independent reviewer, regulated insurance within meaning of ERISA preemption provision's saving clause, did not conflict with ERISA's civil enforcement scheme, and thus was not in conflict with ERISA by impermissibly depriving HMOs of deferential standard of review of benefits determinations).

7. ***Exeter Medical Staff***

The College joined in the *amicus* brief filed in this case before the New Hampshire Supreme Court by the AMA. The principle issue addressed in this *amicus* filing was whether or not a medical staff should be recognized as a legal entity with the right to sue to ensure its right to self-governance or enforce its bylaws. As claimed in the brief, by not being able to be a recognizable legal entity, a medical staff could not preserve the quality of care offered by it within a structural setting, like a hospital.

8. *Oregon v. Ashcroft* (9th Circuit)

This case was an appeal of a federal district court case, finding that the U.S. Attorney General exceeded his authority when providing an interpretation of the (federal) Controlled Substances Act (CSA) that would have prohibited physicians from prescribing controlled substances to facilitate patients who are competent though terminally ill from being aided in dying. Specifically, the Attorney General issued a directive, telling the DEA to revoke permission for physicians to prescribe controlled substances if they complied with the Oregon Death With Dignity Act because physician aid-in-dying (characterized as assisted suicide) was not a "legitimate medical purpose" and thus the use of controlled substances for this purpose violated the CSA.

The College addressed in its brief the parameters of a legitimate medical purpose. The appellate court affirmed the district court holding. *N.B*. The government then appealed the 9th Circuit's decision to the Supreme Court, a case in which the College also participated as an *amicus* party. *See* Section III, para. 14, *infra*).

9. *Kentucky Health Plans*

This case pertained as well to ERISA, but this time to whether the Commonwealth of Kentucky's Any Willing Provider Statute (AWP) was preempted by ERISA if it does not relate to employee benefit plans or, is it saved from preemption because it regulates the business of insurance by regulating the practice of medicine. The AWP statute was intended to promote continuity of patient care and to regulate the practice of medicine, as advocated by the College in its brief. As such, the federal ERISA law should not pre-empt Kentucky's AWP because it (AWP) does not "relate to" an employee benefit plan.

10. *Cicio*

The College adopted the *amicus* brief filed by the AMA in this 2d Circuit federal court of appeals case. The issue addressed principally was whether the decisions made pertained to patient care, or included decisions that would then allow ERISA to preempt traditional New York state law remedies. To uphold the lower court would also violate the dictates of the U.S. Supreme Court in its *Pegram* decision, summarized above in para. 4. The *Cicio* case resulted in two opinions from the 2d Circuit, one before, and then after, rulings from the Supreme Court. It is thus best to consult both 2d circuit opinions in this matter.

11. ***Scheidler***

Joining with the AMA once more, together with other national medical organizations, the ACLM supported patients' right of access to medical care. It opposed violence and all acts of intimidation directed against physicians and other health care providers and their families. It further opposed violence directed against medical facilities, including abortion clinics and family planning centers, as an infringement of individuals' right of access to the services of such centers. In this particular case, the ACLM joined the other *amici* in support of respondents where petitioners (individuals and organizations) systematically employed criminal tactics to hinder or prevent medical practitioners from carrying on their professional work, here, terminating pregnancies and providing reproductive counseling.

12/13. ***Davila*** **and** ***Calad***

In these two consolidated cases from the 5th Circuit federal court of appeals, the Supreme Court was faced with the issue of ERISA's preemption of traditional state law remedies for professional medical negligence. The College characterized the issue in its brief as, whether ERISA is intended to preempt remedial relief provided by state law when an HMO entity, acting through one or more of those in its employ or on its behalf, denies on a prospective basis a request for care and treatment as not medically necessary where the denial results from medical decision-making based upon the exercise of discretionary judgment. The College asked the court to affirm the decisions below, and by doing so, incorporate within the fabric of federal jurisprudence a recognition that managed care entities, *i.e*., those entities that provide or administer care through ERISA health plans, do, indeed, make medical decisions made prospectively based on discretionary judgment – as do other healthcare providers – for which these entities are held as accountable as all others who make medical decisions as to what care and treatment a patient should receive. In doing so, the court would pronounce that remedial relief for such accountability remains venued in state and territorial forums, rather than in federal jurisdictions due to the constructs of ERISA. The Supreme Court reversed the 5th Circuit and did not follow the approach suggested by the ACLM.

14. *Gonzales v. State of Oregon* (USSCt.)
This case results from an appeal from the 9th Circuit. In its *amicus* brief filed in this case, it similarly advocated as it did to the 9th Circuit (*see* para. 8, *supra*.). Specifically, the College advocated that the Attorney General's attempt to define "legitimate medical purpose" constituted a unilateral, uninformed, and politically motivated action. The Attorney General did not have the authority under the Controlled Substances Act (CSA) to make such a determination. This determination is left to the states and the Secretary of HHS, informed by medical expertise. The Attorney General also failed to properly evaluate physician-assisted suicide under the "public interest" standard of the CSA, and failed to give due deference to input from the Oregon State Medical Board in assessing the five factors under this public interest standard (of the CSA). The Supreme Court affirmed the 9th Circuit decision, and, in some measure, concurred with points proffered by the College in its brief.

15. *Baxter*
In its latest brief, this time before the Montana Supreme Court, the College – as it did in the *Quill* and *Glucksberg* cases (*see* para. 2/3, *supra*) – advanced the proposition that those persons who are mentally competent, though terminally ill, have the right to be aided in their death provided that protocols are followed and that the use of palliative care remain an option for such individuals. (This follows the 2008 resolution drafted by Miles and adopted by the College). The College again asserted that the nomenclature in describing end-of-life decision making as occurred in this case does not include the words, "suicide" or "assisted-suicide" or even "physician-assisted suicide."

The lower court in Montana held that a Montana citizen has a right to be so aided under the dignity and privacy clauses of the Montana State Constitution. The Montana Supreme Court affirmed, not on constitutional grounds, but rather on statutory ones. However, what is more significant, and thus pleasing, for the College is that Justice Nelson in his special concurrence addressed nomenclature to be used by those who are competent though terminally ill. For the first time, a high court has concurred (with the College) that what is at issue here is not a suicide, or even an assisted suicide. Equally satisfying is that Justice Nelson reiterated a thought put forth in the College's brief that neither any party nor any of the 21 *amicus* parties references or even confronted.

The College wrote the following: "In furtherance of having this Court consider eliminating what occurs from the facts here as a suicide (and therefore a physician who assists with a suicide) are thoughts of a soldier in a war zone who throws his body on an explosive…while this will cause death, we never view it as a suicide, though it is an intentional act surely to end life and fits the dictionary definition of 'suicide.' Instead we may view that individual as a hero…cast in another light, **would this court want the Montana Constitution to cast a blind eye by failing to say it is no less dignified to be aided in dying under the circumstances described here than for a soldier sacrificing his life for others**…? We surely think not." (Emphasis in original.)

Justice Nelson then penned, "Importantly, and as reflected in the briefing in this case, society judges and typically, but selectively, deprecates individuals who commit 'suicide.' On one hand, the individual who throws his body over a grenade to save his fellow soldiers is judged a hero, not a person who committed 'suicide.'" 2009 WL 5155363, para. 70. He also said, at para. 71 of the opinion, "The patients and the class of people they represent do **not** seek to commit 'suicide.'" (Emphasis added.)

As an aside, the College's brief drew the attention of a national reporter, writing an article on the case for a medical newspaper, to be published by Elsevier shortly. The part of interest was where the brief states, "Concomitantly, as human thought advances over time, our views of issues once held sacrosanct change. This is part of the human condition and ingrained within the fabric of social transition." Indeed, the College has been on the leading edge of this area of medical legal thought, starting with the *Quill* and *Glucksberg* cases nearly fifteen years ago and continuing now with *Baxter*.