EAGLE INTERNATIONAL ASSOCIATES

Presents

HOCUS FOCUS

Using A Focus Group to Defend Your Case (It's Not Magic, but the Results May Surprise You!)

March 16, 2022

The Jefferson Hotel
Richmond, Virginia

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.

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

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PROGRAM

11:15 am **Registration/Sign-In**

11:45 am **Welcoming Remarks**
Alison M. Crane, Esq., Bledsoe Diestel Treppa & Crane LLP
Chair, Eagle International Associates

Program Introduction
Eric Lalande, Magna Legal Services

12:30 pm **Bubble, Bubble, Who's in Trouble? Assessing Liability in a Tricky Case**
Moderators:
Matthew L. Schrader, Esq., Reminger Co., LPA
Barry S. Rothman, Esq., Strongin Rothman & Abrams, LLP
Panel:
Glen Lea, Claims Supervisor, Kinsale Insurance Company
Vickie L. Story, Litigation Specialist, Allianz Global Corporate and Specialty Insurance Company
Michael K. Woolley, North American Transport Director, Transportation Counsel, XPO Logistics

1:10 pm **Focus Group – Liability (Eric Lalande)**

1:30 pm **BREAK**

1:45 pm **The Liability Spell has Been Cast, Now Who Pays and How Much?**
Moderators:
Jason J. Campbell, Esq., Anderson, Murphy & Hopkins, LLP
David V. Hayes, Esq., Bendin Sumrall & Ladner, LLC
Panel:
Beth Herndon, Claims Manager, Berkley Mid Atlantic Group
Cindy Khin, Resolutions Director, Berkley Life Sciences
Regina Nix, Sr. Claims Litigation Specialist, Berkley Assurance Company
Lisa Shepherd, Claims Supervisor, Kinsale Insurance Company

2:40 pm **Focus Group – Damages (Eric Lalande)**

3:00 pm **BREAK**

3:10 pm **A Good Mediation Doesn't "Just Happen"**
Moderators:
John E. Cuttino, Esq., Gallivan White & Boyd. P.A.
David D. Hudgins, Esq., Hudgins Law Firm, P.C.
Panel:
Michael Flaherty, Claims Attorney, ALPS Property and Casualty Insurance Company
Stephanie E. Grana, Esq., Cantor Grana Buckner Bucci , PC
John McCammon, President, The McCammon Group, Ltd.

4:10 pm **Don't Be The One To Pay The Price: Avoiding Bad Faith**
Panel:
Alison M. Crane, Esq., Bledsoe Diestel Treppa & Crane LLP
John Egan, Esq., Rubin & Rudman LLP
Perry W. Oxley, Esq., Oxley Rich Sammons Law Firm
Lyle Robinson, Esq., Taylor Wellons Politz & Duhe

4:50 pm **Results of Focus Group**

5:00pm **Cocktail Reception – Rotunda**

6:00 pm **Dinner – Empire Ballroom**

CRUISER v. SMOOTH & CREAMY and A.C. ROBERTS

Case Synopsis:

Snapshot: Fatal accident involving a 28-year old female bicycle rider and two commercial vehicles; one truck an ice cream delivery tractor-trailer operated by Jose Colon for his employer, Smooth & Creamy Ice Cream Company, and the other a furniture delivery straight truck operated by Josef Pachinski, a subcontractor for A.C Roberts & Co., an appliance retailer and owner of the straight truck. The accident occurred on June 9, 2016 on Fifth Avenue in the Park Slope section of Brooklyn.

Summary of facts:

Plaintiff, Tom Cruiser, currently 35-years old, is a Dartmouth alumnus and a graduate of the University of Pennsylvania School of Law, Class of 2012. He is presently a federal prosecutor in the Southern District of New York; prior to that, and at the time of his wife's death, he had been practicing for three years as an associate at a BigLaw firm and then served as a law clerk to a judge on the U.S. Circuit Court of Appeals, 2nd Circuit.

The 28-year old decedent, Nicole Kiplinger, Cruiser's wife, was also a graduate of Penn Law. She and Cruiser were classmates; they began dating in their last year of law school, began living together in NYC following graduation, were engaged in January 2013 and married in October 2014, 20-months before her death. During her brief professional life, Kiplinger demonstrated a dedication public interest law; after working for a prestigious "magic circle" law firm in Palo Alto, CA in the summer between her second and third years of law school, she declined an offer of full-time employment as a first-year associate at that firm, citing "public interest work" as the reason. Following graduation, bar examination and her move to New York City with Cruiser, where they moved into an apartment together in Brooklyn, she worked in the public interest - non-profit area for approximately two years. Eight months before her death, Kiplinger accepted a position with the Community Bar Association Volunteer Lawyers Project, as coordinator of the association's *pro bono* project, earning a modest income for an Ivy League-trained lawyer, while her husband's salary provided for the vast majority of the couple's expenses. She was an avid runner, cyclist and exercise enthusiast. The couple purportedly had a plan that they would essentially "take turns" shifting between public service/public interest work and higher paying private practice/private sector work.

The fatal accident occurred at or near the intersection of Fifth Avenue and Prospect Place in the Park Slope section of Brooklyn on Thursday, June 9, 2016, at approximately 8:50am. Kiplinger was riding her bicycle northbound on the northbound side of Fifth Avenue, on her way to work in Brooklyn Heights. The Smooth & Creamy truck operated by Colon was also traveling northbound on Fifth Avenue, on its way to a supermarket delivery in the area; Colon's computer-generated manifest for that day reflected that he was late for his next delivery, although he maintains that he had an open window of time for that and his other deliveries

that day, and had no reason to rush. The A.C. Roberts truck operated by Pachinski had parked along the east (northbound) curb of Fifth Avenue, at the intersection with Prospect Place, preparing to unload and make a delivery of a kitchen appliance to a home on Prospect. At the time of the accident, alternate-side-of-the-street parking restrictions were in place prohibiting parking on the northbound side of Fifth Avenue from 8:00am – 9:00am; thus, there were no other vehicles parked along the east curb on that block at the time.

Fifth Avenue in the area of the accident is a two-way roadway, with double-yellow lines separating northbound and southbound traffic; there is sufficient width for one moving lane and one parking lane on each side of the street. The roadway is straight, with a slight descending grade northbound. Kiplinger was riding a Trek 1220 bicycle, and she wearing riding shoes that snapped into place on the pedals. She was not wearing a bicycle helmet; NYC law does not require adults to wear one. She had presumably turned onto Fifth Avenue from Berkeley Place, the street on which she lived, five blocks south of the Prospect Place intersection.

The parties do not dispute that at the time of the accident, Kiplinger was passing along the left (driver's) side of the parked A.C. Roberts truck, at the same time as the Smooth & Creamy truck was passing the A.C. Roberts truck in the travel lane. It is also undisputed that at the same time, the driver of the parked delivery truck, Pachinski, while still seated in driver's seat, opened the driver's door at least part-way. Kiplinger either struck the open truck door or lost control of her bike in an effort to avoid the door. She fell to the left, and was either crushed or mangled by the right rear tandem tires of the Smooth & Creamy truck. Her death was virtually instantaneous and was due to massive skull fractures and brain trauma, and other internal injuries.

There was a single identified eyewitness to the accident who was driving a rented van, also on Fifth Avenue northbound, and was about ½ block behind the Smooth & Creamy truck at the time of the accident. Her testimony was equivocal, but will be used by both defendants to implicate the other.

Plaintiff seeks recovery of damages for conscious pain and suffering and wrongful death. There are no witnesses who will testify that they saw Kiplinger conscious following the accident, but the plaintiff may seek to prove that there was some period of time, however brief, when the decedent was aware of the circumstances facing her and in fear of her impending death. Plaintiff also maintains that he has suffered economic damages by virtue of the loss of his deceased wife's household services, loss of consortium, and loss of financial support. As for the latter component of plaintiff's damages claim, the loss of financial support, the plaintiff contends that his damages should be measured by Kiplinger's earning <u>potential</u>, as a graduate of an Ivy League law school, due to their plan to switch roles as primary breadwinners. The defendants maintain that Kiplinger had shown a clear intention to pursue a public interest/public service career path, that she would have continued on that career path in large measure because she was following in the footsteps of her father, a well-known Washington, DC career public interest lawyer, and that the measure of plaintiff's loss of financial support

must be measured by that earning standard. The defense also contends that any suggestion that the decedent would have or planned to shift to the private sector is purely speculative. The defendants further maintain that after factoring in the decedent's personal consumption, the actual past and future economic loss incurred by the plaintiff is and would continue to be far below that claimed by the plaintiff.

New York law does not allow for recovery of "grief damages" by surviving family members. Additionally, New York is a pure comparative negligence jurisdiction; the decedent's contributory fault will serve to offset, but will not bar, plaintiff's recovery.

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Jason J. Campbell is a partner at Anderson, Murphy Hopkins LLP in Little Rock, Arkansas. His practice is primarily concentrated on professional liability defense and products and premises liability defense. Jason has been recognized by Best Lawyers in America since 2011 and Mid-South Super Lawyers. He earned his B.S.B.A at the University of Arkansas, Fayetteville in 1997 and his J.D. from the University of Arkansas, Fayetteville, Leflar Law Center in 2001. He is also a graduate of the Litigation Management Institute held at Columbia University; the IADC trial academy; and the ABA Construction Forum Trial Academy. He has completed 40 hours of mediation training through the Arkansas Alternative Dispute Resolution Commission. He has taken over 50 cases to jury verdict and arbitration decision.

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

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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 38 year legal career, his practice includes personal injury, products liability, professional negligence, insurance coverage, construction defect, and commercial litigation matters. He is a certified civil mediator and is frequently asked to mediate complex and high-stakes cases. In 2016-17, he was 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 *cum laude* graduate of Wofford College 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 and Products Liability Litigation) and South Carolina Super Lawyers (Civil Litigation Defense). Mr. Cuttino is a past Chair and past Member of the Board of Directors of Eagle International Associates, Inc.

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John Egan is a partner with Rubin and Rudman, LLP, a 75-lawyer general practice firm in Boston, Massachusetts. He is a trial attorney with 40 years experience in a wide variety of product liability, toxic tort, asbestos, personal injury, property damage, fire, professional liability, housing and employment discrimination, insurance coverage and bad faith, and other claims. Has tried over 75 cases to verdict, and has briefed and argued over 30 appeals. He received his B.A. from Bates College in Lewiston, Maine, and his J.D. from the Catholic University of America in Washington, DC. He is a member of the Massachusetts and District of Columbia bars, as well as the bars of the U.S. District Court for the District of Massachusetts, the First Circuit Court of Appeals and the United States Supreme Court. He is a member of the American, Massachusetts, and Boston Bar Associations, the Defense Research Institute, and is a founding member of Eagle International Associates.

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

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For more than 29 years, **Stephanie Grana** has fought for individuals and families suffering from catastrophic injury and wrongful death as a top Richmond personal injury lawyer. When clients' lives are turned upside down due to life-changing injuries or the death of a loved one caused by someone else's wrongful or negligent actions, they turn to Stephanie because she has a proven track record demonstrating her skill and her passion for securing fair compensation on behalf of the injured. In her years of practice, she has recovered more than 50 verdicts and settlements of over $1 million.

Her professional integrity and ability to secure results for her clients has earned her an AV® Rating from Martindale-Hubbell®, a leading lawyer rating directory. She has personally handled numerous high-profile, high-stakes personal injury cases, and has successfully guided her clients to victory. She has been selected to *Best Lawyers in America*® specifically for her excellent work in handling medical malpractice (2009-current) and was recognized as Personal Injury Litigation-Plaintiffs' Lawyer of the Year for 2020.

In addition to her trial work, Stephanie is often selected to teach other lawyers on various topics, including personal injury litigation, brain injury, trial practice, deposition tactics, jury selection, and medical malpractice at conferences around Virginia. Her skill and experience are routinely sought by lawyers who want to gain insight into the trial process, as well as how to secure larger verdicts and settlements for their clients. Stephanie often receives referrals from judges, defense lawyers, physicians and insurance adjusters.

Stephanie is deeply committed to service to her profession and has been voted by her peers to numerous leadership positions in both local and statewide organizations. She is past President of the Virginia Trial Lawyers Association, leading a 2,000+ member voluntary association of trial lawyers from across Virginia. She is a past president of the Virginia chapter of the American Board of Trial Advocates. She is a past-president of

the Lewis F. Powell, Jr. America Inn of Court and the Metro Richmond Women's Bar Association and is a member of the American Association of Justice. Stephanie was selected by The Chief Justice of the Supreme Court of Virginia to serve on the Virginia Model Jury Instruction Committee, which writes and edits jury instructions for all Virginia cases. She is currently an active member of the Boyd-Graves Conference and the Virginia State Bar Future of Law Practice Study Committee. She served for eight years as a member of the Virginia State Bar Disciplinary Committee for the Third District and is an active member of the Virginia State Bar Council for the 14th Circuit. Stephanie currently serves as the President-Elect of the Virginia State Bar and will become the VSB President on June 17, 2022.

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Beth Herndon graduated from the University of Virginia with a Bachelor of Arts degree, majoring in Economics. She began her insurance career 30 years ago at Sentry Insurance as an auto claims representative. She has been at Berkley Mid-Atlantic Group for 22 years, and is currently the Major Case Unit Manager, which is responsible for complex commercial liability claims with high exposures. Over the years, Beth has completed courses to obtain her CPCU, AIC, AIS, and CCP designations.

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Ms. Khin places a high premium on delivering exceptional results while providing high quality service and expertise to the Life Sciences industry for more than 25 years.

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Eric Lalande, M.A. is a Litigation Consultant with Magna Legal Services, LLC. Eric's primary role as a litigation consultant is to assist trial counsels with creating effective trial strategies and arguments for a wide range of complex litigation issues using various research methodologies including, focus group moderation, mock trials, shadow juries, jury selection/voir dire and quantitative research development. In addition, Mr. Lalande also works directly with counsel to develop complex trial graphics to present the most persuasive themes at trial. Before working in the litigation consulting field, Mr. Lalande spent years working as a therapist for individuals with substance abuse addictions and developmental disorders. He brings hands-on experience to our consulting team regarding how individuals learn and retain information and how individuals make decisions in group settings. Over the past few years, Mr. Lalande has managed our data division where he oversees case valuation studies and other large-scale data projects.

Mr. Lalande has worked on a diverse set of cases including but not limited to medical malpractice, personal injury, insurance coverage, financial, patent/IP, construction and contractual disputes. Eric Lalande is a regular guest-lecturer at the Pennsylvania State University and Seton Hall Law School and has presented lessons on jury research, focus groups, jury selection and voir dire. He has provided continuing legal education courses and presentations for various legal firms and organizations. Mr. Lalande is a Penn State graduate with a degree in Psychology and he obtained his Master's in Criminology from DeSales University.

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Glen started his insurance career with ALPS in 2002. Prior to that, he practiced law in Richmond, Virginia, concentrating his practice on commercial litigation, professional liability and construction defect defense, and insurance coverage counseling and litigation.

Glen has more than 10 years of claims experience with concentrations in lawyers professional liability, auto liability, workers compensation, and construction defects. He holds a Bachelor of Arts from the University of Virginia and a J.D. from the University of North Carolina School of Law. He is a member in good standing of the Virginia State Bar.

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John McCammon graduated Phi Beta Kappa from Davidson College in 1971 with a bachelor's degree in psychology. He then attended the Lyndon Baines Johnson School of Public Affairs at the University of Texas and obtained a master's degree in public affairs. After serving in the Army, he obtained his Law Degree from the University of Virginia.

In 1976 Mr. McCammon joined a national law firm, McGuire Woods, in Richmond, Virginia, and became involved in two primary areas of practice: insurance defense work and commercial litigation with an emphasis in construction disputes. His commercial construction litigation practice took him, as an advocate, into a significant number of mediations and arbitrations. In the late 1970's he served ad hoc as an Arbitrator for the American Arbitration Association. In the early 1980's, he increased his representation of a particular insurance company that promoted the use of mediation in defending its insureds. As a result, he became very experienced in mediation as an advocate.

At the beginning of 1994, he retired from his law practice and subsequently undertook a national due diligence effort, investigating the philosophies, programs, practices, and businesses underpinning mediation and arbitration activities throughout the Nation. After a thorough examination of the ADR landscape throughout the Nation, Mr. McCammon founded The McCammon Group in 1995 to provide Alternative Dispute Resolution (ADR) services initially in Virginia. In the following years, The McCammon Group expended its work to include Washington DC and Maryland. The McCammon Group now includes 80 retired state and federal judges and lawyers who have mediated and arbitrated approximately 30,000 cases. The settlement rate in mediation has been approximately 85% over this time.

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Regina Nix is the Sr. Claim Litigation Specialist for Verus Specialty Insurance. She began her career 42 years ago in the insurance industry working in various roles including underwriting and as an P & C licensed agent. She transitioned in the claims role over 32 years ago and is currently handling coverage litigation, complex liability claims, excess liability, and professional liability focusing on matters in litigation.

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Lyle Robinson is a partner with Taylor Wellons Politz Duhe in Madison, Mississippi. He received a Bachelor of Business Administration in Risk Management and Insurance from the University of Georgia in 1992. He received his Juris Doctor magna cum laude from Mississippi College School of Law in 2000. While in law school, he served as the Managing Editor of the Law Review. In addition, Lyle received AmJur Awards in Insurance Law and Secured Transactions, and was awarded an academic scholarship. He is an experienced litigator who specializes in matters that involve complex commercial and tort litigation, insurance coverage disputes, bad faith claims and products liability. Lyle is admitted to practice in all state and federal courts in the state of Mississippi, as well as the United States Courts of Appeals for the Fifth and Eleventh Circuits.

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Barry S. Rothman has over 35 years of experience in civil litigation, with concentrations in transportation/ trucking, construction, premises liability, crime prevention/security and food product liability. In the transportation/logistics field, he represents long and short haul carriers, and warehouse/distribution facility owners/managers, in personal injury, wrongful death and cargo-related matters. In the area of construction litigation, he has represented owners, contractors and engineering concerns in accident and construction defect cases. He has also litigated premises liability and security matters, on behalf of shopping center and mall owners/managers, retailers, hotel chains, residential and commercial property owners and security contractors. In food industry litigation, Mr. Rothman has represented manufacturers, distributors and retailers in contamination, foreign object and food packaging claims.

He has tried to verdict numerous cases in the State and Federal courts, and has been the attorney of record on a number of reported cases reaching the appellate courts.

Barry has also represented clients in commercial and employment matters, including contract and brokerage disputes, discrimination claims, ADA, ADEA, harassment and wrongful termination claims, wage/hour disputes and employee/independent contractor classification matters.

Barry is a graduate of Brooklyn Law School and Brooklyn College of the City University of New York, and is active in his Essex County, New Jersey, community.

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PREVENTING DISASTER VERDICTS:

An Introduction to Using Pre-Trial Research to Stay Out of the Headlines

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PREVENTING DISASTER VERDICTS:

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"I never saw that coming." This is not a phrase you want to hear being uttered by your defense counsel after the verdict comes in. We spend years litigating cases, all the while realizing that the predictability of a jury can change on one or two issues that we may have never considered. Part of mitigating risk is making sure that never happens to you. Fortunately, pre-trial research has given us the ability to drastically reduce or eliminate this risk. Pre-trial research is bifurcated into two categories: exploratory research and confirmatory research. For exploratory research, the key is to find out what is meaningful to jurors. Confirmatory research provides more specific and definitive information that is reflective of actual trial conditions.

Exploratory research typically denotes focus groups. Focus groups are useful tools for researching human behavior and predicting how jurors will act. Specifically, focus groups are intended to elicit the themes that jurors will find significant. The more "trial-like" the research conditions, the more accurate the prediction. Focus groups can be tailored to achieve specific tactical objectives—from determining what is important to jurors in rendering a verdict, to ascertaining the type of evidence and demonstratives that will persuade jurors, to witness effectiveness.

Confirmatory research is more formal than exploratory research—it is more trial-like and rigorous in implementation. Thus, it most frequently takes the form of mock trials. Given the consistency of human behaviors, the use of mock trials is a viable tool to predict trial outcomes

and minimize exposure. In fact, mock jury trials *can* accurately predict both liability and damages and, as such, are a worthwhile investment for law firms to implement. However, to be effective in terms of prediction, as opposed to being merely informative, mock trials cannot be a run-of-the-mill exercise; rather, they must be thought of as a form of psychological research.

Accuracy and reliability depend on hiring a jury consultant with a legitimate background in psychological research and predicting human behavior. Additionally, the legal team must be dedicated to the process. To this end, the mock jurors must reflect those likely to be impaneled. The mock jury must be presented with the same materials that the real jury will hear, particularly essential witness testimony. While prediction is achievable to a substantial degree, there are no guarantees. Court rulings, volatile witnesses, and rogue actual jurors will ultimately determine the outcome notwithstanding mock trial predictions. However, when the proper care and time is taken to ensure the scientific validity of a mock trial, it is a cost-effective tool for determining exposure on a case and far outweighs the utility of guessing or intuiting risk.

Simply, the accuracy of predictability of human behavior for purposes of litigation must be based in scientific principle. Psychological research is highly sensitive. Thus, simulation of actual trial conditions is key to obtaining predictive validity. And, significantly, trial consultants must have background and specialization in psychological measurement and prediction of behavior.

The articles that follow provide you with a detailed look at the resources at your disposal to use pre-trial research to your advantage. The author, George Speckart is the National Director of Litigation Psychology at Courtroom Sciences Inc. He received his Ph.D. in psychology from UCLA, with a specialization in personality measurement. Even before completing his degree, Dr.

Speckart began trial consulting. His research and methods have been used by litigators for jury selection and calculating potential exposure. As Dr. Speckart articulates in *Trial By Science*, *Do Mock Trials Predict Actual Trial Outcomes?*, *Alternative Exploratory Research Designs in Litigation*, and *Is Fear of Science Costing Your Firm?*, with the application of scientific principles and controlled practices, human behavior—and thus the outcome of trials—can be predicted.

IS FEAR OF SCIENCE COSTING YOUR FIRM?

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After spending thirty years working with trial teams, the same types of questions seem to continually surface: "How much will a jury award?" "Will this theme be persuasive?" "What kinds of jurors will be most receptive to my case?" Scrutiny of the underlying factual issues underlying these questions points to (at least one) issue common to them all:

Prediction of behavior.

In every instance, a trial team wants to know what a juror, or group of jurors, will conclude or what behavior they will undertake (e.g., answers to verdict form interrogatories) at some point in the future. Inferences regarding future conduct by definition entail prediction of behavior.

As a scientific endeavor, *prediction* rests at the highest level of achievement. Recalling basic science classes with the image of Newton sitting under the apple tree, he sees the apple fall (observation), derives an initial explanation to be tested (hypothesis) and then, once the initial idea is tested sufficiently, it evolves to the status of *theory*. A good theory will then predict accurately, which is the ultimate goal of science. But prediction is the holy grail, the final objective, because from *prediction* comes *control* (the desirability of which need not be explicated). When research does generate results that predict accurately, we say that the results have *predictive validity*.

Prediction of behavior, being the ultimate objective of jury research, happens to be a highly specialized field of study in psychology. Application of proven scientific methodology in this field might therefore be referred as "psychological technology," defined as the use of psychological research methods to solve real world problems, in this case, obtaining answers to the questions posed at the outset connected with juror behavior.

Rather than drifting off into a realm that appears to be unnecessarily arcane, it is helpful to conceptualize science as simply *a means to reliably ascertain what can be known*. Therefore, the use of science, or more precisely psychological technology (the *application* of science) to predict behavior of jurors is nothing other than an all-out assault on the question of exactly what jurors are going to do with a case.

It would seem reasonable, therefore, given the stakes involved in litigation, that such an "all-out assault" would be rather commonplace. Millions of dollars can rest in the balance based on juror behavior, and the only route to obtain information on this behavior

in advance is jury research (unless, of course there is a prior, identical case). In many cases, post-trial jury interviews are impossible, and the only way to know what jurors are thinking, and how they make decisions, is through jury research.

As stated previously, *science is merely an attempt to confirm reliability of what is thought to be "knowledge."* One would think that such a simple and eminently desirable goal as wanting to confirm the reliability of knowledge with regard to the conduct of a jury would be a top priority – yet even with millions at stake, emphasis on obtaining scientific expertise in jury research is virtually nonexistent.

Recently opinions have been rendered that the legal industry actively *avoids* science (www.ims-expertservices.com/bullseye-blog/november-2013/7th-circuit-excoriates-lawyers,-judges-for-fear-of-science/). The 7th Circuit, in a remarkable statement, charged the legal industry with "fear and loathing of science." *Fear and loathing* of *that which separates fiction from truth, or clever from correct*. What implications could possibly be drawn from the cost-effectiveness of litigation efforts that would be, in any way, positive?

There is more:

- Peter Lee in the Yale Law Journal, wrote "as a general matter, lawyers and science don't mix."

- David L. Faigman, in his books, has stated, "the average lawyer is not merely ignorant of science, he or she has an affirmative aversion to it" and "law students, as a group, seem peculiarly averse to math and science."

- Henry Friendly in *the Federal Jurisdiction* wrote in 1973, "How long shall we continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some advance."

Lawyers, being the ones who typically select jury research practitioners, need help in this area, especially in view of the nature of the jury research industry itself.

The Jury Research Industry

Paradoxically, while jury research is aimed at the highest level of scientific achievement (prediction of behavior), its practitioners frequently lack the requisite scientific expertise. The jury research field has no barriers to entry whatsoever – even hair salons have more stringent credentialing requirements. For example, the American Society of Trial Consultants (ASTC) recently held a vote on whether its members should have credentials and the vote was defeated. Compounding the problem, trial teams *do not look for* scientific expertise when hiring jury research practitioners. The result has been research

often entrusted to erstwhile pre-school teachers, receptionists, paralegals, acting coaches, and even cooks in many cases.

It should be noted that while many practitioners do have Ph. D.'s, the area of specialization is still important. The largest litigation consulting firm in the country was founded and operated by Ph. D.'s in marketing. Many have Ph. D.'s in communication, which is helpful for witness training, but even having a Ph. D. in psychology does not necessarily impart expertise in prediction of behavior if the degree was obtained studying how babies acquire language skills, treatment of deviant behavior or chasing rats through mazes. Just as litigation teams would not want an estate planning or tax attorney examining a witness, one's specific area of expertise within a general discipline such as psychology needs to be examined for its overall fit within the needs of the litigation effort.

One litigator told me recently, "I think an acting coach would be a good jury consultant." In terms of raw ingenuity; creativity; perceptiveness; and a host of other valuable characteristics, it may well be the case that an absence of "credentials" does not constitute a relevant issue whatsoever. However, as stated previously, the present emphasis is on *prediction*, and the tactical benefits of predictive validity to litigation strategy. Without science – an ability to confirm the reliability of what can be known – "prediction" is simply another opinion. Opinions are fine, of course, as long as that is all that they are purported to be. Once there exists a need to establish the *reliability* of an opinion, however, then one enters the realm of science, and it is this question of reliability that is the core issue.

Many who use jury research are content with simply having a person that is liked and trusted assemble a group of test respondents and put together the A/V equipment, taking research design and methodology into their own hands. Psychology as a field has a beguiling "anyone can do that" quality that can lead to erroneous conclusions as a result of the nature of the research itself. Psychological research is a highly sensitive matter, wherein research efforts are exceedingly vulnerable to subtle biases that can and do generate misleading results. Consequently, in high-stakes matters such as litigation, where inferences must be made regarding nuances of juror decision-making, *accuracy* – and therefore scientific rigor – is not an esoteric or pedantic issue. Rather, understanding exactly what jurors will do has real consequences both financially and with regard to litigation careers.

Establishing Qualifications and Maximizing Predictive Validity

Before proceeding, let's define one more term, namely, *qualifications.* Certainly in a field as rich and complex as litigation, scientific credentials alone could not be sufficient, and indeed, the simple concept of *experience* is also a key variable. As we shall discuss momentarily, simulation of actual trial conditions is a key component to obtaining predictive validity. Therefore, in jury research, it goes without saying that a practitioner should be able to have a competent grasp of what such conditions are like, and how they affect juror conduct. The myriad ways in which things can "go bump in the night" in

litigation require resolution through experience if one is to accurately implement research to formulate reliable inferences for a trial outcome.

So *qualifications* must entail the right kind of scientific training, but it must also refer to the right kind of experience in the trenches to accompany it. However, these criteria are rarely checked when vetting prospective jury research practitioners. Those who purchase and acquire jury research – let's call them *consumers* – are almost invariably trained as lawyers, and typically do not have scientific backgrounds. As a result, trial teams are simply not equipped to evaluate the soundness or rigor of scientific research, and so they do not evaluate potential jury research practitioners from the standpoint of scientific research training criteria.

I recently watched an engaging young person become hired to conduct jury selection in a $100 million patent case. She had previously worked in litigation for about one year and had never picked a jury before in her life. Perhaps unbelievably, in many cases, litigators do not even ask about experience, let alone credentials. I have no way to document these assertions except from my personal observation of actual trial teams, but I certainly would have no reason to make the contentions were they not in keeping with what I have actually seen.

Instead of qualifications, jury research practitioners are most often hired based on other criteria, primarily relationships, liking and word of mouth. Real world examples of poor levels of predictive validity in existing jury research are unfortunately common, but easily understandable in the context of how the industry is structured and regulated (or rather *un*structured and *un*regulated). For example, I was recently contacted by a major electronics firm, and I asked the trial team "Are you picking a litigation consultant based on qualifications or relationships?" The reply was "relationships." After choosing a different jury research person, this defendant eventually was assessed damages of $23 million by the actual jury, while the other co-defendants had already settled out for far less. In other words, the company had the least strategically effective position of any party in the case, despite the fact that it had conducted jury research – with a practitioner chosen on the basis of "relationships."

If prediction is the highest level of science, it certainly is not reasonable to expect results that rise to such a level when there is no requirement for, or investigation of, experience, qualifications or credentials. It should be emphasized, however, that this state of affairs is not intended to disparage those who acquire and use the services; as mentioned previously, most people are not even aware that prediction of behavior is a specialized area of research in psychology, nor that such expertise even exists; is available; or is indeed effective in the field of litigation.

Talking to litigators, the vast majority do not *expect* the research to be predictive. The most common viewpoint is that "jury research is more art than science." What seems to be missing is the realization that there is a choice here – it can be more science than art, if the consumers of these services understand that science is indeed available. However, simply by virtue of the astounding levels of diversity among jury research practitioners, it

makes sense that scientists would become involved at some point, especially given the stakes involved. After more than thirty years of evolution, enough has been learned from a scientific perspective so that guidelines can be drawn as to what makes the research predictive.

What Can Science Add?

Research-based prediction will never, of course, be perfect: Complicating factors such as uncontrollable judges and aberrant rulings; intractable witnesses; and the luck of the draw in jury selection will always represent wild cards that can lead actual trials astray. The position taken presently, however, is simply this: Under optimal conditions, when research is designed and implemented by practitioners with appropriate qualifications, the accuracy of the results far exceed intuition and conjecture, and in fact provide information that, in the end, saves trial teams enormous amounts of money as a result of maximally effective trial tactics and settlement strategies (Speckart 2008, 2010).

Jury research may take many different forms, but outside of post-trial juror interviews, the process typically involves (1) recruitment of mock jurors; (2) a trial simulation containing presentations of each side; and (3) the implementation of psychological measurement and/or other research methods. *Validity* – that is, whether the research accurately reflects real world conditions – is determined by these three "legs of a stool," and "breaking" any one of these "legs" will cause the structure to collapse.

With regard to prediction for an individual, let's say a person (on a defense trial team) says prior to jury selection, "I think we need to get rid of labor union members." So we test the question,

Are you or have you ever been a labor union member? 1. Yes. 2. No.

It turns out that the statistical relationship between this Yes/No response and later verdict preference is insignificant, i.e., the data is not predictive.

So we then refine the measurement. In response to the same question, potential answers are now:

1. ***Yes, and I attended meetings or held an official position***
2. ***Yes, but did not attend meetings nor hold an official position***
3. ***Never had a chance to join a labor union***
4. ***Had a chance to join but declined***

Statistical analysis of these response options *does* show a significant relationship with verdict, with option 1 corresponding to a plaintiff verdict, option 4 linked to a defense verdict, and options 2 and 3 not predicting either one.

What has been accomplished? Through refinement of psychological measurement we have started the process of identifying a juror profile that *predicts* verdict. In practice, of

course, more information than simply labor union history is needed, but this is an exemplar of how psychological measurement enables prediction of behavior starting from a single item and then building to a general profile by progressively adding more.

Contrast this process to what normally occurs on trial teams, in which members use experience to attempt to verify predictive relationships. In actual jury selection, trial team members most commonly use general subjective inferences ("I like him") instead of citing statistical relationships. While it is not intended that subjective bases for evaluating jurors be denigrated or dismissed as useless, certainly the addition of scientific criteria for jury selection adds increased power to create a useful profile.

At the group level, *scientific* research is cost-effective in making settlement decisions, since on average, research-derived damages estimates are far more accurate than "intuition," "guessing" or "hunches." As discussed previously (Speckart 2008, 2010), scientific rigor is required for obtaining maximally precise estimates of what a jury would award. The resultant information can then be used to determine where to draw the line in settlement negotiations. If the estimation of damages is inaccurate, tremendous waste can occur in over/under-payment to settle cases.

Traditional means of settling cases based on "experience" have been shown repeatedly to be far more costly than carrying out the research in a scientific manner to estimate the true value of the case in terms of what a jury will actually award. Numerical analyses of settlements in multiple cases with and without scientific research as a guide have shown unequivocally that not only is guessing more expensive than implementing the research, it is *far* more expensive.

For example, a claims adjuster was writing a check to settle a case for $750,000 when his Vice President ordered him to conduct a mock trial. He objected, citing the fact that the exposure was under $1 million, whereupon his supervisor ordered the project anyway. When three mock juries came in at $150,000 -- $250,000, they ultimately settled the case for $400,000 – a savings of $350,000, and a return on investment (relative to mock trial costs) of about 800%. That year the insurance company came in $83 million under budget against its loss reserves in just one department. The cost effectiveness of scientific research methods have been documented repeatedly, but putting these lessons into practice is quite another matter.

Conclusions

Often we hear people say "we will use jury research if the case does not settle" but this perspective misses one of the most valuable functions of the research – knowing how much to settle *for*. Knowing what a jury would do with the case in advance through properly designed research is a key factor in this determination, but the utilization of accurate research to allow savings in this area is typically neglected because of a lack of faith in its predictive validity. This lack of faith, as we have seen, can at least in part be ascribed to a ubiquitous failure to establish qualifications. For example, on dozens of occasions, we have heard insurance claims adjusters refuse to pay for jury research

because "it's not predictive." The foregoing discussions on the nature of the industry, of course, explain precisely how this conclusion became prevalent in the first place.

Ultimately, the emergence of predictive research is not an academic issue, but rather a pragmatic one: Once it is known that science is available and that it generally works, the key is to use it in the right manner, and to insist on science where it is legitimately needed to avoid the inevitable waste involved in guessing at damages. For example, in the *Exxon Valdez* case, our research predicted an award of $5.2 billion, while the actual amount was $5.0 billion. Exxon's stock went up after the verdict, because Wall Street had pegged the award at $10-15 billion; however, these are the types of estimates that are used to settle cases in many instances.

In addition, a vital function of the research is to induce actual trial outcomes that are *better* than those predicted, i.e., to *improve* the tactical position of the trial team. One common question that arises when discussing predictive validity is, "If the research is designed to inform the litigator, should not the actual trial results be *better* than those observed in the research?" Compilation of our outcome statistics comparing actual and mock trial results confirms that the answer to this question is typically "yes" – actual trial results are more favorable than mock trial (research) results nearly 50% of the time, whereas satisfactory levels of predictive validity – results predicting either a defense verdict or damages that are within 5% of those in the actual trial – hover around 40%. The remaining 10% represent actual trial results that are worse than the research outcomes, typically as a result of the complicating factors mentioned previously ("worse" is defined as a verdict reversal or damages that diverge in excess of 5% in an unfavorable direction, respectively).

The absence of a scientific foundation in jury research turns to be more serious than one might think. We have seen millions of dollars wasted as a result of "research" conducted by unqualified practitioners. For smaller plaintiff law firms investing their own money, the results of unreliable research can be devastating (we have seen more than one such firm destroyed as a result of poor research). Thus, ethical implications may be involved: Even when large corporate defendants are involved, whose money is being thrown away by paying more, or (for plaintiffs) accepting less than a jury would award in order to resolve a case (excluding adjustments for risk, nuisance factors, etc.)? How much financial waste is involved by relying on research that lacks scientific rigor? To what extent have unqualified practitioners damaged the reputation of the research, causing yet more reliance on guesses, and more over- or under-payment in settlements that are poorly estimated?

Fortunately, the remedy is simple: Guidelines can easily be proposed to prevent substandard research. There is no need to abandon previously-used criteria ("Who have you worked with?") but the following are minimum requirements that should be added:

1. What research background do you have in psychological measurement and prediction of behavior?
2. In what area of specialization did you receive your Ph. D.?

3. What is the track record of accuracy in your research?
4. How many years of experience do you have in this industry? How many years of *courtroom* experience do you have?

While many users of jury research services profess in a somewhat fatalistic manner that "It's more art than science," by contrast, the position of the present article is "If you want science you merely have to look for it." If a trial team is willing to roll up its sleeves, obtained qualified help, and take on the extra costs of utilizing science and experience, the economic benefits typically far outweigh the costs.

Jury research costs about as much as a fine car, say an Infiniti or Lexus. How much research would one normally expend in choosing a car? I would submit that the amount should not be more than the amount expended in choosing a jury research practitioner. Unlike the automobile purchase, the results of the choice in jury research can have implications that extend far beyond the immediate purchase at hand.

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Pre-trial or "jury research" is sometimes bifurcated into two categories, the first being *Exploratory Research* – projects designed to initially "see what's out there," investigate the substantive terrain of a case, and find out "what sticks" thematically in terms of case arguments, issues, and evidence. These types of projects are commonly referred to as "Focus Groups" and consist of research designs that typically do *not* use deliberating mock juries (although in some instances they can).

In Exploratory Research, the key intent is to find out what is meaningful to jurors. As trial teams "breathe their own exhaust" during months of trial preparation it becomes more and more difficult to ascertain what jurors actually care about versus what "seems important," and since the latter body of information is typically much larger than the former, these types of projects ultimately serve as a form of information reduction – a means to reduce the elements of the case theory into a more manageable body of facts, arguments and issues that is more streamlined and more effective.

The second category – *Confirmatory Research* – is intended to provide more specific and definitive information that can be relied on to reflect actual trial conditions, i.e., to confirm or disconfirm those particular case issues, themes, arguments and evidence that "drive" ultimate verdict and damages decisions by jurors. From the present perspective, then, Confirmatory Research is more formal, trial-like, and rigorous in implementation, most frequently taking the form of Mock Trial or Trial Simulation research. In these designs, judge's instructions are used with verdict form interrogatories to charge deliberating juries. It is generally agreed that Confirmatory Research has a greater potential to be predictive of actual trial outcomes compared to Exploratory Research.

The intent of the present discussion is to consider alternative formats for Exploratory Research, which might loosely be conceptualized as an examination of "different types of Focus Groups." While the concept of "Focus Groups" is typically utilized to refer to relatively simple designs in which a group of test respondents is subjected to presentations designed to "throw it all out there and see what sticks," we will also be considering more specific design alternatives that are implemented to achieve various tactical objectives in the overall preparation of a case.

Traditional Focus Groups

Typically, the traditional Focus Group design consists of the following steps:

1. Recruit a suitable sample of jury-eligible test respondents who are representative of the trial venire;
2. Develop presentations that summarize the positions of the parties in the case (these presentations may or may not include the case demonstrative evidence and witness testimony); and,
3. Implementation, consisting of a) administration of a pre-test measure designed to assess pre-existing characteristics of respondents; b) subjecting the research participants to the

presentations; c) post-test measurements to gauge their reactions to the case; and d) the focus session itself, in which respondents are queried as to their reactions to the case, and the more peripheral beliefs that regulate such reactions.

Thus, the design may be loosely conceived in terms of a "recruit/pre-test/presentation/post-test/focus session" structure, which represents perhaps the most rudimentary of jury research approaches, and indeed these types of projects are often carried out informally, with little (or no) scientific rigor.

The utility of this type of research arises from its capacity to determine what is important to respondents in making a verdict decision, versus that which is hypothesized to be important to jurors but in reality is not. This "separating the wheat from the chaff" or differentiating "correct" from "clever" may play a crucial role in theme development, since some case issues, themes and arguments may seem to be important on an *a priori* basis but ultimately do not in fact have any impact on the actual verdict and damages decisions made by jurors. Moreover, jurors frequently interject issues that are important to them but that were unanticipated by the trial team, lending these projects a kind of serendipity that can beneficially "feed" trial strategy.

Cost effectiveness of these exercises can be considerable, as themes that were hypothesized to be important but found to be ineffective later become discarded, reducing the "load" on the trial team and concomitant discovery costs. As one attorney put it, "I ran a focus group and found out I did not need a $75,000 expert that I was expecting to use." Streamlining the thematic structure of a case through Focus Group research may therefore have a joint effect of making the preparation both more economical and more effective by reducing the themes to only those with maximal traction in terms of persuasive impact.

"…jurors frequently interject issues that are important to them but that were unanticipated by the trial team, lending these projects a kind of serendipity that can beneficially 'feed' trial strategy."

The degree of predictive validity – how well the research can forecast actual juror dispositions and reactions in trial – is a complex topic, but generally speaking, the more trial-like the research conditions, the better (more accurate) the prediction. As we shall see in examining the research options that follow, some research designs are more "trial like" than others. For the present purposes, we note that achieving "trial like" conditions will first involve the completeness of the presentations, and the factual/evidentiary content included therein. Each of the following types of Exploratory Research includes some form of presentation to ground jurors in the facts of the case, and it is the content of these presentations that figures as the most important

determinant of overall predictive validity. While we will resume consideration of this topic at the conclusion of this paper, it is also noted that research methodology plays a key role in the reliability of the results for purposes of making inferences as to how actual jurors will perceive the case.

Special Designs – Graphics Research

Especially in cases that are fact-intensive, it becomes strategically imperative to formulate graphics with optimal educational and persuasive content. The critical role of well-designed graphics in maximally effective trial strategy has generally become self-evident, although some litigators cling to the belief that hand-drawn charts created on the fly "communicate better" (they do not). In some instances, however, the need to identify precisely how to best present complex data becomes so involved or ambiguous as to necessitate an Exploratory Research design that exclusively investigates demonstrative exhibits and their overall impact.

For example, in the *Exxon Valdez* litigation, the marine biology issues arising in conjunction with the claims by fisheries, seafood processors, and Native Alaskans generated the production of over 500 graphics by the defense team to communicate all of the issues related to fish and bird populations, water purity, and dissipation of crude oil, to name a few. With nearly a dozen experts having over 40-50 charts and exhibits each, the need to cut down the number of exhibits at trial became a key impediment to forward progress in trial readiness.

In a classic case of information reduction, Graphics Research was undertaken to reduce the number of charts and simultaneously elicit the feedback needed from test respondents to whittle down the stockpile of exhibits to under 100. Added to the need for information reduction, however, was the additional requirement that the trial team "meet the jury where *they* are" in terms of comprehension and assimilation of technical data. In short, there was a tangible need to have fewer and more persuasive graphics.

The design parameters used in this research, and recommended generally, are as follows:

1. First, recruit a suitable sample of jury-eligible test respondents (30-50) who are representative of the trial venire;
2. Develop a) introductory or "basic" presentations for each side that provide essential information about the case as background; and b) short (2-3 sentence) vignettes to explain the significance of each graphic or demonstrative exhibit;
3. Implementation, consisting of a) giving to respondents the "basic presentations" and subsequently, b) graphic by graphic, providing the explanatory vignettes in conjunction with each chart or exhibit while simultaneously administering c) a measurement device (questionnaire) that gauges their reactions to each chart or exhibit, both in terms of i) clarity and ii) persuasive impact (other parameters may be measured as well, such as "educational value," "appropriateness" and so on); and d) a short focus session with each graphic (or in clusters of graphics to save time in situations where there are many hundreds of graphics to

assess), in which respondents are queried as to their reactions to the individual charts and exhibits.

Data from the these "mini focus sessions" in d) for each exhibit (or cluster) provide the qualitative insight as to how to best modify, refine or re-design each graphic to maximize impact, clarity and overall "juror friendliness" of the exhibit – that is, meeting the jury where *they* are.

Charts and exhibits developed by experts can often be complex and lacking in "jury friendliness." By contrast, using Focus Group queries developed to ascertain what jurors need to learn and understand, results obtained from each chart or exhibit can be used to enhance communicativeness, facilitate recall, and maximize overall persuasive content as the charts or exhibits are modified based on the findings from the project. Moreover, the quantitative data from the measurement devices (questionnaires) can be used to rank-order exhibits in terms of their overall lucidity, persuasiveness or according to whichever parameters have been implemented in the measurement instruments. Such rank-ordering generally reveals where the best charts are, what styles and approaches to presenting data are most effective, and what *not* to do by looking at the *bottoms* of the lists.

Special Designs – Juror Profile Research

Often a case "is what it is" – there are no substantial means of "spinning" the case fact scenario -- and the real challenge is in picking the right jury. The issue of jury selection entails sophisticated scientific inference, as one is necessarily involved in the prediction of behavior: Will this juror vote one way or the other? How strongly will this person advocate a position in deliberations? The need for "sophisticated scientific inference" in turn requires a consideration of a methodological approach to carrying out valid research to accomplish the objectives of prediction.

It is worth mentioning that those who decide to use this type of research are perhaps the most sophisticated of litigation teams who recognize that effective jury selection is much more than "I like this person" or "I don't like that person." Prediction of behavior is, in fact, the highest level of scientific achievement, posing substantial challenges even for the most experienced of research psychologists. Accordingly, specific research design objectives must be met in order to obtain information that can be relied upon in the courtroom.

The use of "Focus Group" research in this instance, as Exploratory Research, may be a bit misleading, but the nature of the methodology ends up resembling Focus Group research in the final analysis. The first methodological issue that requires consideration is the need for large samples of test respondents. In order to scientifically delineate valid juror profiles, one first needs to be able to identify the degree of risk associated with various categories. For example, if one needs to be able to assign a degree of risk for, let's say, Hispanic females versus Hispanic males, it is necessary to have a sample of respondents from each sub-group to determine how that sub-group is likely to vote. When more precision is needed – for example, differentiating married from divorced

Hispanic females, and then again for Hispanic males – the number of test respondents required becomes even larger. Without delving into the complex topic of sampling techniques, it suffices to point out that, in this type of research, generally a sample size of test respondents exceeding one hundred is required for the determination of useful juror profiles.

In practice, research projects of this type follow the steps outlined below:

1. First, select a group of about 120-140 respondents comprising representative cross-sections of jury-eligible persons from the venue (i.e., ensuring a representative cross section of ethnic, marital, age, educational and other similar categories);
2. Prepare videotaped presentations for each important party that capture the essential claims and responses in the case; these presentations should normally be about 45-60 minutes each, based on the key issues and evidence involved in the litigation;
3. Schedule multiple Focus Group sessions of about 4-5 hours each, with each one using 20-30 test respondents; thus, using a sample size of 120, four Focus Groups of 30 subjects each or five groups of 24 subjects each would be optimal (while it would in principle be possible to use three Focus Groups of 40 subjects each, it should be remembered that, in order to conduct focus sessions with group discussion, the number of respondents in each group should not be too large);
4. Develop a comprehensive pre-test that includes measurements of any and all relevant pre-existing characteristics (demographics, experiences, beliefs, attitudes and personality variables) that will or could be considered in actual jury selection. Thus, for a toxic case, one might inquire as to hospitalizations, illnesses, past toxic exposure, diet and health behaviors, etc. This pre-test is a comprehensive and labor-intensive amalgamation of measurements that could conceivably be instrumental in differentiating plaintiff and defendant (or low-damage versus high-damage) jurors;
5. Develop a post-test administered after respondents have seen the presentation tapes that assesses verdict and damages dispositions (along with any other case-related queries that may be useful);
6. Implementation, consisting of (for each of the multiple 30-40 member Focus Groups used) a) administration of the pre-test in (4) above; b) subjecting test respondents to the presentations in (2); c) administration of the post-test in (5); and d) focus sessions in which test respondents provide their opinions of the case.
7. Data Analysis: Using various statistical correlational techniques, ascertain the existence of significant relationships between the pre-test variables measured in (4) and the verdict and damages outcomes measured in (5) to derive juror profiles.

In this research, the availability of "Focus Group" data – normally, the comments offered by respondents describing their reactions to the case themes and issues – is essentially a by-product of the process of obtaining the juror profiles. That is to say, the real "meat" of the project is the considerable work involved in the steps above leading to the profiles ((4), (5), (6 a-c) and (7)), while the use of focus sessions (6 (d)) is an added "bonus."

Thus, while the projects appear to be typical Focus Groups on the surface, the real intent is the derivation of reliable juror profiles for use in jury selection through statistical correlational analyses. However, these projects are extremely productive in that they provide both the profiles and the various substantive findings that become available in the utilization of multiple focus sessions.

Special Designs – Witness Effectiveness Training with Jurors

Witnesses, of course, are where the "checks" written in opening statements get (or *fail* to get) "cashed." While in the early days of litigation consulting it was often stated that "Jurors make up their minds in opening statements," in fact post-trial juror interviews reveal instead that more frequently, jurors make up their minds *while watching the witnesses*. In any event, the importance of effective witness preparation is not a topic that engenders debate.

Witness preparation most frequently takes the form of some type of "sit down" in which an exchange of performance guidelines, principles, ideas and themes is exchanged between the trial team (lawyers and perhaps consultants) and a witness. While much has been written on these types of preparation activities, in the present context, we convert the notion of witness training into an exercise involving test respondents in a Focus Group setting who provide feedback to the witness. We sometimes refer to this as "industrial strength witness training" – that is, Witness Effectiveness Training *with Jurors*.

Indeed, since jurors do not know that the witness is being provided with their feedback, uncensored comments by jurors may create a degree of immediacy and raw impact that can render the process unsuitable for some witnesses: The types of comments provided by jurors can be difficult to endure for sensitive witnesses, and care should be utilized in choosing the right circumstances in which to use this very powerful witness preparation tool. (By contrast, it is particularly effective for intractable witnesses who are resistant to taking advice from lawyers and consultants).

"Our experience suggests that the a priori evaluation of witnesses – that is, the assessment of their likeability and credibility without a 'reality check' from jurors – is notoriously fallible, even for seasoned litigators and experienced consultants."

Our experience suggests that the *a priori* evaluation of witnesses – that is, the assessment of their likeability and credibility without a "reality check" from jurors – is notoriously fallible, even for seasoned litigators and experienced consultants. In other words, *nowhere in the field of litigation will a trial team find that an "opinion" is less useful than in determining in advance how a witness will play* (except in the case of very good witnesses with a

track record of impressive performances). The area of person perception – ascertaining the degree of attractiveness and likeability characterizing a given person – is exceptionally vulnerable to bias, and trial teams seem to routinely over-estimate the positive characteristics of their own witnesses and under-estimate those of their opponents. The fallibility increases exponentially when one considers the stressors induced by the courtroom environment, and how such stressors may unexpectedly affect ultimate performance on the courtroom floor.

Witness Effectiveness Training with Jurors ameliorates these shortcomings in the following manner: Overall, the intent of the exercise is to recreate a slice of the courtroom proceedings by using a jury in conjunction with attorney advocates who provide mock direct and cross examinations, with breaks between testimony sessions in which the panel is queried as to their reactions to the witness performance on relevant dimensions (nonverbal behavior, mannerisms, body language, tone, speech rate, eye contact, facial expressions, and of course the substance of the testimony as well). These juror reactions, elicited in multiple, successive Focus Group settings (or in a single Focus Group session at the conclusion) are "fed back" to the witness and trial team members in real time via closed circuit television. The implications, lessons, and general information provided by jurors are then used as a basis for final preparation of the witness in additional "sit down" sessions. In other words, in this type of witness training, we let the *jurors* guide the ultimate witness training, based on what *they* need to see and hear in order to be fully convinced.

These exercises utilize very little (if any) questionnaire measurements, although response scales may be used to "score" witnesses on credibility dimensions (e.g., candor, trustworthiness, likeability, communicativeness, expertise, etc.). Steps are as follows:

1. First, recruit a suitable sample of jury-eligible test respondents who are representative of the trial venire (in this case 18-24 mock jurors are typically sufficient);
2. Develop a) introductory or "basic" presentations for each side that provide essential information about the case as background and b) scripts for mock direct and cross examination for the witness(es) who are participating;
3. Utilize a courtroom-like set up consisting of a judge's bench, jury box, witness box and counsel table, along with electronic presentation systems to create a realistic trial-like environment;
4. Implementation, consisting of a) having attorneys give respondents the "basic presentations;" b) providing mock direct (or cross, for witnesses who are going to be called adverse); c) excuse the trial team from the "courtroom" and conduct a focus session revealing the witness's characteristics, strengths, weaknesses, etc. with real time transmission through closed circuit television to a secure room where the trial team and witness view the proceedings with the jurors; d) have the trial team re-enter the "courtroom" and resume with the next set of questions to the witness (if direct was first, then this would be the cross, and vice-versa); e) repeat (c) above; and f) continue repetition of the process as needed for as many witnesses as required.
5. [Optional] Questionnaires may be developed

in advance to have mock jurors write about the witnesses in terms of comments or miscellaneous perceptions, possibly including as well standard response scale items measuring selected attributes or credibility dimensions as noted previously.

6. Use the findings for each witness as a foundation for final witness preparation sessions grounded in the perceptions reported by jurors.

Conclusions

In many instances the term "what sticks" has been used to refer to those themes that resonate with jurors and which are emotionally or perceptually relevant to them. In more formal terms, these are the issues or themes that jurors store and retain in memory for problem-solving the case. Psychologists emphasize that memory does not act like a recording device, but rather is selective, with retention depending on the *meaningfulness* of the issue or theme to the perceiver. These considerations are vital to the litigator since *jurors do not deliberate based on what happens in real time – they deliberate based on what has been stored and retained in memory.*

Thus, the use of instant feedback devices is not recommended for Focus Group research, because it literally provides too much information. As jurors selectively store in memory only that which is meaningful, that which has become stored can be counted on to reflect the truly dispositive elements of the case, and conversely, *that which is not stored in memory is just as useful to the litigator as information that was never presented at all*. Therefore, recording of real time reactions to information that never makes it into memory serves up data that essentially has no tactical importance to the litigator.

Limiting research to the examination of only that which jurors have kept in their memory to the end, however, represents not only a more parsimonious approach to the perception of the case, but also a more effective one. As stated previously, the more trial-like the procedure, the more one can count on the associated results to mirror trial outcomes – i.e., be predictive. Since prediction leads to control, the importance of making a research project as trial-like as possible becomes self-evident. Thus, studying what jurors have retained at the end mirrors actual trial conditions in which jurors are only *using* that which they have retained at the end.

Focus Groups have an unmistakable "anyone can do that" aura about them and indeed many people literally believe this. Make no mistake: Focus Group research is psychological research, which is unusually sensitive to insidious forms of bias that can easily contaminate the results. Research has shown repeatedly that data in psychological research is readily affected by the wishes and intentions of the researchers. When such wishes and intentions have strong emotional components, the results are even more vulnerable to bias.

For example, in our examinations of the accuracy of pre-trial research conducted by both plaintiff and defense trial teams, we generally find that research conducted by the former produce higher damages than research conducted by the latter – often much higher. It is not surprising that the wishes and

intentions of the researchers in the former entail damages. In addition, rarely (if ever) do we see damages in projects run by plaintiffs that are not significantly higher than those awarded in trial.

Even in Exploratory Research one cannot escape the ultimate requirement that the research is intended to predict. While such research is not designed to forecast verdict and damages outcomes (the typical requirement for "prediction") *it is still nonetheless predicting the subjective responses of jurors that will presumably occur in the real trial* – otherwise, what utility could the research possibly provide to the litigator? And, if prediction of any kind is in fact required, then we are operating at the highest level of scientific inquiry, and suitable qualifications for conducting the research should be ensured.

Dr. Speckart received his Ph.D. in Psychology from UCLA in 1984 with a specialization in personality measurement. He has been active in the jury consulting field since 1983, and has conducted over 600 mock trials and focus groups in pre-trial research for numerous types of litigation. Dr. Speckart has worked with litigators in over 150 jury selections, beginning with Dalkon Shields cases in 1983, the Agent Orange litigation in 1984, and Exxon Valdez litigation in 1994. His area of emphasis has shifted to patent litigation over the past decade as a result of increased demand for assistance in this complex area of jury psychology.

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CSI

The Mock Shop

In some cases, mock jury trials can accurately forecast the amount of money actually awarded in a dispute, which can help carriers decide how much to settle for.

	Jury 1	Jury 2	Jury3	Jury 4	Average	Actually Awarded
Exxon-Valdez	$2 B	$3 B	$4 B	$12 B	$5.2 B	$5B
Heavy Equipment Burn Case	$25 M	$37 M	$112 M		$58 M	$55 M
AHDC vs. City of Fresno	$1,000	$1	$10,000		$3,667	$1

AP PHOTO/PAT LOPEZ

MEMBERS OF the jury in the fraud and conspiracy trial of former Enron executive Ken Lay and Jeff Skilling in Houston are shown in this courtroom sketch Thursday, May 25, 2006. Many companies resort to mock juries to get an estimate of the potential damages in a case.

LEGAL

Trial by Science

A scientific perspective on predicting jury behavior and hopefully cutting costs at a time when verdicts can mean the difference between tens of thousands of dollars or millions of dollars. BY GEORGE SPECKART, PH.D.

The intervention by psychological research into assessing litigation exposure is generally considered to have begun in the late 1970's, although the study of jury psychology dates back to the 1950's with Hans Zeisel's seminal work in the criminal field.

The study of jury psychology was generally dominated by the focus on criminal juries until the last few decades, when damages awards in civil cases began to reach staggering levels. With the amount of money at stake reaching into the billions since the 1990's, more sophisticated means of estimating and forecasting exposure have become utilized in civil cases by trial teams and their consultants.

Over this time, jury consultants have been increasingly sought by trial teams and their clients to assist with the design and implementation of trial simulation, or "mock trial" research, focus groups, and other forms of pretrial research to determine which relevant themes, issues, and arguments would be effective, and ultimately, to assess the probable verdict and damages dispositions of jurors.

Notwithstanding the popularized methods depicted in the film *Runaway Jury*, the methodologies utilized have adopted various approaches, with varying degrees of legitimacy, as far as scientific rigor is concerned. The types and backgrounds of jury consultants varies widely, but among those with a bent for scientific rigor, post-trial interviews of jurors from the actual trials were used as a

Summary

- Many practitioners calling themselves jury consultants have no formal legal or psychological training
- Engagement of a qualified jury consultant and engaging in mock trials can be a cost-effective way of arriving at settlement.
- Claims adjustors sometimes settle on hunches rather than science in deciding how much to settle for.

CSI

benchmark to test the accuracy of pretrial research activities with mock jurors.

Over the years, data obtained from real jurors and actual trials became a basis for inferring the extent to which pretrial research with mock jurors was accurate, or "hitting the mark." This accumulation of knowledge led to more awareness of how jurors actually make verdict-related decisions in civil cases and the manners in which mock trial research could fail, resulting in significant refinements to mock trial research methodology for ensuring accuracy of the results.

As a result of what has now been a thirty-year period of testing and refinement, mock trial research has evolved to the point at which considerable accuracy is attainable, when the trial teams are willing to expend the time and resources to conduct scientifically valid research.

BUT DOES IT WORK?

In research language, the term "validity" refers to the extent to which research results can truly be used to infer real-world outcomes; in other words, are the results of a mock trial actually predictive of deliberation outcomes in a real trial? The table in the illustration above shows results of mock trial research that accurately forecasted verdict and damages from real trials. These results have been selected from hundreds of potential results in our existing database.

The first one shown, from the litigation surrounding the *Exxon Valdez* oil spill of June, 1989, was focused exclusively on punitive damages, since that was the sole area of the trial team's interest. Four mock juries awarded an average of $5.2 billion, and subsequently the real jury awarded $5 billion. It should be noted that Exxon's stock went up immediately after the jury verdict, as Wall Street had expected a potential punitive award of $10 billion to $15 billion, and that Exxon ended up agreeing to pay less than $500 million in the second half of 2008.

The second project involved one of the world's largest heavy equipment manufacturers, in which an operator received third degree burns after leaking brake fluid ignited. The client settled out after the mock trial, while the remaining defendants (who did not conduct mock trial research) received a $55 million judgement against them delivered by a Los Angeles County jury.

In the third case, a discrimination suit was brought by a housing developer against the City of Fresno. While the jurors agreed on liability, they did not think damages were warranted to any significant extent and the results were consistent throughout the research and real trial.

I HAVE SEEN, FOR EXAMPLE, SPREADSHEETS FOR JURY VERDICTS ON ASBESTOS CASES IN NEW YORK, AND THE RESULTS RANGED FROM ABOUT $500,000 TO $115 MILLION.

Of course there are situations in which predictions can go wrong, particularly with unfortunate rulings by the court or unexpected performance by key witnesses. But, overall, barring unusual circumstances, the science works – as one might expect, if one obtains a representative sample of test respondents, and provides the input that the real jury would receive at trial, it is a simple proposition that the sample will do more or less what the real jury does in response to the same stimuli.

DON'T TRY THIS AT HOME

In practice, however, trial teams are all over the map as far as their assessments of the true utility of using a jury consultant. The reasons for this difference in opinion are rather straightforward, however, from a scientific point of view: Mock jury research is psychological research, which is well-known in academic circles as having serious pitfalls in terms of methodology. In actual practice, however, the reality of the jury consulting field presents something far different than the rigors of academia.

In the litigation world, there are no barriers to entry in the jury consulting field, and the only requirement for becoming a jury consultant is to assert that you are one. As a result, the field is full of practitioners that come from all over the place, from cooks to bottle washers, amateurs in terms of their training, who are designing "psychological research" or mock jury research for corporate clients in multimillion dollar cases.

Since litigators typically make choices on jury consultants based on whom they like instead of whom the jury consultants are (in terms of background and credentials), the result is a great deal of poorly designed

research, leading to the perception that mock trial research is inherently unreliable.

As a result, those who make settlement decisions are apt to doubt the reliability of the research when coming up with a dollar figure for dispensing with a case, and end up instead making such decisions based on hunches. Losses connected with these hunches are generally more expensive than the costs of scientific jury research.

Alternatively, cases are settled on the basis of "nuisance factors" and a myriad number of corporate or management decisions that are far afield from the central question of what a jury would actually do with the case, and what the true exposure is in dollar figures from the standpoint of the courtroom floor.

In a legal malpractice case involving potential damages of nearly $100 million, I was discussing the possibility of conducting a mock trial with lead counsel. She told me, "If the client can settle it for under $10 million, they are going to do that." I asked her, "What if a jury would only award $5 million? What if a jury would only award $2 million? What if the jury would give a defense verdict?" Her reply shocked me: "They don't care," she said. I sat back in my chair and tried to absorb the implications of this position.

The first factor that came to mind was an ethical one: Is it acceptable to spend someone else's money unnecessarily? If you can take a case to court and win, or get out with a $5 million verdict, is it ethical to pay $10 million to "make it go away"? Moreover, is it ethical to pass on the opportunity to find out what the jury outcome options are? Ultimately this case did settle for an amount that "seemed reasonable" and no one actually determined what a jury would have done with the case.

Some attorneys say that they do in fact conduct "research" by conducting archival searches of verdict records in the venue on similar cases. I have seen, for example, spreadsheets for jury verdicts on asbestos cases in New York, and the results ranged from about $500,000 to $115 million.

Obviously, the results' key variables are not the facts that asbestos caused the injury and New York City is the venue, since all of those verdicts had those facts in common. This example is not extreme, yet lawyers and claims personnel in the insurance industry commonly use these spreadsheets to attempt to put a value on their cases.

When the diversity of the numbers is too great to arrive at a point estimate, the preferred

SOME ATTORNEYS SAY THAT THEY DO IN FACT CONDUCT "RESEARCH" BY CONDUCTING ARCHIVAL SEARCHES OF VERDICT RECORDS ON SIMILAR CASES.

methodology is then to resort to the "hunch." Those in the field will use different terms ("intuition based on experience") but the end product is still the same.

In another matter, after he was advised to try a mock trial, an attorney dismissed the idea as a "luxury." The team subsequently went to trial and was hit with a $60 million verdict. The flip side occurred when a former senior vice president of claims for a major insurance carrier, now deceased, stopped his subordinate claims handler in the midst of writing a check for $750,000.

"We're going to do mock trials," he said. When three juries came back at under $250,000, they came back to plaintiff counsel with a new position:

"We'll offer you $400,000 – take it or leave it." The plaintiff took it, and as a result the insurance carrier saved $350,000 in the process (minus the cost of the mock trial research - about $40,000). With the certainty of valid science on its side, the insurance carrier stared down his opponent during mediation and the opponent "blinked."

The obvious cost effectiveness of valid research, however, escapes most decision-makers at settlement time.

Quite often, we hear from trial teams who may be ambivalent about conducting research. Then, during mediation, numbers – frequently in the millions – are somehow "divined" with no factual basis whatsoever for inferring what a jury would actually do with the case. The typical result is settlement based on the same type of hunch that the claims adjuster in our previous example was making in writing the initial check for $750,000 in the first place.

What is noteworthy about the incident in which the claims adjuster was writing the check for $750,000, however, is that the damages were always expected to be below $1 million, yet the insurance company derived a clear benefit from conducting the research.

Most of those in a position to utilize jury research automatically assume that cases under $1 million are "not worth it" or "do not warrant this type of work," yet here is just one

clear instance of a rate of return on investment of over 800 percent (a savings of $350,000 based on research costs of about $40,000). This case is one of literally hundreds from our company's archives.

Imagine how much could be saved in the type of case mentioned at the outset, in which the trial team simply decided that, if the case could be settled for under $10 million, they would take the deal. Moreover, once again, the ethical issue arises – whose money is being wasted here? How much money is being gifted to plaintiff counsel and their clients when parties resort to "instant settlement" instead of taking a tough stand based on research? Is there accountability for this? If so, where?

WHAT DO CLIENTS WANT?

The fate of jury consulting will ultimately hinge on what the litigators, their corporate clients, and the insurers actually want. If the focus is on saving money by the insurers and corporate clients by attempting to control monthly bills and short-term expenses, these decision-makers will be unlikely to realize the types of long-term economic benefits afforded by well-conducted scientific, jury research. While insurers and in-house counsel who manage their trial teams certainly do care about winning, they are typically evaluated based on their performance in suppressing short-term tangible costs. Minimizing settlement amounts or jury awards, based on scientific research, is not part of this calculus. When the rubber hits the road at decision time, the types of research expenses that guide mediation or settlement are frequently rejected as a "luxury" or "too expensive," even though the expense of paying higher settlement amounts down the road dwarfs the costs of the research.

One key complication is how companies budget their management of exposures. In the insurance industry, claims budgets and indemnity budgets are typically separated, and the costs of pretrial research, like legal defense costs, are drawn out of the claims budget, while jury verdict awards or settlement amounts come out of the indemnity budget.

But those who make the decisions on whether to use trial sciences are often evaluated based on how they handle their claims budgets. An insurance insider told me, "A lot of claims adjusters do not want to spend $50,000 out of a claims budget in order to save $200,000 from an indemnity budget."

So the claims adjuster will guess at a settlement amount in order to keep the claims budget low, rather than spending the amount it takes to conduct the research to scientifically ascertain the true value of the case and save money in the indemnity budget.

ONE INSURANCE PROFESSIONAL TOLD ME, "A LOT OF CLAIMS ADJUSTERS DO NOT WANT TO SPEND $50,000 OUT OF A CLAIMS BUDGET IN ORDER TO SAVE $200,000 FROM AN INDEMNITY BUDGET."

Scientific research can create considerable saving when settlement discussions pinpoint an actual number based on what a jury is most likely to do with a case. Obviously, the fact that settlements are arrived at based on a number of factors will continue to play a role in how they are reached in modern litigation.

But in many instances there are – or should be – clear economic factors, an impetus for cost-effectiveness, and even ethical issues that will put the decision-makers' feet to the fire with the burning question, "What would a jury actually do with the case?"

It is imperative that decision makers are aware of the fact that, when well-designed research is carried out by those with the requisite methodological training and experience, the answer is available – and ought to be utilized.

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DO MOCK TRIALS PREDICT ACTUAL TRIAL OUTCOMES?

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Do Mock Trials Predict Actual Trial Outcomes?

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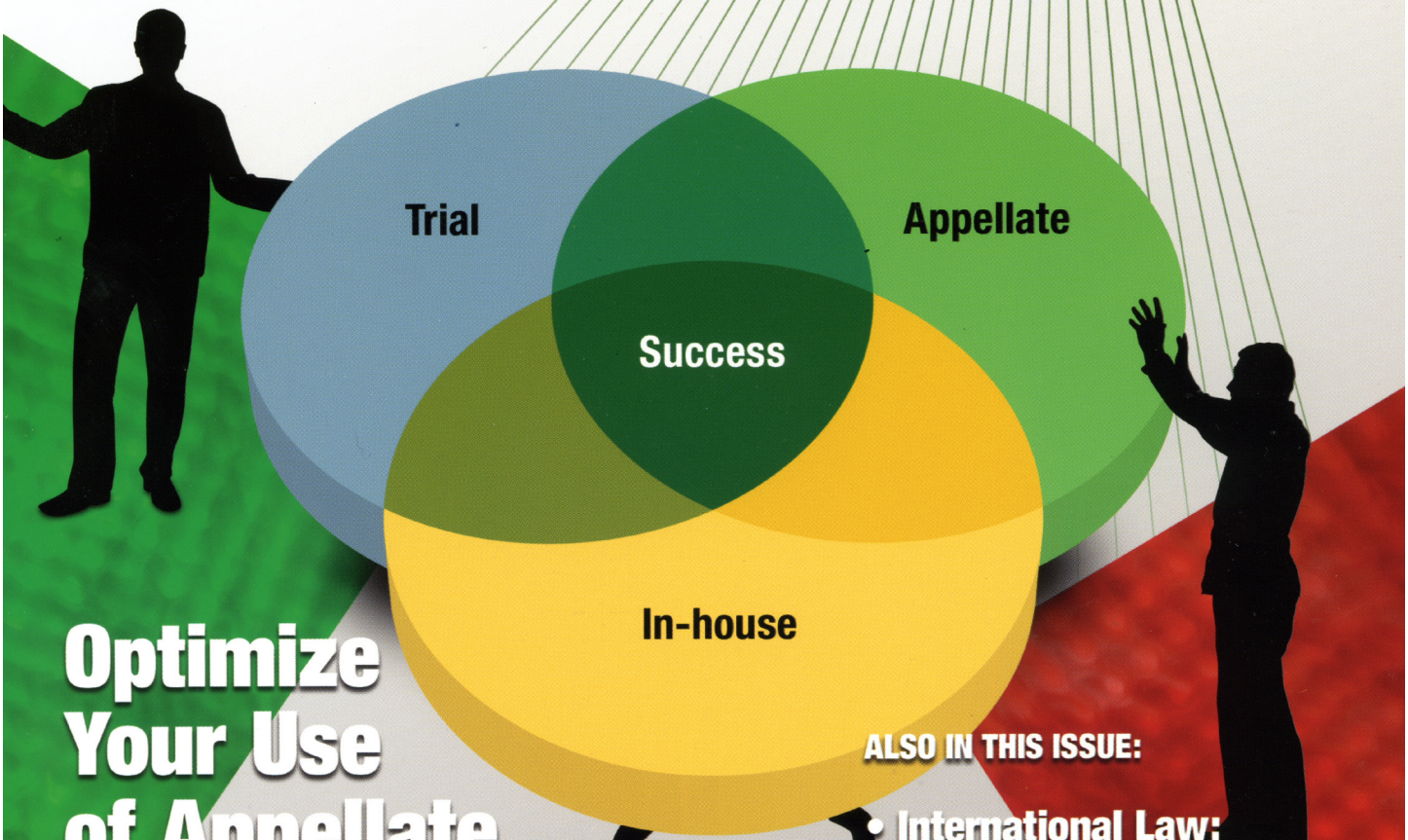

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Much More than a Hunch

By George Speckart

Do Mock Trials Predict Actual Trial Outcomes?

To obtain the right information, we must ask the right questions, and we must not dismiss others. For instance, we should not casually dismiss whether mock trials can predict trial outcomes. After all, if mock trials did—or could—predict actual trial outcomes, the policy implications for trial planning and settlement decisions would be enormous.

Before we can ask whether mock trials do or can predict trial outcomes, we must first clarify our terminology. In particular, we should first define what we mean by "mock trial." If by "mock trial" we mean a legal exercise designed to provide practice for lawyers, and the associated insights that come from practice, we should not expect prediction, as this is not a realistic goal for such an exercise. On the other hand, if we define "mock trial" as a form of *psychological research*, then whether a mock trial has predictive utility carries importance that demands consideration. In this article, we will consider mock trials as a form of psychological research, rather than as practice exercises.

We then may ask the questions, *do* mock trials predict, and *can* mock trials predict? The answer to the first question is, "sometimes—it depends on a number of factors." The answer to the second question is, "yes, to a substantial degree, if they are conducted in a certain way."

The purpose of this article is to explore when and how mock trials achieve prediction, and whether this amounts to "dumb luck," or whether something else happens. Do particular systematic factors allow us to achieve predictive utility in mock trial research? This treatise asserts an affirmative answer and explains how and why, with the proviso that *perfect* prediction still, of course, remains unattainable.

In terms of the current state of the industry, some mock trials do not predict at all. Some have moderate "predictive utility," modestly predicting outcomes. For example, perhaps two of three mock juries in a mock trial research project provide the same verdict as the actual jury. And others have predicted not only liability, but damages very accurately indeed, in particular with a plaintiff-oriented outcome. The real questions then become (1) Can we identify differences in the research design and implementation between those mock trials that predict, achieving predictive utility, and those that do not? (2) What creates predictive utility in a mock trial? (3) How consistent is this predictive utility across multiple projects when the research is appropriately designed and implemented? and (4) What do we want to predict: verdicts finding liability, or damages? While predicting damages is certainly more challenging than predicting liability, presently, mock trials *can also* predict damages. But again, whether they can and whether they do are distinct questions. The answer to the first question is, "yes, to a substantial degree. However, whether mock trials *do* predict damages depends on how they are conducted.

While prediction is achievable "to a substantial degree," it is important to acknowledge that perfect prediction is obviously impossible. Unpredictable factors often impinge on a trial, from court rulings to volatile witnesses to the mysterious "luck of the draw" in jury selection. However, generally speaking, when the research is designed and implemented correctly, prediction of not only liability but also damages is possible on a level that far surpasses the accuracy of "guesses" or "hunches," and in many cases, is surprisingly accurate.

Now that we have established that whether mock trials predict depends on how they are conducted, let's start with the first factor, which is the designer and implementer of the research itself.

Who's Conducting the Research?

Whether mock trials predict partly depends on who does the research. First and foremost, this article documents several exemplars of precise prediction from mock trials, noted below, both in terms of verdict and damages. In each and every one of these cases, the legal team was top-notch, working assiduously to put together the most realistic mock trial possible. Classically exemplifying the phrase "garbage-in-garbage-out," mock trials are more predictive when the legal team is fully immersed, on board, enthusiastic, and willing to work hard. So, the first component of "Who's doing the research?" is always the legal team. Do the members appreciate "balance"—that both presentations in a mock trial must be as persuasive as possible? Are the graphics comparable on both the plaintiff and defendant sides? Has the team chosen truly representative witness excerpts? Are the hearts of legal team members really in the exercise?

Now, a few words about the researchers are in order.

Jury consultants with established expertise in the prediction of behavior are quite rare. Therefore, it is unsurprising that the most prevalent opinion appears to clearly be that mock trials do not predict. Considering the practitioners in the field today, this opinion is certainly understandable. The field of jury consulting has no barriers to entry whatsoever, leading to "bargain services" conducted by practitioners,

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who, before entering the industry, were receptionists, paralegals, acting coaches, accountants, and even cooks. In hiring a jury consultant, a wise consumer will ask, "Do you have a background, credentials or training in the prediction of behavior?" Prediction is a vital, established area of psychological research, and if a client wants this expertise, the client should and is entitled to ask for it, and obtain it.

Poor trial outcomes can be tied to failing to establish consulting credentials. Just as a gastroenterologist would not perform eye surgery, there are different types of psychologists who are qualified to do some things but not others. Many individuals holding Ph.D.'s in psychology have formative training working with autistic children, in counseling and psychotherapy, or chasing rats through mazes. Some may also have managed pain clinics. What a wise consumer needs, however, is a jury consultant with expertise or qualifications in designing and implementing research to predict human behavior. A jury consultant's background does matter. Many jury consultants have Ph. D.'s in Communication, which constitutes an excellent background for witness training and assistance with opening statements, but not for research on the prediction of behavior.

Of course, many practitioners in the field quite legitimately may not care about prediction at all. Mock trials can be hugely informative but still fail to predict. Our topic here, however, is prediction. Estimating damages or exposure is an attempt to predict behavior—namely, the behavior of a group of people making a decision on damages. If we simply want to know how a group of people react to various themes and arguments, that's certainly a legitimate area to research, but if we need to determine a probable trial outcome, exposure or potential damages, then we need to draw inferences about a jury's behavior in the future, and that involves prediction. In those cases, it is reasonable to search for jury consultants with backgrounds of accomplishment in this area, and a litigator should shop as carefully in this area as anyone would before buying anything that would cost $30,000 or more.

Finally, just as nothing bars entry to the field or has established professional standards to guide jury consulting, currently, no ethical standards regulate conduct by those in the field. In other words, if there ever was a "buyer beware" industry, jury consulting is it.

How Is Predictive Utility Obtained?

Progressing from the researchers to research design and implementation, let's examine how appropriately experienced jury consultants can design and implement mock trials to achieve predictive utility. In research terms, this is also called "validity"—namely, the extent to which research measures what it is intended to measure and can accurately extrapolate generalizations to real world events. In our case, here, we want to generalize about actual courtroom verdicts and damages.

> Prediction of not only liability but also damages is possible on a level that far surpasses the accuracy of "guesses" or "hunches."

Constructing a valid mock trial to predict jury behavior is similar to constructing a three-legged stool. It consists of three key components: (1) the participants, or "mock jurors," who must faithfully represent the venire; (2) the presentations, during which the lawyers must present the same materials that the real jury will hear; and (3) analysis, which must demonstrate methodological soundness. If a mock trial meets those three requirements, generally, the goal of reasonably precise forecasting is achievable.

Of course, actual implementation of the research is not quite so simple, but when every decision in a mock trial procedure is resolved by making sure that it follows the "gold standard" criterion of recreating what the real jury will see and hear, the results will become progressively more realistic.

Obviously, regarding the first "leg" of the "stool," the participants, the respondents chosen to participate in a mock trial must reflect those individuals who likely will serve on the jury panel of the particular court in question. Satisfying this aspect of preparation involves elaborate recruiting, measurement, and screening of prospective mock jurors. However, most of the controversy involved in constructing mock trials centers around the second item, the presentations, as many people contend that we cannot possibly simulate the events in a courtroom. Strictly speaking, they are right. We cannot condense an entire trial into an one- to three-day exercise. But certain factors have to be taken into consideration before concluding that a mock trial cannot have predictive utility.

First, jurors do not deliberate based on what happens in the courtroom. They deliberate based on what they *store and retain in their memories*, and then *retrieve from memory* later, and jurors' memories represent a tiny subset of what has occurred in court. S. Tuholski, *When Facts Don't Fit, Some Jurors Make Up New Facts*, Nat'l L.J., Feb. 4, 2008. This is where experience comes into play in designing and implementing a mock trial. Obviously, a researcher's credentials alone are not enough to obtain predictive utility. Selecting the evidence that is pivotal in a case and that should be included in mock trial presentations requires the combined years of judgment of the entire trial team, prior focus group research identifying jurors' "hot buttons," if possible, and other substantive considerations based on the case fact scenario and types of claims involved.

Second, jurors do not make up their minds on the basis of opening statements, a common myth. They make up their minds when *listening to the witnesses*. Incidentally, this is why drawing inferences about future verdicts based on spreadsheets of past verdicts in a venue does not work. Verdict and damages decisions hinge on witness testimony, which varies greatly in appeal and persuasiveness, even across the same types of cases. Therefore, condensing the witness testimony into its essential components, and reflecting this testimony faithfully in a mock trial project, are pivotal elements in achieving predictive accuracy. Selecting

key testimony is an area where researchers heavily depend on lawyers and illustrates why we cannot assert that when predictive utility is achieved, it is solely because of the qualifications of the researchers. Achieving predictive utility absolutely requires a *team effort*. Generally, a good researcher should "coach" the trial team on these issues to get the most out of this team effort.

One of the reasons that mock trials in civil cases can predict is because they involve depositions. It is doubtful that we can make good predictions in criminal cases because without depositions, we do not know enough in advance about witness testimony. But in civil cases, in which the witnesses are more or less tied to depositions, predictive utility becomes more achievable because witnesses' testimony is largely known in advance. However, faithfully distilling vital witness testimony into a mock trial project is exceedingly labor intensive, often requiring more than one day. Indeed, based on our records, of all of the instances in which we achieved predictive utility, the highest levels of accuracy were found in multi-day projects in which a great deal of painstaking labor was expended to get the witness testimony "right."

In the area of analysis, the third "leg" of the "stool," many researchers average the damage awards proffered by each respondent in a focus group or mock trial to obtain an expectation of the damages in a case, but this is a faulty method because juries award damages differently from individuals. In particular, research from various sources has identified what has been termed a "severity shift," which demonstrates that damages awarded by a group tend to shift upward, or escalate, compared with damages awarded by individuals acting alone. Sunstein, *et al.*, *Punitive Damages: How Juries Decide* (University of Chicago, 2002). Thus, the proper way to estimate potential damages is to average across juries, not across individuals. In hiring a jury consultant, a wise consumer will ask a potential candidate how he or she calculates damages estimates.

In hiring a jury consultant, a wise consumer will ask a potential candidate how he or she calculates damages estimates.

The area of psychological measurement, or psychometrics, is a close sister to prediction in psychological research methodology, and various aspects of psychological measurement must be appropriately observed and implemented within the mock trial research to ensure predictive utility. To enumerate these in their entirety is beyond the scope of the present article, but it suffices to say that questionnaires cannot and should not be designed and administered without attention to proper psychometric criteria.

Finally, achieving predictive validity in mock trials requires years of making mistakes and learning from those mistakes to identify various things that simply make research "go wrong." If a plaintiff has color graphics and animations while the defendant simply presents black and white documents on an Elmo display, a perceptual shift in balance will result, or what psychologists call the "demand characteristics" of an experiment, which creates an artificial bias in the results. Bias can be introduced in innumerable other ways, and there is generally no substitute for the watchful eye and experience of an experimenter who has suffered all of the embarrassments of research that went awry in various ways over the years.

The Record

At the bottom of the page is just a partial list of notable examples of precise prediction in mock trial research from our archives. While the skeptical reader will no doubt conclude that these have been cherry-picked, we admit that many exemplars also exist that did not predict. As noted earlier, unexpected court rulings, unstable witnesses, vicissitudes in jury panels, what litigators often refer to as the "luck of the draw" when the members of a venire walk into court, and other factors do sometimes play a role. The list below represents a subset of those from our database that went to trial and in which damages were awarded.

Our position is simply that mock trials *can* predict, and *do* predict, when certain conditions are met, and that most of these conditions are under volitional control of the trial team and the client. The existence of mock trials that do not predict is not proof that they cannot. More often than not, in our view, when mock trials do not predict, either the researchers were unqualified, or the trial team was unwilling to expend the time and effort necessary

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	Mock Jury 1	Mock Jury 2	Mock Jury 3	Mock Jury 4	Average Mock Award/ Actual Award
ETSI v. Burlington Northern et al., 1989	$500 million	$160 million	$310 million		$323 million/$345 million
Newman v. Stringfellow Superfund toxic case, 1992	$175,000	$300,000	$80,000		$185,000/$138,000
Exxon Valdez, 1994	$2 billion	$3 billion	$4 billion	$12 billion	$5.2 billion/$5.0 billion
AHDC v. Fresno, 2001	$1,000	$1	$10,000		$3,667/$1
Steele v. First Union, 2002	$140 million	$275 million	$320 million		$245 million/$239 million
Heavy Equipment Case, 2003	$25 million	$37 million	$112 million		$58 million/$55 million
Legal Malpractice Case, 2008	$88 million	$20 million	$140 million		$83 million/$73 million

Note: Some names have been withheld per the wishes of the client.

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to get it right. Moreover, in cases characterized by the latter, that is, the trial team was insufficiently involved, this is not meant to disparage the lawyers. Quite unfortunately, many mock trials are conducted under "trial by hurry" conditions on the eve of trial, due to factors beyond the control of the lawyers, simply without sufficient time or necessary personnel resources.

Conclusion

The emergence of the potential for predictive utility over the last 30 years of trial sciences has profound policy implications for settlement practice, which naturally entail considering numerous cost-benefit issues in view of the general consensus that, for most cases, research of this type cannot fit into most litigation budgets. In one very fine article about mock trials by J.C. Johnson, the author takes the position that a mock trial is somewhat of a luxury—something that a client should use if he or she can afford it. J.C. Johnson, *Mock Juries: Why Use Them?* Litig. J. (Winter 2009, Vol. 35, No. 2,).

While the achievement of predictive utility appears to provide obvious benefits, examining the costs associated with how cases are actually resolved reveals that such benefits are even more extensive than they might at first appear. Most cases currently resolve to settle or proceed to trial based on "intuition." Conducting scientifically valid research to determine exposure is highly cost effective, since the margin of error in "intuition" is many times greater than the cost of the research. In fact, our analysis based on cases in which settlement negotiations were aborted to conduct research indicates that the margin of error in hunches—that is, the amount that proposed settlement amounts diverge from scientifically valid estimates about jury awards—is typically more than 10 times the cost of research itself.

In short, guessing is not only more expensive than the research—it's *far more expensive* than research. The cost effectiveness issue has been dealt with in other forums. G. Speckart, *Trial by Science*, Risk & Insurance, Oct. 2008. While other factors do dictate settlement value, such as nuisance, risk, and corporate image, what a jury would actually do with a case is still part of the calculation in most instances, and obtaining accurate information in this area can ultimately minimize expenses.

Much has also been written about a lawyer's professional obligations to a client. Discussing with a client whether an appropriately designed and implemented mock trial could benefit a client faced with the need for obtaining an estimate of exposure certainly would appear to be part of those obligations. If mock trials predict, then an entirely new way of viewing mock trials is required. They are no longer simply a luxury. Rather, a mock trial becomes a diagnostic tool implemented to systematically assess exposure—and the question then becomes not whether a client can afford to implement one, but rather whether the client can afford *not* to.

The state of the science has progressed so that accurate prediction is achievable. It is time for rational decisions on settlements to take over, particularly in a climate in which cost effectiveness is important to clients.

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UNDERSTANDING, ANALYZING &

EVALUATING WRONGFUL DEATH CLAIMS

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UNDERSTANDING, ANALYZING & EVALUATING WRONGFUL DEATH CLAIMS

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Wrongful death actions are one of the more complicated and nuanced claims defense attorneys and claims adjusters will encounter. In many personal injury cases damages can be evaluated simply by looking at concrete figures and numbers. Medical bills, lost wages for time away from work and anticipated costs for future care and treatment can typically be determined with relative precision and certainty. Asking someone to put a value on a person's life, however, is no simple or precise task.

In order to properly evaluate wrongful death, the first step is to understand what a wrongful death claim *is* as well as what it *is not*. Once we are able to define what a wrongful death claim is we can examine the measure of damages. The basic first step provides a framework for effective evaluation of specific types of wrongful death damages and what is ultimately recoverable. From there, we will also examine settlement strategies and how to negotiate common issues that arise when attempting to resolve these cases. Finally, we will discuss considerations for trial as well as special cases and issues that arise specifically within the context of wrongful death claims. Examining each of these topics will provide a useful framework for understanding, analyzing and evaluating wrongful death claims.

What Is a Claim for Wrongful Death?

When a family member dies as a result of the alleged negligence of another, a surviving spouse and the next of kin may bring a claim for civil damages. Next of kin includes the spouse of the decedent, and any first-line blood relatives including children,

parents, siblings and grandparents. Claims are generally initiated by a trustee or special administrator appointed on behalf of the next of kin who is named as the plaintiff on behalf of the claimants seeking recovery.

The purpose of a wrongful death action is to compensate the decedent's family for *their* losses-*not* the losses of the decedent. Wrongful death actions are thus distinguishable from survival actions under which the decedent's estate can assert claims for the decedent's injuries before death as well as any economic losses sustained by the decedent. In a survival action the estate is thus essentially stepping into the shoes of the decedent and making claims that would have belonged to the decedent had they survived. Wrongful death actions, conversely, are claims for the losses sustained by those the decedent left behind. The damages recoverable in each type of action are thus separate and distinct. Some jurisdictions allow for both types of actions to be pursued while other jurisdictions only allow recovery under a single theory.

What is Recoverable?

Although the damages recoverable in a wrongful death action vary from state to state they typically involve pecuniary or hedonic damages. These damages include the financial losses sustained by claimants as well as "loss of enjoyment of life" damages. Specifically, if the decedent provided (or could be expected to provide) financial support to the claimants during their lifetime, they can seek damages for that lost support. In order to recover the next of kin must establish that the decedent actually did provide financial support or that the support would be reasonably certain to occur in the future. This is commonly seen in claims by children that were dependent upon a parent for financial support and could be expected to remain dependent until the age of 18. It is also

common for children to allege that a deceased parent would have paid for their education, including college, had they survived. Spouses will likewise claim damages for support they would have received up until the time of retirement. It is also possible in some instances for a significant other to recover damages if they can establish past financial contributions from the decedent.

In other states, such as Minnesota, the spouse and next of kin can also seek damages for less tangible items such as loss of counsel, guidance, aid, advice, comfort, assistance, companionship and protection. These other pecuniary losses can be established through testimony from the next of kin about their relationship with the decedent. The Minnesota civil jury instruction for Wrongful Death claims states:

CIVJIG 91.75 Measure of Damages--Wrongful Death

Money value of damages

When you consider damages for (claimant)(s), determine an amount of money that will fairly and adequately compensate (claimant)(s)for the losses (he) (she) (they)suffered as the result of this death.

You should consider what (name of deceased) would have provided to the (claimant)(s)if (he) (she) (they)had lived.

Factors to consider

You should consider:

1. (His) (Her)contributions in the past

2. (His) (Her)life expectancy at the time of (his) (her)death

3. (His) (Her)health, age, habits, talents, and success

4. (His) (Her)occupation

5. (His) (Her)past earnings

6. (His) (Her)likely future earning capacity and prospects of bettering (himself) (herself)had (he) (she)lived

7. (His) (Her)personal living expenses (cost of supporting the child)

8. (His) (Her)legal obligation to support the (surviving spouse) (next of kin) and the likelihood that (he) (she)would have fulfilled that obligation

9. All reasonable expenses incurred for a funeral and burial (etc.), and all reasonable expenses for support due to (his) (her)last sickness, including necessary medical and hospital expenses incurred after and as a result of the injuries causing death

10. [The probability of (name of decedent)'s paying the debt owed by _____ to _____]

11. The counsel, guidance, and aid (he) (she)would have given (claimant)(s)

12. [The advice, comfort, assistance, companionship, and protection that (name of decedent) would have given if (he) (she)had lived]. [Give CIVJIG 91.85, where appropriate.]

Lost time together

Decide the length of time those related might be expected to survive together. You should compare the life expectancy of (name of decedent) with the life expectancy of each claimant.

Take into account only the amount of time the two being compared would be expected to survive together.

Base your money damages for each claimant on the shorter life expectancy of the two being compared.

Items to exclude

Do not include amounts for:

1. [Punishing the defendant]

2. [Grief or emotional distress of the surviving spouse and the next of kin], or

3. [For the pain and suffering of _____ before (his) (her)death].

Factors to exclude

Do not be influenced by the fact that:

1. [The (surviving spouse) (next of kin) (may have received) (may get) money or other property from (name)'s estate], or

2. [The (surviving spouse) (next of kin) (may collect) (has collected) insurance or workers' compensation benefits because of (name)'s death], or

3. [The surviving spouse has remarried], or

4. [The minor children have been emancipated], or

5. [There is no legal obligation to support the next of kin].

You must determine the total amount of money that will fairly and adequately compensate the (claimant)(s)for the damages suffered as the result of this death. [I will divide the damages among the (claimants).]

As a comparison, a survival action jury instruction, like this one from Virginia, contains an entirely separate measure of recovery:

Under VMJI 9.0000, the jury is instructed to consider all of the following in formulating its compensatory damages (i.e., both economic and non-economic) award in a personal injury case:

(1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;

(2) any physical pain [and mental anguish] he suffered in the past [and any that he may be reasonably expected to suffer in the future];

(3) any disfigurement or deformity and any associated humiliation or embarrassment;

(4) any inconvenience caused in the past [and any that probably will be caused in the future];

(5) any medical expenses incurred in the past [and any that may be reasonably expected to occur in the future];

(6) any earnings he lost because he was unable to work at his calling;

(7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future;

(8) any property damage he sustained.

In wrongful death claims the claimants will typically testify to their relationship with the decedent and what the loss of that relationship as well as their lost time together means to them. These damages can complicate the analysis of wrongful death claims and are typically a sticking point in settlement negotiations.

When evaluating alleged pecuniary losses the attorney or adjuster should look at the financial contributions made by the decedent to the next of kin in the past in order to

determine the veracity of the alleged future losses. As for the claims for lost time together, in addition to deposition testimony, evaluators can look to phone records, written communication, vacation and holiday habits and other more concrete items to verify and quantify the alleged losses.

Any expenses and/or debts of the decedent should also be considered when measuring damages.

Evaluating the Claim

In any wrongful death claim the attorney and adjuster will have to endeavor to determine what the loss of a particular life is worth. Not all cases involve the death of parent and spouse who acted as the sole earner. Often times the contributions of the decedent came in the form of housework, emotional support and other less tangible items. Does that make them less valuable? Certainly not to the claimants. Attorneys and adjusters may attempt to evaluate these claims by looking at replacements costs, like hiring a house cleaner or a handyman. But even these evaluations can't equate for the loss of a loved one. Even more troublesome are cases involving young children. Such cases rarely involve any financial loss. To the contrary, children are generally always financially dependent on the surviving parents. But you will never hear a defense attorney argue that the death of a child resulted in a cost savings to the parents.

That is why when evaluating wrongful death claims it is also important to consider what a jury is *not* allowed to compensate for. In jurisdictions like Minnesota, the jury cannot award damages that punish the defendant or that provide compensation for the emotional distress of the surviving spouse or next of kin or for the pain and suffering of the decedent before they died. Thus, while pecuniary damages sound like an

amorphous subject, the reality is that the recoverable damages in many jurisdictions still boil down to what losses can be specifically measured and quantified. Since items like grief, pain and anger are specifically excluded from consideration the sky is not necessarily the limit.

When evaluating, the attorney or adjuster should get an idea of the financial situation of the descendant and their family. The greater financial impact the decedent had on the surviving family the greater the value of the claim. From there the attorney and adjuster should evaluate the strength of the familial bond between the decedent and the surviving family. The loss of brother who had moved away and whose only remaining connection to the family was an annual holiday card will not warrant the same level of damages as a loving wife and mother living with her family. Determining who the decedent was and what they meant to their family is critical in evaluating the claim.

Settling Claims

Settling Wrongful Death claims can present unique difficulties, particularly when there are numerous next of kin or multiple decedents. Disagreements over settlement distributions or the value of a claim can arise between the parents of a decedent and a surviving spouse. Other times adjusters encounter claims with multiple deaths but a limited policy. Communicating with the next of kin and managing conflicts and expectations among family members and multiple claimants is essential when attempting to resolve claims through settlement. In some scenarios adjusters and attorneys can even use conflicts among various claimants to their advantage when attempting to resolve difficult cases. For instance, in claims involving multiple deaths and a single negligent party with limited policy limits, an adjuster that can convince at least some claimants to

settle early can then in turn use those settlements and the diminishing policy funds to incentivize the remaining claimants to settle as well before the policy is exhausted. Co-defendants should also be looked to for settlement contribution based on their anticipated portion of fault. In auto cases, any uninsured or underinsured motorist benefits will also factor into any practical consideration of the settlement value. The same is true with respect to any life insurance policies or employment benefits that the claimants are entitled to.

Attorneys and claims adjusters should also consider the benefit of the meditation process in resolving difficult cases. Allowing the next of kin the opportunity to speak with a mediator and express their loss can be a cathartic experience that helps them move toward resolution. All scenarios should be examined in any settlement discussion but it is important to remain mindful of the additional complications presented in wrongful death settlements where multiple interests and expectations are at play.

Trial Strategies

As in any case, it is important to consider the attorneys on the other side. Research into prior wrongful death experience and verdicts by the opposing counsel should not be discounted. The jurisdiction is also an important consideration not only when assessing what the measure of damages are but also when examining verdict range. Perhaps more important than any other factor, however, will be the opposing party. While nothing may be more moving to a jury than a loving and likable family that has suffered a significant loss, nothing may be more off-putting than a family attempting to benefit from the death of a loved one. Putting the work in at the discovery stage to evaluate the claimants will help give the attorney and adjuster an idea of what best and

worse-case scenarios will look like. Using the jury instructions for the subject state in depositions and taking the claimants through the damage items one by one is one of the most effective ways to prepare for trial.

Special Considerations

Whenever settling or evaluating a wrongful death claim it is important to also consider any possible outside interests. Employment benefit plans, retirement plans, medical providers and other potential subrogees or assignees may be lurking in the weeds. It's important to verify that all interested parties have been considered and notified before entering into a settlement. You do not want to settle a claim only to find out that there are additional claimants with actionable rights.

Conclusion

Wrongful Death Claims present unique challenges. Understanding what a claim for wrongful death is and what can be recovered is critical to any evaluation of these claims. Each of the issues discussed above should be considered and analyzed when addressing a wrongful death claim.

A MASTER CLASS IN MEDIATION:

Mediation Tips and Strategies

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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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DON'T BE THE ONE TO PAY THE PRICE:

Avoiding Bad Faith

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DON'T BE THE ONE TO PAY THE PRICE:
Avoiding Bad Faith[1]

"We hate to lose, but when we do, rest assured we'll be back, and someone will pay the price." - Woody Hayes, Ohio State University, Football Coach 1951-1978

I. INTRODUCTION

Ohio State University's former football coach Woody Hayes was famous for his quotes; including: "we hate to lose, but when we do, rest assured we'll be back, and someone will pay the price." In the world of handling claims, insurers do not want to be the ones to "pay the price" when there is a loss.

Like all football teams having a playbook, almost all states have statutory or regulatory provisions governing fair claims handling. These laws are mostly a product of the model legislation drafted by the National Association of Insurance Commissioners ("NAIC"). "The purpose of this [Model Act] is to set forth standards for the investigation and disposition of claims arising under policies or certificates of insurances." UNFAIR CLAIMS SETTLEMENT PRACTICES ACT § 1 (1997). The Model Act was not drafted to be construed to create a private cause of action; instead, the Model Act includes proposed language providing for state insurance commissioners to investigate conduct of insurance carriers and issue sanctions if warranted. While most states have adopted the Model Act, there is a split between the states as to whether a particular state's laws permit a private cause of action as opposed to simply implementing administrative penalties. Insurer liability also exits under common law; to which, insured can pursue claims for breach of the insurance contract, breach of good faith duty, breach of fiduciary duty, or negligence arising out of improper claims handling.

This paper will focus primarily on statutory and extra-contractual liability; specifically, addressing extra-contractual liability for failing to defend an insured when there is no bad faith. It will also address when independent counsel is required and provide some best practices.

[1] This paper consists of written materials previously prepared for an Eagle Seminar held in Philadelphia, PA and drafted by Shea Backus, Esq. of the law firm Backus, Carranza & Burden and Lindsay J. Woodrow Esq. of the law firm Waldeck Law Firm, P.A., both individuals have given Perry W. Oxley, Esq. of the law firm Oxley Rich Sammons permission to update this paper.

II. PAYING THE PRICE – FAILING TO ADHERE TO STATUTORY OR REGULATORY PROVISIONS GOVERNING FAIR CLAIMS HANDLING

The Model Act provides the following unfair claims practices when such is committed "flagrantly and in conscious disregard of [the Act] or any rules promulgated hereunder" or "with such frequency to indicate a general business practice to engage in that type of conduct":

A. Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverage at issue;
B. Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies;
C. Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;
D. Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;
E. Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;
F. Refusing to pay claims without conducting a reasonable investigation;
G. Failing to affirm or deny coverage of claims within a reasonable time after having completed its investigation related to such claim or claims;
H. Attempting to settle or settling claims for less than the amount that is reasonable person would believe the insured or beneficiary was entitled by reference to written or printed advertising material accompanying or made part of an application;
I. Attempting to settle or settling claims on the basis of an application that was materially altered without notice to, or knowledge or consent of, the insured;
J. Making claims payments to an insured or beneficiary without indicating the coverage under which each payment is being made;
K. Unreasonably delaying the investigation or payment of claims by requiring both a formal proof of loss form and subsequent verification that would result in duplication of information and verification appearing in the formal proof of loss form;
L. Failing in the case of claims denials or offers of compromise settlement to promptly provide a reasonable and accurate explanation of the basis for such actions;
M. Failing to provide forms necessary to present claims within fifteen (15) calendar days of a request with reasonable explanations regarding their use;
N. Failing to adopt and implement reasonable standards to assure that the repairs of a repairer owned by or required to be used by the insurer are performed in a workmanlike manner.

UNFAIR CLAIMS SETTLEMENT PRACTICES ACT at §§ 3-4. While the Model Act explicitly provides that it is not intended to create a private cause of action, it provides

administrative procedures for the insurance commissioner to determine whether the insurance carrier has engaged in unfair claims practices and sets penalties varying from $1,000 for each violation to revocation of the insurer's license. *Id*. at § 5-7.

Although most states have adopted the Unfair Claims Settlement Practices Act, many states have varying statutory and regulatory laws to govern fair claims practices. *See* EAGLE INT'L ASSOC., INC., FAIR CLAIMS HANDLING STATUTES A 50 STATE SURVEY (Sept. 2015). The following states and territories have adopted the most recent version of the NAIC Model Act in a substantially similar manner: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Marianas, Ohio, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. While District of Columbia, Iowa, Nevada and Oklahoma have not adopted the Model Code, these states and territories have enacted statutory and regulatory provisions to govern unfair practices. *See* D.C. ST. § 31-2231.17; IOWA CODE § 507B.4(9) (Am. 2018); N.R.S. 686A.310 (Am. 1991); NAC 686A.600-690; 36 O.S. §§ 1250.1 et. seq.; OKLA. ADMIN. CODE 365:15-3-5, -7. While Alabama has not adopted any statutory law, it has regulatory law providing for fair claims practices. *See* ALA. ADMIN. CODE. r. 482-1-124-482-1-125 (2003/2014); 482-12-24 (1971). The only state that does not have any statutory or regulatory provisions governing fair claims handling is Mississippi. Mississippi has, however, codified certain guidelines for insurers. *See* MISS. CODE ANN. § 83-9-5.

A. AVOID THE LOSS: KNOW HOW TO HANDLE FIRST PARTY CLAIMS

A first party insurance claim is one where the policyholder makes a claim to its insurance company for damages that are covered by the insurance company's policy. An example of such first party claim would be where a homeowner suffers from a fire at his residence and submits a claim for the fire damage to its carrier under his homeowner's insurance policy. In responding to such first party claim, the carrier should be cognizant of the governing state's laws and regulations in handling the claim and investigation and any pertinent timeframes that must be complied with.

The clock starts ticking when the carrier gets notice of the claim. It is key for the adjuster handling the claim to be aware of any deadlines set by the governing state laws. The following provides a chart summarizing each state's timeframes for initial response to the claim and issuance of any disclaimer of coverage or reservation of rights:

State (Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Alabama (ALA. ADMIN. CODE r. 482-1-125)	15 days, unless payment is made prior	30 days or number of days set forth in policy	30 days or number of days set forth in policy
Alaska (ALASKA STAT. § 21.36.125; ALASKA ADMIN. CODE tit. 3 § 26.040, § 26.070)	10 working days	15 working days	15 working days
Arizona (ARIZ. REV. STAT. § 20-461, ARIZ. ADMIN. CODE R20-6-801)	10 working days	15 working days	15 working days
Arkansas (ARK. CODE ANN. § 23-66-201; 054-00-043 Ark. Reg. § 1)	15 working days	15 working days	15 working days
California (CAL. INS. CODE § 790.03(h); CAL. CODE REGS. tit. 10, § 2695)	15 calendar days unless suit has already been filed	40 calendar days; 80 days if fraud suspected; N/A for certain policies	40 calendar days
Colorado (C.R.S. §§ 10-3-1101 to 10-3-1116)	Reasonably promptly	60 days	60 days
Connecticut (CONN. GEN. STAT. ANN. §§ 38a-815 to 38a-832)	Reasonable time	Reasonable time	Reasonable time
Delaware (DEL. CODE ANN. Tit. 18, § 2304, 18-900-902 DEL. CODE REGS. 1.2.1.2-1.2.1.5)	15 days; Must investigate claim within 10 days of notice of loss	30 days	30 days

State (Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
District of Columbia (D.C. ST § 31-2231.17)	Reasonably Promptly	Reasonable Time	
Florida (F.S. 624.155, 627.426 & 626.9541; FLA. ADMIN. CODE ANN. r. 690-166.024)	14 calendar days; Must investigate claim within 10 working days of proof of loss	60 days of giving reservation of rights or of receipt of summons & complaint	30 days from knowing or should have known of coverage defense
Georgia (GA. CODE ANN. 33-6-34, GA. COMP. R. & REGS. r. 120-2-52-.03)	15 days	15 days; 30 days after receiving notice if proof of loss form not required	Timely notice
Hawaii (HAW. REV. STAT. § 431:13-103(11))	15 days	Reasonable time after investigation completed	Reasonable time after investigation completed
Idaho (IDAHO CODE § 41-1329)	Promptly	None	None
Illinois (215 ILL. COMP. STAT. ANN. 5/154.6; ILL. ADMIN. CODE tit. 50, § 919.50)	Reasonable promptness	Reasonable time to determine coverage and notify insured within 30 days of determination	Reasonable time to determine coverage and notify insured within 30 days of determination
Indiana (IND. CODE § 27-4-1-4.5)	Reasonable promptness	Promptly	Promptly
Iowa (IOWA CODE § 507B.4; IOWA ADMIN. CODE 191 – Ch. 15)	15 days	30 days	30 days
Kansas (KAN. STAT. ANN. § 40-2404)	Reasonably promptly	Promptly	Promptly
Kentucky (K.R.S. 304-12-230; 806 KY. ADMIN. REGS. 12:095)	15 working days	Reasonable time; If more time is needed to investigate, must notify within 30 calendar days	30 calendar days; update every 45 calendar days thereafter until investigation is complete

State (Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Louisiana (LA. REV. STAT. ANN. § 22:1892)	Initiate loss adjustment within 14 days after notification; 30 days for catastrophic losses	30 days (*lawsuit can be considered a proof of loss*)	30 days
Maine (ME. REV. STAT. 24-A, §2164-D)	Reasonably promptly	Reasonable time after investigation completed	Reasonable time after investigation completed
Maryland (MD. CODE ANN. §27-303, § 27-1001; MD. CODE REGS. 31.15.07.03, .04)	15 working days	15 working days or policy	15 working days or policy
Massachusetts (MASS. GEN. LAWS ch. 176D)	Reasonably promptly	Reasonable time; Promptly	Reasonably promptly
Michigan (Michigan's Uniform Trade Practices Act, MCL 500.2001, et. seq.)	30 days to provide materials that constitute a satisfactory proof of loss	None.	Reasonable time. ***Caution*** of waiving disclaimer of coverage when defending without ROR within reasonable time.
Minnesota (MINN. STAT. § 72A.201)	10 business days	60 days; 30 days after investigation is completed	60 days; 30 days after investigation is completed
Mississippi (None)			
Missouri (MO. ANN. STAT. § 375.1000; MO. CODE REGS. ANN. tit. 20, §100-1.030, 1.050)	10 working days	15 working days following all necessary forms	15 working days following all necessary forms
Montana (MONT. CODE ANN. § 33-18-101, et. seq.)	Reasonably promptly	30 days unless request add'l info, then 60 days to pay or deny	None

State (Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Nebraska (NEB. REV. STAT. ANN. § 44-1540; NEB. ADMIN. CODE tit. 210, ch. 60 §6-006 to -008)	15 days	15 days	15 days
Nevada (N.R.S. 686A.310; NAC 686A.600-690)	20 working days	30 working days	30 working days
New Hampshire (N.H. REV. STAT. ANN. 417:4 XV; N.H. ADMIN. RULES, Ins. §1001.01)	10 working days	10 working days; 30 days for health insurance claims	10 working days
New Jersey (NJSA 17:29B-4; NJSA 17B:30-13.1; NJ ADMIN CODE 11:2-17)	10 working days	Reasonable period of time	Reasonable period of time
New Mexico (N.M. STAT. ANN. §59A-16-20)	Reasonably promptly	Reasonable time	Reasonable time
New York (N.Y. INS. § 3420; N.Y. COMP. CODES R. & REGS. tit. 11,§ 216)	15 business days	15 business days	15 business days
North Carolina (N.C. GEN. STAT. ANN. § 58-63 et. seq.)	Reasonably promptly	Reasonable time	Reasonable time
North Dakota (ND CENT. CODE. § 26.1-04-03)	Reasonable time	Reasonable time	Reasonable time
Ohio (OHIO ADMIN. CODE § 3901-1-54, OHIO REV. CODE §§ 3901.19-3901.26)	15 days, but no time limit if suit is filed	21 days	21 days
Oklahoma (36 O.S. §§ 1250.1 et. seq.; OKLA. ADMIN. CODE 365:15-3-5, -7)	30 business days	45 days; 60 days for investigation for property & casualty to be completed	45 days
Oregon (OR. REV. STAT. § 746.230; OR. ADMIN. R. § 836-080-0225 to 235)	30 days	30 days	30 days

State (Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Pennsylvania (40 PA. STAT. ANN. § 1171.5; 31 PA. CODE §§ 146.1-146.9)	10 working days	15 working days	15 working days
Rhode Island (R.I. GEN. LAWS §§ 27-9.1-1 et. seq.; 230-RICR-20-40-1.4 (life, accident & health); 230-RICR-20-40-2.6 to 2.7 (property & casualty)	15 days (property/ casualty); 15 days (accident, health & life)	21 days (property / casualty); Reasonable Time (accident, health & life)	21 days (property / casualty) Reasonable Time (accident, health & life)
South Carolina (S.C. CODE ANN. § 38-59-20)	Reasonable promptness	Prompt investigation	Prompt investigation
South Dakota (S.D.C.L. § 58-33 et. seq.)	At least 30 days	30 days	Not specific, but 30 days could be interpreted from statute
Tennessee (TENN. CODE ANN § 56-8-105)	Reasonably promptly	Reasonable time	Reasonable time
Texas (TEX. INS. CODE Chs. 541, 542)	15 days; 30 days if insurer is an eligible surplus-lines insurer	15 days	Reasonable time
Utah (UTAH ADMIN. CODE R590-190-9 & 10; UCA 31A-26-303)	Promptly acknowledge – within 15 calendar days	Promptly – 30 calendar days	Promptly – 30 calendar days
Vermont (8 V.S.A. § 4724; 21-020-008 VT. CODE R. §§ 5-6)	10 working days	15 working days	15 working days[2]
Virginia (VA. CODE ANN. § 38.2-510; 14 VA. ADMIN. CODE § 5-400-50, -60, -70)	15 calendar days	15 calendar days	15 calendar days; Every 45 days thereafter until investigation is complete

[2] Insurer must obtain its insured's consent when reserving its rights. *American Fiduciary Co. v. Kerr*, 416 A.2d 163 (Vt. 1980) (providing that insurer controlling the defense of the case with knowledge of the facts and without consent of the insured constitutes an election to stand by the terms of the policy).

State (Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Washington (WASH. REV. CODE § 48.30.010 et. seq.; WASH. ADMIN. CODE § 284-30-360, -380)	10 working days; 15 days (group insurance)	15 working days from proof of loss	15 days
West Virginia (W. VA. CODE § 33-11-1, et. seq.; W. VA. CODE R. § 114-14-5, -6)	15 working days	10 working days after completion of investigation; investigation to be commenced within 15 days of claim; reasonable time to complete investigation	10 working days after completion of investigation; investigation to be commenced within 15 days of claim; reasonable time to complete investigation
Wisconsin (WIS. ADMIN. CODE INS. § 6.11)	10 consecutive days	Reasonable time	Reasonable time
Wyoming (WYO. STAT. 26-13-124, 26-25-124)	Reasonably promptly	Reasonable time; 45 days (UIM, property, casualty, life, accident or health)	Reasonable time

While the above chart is intended to provide a quick resource,[3] it is strongly recommended that the policy and the governing state's statutes and regulations are reviewed for more information pertaining to these timeframes, as well as other pertinent timelines (e.g. providing response to written request, providing forms, tendering payment), and case law for any other mandates.

Various states provide differing timeframes to communicate with the insured when additional time is needed to investigate the claim. These timeframes vary from 15 days to 45 days, with specific timeframes for additional communications to be sent setting forth that there is an ongoing investigation and justification for the additional time needed to evaluate the claim. *See* EAGLE INT'L ASSOC., INC., FAIR CLAIMS HANDLING STATUTES A 50

[3] The cited statutes and regulations have been reviewed as of February 12, 2020.

STATE SURVEY (Sept. 2015).

Numerous states have statutory provisions setting forth timelines that are "reasonable" or "prompt" for the insurer to communicate to the insured. Some states provide regulations to define a period of time that is "reasonable" or "prompt." The Model Act provides the following unfair claims practice: "Failing to acknowledge with ***reasonable promptness*** pertinent communications with respect to claims arising under its policies" when done so "flagrantly and in conscious disregard of [the Act] or any rules promulgated [thereunder]" or "with such frequency to indicate a general business practice to engage in that type of conduct." (emphasis supplied). Since "reasonable promptness" was not defined in the Model Act, New Jersey promulgated regulations setting forth a specific timeframe for the insurer to respond. *See* N.J.S.A. 17B:30-13.1(b) (2013). Specifically, "[e]very insurer, upon receiving notification of claim shall, ***within 10 working days***, acknowledge receipt of such notice unless payment is made within such period of time." N.J.A.C. 11:2-17.6(b) (emphasis supplied). Several states have similar regulations that provide specific timeframes to comport with the terminology of the adopted Model Act's defined unfair claims practices: "reasonable time" or "reasonable promptness." *See e.g*. ALASKA STAT. § 21.36.125; ALASKA ADMIN. CODE tit. 3 § 26.040, § 26.070; ARIZ. REV. STAT. § 20-461; ARIZ. ADMIN. CODE R20-6-801; GA. CODE ANN. 33-6-34; GA. COMP. R. & REGS. r. 120-2-52-.03(2)-(3); UCA 31A-26-303; UAC r. 590-190-9 and -10.

Michigan's adoption of the Model Act does not provide for any regulatory framework for specified time periods for the insurance carriers to provide denial of coverage or to provide the insured with a letter setting forth its reservation of rights. The Michigan Supreme Court has held that an insurer who has knowledge of facts which may preclude coverage must give notice of potential defenses within a "reasonable time;" otherwise, the insurer may be estopped from later denying coverage. *Kirschner v. Process Design Assoc., Inc*., 592 N.W.2d 707 (Mich. 1999). In determining what constitutes "reasonable time", the Michigan courts have held that waiting two years to issue a reservation of rights letter is unreasonable, while a reservation of rights letter issued four months after the carrier has provided a defense to the insured is reasonable. *See Meirthew v. Last*, 135 N.W.2d 353 (Mich. 1965); *Fire Insurance Exchange v. Fox*., 423 N.W.2d 325 (Mich. App. 1988).

Flagrant or repetitive failure of the insurer to meet the statutory or regulatory deadlines or to properly handle claims could constitute in (1) administrative penalties and (2) private cause of action.

1. PENALTIES FOR FLAGRANT FIRST PARTY CLAIM HANDLING

Most states adopting the Model Act have adopted substantially similar procedures for the state administrative agency overseeing insurance carriers in enforcing the Act through administrative penalties. *See* UNFAIR CLAIMS SETTLEMENT PRACTICES ACT §§ 5-7. Like the Model Act, the adopted statutory or regulatory law provides for notice of a hearing, a hearing, and a ruling. *See e.g.* CAL. INS. CODE § 790.04-.06; S.D.C.L. §§ 58-12-35, -36 (2014). In addition to the issuance of an order for the carrier to cease and desist from engaging in conduct that violates the unfair claims act, states have set forth varying penalties beyond those specified in the Model Act (e.g. revocation of license or imposition of fines). *See e.g.* CAL. INS. CODE § 790.035(a), §790.08; S.D.C.L. §§ 58-12-36. Virginia, for example, has adopted the following penalties for violation of its Unfair and Deceptive Acts or Practices in Business of Insurance:

> A. Any person who knowingly or willfully violates any provision of this title or any regulation issued pursuant to this title shall be punished for each violation by a penalty of not more than $5,000.
> B. Any person who violates without knowledge or intent any provision of this title or any rule, regulation, or order issued pursuant to this title may be punished for each violation by a penalty of not more than $1,000. For the purpose of this subsection, a series of similar violations resulting from the same act shall be limited to a penalty in the aggregate of not more than $10,000.
> C. Any violation resulting solely from a malfunction of mechanical or electronic equipment shall not be subject to a penalty.
> D. 1. The Commission may require a person to make restitution in the amount of the direct actual financial loss:
> a. For charging a rate in excess of that provided by statute or by the rates filed with the Commission by the insurer;
> b. For charging a premium that is determined by the Commission to be unfairly discriminatory, such restitution being limited to a period of one year from the date of determination;
> c. For failing to pay amounts explicitly required by the terms of the insurance contract where no aspect of the claim is disputed by the insurer; and
> d. For improperly withholding, misappropriating, or converting any money or property received in the course of doing business.

> 2. The Commission shall have no jurisdiction to adjudicate controversies growing out of this subsection regarding restitution among insurers, insureds, agents, claimants and beneficiaries.
> E. The provisions provided under this section may be imposed in addition to or without imposing any other penalties or actions provided by law.

VA. CODE ANN. § 38.2-218 (2010). What is interesting about the Virginia penalties is that any violation resulting solely from a malfunction of mechanical or electronic equipment shall not be subject to penalty. *Id*. at (C).

2. IS THERE A PRIVATE CAUSE OF ACTION FOR FIRST PARTY CLAIMS HANDLING?

While the Model Act explicitly provides that it is not intended to create a private cause of action, some states have either statutorily provided for a private cause of action or the state courts have interpreted the act to provide for a private cause of action. Nevada's unfair practices in settling claims act explicitly provides for a private cause of action by providing:

> In addition to any rights or remedies available to the Commissioner, an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.

NRS 686A.310(2) (1991). *See also*, *Pioneer Chlor Alkali Co., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Penn.*, 863 F. Supp. 1237 (D. Nev. 1994) (recognizing two different causes of action for actions arising under NRS 686A.310 and for bad faith). The Arizona Supreme Court has concluded that ARS § 20-443(C), which provides that "no order of the director pursuant to this section or order of court to enforce it, or holding of a hearing, may in any manner relieve or absolve any person affected by the order or hearing from any other liability, penalty or forfeiture under law," "contemplates a private suit to impose civil liability irrespective of governmental action against the insurer." *Sparks v. Republic Nat. Life Ins. Co*., 647 P.2d 1127, 1139 (Ariz. 1982). *See also, Farmer's Union Cent. Exch. v. Reliance Ins. Co*., 626 F. Supp. 583, 590 (D.N.D. 1985) (providing that N.D. Cent. Code § 26.1-04 may be the basis for an action sounding in tort); *Jenkins v. J.C. Penney Casualty Ins. Co*., 280 S.E.2d 252, 255-56, (W.Va. 1981), *overruled on other grounds by State ex. rel. State Farm Fire & Cas. Co. v. Madden*, 451 S.E.2d 721, 724-25 (W. Va.

1994). On the other hand, California overturned prior case law finding a private cause of action arising under CAL. INS. CODE §§ 790.03(h) and 790.09 in favor of the insured by following the majority approach holding that the Model Act does not provide a private cause of action. *See Moradi-Shalal v. Fireman's Fund Ins. Companies*, 758 P.2d 58, 64 (Cal. 1988) (providing that 17 out of 19 states having been faced with the issue of whether the Model Act created a private cause of action rejected such interpretation).

Although Mississippi has not adopted the Model Act, it allows first-party claimants to sue insurers for bad faith. *See Chapman v. Coca-Cola Bottling Co*., 180 So. 3d 676, 681 (Miss. Ct. App. 2015). The Mississippi Court of Appeals provided that for an insured to prevail on its claim for bad faith, it must prove any of the following: (1) insurer lacked an arguable or legitimate basis for denying the claim; (2) insurer committed a willful or malicious wrong; or (3) insurer acted with gross and reckless disregard for insured's rights. *Id*. The carrier is not in bad faith for denying or delaying payment of a valid claim if there is reasonable cause. *Id*. Under Mississippi law, coverage must be proved to predicate bringing a bad faith claim. *See Sobley v. S. Nat. Gas Co.*, 210 F.3d 561, 564 (5th Cir. (Miss.) 2000).

While some states' laws provide for a private right of action for an insurance carrier's violation of the Act, numerous states that have adopted the Model Act do not provide for such private cause of action. *Compare* 215 ILL. COMP. STAT. ANN. 5/155 (providing that an insured may recover damages, including extracontractual damages and attorney's fees, for the insurer's unreasonable and vexatious delay in the handling and settling a claim); MASS. GEN. LAWS. Ch. 93A, § 9(1) (providing that any person whose rights are affected by another person violating Ch. 176D, §3(9) governing unfair claim settlement practices may bring an action for damages and such equitable relief) *with* GA. CODE. ANN. § 33-6-37 (providing for no private cause of action for violation of the Fair Claims Settlement Act); *Bates v. Allied Mut. Ins. Co*., 467 N.W.2d 255, 259-60 (Iowa 1991) (Iowa does not recognize private cause of action under its statute governing fair claims practices). Some states do allow violations of the Act to be admissible in insurance bad faith cases. *See e.g. Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 233 P.3d 1221 (2010). For those states where the Act does not provide for a private cause of action, the insured still may maintain a cause of action for bad faith against the

carrier for failing to treat its policyholders fairly during its investigation of the claim. *See e.g*. *Klepper v. ACE American Ins. Co*., 999 N.E.2d 86 (Ind. Ct. App. 2013). *See also*, Hamilton Mut. Ins. Co. of Cincinnati v. Buttery, 220 S.W.3d 287, (Ken. Ct. App. 2007) (providing that "a cause of action for violation of [Kentucky's Unfair Claims Settlement Practices Act] may be maintained only where there is proof of bad faith of an outrageous nature").

B. GO FOR THE WIN: PROPERLY HANDLE THIRD PARTY CLAIMS

A third party insurance claim is made by a person who is not the policyholder. The most common example of a third party claim would be a car accident caused by the policyholder; whereby, the third party suffered damages as a result of the accident.

Similar to first party claims, adjusters should be aware of pertinent timeframes surrounding the investigation and handling of the claim. The following chart provides a summary of deadlines for initial response, denial of coverage and reservations of rights for third party claims:

State (Unfair Claims Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Alabama (ALA. ADMIN. CODE r. 482-1-125)	No time limit	No time limit	No time limit
Alaska (ALASKA STAT. § 21.36.125; ALASKA ADMIN. CODE tit. 3 § 26.040)	10 days	15 days	15 days
Arizona (ARIZ. REV. STAT. § 20-461)	N/A	N/A	N/A
Arkansas (ARK. CODE ANN. § 23-66-201; 054-00-043 Ark. Reg. § 1)	N/A	N/A	N/A
California (CAL. INS. CODE § 790.03(h); CAL. CODE REGS. tit. 10, § 2695)	15 days	40 days; 80 days if fraud; N/A for certain policies	40 days
Colorado (C.R.S. § 10-3-1101-1116)	Reasonably promptly	60 days after a valid & complete claim	Reasonably promptly

State (Unfair Claims Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Connecticut (CONN. GEN. STAT. ANN. §§ 38a-815 to 38a-832)	Reasonable time	Reasonable time	Reasonable time
Delaware (DEL. CODE ANN. Tit. 18, § 2304, 18-900-902 DEL. CODE REGS. 1.2.1.2-1.2.1.5)	15 days; Must investigate claims within 10 days of notice of loss	30 days	30 days
District of Columbia (D.C. ST § 31-2231.17)	Reasonably promptly	Reasonable time	
Florida (F.S. 624.155, 627.426 & 626.9541; FLA. ADMIN. CODE ANN. r. 690-166.024)	14 calendar days; Must begin investigation within 10 working days of proof of loss	60 days of giving reservation of rights or of receipt of summons & complaint	30 days from knowing or should have known of coverage defense
Georgia (GA. CODE ANN. 33-6-34, 33-4-7; GA. COMP. R. & REGS. r. 120-2-52-.03)	60 days of receiving written request	None	None but must give its insured timely notice
Hawaii (HAW. REV. STAT. § 431:13-103(11))	15 days	Reasonable time after investigation completed	Reasonable time after investigation completed
Idaho (IDAHO CODE § 41-1329)	None	None	None
Illinois (215 ILL. COMP. STAT. ANN. 5/154.6; ILL. ADMIN. CODE tit. 50, § 919.50)	Reasonable promptness	Reasonable time	Reasonable time
Indiana (IND. CODE § 27-4-1-4.5)	Reasonable promptness	Promptly	Promptly
Iowa (IOWA CODE § 507B.4)	Reasonably promptly	Reasonable time	Reasonable time
Kansas (KAN. STAT. ANN. § 40-2404)	Reasonably promptly	Promptly	Promptly

State (Unfair Claims Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Kentucky (K.R.S. 304-12-230; 806 KY. ADMIN. REGS. 12:095)	15 working days	Reasonable time; If more time is needed to investigate, must notify within 30 calendar days	30 calendar days; update every 45 calendar days thereafter until investigation is complete
Louisiana (LA. REV. STAT. ANN. § 22:1892)	None, 30 days suggested	30 days to settle property damage claim	30 days recommended
Maine (ME. REV. STAT. 24-A, §2164-D)	Reasonably Promptly	Promptly	Reasonable time after investigation complete
Maryland (MD. CODE ANN. §27-303; MD. CODE REGS. 31.15.07.03, .04)	15 working days	15 working days or policy	15 working days or policy
Massachusetts (MASS. GEN. LAWS ch. 176D)	Reasonably promptly	Reasonable time; Promptly	Reasonably promptly; Reasonable time; Promptly; Reasonable time after completion of investigation
Michigan (Michigan's Uniform Trade Practices Act, MCL 500.2001, et. seq.)	30 days to provide materials that constitute a satisfactory proof of loss	None.	Reasonable time to policyholder and not to claimant. ***Caution*** of waiving disclaimer of coverage when defending without ROR within reasonable time
Minnesota (MINN. STAT. § 72A.201)	10 business days	60 days; 30 days after investigation is completed	60 days; 30 days after investigation is completed

State (Unfair Claims Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Mississippi (None)	N/A	N/A	N/A
Missouri (MO. ANN. STAT. § 375.1000; MO. CODE REGS. ANN. tit. 20, §100-1.030, 1.050)	10 working days	15 working days following all necessary forms	15 working days following all necessary forms
Montana (MONT. CODE ANN. § 33-18-101, et. seq.)	Reasonable promptly	Reasonable time	Reasonable time
Nebraska (NEB. REV. STAT. ANN. § 44-1540; NEB. ADMIN. CODE tit. 210, ch. 60 §6-006 to -008)	15 days	15 days	15 days
Nevada (N.R.S. 686A.310; NAC 686A.600-690)	20 working days	30 working days	30 working days
New Hampshire (N.H. REV. STAT. ANN. 417:4 XV; N.H. ADMIN. RULES, INS. §1001.01)	10 working days	10 working days	10 working days
New Jersey (NJSA 17:29B-4; NJSA 17B:30-13.1; NJ ADMIN CODE 11:2-17)	10 working days	Reasonable period of time	Reasonable period of time; ***Caution*** waives coverage defense if defend lawsuit without ROR
New Mexico (N.M. STAT. ANN. §59A-16-20)	Reasonably promptly	Reasonable time	Reasonable time
New York (N.Y. COMP. CODES R. & REGS. tit. 11,§ 216; N.Y. INS. § 3420)	15 days	15 days	15 days
North Carolina (N.C. GEN. STAT. ANN. § 58-63 et. seq.)	Reasonably promptly	Reasonable time	Reasonable time
North Dakota (ND CENT. CODE. § 26.1-04-03)	Reasonable promptness	Reasonable time	Reasonable time

State (Unfair Claims Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Ohio (OHIO ADMIN. CODE § 3901-1-54; OHIO REV. CODE §§ 3901.19-3901.26)	15 days, but no time limit if suit is filed	21 days	21 days
Oklahoma (36 O.S. §§ 1250.1 et. seq.; OKLA. ADMIN. CODE 365:15-3-5, -7)	30 days	45 days; 60 days for investigation for property & casualty to be completed	No specific time, but presumed 45 days
Oregon (OR. REV. STAT. § 746.230; OR. ADMIN. R. § 836-080-0225 to 235)	30 days	30 days	30 days
Pennsylvania (40 PA. STAT. ANN. § 1171.5; 31 PA. CODE §§ 146.1-146.9)	10 days	15 days	15 days
Rhode Island (R.I. GEN. LAWS §§ 27-9.1-1 et. seq.; 230-RICR-20-40-1.4 (life, accident & health); 230-RICR-20-40-2.6 to 2.7 (property & casualty)	15 days (property/ casualty); 15 days (accident, health & life)	21 days (property / casualty); Reasonable Time (accident, health & life)	21 days (property / casualty) Reasonable Time (accident, health & life)
South Carolina (S.C. CODE ANN. § 38-59-20)	Reasonable promptness	Prompt investigation	Prompt investigation
South Dakota (S.D.C.L. § 58-33 et. seq.)	None specified, but 30 days per S.D.C.L. would be appropriate	None specified, but 30 days per S.D.C.L. would be appropriate	None specified, but 30 days per S.D.C.L. would be appropriate
Tennessee (TENN. CODE ANN § 56-8-105)	Reasonably promptly	Reasonable time	Reasonable time
Texas (TEX. INS. CODE Chs. 541)	Reasonable promptly	Reasonable time	Reasonable time
Utah (UTAH ADMIN. CODE R590-190-9 & 10; UCA 31A-26-303)	Promptly acknowledge – within 15 calendar days	Promptly – 30 calendar days	Promptly – 30 calendar days

State (Unfair Claims Statute/ Regulation)	**Contacting Insured Upon Initial Receipt of Claim**	**Issuing Disclaimer of Coverage from Proof of Loss**	**Issuing Reservation of Rights from Proof of Loss**
Vermont (8 V.S.A. § 4724; 21-020-008 VT. CODE R. §§ 5-6)	10 days	30 days	30 days
Virginia (VA. CODE ANN. § 38.2-510; 14 VA. ADMIN. CODE § 5-400-50, -60, -70)	15 calendar days	15 calendar days	15 calendar days; Every 45 days thereafter until investigation is complete
Washington (WASH. REV. CODE § 48.30.010 et. seq.; WASH. ADMIN. CODE § 284-30-360, -380)	10 days	15 days	15 days
West Virginia (W. VA. CODE § 33-11-1, et. seq.; W. VA. CODE R. § 114-14-5, -6)	15 days	10 days after completion of investigation; investigation to be commenced within 15 days of claim; reasonable time to complete investigation	10 days after completion of investigation; investigation to be commenced within 15 days of claim; reasonable time to complete investigation
Wisconsin (WIS. ADMIN. CODE INS. § 6.11)	10 consecutive days	Reasonable time	Reasonable time
Wyoming (WYO. STAT. 26-13-124, 26-25-124)	Reasonably promptly	Reasonable time	Reasonable time

See EAGLE INT'L ASSOC., INC., FAIR CLAIMS HANDLING STATUTES A 50 STATE SURVEY (Sept. 2015) [4]. While this chart is intended to provide a quick resource, and for the most party mirrors first party claims, it is strongly recommended that the policy and the governing state's statutes, regulations and case law are reviewed for more information pertaining to these timeframes, as well as other pertinent timelines (e.g. providing response to written request, providing forms, tendering payment, communicating about ongoing investigation).

[4] The cited statutes and regulations have been reviewed as of February 12, 2020.

Similar to first party claims, a carrier's frequent or flagrant failure to timely and properly handle claims could constitute in (1) administrative penalties, (2) private cause of action or (3) waiver of disclaimer of coverage.

1. WHEN DO PRIVATE CAUSES OF ACTION EXIST FOR THIRD PARTY CLAIMS HANDLING?

Most states do not recognize a third party claimants' private cause of action arising under governing unfair claims acts; however, some states do. *See e.g.* W. VA. CODE ANN. § 33-11-4a(a), 33-11-4a(b) (prohibiting a third party claimant from pursuing a private cause of action and only permitting a third party claimant to file an administrative complaint). *But see*, *Goff v. Penn. Mut. Life Ins. Co*., 729 S.E.2d 890 (W.Va. 2012) (holding that upon the death of the insured, a primary beneficiary to a life insurance policy has standing to bring a statutory bad faith claim against the insurer pursuant to the unfair claim settlement practices section). Massachusetts has enacted legislation specifically providing a private cause of action by third party claimants. *See* MASS. GEN. LAWS. Ch. 93A, § 9(1) (providing that any person whose rights are affected by another person violating Ch. 176D, §3(9), governing unfair claim settlement practices, may bring an action for damages and such equitable relief). In New Mexico, a private cause of action against an insurer for unfair and deceptive practices is available to third party claimants in some circumstances (e.g. failure to settle) but not in other circumstances (e.g. declination of providing non-mandatory excess liability insurance coverage). *Hovet v. Allstate Ins. Co*., 89 P.3d 69, 73 (N.M. 2004); *Jolley v. Associated Elec. & Gas Ins. Servs*., 237 P.3d 738, 739 (N.M. 2010). However, the third-party claimant cannot bring an action against the insurance carrier until the underlying action between the claimant and the insured is concluded. *Hovet*, 89 P.3d at 76-77. The Kentucky Supreme Court has concluded that its unfair claims provision provides for a private cause of action by third party claimants by reasoning that "KRS 446.070 and KRS 304.12–230 read together create a statutory bad faith cause of action" and "that private citizens are not specifically excluded by the statute from maintaining a private right of action against an insurer by third party claimants." *State Farm Mutual Automobile Insurance Company v. Reeder*, 763 S.W.2d 116, 118 (Ky. 1988).

Delays in informing the insured that there may be no coverage under the policy

while providing a defense may later result in waiver of the carrier's right to disclaim coverage under the policy. *See Centennial Ins. Co. v. Tom Gustafson Industries, Inc*., 401 So.2d 1143, 1144 (Fl. Ct. App. 4th dist. 1981) (providing that "a delay in informing the insured of a dispute as to coverage may result in estoppels of the insurer from contesting coverage if the insured can show that he has been prejudiced"); *Merchants Indemnity Corp. of New York v. Eggleston*, 179 A.2d 5050 (N.J. 1962) (holding that an insurer waiting nine months to issue a reservation of rights after having knowledge of all facts giving rise to possible right of disclaimer after defending the insured constituted a waiver of its right to disclaim). *See also*, *World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.*, 695 S.E.2d 6 (Ga. 2010) (holding that insurer was estopped from asserting defense of noncoverage regardless of whether insured could show prejudice).

C. TIPS TO AVOID FOULS FOR VIOLATIONS OF THE UNFAIR CLAIMS SETTLEMENT PRACTICES ACT

The following highlights some pointers that adjusters can do to avoid violating the Unfair Claims Settlement Practices Act:

- ✓ Understand the governing law's requirements for investigating and handling claims
- ✓ Maintain diligent log notes
- ✓ Manage the massive onslaught of daily activities
- ✓ Accurately represent relevant facts and policy provisions
- ✓ Timely affirm or deny coverage
    - ➢ Provide adequate explanations for claim denials
- ✓ Review of Settlement Values
- ✓ Update evaluations regularly
- ✓ Monitor cases appropriately
- ✓ Single point of contact with the State Agency

III. PAYING THE PRICE – EXTRA-CONTRACTUAL LIABILITY WHEN INSURER BREACHES DUTY TO DEFEND ABSENT BAD FAITH

Recently, Nevada Supreme Court considered whether an insurer could be liable for damages in excess of the policy limit plus defense costs when the carrier has not

acted in bad faith. The court answered affirmatively that the insurer may be liable for any consequential damages caused by the breach of the insurance contract for failing to defend its insured. *Century Surety Co. v. Andrew*, 432 P.3d 180, 182 (Nev. 2018).

The underlying pertinent facts in *Century Surety Co. v. Andrew* include an insured who had automobile coverage under a personal policy and a commercial general liability policy for business use. When the matter was initially tendered to the CGL carrier, the insurer determined that the automobile was not being used in the scope of insured's business and denied coverage. After the denial of coverage, the insured notified the insurer of the filing of a complaint that alleged that the insured was within the scope of his employment at the time of the accident. Since an answer was not filed, a default was taken against the insured. Default judgment was entered in the sum of $18,050,183 as the plaintiff suffered significant brain injuries as result of the accident. Insured entered an agreement with plaintiff that judgement would not be executed in exchange for an assignment of rights against the insurance carrier. Nevada law does provide that the duty to defend arises "if facts [in a lawsuit] are alleged which if proved would give rise to the duty to indemnify," which then "the insurer must defend." *Id*. at 184 (citing *Rockwood Ins. Co. v. Federated Capital Corp.,* 694 F.Supp. 772, 776 (D. Nev. 1988)).

Jurisdictions are split as to whether or not an insured can recover in excess of the policy limits when an insurer fails to defend absent bad faith. The majority view limits the liability of the insurer to the amount of the policy plus attorneys' fees and costs when the carrier fails to provide a defense and there is no opportunity to compromise the claim. *See e.g. Afcan v. Mutual Fire, Marine and Inland Ins. Co*., 595 P.2d 638, 647 (Alaska 1979); *Alabama Farm Bureau Mut. Cas. Ins. Co., Inc. v. Moore*, 349 So.2d 1113 (Ala.

1977*); Allen v. Bryers*, 512 S.W.3d 17, 38-39 (Mo. 2016); *Comunale v. Traders & Gen. Ins. Co.,* 328 P.2d 198, 201 (Ca. 1958); *Emp'rs Nat'l Ins. Corp. v. Zurich Am. Ins. Co. of Ill.,* 792 F.2d 517, 520 (5th Cir. (Texas) 1986); *George R. Winchell, Inc. v. Norris,* 633 P.2d 1174, 1177 (Kan. App. 1981); *Hirst v. St. Paul Fire & Marine Ins. Co*., 683 P.2d 440, 447 (Idaho 1984). The minority view does not limit damages to policy limits plus the cost of defense. See *Delatorre v. Safeway Ins. Co*., 989 N.W.2d 268, 274 (Ill. 2013); *Khan v. Landmark American Ins. Co.,* 757 S.E.2d 151 (Ga. App. 2014); *Newhouse v. Citizens Security Mut. Ins., Co*., 501 N.W.2d 1 (Wisc. 1993).

For those jurisdictions following the minority view, the best practice is to defend the insured under a reservation of rights that it is not waiving any right to later deny coverage based on the terms of the insurance policy and to seek declaratory judgment as to coverage. *See e.g. Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454, 460 (Wa. 2007).

IV. KNOW WHEN TO RETAIN INDEPENDENT COUNSEL

The jurisdictions are split as to whether a carrier has to retain independent counsel for the insured when coverage is at issue.

The *Cumis* counsel originated from the California Court of Appeals' holding that when there is a potential conflict of interest between an insurer and its insured requiring the insured to retain independent counsel, the insurer is to pay for the independent counsel. *See San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc.,* 162 Cal.App.3d 358, 208 Cal. Rptr. 494, 50 A.L.R.4th 913 (Ct. App. 1984), *superseded by* CAL. CIV. CODE § 2860. *See also, Nandorf, Inc. v. CNA Ins. Companies*, 479 N.E.2d 988 (Ill. App. 1985); *Belanger v. Gabriel Chemicals, Inc*., 787 So.2d 559 (La.App. 1 Cir. 2001); *Parker v. Agric. Ins. Co.* 109 Misc.2d 678, 440 N.Y.S.2d 964 (Sup. Ct. 1981).

Several states have adopted or modified California's *Cumis* counsel rule. Nevada held that an insurer was required to satisfy its duty to defend by permitting insured to select and pay reasonable costs for independent counsel when an actual conflict of interest exists; however, the court noted that an insurer sending its insured a reservation

of rights letter did not create a per se conflict of interest. *State Farm Mutual Automobile Insurance Company v. Hansen*, 357 P.3d 338 (Nev. 2015). Consistent with Nevada, Minnesota has made it clear that there must be an actual conflict of interest as opposed to an appearance of a conflict, including an insured requesting to be informed of the insured's litigation while maintaining a declaratory judgment action against the insured. *See Mutual Service Cas. Ins. Co. v. Luetmer*, 474 N.W.2d 365, 368-69 (Minn. App. 1991). Other jurisdictions have applied a per se rule that defending under a reservation of rights is a conflict of interest. *See* ALASKA STAT. ANN. § 21.96.100(c) (2014); *Armstrong Cleaners, Inc. v. Erie Ins. Exchange*, 364 F. Supp. 2d 797, 806 (S.D. Ind. 2005); *Pueblo Santa Fe Townhomes Owners' Ass'n v. Transcon. Ins. Co.,* 178 P.3d 485, 491 (Ariz. App.2008); *Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co.,* 788 N.E.2d 522, 539 (Mass. 2003); *Patrons Oxford Ins. Co. v. Harris,* 905 A.2d 819, 825–26 (Me. 2006).

Other states have rejected the *Cumis* rule by reasoning that the insured is the sole client. *See e.g. Point Pleasant Canoe Rental Inc. v. Tinicum Twp*., 110 F.R.D. 166, 170 (E.D. Pa. 1986); *L & S Roofing Supply Co. v. St. Paul Fire & Marine Ins. Co.,* 521 So.2d 1298, 1303–04 (Ala.1987); *Higgins v. Karp,* 687 A.2d 539, 543 (Conn. 1997); *Finley v. Home Ins. Co*., 975 P.2d 1145, 1152-53 (Haw. 1998); *In re Youngblood,* 895 S.W.2d 322, 328 (Tenn.1995); *Tank v. State Farm Fire & Cas. Co.,* 715 P.2d 1133, 1137 (Wash. 1986).

The California Supreme Court recently ruled that an insurance carrier could bring an action against its insured's independent counsel under unjust enrichment for reimbursement of unreasonable and unnecessary fees that it had paid to the *Cumis* counsel. *Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C.*, 353 P.3d 319 (Cal. 2015). In *Hartford Casualty Ins. Co*., the trial court issued an order, which was drafted by *Cumis* counsel, requiring "the insurer to pay all 'reasonable and necessary defense costs,' but expressly preserved the insurer's right to later challenge and recover payments for 'unreasonable and unnecessary' charges by counsel" in a case where Hartford was defending the insured against covered and non-covered claims. *Id*. at 321-22. Due to Hartford being in breach of its duty to defend prior to this court order, Hartford was not able to benefit from California Civil Code limiting the rates charged by independent counsel to be limited to that actually paid by the insurer to attorneys retained in the defense of similar suits. *Id*. at 323 (citing CAL. CIV. CODE § 2860). Hartford incurred $15

million in defense fees and costs. *Id*. In California, where the doctrine of unjust enrichment applies, "the law implies a restitutionary obligation, even if no contract between the parties itself expresses or implies such duty." *Id*. at 326 (citation omitted). In prior case law, the California Supreme Court allowed a carrier to restitution from the insurer for fees paid to independent counsel to defend non-covered claims. *Id*. While the California Supreme Court "emphasiz[ed] that [its] conclusion hinges on the particular facts and procedural history of [the underlying litigation]," including the order providing that Hartford could pursue anyone for the overpayments, the Court held that the carrier was entitled to seek reimbursement directly from *cumis* counsel. *Id*. at 327, 331-32.

V. BEST SETTLEMENT PRACTICES

Most states require that insurers "devise a litigation strategy (and make settlement offers within the policy limits) as if the insurer bore the full exposure." *Transport Ins. Co. v. Post Express Co.,* 138 F.3d 1189, 1192 (7th Cir. (Ill.) 1998). An insurer must give its insured's interests "at least equal consideration with its own when the insured is a defendant in a suit in which the recovery may exceed the policy limits." *See Adduci v. Vigilant Ins. Co.,* 424 N.E.2d 645, 648 (Ill. App. 1981); *Kavanaugh v. Interstate Fire & Casualty Co.,* 342 N.E.2d 116, 120 (Ill. App. 1975); *McKinley v. Guar. Nat'l Ins. Co.,* 159 P.3d 884 (Idaho 2007). Negligent failure to settle typically requires the insured establish (1) the claim is within the scope of coverage, (2) a demand was made that was within policy limits, and (3) the demand was such that an ordinary prudent insurer would have accepted it, considering the likelihood and degree of the insured's potential exposure. *See Twin City Fire Ins. Co. v. Country Mut'l Ins. Co.,* 23 F.3d 1175 (7th Cir. (Ill.) 1994); *Yorkshire Ins. Co. v. Seger,* 279 S.W.3d 755, 768 (Tex. App. 2007); *G.A. Stowers Furniture Co. v. Am. Indem. Co.,* 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929). An insurer must settle, if possible, "where a reasonably prudent person faced with the prospect of paying the total recovery would do so." *Robinson v. State Farm Fire & Casualty Co.,* 583 So.2d 1063, 1067 (Fla. App. 1991).

Various factors are considered in determining whether a failure to settle a case was "reasonable." *Brown v. Guarantee Insurance Co.,* 319 P.2d 69 (Cal. App. 1958), *Commercial Union Insurance Co. v. Liberty Mutual Insurance Co.,* 393 N.W.2d 161 (Mich. 1986). California courts have weighed the following: (1) the strength of the claimant's

case on both liability and damages; (2) the attempts by the insurer to induce the insured to contribute to the settlement (in third party claims); (3) the failure of the insurer to properly investigate so as to fully consider the evidence that exists against the insured; (4) any rejection of settlement advice from the insurer's own attorney or agent; (5) the failure of an insurer to inform its insured of a demand or offer; (6) a failure to consider the amount of financial risk to which each party is exposed if there is a refusal to settle; (7) the fault of the insured in inducing the insurer to reject a demand by misleading the insurer as to the facts; and (8) other evidence that would establish or negate bad faith on the part of the insurer. *Brown*, 319 P.2d at 74. Michigan considers additional procedural items such as: (1) a failure to inform the insured of any relevant litigation developments; (2) a failure to keep the insured informed of all demands outside of policy limits; (3) a failure to solicit a demand or extend an offer when the facts warrant; (4) a failure to accept a reasonable compromise when the liability is evident and the damages are high; (5) a rejection of a reasonable settlement offer that is within policy limits; (6) an attempt to coerce the insured into contributing to a settlement that is within policy limits; and (7) creating undue delay in accepting a settlement demand that is within policy limits where a potential verdict is high. *Commercial Union Insurance Co.,* 393 N.W.2d at 165. Failing to inexcusably meet a deadline placed on a policy limit demand or failing to timely pay policy limits where liability is extreme and damages are high may also result in a finding of bad faith. *Berges v. Infinity Ins. Co.,* 896 So.2d 665 (Fla. 2004).

A claim for bad faith based on an alleged wrongful refusal to settle for an amount within policy limits generally requires a reasonable offer where (1) the terms have been made clear enough to have created an enforceable contract resolving all claims at issue; (2) all third party claimants (if any) have joined in the demand; (3) the demand provides for a complete release of all insureds; and (4) and the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate the insured's exposure. *Critz v. Farmers Ins. Group*, 230 Cal.App.2d 788, 798 (1964) (citations omitted).

In handling demands, whether within policy limits or above, the insurer must do more than just act reasonably—it must be able to prove that all steps taken in either negotiating a settlement or denying settlement was done reasonably. Documenting the

claim file and keeping accurate and complete records of all communications and decisions within the claim analysis is essential. All materials should be date stamped in order for the file to be reconstructed at a later date. Bad faith claims with regard to settlement decisions are often determined by looking at all of the evidence and conducting an analysis of what was available at the time the settlement decisions were made. In addition to file stamping documents, all phone communications should be documented in writing and in as much detail as possible, including attempts to contact an insured or others integral to an investigation, even where the person called is not reached. All activity including investigations in to damages should be noted by date within the file. Dilatory behavior on behalf of an insurer can be the foundation upon which a bad faith claim is structured.

Notwithstanding the requirement to fully and completely document the claim file, the insurer must assume that everything within that file will be discovered by the party making a bad faith claim. *Brown v. Superior Court In and For Maricopa County,* 670 P.2d 725, 734 (Ariz. 1983). Gratuitous comments in correspondence or memoranda should be avoided. This is true for both those handling the claim on behalf of the insurance company as well as any counsel or experts retained by the insurance company. Comments such as “this lady is such a liar” or “I’m sick of this guy” should never be included in any portion of the claim file. However, it is important to document any difficulties that arise in dealing with the insured or claimant. For example, an insured’s failure to timely respond to a demand for proof of loss, an unreasonable restriction on medical authorizations or failure to timely provide medical authorizations, a claimant or insured’s dishonesty relaying essential facts or where the claimant has otherwise delayed the investigation should all be things noted in detail within the file.

VI. CONCLUSION

In conclusion, Coach Hayes said: “Paralyze resistance with persistence.” Instead of standing on the defense in claims handling, understand the governing law and persist with successful and prompt claims handling.

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