# EAGLE INTERNATIONAL ASSOCIATES

*Presents*

# IN A NEW YORK MINUTE, EVERYTHING CAN CHANGE

## Humanizing Corporate Defendants, Mastering Mediations, Preventing and Defending Cyber Security Threats and Managing Complex Settlements

**October 23, 2019**

**W New York – Union Square Hotel**
**New York, New York**

# 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, Canada 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.

# IN A NEW YORK MINUTE, EVERYTHING CAN CHANGE

## TABLE OF CONTENTS

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## Humanizing Corporate Defendants, Mastering Mediations, Preventing and Defending Cyber Security Threats and Managing Complex Settlements

**October 23, 2019**
**W New York - Union Square**
**Great Room – Floor 2R**

***Business Casual Attire***

## PROGRAM

11:45 am **Registration**

12:15 pm **Welcoming Remarks**
Mitchell A. Orpett, Esq., Tribler Orpett & Meyer P.C.
Chair, Eagle International Associates, Inc.

**Program Introduction**
Peter M. Waldeck, Waldeck Law Firm
Program Chair

12:30 pm **Humanizing the Corporate Defendant**
**Moderators:** David V. Hayes, Esq., Owen Gleaton Egan Jones & Sweeney, LLP
John W. VanDenburgh, Esq., Napierski VanDenburgh Napierski & O'Connor
**Panel:**
Jessica Berenbroick, Corporate Counsel, Jaguar Land Rover North America, LLC
Holly Christie, General Counsel, Hecate Energy
Erica Janssen, Risk Management, Holiday Retirement
Steven N. Joseph, Second Vice President, Western World Insurance Group
Jessica C. Tyndall, Director, Commercial Claims, Nationwide Insurance

1:30 pm **A Master Class in Mediation**
**Moderators:** David A. Abrams, Esq., Strongin Rothman & Abrams
Lindsey J. Woodrow, Esq., Waldeck Law Firm
**Panel:**
Laura B. Frankel, Esq., JAMS
John P. Kirby, Vice President - Claims, Philadelphia Insurance Company
Lorrie V. Leonard, Associate General Counsel and Chief Litigation Officer, Allianz Global Corporate & Specialty North America
Jennifer L. Wojciechowski, Director of Operations, Community Association Underwriters of America, Inc.

2:30 pm **BREAK**

2:50 pm **E-Gads: The Horrifying New World of E-Loss and Cyber Torts**

**Moderator:** Mitchell A. Orpett, Esq., Tribler Orpett & Meyer, P.C.
Peter M. Waldeck, Esq., Waldeck Law Firm P.A.

**Panel:**
Stepan Holub, Esq., Holubova advokati
Michelle Morrell, Senior Claims Analyst, North American Claims Group, Allied World Specialty Company
Kim G. Quarles, J.D., Senior Vice President, Willis Towers Watson
Richard Sheridan, Senior Vice President, Chief Claims Officer, Berkley Cyber Risk Solutions

3:50 pm **Settling Large and Multiple Claims, with Limited Insurance, in a Rapidly Changing Demanding Environment**

**Moderators:** John E. Cuttino, Esq., Gallivan White & Boyd , P.A.
Jeffrey V. Hill, Esq., Hill & Lamb LLP

**Panel:**
Laura Archie, J.D., Senior Complex Claims Specialist, Argo Group
John P. Buckley, Vice President-Claims, Western National Insurance Group
Gytis Gavelis, Senior Property and Casualty Claims Leader and Technical Specialist
Venessa Perkins, Member Advocate Regional Manager – Northeast, Pure Insurance Company

4:50 pm **Closing Remarks**

5:00 pm **Reception**

6:15 pm **Dinner**

# MODERATORS AND PANELISTS

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**David A. Abrams** is a founding member of Strongin Rothman & Abrams, LLP with offices in Livingston, NJ and New York, NY. David has been admitted to practice law in New York since 1986 and in New Jersey since 1988 and is also admitted in the federal courts in those jurisdictions. Mr. Abrams has over twenty five years of civil litigation experience, including significant trial experience in the State and Federal Courts of New York and New Jersey. Areas of concentration include hospitality industry litigation, premises and premises security liability, sports and recreational injury litigation, insurance coverage, construction site accidents, transportation/trucking, products liability, professional liability and commercial litigation. Since 1996, Mr. Abrams has served as national coordinating counsel for Club Mediterranee, S.A.'s insured litigation in the United States, a position he proposed, developed, and implemented. He is a former Chairman and a member of the Board of Directors of Eagle International Associates, Inc. Mr. Abrams is a contributing author to the legal treatise Products Liability in New York, Chapter 8, "Defending the Design Defect Case: Strategic Considerations," published by the New York State Bar Association in 1997. Additionally, Mr. Abrams has lectured on a variety of civil litigation topics at Bar Association seminars and before professional organizations. He received his Juris Doctor from Hofstra University School of Law in June 1985, where he graduated "with distinction" (top 10%). He graduated from the State University of New York at Binghamton with a BA in June 1979.

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**Laura Archie** is a Senior Technical Claims Specialist at Argo Group. Laura has a demonstrated history of working in the insurance industry. She handles toxic torts, asbestos and environmental claims. Laura began her career at PMA Insurance Group, followed by Special Claims Services, Inc., a TPA for asbestos claims, and most recently Argo. Laura attended Washington and Lee University School of Law and the University of Rochester. Laura lives in PA with her family. She enjoys running and is an assistant track and cross country coach for a boys high school team. Laura was born in Buffalo and is a diehard Bills fan!

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**Jessica Berenbroick** is Corporate Counsel with Jaguar Land Rover North America, LLC, where she is responsible for managing employment and privacy law matters in the U.S. and Canada. Before joining JLR, Jessica worked in private practice in the tri-state area, first as Associate with Kelley Drye & Warren in New York and then as Counsel with Nukk-Freeman & Cerra in New Jersey. Jessica has extensive experience serving as defense counsel in commercial and employment litigation matters, leading workplace investigations and advising clients on a broad scope of employee relations, benefits, privacy and compliance concerns, all with a dedicated focus on fostering best practices in the workplace. In 2015, Jessica returned to her *alma mater*, Fordham University School of Law, as an Adjunct Professor of Legal Research & Writing. She resides in northern New Jersey with her husband and two children.

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**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 he joined Western National Insurance Group, a Super Regional Property and Casualty insurer comprised of seven companies doing business in 31 states. He now serves as Vice President - Claims where he leads a team of attorneys and claim representatives handling property and casualty claims nationwide. In 2010, he earned his CPCU. His 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 DRI, CLE and at the PLRB conferences. He 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.

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**Holly Christie** is the General Counsel of Hecate Energy LLC where she oversees the legal aspects of all levels of development, financing and management of the company's portfolio of domestic and international solar and storage assets. Hecate Energy LLC is a leading renewable energy power plant developer with an active pipeline of over 10 GW or renewable projects under development and 1,162 MW of renewable PPAs executed, including over 248 MWhs of battery storage. Ms. Christie serves as a key leader in the development of the company through the negotiation and development of projects for large scale stand-alone and hybrid green energy projects from start-up through the long-term support of the lifecycle of the projects. With over eight years of experience in the energy industry, Ms. Christie has led a variety of traditional and non-traditional structural approaches to large scale projects in solar, wind, thermal, stand-alone storage and hybrid solar storage concepts. Prior to working with Hecate, Ms. Christie worked as in-house counsel with Invenergy LLC where she focused her practice on M&A, offtake agreements and commodity trading deals. Ms. Christie began her legal career working with the UNICTR where she assisted in the development of intergovernmental policies.

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**John E. Cuttino** is a Partner with Gallivan, White & Boyd, P.A. in its Columbia, South Carolina office. An active trial attorney throughout his 37 year legal career, his practice includes but is not limited to personal injury, products liability, professional negligence, insurance coverage, construction defect, and commercial litigation. He is a certified civil mediator and is increasingly called on to mediate complex and high-stakes cases. In 2016-17, he served as President of DRI - The Voice of the Defense Bar, the world's largest organization of attorneys who defend the interests of insurers, individuals, and businesses in civil litigation. He is a 1979 graduate of Wofford College (B.A., Government) and a 1982 graduate of the University of South Carolina School of Law. Prior to entering private practice, he served as a law clerk to South Carolina Circuit Judge Dan F. Laney, Jr. Mr. Cuttino is admitted to practice in all South Carolina Courts, the United States District Court for the District of South Carolina, the United States Courts of Appeals for the Fourth Circuit and the Federal Circuit, and the United States Supreme Court. He is a member of the South Carolina and American Bar Associations, a past Chair of the South Carolina Bar Trial and Appellate Advocacy Section, and a

past member of the South Carolina Bar House of Delegates. He is also a member of the American Board of Trial Advocates (ABOTA); the International Association of Defense Counsel (IADC); South Carolina Defense Trial Attorneys' Association; and a Permanent Member of the U.S. Fourth Circuit Judicial Conference. He currently serves as National Co-Facilitator of the ABOTA Civil Trial Bar Roundtable, and is a Member of the Board of Directors for the National Foundation for Judicial Excellence (NFJE). He has been selected for inclusion in Best Lawyers in America (Construction Law 2008-2019 and Products Liability Litigation 2010-2019) and South Carolina Super Lawyers (Civil Litigation Defense 2008-2019). Mr. Cuttino is a past Chair and past Member of the Board of Directors of Eagle International Associates, Inc.

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

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

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

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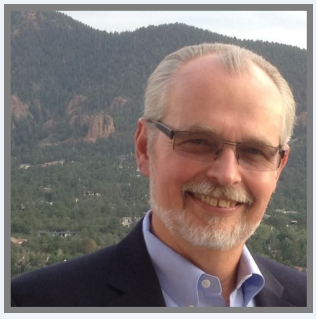

**Gytis Gavelis** is a Senior Property and Casualty Claims Leader and Technical Specialist with over 40-years experience. He was involved in building and managing all facets of a nationwide multiline E&S claims operation and over the years in resolving a significant number of complex insurance and reinsurance claims,

spanning multiple venues, across the country. Gytis has participated in numerous industry panels and has conducted various educational and training seminars throughout the course of his career. He is a graduate of Boston State College with a B.S. Degree in Management.

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

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

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**Stepan Holub** is a partner of Holubova advokati s.r.o., which provides legal services in the Czech Republic since 1991 and is particularly known for its expertise in travel business law, professional liability, insurance and privacy issues.

Stepan is a specialist for multi-generational planning and for data protection law in the Czech Republic. He acts as a "data protection officer" (DPO) for more than 30 schools and municipalities. Stepan also loves to advise active people with entrepreneurial spirit, not only on their legal issues, but also on their strategy in all stages of their business. He helped several start-ups to grow, both locally in the Czech Republic and internationally. Stepan is very good at finding innovative legal solutions, using business and even non-profit structures. When advising, he uses his legal expertise and also his practical experience from own successful internet travel business start-up, which he successfully initiated already during his studies at the university.

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**Erica Janssen** is a Risk Management specialist at Holiday Retirement. She has managed a diverse and complex collection of general and professional liability claims and litigation involving individuals, businesses and government agencies. Originally in the insurance industry, Erica has been in the senior living industry for the past five years. A long-term resident of Portland, Oregon, two years ago Erica moved with Holiday's corporate office to Winter Park, Florida. Erica holds a Master's in Business Administration from Portland State University, and a Bachelor of Science in Political Science from Pacific University.

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**Steven N. Joseph** currently is Second Vice President for Western World Insurance Group in Parsippany, New Jersey. Steve is a 1986 graduate of the University of Pittsburgh School of Law. He recently served as the Chair of the Alternative Dispute Resolution Committee of the Torts, Trial and Insurance Practice Section (2009-2010). Previously, he served as Co-Chair of the Professional Liability Litigation Committee from 1999-2002 in the ABA's Litigation Section, and the Attorney Liability Subcommittee from 1997-1999, also with the Litigation Section. Steve has lectured on professional liability issues and negotiation techniques for the Professional Liability Underwriting Society, Professional Liability Attorney Network, Practicing Law Institute, American Bar Association, and the New York City Chapter of the Corporate Counsel of America. On a personal note, Steve is the proud author of The Last Surviving Dinosaur: The TyrantoCrankaTsuris, and has a very active blog on all things CrankaTsuris at www.TheLastSurvivingDinosaur.com. Steve has also run and completed 45 marathons.

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**John P. Kirby** is a 31 year Claims professional and Vice President – Claims at Philadelphia Insurance Companies, a Member of the Tokio Marine Group. John is a Philadelphia native and 3.5 year graduate of West Chester University as a Criminal Justice Major. He began his career as a Multi-Line Claims representative for Ohio Casualty Insurance Company in 1988 and early in his career transitioned specifically into handling Property Claims. In 2001 he joined Philadelphia Insurance Company and has spent the past 18 years of his career managing large loss property claims. John personally handles individual claims and has one Assistant Vice President and five Claim Supervisors reporting to him who themselves manage the work of other claim professionals. John's day to day responsibility includes all aspects of claim management, litigation management and employee supervision. John firmly believes that claims handling and resolution begins and ends with an open mind, good faith, a deep understanding of individual claim facts and applicable law and treating everyone fairly and with respect.

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**Lorrie Leonard** is Associate General Counsel & Chief Litigation Officer for Allianz Global Corporate & Specialty. In that capacity, she leads a staff of professionals whose responsibilities include management of internal investigations, employee relations matters, corporate litigation and all claims for extra contractual liability. Lorrie has spoken at numerous conferences on litigation management, conflicts of interest, and avoiding malpractice claims. She currently is a member of the Association of Corporate Counsel Chicago Chapter and the Michigan and Illinois State Bar Associations.

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**Michelle C. Morrell** joined Allied World in 2014. Michelle is responsible for handling a wide variety of E&O liability claims, including an emphasis on lawyers' liability, insurance agents' liability, insurance carrier liability, and miscellaneous professional liability. Michelle is also a member of our Cyber Claims Response Team which is responsible for handling first and third party coverages under Cyber/Privacy insurance policies. Prior to joining Allied World, Michelle practiced as an attorney for 10 years in Connecticut. Michelle earned her B.S. in Marketing from Bentley University and her J.D. from Quinnipiac University School of Law. She is a member of the bar in Connecticut.

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

Mitch has devoted more than 40 years of service to the profession, holding numerous leadership positions in the American Bar Association, among others. He was elected to the ABA's Board of Governors and served for many years on its policy-making body, the House of Delegates. He was the chair of the ABA's Section Officers Conference, in which capacity he represented the approximately 240,000 members of the sections and divisions of the American Bar Association. Previously, he was chair of the ABA's 30,000 member Tort Trial and Insurance Practice Section and of the ABA's Standing Committee on Continuing Education of the Bar. He was also vice chair of the ABA's Presidential Commission on the Unintended Consequences of the Billable Hour (United States Supreme Court Justice Stephen G. Breyer, honorary chair).

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


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**Venessa Perkins** currently serves as a Member Advocate Regional Manager at PURE Insurance. Venessa has designations in Associate in Claims (AIC), Associate in General Insurance (AINS), Advanced Certified Claims Professional (ACCP), and Certified Claims Profession: Mediation and Extra Contractual. She has over a decade of experience in the insurance industry handling auto, homeowners, marine, injury, and liability claims. Venessa began as a Claims Analyst at PURE in 2011 handling a wide variety of high exposure claims. Her excellence as a Claims Analyst led to her promotion to Casualty Team Leader then to Casualty Manager and now to Member Advocate Regional Manager. In her current role, Venessa supervises Team Leaders who manage their own team of Member Advocates out of the home office. Venessa has also contributed greatly to the training of various other roles in the claims department at PURE as well as recruiting, maintaining, and developing talent. Her experience and excellence has made her an invaluable part of PURE's claims team for the past 8 years.

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

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

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

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**Rich Sheridan** is the Chief Claims Officer for Berkley Cyber Risk Solutions. Prior to that, Rich was a Vice President of Claims for AXIS Pro Insurance, where he oversaw the company's claims stemming from its Data Breach/Cyber Liability, Technology and Miscellaneous E&O product lines. Before joining AXIS Pro, Rich served in a similar role at ACE North American Claims, and before that was a Complex Claim Director for Miscellaneous Professional Liability Claims at AIG Technical Services. Prior to entering the insurance industry, Rich worked for 3 years as an associate for law firms in New York, and as an Assistant District Attorney in The Bronx, New York for over 5 years. Rich earned his JD from Fordham University School of Law and has a BA in English from the State University of New York at Albany.

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**Jessica C. Tyndall** is a commercial claims director with Nationwide, leading a team of eleven claims professionals handling large loss casualty claims across the eastern United States. Prior to joining Nationwide three years ago, Jessica was a litigation partner with McAngus Goudelock and Courie, in the firm's Raleigh office. Jessica practiced law in North and South Carolina for just under fifteen years prior to joining Nationwide, primarily in the fields of insurance coverage, catastrophic personal injury, and professional liability. Outside of work, Jessica resides in Raleigh with her husband and two children and enjoys being a mom with a few hobbies.

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**John W. VanDenburgh** is a founding partner of the firm of Napierski, VanDenburgh, Napierski & O'Connor, LLP and in more than 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.

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**Peter M. Waldeck** practices exclusively in insurance defense matters, including construction law, product liability, insurance coverage, no-fault UM/UIM, auto liability, professional liability, employment law, day care, health clubs and liquor liability. This includes all phases of litigation from pre-suit investigation and evaluation through trials and appeals. Mr. Waldeck has tried cases throughout Minnesota, Wisconsin and North Dakota and has successfully argued cases at the appellate level. Mr. Waldeck earned a B.A. from Drake University and a J.D. from John Marshall Law School.

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**Jennifer L. Wojciechowski** is currently the Director of Operations at Community Association Underwriters of America, Inc. and is responsible for the strategic coordination of all business units, including product development, underwriting, compliance claims and marketing. Prior to her current role, Jennifer was Casualty Claim Manager, an Executive Adjuster after years spent in private practice as an insurance coverage and bad faith defense attorney.

Jennifer has authored numerous articles, is a frequent lecturer on insurance-related issues and is a dedicated planning committee member and faculty for several insurance conferences. Jennifer's numerous designations include CIRMS (Community Insurance Risk Management Specialist), CCP (Certified Casualty Claims Professional), and CLMP (Certified Litigation Management Professional). Jennifer was a finalist for Claims & Litigation Management Alliance's Litigation Management Professional of the Year in 2014.

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# HUMANIZING THE CORPORATE DEFENDANT

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# HUMANIZING THE CORPORATE DEFENDANT, OR NOT

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What does it mean to "humanize" the corporate defendant and why do we do it? Injured plaintiffs are human beings. They feel pain, anger and fear. They have partners, parents, children and friends. They have jobs, go to church and coach little league. In our subconscious, and at times our conscious mind, they deserve our sympathy. Corporations are monolithic, faceless entities driven by profit and greed. They seemingly do not care and they do not feel. They have deep pockets and endless resources. They do not deserve, and rarely if ever receive, our sympathy. When an individual plaintiff sues a corporation or insurance company claiming injury, bad faith or unfair treatment, it triggers the classic paradigm of David versus Goliath. The corporate defendant, and defense counsel, rightly fear that a jury's natural inclination to sympathy for the "little guy" and bias against the "big bad bully" will yield a huge monetary verdict based, not on fact or law, but on emotion.

The first step in leveling the playing field was taken by creating a legal fiction that recognizes the corporation as a person for the purpose of exercising and imposing various legal rights and responsibilities. The concept of corporate personhood evolved over the years as exemplified in the following cases:

- 1853 – Marshall v Baltimore and Ohio Railroad – the Supreme Court upheld the proposition that corporations were citizens but limited the concept of citizenship to matters of court jurisdiction emphasizing that corporations did not have the same constitutional rights as actual human beings.
- 1886 – County of Santa Clare v Southern Pacific Railroad – In this case the railroad sued the County of Santa Clara arguing that a special tax levied by the County violated the railroad's right to equal protection under the Fourteenth Amendment resulting in the "well settled" proposition that corporations are persons within the provisions of the Fourteenth Amendment.

- 1898 – Smyth v Ames – the Supreme Court voided a Nebraska Railroad Tax on the basis that it constituted a taking of corporation property without due process in violation of the Fourteenth Amendment.
- 1906 – Hales v. Henkel – the Court determined that corporations, like people, are protected from unreasonable searches and seizures under the Fourth Amendment.
- 1931 – Russian Volunteer Fleet v United States – the Court determined that foreign corporations are protected from unlawful government seizures under the Fifth Amendment that ensures fair treatment by the legal system in a case where government officials seized $4 Million worth of property from the Russian Volunteer Fleet.
- 1977 – United States v Martin Linen Supply Company – The Supreme Court applied the concept of double jeopardy to include both humans and corporations.
- 2010 – Citizens United v Federal Election Commission – the Court determined that corporations and individuals enjoy the same legal rights and protections with respect to campaign donations which constituted a protective form of pollical speaking and that, as a result, government cannot limit a corporation's independent political donations.
- 2014 – Burwell v Hobby Lobby – Supreme Court determined that corporations, like other persons, have a right to religious freedom and the ability to assert the religious rights of their owners and shareholders.

The concept of corporate personhood created the illusion of an equal and impartial litigation contest between two "people" – the allegedly aggrieved human person and the accused corporate person.

Most jurisdictions offer the parties the option to request specific charges to the jury, intended to reinforce the theoretical equality of the litigants and the obligation of the jury to decide the case on the evidence alone, impartially and without sympathy or bias toward either party. For example, New York Pattern Jury Instructions 1:27 Exclude Sympathy provides that:

> In reaching your verdict you are not to be affected by sympathy for any of the parties, what the reaction of the parties or of the public to your verdict may be, whether it will please or displease anyone, be popular or unpopular or, indeed, any consideration outside the case as it has been presented to you in this courtroom. You should consider only the evidence—both the testimony and the exhibits—find the facts from what you consider to be the believable evidence and apply the law as I now give it to you. Your verdict will be determined by the conclusion you reach, no matter whom the verdict helps or hurts.

California Civil Jury Instructions (CACI No. 104) entitled Non-Person Party provides that:

> A [corporation] is party in this lawsuit. [The corporation] is entitled to the same fair and impartial treatment that you would give to an individual. You must decide this case with the same fairness that you would use if you were deciding the case between individuals.

Counsel defending a corporation or insurance company should request that the Court charge the jury with any applicable jury instructions that are intended to eliminate the application of sympathy to the plaintiff and reduce or eliminate anti-corporate bias.

Although the law created the fiction of corporate personhood, and although the Court can admonish a jury that they are to decide the case without sympathy or bias, the jury is still subject to the natural, and often times subconscious, inclination to favor David and dislike, or even detest, Goliath. Historically, defense counsel tries to counter the David versus Goliath paradigm by "humanizing" the corporation or insurance carrier being defended. The reason we "humanize" is to try and level what the defense perceives to be an uneven playing field that cannot be balanced by legal fiction or admonition. What do we mean when we use the term "humanize"? Webster's Dictionary defines humanize as:

> … to render human or humane; to soften; to make gentle by overcoming cruel dispositions and rude habits; to refine or civilize; to give a human character expression to.

During his presidential campaign a few years ago former governor Mitt Romney was speaking at the Iowa State Fair. In response to a heckler who asserted that the taxes

necessary to support various government programs should come from corporations and not people Romney responded by saying:

> Corporations are people, my friend, . . . of course, they are. Everything corporations earn ultimately goes to the people. Where do you think it goes? Whose pockets? People's pockets. Human beings, my friend.

The core assertion in the foregoing statement by Governor Romney is accurate. Corporations are composed of people. Those people, both management and labor, make decisions, set policy and carry out the daily activities that allow the corporation to function. They have partners and parents, children and friends. They have jobs, go to church and coach little league. Defense counsel endeavors to convince the jury that for purposes of sympathy and good will a corporation is a person. A fictitious person to be sure, but one that reflects the collective goodness of the individuals who make up the corporation.

Put another way, the traditional view of "humanizing" the corporate defendant is to utilize all permissible trial and evidentiary tactics to soften the jury's view of the corporate defendant as much as possible, hopefully to the point where the "corporate person" is respected, understood, liked and perhaps even admired.

For defense counsel committed to humanizing the corporate defendant it has long been an accepted trial strategy to highlight the good and positive qualities of the corporation and the individuals who comprise the corporation. Numerous articles list various ways for the large corporation and its defense counsel to better relate to and bond with the jury. Dress conservatively, eschewing designer suits; no ostentatious jewelry; drive a mid-size sedan; stay at a modest hotel; avoid multiple attorneys at counsel's table; and most importantly take every opportunity from the opening statement on to educate and remind the jury of the wonderfulness of the defendant and its people. They have children, go to church, work for charity and are a constant force for good in the community. They bring jobs and economic benefits untold. Such a tactic, however, carries risk. It is indeed the exceptional entity that is <u>always</u> a force for good and completely without skeletons in the closet

Defense counsel must be careful to avoid opening the door to harmful evidence regarding alleged prior bad acts, reputation or conduct on the part of the corporation in rebuttal to the "good company story" being offered by the defense as part of the strategy to humanize the corporate defendant. Generally, a party is not permitted to offer evidence of prior bad acts, reputation or conduct to demonstrate conformity therewith and such prior acts are considered collateral or irrelevant. However, if the defendant places its reputation in issue, then the plaintiff can offer contradictory evidence in the form of prior bad acts, bad conduct or a reputation. See Croce v Bromley Corp., 623 F. 2d 1084 (5th Cir. 1980). Therefore, in attempting to humanize the corporate defendant by highlighting and emphasizing the good things it does for, and brings to, the global, national, regional and local communities, consideration must be given to the type of rebuttal evidence that could then be elicited or admitted by the plaintiff that would counter such claims.

Defense counsel should be well aware, however, that there are myriad factors that influence a prospective juror's perception of the corporate defendant and that, in the final analysis, the level of anti-corporation bias in some jurors, both conscious and subconscious, may be so ingrained that it is impossible to persuade them to a favorable view of the corporation. Perhaps the most significant of those factors is the perceived greed or lack of social responsibility of the corporation.

The well-known Greek Philosopher Aristotle, in *Politics* noted that the purpose in accumulation of wealth is to employ that wealth for the benefit of the greater good. In 1989, steel magnate Andrew Carnegie wrote the article "The Gospel of Wealth" in which he noted that:

> This, then, is held to be the duty of the man of Wealth: First, to set an example of modest, unostentatious living, shunning display or extravagance; to provide moderately for the legitimate wants of those who depend upon him; and after doing so to consider all surplus revenues which come to him simply as trust funds, which he is called upon to administer, and strictly bound as a matter of duty to administer in the manner which, in his judgment, is best calculated to produce the most beneficial result for the community . . ..

Conversely, in 1970, Economist Milton Friedman wrote an article in the New York Times in which he asserted that "the business of business is business" and its social responsibility is to make profits without breaking the legal guidelines of the market in which it is operating.

In theory, a jury will be much more accepting of a corporation founded on honest fair dealings with its employees, customers and its global, national, regional and local communities. In practice, it may be becoming more difficult to satisfy a threshold level of overall corporate humanization as the expectations of potential jurors, and the corporations own employees, seems ever increasing with respect to perceived corporate obligations to promote social justice and income equality.

In an October 1, 2017 article in Forbes entitled 5 *Things We Know Millennials Want From a Job, a*uthor Kaytie Zimmerman, noted that millennials searched for the following attributes from their corporate employers:

- They expect employer benefits that fit their values;
- Loyalty is more valuable than they let on;
- They want retirement investment options;
- They want the ability to prioritize the family; and
- ***Social impact is key***.

In an article entitled "The Millennials: A New Generation of Employees, a New Set of Engagement Policies Jay Gilbert writes:

> Millennials are creating a change in how work gets done, as they work more in teams and use more technology. Their social mindset, however, is also a significant factor. As Leigh Buchanon writes in *Meet the Millennials*, "One of the characteristics of millennials, besides the fact that they are masters of digital communication, is that they are primed to do well by doing good. ***Almost 70 percent say that giving back and being civically engaged are their highest priorities***."

In response to the concerns of its clients, customers and employees, corporations are becoming more involved in the social arena and are publicly implementing policies intended to demonstrate the corporation's civic engagement. For example, CVS Pharmacies discontinued the sale of tobacco products; Dick's Sporting Goods Store and Walmart's have discontinued the sale of various types of firearms or instituted well

publicized requests that customers refrain from carrying firearms in their stores; Levi - Strauss implemented a “worker well-being” program; Coca-Cola and Johnson & Johnson have publicly committed to reducing their carbon footprint and Ben & Jerry’s is well known for its donations to various charities. Potential jurors, depending on their own political persuasion, may have differing reactions to such efforts, ultimately creating or reinforcing positive or negative perceptions of the corporation. As corporations become more active and visible in the social and political arena, the audience they are trying to win over in terms of favorable perception is simultaneously bringing to bear social and political pressure intended to influence corporate behavior. Recently various corporations and retail businesses have been targeted for boycotts and social media campaigns based on their political donations, religious affiliations, perceived negative environmental impact, and perceived lack or support or social responsibility with respect to civil rights and income inequality. In an increasingly politically charged environment in which corporations and the public at large become involved in the push-pull of potentially polarizing political or social positions, it may be increasingly difficult to find agreement on a jury panel as to whether a particular corporate person is sufficiently humanized with respect to that juror’s own political or social issues to be respected, understood or perhaps even liked and admired. It is a cliché but “when you try to please everyone you please no one”.

Interestingly the evolution in the tactics of the plaintiff’s bar may herald a different, or at least modified trial strategy apropos “humanizing” the corporate defendant. The concept of “humanizing” is founded on the David versus Goliath paradigm in which a jury is expected to sympathize with David and despise, or even hate, Goliath. With the introduction of Reptilian Theory by the plaintiff’s bar, it may be prudent to direct the focus away from convincing the jury that the defendant is a likeable and admirable corporate person and toward convincing a jury that the corporation stands as a vigilant “entity” that is designed and intended to guard against those dangers that a potential jury are asked to “fear” under the Reptilian strategy. The Reptile strategy attempts to exploit the area of a juror’s brain that is responsible for flight or fight, fear, danger, anxiety and overall safety. It attempts to convince the juror that the actions of the defendant either caused, or not insignificantly, could have caused, severe and irreparable harm. The only way for a juror

to protect themselves, their family and friends, is to award a large verdict intended to discourage and prevent such future behavior. Perhaps it is more important to speak directly to the fears of the potential jury then to be preoccupied with "humanizing" strategy. Corporations are, indeed, made up of individuals. Like the general population, the corporate population represents the good and bad; the ethical and unethical; the competent and incompetent; and the concerned and unconcerned. As a result of normal human failings, and decisions, actions can occur within the corporation that carry the potential for some type of harm and which could, in appropriate circumstances, justify fear on the part of a potential juror. The Greek Philosopher Aristotle is credited with the concept of "the whole" being "greater than the sum of its parts". Rather than focus on the individuals that comprise the corporation and attempting to credit the corporation with human attributes including the best and worst impulses of humanity, it may be more productive to emphasize that the corporation, taken as a whole, knows its business and manages its business well. There are policies, procedures and practices in place that create internal safeguards and redundancies against the individual failings and shortcomings of humans. Instead of attempting to convince a jury that a corporation is a "good person" the better strategy may be to focus on the corporation as efficient and competent centering on the facts of the particular case and the manner in which the corporation's structure worked precisely as it was supposed to work in an effort to guard against potential harm.

Regardless of whether it is the intended strategy of defense counsel to "humanize" the corporate defendant or as an entity of process and oversight designed to reduce the effect of human shortcomings, it is important for defense counsel to become intimately familiar with the reputation and culture of the corporate defendant at the outset of litigation. It is critical to understand the way in which that corporation is viewed by a potential jury pool. Defense counsel should become familiar with the way the corporation has been portrayed in the media, both social and traditional, and, where appropriate, conduct public image surveys and mock trials focusing on how the corporate defendant is viewed by the potential jury pool. If you are going to convince a jury of either the humanity and/or efficiency of the corporate defendant you need to be intimately familiar

with the traits, characteristics, policies, procedures and conduct of your client that support that position.

Regardless of overall strategy, selection of appropriate corporate representatives for testimony at depositions and appearance at trial is critical. Consideration should be given regarding the appropriate corporate witness to testify during discovery and potentially at trial, as well as the appropriate individual to sit at counsel's table and present the public face of the corporation throughout the proceeding.

Federal Rule of Civil Procedure 30(b)(6) provides:

> Notice for Subpoena Directed to Organization. In its notice or subpoena, a party may name as the deponent if public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a non-party organization of its duty to make this designation. The person designated must testify about information known or reasonably available to the organization.

It is commonplace for plaintiff attorneys to videotape deposition witnesses produced by the defendant. Therefore, if the goal is to humanize the defendant, highlight its efficiency, or both, it is imperative that the witnesses produced on behalf of the corporation convey those qualities both in appearance and the substantive content of their testimony.

> There can be no question that the rule [federal Rule of Civil Procedure 30(b)(6)] imposes a "duty to prepare the designee . . . [that] goes beyond matters personally known to the designee or to matters in which the designee was personally involved." (Citations omitted) The designee must be prepared to the extent that matters are reasonable available, whether from documents, present or past employees, or other sources. (Citations omitted). Contrary to the Magistrate Judges ruling in this case, the organization *is expected* to

> create a witness or witnesses with responsive knowledge. Wilson v Lakner 228 F.R.D. 524, 528 (D. Md. 2005).

Not only does the corporate defendant have an obligation under the Federal Rules of Civil Procedure to produce a corporate witness with knowledge of relevant issues in terms of impressing opposing counsel and eventually a jury, it is imperative that the witnesses presented be knowledgeable, confident, authoritative and able to communicate the position of the corporate defendant both, based on the facts of the particular case as well as with respect to the overall corporate character and culture.

It is important to prepare the witness for deposition and/or trial and review extensively the subject areas the testimony will cover; the goal of the testimony; the key documents that will be discussed; prior pleadings and discovery including the Answer to Interrogatories; where appropriate, the other deposition testimony in the case and the overall general narrative of the corporation's position. Where appropriate, mock depositions can be useful for preparation. It is important to convey to the plaintiff's counsel, and ultimately the jury that the corporate representative is honest, credible, forthright, knowledgeable and well in command of the facts, as well the corporate structure and culture.

The corporate representative chosen to sit at counsel's table throughout the course of trial is also extremely important for purposes of reinforcing the message of humanity and/or efficiency that is being presented to the jury. The representative should be engaged and attentive (not checking the iPhone or responding to e-mails). Overly demonstrable physical expressions such as grimacing or head shaking should be avoided. The corporate representative, and any audience members associated with the corporate defendant, should be instructed that the jury and the plaintiff's counsel are always watching and, therefore, any conduct or overt expressions that serve to reinforce the perception of the corporation as unkind, heartless and profit driven must be studiously avoided. It is important to have a corporate representative in the courtroom daily to avoid leaving a jury with the impression that the corporation is unconcerned with the trial or its outcome.

Jury selection is critical in terms of trying to identify anti-corporate bias as well as in terms of educating the jury pool, depending on strategy, as to the corporation's history, positive community involvement, overall goodness, efficiency, safeguards, policies and procedures put in place and implemented to promote the ultimate safety of the plaintiff and their friends and family. In jurisdictions where substantial *voir dire* of potential jurors is permitted, it is important to explore with the potential jury pool, in detail, their knowledge and preconceptions of the specific corporate defendant. It is also important to explore more deep seeded or subconscious bias by asking open ended questions relating to the potential juror's own employment experience in a corporate environment, the experience of friends or families as well as general thoughts and feelings about large corporations; their feelings regarding public stereotype of corporations and CEOs; their knowledge and opinions regarding well known or particularly timely corporate scandals and to identify any particular fears or concerns they may have that can either be exploited by the plaintiff or successfully addressed by the defense.

Obviously, all cases, and the prospect for success in those cases, are fact dependent. As a result, it is essential to identify early on the problems and shortcomings of the case so that a determination can be made as to whether it is appropriate to settle or defend. Whether the strategy is to humanize the corporation in an effort to mitigate jury bias, or to convince a jury to take comfort in the efficiency of the corporate entity as a whole, or both, there is no substitute for getting to know the character, culture and mission of the corporation so that, as defense counsel, you can effectively convey that information to a jury in the manner best suited to address that particular jury pool and to best defend that particular case.

Jwv/Eagle/Article

# A MASTER CLASS IN MEDIATION

## Mediation Tips and Strategies for the Defense

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# A MASTER CLASS IN MEDIATION
## Mediation Tips and Strategies for the Defense

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

## I. TIMING OF MEDIATION

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

### *A. Pre-Suit Mediation*

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

### *B. Mediation Early in the Discovery Process*

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

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

*C. Mediation Pending Summary Judgment/Motions in Limine*

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

*D. Mediation on the Eve of Trial*

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

## II. JOINT OPENING SESSIONS

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

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

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

*B. Best Methods to Increase Efficacy of Joint Opening Sessions*

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

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

## III. INITIAL ROUND

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

*A. The Plaintiff's Room*

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

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

*B. The Defendant's Room*

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

*C. What Information is Shared Between the Parties?*

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

## IV. FOLLOWING ROUNDS

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

*A. Delivering Difficult News*

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

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

*B. Discussions without the Plaintiff*

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

*C. Reconvening the Parties*

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

*D. Dealing with Animosity Between Counsel*

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

## V. DIFFICULT PLAINTIFFS

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

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

*A. Types of Difficult Plaintiffs*

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

*B. Tactics to Handle Difficult Plaintiffs*

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

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

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

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

## VI. CONTROLLING THE MEDIATOR

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

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

## VII. IMPACT OF ADJUSTERS ON THE MEDIATION PROCESS

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

### *A. Settlement Authority*

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

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

*B. Plaintiff Tactics*

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

## VIII. PLAINTIFF'S ADVANTAGES AND DISADVANTAGES

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

*A. Plaintiff's Advantages*

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

*B. Plaintiff's Disadvantages*

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

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

## IX. CONCLUSION

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

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# CYBER/PRIVACY CLAIMS IN AN INCREASINGLY PUBLIC WORLD

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## INTRODUCTION

Were Rip Van Winkle to suddenly awaken today from his long nap, log in to his Facebook account and google "current events since 1819," many things would surprise him. Among those surprises might be that, while he slept, several other "Rip Van Winkles" had withdrawn all of his money from his bank accounts, run up his credit cards and purchased several new homes in the Catskills. Van Winkle had, unfortunately become one of the billions of people who were victimized by data breaches.[1]* As he researched what he should do, Van Winkle would undoubtedly discover that the world in which he now lived 200 years after he first became famous was one in which "phishing" no longer involves rods and reels or water, "hacking" has nothing to do with influenza or chest congestion and "identity" is simply something to steal. Taking it all in, Van Winkle should be forgiven if he were to make the wise choice to go back to sleep.

Insurance companies, insurance adjusters and law firms, however, do not have the luxury afforded Rip Van Winkle. Incidents of financial fraud are increasing. Whether as a result of hacking into business accounts, compromising emails or traditional fraud, losses suffered by individuals and businesses are commonplace and on the rise. In such an environment, where data breach and loss of privacy abound, regulations, lawyers and insurance issues thrive. Cybersecurity and privacy claims have proven to be no exception. Perhaps the most significant in this rapidly evolving world are the regulations recently passed by three different organizations -- the European Union ("EU"), the State of California and the National Association of Insurance Commissioners ("NAIC"). This paper is intended to offer a brief overview of the current situation, explain how increased regulation is being applied to cyber threats and how the insurance market has responded to the cyber and privacy risk.

## GENERAL DATA PROTECTION REGULATION (GDPR)

It is interesting to note that the otherwise rather folksy homepage created by the European Union to inform the public about its recently enacted General Data Protection Regulation adopts a manifestly chilly tone in describing what was done:

[1] USA Today, December 28, 2018.

> After four years of preparation and debate the GDPR was finally approved by the EU Parliament on 14 April 2016. It was enforced on 25 May 2018 – and organisations that are not compliant could now face heavy fines.[2]

The EU identifies the intent behind the GDPR as being "to protect all EU citizens from privacy and data breaches in today's data-driven world." The GDPR invoked many changes to the then-existing regulatory and legislative norms. Foremost among these are its increased territorial scope, the likelihood of fines and penalties being imposed against those breaching the regulation, the more stringent requirements surrounding requests for and withdrawals of consent, breach notification rights, rights to identify, access and be made aware of the use of captured data, and the establishment of a robust right to be forgotten (data erasure).

One of the reasons that the GDPR has created such reverberations around the world and likely establishes the bar for company conduct going forward, even in the United States, is the regulation's extra-territorial scope. The GDPR not only applies to organizations located within the EU but also those located outside of the EU if they offer goods or services to, or monitor the behavior of, EU data subjects. It applies to all companies processing and holding the personal data of data subjects residing in the European Union, regardless of the company's location. Thus, anyone conducting or hoping to conduct worldwide commercial activity or gathering information about EU consumers will almost certainly be subject to the requirements of the GDPR. Given the intentional introduction of required "privacy by design" – the obligation to include data protection from the outset of system design – even anticipated future interaction with the EU and/or its citizens will likely require a business to implement procedures and processes designed to comply with the GDPR.

The GDPR applies to "personal data," meaning any information relating to an identifiable person who can be directly or indirectly identified by reference to an identifier. This definition provides for a wide range of personal identifiers to constitute personal data, including name, identification number, location data or online identifier, reflecting changes in technology and the various ways in which businesses and other entities collect information about people.

In the case of data breach, regulations require that data breaches which may pose a risk to individuals must be notified to regulators within 72 hours and to affected individuals without undue delay. Importantly, organizations can be fined under a tiered system for their failure to comply with this and other requirements established by the GDPR in an amount up to 4% of annual global turnover for breaching GDPR or €20 Million. This is the maximum fine that can be imposed for the most serious infringements, such as failing to comply with rules requiring businesses to obtain customer consent to process data. A company can be fined 2% for not having its records in order (article 28), not notifying the supervising authority and data subject about a breach or not conducting impact assessment. In addition, fines can be assessed under legislation enacted by a Member State of the EU.

Given the express intent of the EU to dissuade organizations from shirking their responsibilities to protect data they collect and the nature of the fines and penalties themselves, it

[2] https://eugdpr.org/.

remains unclear whether insurance policies are designed to or will cover their insureds against whom such fines are assessed. In policies where fines are specifically excluded, of course, this would appear doubtful. If, however, fines are covered "to the extent insurable by law," it is anyone's guess whether some or all fines intended to dissuade or otherwise involving some degree of moral turpitude will be reimbursed by insurers. This is likely to be an emerging area of interest for insurance companies and lawyers and those of us in the US will want to pay attention to developments, particularly in common law countries such as England and Ireland.

## CALIFORNIA CONSUMER PROTECTION ACT (CCPA)

While the GDPR has clearly set the bar for regulation of data protection, many state legislatures and departments have become active in this area as well. Leading the way, to no one's surprise, is the State of California, which has already enacted the California Consumer Privacy Act ("CCPA"). The CCPA goes into effect on January 1, 2020, promising a new year's bounty of new rights relating to the handling, storage and sale of personal information. Notably, it creates private rights of action in which consumers may recover compensatory or statutory damages as well as a public cause of action which may lead to the imposition of fines by the state attorney general. It is important to recognize that the Act has already been subject to legislative action in the form of several amendments which, at the time this paper was prepared, were awaiting signature or veto by the governor. Most of these amendments seek to narrow the scope of some of the CCPA's provisions or limit the availability of damages to specific types of privacy violations. Further developments and treatment of the Act, by the governor, the legislature and the courts, should be carefully monitored and will likely be very influential in how privacy loss is treated, both within California and in other states.

The CCPA gives "consumers," as defined in the Act, certain basic rights with respect to their personal information:

1. the right to know, through a general privacy policy what personal information a business has collected about them, from where it was obtained, for what it is being used and whether and to whom it is being disclosed or sold;
2. the right to "opt out" of allowing a business to sell their personal information to third parties;
3. the right to have a business delete their personal information, with some exceptions; and
4. the right to receive equal service and pricing from a business, even if they exercise their privacy rights under the Act.

Consumers also have the right to request certain additional information from businesses, including the sources from which a business collected the consumer's personal information, the

specific pieces of personal information collected, and the third parties with whom the information was shared. The Act requires businesses to disclose the requested information free of charge within 45 days of receipt of a consumer's request, subject to possible extensions. Companies therefore will need to determine how they can monitor their data sharing practices and marshal the requested information within a short period of time pursuant to a data subject's request.

The Act also forbids businesses from "discriminating" against consumers for exercising their privacy rights under the Act. More specifically, that means businesses cannot deny goods or services, charge different prices for goods or services, or provide a different quality of goods or services to those consumers who exercise their privacy rights. However, the Act does permit businesses to charge a different price, or provide a different level of service, to a customer "if that difference is reasonably related to the value provided to the consumer by the consumer's data." Businesses are also permitted to offer financial incentives to consumers for the collection, sale, or deletion of personal information, subject to specific conditions and notice requirements.

For purposes of the Act, "personal information" is defined as "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household." The Act provides a non-exhaustive list of examples that includes some expansive examples. For example, personal information includes "commercial information" (including "records of personal property, products or services purchased, obtained or considered, or other purchasing or consuming histories or tendencies"), "Internet or other electronic network activity information" (such as browsing and search histories), "education information" and "[a]udio, electronic, visual, thermal, olfactory, or similar information." Personal information does not include information that lawfully is made available from federal, state or local government records that is used for a purpose that is compatible with the purpose for which such data is so maintained.

The Act will apply to for-profit businesses that collect and control California residents' personal information, do business in the State of California, and: (a) have annual gross revenues in excess of $25 million; *or* (b) receive or disclose the personal information of 50,000 or more California residents, households or devices on an annual basis; *or* (c) derive 50 percent or more of their annual revenues from selling California residents' personal information. The Act also draws in corporate affiliates of such businesses that share their branding.

The Act requires that the protections listed above be made available to "consumers," who are defined as California residents for tax purposes.

The Act also provides a private right of action that allows consumers to seek, either individually or as a class, statutory or actual damages and injunctive and other relief, if their sensitive personal information (more narrowly defined than under the rest of the Act) is subject to unauthorized access and exfiltration, theft or disclosure as a result of a business's failure to implement and maintain required reasonable security procedures. Statutory damages can be

between $100 and $750 per California resident per incident, or actual damages, whichever is greater. However, it is not obvious what "per incident" means in this context, so the ceiling for statutory damages currently is unclear.

A consumer who wishes to bring an action under the Act will need to jump through a few hoops before he or she can proceed with a claim. A consumer seeking statutory damages must provide the defendant business with thirty days' notice of his or her intent to sue before filing an action. (Consumers seeking actual damages do not need to supply such notice.) If the business provides the consumer with an "express written statement" demonstrating that the violation has been cured, and that no further violation will occur, within thirty (30) days of receiving the consumer's notice, then the consumer cannot proceed with his or her action for statutory damages. A consumer who files an action must provide notice to the Attorney General within 30 days after filing. The Attorney General may (1) respond by notifying the consumer that the Attorney General will prosecute the action instead, (2) respond by notifying the consumer that he or she must not proceed with the action, or (3) not respond at all within 30 days, thereby allowing the consumer to proceed with the action.

As a practical matter, this law has the potential to change the privacy law landscape in the U.S. – not just California. As described above, the law's protection of California-based "consumers" means that many companies, even those based outside California and even outside the U.S., will be subject to its requirements. Businesses will incur significant compliance costs in order to update procedures, policies and Web sites in accordance with the new law. Additionally, the Act's grant of a private right of action means that companies will have to anticipate a possible flood of consumer-driven litigation.

## NAIC AND STATE ACTIVITY

The National Association of Insurance Commissioners ("NAIC") adopted a Data Security Model Law in November 2017. At the time this paper was prepared, eight states had already adopted some version of the law and it is expected that more will certainly follow. The Model Law applies to "licensees," defined as persons licensed, authorized to operate or registered in accordance with the insurance laws of the state, but not to purchasing or risk retention groups licensed in other states. The Law thus may include insurance carriers and independent adjusters, and agencies and brokerage houses. ;Car rental companies and travel agencies offering insurance products in connection with their businesses may also be subject to the Model Law.

Under the Model Law, licensees must establish and maintain a comprehensive and written "Information Security Program." The program is to be based on the size and complexity of the licensee, the nature of its activities, its use of third-party vendors and the sensitivity of the nonpublic information that it collects. The Law does not appear to anticipate or allow for a "one size fits all" approach to establishing an ISP. Interestingly, the Law expressly mandates that the licensee's board or executive management carry out oversight of compliance with these legal requirements. The Law requires that each licensee maintain a response plan and that it notify the insurance commissioner of a cybersecurity event within 72 hours. Licensees must also exercise

due diligence in the selection and use of third-party service provider and require that those providers maintain reasonable safeguards as well for protecting covered information.

The Model Law protects "nonpublic information," which is seen as being broader than "personal information." Nonpublic information includes business information that would, if the subject of unauthorized access or disclosure, have a material adverse impact on the business, operations or security of that licensee. In addition, the Law protects personal information such as driver's license and social security numbers, credit card and other financial account information, security codes and passwords relating to a consumer's financial accounts, health care information and biometric records.

When looking to individual state requirements, the specific statutes passed by the states must be considered, rather than the Model Law. There are differences in those enactments on such issues as the required deadline for notification of cyber events and effective dates for implementation. Clearly, activity in this area and the resulting impact on insurance companies and other "licensees" other the Law are just getting started and new rules and requirements will continue to emerge in the coming months and years.

## INSURANCE INDUSTRY RESPONSE

As no less an expert than the U.S. Department of Homeland Security has noted:

> Traditional commercial general liability and property insurance policies typically exclude cyber risks from their terms, leading to the emergence of cybersecurity insurance as a "stand alone" line of coverage. That coverage provides protection against a wide range of cyber incident losses that businesses may suffer directly or cause to others, including costs arising from data destruction and/or theft, extortion demands, hacking, denial of service attacks, crisis management activity related to data breaches, and legal claims for defamation, fraud, and privacy violations. Few cybersecurity insurance policies, however, provide businesses with coverage for an area of growing private and public concern: the physical damage and bodily harm that could result from a successful cyber-attack against critical infrastructure.[3]

The Insurance and Risk Management Institute ("IRMI") has described cyber/privacy insurance as:

> a type of insurance designed to cover consumers of technology services or products. More specifically, the policies are intended to cover a variety of both liability and property losses that may result when a business engages in various electronic activities, such as selling on the Internet or collecting data within its internal electronic network. Most notably, but not exclusively, cyber and privacy policies cover a business' liability for a data breach in which the firm's customers' personal

[3] https://www.dhs.gov/cisa/cybersecurity-insurance.

> information, such as Social Security or credit card numbers, is exposed or stolen by a hacker or other criminal who has gained access to the firm's electronic network. The policies cover a variety of expenses associated with data breaches, including: notification costs, credit monitoring, costs to defend claims by state regulators, fines and penalties, and loss resulting from identity theft. In addition, the policies cover liability arising from website media content, as well as property exposures from: (a) business interruption, (b) loss/destruction, (c) computer fraud, (d) funds transfer loss, and (e) cyber extortion.[4]

It is important to recognize that the products being offered in the insurance market for cyber and privacy risk protection is far from uniform. Language used in policies differ significantly and nothing stated here should be assumed to apply across the board. Rather, it is especially important to read and understand the particular coverage being assessed, whether as a purchaser of insurance, a claims professional or a defense or coverage lawyer.

That being said, like other types of insurance, policies dealing with cyber and privacy matters will usually involve both first- and third-party coverages. Typically, first-party coverage will be triggered by events such as the theft or disclosure of protected information, malicious destruction of or accidental damage to data, cyber extortion and malware. First-party coverage is generally available for legal and forensic services to determine whether a breach occurred and to assist with the aftermath—for example, regulatory compliance, costs to notify affected employees and/or third parties, network and business interruption costs, damage to digital data, repair of the insured's reputation, forensic experts and payment of ransom costs.

In contrast, third-party coverage involves claims against the insured for such things as breach of privacy, misuse of personal data, defamation/slander or the transmission of malicious content. Coverage is typically available in some form for legal defense costs, settlements or damages the insured must pay after a breach and for liabilities arising from the insured's use of electronic media, including infringement of copyright, domain name and trade names on an internet site, regulatory fines and penalties.

The risks that are most often addressed by commercial insurance policies for cyber and privacy include network security, privacy, interruption to the insured's business, media liability, and errors and omissions. Network security coverages protect the insured's business in the event of network security failure, typically including data breach, malware infection, cyber extortion, ransomware, or business email compromise. Network security coverage reimburses or fronts first party incurred by the insured as a result of the covered event. These expenses may include expert forensics, costs of restoring data, breach notification, call centers, public relations, credit monitoring, identity rebuild negotiation and payment of extortion demands and legal costs.

Privacy coverage protects the insured against losses due to information or privacy breach and would typically cover claims made by third parties relating to, for example, data breach, legal costs incurred as a result of regulatory investigations and to fines and penalties assessed as a result of such investigations. Given the CCPA's creation of a private right of action in the case

[4] https://www.irmi.com/term/insurance-definitions/cyber-and-privacy-insurance.

of a breach of the statute's provisions relating to information security, this coverage is likely to be an important part of any company's protections going forward. States such as Illinois, with a private cause of action created under the Biometric Information Privacy Act[5] and standing being found under that Act without regard to whether the claimant's information was actually accessed in an unauthorized manner,[6] have seen an explosion in these kind of privacy claims and class action lawsuits that reinforce the importance of privacy coverage.

Network business interruption coverage can respond in situations of operational failures due to a covered cyber event. Thus, when an insured's network or the network of a provider or vendor on whom the insured relies in order to operate becomes compromised or ceases to operate due to a covered incident, insurance may cover the insured's lost profits, fixed expenses and extra costs incurred during the time the business was impacted.

Media liability policies provide coverage for intellectual property infringement, other than patent infringement, resulting from the insured's advertising. It often applies to both online advertising, including social media, as well as print advertising.

Errors and omissions coverage applies to claims arising from errors in the performance of or failure to perform services. This can include technology services, like software and consulting, or more traditional professional services like lawyers, doctors, architects, and engineers. E&O coverage addresses allegations of negligence or breach of contract and will typically provide for indemnification and defense, the latter sometimes being offered in addition to the policy limits and others as part of those limits.

**WHAT IS NOT COVERED: A WARNING TO THE COMFORTABLE AND SELF-ASSURED**

One needn't go far out on a limb to surmise that most company executives and a fair number of brokers (and even claims professionals and lawyers) have yet to sit down and comprehensively read the variety of cyber and privacy insurance policies newly on the market. An interesting study apparently conducted by the FM Global Group and reported in the July 31, 2019, issue of Insurance Journal revealed that seven in ten senior financial executives at the world's largest companies believed that their insurance policies would cover most or all of the losses their companies would incur in a cyber-attack. Many of the losses they foresee, however, are, according to the story, rarely covered by insurance:

> In the study of more than 100 chief financial officers and other senior financial executives, 45 percent said they expected their insurer will cover "most" related losses from a cyber security event, and 26 percent said they expected their carrier will cover "all" related losses.
>
> "As essential as cyber insurance is, the findings indicate financial executives may be deriving a false sense of security from it," said Kevin Ingram, executive vice president and chief financial officer at FM Global. "While insurance is an essential part of the risk management formula, there are losses

[5] 740 ILCS §14/1, *et seq*.
[6] Rosenbach v. Six Flags Entertainment Corporation, 2019 IL 123186.

related to a cyber-attack that insurance cannot cover—like damage to a company's reputation, lost market share, missed growth opportunities, decreased valuation, and losses stemming from increased cost of capital.

But, according to FM Global, most of the effects these financial executives expect to experience in a substantial cyber security event aren't typically covered by insurance policies. These effects include:

- Degradation of the company's brand/reputation (46 percent said this was a likely effect of a cyber security event)
- Increased scrutiny from the investment community (40 percent)
- Decline in revenue/earnings (38 percent)
- Introduction of regulatory compliance problems (35 percent)
- Decline in market share (24 percent)
- Decline in share price (24 percent)

The insurer notes that although insurance would be expected to cover lost revenue during the span of a disruption, lost revenue related to lost growth, market share and brand equity, after resumption of operations would not normally be covered.[7]

Although insurance companies, due to the NAIC Model Law and state legislation, may have no choice but to become compliant with the increased scrutiny on data and information protection, another group that may be even more inappropriately complacent than business executives about its responsibilities is the legal profession. Clearly, most law firms and legal departments have a great deal of personal and nonpublic information in their computer networks and only recently have firms started taking serious steps to protect that information. The day has already arrived when firms are being sued under various theories, including professional negligence, for their purported failures to suitably protect their data from unauthorized access by others. This issue needs to be taken much more seriously by lawyers who, if nothing else, need to understand what their own professional errors and omissions policies will and will not cover in the event of a cyber event.

Additionally, issues of coverage are already arising out of the GDPR and CCPA regulations discussed above. Care must be taken to ensure that the particularized definitions found in those regulations and the scope of protections required are aligned with the same definitions and scope provided by existing policies. In an already varied market of cyber and privacy insurance, little is done with a cookie cutter and few assumptions can be safely made. As hacks, phish and ransomware proliferate and as technology itself threatens to outrun the law's ability to keep pace, it is incumbent on us all to know the law, know the insurance market and know what is and is not covered. There will be surprises enough for all of us and education and our own due diligence will likely be our only defense.

[7] https://www.insurancejournal.com/news/national/2019/07/31/534394.htm.

# THE RIPPLING EFFECTS OF THE GDPR

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# THE RIPPLING EFFECTS OF THE GDPR

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## *I. INTRODUCTION*

European laws usually don't have much of an impact in the United States, but that paradigm is outdated in today's tech and data driven global economy.[1] The EU created a new regulation that has been made directly applicable to all member states and could potentially punish American businesses with hefty fines if they do not comply. On May 25, 2018 the EU adopted "Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)", hereinafter GDPR. The GDPR mandates that personal data be processed in accordance to its three main principles: lawfulness, fairness, and transparency.[2] Companies who ignore the GDPR face fines up to twenty million Euros or 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.

## *II. TERRITORIAL SCOPE OF THE GDPR*

The territorial scope of the GDPR, governed by Article 3, is broad as it is not bound by geographical boundaries, essentially being applicable to data that originates from within the EU, whether or not that data is processed within the Union or outside of it, with limited exceptions.[3] In most cases, the GDPR is applicable to all data that is collected within the EU, regardless of where it is processed.

The rules of GDPR applicability are stated in Article 3 GDPR. It defines the territorial scope of the GDPR in two main criteria: the "establishment", and the "targeting" criterion.[4] When the processing of data is subject to either criterion, the relevant provisions of the GDPR will apply to the data processing activities of the respective data controller or processor.[5] Additionally, the GDPR may apply through virtue of International Law, such as that processing that takes place by EU Member State's embassies.[6]

## *III. SHOCKWAVES ACROSS THE ATLANTIC*

Although the GDPR is a European regulation, its jurisdiction is not limited by the borders the European Economic Area (EEA) or the EU, making it extraterritorial. Rather, the GDPR protects data that is from EU data subjects regardless of where the processing takes place.[7] This is especially true when data is transferred to third countries (countries outside of the EEA) to be processed there.[8] When transferring to third countries for processing, the GDPR mandates that

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1 . Todd Ehret, *Data privacy and GDPR at one year, a U.S. perspective. Part One - report card*, Tomson Reuters (May 22, 2019), https://www.reuters.com/article/bc-finreg-gdpr-one-year-report-card-part/data-privacy-and-gdpr-at-one-year-a-u-s-perspective-part-one-report-card-idUSKCN1SS2K5.

2. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) [hereinafter GDPR], art. 5, 2016 O.J (L 119) 35.

3. Regulation 2016/679, GDPR, art. 3.1, 2016 O.J. (L 119) 32 (EU).

4. European Data Protection Board (EDPB), *Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) - Version for public consultation*, THE EUR. DATA PROTECTION BOARD (Jan. 18, 2019), https://edpb.europa.eu/our-work-tools/public-consultations/2018/guidelines-32018-territorial-scope-gdpr-article-3_en.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

such transfer is done in accordance to Chapter 5 of the GDPR by both the data processor and controller. That requirement is set in place to ensure that the level of protection afforded to EU data subjects by the GDPR is not undermined by processing the data outside of the EU/EEA.[9] The GDPR essentially allows data transfers to third countries in two situations; when the third country been deemed adequate by the European Commission, or, when the data exporter proved the data transfer to be safe based on other measures as defined in the GDPR.[10] Such measures are composed *inter alia,* of adequacy decisions. An adequacy decision is based on the notion that the third country, or its part, provides at least the same level of protection as provided by the GDPR.[11]

Prior to the GDPR, companies in the U.S. were allowed to receive personal data from EU subjects based on the prior existence of the E.U-U.S Safe Harbor Privacy Framework (Safe Harbor). However, then the Court of Justice of the EU determined Safe Harbor to be insufficient to meet the requirements set out in the data protection legislation.[12]

Since then the U.S. was deemed not to have appropriate safeguards until the EU-U.S. Privacy Shield Framework (Privacy Shield Framework) was enacted in 2016. The companies and organizations that have joined the Privacy Shield are deemed to have an appropriate level of data protection.[13]

One of the main pillars of the Privacy Shield Framework that sets it apart from its predecessor, Safe Harbor, are its broad recourse mechanisms set in place to uphold the privacy of EU data subjects whose personal data may be mishandled.[14] Among those mechanisms, Privacy Shield provides EU data subjects with the opportunity to take their claims to binding arbitration before the Privacy Shield Framework Annex I Arbitration Mechanism.

## A. EU-U.S. PRIVACY SHIELD FRAMEWORK

The Privacy Shield Framework was enacted due to the highly globalized structure of the world's economy and to facilitate trans-Atlantic commerce between the EU, the U.S., and other members of the EEA and to at the same time protect the fundamental rights of individuals affected by cross-country personal data transfers.[15] Although the Privacy Shield Framework is not a law, it does extend the applicability of European legislation to companies in the U.S. which are receiving personal data from the EU and the EEA. In essence the Privacy Shield Framework is nothing more than a tool for the U.S. companies to have received an adequacy decision from the European Commission.[16] However, since the adequacy decision for data transfers from the EU to the U.S. is based on the certification through the Privacy Shield Framework, that said company which is no longer certified must seek an alternative method to continue transferring that data such as through an Independent Recourse Mechanism (IRM).[17] The Department of Commerce maintains a public register on their website which denotes companies who have active certification

5. Regulation 2016/679, GDPR, art. 44, 2016 O.J. (L 119) 63 (EU).

10. Regulation 2016/679, GDPR, art. 46, 47, 49 2016 O.J. (L 119) 63 (EU).

11. *Id. Adequacy of the protection of personal data in non-EU countries*, The Eur. Comm'n https://ec.europa.eu/info/law/law-topic/data-protection/data-transfers-outside-eu/adequacy-protection-personal-data-non-eu-countries_en (last visited July 18, 2018).

12. *The Court of Justice declares that the Commission's US Safe Harbour Decision is invalid,* The Eur. Court https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117en.pdf (last visited July 18, 2018) (last visited July 18, 2018).

13. *EU-U.S. Privacy Shield How Personal Data Transferred Between the EU and US is Protected*, The Eur. Comm'n, https://ec.europa.eu/info/law/law-topic/data-protection/data-transfers-outside-eu/eu-us-privacy-shield_en (last visited July 18, 2018).

14. *Id.*

15. Commission, *supra* note *13* at 45.

16. *Id.*

17. *Id.*

under the framework, as well as of those companies who have withdrawn their commitment to uphold the principles advanced by the framework.[18]

### B. THE GDPR A NEW ERA OF DATA PROTECTION

The GDPR is not only mandating compliance in the United States through Privacy Shield certification and other Independent Recourse Mechanisms, but also driving other states to draft their own GDPR-like legislations in order to protect their consumers from data misuse.[19] States such as California and Colorado have enacted their own versions, paving the way for other states to follow in a similar pattern.[20] The GDPR has had even more profound effects in countries like Brazil, where the country has enacted national data protection legislation.[21]

The California Consumer Privacy Act (CCPA) and the Colorado Consumer Data Privacy Act CDPA) will in fact have a substantial effect on California and Colorado lawyers, with domestic fines and penalties.[22] Both acts mandate "regulated", or "covered entities", to take reasonable precautions in order to protect the personal information, and personally identifiable information, of their customers.[23] These terms and their level of protection are synonymous to the "personal data" term used in the GDPR, which encompasses both terms; both of which have to be processes in a fair, transparent and lawful manner.[24] Like the GDPR, the CCPA and CDPA both establish duties for the covered entities to take upon a data breach, with the CCPA also providing for a private right of action and a data subject's ability to request deletion – a notion deeply rooted within the GDPR (the right to erasure).[25]

In the future, we should expect to see more states within the US enacting their own data protection acts that provide a similar level of protection to that of the GDPR. This is especially true, since the United States does not have a federal law that provides a broad level of protection. Even in states where data protection is not a priority, traditional notions of privacy, professionalism and confidentiality may play a role in ensuring that consumer data is protected.

Although the regulations clearly delineate financial penalties for CCPA/CDPA violation at up to $2,500.00 per violation or up to $7,500.00 for international violations; the regulations fail to asses the byproduct of such violations.[26] An attorney in may face penalties for a breach of a duty of confidentiality, should the personal information about their client be disclosed to unauthorized third parties, where the duty of confidentiality remains in effect even after the attorney has ceased representing the client for the matter at hand.[27] Similarly, duties of confidentiality for other professionals may be found in other regulations, such as HIPPA or as a simple contractual obligation.[28] In both cases, where a professional or attorney do not reasonably comply with current law, and as a result they breach their duty of confidentiality to their clients, a tort based cause of action may be available, if not discipline or disbarment.[29] Similarly, attorneys must act with

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18. Commission, *supra* note *13* at 45.
19. Jenifer McIntosh, *Privacy Basics for Colorado Lawyers the Colorado Consumer Data Privacy Act and the California Consumer Privacy Act*, COLO. LAW., August/September 2019, at 26.
20. *Id.*
21. Diego Capistrano*, INSIGHT: Brazil Enacts Its First Data Protection Legislation*, BLOOMBERG LAW (Jan. 23, 2019), https://news.bloomberglaw.com/privacy-and-data-security/insight-brazil-enacts-its-first-data-protection-legislation.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id. See* Regulation 2016/679, GDPR, art. 17, 2016 O.J. (L 119) 43 (EU).
26. *Supra* note 10, at 27.
27. State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 632 (Fla. 1991). *See also FL ST BAR Rule 4-1.6.*
28. 36 Causes of Action 2d 299 (Originally published in 2008). *Citing* Herman v. Kratche*,* 2006-Ohio-5938, 2006 WL 3240680 (Ohio Ct. App. 8th Dist. Cuyahoga County 2006.
29. Biddle v. Warren Gen. Hosp., 1999-Ohio-115, 86 Ohio St. 3d 395, 401, 715 N.E.2d 518, 523.

competence, when complying with all of the applicable data protection laws in their jurisdiction.[30]

But what about the benefits of preventative measures of GDPR compliance? It follows that EU entities and individuals favor doing business with entities that have obtained *a* certification (Through Privacy Shield or another Independent Recourse Mechanism (IRM)). This would apply even to the boutique immigration law firm which may have EU data subjects as clients. It is important to note here that the GDPR applies to all data from the Union, not to data about its citizens. The GDPR would apply even in cases where a third country national residing in the EU is applying for a U.S visa through a U.S law firm. For example, a Mexican citizen living in Belgium, applying for an immigrant visa trough a U.S law firm. In this case it is imperative to have some level of GDPR compliance.

## *IV. CONCLUSION*

Although the GDPR is a European law, it can have far reaching effects on U.S. companies and law firms, especially when doing business in Europe or representing European entities and individuals. The effect of the GDPR can be either direct, i.e. the U.S. company is subject to the GDPR, or indirect, i.e. the U.S. company falls outside of the scope of the GDPR, however its business partners in Europe (data exporters) need it to be deemed safe. Indeed EU companies and individuals will favor doing business with entities that follow the privacy principles of the GDPR and applicable local privacy regulations.

Due to recent developments in the United States and Brazil, Lawyers should be cautious of the manner in which they handle client data to prevent any breach of a client's rights under the GDPR, CCPA, CDPA or other applicable legislation. Further, it must be emphasized that although a data protection act may not be enacted in a lawyer's home state, or in one wherever they practice, the GDPR may apply in cases where the territorial scope extends to the practice by virtue of the "establishment", or the "targeting" criterion.

Moreover, other laws, such as those regulating professional responsibility and a state's bar rules of conduct may also be applicable when a client's privacy is at question. Lastly, compliance with applicable data protection law may be necessary to comply with the requirements of professional liability policies, a breach of which may not be covered by a policy. Similarly, insurers should adopt compliance requirements for their policy holders that adhere to the principles of current data protection legislation, whether it be encryption anonymization, or a simple locked file cabinet.

Overall, U.S law firms and businesses should comply with the GDPR and applicable domestic data protection regulations whenever possible. Doing so will protect the client's privacy interest, reduce exposure to breaches, and promote the business as privacy friendly; in an ever-growing data-driven economy.

30. Michael S. Finkelstein, *Overview of Data Breach Litigation in Louisiana: A Look into Its Uncertain Future*, 63 LA. B.J. 106, 109 (2015).

# SETTLING LARGE AND MULTIPLE CLAIMS, WITH LIMITED INSURANCE, IN A RAPIDLY CHANGING DEMANDING ENVIRONMENT


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**Settling Large and Multiple Claims, with Limited Insurance,**

**in a Rapidly Changing Demanding Environment**

I. Introduction.

Our claim is a tragic accident, with aggravated facts and multiple injuries. Our discussion plan is for the facts to become known in real time, as they do in many claims, requiring the claims professional to react quickly to changing circumstances and demands. For that reason, please do not look ahead, but consider the facts as they are known, and as they change from week to week.

The claim will require the claims professional to react to what is known, but also to anticipate what may develop. We are worried about limits and good faith. The reality is there are more claimants and damages than limits, and the claimants' counsel will seek to "open up the policy." All of you need to be on your toes.

Although we asked you to not look ahead – some of you will have an irresistible impulse to do so. You cannot read all the changing facts here - our PowerPoint slides will reveal our changing facts in real time as we go forward.

II. Week One – The Accident.

Our insured, Horace Driver, called his agent and advised that his son Reckless had borrowed Horace's car and was killed last night on the freeway. Horace knows there was a head-on collision with car full of people involving several fatalities and serious injuries. Reckless may have been drinking and apparently was traveling the wrong way on the freeway entrance. The agent notes the accident headline news and that the policy has bodily injury liability limits of $100,000 per person/$300,000 per occurrence. We in the claim department just received the assignment.

Discussion:

1. Aggravated Liability Facts.
2. Application of Claims Guidelines and Procedures.
3. Evaluation of Liability.
4. What are we anticipating?
5. What are we worried about?

III. Week 2 – We begin to learn more facts.

Reckless was in fact driving the wrong way on the freeway entrance. Alcohol tests are still pending. The other car was driven by John Victim who died at the scene. Others who died at the scene include the driver's 22-year-old daughter Mary, Mary's 24-year-old fiancé James and her brother, 24-year-old brother Karl. John's wife Jane is in serious condition at Memorial Hospital. Other passengers riding in John's car, Alex Johnson and Wendy Jones, were treated at Memorial Hospital and have been released. Demands begin to arrive.

Discussion:

1. Changing Evaluation of Liability.
2. Insurance Issues.
    a. Coverage Questions.
    b. Single Limit and Aggregate Limit Questions.
3. Punitive Exposure.
4. Demands for Limited Insurance Limits Begin to Arrive.
    a. Limited Time Demands.
    b. Conflicting Demands.
    c. Time to Investigate With Expiring Demands.
    d. Conditions on Demands.
    e. Liens.

IV. Week 3 – Claims Evolving.

The blood alcohol results reveal Reckless' blood alcohol level was .14, significantly over the state's legal level of intoxicated driving. Our investigator reports that Reckless was seen drinking, playing pool and belligerent with customers at Danny's Pool Hall. Reckless and Danny were friends and customers sometimes on other occasions suggested that Danny decline to serve Reckless when clearly intoxicated. The pathology report confirms that Mary was three months pregnant at the time of her death. John's wife died at Memorial Hospital last week never having regained consciousness. More Demands arrive.

Discussion:

1. Changing Evaluation of Liability.
2. Deceased Claimant.
3. One of the Victims was Pregnant.
4. Competing Claimants.
5. Potential Additional Defendant.
    a. Liquor Liability.
    b. Does Danny's Pool Hall Change Reckless' Liability?
    c. Additional Funds Available.
    d. Subrogation Potential.

## V. Week 4 - More Conflicting Demands, Danny's Pool Hall Appears.

More separate and conflicting demands arrive. At least one demand claims Reckless was on a family purpose and alleges individual liability of Horace. We are contacted by the liquor liability insurer for Danny's Pool Hall. While Danny's liability is denied, Danny's carries $500,000 of combined liquor liability limits.

Discussion:

1. Inability to Settle for All.
2. Realities of Punitive Damage Exposure.
3. Demand for Financial Condition Affidavit.
4. Refusal of Some to Give a Release.
5. Settlement of Some Claims, Not All.

VI. Week 5 – The Complexity Increases.

We are evaluating liability, acting in good faith and receiving conflicting demands. Things are changing fast and we are continually evaluating all our obligations, opportunities and options.

Discussion:

1. Conflicting Demands – Cannot Satisfy All.
    a. Evaluation of Catastrophic Injury.
    b. Ranking Evaluations of Claims.
    c. Incompetent Plaintiff.
    d. Unrepresented Potential Claimant.
    e. Requests for pre-suit mediation by some claimants
    f. Requests by some claimants for interpleader/voluntary payment of coverage limits into court.
    g. Differing degrees of prowess/ability of claimants' counsel; some with reputations of aggressive/sophisticated pursuit of claims and willingness to go to trial. Others with reputations as "lazy" and unwilling/unable to go to trial.
2. Legal Options.
    a. Policy Limits Tender.
    b. Declaratory Judgment.
    c. Interpleader of Policy Limits.
    d. Where do we stand with respect to Danny's Pool Hall.