Opioid trials remind us of importance of *Brady* rights

By: Nina Marino

Last year, I wrote a piece about the conflicting nature of opioid litigation in America. That article explored the history of opioid manufacturers' representations to the public regarding the addictive qualities of the drugs and the attendant litigation. What was most interesting was that each stakeholder blamed the other for the countless deaths attributable to opioid addiction: pharmacies blamed doctors, doctors blamed manufacturers, manufacturers blamed pharmacies, and on and on. With more than 3,000 lawsuits brought across the country, we are now in the throes of more litigation and the stakes could not be higher.

Last month, a judge in Kingsport Tennessee last month ordered a default judgement of $2.4 billion dollars, in a case regarding liability on the Endo defendants. (*Staubus v. Purdue Pharma, L.P. et al*., Case No. C-41916) The case was brought on behalf of Baby Doe, a child born an opioid addict due to in utero opioid absorption because of the mother's tragic opioid addiction when pregnant. The matter is widely known as the Sullivan Baby Doe suit. The court found that defense counsel engaged in a "coordinated strategy… to interfere with the administration of justice." The reason for the startling default judgement against the Endo defendants was founded in a fraud on the court, based on misrepresentations made by the defendants in the discovery process to suppress or conceal discoverable evidence. The court identified 12 false statements made by defendants in response to plaintiff's discovery requests. The court found that the falsehoods were of such a magnitude that the plaintiff, Baby Doe, was irrevocably prejudiced requiring the bold and ultimate penalty of default judgement regarding liability. Endo has vehemently denied any wrongdoing and has stated it will appeal the judgement. A trial on damages will take place on July 26, 2021.

Locally, we are seeing similar litigation with similar tactics. Opening statements were recently made in a lawsuit brought in Orange County by four municipalities spanning across California against four pharmaceutical manufacturers, including Endo Pharmaceuticals. In this $50 billion dollar lawsuit, the plaintiffs allege that the defendant manufacturers are liable for pumping these highly addictive drugs into the public's hands - and mouths - for the sake of profit, while simultaneously deceiving the public about the risks. The bench trial has progressed in fits and starts as the defense continues to strongly object to both the admission of evidence based on authenticity and the examination of experts. The defense is so far focused on either the suppression or the exclusion of evidence although there have been no allegations that a fraud on the court has or is occurring as in Tennessee.

Fraud on the court can take many forms and, like most matters subject to litigation, two parties can see the same conduct entirely differently. However, once a court has identified a fraud, the remedy imposed must balance both justice and finality. Most jurisdictions require a showing by clear and convincing evidence of intentional fraudulent conduct directed at the court itself. In *Staubus*, this is exactly what the judge identified when he painstakingly reiterated each of the 12 statements made by Endo and its attorneys that he deemed to be, false.

(There is a school of thought that the clear and convincing standard is too onerous for victims of abusive discovery tactics and that Rambo style lawyering is fundamentally *uncivil* and should not be an accepted practice in any court of law).

When one party is the government, there is an expectation that the government will behave above reproach. After more than 30 years of practice, I wish I could say this was true, but of course it is not. One area in which the government's duty to comply with its discovery obligations is murky are with regards to *Brady* evidence. The government's *Brady* obligation, based on the 1963 case of *Brady v. Maryland*, requires the government to produce to the defense all exonerating evidence. The problem with the requirement is that, of course, in many circumstances the government does not identify the evidence as exonerating because the government does not know the theory of the defense. In even worse situations, the government deliberately ignores its obligations.

That is what the court determined happened in the trial of Senator Ted Stevens, which paved the way for the Due Process Protection Act (S.1380), signed into law last year. Because of the government's misconduct, the matter was dismissed. While not a "fraud on the court" in the same vein as the *Staubus* matter, in the Stevens matter, evidence that was favorable to the defense was withheld. Whether or not the failure to disclose caused the court to not perform in the usual manner its job of adjudging cases is unclear. But the result speaks volumes to just how offensive to our sense of justice the conduct was.

To address the heightened importance and awareness of the government's *Brady* obligations, many courts across the country have implemented a standing *Brady* Order which is read in open court at the time of the arraignment. The Order directs the government to do its duty – to produce to the defendant any evidence that is favorable and material to either guilt or punishment. The impact of this Order is unknown. What we do know is that recently reading this Order in open Court has become the norm. Will it deter Rambo style lawyering by the government? That is unknown, but it's a start. Whatever standard is used, and whatever the matter, be it civil or criminal, as lawyers we should disavow Rambo style lawyering as it really is not who we are or who we should be.