EAGLE INTERNATIONAL ASSOCIATES

Presents

MAKING A SILK PURSE FROM A SOW'S EAR

Limiting Exposure When All the Facts are Bad

April 12, 2018

The Jefferson Hotel
Richmond, Virginia

EAGLE INTERNATIONAL ASSOCIATES

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MAKING A SILK PURSE FROM A SOW'S EAR:

Limiting Exposure When All the Facts are Bad

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PROGRAM

12:00 pm	**Registration/Sign-In**
12:30 pm	**Welcoming Remarks** Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, P.C., Vice Chair, Eagle International Associates **Program Introduction** David D. Hudgins, Esq., Hudgins Law Firm, P.C., Program Emcee
12:45pm	**Defending the Indefensible: Handling Claims Where the Insured/Client Has Engaged in Indefensible Conduct** **Moderators:** Daniel J. Ripper, Esq., Luther-Anderson PLLP Sean M. Sturdivan, Esq., Sanders Warren Russell & Scheer, LLP **Panelists:** Lauren Brown, Claims Manager, Kinsale Insurance Company Michael J. Flaherty, Claims Attorney, ALPS Property and Casualty Insurance Company Kevin Mohr, Head of Claim Legal, Hanover Insurance Group Theodore J. Waldeck, Esq., Waldeck Law Firm, P.C.
2:00 pm	**Litigation and The Media: "Counsel, Do You Have Anything To Say For Your Client?"** **Moderator**: Michael Woodson, Esq., Edmonds Cole Law Firm
2:30 pm	**BREAK**
2:50 pm	**Keeping Damages Low** **Moderators**: David V. Hayes, Esq., Owen Gleaton Egan Jones & Sweeney, LLP Debra S. Stafford, Esq., Hudgins Law Firm, P.C. **Panelists:** Ashley O'Brien, Senior Claims Examiner, Kinsale Insurance Company Vickie Story, Senior Claims Adjuster, Allianz Global Corporate & Specialty Ron Thackery, Senior Vice President of Professional Services & Integration, AMR
4:00 pm	**Digital Forensics As A Tool In Dispute Resolution – A Double-Edged Sword** Jack L. Nevins, CCE, EnCE, PI, Regional Director, Senior Consultant, Semke Forensic
5:00 pm - 6:00 pm	**Cocktail Reception** **Dinner**

PRESENTERS

Lauren Brown is a Claims Manager for Kinsale Insurance Company. She manages a team of 10 examiners who handle construction, energy, environmental, general casualty, excess casualty, and small business claims. Ms. Brown began her career with Allstate in 2002 as a Claims Adjuster handling bodily injury claims for personal lines policies. She moved to Travelers to act as an Outside Liability Adjuster for both personal and commercial lines claims in 2005. In 2007 she was promoted to a Unit Manager for the customer care center at Travelers. She then left the insurance field for several years to act as a sales representative in the kitchen and bath industry before returning to work for PMA Management Corporation in 2012. She then worked as a Claims Examiner for James River Insurance before joining Kinsale in October 2013. Ms. Brown graduated from Clemson University with a Bachelor of Science degree in management in 2001. She earned her Senior Claims Law Associate designation in 2003. She is currently pursuing her Chartered Property Casualty Underwriter designation. She holds her insurance adjusting license in Texas.

Michael J. Flaherty is a claims attorney for Attorney's Liability Protection Society. He received his undergraduate degree from James Madison University and his law degree from George Mason School of Law. Mike began handling claims for ALPS, a Montana based LPL carrier, in 2002 and works in the company's Richmond, Virginia office. Prior to joining ALPS, Mike spent four years as staff counsel for a national labor union. Mike also spent a year as staff counsel to the Virginia General Assembly.

David V. Hayes is a partner at Owen, Gleaton, Egan, Jones & Sweeney, LLP, in Atlanta. As a litigator, David represents medical professionals, businesses and governmental entities in state and federal courts across the Southeast. David is licensed in Alabama and Georgia. He received his undergraduate degree from Samford University, in Birmingham, Alabama, and graduated from the Cumberland School of Law at Samford University. David is heavily involved in DRI, the Young Lawyers Division of the American Bar Association and the State Bar of Georgia. David lives in Atlanta with his wife and two boys.

David D. Hudgins is the founder of Hudgins Law Firm, P.C., a litigation, business and insurance practice serving clients in Virginia, Maryland and Washington, D.C. He was born in Virginia and attended Hampden-Sydney College and the University of Richmond School of Law. Mr. Hudgins devotes his legal practice almost exclusively to insurance and corporate defense litigation, and he has represented clients in such diverse areas of practice as professional liability, products liability, church liability, errors and omissions, private security, intellectual property, admiralty, financial agents and brokers, defamation, municipal liability, discrimination, commercial liability, construction, personal injury defense and trust and estate litigation. Mr. Hudgins has extensive jury trial experience, and he handles insurance coverage determinations and declaratory judgment actions as a regular part of his practice. He is a contributing author for the Virginia CLE Publications Handbook *Insurance Law in Virginia*, and is a co-author of *Tort and Personal Injury Law* in West's Virginia Practice Series. Mr. Hudgins is a member of the Bars of Virginia, Maryland, and the District of Columbia. He is admitted to practice in all state and federal courts in these jurisdictions as well as the United States Supreme Court. Mr. Hudgins is a member of several voluntary state and local bar associations and has been elected to membership in the Federation of Defense and Corporate Counsel and the American Board

of Trial Advocates. Other memberships include the Virginia Association of Defense Attorneys, the Defense Research Institute, the Association of Defense Trial Attorneys and the Claims and Litigation Management Alliance. Mr. Hudgins is a past Chairman and member of the Board of Directors of Eagle International Associates.

Kevin Mohr is the National Head of Claim Legal for The Hanover Insurance Group. He has over 20-years of experience within the P&C industry, which followed 9 years of insurance defense practice with a focus in the areas of LPL, MPL, and first-party commercial coverage. Within the Claims arena, Kevin has served in varied roles focused on multiline claims management, legal operational management, and claim enterprise strategic development.

Jack L. Nevins received a Bachelor of Science degree in Applied Physics with an Electrical Engineering minor from the University of Nevada – Las Vegas. Jack brings over 25 years of diverse technical experience to Semke Forensic, including 20 years providing senior level forensic and investigative services to the insurance, legal and corporate communities. As a Data Forensics expert, Jack has conducted electronic evidence collection and analysis related to employment actions, theft of confidential data and trade secrets fraud and arson investigations, and complex technical civil litigation matters. As a Fire Causation expert and Failure Analysis expert, Jack has conducted investigations in matters involving electrical equipment malfunctions, fire events, design deficiencies, lightning and power surge damage, and equipment exposure to contamination events. Jack is certified as an Encase Certified Examiner, a Certified Computer Examiner, and an XRY Certified Mobile Device Examiner. Jack has testified as an expert witness in matters related to Data Forensics and Fire Cause.

Ashley O'Brien is a Senior Claims Examiner at Kinsale Insurance Company. Prior to joining Kinsale, Ms. O'Brien was a Senior Litigation Paralegal at Moran Reeves & Conn, PC. Prior to her tenure at Moran Reeves & Conn PC she was a Certified Financial Planner at Virginia Asset Management in Midlothian, VA. In 2005, Ms. O'Brien began her professional career with Virginia Asset Management counseling high net worth individuals and business owners on estate planning, business evaluation, business continuation and business exit strategies. In 2007, she began her legal career with Moran Reeves & Conn, PC where she was a member of the litigation and trial team responsible for the defense of toxic tort, product liability and general liability cases. In 2013, Ms. O'Brien began her insurance career as a member of the Claims Department at Kinsale Insurance Company handling complex commercial general liability, professional liability and property claims. Ms. O'Brien is a 2005 graduate of the Pamplin College of Business at Virginia Polytechnic and State University. While at Virginia Tech she received her Bachelor of Science degree in Finance with a minor in Leadership Studies. Ms. O'Brien earned her Registered Professional Liability Underwriting designation in 2017 and is currently pursuing her Associate in Claims - Management designation through The Institutes. Ms. O'Brien holds insurance adjusting licenses in Texas, Florida, South Carolina and Louisiana.

Mitch Orpett, as Eagle's attorney representative for the State of Illinois, is a founding member and former managing director of Tribler Orpett & Meyer, P.C., a Chicago law firm serving the insurance and business communities. He was one of six lawyers who formed the firm in 1984. His practice is devoted to the defense of various professional and casualty claims and to the resolution of insurance and reinsurance disputes. He has been active in litigation, arbitration and other methods of alternative dispute resolution and has served both as advocate and arbitrator. He has been listed in all editions of Euromoney Publications' *Guide to the World's Leading Insurance and Reinsurance*

Lawyers and in *Who's Who Legal, Insurance & Reinsurance*. He has also been named as an Illinois "Super Lawyer" and to the Illinois Network of Leading Lawyers, in recognition of his work as an insurance and reinsurance lawyer.

Mitch has devoted more than 35 years of service to the profession, holding numerous leadership positions and chairing several seminars for the American Bar Association, among others. He recently completed his three-year term on the ABA's Board of Governors, as well as its Finance and Audit Committees after serving for many years on its policy-making body, the House of Delegates. He was the chair of the ABA's Section Officers Conference, in which capacity he represented the approximately 240,000 members of the sections and divisions of the American Bar Association. Previously, he served as chair of the ABA's 30,000 member Tort Trial and Insurance Practice Section and of the ABA's Standing Committee on Continuing Education of the Bar. He was also vice chair of the ABA's Presidential Commission on the Unintended Consequences of the Billable Hour (United States Supreme Court Justice Stephen G. Breyer, honorary chair) and has been a member of the Federation of Defense & Corporate Counsel, the Illinois State Bar Association and the Chicago Bar Association. Mr. Orpett has been a frequent author and speaker on many topics dealing with insurance-related claims and litigation cost control for CLM (Bad Faith, Tort Liability and Coverage for Gun Violence) and the American Bar Association and has authored many articles, including "Reinsurance," a chapter in West Group's *Law and Practice of Insurance Coverage Litigation* and "Insurance Producers" in the Illinois Institute for Continuing Legal Education's *Professional Liability* handbook. He has provided training and in-service presentations to a host of insurance companies and other industry groups pertaining to insurance and reinsurance issues and coverage and bad faith.

Mitch is a graduate of the University of Illinois, where he earned his bachelors and masters of arts degrees. He is a 1978 graduate of that institution's College of Law.

Daniel J. Ripper is a partner in the law firm of Luther-Anderson, PLLP in Chattanooga, Tennessee and has been in practice since 1992. He is licensed in all state and federal courts in both Tennessee and Georgia, as well as the Sixth and Eleventh Circuit Courts of Appeal and the United States Supreme Court. Dan received his BA from the University of Notre Dame in 1989 and his JD from the University of Tennessee in 1992. Since that time, he has represented corporations and other businesses as well as individuals in a variety of civil and criminal cases. His practice primarily focuses on the defense of insureds in auto, product and legal malpractice matters along with the frequently associated coverage disputes. He also represents professionals before licensing and disciplinary boards and individuals in significant criminal matters. He has extensive trial experience, both jury and non-jury. He is a member of the Tennessee Bar Association, the Georgia State Bar and the American Bar Association.

Debra Schneider Stafford is a partner at Hudgins Law Firm, P.C., a litigation, business, and insurance practice in Alexandria, Virginia. Ms. Stafford is licensed in state and federal courts in Virginia and Washington, D.C. She earned her B.A. *cum laude* in Classics & Political Science from Randolph-Macon College in 1994 and was inducted into Phi Beta Kappa. During college, she studied archaeology and classics in Rome, Italy for four months. Deb earned her J.D. in 1998 from the University of Richmond, where she was also a member, web editor, and note author for the Richmond Public Interest Law Review. During law school, Deb served as a summer law clerk/intern at the U.S. House of Representatives and at the U.S. Department of Justice. After graduation, she became a staff attorney for the prosecutor training affiliate of the National District Attorneys Association. Deb joined Hudgins

Law Firm as an associate in 1999 and became a partner in 2006. Over the years, she has successfully represented many businesses, individuals, and insureds. Her current practice focuses on defending professional and general liability matters and advising individuals and businesses on transactional matters. Deb is a member of CLM and is rated AV-Preeminent by Martindale. She lives in Fairfax County with her two children. Deb volunteers as an adviser for her sorority chapter at Randolph-Macon, and as a leader for her daughter's Girl Scout troop.

Vickie Lynn Story is a litigation specialist for Allianz Global Corporate and Specialty Insurance Company. She is a graduate of Jacksonville State University, where she received a BS in Criminal Justice/Social Work. After graduation, Vickie launched her career in Birmingham, Alabama, where she began working with a plaintiff firm specializing in auto accidents. That eventually led Vickie into attending Miles Law School where she graduated cum laude. Vickie is a silver star member of Alpha Kappa Alpha Sorority, Inc. Over the last 25 years she has dedicated her time to mentoring young at-risk kids with foster parents of Jefferson County, Alabama. She currently resides in Atlanta, Georgia.

Sean M. Sturdivan is a partner at Sanders Warren Russell & Scheer LLP, an insurance defense firm with offices in Kansas City, Missouri; Overland Park, Kansas; and Springfield, Missouri. Mr. Sturdivan is licensed in the state and federal courts for Kansas, Missouri, and California. He received his B.S. in International Business from Baker University, a small liberal arts college in Kansas, and his J.D. from the University of Oregon. Since graduating from law school, Mr. Sturdivan has represented businesses and individuals in a wide variety of civil claims. His current practice focuses mainly on the defense of insureds in employment, professional liability, product liability, and auto claims. Mr. Sturdivan is an active member of CLM, Defense Research Institute, Missouri Organization of Defense Lawyers, and the state bar associations for Kansas and Missouri. Mr. Sturdivan has been rated AV Preeminent by the Martindale Hubbell Law Directory and named as a Kansas Super Lawyers Rising Star (2011-2017). He lives in Olathe, Kansas, with his wife and 5 kids.

Ron Thackery is Senior Vice President of Professional Services & Integration, AMR and has responsibility for safety, risk management, fleet administration, clinical and education services. In addition, he is responsible for the integration of acquired companies into the organization and leads the Logistics team for FEMA deployments. During his 13 years at AMR, he has led many teams of caregivers and leaders in the development of innovative programs in EMS. Thackery received the Distinguished Service to Safety award from the National Safety Council in 2007, the highest individual award bestowed by the Council. He serves on the Board of Directors for the National Safety Council and chairs the Professional Standards and Research Committee of the American Ambulance Association. Prior to his service at AMR, he was an attorney with a worldwide express transportation company and a national banking association. Thackery holds a BA in humanities from Christian Brothers University and a JD from the University of Memphis.

Theodore J. Waldeck of Waldeck Law Firm P.A., located in Minneapolis, Minnesota, is licensed and practices law in Minnesota, Wisconsin and North Dakota. He is a 2004 graduate of Creighton University and a J.D. graduate of The University of St. Thomas Law School in 2008. He is a member of the Hennepin County and Minnesota State Bar Associations; the Minnesota Defense Lawyers Association; the State Bar of Wisconsin; the Twin Cities Claims Association; CLM International Products Liability Committee; and Eagle International Associates, Inc. Mr. Waldeck practices in insurance defense providing defense to both surplus lines and standard line carriers with primary emphasis in defense of products liability, professional liability, and church claims.

Michael Woodson is the managing partner of Edmonds Cole Law Firm with offices in Oklahoma City and Tulsa. Mike has successfully represented various insurance companies, manufacturers, business organizations, and individuals addressing a wide variety of insurance disputes, coverage disputes, multi-district litigation, and class action litigation. In addition, he lectures on various topics in the fields of insurance, products liability, and electronic discovery issues. Mike earned his B.S. from Northwestern Oklahoma State University in 1991, and his J.D. from the University of Oklahoma, J.D. in 1994.

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DEFENDING THE INDEFENSIBLE: DEFENDING CLIENTS WHO HAVE ENGAGED IN INDEFENSIBLE CONDUCT*

A Panel Discussion Moderated by:

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<u>Introduction</u>

Most claims presented for defense and indemnity under an insurance policy have some meaningful defense that can be made. Usually that defense is fairly obvious from the facts of the case. Unfortunately, however, there are some claims that are presented which not only lack a meaningful defense, they represent conduct that is of such a nature that no reasonable person would attempt to justify the actions of the insured. Allegations of fraud, intentional misconduct or other malicious behavior can be utterly indefensible. Misconduct may have led to significant losses which deserve to be compensated. Even so, it is the obligation of the insurance professional and legal counsel retained by the insurance professional to provide a meaningful defense to the insured within the bounds of ethics and policy limitations.

1. Identifying/defining the indefensible claim

Initially it should be noted that no claim is truly indefensible. Any claim presented to a claim professional, and subsequently to an attorney, will demand a defense of some sort be made and since the defense must be made, the claim is not indefensible. Still, certain claims present more obstacles to the claims professional and attorney in mounting a defense because of conduct of the insured. For the purposes of this paper we will consider an indefensible claim to be one

which has extraordinarily bad facts which are the result of clearly bad or reprehensible conduct. Furthermore, the bad facts and reprehensible conduct are essentially without dispute.

A. Clear Liability

One category of "indefensible" claim is that category of claims which have clear liability. That is to say, when applying the facts at issue to the law of the jurisdiction there is no dispute that the person who committed the acts in question would be legally responsible to other individuals in some way that is compensable. Liability may be clear for a number of reasons. There may be admissions made by the insured at the scene of the accident or over the course of time resulting in confessions of liability. There may be a number of indisputable "bad facts" which require an admission of liability. There may be an apology on the part of the insured to the injured party. There may be an admission to another person of the bad conduct. There may be admissions made in the course of a formal proceeding such as a criminal trial or a disciplinary proceeding which establish liability. Given the technology available in today's world where virtually everything is caught on video or is recorded in some way, and where there are many individuals with the technology readily available to record most anything that is said or done, liability may be clearly established by such recording. Surveillance video exists in many public places now and can frequently establish liability which may previously have been arguable. Additionally there any number of communication platforms that can establish an admission of liability including email, text and social media platforms such as Twitter, Facebook, Snapchat, Instagram and others.

B. Theoretically Defensible With Complicating Factors

There is also the situation that can arise where a case may have some defense under the law or facts, but other factors intrude to make the case very difficult or impossible to defend. Circumstances which would be illustrative include:

> -The defendant's story simply does not add up due to inconsistencies in his/her own recitation of the facts or comparison of the story with those of other involved parties.
>
> -The defendant has made prior sworn statements compromising, but not completely eviscerating, his/her defense position.
>
> -The defendant or corporate representative is thoroughly unlikable or presents badly.
>
> -The defendant is unable to participate in the defense due to death, mental incompetence, or inability on the part of counsel to locate him/her.
>
> -The legal rationale on which the defense relies is tenuous at best.
>
> -The defendant or a critical witness has engaged in outrageously objectionable, weird, or otherwise offensive conduct, even if tangential to the matter at hand.
>
> -The defendant or the principal is under indictment or criminal investigation and will not attest to anything under oath.

Defending Clients Who Have Engaged In Indefensible Conduct, Michael S. Ross and Peter F. Biging, Tort Trial and Insurance Practice Law Journal, Spring/Summer 2017, p.875.

The liability factors present in the case may be exacerbated by the fact that the insured may have initially denied liability or told a different version of events, only to later make an admission through one of the previously mentioned sources concerning his liability. It may also be exacerbated by the fact that there is objective proof of the conduct of the insured by way of video, audio or some other means of making a record of an event, which is at odds with the insured's version of the event. In such cases not only do you have liability which has become clear, you have an insured whose credibility has been destroyed. A case may be theoretically defensible under the facts or the law, but other factors in the case may make it extremely difficult to defend.

Examples of situations where a case is theoretically defensible but the defense is complicated by other factors includes:

> -The defendant's story simply does not add up due to inconsistencies in his/her own recitation of the facts or comparison of the story with those of other involved parties.
> -The defendant has made prior sworn statements compromising, but not completely eviscerating, his/her defense position.
> -The defendant or corporate representative is thoroughly unlikable or presents badly.
> -The defendant is unable to participate in the defense due to death, mental incompetence, or inability on the part of counsel to locate him/her.
> -The legal rationale on which the defense relies is tenuous at best.
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Numerous other factors can create obstacles in the defense of a claim. For example, high-profile cases with negative publicity tend to be more difficult to defend. Defending a case where the entire city or county in which the case is venued has been emotionally agonizing over the events giving rise to the claims can be extremely difficult. Additionally, unreasonable defendants who either push for settlement or want their day in court at any cost can create significant hurdles for lawyers to overcome. Cases venued in states or brought under theories of recovery where attorney fees are recoverable and the amounts of attorney's fees dwarf the actual damages at issue can incentivize plaintiff's counsel to make extreme demands and actually show disinterest in even good faith settlement discussions while they build up their attorney fees. Cases where there is discoverable information that, when revealed, has the potential for exponentially increasing the value of the case can be problematic. Parallel criminal proceedings

or investigations may interfere with the ability to mount a defense, or other circumstances may exist that render defendants unable to defend themselves or participate in their defense. Finally, there are circumstances, even if none of the previously mentioned factors are immediately apparent, where seasoned defense counsel can instinctually feel that the case will be difficult to defend.

2. How to handle the indefensible claim

Having identified a claim for what it is, the next issue becomes, as a practical matter, how to defend the claim. Even though a claim may be seemingly indefensible because of the nature of the conduct at issue, there are always options to consider in determining how to defend a matter in a vigorous and responsible manner. Even if the claim cannot be eliminated, there is value in successfully managing and mitigating the claim.

A. Consider settlement options

Early settlement may be a very effective way of managing a particularly bad claim. For example, if there is information that will come out during the course of discovery that will inflame the plaintiff to a greater extent and provide additional value for the plaintiff's claim, early settlement is an excellent choice. There are factors that may arise, however, that may make early settlement more complicated or impossible. If there are counterclaims or fee disputes, early settlement can be difficult. If there claims that are potentially not covered by the insurance policy in place, early settlement can be difficult. Additionally, if there are issues about coverage, whether it exists in the extent to which it exists, that may make early settlement difficult because

it may not be clear how much coverage is available to resolve the claim, if coverage is available at all. The existence of nonmonetary demands made also complicate matters.

On the other hand, where insurance is available, policy provisions such as an eroding policy that is reduced as attorney's fees and expenses are incurred may make early settlement more desirable. A deductible or retention making the insured responsible for attorney's fees may also make early settlement more desirable.

B. Defense Options

If the case cannot be settled early, defense options must be considered at that point. Other strategies which would be available to mitigate or even eliminate the risk presented by seemingly indefensible claim must be considered.

1. Technical Defenses

There are a number of potential "technical defenses" which are available if it becomes necessary to engage counsel to protect the insured. Some of these technical defenses may include jurisdictional defenses, failure to sue the proper parties or statute of limitations.

In considering jurisdictional defenses, consideration should always be given to whether case should be removed to federal court. Frequently federal courts offer a more conservative and more controlled venue than state courts do. If there is a jurisdictional basis for moving the case to federal court, that may provide a more advantageous jurisdiction for having the matter heard. Another issue that will frequently arise with problem defendants is whether or not service of process has been properly made. Service of process is an essential requirement for gaining the jurisdiction of the court. Absent service of process, the court does not acquire the necessary

jurisdiction to adjudicate a matter. Consequently, it is always important to ensure that service of process has been properly made in these cases.

It is always important to make sure that a case is being brought my proper party. Consequently, the question must always be asked, "does this plaintiff actually have standing to sue?" For example, in a wrongful death case has the proper party brought the case? While this varies to some extent from state to state, the state may require that a wrongful death action be brought by the estate executor or administrator for the benefit of the heirs. Ensure that the person that has brought the suit is the proper party and has met the required qualifications. In the context of a bankruptcy, a claim of a plaintiff who has been through bankruptcy may belong to the bankruptcy trustee, not to the party plaintiff. The bankruptcy trustee may be the only proper party plaintiff. Claims of children can only be asserted by the children's legal guardian. Not any family member is eligible to bring a claim on behalf of the child. Needless to say, this is not an exhaustive list of people who may not be the proper party to bring suit, but it is illustrative of the consideration that should be given to making sure that the person who has brought the suit is the proper party.

Statute of limitation defenses can be exceptionally productive. Failure to timely file a claim is almost always fatal to the plaintiff's ability to recover on that claim. While statutes of limitation typically run from the date of injury, there are times when the injury is not discovered immediately or appreciated immediately. In those cases, while the plaintiff may seek to have the statute of limitations run from the date of discovery, it may have actually begun at the time of the act giving rise to the claim. As an example, in a legal malpractice case, the statute of limitation does not run from the date on which the alleged error by the attorney actually becomes

irreversible, it runs from the date of the alleged bad action. Further, some claims which have statutory limitations may be subject to absolute time limits from the date of occurrence regardless of when the claim may be discovered.

2. Admit Liability and Attack Damages

Frequently significant value rests in a plaintiff being able to fully detail and explain the conduct of the person who has injured him. This is particularly true where the conduct is particularly egregious. Credibly owning up to misconduct and even apologizing for it may go a long way towards limiting the award of damages. An admission of liability is an excellent way to ensure that there are limitations placed on what a jury will ultimately hear about the actions of the indefensible client.

Admitting liability also has the effect of shifting the focus of the case from the defendant and the defendant's bad conduct back to the plaintiff and the plaintiff's ability to establish in a credible way the injury for which they are seeking relief. It is not unheard of that the plaintiff who suffers injury as a result of the indefensible conduct of the insured has only minimal injury. In those cases the best course of defense may be to admit liability and shift the focus to the plaintiff and the plaintiff's inability to prove damages to the extent claimed.

The defense of the "indefensible" claim must always give consideration to the issue of causation. Some claims essentially require "but for" causation which may provide a virtually complete defense even in cases of clear negligence. For example, if a lawyer misses a statute of limitation in filing a claim but the claim itself was legally deficient, without value or otherwise incapable of being proven, there would not be damages. Even really bad conduct must cause damages in order to result in a recovery by the plaintiffs.

3. Additional Defense Considerations

There are additional considerations to be given in handling indefensible claims. No matter how bad the claim is at the time it lands on your desk, it is important that the claim not get any worse. To that end, it is extremely important to speak with the insured and ensure that they are not continuing to engage in bad conduct. An example could be an attorney who is unwittingly involved in a scam that is essentially a Ponzi scheme and has involved clients in making investments in this scam. If the defendant truly believes this is a legitimate investment the defendant may feel inclined to continue to take efforts to have the investment come to fruition feeling that this will result in the resolution of legal matters. This defendant must be convinced not to take any further action or to solicit any further contributions.

It is very important that insured does not continue discussing the case with people other than claims personnel or legal counsel. No matter how bad the claim is when it arrives on the claims desk, it can always be made worse by admissions of the insured or continued comments about the event by the insured which only served to further inflame the plaintiff or to exacerbate already bad liability. It is extremely important to obtain the insured's cooperation in this regard.

Not only is it important that the insured not continue to discuss this matter, in high publicity cases it is frequently important to bring an end to all public communication about the case by any party. It may well be important to obtain a nondisclosure ("gag") order from the court directing that none of the parties make extrajudicial statements to the media concerning the case until the trial of the matter is concluded.

It is also important that the insured doesn't take matters into his or her own hands and try to resolve the matter directly. Once the matter has been referred to the claims department

is extremely important to detail the responsibilities of each of the parties so that the insured understands it is no longer his responsibility or obligation to resolve the matter and that any further action should be taken by claims professional or by counsel retained to defend the matter, not by the insured.

Conclusion

While most claims are pretty clearly defensible under the facts or the law, there are some claims which are best characterized as indefensible. There is some conduct that cannot be justified and some actions which are clearly beyond a reasonable jury's ability to tolerate. In these cases claims personnel and their counsel do not have the luxury of simply walking away from the claim. A rigorous and meaningful defense must still be provided. In providing that defense it is important to give consideration to settlement options, technical defenses and even admitting liability to gain control of the narrative in the case.

*This paper borrows heavily in both structure and content from an article presented at the American Bar Association's annual meeting on August 5, 2016, titled "*Defending the Indefensible: Navigating the Strategic and Ethical Landscape of Defending Clients Who Have Engaged in Indefensible Conduct*". That article was prepared by Michael S Ross and Peter F. Biging, This paper has abbreviated that article and modified it to make it more relevant to the claims professional.

LITIGATION AND THE MEDIA: "COUNSEL, DO YOU HAVE ANYTHING TO SAY FOR YOUR CLIENT?"

Common sense would dictate that it is within the attorney's role to work with the media to ensure accurate reporting and fair treatment of his or her clients. Throughout the last forty years, courts and legal commentators are increasingly recognizing that the media, through the way it covers litigation, can have a very real impact on all stages of a lawsuit. In potential litigation matters that involve the press, working with the media to create more balanced, accurate, and less sensational coverage of a lawsuit is a necessary element in defending a high-profile defendant.[1]

Litigation involving well-known companies or individuals has grabbed the attention of the news media, especially when it involves sensational charges.[2] Despite the media's attentiveness to trial coverage, most attorneys are not trained in public relations. Their attention is and should be focused on the more traditional aspects of lawyering, such as discovery, motion practice, and actually trying the case.[3] Attorneys need to understand that the story is going to be written with or without them. If attorneys fail to speak with the press, they'll have no way of safeguarding that their message gets communicated properly. Attorneys and clients alike should also understand the various strictures contained in the rules of professional conduct when making comments to the public, and the practical considerations in making extrajudicial comments during the litigation process.

I. WHAT CAN YOUR LAWYER SAY?

A. ABA Model Rule 3.6 and History of the Standard

Throughout the last fifty years, there has been a growing change in perception regarding whether legal ethics rules permit defense attorneys to talk with the media when the media presents potential bias against their clients.[4]

In the 1960s, the courts initially provided significant ammunition against allowing lawyers a right to extra judicial speech.[5] These rulings were in response to the media circuses surrounding President Kennedy's death and the high-profile murder charges against Dr. Sam Sheppard in Ohio. After significant media coverage involving The Warren Commission Report and the Supreme Court overturning Dr. Sheppard's murder conviction, the Court recognized that "[c]ollaboration between counsel and the press as to information affecting fairness of a criminal trial is not only subject to regulation, but can be highly censurable and worthy of disciplinary measures."[6]

In response to these opinions, the American Bar Association formed the Advisory Committee on Fair Trial and Free Press to draft new ABA rules on publicity.[7] The Committee's original 1969 Rule said that in civil actions an attorney could not make extrajudicial statements, other than a quotation from public records, if it reflected on the character or credibility of a witness or party, expressed an opinion on the merits of the claims or defenses of a party, or "[a]ny other matter reasonably likely to interfere with a fair trial of the action."[8] At the time, this rule was adopted by most states.

However, beginning in the 1970s, courts began striking down these rules as too restrictive and violative of the First Amendment.[9] In *Chicago Council of Lawyers v. Bauer,* the United States Court of Appeals for the Seventh Circuit found that a district court's "no-comment" rules, which barred lawyers from making public comments about ongoing civil and criminal cases, deprived litigants of their free speech rights.[10] The rule at issue prohibited extrajudicial statements "if there was a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice."[11] The Court held that "[o]nly those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed."[12] The court noted the specific importance of attorney speech when saying, "since lawyers are considered credible in regard to pending litigation in which they are engaged and are in one of the most knowledgeable positions, they are a crucial source of information and opinion."[13]

Again, the ABA tried to effectuate the *Bauer* opinion by adopting Model Rule of Professional Conduct 3.6 in 1983, which authorized sanctions for attorney speech that produced a "substantial likelihood of materially prejudicing an adjudicative proceeding" and prohibited attorneys from discussing information likely to be inadmissible at trial.[14]

Finally, in *Gentile v. State Bar of Nevada,* the Supreme Court addressed the issue even further. A divided court delivered two separate opinions, one by Justice Kennedy, another by Chief Justice Rehnquist. Each opinion addressed a portion of the Court's holding regarding the Nevada rule recognizing extrajudicial statements by lawyers. In the Kennedy opinion, the Court held Nevada Supreme Court Bar Rule 177, which was based on the ABA Model rule, unconstitutional. Justice Kennedy stated:

> An attorney's duties do not begin inside the courtroom door…Just as an attorney may recommend a plea bargain or civil settlement to avoid adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation…including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.[15]

The ABA then goes on to formalize this opinion by drafting ethics rules supporting the right of lawyers to defend their clients in public. It modified Rule 3.6 to add a "right of reply" so that lawyers would feel free to respond to "particularly egregious publicity without fear of sanction."[16] Now, the ABA rules clearly recognize that a lawyer acts within his or her professional responsibility when making "**a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."**[17] The ABA has also acknowledged that representing a client may extend beyond legal issues "to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."[18]

B. Discussing the Common Standard

The Rule in its current form can be found attached to the end of this article. Various states across the country have either fully adopted the abovementioned rule, or tweaked it to their own

liking. Much of the practical direction State Bars have given attorneys regarding the rule can be found in the comment section of 3.6. For instance, the Oklahoma Rule's comments give the following categories of statements identified as "ordinarily" allowed:

1. The claim, offense or defense involved, and except when prohibited, the identity of the persons involved;
2. Information contained in a public record;
3. Whether an investigation of the matter is in progress;
4. the scheduling or result of any step in the litigation;
5. a request for assistance in obtaining evidence and information necessarily related;
6. a warning that a person involved poses a danger if there is a reason to believe a likelihood of substantial harm to an individual or the public.

According to the same comment, Paragraph 5 provides a list of subjects that are likely to have a materially prejudicial effect on a proceeding. Lawyers should generally avoid:

1. statements about the character or credibility of a party, suspect or witness;
2. the expected testimony of a party of a witness;
3. the possibility of a plea in a criminal case;
4. the performance of tests or test results (e.g. an accused's refusal to take a polygraph);
5. an opinion regarding the guilt or innocence of a party.

Additionally, Oklahoma includes a general "catchall" prohibition that includes "information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence at trial and that would, if disclosed, create an imminent and material risk of prejudicing an impartial trial."[19]

State Bar Associations have construed similar restrictions as those listed above. In Pennsylvania, a lawyer sought advice regarding how to handle media inquiries about his clients and their daughter. The daughter had died after the hospital where she was being treated removed her from a ventilator, against the parents' wishes. The media wanted medical records, depositions, and videos taken by a family member showing the parents hysteria and grief. In an informal opinion, the Pennsylvania Bar advised that Rule 3.6, was vague when applied to the situation. The lawyer, the Bar Association said, must determine if the information in the records and video is likely to be inadmissible in determining if it will be materially prejudicial. The committee stated:

> Ultimately, you must use your best judgment as an attorney to make the determination of whether to disseminate information to the media. Whether you can release this information is not merely a question of ethics alone[.] [I]n making this decision, you must consider the facts of your case along with the rules of civil procedure, the rules of evidence, the rules of ethics, and the underlying moral and legal policies behind protecting the public interest. This should help you balance the interests between protecting the right to a fair trial and safeguarding the right to free speech.[20]

Given so many variables and the difficulty in knowing whether information will be admissible, there seems to be little ethical guidance regarding what falls in this category and whether the information could still be considered prejudicial, even if not admissible.

C. Civil Trial vs. Criminal Trial Distinction

There also remains an interesting discussion regarding the distinctions between Criminal and Civil trials. Some of the high-profile cases discussed above dealt with press contact during criminal trials. However, ethics rules and case law concerning extrajudicial statements recognize the crucial distinctions between the two types of cases. Comment 6 to ABA Model Rule 3.6 states that the nature of the proceeding involved is a relevant factor to determining prejudice and that "civil trials be less sensitive" than criminal jury trials to extrajudicial speech.[21] Courts are less likely to impose restrictions on extrajudicial speech in the civil arena for a number of reasons. First of all, civil proceedings typically are more drawn out than criminal, thus speech restrictions could potentially last for many years.[22]

Secondly, it is recognized that civil trials often involve important social issues that require some degree of public knowledge and discussion.[23] Finally, although impartial justice is valued in all legal proceedings, it is generally believed that criminal trials "require even greater insularity…[and that] the mere invocation of the phrase "fair trial" does not readily justify restriction on speech when we are referring to civil trials.[24] Although this latitude in civil trials is noticeable from case law and model rules, civil attorneys will continue to wrestle with the permissible scope of any comments to the media. Caution, particularly in pre-trial communications, is warranted.

II. WHAT SHOULD YOU ACTUALLY SAY - - - IF ANYTHING?

A. Practical Considerations When Dealing with the Media

An attorney's responsibility concerning trial publicity begins from the moment he or she takes the case and lasts until the employment ends. Some of the most crucially important times to be concerned with publicity incidental to a trial is before the actual trial begins.[25] It is also important to note that the professional conduct rules above are designed to prohibit undignified, discourteous, and disrespectful conduct or remarks; the rules are a call to discretion and civility, not to silence or censorship, and they do not even purport to prohibit criticism.[26] An attorney and the client, whether a high profile public figure, or giant corporation, must embrace the challenge and be proactive in taking steps to minimize the potentially harmful effects of adverse media coverage.

Though much of building a relationship with the media can seem to be common sense, it is important that the attorney and client have an early discussion about the possibility of media coverage. Weighing the pros and cons of engaging the media is crucial and an agreed strategy between attorney and client is a must.

One way of addressing concerns to the media and public can be through the use of an official press release. A good press release needs to be simple, straightforward, and objective.[27] The release should summarize the principal facts of the story and answer the questions of who, what, when, where, why, and how.[28] Editorial comment, personal opinion, and colored words or conclusions should be avoided unless they are in the form of direct quotation.[29]

If the decision to engage the media is made, an attorney should keep the following practical advice in mind:

1. Always be available to the press.

2. Provide telephone contact at any time, day or night. Media representatives, like attorneys, have limited free time during the work week. Make sure to always return phone calls and be understanding of the type of schedule a reporter or journalist may have. Wisconsin Criminal defense attorney, Dean Strang, has a special email box to receive media inquiries on high-profile cases.[30]

3. Give interviews without delay.

4. Anticipate press interest and prepare statements. "No-comment" can put you in a bad light. Dean Strang was quoted saying "never say no-comment…it makes you sound like a mob lawyer."[31]

5. Be truthful; misleading information destroys good press relations.

6. If in doubt as to information accuracy, check the facts and promptly transmit desired information to news media requesting it.

7. Where facts must be withheld, tell the reporter so and give him or her the reasons. Here, it is important to help the media representative understand the ethical dilemma an attorney can face when talking about his or her client. Make sure to describe the necessity for "attorney-client privilege" in certain scenarios. Help the media representative and public recognize your professional duty to withhold certain information.

8. Deal directly and impartially with reporters.

9. If it is essential to give a reporter information that is not to be published, establish a clear understanding of exactly what is not intended for publication and why.

10. Do not expect or request reporters to submit stories to you for approval before publication.

[32]

It is also important to note the editorial significance of the terms "off the record" and "on background." The Associated Press (AP) defines "off the record" as meaning that the information can't be published. A reporter could still use the information as a lead however.[33] The AP defines "on background" as meaning that the information can be published, but only according to

conditions set forth by the source. Attorneys should always be cautious when giving out information they don't want on the record.

B. Preparing the Client for Public Statements

When conducting press relations throughout the different stages of a lawsuit, the attorney must not only be skilled in the organization and presentation of events and ideas, but he or she must also know how to shape the attitude of the audience. You have to know how to create a favorable image of your client's case. Any inability of a modern audience to assimilate more than a limited number of ideas and opinions regarding a specific factual scenario has obvious significance in planning your media communications.

Opinions on your client's personality and appearance does not begin at the start of trial - - It begins with the start of his or her case. In creating a favorable "client" image, it is important to always admit the obvious. It may do the attorney little good if obvious facts are laboriously disputed. If a fact seems detrimental to your client's interest, it should be adequately explained, and if necessary, conceded.[34] Like jurors in a trial, the public and the media will get the impression that the attorney is trying to resort to tricks to conceal some very important point and that he is not to be trusted. Take an example from a homicide prosecution; instead of laboring over the obvious that your client had a gun, admit the fact but use either premise of "Sure he had a gun, but it wasn't loaded," or "Sure he had a gun, but he didn't fire it."[35]

There are additional considerations when preparing your client for media exposure. The first is to watch your vocabulary. Lawyers and sophisticated clients alike have a tendency to use legal jargon when commenting on a legal matter.[36] Experts are usually in an agreement that jargon-laden comments do not play out well when communicating to the public at large – so keep it simple and to the point.[37] An attorney also needs to know when to stop talking. When commenting on a case, make a statement brief, concise, and quotable.[38] Oshkosh attorney, George W. Curtis, believes that talking to the media should be the same as describing your case to the jury, "if [attorneys] can't describe their case in one sentence…they're not ready.[39] An attorney should also scrutinize his or her words in isolation…think about what each sentence will look like in isolation.[40] Usually attorneys aren't misquoted, they're quoted without context.

It is also important to prepare for a client's past issues. Nowadays, many state and federal courts have easily accessible online portals that allow a person to look up a plaintiff or defendant's entire criminal and civil case history. This type of online search is well-known by media members and often jurors. As an advocate for the client, an attorney must discuss with his or her client all prior criminal and civil cases that could potentially be found by a member of the public. After discussion, attorneys should do their own search to ensure that each charge or lawsuit has been reviewed and an adequate strategy developed.

"Trial by newspaper" is a phrase that many civil litigators have come to know throughout their career. Public perception and media coverage can contribute to your client's guilt or innocence long before the actual trial begins. Civil litigation matters are of public interest and based on the delay in causes reaching trial, and as such, the public will often receive considerable information regarding the case prior to it being heard. The accuracy and relevancy of this

information will most likely not have been protected by the rigorous principles of judicial evidence. That is why an early assessment of the publicity value of the case is essential to the client's interest. Attorneys should always be prepared to document the publicity, its date, and extent. Just like completing a conflict check, an attorney and staff should run a search on any kind of publicity that may have arisen before the matter was put on your desk.

III. CONCLUSION

In a perfect world, justice would be served solely based on what is admitted in the courtroom and attorneys would only need to worry about arguing the law. Unfortunately, litigation journalism and trial coverage is a given in today's judicial system. Despite the media coverage and potential for negative publicity, an attorney can advocate for and defend his or her client to not only the jury, but the public through early preparation, organization and client communication.

Footnotes

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[1] Dirk C. Gibson & Mariposa E. Padilla, *Litigation Public Relations Problems and Limits,* PUB. REL.REV., 215, 216 (June. 22 1999) (citing Gary Moran & Brian L. Cutler, *The Prejudicial Impact of Pretrial Publicity,* J. OF APPLIED SOC. PSYCHOL. 21 (1991)).

[2] Steven B. Hantler, Victor E. Schwartz, & Phil S. Goldberg, *Extending The Privilege To Litigation Communications Specialists In the Age of Trial By Media,* PUB. COMCLON 7, 10 (2004)

[3] *Id.* at 9

[4] *Id.* at 14

[5] *Id.* at 16

[6] *See* Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

[7] *See generally* STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (Tentative Draft 1966).

[8] MODEL CODE OF PROF'L RESPONSIBILITT DR 7-107(G) (2003).

[9] *See,* e.g., Gentile v. State Bar of Nevada, 501 U.S. 1030, 1030-31 (1991) (citing *In re Oliver,* 333 U.S. 257, 270-71 (1948)); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).

[10] *Bauer,* 522 F.2d at 248-49.

[11] *Id.*

[12] *Id.* at 249

[13] *Id.* at 250.

[14] *See* Gabriel Gregg, Comment, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity,* 43 UCLA L. REV. 1321, 1133-34.

[15] Gentile v. State Bar of Nevada, 501 U.S., 1030, 1033-34 (1991)

[16] *See* Gregg, at 1382.

[17] MODEL RULES OF PROFL. CONDUCT R. 3.6(c) (2003).

[18] *Id.* at R. 2.1.

[19] OK ST. RPC Rule 3.6, Comment 5 (5).

[20] Pa. Eth. Op 96-45, 1996 WL 928141.

[21] Debra S. Katz, *Extrajudicial Statements: Lawyers' Ethical Obligations in Communicating with the Press.* PUB. DEBRA S. KATZ, KATZ, MARSHALL & BANKS, LLP. (2007).

[22] *Id.*

[23] *Bauer* at 257-58.

[24] *Id.*

[25] 1 Am. Jur. Trials 303, *Controlling Trial Publicity,* §1 (Originally published in 1964).

[26] *Id., See also*, Grievance Adm'r v. Fieger, 476 Mich. 231, 719 N.W.2d 123 (2006).

[27] *Id.* at § 22

[28] *Id.*

[29] *Id.*

[30] Dianne Molvig, *Rapport with Reporters,* Wis. Law., September 2009, at 8, 10

[31] *Id.*

[32] 1 Am. Jur. Trials 303 at §20.

[33] *See* Diane Molvig, at 11.

[34] *See* 1 Am. Jur. Trials 303 at §28.

[35] *Id.*

[36] *See* Diane Molvig, at 11.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

Keeping Damages Low From the Defense Perspective

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I. Introduction

The best way to keep damages low is to avoid them. Indeed, when asked about attacking damages most defense counsel will recite the familiar refrain: "If I'm worried about damages, I've already lost." The conventional thinking behind this train of thought in such cases is that most are won or lost on questions of liability – breach of duty and causation. Defense counsel regularly uses a jury charge to drive this point home – instructing the jury that damages shouldn't even be discussed unless liability is proven.[1] In certain types of personal injury cases, such as auto wreck cases where liability is often admitted, damages can be the only thing that either side is arguing about at trial. From either end of the spectrum, analyzing and attacking damages early on can affect settlement value, discovery strategy, and trial presentation. This paper will focus on oft-used strategies to limit or eliminate damages, and cautionary tales to consider as you prepare your case for settlement or trial.

II. The Causation Problem

The most effective and common attacks on the damages portion of a plaintiff's case often stem from a speculative, uncertain or vague causal relationship between the damage and the tort alleged. These attacks will often arise in the context of medical bills where unrelated expenses are not segregated; future lost earnings not causally related to the alleged negligence and which are vague or speculative; and in the presence of an intervening cause or superseding cause.

A. Expenses Incurred Not Causally Related

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[1] Zwiren v. Thompson, 276 Ga. 498 (2003) (standing generally for principle that plaintiff must first prove duty, breach, and proximate cause); O'Day v. Nanton, 905 N.W. 2d 568, (2017) (holding that plaintiff must prove duty, breach and causation).

In a case taken to trial recently, as a part of his claim for economic damages in a malpractice action the Plaintiff alleged that he was entitled to the entirety of his medical bills from the institution where the alleged malpractice had occurred. By way of testimony from an expert economist, Plaintiff wished to introduce at trial evidence that he was entitled to $82,000 in such medical expenses. These expenses, however, comprised the entirety of the medical bill from this facility, while the alleged malpractice occurred midway through this very hospitalization. There were no allegations of negligence made related to the initial portion of the hospitalization. As you would expect, there was also no expert testimony that the medical expenses during this initial portion of the hospitalization flowed from any tortious act. Plaintiff's counsel made no effort to segregate out those medical expenses which were causally related to the care at issue and those medical bills that would have been incurred in the absence of any negligence. Unfortunately for Plaintiff, this failure resulted in the entirety of the medical bill being excluded from trial.

While it may seem axiomatic that medical expenses unrelated to any negligent act may be excluded without a showing "that such expenses were incurred in connection with the treatment of the injury . . . involved in the subject of the litigation," rejection of the expenses as a whole is a less obvious tenet of the law. However, dating back to 1888 some appellate courts have held that evidence being offered as a whole, and that part of it relating to [inadmissible and irrelevant facts], the whole is properly rejected.[2] As it pertains to the exclusion of an entire medical bill, the case of Lester v. S.J. Alexander[3] is

[2] Skellie v. Central R. & B. Co., 81 Ga. 56 (1888).

[3] 127 Ga. App. 470 (1972),

illustrative of the point. In Lester, the Court of Appeals of Georgia was asked to address the trial court's exclusion of an entire hospital bill where the plaintiff failed to "differentiate between those charges directly related to treatment of his injuries and those for a [different ailment] having no connection with the automobile collision."[4] Finding that exclusion of the entire bill was proper, the Court held:

> Where, as here, the submitted bill included without differentiation items having no relevance to the automobile collision, the proffered evidence not only failed to meet the statutory requisites . . . but was properly rejected under the rule that testimony offered as a whole without separating the relevant from that which is irrelevant and inadmissible is to be repelled in its entirety.[5]

Relying on the ruling in Lester, the Georgia Court of Appeals in CFUS Properties v. Thornton again upheld the principle, finding that "in his or her sound discretion, a trial judge can properly exclude such a medical bill from evidence for the plaintiff's failure to segregate out the unrelated expenses from the medical expenses that were the necessary result of the tort."[6] Many other states, which have confronted this issue, have excluded the bill at trial or found reversible error[7].

B. Past and Future Lost Wages

The inherently speculative nature of what a person would have earned in the future but for the tortious act of another is an issue that appellate courts struggled with.

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[4] Lester, 127 Ga. App. at 471.

[5] Id. at 472.

[6] Thornton, 246 Ga. App. at 79.

[7] Texarkana Memorial Hosp., Inc., v. Murdock, 946 S.W. 2d 836 (1997) (plaintiffs introduced, as evidence of damages, entire hospital bill and Supreme Court reversed due to plaintiff's failure to segregate unrelated expenses); Hall v. St. Louis Public Srvc., Co., 266 S.W. 2d 597 (Mo. 1954); Powers v. Campbell, 442 P. 2d 792 (1968).

Generally, though, the analysis of the propriety of both past and future lost earnings hinges on the cause of the damage rather than the difficulty in ascertaining a fixed amount, which often remains a jury issue.[8] Nonetheless, there must be evidence from which a jury can estimate or reasonably infer the loss or decrease in earning capacity, and a claim for future lost wages cannot be based upon pure conjecture or speculation.[9]

In addressing lost wages, the defense will often focus their assessment on the plaintiff's ability to present evidence sufficient to 1) establish an earnings history to support a past lost wages claim and/or 2) prove "loss of definite earnings that would have been received in the future but for an injury."[10] The ability of the defense to eliminate these damages often pivots on a number of factors, including evidence of recent unemployment,[11] testimony about future employment unrelated to jobs performed in the

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[8] Young v. Georgia Agr. Exposition Auth., 318 Ga. App. 244, 248-49 (2012) ("If it has been sufficiently established that the loss of earnings was caused by the tortious conduct of the defendant, the fact that the exact measure of the earnings lost may be challenging for the jury to calculate does not preclude their recovery."); Lewis v. N.J. Riebe Enterprises, Inc., 825 P. 2d 5, 18 (1992) ("Once the right to damages is established, uncertainty as to the amount of damages does not preclude recovery.").

[9] Unibar Maintenance Servs., Inc. v. Saigh, 769 N.W. 2d 911 (2009).

[10] Edwards v. Ethicon, Inc., 2014 WL 3361923 *19 (S.D. W. Va. 2014).

[11] Thomas v. Boyd, 2017 WL 5474113 (La. App. 2 Cir. 2017) (Evidence showed that, prior to trial, plaintiff could do light duty work but that he was simply uninterested in ever returning to any type of work); Beal v. Braunecker, 185 Ga. App. 429, 433 (1987) ("Thus, if plaintiff had been eunemployed and unable to establish his earning capacity, no recovery of damages for loss of earnings would be allowed.")

past,[12] and lack of qualifications.[13] These issues arise in the context of a hired economist who might assess a plaintiff's past work history, and then extrapolate from that history a future lost earnings amount. If the economist is unaware of employment gaps, prior demotions, significant unemployment, qualifications issues, and the like, and has failed to take such factors into account in his economic assessment, defense counsel should exploit those facts. Ideally, the lost wage claim could get excluded or, at least, the expert's credibility will be called into question.

In a recent wrongful death matter taken to trial, the plaintiff wished to offer testimony from an economist that his deceased wife was going to work in the future as a paralegal, despite the fact that she had been disabled for the previous 9 years. Plaintiff's theory was that his spouse was having surgery to address her disability, and if successful, she would have returned to the workforce as a paralegal. Instead, Plaintiff argued, the surgery was not successful and because of the alleged negligent medical care she passed away. At deposition, the economist admitted that any testimony about what she might do in the future was speculative, and that he couldn't provide any factual support for his assumptions about her future earnings.

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[12] Jones v. O'Day, 303 Ga. App. 159, 163-64 (2010) (Recovery for lost future wages as a pilot unsupported when no prior employment history as pilot, but allegations related to disqualification from flight school due to Lasik surgery); Henrick v. Fuerst, 2002 WL 31876326 (Cal. 2002) (Recovery for future lost wages as a DEA agent unsupported when plaintiff was only student and hiring statistics for DEA showed agency only hired 7 to 10 percent of applicant pool).

[13] See, e.g. System Pros, Inc. v. Kasica, 145 A. 3d 241 (2016) (Plaintiff unable to claim future lost wages when evidence was clear that he was unqualified for position he was claiming); Singleton v. Phillips, 229 Ga. App. 286 (1997) (reversing denial of directed verdict on lost earnings where theories about why promotion not received "were purely speculative.")

At summary judgment, defense counsel moved to dismiss any claim for past or future lost wages, arguing a lack of proof that she would have wanted to return to work even if the surgery had been successful, a lack of evidence she possessed or maintained the skills or qualifications to be employable as a paralegal, and no evidence that any law firm would have hired her. Finding a lack of evidence to support either past or future lost wages, the trial court granted the defendants' summary judgment motion.

Another aspect of damages that directly bears upon lost future wages, medical expenses, and wrongful death damages is life expectancy. The importance of life expectancy is often overlooked simply because a jury may decide life expectancy themselves, without direct evidence on the subject.[14] The simplest way of proving life expectancy, though, is to use a mortality table, several of which have been approved by statute. Obviously, such tables do not take specific co-morbidities into account and are based on average life expectancy for the entire population. Defendants are often able to limit the impact of these tables by arguing for a reduction of life expectancy based on pre-existing medical conditions.[15]

C. The Life Care Plan

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[14] McQueen v. Jersani, 909 So. 2d 491 (2005) (Jury could assess life expectancy based solely upon plaintiff's testimony and physical appearance at trial.); Davis v. Whitcomb, 30 Ga. App. 497 (1923);

[15] Procaccini v. Lawrence and Memorial Hosp., Inc., 168 A. 3d 538 (2017) (Use of mortality table is not exclusive means of proving life expectancy); Ellis v. Clarke, 50 N.E. 3d 221 (2016) ("mortality tables are admissible regardless of the poor health of the person … when the opposing side believes that the person in question … has a lower life expectancy than reflected in the mortality tables, the usual remedy is to offer evidence to that effect and argue the point to the jury.")

One of the more common defense tactics is to question the validity and reasonableness of the life care plan. Attacks on life care plans are rooted in the inherently speculative nature of predicting a plaintiff's future needs and presenting such needs to a jury. Often during deposition, defense counsel will spend significant time attempting to establish the life care planner's lack of medical qualifications, lack of ability to prescribe treatments suggested in the LCP, and lack of basis for specific medical needs or treatment. Attempts to limit such testimony are inherently more successful when there is no physician testimony that the medical treatments and other items of need are necessary or will be incurred in the future, to a reasonable degree of medical probability. The lack of such testimony lends credibility to the notion that any such component of the life care plan is speculative and so uncertain so as to prevent recovery.

The admissibility of the future medical care is an issue appellate courts in many states have been asked to address, and they consistently have held that any item of future damage, including future medical care and treatment, requires "reasonable certainty that the Plaintiff will sustain future medical expenses proximately caused by [the defendants]."[16] In establishing reasonable certainty, "an award of future medical expenses is authorized where it is supported by competent evidence."[17]

With the adoption of the Daubert standard to establish competent expert testimony in many states, it stands to reason if there is no medical testimony from a physician or other health care provider qualified to give such testimony, even the most

[16] Bennett v. Haley, 132 Ga. App. 512, 515 (1974); See e.g. Thomas v. Boyd, 2017 WL 5474113 (La. App. 2 Cir. 2017) (holding that plaintiff must prove future medical expenses will more probably than not be incurred).

[17] Bull Street Church of Christ v. Jensen, 233 Ga. App. 96, 102 (1998).

careful prepared life care plan could get excluded if it contains unsupported future treatment.

D. Intervening and Superseding Cause

Although more related to proximate cause, a damages assessment from the defense will often also include analysis of any potential intervening or superseding cause of the damage sought. If the damages sought by a plaintiff were caused by an independent, unforeseeable intervening act, defense counsel will often seek to exclude such damage or include jury charges asking a jury to preclude any damage caused by the intervening act of a third party.[18] Likewise, if the damages did not flow from the tortious act of defendant, but rather were caused superseding causes or conditions, defense counsel will seek to limit recovery. Even if not adjudicated at the summary judgment stage, defense counsel will often seek to charge the jury that if they are unable to determine that the damage sought was caused by the negligence of defendant or by some other superseding cause, then plaintiff has not met her burden and recovery would be prohibited[19].

III. ADDITIONAL DAMAGES CONSIDERATIONS

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[18] See Pruett v. Phoebe Putney Mem. Hosp., 295 Ga. App. 335 (2008) (holding no recovery where there has intervened between the act of defendant and the injury to plaintiff, an independent, intervening, unforeseeable act or omission of someone other than defendant, that was not triggered by defendant's act, and which was sufficient of itself to cause the damage.); Powell v. Harsco Corp., 209 Ga. App. 348 (1993).

[19] Komlodi v. Picciano, 89 A. 3d 1234 (N.J. 2014) (holding that jury had to determine whether oral ingestion of Duragesic patch was reasonably foreseeable by defendants and reversed for trail court’s failure to provide appropriate instruction).

Along with the causation issues related to disproving damages, the remainder of this paper will briefly address two other defense tactics and current trends when addressing damages through the course of discovery and at trial.

A. Mitigation of Damages

Rather than a substantive element of a plaintiff's tort claim, mitigation of damages, or, better stated, the failure of plaintiff to mitigate damages, is an affirmative defense that defendants will often plead, and thus have to prove.[20] An example of the the duty of a plaintiff to mitigate his damages is codified in Georgia at O.C.G.A. § 51-12-11, which states in part: "When a person is injured by the negligence of another, he must mitigate his damages as far as is practicable by the use of ordinary care and diligence." In other states, the requirement for a plaintiff to mitigate damages may be contained in case law. This defense will often arise in the context of a plaintiff failing to follow instructions of a

[20] Weston v. Dun Transp., 304 Ga. App. 84, 87-88, 695 S.E.2d 279, 282 (2010) (holding that on summary judgment, defendants have the burden of proving that the plaintiff "by ordinary care could have avoided the consequences to himself or herself caused by the defendant's negligence."); Monahan v. Obici Medical Management Services, Inc., 271 Va. 621, 628 S.E.2d 330 (2006) (holding mitigation of damages is affirmative defense and defendant has burden of proving that plaintiff failed to mitigate, and further that in Virginia this affirmative defense may be basis for reducing damages, but unlike many other affirmative defenses does not necessarily bar all recovery)

physician,[21,22] failing to take steps to reduce damages such as pain and suffering,[23] or a failure to take action to avoid the damages resulting from the mistake of another.[24] When assessing a plaintiff's damage claims, always keep in mind to look for any instances where doctor's orders weren't followed.

Failure to mitigate damages in medical malpractice cases, for instance, often arises in the context of emergency room care where the patient was told to follow up with their

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[21] DeVooght v. Hobbs, 265 Ga. App. 329 (2004) (jury instruction on failure to mitigate damages appropriate when patient missed appointment and failed to bring consent form to hospital, against instructions of physician); Holley v. Pambianco, 270 Va. 180, 613 S.E.2d 425 (2005) (finding evidence of post-discharge instructions given to patient after procedure and content of communications with doctor's office on day after medical procedure was admissible as relevant to mitigation, but video shown to patient six weeks prior to procedure which did not contain any significant warnings was not admissible). See also Cox v. Lesko, 263 Kan. 805, 953 P.2d 1033 (1998) (finding failure of plaintiff to perform prescribed physical therapy could be used as evidence of fault in comparative negligence state as well as failure to mitigate damages).

[22] Johnstone v. Malone Office Equip. Co., 192 Ga. App. 137 (1989) (Choice to drink alcohol rather than taking prescribed pain medicine caused loss of income rather than collision itself); Snead v. Holloman, 101 N.C. App. 462, 400 S.E.2d 91 (1991) (remanding case for failure to instruct jury on mitigation of damages where evidence showed doctor prescribed back exercises and plaintiff had stopped performing exercises)

[23] Rosenthal v. O'Neal, 108 Ga. App. 54 (1963) (verdict eliminating pain and suffering proper where evidence revealed failure of plaintiff to take steps to reduce pain and suffering). Cf. Carnival Cruise Lines, Inc. v. Gooden, 535 So.2d 98 (Ala. 1988) (holding that in fraud case against cruise line regarding misrepresentations on handicapped accessibility to bathrooms on ship, there was sufficient evidence for jury to conclude that plaintiff did not fail to mitigate, even though plaintiff refused assistance offered by ship's staff to assist him to bathroom).

[24] Crowley v. Trust Co. Bank of Middle Georgia, N.A., 219 Ga. App. 531 (1995) ("If shown that client could have avoided damages resulting from attorney's mistake, but did not do so, recovery for malpractice is limited to those losses client would have suffered had damages been properly mitigated.")

primary care physician if their situation worsened and no follow-up occurred. If your plaintiff claims she was treated negligently in the ER, but then failed to follow up with anyone as her condition steadily worsened, this can be the death knell for a plaintiff's claim. In one wrongful death claim taken to trial recently, the decedent stayed home for 8 days while in steadily worsening pain, where her mother had told her she needed to go back to the hospital. She refused to return until she was in full sepsis, which prolonged her hospitalization and ultimately contributed to her death. Not only did this failure to mitigate break the chain of causation, but it allowed the defense to argue the damages for the final hospitalization were not attributable to defendants.

Another category of "failure to mitigate" cases fall under the doctrine of avoidable consequences. This affirmative defense, codified in Georgia at O.C.G.A. § 51–11–7, states that "[i]f the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." The standard to prove such action is the ordinary person standard, with Georgia appellate courts holding that in relation to O.C.G.A. 51-11-7, a plaintiff "must . . . avoid the effect of the defendants' negligence after it becomes apparent to him or in the exercise of ordinary care he should have learned of it. "[25] This doctrine does not suggest that a defendant can be relieved of a duty owed plaintiff, but rather would deny recovery for any damages which could have been avoided by reasonable conduct on plaintiff's part."[26] Conversely, if a plaintiff is able to show that a defendant acted willful or wantonly, and had "actual intention to do harm

[25] Weston, 304 Ga. App. at 87.

[26] Osburn v. Pilgrim, 246 Ga. 688 (1980).

or inflict injury,"[27] the doctrine of avoidable consequences does not act as a bar to recovery.

The doctrine of avoidable consequences has arisen recently in the context of another wrongful death claim where the decedent, for religious reasons, refused to receive blood products that would have saved her life. The patient ultimately died from acute post-partum hemorrhage. Although the defendant was dismissed before the Court could rule on the application of the doctrine, the defense sought to completely bar recovery of wrongful death damages given Plaintiff's affirmative failure to act to avoid harm. If you find that the plaintiff has taken some action where she failed to avoid harm, or where she failed to follow orders, you may be able to reduce the damages claim significantly, or possibly eliminate the damages claim.

B. Collateral Source Considerations

Generally, the collateral source rule in in multiple states serves to prohibit a party from presenting evidence that another party received payments from other sources, such as plaintiff's own insurer.[28] The premise underlying this rule is that "a tortfeasor cannot

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[27] Chrysler Corp. v. Batten, 264 Ga. 723 (1994).

[28] Andrews v. Ford Motor Co., 310 Ga. App. 449, 451 (2011); Abrishamian v. Barbely, 188 Md. App. 334, 981 A.2d 797 (2009) (stating part of the reasoning for Collateral Source Rule providing for exclusion of evidence of plaintiff's insurance coverage is, "to be sure that a tortfeasor pays the full amount of damages, even if the injured party's expenses have been paid by a third party (such as a health insurer)," but further finding an exception applied and evidence of insurance was admissible because plaintiff had opened the door by asserting through testimony of his doctor that plaintiff delayed treatment because of insufficient funds); Geske v. Williamson, 945 So.2d 429 (Miss. 2006) (noting tortfeasor generally cannot introduce evidence of plaintiff's other sources of recovery to mitigate damages, but exception exists if evidence is introduced for other purpose); Acuar v. Letourneau, 260 Va. 180, 531 S.E.2d 316 (2000) (holding that defendant in personal injury case cannot deduct from the damages any of the benefits plaintiff obtained from

diminish the amount of its liability by pleading payments made to the plaintiff under the terms of a contract between the plaintiff and a third party who was not a joint tortfeasor."[29] This has long been the rule in Georgia, Virginia, and other states, and remains the rule today. However, current trends may call into question the applicability of the collateral source rule under certain circumstances and further seek to eliminate elements of medical expenses based on expenses "actually incurred."

This trend has specifically arisen in the context of payments for medical services that are paid by Georgia's Medicaid Program. For example, an account statement from a hospital may read that a bill totals $250,000.00 as charged, but then reveal that Medicaid adjusted the charge to $100,000.00. Such a write-off by Medicaid is common practice and occurs in almost all situations where Medicaid benefits are involved. Because these medicals bills are presented as items of special damage, an argument can be made that the actual amount paid by the Medicaid Program is the proper measure of damages. The reasoning behind such argument can be broken down into 5 essential parts: 1) State and Federal law require healthcare providers to accept the actual amount paid; 2) the actual amount paid reflects the amount of "special damages which actually flow from the tortious act;"[30] 3) recovery of more than the amount actually paid represents a double

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his health insurance, "whether those benefits took the form of medical expense payments or amount written off because of agreements between [plaintiff's] health insurance carrier and his health care providers.").

[29] Id.

[30] O.C.G.A. § 51-12-1 ("Special damages are those which actually flow from a tortious act; they must be proved in order to be recovered.")

recovery; 4) limiting recovery prevents fraud on the jury; and 5) limiting recovery to the actual amount paid does not violate the collateral source rule.

On the first point, Federal law makes clear that if a Medicaid provider accepts Medicaid payments, such payments represent "payments in full." Likewise, state appellate courts have acknowledged that a Medicaid provider must accept Medicaid payments as full reimbursement for the services rendered, and that those providers may not accept payment in excess of that full reimbursement amount.[31] While this may appear to be a collateral source issue, the argument that a billed versus paid distinction in the Medicaid context is unrelated to the collateral source rule, and actually helps protect the rule. Applying the argument, a defendant would continue to be prohibited from introducing evidence at trial regarding payments that a third party made towards medical expenses. Rather, a defendant would merely seek to have the amount actually paid be the amount submitted to a jury as an item of special damage. This, in turn, would ostensibly satisfy the public policy provision in many states that "prohibits a plaintiff from a double recovery of damages"[32] by disallowing submission to the jury of expenses that are never required to be paid. It is yet to be seen if this strategy will work, but do not be surprised if this issue encountered in cases where plaintiff's medical expenses have been paid by the Medicaid program.

IV. CONCLUSION

While it remains true that the best way to keep damages low is to avoid them, this paper has highlighted a number of methods of attack that may help in lower damages.

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[31] Vallentine v. Allstate Ins. Co., 140 Ga. App. 411 (1976).

[32] Candler Hosp., Inc. v. Dent, 228 Ga. App. 421 (1997).

Although defendants will usually find the easier route of attack being to focus on the causal relationship (or lack thereof) between the tort and the damages sought, there may be other options available depending on the specifics of the case. Regardless of the plan of attack, an analysis of damages and plan for attacking such claims should be made early and often.

DIGITAL FORENSICS AS A TOOL IN DISPUTE RESOLUTION – A DOUBLE-EDGED SWORD

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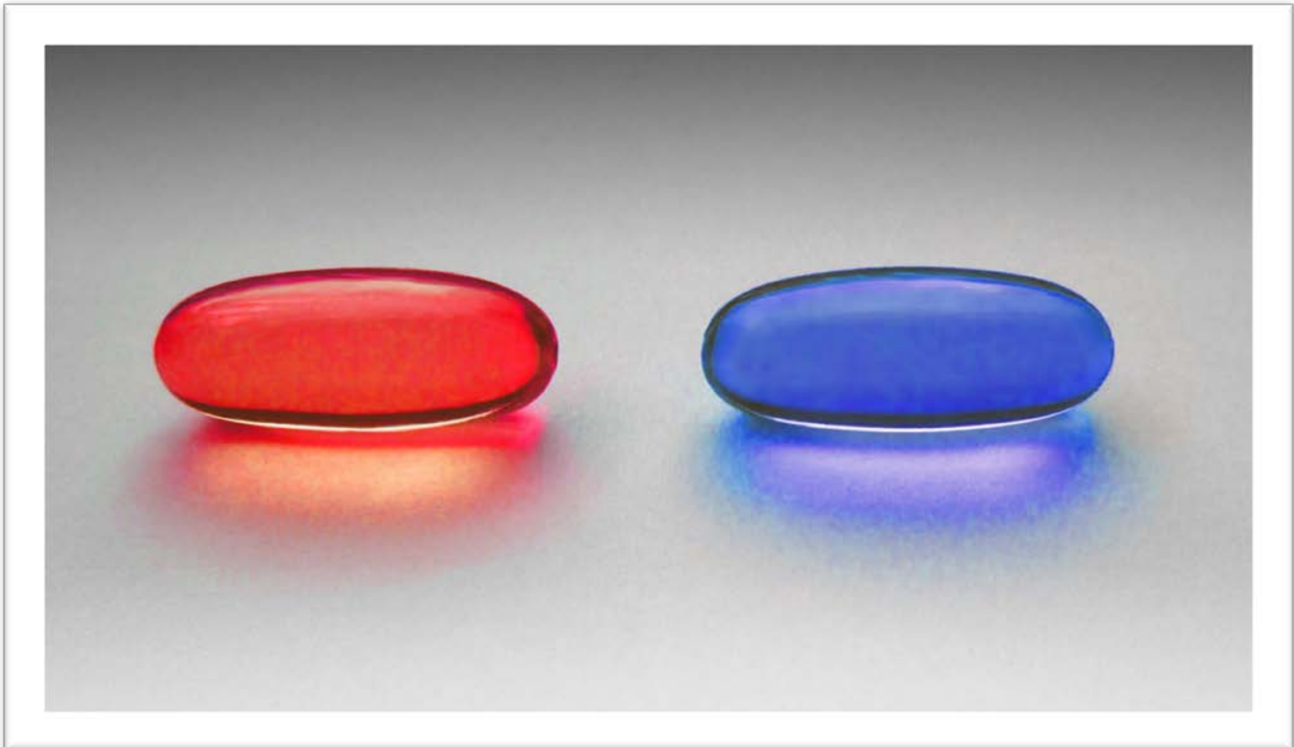

Introduction

The construct of modern society mandates the use of digital devices to conduct personal and business transactions. The ability to freely choose the level to which we embrace and integrate technology into our daily routines is rapidly disappearing. To be a citizen of an industrialized nation requires the acceptance of the loss of complete anonymity. The ideas of “going dark” or “running off the grid” are great concepts for Hollywood movies, but are becoming increasingly impossible for those who live and work in modern society. As a by-product of this technology state, we as individuals create a massive data footprint when utilizing computers, smartphones, and other technology. The increased interest in the aggregation of consumer data has created a separate and perhaps more massive pool of uniquely identifying data (UID) tied to each individual engaged in technology use. The ability to identify and access these various points of data aggregation can provide unique insight into an individual’s routines, actions, associations, and other relevant metrics that may benefit an investigation or defense action. Conversely, the identification and recovery of such data may serve to confirm or further exacerbate a known issue. Ultimately, developing an understanding of the digital evidence concept will equip the individual with a complete view of the risk or reward landscape.

1. Common Points of Data Aggregation

Technology improvement and consumer demand are factors driving the development of new digital technologies. The increase in data storage density and dramatic decrease in storage cost are such areas.[i] These aspects, coupled with the unification of device function and the development of high speed cellular networks, have fundamentally impacted the placement of device technologies in

the pecking order when one is considering the collection and analysis of digital data. The area of data forensics must also adapt and change to keep pace with technology advances.

A. Smartphone Mobile Devices

Smartphone devices as a principal means of data consumption became the norm beginning in 2014[ii] as the volume of search queries from static devices such as personal computers (PC) and laptops fell below that of the smartphone device. The device's design has followed a technology convergence approach through the integration of many user desired functions into a single device platform. Functions previously found in individual technology devices, such as the digital camera, video camera, mobile telephone, digital messaging (paging), global positioning system (GPS), digital music player, radio, and television, have now been merged into the smartphone. Common activities such as electronic mail, internet browsing, document viewing and construction, media viewing, and voice communications are now conducted using the smartphone.

The memory storage capacity of these devices has increased in step with the advancements in flash memory technology. Storage is often augmented using cloud-based storage services. The management of data storage and deleted data retention differs from traditional memory storage previously common in traditional computing platforms. Data encryption is a common practice used with smartphone devices.

Cloud and Synced Data Storage

The increased use of mobile computing platforms has necessitated the development of flexible and accessible data solutions. The demands of business have also impacted the traditional network

and data storage concepts. Centralized business operations have been supplanted in favor of a more fluid business concept that allows Internet presence and exposure to global markets. These factors have fueled the development of cloud-based data hosting, a service industry based on cheap data storage costs, high-speed access, and near 100 percent uptime reliability.[iii] Cloud-based storage and computing environments provide the foundation for social media platforms, file sharing services, mobile device data sync/backup, electronic mail, and digital personal profile management. Many of the services mentioned require the user's active involvement and/or consent for the creation of accounts and the collection of data. Collection of user data may also occur through less than clear acknowledgements, such as a by-product of accepting a lengthy Terms of Service or Access Agreement when installing applications (apps) on the smartphone. A limited list of data collected and stored in the cloud may include photographs, documents, telephone call logs, electronic mail, Short Message Service (SMS) and Multimedia Message Service (MMS) content and associated metadata, voicemail messages, location data (GPS), wireless network sign-on history, mapping and routing history, voice commands or voice search strings, internet search history, and search term history.

B. Traditional Computing Systems

Although current trends suggest a move away from the traditional desktop PC and laptop computers (computers), these devices are still commonly used. The design and operation of these computers lend themselves well to data forensic processes but stand in contrast to the function and operation of the smartphone platform. The design principals in place during these systems' evolution, both hardware and software, permit the recovery of relevant data through forensic processes that, in many ways, are more robust than data that may reside on the smartphone. The relatively large

storage capacities of the traditional computer, often 10 to 30 times the capacity of a smartphone, allow for the retention of a long digital history on the computer. Data encryption, common on the smartphone platform, is rarely encountered when assessing data contained on computers. The exceptions being computers used in business segments falling under government and/or privacy regulations, banking, finance, investment, healthcare, and government contracting entities, as examples.

C. Many Other Sources

How can we fully understand the numerous other possible data aggregation points available for consideration? My recommendation is to assume data exists until proven otherwise. Current technology trends, such as the Internet of Things (IoT) explosion[iv] coupled with the breakneck speed of cloud-based storage and computing growth, have served to create myriad points for consideration. Other possible areas to address include Smart TVs, Internet-enabled appliances, mobile-enabled vehicles, autonomous driving vehicles, video security systems, Smarthome devices, building automation and control systems, factory automation systems, building access control platforms, wearable technologies (video and data collection), drones, and solid-state data storage devices of any type.

2. Privacy and Data Forensics

The advent of mobile computing, coupled with the growing interest in the analysis of user-generated data for the purpose of big-data analysis, has brought individual privacy and the protection of data resulting from actions and activity of the user to the forefront of legal concerns. Given the average individual generates between .3 and .7 Gigabytes of data per day,[v] the amount of user-

generated data is staggering and presents an interesting argument regarding ownership and privacy. Many standing legal rulings and laws prevent the production of user data from internet-based service providers and cloud-storage locations.[vi] Data residing in static storage states on mobile or computer platforms also garners protection from unauthorized collection and viewing. In the realm of civil litigation proceedings, authorization to collect and analyze data is often at the discretion of the owner of the data, unless compelled by court order.[vii] [viii] In the case of smartphone devices, this data may be encrypted, and obtaining user passcodes is required to gather any meaningful data. Simple device passcode locks are sufficient to thwart forensic collection processes in many cases. Although technology advances may present tools or techniques to circumvent intended protective "locks" on data,[ix] data privacy and legal precedent prevent the implementation of such solutions to obtain access to user data. It is possible legal contracts or other binding language may allow for the compulsion to produce user's data.

The current Bring Your Own Device (BYOD) policies adopted by many businesses have also introduced more confusion into the understanding of data ownership. Allowing end users to utilize personal computing and mobile devices in the workplace has created a complex intermixing of personal and business data on the same platform. This scenario creates an immediate conflict when considering the protection of personal data from the investigation of business-related activities. Although the technology landscape is attempting to address this through sophisticated device management platforms, a clear standard has not been established.

Recognizing the foreseeable legal battle over the production of user data, many Internet-based service providers and social media platforms have created mechanisms and tools to allow the

collection of data by the authorized account holder or a second party authorized by the account holder. In all cases, it is highly recommended the ownership of the data at interest is established, the owner is advised of the intent to collect and analyze, and authorization and consent is obtained. The use of a third-party vendor to collect, document, produce, and securely store the subject data is highly recommended. The use of in-house technology staff is discouraged due to concerns of bias or improper access to data.

3. Summary

Technology growth, social dictates, and cost-driven factors have all coalesced to create massive data collection points containing potentially valuable and/or damaging information which may be relevant in litigation and dispute resolution. Careful consideration should be made when weighing the benefits or risks in obtaining and analyzing relevant data. It is important to know this information exists and to know your opponent may also be aware of the same potential.

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[i] https://www.spectralogic.com/wp-content/uploads/white-paper-digital-data-storage-outlook-2017-v3.pdf

[ii] https://www.statista.com/statistics/434152/local-mobile-desktop-search-query-volume-usa/

[iii] https://arxiv.org/ftp/arxiv/papers/1308/1308.1303.pdf

[iv] https://www.statista.com/statistics/471264/iot-number-of-connected-devices-worldwide/

[v] https://www.quora.com/How-much-digital-data-does-an-average-digital-user-generate-per-day-and-per-year

[vi] https://content.next.westlaw.com/6-502
0467?transitionType=Default&firstPage=true&bhcp=1&contextData=(sc.Default)

[vii] https://consumermediallc.files.wordpress.com/2014/11/245515028-fingerprint-unlock-ruling.pdf

[viii] https://consumermediallc.files.wordpress.com/2016/12/iphonepasscode.pdf

[ix] https://blog.malwarebytes.com/security-world/2018/03/graykey-iphone-unlocker-poses-serious-security-concerns/