“If not us, then who?”
NATA’s theme for 2019

Book Review

The movie *Inherit The Wind*, regarding the “Scopes Monkey Trial” of 1925 which pitted evolution against creation, portrays fellow Nebraskan, William Jennings Bryan, as a bumbling religious zealot.

That is a false accusation, concludes Harvard Prof. Alan Dershowitz in *America on Trial: inside the legal battles that transformed our nation*. Bryan, though feeble (he died five days after the Scopes trial), was a highly skilled advocate who was no simple-minded literalist, writes Dershowitz.

Why is this important? Bryan, who preferred to discuss God more than politics, has stood watch at the U.S. Capitol in Statuary Hall for 82 years, but has been replaced by Chief Standing Bear, (J. Sterling Morton will be replaced by Willa Cather).

As his statue departs the Capitol, we tip our hat to William Jennings Bryan, a humble Nebraska trial attorney who, in the Scopes jury trial, defeated the nation’s foremost criminal defense attorney, Clarence Darrow (let that soak-in for one moment).

Things to Do in October

1. Turn “on” your porch lights for Halloween. Candy was handed to you as child, so pass the tradition to the next generation. Most children will say “thank you.”

2. Clean gutters, downspouts, and store hoses. Avoid major costs to your home by allowing water to flow away from your foundation. Drain hoses for use next Spring.

3. Join NATA & NATA PAC. From the best legal seminars in Nebraska to legislation (think “slight/gross” versus “comparative fault.” Or, the new law permitting work comp electronic payments for clients). Absolutely nobody does more for the civil trial practice and our clients than NATA.

4. Ensure the chimney is clear. Birds love to build nests atop chimneys. Avoid smoke damage into your home by ensuring that the chimney is open to your fireplace or stove.

5. Sign-up for NATA seminar “Practice Pointers” on December 6, in Omaha.

Don’t be late for Court…but, are you chronically late? The reasons thereof:


2. Passive-aggressive: won’t deal with a deadline, then becomes angry as deadline looms.


(continued on page 40)
### 2019
#### October
8 - 11  NSBA Annual Meeting - October 8 – 11, 2019
NATA Seminar/NSBA Annual Meeting
Work Comp Happenings: New Bills and Recent Decisions Affecting WC
8:00 – 10:30 a.m., Wednesday, October 9, 2019
Embassy Suites Omaha/La Vista Hotel & Conference Center
La Vista

#### December
6  NATA Seminar, Practice Pointers
December 6, 2019, Scott Conference Center, Omaha

### 2020
#### February
8 - 12  AAJ Winter Convention
February 8-12, 2020
Hilton New Orleans Riverside Center
New Orleans, Louisiana
27  Joint Meeting of NATA Board, NATA PAC Trustees, and NATA Legislative Committee
3:00 – 6:00 p.m., Thursday, February 27, 2020
Quarry Oaks Clubhouse, Ashland
28  NATA Seminar, Topic TBD
Friday, February 28, 2020
Scott Conference Center, Omaha

#### May
1  NATA Seminar, Topic TBD
Friday, May 1, 2020
The Graduate, Lincoln

#### June
25-27  NATA Summer Meeting
Thursday, June 25 – Saturday, June 27
Bridges Bay Resort, Lake Okoboji, Iowa

### The Prairie Barrister is published quarterly by the Nebraska Association of Trial Attorneys, 941 “O” Street, Lincoln, NE 68508, (402) 435-5526. Inquiries regarding submission of articles and advertising should be directed to Stella Huggins.

The statements and opinions in editorials or articles reflect the views of the individual authors and are not necessarily those of NATA. Publication of advertising does not imply endorsement. © 2019 Nebraska Association of Trial Attorneys, Inc. Contents cannot be reproduced without permission.
What does it mean to try a case to a jury? I’ve been thinking a lot about it since participating in a jury trial this last June, in Douglas County District Court. I’ve been involved in trials before, but this case was different and I could feel it. This case was my first civil jury trial.

In both the material and spiritual sense, I’ve been through trials. In the material, literal sense, I have handled jury and bench trials on a variety of matters in state courts, federal courts and administrative immigration courts. But never a civil jury trial for an injured person.

In terms of spiritual trials, I have repeatedly defended immigrants taken from their family homes at daybreak. ICE agents breaking doors, six-at-a-time to arrest a worker, carrying a lunch pail, wearing steel toe boots and ready for the day’s work. They often leave the wife and mother behind with the children and claim to be compassionate for not arresting the mother and leaving orphans. These spiritual trials are amplified by the lack of access to a jury trial. Immigrants are denied the right to be heard by their neighbors on deportation matters no matter how long they live next to them. Without the power to appeal to the common sense of justice that lies deep in every human heart, injustice reigns.

Where and how can we access the power of a jury to give justice to our community? How can I develop skills that allow me to communicate powerfully what justice demands? To my mind, answering these questions is the work of a trial lawyer. I consider being a trial lawyer a lifelong experiment full of opportunities to refine my answers and methods.

For example, my first civil jury trial.

In this trial, I was fully aligned with the truth. Based on my prior trials, I knew being aligned with the truth is fundamentally powerful – especially in front of a jury. Jurors are different than insurance adjusters, corporate lawyers and judges. There is an ability to speak plainly, in plain terms. A juror’s mind is not clouded by convoluted intellectual justifications created to avoid the inescapable conclusion they have become an instrument of injustice. With a juror you can speak the simple truth and receive justice.

At least, that is what I was hoping.

During the trial, I started to feel it was working. I spoke plainly and truthfully. Actually, I felt embarrassed to say what I had to say – it felt mean. It is against my nature to be harsh. But sometimes the truth hurts. For example, it did not feel nice to tell the jury the corporation negligently injured a pregnant woman, made her life hell, offered no help, invaded her privacy by obtaining 10 years of medical records, attacked her while deposing her and, by having a trial, was continually salting the wound of

(continued on page 4)
their initial negligence by denigrating her good name in court. But since it was true, when I said it, the jury heard it. Unlike adjusters, lawyers and judges they could sense that no one goes through a trial for fun or even for a “jackpot.” They go through a trial to receive justice.

“Unlike adjusters, lawyers and judges they could sense that no one goes through a trial for fun or even for a “jackpot.” They go through a trial to receive justice.”

That’s what I kept telling myself.

And then it came, my cubic centimeter of chance – that opportunity that comes and goes so fast you must be waiting for it to seize it. There it was, my opponent displayed his lack of fidelity to the truth flagrantly before the jury (a mistake I learned to recognize through personal reflection). With calm, we rose, pointed out the medical findings that had been so clearly misrepresented and, in closing, gored opposing counsel’s credibility to the point of no return.

At least, that is what I think happened, with hindsight.

With my opponent’s credibility gored and limping behind me, I had only my final words left to determine victory or defeat. But what of victory and defeat? I say nothing of them. I thought only of justice for my injured client. I prayed the night before closing argument by imagining the truth to be a compass pointing due North to justice.

So what did I tell the jury? I told them I had never asked a jury for money before - it was my first time. I told them I called a mentor with decades of experience for help the night before and he told me not to “blow it.” I looked at each of my most sympathetic jurors directly in the eye and gave them every powerfully true statement I could think of, one at a time, said for understanding not for flair. Although, that doesn’t mean there was no flair. The truth has its own flair and I stayed true.

The case was submitted to the jury at 11:00 a.m. on a Friday. Six hours later the judge called and let us know a deal had been made after six hours of deliberations allowing a 10-2, non-unanimous verdict. We arrived at the courthouse and the forewoman (it’s a modern world!) delivered the verdict: $60,000 for the Plaintiff as justice for 8 months of temporary hell, while pregnant, caused by corporate negligence.

Do you want to hear the shameless courthouse gossip about what happened in the jury room?

Of course you do - be honest.

A few days later the jury forewoman called to tell me what happened. She was concerned I would get the wrong idea about the hung verdict. The judge’s bailiff commented to her presuming the holdouts were for the Defense. As an aside, the same bailiff previously expressed skepticism to me about beating the offer to confess judgement made by the defense and the possibility I could be taxed with court costs – her cynical nature barely veiled.

No, said the forewoman. She had become forewoman specifically to bring justice to my injured client. She knew the anguish caused by a threatened miscarriage to a planned pregnancy. In fact, during voir dire she described how she had never conceived children with her spouse despite years of trying (and was not struck!). She argued for six hours for one million dollars and she was sorry to have “blown it.” She had two allies but lost her last one at 4:30 on Friday afternoon – allowing the 10-2 compromise verdict. She made them wait another 40 minutes after the defection, the full six hours, rather than agree to $60,000 and leave early. I made sure she knew she was my personal hero and thanked her profusely.

There you have it, my first civil jury trial - an experiment with the power of the truth.
“She had become forewoman specifically to bring justice to my injured client. She knew the anguish caused by a threatened miscarriage to a planned pregnancy.”

In 2014, Ross started his own firm with Pesek Law, LLC. As a private attorney, Ross focuses on accident and injury cases. He was recognized by the Nebraska Bar Association as the Outstanding Young Lawyer of 2013 and by the University of Nebraska Alumni Association with an Early Achiever Award. Most recently, he was awarded the Seeds of Justice Award from the Nebraska Appleseed organization. Ross’s volunteer experience includes being an advocate for immigrants and their families and offering free legal services. He has established a free legal clinic at Our Lady of Guadalupe church in South Omaha where he has provided free legal consultation to over 1,500 people. Ross also established the True Potential scholarship program. Since 2014, True Potential awarded over 50 one-year scholarships to immigrant students attending community colleges who would otherwise not be eligible for financial aid, based on their immigration status. Ross serves as a member of the Nebraska Association of Trial Attorneys Board of Directors.

Where is Justice?

By Ross Pesek

Where is Justice at the Courthouse?

Is Justice a statue?

A gleaming, golden woman, Blindfolded with scales in hands?

No.

Justice dwells within.

Moving here, then there,

Battling on the tongues of humans,

If you can align yourself with it, you can win,

For no matter the outcome,

You win only when justice is with you,

But what of those moments,

When injustice reigns?

When good and evil battle,

And justice does not intervene,

What then?

Do not despair.

Justice cannot be everywhere,

But, with practice, we can always be with justice.

◆
The Legal Aspects of TeleHealth and the §48-134 Exam
Brock D. Wurl

The interplay between §48-134 and TeleHealth is something that is going to affect all of our practices at one point in the near future if it hasn’t already. §48-134 permits the employer in a workers’ compensation case to require the employee to “submit himself or herself to an examination by a physician or surgeon.” Historically, that has meant that an appointment is scheduled at a doctor’s office, the client presents himself or herself and the doctor, after spending some time with our client, the doctor hired by the defendant or insurer renders an opinion that oftentimes assures the client that nothing is wrong and that they can return to full duty. We proceed with the case. Our clients have gone through this routine many times and we’re all familiar with it. That routine is currently in the process of changing. TeleHealth is rapidly changing the landscape of not only the health care field, but of §48-134 examinations as well.

Nebraska has identified the coming wave of this new-fangled style of medicine and has passed the Nebraska TeleHealth Act, codified at Neb. Rev. Stat. §§71-8501 to 71-8505. That Act defines TeleHealth as:

(3) TeleHealth means the use of medical information electronically exchanged from one site to another, whether synchronously or asynchronously, to aid a health care practitioner in the diagnosis or treatment of a patient. TeleHealth includes services originating from a patient’s home or any other location where such patient is located, asynchronous services involving the acquisition and storage of medical information at one site that is then forwarded to or retrieved by a health care practitioner at another site for medical evaluation, and telemonitoring;


That same statute goes on to define a TeleHealth Consultation as:

“(4) TeleHealth consultation means any contact between a patient and a health care practitioner relating to the health care diagnosis or treatment of such patient through TeleHealth;”

Neb. Rev. Stat. § 71-8503

This can take the form of video, audio, written or any other telecommunications means that do not involve a face to face interaction between a client/patient and a medical professional or examiner.

As the medical field transitions more and more towards TeleHealth examinations concerns and questions do arise for our clients, especially with regard to §48-134 examinations.

Can you object or refuse to attend a TeleHealth examination under §48-134?

Under §48-134, if an employer or insurer compels our client to attend an examination by a doctor hired and chosen by the defense, the client must submit to that

(continued on page 8)
One Integrated Solution

The Centers provides a full range of services specifically designed to meet the needs of law firms and the clients they serve. From our dedicated case management center to our accounting department, our organization offers a full spectrum of tools to optimize your client’s settlement, minimize your risk, and increase your bottom line.
examination or risk foregoing their workers’ compensation benefits. §48-134 states that the “unreasonable refusal” to submit will deprive the individual the right to compensation during the period of refusal. “In short, § 48–134 places the selection of the examining physician solely within the employer’s or insurance company’s discretion, so long as the physician selected is one legally authorized as set out in § 48–134.” Behrens v. Am. Stores Packing Co., 234 Neb. 25, 29, 449 N.W.2d 197, 200 (1989). There isn’t any case law I was able to find that addressed whether a refusal to submit to a TeleHealth examination constituted an “unreasonable refusal.”

That leaves us with an initial answer of treating these examinations the same way that they’ve been treated historically and if the insurer wants to do the examination remotely so that they can save on the cost of mileage or even on the examination bill, your client must submit to that exam. However, TeleHealth examinations are subject to the Nebraska TeleHealth Act which states,

The Nebraska TeleHealth Act does not: (1) Alter the scope of practice of any health care practitioner; (2) authorize the delivery of health care services in a setting or manner not otherwise authorized by law; or (3) limit a patient’s right to choose in-person contact with a health care practitioner for the delivery of health care services for which TeleHealth is available.

Neb. Rev. Stat. § 71-8504 (emphasis added)

“...if the insurer wants to do the examination remotely so that they can save on the cost of mileage or even on the examination bill, your client must submit to that exam.”

Part (3) of § 71-8504 is important because it empowers the patient to choose in person contact with a health care practitioner in lieu of a TeleHealth examination. I was unable to find any instances where an objection had been made under this statute or where this issue had been adjudicated, but I believe that if you or your client want to object to the use of TeleHealth for a §48-134 exam you do have standing to make that argument and to request that your client be seen in person.

What about HIPAA?

Another concern with this type of examination is the ease with which electronic communications can be recorded or hacked and also whether the information being shared is HIPAA protected. A normal Skype, Zoom, or FaceTime communication is not HIPAA compliant according to www.HIPAAjournal.com which states,

“As copies of communications sent by SMS, Skype or email remain on the service providers’ servers, and contain individually identifiable healthcare information, it would be necessary for the covered entity to have a BAA with (for example) Verizon, Skype or Google in order to be compliant with the HIPAA guidelines on telemedicine.

As (for example) Verizon, Skype and Google will not enter into BAAs with covered entities for these services, the covered entity is liable for any fines or civil action should a breach of ePHI occur due to the third party’s lack of HIPAA-compliant security measures. The covered entity would also likely fail any HIPAA audit they are subject to for failing to conduct a suitable risk assessment – which might also affect the receipt of payments under the Meaningful Use incentive scheme.”

https://www.hipaajournal.com/hipaa-guidelines-on-telemedicine/

There are, however, secure messaging apps or programs available and the examiner should be familiar with the app or program they are using. Use of this secure technology must be a requirement if your client is participating in a TeleHealth examination. The Nebraska TeleHealth Act requires that a health care facility licensed under the Health Care Facility Licensure Act have proper protocols in place to protect confidentiality, “A health care facility licensed under the Health Care Facility Licensure Act that receives reimbursement under the Nebraska TeleHealth Act for TeleHealth consultations shall establish quality of care protocols and patient confidentiality guidelines to ensure that such consultations meet the requirements of the act and acceptable patient care standards.” Neb. Rev. Stat. § 71-8507

Beyond the software questions, it is also recommended to inquire as to who will be present with the examiner on
the other end of the transmission, as well as whether anyone will be present with the client on their end of the transmission. I have talked to a few attorneys around the state whose clients have been examined via TeleHealth and they have indicated that there was a PA present where the client reported, but the examiner was only available via video transmission. It is my understanding that the PA was essentially the hands of the examiner in putting the client through the physical portion of the exam, while the examiner observed and made notes.

Is There Any Additional Paperwork?

The short answer is that yes, there is additional paperwork and the requirement for that is found in Neb. Rev. Stat. Ann. § 71-8505 which states,

(1) Prior to an initial TeleHealth consultation under section 71-8506, a health care practitioner who delivers a health care service to a patient through TeleHealth shall ensure that the following written information is provided to the patient:

(a) A statement that the patient retains the option to refuse the TeleHealth consultation at any time without affecting the patient’s right to future care or treatment and without risking the loss or withdrawal of any program benefits to which the patient would otherwise be entitled;

(b) A statement that all existing confidentiality protections shall apply to the TeleHealth consultation;

(c) A statement that the patient shall have access to all medical information resulting from the TeleHealth consultation as provided by law for patient access to his or her medical records; and

(d) A statement that dissemination of any patient identifiable images or information from the TeleHealth consultation to researchers or other entities shall not occur without the written consent of the patient.

(2) The patient shall sign a written statement prior to an initial TeleHealth consultation, indicating that the patient understands the written information provided pursuant to subsection (1) of this section and that this information has been discussed with the health care practitioner or his or her designee. Such signed statement shall become a part of the patient’s medical record.

(3) If the patient is a minor or is incapacitated or mentally incompetent such that he or she is unable to sign the written statement required by subsection (2) of this section, such statement shall be signed by the patient’s legally authorized representative.

(4) This section shall not apply in an emergency situation in which the patient is unable to sign the written statement required by subsection (2) of this section and the patient’s legally authorized representative is unavailable.


Without those written guarantees of confidentiality, the provider is not in compliance with the Nebraska TeleHealth Act.

Where is the Examiner Located?

The Nebraska TeleHealth Act governs “health care practitioners” engaging in TeleHealth, however, the Act defines a “health care practitioner” as “(2) Health care practitioner means a Nebraska medicaid-enrolled provider who is licensed, registered, or certified to practice in this state by the department;” Neb. Rev. Stat. § 71-8503. If the examiner is not a “health care practitioner,” and subject to §71-8503, then you should question where does the examiner practice and where will the examiner be at the time of the examination. Further, what do the statutes of that state say with regard to TeleHealth?

Technical Issues

Another area of concern is broadband access and communication problems. According to evisit.com, a
The Legal Aspects of TeleHealth and the §48-134 Exam  (continued from page 9)

TeleHealth software program, the recommended download/upload speeds for TeleHealth to work properly are 15Mbps/5Mbps. ([https://blog.evisit.com/what-are-the-basic-technical-requirements-for-TeleHealth](https://blog.evisit.com/what-are-the-basic-technical-requirements-for-TeleHealth)) The map below, created by the State of Nebraska Public Service Commission displays the download (DL) and upload (UL) speeds that are available in various areas of the State. Please note that in the red, tan and yellow areas the download speed is acceptable, but only in the red areas is the upload speed available as of 8/6/19 when this map was pulled from the Nebraska Public Service Commission website. ([http://prodmaps2.ne.gov/Html5PSC/index.html?viewer=broadband](http://prodmaps2.ne.gov/Html5PSC/index.html?viewer=broadband))

Inadequate download/upload speeds can cause miscommunications. Miscommunications can cause misdiagnoses. Misdiagnoses can cause confusion and inaccurate results. Before your client submits to the TeleHealth exam, ensure that there are adequate download/upload speeds and advise your client that if there is a problem with the connection, to stop the examination and request an in-person consultation.
Conclusion

TeleHealth exams are coming if they’re not already here. It is anticipated that they will become more and more common as time progresses as they are more convenient and cost effective for doctors and insurance companies, and in some cases more convenient for the client. This transition however does not eliminate the rights of your client. Under the Nebraska TeleHealth Act your client has the right to object to the TeleHealth examination and choose an in-person examination pursuant to Neb. Rev. Stat. § 71-8504.

“TeleHealth exams are coming if they’re not already here.
It is anticipated that they will become more and more common as
time progresses as they are more convenient and cost effective for
doctors and insurance companies, and in some cases more convenient
for the client.”

If your client does choose to proceed with the TeleHealth examination, be sure to obtain the written information and signature as required by Neb. Rev. Stat. §71-8505. Additionally, below is a list of questions to ask before your client agrees to and undergoes a TeleHealth examination.

Questions to ask before your client participates in a TeleHealth examination:

1. Where does my client need to report?
2. Who will be present with my client and what is that person’s role?
3. Will there be any cost to the client?
4. Is the examiner a Health Care Practitioner under the definition of §71-8503?
   a. If not, then where is the examiner located?
   b. What are the TeleHealth statutes of the state where the examiner is licensed to practice and/or located?
5. What software/app will be used?
   a. Does your client need a login/password?
6. Will the transmission comply with all HIPAA standards and requirements?
7. Will the transmission be recorded?
   a. If so, by whom and who will retain a copy of that recording?
   b. If so, I want a copy.
8. Who will be present with the examiner?
9. Has the proper notice been given under §71-8505?
10. What is the recommended download/upload speeds?
    a. Does your client have access to those speeds?

Brock D. Wurl, Paloucek, Herman & Wurl, North Platte, began with the firm in 2008 as a law clerk and has been an associate since 2010 and a partner since 2017. Brock’s primary areas of focus are personal injury, workers’ compensation, real estate litigation, and Social Security Disability (SSI/SSDI). He has been a member of the Nebraska Association of Trial Attorneys Board of Directors since 2013, and currently serves as Secretary. He has served as program chair and speaker at numerous NATA seminars. The article is from his presentation at the NATA Annual Meeting & Fall Seminar “Practice Pointers: The Future in Representing Those in Need” held on September 13, 2019.
ADVICE FROM LAWYERS

I asked a number of excellent Nebraska trial attorneys to relay significant advice which helped them to be a better lawyer or to send a tip to pass along to NATA members.

Clarence Mock passes along his collection of wisdom:

I think it is useful to consider the practice of law more like a marathon than a sprint. As a practical matter, while you can learn both the law and effective techniques to help your clients accomplish their goals, if you can’t manage your mind, you won’t stay in the race for long. To that end, you must learn to approach all circumstances with equanimity without expectation of any particular result while striving to do the best you can. In other words, focus on the process of serving your client and not the concerns of your ego. It is not about you.

Chris Miller responded as follows:

1. Take deposition prep seriously;
2. Don’t sit at your desk unless you are working, either push a case or leave the office to do errands or mow the lawn;
3. Read and follow “Most Do Them Wrong” by Robert Musante (Trial is argument. Deposition is trial. Deposition is argument.)
4. Read and follow “How to Write a Memorandum From a Curmudgeon” by Mark Herrmann;
5. Hire talented people and then get out of their way;
6. Use Requests for Admissions;
7. Discovery – pick your battles wisely but follow through on the fights you pick;
8. Create a “Potential Motions in Limine” memo at the start of each case;
9. Spend more time on voir dire;
10. Be kind.

Frank Miner responded:

1. Answer the phone;
2. Speak with all new potential clients yourself.

Nancy Peterson responded that the most important advice she received were the three rules of private practice:

1. Get the money up front;
2. Get the money up front;
3. Get the money up front.

Katie Martens stated:

1. Don’t get too busy that you don’t pay attention to the details of each case;
2. Listen to your gut.
Eric Brown has collected a number of tips from lawyers over the years including:

1. Join list serves, not just NATA but those in your areas of practice;
2. It is better to be broke and not working rather than be broke and working for a client that will never pay you;
3. You earn a fee so don’t feel bad about asking for it;
4. Care deeply about your clients and their causes but don’t care about them more than they do.

Dan Thayer passes on the following advice:

When it’s time to read a trial deposition in court, don’t ask another lawyer. Instead, hire the local tv or radio personality for $100 for an hour. Professional readers have a pleasing and commanding voice. The judge, jury and you will be pleased with the results.

Holly Morris suggests:

1. Write more letters. That way, there is no ambiguity as to what you told the client/opposing counsel/adjuster, etc.
2. On the other hand – pick up the phone more, too, particularity with opposing counsel. We face the same opponents often, and you will get to know each other and build more rapport with a phone call than strictly with emails.
3. Remember that good employees are your most important asset and will make your practice and your life immeasurably better. Treat them accordingly.
4. Delegate. See #3.

Pete Wegman adds

“Try to touch paper just once – something comes in the mail, deal with it. Scan it, save it or put it in your outbox. Do not put it in a pile on your desk to deal with later.”

I did receive one disheartening response. “I’ve been thinking on this since I got your email and honestly, I can’t think of much advice I have gotten in response to my asking questions that hasn’t been self-serving, archaic or patronizing.”

Advice I received just out of law school:

I asked another lawyer a question, he simply said “read the statutes, it’s all there.” I also recall being in a bit of a panic when I received a motion to strike. I contacted another lawyer and was told “Don’t worry Vince, you’ll get it right by the third or fourth time. That’s why they allow amendments to pleadings.”

We should all try to help out other lawyers with advice when asked. Remember, “all boats, big and small, rise on the same tide.”
$60,000 – Verdict
Slip and Fall – Subchorionic Hematoma
District Court of Douglas County
Nanci Balbuena v. Spartan Nash
Docket No.: CI 18-635
Date of Verdict: June 14, 2019
Plaintiff Attorney: Ross Pesek

In August 2016, Plaintiff, a 30-year-old homemaker, visited “Supermercado” on 29th & Leavenworth, Omaha, for groceries. While there she slipped on water that had leaked from the roof and pooled near a metal beam. Defense admitted liability because the ceiling showed obvious signs of longer-term water leakage. Plaintiff was six weeks pregnant, suffered a subchorionic hematoma which caused her to receive extensive bedside counseling about threatened abortion at the emergency room. Plaintiff also sustained a hip and a knee injury with no formal diagnosis. Unusual Facts: Plaintiff was an undocumented immigrant who testified using an interpreter. She admitted immigration status during direct testimony. Medical bills were not offered into evidence, and only non-economic damages for temporary injury were argued. Defendant filed and was granted motions in limine on eleven separate issues including permanent injuries, future medical expenses, lost wages, future earning capacity, or negligence as liability was admitted. Defendant counsel asked the jury for a verdict of $2,500 despite knowing the amount of outstanding medical bills. Experts Used: Dr. Melany Manning, treating physician. Medicals: $14,700. Settlement Offer: $15,000. (19-023)

$121,091 – Verdict
Collection Action – Contract Dispute
District Court of Thurston County
Crop Production Services, Inc. v. Lori Kaser
Docket No.: CI 17-8
Date of Verdict: July 25, 2019
Plaintiff Attorney: James Luers

Crop Production Services sued for recovery of $136,091, money owed on an open account for seed, chemicals and services provided to Defendant Kaser for her crops during the 2016 year. Defendant farmed approximately 1,500 acres in Thurston and Cuming Counties. Defendant counter-claimed for crop loss as a result of delivery of wrong seed and failure to apply furrow insecticide for rootworm control, seeking $285,000. At trial Plaintiff reduced its claim to $121,091 as a result of admittedly failing to apply the insecticide as ordered. Defendant’s counterclaim was denied in full. Unusual Facts: Trial lasted four and half days, with over eighty exhibits and a dozen witnesses, including neighboring farmers who had higher yields than Defendant. Experts Used: Plaintiff used an agronomist Steve Keck. Defendant used Dr. James Shepers, an agronomist and soil scientist. Settlement Offer: Once suit was filed there were no offers to settle Plaintiff’s claim or Defendant’s counter-claim. (19-025)
NATA VERDICT AND SETTLEMENT EXCHANGE

Name of Attorney Submitting Case

Plaintiff Attorney Name

Defense Attorney Name

☐ May we have your permission to publish your name?

Phone

☐ Verdict ☐ Settlement

Date of Verdict (or Settlement):

Amount of Verdict (or Settlement):

Title of Case:

Court/County:

Docket No.:

Liability Facts (include sex, age, and occupation):

Injuries:

Coverage:

Medicals:

Lost Wages:

Settlement Offer:

Experts Used:

Unusual Facts:

Please mail or email to the NATA office: 941 “O” St., Ste. 203, Lincoln, NE 68508 • nata@nebraskatrial.com
Verdicts & Settlements  (continued from page 14)

SETTLEMENTS

$500,000 – Settlement
Low Impact Collision –
Low Back Intrathecal Hemorrhage
Nebraska Workers’ Compensation Court
Acosta v. Acosta Trucking
& Werner Construction
Docket No.: Doc 217 No 1621
Date of Settlement: May 2019
Plaintiff Attorneys: Justin High, Erin Fox, Dan Fix

Plaintiff is a Spanish speaking truck driver who was in a low impact collision that caused an intrathecal hemorrhage in his low back that went undiagnosed for several days. Unusual Facts: Plaintiff was employed by his extended family members who failed to maintain workers’ compensation insurance on their employees. Direct employer Defendants alleged Plaintiff was an independent contractor with no factual support for that position. Experts Used: Dr. Byron Spencer, Dr. Santamaria, Dr. Bansal. Medicals: $572,013.25 not reduced per the fee schedule. Lost Wages: $52,000.00. (19-026)

$200,000 – Settlement
FTCA – Wrongful Death
USDC District of Nebraska
Johnson v. United States
Docket No.: 4:16CV3193
Date of Settlement: May 2019
Plaintiff Attorneys: Justin High, Frank Younes, Dan Wasson

Decedent was a 20-year-old who had stolen a car, led police on a high-speed chase, and entered Offutt Air Force Base. His car was barricaded in and he was approached by two officers – one a highly trained Deputy, and one a member of the base security force. While further attempting to flee, he was shot and killed by the base security officer. The Deputy did not fire. Unusual Facts: Plaintiff was single with no children. He was addicted to opioid medication and estranged from his family. Medicals: $50,000. (19-027)

$180,000 – Settlement
Slip and Fall – Low Back and Hand Injury
Nebraska Workers’ Compensation Court
Lopez v. Advance Services
Docket No.: Doc 218 No 0961
Date of Settlement: April 2019
Plaintiff Attorneys: Justin High and Erin Fox

Plaintiff was a Spanish speaking laborer who sustained injury to her low back and left hand when she slipped and fell on ice. Unusual Facts: Plaintiff was placed on MMI with no restrictions or impairment prior to seeking counsel. Medicals: $35,015. (19-028)

$150,000 – Settlement
Bilateral Carpal Tunnel and Thumb Arthritis
Nebraska Workers’ Compensation Court
Vacek v. One Drake Place, LLC
Docket No.: Doc 219 No 0555
Date of Settlement: June 2019
Plaintiff Attorney: Justin High

Plaintiff was a nail technician. She developed bilateral carpal tunnel and bilateral thumb arthritis after 28 years of performing manicures. She underwent four surgeries and was restricted from performing her job. There was significant disagreement between the treating physicians about causation of the injuries and causation of the permanent restrictions. Unusual Facts: Using conservative estimates, Plaintiff performed manicures on 700,000 nails over the course of 28 years as a nail tech. The original treating physician opined that her work did not contribute to her thumb arthritis but did contribute to the carpel tunnel. He further opined that all of the Plaintiff’s restrictions were attributable to the thumb arthritis and not the carpal tunnel. Plaintiff accepted this settlement against her attorney’s advice. Experts Used: Dr. Murphy, Dr. Mickels, Dr. Thompson, Dr. Jones. Medicals: $78,000. (19-029)
$625,000 – Settlement  
Slip and Fall – Leg Fracture, PTSD, Anxiety and Depression  
Nebraska Workers’ Compensation Court  
Bright v. Schneider Trucking  
Docket No.: Doc 216 No 1338  
Date of Settlement: June 2019  
Plaintiff Attorney: Justin High

Plaintiff was a Spanish-speaking laborer working in Rotella’s production facility when he fell approximately 14 feet from scaffolding sustaining severe fractures of his pelvis and injuries to his left shoulder. Unusual Facts: After the injury, Defendant went to extraordinary measures to keep Plaintiff employed, allowing him the unrestricted use of a quad cane and flexible hours. At Defendant’s first opportunity, they terminated Plaintiff for allegedly threatening the safety of another employee when the other employee attempted to relieve Plaintiff of his safety glasses. Plaintiff needed his safety glasses due to an eye condition. The alleged incident was recorded on videotape. Experts Used: Dr. Pilley, Jenn Locke, Karen Stricklett, VR Counselor. Medicals: $100,000. (19-032)

$800,000 - Settlement  
18-foot Fall – Multiple Fractures and TBI  
Nebraska Workers’ Compensation Court  
Goldtooth v. DSI Mechanical  
Docket No.: Doc 218 No 0463  
Date of Settlement: June 2019  
Plaintiff Attorney: Justin High

83-year-old male Plaintiff was riding as a passenger with Defendant wife driving when their vehicle was rear-ended on I-80. Expert witnesses disagreed on the cause of the accident. Plaintiff filed suit against his wife as driver of the vehicle in which he was a passenger, and the driver of vehicle who rear-ended his vehicle. Plaintiff suffered a fracture of his back, urethral injury and respiratory failure. Unusual Facts: Joint and several liability against his wife and driver of other vehicle on economic damages. Policy limits offer from both defendant carriers needed to pursue UIM policy of Plaintiff. Coverages: Defendant wife-driver, $100,000 BI; Other Defendant, $100,000; UIM, $100,000. Medicals: $184,827. (19-033)

$349,000 Plus MSA - Settlement  
14-foot Fall – Multiple Fractures  
Nebraska Workers’ Compensation Court  
Rivera v. Rotella’s Italian Bakery  
Docket No.: Doc 215 No 0526  
Date of Settlement: June 2019  
Plaintiff Attorneys: James Walz, Erin Fox, Justin High

Plaintiff was a long haul truck driver who sustained a right leg fracture of her tibia and fibula when she slipped on ice. She also developed PTSD. Plaintiff fell in the parking lot of a large truck stop late at night, in early January, far away from any other people. She reasonably believed she would freeze to death, which caused PTSD, anxiety and depression. She had extreme difficulty with slippery environments and was unable to leave her house in icy conditions. Unusual Facts: Plaintiff is severely dyslexic and utilized her phone to “read” documents and emails, which made vocational rehabilitation impossible. Experts Used: Dr. Jensen, Dr. Bansal, Ted Stricklett, VR Counselor. Medicals: $125,000. (19-030)
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“We’re Doing Pretty Good… I Think I’ll Dial Back That Contribution.”

When I was in high school, my mom was a little nuts for Tom Selleck. She watched Magnum, P.I., every week, and don’t let nobody mess with her date-night.

I thought the show was pretty good, too. I remember, Selleck had a line he threw out every episode, when the plot was starting to twist or confuse the viewer.

He would come on, in a voice-over and just say, “I know what you’re thinking…” In my experience, he was usually right. He did know what I was thinking. Then he’d tell us why he thought differently. I always bought in to his explanations.

Now, I know what you’re thinking… The PAC financial reports are looking pretty good. We have a nice nest-egg. Looks like we’re good, I’ll just dial back that annual pledge and we’ll let the PAC coast for a while.

Here is why I would make a spirited argument against that.

When I was first elected to chair the PAC, as an organization, we struggled to bring in more than $60,000 per year. As a result, the PAC often wasn’t able to meet our needs.

We were rationing our contributions to the most critical races; the most likely-to-win candidates.

This restricted our ability to respond to the oft-shifting landscape of a hotly contested legislative race, or contributing to independent committees who were able to push out effective and often times, game-changing issue ads.

We were flat-footed when tort reform efforts or other critical issues came up in the legislature that we needed to fight – and please don’t misunderstand, it takes money to fight.

If you are of a certain age and a member of NATA you will remember with not-so-fond-nostalgia the frequent, hastily-convened Phone-a-thons of yore. We were often under the gun to raise money quickly.

And if we did, we had little time to plan ahead or entertain deep strategic plans to employ with the money. Raise it and flush it out!

This says nothing of the fact that we had no real ability to plan far enough ahead to engage in serious recruitment.

And when push came to shove on the floor of the Unicameral, we had a small seat at the table and wielded only a little bit of “Trial Lawyer Clout.”

We as a group of interested PAC contributors, then, decided to steer our ship in a bold direction. We agreed that these problems I just listed, needed to be resolved and aggressive and sustained fundraising for the PAC was our answer.

We set a goal to raise enough money annually to plan, recruit and support candidates. We sought to respond nimbly to any campaign or legislative emergency which might arise. We wanted to become a consistent player in the legislative arena.

In the past six years, this PAC has done amazing things, not the least of which has been to reach a consistent annual collection from our contributors of over $120,000. This is a significant step forward for our PAC.

The reason we have such a healthy PAC today is because of consistent, predictable and long-term support of the PAC by our contributors.”

The reason we have such a healthy PAC today is because of consistent, predictable and long-term support of the PAC by our contributors.

When we started, we all committed to making the pack a priority. We each accepted the responsibility to step up. Cutting back now feels like saying, “Let someone else do it.” It douses the whole “Team” vibe we have going right now.

Let’s not go back to the old days of roller coaster PAC balances, broken budgets and panicky fund-raising calls portending doom and plagues “if we don’t raise $200,000 by Friday!”

I miss Magnum P.I., but I don’t miss the old days of the PAC.

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YOUR CLIENTS NEED YOU.
WE NEED YOU.
WE CAN DO THIS TOGETHER.
Cybercrime: Protecting Your Law Firm from the Inevitable

By Ben Glass and John Pirkopf

Data breach cases have made headlines in recent years, from Yahoo to Marriott to Target to Equifax. While the larger companies tend to attract more public attention, cybercrime does not discriminate, and more and more law firms are impacted by the threat of or actual attacks. According to The Center for Strategic and International Studies (CSIS), the total global cost of cybercrime is closing in on $600 billion, and this number is up from the 2014 estimate of $445 billion.¹ Other estimates make that look conservative. According to Dr. Michael McGuire, Senior Lecturer in Criminology at Surrey University in England, the revenues of cybercrime have hit $1.5 Trillion annually.² While this number is staggering in and of itself, it is hard to comprehend exactly what that means to a law firm. Breaking cybercrime down into distinct and specific categories sheds light on the gravity of these threats, not only on industry specific levels, but personal, national and global levels. Globally, the study finds the following:

- $860 billion – Illicit/illegal online markets
- $500 billion – Theft of trade secrets/Intellectual Property
- $160 billion – Data trading
- $1.6 billion – Crimeware-as-a-Service
- $1 billion – Ransomware

Nationally, the US is easily the most attacked country in the world. In the fourth quarter of 2017 alone, the US suffered 238.6 million attacks.³ Actual data breached, stolen, and exposed is estimated at 446.5 million records since 2005.⁴ These numbers just continue to grow. While the financial services industry may have been hit the hardest, with an average cost of $18.28 Million per firm in 2017,⁵ state ethics opinions, legal malpractice actions, and statistics make it clear that law firms are becoming a more frequent point of attack. Fifty-eight percent of cyberattacks hit small businesses (defined as a business with less than 250 employees), with the professional services industry being the third most attacked.⁶ And nearly a quarter of all law firms experienced a data breach in 2017.⁷

These statistics are alarming and hopefully cause law firms to revisit their current security measures, as well as their breach protocol in the event the worst happens. But what really should that entail? This article addresses the most common vulnerabilities in a law firm and best practices with respect to protecting both firm and client information.

Law Firms and Cyber Security

There is more to securing a firm’s network and sensitive data than a good password. Security needs to be built into the culture of your workplace. Increasingly, cyber criminals are employing clever and sophisticated methods to steal, sabotage, or ransom firm data. Law firms are now being recognized by attackers as a sweet spot for attacks. This is due, in part, to the amount of highly sensitive data to which firms have access. This combined with limited compliance regulations, variation in size and budget, and limited employee training and knowledge, leads to an appealing target for cyber criminals.

According to a recent ABA survey, 15% of law firms and about a quarter of firms with at least 100 attorneys have fallen victim to a breach. This is not an anomaly. Other surveys support this. These numbers are growing.⁸

Unfortunately, only 61% of small businesses actually have a data security specialist, outsourced department, or internal department, and only 34% review data security policies annually.⁹ In the same research, it was found that only 28% of small
businesses actually have a data security policy, and of those, only 14% actually have different levels of data access privileges. The fact is that most workplace environments do not discuss data security enough, though they should be making it an integral part of their workplace culture.

“Threats and threat protection are constantly evolving, but the biggest threat is one that is most often overlooked—the user.”

While attacks are becoming more advanced and sophisticated, so too is the technology used to combat them. It is a constant game of cat and mouse. The recommended posture information technology professionals take regarding attacks is not will we get attacked, but rather when. Threats and threat protection are constantly evolving, but the biggest threat is one that is most often overlooked—the user. In order to address issues stemming from the user, it is important that lawyers and law firm staff understand the applicable terminology, as well as where problems most frequently occur and the best ways to avoid the worst-case scenario.

Cybersecurity Vocabulary

Though lawyers are becoming more sophisticated with respect to technological terminology, it is important—and in some states a requirement—that lawyers be well-versed in security terms in order to know what they have and what they should be doing in terms of protecting their clients and their law firms. Some of the most industry specific parlance is provided here to better understand the issues and methods of addressing them.

- **IT**: refers to Information Technology (your IT department, or outsourced IT).

- **“The Cloud” or “Cloud-based”**: refers to the location of data and applications that are not housed internally. For instance, Dropbox is a cloud application that houses your files and folders in the cloud. This generally means that the data is stored in physical data centers (digital data storage facilities) throughout the world that are networked with redundancy in case one of the data centers experiences a problem, attack, or failure. Office 365 is a cloud application and email provider. The email application, storage, controls, and protocols for email are stored in Microsoft’s data centers around the world. Lawyers need to be aware of the terms of service agreements with cloud-based programs to ensure the third-party’s security meets with the firm or state’s requirements.

- **Encryption**: an IT term that generally means “locked.” Encryption can be used for good or bad purposes. It is important that a firm encrypts or locks its data, so that prying eyes cannot see the data without the key to the lock. The key to the lock is held by the firm and generally locks and unlocks data in the background without user interaction or with minimal user interaction (username and password). Encryption can also be used for malicious purposes. A hacker, or IT savvy threatening third party, can encrypt your data if it is not properly protected. This is especially worrisome because encryption is very powerful. It is a lock in which the key is very difficult to copy or duplicate.

- **Malware**: generally, means bad software. Malware is designed to disrupt your computer operations and your productivity, often in an attempt to gain access to or exploit your data.

- **Virus**: in an IT context, refers to bad software that is written to corrupt, or delete your data, but that also is written to self-propagate throughout your network (designed to go from computer to computer).

- **Spyware**: refers to specific malware that is designed to capture your information (usernames, passwords, browsing data, keystrokes, even habits).
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Cybercrime: Protecting Your Law Firm from the Inevitable  (continued from page 28)

- **Phishing**: a term that is derived from fishing. A phishing scam is a situation where a hacker is posing as a colleague, or known safe entity, in an attempt to retrieve your personal data (username, password, SSN, address, etc.). The hacker is fishing for your data and acting as bait. Most of the time, this comes in the form of an email that looks like it is from a legitimate person or entity but is not. The email could fraudulently appear to be from your bank, or your email provider, asking you to confirm certain personal information as a precaution, when in fact they never had it to begin with. Phishing scams are very complex and often have fake websites and phone numbers that appear to be from legitimate vendors.

- **Ransomware**: a devastating and relatively new subset of malware. Ransomware is designed to make your data unavailable until you pay the hackers. Ransomware enters your system through clicking on links in phishing scams, or visiting fraudulent or unsafe websites, or inserting infected media (USB drive), and then encrypts all your files and folders. It can propagate to data in your workplace through its network. Restoring your data from backups is often the only way to retrieve your data. Your last known good backup is often what you are left with, so it is crucial that your backups work well and work often. If there is no good backup, the only solution is to negotiate and pay the hackers for the key to the encryption lock. Paying the hackers is negotiating with criminals and should be avoided at all costs as it rewards the people, thus, perpetuating the crime.

- **Business Continuity and Disaster Recovery**: relatively new terms in an IT sense. They refer to establishing protocols and procedures in the case that your data is lost due to a physical disaster, ransomware/virus attack, or hardware failure. In this scenario, it is important that there is a tested contingency plan in place. Often these terms get confused with having backups. A backup is a copy of your data. A business continuity/disaster recovery plan contains your backups in an environment that is digitally accessible with the least amount of downtime or lost productivity possible. Your IT department or outsourced managed service provider should have this in place and test it regularly.

**Human Error Factor**

When addressing information security, the biggest variables are more often than not the users of the information. The goal is to develop a security-centric culture in the workplace. Hackers know that people are the easiest way to gain access to a network. Technically savvy and non-technical people (people whose profession is not in the technology industry) are both at risk. Exploiting this vulnerability is called social engineering, or social hacking. A social engineering hacker relies on tricking a user to divulge confidential information such as usernames and passwords. This is done in various ways. Sometimes verbally, where a person poses (either in person or over the phone) as someone on your IT team; sometimes electronically (sending fraudulent emails phishing for information); and sometimes both. Once a social hacker has access to your environment, they may choose to lie dormant, monitoring communications, conversational email styles, organizational-specific protocols, and firm hierarchy. Once the hackers have a sense of the organization’s styles and protocols, they can exploit what

(continued on page 32)
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they have learned for a bigger payload. This is done by slowly beginning a conversation, establishing trust, and finally striking. Without getting into specific anecdotes, it is not uncommon to see long-con approaches devastate businesses. According to IBM’s “2014 Cyber Security Intelligence Index,” 95% of cybersecurity breaches were due to human error.10

**Educating Law Firms**

In a security-centric culture shift, law firms should assume that the chances of a successful social engineering attack will go down. Educating staff about these threats, dedicating IT resources to staying abreast of the ever-changing techniques, and facilitating conversations around these topics are steps law firms can take to reduce the risk. Below are some examples of processes, best-practices, techniques, and technology to help mitigate risks and minimize downtime.

The most important among them is developing a culture of awareness. It is strongly recommended that a firm’s IT partners provide regular trainings for all members of the organization, which means that senior partners down to newly hired staff should all participate. This also means that security measures must be a part of any law firm’s onboarding of new employees. By discussing the ideas presented here, firms can encourage employees to integrate security into their work routine.

**Identity**

The first principle addressed here is identity—proving you are who you say you are and preventing a hacker from impersonating you. Of course, what this refers to, in its simplest form, are passwords. Credentials are integral to secure data access. This is a constant vulnerability. As computers get faster and more powerful, they can crack increasingly complex passwords. Some basic recommendations that can help provide additional protection follow.

While biometric authentication is quickly evolving (think fingerprints and facial recognition), it is not always practical to implement for all platforms. On the other hand, dual factor authentication is quickly becoming the new norm and adds significant security. The most common forms of dual-factor authentication use a person’s mobile device and email account. In these scenarios, an IT professional configures access to a firm's data and network to require a code that is sent to an individual’s phone via text or to an email account. This code is randomly generated and provides access auditing for IT professionals when a breach is suspected. Consultants strongly recommend dual factor authentication as a relatively easy way to help shore up IT resources.

Passwords should also be longer. As one might assume, the longer the password, the harder for a computer to figure it out. Likewise, the more time a computer has to guess a password, the greater the chance it will succeed. Thus, IT professionals also recommend longer passwords that users change regularly. Additionally, by changing passwords, any passwords that have been previously compromised will no longer be in use.

Password sharing is a vulnerability. Not only does sharing passwords increase the chances of an environment being compromised, but it also makes it harder to figure out what happened when it is compromised. If people share passwords, it is harder to tell from where a threat came. It is also best practice to use different passwords for different services. If a password is compromised, not all of them are. Password hints and challenge questions are also problematic. With the rise of social media and our increasingly digital lives, social hackers are increasingly able to guess answers to challenge questions and password hints. How hard is it to figure out someone’s mother’s maiden name in the age of Facebook? When asked to set up password hints or challenge questions, nonsensical answers are recommended, e.g. Question: “What’s your favorite
sports team?” Answer: “I like pizza!” By mining the internet, posing as other people, and monitoring behavior, hackers can glean a ton of information that they then use against their victims.

**Update Software**

Technology changes quickly. When combating cyber criminals, speed is important. It is important to adapt new technologies quickly, keep software updated and patched, and to respond when things change. However, this is only one piece. It is also important to nurture a culture of security. Most security breaches are the result of human error. Even the most sophisticated companies are vulnerable to simple mistakes. It happens. Just think about the redaction error made by Paul Manafort’s attorneys, or the errant link John Podesta clicked, leading to the compromise of his emails. The fact is that mistakes happen. Therefore, it is so important to have a plan for when they do. IT professionals should recommend fostering a work culture in which employees feel comfortable acknowledging when they make a mistake and have a plan for what to do when it happens. Technology should help not hurt. The best way to make this happen is to recognize that people are the weak link and will make mistakes. If firms understand and plan for this, they will save a lot of pain and money. Making decisions and planning before crisis hits will allow a firm to focus on resolving the problem rather than trying to figure out what to do. Simple things, like having a communication plan, outlining emergency actions to take (when do you simply unplug a computer?), and having a good plan B are essential. When discussing a plan B, what firms should really be addressing is their backup system.

**Backups, Business Continuity and Disaster Recovery**

Technical security is great, until someone mistakenly clicks on a link, inserts the wrong USB drive, or clicks on the wrong program. Because security is so tenuous, it is essential to have an action plan for when (not if) something goes wrong.

Backing up data can take many forms, from simple copies stored on a hard drive, to cloud replicated copies that a firm can access remotely. Business continuity is a key concept when it comes to backups. The best backup solutions allow firms to continue working in the case of an

(continued on page 34)
emergency. With the proper planning, in the case of a crisis, an entire law firm can be working off a backup network within an hour while the professionals restore the original network. In a scenario where the network is taken off line, proper planning can keep a firm on track.

The landscape around preserving data has become increasingly important and sophisticated. When looking at direct and indirect costs, downtime for a firm compounds quickly. Having a data backup is critically important but having access to that data in a meaningful way is just as important. This is the reason business continuity and disaster recovery is so important. A business continuity solution provides a firm with a “hot” replica of their systems, network, and most importantly data. This replica is always on standby, and a firm can access the replica in the case of a disaster. These replicas can be onsite, offsite, or both, depending on the system.

Antivirus

Good antivirus software is essential. Antivirus software protects your workstations and servers from malicious programs. No antivirus software is going to stop everything, but along with other tools, antivirus can identify and quarantine dangerous programs that find their way onto your network. Antivirus programs work in different ways. A traditional antivirus program would look at a set of virus definitions (programs and code) and then scan a network for the viruses. Newer antivirus programs are looking at real time activity across the internet and scan for abnormal behavior. If an unknown program starts proliferating on networks worldwide, the program can begin blocking the program in real time within the law firm. Again, cyber security is a cat and mouse game, and it is important to adapt as things change. A law firm should be aware of the capabilities of its antivirus software and consider upgrading to integrate these newer technologies.

Antimalware

Antimalware software is different from antivirus software in that it monitors your network resources for abnormal behavior and aims to arrest any programs that are behaving abnormally. One of the most common types of malware attacks is one in which the hacker encrypts a firm’s data and then demands payment, usually in Bitcoin, in exchange for a key to decrypt the data. Encryption is a process and takes time. If you have antimalware software on your computers, it should be able to detect such a process, stop it, and create alerts letting the IT people know what is happening. Likewise, if a malicious program is monitoring and reporting behavior on your network, antimalware software should be able to identify and stop it.

Spam Filtering

Email spam filtering is a subscription service. Like antivirus software, the service is constantly evolving. Traditional spam filters compare incoming email messages to a known list of dangerous or “spammy” addresses or attachments and will reject the messages before they get to your computer. Newer spam filtering services offer much more. In addition to basic filtering, these services are able to test programs and links on external servers before allowing messages through. If the filter discovers anything abnormal or dangerous, the message is blocked. These services also offer the ability to send encrypted messages, which adds another layer of security that is quickly becoming the standard within law firms.

Addressing Generational Differences

There may be multiple generations within a firm’s workplace. It is no secret or surprise that different generations use technology differently. This can lead to a bit of a power inversion. Senior partners are often older and less technology savvy than younger employees, who are new to law, but both are equally as vulnerable to attack. While older generations may subject a firm to an attack as a result of being unaware of the danger, younger generations may subject a firm to an attack by becoming complacent. A security-centered culture should hold everyone to the same standards, partners and staff alike. As mentioned earlier, security evolves, and firms subject themselves to greater risk
by continuing to do things the way they always have without acknowledging and addressing these differences.

In the same vein, law firms cannot simply set up the security system and expect it to be foolproof. They must inform employees of what exists, how it works, and what the limits of that system are so that employees may be part of the process as well.

Protecting Client and Firm Money

Law firms must be extra careful when money and sensitive data is involved. Technology has made it very easy to move money. This has obvious benefits, but also poses significant risk. There are too many stories of hackers monitoring and imitating partners, clients, or opposing counsel; requesting the transfer of funds; and then disappearing into thin air. Lawsuits filed by victim-clients are on the rise, stemming from the improper electronic transfer and loss of trust fund money. Firms should develop a policy requiring verbal confirmation any time they move money, and they should also require employees and clients to exchange sensitive account information telephonically or in-person to avoid interception of such private information.

Mobile Security

Increasingly, people are working off their mobile devices. Mobile phones, tablets, and laptops are quickly replacing traditional workstations. There are a number of major implications for IT security. First, mobile devices are easy to lose. If a lawyer’s devices are not securely locked down, the information on them can end up in the wrong hands.

Additionally, the line between personal and work devices is becoming blurred. Many employees configure their personal devices to connect to work email accounts. While IT providers can control security on work devices, they do not have the same control over employee personal devices. As a result, they have no control over the way these phones are configured or even whether it is password protected. Thus, it is essential to have a workplace policy that clarifies what employees can and cannot do with work information on their devices. Are employees allowed or even expected to have work email on their personal phones? What happens if the phone is lost, stolen, or if the employee leaves on bad terms? What layers of protection are required on devices? It is essential to provide clarity around mobile device usage, as well as a plan for the inevitable loss of a device or departure of an employee.

Mobile devices are also a lot smaller and used in many places. This makes the user more likely to make mistakes. If a phishing email comes through while a lawyer is glancing at emails on the phone during a lunch meeting, the likelihood of clicking, forwarding, or taking inadvertent action increases. Encourage employees to be extra cautious while on mobile devices.

Mobile devices connect to all sorts of wireless networks—coffee shops, airports, hotels, or even opposing counsel’s office. Many are safe and pose little threat; however, there are risks. Many free networks collect information for marketing purposes; others may be set up with the intention of monitoring data for more sinister uses. The fact is that a wireless network can be set up to look like a legitimate one, and if employees are not careful, they can put the entire firm at risk. The best practice is for firms to provide and/or require the use of mobile hotspots and encourage employees to connect only to known networks. If a lawyer finds a wireless network and does not know where it comes from, she or he is probably better off not connecting.

Remote Access

As the speed of data retrieval and manipulation has increased, so too has the ability to access that data remotely. In order to do this, it is advisable to have a properly configured virtual private network (VPN). A VPN is an encrypted internet connection between any given device (think laptop or tablet) and the law firm’s data. The connection requires a user’s unique credentials and often dual-factor authentication in order to make the connection.

(continued on page 36)
Cyber Insurance

Many lawyers may not even be aware of such coverage, but cyber insurance can also play a key role in a firm’s IT planning. Not only will it reimburse a portion of costs associated with a catastrophic event, but it can also help an organization get its IT house in order. Most insurers require documentation and proven compliance related to the IT environment, including an IT Use Policy and a Response Plan. Insurers want to know what is being done to keep the bad guys out and what will be done if they get in. IT specialists should be a firm’s partner in the process of developing these policies and plans.

“Cyber security threats are increasing and evolving. While the statistics are scary, they should encourage law firms to start thinking about how they are positioning themselves to adapt to and mitigate these threats. Most importantly, firms need to acknowledge that users may be the weakest link and that educating lawyers and staff is integral in preventing the worst from occurring. ... simple steps can have a huge impact on the security of a firm's environment.”

Conclusion

Cyber security threats are increasing and evolving. While the statistics are scary, they should encourage law firms to start thinking about how they are positioning themselves to adapt to and mitigate these threats. Most importantly, firms need to acknowledge that users may be the weakest link and that educating lawyers and staff is integral in preventing the worst from occurring. Firms can do this by developing a security-centric culture in which people are cautious and smart when it comes to technology, but also feel empowered to speak up when they suspect something is not right. Simple steps can have a huge impact on the security of a firm’s environment.

Ben Glass has more than 20 years of experience orchestrating technological solutions for companies in nearly every industry, including the legal, financial, and medical sectors. Ben and his business partner, Eric Osborne, founded Bespoke Technology Group, a Denver based IT firm, to deliver high-touch, white-glove IT solutions to small and growing businesses.

John Pirkopf has been working in IT since 2000. He joined Bespoke Technology Group as a consultant in 2017. John has a background in social welfare, working with for-profit and not-for-profit organizations. John’s areas of focus are IT consulting, networking, web design, data backup, and security.


Mark Kosieradzi’s new book, Deposition Obstruction: Breaking Through (AAJ Press 2019), will help us get depositions right.

His motivation to write this groundbreaking work is simple, yet profound:

- Without truth, there will be no justice;
- To find truth, our civil justice system must allow it to be discovered;
- An essential mechanism to discover truth is the pre-trial deposition at which a witness is questioned under oath;
- Many lawyers fail to learn our deposition rules, and therefore cannot discover truth when an obstructing adversary violates them.

The rules of civil procedure, along with a body of case law interpreting them, empower a lawyer to uncover truth, but only as long as the lawyer takes the time to understand them. Otherwise, Kosieradzki warns, depositions often descend into an “adolescent food fight.” Kosieradzki has comprehensively compiled the deposition law for us. His writing is insightful and easy to use—even in the real-time back-and-forth of a deposition itself. I will not attend another deposition without Deposition Obstruction.

Kosieradzki calls deposition law our “rules of engagement.” He explains that depositions are conducted just like a trial, only without the judge. Behavior that would not be tolerated at a trial should likewise not be tolerated at a deposition. Kosieradzki fast-tracks the learning curve on how to use our rules of engagement to prevent the obstructers from derailing the truth.

Deposition abuse often occurs when a defending lawyer is not prepared. That lawyer does not predict which questions will be asked and fails to prepare the witness. As a result, the deposition testimony of the witness then becomes devastating to the case. The unprepared lawyer, in a frantic attempt to stop the carnage, starts coaching the witness and making specious objections.

Once the defending lawyer starts using improper tactics, if the questioning lawyer does not know the rules of engagement, the lawyers often start barking at each other, and chaos ensues. Deposition Obstruction teaches us how to demand adherence to the rules of engagement.

Deposition Obstruction explains what to do when the defending lawyer starts coaching the witness. For example: “At the time you entered the intersection the light was red, correct?” Before the witness gets to answer, the defending lawyer blurs: “If you remember.” Kosieradzki teaches that such an interruption is not innocuous; it is a clear, unfair, instruction to the witness: “Don’t answer that—claim you do not recall.”

Kosieradzki explains not only how to spot such deposition cheating, but, perhaps more importantly, provides simple and specific responses to stop the coaching. When an adversary begins to coach by blurring “if you know” to the witness, we should simply state, on the record,
“Please don’t make suggestive comments in the presence of the witness.” Kosieradzki notes that such a record will satisfy Rule 37’s “meet and confer” requirement to later seek judicial intervention, if necessary. If an adversary passes notes or texts the witness, Kosieradzki lays out the cases that prohibit such conduct. Again, we must make a record of the abuse and decline the temptation to descend into unprofessional arguing.

Many lawyers and judges do not realize how limited the grounds for deposition objections are. As Kosieradzki explains, a deposition is designed to be a truth-finding conversation between a witness and a lawyer. A deposition riddled with spurious objections ruins its rhythm, flow, and efficacy.

Privilege, such as attorney/client or doctor/patient, is one of the rare types of deposition objections that can be proper. The assertion of privilege is one of the few times a defending lawyer can instruct the witness not to answer. Kosieradzki lays out how to question the witness to ascertain whether the privilege has been waived. Another permissible type of deposition objection is a foundational one. For example, if a witness is asked to describe a plane crash, without first establishing that the witness was sitting in the airport parking lot 100 yards from the crash with an unimpeded view, the foundation objection is well taken. Because the inquiring attorney could, then and there, “cure” the foundational defect with additional questions, this objection is valid.

In addition, some improper questions can be cured by changing their wording; for example, if a question is leading. Kosieradzki explains that the rules tell us to make such objections by simply stating, “Objection to form.” The inquiring lawyer can then and there rephrase the questions. The form objection is not an attorney’s license to give a speech, say how badly the question is worded, or how terrible our case is. Instead, the objection is to be concise and straightforward. Similarly, if the defending lawyer does not understand a question, no objection is allowed. What the lawyer thinks is important. If the witness understands the question, the deposition shall proceed.

Most trial objections, moreover, are simply improper at a deposition. Unlike privilege, foundational, or form objections, relevance objections have no place. If a question is not relevant to the litigation, the inquiring lawyer cannot cure the shortcoming and make the question relevant by asking additional questions. To be sure, in extreme cases where the lawyer’s questions are patently irrelevant, an objection and instruction not to answer may be appropriate; however, in most instances, relevance objections have no place at depositions.

“To be sure, in extreme cases where the lawyer’s questions are patently irrelevant, an objection and instruction not to answer may be appropriate; however, in most instances, relevance objections have no place at depositions.”

Similarly, a question that calls for hearsay cannot be cured by asking more questions. The hearsay ruling can be heard later before the judge, so there is no reason to interrupt the flow of the deposition. In short, Kosieradzki supplies the tools to shut down a deposition obstructer.

As a bonus, Kosieradzki not only appends all pertinent federal deposition rules, but also provides a concise summary of each state’s rules so you can quickly see how your state’s rules of engagement depart from—or are in harmony with—the federal rules and cases.

Kosieradzki has written the essential, user-friendly work on deposition law.

Thanks, Mark.

Tim Gresback, WSAJ member, practices law in Moscow, Idaho and can be reached at tim@moscowattorney.com

This article originally appeared in Trial News, the monthly newspaper of the Washington State Association for Justice.
ESTIMATING LOSSES IN PERSONAL INJURY AND WRONGFUL DEATH CASES

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“David is a real professional. He is comfortable, confident and believable on the stand. I always retain him at the very beginning of a new case. I definitely want him helping, not opposing me.”

— Repeat Client

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President’s Message  (continued from page 1)

5. Resistance: carryover rebellion as a child who, now as an adult, refuses to comply.
6. Anxiety: fear of downtime if you arrive too early.
7. Attention-seeker: wants everyone to watch as they enter the room. Sign of immaturity.

Don’t fall into these seven traps. Be timely - always.

What NATA is doing for you.

1. Cutting edge seminars. Nobody does what we do…… our Unicameral changes laws regarding civil cases and work comp every year – our seminars will inform you. Our Nebraska Supreme Court changes rules (summary judgment, most recently), and we share with you how to navigate those new rules. Caselaw changes in the courtroom? We inform you of these updates and other trends in the courtroom.
2. List Serve: a perplexing legal question? Get answers from lawyers ranging from Scottsbluff to Omaha. This tool, alone, is worth the annual dues to NATA.
3. Unicameral: in 2019, nearly 800 Bills were introduced and NATA’s lobbyists, O’Hara Lindsay & Associates and our Legislative Committee reviews each of them. Every major legislative effort in the past 30 years involving the civil trial practice had NATA at the forefront.
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7. Do you have a good idea? Let us know if you have a new legislative proposal or believe that an existing law should be amended. A seminar idea? Website improvement? We would love to hear from you. Just email nata@nebraskatrial.com.

Dan Thayer
Membership in the Circle of Advocates at an annual dues of $1,750.00 and Sustaining Membership at an annual dues of $1100.00 provide needed financial support for NATA’s work in service to its members, their clients, and the public.

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