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Inside This Issue

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Defending the Insurance Broker: What's so "Special" About It?

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It used to be much easier to classify insurance "brokers" and "agents" as they were distinguished from each other and their roles were defined: "agents" were salaried employees or exclusive agents of an insurance company, "brokers" were independent agents of an insured, and their duties were to their respective principals. In large part, however, this clear distinction no longer applies. As independent brokers enter into agency agreements with multiple carriers that permit them to accept applications and premiums on the carrier's behalf, and sometimes even bind coverages, the line between these traditional characterizations becomes blurred. The independent "broker" becomes an "agent," at least in some sense of the term, of several different insurance carriers.

By entering into these agency relationships, the broker is able to more efficiently shop for attractive premiums and coverages, and thus is well-positioned to promote herself to prospective insureds. The dual-agency relationship brokers have with carriers and insureds is widely

— Continued on next page

Letter from the President

Kathleen V. Buck, Esq. | *Minnesota Lawyers Mutual Insurance Company*

Dear PLDF Members,

Welcome to our new leadership year! I am thrilled to work with you and continue building on our past achievements. As I sat down to write, I noticed an energy about. The air has cooled here, the wreaths reappeared. At 5:30 a.m. my youngest child eagerly snuck a peak out the window hoping she would discover snowflakes coating the yard. No luck. The excitement remained. I felt the energy as I wandered downtown in search of an espresso, occasionally looking up to see delighted eyes and resilient, joy-filled faces. This crazy, restless season arrived just in time, allowing us to celebrate, look forward, and express our gratitude.

— Continued on page 21

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recognized and permitted, providing there are no conflicts of interest, which typically there are not: the insured wants to buy coverage, the carrier wants to sell it, and the broker facilitates the transaction. In reality, however, the moment the independent broker becomes an agent of the insured, the relationship becomes considerably more complex.

Order-Taker or Consultant?

Most often, brokers get sued when something goes wrong for the insured and he realizes he has no coverage for the resulting losses. In such cases the insured typically claims the broker should have more fully explained the insured's existing coverages, and recommended additional insurance that, in hindsight, would have covered the loss. Ascertaining the circumstances and conditions of the broker's engagement—*after* the insured realizes there is no coverage for a particular claim, and *after* the broker has been sued—is highly subject to interpretation, to say the least. However, defining the broker-insured relationship and corresponding duty owed by the broker is often the most important—and overlooked—aspect of any lawsuit filed against the broker. The insured will try to define the broker's role as broadly as possible, and the broker will do the exact opposite, claiming she (properly) performed a relatively narrow task for the insured.

It is generally accepted a broker must exercise reasonable care, skill and diligence when she undertakes to procure insurance coverage for her client. *See, e.g., A.G. Edwards & Sons, Inc. v. Drew, 978 S.W.2d 386, 394-95 (Mo. Ct. App. 1998).* Some courts have held the broker must follow the client's instructions, provide the coverage she undertakes to supply, and secure a policy that is not materially defective. *President v. Jenkins*, 853 A.2d 247, 257 (N.J. 2004). While these broad statements provide a starting point to examine the relationship between the broker and client, they offer no practical assistance in defining the broker's specific duties.

Often, an insurance broker is also said to owe a "fiduciary" duty to her client. *Perelman v. Fisher*, 700 N.E.2d 189, 192 (Ill. Ct. App. 1998). Some of the markers of this fiduciary relationship have been identified as: (1) one party being subservient to the dominant mind and will of the other party as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies or a business, which are the property of the subservient party, being possessed or managed by the dominant party; (3) a surrendering of independence by the subservient party to the dominant party; (4) an automatic and habitual manipulation of the actions of the subservient party by the dominant party; and (5) the subservient party placing trust and confidence in the dominant party. *A.G. Edwards*, *supra*, at 394.

Does this mean courts believe the broker-insured relationship typically involves these onerous characteristics? Many insurance brokers would certainly disagree, particularly with regard to their more sophisticated commercial clients. So what exactly does this fiduciary relationship mean in the broker-insured setting, and when considered against the background of the factors which normally define a fiduciary relationship, can it provide the insured with ammunition to argue the broker owed him the duties of affirmatively explaining or recommending coverages?

Some courts that have considered this issue have found that such a "super duty" to explain coverages ordinarily does not exist simply because an unfortunate situation has occurred that will leave someone uninsured. *Wang v. Allstate Ins.*

[W]here the broker has taken it upon herself to counsel her client about specialized insurance coverages, held herself out as an expert to her client, or received extraordinary compensation from her client for services provided, a jury may be allowed to consider whether recommending or explaining coverages to her client falls within the scope of her agency, and thus her fiduciary duty owed.

Co., 592 A.2d 527, 531 (N.J. 1991). However, those same courts have specifically left the door open, finding such a "super duty" *could* exist if a "special relationship" exists between the parties which indicates reliance by the insured on the broker. *Wang, supra,* at 532-34. Other courts have offered guidance regarding the elements of such a relationship, noting it can be evidenced by a broker: (1) exercising broad discretion in serving the client's needs; (2) counseling the client about specialized insurance coverage; (3) holding herself out as a highly skilled insurance expert coupled with the insured's reliance on her expertise; or (4) receiving compensation beyond any ordinary commission for the advice or guidance provided. *Court View Centre, LLC v. Witt*, 753 N.E.2d 75, 87 (Ind. Ct. App. 2001).

Generally speaking, we are left to conclude a broker is not automatically required to recommend or explain insurance coverages to her client. To the contrary, such a duty generally is not imposed on the broker. However, where the broker has taken it upon herself to counsel her client about specialized insurance coverages, held herself out as an expert to her client, or received extraordinary compensation from her client for services provided, a jury may be allowed to consider whether recommending or explaining coverages to her client falls within the scope of her agency, and thus her fiduciary duty owed.

Defending the lawsuit – Can you blame the client?

When brokers get sued in these so-called "failure to recommend" or "failure to advise" lawsuits, their conduct invariably is placed under a microscope and their actions second-guessed. But what about the client? Does he have certain obligations which, if not fulfilled, can successfully be asserted as affirmative defenses or bars to recovery?

In most jurisdictions there are no "absolutes" regarding either the scope of the duty owed by an insurance broker to the insured, or the insured's obligations in dealing with the broker or familiarizing himself with his own coverage. Relevant considerations in defining both are the specificity of the insured's request, the nature and history of the relationship between the broker and insured, what duties the broker has voluntarily assumed, the nature of the insurance coverage at issue, and how sophisticated the insured is. The analysis is clearly fact-specific, and therefore the insured/plaintiff will often be able to defeat the broker/defendant's motion for summary judgment. This is particularly true when, as is almost always the case, the plaintiff has retained an expert to opine the broker was negligent for failing to recommend or explain coverages to the client. To minimize the plaintiff's (and his expert's) ability to do this, and thereby maximize the broker's ability to prevail at summary judgment or trial, as with any case the defense attorney needs to establish favorable facts during the discovery process. Comprehensively questioning the plaintiff at his deposition is crucial.

Perhaps the most common scenario facing insurance brokers in "failure to recommend" or "failure to advise" cases is the client's contention—after the fact—he wanted "full coverage" or "the best coverage," regardless of cost. Chances are the broker never agreed to act upon such a vague request, so the broker's attorney should explore what exactly the client means by "full coverage." Did he really want to be insured for every possible risk under the sun? Does he truly believe that is even possible? What were the client's reasonable expectations regarding his insurance, and were they fulfilled? When confronted with the endless insurance coverages available for purchase, certain boundaries of this "full" coverage will come into focus. It will demonstrate how the client, not the broker, is in the best position to ascertain his own exposure. Insurance brokers are not personal financial counselors and risk managers—clients are in a better position to know their personal assets and liabilities to protect themselves. *Murphy v. Kuhn*, 682 N.E.2d 972, 976 (N.Y. 1997).

The insured should be questioned about the terms and conditions specifically included in the policy that was placed.

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Did he read the policy? How educated is he? What previous insurance coverages did the client have in place, perhaps with a different broker? If the same policy was in place for years on a renewal, a stronger argument can be made that the client should have been familiar with it.

This will often lead to the client's assertion he relied upon his broker's advice for "all of his insurance needs." Perhaps he will portray himself as too busy to read his policy or to be bothered with the minutiae of insurance issues, and so he delegates them to his broker. The client's version of the relationship should be challenged. Did the insured pay the broker any fee apart from the commission earned on the policy placement? Had the broker ever recommended any specialized coverages for the insured before? Did the client really expect the broker to read and explain every single provision of the policy to him? Had the client ever previously made specific requests for policy changes, thus reflecting some understanding of what his policy did and did not cover? Eliciting helpful information from the plaintiff on these issues can be difficult, because most good brokers *do* make recommendations to their clients and *do* hold themselves out to their clients as having superior knowledge of insurance issues. After all, it is a business and there is plenty of competition. Preparing the broker for her deposition by ensuring she is able to specifically define the circumstances of her engagement regarding the insurance coverage(s) at issue is equally or more important on these issues.

All of this is done with an eye toward convincing a judge or jury not only that the broker was not negligent, but that the actions the insured claims the broker should have taken were not even within the scope of the broker's duty. This serves as both a factual argument for the jury and legal argument for the judge (since the existence of a duty is a matter of law) that will also preserve the right to appeal. If an undesirable verdict results from trial, perhaps an appellate court can be convinced, under the facts established, such a duty claimed by the plaintiff should not even exist.

Conclusion

Imposing a duty upon an insurance broker to recommend or explain coverages to her client effectively allows the client to insure himself after the fact by claiming he would have bought additional coverage had it been offered. As one court noted, this "turns the entire theory of insurance on its ear." *Farmers Ins. Co., Inc. v. McCarthy*, 871 S.W.2d 82, 86-87 (Mo. Ct. App. 1994). People take an "intellectual gamble" when purchasing insurance, as they weigh the expense of insurance against the amount of coverage they purchase. Allowing people to seek coverage post-occurrence allows them to completely circumvent this risk. *Id*. When the client realizes he lost his "intellectual gamble" and blames it on the insurance broker, why not try to shift the focus of the analysis to the conduct of the client instead of the broker? After all, sometimes the best defense is a good offense. ■

About the **AUTHOR**

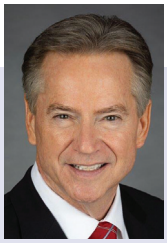
Matthew S. Marrone is vice chair of *Goldberg Segalla, LLP's* Management and Professional Liability practice group. He has defended hundreds of lawyers, insurance agents and brokers, and other professionals in malpractice and related litigation, and often represents these same professionals in ethics investigations and disciplinary proceedings. Matt has extensive complex jury trial experience, some involving exposures in excess of $25 million. He is licensed and actively practices throughout all state and federal courts of both Pennsylvania and New Jersey. He can be reached at mmarrone@goldbergsegalla.com.

Documents Defense Attorneys Should Request in Insurance Agent E&O Claim Discovery – Beyond the Customary

Brent Winans, CPCU, ARM | *Clear Advantage Risk Management*

An insurance agent E&O defense attorney recently complained to me that even when he requests that the agency provide him with their "complete file" for the plaintiff insured, he often gets much less. I have found that making the request to the agency as specific as possible can help overcome that problem. Drawing on both decades of experience as an agent and the scores of agent E&O cases on which I have served as an expert, I offer these suggestions on what to request.

- The complete electronic records contained in the agency's electronic management system software. These records can typically be produced in either a format that fully reproduces all of the notations in the record or one in which the notations are truncated. Request the full electronic record with all notations fully reproduced – not truncated.
- Specify that the production of the electronic record is to include all documents related to the account (not just this claim) for the period of time in question. This is specifically to include, but is not limited to, all attachments, binders, certificates, receipts, communication logs, policy documentation, contact information for the client, "sticky notes," claim information, photographs, reports, and memos, whether they exist electronically or in hard copy.
- The insurance agency's definitions of the codes used in their electronic records and a list of the people whose names are referred to by initials in their electronic records.
- Ask the agent what their present relationship is with the insured and who all of the employees are who have or had a relationship/contact with the insured.
- All those people's emails, searched – especially the producer's. A producer, account manager, service representative, or executive may have emails to the client, insurance company, or others that are not attached to the company's electronic records. Producers are the most likely group to have emails to and from the client, insurers and others which are not attached.
- Screen shots of all text messages from the producer and other agency personnel to the client, insurers, claims adjusters, surplus lines brokers, and any others who may be involved. This is to include screen shots of text messages between members of the agency (and its parent company if there is one) who may be involved.
- Notes taken by any agency personnel on any aspect of the account which touches in any way on the subject claim, whether considered to be personal and confidential notes or not (except for attorney/client privileged documents).
- The contract between the insurance agency and the insurance company involved in the claim.
- If a surplus lines broker or an intermediary were involved in the placement of the insurance or the reporting of the claim, the contract between the insurance agency and the surplus lines broker or intermediary.
- If the agency disciplined or otherwise counseled any employees for any actions which touched upon the matters involved in the claim, copies of all human resources and other agency records documenting those actions. ■



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Brent Winans is Vice President of *Clear Advantage Risk Management* in Delray Beach, Florida, a division of the Plastridge Insurance Agency. He provides fee-based (no insurance sales) risk management consulting services to larger clients and has served as an expert witness on both sides of over 130 agent E&O cases in 15 states. He is a licensed insurance producer in Florida, New Jersey, and Pennsylvania. He has worked as both an insurance producer and an insurance buyer. Before moving from Denver to Florida, he was the Director of Risk Management for an international company that included the Colorado Rockies Baseball Team, international mining operations, and the world's largest broker of nuclear fuel.

In 1997 he accepted a position with the National Council on Compensation Insurance (NCCI), took a sabbatical from the insurance industry for several years to work in the non-profit world, and then joined the Plastridge Agency in 2007.

His articles have appeared in *Business Insurance*, *Commercial Leasing Law and Strategy*, *IRMI's Risk Report*, *IRMI Insight*, and *Risk Management Magazine*. His articles on agent E&O issues appear regularly in IRMI's "Expert Commentary" series.

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Privacy Law: What Every Lawyer Needs to Know

Carrie K. Gaines, JD/LLM. CIPP, US | *Morrow, Willnauer & Church, LLC*

Despite numerous attempts over the years, there is no one comprehensive federal law that governs data privacy in the United States. However, there is a new proposed federal privacy law, the American Data Privacy Protection Act (ADPPA), that could pass soon. Until then there is a complex patchwork of sector-specific and medium-specific laws, including laws and regulations that address telecommunications, health information, credit information, financial institutions, and marketing.

The data privacy enforcement agency in the U.S. is the Federal Trade Commission (FTC). Its authority to regulate on behalf of consumer protections comes from The Federal Trade Commission Act (FTC Act) which has broad jurisdiction over commercial entities under its authority to prevent unfair or "deceptive trade practices." While the FTC does not regulate what information should be included in website privacy policies, it uses its authority to issue regulations, enforce privacy laws, and take enforcement actions to protect consumers.

The current patchwork of federal privacy law includes The Children›s Online Privacy Protection Act (COPPA), which governs the collection of information about minors, The Health Insurance Portability and Accounting Act (HIPAA), which governs the collection of health information, The Gramm Leach Bliley Act (GLBA), which governs personal information collected by banks and financial institutions, and The Fair Credit Reporting Act (FCRA), which regulates the collection and use of credit information.

Currently, each state's attorney general oversees and enforces state data privacy laws governing the collection, storage, safeguarding, disposal, and use of personal data collected from their residents, especially regarding data breach notifications and the security of Social Security numbers. Some state laws apply only to governmental entities, while others apply only to private entities, and some apply to both.

California was the first and four other states (Colorado, Connecticut, Utah, and Virginia) have passed comprehensive legislation. As of May 2022, legislation is in committee in Alaska, Louisiana, Massachusetts, Michigan, North Carolina, New Jersey, New York, Ohio, Pennsylvania, Rhode Island and Vermont.

The most comprehensive state data privacy legislation to date is the California Consumer Privacy Act (CCPA). Signed into law on June 28, 2018, it went into effect on January 1, 2020. The CCPA is cross-sector legislation that introduces important definitions and broad individual consumer rights and imposes substantial duties on entities or persons that collect personal information about or from a California resident. These duties include informing data subjects when and how data is collected and giving them the ability to access, correct and delete such information. This notice must be disclosed in a privacy policy displayed on the entity's website that collects the data.

The CCPA was amended by ballot initiative in 2020. California residents overwhelmingly supported the adoption of the California Privacy Rights Act (CPRA), which added the following to the CCPA: the right to rectification which updates and adds to a consumer's right to correct inaccurate personal information; the right to restriction which grants consumers the right to limit the use and disclosure of their sensitive personal information, the definition of sensitive personally identifiable information which updates the definition of personal information. Also, certain types of information, like a consumers' Social Security number, must be handled with special protections.

The CPRA also increases fines for breaches of children's data threefold, expands breach liability beyond breaches of unencrypted data to disclosures of credentials (like an email address or password) that could lead to access to a consumer's account, limits the duration of time a company may retain a consumer's information to only what's necessary and "proportionate" to the reason it was collected in the first place, and requires companies using third-party vendors to mandate contractually that those third parties exercise the same level of privacy protection to data shared with them as the first party.

Also, the CPRA establishes a new privacy regulator. The California Privacy Protection Agency will fine violators, hold hearings about privacy violations and clarify privacy guidelines. It's a five-member board, and it starts enforcing six months after the CPRA goes into effect on July 1, 2023.

Virginia›s Consumer Data Protection Act (CDPA) was passed on March 2, 2021. It grants Virginia consumers certain rights over their data and requires companies covered by the law to comply with rules on the data they collect, how it's treated and protected and with whom it's shared.

The law contains some similarities to the EU General Data Protection Regulation›s provisions and the California Consumer Privacy Act. It applies to entities that do business in Virginia or sell products and services targeted to Virginia residents and also do one of the following: control or process the personal data

of 100,000 or more, or control or process the personal data of at least 25,000 consumers *and* earn 50% of their revenue by selling personal information.

The CDPA requires companies covered by the law to assist consumers in exercising their data rights by obtaining opt-in consent before processing their sensitive data, disclosing when their data will be sold and allowing them to opt out. It also requires companies to provide users with a clear privacy notice that includes a way for consumers to opt out of targeted advertising. The CDPA becomes effective on Jan. 1, 2023.

In June 2020, Colorado became the third U.S. state to pass a privacy law. The Colorado Privacy Act grants Colorado residents rights over their data and places obligations on data controllers and processors. It contains some similarities to California's two privacy laws, the California Consumer Privacy Act (CCPA) and the California Privacy Rights Act (CPRA), as well as Virginia's recently passed Consumer Data Protection Act (CDPA). It also includes terms and ideas from the EU›s General Data Protection Regulation (GDPR).

While there are similarities, such as a right to opt-out, special protections for sensitive data and the adoption of some privacy-by-design principles, there are significant differences. The CPA applies to businesses that collect personal data from 100,000 Colorado residents or collect data from 25,000 Colorado residents *and* derive a portion of revenue from the sale of that data.

The law lists five rights granted to Colorado residents once the law becomes effective. They are: the right to opt-out of targeted ads, the sale of their personal data or being profiled, the right to access the data a company has collected about them, the right to correct data that's been collected about them, the right to request the data collected about them is deleted, and the right to data portability (that is, the right to take your data and move it to another company).

There are 17 blanket exemptions within the law. Data exemptions include data collected for Colorado health insurance law purposes, data covered by certain sectoral laws, including COPPA or the Family Educational Rights and Privacy Act (FERPA), data de-identified or pseudonymized, data maintained and used by a consumer reporting agency, and data being used for employment records purposes.

In July 2019, New York passed the Stop Hacks and Improve Electronic Data Security (SHIELD) Act. This law amends New York›s existing data breach notification law and creates more data security requirements for companies that collect information on New York residents. As of March 2020, the law is fully enforceable.

This law broadened the scope of consumer privacy and provides better protection for New York residents from data breaches of their personal information. It requires employers in possession of the New York residents' private information to "develop, implement, and maintain reasonable safeguards to protect the security, confidentiality, and integrity of the private information." The state Attorney General has already fined a company $600,000 for failing to meet minimum standards that led to a breach in security and leak in personal information.

In March 2022, Utah became the fourth state to enact a comprehensive consumer privacy law, which will take effect December 31, 2023. The Utah Consumer Privacy Act (UCPA) draws from both the Virginia Consumer Data Protection Act and Colorado Privacy Act, and their California predecessors.

The law applies to both data controllers and processors and applies to those to generate over $25 million in annual revenue and either: Control or process personal data for over 100,000 consumers yearly or derives over 50% of the entity's gross revenue from the sale of personal data and controls or processes the personal data of 25,000 or more consumers. There are exemptions for personal data collected, however; they're broader and at both at the entity and data level.

The law does not apply to a governmental entity or third party acting on behalf of a governmental entity, tribes, institutions of higher education, nonprofit corporations, a covered entity, a business associate, information that meets the definition of protected health information for purposes of HIPAA and related regulations, and Protection of Human Subjects laws.

Financial institutions governed by the Gramm-Leach-Bliley Act and information in the Fair Credit Reporting Act also aren't subject to the UCPA. Data processed or maintained in the course of employment also is exempt.

Consumers have the right to: confirm whether a controller is processing their personal data and access or delete personal data provided, obtain a copy of their personal data, and opt out of processing of personal data for the purpose of targeted advertising or for sale. The UCPA does not include the right to opt out of profiling, nor does it codify the right to correct inaccuracies in their data.

The fifth and most recent state to adopt a comprehensive consumer privacy law is Connecticut. Senate Bill 6, or "An Act Concerning Personal Data Privacy and Online Monitoring" (CTDPA) goes into effect July 1, 2023. The law applies to those who control or process personal data of and during the preceding calendar year, controlled or processed personal data of not less than

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100,000 or more Connecticut residents, excluding residents whose personal data is controlled or processed solely for the purpose of completing a payment transaction; or controlled or processed the personal data of not less than 25,000 consumers and derived more than 25% of their gross revenue from the sale of personal data.

The law is the first to specify that payment transaction data is not subject to the law. This provision was included for small businesses that process information for completing a transaction, such as restaurants. Consumers can opt out of processing their data for targeted ads and for sale, as well as profiling. The state allows a 60-day period to remedy violations through December 31, 2024. ■

About the **AUTHOR**

Carrie K. Gaines went to the John Marshall Law School in Chicago, Illinois and earned her Juris Doctorate Degree and an L.L.M. in Intellectual Property Law. She is also certified by the International Association of Privacy Professionals (IAPP) as a Certified Information Privacy Professional (CIPP/US). Carrie currently resides in Omaha, Nebraska where she works as a Civil Litigation attorney at *Morrow Willnauer Church, LLC*. Carrie may be reached at cgaines@mwcattorneys.com.

The Monster Being Unleashed by New Pay Transparency Laws

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To quote a Gallup Business Journal article, "Pay is a status-laden, envy-inspiring, politically charged monster." *The Problem of Pay*, Rodd Wagner and Jim Harter, Gallup Business Journal, May 8, 2008. The advent of new pay transparency laws across the country thus begs the question—what could go wrong?

The Distinction Between Legal and Illegal Pay Disparities

The wage gaps which exist in the U.S. for minorities and women have been well documented. According to the Bureau of Labor Statistics, for the third quarter of 2022 the median weekly earnings for women were 83.1% of the median weekly earnings for men. The median weekly earnings for black males were 77.3% of the median weekly earnings for white males. The median weekly earnings for Hispanic males were 76.2% of the median weekly earnings for white males.

The prevalence of race and gender discrimination in pay cannot be denied. Even in the absence of overt bias, unconscious bias can result in lower pay for minority and female employees. It likewise cannot be denied that seemingly legitimate wage gaps can often be traced to unlawful decisions in the past.

Still, the wage gaps for minorities and women cannot be entirely attributed to unlawful pay discrimination. Many wage gaps can often be explained by the practice of paying employees differently based upon position, location or department.

A recent Harvard Business Review article, for instance, addressed a significant gender wage gap at a large employer which could not be fully attributable to pay discrimination:

> "A multinational company employing approximately 22,000 software engineers, mostly in the U.S. and India had a problem: In the organization as a whole, women were paid on average 33% less than men: For every dollar men made, women earned only 67 cents. But, when comparing women to men with similar job titles, skills, and company tenure, this pay gap shrank to a mere 3% — still statistically significant but practically of much less consequence."

Your Company's Pay Gap is About More than Money, Kat Gauthier and Lalith Munasinghe, Harvard Business Review, March 31, 2021. In this analysis, the pay disparity existed "due to an overrepresentation of men in the upper echelons of the organization, where obviously the compensation was substantially greater." The issue in this company was less about equal pay for equal work than about the representation of women across the organizational hierarchy.

That a wage gap exists at a company, therefore, does not necessarily mean the gap itself is unlawful. Under the Equal Pay Act of 1963, a wage violation occurs only when employees of opposite genders are paid differently for a job which (1) requires substantially equal skill, effort, and responsibility; and (2) is performed under similar working conditions within the same establishment. 29

U.S.C. § 206(d)(1). An exception, which must be proven by the employer, applies where such payment is made pursuant to (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex. *Id*.

Under Title VII of the Civil Rights Act of 1964, which protects minority and female employees, a pay violation occurs if:

(1) An employer pays employees inside a protected class less than similarly situated employees outside the protected class, and the employer's explanation (if any) does not satisfactorily account for the differential;

(2) An employer maintains a neutral compensation policy or practice that has an adverse impact on employees in a protected class and cannot be justified as job-related and consistent with business necessity;

(3) An employer sets the pay for jobs predominantly held by protected class members below that suggested by the employer's job evaluation study, while the pay for jobs predominantly held by employees outside the protected class is consistent with the level suggested by the job evaluation study;

(4) A discriminatory compensation system has been discontinued, but salary disparities caused by the system have not been eradicated; or

(5) The compensation of one or more employees in a protected class is artificially depressed because of a discriminatory employer practice that affects compensation, such as steering employees in a protected class to lower paid jobs than persons outside the class, or discriminating in promotions, performance appraisals, procedures for assigning work, or training opportunities.

EEOC Compliance Manual, Section 10-3 Compensation Discrimination.

People are fascinated by what other people make… Like few other attributes, pay allows the rank ordering of individuals, an unvarnished display of where each stands in the hierarchy.

The Psychology of Pay

In the "*Problem of Pay",* authors Rodd Wagner and Jim Harter wrote of three basic truths regarding the psychology of pay, including the emotional lens through which employees view the topic of pay.

First, "People are fascinated by what other people make." Wagner and Harter explained: "Like few other attributes, pay allows the rank ordering of individuals, an unvarnished display of where each stands in the hierarchy."

Wagner and Harter cited a Wall Street Journal article as an example of this fascination. *You May Regret Looking at Papers Left on the Office Copier*, Jared Sandberg, Wall Street Journal, June 20, 2006. That article wrote of a woman who found on the office copier a document containing the performance ratings, base compensation, raises and bonuses for 80 of her colleagues. She was "outraged that a noted screw-up was making $65,000 a year more than competent colleagues, while some new hires were earning almost $200,000 more than their counterparts with more experience", said the story. The discovery led the woman to quit.

Second, "Most employees are less than completely satisfied with the pay they are receiving." Wagner and Harter noted "the worst performers … are just as likely as the best employees to say they should be paid more."

More recent studies confirm these findings. According to a Bankrate February 2022 Job Seeker Survey, 55% of those surveyed answered "Yes" to the following question: "Have you ever felt that you were underpaid compared to peers with the same work experience/ qualifications?"

A two-year Payscale study from May 2015 to May 2017 asked roughly 930,000 people "How do you think your current pay compares to other employees like you?" *Most People (Still) Have No Idea Whether They're Paid Fairly*, Teresa Perez, Payscale, December 11, 2017. The study found:

> "Over two-thirds of respondents inaccurately reported their market position, with the vast majority placing themselves below their actual position in the market. In other words, large swaths of the working population incorrectly believed they are being underpaid. Most notably, of the people who think that they are paid below market rate, 77 percent actually *are* paid at market rate, while an additional 12 percent are paid above market rate. That means that only 11 percent of people who said they are underpaid actually are paid

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> less than the median market rate for people with similar characteristics [emphasis in original]."

Third, for many employees, "Pay is more about status than about paying the bills." Wagner and Harter elaborated:

> "Numerous studies show that a person's satisfaction with his pay is affected more by how much he out-earns those around him than by the absolute level of his pay. Assuming the purchasing power of a dollar is the same in the following two situations, which would you prefer? (A) Your yearly income is $50,000, while others receive $25,000 or (B) Your annual income is $100,000, while others earn $200,000? Given that choice, half the people would choose the lower absolute salary that puts them at the top of the heap."

When asked about greater SEC pay transparency requirements for corporate executives, Warren Buffett, the chief executive of Berkshire Hathaway, confirmed the psychological impact of such transparency:

> "The unintended consequence could be that it becomes a shopping list for C.E.O.'s. Of the seven deadly sins, the one that seems to work more than greed is envy. If others have it, they want it."

New Pay Transparency Laws

Pay transparency laws have long been a fixture of U.S. labor and employment law. Under the National Labor Relations Act, employees have the right to communicate with other employees at their workplace about wages. Executive Order 11246 safeguards the right of employees of federal contractors to inquire about, discuss or disclose their pay or that of other employees or applicants. Presently, there are 17 states with laws protecting the right of employees to freely to discuss their pay without fear of retaliation.

In recent years, however, many states and municipalities have enacted pay transparency laws which require employers to provide salary ranges to job candidates. States adopting such laws include California, Colorado, Connecticut, Maryland, Nevada, Rhode Island, and Washington. Municipalities adopting such laws include New York City, Jersey City, Cincinnati, and Toledo.

According to their supporters, the new pay transparency laws are intended to help narrow the gender and racial wage gaps. The laws ostensibly aim to provide minority and female job candidates more negotiating power and prevent them from unknowingly accepting lower salaries than white male job candidates. The laws also purport to provide victims of race or gender pay discrimination ammunition for legal action under federal, state, and local employment laws.

Exposures for Employers and Their Insurers

To be sure, the new pay transparency laws themselves present risks of fines and litigation for violating employers. The New York City law provides for civil penalties up to $250,000.

Nevertheless, such risks may pale in comparison to the risks now faced by employers who must comply with the laws. The publication of salary ranges will undoubtedly be viewed by employees through an emotional lens. As set forth above, they will likely be (1) fascinated with what other employees make, (2) more aware of their dissatisfaction with their own pay, and (3) envious of the employees receiving higher pay.

Indeed, such a likelihood was the conclusion reached by another Harvard Business Review article:

> "Widely publicizing pay simply reminds the vast majority of employees, nearly all of whom possess exaggerated self-perceptions of their performance, that their current pay is well below where *they* think it should be. Transparency creates an expanded playground for our comparisons, potentially heightening our attention and obsession with it and elevating the negative emotions and behaviors that result. [emphasis in original]."

The Case Against Pay Transparency, Todd Zenger, Harvard Business Review, September 30, 2016. Thus, "pay transparency unveils more than real gender-based inequities; it also fuels perceived inequities prompted by inflated self-perception."

In response to published salary ranges, therefore, employees at the bottom of the salary range may ask why they are not at the top of the range. Employees below the salary range may ask why they are not within the range. For instance, employees in job titles with lower salary ranges may ask whether job titles with higher pay more accurately reflect their actual duties. Employees may question why a salary range is higher for similar positions in other locations or departments.

When the employees asking these questions are minorities or women, the risks for employers are understandably higher. For some employers, answers to the questions will reveal potential liability under employment discrimina-

tion laws. Under the Equal Pay Act, this potential liability includes liquidated damages and attorney's fees. Under Title VII, this potential liability includes compensatory and punitive damages and attorney's fees.

For other employers, innocuous answers to the questions may not be enough to stave off a charge of discrimination or a lawsuit given the intense emotions underlying the psychology of pay. Especially as to a circumstance in which the employer has the burden of defending a pay disparity under the Equal Pay Act or Title VII, the determination may be made that the benefits of legal action outweigh the risks.

While not equating transparency requirements to unleashing a monster, as other scholars have done, legal experts acknowledge such laws heighten the risk of discrimination suits for employers and their insurers. As more and more jurisdictions enact pay transparency laws, this risk will only increase.

It is thus imperative that employers act immediately to mitigate these risks. Such mitigation should include an immediate evaluation of not only of salary ranges, but also of pay structures. ■

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Preparation of the Health Care Provider for Deposition and Trial Testimony (And How This Can Help Prevent "Nuclear Verdicts")

Walter J. Price, III | *Clark, May, Price, Lawley, Duncan & Paul, LLC*

There have always been many challenges associated with preparing healthcare providers for depositions. Today, two issues are of particular concern. The first is the continued use of "Reptile Theory" tactics by plaintiff counsel. The second involves a perceived mistrust of institutions, which affects the impression of employees of hospitals, nursing homes, and the like.

> The "Reptile Theory" . . . generally seeks to focus on fears and concerns broader than the issues in the case, presumably causing jurors to respond to a perceived threat to their own safety.

Reptile Theory

Regarding the former, the purpose of this discussion is not to address the supposed "scientific" background for the "Reptile Theory" but, instead, to present practical examples of the types of questions that may be posed with that strategy and provide examples of simple responses. The "Reptile Theory" was introduced by David Ball and Don C. Keenan in *Reptile: The 2009 Manual of the Plaintiff's Revolution.* The theory generally seeks to focus on fears and concerns broader than the issues in the case, presumably causing jurors to respond to a perceived threat to their own safety. Ann T. Greeley, Ph.D., *Snakes and Lizards and Crocodiles (Oh My!): A Primer on the Reptile Theory of Trial Strategy.* In undertaking this process, the plaintiff attorney attempts to focus on the defendant's behavior , particularly demonstrating that there were safety rules available or in place to prevent the type of danger at issue, yet those rules were violated. Greeley; John R. Crawford and Benjamin A. Johnson. *"Strategies for Responding to Reptile Theory Questions," For the Defense* (December 2015).

The "Reptile Theory" generally involves an effort to obtain key admissions in depositions, condition the jury during voir dire to certain themes, and to set the stage for application of the themes in opening statement. The themes, particularly as sought through deposition questioning, include an assertion that safety is always the defendant's top priority and that any level of danger is inappropriate. Greeley, p. 9. Accordingly, reducing risk is also a top priority. These assertions are concluded with the question or statement seeking affirmation that if someone violated a safety rule that person

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or company would be responsible for the accident or incident. Greeley, p. 10.

The attorney often seeks admissions from the witness regarding broad statements about safety and safety rules which then prevent the witness from escaping those points in case-specific questions. Below is a series of questions presented to a nurse in a recent medical malpractice case in Alabama demonstrating the preliminary, broad safety statements:

(1) Tell me if you agree with the following statement. In your opinion is a hospital, or its staff ever allowed to needlessly endanger a patient?

(2) Should a hospital and its staff ever refuse a patient's request for help walking?

(3) Would you agree that patient safety is the most important thing at a hospital?

(4) So pretty much everything that a hospital nurse does should be ruled by safety?

(5) And at a minimum, a hospital and its staff should at least follow its own safety rules and procedures?

(6) This is because violating a patient's safety rule might end up hurting or killing somebody, right?

(7) So, it's fair to say that a nurse shouldn't make choices that put patients at unnecessary risk?

(8) Because extra risk means more danger, right?

(9) You tell me if you agree with this—I put my life in your hands. In return, you agree to take care of me and keep me safe. Now is that a fair deal?

(10) Do you think most patients expect that? Do you think patients deserve that?

(11) So, you would agree with me that it's basically a patient's right to be taken care of and kept safe?

Of course, medical cases are ripe for such an approach as potential "safety rules" abound. These may include hospital or nursing home policies and procedures, medical treatises and texts, standards promulgated by The Joint Commission and other industry groups, federal regulations, and resources such as the *Physician's Desk Reference.* Advice regarding responses to questions seeking to apply such "rules" will follow.

The "Reptile Theory,'' while purportedly having a scientific basis, for purposes of witness questioning, involves two tried-and-true techniques. The first is, as alluded to above, the progressive application of general rules to a specific situation. Another example of this progression is as follows:

(1) If a patient's status changes, the safest thing to do is call the physician immediately?

(2) Documentation in the chart must be thorough; otherwise, a patient could be put in danger, right?

(3) When a test or lab is ordered, you would agree with me that you should review the results immediately, because any delay would put the patient at risk?

(4) Nurse Jones, you would agree with me that when a troponin level is elevated, the patient is in imminent danger, correct?

Bill Kanasky, Jr., Ph.D. and Ryan A. Malphurs, Ph.D., *Derailing the Reptile Safety Rule Attack: A Neurocognitive Analysis and Solution,* p. 6. Once the witness has agreed to the paramount nature of safety, including, here, timely contact with the physician, he or she may struggle to escape the assertion that a lab result was not timely reported to the physician.

The other familiar form of witness questioning is to "shame" the witness into feeling obligated to provide a certain response. Examples of these questions include:

(1) Failing to call a physician at 4:00 p.m. was a safety violation?

(2) It exposed my client to unnecessary risk and harm, right? If you would have called a physician it would have prevented by client's stroke, right?

(3) Nurse Jones, failing to call a physician immediately at 4:00 p.m. was a deviation of the standard of care, wasn't it?

Kanasky and Malphurs, p. 9. Often, the witness feels compelled to say he or she "knew better'' than to act as occurred.

The most important rule in responding to "Reptile" questions is to "never say yes." Crawford and Johnson, p. 71. General safety rules of this type fail to consider the specific circumstances of the case and, more importantly, fail to consider the complexity of medical matters. While witnesses may certainly testify that safety is important and that they strive to prevent injury to patients, the rather simple example of a surgery shows that medicine does not present a black-and-white home for the use of "safety" rules. It should only take a matter of moments to list the number of risks, and even dangers, associated with many, if not most, medical procedures undertaken in an effort to cure. Indeed, a discussion of this analysis is key to building the witness' confidence in

While witnesses may certainly testify that safety is important and that they strive to prevent injury to patients, the rather simple example of a surgery shows that medicine does not present a black-and-white home for the use of ‘‘safety” rules.

disagreeing with the “safety rule” statements which are posed as questions. The key is to avoid the cascade of affirmative responses whereby the witness becomes “boxed in” when finally asked about the care at issue. In doing so, the witness may certainly disagree with the premise of the initial, broader questions.

Recognizing that “Reptile’’ progression of questioning generally moves from broad to more specific safety questions, witnesses must be prepared to respond to those initial questions asserting that a particular course of care would be the safest course or would be the course least likely to place the patient in danger. Often, the following are true and accurate responses:

(1) It depends on the patient’s specific circumstances.

(2) It depends on the full picture.

(3) Not necessarily, as every situation is different.

(4) That is not always true.

(5) I would not agree with the way you stated that.

(6) That is not how I was trained.

Kanasky and Malphurs, p. 12. Again, this approach is not new, and it is not inappropriate.

Returning to the notion that the “Reptile” attorney seeks damaging admissions during discovery depositions, a corollary to the “never say ‘yes’” rule is that the witness may say “yes, but”. For generations, defense lawyers have been mentored or taught that witness preparation includes instructions such as “answer only the question asked” and “do not volunteer.” However, “saying too little can leave false impressions, impair credibility, or otherwise harm the case as much as saying too much, sometimes even more so.’’ Kenneth R. Berman, “Reinventing Witness Preparation,’’ *Litigation* (Summer 2015), p. 27. (Indeed, Berman’s article provides an excellent discussion of general witness preparation). The “yes, but” ancillary rule allows the witness to tell the full story without being limited by the attorney’s question thereby preventing the witness from being misunderstood or factsbeing left out of the description.

Another concern in the medical field is the potential that the general “safety rule” replaces either the concept of “reasonableness’’ or even the medical or nursing standard of care. *See, e.g.,* Crawford and Johnson, p. 72. Defense counsel must carefully prepare witnesses in medical malpractice actions to focus on the legal standard applied in a medical liability action; that being, the medical or nursing standard of care.

One way plaintiff attorneys try to change the applicable standard is to ask questions including absolute terms. These include, for example, the following:

(1) Always;

(2) Never;

(3) Number One Priority;

(4) Best; and,

(5) Best Possible.

If the witness answers questions including these terms in the affirmative, he or she has agreed to the higher standard which will then be practically applied to the care at issue. Witnesses need to be taught to identify absolute terms so that they will not fall into this trap.

Finally, regarding the “Reptile” topic, it may be suggested that witnesses not answer “damages” questions. Crawford and Johnson, p. 72. Responsibility for injury or damage is a legal matter and the involved lawyers will argue those issues to the jury.

Institutional Mistrust

Another current trend in witness preparation involves a general thought that many jurors are mistrusting of institutions. Such a concern may go hand-in-hand with the “Reptile Theory” where plaintiff attorneys seek to play upon these biases. In preparing healthcare providers for deposition, it is important to consider those issues significant to patients. In a twist of the “Reptile Theory,” one may consider that jurors might assess healthcare providers by considering whether the jurors would themselves welcome the care of the testifying witness. A 2006 article addressed the behavior of healthcare providers considered as “ideal.” Neeli M. Bendapudi, Ph.D., et al., “Patients’ Perspectives on Ideal Physician Behavior,” *Mayo Clin. Proc.* (March 2006). The traits identified included:

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(1) Confidence;

(2) Empathy;

(3) Humanity;

(4) Personal Concern;

(5) Forthrightness;

(6) Respect; and,

(7) Thoroughness.

Bendapudi, p. 340. While one may easily recognize these qualities as a patient, they can also be exhibited by a testifying witness. For example, the most important factor in establishing witness confidence is preparation and practice. Intimate knowledge of the medical record is key to establishing this confidence as well. Empathy, humanity, and personal concern are important to the most basic of trial issues —credibility. A conscientious and polite witness will largely demonstrate these qualities though, yet again, preparation and practice are essential to invoking these qualities, especially in the "Reptile" realm where the questioning often involves attempts to unnerve or humiliate witnesses. Greeley, p. 8, 9. By way of example, the above questions posed in the noted Alabama deposition example came immediately after the witness was asked her name.

Essentials of Witness Preparation

While defense counsel may want to rush into covering accepted "rules" for witness testimony, the initial focus of witness preparation should be on the witness' concerns. Often witness preparation is hindered because the witness is focused on other issues and, therefore, he or she is not paying attention to the attorney instructions. Such witness concerns may be rather simple including, for example, where to park, what to wear, who will be present for the deposition, will the plaintiff be present for the deposition, and when does the witness need to arrive. Other times there may be witness-specific issues which need to be initially addressed. A recent example was a witness who wore hearing aids who was concerned about how and when to bring this to the plaintiff attorney's attention.

The more information the witness has, the more comfortable he or she will be in the deposition. Therefore, it is important that defense counsel take time to explain many basic concepts and issues which will come up in a deposition. At the outset, the attorney needs to explain to the witness the purpose of the deposition. Similarly, the witness should be told what is meant by the "usual stipulations" and the effect of the same. In addition, the attorney needs to explain the nature of objections and instructions and how the witness needs to proceed in the event an objection is made or an instruction not to answer is given. Rather simply, the witness needs to be told that he or she can ask for a break at any time during the deposition. Likewise, the witness needs to be instructed to carefully review any documents the plaintiff attorney shows them during the course of the deposition. Many times, witnesses do not know how to respond when asked how they prepared for the deposition. Counsel must be sure to address this anticipated question during deposition preparation.

Most witnesses, including highly intelligent and successful practitioners, are intimidated by the deposition process. One way to combat this anxiety is to make sure that the witness knows that they have more control during the deposition than they otherwise believe. For example, the witness can, and should, ask the lawyer to rephrase questions which he or she does not understand. Surprisingly, the witness can control the pace of the deposition by pausing or by his or her speaking style. The witness needs to be reminded that it is his or her deposition and it is their opportunity to tell the full story.

Defense counsel should also explain his or her role to the witness. The witness needs to understand that the attorney is not a cheerleader. The witness further needs to understand that the attorney may be firm at breaks and may even appear upset. Defense counsel needs to assure the witness that this is all an effort to see that the witness' deposition goes as well as possible.

Our witnesses receive a minimum of three preparation meetings and often more. During the first meeting, we utilize a PowerPoint in discussing depositions generally, including some tips for identifying trick questions and providing complete answers. During the second session, we begin to address the factual issues involved in the case and begin working on answering some sample questions. This is a good opportunity to use a thesaurus in order to identify strong words which the witness can use to tell his or her story. The third session includes a videotaped mock examination with a critique of the witness' performance. Often times we will copy the plaintiff attorney's style and the examination is usually very aggressive. Sometimes we will conduct a "full" deposition, and, on other occasions, we will focus on key issues and anticipated questions. It is important to take time between these sessions so that the witness can digest the information provided and practice answering sample questions before the next session. It is also helpful to have the witness practice even simple questions such as ones seeking a list of job duties so that they can easily describe those duties during the deposition. Another benefit of the videotaped examination is that witnesses can see themselves on video and identify distracting habits.

Of course, in today's world other issues need to be addressed. For exam-

ple, defense counsel needs to ask the witness if he or she has any cellphone photos, videos, or text messages in any way related to the subject care. In addition, defense counsel should check the witness' social media profile just as he or she would examine the plaintiff's profile.

During the deposition preparation sessions, the witness should be counseled on various tactics used by plaintiff attorneys. These include, for example, questions in which the attorney restates the witness' answer though slightly changes the answer to better support the plaintiff's case. Likewise, witnesses should be counseled about questions in which the attorney tries to create doubt in the witness' recollection or answer. Counterintuitively, witnesses should be told that repetitive questions by the plaintiff attorney are generally a sign of success. The witness should also be told how to address interruptions. It is important that the witness go ahead and finish his or her answer so that his or her whole story or whole truth may be on the record.

Much of witness preparation involves defense counsel attempting to identify questions which will be posed during the deposition. In doing so, the attorney needs to anticipate creative lines of questioning. These may involve questions addressing CMS "never events" or state nursing regulations. The attorney needs to be careful to review hospital policies and procedures, The Joint Commission publications, as well as, for example, ACOG and AWHONN publications and guidelines.

Nuclear Verdicts

There is no real definition of a nuclear verdict. Many commentators suggest that such is a verdict exceeding $10 million. Nonetheless, it is clear that larger and larger verdicts have been seen during recent years.

Deposition preparation can go a long way toward preventing these events. Preparation for "Reptile" questions is important so that the witness does not provide the plaintiff attorney with "sound bites" which can be used to suggest that the witness has admitted breaching the standard of care. In addition, corporate representatives must be prepared to address questions beyond the areas of inquiry included in the deposition notice. Another thing to consider is whether to conduct a direct examination of a corporate representative in the event that the deposition is played in the plaintiff's case. Many commentators say that one of the best ways to prevent nuclear verdicts is to tell the defendant company's story. Seemingly, one of the best ways to do that is to show that the company has good, caring employees as demonstrated by their effective deposition testimony. ■

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Practicing Well: Change it up!

Patty Beck | *A Balanced Practice, LLC*

I've always been a fan of routines. There is a certain comfort in having structure, predictability, and experience making things happen each day. They help us get the kids off to school on time, stay productive throughout the day, and allow for a consistent way to decompress from the day's activities. On the flip side, sometimes they can feel monotonous when we rely on the same routine day after day—taking the same route to work, drinking the same morning beverage, eating out at the same places, etc. The familiarity, although often comforting, can take a mental and physical toll on us over time if we're not paying attention. So, what can we do?

Change it up! No, I don't mean a massive overhaul to your routine. What I mean is that by taking time to think about how we can make small changes to our routines, it can have the effect of breathing new life into a day that might otherwise feel a bit stale.

When I initially sat down to work on this article, I was feeling a bit stuck and uninspired. After three years of doing the same morning routine that typically brings me joy—yoga, drinking my coffee outside on my deck (mindfully, of course), and watching my dogs wrestle in the backyard—I wasn't excited to go upstairs to my home office, which is usually a place of inspiration for me. So, I decided to change up my scenery and work from a nearby European-style coffee shop that I'd heard of but had never been to. I was admittedly a bit nervous since I am a creature of habit, but after my experience, I have never been so happy that I tried something new!

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> If you're ever feeling like the days blend together doing the same things over and over again, try changing one small thing to shake things up.

For starters, I walked into what felt like a Hallmark Christmas movie set. The décor was modern yet festive with little white lights wrapped around evergreen garlands draped across the ceiling, all seating areas were designed to bring people together in a family-style manner, and the back of the space had a beautiful boutique with unique candles, clothing, and jewelry for sale. The room was buzzing with people, but it felt different than a chain coffee shop. Everywhere I looked, people were sitting down to enjoy themselves rather than rushing out with a coffee to go. People visited over board games, some worked from their laptops, and others enjoyed reading the morning paper.

In keeping with my effort to try new things, I scrapped my usual vanilla latte for a London Fog (which I discovered is very similar but with tea instead of espresso) and spent the next few hours taking in the environment as I quietly worked on this article. The more time I spent simply noticing the charming décor, friendly customer interactions with staff (I overheard one woman say this was her new "happy place"), and relaxed pace of everyone's day, the more joy and inspiration I felt within myself. My mood had completely changed for the better, and I found myself excitedly writing this article with ease.

If you're ever feeling like the days blend together doing the same things over and over again, try changing one small thing to shake things up. For example, if you always eat lunch at your desk while working, try eating in a common area instead while listening to a few minutes of a podcast. If you feel overwhelmed by the morning rush out the door, wake up five minutes earlier and spend a few minutes meditating in bed to ground yourself before the chaos ensues. If you pick up your kids from school and take the same route home each day, try taking a different side street—it might add to your drive time, but it might also be worth it to experience the visual stimulation of new scenery (and to see beautiful holiday lights from other neighborhoods).

The goal is not to turn your routine upside down or to have a magical Hallmark-esq experience each day (although wouldn't that be amazing?). Instead, work toward making little changes that can allow you to experience more joy in the quiet mundane parts of your day. Start by picking one day this week to try something new and go from there. Sometimes even changing something as simple as which side of the table you sit at or picking a festive coffee mug over your usual mug can boost your mood and make the day feel new and fresh.

As always, if you are struggling with anything—stress, mental health, a feeling of "meh" (also known as languishing), please contact your state's confidential lawyers' assistance program or another trained mental health provider. Information is available in the new PLDF 50-State Survey of Lawyer Mental Health & Well-Being Resources located on the PLDF website. Sending you all good wishes to feel joy and inspiration as we head into 2023! ■

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Patty Beck is the President & Owner of *A Balanced Practice, LLC*, where she teaches attorneys practical strategies for incorporating well-being into their personal and professional lives. Prior to discovering her passion for attorney well-being, she worked as an associate at a large law firm in Minneapolis, MN practicing employment law and as a Claim Attorney for *Minnesota Lawyers Mutual Insurance Company* where she helped attorneys navigate challenging legal malpractice and ethics complaints. Through her experience in private practice and helping lawyers through difficult times, she discovered her passion for teaching lawyers the "little things" they can do each day to improve their relationship with stress and overall satisfaction with their careers. She can be reached at patty@abalancedpracticellc.com.

Technological Competence: Legal Malpractice Implications

Jennifer B. Groszek, Vice President – Claims Advocate Lead | *ProQuest, a division of Alliant*

Technology in the practice of law is beneficial, essential, and (*now*) unavoidable. A lawyer's duty to provide competent representation to a client extends to competency in relevant technology. "To maintain the requisite knowledge and skill, a lawyer shall keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Model R. Prof. Conduct 1.1, Cmt 8. While there are many benefits to using technology to improve productivity and efficiency in the practice of law, there are risks. The client and court expectations of technological competency is high and failing to keep up or using technology as an excuse for missed deadlines or bad conduct can, and does, lead to attorney discipline complaints and legal malpractice claims. A review of current case law illustrates that diverted emails, technical failure, clerical mishaps, and electronic filing snafus will not save you in court. Additionally, recent disciplinary actions illustrate that lawyers must know how to use online platforms and to do so ethically. Further, technological competence extends to e-discovery and cyber security under ABA Model Rules 1.1 and 1.6, where lawyers have a duty to protect their client's data. Lack of competence in e-discovery and data security can pose ethical and legal malpractice issues.

Diverted Emails/Technological Glitch is the New "My Dog Ate My Homework" but Courts Aren't Biting!

Emails going to spam, an unchecked email address, or diverting directly into an inbox folder (unread) by way of a "rule" are ripe for missed deadlines and blown statutes. In *Drewery obo Felder v. Gautreaux*, the court denied a motion to vacate a judgment where the plaintiff's counsel argued that emails were mistakenly diverted to a spam folder resulting in his subsequent failure to respond to a summary judgment motion. *Drewery obo Felder v. Gautreaux*, 2020 WL 5441230 (M.D. La. Sept. 10, 2020). In this case, the defendants filed a motion for summary judgment to dismiss the plaintiff's remaining claims on March 3, 2020. The motion's notice was electronically filed using CM/ECF, which stated opposition to the motion must be filed within 21-days of the filing of the motion. *Id*. at 3. The plaintiff failed to file a timely response, and the court granted summary judgment. In its ruling, the court also ordered that the plaintiff must respond within 14 days with his opposition memorandum to the motion along with a reason for his failure to comply with the deadlines. *Id.* The plaintiff's counsel also missed this deadline. *Id*.

Finally, on June 9, 2020, the plaintiff's counsel filed for a Motion for Leave to File a Motion to Vacate Judgement and his opposition to the motion for summary judgment. He argued that "because of a malfunction or failure of the electronic filing system", he failed to get any of the notices. *Id*. at 4. The plaintiff's counsel offered evidence that he emailed the electronic filing system administrator that he was not receiving notices or court decisions anymore and thought the issue was resolved until he located the court's order and judgment in his spam folder. *Id*. at 5.

The court noted that few courts have found that notice diverted to a spam folder qualifies as excusable neglect. *Id.* at 15. Further, relief in similar circumstances has only been granted "when counsel was completely unaware of computer problems, the delay caused by counsel's mistake was very slight, and the case was in early stages of the proceeding" *Id*. Here, the court found that plaintiff's counsel realized the CM/ECF notification issue on April 13, 2020 and failed to show any evidence that he attempted to fix the issue aside from sending one email to the electronic filing system administrator. *Id*. at 16. The court noted that counsel failed to demonstrate due diligence as he should have taken affirmative steps to check the case status online. Ultimately,

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While there are many benefits to using technology to improve productivity and efficiency in the practice of law, there are risks. The client and court expectations of technological competency is high and failing to keep up or using technology as an excuse for missed deadlines or bad conduct can, and does, lead to attorney discipline complaints and legal malpractice claims.

the court found that counsel's lack of corrective measures to ensure the email notification issue was resolved or to check the status of the case directly online did not constitute excusable neglect as counsel did not meet his duty of diligence. *Id*. at 17.

In *Rollins v. Home Depot*, the Court of Appeals for the Fifth Circuit upheld the district court's denial of the plaintiff's Rule 59 Motion for Relief, determining it was not an abuse of discretion. *Rollins v. Home Depot USA*, 8 F.4th 393 (5th Cir. 2021). The plaintiff's counsel failed to respond to the defendant's motion for summary judgment, arguing he did not know about the motion due to a glitch in his email system. *Id*. at 397. The Court found that counsel's failure to respond was within his "reasonable control," and he was in the best position to ensure that his email was working properly. *Id*.

Similarly, in *Inocencio v. Walmart*, the Court denied a motion to vacate where counsel thought email notifications of filings would be sent to the "eserve address", as opposed to the one he provided upon admission to practice. *Inocencio v. Wal-Mart Stores Texas, LLC*, 2020 WL 7646298 (S.D. Tex. Dec. 23, 2020). Counsel missed numerous deadlines and a final judgment was entered in favor of the defendant. The court found that the plaintiff was served and given notice of every filing in the case, and counsel had a "duty of diligence" to monitor his cases. *Id.* at 8. Ultimately, it is the lawyer's responsibility and duty to monitor his or her own cases, computer glitch or not, and failing to do so can have severe consequences.

The departing attorney can also present risks for missed deadlines and blown statutes of limitations. Generally, when there is a departing attorney or staff member, an automatic reply message will relay that the person is no longer working at the firm and provide a new contact. However, it is equally important to check the departing attorney's inbox for orders, upcoming dates, and other time sensitive matters. Malpractice claims can arise when deadlines are missed because an attorney left the firm and emails went unattended or unforwarded. Additionally, the courts will likely not find "excusable neglect."

As discussed, "computer problems," "glitches," and "technical failures" will not buy you more time or be a valid excuse for missed deadlines. Courts are quick to point out that the root of a "technical glitch" or "computer problems" is often due to delay or the attorney's lack of due diligence, as opposed to a problem with technology. For example, in *Reed v. Marmaxx Operating Corp*., the defendant filed a motion for summary judgment based on the statute of limitations, as the plaintiff's petition was not filed until three days after the statute expired. *Reed v. Marmaxx Operating Corp*., 2015 WL 123951 (E.D. Tex. 2015). The plaintiff argued that "she timely submitted her Petition for e-filing in state court prior to the expiration of the statute of limitations in this case, but because of technical problems with the e-filing system, of which Plaintiff was not made aware until after the statute of limitations expired, Plaintiff's Petition would have been timely filed." *Id*. at 9-10. The court noted that the plaintiff retained counsel seven months prior to the expiration of the statute of limitations and did not provide an explanation for the delay in filing the petition. *Id.* at 12. Additionally, the court stated that electronic filing was not mandatory at the time and counsel could have filed the petition in person or by mail. *Id*. at 13. Therefore, counsel was not diligent in the filing of her petition and equitable tolling was not applied. *Id.* at 15.

Likewise, in *McGuffin v. Colvin*, the court also rejected a plaintiff's motion for equitable tolling of the plaintiff's claim where the CM/ECF system did not accept the complaint in time. *McGuffin v. Colvin*, 2017 WL 52579 (E.D.N.C. 2017). In this case, the plaintiff's counsel first attempted to log into CM/ECF over two-and-a-half hours before his complaint was due. *Id*. at 12. His log-in credentials were not accepted and he was unable to obtain or reset his password despite calling and emailing the help desk. *Id*. The court found that "preventable issues with the electronic filing system during the final hours of a final period do not constitute extraordinary circumstances that warrant equitable tolling." *Id*. at 13. The court noted that this was a "classic reminder of the risks that [plaintiffs] take for no apparent reason by waiting until the very end of a filing period to initiate their lawsuits." *Id*. at 14.

Lack of Diligence and Knowledge along with Bad Online Behaviour with the Use of Technology Create Unnecessary Risks for Law Firms

Along with increased risk from email and technology mishaps, the use of online platforms with remote depositions, hearings and trials can lead to an increase in malpractice claims or disciplinary complaints. While the cat filter during a court call might not warrant formal discipline, there are situations that can lead to more serious consequences. What you cannot ethically do in person, you cannot ethically do online. The casualness of remote hearings, mediations and depositions can, and often do, lead to a lack of decorum that is expected in court.

For example, in the *Barksdale School Portraits v. Williams*, an attorney was sanctioned and disqualified from the case where a review of the video deposition identified over 50 instances where defense counsel provided the deponent an answer to a question followed by the deponent repeating the answer. 339 F.R.D.

341, 345, No. 2-cv-11391 (D. Mass., Aug. 31, 2021). The court noted that counsel's conduct exploited the remote nature of the deposition by assisting his client and preventing plaintiffs' rights to a fair examination. *Id*. at 346. Defense counsel's actions "were not a momentary or single lapse of judgment but were repeated numerous times over the course of the day." *Id*. The judge granted the plaintiffs' request to play and highlight to the jury the recorded exchanges of defense counsel's witness leading. *Id*. at 347. The court found this relief appropriate and allowed the jury to assess the deponent's credibility. *Id*.

Lawyers are also expected to learn how to use current technology platforms. In a Connecticut disciplinary action, it was noted that the court scheduled a status conference and provided instructions as to how to participate remotely. *In re Disciplinary Proceeding v. Richard P. Lawlor,* 2021 Conn. Super., 2021 WL 3487216 (Conn. July 15, 2021). Plaintiff's counsel failed to appear at three court-scheduled status conferences and a non-suit was entered. Evidence was presented that defense counsel attempted to contact him through telephone and email messages to no avail. *Id.* at 11. Subsequently, the court noted that it was clear during the remote hearing that counsel was not familiar with the Microsoft Teams platform. *Id*. at 20. The court found that he had sufficient time prior to the hearing to become familiar with the platform as an electronic invite was sent describing technologic requirements and process. *Id*. at 21. However, during the hearing, counsel was heard and seen repeatedly asking for help from others in his office. *Id.* Ultimately, the court held that it was concerned for his ability to participate in future remote hearings, and there was no showing that counsel had taken any steps to correct the issues that led him to miss the court appearances. *Id*.

Counsel was suspended for 30 days, and prior to restatement, he was required to show that he had become proficient in the use of Microsoft Teams "for the purposes of participating in remote court hearings and has the necessary computer or other devices available to him to do so." *Id*. at 24. Further, the lawyer was ordered to complete a CLE in small law office management within six months of the order. *Id.* Here, the court noted that establishing proper office management procedures includes keeping abreast of technological changes in the practice of law. *Id*. at 20.

E-Discovery: If you don't know, Hire Someone Who Does!

Technology competency extends to knowledge of e-discovery and the discovery of electronically stored information (ESI). While it is expected that attorneys have a general understanding of e-discovery, competency may require even a highly skilled attorney to retain e-discovery consultants to assist. The State Bar of California issued an ethics opinion relating to a lawyer's competency in e-discovery and ESI issues. State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion 2015-193. The Committee opined lawyers must know how to properly use the technology or hire (and supervise) someone who does; however, ultimately, the attorney must maintain overall responsibility for the work of the expert. *Id*. at 4. Ultimately, the Formal Opinion provides that "*An attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation."* As the Opinion pointed out, "lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery." *Id*. at 7. *Of further importance, keep in mind that lack of competence in e-discovery issues also may lead to an ethical violation of the duty of confidentiality." Id*.

No, 123456 is not a Secure Password

A lawyer's cyber security knowledge and preventative measures correspond directly with ABA Rules 1.1 and 1.6. Under ABA Model Rule 1.6(c), "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Comments 18 and 19 to Model Rule 1.6 note lawyers must act competently to safeguard information relating to the representation of a client against unauthorized access by third parties or unintended participants. *Id*. On point, the ABA issued Formal Opinion 477R relating to lawyers' ethical obligation to protect confidential client information when using technology to communicate with clients. ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 477R (Revised May 22 2017).

The opinion highlights that with advances in technology comes ever-increasing cybersecurity threats. "At the intersection of a lawyer's competence obligation to keep 'abreast of knowledge of the benefits and risks associated with relevant technology,'" and confidentiality obligations to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology

— Continued on next page

in communicating about client matters." *Id*. at 4. The Opinion notes that the reasonable efforts necessary to protecting client data is a fact-based analysis. *Id*. at 5. While not exclusive, Comment 18 to Model Rule 1.6 provides factors to consider in order to determine when additional security methods are required and the Opinion provides guidance to guard against disclosures. *Id*. at 5-6. Further, lawyers and law firms not only must protect client data but also inform clients of any data breaches that may affect their confidential information. ABA Formal Opinion 483 offers guidance as to a lawyers' obligations after a data breach or cyberattack. ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 483 (October 17, 2018). Data security is a priority as law firms remain high targets of hackers and ransomware. Make it a priority at your firm, for everyone.

Practice Pointers to Avoid Technology Related Pitfalls

- Periodically check lists of files (inactive and active) to ensure that nothing has slipped through the cracks.
- Avoid funneling a certain type of email into a separate folder that you review less frequently.
- Avoid sending emails "on the move" unless necessary.
- Use firm timekeeping software to identify "stale" files that have not had any time billed within the preceding 30 days.
- Ensure that multiple team members automatically receive electronic notices of hearing and similar documents.
- Calendar routine checks of active case dockets every two weeks.
- Copy assistants or paralegals for an additional set of eyes on key developments.
- Review files after staffing changes to double-check substitutions are filed, deadlines are calendared, etc.
- Establish consistent protocols to demonstrate routine diligence regarding electronic communications and notices.
- If an issue arises, immediately notify the client, opposing counsel, and the court.
- Maintain the same decorum online as you do in person.
- Avoid getting too casual with online mediations or court hearings. Maintain formality.
- Ethics are the same whether online or in person.
- Use strong, unique passwords.
- Multi-Factor Authentication (MFA) is a must.
- Regularly educate staff/attorneys on cyber security.
- Avoid connecting to an unsecured wifi, such as at the airport or in a public place.
- Lock your computer during periods of inactivity. ■

* *This article is for informational purposes only and is not intended to be construed or viewed as legal advice.*

About the **AUTHOR**

Jennifer B. Groszek, JD is a Vice President at *ProQuest, a division of Alliant*. She provides risk management, claims advocacy, coverage and claims management consulting to clients nationwide. Jennifer has over 20 years of experience as an attorney and claims and business consultant. Her experience in both the public and private sectors has enabled her to develop broad-based expertise that she employs to provide risk management and practical claims solutions to clients. She can be reached at jennifer.groszek@alliant.com

Celebrate

Now and throughout this coming year, my goal is to celebrate our exceptional PLDF members and enhance the PLDF experience for all of us. Using our social media platforms, we will frequently share your accomplishments and your milestones. Please take time to reach out to Sandra, myself, other board members, or committee leaders to share your victories, your articles, your community service activities, and all other fabulous feats, so that we in turn can feature them and celebrate along with you. PLDF's greatness lies in its members, our networks, and the wonderful friendships we have built along the way.

We will continue the tradition of having local get-togethers, some formal most less so—allowing us to reconnect with one another in small regional settings throughout the year. We will post upcoming get-togethers on the official PLDF LinkedIn page and on our website. Let's CELEBRATE!

Look Forward

With this season, we are also given time to look forward and lay our plans for the coming year. The PLDF has an excellent team of leaders energized to build upon last year's magnificent work and we are looking for others to join us. If you are not yet actively engaged, please consider joining our committee calls, sharing your experiences, authoring an article for the PLDQ, or starting to lay the groundwork for annual meeting proposals. We cannot wait to see you in Denver September 27th- 29th!

The leadership is also looking forward to providing additional value working with our committees to offer six CLEs scattered throughout the coming year. We will be kicking off the year with the first ***Redefining Winning*** (more details to be shared very soon). While this webinar will focus in part on learning from one's mistakes, my goal is to help facilitate further discussions centered not only on defense verdicts, but more broadly on our industry members' and practicing attorneys' daily successes. From diplomatically resolving a tragedy of errors to supporting a troubled customer or client, we win.

As we look to this coming year, let us work together to increase our PLDF membership. I personally have used our online member list to find counsel for past cases and have added several members to our panel. Over the years, we have also increased the number of insurance companies represented by our members. Our growing membership makes and keeps us strong. I ask each of you to consider reaching out to colleagues and contacts to share your PLDF experience and encourage others to consider joining. Please also remember, PLDF offers 50% off member dues for attorneys in practice up to five (5) years and membership for industry professionals remains FREE!!

Express Our Gratitude

As we wrap up 2022, I am grateful. I am grateful for having the chance to work with our talented leaders throughout the years. I have learned from them, debated them, laughed with them, and had far too much fun. I am grateful to be able to work with the talented chairs and vice-chairs who have enthusiastically taken on their roles, and I look forward to a fabulous year. Thank you for allowing me to serve with you.

Working in professional liability defense, we are lucky. Every day provides opportunities to make impactful differences in the lives of others. As I have gotten older, I take more time to remember, and one man's experience still resonates with me frequently in my work.

It had been a straightforward case, a missed statute of limitations, an attorney suffering a health crisis, a horrific underlying accident. It came down to economics. Too much time wasted, but late into the night we found a resolution to put him back to where he may have been but for the missteps along the way. I remember his eyes were moist as he reached for my hand, and he softly turned his head as though he wished me not to fully see the scars that covered most of his face. I remember the strength of his grip. I recall his voice trembling, as his wife patted him gently on the shoulder, and he quietly, forcefully thanked me for making them whole. Thanked me. I was lucky. Whether you are an insurance professional or a practicing defense attorney, I hope you feel lucky too.

Thank you for all you do.

Kathleen

About the **AUTHOR**

Kathleen V. Buck is the Vice President of Claims at *Minnesota Lawyers Mutual Insurance Company* (MLM). She currently manages an awesome team of talented, innovative claim professionals who bring joy to every day. She is the President of the Professional Liability Defense Federation (PLDF), as well as an active member of the International Association of Defense Counsel and the American Bar Association. She has also served on several nonprofit boards over the past two decades. She can be reached at kbuck@mlmins.com.

Association News

Call for Volunteers!

The PLDF Diversity & Inclusivity Committee is interested in adding a few more members to their ranks. Please contact one of our committee leaders to volunteer today:

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Welcome New Members

We are thrilled to welcome the following new members to the Association:

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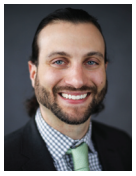

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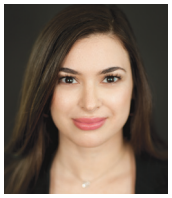

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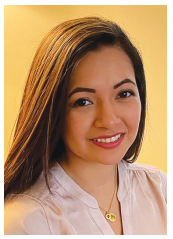

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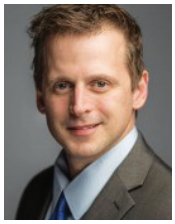

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Interested in getting involved? We'd love to have you join a committee (or two!) to help move the association forward. Please contact the PLDF office to get plugged in!

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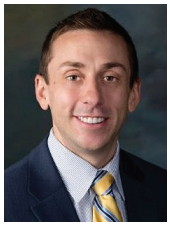

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