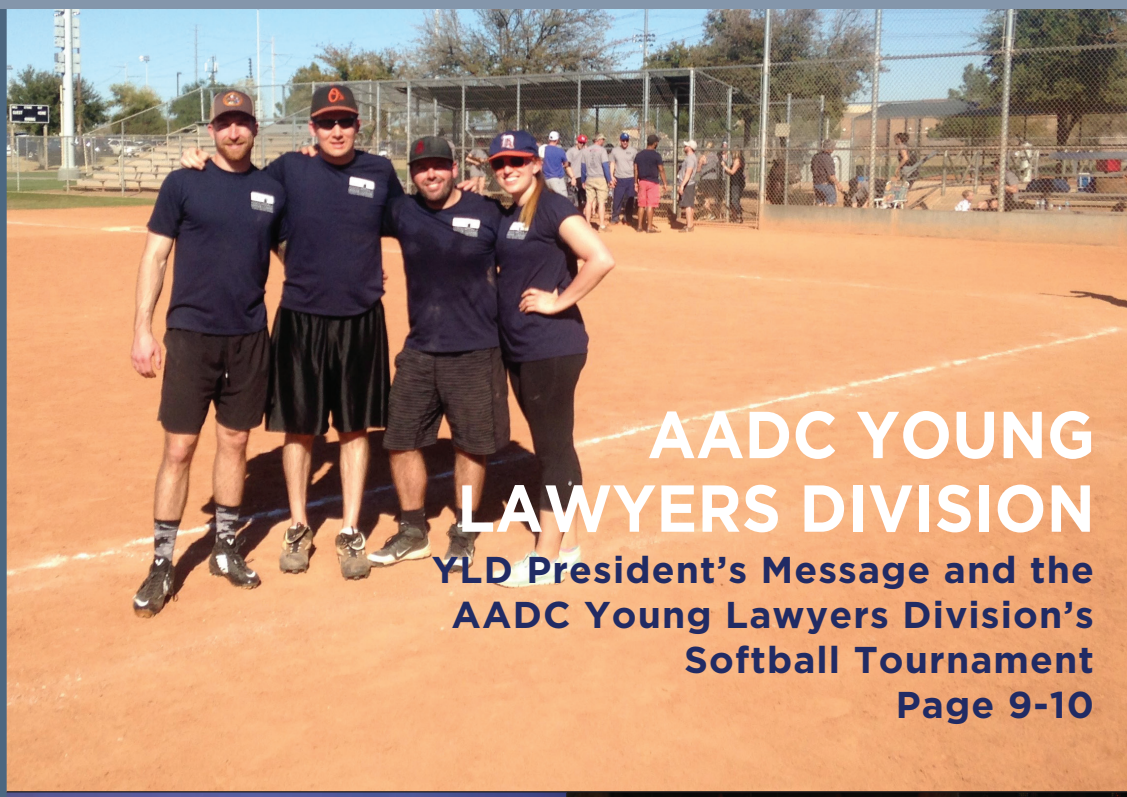
The Arizona Association of Defense Counsel

Common Defense

SPRING 2016

A Magazine for Arizona Defense Attorneys



AADC YOUNG LAWYERS DIVISION

YLD President's Message and the AADC Young Lawyers Division's Softball Tournament

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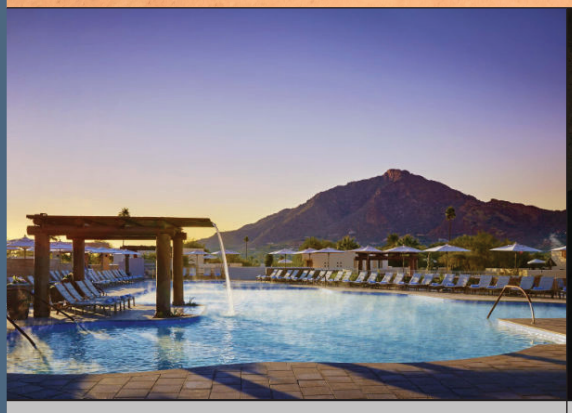

AADC Annual Meeting

June 3-5 at the JW Marriott Camelback Inn Resort & Spa in Scottsdale, Arizona

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Tucson and Phoenix Judicial Holiday Receptions

Honoring the year's Judicial Excellence Award Recipients, Hon. Ann A. Scott Timmer and Hon. Charles R. Pyle.

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President's Message

Have you been monitoring the AADC's Legislative Updates? If so, you are aware that a number of bills introduced this legislative session were directed at our state's merit selection system and our state's mandatory bar, measures that could have an impact on voluntary bar organizations such as the AADC. You also know that the AADC is there to keep you apprised of these developments and, when warranted, provide the perspective of the civil defense bar at the legislature.

Are you aware of an issue on appeal the resolution of which could have an impact the civil defense bar? If so, you know that you can ask the AADC to weigh in through our amicus program.

Is maintaining the quality of our judiciary a priority for you? If so, then you know that the AADC interviews quality judicial applicants seeking our recommendation.

What about your own bottom line? Are you interested in efficiently satisfying your CLE requirements with programs of interest to the defense bar? If so, then you know that the AADC provides CLE programs through its advocacy lunches and special interest groups. You also know that these programs are free to members, many of which you can now attend from your computer.

Would you like a way to connect with colleagues about experts and legal issues. If so, then you know that the AADC maintains an expert witness database and a list-serve allowing you to marshal the resources of the civil defense bar.

As an AADC member, you also know that the AADC provides many other services and opportunities to its members though its Young Lawyers Division and closing argument competitions, its pro bono program, and its judicial receptions in Phoenix and Tucson. The AADC also strives to provide more value and special-interest content to its members through this publication and through our developing LinkedIn group.

One thing you might not know, however, is that the AADC needs you to engage. Come to our events, contact our Board members, and get involved in committees and programs we offer. By doing so, you help us deliver value to you, and you make us a more robust and stronger counter-point to organizations that represent the plaintiffs' bar.

How to engage? Look for our weekly e-mails announcing upcoming CLE opportunities and other events. Sign up and come to our events. In particular, our annual golf tournament to benefit the ALS Association of Arizona is set for Saturday, April 30th, at the Biltmore Golf Club. Golf with us and support this worthy cause. After two years away from the Phoenix area, the AADC holds its Annual Meeting on Friday, June 3rd, and Saturday, June 4th, at the beautiful Camelback Inn in Paradise Valley. Join us for socializing and cocktails on Friday evening and for our CLE programs on Saturday morning.

The AADC strives to make a difference by working with you offer services and opportunities to improve your practice, as well as vigorously promote the interests of the civil defense bar and the clients we are privileged to represent. If you are interested in learning more about the AADC, please feel free to contact any of our Board of Directors, or me directly at 602.916.5338 or sfreeman@fclaw.com.

Scott Day Freeman, Esq.
President

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Correspondence and articles are welcome and should be sent to the Editor. Email articles for submission to Johnny Sorenson at johnny@sorensonlaw.net. The right is reserved to select materials to be published. Material accepted for publication becomes property of the Arizona Association of Defense Counsel.

AADC
950 E. Baseline Rd. #104-1025
Tempe, Arizona 85283
Phone: 480-609-3999
Fax: 480-609-3939
Email: admin@azadc.org
www.azadc.org

2016 AADC CALENDAR OF EVENTS

SPECIAL EVENTS

AADC Annual Meeting
June 3-5, 2016
1:30-5:00 pm
JW Marriott Camelback Inn Resort & Spa
Scottsdale, AZ

ADVOCACY LUNCHEONS

Advocacy luncheons are held from 12 - 1 pm at Gust Rosenfeld, One E. Washington St., 15th Floor, Phoenix

May 11, 2016	Appellate Advocacy *Speaker: Lori Voepel, Esq.*
Sept. 14, 2016	*Speaker: TBD*
Oct. 12, 2016	*Speaker: TBD*
Nov. 9, 2016	*Speaker TBD*
Dec. 14, 2016	*Speaker: TBD*

AADC Annual Meeting at the JW Marriott Camelback Inn Resort & Spa in Scottsdale, Arizona

The AADC is holding its Annual Meeting on June 3-5 at the JW Marriott Camelback Inn Resort & Spa in Scottsdale, Arizona. The Annual Meeting events include a cocktail party Friday evening, CLE program Saturday morning and a dinner Saturday evening thanking Scott Freeman, our outgoing president, for his services to the organization and welcoming in our incoming president, Craig McCarthy.

The Annual Meeting is a great opportunity to connect and socialize with other members of the defense bar and obtain CLE credits. We hope all members are able to join us for this fantastic event.

Whose Burden Is It Anyway: Proving Collectibility in the Underlying Legal Malpractice Case

By William F. King, Esq., Shareholder

Bonnett, Fairbourn, Friedman & Balint, P.C.

William F. King, Esq.

It is black-letter Arizona law that a legal malpractice plaintiff must prove damages, or the amount of loss actually sustained as a proximate result of the lawyer defendant's negligence. In the case-within-a-case framework, this requires a legal malpractice plaintiff, at least as of today, to demonstrate in the appropriate circumstance that the underlying defendant was collectible, or had the financial wherewithal to satisfy the judgment that would have resulted in recompense "but for" the alleged legal malpractice.

Eminently logical, isn't it, that legal malpractice plaintiffs should carry this burden? Isn't collectibility synonymous with proving proximate cause and damage as part of the legal malpractice plaintiff's underlying case? *Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (Ct. App.1986) ("One claiming legal malpractice must therefore establish … the fact and extent of the injury.").

Perhaps logical, but manifestly unfair, at least according to a recent swell of out-of-state court decisions that have reversed the traditional rule in favor of shifting the burden of proving uncollectibility to the malpractice lawyer-defendant.

In *Schmidt v. Coogan*, the Washington Supreme Court reversed an intermediate appellate panel's decision, concluding that Schmidt, the legal malpractice plaintiff, did not have the burden of proving uncollectibility, but rather "a negligent attorney may raise uncollectibility as an affirmative defense to mitigate or eliminate damages." 335 P.3d 424, 429 (2014).

There, Teresa Schmidt retained lawyer, Timothy Coogan, to represent her after she fell in a grocery store. Days before the statue of limitations was set to expire, Coogan filed a complaint naming the wrong defendant. He subsequently filed two amended complaints; those complaints, however, were held to be untimely.

Schmidt then sued Coogan for legal malpractice. At the close of Schmidt's case, Coogan's lawyers made an oral motion for judgment as matter of law, contending that Schmidt presented no evidence that the judgment in the underlying case would have been collectible. The trial court denied the motion; the jury awarded Schmidt approximately $84,000.

After the state's appellate court reversed in 2012, concluding that collectibility remained an integral component of Schmidt's case-within-a-case damages, the Washington Supreme Court in turn reversed it, ruling on an issue of first impression that collectibility is not an element of a *prima facie* malpractice claim, but instead an affirmative defense that the malpractice defendant must plead and prove. The court's decision rested primarily on policy implications, ranging from the "unfair[] presum[ption] that an underlying judgment is uncollectible when the record is silent[,]" to "the guiding principle in tort law, which 'is to make the injured party as whole as possible through pecuniary compensation.'" *Schmidt*, 335 P.3d at 429. *Schmidt*, like its predecessor cases, relies upon fairness, but provides no guidance, and no specific elements addressing collectability from which defense practitioners can draw upon in defending their lawyer clients. *See* Michael P. Cross, Esq., Nicole M. Quintana, Esq., YOUR PLACE OR MINE?: THE BURDEN OF PROVING COLLECTIBILITY OF AN UNDERLYING JUDGMENT IN A LEGAL MALPRACTICE ACTION, 91 Denv. U.L. Rev. Online 53, 58 (2014).

About four months after *Schmidt* was decided, the Supreme Court of Virginia handed down its opinion in *Smith v. McLaughlin*, which adopted *Schmidt* and its

progeny *in toto*: "Today . . . we join the 'growing trend' to place the burden of pleading and disproving collect[i]bility on the negligent attorney as an affirmative defense." 769 S.E.2d 7, 19 (2015) (citing Schmidt). The *Smith* Court relied upon many of the same policy reasons espoused in *Schmidt*, but took its own analysis one step further, attempting to differentiate between a legal malpractice plaintiff's burden to prove damages on one hand, and his or her burden to prove the ultimate amount of the judgment that would have been obtained on the other:

> We have held that a legal malpractice plaintiff bears the "evidentiary burden" to prove the value of his lost claim, that he would have prevailed at trial on that claim, and the amount he would have been awarded by the fact finder on that claim. But we do not place the burden on a legal malpractice plaintiff to also prove the value of the underlying judgment that he would have been able to collect absent the attorney's negligence.

Smith, 769 S.E.2d at 18 (citations omitted).

While gaining momentum in many jurisdictions, this trend is not without criticism. Attempting to distinguish the value of the lost legal malpractice plaintiff's claim from value of the underlying judgment bears the hallmarks of a result-orientated exercise in semantics. It also appears to ignore the potential windfall that could inure to certain legal malpractice plaintiffs, who never would have collected in the underlying case, but now – under this growing trend – are absolved from proving collectibility as part of their damage presentation. *See McKenna v. Forsyth & Forsyth*, 280 A.D.2d 79, 83, 720 N.Y.S.2d 654, 657 (2001) ("To hold otherwise would go beyond the usual purpose of tort law to compensate for loss sustained and would give the client a windfall opportunity to fare better as a result of the lawyer's negligence than he would have fared if the lawyer had exercised reasonable care.").

In many jurisdictions, however, a legal malpractice plaintiff must still prove collectibility as part of the case-within-a-case structure. *See, i.e., Paterek v. Petersen & Ibold*, 890 N.E.2d 316, 321 (Ohio 2008) ("We hold that collectibility is logically and inextricably linked to the legal-malpractice plaintiff's damages, for which the plaintiff bears the burden of proof. In proving what was lost, the plaintiff must show what would have been gained."); *Klump v. Duffus*, 71 F.3d 1368, 1374 (7th Cir. 1995) (applying Illinois state law) ("While we are mindful that a minority of courts have placed the burden on the defendant to prove the uncollectibility of the underlying judgment, we conclude that the burden is more properly placed on the plaintiff. . . .This is the position taken by the majority of courts and is more consistent with a plaintiff's burden of proof in negligence actions, generally."); *see also* Joseph H. Koffler, LEGAL MALPRACTICE DAMAGES IN A TRIAL WITHIN A TRIAL—A CRITICAL ANALYSIS OF UNIQUE CONCEPTS: AREAS OF UNCONSCIONABILITY, 73 Marq.L.Rev. 40, 52 (1989) ("To predicate an award of damages upon both the requirement that a judgment would have been recovered and that it would have been collectible . . . requires a showing of causation . . . that is conceptually no different from that required in negligence cases generally."); *see generally* Ronald E. Mallen et al., 4 LEGAL MALPRACTICE § 33:32 (2016 ed.) (collecting cases); *but cf.* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53, cmt. b (2000) ("RESTATEMENT § 53, cmt. b") ("Thus, the lawyer's misconduct will not be the legal cause of loss to the extent that the defendant lawyer can show that the judgment or settlement would have been uncollectible, for example because the previous defendant was insolvent and uninsured. The defendant lawyer bears the burden of coming forward with evidence that this was so.").

Not every legal malpractice action requires a collectability analysis. "It is only where the alleged malpractice consists of mishandling a client's claim that the plaintiff [and under the minority approach, the defendant] must show proper prosecution of the matter would have resulted in a favorable judgment and collection thereof." *DiPalma v. Seldman*, 27 Cal. App. 4th 1499, 1507, 33 Cal. Rptr. 2d 219, 223 (1994); *Smith*, 769 S.E.2d at 17 ("Collectibility limits the measure of the legal malpractice plaintiff's damages to how much the legal malpractice plaintiff could have actually recovered from the defendant in the underlying litigation absent the attorney's negligence, not simply to the face value of the lost claim.").

Whose Burden Is It Anyway *(continued)*

Arizona courts have yet to squarely address the issue of which party carries the burden of proving a solvent underlying defendant in the case-within-a-case framework,[2] which perhaps will engender plaintiff arguments that RESTATEMENT § 53 , cmt. b should apply.[3] Until that time, however, defense practitioners should focus their efforts where appropriate on the underlying defendant's insolvency. *Phillips v. Clancy, supra*, remains good Arizona law, and should be cited with confidence on this issue.

2 *See e.g. Reed v. Mitchell & Timbanard, P.C.*, 183 Ariz. 313, 903 P.2d 621 (Ct. App. 1995) (discussing, but not addressing the defense of whether the underlying debt was collectible as to the facts of that specific case); *Elliott v. Videan*, 164 Ariz. 113, 118, 791 P.2d 639, 644 (Ct. App. 1989) (issue of legal malpractice plaintiff's failure to present evidence of collectibility of underlying judgment not properly before the court on appeal) ("Videan contends that an element of Elliott's legal malpractice cause of action is that the underlying judgment would have been collectible. The only argument on that issue below, however, appears in Videan's motion for judgment notwithstanding the verdict....Under the circumstances, then, the issue is not properly before us on appeal.").

3 The Arizona Supreme Court cited RESTATEMENT § 53, cmt. d in *Glaze v. Larson*, 207 Ariz. 26, 83 P.3d 26 (2004), but not cmt. b.

Drones: The Sky Is The Limit?

By Amy Wilkens, Esq.

Lorber, Greenfield & Polito, LLP

Amy Wilkens, Esq.

The applications for drones or unmanned aerial systems ("UAS") are seemingly infinite. UAS capabilities were perhaps initially introduced to the public by the military. However, other industries quickly found ways to utilize UASs to improve how they do things. UASs have been used by police, safety and rescue, filmmakers, photographers, design and construction professionals, real estate professionals, journalists, scientists, farmers, delivery services and many others. In addition to being useful, UASs are, well, fun. Thus, a large number of hobbyists are putting drones in the sky as well. The rising use of drones has raised concerns regarding privacy, safety, and property, leaving federal and local legislators scrambling to keep up.

The use of drones for commercial purposes has been somewhat limited by the Federal Aviation Administration ("FAA"), which claims regulatory authority over the same. The FAA currently requires those seeking to use drones commercially obtain special authorization from the FAA via a Section 333 exemption and/or airworthiness certificate. The FAA grants such special authorization on a case-by case basis and a pilot certificate is required. The FAA has proposed new rules, more akin to those regarding recreational drone use. However, it remains unclear if and when the FAA will adopt the same.

For recreational users, the primary guidelines and regulations also come from the FAA. The FAA permits the recreational use of drones, weighing between .55 and 55 pounds, with the following guidelines, among others:

- Must be flown a sufficient distance from populated areas and full scale aircraft
- Should be flown in daylight, within visual sight of operator, and below 400 feet
- Cannot be used for business purposes
- Cannot operate within five miles of an airport (unless prior notice to airport personnel and air traffic control tower and flown within visual line sight of operator)

Additionally, owners must register their drones with the FAA's UAS registry and pay a $5 fee. Registration is valid for three years and is good on all on all of the drones owned by the same registrant. The registration number must be marked on all aircraft owned. The FAA warns those who do not register could face civil and criminal penalties.

The FAA also establishes "No Drone Zones" and Temporary Flight Restrictions to protect persons and/or property on the ground or other reasons as it deems appropriate. As an example of such restrictions, the FAA recently launched a PSA regarding Super Bowl 50 to let people know to "leave their drones at home" as the airspace around Levi's Stadium would be a "No Drone Zone" during the event. Drones were prohibited from operating within a 32-mile radius of the stadium from 2 p.m. until 11:59 p.m. on game day. Other examples include standing restrictions in National Parks or Washington D.C., or temporary restrictions for events such as airs shows or sporting events.

In Arizona, there are currently no state laws directly addressing the recreational use of drones. HB 2073 was recently introduced and, if enacted, would make it a felony for a person to operate or use an unmanned aircraft system to intentionally photograph or surveil certain "critical facilities" or property of other persons without prior consent.

Certain municipalities have passed or are considering legislation regarding drones usage. Paradise Valley was the first town in Arizona to pass drone regulations.

Drones: The Sky Is The Limit? *(continued)*

The Town's laws permit drone use for recreational purposes below 500 feet from the ground on one's own private property or that of another, with the owner's permission. The laws further require drones shall not be used in a careless or reckless manner that poses an apparent or actual threat of harm to persons or property, shall not be used to transmit any visual images or recordings of any person or property where there is a reasonable expectation of privacy, and provide penalties for any violation. Regarding commercial use, the Town requires users register with the Town's Police Department and provide notice of each flight at least four hours in advance of the same. The City of Phoenix is also considering adopting restrictions on drone use. The Phoenix City Council has put off its vote on the proposed ordinance until April of this year.

This piecemeal approach to drone regulation by city, state and federal governments is headache-making for drone users, commercial and recreational, seeking to remain compliant. Despite this, drone use is on the rise and with it a rise in legal claims. Other states have already seen litigation regarding various drone issues, primarily property vs. privacy. In one more publicized example, a Kentucky drone hobbyist filed a claim in federal court seeking damages when his drone was shot down by a property owner, dubbed the "drone slayer". The property owner claims he shot down the drone as it was flown over his property and invading his privacy. Kentucky has no laws specifically addressing drone use and no precedence defining what action can be taken by property owners with regard to trespassing drones. Nonetheless, the U.S. District Court for the Western District of Kentucky dismissed the case, finding the drone presented an invasion of privacy and the property owner had the right to shoot it down. No doubt we can expect similar claims here in the near future.

Given the fast technological evolution and vast applications, we can surely expect more legislation and more lawsuits nationwide regarding UASs. Our local and national lawmakers and enforcers are not alone, the issues posed by the proliferation of drones are being felt the world over. The most creative solution thus far is courtesy of the Dutch National Police, who are training eagles and other birds of prey to pick drones out of the sky. Here, we will likely be relegated to a less awesome, more traditional approach moving forward.

AADC Young Lawyers Division President's Message

By Jason Kasting, Esq.

Jones, Skelton & Hochuli, P.L.C.

Jason Kasting, Esq.

The year is off to a great start for the Arizona Association of Defense Counsel's Young Lawyers Division!

On February 20, we held our annual charity softball tournament in Tempe. The team from O'Connor & Campbell prevailed over Jones, Skelton & Hochuli in the final round. However, the real winner was our charity partner. This year, all proceeds benefited Southwest Human Development (SWHD), Arizona's largest non-profit dedicated to early childhood development. We raised about $10,000 in total, through team donations, sponsors, and raffle ticket sales. SWHD was a great partner, and we look forward to working with them again next year!

Our Young Lawyer Spring CLE event will take place on the afternoon of Thursday, April 21 at Gust Rosenfeld. We have three fantastic presentations lined up. The presentations include: "Ethics Considerations for Young Lawyers," by Jim Osborne, Esq. and Russell Yurk, Esq.; "Medicare Liens," by Christina Kelly, Esq.; and "Scientific Lawyering: Applying Lessons From Behavioral Science to the Courtroom," by Kirk Hays, Esq., Dr. Ted Cross, and Chantell Cornett. There will also be a free happy hour at Copper Blues following the CLE. Please visit www.azadc.org to register. We look forward to seeing you there!

Lastly, we plan to hold our YLD executive board elections for the 2016-2017 term in June. We are generally able to accommodate anyone who is interested in becoming involved. Keep an eye out for additional information about our prospective new board member event, to occur in June. In the meantime, feel free to contact me directly at jkasting@jshfirm.com if you are interested in joining our board!

Thanks, and we look forward to seeing you at our Young Lawyer Spring CLE event on April 21!

Jason Kasting
Jones, Skelton & Hochuli, P.L.C.
YLD President

YLD'S Annual Softball Charity Event!

The AADC's Young Lawyers Division held its annual charity softball tournament on February 20. All proceeds benefited Southwest Human Development (SWHD), Arizona's largest non-profit dedicated to early childhood development. The tournament featured teams from numerous AADC member firms. The team from O'Connor & Campbell (pictured here) prevailed over Jones, Skelton & Hochuli in the final round.

The tournament, which raised about $10,000 for SWHD, through team donations, sponsors, and raffle ticket sales, was a huge success! If you are interested in having a team for next year's tournament, please contact YLD president Jason Kasting at jkasting@jshfirm.com.

Primer on Insurance Coverage for Cyber Security Risks

By John K. Wittwer, Esq.[1]

The Cavanagh Law Firm, PA

John K. Wittwer, Esq.

The adoption rate for cyber insurance more than doubled from 10 percent to 26 percent over the past year.[2] Cyber insurance coverage issues are multiplying in response to substantial new risks including data breaches, hacking, electronic theft, network security liability, privacy violations, and regulatory liability, to name a few.[3] Insurance coverage for cyber risks might exist under both traditional forms and new specialty cyber policies, as discussed below.

General Liability – Coverage A

General liability insurance such as commercial general liability (CGL) policies typically include distinct provisions under Coverage A and Coverage B. Coverage A covers "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The CGL definition of "bodily injury" typically includes "bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom." Victims of a data breach usually do not suffer physical injuries, but they may assert claims of emotional distress. Most states – including Arizona – interpret the phrase 'bodily injury' to exclude claims for purely non-physical or emotional harm.[4]

In addition to bodily injury, another question is whether a data breach causes "property damage" within the meaning of the CGL policy. Property damage is typically defined to include physical injury to tangible property, including all resulting loss of use of that property. It also includes loss of use of tangible property that is not physically injured. On a national level, courts have mostly concluded that electronic data not qualify as "tangible property."[5] The answer might depend on which ISO form is in question. The pre-2001 ISO form was analyzed in the Arizona case of *Am. Guar. & Liab. Ins. Co. v. Ingram Micro, Inc.,* No. CIV. 99-185 TUC ACM, 2000 WL 726789 (D. Ariz. Apr. 18, 2000), where the court concluded that loss of data on computer network constituted "property damage." But that case was decided before the 2001 ISO change clarifying that "electronic data is not tangible property."

Exclusions. Various CGL exclusions might preclude coverage for cyber liabilities. Exclusion j.(4) precludes coverage for property damage to personal property in the care, custody or control of the insured. The "care, custody or control" exclusion comes into play especially with lost hardware situations, such as a stolen laptop or USB stick. In addition, the ISO War exclusion, CG 00 01 12 07, Exclusion i., provides that coverage does not apply to war, undeclared or civil, or "warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any

1 John Wittwer (jwittwer@cavanaghlaw.com) is a Member at The Cavanagh Law Firm, PA, in Phoenix, Arizona. His practice focuses upon the defense of insurers in bad faith and coverage claims and litigation.

2 Experian 2015 Second Annual Data Breach Industry Forecast, at p. 8.

3 A list of U.S. state data breach notification laws can be found at http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx. For Arizona, *see* A.R.S. § 44-7501.

4 *See Transamerica Ins. Co. v. Doe,* 173 Ariz. 112, 840 P.2d 288 (App. 1992), *review denied* (Ariz. Dec. 1, 1992) (bodily injury although undefined in underinsured motorist coverage encompasses only physical injuries, impairment of physical condition, sickness, disease or substantial pain).

5 *See, e.g., Warner v. Fire Ins. Exch.*, 230 Cal. App. 3d 1029, 1035, 281 Cal. Rptr. 635 (1991) ("tangible property" is understood in "plain and ordinary" sense to mean "property (as real estate) having physical substance apparent to the senses"); *Cincinnati Ins. Co. v. Prof. Data Servs., Inc.*, 2003 U.S. Dist. LEXIS 15859, *21 (D. Kan. 2003) (loss of use of software and data is not "property damage" because neither has "any physical substance [or] is perceptible to the senses"); *Am. Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 96 (4th Cir. 2003) (Virginia law) (same).

government, sovereign or other authority using military personnel or other agents…." A computer hack might qualify as "warlike action" if it was perpetrated by a government, like North Korea's alleged involvement in *The Interview* attack against Sony.[6]

General Liability – Coverage B

Coverage B covers "those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury.'" In turn, "Personal and advertising injury" is "injury … arising out of one or more of the following offenses: … [o]ral or written publication, in any manner, of material that violates a person's right of privacy." Key battlegrounds under Coverage B include the following: "(1) the lack of a 'publication' in many cyber incidents; (2) the lack of a claim for a violation of privacy; (3) the insured or third party's knowing or intentional violations of the law and corresponding policy exclusions; (4) the insured's expected or intended injury and corresponding policy exclusions; (5) the insured or third party's criminal activity and corresponding policy exclusions; (6) the insured's liability for fines, penalties, or other nonmonetary relief that does not fall within the policy's definition of covered Loss; and (7) online activity or intellectual property exclusions."[7]

"Publication." One question is whether "publication" requires a communication to someone else besides the hackers. Some courts have held that there is no publication where there is an absence of allegations or evidence that personal identifying information (PII) has been accessed or otherwise resulted in identifiable harm. Other important questions include whether "publication" requires the insured to voluntarily disclose the confidential information, or merely fail to protect it. Another coverage defense might exist if the suit does not seek damages ***because of*** "publication" that violates "right to privacy" – versus being based on other claims such as negligence per se based on non-compliance with data breach notification statutes.[8]

"Invasion of privacy." The common law privacy tort entails four separate and independent tort claims: (1) Publicity to private life; (2) Appropriation of name or likeness; (3) False light; and (4) Intrusion upon seclusion. In the context of coverage for data breaches, some courts hold that "privacy" only means the right of secrecy (publicity to private life) and does not include the right to be left alone (intrusion upon seclusion).[9]

ISO Form Changes Over the Years. The standard CGL forms have changed dramatically in recent years, significantly narrowing or even eliminating cyber coverage. ISO Form No. CG 00 01 10 01 was added in 2001 and provides that "electronic data is not tangible property."[10] ISO Form No. CG 00 01 12 04 was added in 2004. It introduced exclusion "p" (Electronic Data Exclusion), which eliminates coverage for "[d]amages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data." The ISO Electronic Data Liability Coverage Form, Form CG 00 65 12 04, was also added in 2004. It provides claims-made coverage, subject to exclusions, for an

6 *See generally* Matthew Foy and Jonathan Schwartz, *A Watershed Moment for Cyberinsurance: Sony's Interview Quagmire,* IN-HOUSE DEF. Q., 73-82 (Spring 2015) (discussing potential cyberinsurance implications of *The Interview* attack); *id.* at 77 *(comparing Cedar & Washington Associates, LLC v. Port Authority of N.Y. & N.J. (In re September 11 Litigation)*, 751 F.3d 86 (2d Cir. 2014) (deciding that 9/11 was an 'act of war' even though it was not perpetrated by a state or government), *with Pan Am. World Airways Inc. v. Aetna Cas. & Surety Co.,* 505 F.2d 989 (2d Cir. 1974) (holding that coverage for the loss of the aircraft resulting from a hijacking by the Popular Front for the Liberation of Palestine was not barred by the War exclusion because the incident was not caused by a war waged between two states or state-like entities)).

7 James H. Kallianis, Jr., *Insurance Coverage Issues Implicated in Data-Breach Claims*, FOR THE DEFENSE, 56, 57-58 (DRI Mar. 2015).

8 Perhaps the most significant Coverage B cybersecurity case to date is *Recall Total Info. Mgmt., Inc., v. Federal Ins. Co.*, 115 A.3d 458 (Conn. 2015). The insured was a transport vendor who allegedly lost data tapes containing sensitive data on a large number of employees. A third party allegedly recovered the tapes, but there was no evidence that the information on the tapes was ever accessed. The main "damages" sought were the costs of notification and remedial measures allegedly taken by the owner of the tapes. The court ruled that there was no "publication" absent evidence that information was ever accessed, noting that communication of information to a third party was required to trigger coverage. The court also held that triggering a breach notification statute does not demonstrate personal injury as such statutes "merely require notification to an affected person so that he may protect himself from potential harm."

9 *See Telecom. Network Design v. Brethren Mut. Ins. Co.*, 5 A.3d 331 (Pa. Super. Ct. 2010), *appeal denied*, 38 A.3d 826 (Pa. 2011); *State Farm Gen. Ins. Co. v. JT's Frames, Inc.*, 104 Cal. Rptr. 3d 573 (Cal. Ct. App. 2010).

10 A separate question under the 2001 form is whether "loss of use" is covered. The Eighth Circuit concluded that a claim seeking damages for loss of use of tangible property was found to be covered in *Eyeblaster, Inc. v. Federal Insurance Co.*, 613 F.3d 797 (8th Cir. 2010), where a computer allegedly was rendered unusable due to spyware.

"electronic data incident" that causes "loss of electronic data." As to Coverage B, ISO Form No. CG 00 68 05 09 was added in 2009 and prohibits coverage for claims arising from any statute that "addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information." 2013 Form CG 24 13 04 13 eliminates the offense for "[o]ral or written publication, in any manner, of material that violates a person's right to privacy" from the definition of "personal and advertising injury." New ISO exclusions were also introduced in 2014, including Forms CG 21 06 05 14, CG 21 07 05 14, and CG 21 08 05 14, again, significantly narrowing and/or eliminating cyber coverage.

The clear trend is to eliminate data breach exposures from CGL coverage. Although the window for such coverage may be closing, in any given coverage case, the outcome may depend on whether the policy in question utilizes one of the newer forms. The old forms will continue to get litigated while new forms gradually work their way into usage.

Errors & Omissions (E&O) and Professional Liability (PL) Policies

There might be some coverage for cybersecurity exposures under traditional PL and E&O policies. These types of policies are generally designed to cover a "wrongful act" arising out of the rendering of or failure to render "professional services." Potential coverage disputes might include whether third party claims resulting from professional services are causally connected to data exposure, questions over whether first party costs are not covered, and questions over whether the incident arises from "professional services."

For example, in *First Commonwealth Bank v. St. Paul Mercury Ins. Co.,* 2:14-cv-0019, D.E. 21 (W.D.Pa. Oct. 6, 2014), the plaintiff, a bank, filed a complaint alleging breach of contract seeking coverage under a banker's professional liability policy. The complaint alleged that one of the bank's depositors was targeted by a computer hacker who wrongfully wired roughly $3.5 million out of the depositor's accounts after the depositor had become a victim of malware. The bank refunded the money under a UCC provision requiring a bank to refund a depositor for money lost as a result of the bank's acceptance of a fraudulent wire transfer. After making this refund, the bank notified its insurer, which denied coverage on the basis that the bank had not obtained the insurer's consent before making payment, and thus, the bank allegedly violated the policy's voluntary payments provision. The court rejected the insurer's position and refused to enforce the voluntary payment provision, essentially finding that the UCC repayment requirement was mandatory, not voluntary. *First Commonwealth Bank*'s same reasoning "may also apply to cybersecurity laws and regulations that require a company to notify its customers when customers' personal identifiable information has been breached. . . . Thus, once a data breach is discovered, insurers should have no basis under such a statute to assert that the mandated notifications are 'voluntary.'"[11]

The case of *Attorneys Liab. Prot. Soc'y, Inc. v. Whittington Law Associates, PLLC*, 961 F. Supp. 2d 367 (D.N.H. 2013), *appeal dismissed* (Sept. 18, 2013), arose out of a social engineering scam. The court held that the firm's malpractice insurer did not have to cover a claim against the insured law firm to recover over $150,000 due to a Nigerian check scam. The insured was fraudulently induced by a fake client to deposit a counterfeit check into the insured's bank account and then to promptly wire the bulk of the funds to a foreign bank. Coverage was barred under the policy's exclusion for conversion or misappropriation of funds under insured's control.

Crime Policies

Commercial crime and employee theft policies are generally cover loss of money, securities or property caused by criminal acts of third parties, loss of money or securities resulting from fraudulent fund transfer, loss resulting from employee dishonesty, credit card fraud, and associated expenses. Potential coverage disputes under these policies might arise in data breach cases involving loss of confidential information, loss of intangible or intellectual property, indirect or consequential loss, fines, and penalties.[12]

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11 "Cyberattack Reimbursement Doesn't Require Insurer Consent," *Law360*, 11/10/2014.

12 For example, in *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 691 F.3d 821 (6th Cir. 2012), the court held that DSW was covered for expenses for customer communications, public relations, lawsuits, regulatory defense costs, and fines imposed by Visa and Mastercard under the computer fraud rider of its blanket crime policy. In

Primer on Insurance Coverage *(continued)*

Cyberinsurance Policies

Policy Architecture. Cyber risk may be written as a dedicated standalone policy or added to an existing policy, e.g., as an endorsement. Cyberinsurance policies may provide cover for first- and/or third-party costs of a data breach incident. First party costs generally include forensic examination, cost of hiring privacy counsel, breach notification mailings, public relations, credit monitoring, call center services, and extortion. On the other hand, third party costs generally include claims by private litigants, claims by state attorneys general and other regulators, regulatory fines and penalties, and costs associated with card brands. A review of more than a dozen specimen cyberliability policies from leading insurers yields some common elements:

> Cyberinsurance coverages are sole a la carte, on a claims-made or claims-made-and-reported basis. First, there is data breach liability coverage, which provides defense and indemnity for the insured against lawsuits resulting from a data breach. Second, there is regulatory proceeding coverage, which also provides defense and/or indemnity for the insured against governmental investigations resulting from a data breach. Third, there is response cost coverage, which provides for forensic investigation, counsel regarding notification requirements, credit monitoring and identity restoration services, crisis management/public relations services and call centers. Typically, all of these coverages are subject to a general aggregate, and sub-limits for many of the coverages are common.[13]

In addition to the coverages described above, other first-and third-party coverages are available for purchase in connection with a cyberinsurance policy, including personal injury liability coverage (*e.g.*, intellectual property infringement, defamation, invasion of privacy, etc.), business interruption coverage, reputation coverage, and data asset coverage (*i.e.*, restoring the insured's own systems following an attack.[14]

"The First Cyberinsurance Case." *Travelers Prop. Cas. Co. of Am. v. Fed. Recovery Servs., Inc.,* No. 2:14-cv-170 TS, 2015 WL 2201797 (D. Utah May 11, 2015), has been referred to (debatably) as the first cyberinsurance coverage case.[15] In *Travelers,* the insured was hired to provide processing, storage, and other handling of electronic data for their customers. After agreeing to share certain information with a customer's predecessor, the insured allegedly omitted certain information. The insured sought coverage under a "CyberFirst" policy that included a Technology Errors and Omissions Liability Form. The policy provided in part that Travelers "will pay those sums that [Federal Recovery] must pay as 'damages' because of loss…caused by an 'errors and omissions wrongful act'…" The insurer agreed to defend under a reservation of rights, and later filed a declaratory judgment action. The court in the coverage action ruled that the loss was not caused by "any error, omission or negligent act," because in order to trigger coverage, "there must be allegations … that sound in negligence." Here, the court observed that the allegations only involved the knowing withholding of information. Accordingly, the first cyberinsurance case might not be much of a landmark, in the sense that it turned on a run-of-the-mill intentional conduct issue rather than any complex technical analysis.

Although the wave of cyberinsurance coverage litigation may only just be beginning, some likely areas for coverage disputes are discussed below.

Bodily Injury/Property Damage. There have been reports of cyberattacks causing physical damage to a Turkish pipeline, Iran's nuclear centrifuges, and a German steel factory. The future will likely bring more cyberattacks that result in bodily injury/property damage, with the proliferation of smart homes, smart energy grids, smart cars, drones, etc. Cyberinsurance is typically intended to address non-tangible data breach risks.

Universal Am. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 16 N.Y.S.3d 21 (N.Y. 2015), the court held that a "Computer Systems Fraud" endorsement covering "Loss resulting directly from a fraudulent … entry of Electronic Data … into … the Insured's … Computer System" did not cover fraudulent billings submitted by an authorized user. In *Apache Corp. v. Great Am. Ins. Co.*, No. 4:14-cv-00237 (S.D. Tex. Aug. 7, 2015), a fraud committed by a phone call and email on vendor letterhead with the perpetrator's bank account information involved "loss resulting directly from [computer fraud]" and thus triggered coverage under "Computer Fraud" coverage of crime policy.

13 Foy and Schwartz, *supra*, at 79.

14 *Id.*

15 Roberta Anderson, "5 Takeaways From The First Cyberinsurance Case," *Law360,* 5/18/15.

Primer on Insurance Coverage *(continued)*

Future litigation will likely include disputes over whether such policies also cover cyberattacks resulting in tangible injuries.

"Insured"/Rogue Employees. Many cybersecurity incidents are caused by insider negligence or rogue employees. Therefore, it is important to analyze who qualifies as an "insured" under the policy, and whether, for example, one insured's intentional act of hacking would eliminate coverage for other insureds.[16]

Minimum Security Measures. If an insured states in its application for cyberinsurance that it follows certain "minimum required practices" of good cyber hygiene, then coverage might not exist for a data breach allegedly caused by the insured's failure to maintain those minimum practices.[17] Taken to the extreme, this coverage defense might draw an accusation that coverage is illusory. After all, anytime there is a security breach, there probably was – at some level – a failure to follow good security practices. On the other hand, the insured cannot reasonably expect coverage for the cyber equivalent of leaving the door to the bank vault wide open. And the carrier is entitled to reasonably rely on assurances made in the application.

Regulatory Proceedings. A data breach incident might result in enforcement action brought by state attorneys general, state and federal agencies, and/or other regulators. With respect to regulatory fines or penalties, some cyberinsurance policies provide both defense and indemnity, while others are defense-only (and some policies have wasting limits), with no coverage for fines/penalties.

Statutory Damages. Another issue is whether statutory damages in private suits are covered. Individual injury from a data breach is difficult to quantify. Data breach statutes try to address that with statutory/liquidated damages, which may apply on a per-victim and/or per-violation basis. These statutory damages can quickly skyrocket, which is partly why they are of concern for insurance and are already being litigated.[18]

Payment Card Industry ("PCI") Fines. Some policies limit coverage of "payment card industry fines" – penalties charged by credit card associations for not complying with data security standards.[19]

Social Engineering. Phishing, spear-phishing, CEO fraud, and other social engineering scams present interesting coverage questions. A policy might not afford coverage where the insured does not get "hacked" in the traditional sense, but instead, is merely tricked into voluntarily doing something stupid.[20] Separate endorsements might be available for more robust

16 *Cf. Am. Family Mut. Ins. Co. v. White*, 204 Ariz. 500, 65 P.3d 449 (Ct. App. 2003) (holding that phrase "any insured" in an exclusionary clause in an insurance policy means something more than the phrase "an insured"; the distinction between "an" and "any" is that the former refers to one object and the latter refers to one or more objects of a certain type, and therefore, use of the phrase "any insured" in a policy exclusion bars coverage for any claim attributable to the excludable acts of any insured, even if the policy contains a severability clause).

17 *See Columbia Casualty Co. v. Cottage Health System,* No. 2:15-CV-03432 (C.D. Cal. 2015), a case in which the insurer argued that coverage was barred because Cottage failed to follow the cybersecurity procedures it identified in its policy application. According to the complaint, the data breach occurred because the file transfer protocol (FTP) settings on Cottage's Internet servers permitted anonymous users to access patients' information via Google Inc.'s search engine. The *Columbia* case was later dismissed without prejudice pursuant to an ADR provision.

18 *See, e.g. Doctors Direct Ins., Inc. v. Beaute'e'mergente, LLC*, 38 N.E.3d 116 (Ill. App. Ct. 2015) (holding that statutory violations arising from blast text solicitation of Botox services did not allege a "privacy wrongful act" within the meaning of the "cyber claims" endorsement; the TCPA "only prohibits the actual making of certain kinds of calls," and it "does not address how a caller might control or use personally identifiable financial, credit or medical information before a call is made"; the Consumer Fraud Act prohibits conduct that violates public policy established by other statutes, including the TCPA; and neither the TCPA nor any other statutes cited by plaintiff were associated with "the control and use of personally identifiable financial, credit, or medical information" and therefore they were not covered under policy).

19 *In New Hotel Monteleone LLC v. Certain Underwriters at Lloyd's of London et al.*, case number 2:16-cv-00061 (E.D. La.), a hotel filed suit challenging the coverage limit of a cybersecurity policy following a data breach. The hotel was allegedly hacked in 2013 and again in 2014. The policy provided for a $3 million coverage limit but allegedly also contained an endorsement that, in the event of another attack, would limit coverage of PCI fines to $200,000. The insurer allegedly took the position that the PCI fine endorsement applied not only to the security penalties but also to the fraud and reimbursement claims and that the hotel would only be covered up to $200,000 – not $3 million. This is a new 2016 case where, as of this writing, Lloyds has filed a motion to dismiss on the basis of an international arbitration clause.

20 *See, e.g., Medidata v. Federal Ins. Co.*, case no. 1:15-cv-00907 (S.D.N.Y. 2015) (insurer sought summary judgment arguing perpetrator did not actually "hack" into insured's computers, where insured's employees were allegedly fooled into wiring $4.8 million to a fraudulent account, and policy covered "direct loss . . . resulting from Computer Fraud committed by a Third Party."); *Ameriforge Group Inc. v. Federal Ins. Co.*, case no. 2016-00197 (Harris County, Texas) (Texas manufacturer filed suit for breach of contract, bad faith, and other claims, seeking coverage under Federal's policy after the insured was allegedly duped into wiring $480,000 overseas by a fraudulent email from a CEO imposter).

Primer on Insurance Coverage *(continued)*

coverage of social engineering risks.

We are just beginning to scratch the surface of cyberinsurance. Other interesting coverage questions will likely include the following: (1) Does coverage extend to data breaches caused by the named insured's cloud vendors, and how is this affected by additional insured endorsements and contractual liability provisions? (2) Do sublimits apply? (3) What is the policy's definition of "confidential information" to qualify for coverage in the event of a breach, *e.g.*, for an insured law firm, does it include only traditional "PII" or does it extend to entire client files? (4) Does the policy cover only electronic data or does it also cover loss of tangible items such as a laptop or a flash drive? (5) Do any geographical limits preclude coverage, *e.g.*, European Union data protection laws? (6) Since many data breaches can go undetected for years, what is the policy's retroactive date? These issues and more will surely be litigated in the coming years. For coverage lawyers, it is an exciting time.

Small Firm Practice In The 21st Century Challenges, Advantages, Opportunities

A Collaborative Effort by and among the following FDCC Members who presented at the FDCC Winter Meeting, San Diego, March 1, 2016:

Christian J. Steinmetz, Alison R. Christian, Kile T. Turner, and David J. MacMain[1]

Alison R. Christian, Esq.

INTRODUCTION

It is interesting to look at the changes that have occurred in the modern law practice given the advent of new and improved technologies, the strategies employed by lawyers in marketing, and the unavoidable fact that fewer and fewer cases are being tried to juries. The exponential explosion of the number of lawyers in the wake of *L.A. Law* and other television shows of the 80s and 90s mandates that we each stay at the top of our game(s), because there are 2-3 lawyers waiting in the wings to replace us. Never has competition among us been greater. On top of keeping up with the changes in substantive law, it is vital that each of us embrace the changes and adopt the trends in the practice of law brought about by innovations in technology, marketing, and management. This must be balanced with an ever-more cloudy and muddled world of ethical considerations which sometimes accompany, but more often follow, these changes in the practice of law.

There are just over 1.3 Million licensed lawyers in the United States. Would it shock you to learn that most lawyers practice solo or in small firms of 10 lawyers or less? Probably not, because the prevalence of the number of solo practitioners will always abound in a profession known for its members' desire to control their destinies. Still, the latest statistics from the American Bar Association (ABA) demonstrate that 49% of us practice solo and 20% practice in firms of 10 or less lawyers.[2] Looking at it from another angle might bring about the proverbial *shock and awe,* because among those of us who practice in firms of any size, 89% of us practice in firms of 10 or less lawyers. This lies in comparison to on 5% in firms of 21 or more lawyers.[3] Taking a moment to step back and look around in our profession will open one's eyes and enable one to understand the role that the small firms play in our profession.

OVERVIEW OF THE IMPACT AND ROLE OF SMALL FIRMS

Small firm practitioners typically develop and implement the cutting edge strategies which many within the rest of the profession later adopt and follow. As we discuss below and as we will examine during our presentation, the wonderful opportunities a practitioner enjoys within smaller firms are accompanied by challenges unique to smaller firms, challenges which require self-awareness, creativity, and a willingness to think outside of the proverbial box.

Many lawyers begin their careers with mid-size and larger firms only to leave them to form smaller *"boutique"* firms which may specialize in one or a few areas of practice. Many small firms' genesis lies within a common search for change in the method of practice among its founders. Liberation from non-billable management responsibilities, the freedom to practice in multiple practice areas,

1 The Federation of Defense & Corporate Counsel (FDCC), composed of recognized leaders in the legal community who have achieved professional distinction, is dedicated to promoting knowledge, fellowship, and professionalism of its members as they pursue the course of a balanced justice system and represent those in need of defense in civil lawsuits. To learn more about the FDCC, visit their website at www.thefederation.org.

2 ABA Lawyer Demographics Table – 2015 http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.pdf

3 Id.

more control over one's hours and one's presence in the office are among the leading changes sought by those who leave larger firms to form small firms.

Conversely, the solo practitioners who join often seek the strength in numbers, lateral assistance, and the security of being able to practice with other specialists and like-disciplined lawyers. Sharing responsibilities for management, technology, and marketing are often significant drivers for the solo practitioner who decides to band with others.

The common theme among them all is a desire for a change from the present to a new environment in which the lawyer can practice his or her trade and service clients' needs more effectively without compromising the ultimate reward – making a living. However, the revolution does not cease once new business cards and stationery are printed – it is only beginning.

In smaller firms, the "leaner and meaner" culture leaves much less room for any vestiges of a reluctance about welcoming change, because a small firm lawyer's success (and survival) frequently depends on the ability to sculpt his or her practice to the lawyers' clients' variety of needs. It is not just enough that smaller firms' typically lower overhead results in lower hourly rates or fee structures. We have seen the resulting effect of rate-cutting wars - the quality of representation eventually suffers. Ethical corners are cut by lawyers having to take on too much work to fulfill quotas, goals, and requirements or untrained or inexperienced baby-lawyers are given too much responsibility, because only their hourly rates can accommodate the slashed fee structure.

The 21st Century client is much more aware, savvy, and attuned to needs for access, value, and successful representation. Few corporate or institutional clients are without someone within who is a veteran of over-billing or the effects of rate-cutting. The 21st Century client understands that it will have to pay for good legal representation, but it also recognizes that the traditional attorney-client relationship model has changed. Instant access (and responses) through email or texting, accountability for all billing entries, and the ability to control the litigation landscape are *de rigueur*. Certainly, the characteristics of the needs of *Coca-Cola* or Apple will differ from Lulu & Coco's Custom Interiors, LLC, but the motifs of access, value, and success pervade both.

A small firms' flexibility to meet clients' needs is maintained through often unique and ever-revised approaches to technology, marketing, and internal management. In a smaller firm, implementing new methods, policies, and introducing new technology is much easier among 6 lawyers than among 15, 50, or 500. Levelling the playing field among 9 lawyers is a much easier task for management than to do so among 19 or 59. Finally, more and more, the specialized experience among many small *"boutique"* firms' rosters enable those firms to market themselves as business-partners and collaborators with larger firms where the client can get the best of both worlds.

Still, what may seem like a brave, new world in our profession is not without a whole host of ethical concerns which are somewhat unique to smaller firms. Questions never reached by the solo practitioner whose practice could not withstand the burden of the business and questions never considered by the larger firm practitioner whose IT department or marketing vendor address these issues are those which small firm practitioners analyze, address, and ensure continued protection of clients' interests on a daily basis.

Small Firms & Technology: A Match Made in Cyber Space

Small firms have several distinct advantages when it comes to staying current with technology. First, it's easier to turn a small ship. There are fewer decision-makers in a small firm and if changes need to be made, they can happen relatively quickly. Second, many of the technology products charge for access on a per-user basis. At a small firm, fewer users equals lower costs. Third, technology exists to improve efficiency. Small firms already stay competitive by offering lower rates than large firms. Adding a layer of even minimally-improved efficiency through technology will result in dramatically more competitive rates. As solo practitioner and technology columnist Jeff Binnion said, "Legal technology is about finding ways to work more efficiently so you can spend more time focusing in substantive things and less time doing mundane tasks." This portion of the article will explore various ways in which small firms can provide better client service, improve their bottom-line, and free up valuable attorney time through the use of technology.

Small Firm Practice In The 21st Century *(continued)*

1. Adventures in the Cloud: Document Management.

Our firm maintained paper files for years. We stored electronic documents on a physical server that lived in a mysterious, and somewhat ominous, locked room. We spent a great deal of money on off-site storage for closed files, oftentimes long after expiration of the State Bar's retention policy. The result was unnecessary overhead. There were hard costs associated with these antiquated procedures (e.g. paper, ink, staples, etc.), but there were soft costs as well. We did not make efficient use of our leased space because we storing paper files and large servers, we relied upon more support staff than a small firm should, and we could not provide our clients with the instant responses they expect from their lawyers. Our lives changed when we ditched the paper, quit the servers, and said so long to storage!

Last year, we successfully made the switch to a cloud-based document management program that allows us to store an unlimited amount of documents (from over 200 file types), share and access content remotely and securely, and collaborate both internally and externally on documents. It only cost $1,000 to make the transition and the entire office was up and running (almost seamlessly) after a few, free training sessions. Our monthly costs are also very manageable, at $20/user. The process also allowed us to determine which files we needed to maintain as open, which could be closed, and which could be ethically destroyed. So it was a win-win-win. Here are some of the features I enjoy most:

- Our entire database is searchable from any of my devices, any time. Need to find that memo on reasonable expectations and can't remember the file name? Want to show an associate a sample request for a federal fee application? Sitting at a mediation and need a copy of a specific policy? Type the search terms in and a list of all relevant documents is instantly generated. You can then filter the results and get exactly what you need with the speed of a Google search.

- We can collaborate intra-office on the same document and maintain all prior versions. When I am ready for my assistant to format a letter or pleading, I can tag her with a Twitter-like handle within the system and she will instantly receive notification that the document is ready to access. I even have the option of locking a document to prevent others from making changes while I am working in it.

- We can send electronic links to large document files, even to non-system users. One of the features that our clients, opposing counsel, and associates have appreciated is that we can quickly send them secure links to documents without having to send multiple emails or risk a bounce-back because the files were too big. For example, when we get a subpoena response with hundreds of pages, we can bates-label the response, upload it, and circulate a link within a matter of minutes. If you are curious about what the recipient sees, email me and I can send you a sample link.

- We can rest easy knowing our documents are as secure as possible. One of the biggest concerns that we had when moving to the cloud was maintaining our ethical obligation of confidentiality to our clients. The system uses layered encryption both in transfer and at rest. Their data centers use "biometric entry authentication, closed-circuit video monitoring, and 24/7 armed guards" and "N+1 or greater redundancy for all network components and system components."

2. Improving Cash Flow: Electronic Billing Programs.

One of the most important steps in keeping the lights on at a small firm is maintaining steady cash flow. That means getting the bills out the door on time, getting our invoices paid promptly, and tracking realization so we can make improvements. Many, if not the majority, of our clients shifted to electronic billing systems over the last several years. Our firm needed to adapt in order to meet their changing needs. In addition to our "associate lunch incentive" program (which I'm happy to talk about if you have any questions) we now rely heavily on our

electronic billing software to keep the trains moving on time.

There are several practice management products on the market, but the two that our small firm considered best for our purposes after extensive vetting each offered features that are invaluable to a small firm: the ability to enter and release time online with task codes for electronic billing; maintaining our client conflict database; and creating invoices and general ledgers. They also track, however, the financial "health" of the firm.

With the LMS software we elected to use, we have 24/7 access to a Business Intelligence dashboard. I can tell how many matters we have open, how many hours a particular associate has billed each month (and can also see non-billable time they have tracked, such as marketing and pro bono hours), how much a client has paid us to date on a file, the current amount outstanding on any matter, our billing rates for that file, and how our profitability compares to the same time last year. I can also generate reports that show me each associate's realization rate, the amount of time that has been written off internally, the amount of time that has been written off by clients, and their effective hourly rate. This type of information allows our firm to make corrections on a quarterly basis, improve our efficiency for clients, and maximize profitability by year-end.

3. Save Precious Time: Document Review.

At our year-end partners' meeting we talked about how much the practice of law has changed over the course of even the last five years. We receive electronic documents in higher volume than ever before, yet there is a growing expectation we will be able to review these documents more quickly and efficiently than ever. We need to analyze, synthesize, and organize an incredible amount of information – without the teams of litigation paralegals and young associates that are available at large firms. The other day we received a flash drive containing 7 gigabytes worth of data for expert disclosures. That was not even the parties' disclosures; it was only the experts. How does a small firm begin to process that kind of information?

The answer for us is simple: we rely heavily on electronic document review tools. We learned through trial and error that every associate has different review methods and preferences, and it is a waste of time to force them to use the same tools. We have two associates who prefer to review and physically mark-up documents on their iPads; the other two prefer to use their laptops. For our Apple Team, the product we selected allows associates to remotely access thousands of pages of paper and to mark-up the documents as though they were printed in front of them (e.g. make handwritten notes, highlights, flag pages, etc.) Our PC Team, however, prefers a different product which allows them to review and edit PDFs, create bookmarks, and cull out important pages to save as stand-alone documents. This team usually maintains a working internal memo in a Word document and can easily jump back and forth between different formats on their laptops.

Once the first-round review is complete and the important documents have been identified, we turn to other platforms for synthesizing the information and focusing the case strategy. We learned through trial and error that the some products did not work well for ground-up review but were better for organizing the case after necessary documents had been identified. Also, once we streamline the documents, we can then create "key issues", "key facts", and a cast of characters that can be color-coded, annotated, and compiled into hyper-linked summaries. This feature is very helpful in creating deposition outlines or trial witness examinations, for example. A "key facts" feature also has a field to enter important dates. These dates can then be imported to our internal platform and within seconds can create a visual chronology of the case.

4. Ace(ing) Hardware

Technology evolves daily. Hardware depreciates daily. It is seems like a lose/lose proposition. That is why many firms approach technology like some people approach cholesterol – waiting until there is a problem to make changes. Small firms cannot afford to take those kinds of risks, however. They have to be proactive about planning for regular technology upgrades to avoid detrimental business interruptions. The other day we upgraded one aspect of our system, and my laptop was out of commission for an hour and a half over lunch. I felt like my arms had been cut off. I cannot imagine what I would do if my laptop crashed completely!

Small Firm Practice In The 21st Century *(continued)*

That is why we budget for hardware replacement every 3-5 years. We made a shift over the last few years away from desktops. Now, we lease laptops for every lawyer, our office administrator, and both paralegals for less than it cost to purchase them. We also have the option to purchase them for $1 (no, that's not a typo) at the end of the lease. That way, when the hardware becomes outdated, we can easily upgrade without being left with a bunch of equipment that has nominal street value. We also issued firm iPad Airs to all of our attorneys through a contract with our internet provider. The contract included a "cost" for leasing the devices that was offset by a credit in the same amount toward our internet. Again, this was win-win.

These mobile devices are ideal for a small firm practice. Our lawyers need the ability to work remotely, both for associate happiness purposes and as a practical reality. If we are traveling for a mediation or a deposition, we need to deliver prompt client service. With our laptops and the software described above, we are equally efficient regardless of whether we are at the office. Our people also appreciate the ability to change their scenery throughout the day. After the wave of media attention on how "sitting is the new smoking" our office made stand-up workstations available to all of our employees. Because one of our firm cultures is "Be MacGyver: Do More With Less", we also found a way to convert the $25 Ikea coffee table into a dual-level stand-up desk. Laptops and iPads worked seamlessly with these new stations and take up much less space than traditional desktops.

5. Cyber Security: What You Don't Know Can Hurt You.

No discussion of firm technology would be complete without mentioning cyber security. Even small firms cannot afford to ignore the risks posed by cyber threats. There are several free antivirus software products available (although the "free" products are geared primary for personal use). Small firms can also look into the best commercial antivirus products for 2016 (PC Mag and others) that are available for purchase. Our firm has had success with a combination of different, but affordable software products. In addition to the security features built into our Windows platform, these products create an added layer of protection that helps me sleep better at night.

These products cannot defend your firm from attacks unless you are also mounting a good offense. If your employees, like ours, are using firm-issued mobile devices or personal devices to access company information you should have several policies in place. First, I recommend a BYOD policy that sets forth parameters for who can use what technologies and where. For example, can employees connect their cell phones to the firm's wireless internet? Can employees download a firm platform app to their phone and access firm documents remotely? If so, under what circumstances? If a device goes missing, how does the firm locate and potentially disable and/or wipe that device remotely? Implementation and explanation of these policies will help protect your company. There are several outside resources available to analyze your firm's current security health if you want to know how you rank.

The next policy that every firm needs to have is a cyber liability insurance policy. This is particularly so for small firms who do not have as many resources available to respond in the event of a security breach. These types of policies are becoming increasingly common, and some clients are actually requiring them for law firms in addition to professional liability policies. Costs for notification, forensic investigation, and fines and penalties can sky rocket quickly, even if no lawsuit is filed. In addition to the protection against third-party liability and first-party losses, such policies often provide risk management services that give firms access to IT professionals and other experts who can help implement better protocols. Our firm learned a great deal through the application process about our weaknesses and little steps we could take to enhance our security. For example, we implemented double-authentication for our devices, increased the length of our passwords, and improved our BYOD policy.

Technology is an inescapable part of the legal professional and its prevalence will only continue to increase. These tips are some of the ways that our small firm has managed to stay current and competitive without breaking the bank.

Marketing the Small Firm Advantage

There is a prevalent idea in the legal world today that bigger is better-the bigger the firm, the better the firm. All one has to do

is look at a list of "prestigious" firms to see that the more lawyers a firm has, the more likely it is to be considered "elite". Perhaps that is what is behind the current merger trend where we are seeing firms rushing to add size at an unprecedented rate. Ironically, law firm failures (Dewey & Leboeuf and Heller Erhmann are just two examples), are happening at an unprecedented rate as well. As more firms merge and become bigger, a door of opportunity is opening for a new player on the block- the small firm.

Small firms are now being called "boutique", which may better emphasize the fact that just because a firm is small, it can still provide excellent representation to its clients. In fact, in many instances, a boutique firm can offer *better* services and at a significantly lower price. Although we practice in the age of law firm mergers, now more than ever, the unique characteristics of the small firm are more in demand than ever before.

Better, faster, cheaper: those three words describe the new focus on legal spend. Not only are clients seeking (or more accurately, demanding) the best legal representation, but now the expectation is that the high quality legal representation should be provided more quickly and at a lower cost. While this may seem like a tall order if not a complete pipe dream, the reality is that better, faster, and cheaper legal representation is available—by hiring a smaller firm.

In a world where the battle worn trial lawyer with years of experience—and the battle scars to prove it—is a vanishing breed, hiring the most expensive lawyer may not get you the most *experienced* lawyer. This ironic trend in our profession may defy economic logic because usually the more rare the skill, the greater the price. However, because the value of the case is directly related to what the expected jury verdict will be — there will always be a need for experienced and skilled trial lawyers. And most of these trial lawyers can be found in smaller law firms.

One of the biggest advantages smaller firms have is that their lawyers usually have more trial experience. As jury trials become less frequent, corporate clients are going to have to look further to find lawyers to try their cases. Therefore, we can expect that the lawyers will the most trial experience will be the defense bar leaders in the future - and a majority of those lawyers will be from small firms.

One of the reasons large firms are considered "prestigious" is their strict hiring criteria and how they hire only the top students from the top law schools. Indeed, it is true that graduates from prestigious law schools are more likely to end up at larger firms—which pay larger salaries to attract and keep the "top talent." However, it is interesting to note that not a single *US News & World Report* ranked top 10 law school made the list of Top 10 Schools for Advocacy. Thus, while large firms are focused on hiring those with the best law school grades, it is not clear that they are hiring the top litigation talent. Avoiding time consuming tasks in law school such as mock trial and moot court competitions may have helped the students do better with their grades, but also made them less prepared for becoming a *real* litigator and defending their clients' interests in a real courtroom. As one commentator noted based on his research, *"*[A] *ttorney* [skills] *accrue from the development of practice skills, rather than from the more typical theoretical learning provided by most law schools…"* The author goes on to note that research *"calls into question law school grades and honors as measures of competence…"*[4]

Smaller firms frequently have business models closer to that the businesses they represent, because they take specifics steps to model their operation to that of principal or cornerstone clients. More and more, 21st Century clients tend to hire more on ability than pedigree.[5] The truth is that it is the clients that pay the law firm salaries, and there is no indication that success in law school will make one an effective and successful litigator in the courtroom.

The disconnect between the high associate billing rates and the lack of experience has been recognized by Corporate America. For example, Brian Brooks, general counsel for Fannie Mae was recently quoted as saying that the high cost of junior lawyers exemplifies the "broken" law firm profit structure.[6] The article

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4 Lawrence Kreiger, The Geo. Wash. L. Rev. Vol. 83:554, 591; 2015.

5 Consider that when included on surveys, the Princeton law school is a perennial top 10 law school despite having closed its doors for good in 1852 after graduating a total of 11 lawyers. (Yale Daily News, March 23, 2011).

6 Martha Neil, GC's fix for 'broken' law firm profit structure: Cut associate billing rates; Bloomberg BNA, Aug. 11, 2015.

goes on to explain that major law firms make money by leveraging lots of associate hours for each rainmaking partner. However, companies are becoming more astute in their allocation of legal spend by no longer agreeing to this practice. While the willingness to pay high rates for senior lawyers remains, the plethora of fees generated by file-churning among less experienced mid and lower level attorneys no longer justifies the rates being charged at more bulky firms.

A coming trend is that more and more, one sees smaller firms receiving referrals from large firms in conflict situations or being associated by larger firms in situations where specialized or local representation is needed. The large firm does not have to worry about a competitor stealing the client, but can still be confident that the client is getting excellent representation. Because of this evolving dynamic, smaller firms tend to have a more collaborative relationship with larger firms, especially amongst firms that represent businesses and corporations. This type of relationship underscores the fact that small firms can provide top drawer services to clients in the areas where the particular firm excels.

One of the best advantages of a smaller firm is that its lawyers are not weighed down by all of the obligations necessary to run a large law office. A senior partner at a large firm may serve on various committees that decide the operation and management soaking up non-billable time that is recouped through higher rates and work by less experienced lawyers. The smaller the firm, the less likely a significant staffing hierarch needs to be established for a particular matter, and numerous partners to not have to be consulted in order to make important decisions on the case. Further, conflicts of interest are not only less likely to exist, but they can be accurately determined much more quickly as well. Large firms often employ one or more people to manage the firm's potential conflicts, which adds to the cost of overhead which is ultimately borne by the client in the form of higher fees. In fact, according to legal consulting firm Altman Weil, *"There are no economies of scale in law practice in the sense that larger firms always have higher per lawyer overhead, on average, than smaller firms."*[7]

Finally, as discussed elsewhere in this paper, technology has done a lot to level the playing field like never before between firms of disparate size. In the past, only a big law firm could afford both the books and the extra space of an extensive library managed by a college educated librarian. With the advent of the internet, a 10 person firm has the same research capabilities as a 100 person firm. The only difference is that the billable rate of the person doing the research is much lower at the small firm.

In conclusion, small law firms have many competitive advantages over their larger counterparts. At a time where talented and experienced courtroom lawyers are at a premium, they are most likely to be found at a firm with fewer lawyers. Not only do these lawyers typically have more experience, they also work for lower rates due to lower overhead and great efficiency. Larger firms with higher hourly rates do not always correlate to superior courtroom skill. Firms of all sizes are beginning to work together to the benefit of clients. Finally, technology now allows small firms to access the same information. Therefore, "better, faster, cheaper" is more readily obtainable – if you hire a small firm.

Small Firm Management

Managing a small law firm has unique challenges – but also wonderful opportunities. Small firms are leaner and meaner, and often better able meet client's needs, adopt to changes and offer cost-effective legal counsel. Conversely, managing a small firm requires greater creativity, and a realistic recognition of what the small firm capabilities are – and what they are not. Staff stability, quality of life, effective use of technology and non-economic rewards are particularly important issues that small firm management must be cognizant of and able to meet. Successful small firm managers need to be able to wear multiple hats (e.g. rain-maker, practitioner, manager, and cheerleader) and be particularly smart about delegation and using other lawyer and staff talents.

Having been (1) a partner and practice group leader at a large City law firm of 175+ lawyers with 3 satellite offices for 19 years, (2) a partner and practice group leader at suburban firm of 30+ lawyers for 4 years, and (3) a founding member and managing partner of an 8 attorney firm for the past 3 years, I have seen management from various angles

7 Ward Bower, *"Why the Future Looks Good for Smaller Law Firms"* Altman Weil, Survey of Law Firm Economics.

Small Firm Practice In The 21st Century *(continued)*

and perspectives. I have seen the good, the bad, and sometimes the 'ugly.' I have seen the pros and cons of each size firm; what each type of firm is well-equipped to do; and what each size firm is challenged to do. What follows is a series of bullet point issues, things to consider, and 'food for thought' from a small firm management perspective. These are no particular order. There is no 'right' answer(s) - it is **your** firm, but it is important that you think and talk about these issues, and 're-talk' and 're-think' about them each year as things, people, perspectives and goals change.

- Partnership structure
  - Inclusive and books are open vs. closely managed and information is limited?
  - Equal equity or one-partner dominated?
  - Age of partners?
  - Is there a mentor partner(s)?
  - Young growing partner(s)?
  - Is there a need to consider succession? If so, when – 5 years, 15 years?
  - Is the firm expected/ desired to grow, shrink, or stay the same size?
  - How is change in ownership interest handled?

- Management (internal) of Firm
  - Dictator? Consensus? Democracy?
  - Partners / Management must "model" desired behavior and work-ethic
  - Understanding and flexible . . . but "NO" is necessary
  - Consistent application of rules

- Management (external) of Firm
  - Common theme / message to outside world, clients and vendors
  - One voice and consistent approach
  - What do you want the firm to be "known for?"
    - One prominent lawyer(s)
    - Type of law or practice area
    - Client perception
    - Bar perception
    - Court perception

- Business model
  - What is target business(es)?
  - Do you prefer/expect the firm to be a general practice?
  - Is there a common theme to the 'type' of business you do currently?
  - Is there a desire to transition to a different or additional 'type' of business?
  - Are there clients you want to 'fire' or types of business you want to avoid?

- Rate structure?
  - Does it vary with practice area?
  - Does it vary with client?
  - Does differing rate structures offer positives? Negatives?

- What is the 'firm culture?
  - Profit driven?
  - Quality of life?
  - Growing, or happy to stay the same size?

- What is the 1 year plan? 5 year plan? 10 year plan?
  - Do the members share the same vision?
  - Are the member in the same 'life/career stage'?
  - Does it vary by member?

- What is 'rewarded' through financial compensation?
  - Origination?
  - Billable Hours?
  - Track / get credit for non-billable hours ["A" (Administrative), "B" (Billing) and/or "C" (Client care or development)]?
  - Client Relationships / Contacts?
  - Management / Administration?

- What is 'target' associate? "Baby" lawyers or "Seasoned" veterans or some combination of both?
  - Baby lawyers cost less . . . need more guidance and direction . . . greater turn over . . . possible greater potential . . . work rate/life-work balance may be different due to generational issues and/ or 'season of life'
  - Seasoned lawyers cost more . . . can take on greater responsibility . . . less likely to leave – but can also more likely to take business . . . motivated differently

- Staff retention – both associate and support staff
  - Loss of 1 lawyer at 8 person firm = loss of 25 lawyers at 200 person firm
  - How do you retain and keep long-term?
    - Salary?
    - Bonus?
    - "Ownership"?
    - Investment in development?
    - Quality of life?

- Each attorney is differently motivated.

- Support staff
  - Office manager, secretary and paralegal?
  - Ratio to attorneys?
  - Generalists / cross-trained
  - What, and how much, is delegated?
  - How dependent is firm on any one or more support staff specifically?
  - Which of their tasks are billable?

- What is done in-house vs. use of outside vendors
  - Accountant
  - Business advisor
  - Bookkeeper
  - IT Company
  - Website
  - Billing coordinator

- Financial Health
  - Careful screening and selection of clients
  - Retainers up-front and replenish
  - Diverse business and/or source of business
  - Monthly A/R review and calls to clients if 90+ days overdue

- How much emphasis / money spent on:
  - Associate development
  - Seminars and CLEs
  - Organizations and memberships
  - Client development and retention

- Work style and location:
  - Actual office location
  - Work at home v. expected to be in office

- 'Espirit de corps'
  - Partner meetings
    - Monthly
    - Location
  - Associate Meetings
    - Monthly / Quarterly
    - Mentoring / Lunches / Tag-alongs
  - All-Office Meetings
    - Lunches
    - "Free lunches"
  - Flexibility vs. Rules
    - Family / Personal Issues
    - PTO days
    - Work at Home
  - Dress Code
  - "Snow" days and "holidays"
  - Part-time vs. Full-Time

CONCLUSION

While all recognize that all lawyers, not just small firm practitioners, deal with technological, marketing, management, and ethical issues on a regular basis as part of meeting the obligations within our profession, it is clear that the overwhelming majority of firm practitioners in the United States practice in small firms. It has been said that law follows society and technology. Accordingly, it is most often in small firms that the profession sees coming trends and the first signs of the continual reinvention of the self to remain relevant and successful from a business perspective.

This paper looks at the practice of law in the 21st Century from the perspective of 4 small practitioners from the Northeast, Southeast, and Southwest regions of the United States. The issues each sees are identical, no matter what region the practice lies. While small firm practitioners often enjoy greater freedoms and control of their respective destinies than their larger firm counterparts, those small firm benefits are balanced by the greater "ripple effect" that an individual lawyer's decision has on the firm as a whole. The good news is that while the environments are radically different in small firms than in larger firms, trends among the practice show a trend toward collaboration and self-recognition among both camps.

One might be inclined to say that small firm lawyers might have more freedom to shoot from the hip, but with that, they are required to have better aim.

AN OPEN LETTER TO AADC MEMBERS
- FREE MEDIATIONS -

(From Jack Levine, a Past President of AzTLA)

Dear AADC Member,

Because of my passion for mediation, which goes back many years, I am reaching out to all AADC members to accept me as a neutral mediator for your cases. Because I have had a strong association in the past with the plaintiff's bar, until I can gain the trust and acceptance of AADC members as an absolutely neutral mediator, I am offering free mediations. As a mediator, my only goal is to get each case settled. It is of absolutely no interest to me, whether one side or the other gets a good deal or a bad deal in a mediated settlement, I will lean on each side equally in an effort to reach a settlement, which, to a mediator, that is the only thing that really matters, because one's settlement success rate is what builds your reputation.

A number of years ago, when I was the principal mediator for the local office of the American Arbitration Association, I had a settlement success rate of 87.8%, in liability insurance claims, the highest rate in their history. Whatever decision you reach concerning your willingness to accept me as a mediator for your cases, will be gracefully accepted, however, I don't want to leave any stone unturned in reaching out to you and to AADC for your blessings on my efforts.

One further thought - if I were a defense lawyer and looking for a potential mediator, there is no one who would be better equipped to persuade the plaintiff to accept my offer than a plaintiff's lawyer with good credentials. When I was a plaintiff's lawyer, that is the strategy that I always used in the mediation of my cases, i.e. I would always seek a prominent defense lawyer as the best possible mediator for my case, because I knew that if I made a reasonable offer, a defense lawyer/mediator would have the best chance to persuade the defendant to settle the case. I urge you to use this same strategy in your cases. So, next time you have an opportunity to mediate one of your cases, tell the plaintiff's lawyer that you would like me to be your mediator and, that there will be no charge for the mediation. Then call me with the other side's contact information and I will make all of the arrangements. I look forward to seeing you around the mediation conference table. I remain, sincerely yours,

Jack Levine
(602) 395-9000 (office) or (602) 315-3200 (cell)
Levine2005@aol.com (e-mail)

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Let's Hear It For The Defense

Johnny Sorenson and Matthew Nicely Obtain Defense Verdict in Breach of Contract Lawsuit

Johnny Sorenson and Matthew Nicely, attorneys at The Sorenson Law Firm, obtained a net defense verdict on behalf of a skin care manufacturer in a breach of contract lawsuit brought by a national and international skin care distributor. Starting in 2009, Plaintiff purchased from Defendant exclusive high-end skin care products for distribution by Plaintiff both nationally and internationally including a product known as "Envision Eye Cream". Defendant manufactured and sold Envision to Plaintiff in 2009 and 2010, which Plaintiff distributed to its customers. On August 30, 2010, non-party Belfer Cosmetics filed a complaint for patent infringement against Plaintiff and various other non-parties related to an ingredient in Envision Eye Cream and other products. Plaintiff notified Defendant of non-party's lawsuit and requested defense or indemnity. Defendant hired a patent attorney to resolve this issue but did not formally accept the Plaintiff's tender of defense for approximately three months. Non-party Belfer's patent infringement claim was not fully resolved, until September of 2011, by way of a written settlement and license agreement paid for by Defendant for $10,000 to protect Plaintiff and Plaintiff's customers. In its lawsuit, Plaintiff alleged Defendant warranted the product would be free of any claim of patent infringement, would be delivered in a merchantable condition, and would be delivered fit for the particular purpose for which it was purchased by Plaintiff. Plaintiff also alleged that, for over three months, Defendant refused to provide defense or indemnity to Plaintiff in connection with non-party patent infringement claim, and did not agree to do so until December 2010 and that Plaintiff incurred $24,550.50 in attorney's fees and costs associated with defending the patent infringement claim. Plaintiff also alleged it lost a large contract for the sale of the product to a Japanese distribution company, and lost money on start-up fees and costs related to the Japanese account. Plaintiff also alleged lost future profits in Japan. Defendant denied liability, advancing the defense that it retained an attorney to obtain an extension to answer the patent lawsuit and to negotiate a settlement on behalf of Plaintiff. Defendant further argued that it accepted the Plaintiff's tender of defense in a timely manner before Plaintiff was required to incur legal fees. Defendant argued that the settlement agreement with non-party allowed Defendant to obtain a licensing agreement from non-party which allowed Defendant to manufacture the product and sell it to Plaintiff. Defendant also argued that all of Plaintiff's damages were either entirely or largely fabricated and that Plaintiff's owner committed perjury during his deposition and during trial. Defendant argued that Plaintiff tried to use the Belfer patent claim as an excuse to get out of paying its final invoice and to demand free product. Defendant alleged Plaintiff failed to pay $12,906.99 for other products, not part of the patent infringement claim, from November 29, 2010 through December 9, 2010, and counterclaimed for breach of contract for the final invoice. The Jury unanimously found in favor of Defendant and awarded a net verdict in favor of Defendant for $7,900.

Mark Zukowski and Erik Stone Obtain Directed Verdict in Copyright Infringement Case

Mark Zukowski and Erik Stone, attorneys at Jones, Skelton & Hochuli, successfully obtained a directed verdict on all claims in favor of their client, WaterFurnace International, Inc., during a highly complex copyright infringement trial held in the United States District Court for the District of Arizona. The Plaintiff, The ACT Group, sought nearly $1 million in damages and alleged that WaterFurnace and co-defendant, James Hamlin, jointly infringed on The ACT Group's copyrighted sales-training material. At trial, Plaintiff argued that its former employee, Hamlin, used Plaintiff's protected material to develop a series of sales-training seminars for WaterFurnace. In defense, WaterFurnace argued that it did not participate in any allegedly infringing conduct and was not responsible for any unauthorized use of the Plaintiff's protected material. After completing the first week of a two-week trial, Zukowski and Stone obtained a directed verdict in favor of WaterFurnace.

Lori Voepel, Don Miles and Josh Snell Obtain Favorable Opinion from Arizona Supreme Court

Lori Voepel, Don Myles and Josh Snell have obtained a favorable Opinion from the Arizona Supreme Court in an important products liability case. In *Watts v. Medicis Pharmaceutical Corporation,* No. CV-15-0065 (Jan. 21, 2016), the Arizona Supreme Court adopted the "learned intermediary doctrine," under which a prescription drug manufacturer satisfies its duty to warn end-users by giving

Let's Hear It For The Defense *(continued)*

appropriate warnings to the prescribing physician or other health-care provider who is in a position to reduce the risks of harm from the drug. The Arizona Supreme Court, which had never previously addressed the doctrine, also rejected a "direct to consumer" marketing exception, joining the vast majority of other jurisdictions that follow the doctrine with no direct to consumer marketing exception.

In largely vacating the underlying Arizona Court of Appeals' Opinion, the Court rejected Watts' rationale that the learned intermediary doctrine "creates a blanket immunity for pharmaceutical manufacturers," because the manufacturer who fails to give adequate warnings to the physician or health-care provider can still be liable. The Supreme Court also rejected the Arizona Court of Appeals' holding that the learned intermediary doctrine is "incompatible" with the Uniform Contribution Among Tortfeasors' Act. As the Court explained, Arizona's UCATA simply requires the apportionment of damages based on degrees of fault. Under the learned intermediary doctrine, the manufacturer that gives adequate warnings to the learned intermediary is simply not at fault. Finally, the Supreme Court rejected Watts' argument that the doctrine violates the anti-abrogation clause in Arizona's Constitution.

The Supreme Court upheld the Court of Appeals' determination that prescription drugs are covered by Arizona's Consumer Fraud Act and remanded to the trial court on that ground. The Supreme Court expressly left two issues open for further litigation on remand: (1) whether the materials relied upon by Watts constituted "advertising" under the Act, and (2) whether her state consumer fraud claim is pre-empted by federal law. The Court also remanded the case to the trial court for a determination of whether Medicis gave adequate warnings to Watts' physician or health care provider. If so, her products liability claim must be summarily denied under the learned intermediary doctrine.

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Amicus Committee Update

As part the AADC's mission to educate its members and the judiciary, the AADC is committed to advocating in support of important legal issues affecting the Defense Bar. Because of the importance that Arizona's common law plays in all of our practices, the AADC Amicus Committee is always looking for opportunities to advance the interests of the Defense Bar in Arizona's appellate courts through filing amicus curiae briefs.

Recently, for example, the Supreme Court granted a petition for review in *Cramer v. Hon. Starr/Munguia/Bejarano*, CV-15-0317-PR, over a ruling that reiterates the pre-UCATA case law which holds the tortfeasor in a car accident liable for any subsequent medical malpractice. The AADC Committee prepared an amicus brief (with Jeffrey Warren, Amanda Heitz, Charles Callahan appearing on the brief) seeking to challenge the original tortfeasor rule. The Supreme Court held oral argument on March 29, 2016.

In addition, the AADC filed an amicus brief in *Newman v. Cornerstone Nat. Ins. Co.*, 237 Ariz. 35, 344 P.3d 337 (2015), which helped lead to a favorable result for the insurance carrier. The Arizona Court of Appeals affirmed the trial court's summary judgment ruling in favor of the insurer finding that an insured's execution of a waiver of underinsured motorist (UIM) coverage was valid even though the insurer and agent did not specify the cost of adding the coverage.

If any of you have an important legal issue before the Court of Appeals or Supreme Court that you believe would benefit from amicus curiae support, please contact the Chair of AADC's Amicus Committee, Charlie Callahan (ccallahan@jshfirm.com, 602-263-7392).

High School Mock Trial Competition

Did you know that the AADC supports Arizona's annual high school mock trial competition by offering a combined $1,000 in scholarship funds for the top two high school mock lawyers in Arizona? This year the competition was held in Phoenix on March 19, 2016. This year's first place winner was Katherine Milano from Xavier College Preparatory, and she received a first place award and $600 scholarship check. This year's second place winner was Alberto Arevalo from University High School, and he received a second place award and a $400 scholarship check. They are the two students pictured on the right hand side of the picture.

Justice Ann A. Scott Timmer Awarded the Judicial Excellence Award

By Johnny J. Sorenson, Esq.

Hon. Ann A. Scott Timmer

At the Phoenix Judicial Reception, the AADC was proud to honor Justice Ann A. Scott Timmer with the Judicial Excellence Award. The AADC recognized Justice Timmer with the Judicial Excellence Award for her contributions to the judiciary and legal system. Justice Timmer was humble and grateful in her acceptance of the Award and extended to the AADC members a heartfelt gratitude for the recognition of receiving the Judicial Excellence Award.

Justice Timmer obtained her Bachelor of Arts degree in 1982 from the University of Arizona and her J.D. from Arizona State University in 1985. Between 1985 and 2000, Justice Timmer practiced law with private Phoenix law firms. Justice Timmer's practice focused primarily on commercial and employment litigation, and she practiced before state and federal trial and appellate courts, and administrative tribunals. Justice Timmer tried capital murder cases as a defense attorney and later as a special prosecutor. In 2000, Justice Timmer was appointed to Division one of the Arizona Court of Appeals. She served as Vice Chief Judge from 2006 to 2008 and Chief Judge from 2008 to 2011. Justice Timmer was appointed to the Arizona Supreme Court in 2012. Justice Timmer is currently the only female Justice on the Arizona Supreme Court. Justice Timmer recently served as the Supreme Court Liaison to the Arizona State Bar Board of Governors.

In addition to judicial duties, Justice Timmer has been and continues to be involved in community organizations including, among others, International Association of Women Judges, Arizona Foundation for the Handicapped, Arizona Women Lawyers Association, Glendale Judicial Advisory Board and the American Bar Association Judicial Internship Program.

2015 Phoenix Holiday Judicial Reception

By Johnny J. Sorenson, Esq.

On December 3, 2015, the AADC hosted its annual Phoenix Judicial Reception and Award Ceremony at the ultra-popular Bitter and Twisted Cocktail Parlour located inside Phoenix's historic Luhrs Building. Housed in the same building as the former prohibition headquarters of Arizona, the annual AADC included world-class cocktails and drinks of all sorts, chef inspired hors d'oeuvres, and a private lounge dedicated to our bitter and twisted group of lawyers, judges, and VIP guests.

The 2015 Phoenix Judicial Reception was well attended by both lawyers and judges, and it was a fun time for all. Laughs, good times, and networking opportunities were enjoyed by all. The AADC was proud to present The Honorable Justice Ann A. Scott Timmer with the Judicial Excellence Award for Phoenix! If you missed the 2015 Phoenix Holiday Reception, don't worry because you can catch our future events! Given the excitement and positive feedback about the location, the AADC will likely make more bitter and twisted decisions for our future events!

The Honorable Charles R. Pyle

By Johnny J. Sorenson, Esq.

Hon. Charles R. Pyle

Judge Pyle has been a leader in the Arizona and Pima County legal communities for over 40 years. After graduating from Stanford University with a Bachelor of Arts degree in 1970, Judge Pyle received his law degree from the University of Arizona, College of Law in 1973. For ten years, beginning in 1977 through 1987, Judge Pyle was a staff attorney with Southern Arizona Legal Aid specializing in consumer and indigent health care.

In 1987, Judge Pyle then worked in the Civil Division of the Pima County of the Attorney's Office, working extensively with the Pima County Health Department in their response to the AIDS crisis. From 1989 to 2001, Judge Pyle supervised the Tucson Office of the Liability Management Section of the Arizona Attorney General's Office. During that time, he frequently wrote and lectured on the use of ADR, particularly mediation, to resolve civil disputes.

Judge Pyle was sworn in as a United States Magistrate Judge on June 28, 2001 for the United States District Court, District of Arizona, Tucson Division.

2015 Tucson Holiday Judicial Reception

By Chris Begeman

On December 10, 2015, the Tucson bar proved that the best parties don't just happen in Phoenix! The AADC hosted its Annual Tucson Judicial Reception at the prestigious Arizona Inn, which included cocktails, drinks of all sort, food, and good holiday cheer. The AADC also presented The Honorable Charles Pyle with the Judicial Excellence Award for Tucson. This was a great event, well attended by both the bench and bar from both Pima County and Maricopa County members as well. This event has been growing in size each year, and it will soon be one of "can't miss" events for the Tucson bar.

2015-2016 Board of Directors

Chris H. Begeman
Righi Fitch Law Group
2111 E. Highland Ave.,
Ste. B440
Phoenix, AZ 85016
602-365-6776
Fax: 602-385-6777
chris@righilaw.com

Lee Blake
blakelaw@outlook.com

Charles Callahan, Treasurer
Jones, Skelton & Hochuli, P.L.C.
2901 N. Central Avenue,
Ste. 800
Phoenix, AZ 85012
602-263-1700
Fax: 602-263-1784
ccallahan@jshfirm.com

Matthew L. Cates
Jennings Strouss & Salmon
One E. Washington St.
Suite 1900
Phoenix, AZ 85004
602-262-5802
Fax: 602-495-2613
mcates@jsslaw.com

Alison Christian
Christian Dichter & Sluga
2700 N. Central Ave.,
Ste. 1200
Phoenix, AZ 85004
602-792-1706
Fax: 602-792-1710
achristian@cdslawfirm.com

Holly P. Davies, Immed. Past President
Lorber, Greenfield & Polito
3930 E. Ray Rd. Ste. 260
Phoenix, AZ 85044
602-437-4177
Fax: 602-437-4180
hdavies@lorberlaw.com

Scott Day Freeman, President
Fennemore Craig, P.C.
2394 E. Camelback Rd.
Ste. 600
Phoenix, AZ 85016
602-916-5000
Fax: 602-916-5999
sfreeman@fclaw.com

Megan Gailey
Broening, Oberg, Woods & Wilson
1122 E. Jefferson St.
Phoenix, AZ 85034
602-271-7790
Fax: 602-252-4197
bwp@bowwlaw.com

Bill King
Bonnett, Fairbourn, Friedman & Balint, P.C.
2325 E. Camelback Rd.
Ste. 300
Phoenix, AZ 85016
602-274-1100
Fax: 602-274-1199
bking@bffb.com

Adam E. Lang, Secretary
Snell & Wilmer
Once Arizona Center,
400 E. Van Buren
Phoenix, AZ 85004
602-382-6522
Fax: 602-382-6070
alang@swlaw.com

Michael L. Linton
McBan Law Offices
1795 E. Skyline Dr. Ste. 155
Tucson, AZ 85718
520-624-6446
Fax: 520-624-6617
mlinton@macbanlaw.com

Barry M. Markson, DRI State Rep.
Thomas, Markson, Rubin & Kelley
2700 N. Central Avenue,
Suite 800
Phoenix, AZ 85004
602-274-8289
Fax: 602-285-4482
bmarkson@ttmfirm.com

Craig McCarthy, President Elect
Gust Rosenfeld
One E. Washington, Ste. 1600
Phoenix, AZ 85004
602-257-7974
Fax: 602-254-4878
mccarthy@gustlaw.com

Jill J. Ormond
Lewis Roca Rothgerber Christie
201 E. Washington St.,
Ste. 1200
Phoenix, AZ 85004
602-262-5713
Fax: 602-262-5747
jormond@lrrlaw.com

Melanie Pate
Lewis Roca Rothgerber Christie
201 E. Washington St.,
Ste. 1200
Phoenix, AZ 85004
602-262-5318
Fax: 602-734-3785
mpate@lrrlaw.com

Jasmina Richter
Sanders & Parks, P.C.
3030 N. 3rd Street, Suite 1300
Phoenix, AZ 85012
602-532-5600
Fax: 602-532-5700
Jasmina.richter@sandersparks.com

James Robles
Perry, Childers, Hanlon & Hudson PLC
722 E. Osborn #100
Phoenix, AZ 85014
602-266-0392
Fax: 602-266-0691
jarobles@pchhlaw.com

Brian Rubin
Thomas, Markson, Rubin & Kelley
2700 N. Central Ave. Ste. 800
Phoenix, AZ 85004
602-604-7509
Fax: 602-285-4482
brubin@ttmfirm.com

Josh Snell
Jones, Skelton & Hochuli, P.L.C.
2901 N. Central Avenue,
Ste. 800
Phoenix, AZ 85012
602-263-1700
Fax: 602-263-1784
jsnell@jshfirm.com

Johnny J. Sorenson
The Sorenson Law Firm, LLC
950 W. Elliott Rd., Ste 226
Tempe, AZ 85226
480-839-9500
Fax: 480-839-9508
johnny@sorensonlaw.net

Michele G. Thompson
Udall Law Firm
4801 E. Broadway Blvd,
Ste. 400
Tucson, AZ 85711
520-623-4353
Fax: 520-792-3426
mthompson@udalllaw.com

Ryan P. Toftoy
Holloway Odegard & Kelly, PC
3101 N. Central Ave.
Phoenix, AZ 85012
602-308-0115
Fax: 602-240-6677
rtoftoy@hoklaw.com

Les Tuskai
City of Phoenix
200 E. Washington St.,
Ste. 1300
Phoenix, AZ 85003
602-262-6761
Fax: 602-534-2487
Les.tuskai@phoenix.gov

Jeff Warren
Bowman and Brooke
2901 N. Central Ave.
Suite 1600
Phoenix, AZ 85012
602-643-2300
Fax: 602-248-0947
Jeffrey.warren@bowmanandbrooke.com

John Wittwer
Kunz Plitt Hyland & Demlong, PC
3838 N. Central Ave., Ste. 1500
Phoenix, AZ 85012
602-331-3660
Fax: 602-331-8600
jkw@kunzlegal.com

Arizona Association
of Defense Counsel

950 E. Baseline Rd. #104-1025
Tempe, Arizona 85283

AADC Annual Meeting at the JW Marriott Camelback Inn Resort & Spa in Scottsdale, Arizona

The AADC is holding its Annual Meeting on June 3-5 at the JW Marriott Camelback Inn Resort & Spa in Scottsdale, Arizona. The Annual Meeting events include a cocktail party Friday evening, CLE program Saturday morning and a dinner Saturday evening thanking Scott Freeman, our outgoing president, for his services to the organization and welcoming in our incoming president, Craig McCarthy.

The Annual Meeting is a great opportunity to connect and socialize with other members of the defense bar and obtain CLE credits. We hope all members are able to join us for this fantastic event.