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- Mat Kresz is a Cybersecurity & Data Privacy, Technology, Intellectual Property, and Business attorney in Chicago.
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- Through the business and technology experience he gained in his CIO and business leadership roles, Mat is equipped to identify opportunities, solve problems, and mitigate risk with business requirements in mind.

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# Today's Agenda

I. Common Terms

II. BEC & Wire Fraud Case Studies and recent developments regarding BEC

III. What you can do to prevent a BEC and Wire Fraud

IV. What to do if you're a victim

V. Ethical (and legal) responsibilities

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# I. Common Terms

- **Phishing**
  Practice of sending fraudulent emails that purport to be authentic to induce recipient to take actions that leads to fraud.
- **Spear Phishing**
  Phishing that targets specific individuals.
- **BEC**
  "Business Email Compromise." Incidents where an email account becomes compromised –whether a "business" email account, or otherwise.
- **SPAM** (in Contrast to Phishing)
  Junk email. Unwanted, unsolicited, and sent in bulk, but not necessarily malicious.
- **ESP**
  Email Service Provider, such as Office 365, G Suite for Business, ZOHO, etc.
- **Tenant** (Also Email Tenant or Tenant Account)
  A company account within an ESP that contains one or more email boxes. The account that is designated to be the "Admin" account usually provides access and visibility to all email boxes and their configuration within the Tenant Account.
- **Mailbox Rules**
  Email handling rules that perform one or more actions on an email message when a certain condition is met. Example: A mailbox rule could be established to forward any email that contains "wire" or "money" to fraudster@aol.com.
- **MFA or 2FA**
  "Multi-Factor Authentication" or "Two Factor Authentication." Commonly, it is an access code that is generated by the service provider (such as an ESP) and texted to the user that the user must enter in addition to their user name and password to access the subject service.
- **Session Cookie**
  A small file saved to a computer that a website uses to confirm that the user has previously authenticated (successfully logged-in), so that the website need not request the user's credentials to re-authenticate him/her when the user clicks a link while in that session. Note: this is not the "remember me" feature, but can function like it.
- **Threat Actor**
  The bad guy. Usually part of a gang that specializes in certain types of cyber crime.

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# II. BEC & Wire Fraud Case Studies

- A) Family Law Practice was required to make notice to client due to BEC
- B) BEC in a Real Estate Transaction Resulted in $380,000 Loss
- C) Law Firm Wired $63,000 Settlement Payment to Fraudster; Client Sued

**Please note:**
These case studies are based on real matters, but some facts or other aspects were modified or fictionalized for confidentiality purposes.

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# II. A) Family Law Practice BEC

- **Facts**
  - Family law firm of about 5 attorneys handled Wills, Trusts, Estates.
  - The attorney responsible primarily for Estates work observed mailbox rules that she did not set.
- **Investigation**
  - Microsoft confirmed that several logins occurred from overseas locations.
  - The firm hired counsel, and counsel retained a Cyber Forensics Firm.
  - Cyber Forensics investigation determined that three of five email accounts within the tenant were compromised; and that
  - The threat actor likely gained access to at least one account by way of "credential stuffing."
  - The Firm certified that only one compromised account could have contained Personally Identifiable Information and Financial Account information, but that there was substantially no likelihood that the other compromised accounts contained any sensitive information.
- **Conclusion**
  - Firm notified the client whose personal and account information could have been compromised that a data incident occurred; and
  - Firm provided client with credit monitoring service.

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# B) BEC in a Real Estate Transaction Resulted in $380,000 Loss

- **Facts**
  - Buyers wired to sellers a substantial down payment on a home, approximately $380,000.
  - Just before closing, the parties discovered that the payment was made to a fraudulent bank account.
- **Investigation**
  - A forensic investigation was substantially inconclusive. Too much time passed between the incident and an attempt to investigate, and very little forensic artifacts remained.
  - It could not be determined whether the buyer's, seller's or attorneys' email accounts were compromised, or whether more than one parties' email accounts were compromised.
  - (My theory: access to a domain registrar where the subject domains were registered was compromised, and that enabled the threat actor to set up a second ESP that sent "true" emails through the true domains.)
- **Conclusion**
  - Claim was made to at least one party's Cyber Liability carrier.
  - Carrier attempted to settle – but the matter carried on to litigation.

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# C) Law Firm Wired $63,000 Settlement Payment to Fraudster; Client Sued

- **Facts**
  - In the case of Bile v. RREMC, LLC, a settlement between Bile and RREMC was reached, wherein Bile was to receive $65,000 from RREMC to settle a claim. RREMC was to pay $2,000 by check, and $63,000 by wire.
  - Bile's Counsel received emails that clearly showed he was being targeted by a bad actor. However, he did not warn the other party.
  - Bile's Client began to pressure the parties to effectuate payment.
  - RREMC's Counsel received an email from the fraudster posing as Bile's Counsel that issued instructions to wire $63,000 to a certain Barclay's account in Bile's name. RREMC initiated the wire and wired $63,000 to the fraudster, unknowingly.
  - Bile's Counsel inquired to RREMC's Counsel re. status of payment – and this is when the parties discovered that Wire Fraud occurred.
- **Claim**
  - Bile sued RREMC for specific performance (that it wire another $63,000 to Bile).

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# C) Law Firm Wired $63,000 Settlement Payment to Fraudster; Client Sued

- **Outcome**
  - **The Court found that Bile's Counsel failed to exercise ordinary care when it had actual knowledge of a fraudster's attempt to meddle with the transaction but failed to warn RREMC's Counsel that the transaction was apparently targeted by a fraudster.**
  - **The Court also found that RREMC's Counsel did not fail to exercise ordinary care because it had no indication that the transaction was targeted and opined that since they followed their internal verification procedures closely, they would not have initiated the wire had it known that the transaction was being targeted by a fraudster.**
  - **Therefore, RREMC's Counsel was found to have performed when it paid out the first $63,000 by wire – and is not liable to pay a second $63,000 to plaintiff Bile.**
  - **Bile did not receive his $63,000—but maybe he tried to recover from his attorney?**

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# Which Party Shoulders the Loss?

- In Arrow Truck Sales, Inc. v. Top Quality Truck & Equipment, Inc., No. 8:14-cv-2052-T-30TGW, 2015 U.S. Dist. LEXIS 108823 (M.D. Fla. Aug. 18, 2015), both seller and buyer's email accounts were compromised.
- The fraudster's actions led to Arrow paying $570,000 to a fraudster, and not to Top for 12 trucks.
- And ruled that **the party that was in the best position to prevent the fraud but failed to attempt to verify the wire instructions failed to exercise reasonable care, and would be liable.**

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# Trending Now: "Crimson Kingsnake" Impersonates Law Firms in BEC


https://www.infosecurity-magazine.com/news/bec-crimson-kingsnake-92-malicious/

Nov. 04, 2022

- The "Crimson Kingsnake" gang impersonates law firms and debt collectors across the US, UK, and Australia to collect on "unpaid invoices."

  https://www.infosecurity-magazine.com/news/bec-crimson-kingsnake-92-malicious/



# Trending Now: AiTM Phishing Scheme Used to Bypass MFA

**Email with Purported Voicemail Attached (below):**


https://www.microsoft.com/en-us/security/blog/2022/07/12/from-cookie-theft-to-bec-attackers-use-aitm-phishing-sites-as-entry-point-to-further-financial-fraud/

July 12, 2022

- Fraudsters can overcome 2FA by stealing the session cookie.
- Fraudster causes a user to access a legitimate website (such as Office 365) through the Fraudster's Proxy. When the user logs in to the legit website, the Fraudster is able to intercept the session cookie, and return to the legitimate website to access the user's account without logging in (because he has the session cookie that tells the site that authentication has occurred).
- One way that a fraudster redirects users through his proxy is by sending phishing emails.

# III. What you can do to prevent a BEC and Wire Fraud

- Conduct Security Awareness Training. Security awareness keeps security issues "top of mind."
- Stay out of financial transactions if you can. Let the parties work directly to set remittance plans.
- Verify wire instructions by phone if you have to be involved in the transaction, even if the wire instructions appear to be authentic.
- If you suspect that the transaction is being "targeted," immediately warn the other party by phone, not email. Remember: your emails might be seen and intercepted by a bad actor.
- Use a strong password that you only use for your email account. Don't use the same password across multiple services.
- Use a commercial ESP that caters to businesses. Business accounts will have additional tools that can be used to detect or prevent intrusions and prevent fraud. They often have better support, too.
- Implement 2FA / MFA. It's included in many services.
- Contact your IT professional about features that you might already have that could be enabled to help you recognize fraud. (Example: [EXTERNAL] banner. "You don't normally receive email from… " banner.)
- Also: buy insurance that covers wire fraud.

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# IV. What to do if you're a victim

- **Important Note**
  - It is critical to move very quickly (within minutes or hours).
  - Every firm should have an incident response plan ready in case of emergency.

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# IV. What to do if you're a victim

- Engage Cyber / Data Privacy Counsel immediately to assist you.
- Initiate a claim to your cyber liability carrier.
- Immediately provide notice to the other party to prevent further fraudulent transactions.
- Immediately contact the financial institutions involved. They may be able to retrieve some of the mal-wired funds or freeze what funds might be in the fraudster's account. Move quickly!
- Contact local law enforcement and make a police report. (Local law enforcement might refer you to another agency.)
- Contact the FBI's Internet Crime Center to report the incident.
- Assess your ethical responsibilities post-incident.

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# V. Ethical Responsibilities

- **ABA's Formal Opinion 483.** "[T]he American Bar Association Standing Committee on Ethics and Professional Responsibility reaffirm[ed] that lawyers have a duty to notify clients of a data breach…."
- **Notify Opposing Counsel.** "[A]ttorneys have 'an obligation to contact opposing counsel when and if they receive suspicious emails instructing them to wire settlement funds to a foreign country where such [a] request has never been made during the course of performance of the parties." Bile v. RREMC, LLC, Civil Action No. 3:15cv051, 2016 U.S. Dist. LEXIS 113874, at *34 (E.D. Va. Aug. 24, 2016).
- **Data Privacy Laws & Contractual Obligations.** State and federal data privacy laws may also apply that require that a data incident that involved personal information. Furthermore, notice may be required pursuant to a contract.

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## Questions & Comments

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# WORKSHEET #1– SOMETHING ABOUT BIAS

Everyone carries some level of bias as it is natural. In order to lead effectively, leaders must quickly recognize any potential existing bias that could affect decision-making or team morale. In this exercise, consider a personal and professional situation where bias was evident and detail how it affected your thoughts or actions. Questions to consider while completing this worksheet is how have you grown from these encounters and what steps must be taken to mitigate against future occurrences.

# WORKSHEET #2- HOW DO YOU RATE YOUR EMOTIONAL INTELLIGENCE?

Optimizing performance in organizational development relies on the leader's ability to utilize emotional intelligence in diverse settings. Document how you rate on your emotional intelligence based on the lecture notes. Are there any areas you feel that you should improve? Recall the your personal SWOT analysis. Detail how you can improve or maintain the four key areas of E.I. (perceiving, reasoning, understanding, and managing).

# Rural Legal Deserts Are a Critical Health Determinant

We introduce "rural legal deserts," or rural areas experiencing attorney shortages, as a meaningful health determinant. We demonstrate that the absence of rural attorneys has significant impacts on public health—impacts that are rapidly exacerbated by COVID-19.

Our work builds on recent scholarship that underscores the public health relevance of attorneys in civil and criminal contexts. It recognizes attorneys as crucial to interprofessional health care teams and to establishing equitable health-related laws and policies. Attorney interventions transform institutional practices and help facilitate the stability necessary for health maintenance and recovery. Yet, critically, many rural residents cannot access legal supports.

As more individuals experience unemployment, eviction, and insecure benefits amid the COVID-19 pandemic, there is a need for attorneys to address these social determinants of health as legal needs. Accordingly, the growing absence of attorneys in the rural United States proves particularly consequential—because of this pandemic context but also because of rural health disparities. We argue that unless a collaborative understanding of these interrelated phenomena is adopted, justice gaps will continue to compound rural health inequities. (*Am J Public Health.* 2020;110:1519–1522. doi:10.2105/AJPH.2020.305807)

*Michele Statz, PhD, and Paula Termuhlen, MD*

In 2017, the Legal Services Corporation, a federally established nonprofit organization, published *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans*.[1] The report estimated that 10 million rural Americans have incomes below 125% of the federal poverty line. Three quarters of low-income rural residents experience at least one civil legal problem in a year, and nearly one quarter face six or more civil legal needs in a year. Critically, the most common type of legal issue low-income rural residents report is access to health care.[1]

Despite the clear need, there is ample evidence that increasing numbers of rural individuals cannot access legal assistance in civil and criminal matters because of growing attorney shortages. Indeed, many rural US counties now have few attorneys, if any.[2] Defined as "rural legal deserts," this phenomenon is accelerated by the "graying bar"—attorneys who are retiring but not being replaced because of declining law school enrollments and limited specialized training for students interested in rural practice. These rural justice gaps are further exacerbated by the challenge of recruiting and retaining attorneys in areas with struggling local economies and underresourced educational and health care systems.

What results, then, is that only 14% of rural individuals receive assistance for their civil legal problems—a rate less than half the national average.[1] Rural residents do not necessarily fare better when it comes to criminal matters. For instance, because of a shortage in defense counsel, rural criminal defendants in Wisconsin have to wait as many as two months before receiving a public defender.[3] In rural tribal courts, many of which cannot afford to provide public defenders to tribal litigants, individuals are nearly always self-represented.[4] The absence of legal counsel renders individuals experiencing housing precarity, intimate partner violence, or opioid addiction further vulnerable. Access to critical supports and treatments is delayed, and family stress is compounded. Most simply, a lack of attorneys propagates a cycle of increased risk for further health problems.

Drawing on our work with rural patients and stakeholders, we identify this rural justice gap as a public health concern. Despite meaningful attention to social and structural determinants of health—many of which are intrinsically legal—and to physician–attorney collaboration, there has so far been little, if any, formal recognition of this unique rural disparity among public health researchers. This is surprising, given that the same US regions experiencing hospital closures and physician shortages, often characterized as rural health care deserts,[5] are largely also classified as rural legal deserts. Although increasing numbers of policymakers are attending to these so-called deserts, their efforts are largely exclusive to either health care or law: so far no one has formally identified rural health care gaps as justice gaps, or vice versa. The consequences of this siloed approach are vast, particularly as we consider the health and socioeconomic effects of the COVID-19 pandemic. In response, we argue for meaningful acknowledgment of rural justice gaps as critical determinants of health. A collaborative understanding of this legal context will lend necessary insights to mitigating urgent rural health needs.

## THE HEALTH–LAW INTERFACE

Recent public health scholarship has importantly documented

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the health outcomes of exposure to the US criminal justice system.[6] It has likewise underscored the need to advance research aimed at improving health outcomes for criminal justice–involved populations.[7] Other work has highlighted the public health effects of what are generally understood as civil legal needs, among them substandard housing, benefits or wage disputes, food insecurity, and education and employment barriers.[8–10] These issues are commonly identified as social and structural determinants of health and often discussed in the context of medical–legal partnerships (MLPs).

This scholarship underscores the public health relevance of courts and court personnel in the context of both criminal and civil matters. It recognizes attorneys as valuable members of interprofessional health care teams, as MLP attorney interventions lower emergency room visits, decrease health care avoidance stemming from concerns about health insurance and costs, and reduce stress and increase personal well-being.[11,12] Recent public health research also appreciates how attorneys' strategic litigation can improve or enforce laws that influence health.[13] At a fundamental level, this awareness reflects a principle of medical ethics, namely that physicians respect the law and recognize their responsibility to seek changes to those requirements contrary to the best interest of patients.[14]

Even when not formally involved in the health care setting, legal assistance powerfully mitigates and even prevents health issues. Significantly, these complex needs are not deferred during a pandemic. Rather, rapidly growing numbers of individuals are facing unemployment, eviction, insecure benefits, and limited or restricted access to health care systems. In rural regions already familiar with this precarity, the trajectory of COVID-19 has magnified deep sociospatial vulnerabilities. Presently, the rate of US cases and deaths appears to be increasing more rapidly in rural areas, with rural regions described as a tinderbox for SARS-CoV-2. Rural residents are older, experience more chronic conditions, and are more likely to be essential workers and at a greater risk for exposure.[15] At a structural level, many rural communities also contend with underresourced or even shuttered hospitals; labs, grocery stores, and pharmacies "at the end of the supply chain"; and limited or absent infrastructure necessary for telehealth.[16]

## RURAL HEALTH AND LEGAL DISPARITIES

As they pertain to the rural United States, the health and legal consequences of the COVID-19 pandemic must be situated within a broader context of poverty and structural vulnerability. Rural US poverty rates have exceeded urban poverty rates every year since 1959, and persistently high-poverty counties are overwhelmingly rural.[2] Migrant farm workers may endure substandard housing and abusive working conditions. The elderly, disabled, and veterans are all disproportionately represented in the rural United States, and all need diverse supports. American Indians and Alaska Natives are often rural and contend with high poverty rates, health inequities, and a complex interplay of state, federal, and tribal laws.[2] Rural communities also disproportionately experience environmental hazards and degredation.[2]

It is perhaps unsurprising that rural regions exhibit marked health disparities, including poorer health outcomes than urban areas and what Cosby et al. describe as the "rural mortality penalty."[17] Rural communities also face significant legal disparities when compared with metropolitan areas. Not only is there a shortage of private practitioners, but low-income rural individuals are often at a significant distance from nonprofit legal aid organizations, which tend to be centered in urban areas. Metropolitan regions, additionally, offer larger firms that can take on pro bono or "low bono" cases, better resourced law libraries, courthouses accessible by public transit, consistent digital connectivity, and law schools that may provide specialized free legal assistance through housing and family law clinics. Simply put, the same sociospatial aspects that affect rural community members' access to health care—vast distances, professional shortages, insufficient or nonexistent public transit, a lack of reliable communication tools—also limit their access to justice. These challenges are further exposed and exacerbated by the pandemic, as social-distancing requirements result in curtailed or eliminated public supports (e.g., Internet access at a local library) just as the need for electronic communication, secure document transmission, and remote court appearances grows.

## THE PUBLIC HEALTH COSTS OF RURAL DESERTS

If not resolved in an appropriately multifaced way, legal needs compound existing health issues, and health needs impede access to justice. Without rural attorneys, health care professionals cannot refer patients to civil legal aid or an immigrant advocacy organization. There are also fewer prospects for medical–legal partnerships—a reality reflected in the relative dearth of literature on rural MLPs.[18] In rural legal deserts, there are fewer attorneys to advocate rural health at a policy level, either through local impact litigation or through systematic public health law.

Of course, the absence of rural health providers proves just as consequential to the justice system. For instance, the rural per capita opioid overdose rate is 45% higher in rural than in urban areas,[19] and treatment of chemical dependency is often delayed if a rural individual is involved in the criminal justice system and must wait for months to get a public defender. Not only does this leave an individual addicted to opioids in a high-stress situation with a greater risk of reoffense, but she or he also has a lower likelihood of treatment options in a rural region. Many rural areas do not have a certified opioid treatment program, and only 3% of physicians with waivers to prescribe buprenorphine and methadone operate in rural communities.[20]

Other justice supports, including drug or driving while intoxicated courts, family dependency treatment courts, and mental health courts, likewise rely on health care professionals for diagnoses, assessments, protocol development, and education. These interprofessional courts are invaluable, and yet there are geographical differences in who benefits the most from them. The effectiveness of rural drug courts arguably lags

behind urban courts, which may provide more culturally specific services, have larger program budgets, and are more likely to offer adjunct health, mental health, and social services.[21]

Just as the absence of rural attorneys influences the public's health, the absence of rural health care professionals uniquely impedes justice delivery. This is particularly significant now, as already limited health resources in the rural United States are redirected to other life-saving activities. These professional deserts add credence to the notion that disparities in access to justice and health care are a critical, deeply intertwined public health concern. With fewer opportunities for interprofessional advocacy on behalf of vulnerable community members, both individuals and systems are affected.

## MOVING FORWARD

Amid the rampant physical, financial, and emotional hardships wrought by the COVID-19 pandemic, Americans are asking, "If I can't afford to pay all of my health care bills, which should I pay first?" "If I am unable to work from home [a reality for many rural Americans experiencing technology deserts], will I still get paid?" "What if I can't pay my utilities?" "What if I don't feel safe in my home?" These questions demonstrate legal needs and personal values, and they intimately involve the health and well-being of individuals, families, and communities. In rural areas experiencing shortages of health and legal professionals, answers to such multidimensional questions are increasingly rare. We need to collaboratively address concomitant rural health care and legal deserts—and now more than ever.

As a first step, we propose dismantling the professional boundaries implicit in desert designations. Rural public health and justice challenges are deeply intertwined and together must acknowledge the unique sociospatial and structural barriers rurality presents. Any professional initiative that neglects this complex rural context will be insufficient at best, impossible at worst. Consider, for instance, that the same legal scholarship that identifies public health as a key component of rural justice administration neglects growing rural attorney shortages.[22] Although we commend the call for rural lawyers to incorporate public health law practices into their advocacy, rural lawyers must first be there. We accordingly encourage health and legal professionals to mindfully consider each other's presence and capacity. This requires conscious commitment: even in a small community, dwindling attorney numbers may not be evident to health professionals—especially if providers are overwhelmed or health systems are experiencing high turnover. We also firmly acknowledge the complex challenges that each sector individually confronts: declining law school enrollment, for instance, and prevailing payment models and prescription drug costs.

Merely expanding our conceptualization of rural deserts, however, necessarily grows a new professional rural spatial imaginary, or a new way of representing and talking about rural spaces. This is crucial for addressing both the immediate local and long-term structural consequences of health and justice gaps across the rural United States. What might this look like? For one thing, public health could widen its scope of care to include justice gaps. This could be as basic as enhancing metrics, such as including the availability of attorneys as a social and economic factor in the "county health rankings & roadmaps" tool.[23] It might mean that the US Health Resources and Services Administration, which in 2014 recognized civil legal aid as an enabling service and allowed health centers to use funding for MLPs, additionally considers the presence of attorneys as relevant to health professional shortage areas. Most simply, we must broaden our conception of what—and who—makes a healthy public.

Relatedly, we must scale up our interprofessional partnerships in light of professional shortages. If an MLP is impossible owing to a dearth of local attorneys or clinic closures because of consolidation, then broader collaborations must be mobilized across regional legal aid organizations, community health clinics, firms willing to provide pro bono or low bono assistance, and state bar and primary care associations, as with the Montana Health Justice Partnership.[24] A potential drawback of this suggestion is that it demands more of already overburdened health care and legal professionals. Accordingly, we must extend this professional rural spatial imaginary far into the future and beyond the health care and legal professions. This is, after all, the ultimate goal: that we understand that the solutions to health services and justice gaps—and likewise to technology, mental health, dental, and other rural deserts—are as interrelated as the problems themselves.

This means advocating initiatives and policies that improve the health of a community and help recruit and retain professionals. An immediate example of this is expanded rural broadband and cellular coverage. As the COVID-19 pandemics has demonstrated, rural residents are among the likeliest to need and benefit from telehealth and telelegal solutions—and yet are the least likely to have consistent access to broadband Internet or cellular service.[2] A longer-term example is the collective advancement of rural pipeline programs in which students engage law and health care as intrinsically related, observe the participation of attorneys and health care providers on equal justice committees and treatment courts, and find public health and legal professionals who reflect their identities and experiences. This is critical to innovating professional education and addressing complex, deeply interrelated needs.[25] Relatedly, more medical and law schools must generate pathways to rural practice by selecting students who understand rural communities and by developing sustained and immersive rural educational experiences.

We have introduced rural justice gaps as a critical social and structural determinant of rural health. This adds dimension to prevailing understandings of rurality and rural health care provision, and it contributes a novel, spatially specific interpretation of interprofessional care. We make this argument at a critical time; growing numbers of individuals urgently need health care and legal supports amid the COVID-19 pandemic. For rural health and justice systems that are underresourced and over capacity, these supports were already lacking. Without a meaningful recognition of such interrelated phenomena, justice gaps will continue to compound rural

health inequities. Yet by correlating rural professional shortages, we demonstrate that acknowledging one rural gap—namely legal—provides critical context and a better understanding of other barriers to rural health care. This is a necessary first step, one that demands a collaborative approach to addressing urgent rural health disparities. AJPH

## CONTRIBUTORS

M. Statz conceptualized and led the writing of the article. P. Termuhlen contributed to the writing. Both authors revised the article and reviewed and approved the final version.

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## CONFLICTS OF INTEREST

The authors declare that they have no known competing financial interests or personal relationships that could have influenced the work reported in this article.

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# THE EMOTIONALLY ATTENTIVE LAWYER: BALANCING THE RULE OF LAW WITH THE REALITIES OF HUMAN BEHAVIOR

Randall Kiser*

## INTRODUCTION

The law and emotions have an uneasy, if not antagonistic, relationship. In an extreme view, emotions are antithetical to the rule of law—human frailties that pose a constant threat to the orderly and impartial dispensation of justice. The central purpose of a statute or legal principle, in this view, is to ensure that emotions like empathy, anger, and revenge do not poison the objective analysis of facts and the uniform application of rules. The rule of law and the progression of society "from Status to Contract" are intended to elevate the judicial system above personal pique and favoritism, displacing emotions with uniformity and predictability.[1] The sign that a law student has evolved from a naïve scholar to an incipient lawyer is the belief, as expressed by one student, that a lawyer's work is "like a 'mathematical problem' to be solved" and, for that reason, "I don't get too emotionally involved in what I'm doing."[2]

Although the law may denigrate the role of emotions, the successful practice of law requires a high level of emotional intelligence. The traits that comprise emotional intelligence (self-awareness, self-management, social awareness, and relationship management skills) are essential to superior attorney performance.[3] These traits also are essential to developing the sense of personal meaning, responsibility, and fulfillment that distinguish expert performers.[4]

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[1] HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 170 (1861).

[2] Tan Seow Hon, *Birthing the Lawyer: The Impact of Three Years of Law School on Law Students in the National University of Singapore*, SING. J. LEGAL STUD. 417, 449 (2010); *see generally* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (2007).

[3] *See generally* VENTURING BEYOND THE CLASSROOM (Christopher Honeyman et al. eds., 2010); David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Noncon-*

This article explores the tension between the law and emotional intelligence and suggests that emotional intelligence is unjustifiably neglected in legal education and professional development. Part I begins with a brief discussion of the historical conflict between the law and emotions, and then Parts II and III explain why emotional intelligence is central to effective attorney performance and the prevention of legal malpractice claims. To augment our understanding of how emotions affect the actual practice of law, Part IV presents excerpts from attorney interviews reported in *How Leading Lawyers Think: Expert Insights into Judgment and Advocacy*.[5] The article concludes, in Part V, by highlighting specific changes in medical school education and practice that demonstrate the critical importance of emotional intelligence and indicate that the legal field is woefully late in incorporating communication, observation, and problem-solving skills into law student selection criteria and law school course requirements.

## I. CONFLICTS BETWEEN LEGAL EDUCATION AND EMOTIONS

Both legal education and law practice are "aggressively rational, linear, and goal-oriented," and lawyers tend to be unaware of the "wishes, fears, beliefs, and defenses that motivate our actions," according to Professor Melissa Nelken, Faculty Chair of the Hastings Center for Negotiation and Dispute Resolution.[6] She notes that lawyers deliberately divorce emotional issues from client cases, seeing emotions as impediments to intelligent, rational problem solving:

> Law, many lawyers say, is based on facts, not feelings; it is logical; and success is measured by whether you win or lose in court or by the dollar amount of settlements. Lawyers must *act* on behalf of their clients, and there is a premium on

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*scious Cognitive Processes for Law and Legal Theory*, 2008 BYU L. REV. 1275; Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137 (2011); Peter H. Huang, *Reasons Within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435 (2000); William W. Maddux et al., *Chameleons Bake Bigger Pies and Take Bigger Pieces: Strategic Behavioral Mimicry Facilitates Negotiation Outcomes*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 461 (2008); Myeong-Gu Seo & Lisa Feldman Barrett, *Being Emotional During Decision Making—Good or Bad? An Empirical Investigation*, 50 ACAD. MGMT. J. 923 (2007).

[4] *See generally* THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE (K. Anders Ericsson et al. eds., 2006); MIHALY CSIKSZENTMIHALYI, CREATIVITY: THE PSYCHOLOGY OF DISCOVERY AND INVENTION (1996); MIHALY CSIKSZENTMIHALYI, FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE (1990); HANDBOOK OF COMPETENCE AND MOTIVATION (Andrew J. Elliot & Carol S. Dweck eds., 2005).

[5] Parts of this article are excerpted from RANDALL KISER, HOW LEADING LAWYERS THINK: EXPERT INSIGHTS INTO JUDGMENT AND ADVOCACY (2011) [hereinafter KISER, HOW LEADING LAWYERS THINK]. Sections of the article regarding legal malpractice claims are excerpted from RANDALL KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS (2010) [hereinafter KISER, BEYOND RIGHT AND WRONG].

[6] Melissa L. Nelken, *Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 421 (1996).

> reaching sound decisions quickly. In law school, students are taught that how they feel about the cases they read is irrelevant; what matters is the soundness of their logic. Unlike medicine, for example, law is still taught largely as an exercise in abstraction, based on case reports and analysis of judicial opinions.
>
> Resistance to the human dimension of the lawyer's work is built into most law training.[7]

Professor Nelken contends that actual practice "inevitably involves the lawyer deeply in the hopes, fears, and conflicts of her clients" and that lawyers' conflict resolution capabilities are enhanced by emotional skills like self-observation and awareness of the "assumptions, anxieties, and conflicts that are part of who one is."[8] Her law students, nevertheless, resist thinking about how their emotions and personal backgrounds affect their conflict resolution styles and goals. As one student said to her, "If I'd wanted to learn about feelings, I wouldn't have gone to law school."[9]

Joe Jamail, a Texas trial attorney famous for representing Pennzoil in its lawsuit against Texaco and winning a $10.53 billion verdict in 1985 (reduced on appeal to $8.53 billion), criticizes law school instruction that ignores the role of emotions: "'Today's law schools teach students how not to get emotionally involved in their cases,' he says. 'That's bullshit. If you are not emotionally involved, your client is not getting your best effort.'"[10]

A similar controversy about the role of emotions has emerged in medical schools where the "curriculum creates doctors who lack humanity, who see patients as diseases rather than as whole people and who have what the medical literature calls 'ethical erosion'—a loss of idealism, empathy, morality."[11] In light of research indicating that personal traits like openness, agreeableness, extraversion, and conscientiousness may be more predictive of success in clinical practice than test scores, some medical schools now introduce students to real patients on the first day of class and emphasize "relationship" skills like listening and building trust.[12]

Dr. Abraham Verghese, a professor of medicine at Stanford University and one of the leaders in bridging the gap between the art and science of medicine, says, "I've never bought this idea of taking a therapeutic distance . . . . If I see a

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[7] *Id.* at 421–22.

[8] *Id.* at 422, 425.

[9] *Id.* at 422.

[10] Mark Curriden, *Lions of the Trial Bar: Joe Jamail*, A.B.A. J., Mar. 2009, at 32, 34; *accord* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 6 n.5 (1987).

[11] Anemona Hartocollis, *In Medical School, Seeing Patients on Day 1 to Put a Face on Disease*, N.Y. TIMES, Sept. 3, 2010, at A15.

[12] *See* Filip Lievens et al., *Personality Scale Validities Increase Throughout Medical School*, 94 J. APPLIED PSYCHOL. 1514, 1514, 1529 (2009); Haikang Shen & Andrew L. Comrey, *Predicting Medical Students' Academic Performances by Their Cognitive Abilities and Personality Characteristics*, 72 ACAD. MED. 781, 781, 785–86 (1997); Hartocollis, *supra* note 11.

student or house staff cry, I take great faith in that. That's a great person, they're going to be a great doctor."[13]

## II. LAWYERING SKILLS AND EMOTIONAL INTELLIGENCE

The importance of a comprehensive skillset—integrating substantive legal knowledge with emotional intelligence—is shown in the American Bar Association's MacCrate Report, which ranks the skill of "problem solving" above legal analysis and legal research.[14]

That report also identifies communication, counseling, negotiation, advising a client, and the ability to recognize and resolve ethical dilemmas as "fundamental lawyering skills."[15] These fundamental skills necessarily require a blend of human judgment, technical proficiency, and emotional maturity. The MacCrate Report's concerns about the narrowness of attorney education are reiterated by The Carnegie Foundation for the Advancement of Teaching:

> The difficulty, as we see it, lies in the relentless focus, in many law school courses, on the procedural and formal qualities of legal thinking. This focus is sometimes to the deliberate exclusion of the moral and social dimensions and often abstracted from the fuller contexts of actual legal practice.[16]

In a study of two thousand attorneys and law students, law professor Marjorie Shultz and psychology professor Sheldon Zedeck found that successful lawyers demonstrate strong competencies in "networking, building relationships, practical judgment, ability to see the world through the eyes of others, and . . . commitment to community service."[17] These traits are predominantly emotional, and their importance and development are neglected in the traditional law school curriculum. These traits, moreover, are "negatively associated" with high academic performance, meaning that law students with high grades do not frequently exhibit these traits.[18] Thus, academic success, as measured by grades received in a conventional legal curriculum, is unlikely to ensure emotional development.

## III. LEGAL MALPRACTICE LIABILITY AND EMOTIONAL INTELLIGENCE

At the most elemental level of law practice, emotional intelligence appears to be necessary for attorneys to avoid malpractice liability. Malpractice claims data show a significant and persistent conflict between client expectations and

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[13] Denise Grady, *Physician Revives a Dying Art: The Physical*, N.Y. TIMES, Oct. 12, 2010, at D1.

[14] *Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 138.

[15] *Id.* at 138–40.

[16] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 145 (2007).

[17] William D. Henderson, *The Bursting of the Pedigree Bubble*, NALP BULL., July 2009, at 1, 13.

[18] *Id.*

attorney performances in "soft" skills requiring judgment, discernment, awareness, and perspective: case evaluation, risk assessment, strategy development, client communication, and settlement negotiations. According to the American Bar Association's "Profile of Legal Malpractice Claims," the specific activity "Settlement/Negotiation" constituted 6.79 percent of all malpractice claims in the 2008–2011 period, and 7.67 percent of all malpractice claims in the earlier 2004–2007 period (when claims are classified by "type of activity").[19] The errors "Failure to Follow Client's Instructions," "Failure to Know or Properly Apply the Law," "Failure to Obtain Client's Consent or to Inform Client . . . of various alternatives or the risks involved," "Inadequate Discovery of Facts or Inadequate Investigation," and "Planning or Strategy Error" constituted 35.99 percent of all malpractice claims in the 2008–2011 period and 37.58 percent of all malpractice claims in the 2004–2007 period (when claims are classified by "type of alleged error").[20] Thus, more than one-third of all malpractice claims allege errors relating to professional skills required in pre-trial evaluations, discovery, procedures, counseling, negotiations, and settlements. These skills necessarily entail an integration of substantive legal knowledge with a broader range of competencies embraced by emotional intelligence—listening, understanding, communicating, conceptualizing, anticipating, simulating, and perspective-taking.

The critical importance of emotional intelligence is further demonstrated by legal malpractice claims data compiled by an Ontario, Canada insurer, The Lawyers' Professional Indemnity Company ("LAWPRO"). Its data regarding attorney malpractice claims are the most complete because, unlike their American counterparts, all attorneys in Ontario are required to carry malpractice insurance, and LAWPRO is the only carrier.[21] (The American Bar Association has compared its malpractice data with that of LAWPRO and concluded that the results "show relatively similar claims experiences between the two countries.")[22] LAWPRO's data indicate that the major cause of malpractice claims has shifted during the last thirty years from calendaring mistakes (usually failing to file an action before it was barred by the statute of limitations) to "attor-

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[19] AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS: 2008–2011, at 9 (2012) [hereinafter 2011 ABA MALPRACTICE STUDY]; AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS: 2004–2007, at 7 (2008) [hereinafter 2007 ABA MALPRACTICE STUDY]; *cf.* AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS: 2000–2003, at 7 (2005) [hereinafter 2003 ABA MALPRACTICE STUDY] (showing "Settlement/Negotiation" constituted 8.20 percent of all malpractice claims in the 2000–2003 period).

[20] 2011 ABA MALPRACTICE STUDY, *supra* note 19, at 12; 2007 ABA MALPRACTICE STUDY, *supra*, note 18, at 10, 23–24; *cf.* 2003 ABA MALPRACTICE STUDY, *supra*, note 19, at 10 (showing that these errors constituted 41.54 percent of all malpractice claims in the 2000-2003 period).

[21] Kara MacKillop & Neil Vidmar, Legal Malpractice: A Preliminary Inquiry 18 (June 29, 2006) (unpublished manuscript), *available at* http://ssrn.com/abstract=912963.

[22] *Id.* at 21.

ney/client communication and relationship issues."[23] According to law professors Kara MacKillop and Neil Vidmar, communication and relationship problems were responsible for 46 percent of all claims and 51 percent of claims costs.[24] The errors, they note, "fall into four categories: failure to follow client instructions (13.7% of claims, 13.6% of costs), inadequate discovery or investigation (12.9%, 15%), failure to inform or obtain consent (11.6%, 13.4%), and poor communication (8%, 9%)."[25] Calendaring issues constituted only "14% of the total number of claims and 11% of claim costs," although they were the primary type of malpractice claim thirty years ago.[26] Because contemporary attorneys are more likely to face a malpractice claim regarding their relationship skills than their calendaring systems, attorneys who lack emotional intelligence are a swelling financial risk for law firms and malpractice insurers.

## IV. ATTORNEYS' VIEWS OF THE ROLE OF EMOTIONS IN LAW PRACTICE

Seventy-eight leading litigation attorneys were interviewed for the book *How Leading Lawyers Think: Expert Insights into Judgment and Advocacy*.[27] These attorneys were selected from a dataset of 8114 attorneys in New York and California based on superior performances in predicting case outcomes.[28] Among the topics addressed in the attorney interviews was the role of emotions and the relative importance of technical legal competence and "soft" skills like empathy, maturity, judgment, and self-awareness.[29]

### *A. Legal vs. Subjective Factors in Case Evaluation*

When asked whether other attorneys' errors in case evaluation are attributable to errors about the law or intangible factors like witness appeal and credibility, the attorneys generally point to subjective judgments as being the culprit:

- [O]f course you have to know the law. But when lawyers fail, it's the subjective that they do not take into account. The law is not as critical as the guts that go into the jury's deliberations.
- They [other attorneys] don't see the soft facts and don't appreciate the art of advocacy. The vast majority of cases that I've gotten large awards in had de minimis offers. They misunderstood the art of advocacy.
- The emotional component that a good plaintiff's case has is something that is not considered by [medical malpractice] defendants because they get more attuned to the medicine. There is an emotional compo-

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[23] *Id.* at 15, 19–20.
[24] *Id.* at 19.
[25] *Id.*
[26] *Id.* at 15, 19.
[27] KISER, HOW LEADING LAWYERS THINK, *supra* note 5, at 1.
[28] *Id.* at 3–4; *see also* KISER, BEYOND RIGHT AND WRONG, *supra* note 5, at 32–35, 431–35 (describing datasets and selection criteria).
[29] *See* KISER, HOW LEADING LAWYERS THINK, *supra* note 5, at 75–85.

nent that some defendants lose sight of as it relates to a juror's sympathy. When defendants in med mal cases get bad results at trial, it's not because they get it wrong as much as it's because it's more of a medical judgment issue to them as opposed to how people are going to respond.

- They don't understand how these personal factors, the intangible factors, will evolve through the process, how the facts will unfold. It comes full circle.
- We never know the truth; we know the perception. The law is the simplest part of it.[30]

An attorney who spent decades practicing on the defense side and then became a plaintiffs' attorney noted that attorneys were technically competent but often unaware of the complexities and dynamics of jury trials: "They know what they're doing as lawyers, but not as trial attorneys and trial evaluators. They get lost in the maelstrom."[31]

### *B. Risks of Emotional Involvement*

When asked whether emotions interfere with case evaluation and, specifically, whether emotions promote or hinder sound judgment and effective trial advocacy, the attorneys made some critical distinctions and highlighted the ongoing tension between emotional commitment and professional objectivity. Referring to the role of emotions in case evaluation, some attorneys remarked:

- A lot of attorneys can't take the emotion out of it. That can be a good thing but you have to be able to stand back. After the depos are done, I start to visualize in my own mind how the trial will play out. If I think the plaintiff is likely to be sympathetic, or my client is not credible, that's a bad combination.
- Some types of clients I may visit in their homes. It gives me a better feeling for who they are and how their family relates to them. There are times when you definitely need to be emotionally involved, but you have to keep that to a minimum. It's really important to stay detached.
- There are times when you need to be emotional. There are times when you have to use some emotions to decide what to do. I'm probably more emotional than my male partners, but I think that's to my advantage.

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[30] *Id.* at 78.

[31] *Id.* The study attorneys' perception that their colleagues are technically proficient but occasionally insensitive to other issues is buttressed by Fulbright & Jaworski's annual survey of corporate counsel. "The good news is that only a small minority of respondents cited incompetence among their law firms as problem areas," report Fulbright partners Helen Duncan and Peter Mason. "The real issues were unpredictable costs, poor communication and inadequate preparation on case matters." Consistent with the emphasis on delivering results instead of selling expertise, corporate counsel informed Fulbright that "law firms should refocus their efforts and that law firms can best serve their litigation clients as true service providers, not merely specialists in the law." Helen Duncan & Peter H. Mason, *In-House Counsel Offer Their Advice to Law-Firm Litigators*, S.F. DAILY J., Sept. 27, 2004, at 5.

- There are cases that benefit from a more passionate approach, some from a dispassionate approach. Whatever approach you take, you still have to be very professional.
- Emotions only sustain you for so long. But it is also a damaging tool. I've seen an attorney get too emotional—gets sidetracked, loses concentration. I think emotion is a blinder.[32]

"If I really like my client," comments a plaintiffs' attorney, "I have to be in a position to say, 'Whoa, we need to step back. Am I being affected by the fact I like this client and want to win for him?' "[33]

Reflecting on the relationship between emotion and trial advocacy, the attorneys noted that some degree of emotional involvement or sensitivity is critical:

- It's a combination. You have to have some inner man to know if you're connecting with the jury.
- Some attorneys never connect with their clients. At times this is good because it makes you objective. But other times you have to have that missionary zeal to connect with the jury. Some attorneys are just flat, too dry, too dead. The middle ground is tough to find. Out of 1,000 cases I handled on the defense side, only three plaintiff attorneys took the time to find family and friends [who would testify regarding how the accident changed the plaintiff]. If you get the jury emotionally involved you will always win.
- There has to be a fire in the guts for the attorney and the client.
- If I get emotional about evaluating the case, I'm probably on the losing end. But in looking at what happens at trial, I have to be emotional. My forte is closing argument. Juries are primarily emotional. . . . I have to understand what that emotion is going to be when I get to trial. So I try to understand that emotion that's going to come out. If a woman has scars on her arm, I cannot argue she should wear blouses with sleeves. My time to get emotional is the night before closing argument. It's a gut instinct, it's ego. You decide what that feeling will be in your closing argument.[34]

Another attorney who had changed his career from a defense practice to a plaintiffs' practice noted that an attorney has to understand his own emotions very well. "You should know where your emotions are and how to stop that emotional train," he commented.[35] Asked whether he was emotionally more mature now than when he started practicing law, he responded immediately, "Undoubtedly. I know myself better. You learn things about yourself, if you're paying attention."[36]

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[32] KISER, HOW LEADING LAWYERS THINK, *supra* note 5, at 79.
[33] *Id.*
[34] *Id.* at 79–80.
[35] *Id.* at 80.
[36] *Id.*

### *C. Effect of Emotions on Clients, Adversaries, Jurors, and Insurers*

Apart from knowing how emotions could affect their own judgment and advocacy, the attorneys repeatedly pointed to the importance of understanding how emotions affect clients and adversaries, especially in settlement negotiations:

- When I started representing plaintiffs, my first case settled for $900,000. That's a case I would have paid $75,000 for if we represented the defendant. Everybody is afraid—plaintiffs and defendants laying out all of this money. You have to manipulate the other side's fear and have none yourself. Fear equals the perception of risk—not even risk, but the perception of risk.
- Doctors' belief that they did nothing wrong interferes with settlement. For their part, it's an emotional issue. They believe deep down they did nothing wrong. But even if they believe they did nothing wrong, there's a business decision [to settle or try a case] that has to be made.
- People do not realize the emotional effect litigation has on clients. Young attorneys do not realize the damage that is done by having to relive the trauma of an emotionally devastating event like wrongful death. Humans have a capacity to mend, to recover over time, and litigation reopens memories that people are trying to recover from. They do not realize the damage they will do to their own clients even if they win. They [clients] have to relive all the painful events they are trying to put behind them. Most attorneys do not realize that winning is resolving a case earlier rather than winning at trial.
- I see non-money issues popping up all the time. In the case you mentioned in your letter, my client wanted the relationship to continue more than the judgment. In defendant's obstinacy and anger—just being a dickhead—he refused to continue the business relationship he was contractually bound to. As a businessman, my client wanted to earn his money. He did not just want a settlement payment. They [defendants] just wouldn't do it. We just wanted them to buy [product] from us. Even post-judgment they could have resolved this by resuming the relationship. But since the defendant wouldn't do that, we went on and also got attorneys' fees and court costs. Sometimes there is a disconnect. People are caught up in agendas—"I did nothing wrong."[37]

The attorneys also considered the impact of subjective factors on jurors and insurance company claims representatives. In many cases, intangible features of a case were considered as important as "hard" facts:

- The soft stuff is important—the charismatic nature of the client, the attractiveness of the client. I've had adjusters say they will tender the limits after they met an attractive client.
- If I have a motorcyclist with a tattoo for a client, helping a grandmother cross a street, and he's hit by a drunk driver, that case is still worth less than a Boy Scout helping her across the street. A large part is based on subjective human behavior.

[37] *Id.* at 80–81.

- For jurors a big question is, "Is the plaintiff a nice person?"
- [Y]ou have to evaluate the overall case; this includes the likeability and unlikeability of the plaintiff and the defendants. We always look very carefully at the personal factors and have to ask, "Is there anything about the defendant that would offend anyone?" because that will change the evaluation.
- Personality is the most important factor in case evaluation. It's a people skill. If you don't have a feel for people you won't make it. . . . This has so many facets it's like a symphony. The tuba may not sound very good by itself, but when you put the tubas with the French horns and get them all together in the right way the sound is great.
- In a wrongful death case, I have to be very mindful of how to address the representative. I can't address them like I would a regular plaintiff, even if I think they're exaggerating. I have to watch my tone, my words. In one case they put their granddaughter on the stand, and I had to decide whether to cross-examine her. I said to myself, "I'll earn my points somewhere else." I'm not that stupid.
- If the plaintiff makes a sympathetic appearance, you have to take that into consideration. Conversely, if your client makes a poor witness—even if the medicine is on your side—it doesn't matter. In another case I had, the jury said they had problems with my client and the doctor's office manager's credibility. The jurors' perceptions of the parties go to the liability side.[38]

Integrating all case factors—subjective and objective—into a composite evaluation is a major challenge for even the most savvy trial lawyers. "You have to become somewhat of a psychiatrist and a psychologist and relate to people and have them relate to you,"[39] remarks a renowned plaintiffs' attorney.

### *D. Self-Awareness*

The attorneys displayed a deep sense of their own skills, biases, shortcomings, and limitations. Many have developed empathy by experiencing failure and rejection in their own lives, and some have overcome alcoholism, childhood abuse, debilitating illness, and other personal tragedies. An attorney famous for his ability to connect with jurors describes a setback early in his career:

> I think I see how people really are and how they come across. I also know what it's like to be ignored. When I graduated from law school there was nothing I wanted more than to be a plaintiffs' attorney in the San Francisco Bay Area. I got there and found it was a buyers' market, and I could not even get an interview at [two San Francisco personal injury firms]. I showed up three times and tried to talk the receptionist into letting me talk with a lawyer at [law firm]. I couldn't even get past the receptionist. Back then I hadn't had a decent haircut in years and didn't have these [points to lower teeth] because they had been

[38] *Id.* at 82.
[39] *Id.* at 83.

> knocked out in a fight. I spent weeks trying to get a job before heading to [city] where I had said I would never live.[40]

For every study attorney who enjoyed a comfortable childhood, another study attorney seemed to have lived a hardscrabble existence in his youth. Regardless of their backgrounds, both privileged and necessitous, the attorneys endeavored to fulfill their own concepts of accomplishment and to meet their personal standards of integrity and professional commitment to clients.[41] Whatever their individual circumstances had been, the study attorneys exhibited a high level of self-awareness and deliberateness about their practices.

The self-awareness exhibited by the study attorneys is a frequently overlooked element of expertise. Expert performers like the study attorneys distinguish themselves by continually completing a self-regulatory cycle of forethought (task analysis and self-motivation), performance (self-control and self-observation), and self-reflection (self-judgment and self-reaction).[42] Although non-experts also attempt to improve their performance in some way, experts accelerate their improvement by setting higher goals for themselves, recalling more pertinent and substantial information about their performance, and attributing errors to sources over which they have control.[43]

Self-awareness is as important in the legal field as it is in any other professional endeavor where lives, reputations, and assets are at stake. When lawyers lack self-awareness and emotional intelligence, they unwittingly overlook key factors in case evaluation, mismanage pre-trial preparation, and fail to achieve optimal trial results. This lack of personal awareness directly harms case strategies, as law professors Stefan Krieger and Richard Neumann explain: "Most lawyers have some personality trait that, if left uncontrolled, will in one way or another obstruct strategy."[44]

The fact that some attorneys may be unaware of their emotions and how their personalities affect people is discussed by one of the study attorneys:

> Case evaluation is like body consciousness. Do you know what that means? We had a guy in this office who had no body consciousness—could not walk

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[40] *Id.*

[41] That intrinsic motivation is a more powerful determinant of success than family income is again demonstrated by a study of ten thousand West Point cadets over fourteen years: "logistic regression results controlling for age, sex, race, high-school grades, SAT score, parental income, religion, entering year, other factors, and interaction terms indicated that the effect of holding stronger internally based reasons for attending West Point on graduating and becoming a commissioned officer was positive and significant (F4: $\beta = 0.22$, $P < 0.0001$)." Amy Wrzesniewski et al., *Multiple Types of Motives Don't Multiply the Motivation of West Point Cadets*, 111 PROC. NAT'L ACAD. SCI. U.S. AM. 10990, 10993–94 (2014).

[42] Barry J. Zimmerman, *Development and Adaptation of Expertise: The Role of Self-Regulatory Processes and Beliefs*, *in* CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE, *supra* note 4, at 705, 708.

[43] *Id.* at 711–12.

[44] STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 39 (3d ed. 2007).

> around without hitting something. He had a big blustery voice but no sense of how he impacted people and how he moved around the office. Many lawyers are personally brilliant but oblivious to where they are in the world. They do not see how they come off to people. They are not honed in their thinking. They might be book smart, but they are not people smart.[45]

"Book smart but not people smart" suggests that attorney self-awareness has changed little since 1955, when Erwin Griswold, the Dean of Harvard Law School, said, "Many lawyers never do seem to understand that they are dealing with *people* and not solely with the impersonal law."[46]

Interacting with people and understanding the personal implications of legal decisions, the attorneys exhibited many of the core competencies that constitute emotional intelligence: self-awareness, self-assessment, consciousness, self-control, trustworthiness, conscientiousness and adaptability.[47] They were self-critical and continually monitored themselves for maladaptive behavior. In describing the interplay between emotions and law practice, they made these observations about themselves and other attorneys:

- Lawyers are ego driven, egocentric driven, especially trial lawyers. They start to believe they are invincible, they can do anything, like it's just a matter of personality. Lawyers are guilty of being too egocentric. You have the leading role, you're on center stage, you're the producer and the director. There's a danger in that. Trial work has a lot of stress; it attracts you when you're young and you have a lot of testosterone, but there's a price to pay. Sometimes it's your judgment.
- How do I know when I'm getting too emotional? When I can't see everything—when you can't see—when you start to believe your own bullshit.
- In the old days, I was more emotional, one way or the other, about each case. I got better over time with controlling my emotions, more analytical, but I still feel like crying sometimes in closing argument. I let my voice crack. That's as far I can go with the jury, even if I feel like crying.
- It's my personality—I want to fight everything. I know now to pick my wars.
- It's hard to know when the jury thinks you're beating up on a plaintiff. I consider myself to be pretty sensitive, but in one case I misread the jury. Maybe I didn't think to ask myself, "Will this bother the jury?" Maybe I wasn't paying enough attention. You have to carefully assess the impact of your words—not just not getting angry but not being sarcastic.
- Some partners are very detail-oriented but have had some very bad results at trial because they lack that emotional sense.[48]

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[45] KISER, HOW LEADING LAWYERS THINK, *supra* note 5, at 84.

[46] Peter Reilly, *Mindfulness, Emotions, and Mental Models: Theory That Leads to More Effective Dispute Resolution*, 10 NEV. L.J. 433, 433 (2010) (quoting Erwin N. Griswold, *Law Schools and Human Relations*, 8 COLUM. L. REV. 605, 607, 609–10 (1908)).

[47] DANIEL GOLEMAN, WORKING WITH EMOTIONAL INTELLIGENCE 26 (reissue ed. 2006).

[48] KISER, HOW LEADING LAWYERS THINK, *supra* note 5, at 84–85.

As indicated by these remarks, the line between constructive and detrimental emotional involvement is opaque, and it is a perpetual challenge to exploit the benefits of emotional commitment and enthusiasm while avoiding the damage of emotional biases and extremism. What seems to distinguish these attorneys from some of their colleagues is not that they avoid this conundrum altogether but that they are thinking about it regularly.

## V. LESSONS FROM THE MEDICAL PROFESSION

The medical profession is years ahead of the legal profession in recognizing the importance of emotional intelligence and incorporating psychology into its student admissions process and professional curriculum.[49] Many of the reforms in medical education reflect fundamental changes in how physicians communicate, coordinate responsibilities, and evaluate their performance on teams; how competence is defined and measured; how medical students develop discrete technical skills and broad problem-solving and communication skills; and how patient outcomes are affected by psychological, cultural, and sociological factors previously deemed extraneous to the practice of medicine. These fundamental changes and the trends they represent are shown in Table 1, with the hope that their counterparts in the legal profession can be readily identified and implemented.

The broad changes in the medical profession—shifts from individual to organizational practices; a focus on outcomes rather than processes; and increasing demands for leadership, communication, problem-solving, and observational skills—closely resemble contemporary challenges to the legal profession. Unlike the medical profession, however, the legal profession has proven to be tardy, if not stymied, in attempting to meet its challenges. The giant upheavals in law school enrollments, entry level employment prospects, and law firm economics will continue to rock the profession until it starts to acknowledge and adapt to decades of technological, pedagogical, demographic, and attitudinal changes.

To demonstrate how medical schools are responding to these challenges, four specific reforms are highlighted below. These reforms illustrate the range of innovation in medical school education, the skills assessed and enhanced by these reforms, and the applicability of the methods and underlying concepts to legal education.

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[49] *See* Pat Croskerry, *Diagnostic Failure: A Cognitive and Affective Approach*, *in* 2 ADVANCES FOR PATIENT SAFETY: FROM RESEARCH TO IMPLEMENTATION 241, 246–47 (Kerm Henriksen et al. eds., 2005).

TABLE 1: MEDICAL PROFESSION TRENDS AND THEMES

| Old | New |
|---|---|
| Orientation: | |
| Organs | Organisms |
| Teaching: | |
| Lectures | Simulations |
| Recall; Memory | Critical thinking |
| Discrete Subjects | Comprehensive problem-solving |
| Testing | Self-evaluation skills |
| Credentialing | Perpetual learning |
| Performance: | |
| Control | Communication; Leadership; Receptiveness |
| Certainty | Tolerance of ambiguity |
| Diagnostic speed | Observational quality |
| Opining | Listening; History-taking |
| Advising | Motivating |
| Directing | Leading |
| Competence | Effectiveness |
| Deference | Inquisitiveness |
| Uniformity | Adaptability; Agility |
| Procedures | Outcomes |
| Structure: | |
| Independent physicians | Health care teams |
| Hierarchies | Collaboration |
| Patients: | |
| Patient behavior | Cultures and contexts |
| Patient compliance | Cognitive and educational interventions |

### *A. MCAT*

In 2015, the Medical College Admissions Test (MCAT) will include a new section, "Psychological, Social and Biological Foundations of Behavior," consisting of fifty-nine questions to be answered within ninety-five minutes.[50] This new section responds to public opinion research indicating that "physicians have a strong medical background but lack bedside manner" and recent findings that "integrating social and behavioral sciences into medical education can

[50] *What's on the MCAT2015 Exam? Psychological, Social, and Biological Foundations of Behavior*, ASS'N AM. MED. COLLEGES, https://www.aamc.org/students/download/374014/data/mcat2015-psbb.pdf (last visited May 13, 2015).

improve health care."[51] As Darrell Kirch, the president of the Association of American Medical Colleges notes, "bedside manner is a complex mix of understanding people, where they come from, how they think, and why they behave the way they do . . . . We think this shift in emphasis will help us round out that dimension of a good doctor."[52]

The subjects tested in the new MCAT extend beyond conventional assessments of scientific knowledge and proficiency in working with scientific data to the "soft" skills that often are determinative of patient satisfaction and outcomes. Recognizing that "approximately half of all causes of morbidity and mortality in the United States are linked to behavioral and social causes,"[53] the new MCAT contains a broad range of topics from the behavioral and social sciences: perception, attention, cognition, memory, emotion, stress, personality, psychological disorders, motivation, attitudes, heuristics, intuition, culture, socialization, learning, behavior change, identity, bias, status, self-presentation, and social class.[54] These broad topics in psychology, sociology, and biology reflect this overall distribution: 60 percent psychology, 30 percent sociology, and 10 percent biology.[55]

In incorporating the behavioral and social sciences, the new MCAT appears to recognize that scientific knowledge alone is sometimes ineffective in improving patient health and that technical proficiency can be ineffectual absent an understanding of persuasion, motivation, and risk assessment. Illustrative of this new emphasis on the psychological determinants of health and illness and the advantages of combining sound advice with effective persuasion are these two new MCAT questions:

> Which statement is NOT compatible with the hypothesis that self-serving bias can account for participants' explanations of their body weights?
>
> A. Obese participants view their unhealthy weight as a result of having too many fast food restaurants near home.
> B. Non-obese participants view their healthy weight as a result of having strong will power.
> C. Obese participants view their unhealthy weight as a result of not having time to exercise regularly.
> D. Non-obese participants view their healthy weight as a result of not having any fast food restaurants near their home.
>
> Answer: D

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[51] Sarah Mann, *AAMC Approves New MCAT® Exam with Increased Focus on Social, Behavioral Sciences*, AAMC REP. (Mar. 2012), https://www.aamc.org/newsroom/reporter/march2012/276588/mcat2015.html.

[52] *Id.*

[53] Richard Lewis, *MCAT Revision Anticipates Psychological Science*, APS OBSERVER (Apr. 2013), http://www.psychologicalscience.org/index.php/publications/observer/2013/april-13/mcat-revision-anticipates-psychological-science.html.

[54] ASS'N OF AM. MED. COLLS., PREVIEW GUIDE FOR THE MCAT2015 EXAM 94–98, 101–08, 113 (2d ed. 2012).

[55] *Id.* at 114.

> Under which conditions would people be most likely to experience comparative optimism regarding their own likelihood of contracting HIV?
>
> A. When an in-group member has been diagnosed with HIV
> B. When an out-group member has been diagnosed with HIV
> C. When a public figure has been diagnosed with HIV
> D. When a credible physician has been diagnosed with HIV
>
> Answer: B[56]

These questions also represent a shift from process to outcomes, as professional performance is now measured not simply by the soundness of the diagnosis and the appropriateness of the recommendations but also by the actual effects on the patient. In law practices, clients now place a similar emphasis on outcomes and expect their attorneys to be both knowledgeable and effective. Technically correct legal advice that neither solves a problem nor guides future action is ignored and unpaid, as law firm collection rates plummet from 92 percent in 2007 to 83.5 percent in 2013.[57]

### *B. Multiple Mini Interviews*

In addition to modifying the MCAT, the medical profession has implemented more realistic, comprehensive methods to assess the problem-solving and decision-making styles and capacities of medical school applicants. One proven technique, adopted by more than thirty-five medical schools in the United States and Canada, is the Multiple Mini Interview ("MMI").[58] An MMI usually consists of six to ten sessions—each approximately eight minutes long—in which a medical school applicant is asked to read a scenario posted outside the interview room door and then meet with a trained interviewer to discuss her opinions and decision-making strategies. The scenarios include ethical quandaries and current policy problems and sometimes require the candidate to interact with another candidate or relate to an actor in a simulated patient/physician discussion. At the conclusion of the interview, the candidate moves to another station with a different scenario and interviewer. Between interviews, the interviewers score each candidate's performance on an evaluation form with a seven-point scale.

The MMI scenarios are designed to assess skills and characteristics that otherwise evade analysis in a conventional medical school application process: listening, problem solving, maturity, creativity, persuasion, tolerance of ambiguity and dissident opinions, flexibility, resilience, and empathy.[59] Specific medical knowledge is not required, and the scenarios generally present a prob-

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[56] *Id.* at 116, 122.

[57] Jennifer Smith, *Law Firms Press to Get Bills Paid by Year-End*, WALL ST. J. (Dec. 22, 2013, 6:47 PM), http://www.wsj.com/articles/SB10001424052702304773104579270470475326780/.

[58] *See Multiple Mini Interview Preparation*, ASTROFF, http://astroffconsultants.com/multiple-mini-interview-mmi/ (last visited May 18, 2015).

[59] *Id.*

lem that requires analytical reasoning complemented by sound communication skills and defensible insight into human behavior, as illustrated by this sample question:

> Clostridium Difficile (C. difficile) is a type of bacteria that increases its activity with most antibiotic use, and is therefore very difficult to treat. Research shows that the most effective way to prevent the spread of infection is frequent handwashing. However, many people have flat-out refused to wash their hands in hospitals. The government is contemplating passing a policy to make it mandatory for people entering hospitals to wash their hands or else risk not being seen by doctors and being escorted out of the building against their will. Do you think the government should go ahead with this plan? Consider and discuss the legal, ethical or practical problems that exist for each action option and conclude with a persuasive argument supporting your decision.[60]

The decision-making process employed by the candidate is often more important than the candidate's substantive response. Some scenarios replicate clinical crises demanding multiple levels of expertise and probe whether the candidates would recognize their limitations and seek advice from other professionals. In those scenarios, acknowledging that one does not know the answer but knows how to obtain it is preferable to the overconfident expressions that frequently precede rookie errors.

The MMI initially was designed to provide multiple samples of a candidate's abilities, to afford candidates an opportunity to recover from a negative performance in one interview, and to avoid the demonstrated subjectivity of traditional, single medical school interviews.[61] Years after its adoption by leading medical schools, the MMI has proven to be a highly reliable predictor of clinical performance, far superior to traditional interviews.[62] The benefits of this more comprehensive assessment tool extend beyond the medical profession and directly affect society in general, as the developers of the MMI explain: "Health sciences programmes do, after all, have an ethical obligation to do everything in their power to make appropriate and accurate admissions decisions because these decisions will have a large impact on the quality of health care received by society."[63] Improved assessment tools, if adopted by law schools,

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[60] *Sample MMI Questions*, MULTIPLE MINI INTERVIEW, http://multipleminiinterview.com/mmi-questions/ (last visited May 14, 2015).

[61] Kevin W. Eva et al., *An Admissions OSCE: The Multiple Mini-Interview*, 38 MED. EDUC. 314, 323 (2004). *See generally* Clarence D. Kreiter et al., *Investigating the Reliability of the Medical School Admissions Interview*, 9 ADVANCES HEALTH SCI. EDUC. 147 (2004).

[62] Eva et al., *supra* note 61; Kevin W. Eva et al., *The Ability of the Multiple Mini-Interview to Predict Preclerkship Performance in Medical School*, 79 ACAD. MED., at S40, S42 (2004); Koshila Kumar et al., *Experiences of the Multiple Mini-Interview: A Qualitative Analysis*, 43 MED. EDUC. 360, 361 (2009); Harold I. Reiter et al., *Multiple Mini-Interviews Predict Clerkship and Licensing Examination Performance*, 41 MED. EDUC. 378, 383 (2007). Some researchers express concern that MMI interviews favor extrovert personalities. *See* Anthony Jerant et al., *Does Applicant Personality Influence Multiple Mini-Interview Performance and Medical School Acceptance Offers?*, 87 ACAD. MED. 1250, 1255 (2012).

[63] Eva et al., *supra* note 61.

could have a similarly broad impact on the quality of legal services delivered to clients throughout society.

### C. Emotional Intelligence Assessment and Development

After admission to medical school, students participate in a wide range of new programs designed to assess and improve their emotional intelligence. The recent emphasis on emotional intelligence results from the Accreditation Council for Graduate Medical Education's decision to include "interpersonal and communication" skills as one of the six core competencies.[64] Medical school graduates now are required to demonstrate skills "that result in the effective exchange of information and collaboration with patients, their families, and health professionals," and they are expected to "work effectively as a member or leader of a health care team or other professional group."[65]

The imperative to improve physicians' interpersonal and communication skills is grounded in extensive research indicating that (1) diagnostic errors are the most common malpractice claims; (2) poor communication and teamwork are the leading causes of diagnostic errors; (3) communication failures among doctors, patients, and nurses often result "because some doctors, while technically competent, are socially inept;" and (4) improved communication is correlated with patient adherence to medication, willingness to seek care, and openness in disclosing information.[66] As Alicia Monroe, the University of South

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[64] Daisy Grewal & Heather A. Davidson, *Emotional Intelligence and Graduate Medical Education*, 300 J. AM. MED. ASS'N 1200, 1200 (2008); Susan R. Swing, *The ACGME Outcome Project: Retrospective and Prospective*, 29 MED. TCHR. 648, 648 (2007).

[65] ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., ACGME COMMON PROGRAM REQUIREMENTS 9 (rev. ed. 2014), *available at* http://www.acgme.org/acgmeweb/Portals/0/PFAssets/ProgramRequirements/CPRs_07012015.pdf. The ACGME Competencies include:

> IV.A.5.d) Interpersonal and Communication Skills
>
> Residents must demonstrate interpersonal and communication skills that result in the effective exchange of information and collaboration with patients, their families, and health professionals. Residents are expected to:
>
> (1) communicate effectively with patients, families, and the public, as appropriate, across a broad range of socioeconomic and cultural backgrounds;
>
> (2) communicate effectively with physicians, other health professionals, and health related agencies;
>
> (3) work effectively as a member or leader of a health care team or other professional group;
>
> (4) act in a consultative role to other physicians and health professionals; and,
>
> (5) maintain comprehensive, timely, and legible medical records, if applicable.

*Id.* at 7, 9.

[66] Boon How Chew et al., *Emotional Intelligence and Academic Performance in First and Final Year Medical Students: A Cross-Sectional Study*, 13 BMC MED. EDUC., art. 44, at 1, 1 (2013); Swing, *supra* note 64, at 652; Ali S. Saber Tehrani et al., *25-Year Summary of US Malpractice Claims for Diagnostic Errors 1986–2010: An Analysis from the National Practitioner Data Bank*, 22 BMJ QUALITY & SAFETY 672 (2013); Anita R. Webb et al., *Emotional Intelligence and the ACGME Competencies*, 2 J. GRADUATE MED. EDUC. 508, 508–09 (2010); Gardiner Harris, *New for Aspiring Doctors, the People Skills Test*, N.Y. TIMES, July 10, 2011, at A1.

Florida College of Medicine's Vice Dean for Educational Affairs, notes, "We teach students the technical and academic side of medicine, but we don't necessarily help them cultivate mindfulness, self-awareness, empathy, and other personality traits equally critical to their success as physicians."[67]

Specific methods of measuring and developing student self-awareness and empathy include participating in 360-degree evaluations by nurses, professors, faculty advisors, and residents; attending workshops on communication and empathy; writing about emotional responses to traumatic medical events; taking self-report tests like the Bar-On Emotional Quotient Inventory ("EQ-I") and the Self-Report Emotional Intelligence Test ("SREIT"); ability-based tests like the Mayer-Salovey-Caruso Emotional Intelligence Test ("MSCEIT"); and physician-specific assessments like the Jefferson Physician Empathy Scale, and the thirty-four-item instrument developed by Carrothers, Gregory, and Gallagher; and studying videotaped discussions between a patient and the student during which the patient's galvanic skin responses (moisture level fluctuations signaling periods of emotional arousal) are simultaneously displayed.[68]

The initial results from these programs indicate that "interventions can be successful in reducing the effects of stress and in enhancing medical students'/junior doctors' empathy skills."[69] Other studies, however, report uneven results and a lack of interest and commitment among medical students.[70] Although "best practices" for developing medical students' emotional intelligence have yet to be established, the benefits of enhanced emotional intelligence appear to be well documented.[71] A 2010 literature search, for instance, reported that higher emotional intelligence was positively correlated with better "doctor-patient relationship[s], increased empathy, teamwork and communication skills, and stress management, organizational commitment and leadership."[72]

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[67] Mike Martin, *New Medical Education Program Selects Students for "Emotional Intelligence,"* AAMC REP. (Dec. 2011), https://www.aamc.org/newsroom/reporter/december2011/268876/emotional-intelligence.html.

[68] *See, e.g.*, Elizabeth J. Austin et al., *A Preliminary Study of Emotional Intelligence, Empathy and Exam Performance in First Year Medical Students*, 39 PERSONALITY & INDIVIDUAL DIFFERENCES 1395, 1399 (2005); Robert M. Carrothers et al., *Measuring Emotional Intelligence of Medical School Applicants*, 75 ACAD. MED. 456 (2000); Grewal & Davidson, *supra* note 64, at 1201.

[69] Eva M. Doherty et al., *Emotional Intelligence Assessment in a Graduate Entry Medical School Curriculum*, 13 BMC MED. EDUC., art. 38 at 1, 1 (2013); *accord* M. Gemma Cherry et al., *What Impact Do Structured Educational Sessions to Increase Emotional Intelligence Have on Medical Students? BEME Guide No. 17*, 34 MED. TCHR., 2012, at 11, 11.

[70] Webb et al., *supra* note 66, at 510–11.

[71] Chew et al., *supra* note 66 ("[I]n clinical practice, [emotional intelligence] has been related to improved empathy in medical consultation, doctor-patient relationships, clinical performance and patient satisfaction."); *see* Doherty et al., *supra* note 69; Hui-Ching Weng et al., *Associations Between Emotional Intelligence and Doctor Burnout, Job Satisfaction and Patient Satisfaction*, 45 MED. EDUC. 835, 835 (2011).

[72] Sonal Arora et al., *Emotional Intelligence in Medicine: A Systematic Review Through the Context of the ACGME Competencies*, 44 MED. EDUC. 749, 749 (2010) (citations omitted).

### *D. Enhanced Observation Skills*

The "Observational Skills Workshop," designed to enhance medical students' perceptions and diagnoses, began as a collaboration in 1997 between Linda Friedlaender, the Curator of Education at the Yale Center for British Art, and Irwin Braverman, M.D., Professor of Dermatology at the Yale School of Medicine.[73] More than twenty-five other medical schools (and business schools like the Yale School of Management and the Wharton School at the University of Pennsylvania) have implemented similar programs.[74]

In a typical enhanced observation program, a group of four medical students view a pre-selected painting, chosen for its rich gestures, vivid expressions, and ambiguous setting, for fifteen minutes and then are asked to describe it "in a way that if someone is listening but doesn't see the painting they will get a mental image of it."[75] (This is remarkably similar to an attorney's challenge in depicting a scene for a judge or jury). After relating their perceptions, the students are asked to create the narrative of the picture and to form a hypothesis "as to what you think this is all about."[76] Before a curator describes the actual background of the painting, the students often are asked whether something has been left out of their descriptions, narratives, or hypothesis. As Ms. Friedlaender notes, "Sometimes, interestingly enough, the elephant in the middle of the room is not addressed. And I will say to them, 'Would you like to say something about the person in the middle of the painting?' "[77]

Medical students participating in these enhanced observation programs demonstrate a significant improvement in detecting and diagnosing diseases.[78] The paintings, as Dr. Braverman explains, "are a surrogate for the patient . . . . This allows for differential diagnosis and highlights the problem of premature

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[73] *See* Jacqueline C. Dolev et al., *Use of Fine Art to Enhance Visual Diagnostic Skills*, 286 J. AM. MED. ASS'N 1020, 1020 (2001).

[74] *See* Yale Univ., *The Art of Medicine*, YOUTUBE (May 5, 2009), https://www.youtube.com/watch?v=oL1b1tMNI4E.

[75] *Id.*; *see* Jacqueline C. Dolev et al., *Observational Skills*, YALE SCH. MED., http://medicine.yale.edu/dermatology/education/obvskills/ (last visited May 30, 2015).

[76] Yale Univ., *supra* note 74.

[77] *Id.*

[78] Dolev et al., *supra* note 73; Sheila Naghshineh et al., *Formal Art Observation Training Improves Medical Students' Visual Diagnostic Skills*, 23 J. GEN. INTERNAL MED. 991, 995 (2008) ("[O]bservation skills, including those directly relevant to clinical medicine, can be successfully acquired through active, structured study of works of art and medical imagery."); Pamela B. Schaff et al., *From Contemporary Art to Core Clinical Skills: Observation, Interpretation, and Meaning-Making in a Complex Environment*, 86 ACAD. MED. 1272, 1272 (2011) ("[S]tudents were able not only to apply their observational and interpretive skills in a safe, nonclinical setting but also to accept the facts that ambiguity is inherent to art, life, and clinical experience and that there can be more than one answer to many questions."); *see* Johanna Shapiro et al., *Training the Clinical Eye and Mind: Using the Arts to Develop Medical Students' Observational and Pattern Recognition Skills*, 40 MED. EDUC. 263, 263 (2006) ("In the arts-based conditions, students also developed skills in emotional recognition, cultivation of empathy, identification of story and narrative, and awareness of multiple perspectives.").

conclusions."[79] In addition to improving their diagnostic skills, the medical students learn critical communication skills as they listen to and discuss other students' perceptions and interpretations. "They begin to see things they ordinarily would have passed over," Dr. Braverman relates. "And what we realized afterwards is that we've actually taught them something about teamwork, what it means to communicate with one another over some issue."[80]

At the conclusion of an enhanced observation program, a medical student commented, "Being a doctor is all about seeing everything that's in front of you and not just seeing it but really looking and watching and observing. And to be a better observer, is to be a better doctor."[81] In the practice of law as well, better observers are better lawyers. An attorney's ability to accurately perceive and describe people and conditions, to discern the emotions of clients, judges, witnesses, and other attorneys and to divine and convey the narrative of a dispute or transaction is central to effective communication and successful client relationships. Just as physicians lose diagnostic acuity as their attention shifts from patient observation to laboratory tests, lawyers lose evaluative capabilities as their attention shifts from human expression to contracts and briefs. In both professions, we are at risk of losing our "visual literacy."

## CONCLUSION

Our inability to reconcile emotions with the legal order has retarded improvements in law school education and the practice of law. In our quest for dispassion, impartiality, and predictability, we have divorced ourselves from the realities of human behavior. Like Ulysses strapping himself to the ship's mast to avoid the Sirens' temptations, we have abjured emotions to escape the troublesome tensions between fairness and compassion, equality and individuality, uniformity and discretion, knowledge and wisdom, and objectivity and discernment. Our unease with emotions leads to serious misunderstandings and erroneous predictions about how clients, judges, and juries react to loss, disrespect, neglect, conceit, unfairness, frustration, and deceit.

Effective attorneys understand their personal motivations, biases, convictions, habits, and weaknesses, and they develop integrity, credibility, humility, and maturity by embracing all dimensions of their personalities. They also know that their clients' positions ultimately will be evaluated by imperfect judges and juries attempting to impose their individual sense of justice under a canopy of law. Recognizing that jurors' decisions are an admixture of facts, common sense, formal law, and expert witness testimony, effective attorneys

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[79] John Jesitus, *Studying Fine Art Enhances Clinical Observational Skills*, DERMATOLOGY TIMES (Feb. 1, 2012), http://dermatologytimes.modernmedicine.com/dermatology-times/news/modernmedicine/modern-medicine-feature-articles/studying-fine-art-enhances-cl.

[80] Yale Univ., *supra* note 74.

[81] *Id.*

skillfully integrate emotions, evidence, and arguments.[82] Since they have learned to respect rather than shun emotions, their advocacy more closely tracks jurors' reasoning processes, and they impress jurors as being both more likeable and more persuasive.

The role of emotion in case evaluation and the importance of emotional commitment in trial representation are synthesized in this email to the author from John V. Hager, one of the attorneys interviewed for *How Leading Lawyers Think*:

> I wanted to add a couple points after thinking about our discussion.
>
> Maintaining a professional distance is important to accurate evaluation, as I said. But a lawyer really serves two roles: that of an advocate, putting the client's best case forward to the outside world, and, on the other hand, serving as a neutral (this is the real point for evaluation) advisor about the likely outcome of the case. I am not sure many lawyers appreciate this distinction or realize that they have these two roles that must be separated.
>
> In the advocate's role, feeling the emotion of the case, even for a defendant who will not pay a dime [because of insurance coverage] if the case is lost, is important to the best advocacy. Letting oneself feel the emotion, without being overcome by it, helps trial advocacy. During almost every trial, I end up crying sometime, away from court, not because of unhappiness or fear of loss, but just from the overwhelming emotion I feel during trial. I don't know if I am unique in this respect. I do think some lawyers lose this as they age—a sort of cynicism can creep in. I consider myself lucky that I can genuinely feel the emotion in every case.
>
> This is probably beyond your topic of interest, but your inquiry prompted me to have these thoughts that I felt I should share with you.[83]

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[82] NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 5 (2000).

[83] KISER, HOW LEADING LAWYERS THINK, *supra* note 5, at 85.

DIVERSITY & INCLUSION

# Increasing Law Firm Diversity

Share:

By David O'Connor

*Diversity & Inclusion Committee Newsletter - Winter 2020*

The legal profession is generally perceived as lagging behind other professions and industries in the area of diversity and inclusion (D&I). Although there are many notable exceptions, women and minorities are often under-represented at law firms and in-house law departments, particularly in leadership positions. They also often receive lower compensation than non-diverse attorneys and are excluded from, or overlooked for, other important law firm and law department roles, opportunities, and benefits.

Many in-house law departments have increased their diversity by participating in their organizations' D&I programs. Many law firms also have recently improved their D&I efforts, and numerous minority-owned law firms have been established. To accelerate these law firm diversification efforts, many law departments are becoming increasingly active and vocal in

encouraging D&I at the majority-owned law firms they retain for legal services. Law departments are also increasing their use of minority-owned law firms.

## Law Firm Diversity Defined

The two main types of law firm diversity are: (1) majority-owned firms that employ attorneys with diverse characteristics and backgrounds and (2) minority-owned firms, including diverse solo practitioners. Majority-owned law firms are firms that are largely owned, led, and managed by white males. Diversity at majority-owned firms is reflected in the employment, status, and roles of attorneys with diverse backgrounds, such as their:

- Gender
- Race or ethnicity
- Sexual orientation or identification
- Disabilities
- Religion
- Age
- National origin
- Military service

Minority-owned law firms, including solo practitioner firms, are firms owned by:

- Women
- Racial and ethnic minorities
- LGBTQ persons

# Current State of Law Firm Diversity

A 2019 study of over 1,000 offices of major law firms in the US found that in 2018, women comprised 35.41 percent of the attorneys at those firms. That same survey found that 16.1 percent of attorneys at those firms were racially or ethnically diverse, 8.08 percent were racially or ethnically diverse women, 2.86 percent were LGBTQ attorneys, and 0.53 percent were attorneys with disabilities. The survey also found that in 2018, 23.36 percent of firm partners were women, 9.13 percent were racially or ethnically diverse, and 3.19 percent were racially or ethnically diverse women. The study did not disclose the percentages of LGBTQ partners or partners with disabilities. The study also did not distinguish between majorityowned firms and minority-owned firms nor did it disclose the number of minorityowned firms in the US.

# Benefits of Increasing Law Firm Diversity

Increased law firm diversity can provide many benefits to an in-house law department, its organization, and the legal profession, including:

- Raising quality
- Reducing costs
- Enhancing the law department's reputation
- Improving departmental operations
- Contributing to organizational initiatives
- Supporting external D&I efforts

# Raising Quality of Law Department Services

The most important contribution a law department makes to its organization is the delivery of professional and cost-effective legal services.

A law department's D&I efforts can improve the quality of its services and the results they generate because:

- Diverse firms and attorneys bring different perspectives, experiences, and opinions to identifying, addressing, and resolving legal issues
- Teams with diverse members often are compelled to be more innovative, creative, and collaborative than teams with members that share similar backgrounds
- Diversification encourages team members to consider factors and issues that they might otherwise overlook, undervalue, or dismiss.

## Reducing Outside Counsel Costs

In-house law departments that use qualified minority-owned firms can achieve high-quality results while simultaneously reducing their legal spend because:

- Minority-owned law firms are typically smaller and have lower operating expenses than their majority-owned competitors, so they often charge lower rates for their attorneys' services
- In addition to their lower rates, smaller firm attorneys are often more experienced and efficient than the associates at larger firms providing the firm's day-to-day legal services
- Many minority-owned law firms are relatively new compared to longer-established majority-owned firms and they are often more aggressive in obtaining and retaining clients. This can result in lower hourly rates and more creative uses of alternative fee arrangements

## Enhancing Law Department's Reputation

An in-house law department's law firm D&I program that delivers improved

results to the organization demonstrates that the department is forward-thinking and committed to improving its services and advancing the legal profession. Employing a diverse roster of qualified outside counsel experienced with different cultures, languages, and backgrounds can enhance the department's reputation, credibility, and effectiveness with:

- Diverse business colleagues that interact with outside counsel
- Other organizational colleagues
- The organization's clients or customers
- External legal professionals
- Judges and juries

## Improving Law Department's Operations

The effective use of diverse law firms and attorneys can contribute to a law department's internal operations by:

- Encouraging diverse law department personnel to remain engaged in their roles and employed by the organization because the department promotes, practices, and rewards diversity
- Increasing job satisfaction across the department by providing its members with opportunities to support important principles of justice, ethics, and equality
- Causing talented and diverse candidates to consider joining the law department because of its strong commitment to D&I

## Contributing to Organizational D&I Initiatives

Law departments for organizations that have established D&I initiatives can

support those initiatives by pursuing increased law firm diversity. The law department's support allows the organization to:

- Demonstrate the broad scope of its D&I initiatives
- Highlight the importance of participating in D&I initiatives to its other departments and functions
- Include the law department's successes in the organization's public D&I disclosures

## Supporting External Diversity Efforts

A law department's increased use of diverse attorneys and minority-owned law firms provides additional benefits to the legal profession and society-at-large, including:

- Encouraging the recruiting, hiring, development, retention, and promotion to leadership roles of qualified diverse attorneys at majority-owned firms
- Demonstrating the quality and reliability of diverse attorneys and minorityowned firms to other potential clients
- Supporting the economic viability of minority-owned law firms, which encourages the expansion of that business model in the legal profession
- Prompting diverse candidates to pursue careers in the legal profession
- Increasing minorities' access to the justice system
- Making the legal profession more representative of the population it serves

# Challenges and Risks of Increasing Law Firm Diversity

There are also challenges and risks of increasing law firm diversity, including:

- Identifying diverse firms and attorneys
- Exposing internal lack of diversity
- Creating operational inefficiencies by introducing new firms
- Reducing quality by unduly emphasizing diversity over other goals

# Identifying Qualifying Firms and Attorneys

A law department implementing a law firm diversity program must identify qualifying firms. A recent study found that that more than 85 percent of law firms surveyed have diversity committees that include senior partners, and more than 30 percent employ a dedicated diversity professional. However, the fact that a law firm dedicates resources to its diversity program does not guarantee that its D&I efforts are successful. A law department needs to perform due diligence to determine the effectiveness of firms' diversity programs. The law department similarly must identify minority-owned law firms and confirm their qualifications before retaining them.

# Highlighting Law Department's Lack of Diversity

An in-house law department that is not already diverse must ensure that its operations reflect D&I principles before implementing a law firm diversity program. If a law department does not prioritize D&I in its operations, majority-owned firms cannot be expected to follow a department's law firm diversity guidelines.

# Inefficiencies from Onboarding New Firms

An in-house law department and its organization benefit from maintaining longterm relationships with outside counsel and their law firms. Outside counsel representing an organization over many years often develop deep knowledge of an organization's:

- Personnel
- Business model
- Operations.
- Risk tolerance and profile
- Culture
- Industry
- History
- Jurisdictional legal requirements

Replacing long-term outside counsel with newly hired diverse firms can create inefficiencies because those new firms must spend time and resources:

- Becoming familiar with the organization and its operations
- Developing personal connections with in-house counsel and their business colleagues
- Learning the law department's billing, matter-management, and knowledge management policies, practices, and systems

# Promoting Diversity at the Expense of Quality

Law departments are responsible for assigning their work to appropriately qualified law firms and attorneys, regardless of whether those assignments are made to majority-owned firms, minority-owned firms, diverse attorneys, or non-diverse attorneys. Therefore, a law department must design and implement a program to identify and retain diverse firms and attorneys that is consistent with its obligation to match its outside counsels' experience, skills, qualifications, and resources with the complexity and importance of the matters it assigns to them

## Steps to Achieve Increased Law Firm Diversity

Law departments can use different tools to improve law firm diversity, including:

- Adopting inclusive law department operating principles
- Establishing and implementing policies, practices, and procedures for identifying, retaining, and onboarding diverse outside counsel
- Working with third parties, such as bar associations, interest groups, and law departments at industry peers

## Adopting Law Department Operating Principles

The general counsel's commitment to D&I is the first step to increasing the diversity of a law department's outside counsel. The general counsel must demonstrate that diversity is one of the law department's core values and adopt operating principles that reflect the importance of diversity to the law department's mission of providing quality legal services to the organization. If the general counsel does not encourage diversity and take steps to achieve it in the department's internal and external operations, any D&I initiatives the department pursues are unlikely to succeed. Operating principles and practices the general counsel can adopt to support law firm diversity include:

- Emphasizing the importance of D&I in the department's mission statement
- Educating the law department about the importance of D&I principles to the department's operations
- Establishing D&I as a key driver in the department's selection of outside counsel
- Including supplier D&I goals in in-house counsels' annual performance targets
- Appointing respected senior in-house counsel or the department's law department operations professional to lead the department's D&I initiatives
- Designating department members to participate in the organization's D&I programs and partner with outside D&I interest groups
- Budgeting funds to support minority bar associations and other organizations dedicated to increasing D&I in the legal profession
- Implementing unconscious bias elimination training
- Publicizing the department's D&I-focused operating principles and demonstrating the department's successful performance against those principles:
    - within the law department;
    - around the organization; and
    - among the department's outside law firms
    - Developing metrics to track and measure the department's progress against its D&I goals, regularly collecting and

auditing the resulting data, and updating the department's D&I goals, initiatives, and strategies as necessary

## Establishing Outside Counsel

Policies General counsel should also develop, implement, and follow outside counsel policies, practices, and procedures to identify and engage qualified law firms that support the department's D&I goals. In-house law departments collectively send business worth hundreds of millions of dollars to outside law firms every year. General counsel can have a material effect on the improved diversification of the legal profession by sending business to or otherwise recognizing law firms that support, practice, and demonstrate success against D&I principles and withdrawing or declining to send business to law firms that do not prioritize diversity.

## Identifying Diverse Law Firms

The law department should collect from its majority-owned firms their data for the attorneys in each category of diversity in the law department's diversity program, including:

- Percentages of:
    - firm attorneys;
    - partners;
    - equity partners;
    - non-equity partners;
    - counsel and non-partner track attorneys;
    - associates;
    - incoming classes of associates and their rates of

progression through the firm's partnership process relative to non-diverse associates;

- partners leading practice groups; and
- partners serving on firm management, compensation, and other leadership committees

- Hourly rates, including how those rates compare to similarly situated and qualified non-diverse attorneys.
- Compensation statistics, including gender and minority pay-gap information
- Number of hours spent on the organization's legal matters, including hours spent on substantive tasks, to confirm that diverse attorneys are performing meaningful work for the organization

The law department should collect additional data from its majority-owned firms to supplement the information on the firms' diverse attorneys, including information regarding the firms':

- Publicly available D&I statements.
- Commitments to and performance against external diversity benchmarks, such as:
  - the Diversity Lab's Mansfield Rule 3.0; and
  - American Bar Association (ABA) Resolution 113: Promoting Diversity in the Legal Profession.
- Internal D&I policies and performance against those policies, including the firms' commitments to:
  - hire, retain, and promote diverse attorneys;

        - eliminate any gender or diversity pay gaps; and
        - encourage diversity within its service suppliers
    - Support for the firms' affinity groups, also known as employee resource groups, which are employee groups organized based on social identity, shared characteristics, or life experiences.
    - Training and education programs for other firm attorneys to:
        - encourage their support for the firms' diversity initiatives; and
        - identify and avoid unconscious bias
    - Personnel assigned to manage the firms' D&I initiatives
    - Strategic growth plans and the contributions to those plans the firms' D&I goals are expected to make
    - Committees responsible for implementing the firms' D&I policies, including the committees':
        - members;
        - mission statements;
        - levels of authority;
        - action plans; and
        - results against specific diversity targets.
    - Recruiting at non-traditional law schools.
    - Participation in diversity initiatives, including:
        - apprenticeships, internships, and fellowships;

- partnering with clients' diversity activities; and
- supporting bar association programs

The law department should also collect information from minority-owned law firms, including confirming that the law firms are certified as minority-owned by third-party organizations, including:

- The National Association of Minority and Women-Owned Law Firms (NAMWOLF).
- The Women's Business Enterprise National Council (WBENC).
- The National Minority Supplier Development Council (NMSDC).
- The National LGBT Chamber of Commerce (NGLCC). The law department can collect diversity data about each law firm by:
- Interviewing the firm's:
  - attorneys; and
  - staff members responsible for implementing the firm's diversity programs
- Considering the firm's:
  - publicly available information; and
  - internal D&I policies.
- Reviewing the firm's responses to:
  - the ABA Model Diversity Survey, which collects data from law firms on their D&I practices; or
  - surveys designed and conducted by the law department

- Reviewing publicly reported diversity data collected by organizations such as:
    - The National Association for Law Placement (NALP);
    - The Minority Corporate Counsel Association (MCCA); and
    - The Association of Corporate Counsel (ACC).
- Conferring with the law firm's other clients
- Researching the law firm's certifications by third parties

The law department should periodically refresh the diversity data it collects about its firms to ensure that data remains accurate and up-to-date.

## Outside Counsel Retention and Billing Policies

Most in-house law departments establish policies for retaining outside counsel and provide their outside counsel with billing guidelines. Including D&I standards in these policies and guidelines provides a law department with mechanisms to:

- Demonstrate the importance of diversity to its in-house counsel and outside law firms
- Ensure that diverse attorneys and law firms are provided opportunities to provide legal services to the organization
- Improve the results achieved by the law department by using diverse outside counsel

The policies, practices, and procedures that in-house law departments can employ to improve diversity among its outside counsel include:

- **Inclusion in preferred provider networks (PPNs).** Many departments have networks of qualified firms they send most of their work to in exchange for being charged lower rates, receiving flexible payment terms, and having dedicated teams of firm attorneys working on their matters. Law departments can benefit from receiving legal services informed by diverse perspectives, experiences, and opinions by including diverse law firms and attorneys in their PPN process

- **Participating in department requests for proposals (RFPs).** Law departments are increasingly using RFPs to identify, evaluate, and retain outside counsel. A law department's RFP process can support and advance its D&I initiatives by:

    - requiring law firms to include diverse attorneys on the teams participating in the RFP response and providing the legal services awarded to the firm, including in supervisory roles;

    - inquiring about the diversity initiatives, statistics, and successes of majority-owned firms participating in the RFP process; and

    - inviting minority-owned firms to participate in the process.

- **Outside counsel guidelines.** Some in-house law departments include specific diversity requirements and provisions in their outside counsel guidelines, including:

    - requiring the assignment of at least one diverse firm relationship partner to the organization's account;

    - mandating that a minimum percentage of billable hours on substantive tasks be performed each month by diverse attorneys;

- requiring each firm to complete the ABA Model Diversity Survey;
- committing a minimum percentage of the department's annual outside counsel spending to certified minority-owned firms;
- sharing the onboarding costs incurred by newly-retained diverse law firms and attorneys;
- financially rewarding firms if they meet agreed-to diversity goals around staffing and leadership and penalizing those firms that do not meet those goals; and
- receiving regular reports on each firm's D&I programs and results

- **Informal department practices.** Law departments that do not adopt formal policies or practices emphasizing D&I in identifying, evaluating, and retaining outside counsel can still support diversity by:
  - encouraging in-house counsel to research and consider diverse firms and attorneys to represent the organization; and
  - including diverse members of the department in the process of hiring outside counsel

- **Other recognition events.** A law department can encourage law firm diversity by recognizing and celebrating those firms that partner with the department on its D&I initiatives, provide the organization with diverse legal support, and support diversity initiatives within their own firms and legal communities. For example, a law department can:

- establish an annual award for the firm that makes the most meaningful contribution to diversity during the year;
- acknowledge that firm at a celebratory event or in written materials; and
- publicize the winner among the department's other firms to incentivize them to compete for the award by increasing their D&I efforts

## Working with Third Parties

In addition to emphasizing the importance of diversity in their internal operations and through their outside counsel retention and billing practices, in-house law departments can join third parties to help diversify the legal profession. These third parties include:

- Bar associations.
- Industry interest groups.
- Law departments at industry peers

## Working with Bar Associations

Numerous national, state, and local bar associations, including the ABA, have established diversity committees and developed initiatives to promote diversity among their members and in the legal profession. There are also several bar associations that focus on advancing the career opportunities for attorneys in discrete categories of diversity, including:

- The Disability Rights Bar Association (DRBA)
- The Hispanic National Bar Association (HNBA)
- The National Asian Pacific American Bar Association (NAPABA)

- The National Association of Women Lawyers (NAWL)
- The National Bar Association (NBA)
- The National LGBT Bar Association (NLGBTBA)

In-house law departments can support the diversity efforts of these and other bar associations by:

- Providing financial support
- Paying membership dues for department attorneys
- Encouraging department attorneys to volunteer their time and expertise to association projects, including serving as speakers and panelists at bar association events
- Attending and promoting their programs and initiatives

## Working with Interest Groups

In-house law departments can also support the legal profession's diversification by partnering with third-party interest groups, including:

- ACC
- The Diversity Lab
- The Leadership Council on Legal Diversity (LCLD)
- MCCA
- NAMWOLF

Many of these organizations have created tools to assist in-house counsel evaluate, confirm, and support law firm and other legal industry diversity initiatives. For example:

- The Diversity Lab has developed the Mansfield Rule under which participating law firms qualify as Mansfield Certified if they meet targets around:
    - the consideration given to diverse candidates for firm leadership positions;
    - the adoption of transparent processes for firm promotions; and
    - the implementation of other criteria encouraging the fair consideration of diverse candidates for firm roles and activities
- The LCLD has several programs designed to increase diversity in the legal profession, including:
    - the Fellows Program, which works to develop leadership competencies of law firm attorneys from diverse backgrounds;
    - the Fellows Alumni Program, which provides past Fellows Program participants opportunities to mentor new Fellows, participate in community service projects, and engage in diversity outreach efforts to universities and law schools; and
    - corporate and law firm membership programs that allow members to participate in LCLD events, build support networks, and share best D&I practices
- NAMWOLF has created a certification program for law firms to demonstrate to potential clients that they are minority-owned firms capable of providing high-quality legal services. NAMWOLF's qualification criteria include the firm's:

- certification by NGLCC, NMSDC, or WBENC that the firm is minority-owned, operated, managed, and controlled;
- favorable references from corporate clients, including clients in the Fortune 500;
- Martindale-Hubbell AV Peer Review Rating;
- presence on outside counsel approved lists and panels; and
- other awards and memberships

## Working with Industry Peers

In-house law departments can also work with law departments at industry peers to encourage law firm diversity. For example, in January 2019, general counsel and chief legal officers from over 170 companies published an open letter to their law firms expressing their commitment to increasing diversity in the legal profession and:

- Congratulating those firms that embrace increased diversity in their recruiting, hiring, retention, and promotion practices
- Expressing their disappointment in those firms that do not work to retain, promote, and fairly compensate diverse attorneys
- Stating their intention to direct their legal spend to firms:
    - showing their commitment to diversity through their practices, policies, and procedures;
    - achieving demonstrable results in the diversity of their attorneys at all firm levels; and
    - providing high-quality legal services

In May 2019, those general counsel and chief legal operating officers joined

the Diversity Lab in issuing a document entitled Strategies and Tactics for In-House Legal Departments to Improve Outside Counsel Diversity. This document contains specific steps law departments can take to improve diversity at their law firms, including:

- Hiring and retaining law firms that prioritize and achieve diversity
- Working with firms to encourage diverse students to pursue careers in the legal industry
- Supporting:
    - the careers of diverse attorneys; and
    - the success of minority-owned firms.

In-house law departments can also join industry peers in:

- Sponsoring and attending diversity networking events, job fairs, and conferences.
- Allowing their in-house counsel to serve as mentors in organized and informal programs for diverse law students and attorneys.
- Participating in national and local internship programs focused on diverse candidates.

**ENTITY:**

**TORT TRIAL AND INSURANCE PRACTICE SECTION**

**TOPIC:**

**DIVERSITY AND INCLUSION, TORTS**

**David O'Connor**


# Lawyers' Professional Liability

Mosea Harris
- Sr. Claims and Risk Manager
- ISBA Mutual Insurance Company

Adam W. Czerwinski
- Owner/Principal Agent
- Sidebar Insurance Solutions, Inc.

 

## What are We Talking About?

Our purpose is to discuss the liability issues facing the legal practice.

We will discuss the causes of these risks and the ways in which your practice can manage, avoid, and mitigate these risks through best practices and insurance.

 

## Four Insurance Policies All Firms Must Evaluate

1. Legal Malpractice/Errors and Omissions/Legal Professional
2. General Liability/Business Owners Policy
3. Workers Compensation
4. Cyber Liability Policy

 


## What Types of Claims Do We See?

What are Examples of Claims Related to Substantive Errors?

- Failure to Know or Apply the Law Correctly
- Inadequate Discovery or Investigation
- ARDC Complaints

What are Examples of Claims Related to Client Relations?

- Failure to Follow Instructions
- Failure to Provide Sufficient Information / Obtain Consent
- ARDC Complaints

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## Failure to Know Or Apply the Law Correctly

**Practice Tips**

- Know your area of expertise – DON'T DABBLE
- Continually study the law by taking advantage of relevant CLE
- Check the credentials of new lawyers, lateral hires, backup lawyers, and referral sources
- Supervise and properly train associates, paralegals, and staff
- Require the approval of two attorneys for opinion letters.
- Use checklists and forms.

Source: The Fundamentals of Loss Prevention for Lawyers, ISBA Mutual

 

## Failure to Know Or Apply the Law Correctly

### Tips to Avoid Missing Statutes

- Make your initial calculation of the statute of limitations date(s) immediately
- Do not assume you already know the applicable statute of limitations
- Be on the alert for unusual circumstances that might impact your statute of limitations analysis.
- When working in an unfamiliar venue, always call local counsel to verify foreign statutes of limitations
- Do not rely solely on information provided by any one source, particularly clients
- Check the Illinois State Bar Association's current Guide to Illinois Statutes of Limitations and Repose and other resources

Source: The Fundamentals of Loss Prevention for Lawyers, ISBA Mutual

 

## Inadequate Discovery/Investigation

**Definition:** This category includes cases where the claimant alleges that certain facts which should have been discovered by the lawyer in a careful investigation or in the use of discovery procedures were not discovered or ascertained.

 

## Inadequate Discovery/Investigation

**Practice Tips**

- Ask questions… and then ask more
- Pay attention to details
- Take thorough notes
- Verify all levels of ownership: Government, Corporations, Private Companies.
- Methods of discovery:
  - Client Interviews
  - Non-party Interviews
  - E-Discovery
  - Interrogatories
  - Deposition

Source: The Fundamentals of Loss Prevention for Lawyers, ISBA Mutual

 


## Failure to Follow Instructions

**Definition:** Attorneys are supposed to follow the instructions of their clients and a failure to follow instructions claim can be made whether or not the failure was intentional or unintentional.


## Client Relation Claims

### Practice Tips

- Prepare an engagement letter and have it signed by client
- Increase your documentation
- Send letters to unrepresented parties
- Retain a record of your research
- Retain copies of all drafts of agreements and contracts
- Send a disengagement letter when you are withdrawing from representation. Contact your insurance carrier's risk management support for examples
- Communicate in writing
- Get written confirmation from client. Get it signed
- Document. Document. Document.

Source: The Fundamentals of Loss Prevention for Lawyers, ISBA Mutual

## Elements of an Engagement Letter or Fee Agreement

- A clear identification of who the client is.
- A detailed description of the legal work to be performed.
- A description of any critical aspects of the matter for which the lawyer will not be responsible.
- A detailed description of the fee arrangement.
- In the case of solo lawyers, the identification of a backup lawyer designee.
- File retention and destruction procedures.
- Language that indicates that your firm will not be delivering wire transfer instructions.
  - For sample engagement letters and fee arrangements, contact your bar association & various online resources.

 

## Non-Engagement & Disegagement

- If the firm declines representation, always send a letter to the individual or entity that has been declined.
- The Non-Engagement letter should clearly state your decision not to represent the declined client
  - Never give an opinion as to the viability of a particular case or matter.
  - Do not specify the statute of limitations date in your letter.
- This can be accomplished quickly with a form letter you can obtain from your bar association & various online resources.

 

## Client Relation Claims

### Tips on What to Document

- Client's consent to all major decisions.
- Client's instructions to proceed in a manner against the client's best interests.
- Anything unusual.
- All demands/offers and the client's response.
- Telephone calls.
- Err on the side of everything.

Source: The Fundamentals of Loss Prevention for Lawyers, ISBA Mutual




## Lawyers' Professional Liability

- What is Lawyers' Professional Liability Insurance?
  - Malpractice, Negligence, Errors and Omissions Coverage, ARDC Complaints.
- But why do you need it?
  - Mistakes happen and your CLIENT needs to be made whole
  - OR
  - No malpractice was committed, but you have to be DEFENDED!

 

## Lawyers' Professional Liability

- How do I report a claim?
  - Reporting information is usually on the Declarations Page
  - May also be on the Policy Form
  - Follow the Reporting Requirements of your Policy
    - Date(s) of Wrongful Act; Alleged Damages; Claimant's Name; Date you became aware of a Claim
    - Attach a copy of the lawsuit, demand, e-mail, etc.
- Why is timeliness important?
  - Professional Liability Policies are Claims Made and Reported

 


ISBA
MUTUAL
INSURANCE
Other Risks Facing Law Offices


ISBA
MUTUAL
INSURANCE
General Liability/ Business Owners Policy

## Business Owners Insurance

- What is Business Owners Insurance?
  - Insurance for your business' operation and business property
- Why do you need it?
  - To protect your business from general risks like slip and falls
  - Can also protect business from car accident claims stemming from employee-involved accident
  - Can repair/replace your business' furniture/property

 

## Workers Compensation Insurance

- What is Workers Compensation Insurance?
  - Insurance for your employees's injuries
- Why do you need it?
  - Required by law – misdemeanor/felony
  - Protects your from general damages – claimants are limited to statutory damages
  - Can also cover claims from claims by employees' dependents' and third-party beneficiaries

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## Cyber Liability Insurance

- What is Cyber Liability Insurance?
  - Protects firm against cyber attacks and liability
    - Third Party Coverages
    - First Party Coverages
- Why do you need it?
  - Statutory damages/Ethical Obligations for improper disclosure of personal information
  - Protects firm against cyber attacks, cyber thefts and ransoms
  - Can also help repair the damages caused by the attacks

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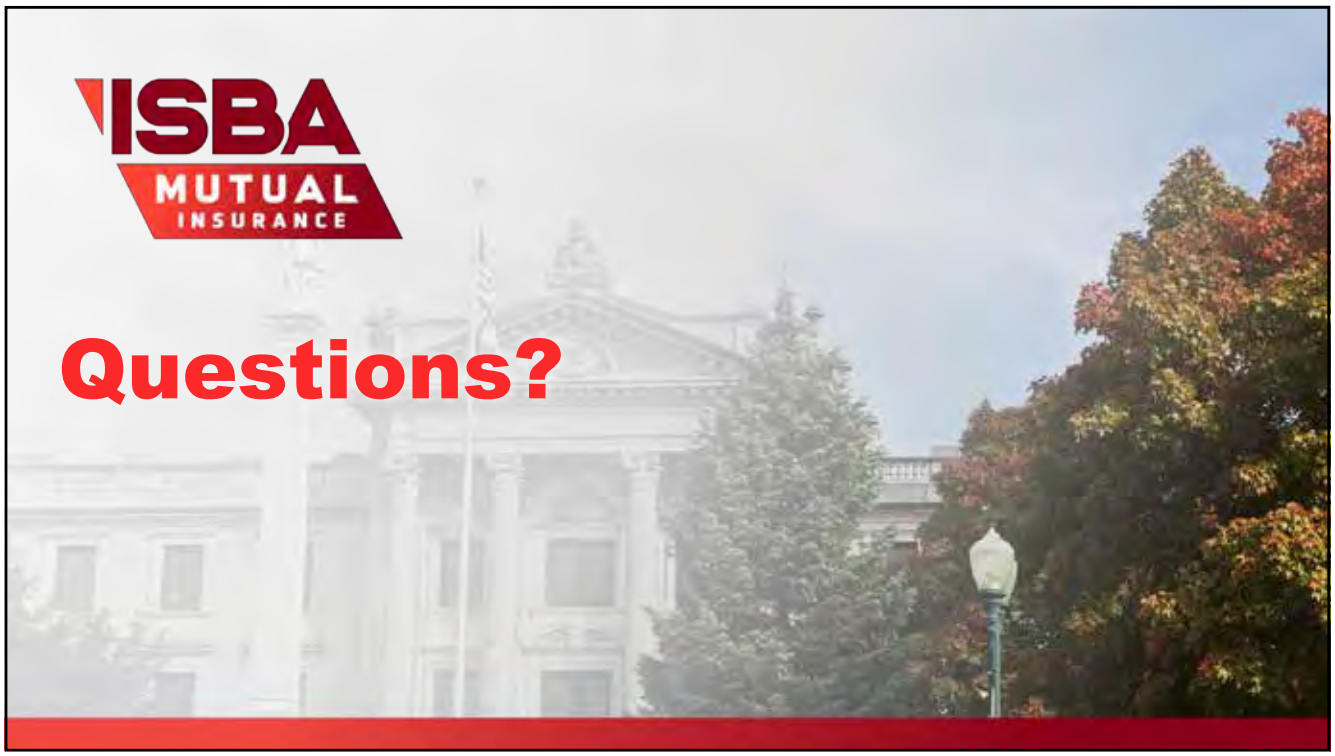

# Questions?

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