EAGLE INTERNATIONAL ASSOCIATES

Presents

RIPPED FROM THE HEADLINES:

Successfully Defending Volatile Claims

May 18, 2018

Royal Palms Resort
Scottsdale, Arizona

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.

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PROGRAM

7:30 am	**Breakfast**	
8:30 am	**Welcome and Program Introduction** John W. VanDenburgh, Esq., Napierski, VanDenburgh, Napierski & O'Connor, LLP Chair, Eagle International Associates, Inc.	
8:40 am	**Mass Shootings in Schools and Churches: Where Does the Liability Begin and End?** **Co-Moderators:** John Egan, Esq., Rubin and Rudman LLP Chris Koning, Koning & Associates **Panelists**: Kathleen M. Austen, Product Director, Commercial Lines, The Hanover Insurance Group Edward F. Harkins, Senior Claims Examiner, James River Insurance Company Michael B. Krackov, Assistant Vice President of Resolutions Management and Associate General Counsel, United Educators Cy McFarlin, Director, Claims Administration, Insurance Board	
9:40 am	**Defending Sexual Harassment/Assault Claims in the Era of #MeToo** **Co-Moderators:** Alison M. Crane, Esq., Bledsoe Diestel Treppa & Crane LLP Jack Storer, Esq., Swenson Storer Andrews & Frazelle, PC **Panelists:** John F. Cleary, Esq., Of Counsel, Church Mutual Insurance Company Paul M. Finamore, Esq., Niles Barton & Wilmer LLP Greg Welsh, Claims Manager, Marriott Claims Services	
10:40 am	**Break**	
11:00 am	**What's the Damage? Tips on Valuing Those Challenging Cases While Assessing Liability Exposure** **Co-Moderators:** Frank H. Gassler, Esq., Banker Lopez & Gassler P.A. Lindsey J. Woodrow, Esq., Waldeck Law Firm P.A. **Panelists:** John P. Buckley, J.D., C.P.C.U., Assistant Vice President – Claims, Western National Insurance Group James Robinson, Risk Management, Revantage Corporate Services MoniQue A. Simpson, Managing Attorney, American Family Insurance Jean M. Staffo, SCLA, Technical Specialist, IFG Companies	
12:00 pm	**Closing Remarks / End Program**	
12:15 pm	**Buffet Lunch (Non-Golfers)**	
12:30 pm	**Departure for Golf – Camelback Golf Course** (Box Lunch Provided in Carts)	***Front Entrance***
2:00 pm	**Departure for Archery**	***Front Entrance***

CONTINUING EDUCATION CREDITS

3.0 General Adjuster Optional Florida * 3.0 General Adjuster Texas
3.0 Legal Illinois * 3.5 Legal Wisconsin

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MODERATORS and PANELISTS

Kathleen M. Austen has worked for Hanover Insurance Company in Worcester, Massachusetts for the past eight years and is currently a Product Director for Commercial Lines. Prior to that, she worked as a National General Adjuster. Kathleen currently prepares coverage forms for Commercial Lines, including general liability, professional liability and specialty coverages. In her prior capacity, she handled professional liability and complex general liability claims and coverage litigation. Prior to Hanover, she was the Claim/Litigation Manager at RiverStone Claims Management in Manchester, New Hampshire for three years, handling toxic tort claims, litigation pertaining to 9/11 bombings of the World Trade Center, and professional liability claims. Kathleen was in private practice litigating insurance defense and coverage matters for 14 years. She received her undergraduate degree from Boston University and her J.D. from Boston College Law School.

John P. Buckley is a graduate of Carleton College, Northfield, MN, and William Mitchell College of Law. He is admitted to practice in Minnesota and Wisconsin, U.S. District Court and the Eighth Circuit Court of Appeals. He practiced for five years with Bassford, Lockhart, Truesdell and Briggs, focusing on insurance agent E & O defense and insurance coverage work. In 1995 John joined Western National Insurance Group, a Super Regional Property and Casualty insurer comprised of seven companies doing business in 15 states, as Claims Counsel. He now serves as Assistant Vice President - Claims where he leads a team of attorneys and claim representatives handling casualty claims nationwide. In 2010, he earned his CPCU. John's work involves advising the company in all areas of insurance matters, including underwriting, claims, reinsurance and insurance coverage issues. He teaches CPCU courses and has presented at CLE and at the PLRB conferences. John has represented Western National in legislative initiatives and is active in the Insurance Federation of Minnesota, Minnesota Defense Lawyers Association and the Defense Research Institute. His team partners with outside counsel across the country to provide Western National policyholders with exceptional legal representation.

John F. Cleary retired as Vice President, Secretary and General Counsel of Church Mutual Insurance Company in Merrill, Wisconsin. Upon his retirement in March of 2017 he continued his service to Church Mutual, with the title, Of Counsel, to the legal department of Church Mutual. Over the course of his career, Mr. Cleary was in charge, at various times, of all corporate legal work, licensing, leases, media contact, legislative interpretation, governmental affairs, compliance and supervision of all litigation in which Church Mutual was a named defendant. He also specialized in the handling of catastrophic personal injury claims, and sexual misconduct claims. In addition to his duties at Church Mutual, Mr. Cleary continues to accept assignments as an Arbitrator in cases involving inter-company disputes in the insurance industry. Mr. Cleary received his B.A. from St. Norbert College, De Pere, Wisconsin and his J.D. from Chicago-Kent College of Law, and a C.P.C.U. from the Insurance Institute of America. He is admitted to the Bar in Wisconsin and Arizona.

Alison M. Crane is a partner with Bledsoe, Diestel, Treppa & Crane, LLP in San Francisco, California. Her practice focuses on complex personal injury, wrongful death and business litigation, including products liability, industrial and construction accidents, unfair competition, and employment litigation. Alison graduated from Villanova University in 1995 and received her J.D. from Boston University School of Law in 1998. She is a member of the Judicial Nominations Evaluation Commission for the State Bar of California and serves as Chair of the Queen's Bench Mentorship Committee. She is also active in the American Inns of Court which promotes legal excellence, civility, professionalism, and ethics and the Association of Defense Counsel for Northern California and Nevada.

John Egan is a partner with Rubin and Rudman, LLP, a 75-lawyer general practice firm in Boston, Massachusetts. He is a trial attorney with over 35 years experience in a wide variety of product liability, toxic tort, asbestos, personal injury, property damage, fire, professional liability, housing and employment discrimination, insurance coverage and bad faith, and other claims. Has tried over 75 cases to verdict, and has briefed and argued over 30 appeals. He received his B.A. from Bates College in Lewiston, Maine, and his J.D. from the Catholic University of America in Washington, DC. He is a member of the Massachusetts and District of Columbia bars, as well as the bars of the U.S. District Court for the District of Massachusetts, the First Circuit Court of Appeals and the United States Supreme Court. He is a member of the American, Massachusetts, and Boston Bar Associations, the Defense Research Institute, and is a founding member of Eagle International Associates.

Paul M. Finamore is a member of Niles, Barton & Wilmer, LLP located on the Inner Harbor in Baltimore, Maryland. His 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., the U.S. Court of Appeals for the Fourth Circuit, U.S. Court of Appeals for the Federal Circuit, and the U.S. Court of Federal Claims.

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 2102. He has been a recipient of the Golden Gavel Award from the Westfield Group of Insurance Companies. He is a member of Eagle International Associates, Inc., the Federation of Defense Corporate Counsel, the Defense Research Institute, and the Professional Liability Underwriting Society. Mr. Finamore has published articles in DRI's *The Voice* and the Federation of Defense Corporate Counsel's Employment Practices and Workplace Liability Section Newsletter.

Frank H. Gassler's diverse practice encompasses all types of personal injury, wrongful death and property damage products liability litigation. In the course of his career, he has defended numerous products, including paints and coatings, household and industrial chemicals, solvents, agricultural pesticides, electronic devices, tools, automotive and aircraft components, heavy equipment, pharmaceuticals, medical devices, sports equipment, toys, electrical and plumbing supplies, pool equipment, smoke detectors and alarms, motorcycles, bicycles and lawnmowers. Mr. Gassler has also handled a variety of construction defect litigation cases, including "sick building" and mold cases, involving heating ventilation and air conditioning systems, roofing systems, construction materials, cladding, windows, water intrusion, and building design. In addition, Mr. Gassler routinely represents non-medical professionals such as lawyers, accountants, architects, and engineers in malpractice cases. He also represents real estate brokers and agents, title companies and appraisers in negligence cases. Mr. Gassler is a graduate of Villanova University (B.A. cum laude 1973) and the Columbia University School of Law (J.D. 1976). He is Board Certified as a Civil Trial Lawyer by the Florida Bar. He

is listed in Best Lawyers in America ("Lawyer of the Year" Legal Malpractice Law – Defendants Tampa 2014; Personal Injury Litigation – Defendants Tampa 2015; and Product Liability Litigation - Defendants Tampa 2016), Super Lawyers (2006-2018) and Florida Trend's Legal Elite (2004; 2008; 2010-2014). He is member of the American Bar Association, the Federation of Defense and Corporate Counsel, the Defense Research Institute and the Florida Defense Lawyers Association.

Edward F. Harkins is Senior Claims Examiner at James River Insurance Company, currently specializing in General Liability, Premises Liability, Construction Defect, Products Liability, and New York Labor Law claims. Ed has more than 27 years claims experience. He has also handled Excess/Umbrella, Liquor Liability, Oil & Gas, Professional Lines- Public Entity-1983 Civil Rights Cases, Police excessive force cases, EPLI, Preferred Dealership Program - E & O. Ed earned his B.S. Marketing from St. John's University in New York and currently holds licenses in more than 20 states and handles litigation claims across the country. He also has the Insurance Institute of America IIA- Writing At Work designation, INS 21, 22, 23- General Insurance. Ed participated as a panelist at the 2016 Eagle Conference in Scottsdale on Avoiding Black Holes - Wrongful Death Claims. He enjoys all sports and participates in cross-fit to stay in shape.

Chris Koning graduated from Marietta College in Ohio. He started his insurance career in New York City in 1974 as an underwriter, moving to claims within six months and then moved to Cleveland with GAB. In 1978, GAB moved Chris to San Jose, California. He subsequently went to work with Russo Claims Service for seven and a half years managing their San Jose and Daly City offices. In June 1985, Chris started Koning and Associates as a one man shop and has been blessed over the past 33 years in growing the business to 14 offices in three states and 35 adjusters and investigators. Chris met his wife Pam in college and they have been married for 40 years and have three children. The Konings have appeared on *Family Feud*, Price is Right and Let's make a Deal. Chris is an avid tennis player and golfer and makes his home in Southern California.

Michael B. Krackov is the Associate Vice President for Resolutions Management and Associate General Counsel for United Educators. Michael joined UE in 2004 and he previously led both the West and the New England Claims Teams. In his current role, he supervises the Specialty Resolutions Group, including the five geographic legal teams. Prior to United Educators, Michael was a trial lawyer in Maryland and D.C., at the law firm of Budow & Noble, P.C, litigating a wide range of tort, business and insurance matters. Michael received his B.A. from Villanova University, and was an officer in the United States Navy for four years. He received his J.D. from George Washington University. After law school, Michael clerked for the Honorable Stephen Eilperin at the Superior Court for the District of Columbia. He is a member of the National Association of College and University Attorneys, the Maryland Bar and the District of Columbia Bar.

Cy McFarlin has served in the insurance industry for more than 20 years as an adjuster and claims manager for both personal and commercial lines. His specialties include general and professional liability, as well as auto and homeowners. Cy currently works as the Claims Director for the Insurance Board, based in Cleveland, Ohio. The Insurance Board provides an insurance program to approximately 4100 churches across the country in four denominations: United Church of Christ, Disciples of Christ, Presbyterian USA and Alliance of Baptists.

James Robinson is a Risk Management professional with Blackstone, his department is responsible for over 50 million square feet of class A office space, 58 thousand units 203 properties of multifamily housing as well as retail, Senior Living, Industrial and hospitality portfolios. He is a Risk Management and insurance professional with many years of experience at the branch; region and home office levels. James has worked for Brokers, National Insurance Carriers and Third Party Administrators. He has experience with purchasing insurance, contracts, leases, risk assessment, risk control. James considers himself a true claims and Risk Management technician. One of his proudest accomplishments is that while employed at CCC Information Services in Chicago, he was instrumental in helping to start the Claim Department of Esurance Insurance Company, a then startup company. Today, Esurance an Allstate owned company is one of the fastest growing and innovative companies in the personal lines insurance industry.

MoniQue A. Simpson is the Managing Attorney of the West Region Supervisory/Advisory Legal Office at American Family Insurance. She and her team of 8 lawyers oversee litigation in the region and provide advice and training to the company on current trends or case law. Prior to joining the corporate world, MoniQue was an insurance defense attorney first practicing 10 years at a small firm, before taking the leap to open her own firm with colleagues.

Born and raised in beautiful Tucson, Arizona, MoniQue moved to Phoenix to attend Arizona State University. While there she also obtained her law degree. When not practicing law, MoniQue is a mother to a wonderful 15 year old son, who is active in sports. If not on the sidelines cheering or volunteering on the parents' committee, she serves as a Judge Pro Tem for the Maricopa County Superior Court. Her volunteer work also extends to being a mediator for Arizona Attorney General Civil Rights Divisions' mediation program, and Vello (a United Way reading program with children in underprivileged schools).

Jean M. Staffo, Technical Specialist with IFG Companies, located at a satellite office here in Scottsdale, Arizona. With almost five years at IFG Companies, prior to that spent eleven years at Scottsdale Insurance, harnessing her love and expertise of the E&S industry, primarily focused in General Liability Claims. Prior to those eleven years, Jean worked at Sentry Insurance Co. and The Hartford Personal Lines Regional Claims office, where her claims career began back in the summer of 1997. Jean's focus and passion is her review and dissection of damages and evaluation of bodily injury claims, which stems from her collegiate studies. While studying Anthropology at The University of North Carolina – Charlotte, in the early 90's, she studied under Professor of Anthropology/Forensic Anthropologist/Author/Producer Kathy Reichs, famous for the Fox TV series Bones. These studies and continued interested in the forensic field, has definitely assisted Jean with her analysis of trauma, review and evaluation of bodily injury claims.

Jack Storer is a partner with Swenson, Storer, Andrews & Frazelle, P.C., in Phoenix, Arizona. Jack is a Certified Specialist in Injury and Wrongful Death Litigation by the State Bar of Arizona. His practice areas are Insurance Defense, Product Liability, Premises Liability, Vertical Transportation Industry, Large Vehicle Accidents; Construction Defect, and Insurance Coverage. Jack is a graduate of the University of Denver, BSBA 1974, MBA 1977; Law School: DePaul University 1980. His Bar membership is in Texas (1980), Illinois (1981), and Arizona (1985).

John W. VanDenburgh is a founding partner of the firm of Napierski, VanDenburgh, Napierski & O'Connor, LLP and in 30 years of practice he has successfully tried numerous cases to verdict. Mr. VanDenburgh handles a wide range of cases including, construction law & accident claims, professional liability including medical & dental malpractice defense, products liability actions, motor carrier litigation, environmental claims, premises liability, general accident claims, insurance coverage issues, employment liability and civil rights actions. He has received Martindale-Hubbell's AV Preeminent peer review rating, the highest rating in legal ability and ethical standards. John has been recognized by U.S. News & World Report as one of New York's Best Lawyers in the field of plaintiff's personal injury and as an Upstate New York Super Lawyer in the area of personal injury and medical malpractice defense.

Greg Welsh was born in Boulder, Colorado. His father, James Welsh, was employed 33 years by State Farm Insurance Companies as a Claims Manager in Tucson in the early 70's and Claims Superintendent in Phoenix in the 90's. Greg attended grade school in Tucson and high school in the suburbs of Philadelphia, PA. He graduated from Mount Saint Mary's University in Emmitsburg, MD in 1980 with a B.S. in Business & Finance. After college he was employed as an Insurance Field Investigator for Equifax Services in Washington, DC and specialized in Surveillance. Greg joined Marriott International in 1989 in Bethesda, MD and transferred to Dallas, TX in 1992 where he is currently a Claims Manager for Marriott Claims Services. Greg resides with his wife Nancy in Frisco, Texas. In his spare time Greg is an avid runner, and golfer.

Lindsey J. Woodrow of Waldeck Law Firm P.A., located in Minneapolis, Minnesota, is licensed and practices law in Minnesota State and Federal Courts. She received her B.A. in 2004 from Gustavus Adolphus College, and received her J.D. in 2008 from Hamline University School of Law. Prior to joining Waldeck Law Firm, she was a Judicial Law Clerk for the Honorable Chief Judge John H. Guthmann in Minnesota's Second Judicial District, Ramsey County, Minnesota. She is a member of the Hennepin County and Minnesota State Bar Associations, the Minnesota Defense Lawyers Association (MDLA), the Minnesota State Bar Association (MSBA), and is admitted to practice law in the Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community. She is also admitted to practice and is a member of the State Bar of Wisconsin and the State Bar Association of North Dakota. She is a member of Eagle International Associates, Inc., Twin Cities Claims Association and the Claims and Litigation Management Alliance. Lindsey J. Woodrow practices exclusively in insurance defense matters, including construction law, product liability, insurance coverage, no-fault, UM/UIM, auto liability, SIU/EUO, professional liability, employment law and liquor liability. This includes all phases of litigation from pre-suit through trial and appeals.

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ARMING TEACHERS WITH FIREARMS:

WHAT IS THE CURRENT STATE OF THE LAW?

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ARMING TEACHERS WITH FIREARMS:
WHAT IS THE CURRENT STATE OF THE LAW?

In the immediate aftermath of the Parkland, Florida high school shooting on February 14, 2018, in which 14 students and three school administrators were killed, and 17 others were wounded, by a lone 19-year old armed with an assault rifle, President Trump said that, "If you had a teacher who was adept with the firearm, they could end the attack very quickly . . . If the coach had a firearm in his locker when he ran at this guy . . . he wouldn't have had to run. He would have shot and that would have been the end of it. . . . Highly trained, gun adept, teachers/coaches would solve the problem instantly, before police arrived.. . . You give [teachers] a little bit of a bonus, so practically for free, you have now made the school into a hardened target" *CNN*, Feb. 22, 2018; *USA Today*, Feb. 22, 2018; *Yahoo News*, Feb. 22, 2018; *N.Y. Times*, Feb. 22, 2018. Various teacher organizations, as well as law enforcement agencies were almost universal in their criticism of such an idea. *N.Y. Times*, Feb. 22, 2018; *USA Today, Feb. 22, 2018.* Experts in school safety and security have also expressed the view that arming teachers or school administrators will not deter or reduce the incidence of school shootings, but will, more likely, increase the level of violence and pose additional liability risks to schools that do so. *See, e.g.*, Dragan, *School Safety and Security: Protecting Students in the Age of School Shootings* (May 1, 2018). www.education-expert.com/2018/05/school-safety-and-security-protecting students-in-the-age-of-school-shootings/.

The President also said, "Gun-free zone to a maniac – because they're all cowards – a gun-free zone is 'let's go in and let's attack because bullets aren't coming back at us.' . . . To a killer or somebody who wants to be a killer, that's like going in for the ice cream. That's like, 'Here I am, take me.'" *CNN*, Feb. 22, 2018; *Yahoo News*, Feb. 22, 2018. However, there does not appear to be any evidence in support of the proposition that gun-free zones operate as "magnets" for mass

shooters. *Guns in Schools*, Giffords Law Center, http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/guns-in-schools/.

Irrespective of the merits of the policy debate over whether arming school teachers or administrators might make schools safer, and more secure from gun violence, there remain the twin questions of what such a law might look like, and what liability risks might be created, exacerbated, or perhaps minimized by enacting such a law.

For purposes of illustration, we examine a recently-enacted Wyoming statute and a corresponding local ordinance of the Park County School District (Cody, WY), enacted just several weeks ago on April 17, 2018. The statute, *Wyo. Stat.* 21-3-132, was enacted in July 2017, and is entitled "Possession of Firearms on School Property". In summary, the statute authorizes local school districts to adopt rules that permit school employees to carry a concealed weapon on school property if he/she holds a concealed carry permit, and has secured approval from the school district. The rules to be adopted at the local level require, at a minimum:

- An application and approval process.
- The firearm be maintained on the person of the employee, or kept in a lock box under the employee's direct control.
- An initial course of at least 24 hours of training, including 8 hours of "scenario based training".
- A revocation and/or suspension process.

The statute also contains various notice requirements to the community and to local law enforcement, and a waiver provision for "isolated rural schools". The full text of the statute is printed in the Appendix.

Park County School District #6, which includes the city of Cody, Wyoming, adopted a school firearms Policy in accordance with the statute on April 17, 2018. A copy of the complete text of Policy CKA (Firearms: Personnel Authorized to Carry) is also printed in the Appendix. The text of the Policy generally follows the minimum requirements of the statute, with several minor variations. Among them, the application process requires all School District employees seeking to secure approval to submit to a Department of Family Services Central Registry Screening, and a psychological suitability examination, to be subject to random drug and alcohol testing, and to undergo 18 hours of annual training (the statute requires a minimum of 12), and to be trained to address active shooter situations, hostage situations, and situations with armed students who present a threat to themselves or others. The Policy also contains some provisions pertaining specifically to the use of firearms, specifically,

> An employee who receives approval by the Board to carry a firearm pursuant to this policy shall only fire his or her firearm if he or she reasonably perceives that his or her life, or the life or lives of others, are in imminent risk of death or serious bodily injury.
>
> In the event that a firearm is fired for any reason, the employee shall be placed immediately on paid administrative leave pending an investigation of the incident.

Finally, the Policy also contains a provision pertaining to the defense of sovereign immunity. Wyoming has a governmental immunities that is not dissimilar to the federal Tort Claims Act, and numerous state Tort Claims Acts. *Wyo. Stat.* 1-39-101 through 1-39-121. The local Policy states:

> Nothing herein is intended to limit or prevent the school district or any board member or employee from asserting the defense of governmental immunity to any claim arising from the possession or use of a firearm. To the extent an employee uses a firearm as authorized by and in compliance with this policy, such conduct shall be deemed to be within the scope of the employee's employment for immunity purposes.

One can imagine a broad range of issues arising from a teacher's use (or non-use) of a firearm in the context of a school shooting incident. In no particular order:

- What are the negligent training implications if an armed teacher inadvertently shoots a student or other bystander during a school shooting incident? Is the school district liable, or is the training provider? What if the training provider is a law enforcement agency?

- What are the liability implications if a teacher/administrator fails to keep the firearm in his/her possession or control, as required by the Policy (and the statute), and a weapon is stolen or lost?

- What are the liability implications if an unauthorized teacher/administrator brings a weapon to school and it is used, either in the commission of a crime, or if it misused in an attempt to stop or prevent a shooting incident from occurring?

- What are the liability implications if an authorized teacher, with a concealed carry permit and all of the appropriate training, fails to respond to a school shooting incident, as expected, and death or injury results? Is the teacher liable for having failed to stop or prevent the incident? Is the school?

- What are the liability implications for a school if the teachers and administrators seek concealed carry approval in such small numbers that the number of armed teachers on the school campus at any one time is always very small, or even non-existent?

- What are the liability implications for a school district that chooses not to adopt concealed carry rules for its teachers, but other surrounding communities typically do? Does the prevailing local culture create a duty of care on each local school?

- What are the liability implications if an armed and approved teacher mistakes a school scuffle for a shooting incident, forms an objectively reasonable perception that his life or the lives of others in the area, are at risk, and shoots someone? Must the "imminent risk of death or serious bodily injury" be posed by someone with another firearm? Or can a teacher use a gun to break up a fist fight?

- What are the liability implications if a teacher with a firearm delays calling law enforcement to intervene in a shooting incident because the teacher has elected to "take matters into his/her own hand" by using a firearm to intervene in the incident in an attempt to stop it?

- What are the liability implications if the teacher's firearm of choice is clearly inadequate to counter, for example, an assault rifle being used by a live shooter?

- Given the high prevalence of suicide among mass shooters, is it possible that arming teachers will actually encourage a mass shooter to attack an "armed" school? Or, might the presence of armed teachers encourage a mass shooter to arm himself more heavily than he otherwise would?

- What are the coverage and underwriting implications of a school district electing to permit its employees to bring concealed firearms into a school?

On the subject of liability claims against third parties resulting from a mass shooting at a school, the estate of one of the teenage victims of the Parkland, Florida high school shooting filed suit on April 30, 2018 against the shooter, an armed school security guard who is alleged to have been unresponsive to the attack, several mental health agencies who are alleged not to have properly treated the shooter's mental health issues or to have failed to notify law enforcement that he posed a risk of violence because of his mental state, and several of his adult guardians for having failed to prevent the shooter from having access to firearms and for failing to intervene and secure proper mental health treatment for him. A copy of the Complaint in *Pollack v. Cruz, et al*, Docket No. CACE-18-009607-(26)(Broward County, April 30, 2018), is attached in the Appendix.

One final source of information. Concealed carry laws are almost exclusively a matter of state law, and evaluating a third-party liability claim resulting from a school shooting incident where armed teachers or administrators may have played a role requires knowledge of what the local laws are with regard to carrying concealed weapons in school. The following compendium of such laws is largely taken from a gathering of the relevant state statutes compiled by researchers at the Giffords Law Center to Prevent Gun Violence. *See generally* http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/guns-in-schools/. In addition to this collection of statutory references on guns in schools, the Giffords web site contains a wealth of additional information about state and federal gun laws, background checks, "safe schools"

training, Second Amendment case law, etc. Irrespective of your political views on gun ownership and gun safety, the site is a rich resource of information. *See* http://lawcenter.giffords.org/.

State	**Guns in K-12 Schools**	**Concealed Carry in K-12 Schools**	**Statutory Citation**
AL	Prohibited	Allowed	Ala. Code § 13A-11-72(c), (e) and (g).
AK	Prohibited	Allowed	Alaska Stat. §§ 11.61.210(a)(7), (8) Alaska Stat. §§ 18.65.755.
AZ	Prohibited	Prohibited in public schools; private schools may prohibit.	Ariz. Rev. Stat § 13-3102(A)(12), (C)(4), (H), (M) (4), (5); § 15-341(A)(23) *see also* Op. Att'y Gen. Ariz. No. I16-009 (R15-024) (Sept. 2, 2016), 2016 Ariz. AG LEXIS.)
AR	Prohibited	Prohibited	Ark. Code Ann. § 5-73-119(b)(1), 306(14). An exception applies to possession at private K-12 schools and preschools run by houses of worship in certain circumstances.
CA	Prohibited	Prohibited	Cal. Penal Code §§ 626.9(b), (c), (e)(1); Cal. Penal Code § 30310(a).
CO	Prohibited	Prohibited	Col. Rev. Stat. § 18-12-105.5(1), 214(3).
CT	Prohibited	Prohibited	Conn. Gen. Stat. § 53a-217b(a).
DE	Prohibited	Prohibited	Del. Code Ann. Tit. 11, §1457(a)-(c).
DC	Prohibited	Prohibited	DC Code Ann. § 22-4502.01.
FL	Prohibited	Prohibited	Fla. Stat. §§ 790.06(12)(a)(7), (9), (10), 790.115(1)-(2)(a), (c); 810.095.
GA	Prohibited	Prohibited	Ga. Code Ann. § 16-11-127.1.
HI	No relevant statute		Hawaii has no relevant statute.
ID	Prohibited	Prohibited	Idaho Code § 18-3302C, 3302D(1), (2)(e), (4).

State	Guns in K-12 Schools	Concealed Carry in K-12 Schools	Statutory Citation
IL	Prohibited	Prohibited	720 Ill. Comp. Stat. 5/24-1(a)(4), (a)(9), (a)(10), (c)(1), (c)(1.5), (c)(4); 430 Ill. Comp. Stat. 66/65(a)(1).
IN	Prohibited	Prohibited	Ind. Code ann. §§ 35-47-9-1(a), 2.
IA	Prohibited	Prohibited	Iowa Code §§ 280.2; 724.4B(1).
KS	Prohibited	Schools May Prohibit	Kan. Stat. An. § 21-6301(a)(11); H.B. 2052, 85th Leg., Reg. Sess. (Kan. 2013); Kan. Stat. Ann. § 75-7c10(a).
KY	Prohibited	Prohibited	Ky. Rev. Stat. Ann. §§ 237.110(16)(f), 527.070.
LA	Prohibited	Prohibited	La. Rev. Stat. Ann. §§ 14:95.2(A), 14:95.6; 40:1379.3(N)(11).
ME	Prohibited	Prohibited	Me. Rev. Stat. Ann. Tit. 20-A, § 6552.
MD	Prohibited	Prohibited	Md. Code Ann., Crim. Law § 4-102.
MA	Prohibited	Prohibited	Mass. Gen. Laws ch. 269, § 10(j).
MI	Prohibited	Prohibited	Mich. Comp. Laws §§ 28.425o(1)(a), 750.237a(4), (6)(b), (6)(d).
MN	Prohibited	Prohibited	Minn. Stat. § 609.66, Subd.1d.
MS	Prohibited	Prohibited	Miss. Code. Ann. §§45-9-101(13); 97-37-17.
MO	Prohibited	Prohibited	Mo. Rev. Stat. §§ 571.030.1(10); 571.107.1(10).
MT	Prohibited	Prohibited	Mont. Code. Ann. § 45-8-361(1), (5).
NE	Prohibited	Prohibited	Neb. Rev. Stat. §§ 28-1201(8), 28-1204.04(1), 69-2441(1)(a).
NV	Prohibited	Prohibited	Nev. Rev. Stat. Ann. §§ 202.265(1)(e), 202.3673(3)(a).

State	Guns in K-12 Schools	Concealed Carry in K-12 Schools	Statutory Citation
NH	**Allowed**	**Allowed**	*See* NH Rev. Stat. Ann. §§ 193-D:3; 193-D:1; 193:13.
NJ	Prohibited	Prohibited	N.J. Stat. Ann. § 2C:39-5e.
NM	Prohibited	Prohibited	N.M. Stat. Ann. §§ 29-19-8(B), (C); 30-7-2.1.
NY	Prohibited	Prohibited	N.Y. Penal Law §§ 265.01(3), 265.01-a, 265.20(a)(3).
NC	Prohibited	Prohibited	N.C. Gen. Stat. § 14-269.2.
ND	Prohibited	Prohibited	N.D. Cent. Code § 62.1-02-05.
OH	Prohibited	Prohibited	Ohio Rev. Code Ann. § 2923.122.
OK	Prohibited	Prohibited	Okla. Stat. tit. 21, § 1280.1. *But see* Okla. Stat. tit. 21, § 1277(D).
OR	Prohibited	**Allowed**	Or. Rev. Stat. §§ 166.360(4); 166.370(1), (3)(d), (g).
PA	Prohibited	Prohibited	18 Pa. Cons. Stat. Ann. § 912.
RI	Prohibited	Prohibited	R.I. Gen. Laws § 11-47-60.
SC	Prohibited	Prohibited	S.C. Code Ann. §§ 16-23-420(A); 16-23-430; 23-31-215(M)(5), (6), (7).
SD	Prohibited	Prohibited	S.D. Codified Laws § 13-32-7; *but see,* S.D. Codified Laws § 13-64-1.
TN	Prohibited	Prohibited	Tenn. Code Ann. § 39-17-1309(b), (c); *but see,* Tenn. Code Ann. §§ 49-50-803 and 49-7-161; 2016 TN S.B. 2249, amending Tenn. Code Ann. §§ 49-6-816 and 39-17-1309.
TX	Prohibited	Prohibited	Tex. Penal Code § 46.03(a)(1), (f); Tex. Educ. Code § 37.125(a).
UT	Prohibited	**Allowed**	Utah Code Ann. § 76-10-505.5.
VT	Prohibited	Prohibited	Vt. Stat. Ann. Tit. 13, § 4004.

State	**Guns in K-12 Schools**	**Concealed Carry in K-12 Schools**	**Statutory Citation**
VA	Prohibited	Prohibited	Va. Code Ann. § 18.2-308.1(B), (C).
WA	Prohibited	Prohibited	Wash. Rev. Code Ann. § 9.41.280.
WV	Prohibited	Prohibited	W. Va. Code § 61-7-11a(b); *but see* 2017 WV SB 388 (signed by the Governor Apr. 26, 2017), amending W. Va. Code §§ 61-7-11a, 61-7-14.
WI	Prohibited	Prohibited	Wis. Stat. § 948.605.
WY	**No relevant statute**	**Allowed** for school employees	Wyo. Stat. 21-3-132.

APPENDIX

- Wyoming Gun Statute

- Cody Wyo. Gun Ordinance

- *Pollack v. Cruz* Complaint

WYOMING FIREARMS STATUTE

21-3-132. Possession of firearms on school property.

(a) The board of trustees in each school district may adopt rules and regulations, in consultation with local law enforcement, to allow the possession of firearms by employees possessing a valid concealed carry permit under W.S. 6-8-104 on or in any property or facility owned or leased by the school district. Employees of a school district who hold a valid concealed carry permit issued under W.S. 6-8-104 may carry a concealed firearm on or into school facilities or other areas designated by the board of trustees, provided the employing school district has adopted rules and regulations that allow possession of firearms on school property and the employee has received approval by the board of trustees as required by this section.

(b) For purposes of this section, "employee" means any person employed under contract with the board of trustees of a school district, including but not limited to, superintendents, assistant superintendents, principals, assistant principals, teachers, guidance counselors, librarians, teacher's aids, coaches, business managers, secretaries or administrative assistants, janitors, bus drivers, volunteers or other employees on contract with a school district.

(c) The rules required by subsection (a) of this section shall at a minimum:

(i) Establish an application and approval process for employees possessing a valid concealed carry permit under W.S. 6-8-104 to carry a firearm on school property;

(ii) Require any person carrying a firearm pursuant to this section to maintain the firearm on his person at all times or in a concealed biometric container or lock box within the direct control of the individual at all times;

(iii) Establish ongoing training requirements, curricula and instructor qualifications, subject to approval by local law enforcement, including:

(A) An initial course of training comprised of not less than sixteen (16) hours of live fire handgun training, and eight (8) hours of scenario based training using nonlethal training, firearms and ammunition; and

(B) Annual firearm qualification and documented recurrent training of not less than twelve (12) hours with an approved instructor.

(iv) Provide a process for the revocation or suspension of the authorization under this section for an employee to carry a firearm on school property.

(d) The board of trustees in any school district may waive all or part of the training requirements of subsection (c) of this section for isolated rural schools and employees in those schools.

(e) The superintendent of the district shall notify the parents and guardians of students attending school in the district of the ability of employees to carry firearms and the rules and regulations governing possession.

(f) The superintendent of the district shall notify all law enforcement agencies with jurisdiction over the area of the location and names of all employees who receive permission to carry firearms from the district's board of trustees. The identities of the employees who receive permission to carry firearms from the district's board of trustees shall be confidential and are not public records for purposes of W.S. 16-4-201 through 16-4-205.

(g) Nothing in this section shall authorize an employee to carry a firearm, concealed or otherwise, on or into any facility or other school district property without the express approval of the board of trustees and notification of parties as required by this section.

(h) Nothing in this section shall authorize a student of a school district to carry a firearm, concealed or otherwise, on or into any facility of a school district.

(j) Any rules and regulations adopted under this section shall only apply to persons who are employees, as defined in subsection (b) of this section.

PARK COUNTY SCHOOL DISTRICT #6
BOARD OF EDUCATION POLICY

Code: CKA

FIREARMS: PERSONNEL AUTHORIZED TO CARRY

Pursuant to W.S. 21-3-132, the Board of Trustees of Park County School District No. 6 may authorize employees to conceal carry firearms on property or in facilities owned or leased by Park County School District No. 6, subject to the terms, condition, and limitations prescribed by state law and federal law, this policy and such other policies, rules and regulations adopted by the Board of Trustees. The Board of Trustees shall establish and approve ongoing training requirements, curricula and instructor qualifications, subject to approval by local law enforcement. Employees are subject to and shall comply with Policy EBC – Emergency Preparedness. Safety protocol for Employees Authorized to Carry will be made in consultation with the Superintendent, School Resource Officer (SRO), School Safety and Security Supervisor, local law enforcement and subject matter experts. Student safety and security shall be the first priority of all employees in the event of an emergency. Conceal carry staff members shall consider their skills, training and available tactics when determining the safest course of action for student safety during an emergency.

DEFINITIONS:

"Board" shall mean the Board of Trustees of Park County School District No. 6.

"Concealed Carry Firearm" shall, for purposes of this policy, mean any modern, concealable handgun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

"Employed Under Contract" shall mean:

> Employees employed by Park County School District No. 6, including, but not limited to: the superintendent, assistant superintendents, principals, assistant principals, teachers, guidance counselors, librarians, teacher's aides (paraprofessionals), coaches, business managers, secretaries or administrative assistants, janitors, and bus drivers. For purposes of this policy and W.S. 21-3-132, classified and other at-will employees at the rural schools may be offered at the discretion of the Board of Trustees, an at-will contract in order to meet the requirements of the statute. The review, consideration or approval of an application by an employee to carry a firearm shall in no way be construed to alter the at-will status of any employee.

"Firearm" shall, for purposes of this policy, mean any weapon, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

"Local Law Enforcement" shall be defined as the City of Cody Chief of Police and the Park County Sheriff.

"School District" shall mean Park County School District No. 6.

"School district property" shall mean all real property, buildings, facilities, and structures owned or leased by Park County School District No. 6., and shall also include vehicles owned or leased by the School District.

LIABILITY INSURANCE

As a part of the district's umbrella insurance coverage, the board of trustees carries liability insurance acquired to protect employees against damage suits arising out of the employee's performance of his/her duties within the scope of his/her employment and assigned responsibilities with the school district. Reference Policy GCBH – Liability Insurance.

APPLICATION AND REQUIREMENTS

Any person Employed Under Contract by the School District who wishes to carry a firearm on school district property shall submit an application through the Superintendent to the Board. CKA-R1- (*Application to Carry Firearm on School Property*). The application shall be signed by the employee and sworn under oath. The Board, in its sole and absolute discretion, may initially approve, deny or initially approve with conditions such application, for any reasons, based on the Board's determination of what is in the best interests of the School District. The Board may limit the number of persons who carry firearms within the School District or within a school.

Any person Employed Under Contract by the School District who wishes to carry a firearm on school district property shall satisfy the following requirements. Upon completion of all requirements (with the exception of the requirement in section f.2, which must be completed on an annual basis if the employee is approved), the Board will determine whether to approve, deny or approve with conditions the employee's application to carry:

a. Employee must be in good standing and shall not currently be on nor have been on any plan of improvement within the past five years.

b. Employee shall have been employed by the Park County School District No. 6 for a minimum of two continuous years prior to making application.

c. The employee must possess and maintain a valid State of Wyoming concealed firearm permit issued pursuant to W.S. 6-8-104, and must submit a copy of such permit with the application, and must submit all renewals of that permit during the time while the employee is authorized to carry a firearm on school district property.

d. The employee shall submit to a Wyoming Department of Family Services (DFS) Central Registry Screening.

e. The employee shall submit to a psychological suitability exam by a provider selected by the Board of Trustees. The results of the psychological suitability exam shall be received by and remain the property of Park County School District No. 6. Results of the exam shall be submitted by the provider to the district before an application will be considered. At the discretion of the Superintendent and by recommendation of an Administrator, subsequent exam(s) may be required.

f. The employee shall fulfill the training requirements and curricula as determined and approved by The Board and Local Law Enforcement in *CKA-R4*. Additionally, initial and annual training requirements shall include live fire with barricades, kneeling, magazine change and firing from the non-dominant hand. The employee shall submit a certificate of completion for the initial training.

1. Prior to carrying a firearm on School District property, successfully complete an initial training course approved by the Board comprised of not less than sixteen (16) hours of live fire handgun training, and eight (8) hours of scenario based training using non-lethal training, firearms, and ammunition.

2. Thereafter, the employee shall provide documentation of qualification and recurrent training to include live fire and scenario based training of not less than eighteen (18) hours each year with a board approved trainer. The Board of Trustees also recommends participation in law enforcement training opportunities when available.

3. In addition to, or as part of the training requirements above, the employee shall participate in training specifically designed to address active shooter situations, hostage situations, and situations with armed students who present a threat to themselves or others.

g. The employees shall consent in writing to drug and alcohol testing, including but not limited to random drug and alcohol testing (refer to CKA-R5). Written consent shall be included in the application form attached to this policy as Regulation CKA-R1.

h. Each employee who is approved by the Board to carry a firearm on school district property shall keep and maintain the firearm on his or her person at all times, or at the discretion of the Board, in a concealed, locked, biometric container within the direct control of the individual at all times.

i. All expenses for the psychological suitability exam, Wyoming DFS central registry screening, drug testing, concealed biometric container and initial training with associated costs shall be borne by the district. All other expenses such as but limited to: firearms, ammunition, holster, and annual training shall be borne by the employee.

j. Employee will disclose to their administrator or direct supervisor any circumstance that would reasonably reflect on their competence to convey a firearm into a school safety zone, including but not limited to a citation or arrest for or conviction of a crime (other than parking or minor moving traffic violations), the use of any medication or other substance that could impair the person's judgment, or any medical, mental or other condition that could impair or interfere with the person's ability to responsibly convey a deadly weapon into a school safety zone. Failure to do so is cause for disciplinary action including and up to termination.

k. Policy CKA authorizes approved employees to carry a firearm on School District property. The employee shall have no authority under this policy to carry such firearm on school district business or activities away from or off of school district property.

USE OF FIREARMS

An employee who receives approval by the Board to carry a firearm pursuant to this policy shall only fire his or her firearm if he or she reasonably perceives that his or her life, or the life or lives of others, are in imminent risk of death or serious bodily injury.

In the event that a firearm is fired for any reason, the employee shall be placed immediately on paid administrative leave pending an investigation of the incident. The District shall require that a fit-for-duty exam be taken and passed prior to the Employee Authorized to Carry **resuming** their duty, and shall require the employee to follow any recommendations as a result of the exam. The results of the psychological suitability exam shall be received by and remain the property of Park County School District No. 6. The District shall absorb the cost of this exam.

Nothing herein is intended to limit or prevent the school district or any board member or employee from asserting the defense of governmental immunity to any claim arising from the possession or use of a firearm. To the extent an employee uses a firearm as authorized by and in compliance with this policy, such conduct shall be deemed to be within the scope of the employee's employment for immunity purposes.

REVOCATION/SUSPENSION OF BOARD APPROVAL TO CARRY FIREARM

Any employee who is approved by the Board to carry a firearm on School District property is subject to having such privilege suspended by the Superintendent at any time for any reason, including at the request of the employee. The Superintendent shall notify the Board, supervising administrators or supervisors, and Local Law Enforcement of any suspension. The Board shall review any suspension of privileges and may suspend or revoke at any time without prior notice to the employee for any reason. There shall be no right to a hearing, appeal or other recourse following such decision. The suspension may be temporary or permanent at the discretion of the Board.

WITHDRAWAL OF PRIVILEGE

If an armed employee decides to withdraw from staff conceal carry status, withdrawal notification must be submitted in writing to the Superintendent. Once accepted by the Superintendent, forfeiture of conceal carry status is immediate. The Superintendent will notify the Board, supervising administrators or supervisors, and Local Law Enforcement.

FIREARMS/HOLSTER AND AMMUNITION

The Employee Authorized to Carry must present a firearm, holster, and ammunition, meeting the requirements as stated in CKA-R2 and CKA-R3, for inspection and review by trainers and/or law enforcement advisors identified by the Board of Trustees. The employee shall use the firearm in initial and annual training events; and carry this firearm only, upon approval of the application. The make, model, caliber, and the serial number of firearm approved for use will be documented in the individual's application packet – CKA-R1.

If an approval applicant requests to change either firearm or holster, applicant shall refer to CKA-R2.

The Employee Authorized to Carry is responsible for the care and cleaning of their approved firearm. Maintenance shall be consistent with the manufacturer recommendations.

Firearms will be inspected once a year per CKA-R2 and Employee Authorized to Carry shall provide written documentation of the inspection and condition of the firearm to the Superintendent.

NOTICE OF APPROVAL

The Superintendent shall notify parents and guardians of students attending school in the district of the ability of employees to carry firearms and the rules and regulations governing possession.

The Superintendent shall notify Local Law enforcement of the location and names of all employees approved by the Board to carry firearms on school district property.

The Superintendent shall notify supervising administrators or supervisors the names of the concealed carry employees, for **whom** they directly supervise.

CONFIDENTIALITY

The identities of the employees who receive permission to carry firearms from the Board shall be confidential and are not public records for purposes of W.S. 16-4-201 through 16-4-205.

PARK COUNTY SCHOOL DISTRICT #6
BOARD OF EDUCATION POLICY

COMPLIANCE

Any employee approved to carry a concealed weapon on school district property shall comply with all provisions, regulations, and exhibits of this policy. Any employee who is authorized by this policy to carry a firearm who fails to comply with any provision of this policy will be subject to disciplinary action, up to and including termination.

LIMITATIONS OF THIS POLICY

Nothing in this policy shall be construed to permit, allow or in any way authorize any person to carry a firearm or other weapon, concealed or otherwise, in violation of local, state and federal law. Any person who is approved to carry a firearm pursuant to this policy shall be responsible for complying with any and all applicable laws.

Nothing in this policy shall authorize a student or member of the public to carry a firearm, concealed or otherwise, on school district property.

Approval for an employee to carry a firearm pursuant to this policy shall not convey any property right, additional compensation, or any continuing right to carry a firearm. The Board of Trustees may revoke or suspend such approval at any time, without notice or a right to a hearing, as described above. Approval to carry a firearm shall not be construed to imply any continuing contract status, or any employment contract rights.

Adopted: 4/17/2018

Filing # 71417129 E-Filed 04/30/2018 01:50:58 PM

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE-18-009607-(26)

ANDREW POLLACK, as Personal Representative of the Estate of **MEADOW POLLACK**, Decedent,

Plaintiff,

vs.

NIKOLAS CRUZ; SCOT PETERSON; the ESTATE OF LYNDA CRUZ; JAMES SNEAD; KIMBERLY SNEAD; HENDERSON BEHAVIORAL HEALTH, INC.; JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC.; and SOUTH COUNTY MENTAL HEALTH CENTER, INC.,

Defendants.
_____/

COMPLAINT AND DEMAND FOR JURY TRIAL

ANDREW POLLACK, as Personal Representative of the Estate of MEADOW POLLACK, Decedent, by and through undersigned counsel, sues the Defendants, NIKOLAS CRUZ, SCOT PETERSON, the ESTATE OF LYNDA CRUZ, JAMES SNEAD, KIMBERLY SNEAD, HENDERSON BEHAVIORAL HEALTH, INC., JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC., and SOUTH COUNTY MENTAL HEALTH CENTER, INC., for wrongful death as follows:

PARTIES, JURISDICTION, VENUE, AND ALLEGATIONS COMMON TO ALL COUNTS

1. This wrongful death action is for damages in excess of this Court's minimum jurisdictional requirements, exclusive of interest and costs.

2. The potential beneficiaries of a recovery for wrongful death in the instant action are: Plaintiff, who is the surviving father of the Decedent; Shara Kalpan, who is the surviving mother of the Decedent; and the Decedent's Estate. Plaintiff and Shara Kaplan reside separately in, and are citizens of, the state of Florida.

3. This wrongful death action accrued in Broward County, Florida.

4. Jurisdiction of the subject matter, personal jurisdiction over the Defendants and venue are all proper in Broward County, Florida.

5. The Defendant NIKOLAS CRUZ is over the age of 18 years, *sui juris*, and a beneficiary of Defendant, the ESTATE OF LYNDA CRUZ.

6. The Defendant, the ESTATE OF LYNDA CRUZ, is Case No.: 062018CP000799A001CE in the Probate Court in and for the Seventeenth Judicial Circuit in and for Broward County, Florida, and consists of the assets of Lynda Cruz, the adoptive mother of the Defendant, NIKOLAS CRUZ, as of her death on November 1, 2017, and names NIKOLAS CRUZ as a beneficiary.

7. The Defendant SCOT PETERSON is over the age of 18 years and *sui juris*,

8. The Defendant JAMES SNEAD, is over the age of 18 years, *sui juris*, and the husband of Defendant, KIMBERLY SNEAD.

9. The Defendant KIMBERLY SNEAD is over the age of 18 years, *sui juris*. and the wife of Defendant, JAMES SNEAD.

10. The Defendant, HENDERSON BEHAVIORAL HEALTH, INC., is a Florida not for profit corporation that was at all times material hereto licensed to do and doing business in Broward County, Florida.

11. The Defendant, JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC., is a Florida not-for-profit corporation that was at all times material hereto licensed to do and doing business in Palm Beach County, Florida.

12. The Defendant, SOUTH COUNTY MENTAL HEALTH CENTER, INC., is a Florida not-for-profit corporation that was at all times material hereto licensed to do and doing business in Palm Beach County, Florida.

13. At all times material hereto, NIKOLAS CRUZ suffered from and was subject to severe mental illness and was prone to violence.

14. At all times material hereto until her death, NIKOLAS CRUZ resided with his adoptive mother, Lynda Cruz.

15. The following chronological summary sets forth relevant events that occurred during the period in which NIKOLAS CRUZ resided with Lynda Cruz:

    a. In November, 2012, Lynda Cruz reported that NIKOLAS CRUZ attacked her with a plastic vacuum cleaner hose.

    b. In January, 2013:

        i. Lynda Cruz reported that NIKOLAS CRUZ threw her against a wall because she took away from him his X-box video game system.

        ii. Lynda Cruz told police that NIKOLAS CRUZ suffered from ADHD, OCD, and anger issues.

        iii. A counselor with HENDERSON BEHAVIORAL HEALTH, INC. determined that NIKOLAS CRUZ did not warrant hospitalization for mental health evaluation.

    c. During the 2013 school year, NIKOLAS CRUZ accrued 26 disciplinary incidents at the middle school he attended, averaging almost three per month.

    d. In February, 2014, NIKOLAS CRUZ enrolled in Cross Creek, a school for students with emotional and behavioral disorders.

e. In June, 2015, school records note that NIKOLAS CRUZ was distracted on more than one occasion by other students' inappropriate conversations concerning guns, people being killed, or armed forces.

f. In January, 2016, NIKOLAS CRUZ enrolled as a full-time student at Marjory Stoneman Douglas High School in Parkland, Florida.

g. In February 2016, police received a report that NIKOLAS CRUZ had posted a photograph of himself with guns on Instagram, stating to the effect that he planned "to shoot up the school." A deputy responded to the house, found that he had knives and a BB gun, and subsequently passed the information to Broward Sheriff's Deputy SCOT PETERSON, the School Resource Officer ("SRO").

h. In September, 2016:

   i. NIKOLAS CRUZ was suspended from school and referred to social workers after getting into a fight following a break-up with his girlfriend.

   ii. NIKOLAS CRUZ turned 18 years of age.

   iii. A student reported to SRO Deputy SCOT PETERSON that NIKOLAS CRUZ, while depressed, had cut himself and ingested gasoline in an attempt to kill himself. The student further stated that NIKOLAS CRUZ wanted to buy a gun for hunting, had drawn a swastika on his backpack next to the words "I hate n-----s".

   iv. Counselors from HENDERSON BEHAVIORAL HEALTH, INC., advised police that NIKOLAS CRUZ "was not a risk to harm himself or anyone else" because he was on a treatment plan for ADHD, depression, and autism.

v. The Florida Department of Children and Families opened an investigation of NIKOLAS CRUZ, calling him a "vulnerable adult due to mental illness". The report notes that he plans to buy a gun, but "it is unknown what he is buying the gun for."

i. In November, 2016, The Florida Department of Children and Families closed its investigation of NIKOLAS CRUZ. It reported that his "final level of risk [was] low," noting that his mental health clinician stated that he took his medication regularly and kept his appointments. The report further found that he suffered from depression, ADHD, and autism.

j. In January, 2017, NIKOLAS CRUZ was suspended for "low assault" and referred for a threat assessment.

k. In February, 2017:

i. NIKOLAS CRUZ was expelled from school after fighting and told not to return.

ii. NIKOLAS CRUZ purchased the AR-15 rifle that he would use approximately one year later in committing the massacre at Marjory Stoneman Douglas High School. This was one of at least ten guns he purchased after his 18th birthday.

l. In September, 2017, the Federal Bureau of Investigation received a report from Mississippi that someone identifying himself as "nikolas cruz" had left a message on a YouTube channel stating "I'm going to be a professional school shooter."

16. On November 1, 2017 Lynda Cruz died after a brief illness.

17. That same day, a cousin of Lynda Cruz called the police to report that NIKOLAS CRUZ had weapons and requested that they be removed.

18. Shortly thereafter, NIKOLAS CRUZ moved in with a family friend, Rocxanne Deshamps, and her son, Rock.

19. The Deschamps forbade NIKOLAS CRUZ from bringing or otherwise possessing any guns on the property, and after arguments and at least one fight, NIKOLAS CRUZ vacated the Deshamps' residence.

20. In late November, 2017, NIKOLAS CRUZ moved in with a friend from school and his parents, JAMES SNEAD and KIMBERLY SNEAD (collectively, "the SNEADS").

21. The SNEADS allowed NIKOLAS CRUZ to bring and possess his guns on their property, including the AR-15 rifle that he subsequently used in committing the massacre at Marjory Stoneman Douglas High School.

22. At all times material hereto, the SNEADS undertook to maintain exclusive control over NIKOLAS CRUZ'S guns by placing them in their locked gun safe to which JAMES SNEAD has asserted he possessed the only key.

23. At all times material hereto, contrary to said assertion by JAMES SNEAD, NIKOLAS CRUZ had access to one or more of his guns, while residing at the SNEADS' residence, including the AR-15 rifle that he subsequently used in committing the massacre at Marjory Stoneman Douglas High School.

24. On or about January 5, 2018, the Federal Bureau of Investigation received a report from "a person close to NIKOLAS CRUZ" who was worried about him "getting into a school and just shooting the place up." The caller reported concerns about his "gun ownership, desire

to kill peoples, erratic behavior, and disturbing social media posts, as well as the potential of him conducting a school shooting."

25. Sheriff Scott Israel reported that his office has responded to or been involved in some way with 23 type calls involving NIKOLAS CRUZ or his family prior to the shooting. However, based on logs of the original calls and additional records obtained by CNN, it appears that the Broward County Sheriff's Office actually received 45 calls in the past decade related to the Cruz home, NIKOLAS CRUZ or his brother. Descriptions of those calls range from "mentally ill person" to "child/elderly abuse," "domestic disturbance," "missing person," and more. The vast majority of the calls resulted in "no written report."

26. On February 14, 2018, NIKOLAS CRUZ removed the AR-15 from the gun safe at the home of the SNEADS and, employing an UBER driver, travelled to Marjory Stoneman Douglas High School in Parkland, Broward County, Florida.

27. On that date, at approximately 2:21 p.m., NIKOLAS CRUZ entered Building 12 and began shooting both students and teachers alike.

28. NIKOLAS CRUZ used his AR-15 rifle to kill 17 students and teachers, and shooting and wounding more.

29. The Decedent, MEADOW POLLACK, was one of the 17 people whom NIKOLAS CRUZ shot to death.

30. Specifically, NIKOLAS CRUZ shot MEADOW POLLACK four times after she exited a classroom on the third floor of Building 12. In an awe inspiring display of heroism and fortitude, after being shot, MEADOW POLLACK, crawled down the hallway to another student, a freshman. MEADOW POLLACK then laid her bullet riddled body on top of the other student, who had not yet been shot, in an attempt to protect the freshman. But

NIKOLAS CRUZ was unrelenting in his savagery. He pointed his assault rifle at MEADOW POLLACK'S back and shot into it repeatedly. The bullets pierced through MEADOW POLLACK'S back and into the child beneath her, killing both students. In a final act or barbarity, NIKOLAS CRUZ shot MEADOW POLLACK in her head.

COUNT I
WRONGFUL DEATH AGAINST NIKOLAS CRUZ

31. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

32. As result of NIKOLAS CRUZ shooting and killing MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

33. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, NIKOLAS CRUZ, for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT II
WRONGFUL DEATH AGAINST SCOT PETERSON

34. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

35. Confucius perfectly sums up SCOT PETERSON's conduct on February 14, 2018: "To know what is right and not do it is the worst cowardice." SCOT PETERSON is a coward.

36. When NIKOLAS CRUZ entered Building 12 on the Marjory Stoneman Douglas High School campus on February 14, 2018, at approximately 2:21 p.m., he did so by entering the east stairwell.

37. His AR-15 rifle was inside a soft black case. When he exited the stairwell, he pulled the AR-15 rifle out of the case and began firing.

38. NIKOLAS CRUZ set off the school's fire alarm prompting the start of the evacuation of some 3,000 students and staff.

39. NIKOLAS CRUZ then began shooting into four classrooms.

40. NIKOLAS CRUZ then then took another stairwell to the second floor and shot another victim.

41. Some students took cover inside classrooms while others jumped over fences to escape and take shelter.

42. At approximately 2:22 p.m., SCOT PETERSON was near the Administration Building.

43. Also, at approximately 2:22 p.m., the first 911 call is made to the City of Coral Springs communications center.

44. At approximately 2:23 p.m., SCOT PETERSON headed in the direction of Building 12. He advised over Broward Sheriff's Communication Dispatch: "Be advised we have possible, could be firecrackers, I think we have shots fired, possible shots fired, 1200 Building."

45. Instead of actually entering Building 12 as he should have, SCOT PETERSON positioned himself out of harm's way, though within earshot of the NIKOLAS CRUZ'S carnage, outside of the southeast corner of Building 12 and the northeast corner of Building 7.

46. SCOT PETERSON cowered in his safe location between two concrete walls outside of Building 12 the entire time NIKOLAS CRUZ trained his AR-15 and rained bullets upon the teachers and students of Marjory Stoneman Douglas High School.

47. Also at approximately 2:23 p.m., Coral Springs Fire Department was dispatched to the school.

48. A Broward Sheriff's Deputy advised Broward Sheriff's Communication Dispatch that shots were heard all the way out by the football field. SCOT PETERSON, from his safe and cowardly position, called on multiple occasions for the school to be locked down.

49. SCOT PETERSON's lockdown prevented students and teachers from escaping Building 12. SCOT PETERSON even commanded: "We're in total lockdown right now. Nobody's leaving the school, everybody's in lockdown."

50. SCOT PETERSON had no doubt the gunfire was coming from Building 12. Indeed, at approximately 2:24 p.m., he advised Broward Sheriff's Communication Dispatch: "We're talking about the 1200 building, it's going to be the building off Holmberg Road."

51. NIKOLAS CRUZ continued firing at the teachers and students of Marjory Stoneman Douglas High School for what must have seemed like an eternity to those inside Building 12.

52. At approximately 2:27 p.m., hearing the calls for help over Coral Springs Dispatch, a Coral Springs Officer arrived at the school.

53. Also at approximately 2:27 p.m., the cowardly SCOT PETERSON, still in his safe location, advised Broward Sheriff's Communication Dispatch: "Make sure I have a unit over in the front of the school, make sure no one comes inside the school." SCOT PETERSON continues his directive advising Broward Sheriff's Communication Dispatch to order the

real police officers to stay away: "Broward. Do not approach the 12 or 1300 building, stay at least 500 feet away at this point."

54. Also at approximately 2:27 p.m., while SCOT PETERSON remained guarded by two concrete walls outside of Building 12 for four minutes, NIKOLAS CRUZ took Building 12's east stairwell to the third floor, where he dropped the AR-15 rifle, ran down another set of stairs, exited the building, and ran toward the school tennis courts.

55. Law enforcement officers from Coral Springs Police Department and Broward Sherriff's Office arrived at various entry points along Marjory Stoneman Douglas High School's campus. As the law enforcement officers made their way to Building 12, doing what they were sworn and trained to do, some stopped to render aid to gunshot victims they encountered as they approached.

56. At approximately 2:29 p.m., Coral Springs Officer Tim Burton found SCOT PETERSON still shielded from danger in his safe position outside of Building 12, near the northeast corner of Building 7.

57. The pusillanimous SCOT PETERSON remained safe in his position away from NIKOLAS CRUZ, never once attempting to go inside Building 12 where the School Resource Officer knew the shooting was taking place, never once attempting to save a life, never once attempting to fire a single bullet at NIKOLAS CRUZ.

58. Rather, SCOT PETERSON waited and listened to the din of screams of teachers and students, many of whom were dead or dying, and the blasts of NIKOLAS CRUZ's repeated gunfire.

59. At approximately 2:32 p.m., real law enforcement officers made their way into Building 12. However, it was too late to stop NIKOLAS CRUZ. He had already left.

60. Prior to February 14, 2018, SCOT PETERSON underwent the Broward Sherriff's Office active-shooter training program.

61. Prior to February 14, 2018, SCOT PETERSON received at least one refresher training in Broward Sherriff's Office active-shooter training program.

62. Any suggestion that SCOT PETERSON was precluded by his training to enter Building 12 and addressed and killed NIKOLAS CRUZ before NIKOLAS CRUZ murdered MEADOW POLLACK would be patently false.

63. According to SCOT PETERSON'S training, Broward Sheriff's Office Department of Law Enforcement Standard Operating Procedures 4.37.2(C): "If real time intelligence exists the sole deputy or a team of deputies may enter the area and/or structure to preserve life. A supervisor's approval or on-site observation is not required for this decision."

64. There was only one person on the Marjory Stoneman Douglas High School campus on February 14, 2018 between 2:22 p.m. and 2:27 p.m. who could have stopped NIKOLAS CRUZ.

65. There was only one other person on the Marjory Stoneman Douglas High School campus on February 14, 2018 between 2:22 p.m. and 2:27 p.m. who was armed.

66. There was only one person on the Marjory Stoneman Douglas High School campus on February 14, 2018 between 2:22 p.m. and 2:27 p.m. who was trained to deal with an active shooter.

67. Unfortunately for the teachers and students of Marjory Stoneman Douglas High School, that one person was SCOT PETERSON.

68. During a February 25, 2018 interview with Jake Tapper on CNN, Broward Sherriff Scott Israel confirmed "while the killer was on campus with this horrific killing, there was one

deputy, one armed person within proximity of that school. And that was [SCOT PETERSON]."

69. Sheriff Israel added in the interview that "one deputy was remiss, dereliction of duty, and he's now no longer with this agency. And that's [SCOT PETERSON]."

70. SCOT PETERSON did nothing. He had the opportunity and obligation to prevent the death of those innocent people, including MEADOW POLLACK, who were on the third floor of Building 12. But he let those innocent people die because he was a coward.

71. On February 23, 2018, Broward Sherriff Scott Israel held a press conference after reviewing the footage of SCOT PETERSON'S pusillanimity on February 14, 2018, and Israel aptly stated he was: "Devastated. Sick to my stomach." When asked what SCOT PETERSON should have done when gunfire broke out at the Parkland school on February 14, Israel likewise aptly said SCOT PETERSON should have gone into the building and "[a]ddressed the killer. Killed the killer."

72. During the February 25, 2018, interview with Jake Tapper on CNN, Broward Sherriff Scott Israel unequivocally and rightly stated: "[D]o I believe if SCOT PETERSON went into that building, there was a chance he could have neutralized the killer and saved lives? Yes, I believe that."

73. Continuing in his interview with Jake Tapper, Broward Sherriff Scott Israel rightly recognized: "We push to the entry, to the killer. We get in, and we take out the threat."

74. In a separate interview on February 25, 2018, with an NBC 6 local news reporter, Israel added: "I gave [SCOT PETERSON] a gun. I gave him a badge. I gave him the training. If he didn't have the heart to go in, that's not my responsibility."

75. When SCOT PETERSON was observed on surveillance footage at 2:23:44 cowering at the southeast corner of Building 12, NIKOLAS CRUZ had not yet gone to the third floor and killed MEADOW POLLACK.

76. SCOT PETERSON irrefutably owed a duty of care to MEADOW POLLACK to have done by 2:23:44 what Sheriff Israel said: Enter Building 12, address the killer and kill the killer.

77. Had SCOT PETERSON done so, MEADOW POLLACK would not have been shot and killed.

78. There was an allocation of resources to employ and deploy SCOT PETERSON as an SRO for the purported safety and welfare of the administration, teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK.

79. This employment and deployment of SCOT PETERSON included stationing SCOT PETERSON as an SRO at all times during school hours to protect the administration, teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK, from a variety of threats, including those posed by active shooters.

80. The administration, teachers and students, including MEADOW POLLACK, constituted a discrete class of persons for whose benefit the employment and deployment of SCOT PETERSON, and the ostensible consequential deterrent and protective effects, provided.

81. Moreover, Marjory Stoneman Douglas High School was mandated to otherwise be a gun-free zone.

82. MEADOW POLLACK and her fellow students, the teachers and the administration all relied – MEADOW POLLACK and those killed or injured on the third floor to their detriment – on SCOT PETERSON being stationed as an SRO at all times during school hours to protect them from a variety of threats, including those posed by active shooters,

and being the only person armed with a firearm and hence the only one capable of protecting them from these threats.

83. SCOT PETERSON affirmatively further induced that reliance.

84. SCOT PETERSON had direct and continuing contact with the administration, teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK.

85. The students, including MEADOW POLLACK, were at all times at the school compelled into a custodial relationship with adults, all of whom save SCOT PETERSON, were mandatorily disarmed.

86. SCOT PETERSON'S duty of care to MEADOW POLLACK to enter Building 12, address the killer and kill the killer, is not barred by the public duty doctrine; that doctrine is inapplicable because SCOT PETERSON was not simply attempting to enforce a law and/or engaged in the protection of the general public; SCOT PETERSON owed MEADOW POLLACK this duty of care pursuant to traditional principles of tort law.

87. Alternatively, this duty of care is not barred by the public duty doctrine; the public duty doctrine is inapplicable because SCOT PETERSON was not simply attempting to enforce a law and/or engaged in the protection of the general public; instead, SCOTT PETERSON affirmatively sought to provide a service to the administration, teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK; this duty of care is thus engendered by the undertaker doctrine.

88. SCOT PETERSON undertook the duty to protect the administration, teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK, from a variety of threats against unreasonable risk of physical harm, including those posed by

active shooters, and he was required to exercise reasonable care in the fulfilment of that duty, which commanded that he enter Building 12, address the killer and kill the killer,

89. Alternatively, there exist one or more exceptions to the public duty doctrine.

90. First, SCOT PETERSON had a special relationship with the administration teachers and students – especially the students – at Marjory Stoneman Douglas High School, including MEADOW POLLACK, which gave rise to a duty to protect them against unreasonable risk of physical harm, and to enter Building 12, address the killer and kill the killer.

91. This special relationship existed, in whole or in part, by the aforesaid: Allocation of resources to employ and deploy SCOT PETERSON; the employment and deployment of SCOT PETERSON; the school grounds serving as a gun-free zone; the reliance on the employment and deployment of SCOT PETERSON; the further inducement by SCOT PETERSON of the reliance on his employment and deployment; the direct and continuing contact made by SCOT PETERSON; and/or the compelled custodial relationship.

92. Additionally or alternatively, SCOT PETERSON was an actual or apparent agent of the School, and the special relationship exception to the public duty doctrine in the context of schools and minor children, like MEADOW POLLACK, is firmly entrenched in the law.

93. Additionally or alternatively, a special tort duty exception to the public duty doctrine exists because SCOT PETERSON became directly involved in circumstances which placed people, including MEADOW POLLACK, within a "zone of risk" by creating or permitting dangers to exist or otherwise subjecting them to danger.

94. SCOT PETERSON permitted the danger that was NIKOLAS CRUZ to go to the third floor to continue his killing spree when SCOT PETERSON had ample opportunity to prevent that.

95. Additionally or alternatively, SCOT PETERSON'S special duty existed in whole, or in part, with the teachers and students of Marjory Stoneman Douglas High School, including MEADOW POLLACK, because SCOT PETERSON'S lockdown of Building 12 and false assertions that the shooter was or might be elsewhere besides Building 12 prevented other, real – brave – law enforcement officers from entering the Building and addressing and killing the killer before the he murdered MEADOW POLLACK.

96. Additionally or alternatively, SCOT PETERSON'S special duty existed in whole, or in part, with the teachers and students of Marjory Stoneman Douglas High School, particularly those on the third floor of Building 12, including MEADOW POLLACK, because SCOT PETERSON's failure to enter while at the same time commanding a lockdown of Building 12 while NIKOLAS CRUZ was not yet on the third floor, restrained their freedom to act to protect themselves from the violent acts of NIKOLAS CRUZ.

97. The inaction and dereliction of duties by SCOT PETERSON as described herein, taken together, constituted a clear and present danger to the health and well-being of the teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK.

98. The inaction and dereliction of duties by SCOT PETERSON as described herein, were made while he was in the course and scope of his duties as an SRO but in bad faith, or with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights and safety of the teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK.

99. SCOT PETERSON breached his duties owed to the teachers and students at Marjory Stoneman Douglas High School, including MEADOW POLLACK by committing one or more of the following acts of commission and/or omission:

a. Failing to enter Building 12;

b. Failing to attempt to take out the threat, NIKOLAS CRUZ;

c. Failing to attempt to neutralize the killer, NIKOLAS CRUZ;

d. Failing to attempt at saving a single life but his own;

e. Failing to respond those victims relying upon him for protection;

f. Failing to exercise reasonable care in the fulfilment of the duties he undertook to protect; and/or

g. Failing to follow the policies and procedures reasonably calculated to mitigate, reduce and/or eliminate the risk of the injuries and harm during an active shooting.

100. As result of SCOT PETERSON acting in bad faith, or with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

101. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, SCOT PETERSON, for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act,

caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT III
WRONGFUL DEATH AGAINST THE ESTATE OF LYNDA CRUZ

102. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

103. At all times material hereto prior to her death, LYNDA CRUZ knew or should have known that NIKOLAS CRUZ suffered from mental illness and was a threat to others.

104. At all times material hereto prior to her death, LYNDA CRUZ owed a duty to the public, including MEADOW POLLACK, to exercise reasonable and ordinary care to:

a. properly supervise and obtain proper diagnosis and treatment for NIKOLAS CRUZ;

b. take appropriate steps to prevent NIKOLAS CRUZ from obtaining the means and/or opportunity to harm others; and

c. inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone.

105. LYNDA CRUZ was negligent and breached her duty of reasonable care as described herein.

106. As result of LYNDA CRUZ'S negligence, which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

107. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, the ESTATE OF LYNDA CRUZ, for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT IV
WRONGFUL DEATH AGAINST JAMES SNEAD

108. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

109. At all times material hereto, JAMES SNEAD knew or should have known that NIKOLAS CRUZ suffered from mental illness and was a threat to others.

110. At all times material hereto, JAMES SNEAD owed a duty to the public, including MEADOW POLLACK, to exercise reasonable and ordinary care to keep any and all guns in their care, custody, and control secure from use in a crime, and specifically from any such foreseeable use by NIKOLAS CRUZ.

111. JAMES SNEAD was negligent and breached his duty of reasonable care for the safety and protection of the public and MEADOW POLLACK by allowing NIKOLAS CRUZ to have access to his guns over which the JAMES SNEAD had asserted control as a condition of NIKOLAS CRUZ residing in the Snead home.

112. As result of JAMES SNEAD'S negligence, which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

113. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, JAMES SNEAD, for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT V
WRONGFUL DEATH AGAINST KIMBERLY SNEAD

114. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

115. At all times material hereto, KIMBERLY SNEAD knew or should have known that NIKOLAS CRUZ suffered from mental illness and was a threat to others.

116. At all times material hereto, KIMBERLY SNEAD owed a duty to the public, including MEADOW POLLACK, to exercise reasonable and ordinary care to keep any and all guns in their care, custody, and control secure from use in a crime, and specifically from any such foreseeable use by NIKOLAS CRUZ.

117. KIMBERLY SNEAD was negligent and breached her duty of reasonable care for the safety and protection of the public and MEADOW POLLACK by allowing NIKOLAS CRUZ to have access to his guns over which KIMBERLY SNEAD had asserted control as a condition of NIKOLAS CRUZ residing in the Snead home.

118. As result of KIMBERLY SNEAD'S negligence, which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

119. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, KIMBERLY SNEAD, for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT VI
WRONGFUL DEATH AGAINST HENDERSON BEHAVIORAL HEALTH, INC.

120. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

121. At all times material hereto, HENDERSON BEHAVIORAL HEALTH, INC. knew or should have known that NIKOLAS CRUZ suffered from mental illness and was a threat to others.

122. At all times material hereto, HENDERSON BEHAVIORAL HEALTH, INC. owed a duty to the public, including MEADOW POLLACK, to exercise reasonable and ordinary care to:

a. properly diagnose and treat NIKOLAS CRUZ; and

b. take reasonable steps to inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone.

123. HENDERSON BEHAVIORAL HEALTH, INC. was negligent and breached its duty of reasonable care by not properly diagnosing and treating NIKOLAS CRUZ and/or not taking reasonable steps to inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone, as described herein.

124. As a direct and proximate result of the negligence of HENDERSON BEHAVIORAL HEALTH, INC., which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving

mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

125. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, HENDERSON BEHAVIORAL HEALTH, INC., for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT VII
WRONGFUL DEATH AGAINST JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC.

126. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

127. At all times material hereto, JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC. knew or should have known that NIKOLAS CRUZ suffered from mental illness and was a threat to others.

128. At all times material hereto, JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC. owed a duty to the public, including MEADOW POLLACK, to exercise reasonable and ordinary care to:

c. properly diagnose and treat NIKOLAS CRUZ; and

d. take reasonable steps to inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone.

129. JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC. was negligent and breached its duty of reasonable care by not properly diagnosing and treating NIKOLAS

CRUZ and/or not taking reasonable steps to inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone, as described herein.

130. As a direct and proximate result of the negligence of JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC., which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

131. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, JEROME GOLDEN CENTER FOR BEHAVIORAL HEALTH, INC., for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

COUNT VIII
WRONGFUL DEATH AGAINST SOUTH COUNTY MENTAL HEALTH CENTER, INC.

132. Plaintiff re-alleges paragraphs 1 through 30 as if fully asserted herein.

133. At all times material hereto, SOUTH COUNTY MENTAL HEALTH CENTER, INC. knew or should have known that NIKOLAS CRUZ suffered from mental illness and was a threat to others.

134. At all times material hereto, SOUTH COUNTY MENTAL HEALTH CENTER, INC. owed a duty to the public, including MEADOW POLLACK, to exercise reasonable and ordinary care to:

e. properly diagnose and treat NIKOLAS CRUZ; and

f. take reasonable steps to inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone.

135. SOUTH COUNTY MENTAL HEALTH CENTER, INC. was negligent and breached its duty of reasonable care by not properly diagnosing and treating NIKOLAS CRUZ and/or not taking reasonable steps to inform the proper authorities and the public of any threat that NIKOLAS CRUZ may foreseeably pose to anyone, as described herein.

136. As a direct and proximate result of the negligence of SOUTH COUNTY MENTAL HEALTH CENTER, INC., which caused the shooting and killing of MEADOW POLLACK, Plaintiff, the surviving father of the Decedent, and SHARA KAPLAN, the surviving mother of the Decedent, suffered damages, including, but not limited to: mental pain and suffering from the date of injury. Also, medical or funeral expenses due to the Decedent's injury or death have become a charge against his Estate or were paid on behalf of Decedent.

137. WHEREFORE, the Plaintiff, as personal representative of the Decedent's Estate, demands judgment against the Defendant, SOUTH COUNTY MENTAL HEALTH CENTER, INC., for damages for the benefit of the Decedent's survivors and Estate all damages, as specified in the Wrongful Death Act, caused by the injury resulting in death. Plaintiff also demands trial by jury for all issues so triable, and any other relief this Honorable Court deems just and proper.

Dated this 30th day of April, 2018.

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Defending Sexual Misconduct Allegations in the #MeToo Era

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Harvey Weinstein. Bill Cosby. Kevin Spacey. Once among the list of Hollywood elites, those names now evoke a much different reaction.

A year ago, a criminal jury failed to convict Bill Cosby on sexual assault charges arising from allegations he drugged and raped an unconscious woman. Six months later, the New York Times exposed the sordid allegations against Harvey Weinstein, spawning a movement with social media hashtags like #MeToo, #TimesUp, and, most significantly for those assessing risk, #believewomen. In April 2018, Cosby was convicted on all charges.

From a legal perspective, the Cosby trials were different, with a retrial never being identical to the first. The lead defense attorney for Cosby was different as, of course, was the jury. In the second case, five other alleged victims were permitted to testify, compared to one in the first trial. Finally, the recent case was tried in the #MeToo era. Has the cultural awakening occasioned by the #MeToo movement changed how people think about allegations of sexual misconduct? Or is the Cosby case, with its notoriety and sheer volume of allegations, too far outside the norm to serve as a bellwether for future cases?

At bottom, a he said/she said case begins as a coin flip, with available evidence and the credibility of the accused and accuser tipping the scales in favor of one party. The #MeToo movement has been an important catalyst in creating a conversation about power and abuse. As a result, bad behavior is less likely to be seen as a one-off comment or an innocent misjudgment of circumstances. The notion that any one incident is part of a larger, more pervasive underbelly that permeates both personal and professional settings, is no longer a bridge too far in the mind of the public. On a practical level, whether the allegation involves harassment, assault or other misconduct, the accused is more likely to feel he must disprove the allegation to have a credible chance of prevailing in the matter.

With wave after wave of accusations breaking on a seemingly daily basis, how does that affect the value of pending cases? Is this the time to be trying a sexual assault or harassment claim before a jury? Or should it be avoided at all, or nearly all, costs? Of course, there are no easy answers to those questions, and cases find their way into trial departments for reasons as varied as the claims themselves. Regardless of the news of the day, these claims can be

successfully navigated and resolved with a steady hand and well-developed plan to gather and present the evidence necessary to the defense.

The Importance of an Early Investigation

The most compelling means to gain the leverage needed to drive the narrative in a sexual misconduct claim is objective evidence that can create a timeline – a timeline of the evening, the relationship, the behavior of the parties after the fact. Depending on the circumstances, surveillance, receipts, photos, texts, phone calls and other objective data can buttress a narrative in a way that even third-party witnesses cannot. In investigating claims, prioritize efforts to preserve data with a limited shelf life when the means to do so is available.

- Surveillance - While today's surveillance footage tends to be stored on larger digital storage devices than in the days of a single tape that repeated, it often disappears quickly. If possible, endeavor to obtain or preserve video footage within the first 72 hours after an incident.
- Texts - Records of the fact that texts were exchanged may be available months and years after the incident from a wireless carrier, but the *content* of text messages is generally lost in 30-60 days, unless it is preserved by the sender or recipient on a personal phone.[1] Take steps to ensure important information is download and/or backed up when possible. Moreover, take steps to investigate if backups of the messages were preserved on the phone or *other devices*.
- Photographs – Photos can be found both on the camera roll of a phone and/or within apps designed to transmit images. When looking for photos, check all possible locations and ensure that opposing counsel does so as well.
- Metadata – Gather documents or photos in their native digital format. Utilize the information contained within digital files like photos. A simple right click on an image will give an option for "properties" while online EXIF readers such as www.metapicz.com will allow you to input an image and receive detailed information about the photo, including the specifications of the camera it was taken on as well as time, date and, sometimes, location. If the information is

[1] If the matter involves a police investigation, the contents of the phones of the alleged victim and/or the accused may have been preserved by law enforcement using Cellebrite or similar technology.

valuable, appropriate steps can be taken to lay the foundation for that evidence and to secure appropriate experts to testify about it if necessary.

- Social Media – Social media accounts can be a valuable source of information on both liability and damages. Such accounts are also easily manipulated, and privacy settings controlled. To the extent they are publicly viewable, capture full digital versions of any available social media as soon as possible. If litigation has commenced, a complete download of social media accounts can be requested in discovery.[2] Trying to obtain account information directly from social media providers is inevitably a difficult and often fruitless endeavor.
- Credit Card Receipts – Credit card transactions will appear on bank statements that can be subject to subpoena but the actual receipts signed at a restaurant or other point of sale are kept by the business for a more limited period. In a case involving disputes about timing, intoxication or other capacity issues, receipts can offer time stamps as well as evidence of the ability to calculate a tip or sign legibly in the appropriate location.

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[2] Exemplar requests: **facebook:** A complete copy of the ELECTRONIC DOWNLOAD of YOUR Facebook information. [For purposes of this Request only, the "ELECTRONIC DOWNLOAD" is to be acquired through the following steps: 1. Click at the top right of YOUR Facebook page and select "Settings"; 2. Click on "Download a copy of your Facebook data" below YOUR general account settings; 3. Click "Start My Archive"; 4. The resulting files are to be provided to Propounding Party in electronic form (i.e. Compact Disk, Flash Drive, Dropbox, etc.) **Twitter**: A complete copy of the ELECTRONIC DOWNLOAD of YOUR Twitter archive. [For purposes of this Request only, the "ELECTRONIC DOWNLOAD" is to be acquired through following these steps: 1. Go to your account settings by clicking on the profile icon at the top right of the page and selecting Settings from the drop-down menu; 2. Click Request your archive; 3. When your download is ready, Twitter will send an email with a download link to the confirmed email address associated with YOUR Twitter account; 4. Once you receive the email, click the Go now button to download a .zip file of your Twitter archive. The .zip file is to be produced to Propounding Party in electronic form (i.e. Compact Disk, Flash Drive, Dropbox, etc.).] Dropbox, etc.) **Instagram**: A complete copy of the ELECTRONIC DOWNLOAD of YOUR Instagram archive. [For purposes of this Request only, the "ELECTRONIC DOWNLOAD" is to be acquired through following these steps: 1. Go to http://instaport.me/; 2. Click the "Sign in with Instagram" bar on the left side; 3. Sign into Instagram utilizing your credentials; 4. You will be prompted by Instagram to "authorize" Instaport to access your basic information. Click the green "Authorize" button; 5. Under "choose your export options" confirm the "All my photos" option is selected by toggling the button to the left; 6. Click "Start Export"; 7. The archive will begin to download. Once it is finished, click the "download only" option in the box on the right and save the .zip file. The .zip file is to be produced to Propounding Party in electronic form (i.e. Compact Disk, Flash Drive, Dropbox, etc.).]

- Law Enforcement Investigations – Information gathered in connection with a criminal investigation that did not result in a prosecution may not be preserved for the duration of an associated civil action. If information gathered during an investigation may be important to you, check the retention and destruction policies for relevant laboratories and agencies and consider whether a letter seeking the preservation of evidence is warranted or desired.

Formulate and Execute a Clear Defense Strategy

Many misconduct claims are driven by the amorphous concept of "consent." Rarely is detailed affirmative consent sought or obtained in sexual encounters. In 2014, California became the first state to require colleges to use affirmative consent as the standard in campus sexual assault adjudications with several states following suit thereafter. Affirmative consent requires "an affirmative, unambiguous and conscious decision" by each party to engage in sexual activity. Similar definitions have been adopted in other states. According to the State University of New York, affirmative consent requires that partners must explicitly agree to engage in sex, consent can be withdrawn at any time during an encounter, and "silence or lack of resistance" does not imply consent. Further, a person cannot consent while intoxicated and partners must consent every time a sexual encounter occurs, regardless of whether they've consented to a particular type of behavior in the past.

In reality, consent is inevitably clearer in the moment and less ascertainable in hindsight – particularly when allegations of lack of consent or inability to consent are made. As consent is an element of nearly any claim of sexual impropriety, it is up to the plaintiff to prove she *did not* consent to the conduct in question. In some instances, a reasonable and good faith belief that the accuser did consent can be a defense to the claim, even if that belief was mistaken.

When alcohol or other substances were involved, the lines blur quickly. (Pun intended). The aforementioned investigative evidence, properly preserved, provides objective datapoints on which to build the defense of the case. Creating a timeline of events with unassailable evidence builds credibility and brings a strong, persuasive quality to your presentation of the events.

Ultimately, your case will be adjudicated in the #MeToo era but cannot be defined by it. In some cases, an entity may have a defense that, regardless of the conduct alleged, they were unaware of the propensities of the accused or are otherwise not legally responsible for their conduct. But often the credibility of the accuser and the accused take center stage. Challenges

to the accuser's credibility, recollection and damages, will undoubtedly prompt charges of victim blaming and simply must be met head on. An evaluation of the behavior of the accuser before, during and after the alleged incident are all fair and necessary inquiries. Where the behavior is inconsistent with allegations of unconsented to contact, the explanation for those inconsistencies should be explored.

At the same time, defense counsel must be cognizant of the dynamics of the jury. Where the accused's behavior is problematic, a candid assessment of the risks and potential damages associated with the action should be made as early as possible. While direct victims are likely to be excused for cause in the *voir dire* process, some portion of the jury is likely to have friends or family that have been touched in some way by the issues of abuse or harassment. Care must be taken to ensure credibility hits against the accuser are targeted and supported by the evidence to avoid backlash and maintain higher ground. This is particularly true where the accuser claims a lack of recollection of the events in question whether due to trauma, injury or incapacity.

Developments in the Law that Affect the Trial and Resolution of Your Case

In assessing risk and ultimately, trial strategy, it is important to understand the legal framework against which evidence will be measured.

1. "Me Too" Evidence

If a case involves charges of anything other than an isolated incident, the admissibility of "me too" evidence should be ascertained and explored. Since 2011, the case of Pantoja v. Anton has been cited to frequently for the proposition that courts may consider certain "me too" evidence in harassment and discrimination cases. ((2011) 198 Cal.App.4th 87.)

In Pantoja, the plaintiff, a law firm employee, alleged she had been subjected to a pattern of abusive conduct by defendant Anton before she was fired. She sued Anton and his law corporation for employment discrimination, wrongful termination in violation of public policy, battery, sexual battery, and intentional infliction of emotional distress.

A key issue at trial was whether Plaintiff could introduce evidence from other former employees who allegedly suffered similar harassment by Anton. Plaintiff admitted she did not witness the alleged "me too" evidence, some of which took place before she was employed, and thus it did not affect her work environment. Plaintiff offered the evidence to show Anton had a discriminatory intent and to rebut his testimony that he never engaged in, nor would tolerate, any harassing conduct. The trial court found the evidence was inadmissible to prove Anton's intent

or to impeach him, because it did not concern facts that took place while Plaintiff was an employee. And as the Plaintiff did not "personally witness[] such acts" they did not "adversely affected her working environment."

On appeal from a defense verdict, the Court of Appeal reversed, holding the employee need not show the conduct was motivated by sexual desire because the law prohibits all severe and pervasive demeaning misconduct based on an employee's sex. Rather, a sexual harassment claim based on a hostile work environment exists under both federal and state law, generally, where the employee was subjected to unwelcome conduct or comments because of his or her sex and the result was harassment so severe or pervasive that the conditions of the employment were altered.

While inadmissible as character evidence, evidence that Anton harassed other women outside of Plaintiff's presence could have shown the jury that he harbored a discriminatory intent or bias based on gender. Further, admission of the evidence would have allowed the jury to evaluate the credibility of Anton and other defense witnesses who claimed the conduct alleged did not occur, as well as Anton's claims that he did not have a discriminatory intent.

The court's very broad view of the admissibility of "me too" evidence is concerning for employers. While allegations of bad behavior generally, or with regard to persons not similarly situated to the plaintiff, is not necessarily relevant, the decision can significantly expand the scope of discovery in a harassment case as well as the dynamics of trial.

2. Rape Shield Laws

In the late 1970s, and into the1980s, states began taking steps to protect alleged victims of sex crimes. Most states, as well as the federal system, have some variation of rape shield laws.

In California, in a civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion, reputation, or evidence of specific instances of a plaintiff's sexual conduct, is not admissible by the defendant to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the claim is for loss of consortium. However, the

prohibition does not extend to exclude evidence about the accuser's past sexual *with the alleged perpetrator*.[3] (Cal. Evidence Code §1106(b).)[4]

Prohibitions on the use of a plaintiff's past sexual experiences are not absolute, though exceptions are limited and likely to be hard fought. The notable exception is when such information is relevant to attack the credibility of the plaintiff. As a prerequisite to introducing otherwise prohibited evidence to attack credibility, a motion must be made pursuant to Evidence Code §782 and the court must grant approval to proceed. Perhaps unsurprisingly, trial judges have narrowly exercised this discretion so as not to allow the credibility exception to undermine the legislative intent in creating the rape shield protection.[5]

Similarly, Federal Rule of Evidence 412 precludes admission of evidence offered to prove that a victim engaged in other sexual behavior (F.R.E. 412(a)(1)) or evidence offered to prove a victim's sexual predisposition (F.R.E. 412(a)(2).) Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy. (F.R.E. 412(b)(2).) As in the state procedure described above, a noticed motion is required to seek admission of evidence otherwise precluded by the Rule. (F.R.E. 412(c).)

The balancing test the Court will employ requires the proponent of the evidence to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice of any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity differs from the general rule governing admissibility set forth in Rule 403 (more prejudicial than probative) in several key

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[3] In Rieger v. Arnold (2002) 1041 Cal.App.4th 451, 464-5, the Court of Appeal determined that the term "perpetrator" in Evidence Code §1106 was broader than the term "defendant" in § 1103 (criminal rape shield statute) and includes "not only the named defendants but also any other actor whose conduct the plaintiff seeks to ascribe to the employment entity." In Rieger, the court admitted evidence about plaintiff's prior sexual conduct with "the individual defendants, or others whose conduct the plaintiff ascribed to the employer, regardless of whether it occurred within or outside the workplace."

[4] In a civil action for sexual battery brought by a minor against an adult, prior sexual history is inadmissible to establish consent.

[5] People v. Chandler (1997) 58 Cal.App.4th 703, 708.

respects. First, it alters the burden such that the proponent of the evidence must demonstrate its admissibility as opposed to the party opposing its use demonstrating prejudice sufficient to warrant exclusion. Second, the standard expressed in subdivision (b)(2) requires that the probative value of the evidence *substantially* outweigh the specified dangers. Finally, the test considers "harm to the victim," in addition to prejudice to the parties.

3. Civil Rights Statutes

Since 2002, California has had a "gender violence" statute which was purportedly created to address limits in existing laws which did not adequately prevent and remedy gender-related violence. (Cal. Civil Code §52.4). The statute was specifically enacted in response to the United State Supreme Court's decision in U.S. v. Morrison (2000) which held that Congress lacked authority to create the civil damages remedy of the Violence against Women Act (42 U.S.C.A. §13981.)

Section 52.4 offers two definitions of "gender violence." The first defines gender violence as consisting of "one or more acts that would constitute a criminal offense under state law that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, committed at least in part based on the gender of the victim, whether or not those acts have resulted in criminal" charges. (Cal. Civil Code §52.4(c)(1).) The second defines gender violence as consisting of "[a] physical intrusion or physical invasion of a sexual nature under coercive conditions, whether or not those actions have resulted in criminal charges." (Cal. Civil Code §52.4(c)(2).) Phrases such as "physical intrusion," "physical invasion," and "under coercive conditions" are not defined and the legislative history is not illuminating on those points. If a man reasonably believes that a woman wants him to have physical contact with her, but she's only acting that way because she feels pressured, is that coercive? Despite being in place for over 15 years, the statute has rarely been the subject of appellate decisions or clarification.

Subdivision (a) establishes the cause of action and states that the plaintiff may seek "actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief." The same subdivision provides that a "prevailing plaintiff may also be awarded attorney's fees and costs" - a significant point of leverage for the accuser.

Despite the intent of its authors, there are several other statutes which provide a remedy for gender-related violence including the Ralph Act (hate crimes) Civ, Code §51.7; Civ. Code §51.9 (sexual harassment in business, service, or professional relationships); Civ. Code §1708.5 (sexual battery); and Civ. Code §1708.7 (stalking); and Civ. Code §1708.6 (domestic violence).

But, a comparison with each of the other statutes reveals that Section 52.4 offers something that each of the others lack. A Section 52.4 claim carries a longer statute of limitations than a Ralph Act claim, at least as to a plaintiff who was victimized when she was a minor.[6] A Section 52.4 claim is more attractive to a plaintiff than a claim for sexual battery in that the former has a longer statute of limitations (three years versus two) and provides for an award of attorney's fees. Moreover, Section 52.4 prohibits some misconduct that the sexual harassment cause of action in Civil Code §51.9 and the torts of domestic violence and stalking do not, such as a sexual assault not arising out of a business or intimate partner relationship.

Notably, an employer is not liable for gender violence "unless the employer personally committed an act of gender violence" making the normal rules of agency liability of an employer inapplicable in a Section 52.4 claim.

4. Confidentiality Provisions in Settlement Agreements

a. Sexual Assault and Abuse Cases

Confidentiality provisions in civil settlement agreements have received a new level of scrutiny in recent years with some quick to point to such provisions as a means to silence victims and perpetuate abuse. Effective January 1, 2017, Section 1002 of the California Code of Civil Procedure prohibits any provision of a settlement agreement from preventing the disclosure of factual information establishing a cause of action for civil damages for an act that may be prosecuted as a felony sex offense, or for an act of childhood sexual abuse, sexual exploitation of a minor, or sexual assault against an elder or dependent adult. (Cal. Code of Civ. Proc. § 1002(c).) Any such provision in a settlement agreement is void, and a court may not enter any such order in any such action, whether by stipulation or otherwise. (Cal. Code of Civ. Proc. § 1002(a), (d).) Indeed, the statute goes so far as to advise that attorneys may be disciplined for demanding such a provision, or even advising a client to sign an agreement containing such a

[6] If the plaintiff was a minor at the time of the alleged misconduct, the limitations period is eight years "after the plaintiff attains the age of majority or…three years after the date the plaintiff discovers or reasonably should have discovered the psychological injury or illness occurring after the age of majority that was caused by the act, whichever date occurs later. (Cal. Civ. Code § 52.4(d).)

provision, and directs that the State Bar "shall" investigate and take appropriate action in any matter brought to its attention. (Cal. Code of Civ. Proc. § 1002(e).)

However, Section 1002 does not preclude the parties from making an agreement to prevent the defendant from disclosing any medical information or personal identifying information about the victim or any information revealing the nature of the relationship between the victim and the defendant. Notably, the statute does not preclude the right of a victim to disclose this information. Lastly, the section does not prevent a nondisclosure agreement regarding the settlement amount.

b. Proposed and Enacted Legislation Regarding Employers

i. California

In early 2018, Senate Bill 820 was introduced in the California Senate. If passed, this law would prohibit the inclusion of nondisclosure terms in settlement agreements relating to actions alleging claims of sexual harassment or discrimination in the workplace.

As it relates to the workplace, SB 820 would build on and broaden Code of Civil Procedure § 1002 by including actions seeking civil damages for sexual assault, sexual harassment, or workplace harassment or discrimination based on sex or failure to prevent an act of workplace harassment or discrimination based on sex.[7] Unlike Cal. Code of Civil Procedure §1002, however, SB 820 would permit the inclusion of nondisclosure terms upon the request by the complaining party.

ii. New York

The State of New York is also imposing limits on confidentiality in similar cases.[8] On March 12, 2018, the New York State Senate passed S-7848A, a bill which: (i) prohibits mandatory arbitration agreements for sexual harassment complaints; (ii) bans confidential sexual harassment settlements unless the confidentiality provision is separately considered and consented to by the complainant; (iii) creates a statutory definition of "sexual harassment"; and (iv) expands state-law protections against sexual harassment to independent contractors. On

[7] At the time this article was authored, the bill was set for hearing on May 1, 2018. The status of the bill can be monitored at the following location: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB820.

[8] Bills that would ban the use of nondisclosure agreements when settling sexual-harassment claims have also been proposed in Massachusetts, Pennsylvania, New Jersey and Washington.

April 12, 2018, Governor Andrew Cuomo signed into law a 2019 New York budget implementing the provisions of S-7848A.

- Effective Immediately: The new legislation prohibits sexual harassment of "non-employees in the employer's workplace," including "contractors, subcontractors, vendors, consultants or other persons providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace."
- Effective July 11, 2018:
    - Any settlement, agreement or other resolution directly relating to sexual harassment claims may not include language that prevents the disclosure of the underlying facts unless the plaintiff (1) has been given 21 days to consider the confidentiality/non-disclosure provision and 7 days to revoke the agreement after signing.
    - Mandatory arbitration agreements with respect to sexual harassment claims will no longer be enforceable and shall be deemed null and void. However, mandatory arbitration agreements that include sexual harassment disputes remain enforceable with respect to all other claims.

iii. Changes in Federal Tax Laws

On the federal level, Section 13307 of the Tax Cuts and Jobs Act of 2017 amends Section 162 of the Internal Revenue Code to eliminate a tax deduction for sexual harassment-related settlements if the settlement or payment is subject to a nondisclosure agreement. Under the Act, employers may now have to choose between deducting as business expenses settlement payments for sexual harassment or sexual abuse claims, and maintaining the confidentiality of such settlements.

What will follow from these changes in the law remains to be seen. While introduced to address legitimate and reasonable concerns in some instances, these new laws may well cause a dramatic shift in the way sexual harassment and misconduct claims are handled. For example, where new laws apply only to settlements reached after litigation has commenced, they could pressure employers to settle matters pre-litigation, thereby increasing the value for factually questionable claims. To the extent a lawsuit is filed, potential unintended consequences include dis-incentivizing defendants to settle claims due to the public nature of such settlements.

Ultimately, such provisions may steel the resolve of defendants to take a case to trial as the only means to clear their name.

Funneling more cases towards trial may ultimately not be in the best interest of alleged victims. Trials of such matters are emotionally taxing for all involved. They generally involve challenges to the credibility of the accuser, or unflattering details about the nature of the encounter or relationship aired in a public forum. When both sides are represented by counsel, confidentiality is a mutual decision which can be negotiated and bargained for. Taking that off the table can operate to eliminate something that can have value to both sides.

CONCLUSION

One thing is certain, the #MeToo movement is likely to bring about more claims for misconduct. As with any subject, those claims will cover the gamut from meaningful to meritless. Navigating these claims, requires a comprehensive investigative plan, a solid litigation strategy and a clear understanding of the best possible outcome for client under the circumstances.

What's the Damage?

Tips on Valuing Those Challenging Cases While Assessing Liability Exposure

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What's the Damage?

Tips on valuing those challenging cases while assessing liability exposure.

This paper discusses four key areas of assessing liability exposure: considerations for settling cases, exposure versus liability, assessing the potential values of a claim and the timing of settlement.

Initial Considerations

Of primary importance is the protection of the insured. As a practical matter, taking into account the available policy limit, the costs of defense and the overall liability exposure will often result in a prompt settlement.

However, there are a number of other factors that may come into play. First, is there a deductible? Does the policy have a loss only deductible that provides for a "dollar one defense," or are defense costs included within the deductible? Is an insured willing to pay the total amount of the deductible in a situation where it is perceived that the insured has very limited or no liability; this may have a significant impact on how the claim is viewed. A professional sued for malpractice often feels strongly about the claims that are being made against them, which at times impacts their willingness to contribute toward any settlement, and it is not uncommon for an insured to request the carrier to waive a deductible.

Second, the identity of the insured may be another important consideration. Is the insured an individual? Does the insured have a "high profile" in the community? Is the insured a celebrity? Alternatively, is the insured a small family company or, perhaps, a national or multi-national corporation? If the insured is a large corporation, does it pay significant premiums, does it have a large self-insured retention, had it retained the right to select counsel and control the defense? All of these factors should be considered during an initial valuation of a claim.

Third, the decision to settle might be influenced by the availability of other insurance. Assuming there are two primary policies, the first question might be whether the coverage of the other policy is "pro rata" or whether it is excess over the first layer of coverage. Check the "other insurance" clause. What is the actual exposure to the company?

There might also be excess or umbrella insurance available. Both policies would provide additional coverage to the insured beyond the limits of coverage available on the primary policy. Generally speaking, excess policies are more restrictive than umbrella policies, and routinely provide coverage above the limit of the underlying policy, but not broader coverage. Many excess policies "follow-the-form" of the primary policy. When an insured has an excess follow-form policy, the excess coverage is subject to all of the

terms and conditions of the underlying policy. An umbrella policy, on the other hand, might provide broader coverage than the underlying policy. It is important to consider the duties owed by primary insurers to excess or umbrella insurers.

Finally, consideration must be given to the possibility that a settlement might spawn further litigation. A decision not to settle quickly might result in bad publicity that causes other claims to be filed. Alternatively, if some type of serial litigation is a possibility, consideration might be given to a global resolution, such as a settlement class action. Another possibility is existing multi-district litigation that covers the subject of the dispute. Prior to considering any settlement, removal and referral might be a viable option.

It should not be overlooked that the decision to settle may also affect future underwriting. (This might depend, in part, upon whether the policy is an occurrence or claims made-type policy.) The bottom line is that all of these factors, including others, may come into play.

Exposure Versus Liability

Especially when dealing with the potential high exposure claim, it is imperative to immediately start an investigation and assessment of that claim. This is particularly important when no lawsuit has yet been filed. Local adjusters or investigators can provide a great resource for obtaining a good "feel for the facts" of the case and impressions of the claimant, any witnesses and your insured.

Early retention of experts is another way in which an adjuster can undertake an initial liability assessment in high exposure cases. Finding local and reputable accident reconstructionists, engineers, architects, medical professional and damage experts can provide a competent evaluation of both exposure and liability. In personal injury cases, if available, obtain all of the claimant's medical records immediately and arrange for a records review. A surgery that might take place three years after an accident may be easily discredited by a timely records review -- cutting exposure on the file even without physically seeing the claimant for an examination.

On the liability side, an early accident reconstruction can provide critical analysis and opinion shoring up the lack of liability, or perhaps, the questionable liability of the insured. By way of example, tire skid and scuff marks may disappear, vehicles may be repaired or destroyed, the scene of the accident might change (for example, guard rails might be replaced following an accident), all making it more difficult to assess liability. While early opinions in a catastrophic loss case finding that the insured has little or no liability may not preclude a lawsuit from being filed, it may give great assistance in obtaining a relatively low settlement in subsequent settlement negotiations or at a mediation. Saying "It's not my insured's fault" is much more clearly done through an

expert, and it also sets the frame of mind of the claimant's counsel to know that this is a claim the carrier is willing and ready to fight.

Do not forget to consider the "next level up expert." If your claimant is treating with a chiropractor, look at retaining an orthopedic surgeon or, perhaps, a neurologist or neurosurgeon, if there are radiating symptoms, to perform an evaluation. If the claimant has suggested that his lawyer retained a local construction company to do an evaluation and bid on a defect claim, consider retaining an engineer or an architect. These advanced experts may come with higher fees, but they also come with a certain amount of additional expertise in assisting with the assessment of the file. With their additional credibility, they can also have an impact on how a jury would subsequently view any of the liability issues.

An attorney may be a great asset to help in assessing exposure and performing a complete legal analysis. Local defense counsel can also aid in finding those important and reputable experts and get investigators as described above. Counsel can also be useful in providing legal analysis and supporting case law early in the analysis, so that an adjuster can complete a full investigation on all of the facts relevant to the legal theory portion of the claim. An attorney can also ensure the interests of the insured are protected, and provide additional work product and attorney-client privilege protection to any facts and opinions learned, discovered and obtained through an early investigation.

On high exposure cases, the likelihood and effect of media coverage should be a consideration. Attorneys can help frame media scrutiny and coverage in those high profile cases, and can limit access to the insured. They can also assist in the retention of publicist to deal with the media.

Once the preliminary investigation is complete, weigh the potential of a Rule 12 Motion to Dismiss or Summary Judgment Motion should litigation ensue. If a full investigation was completed prior to the commencement of litigation, an early Motion to Dismiss may be feasible, thereby limiting the cost of defense, including the taking of depositions and the retention of damages experts. Even if the motion is unsuccessful, the filing of the motion or even the threat of filing can play a large role in settlement discussions. The motion and arguments of counsel on the issues a jury will someday be asked to determine, especially if they are made in the presence of the plaintiff, can go a long way to reducing the settlement value of the case.

In those cases, where an insured is going to share some portion of the liability, determine what the comparative fault structure is in the relevant jurisdiction. Cases with multiple potentially liable parties can also limit or even negate liability of the insured. Likewise, when investigating the matter, make certain that all potentially liable parties are put on notice of the claim, that proper tenders are made where applicable, and that the

investigation includes an analysis on how much of the overall liability can be attributed to another party rather than the insured.

As a final note on this topic, reviewing jury instructions and verdict forms can be a useful tool in evaluating claims, even pre-suit. Knowing what a juror will be asked to decide, the questions jurors will need to answer, such as the interrogatories regarding future damages and life expectancy tables (if applicable), can prove to be beneficial in understanding the liability defenses and issues.

What are the Potential Values of the Claim?

In high exposure cases especially, often times the first valuation that comes from the claimant's counsel will be inflated. In evaluating the value that the claimant's counsel assigns to a case versus what the actual exposure of settlement value should be an important aspect of the early investigation process, but should also be done on a regular basis throughout the course of the file. As is well known, any evidence or information learned through the adjuster's investigation, defense counsel's investigation, or even provided by plaintiff's counsel or the insured can change the value of the case at any time. It is not wrong to stick to an evaluation; however, you must make sure that consideration is given to all additional information that may be provided -- regardless of the source.

When assessing either the exposure or settlement value, identify whether the exposure is contained. Is this a case that will have future damages, or is there a finite value to it? Consider the bodily injury case that transforms from a basic soft tissue neck/back injury to a case involving fusion surgery or claims of a traumatic brain injury. Also consider construction defect cases; the longer the claim exists, often times the more "defects" are identified. Repair costs can mushroom from replacing some roofing to repairing the complete building envelope. Knowing if the exposure is contained, or if it can be locked-in early on is an important consideration to be given when valuing the file.

A claim cannot be properly valued without knowing what the costs are. For example, are the special damages known, are the subrogation liens and offsets identified, is there a Medicare lien, is there sufficient documentation of a loss of earnings claim, have repair estimates been provided, has there been a competitive estimate completed - - all of these need to be understood. In some cases, the less tangible damages can have the greatest impact on how a claim is valued. Future medical expenses, pain and suffering, future losses of earning and punitive or exemplary damages should all be evaluated as part of the process.

On assessing the exposure on these less tangible aspects of the claim, do not discount who your claimant or plaintiff is. What is the age of the person? Are they likeable? What is their educational background, religion, socio-economic status, nationality or culture? Someone who has met the claimant in person, someone like a local

adjuster/investigator or defense counsel, can greatly assist in obtaining answers to these questions. A jury is going to consider all of these factors, and so should you! Obviously, a more likeable plaintiff can lead to a higher exposure which, in turn, can lead to a higher settlement value of the case. Conversely, an unlikeable plaintiff, regardless of the facts of the case, can turn off a jury and significantly lower or even extinguish the value of the plaintiff's claim.

Timing of A Settlement Can Really Matter

Early settlement can provide benefits in cases where pubic exposure plays a role in the case, including the negotiation of terms and conditions within a settlement agreement such as a non-disparagement clause or a confidentiality clause. Control over timing and substance of the information that is disclosed can also be of benefit to an early settlement, especially in highly visible cases or, perhaps, professional liability cases where there is a concern that sensitive matters need to be protected and contained.

Early settlement can offer both parties the ability to exercise some control over the expense of litigation. It can also provide a benefit to the plaintiff and the insured by avoiding the time and effort it takes on their respective part to participate in the litigation process. This can and does have an impact on how the insurer is viewed within the industry as well

Early settlement is, of course, not appropriate in all cases. Delaying settlement talks until the full investigation into the matter on both liability and damages to discover any latent favorable or unfavorable facts can be critical.

Whether early in the process or at the eve of trial, in a low liability high exposure case, do not forget to consider the option of serving an Offer of Judgment or Proposal for Settlement if that tool is available in your jurisdiction. A formal offer is sometimes viewed differently by a plaintiff as a "last offer" by a defendant and taken more seriously. Often times it also includes some penalty such as the requirement to pay attorney's fees at the close of the litigation. Obviously, it is imperative to make sure that the amount offered is an amount that the insurer is willing to pay if accepted. Once offered, there may be a limitation on the ability to withdraw the offer if it is in the form of an Offer of Judgment or Proposal for Settlement.