EAGLE INTERNATIONAL ASSOCIATES

Presents

THE WHOLE WORLD IS WATCHING: Successful Defense of Claims in An Increasingly Visible World

May 15, 2019

W Chicago City Center
Chicago, IL

EAGLE INTERNATIONAL ASSOCIATES

MISSION STATEMENT

Eagle International Associates is an international network of independent law firms, adjusters and claims related service providers throughout the United States and Europe. Eagle members are dedicated to providing insurance companies and self-insureds with the highest quality legal and adjusting services for competitive and fair compensation. As members, we are committed to the highest ethical standards and act with professionalism and civility in all our endeavors. Eagle members exceed their clients' expectations for quality and service. At every opportunity, we promote the use of Eagle and its members and refer existing relationships through active participation in Eagle's meetings, programs and seminars.

DIVERSITY POLICY

Eagle International Associates, Inc. is of the strong belief that our organization is stronger, more valuable, and more effective through the inclusion of adjustors and attorneys of diverse gender, sexual orientation, racial, ethnic, cultural backgrounds, and all religious or non-religious affiliations. Eagle recognizes that the inclusion of such diversity is vital in order to achieve excellence and to serve its clientele effectively. Eagle is committed to a further understanding of its cultural filters and the absolute need to accept each person as a valued, talented, unique individual, which, when working with other Eagle members, will bring the organization and all its members genuine benefits and competitive advantage in the marketplace.

THE WHOLE WORLD IS WATCHING:
Successful Defense of Claims in An Increasingly Visible World

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MAY15, 2019
Chicago

PROGRAM

12:00 pm **Registration/Sign-In**

12:45 pm **Welcoming Remarks**
John W. VanDenburgh, Esq., Napierski, VanDenburgh, Napierski & O'Connor, LLP
Chair, Eagle International Associates, Inc.

Program Introduction
Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, P.C.
Vice Chair, Eagle International Associates, Inc.
Program Chair

1:00 pm **Up in Smoke – How Do the Changing Marijuana Laws Impact Claims?**
Moderators: Ron Thackery, Esq., Pozo-Diaz & Pozo, P.A.
David V. Hayes, Esq., Owen Gleaton Egan Jones & Sweeney LLP
Panelists:
Reema Hammoud PharmD, BCPS, Director Clinical Pharmacy, Complex Pharmacy Management, Sedgwick
Dean C. Heizer, Esq., Executive Director, Chief Legal Strategist, LivWell Enlightened Health
Kieran J. O'Rourke CPCU, CRM, CIC, Vice President, Director of Underwriting, Cannasure Insurance Services LLC
Steven B. Sherman, J.D., PSA Insurance & Financial Services
Carol Threlkeld, Strategic Claims Consultant, Berkley Select

2:00 pm **Gathering and Protecting Evidence in Canada & Europe, for Insurers, Litigants & Attorneys.… We are no longer in Kansas, Toto**
Moderators: David A. Bertschi, Esq., Bertschi Orth Solicitors and Barristers LLP - Ottawa
Paul M. Finamore, Esq., Maryland
Panelists:
Michael P. Acain, Esq., McKay deLorimier & Acain - California
Klara Dvorakova, Esq., Holubova Advokati - Czech Republic
Pierre Humblet, Esq., Lebeau & Humblet - Belgium

2:45 pm **BREAK**

3:00 pm **Mediation: Behind Closed Doors**
Moderators: Jeffrey V. Hill, Esq., Hill & Lamb LLP
Lindsey J. Woodrow, Esq., Waldeck Law Firm P.A.
Panelists:
Michael DeLonay, Vice President, Swiss Re
Laura Frankel, JAMS
Jeff Kichaven, Esq., Principal Mediator, Jeff Kichaven Commercial Mediation
Tom Werlein, Associate Counsel, Sentry Insurance

4:00 pm **The Future of Successful Litigation Management: 2020's Not Just Hindsight Any More**

Moderators: Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, P.C.
Matthew L. Schrader, Esq., Reminger Co., LPA

Panelists:

Glenn Fischer, Senior Counsel, Complex Claims, Markel Service, Incorporated
Haralyn Isaac, Vice President Claims, Great American Insurance Company
Crystal Ivy, Claims Director, AmTrust Financial Services, Inc.
Kim G. Quarles, Senior Vice President, Willis Towers Watson

5:00 pm **Closing Remarks**

Cocktail Reception

6:15 pm **Dinner**

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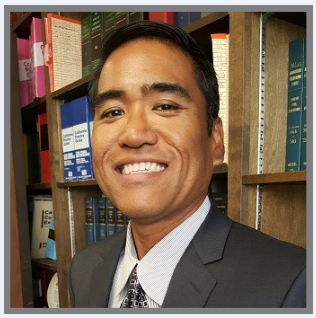

Michael P. Acain is a partner at McKay, de Lorimier & Acain, in Los Angeles. Specializing in civil litigation, Michael has represented a number of religious organizations, school districts, and assisted living care facilities in a wide variety of matters, including those involving general and premises liability, professional liability, and the protection of rights guaranteed under the First Amendment of the United States Constitution. Michael has also been involved in a number of Appellate matters, and is currently admitted to the Ninth Circuit Court of Appeals, in addition to the California State Bar and the U.S. District Court for the State of California. Michael has extensive experience in various forms of Alternative Dispute Resolution, and has successfully mediated a number of cases, including those involving claims for elder abuse. A graduate of Loyola Marymount University, and Loyola Law School, Michael previously served on the Board of Governors for the Philippine American Bar Association, and has been recognized as a Super Lawyers Rising Star.

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David Bertschi is a founding partner at Bertschi Orth Solicitors and Barristers LLP./s.r.l. “BOS Law”. David is an experienced Civil trial attorney who for the past 34 years has restricted his Insurance and Risk Management practice to highly contentious, catastrophic and precedent-setting cases in insurance law. David represents insurers, self-insured corporations and institutional clients throughout Canada, the US and overseas. David is fluently bilingual. He has represented clients in Jury & non-Jury trials and before a variety of Administrative Tribunals on complex multi-party, multi-jurisdictional and catastrophic losses. David is a former part-time Assistant Crown Attorney and Ontario Human Rights Prosecutor. He is an accredited mediator who uses his training in mediations and arbitrations of litigation disputes both in private and court-mandated proceedings.

David is a past President of the Canadian Defence Lawyers, which is Canada’s largest organization of civil defence trial lawyers. In recognition of his substantial experience in insurance litigation, David has been invited to write and speak on numerous issues of interest to insurers, self-insured corporate clients and to various industry associations including: the Advocate’s Society, the Ontario Bar Association, the Bar Admission Course, Canadian Defence Lawyers, the FDCC and the Canadian Chamber of Commerce on “hot-button” topics such as : Assessing Catastrophic Impairment, Aggravated and Punitive Damages, Employer and Host Liability, Uninsured and Underinsured Liability, Privacy, Cyber Security and the GDPR, on the art of Cross-Examination and on Preparing and Presenting Expert Evidence at the CAT and CMLE annual certification programs for the Canadian Society of Medical Evaluators (CSME).

For a listing of David's credentials and accomplishments and those of the lawyers at BOS Law, please visit our website at www.boslaw.ca.

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Based in Chicago, **Mike DeLonay** has over 39 years in the insurance industry. For the best decade, Mike has worked on the Swiss Re Primary E&S Casualty Team handling complex, high exposure GL claims of all types. Mike's extensive claim experience includes handling all types of property and casualty claims both personal and commercial lines, as well as primary and excess layers of coverage. Mike has a specific expertise is in Public Entity Claims including civil rights litigation. Mike is a member of the Claims & Litigation Management Alliance (CLM) serving on their Insurance Coverage Litigation Committee and their Municipal Law Committee. Mike has been a panel member at several industry events.

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Klara Dvorakova is a partner of Holubova advokati s.r.o., which provides legal services in the Czech Republic since 1991 and is particularly known for its expertise in travel business law, professional liability and insurance, companies' start-ups and real estate transactions.

Klara is a leading travel law specialist in the Czech Republic. She is the co-author of the first Czech complex legal book on travel law: Travel Law (Dvorakova, born Havlickova, K., Kralova, R. Cestovni pravo. Praha: C. H. Beck, 2015) and has commented on package travel contract in the Civil Code Commentary (Praha: C. H. Beck, 2017 and 2019). She gives lectures on Travel law at the Faculty of Law in Prague and Brno, and regularly publishes articles and gives lectures on legal issues related to liability, travelling and regulation of travel business. Klara's clients are predominantly tour operators, travel agents, hotels and other travel businesses, whom she advises on how to get started or realize new projects and how to conduct business in accordance with the laws applicable to the sector of tourism, including the insurance issues. Klara is also an experienced professional liability lawyer. She has a special interest in personal injury cases caused by accidents during travelling, and sports – especially climbing or mountaineering. She currently acts as a chief of the Legal Experts Working Group of the International Climbing and Mountaineering Federation (UIAA).

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Paul M. Finamore's litigation practice concentrates in first and third party claims including the defense of general liability, professional liability, and employment claims. He is admitted to practice in the state and federal courts in Maryland and Washington, D.C.

Mr. Finamore has an AV- preeminent peer rating in Litigation, Insurance, and Labor and Employment. He has been recognized as a top attorney by Maryland SuperLawyers magazine annually from 2008 through the present. He is a three-time recipient of the Golden Gavel Award from the Westfield Group of Insurance Companies. He is a member of Eagle International Associates, Inc. and the Federation of Defense Corporate Counsel.

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Glenn Fischer is Senior Counsel, Complex Claims, at Markel Service, Incorporated. He is responsible for matters of high exposure and complexity involving professional liability risks faced by lawyers, medical professionals, insurance agents and brokers, IT professionals, architects and engineers, environmental contractors, senior living facilities and other miscellaneous professional risks. Glenn came to Markel in 2008 from private law practice, and previously held positions as senior claims examiner, executive claims examiner, and claims manager. He received his JD cum laude from the John Marshall Law School, Chicago, where he was a member of the Law Review.

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Throughout her 30 year career in the insurance industry and as a litigator, **Laura B. Frankel**, Esq. developed a strong reputation as a skilled negotiator and case evaluator. Ms. Frankel joined JAMS after more than 15 years at CNA Insurance. At CNA, she was involved in litigation management of complex, high exposure legal malpractice and other professional liability cases; coverage evaluation and litigation and trial roundtables. She participated in hundreds of mediations around the country.

Ms. Frankel has special expertise in complex, high-severity professional liability claims for lawyers and accounting professionals. During her law firm practice, she handled a wide range of civil litigation, with a focus on medical malpractice cases. She is recognized for her tenacious, collaborative and creative approach to problem solving. She has a keen understanding of how to assess risk on both sides of a dispute.

Ms. Frankel has extensive experience in the resolution of complex disputes Insurance Coverage, Bad Faith, Professional Liability, Personal Injury and Products Liability.

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Reema Hammoud, Director Clinical Pharmacy, Complex Pharmacy Management, Sedgwick. Reema is a board certified pharmacist with over 10 years of experience. She earned her doctorate of pharmacy from Ferris State University in 2006 and gained board certification in pharmacotherapy in 2014. She has experience working in a multitude of clinical settings including community, hospital, and psychiatric. Reema joined Sedgwick in 2014 and has been active in formulary management, clinical services, and drug utilization management. Along with working as a clinical liaison between clients and pharmacy benefit managers, Reema provides developmental support to the Complex Pharmacy Management Team.

Through her experience and training she has helped integrate pharmacy solutions and opioid best practices into Sedgwick, helping numerus clients and claimants successfully transition away from opioid treatment.

Reema has helped Sedgwick with the creation of a new student clerkship program which allows pharmacy students the opportunity to include workers' compensation studies as part of their pharmacy curriculum. She has also created a summer internship program that will allow Sedgwick the opportunity to work with newly trained pharmacy students to synergistically enhance complex pharmacy services.

Reema's main goal is to work with clients and providers to ensure the best results for the injured worker. Reema and her highly trained staff utilize best practices which include the development of weaning protocols that focus on opportunities to allow providers to discontinue medications in a safe and effective way. This allows clients the benefit of having their injured workers off of medications that may have been hindering their complete recovery.

Outside of the clinical realm, Reema has been passionate about cultivating an atmosphere of ideas by promoting inclusion. She is currently the Chair of Diversity and Inclusion council at Sedgwick, local office Manager Liaison for culture warrior committee, and a Member of the committee of the Saint Joseph Mercy Hospital board.

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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.

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Dean Heizer has been practicing law in Colorado for 29 years. Prior to joining LivWell, Dean was a founder and managing partner of Heizer Paul LLP, a boutique Denver firm representing clients in complex civil litigation, civil rights, regulatory matters, employment, employee benefits, non-profit formation and counseling, politics and government relations. Prior to forming Heizer Paul LLP, Dean was a partner with Gorsuch Kirgis LLP, where his practice focused on management side labor and employment law and the representation of Taft-Hartley pension plans and health benefit plans.

At Livwell, Dean, Executive Director and Chief Legal Strategist, is responsible for the legal affairs, human resources, security and compliance, risk management and insurance and government relations. Dean assists LivWell with corporate legal and political strategy, and helps the firm to navigate the regulatory pitfalls inherent to the business. Dean also acts as the gatekeeper for all of the firm's outside counsel relationships from litigation to transactions.

LivWell is one of Colorado's largest vertically integrated cannabis businesses, with 14 dispensaries around the state. LivWell employs nearly 600 of the hardest working farmers, inventors, advocates, and budtenders in the business. Learn more at www.livwell.com.

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Jeffrey V. Hill is a partner at Hill & Lamb LLP an insurance and trial practice law firm in Portland, Oregon. He is a thirty-five year plus trial lawyer who concentrates his practice in Oregon and Washington in the areas of complex insurance coverage and bad faith as well as defense of professional, fire, environmental and financial liability claims. Jeff received his undergraduate degree in economics from Washington State University in 1978 and his law degree from the University of Puget Sound in 1981. He is admitted to practice in all courts of the states of Oregon and Washington. He is a member of the Oregon Association of Defense Counsel, The International Association of Defense Counsel, Defense Research Institute, The CLM and is a frequent contributor to insurance and trial related presentations throughout the United States and Europe. He is recognized as an Oregon Super Lawyer and by Best Lawyers.

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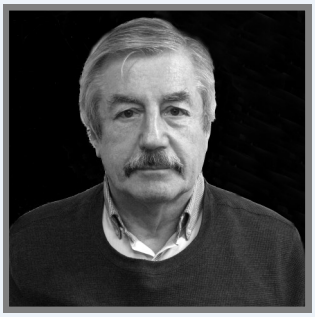

Pierre Humblet is a founding partner of *Lebeau et Humblet* in Liege, Belgium. Mr. Humblet specializes in liability and insurance matters as personal injury losses, fire insurance, professional liability and malpractice, products liability etc. He is now senior partner of his law office and the firm is thriving with a concentration zone in the four provinces of Southern Belgium, including the German-speaking region. Mr. Humblet's association with Eagle International started in the 1990s. Since then, Mr. Humblet has been a loyal Eagle member and on the Board of Directors for several years. Mr. Humblet finds infinite worth in learning more about the structure, philosophies, client relations and management styles of his American counterparts. Eagle membership, according to Mr. Humblet, also represents as unique, his firm's ability to provide clients with wider, international services, while also increasing visibility and reputation among clients and peers. Mr. Humblet obtained his Doctor in Law from Liege State University. He is registered with Liege Bar Association and allowed to plead before all Belgian Courts except the Supreme Court.

In addition to his Eagle membership, Mr. Humblet is an avid mountain climber and is now President of the Court of the International Mountaineering and Climbing Federation he presided in the past. He has travelled over the last 27 years to promote worldwide mountaineering activities. He is also an arbitrator for the Belgian Court for Arbitration in Sports and a teacher for sports instructors in liability matters.

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Haralyn Isaac is Vice President-Claims at Great American Insurance Company's Executive Liability Division. Ms. Isaac handles multi-million dollar claims made against corporate directors and officers, breach of contract and bad faith claims brought against Great American and media related and data breach claims. In addition, she manages a staff of attorneys handling of professional liability claims. In addition to her claim handling and supervisory responsibilities, Ms. Isaac's duties at Great American includes a role on the division's steering committee, membership on the panel counsel task force, working with underwriters on policy language, interpretation and endorsements, interacting with reinsurers and selecting and managing outside legal counsel. She also has primary responsibility for the oversight of managing general underwriters.

Prior to joining Great American, Ms. Isaac was a Principal of Milliman USA, and led the firm's claim management consulting practice. Prior to joining Milliman, Ms. Isaac practiced law with a major Chicago law firm.

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Crystal Ivy is Claims Director, Professional Liability at Amtrust North America since 2016 handling insurance agent's and attorney's liability claims. Previously employed as a Senior Claims Attorney at Executive Liability Division, Great American Insurance from 1998-2005 and Swiss Re from 2005-2016, handling varied professional liability claims, including director's and officer's liability claims, financial entity's liability claims, non profit executive 's liability claims, and employment practices liability claims. Additionally, held various management positions in human resources and risk management at W.H. Smith and Federated Department Stores. A graduate of Smith College in Northampton, Massachusetts, receiving a Bachelor of Arts degree with a double major in Government and Economics and of DePaul University School of Law, receiving a Juris of Doctorate in law. Presently, resides in Chicago with her family and remains active in numerous community projects and youth focused volunteer activities.

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Jeff Kichaven is "Ranked in Chambers USA" as one of the country's top mediators. Based in Los Angeles, he has a nationwide practice focusing on insurance coverage, intellectual property, and other complex B2B cases. He is an Honors Graduate of Harvard Law School and a Phi Beta Kappa Graduate of the University of California, Berkeley. "Who's Who Legal 2018" honored him as a "Thought Leader" in mediation, one of only seven mediators in North America to receive this recognition. He practiced scorched-earth commercial litigation for over 15 years before he began his mediation practice in 1996. He is a Member of the American Law Institute. He is Contributing Author of Chapter 25, "Considering Alternative Dispute Resolution," in the New Appleman Insurance Practice Guide. He has been named California Lawyer Attorney of the Year in ADR, and Best Lawyers named him Best Mediator in Los Angeles, 2015. The Asian Pacific-American Dispute Resolution Center awarded him its Special Award for Excellence in Mediation, for his commitment to diversity and his nationwide leadership in his profession. He has taught mediation training and mediation advocacy training for numerous bar associations and schools, including his Alma Mater, Harvard Law. His views on mediation have been cited in The New York Times and The Wall Street Journal.

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Kieran J. O'Rourke has over 30 years of impressive commercial underwriting, product and program development experience in the insurance industry.

Prior to joining Cannasure, Kieran was Assistant Vice President of Property Underwriting of AmTrust Financial Services, Inc (AFSI). Kieran's career experience spans P&C underwriting, MGA underwriting for alternative energy products and alternative market product development, oversight of research and product development and directing regional commercial insurance sales for a Fortune 500 carrier.

Kieran is a talented and respected leader. His disciplined underwriting approach and business fundamentals consistently yields sustainable growth and profits relative to proprietary program development.

At Cannasure, Kieran manages the firm's Program division and guides the company's development of future cannabis and hemp programs.

Kieran's expertise keeps him busy and is well sought after by leading media outlets and speaks at insurance and cannabis industry events. Kieran has a unique perspective and thought-leadership of underwriting relative to the emerging trends and risk transfer solutions in the cannabis and hemp arena.

A graduate of The University of Akron, Kieran holds the Chartered Property Casualty Underwriter (CPCU) designation, as well as the Certified Insurance Counselor (CIC) and Certified Risk Manager (CRM) designations.

Now retired from his civic duties, Kieran held elected office for over 20 years as a Trustee on the Village of Seville's (Ohio) utility board. He now devotes his free time to family, which includes a growing number of grandchildren.

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Mitch Orpett, is the Vice-Chair of Eagle and its attorney representative for the State of Illinois. He 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 40 years of service to the profession, holding numerous leadership positions in the American Bar Association, among others. He was elected to the ABA's Board of Governors and served 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 was 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).

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

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Kim Quarles has been in the insurance business for 25+ years, having practiced law before joining the insurance industry as a Claim Attorney. She focuses on Professional Liability exposures for law firms, management consultants, and the unique cyber risk insurance needs of professionals. Before joining the FINEX U.S. team, Ms. Quarles was responsible for a $25,000,000 lawyer's malpractice program within Willis. In this role, she managed risk management, claim coordination, program development, and strategic planning.

Ms. Quarles is a frequent speaker on law firm issues, professional liability, Cyber, TRIA and Global Warming. Most recently she presented comments at the closing plenary session of 67th United Nations DPI NGO Conference at the UN and was a panel member at the CLM conference on Cutting Edge Issues in the Practice of Law.

Prior to joining Willis in 2000, Ms. Quarles was responsible for developing a 50-state professional liability program for the Berkley Group. In that capacity, Ms. Quarles formulated departmental guidelines and procedures; drafted and implemented underwriting guidelines, initiated product development, drafted policies, evaluated new business opportunities, and analyzed underwriting results. While employed with Virginia Surety, Ms. Quarles was responsible for restructuring several unprofitable professional liability programs and returning them to profitability. Product lines included Lawyers, Insurance Agents and Specified Professionals. As a Senior Attorney at Shand, Morahan, Ms. Quarles supervised a caseload of Lawyers, Products Liability, Architects and Engineers, and Realtors claims.

Ms. Quarles earned her Bachelor's degree from Western Illinois University and her J.D. from The John Marshall Law School.

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Matthew L. Schrader is a shareholder in Reminger Co., L.P.A.'s Columbus office. He has litigated and tried cases involving professional liability, medical malpractice, wrongful death, products liability and copyright infringement. Matthew has tried cases in both the state and federal courts throughout Ohio. He has also

argued and briefed appeals in Ohio's appellate courts and the Fourth and Sixth Circuits. Matthew earned his B.A. from Xavier University, University Scholar in 1998 and his J.D. from the University of Dayton School of Law in 2001.

For nearly 10 years, Matthew served as the Coach of and Advisor to the Mock Trial Team of the Capital University School of Law, where he also served as Adjunct Professor teaching second and third year law students trial advocacy and evidence. Matthew has acted as general counsel to one of central-Ohio's largest non-profit organizations, a health, wellness and addiction treatment facility, and a large auto parts distributor. He has spoken to audiences throughout the country on issues dealing with trial practice, jury selection, medical negligence, professional liability, claims management and employment issues. He is Rated AV® Preeminent™: Very Highly Rated in Both Legal Ability and Ethical Standards by Martindale Hubbell Peer Review and has been recognized as a Rising Star by Ohio Super Lawyers Magazine in 2011, 2014-2016 and as a Super Lawyer from 2017-2019. Matthew has also been selected as one of the Top Lawyers in Central Ohio by Columbus CEO Magazine from 2016-2019.

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Steven Sherman J.D. has over 12 years of experience in the insurance industry. Steven provides a variety of risk management solutions for physicians, lawyers, and other professionals. He is also the area's leading cannabis insurance expert, securing specialty coverages for medical and recreational marijuana growers, processors, dispensaries, security firms, lawyers and consultants serving the cannabis industry. His legal background and insurance expertise allows him to use his wide network of resources to offer creative solutions for his clients.

In his former role, Steven oversaw the development of a captive insurance company as Executive Director of LifeSpan Products & Services, where he evaluated different insurance programs for the organization. Steven's experience both as a buyer and a seller of insurance, represents an advantage to his clients as he is better able to understand needs and exceed expectations. Steven earned his BA from Emory University in Atlanta and earned his J.D. from the University of Baltimore School of Law. He is also a member and PAC Director of the Maryland Medical Dispensary Association.

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UP IN SMOKE

An Overview of the Impact of Legalized Marijuana

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An Overview of the Impact of Legalized Marijuana

420 Louis

In 1971, five students at San Rafael High School in California began meeting after school near a statue of Louis Pasteur with the intent of locating a crop of cannabis in the area. With time they designated 4:20 p.m. as the time for meeting after school to smoke marijuana, which followed the commencement of most after school activities. It is rumored that the likelihood of their detection was reduced once other students and staff were engaged in extracurricular activities. With time the group shortened the phrase to "4:20" which meant that they would consume cannabis. Over several years, the term gained popularity and April 20 of each year is a celebration of cannabis with many colleagues lighting up in recognition of progress made and future endeavors.

Legalization of Cannabis in the US

Marijuana is legal in 33 states and the District of Columbia for medicinal purposes. In addition, ten US states have legalized marijuana for recreational purposes. Recently, Canada became the second country to legalize marijuana for recreational purposes. Uruguay was the first country to legalize marijuana in 2013.

In the US, legalization at the state level addresses the amount of marijuana that can be possessed by an individual, the number of plants that may be cultivated per household and the legal age for such use, possession, distribution and cultivation. It is noteworthy that most state laws protect individuals from criminal prosecution and civil fines for these permitted uses.

A poll conducted by CBS over four days in April 2019 revealed that among Americans, 65% support the legalization of marijuana. (1) This is an increase of 6% in one year and an increase of 20% since 2013. From the state perspective, one impetus for legalization are the tax revenues generated from permissive legalization statutes. In 2018, the State of Colorado generated $266 million in taxes and fees from marijuana sales. (2) These funds support the general budget as well as education and other initiatives.

There have been a variety of concerns with the legalization and distribution of marijuana which have circulated through the media. For example, whether legalization increases opportunities for use by underage persons, issues surrounding the potency of tetrahydrocannabinol ("THC") in edibles and products inhaled, the need for accuracy in product labeling, whether marijuana is a gateway drug, etc.

The political environment also impacts efforts by states to legalize marijuana. The Obama administration took a relaxed approach to the drug which allowed states to legalize marijuana provided age restrictions and protections for transporting across state lines were in place. Then Attorney General Sessions issued a Memo of Enforcement in 2018 announcing a return to the rule of law requiring the enforcement of Federal law with respect to marijuana. (3) Acting Attorney General Barr indicated in his Senate confirmation hearing that he wouldn't pursue marijuana companies that comply with state laws. (4)

Marijuana and the Controlled Substances Act

The Controlled Substances Act includes marijuana as a Schedule I drug. As a Schedule I drug, marijuana is illegal at the Federal level with criminal penalties for the cultivation, distribution and possession of illicit drugs. The Controlled Substances Act divides drugs and other substances into five separate schedules. (5) The Drug Enforcement Agency ("DEA") of the Department of Justice places substances in these schedules based upon whether they have a currently accepted medical use in treatment, their relative abuse potential and likelihood of creating dependence when abused.

Several examples of Schedule I drugs include Heroin, LSD, Peyote and Marijuana. These drugs have been determined by the DEA to have no current acceptable medical use in the US and lack accepted safety for use under medical supervision and have a high potential for abuse. Interestingly, examples of Schedule II Controlled substances include Dilaudid, OxyContin, Fentanyl, Morphine, Opium and Codeine. Schedule II drugs are designated as having a high potential for abuse which may lead to severe psychological or physical dependence.

In July of 2016, the DEA reaffirmed Marijuana as a Schedule I Drug under the Controlled Substances Act. (6) The extensive review in response to a request from the Governor's of Rhode Island and Washington stated that rescheduling the drug to a lower level would require that the chemistry for the drug is known and reproducible, that adequate safety studies exist, that studies prove efficacy, that the drug is accepted by qualified experts and that scientific evidence is widely acceptable. The reaffirmation provides a detailed explanation that these requirements have not yet been met. Interestingly, because the process for extracting THC or Cannabidiol ("CBD") often produces different volumes, the ability to conduct the same test on groups has been difficult. Thus, the ability to reproduce the same drug for testing and benefit to users has not been met.

Impact of State Legalization on Employment Practices

A 2009 Washington Supreme Court decision (7) involved a Teletech applicant who failed a drug test due to the presence of marijuana. Roe had been issued a medicinal card for marijuana due to her history of migraines. At the time she took the test, Roe advised Teletech of her use of medical marijuana pursuant to a physician's authorization and that she exclusively used the drug in her home. The Supreme Court confirmed that Washington's Medical Use of Marijuana Act ("MUMA") did not obligate Teletech to accommodate Roe's use of medical marijuana, even where Roe did not hold a safety sensitive position and engaged in the use of marijuana solely off duty. The relevant section of MUMA states "(n)othing in this chapter requires any accommodation of any medical marijuana use in any place of employment."

In California, the Compassionate Use Act of 1996 provides that individuals using marijuana under the care of a physician are not subject to criminal prosecution from the State. (8) A 2005 decision of the California Court of Appeals for the Third District (9) denied a qualified person any remedy for termination when testing positive for marijuana. The Court relied on the illegality of marijuana at the Federal level to uphold the termination of Mr. Ross, even though California's Fair Employment and Housing Act prevented employment discrimination based upon a person's physical disability or medical condition. In summary, the employer was not required to accommodate an employee using an illegal substance (as per the Controlled Substances Act), even when it was validly recommended by a physician.

A 2009 decision by the Montana Supreme Court found that the Medical Marijuana Act ("MMA") did not protect an employee from termination for a positive test for marijuana. (10) The employee, Johnson, began using medical marijuana under the supervision of a physician following a work-related injury. Johnson personally paid for the medical marijuana and only used the drug when off duty. After testing positive, the employer asked Johnson to sign a "last chance agreement" agreeing not to test positive for marijuana in the future. The employee refused to sign the agreement and was terminated. The lower court dismissed Johnson's claim for wrongful discharge and the Supreme Court affirmed the decision holding that "(t)he MMA is a decriminalization statute that protects qualifying patients from criminal and civil penalties for using, assisting the use of, or recommending the use of medical marijuana." The MMA specifically provides that it cannot be construed to require employers to accommodate the medical use of marijuana in the workplace.

The Ninth Circuit Court of Appeals held that marijuana use under a physician's supervision in accordance with state law was not protected under the American's with Disabilities Act (ADA"). (11) The court held that the ADA excludes illegal drug users from its definition of qualified individuals with a disability. Although California law excepts uses of marijuana for medical reasons, there is no such exception in the Controlled Substances Act.

The US Court of Appeals for the Sixth Circuit affirmed the District Court's dismissal of a case for wrongful discharge after testing positive for marijuana under the Michigan Medical Marijuana

Act (“MMMA”). (12) The plaintiff, Joseph Casias, joined Wal-Mart in 2001 and was subsequently diagnosed with sinus cancer and an inoperable brain tumor and continued to suffer from head and neck pain. Casias received a medical marijuana card in 2009 and used the drug to manage pain. Following a work-related injury, Casias received a standard drug test pursuant to Wal-Mart policy and prior to its administration showed his card to the staff. Casias tested positive for marijuana and was terminated. The District Court found that the MMMA did not repeal the rule of “at-will” employment in Michigan.

An important decision out of Colorado, Coats, illustrates further that the illegality of marijuana at the federal level controls the outcome of employment related decisions. Colorado’s Supreme Court ruled that Dish Network could terminate Coats for using medical marijuana while off duty. Colorado is one of several states with a Lawful Activities Statute that prohibits employment discrimination for employees engaged in lawful activities outside the workplace. The Supreme Court upheld the decisions of the lower courts and opined that Coat’s marijuana use couldn’t be considered lawful because it violated federal law. In addition, the court held that in Colorado’s lawful activities statute, the term lawful refers only to those activities that are lawful under both state and federal law.

In 2017, the Massachusetts Supreme Judicial Court found a different result in a handicap discrimination case under the Massachusetts Fair Employment Practices Act (“MFEP). (14) This decision has the potential to impact future court decisions. The MFEP provides protection to users from criminal or civil actions and does not contain any anti-discrimination provision or language providing employment protection. In this matter, Barbuto suffered from Crohn’s disease and treated with medical marijuana. Upon accepting a position with Advantage, Barbuto appeared for a drug test and voluntarily disclosed her disease and treatment regimen. After testing positive, she was terminated. In this case, the Court held that if the medical marijuana user is an individual with a handicap or disability, that person may assert a claim for handicap discrimination under state law. This requires the employer to continue discussion with the employee to determine if the employee can perform job duties with a reasonable accommodation. If, other medications than medical marijuana, would serve as reasonable accommodations, they must also be considered.

Maine has the most employee friendly laws for drug testing for marijuana. (15) Maine’s recreational marijuana law essentially prohibits employers from making adverse employment decisions for off-duty use of marijuana. The 2018 law prevents Maine employers from pre-hire testing for marijuana. Reasonable suspicion testing is still allowed in Maine because being under the influence while on duty is not permitted. Those employers subject to federally mandated drug testing requirements are exempted from the Maine statute for those specific employees.

<u>Legalized Marijuana and Workers Compensation</u>

The law regarding the use of marijuana as a treatment regimen for injured workers and the cost covered by the workers compensation provider is in development. While there are a few decisions of note, there is a concern among Insurance Carriers and Third-Party Administrators regarding payment for drugs that are listed on Schedule I of the Controlled Substances Act and that remain illegal at the federal level. A separate question is raised when an injured worker tests positive for marijuana and is a properly authorized medical user while state law allows for the denial of the claim or a reduction in benefits for that activity.

Interestingly, Maine's Supreme Court held that an employer was not required to pay for an employee's medical marijuana, as that would directly conflict with federal law (16)

A New Mexico decision, Vialpando (17), involved an appeal by an employer of a Workers Compensation Administration order to reimburse an employee's medical marijuana costs. The court held that New Mexico's workers compensation laws permit reimbursement and that marijuana is a medically necessary treatment, while rejecting federal preemption arguments.

Similarly, Minnesota's Department of Labor and Industry issued rules excluding medical marijuana from the definition of illegal substances that cannot be used as treatment. Thus, medical marijuana is a reimbursable form of medical treatment.

The California case of Cockrell (18) remains undecided on the subject. The Workers Compensation Appeals Board rescinded the decision of a Workers Compensation Judge's ("WCJ") finding of reimbursement for medical marijuana. The matter has been returned to the WCJ for further consideration of the Health and Safety Code Section 11362.785(d) stating that nothing in the medical marijuana program will require an insurer or health plan to reimburse for medical marijuana.

Legalized Marijuana and Liability

As the marijuana industry expands with the legalization in more states and the entry of well-funded investors, a body of law which is currently in its infancy will likely develop. As growers expand and make their supplies available to a broader group of consumers, issues related to growth, distribution, storage, crop viability, flood, mold, theft, embezzlement, fire, etc. will develop. As consumers use the product, issues related to quality, potency, access to minors and labelling will increase. Dispensaries will continue to deal with issues related to storage, theft, sale to minors, dram shop type liability and the rest.

The availability of insurance and the exclusion of specific coverage from policies will also continue to develop as carriers interested in the industry make their products available. There are questions regarding the ability to enter a contract when the object of the insurance contract is illegal. Will the insurance policy for marijuana be enforceable? Ideas also center on the use of off-shore captives for insurance to avoid the prohibitions afforded by the Controlled Substances Act.

There are two cases with opposite outcomes on the issue of insurance contracts. The first, Tracy v. USAA (19) involved the theft of marijuana plants from the home of Ms. Tracy. USAA denied her claim arguing that since marijuana was illegal under federal law, marijuana plants could not be insured. The court agreed. The second case, Green Earth (20), which operated a growing facility and a retail dispensary suffered wildfire damage. The carrier sought to deny coverage on the grounds that the subject of the risk was illegal marijuana. The Court disagreed stating that the carrier understood the risk when it entered the insurance policy.

While the initial view may have been or a rogue and developing industry, the inherent issues are being addressed and carriers are recognizing a new developing market.

Footnotes

1. Jennifer De Pinto, “Support for marijuana legalization hits new high, CBS News poll finds,” CBS news, April 19, 2019.
2. Colorado Department of Revenue, Marijuana Taxes, Licenses, and Fees, Transfers and Distribution, December 2018.
3. Office of the Attorney General, Memorandum for All US Attorneys, “Marijuana Enforcement”, January 4, 2018.
4. “Trump Attorney General Pick Puts Marijuana Enforcement Pledge in Writing,” Tom Angell, Forbes, January 28, 2019.
5. 21 CFR Sections 1308.11 – 1308.15.
6. “Denial of Petition to Initiate Proceedings to Reschedule Marijuana”, 81 Fed. Reg. 156 (August 12, 2016).
7. Roe v. TeleTech Customer Care Management (Colorado) LLC, 171 Wn.2d 736, 257 P.3d 586 (2011).
8. California Health and Safety Code Section 11362.5
9. Ross v. Ragingwire Telecommunications, Inc., 174 P.3d 200 (2008).
10. Johnson v. Columbia Falls Aluminum, 2009 MT 108 (2009).
11. James v. City of Costa Mesa, 684 F.3d 825 (9th Cir. 2012).
12. Casias v. Wal-Mart Stores, Inc., 764 F. supp. 2d 914 (2011).
13. Coats v. Dish Network, Colo., No. 13SC394, (6/15/15).
14. Barbuto v. Advantage Sales and Marketing, LLC, SJC-12226 (July 17, 2017).
15. 26 Maine Revised Statutes Annotated c.7, sub-c. III-A.
16. Bourgin v. Twin Rivers Paper Company, LLC, 2018 ME 77.
17. Vialpando v. Ben’s Auto. Servs. & Redwood Fire and Cas., 331 P.3d 924 (2014).
18. Cockrell v. Farmers Insurance, 2015 Cal. Work. Comp. P.D. Lexis.
19. Tracy v. USAA Casualty Insurance Company, 11 CV00487 LEK-KSC (D. Hi. March 16, 2012).
20. The Green Earth Wellness Center LLC v. Atain Specialty Insurance Co., 163 F. Supp.3d 821 (D. Colo. 2016).

TIPS FOR U.S. PRACTITIONERS ATTEMPTING TO SOLVE THE FOREIGN DISCOVERY PUZZLE

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TIPS FOR U.S. PRACTITIONERS ATTEMPTING TO SOLVE THE FOREIGN DISCOVERY PUZZLE

I. Procedures Available to Obtain Foreign Discovery in U.S. Litigation.

A. Federal Rules of Civil Procedure ("FRCP")

1. Depositions of individuals in a foreign country

a. Non-Party – **FRCP 28(b)**

i. Deposition of a non-party may be taken in a foreign country:

(A) Pursuant to an applicable treaty or convention

(B) Pursuant to a letter of request

(C) On notice to the deponent, with the deposition to commence before a person authorized to administer oaths in the place where the examination is held

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

ii. U.S. Federal Courts do not have jurisdiction to compel a foreign non-party to appear for deposition should said individual choose to ignore the deposition notice.

b. Party – **FRCP 30**

i. Permits a "party" to take the testimony of any person, including the opposing "party," by notice of deposition upon oral examination.

(A) With regard to corporate entities, the term "party" also includes the corporation's "officers, directors or managing agents."

ii. A party who fails to comply with a properly served deposition notice may be subject to sanctions under FRCP 37.

2. Request for Production of Documents – **FRCP 34**

a. A "party" may be served production requests under FRCP 34

b. A "non-party" may be served production requests either under FRCP 34 or FRCP 45(a)(1) (subpoena)

i. If a non-party is not within the jurisdiction of the Federal Court issuing the subpoena, the Federal Court would not have jurisdiction to compel the non-party to produce the requested documents.

3. Interrogatories – **FRCP 33**

B. Treaty-Based Foreign Discovery

1. Hague Convention

a. Permits a U.S. litigant to obtain evidence from an uncooperative foreign witness.

b. Methods of collecting evidence under the Hague:

i. Letter of Request / Letters Rogatory

(A) *See*, procedure described in "Letters Rogatory: Enforcement of Foreign Court Orders to Obtain Evidence in Ontario"

ii. Collection of Evidence in the Foreign Country by a retained Diplomatic and Consular Officer.

iii. Collection of Evidence in the Foreign Country by a retained "Commissioner"

2. Use of the Hague Convention in U.S. Courts

a. The U.S. Supreme Court has determined that the Hague Convention presents only an *optional*, rather than mandatory procedure for taking evidence in a foreign country. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist.*, 482 U.S. 522, 536-40 (1987) ("*Aerospatiale*")

b. A litigant is *not* required to attempt discovery first under the Hague Convention before pursing it by other means. *Id.* at 541-542.

II. **Foreign "Blocking" Statutes.**

A. A number of foreign countries have passed statutes "to preclude disclosure of otherwise discoverable information and documentary evidence" in foreign litigation. *Lyons v. Bell Asbestos Mines, Ltd.,* 119 F.R.D. 384, 388 (D.S.C. 1988)

B. These so called "blocking" statutes are laws passed by a foreign government imposing a penalty upon a national for complying with a foreign court's discovery request. *Id.*

III. **Effect of Foreign "Blocking" Statutes Upon U.S. Litigation.**

A. American practitioners may find themselves in a situation where they either: a) propound discovery to a foreign party who refuses to comply with the discovery request because of the foreign "blocking" statute; *or* b) represent a foreign litigant who advises that they cannot comply with a served discovery request because they would otherwise expose themselves to potential criminal liability in their home country should they voluntarily provide the information and/or documentation requested.

B. Response of U.S. Courts to "Blocking" Statutes

1. A foreign litigant that fails to respond to a discovery request propounded in U.S. litigation, due to fear of being criminally prosecuted for violation of its country's

"blocking" statute, may still be subject to *sanctions* in the U.S. litigation for non-compliance with the discovery request. *Societe Int'l v. Rogers pour Participations Industrielles et Commerciales, S.A.*, 357 U.S. 197, 212 (1958)

2. U.S. Courts will conduct a comity analysis to determine whether a foreign "blocking" statute excuses a foreign litigant from responding to U.S. style discovery.

    a. Factors to consider (*see*, Restatement (Third) of Foreign Relations Law §442(1)(c).

        i. Importance to the investigation or litigation of the documents or other information requests;

        ii. Degree of specificity of the request;

        iii. Whether the information originated in the U.S.;

        iv. Availability of alternative means of securing the information; and

        v. The extent to which noncompliance with the request would undermine important interest of the U.S; or

        vi. The extent to which compliance with the request would undermine important interests of the state where the information is located.

3. In those instances where a U.S. Court permits discovery to proceed, regardless of the existence of a foreign "blocking" statute, the U.S. Court "should exercise special vigilance to protect foreign litigants from. . .unnecessary, or unduly burdensome, discovery. . ." *Aerospatiale, supra,* 482 U.S. at 546.

IV. Options when Defending a Foreign Litigant Whose Home Country is a Signatory to the Hague Convention, and has a "Blocking" Statute.

A. Initially assert that discovery propounded upon the foreign litigant comply with the Hauge Convention.

1. A party's right to require discovery be served in accordance with the Hague Convention may be *waived* if it fails to initially assert an objection on this basis. *See*, *Am. Home Assurance Co. v. Societe Commerciale Toutelectric*, 104 Cal.App.4th 406, 433 (2002)

B. Determine whether the American parties will stipulate to proceed under Hague Convention Procedures to avoid the protracted comity analysis.

1. Practical Example - French Blocking Statute

    a. Prohibits a French party from requesting or disclosing documentation or information in foreign litigation unless otherwise permitted in a treaty or international agreement.

    b. The Hauge Convention is a treaty / international agreement.

c. Under Article 17 of the Hague Convention, discovery in foreign litigation may be taken by a Commissioner designated by the State where evidence is to be taken.

d. A French litigant may participate in U.S.-Style discovery without violating the French "blocking" statute if said discovery is conducted through the use of an appointed Commissioner.

i. A Commissioner can be any individual in France or the United States that is not the party, the party's agent, or the party's attorney.

2. Steps to Appoint a Commissioner

a. Obtain from the U.S. Court an Order Requesting the Appointment of the Commissioner

b. Submit the U.S. Court Order to the proper authorities in the foreign country where the evidence is to be taken, requesting the Appointment of the Commissioner.

c. If approved, proceed with all discovery in accordance with the FRCP, with all discovery requests / responses by the foreign litigant submitted via the Commissioner.

3. Costs and Benefits of Appointing a Commissioner.

a. The parties must reach an agreement on the costs / fees of the Commissioner.

b. Agreeing to a Commissioner prior to commencing discovery will ensure that the parties need not go through the protracted process of having the U.S. Court conduct a comity analysis to determine whether to proceed under the Hague Convention, and/or whether to recognize the foreign "blocking" statute.

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LETTERS ROGATORY:

Enforcement of Foreign Court Orders

to Obtain Evidence in Ontario

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Letters Rogatory:
Enforcement of Foreign Court Orders to Obtain Evidence in Ontario

By: David Bertschi with assistance from Michael Adamek

COLLECTING EVIDENCE IN ONTARIO

This paper discusses the legal process when counsel outside of Canada wishes to obtain evidence that is located within Canada and specifically within the province of Ontario. Please note that for the most part Ontario's rules and laws concerning the gathering of *International Evidence* [Ontario makes up approximately 40% of Canada's GDP and population base] mirror the other common law jurisdiction requirements. Please note Québec, is a Civil Code jurisdiction has its own unique rules and regulations. For ease of reference, counsel outside of Canada shall be referred to as the "foreign" jurisdiction.

Foreign counsel will be required to pursue the following process when they wish to compel and depose a witness in Canada or they wish to secure copies of records that relate to a legal proceeding in the foreign jurisdiction. For example, there may be a key witness who lives in Ontario, or certain documents which may only be accessible in Ontario, such as telephone records in the sole possession of a telephone service provider whose head office is located in Ontario.

The general rule is that a foreign court has no authority in Canada to compel a Canadian or in this case, a resident or citizen of Ontario to attend at a pre-trial examination (known as a deposition in the United States), nor to compel company located in Ontario to produce documents for use in the foreign proceeding nor to force a witness to travel to a trial in said foreign jurisdiction.

Accordingly, how does one resolve this jurisdictional obstacle? Foreign counsel must undertake a twofold process by which to obtain the evidence which they require.

First, foreign counsel must obtain an order from the court which has jurisdiction over the matter in dispute. The foreign court or tribunal must issue what are known as "Letters Rogatory" (also known as "Letters of Request"). Letters Rogatory are a formal written request by a foreign judge asking that a Canadian or in this case, an Ontario Superior Court Justice to give effect and enforce the foreign court order. Put another way, the foreign judge may issue an order with Letters Rogatory asking that an Ontario judge compel a third party, namely an individual or a business entity located and subject to Ontario or Canadian laws to produce specified documents or to have an officer of the Corporation or an individual attend at an examination under oath related to the foreign proceeding.

Once the Letters Rogatory are issued by the requisite judicial officer in the requisite foreign jurisdiction, the 2nd requisite step of the process requires foreign counsel to retain an agent/lawyer or law firm in Ontario to bring an Application before Ontario's Superior Court of Justice.

This Application is the means by which Ontario counsel formally requests that a judge of the Ontario Superior Court of Justice give effect to the Letters Rogatory and to adopt the foreign order.

ONTARIO'S JURISDICTION FOR ENFORCEMENT OF LETTERS ROGATORY

An Ontario court obtains its authority to give effect to the foreign issued Letters Rogatory under the principle of *judicial comity*, that is, through the mutual deference and respect existing between two foreign jurisdictions.

This authority is governed by a balance check: the Canadian or in this case, Ontario court must consider the impact of the proposed Letters Rogatory on Canadian Sovereignty, as well as whether "justice" requires that the judicial officer to compel the taking of the evidence . It is these two principles which will guide the Superior Court of Justice in deciding whether to give effect to the foreign order.[1]

The Superior Court of Justice will look not adhere blindly to the Letters Rogatory emanating from any foreign jurisdiction but rather, the judge will look behind the wording of the Letters Rogatory to examine precisely what the foreign court is trying to accomplish. The foreign court does not have final say and the Ontario court need not accept the request as set out in the foreign order.[2] Nevertheless, the Ontario court is also not supposed to act as an appellate body with respect to the foreign order. The foreign decision-maker is entitled to deference and respect.[3]

An Ontario court also finds its authority for granting Letters Rogatory under two statutes which govern the collection of evidence in Canada: section 46 of the federal statute, the *Canada Evidence Act*, R.S.C. 1985, c. C-5; and section 60 of the provincial statute, in this case, the *Ontario Evidence Act*, R.S.O. 1990, c. E.23. These sections need not be reproduced here, but it is important to note that the statutes expressly enable an Ontario judge with the appropriate authority and *discretion* to determine whether or not to grant Letters Rogatory. Additionally, these statutes widely empower the Ontario Superior Court judge to give any additional or supplementary directions with respect to the production of the evidence sought as they may deem appropriate.

[1] *AstraZeneca LP v Wolman,* 2009 CanLII 69793 (ONSC*)* at para 17-18 ["*AstraZeneca"*]
[2] *AstraZeneca* at para 18
[3] *AstraZeneca* at para 19

THE LEGAL TEST

Before a Superior Court of Justice exercises their discretion to grant Letters Rogatory, there are four preconditions and six criteria that must be satisfied by the applicant who is seeking to enforce the foreign order. Frequently, Ontario courts have disregarded the four preconditions as they directly pursued an analysis of the six criteria because the preconditions are usually clearly satisfied by the foreign order itself. These **four preconditions** demanded by the court are:[4]

1. it must appear that a foreign court is desirous of obtaining evidence, or that the obtaining of the evidence has been duly authorized by commission, order, or other process of the foreign court;

2. the evidence sought must be within the jurisdiction of the Ontario court;

3. the evidence sought must be in relation to a civil, commercial, or criminal matter pending before the foreign court, or it must be in relation to an action, suit, or proceeding pending before the foreign court; and

4. the foreign court must be a court of competent jurisdiction.

The **six criteria** which must be satisfied before the Ontario Superior Court of Justice before a judge of said court will exercise their decision are the following, and are elaborated below:[5]

(1) The evidence sought must be relevant.
(2) The evidence sought must be necessary for trial and will be adduced at trial, if admissible.
(3) The evidence sought must not otherwise be obtainable.
(4) The foreign order must not be contrary to public policy.
(5) The evidence sought must be identified with reasonable specificity.
(6) The foreign order cannot be unduly burdensome.

(1) Relevancy

Relevancy protects against "fishing expeditions" and against requiring Canadian citizens from participating in a process that may be of no assistance to the foreign parties. This criteria compels counsel to address the court's concern as to whether a link exists between the evidence sought and the claims asserted in the foreign proceeding.[6]

[4] *King v. KPMG*, 2003 CanLII 49333 (ONSC) at para 6 [*"King"*]
[5] *AstraZeneca* at para 22
[6] *AstraZeneca* at para 23

(2) Necessity

An Applicant is not required to establish that the evidence sought *will* ultimately be admissible at trial. Rather, counsel for the Applicant need only show that the evidence requested *would be* producible or compellable at the pre-trial stage of production, discovery, or in the disposition of the foreign proceeding.[7]

(3) Availability

Can evidence of the same value be obtained elsewhere or otherwise?[8] For example, if production of a witness is sought, foreign counsel must demonstrate why the particular witness identified in the Letters Rogatory has unique knowledge that is otherwise not available elsewhere. A request to enforce the Letters Rogatory will likely be denied if multiple witnesses possess the evidence sought and if any of those witnesses reside within the foreign court's jurisdiction such that they could be compelled to testify without the need for the issuance of the Letters Rogatory.

(4) Public Policy

When determining if the receiving jurisdictions' public policy may be breached by the foreign order, the Superior Court of Justice's focus is not on the underlying foreign proceeding, rather, the Ontario court must consider what impact the request has Ontario law .[9] If production of the requested documents would result in a breach of confidentiality, or privilege or of fiduciary obligations in Ontario, then the Ontario court will deny the impugned request.[10]

(5) Specificity

Determining whether the documents sought are sufficiently identified with the requisite specificity will vary depending on the circumstances of each case.[11]

With that in mind, the best practice is to be as specific as possible. Documents should be identified by name (to the extent possible), author, and date(s). When seeking to question a witness, the topics that the witness will be asked to address should be set out in as much detail as possible.

Importantly, foreign counsel's requests should avoid using broad or nonspecific language such as "any and all evidence relating to the issue of…"

[7] *King* at para 11
[8] *AstraZeneca* at para 27
[9] *Presbyterian Church of Sudan v. Rybiak*, 2006 CanLII 32746 (ONCA) at para 23.
[10] *King* at para 14
[11] *AstraZeneca* at para 27

(6) Burden of Proof

The evidence sought cannot be unduly burdensome on the party who is the subject of the Letters Rogatory. The language prohibiting "unduly" burdensome requests suggests that some burden is inherently acceptable.

Ontario Courts of Justice in assessing the burden placed upon the foreign order, will keep in mind what the relevant witnesses would be required to do and produce in the event that the action is tried.[12]

Understandably, the more limited the request for production sought, and the less that a witness is required to do, the more likely that the foreign request will be granted.

BEST PRACTICES

The following are our recommendations for foreign counsel to include in their respective their Letters Rogatory to increase the likelihood at an Ontario Superior Court of Justice will give effect to same.

- Consult with the other party (e.g. the witness who will testify, or the organization or individual who will be required to produce records) to narrow the specifics of the evidence available and specifically which they are seeking.

- Confirm that a witness's reasonable expenses will be reimbursed by the foreign party which seeks to examine the witness, or that the foreign party will pay administrative costs associated with all costs associated with the production and copying of said documents.

- Arrange for examinations to be conducted with the view to inconveniencing the witness as little as possible (such as conducting an examination where the witness resides, or by videoconference).

- Outline the key issues in dispute in the foreign proceeding and connect the relevancy and necessity of the evidence sought to the possible resolution of the issues in dispute.

- If a witness is to be examined, include a list of topics or information required as specifically as possible, whereby a framework for the examination is created. Identify the expected time required to complete the examination.

[12] *AstraZeneca* at para 22

- Identify the applicable legal rules that demonstrate that the evidence would be producible at trial in the foreign jurisdiction in the event that the matter proceeds to trial.

- Consult with Canadian or in this case Ontario counsel to confirm that the evidence sought is unlikely to contravene any public policy or evidentiary rules in the specific jurisdiction including but not limited rules surrounding confidentiality, privilege, or fiduciary duties.

- If at all possible, obtain the opposing party's consent to produce the evidence sought or to attend at the examination, or at least demonstrate that all reasonable efforts were made to attempt to accommodate and address any of the other party's concerns.

TAKING OF EVIDENCE IN BELGIUM

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You can find all the necessary information on **taking of evidence in Belgium** visiting the following website, available amongst others in English:

https://e-justice.europa.eu/content_taking_of_evidence-76-be-en.do?init=true&member=1

This website is very useful since it is devoted to this topic in all the member countries of the European Union.

Of course, the Belgian judges will follow their legislation in gathering evidences even if required by foreign authorities.

You will appreciate the importance of **written evidences under our Belgian laws** especially in civil matters. I refer to article 1341 and following of our **Civil Code**. You need a written document for all obligations exceeding 375€ and you are not allowed to testify against such a document. You will see that in commercial matter, the range of evidences is larger.

Much more under current article 961.1 and 2 of **our Civil Proceedings Code**:

Art. 961/1. [1 Lorsque la preuve testimoniale est admissible, le juge peut recevoir de tiers des déclarations, sous forme d'attestation, de nature à l'éclairer sur les faits litigieux dont ils ont personnellement connaissance.]1

Art. 961/2.[1 Les attestations sont produites par les parties ou à la demande du juge. Le juge communique aux parties celles qui lui sont directement adressées.

Les attestations doivent être établies par des personnes qui remplissent les conditions requises pour être entendues comme témoin.

L'attestation contient la relation des faits auxquels son auteur a assisté ou qu'il a personnellement constatés.

L'attestation mentionne les noms, prénoms, date et lieu de naissance [2 et domicile]2 de son auteur ainsi que, s'il y a lieu, son lien de parenté ou d'alliance avec les parties, de subordination à leur égard, de collaboration ou de communauté d'intérêts avec elles.

L'attestation indique en outre qu'elle est établie en vue de sa production en justice et que son auteur a connaissance qu'une fausse attestation de sa part l'expose à des sanctions pénales.

L'attestation est écrite, datée et signée de la main de son auteur. Celui-ci doit annexer, en original ou en photocopie, tout document officiel justifiant de son identité et comportant sa signature.]

It means that to relieve judges of the burden of hearing witnesses, under specific formal forms, you can gather the testimonies by yourself in writing and table them before the Courts. In my law office, we printed forms to collect such evidences with full respect of the formal requirements.

In my view, a US citizen could proceed the same way in Belgium ("in accordance with the provisions of the law of that State" states The Hague Convention).

Argument: it seems to be accepted in Belgian private international law that the general rules relating to the admissibility of evidence can be determined not only by the law of the court seized but also by the

law of the place where the document was drawn up, by application of the rule *locus regit actum* (+ Rome Convention 1980 June 19)

All the information about **the Hague Convention** is available on the HCCH Website at:

https://www.hcch.net/en/home/

You do have for each HCCC member, indication of the National Organ, with the contact details:

USA:

Office of Private International Law

Office of the Legal Adviser

Department of State

2430 E Street, NW

Room 357, South Building

WASHINGTON, DC 20037-2851

BELGIUM:

Service Public Fédéral des Affaires Etrangères, du Commerce Extérieur et de la Coopération au Développement

Direction Générale des Affaires Consulaires (DGC)

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Then you have the list of the agreements in which each member country has been party or signed.

You will see that **Belgium** is bound by **The Hague on Civil Proceedings, 1954 March 1st. Convention** (contracting party) (See especially articles 8 to 16).

You see on the other side that **USA** is bound by **The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad** in Civil or Commercial Matters (Contracting party).

In any case our **Belgian Civil Proceedings Code** states:

Art. 873.Le tribunal ou le juge à qui est adressé une commission rogatoire est tenu de la faire exécuter.

Toutefois et à moins que les conventions internationales n'en disposent autrement, l'exécution des commissions rogatoires émanant des autorités judiciaires étrangères ne peut avoir lieu qu'après avoir été autorisée par le ministre de la Justice.

Le tribunal de première instance, le tribunal du travail ou le [1 tribunal de l'entreprise]1 commis rogatoirement peut désigner un juge d'un degré égal ou inférieur.

Art. 874. Les commissions rogatoires sont adressées à un tribunal ou à un juge d'un degré égal ou inférieur.

It means that in any case our Courts have to execute letters of request addressed to them by the entitled foreign legal authorities, either directly in case of international convention or otherwise with the authorization of the Ministry of Justice.

Another aspect of cooperation:

What is common to me in the European context is the **writing of opinions for foreign Courts** about liability under Belgian law, Belgian law on insurance and assessment of damages in my country. This either because the insurance policy is written under Belgian law or because the accidents occurred in Belgium and the claimants filed the cases against the insurer before the Court at their addresses what is allowed in the EU. I made it a lot especially for UK colleagues.

Finally, I shall mention, concerning **Criminal Proceedings:**

1988 January 28th Convention between USA and Belgium

Convention entre le Royaume de Belgique et les Etats-Unis d'Amérique concernant l'entraide judiciaire en matière pénale, signée le 28 janvier 1988 (NOTE : version conforme à l'Accord entre l'Union européenne et les Etats-Unis d'Amérique du 25-06-2003, 2003-06-25/36)

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=1988012840

2003 June 25th Agreement between European Union and USA

Accord entre l'Union européenne et les Etats-Unis d'Amérique en matière d'entraide judiciaire, fait à Washington D.C. le 25 juin 2003 :

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2003062536

2011 September 20th Agreement between Belgium and USA

Accord entre le Royaume de Belgique et les États-Unis d'Amérique sur le renforcement de la coopération dans la prévention et la lutte contre la criminalité grave, à Bruxelles le 20 septembre 2011

http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&cn=2011092007&table_name=loi&&caller=list&fromtab=loi&tri=dd+AS+RANK

GATHERING AND EVALUATING OF EVIDENCE IN THE CZECH REPUBLIC

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Gathering and Evaluating of Evidence in the Czech Republic

The goal of our presentation is to identify the key differences between the Czech and US civil procedure rules in regard to gathering and evaluating evidence, so that US attorneys are not surprised when dealing with the Czech judicial system.

Let´s take it from the top.

1. **Did you know there are no juries in the Czech judicial system?**

Unlike the US system where civil cases may be decided by a panel of members of the community, civil law disputes heard before the Czech courts are always decided by judges in bench trials. In fact, Czech procedural law does not know the institution of jury trials. In all cases the judge is both the finder of fact and ruler on matters of law and procedure. Most notably, under this arrangement the judge decides the credibility of the evidence presented at trial, and also decides what happens at the trial according to the law and rules of civil procedure.

2. **Did you know that it is, in effect, the judge who decides which of the evidence will be presented and admitted?**

It is well known that the adversarial system of justice is the heart of both the common law and the civil law systems. The Czech understanding of the system differs from the American one. Like the US system, where each party presents evidence to be admitted before the court, the judge decides which of the evidence proposed by the parties to a dispute will be admitted According to the Czech Civil Procedure Code. However, in the Czech judicial system the judge can ultimately decide to present and admit other evidence not proposed by the parties if the evidence is necessary to make findings of fact. Thus, in the Czech judicial system it is not the opposing parties who determine the evidence to place before the court; rather, from an American perspective it might be seen as if the court is the actual *dominus litis.*

3. **Did you know there is no pre-trial discovery process under the Czech procedural law?**

While in civil cases in the US, evidence is primarily gathered by parties, and from each other, using the pre-trial discovery process, there is no such notion under Czech law. Disclosure? That does not exist in the Czech Republic. No party to a dispute would automatically share evidentiary information, and it is unimaginable that parties to a dispute would be forced to do so. All evidence is always saved until the time of the trial. Depositions? There is no such thing either. Witness testimony are only heard during the trial. Only if there is a concern that it would not be possible to hear the witness later, it is possible for a judge to hear the witness testimony at a pre-trial stage. Judge´s involvement is however always required.

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1 - JURY

There is no Jury in Civil case in France.

There is Jury in the most serious criminal cases in France.

2 - EVIDENCES

The French system is an adversarial system.

Each party has the burden of bringing its own proof.

This are two mitigations.

2.1 - Court appointed Expert

In technical case, French Court appoints a technical Expert that would provide its opinion to the Court.

Each party would compare in front of the technical Expert with its attorney and provides technical evidence.

The Court appointed Expert can ask for any document that he finds useful and if necessary, asks the Judge to an Order compelling the production of documents.

2.2 - Ex parte proceeding

A party can ask the Judge to appoint a bailiff to collect technical evidences.

This proceeding is particularly used e discovery.

The bailiff would be assisted with an computing Expert and search in the party e system.

The evidence collected would not be provided immediately to the others parties but would be keep by the Judge, so that the party can object to the production.

The Judge would decide if the evidence collected can be produced in Court.

3 - APPEAL

Appeal in France is a de novo trial in which each of the parties can provide new claims and introduce new evidences.

WHAT HAPPENS IN THE PLAINTIFF'S ROOM

Mediation Trips and Strategies for the Defense

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WHAT HAPPENS IN THE PLAINTIFF'S ROOM
Mediation Tips and Strategies for the Defense

Mediation is a widely utilized method of dispute resolution where Plaintiffs, Defendants, and a third-party impartial mediator can engage in a meaningful exchange of thoughts regarding a case to ultimately come to a mutually beneficial settlement. Mediation is a beneficial form of dispute resolution in that it allows parties to speak freely about the case at hand, focus on the case at the same time, control mutually beneficial financial outcomes of the case, and resolve matters quickly and at a lower cost than proceeding to trial. The mediation process involves opening statements by the disputants, joint discussions between the disputants, private caucuses between each party and the mediator, and closure. However beneficial this mediation process might be, it does leave open a question for the defense about what is happening in the Plaintiff's room during their private caucus time. This paper will discuss various aspects of the mediation process, examine these aspects from the Plaintiff's point of view, and analyze how defense attorneys can best use this understanding to obtain favorable outcomes for their clients in mediation.

I. TIMING OF MEDIATION

There are many windows of opportunity during which parties can explore the possibility of mediation, ranging from when the dispute arises, to after discovery, all the way up until trial. Most often, mediation takes place after the exchange of written discovery and the deposition of the Plaintiff. However, given the variety of times that mediation can take place, it is important to consider if and how the Plaintiff's tactics vary based on when the case is being mediated.

A. Pre-Suit Mediation

The earlier in the claims/litigation process that a case is, the easier it is to negotiate better settlements with the Plaintiff, making pre-suit mediation an attractive option for defense counsel. Plaintiffs can be more likely to settle for less money early on for several reasons. First, offering to settle early puts pressure on Plaintiff's attorneys to settle, as if they recommend settlement, they are essentially assuring their client that they can increase their net recovery, without the expenses incurred during further prosecution of the case. Additionally, Plaintiffs themselves are more likely to accept settlements early on, as opposed to going through the emotional and practical time and energy commitment of years of discovery and litigation. However, when a Plaintiff has unrealistic expectations about a case, then going through discovery or partial discovery before mediation might be a better option.

B. Mediation Early in the Discovery Process

Similarly to pre-suit mediation, Plaintiffs also tend to be inclined to pursue mediation and accept settlements early on in the discovery process. This allows them to avoid the time, expense, and emotional trauma of extending the discovery process longer than need be. Of course, if early discovery proves extremely favorable for the Plaintiff, they will be less willing to pursue mediation and early settlement, but if it goes poorly, they will be more likely to settle. At this point, it is most important to know your case, understand the strengths and weaknesses, and

anticipate how Plaintiff is most likely feeling about their case to understand how likely they are to settle.

C. Mediation Pending Summary Judgment/Motions in Limine

When motions are pending that could significantly impact the outcome of a case, parties tend to develop a heightened awareness of the risks involved in letting the controversy be decided by a third party rather than through mutual agreement. This can encourage mediation in and of itself. When considering this from the Plaintiff's perspective, this may push the Plaintiff to give more consideration to settlement offers that they may have declined before.

D. Mediation on the Eve of Trial

When mediation comes late in the process, the emphasis of the process changes. The process becomes almost solely focused on developing settlement terms that both parties will find agreeable and acceptable, and does away with dealing with other components of mediation like parties underlying emotions. This means that if a Plaintiff and/or opposing counsel has previously been irrational, over emotional, or not agreeable, this is when they are most likely to act and accept reasonable settlements. Late-stage mediations generally serve a purpose to avoid the high risks of trial, so even emotional and argumentative Plaintiffs may be willing to settle on a reasonable deal here, even if they had not been willing to previously.

II. JOINT OPENING SESSIONS

Another key evaluation that the Defense will want to consider is whether or not an opening session will be helpful or harmful in the resolution of the case. The opening session generally serves several purposes in that it allows the mediator to explain the mediation process and establish ground rules for the mediation, permits parties to see and assess one another, enables attorneys to share their clients' positions, and allows the parties to speak directly to the opposing party's decision maker. However beneficial opening sessions may be, sometimes they are better foregone in the mediation process.

A. When is a Joint Opening Session Helpful or Harmful?

An opening session, per the purposes listed above, can be beneficial for both parties in that it promotes constructive discussion and transparency that lays a foundation that allows issues to be resolved more quickly. However, sometimes opening sessions may be more harmful and ought to be avoided. For example, in situations where a Plaintiff seems overly emotional or irrational in their desires, this may hinder their ability to negotiate well in a group setting. In situations such as these, it may be better to resolve to negotiate from behind closed doors in order to minimize the likelihood of aggravating the Plaintiff. Similarly, if there is animosity between counsel and the Plaintiff's counsel seems unwilling to listen to arguments coming from the Defense, it may be wise to forego a joint opening session to avoid the wasted time of presenting arguments that will, ultimately, be ignored by the other side.

B. Best Methods to Increase Efficacy of Joint Opening Sessions

If you have chosen to hold a joint opening session, the following may be helpful in increasing the efficacy of the session:

- Call the opposing counsel prior to the mediation. Here you can ask the opposing counsel to explain her client's position, find out if they need any more information from you before proceeding, determine the attorney's relationship with their client, and build rapport with the opposing counsel before entering an adversarial environment.
- Call the mediator prior to the mediation. This will allow you to set the stage for the mediator and let them know of any unique facts or concerns you have about the mediation and opening session. This will allow them to better moderate the situation.
- Only use demonstrative aids in the opening session with clear purpose. Use aids that help your opponent better understand your position but without being so long in presentation as to lose the aid's desired effect.
- Think about how you can use this session to show the other side the merits of your case and convince them of your position, as this is likely the only time you have to speak directly to the opposing party.
- Address the other side, not the mediator. Again, this may be your only chance to address them, so use this to your advantage.
- Make it expressly clear that you are willing to listen thoughtfully to the other side and understand and consider their position, and ask that they do the same for you.
- If your client is credible and presents well, consider letting them speak during the opening session. This will allow the other side to see that your client would be a strength for your case at trial, and additionally, it might have a therapeutic value for the disputing clients.

III. INITIAL ROUND

After the opening session, if one took place, parties will separate and begin private caucuses with the mediator. The mediator typically uses this initial caucus to develop a trusting relationship with the parties and to better understand the facts, law, and controversy from each party's point of view. The mediator also, generally, tries to obtain an initial offer or demand in the first round of caucuses, and tries to encourage reasonableness from the get-go. Given the individual and sequential nature of the caucuses, however, it is important to consider what is happening in the other room during the initial private caucus.

A. The Plaintiff's Room

Typically, the mediator starts in the Plaintiff's room unless circumstances would indicate that it makes more sense to start with the Defendant, i.e., if prior negotiations left a Plaintiff's previous offer unanswered. As mentioned before, the mediator will use this time to build trust and better understand the Plaintiff's theory of the case. The mediator may also use this as time to read the room and understand the situation in its entirety; for example, who was control of the room – Plaintiff, or counsel? Additionally, they may note whether or not the Plaintiff seems emotional about the case to the extent that it might make it difficult to engage in meaningful negotiations. If

that is the case, the mediator might spend more time in the Plaintiff's room to quell these emotions before moving on to substantive negotiations. Once the initial caucus with the Plaintiff has concluded, the mediator will move on to the Defense's room. Before departure, mediators will typically give the Plaintiff's room some things to think about in their absence, for example, issues that may have come up during opening that the mediator thinks would benefit the Plaintiff and counsel to discuss further in their absence.

B. The Defendant's Room

The Defendant's initial caucus will, typically, be similar to that of the Plaintiff's in that the mediator has the same goals of building trust and increasing their understanding. Of course, at this point, the mediator has already heard the Plaintiff's point of view. Sometimes, this leads the Defense to treat their initial round as an essential opportunity to persuade the mediator on the merits of their case. However, mediators report that this is not the most productive use of this initial meeting. The goal of the mediation is to persuade the other side to settle, not the mediator. While, of course, it is important to explain the merits of your case, mediators are typically reluctant to too quickly embrace one side's theory. This means that your time here is better spent being candid and factual rather than overly persuasive. This will lead to the most transparent opening caucus, which will increase both the mediator's efficiency, as well as a favorable view of your party.

C. What Information is Shared Between the Parties?

Because mediation involves at least two parties, sometimes more if there are co-defendants, the mediator will be going between different rooms to facilitate discussions and share information. A question may then arise about what, and how much, information is the mediator sharing between rooms. Rules with respect to confidentiality vary between jurisdictions and mediators. However, mediators should never disclose anything that parties reasonably expect to be kept confidential without someone's explicit permission. In terms of during an initial round, a mediator is less likely to share a lot of information between rooms. This is because of the nature of the initial round as a method to increase trust and simply understand issues better. After this has been established, mediators begin to share more information between rooms in the following rounds.

IV. FOLLOWING ROUNDS

The following rounds of private caucuses are where the actual settlement negotiation truly starts and finishes. These caucuses can give rise to some tricky situations involving the Plaintiff, some of which are detailed below.

A. Delivering Difficult News

No client likes to hear bad news about his or her case. However, frequently, during mediation, a mediator will identify the weaknesses of a party's case, such as strong legal defenses from the other side that eliminate the claim, damage defenses that significantly lower the value of the Plaintiff's case, and witness problems with the case. When this is the case, the mediator typically

bears the burden of delivering this bad news. As such, when the mediator must deliver bad news to a Plaintiff, they are typically experienced in cushioning negative responses. While of course some Plaintiffs will be angry, upset, or emotional, Plaintiffs typically handle bad news better coming from a mediator, someone who serves as a neutral agent of reality, as opposed to their counsel, someone who they see as their advocate. The impact of clients who do not handle bad news well is discussed in the next section on Difficult Plaintiffs.

B. Discussions without the Plaintiff

Sometimes, it may be beneficial for attorneys to meet privately either with each other or with the mediator. Mediators report that this tends to be an efficient method of settling cases swiftly that seemed as though they may have been at an impasse. Taking the two attorneys and the mediator to the side can allow for some transparency in discussion about where they are in the mediation and why. Being out of the earshot of the Plaintiff can frequently lead to quicker settlements, so if things are going poorly during the mediation, consider requesting a conference without the Plaintiff present.

C. Reconvening the Parties

During the course of mediation, parties should consider the possibility of meeting with the opposing counsel. This is especially useful if it appears as though parties have reached a potential impasse. Consider asking the mediator if they think it would be helpful to meet with the opposing counsel, either with or without the clients. This meeting can be used to ask what is going on in the other room, to clarify either client's position, and to see if settlement is likely or possible. This can provide you with some insight as to what is happening behind closed doors and either come to a resolution more quickly, or cease mediation if it appears that a settlement cannot be reached.

D. Dealing with Animosity Between Counsel

Mediators report that they are frequently discouraged and disappointed by opposing attorneys who foster a great amount of animosity towards one another during the mediation process. When mediators notice this animosity, it signals to them that counsel has an unwillingness to compromise or settle. Negotiations between feuding attorneys tend to be less successful as a result of clouded judgment. Here, the best advice is truly to treat the opposing counsel with respect and show a willingness to listen and negotiate in good faith. The importance of this cannot be overstated for defense counsel – Plaintiffs are frequently upset and feel victimized or ignored by the Defendant. If defense counsel can show sympathy and willingness to listen, agreements are often reached more quickly. If, to the best of your efforts, the animosity is still not being subdued, as a last resort, see if it may be possible to bring in one of your partners for the mediation instead.

V. DIFFICULT PLAINTIFFS

There are a variety of types of Plaintiffs that one may encounter in the mediation process. Depending on how a Plaintiff feels and behaves, mediation strategies may need to be adjusted in

order to effectively accommodate the Plaintiff. Below are several types of commonly difficult Plaintiffs and tactics for handling them.

A. Types of Difficult Plaintiffs

- The Angry Plaintiff: The angry Plaintiff may be angry about the incident giving rise to the claim but without any real damages, angry about the incident and unrealistic about how litigation will unfold, or some combination thereof.
- The Emotional Plaintiff: The emotional Plaintiff may be too emotional or sad about the incident to be rational about the value of the case.
- The Know-It-All Plaintiff: The know-it-all Plaintiff somehow seems to know more than the mediator, attorneys, judges, and jurors combined.
- The Uncontrollable Plaintiff: The uncontrollable Plaintiff is one where even Plaintiff's counsel cannot gain control over a Plaintiff's expectations, or they have set the Plaintiff's expectations too high.

B. Tactics to Handle Difficult Plaintiffs

The first thing to do when you know you are dealing with an emotional or difficult Plaintiff is to inform the mediator before mediation begins. The mediator's knowledge of the Plaintiff's difficulties will allow them to best prepare to handle the situation when the mediation actually occurs. It is important to note that dealing with an emotional plaintiff is primarily the job of the mediator, not the Defense, and will primarily take place behind closed doors during private caucuses. This means two things: 1) the more information you can share with the mediator, the better, as it will allow them to be as prepared as possible to deal with potential irrationalities; and 2) you must remember to be patient during the process when dealing with emotional Plaintiffs. Mediators may need to spend more time in the Plaintiff's room, since they are discussing not only the settlements at hand, but the emotions involved as well. Delays can be viewed as a good thing when dealing with difficult Plaintiffs, as it likely means a mediator is doing everything they can to quell the Plaintiff's emotions before engaging in talks of settlement.

Another tactic to consider when you are dealing with a Plaintiff who you know is emotional is to either decline a joint session or opening statement, or at the very least, be very selective in your word choice during these sessions, if they transpire. You will want to sound as non-confrontational and non-argumentative as possible in order to avoid upsetting the Plaintiff further. Also, in these sessions, consider offering a statement of sincere sympathy and condolences on the client's behalf. This can easily be done without making admissions of fault, and serves an excellent purpose of defusing anger before negotiations really get started to open the way to serious settlement discussions.

Something to note in all cases with difficult Plaintiffs is that it may be hard or impossible to settle if a Plaintiff is overly emotional or irrational about the issues at hand. In these cases, if mediation is clearly not leading towards a mutually beneficial settlement, the Defense can still garner some benefits from engaging in the mediation process. First, the Defense should still be able to leave the mediation with a better understanding of the Plaintiff's case. Discussions had in opening, as well as Plaintiff's proposed settlements, will allow the Defense to better understand what the Plaintiff's expectations are, perhaps what their theory of the case is, and how to best

proceed going forward with this new information. Second, the Defense should be able to least see what the bottom line number that the Plaintiff will accept is. Even if a case cannot be settled at mediation proper because of an irrational Plaintiff, given that most cases settle, having this information will allow Defense counsel to better negotiate and strategize going forward about how to settle the case, and at what cost.

VI. CONTROLLING THE MEDIATOR

In addition to all advice already given about how to appear favorably to the mediator, consider the following to have an overall positive impact on the mediator and increase your chances of success in the mediation:

- Know your case: Credibility and knowledge are two of the most powerful sources of success in mediation. Counsel should know the merits of the case, as well as the weaknesses, and discuss these knowledgably and openly with the client as well as the mediator. Appearing prepared makes the mediator more likely to respond to your position favorably.
- Anticipate the other side's position: Having a knowledge and understanding of the other side's finances, incentives, BATNA (best alternative to a negotiated agreement), WATNA (worst alternative to a negotiated agreement), and PATNA (probable alternative to a negotiated agreement) will allow you to negotiate effectively and focus the mediator on issues that are going to be potential barriers to settlement.
- Send the mediator information in advance: Any information provided to the mediator prior to the mediation will give them a better understanding of the factual and legal issues, especially from your perspective. This will make the mediator more prepared to explain and argue for your client's position in the mediation.
- Be reasonable and provide evidence for all offers: If you propose wildly unreasonable offers and/or do not provide evidence for why you are offering what you are offering, the mediator is less likely to see you as taking the mediation as seriously, and, as a result, is less likely to take you and your position seriously. Being realistic and reasonable will be attractive to the mediator and encourage them to be an effective advocate for you when they are in the Plaintiff's room.

VII. IMPACT OF ADJUSTERS ON THE MEDIATION PROCESS

In situations where the Defendant is or involves an insurance carrier, insurance adjusters become interested parties in the mediation process. Whether attending the mediation or not, adjusters certainly can play a crucial role in the success of a mediation.

A. Settlement Authority

One of the biggest problems that mediators point to in mediations involving insurance carriers is the lack of proper settlement authority. When adjusters do not attend the mediation, they are depending on counsel to come to an appropriate settlement during the mediation. However, they are also intending for counsel to negotiate a settlement within a predetermined range that they find to be acceptable and have therefore authorized. Sometimes, the mediation process does not go according to plan, or perhaps even reveals new information that changes the possible

settlement amount drastically. When this is the case, counsel may not have proper authority to agree to the most reasonable settlement. In these situations, counsel will then have to spend time contacting and phoning the adjuster, sometimes multiple times, in order to get proper authority. Not only does this irritate mediators and Plaintiffs, but sometimes it jeopardizes and leads to ultimate failure of a settlement altogether. Adjusters should make sure to work with counsel closely to provide proper settlement authority prior to mediations to account for all potential circumstances.

B. Plaintiff Tactics

When adjusters are involved in attending the mediation, Plaintiffs and counsel sometimes use this to their advantage. Up until this point, the Plaintiff has been but a faceless claimant to the adjuster. When faced with the Plaintiff directly, Plaintiffs and their counsel frequently seize this opportunity to speak as highly, personally, and humanely about the Plaintiff and their situation as possible so as to humanize the Plaintiff to the adjuster. Ideally, this tactic is used to garner sympathy and increase the limit of where the adjuster is willing to settle. Adjusters should be aware of this tactic and keep the concrete facts of the case at the forefront of their decision-making.

VIII. PLAINTIFF'S ADVANTAGES AND DISADVANTAGES

When considering what is going on in the Plaintiff's room during a mediation, one important consideration to keep in mind is what inherent advantages and disadvantages a Plaintiff has in every mediation. Some of these are detailed below and ought to be kept in mind when considering strategy from the Defense's point of view.

A. Plaintiff's Advantages

- Defendant's Exposure: Oftentimes, the Defendant in a case will be an insurance company or a corporation. When this is the case, Plaintiffs find themselves with some negotiating leverage in mediations, since Defendants usually prefer settlement over going to trial in order to minimize any negative exposure.
- Circumstantial Advantages: Sometimes various circumstances lead to a Plaintiff's advantage in mediation. These include if the Plaintiff was severely and/or obviously injured, if the Plaintiff would appear to be a favorable witness, or if the Defendant and/or the Defendant's industry is looked upon negatively by society at large. If any of these are the case in a mediation, the Plaintiff may be able to use this to their advantage.

B. Plaintiff's Disadvantages

- Emotional Involvement: Plaintiffs tend to be more emotionally invested in a case than a Defendant, especially when the Defendant is a corporation or insurance company. To a company, the Plaintiff's case is just another claim, but to the Plaintiff, it is viewed as a lot more. This can impact a Plaintiff to their detriment in a mediation in several ways, for example, inefficient negotiation as a result, or clouded judgment.

- Financial Involvement: Plaintiffs are also usually more financially invested into a case than the Defendant. The Plaintiff bears the financial cost of a lawsuit until payment is rendered, whereas Defendants are not out much until the time of payment. This puts the Plaintiff at a negotiating disadvantage and makes them more likely to settle.

IX. CONCLUSION

In sum, while mediation is frequently a cost-effective and time-saving method of resolving controversies, it is most beneficial for the Defense to understand their opposing counsel and what mediation looks like from the Plaintiff's perspective before the mediation actually begins. By evaluating the timing of the mediation, the emotions of the Plaintiff, the strategy behind choosing whether or not to engage in joint sessions and more, Defense counsel will be substantially more effective in obtaining favorable results for their clients by understanding not only their client's needs and positions, but those of the Plaintiff as well.

THE FUTURE OF SUCCESSFUL LITIGATION MANAGEMENT:

2020'S NOT JUST HINDSIGHT ANY MORE

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"Nothing is so painful to the human mind as a great and sudden change."
– Mary Wollstonecraft Shelley, Frankenstein

The classic play and movie, Inherit the Wind, is a famous somewhat fictionalized account of the Scopes "Monkey Trial" in Dayton, Tennessee in 1925. In that trial, Clarence Darrow faced off with the three-time presidential candidate and renowned orator, William Jennings Bryan, in a battle over the right to teach evolution in the public schools. Darrow and Bryan are presented as polar opposites in many ways – a prosecutor versus a defense attorney; an agnostic/atheist versus a strict believer in an old-testament God; a free-thinking liberal crusader versus an old-school fundamentalist preacher. Interestingly, one of the topics about which these opposites in the play briefly converse is the subject of "change," an issue that increasingly seems to be the cause of struggle and discontent among lawyers and insurance professionals.

Particularly poignant is the short scene in the play which takes place in one of those quaint quiet moments (that you only see in movies and plays) after the court proceedings have already begun. Matthew Harrison Brady (Bryan) and Henry Drummond (Darrow) are alone and begin to reflect on their earlier work together, when they fought on the same side for many causes. "Why is it, my old friend," Brady asks, "that you have moved so far away from me?" Drummond replies simply, "All motion is relative. Perhaps it is *you* who have moved away – by standing still."

As lawyers, we are trained to look at precedent for our answers. Change, while inevitable and occurring at an increasingly rapid pace, nevertheless essentially violates that precedent. Neither lawyers nor insurance claims professionals are particularly well-known for aggressively embracing that change. New battles, divisions and challenges have emerged in the practice of tort and insurance law. Lawyers must try to cope with the shifting plates which underlie our practice – from law firm structure and salary escalation to partner defection, from minimum billable hours to the "road warrior" blues, from client guidelines to remote courtrooms and rocket dockets. Likewise, claims professionals are confronted with job insecurity, ever-changing management and management directives, technology, increased pressure on the bottom line and demands from claimants, insureds, management and their own outside counsel. Both lawyers and claims professionals face increased pressure, increased hours, revolutionary technology purportedly allowing to do accomplish even more on a 24/7 basis, the threat and the blessing of artificial intelligence and a marked lack of job security or serenity. For some, the last decade

especially has brought about the metamorphoses of once proud professions into unabashed, money-generating businesses. In this tempest, change seems sudden, but is it? Rather, might we be exacerbating the effect of change by trying to be resistant to it?

Change Agents Confronting Lawyers

Having surveyed recent literature on the subject of the future of the legal industry, a number of common themes emerge. Almost everyone predicts that technology will dramatically alter how we practice, how justice is administered and how we spend our time as lawyers. That is clearly the easy part. The more difficult assignment is predicting precisely ***how*** those changes will manifest themselves and how we can prepare ourselves, our firms and our clients for that inevitable day. Let's be honest, if we knew the answer to that question, we'd be sitting in our office campus in Silicon Valley or in our vineyard in Napa Valley.

Even in our uncertain world, a number of topics are commonly identified as likely drivers of significant future change in the legal profession. Among these are:

1. The ongoing relationship between Baby Boomers and Millennials and the anticipated retirements of the Baby Boomer lawyer in the years ahead. Much has been made of the real and imagined differences between and among the generations now populating law firms and legal departments and seminars abound on the keys to managing the younger employee. Nevertheless, no one quite seems to have a handle on how generational differences are likely to play out in how lawyers practice (Together in firms? Remotely while wearing pajamas or sweat pants? Some of both or something completely different?) Where will law firm leadership come from and will it even matter?

2. Continuing work-life balance issues. Another topic that just won't seem to go away is, perhaps, simply a by-product of the perceived generational differences discussed above. Nevertheless, if the "greed is good" mentality of the 1980's is gone forever and has been replaced, perhaps, by "bohemian bourgeoisie" made famous and brilliantly described by David Brooks,[1] the traditional models defining success for attorneys is likely to be transformed. This has implications not only for law firm leadership but also for staffing, compensation and client service writ large.

3. Staffing, Compensation and the Billable Hour. The law firm model has, with some minor mutations back and forth between diamonds, pyramids and other geometric shapes, remained largely unchanged. Partners work harder, but still wish to delegate to a highly leveraged associate class. Associates work harder yet in a Faustian bargain intended to guarantee future security. That's the idea, anyway. Reality, however, does not always look like it's following that model and seems to be moving farther and farther from it. If attorneys, regardless of age (one theory holds that even the erstwhile "pedal to the medal" Baby Boomers no longer want to work as hard as they have for the last 40-50 years and seek the same elusive life-work balance of

[1] Brooks, David. *Bobos in Paradise: The New Upper Class and How They Got There*, Simon &Schuster, 2000.

younger generations of lawyers), are no longer willing to devote untold hours to the practice of law or demand that those hours be logged in different environments and calculated in different manners, there will be an impact on law firms adhering to the traditional structure and model for delivery of legal services, either on staffing needs, compensation (i.e., profit) levels or both. Getting ahead of this change will be a crucial requirement for the successful firms of the future.

4. Legal Outsourcing. We have already seen a movement towards "legal process outsourcing ("LPO"), in which the work of attorneys and paralegals is transferred to vendors located outside the firm and often outside the country. LPO may be initiated by the firm itself or by the client and the results achieved by several of these vendors, if numbers and marketing statements are to be believed, are quite impressive. The lessons of LPO may well be that law firms will lose the opportunity to perform some of the work they have traditionally undertaken in-house, potentially wreaking even further havoc on the firm's staffing and compensation needs and expectations. At minimum, the fact that law firms' delivery of legal services apparently allows room for such savings for clients who use LPO should be taken as a serious criticism of those delivery systems and a strong suggestion that change is needed.

5. Virtual Law Firms. Why gather together in a bricks and mortar office and pay the considerable expense of physical space? Many lawyers would love to work remotely more often if not exclusively and office space represents one of the largest expenditures firms make. Once the walls come down, do cities and states remain important? Does a single firm for the connected remote attorneys make sense in those circumstances? Might the law firm of the future resemble an entity with diverse profit centers or divisions or as a network of cooperating individuals who band together for their mutual benefit but for their individual compensation/reward?

6. Alternative Legal Services Delivery Models. It was not all that long ago that attempts to authorize multidisciplinary practices combining legal and non-legal services in the same organization were rejected. The idea, however, is far from dead, both abroad and in the U.S. Many anticipate that, ultimately, law firms will engage in authorized multidisciplinary practices, dramatically changing both business models and the products and services offered by what used to be simple law firms. As the existence of consultant groups affiliated with law firms attests, we are already inching our way towards multidisciplinary practice without admitting it. Additionally, age-old concerns about entire communities and classes of people who are underserved or unserved by the law and who have extremely limited or no access to justice continue to press for reforms that enable non-lawyers to help where lawyers have not appeared. Increased access to justice is also likely to result from internet resources, by which individuals and companies can help themselves and not rely on the retention of lawyers.

7. Technology. All of the topics discussed above will become more likely as technology continues to free lawyers from their offices and desks. The challenge lies not in predicting what that technology will look like but in how we intend to use and benefit

from an unchained practice of law. As clients realize (rather belatedly, to be sure) that small and lean firms or groups of lawyers can provide the same quality legal service at a fraction of the cost of those firms wed to the old leveraged law firm models, change in the legal profession will accelerate. The "tipping point" made famous by Malcolm Gladwell[2] will become a cascade of change and industry mutation, undoubtedly leaving behind in its wake many who prove to be incapable of change.

8. Changing Clients. Perhaps chief among our current professional laments is the supposed disintegration of the lawyer-client relationship. While many have rather successfully couched this debate as purely one of ethics, there is no mistaking the smell of money at the root of these problems. Insurance companies and corporations today are much more aggressive in attempting to control their litigation costs. Attempts to cut these costs are unquestionably often aimed at the bottom line enjoyed by some firms. Defense bars have cried foul and the industry–our clients–seems at times to be preparing for a long, bloody war. Meanwhile, some of us sit on the porch and wonder why we are no longer close with our clients. In the midst of this escalating tension and unrest, it may well be wise to remember the words of Henry Drummond cited above. Perhaps, by not recognizing the pressures and changing goals of insurance companies and insureds, it is we, as a profession, who have "moved away–by standing still."

   As difficult as it may be, we must learn not only to accept, but to embrace change. It is not particularly easy, it is not always a great deal of fun, but it is essential to our survival and therefore clearly beats the alternative. Just as we cannot ignore the computer and hope to excel in our practice, so too should we learn to deal with the new world of our clients. If, through litigation management, cost control, better business practices or the like, our clients have begun to treat their lawyers differently (whether outside, corporate or staff attorneys)–if they have begun to "move away," --we need to find the will and the skills to move with them. Moreover, we need to do so, not in a firestorm of antagonism and conflict, but in partnership, with an eye towards mutual benefit.

Change Agents Confronting Insurers and Claims Professionals

According to PwC's recent Audit and Risk Committee Forum survey, 44% think that "most existing insurers will not survive, at least in their current form."[3] With this cheery outlook in mind and without judgment as to whether such a result would be a good or bad thing for the industry of for insureds, we cannot help but wonder what can be done to forestall this kind of projected devastation. As with the legal profession discussed above, several common phenomena are identified by supposed experts and futurists examining the insurance industry and

[2] Gladwell, Malcolm. *The Tipping Point: How Little Things Can Make a Big Difference.* Little, Brown and Company, 2000.

[3] https://www.pwc.com/us/en/industries/insurance/library/top-issues.html.

merit some consideration by those concerned about the role of insurance (or of themselves) in the years ahead.

1. Compilation and Use of Data. Data compilation is no longer a serious issue. Tremendous volumes of information about insureds, markets, risks, claims, settlements and verdicts is now available, as are measurements pertaining to an insurer's underwriting and claims performance and the services provided by outside vendors. Data is no longer limited to what the company itself has been able to develop internally but can now also be obtained from outside sources, including social media, third-party and government databases, and the internet of things. Clearly, gathering data is not the big issue or challenge for companies going forward. What is likely to be a major contributor to success in the future is how information and data is put to work for the benefit of the company.

   The successful insurer will, in the not-too-distant future be equipped to monitor and react to data available or streaming in to the company. Claims professionals may become involved in a loss as it occurs, as connected devices provide ongoing information about an insured's activities or operations or about risks insured. New models for claims prevention and loss mitigation will undoubtedly be created to try to take advantage of the speed with which information becomes known. Even the skills required of underwriters and claims professionals will likely evolve as greater amounts of information become available at ever-increasing speeds. Those following traditional models face a great risk of being left at the starting gate while the race is being run and won by others more facile with data management and interpretation.

2. Use of Analytics. Predictive analytics technologies will provide insurers with the ability to take collected information and predict a host of outcomes and results that may impact risks they insure. For example, devices installed in cars can now transmit reams of data about the manner in which the car is being operated (or operating itself), specific driver actions such as speed and braking, and weather and route conditions affecting risk. Weather information can be updated and interpreted on a real-time basis and, when appropriate, insureds facing substantial risk of loss can be notified so as to avoid or mitigate loss.

   Similarly, predictive analytics applied can be applied to help manage effective claims handling. Certain types or claims can be assigned to those who have demonstrated objective and measurable success and expertise in those areas. Claims that appear to be low risk but which bear certain characteristics that have been identified through predictive analytics as really being high-risk can be spotted early and adjusted accordingly. Discrete claim functions proven to be crucial in the development of ultimate loss can be isolated and greater attention paid to them at crucial times by the most appropriate claims professional.

   What is evident is that the effective use of predictive analytics will require a change in traditional approaches to risk, coverage and claims. Insurance companies will need to identify the new skills that will be required to successfully implement and manage

the information produced through these analytics and provide the education and training to the appropriate level of employees. Moreover, many companies will be confronted with the need to drastically modify their technology so that they know what information to capture and how to manage it

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The changes wrought be such a new operating model will pose many challenges. They will require the use and management of the right blend of people, process and technology and a willingness to do things in a different way. The sooner companies can begin this process, the more likely they will be to succeed while others strive to catch up.

3. Increased Claims Efficiency. – Lemonade. The future is here. Whether or not people are ready for it, signs that "the future is now" are all around. One such example is the new renters and home insurance company, Lemonade Insurance Company, based in New York. Marketing itself with the catchphrase "Forget Everything You Know About Insurance - Instant everything. Killer prices. Big heart,"[4] Lemonade eliminates insurance agents and brokers, promising a process that will take 90 seconds to get a policy and 3 minutes to get paid for a claim. Moreover, Lemonade is based on a model whereby it takes a flat fee for providing coverage and handling claims with the remaining profit (premium less claims paid) donated to a charity or cause of the insured's choosing. Based on a technology-based process driven by artificial intelligence and chat boxes and on behavioral science designed to eliminate conflicts of interest in how premium dollars are spent, Lemonade is already demonstrating what the future of insurance may entail and, more importantly, how new and creative thinking can turn an established industry on its comparatively stodgy head.

   The implications of an insurer without a sales force and without much of a claims department are interesting and the ultimate challenges of any business compelled by its business model to drive costs down to their lowest extreme remain unclear. Likewise, despite its apparent early success and rapid growth, both in issuing policies and in raising capital, it is still an open question whether Lemonade can expand into other risks and additional markets. Nevertheless, even if it exists only as a fixture in the personal lines renters and homeowners' market, it would appear to have a great capacity for transforming a substantial segment of the insurance industry.

   Another yet uncharted consequence of this method of selling insurance and processing claims is its impact on the expectations of insurance consumers across the board, particularly those who are already demanding instantaneous service, on-line as opposed to human interaction and low prices in other fields of commerce. As this segment of the insurance industry is exposed to new and similar products, new kinds of policy offerings, demands for charitable and social benefit from the use of money and expectations of significantly lower price points will almost certainly take root and grow. Moreover, the company that dares take two weeks to pay a claim, rather than a couple of days (much less Lemonade's "3 minutes to be paid") risk the loss of its

[4] www.lemonade.com

market. If we expect or would not be surprised to see paper insurance policies disappear, it probably would not be much of a stretch to watch the same thing happen to those companies who cannot liberate themselves from that paper or from the people who have traditionally pushed it.

4. Claims Robots and Artificial Intelligence. Given, as we have seen with Lemonade, that we need not peer too far into the future to witness the implementation of chat boxes and on-line sales and claims processes, it is clear that artificial intelligence is likely to be among the next big things in insurance company operations. We know that a portion of the traditional work of the claims professional has already been largely usurped by software and programs that purportedly rely on artificial intelligence or predictive analytics – the review and pruning of outside attorney invoices. While undoubtedly helping free the claims professional to more effectively adjust claims, can there be any doubt but that later generations of artificial intelligence can similarly replace additional functions heretofore performed by human claims professionals?

   Given the increased availability of data regarding losses and their value in the insurance and legal marketplace, for how long will one be able to argue legitimately that a human claims professional can better evaluate a claim than an AI robot? Can the experience gleaned over the course of a 30-year career trump the hard and up-to-the minute data compiled in data systems? One might suggest that the claim settled in 2000, no matter how many sophisticated issues it involved and no matter how many lessons were learned, is relatively meaningless compared to data regarding how much money is typically paid by insurers and/or awarded by juries for injuries of a certain nature and scope in a particular jurisdiction, particularly when further sliced and diced by claimant and defense attorney, judge, treating physician, testifying expert and a host of other real or imagined case drivers? What human can keep up?

   While we are left to ponder the extent to which there will be room for humans in the claims department of the future, we should also pose what may be the more important question. We can be certain that someone, at least in the foreseeable future, will have to run the claims department AI and make decisions about how and when to apply it. The question then becomes who will be left to populate the human function of claims departments? What skills will they possess and how will they outlast those whose functions are eliminated? Tomorrow's insurance leaders, and indeed the mere survivors, will need to develop the ability to adapt to a constantly evolving technology, an increased need to manage AI and a remote marketplace reachable only on the web or whatever replaces it.

Some Closing Thoughts About Change

This paper and the panel presentation it is intended to accompany both seek to identify some of the major agents for serious change in the legal and claims management professions. While the opinions of pundits and observers diverge to some degree when compiling lists of such future change agents, certain elemental truths also emerge. Unfortunately, in the rush to predict

the next great change, perhaps the most important lessons about change and, as a result, the best opportunity for coping with it are lost.

Ultimately, success or failure in a changing world is likely to be determined by our own state of mind, not by the specific change agent. When Tim Cook of Apple maintains that coding should be a part of every student's core curriculum, he is not necessarily speaking to any particular technological innovation but to a skill set that will enable the student to cope with a variety of potential change and to thrive because of the new skills he or she has mastered. But we know, as illustrated in Inherit the Wind, that not everyone will make the effort to be equipped for change. As Fyodor Dostoyevsky wrote in Crime and Punishment, "taking a new step, uttering a new word, is what people fear most."

Successful leaders, successful firms and successful companies will motivate employees to embrace and actively prepare themselves for change. Nietzsche wrote, "The snake which cannot cast its skin has to die." Industry forces will give all of us the opportunity to cast aside our old analog skins and to immerse ourselves in a brave new world. Standing still is clearly not a strategy and is not a viable option. To the contrary, to successfully meet new challenges and thrive in a world of increasingly rapid change, we need to educate ourselves and our colleagues now. We must be prepared to confront our fear of change, cast aside our old, tired ways, increase and redirect our talents and dedicate ourselves to the growth that can come only through embracing and successfully managing change. For the key must truly be "managed" change. As was so brilliantly illustrated 200 years ago by Mary Wollstonecraft Shelley in *Frankenstein* – while we should not fear scientific or, in this case, technological progress, we should nevertheless keep in mind that "great change" without human guidance and control can lead to unintended and horrific consequences.