DEFENSE NEWS

Fighting for Justice and Balance in Civil Courts

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IN THIS ISSUE

Federal Court Applies *Tegman* to Minimize Damages in Sexual Abuse Case

By Michael Rosenberger, Gordon Murray Tildan LLP[1]

In 2003, the Washington Supreme Court decided *Tegman v. Accident and Medical Investigations*,[2] holding that negligent defendants are not jointly and severally liable for damages resulting from intentional acts. This decision has the potential to dramatically reduce the damages in negligent supervision cases and any other case where a party is found to have negligently failed to prevent an intentional tort. To date, it has not produced the revolution that some had anticipated.

The courts have resisted applying *Tegman* by, for example, requiring a defendant to prove that negligently caused damages are divisible from intentionally caused damages. However, in the recent case of *R.K. v. Corporation of the President of The Church of Jesus Christ of Latter-day Saints* ("COP" or "the Church"), Judge Ricardo S. Martinez of the Western District of Washington applied *Tegman* to a case alleging negligent failure to prevent sexual abuse.[3] Judge Martinez specifically rejected the notion that the defendant had any obligation to prove divisibility of damages.

In this case tried in October 2006, the *Tegman* ruling had a significant impact on the judgment against COP. The jury determined that 75 percent of plaintiff's damages were caused by the intentional tortfeasor, thus making plaintiff's recovery against the church one quarter of what it would have been absent the *Tegman* ruling.

The *Tegman* Decision

Plaintiff Tegman retained defendants McClellan and Accident and Medical Investigations ("AMI") to pursue her personal injury claims stemming from an automobile accident. McClellan failed to tell Tegman he was not a lawyer. Several years later, McClellan settled Tegman's case without her knowledge or consent, forged her signature, and placed the settlement funds into his bank account rather than a legal trust account. He later sent her a check for what he believed was her share of the settlement proceeds. During Tegman's representation by AMI, lawyers Jescavage and Noble represented Tegman. They knew McClellan was not a licensed lawyer and that settlement proceeds were not placed into a trust account.

In the subsequent action that produced the Supreme Court decision, Tegman and two other former clients sued AMI, McClellan, Jescavage and Noble. The trial court granted summary judgment against McClellan and AMI on several theories, including intentional torts such as fraud. The case proceeded to trial against Noble and Jescavage, where a jury found them liable for negligence and

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malpractice. On appeal, Noble argued that the trial court erred in holding her jointly and severally liable for damages caused by the intentional torts, rather than limiting joint and several liability to the damages caused by negligence.

The Supreme Court reversed the trial court and the Court of Appeals. The court held that Noble was jointly and severally liable for damages caused by "fault."

> She is not, however, liable for damages that result from intentional acts or omissions. We remand for segregation of that part of the damages due to intentional conduct from those damages due to negligence.[4]

Justice Madsen's opinion for the five to four majority, over a vigorous dissent by Justice Chambers, relied exclusively on a rigorous interpretation of RCW 4.22.070.

The *Tegman* holding followed from a series of propositions that can be summarized as follows.

First, the 1986 Tort Reform Act, and RCW 4.22.070 in particular, "provides that several, or proportionate, liability is now intended to be the general rule."[5] This follows *Washburn v. Beatt Equip. Co.*, in which the court stated that while RCW 4.22.030 seemingly provides for a general rule of joint and several liability, with RCW 4.22.070 being an exception, "RCW 4.22.070 is in fact an exception that has all but swallowed the general rule."[6]

Second, RCW 4.22.070 (1) requires the jury to determine the percentage share of "fault" attributable to each entity that caused the plaintiff's damages. The definition of fault under Chapter 4.22 RCW excludes intentional acts or omissions. The majority noted *Welch v. Southland Corp.*[7], in which "this court held that in light of the statutory definition of 'fault' a defendant who was not an intentional actor could not apportion liability to a third party intentional tortfeasor under RCW 4.22.070."[8] Hence, the jury apportions fault under RCW 4.22.070 among only those actors who are negligent, reckless or subject to strict liability.

Third, RCW 4.22.070 (1) provides that "the liability of each defendant shall be several only and shall not be joint" unless one of two listed exceptions applies. The exception relevant in *Tegman*, and that most commonly arises, is set forth in subsection (1)(b). It provides that "[i]f the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the *sum of their proportionate shares of the claimant's total damages.*" In the lynchpin of the opinion, the majority then observed "the only joint and several liability contemplated by this exception is that shared by the *at-fault* defendants."[9] This conclusion follows from the exception's reference to "proportionate shares," which may be apportioned to at-fault entities but not intentional tortfeasors.

In sum, since negligent actors can be jointly and severally liable only for the *sum of the proportionate shares* of the at-fault parties against whom

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judgment is entered, and such at-fault parties exclude intentional actors, a negligent actor cannot be jointly and severally liable for damages caused by an intentional actor.

Tegman Met with Resistance in Trial Courts

Tegman's logic would seemingly apply in any negligent supervision or "failure to protect" case where the plaintiff was injured by an intentional act. However, no trial court instructed a jury to segregate damages caused by an intentional tortfeasor until Judge Martinez's decision in R.K. v. COP, three years later.

Trial courts have found varying justifications for avoiding the application of *Tegman*. In one case from the Eastern District of Washington, the court appeared to have distinguished *Tegman* because in the case at bar the intentional tortfeasor was not a party.[10] In another case, Judge Downing of King County Superior Court declined to apply *Tegman* on the ground that the burden of proving the harm could be segregated rested with the defendant and, absent proof of such divisibility, *Tegman* did not require segregation of damages. These arguments, and others, were rejected by Judge Martinez in *R.K.*

In the case tried before Judge Downing, *Aba Sheikh v. Choe*,[11] the Supreme Court reversed a jury verdict for plaintiff on the ground the State of Washington owed no duty to the plaintiff. In a concurring opinion, Justice Chambers wrote that *Tegman* "must be read in harmony with our case law interpreting apportionment, especially *Cox v. Spangler* and *Phennah v. Whalen*, as Judge Downing properly did here."[12] Justice Chambers wrote that *Cox*, a Washington Supreme Court decision from 2000, stands for the proposition that "an at-fault defendant bears the burden to prove seemingly indivisible damages are in fact segregible, and if this burden is not met, the defendant remains liable for those damages."[13] *Cox*, however, did not involve intentional wrongdoing. Whether that distinction is material (or not, as Justice Chambers believes) will likely be the focus of future Supreme Court scrutiny.

The *R.K.* Order Applying *Tegman*

R.K. had been abused by a member of the Church, Loholt, in the early 1970s. During the relevant period of time, clergy were required to report knowledge of instances of sexual abuse to law enforcement.[14] Plaintiff alleged that prior to Loholt's abuse of plaintiff, a member of the local congregation had informed the bishop that Loholt had touched another boy. The actual content of that report was disputed, but what was undisputed is that the bishop did not notify law enforcement.

Three months before trial, COP moved for an order that the court instruct the jury to segregate damages resulting from the intentional sexual abuse from damages attributable to the Church's alleged negligence, if any. The Church's motion aligned the Church's position with that of the negligent defendants in *Tegman*, and argued that plaintiff was simply repeating arguments made in the *Tegman* dissent: arguments that, of course, did not prevail.

In its opening brief, the Church argued that *Tegman* is analytically indistinguishable from a case involving failure to prevent sexual abuse.

> [I]f Noble had discharged her duty, Ms. Tegman's damages would have been avoided. For example, if Noble had informed Tegman that McClellan was controlling the litigation despite being engaged in the unauthorized practice of law, and that McClellan was tendering settlement offers without Tegman's knowledge, Tegman surely would have fired McClellan and obtained proper representation. [Hence], *Tegman* is just like the present case: in both cases, the allegedly negligent actor could have prevented the harm from the intentional tortfeasor.[15]

In opposition, plaintiff argued that if the court required segregation of damages, the Church would achieve exactly what the defendant in *Welch* was not permitted to do: namely, avoid joint and several liability for damages caused by an intentional tortfeasor.

However, plaintiff's argument had a fatal flaw: it was specifically advanced by the dissent in *Tegman* and it did not carry the day. Justice Chambers' dissent specifically discussed *Welch*:

> [*Welch*] took a hard look at the statute and rejected Southland's attempt to compare negligent and intentional conduct. 'If the legislature had intended liability to be apportioned to individual tortfeasors, it could have included intentional acts and omissions within the statutory definition of *fault* when it enacted RCW 4.22.070.' We found that the statute did not authorize apportionment of damages between intentional and negligent causes.[16]

Note that although *Welch* dealt explicitly with fault, the dissent

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characterized it as also barring "apportionment of damages." The *Tegman* majority responded directly to the dissent on this point, stating that *Welch* barred apportionment of fault, not damages: "Here, it is clear that no fault is apportioned to the intentional tortfeasor, exactly as RCW 4.22.070 requires, and *Welch* holds."[17]

Judge Martinez thus rejected plaintiff's argument. The court noted:

> *Welch* governs the apportionment of fault, whereas *Tegman* governs the apportionment of damages. This is evidenced by the *Tegman* majority's rejection of certain premises set forth in the dissenting opinion. . . . [T]he majority opinion made clear that Justice Chambers had misapplied *Welch*, and that Welch only applied to the apportionment of fault.[18]

Next, plaintiff argued that *Tegman* did not apply in the present case because, unlike *Tegman*, the intentional tortfeasor was not a party. However, this approach would have allowed counsel for plaintiffs to circumvent *Tegman* by not suing the intentional tortfeasor. The notion that *Tegman*'s effect could be so easily nullified is inconsistent with the majority opinion:

> [N]egligent defendants are jointly and severally liable only for that part of the total damages that they negligently caused. The at-fault defendants are not jointly and severally liable under RCW 4.22.070(1)(b) for *any* damages resulting from intentional acts or omissions.[19]

The damages for which a negligent actor is not liable—"any damages resulting from intentional acts or omissions"—exist whether or not a plaintiff chooses to sue the intentional tortfeasor. Nothing in *Tegman*'s text or reasoning suggests that its

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application depends on whether the intentional tortfeasor is a party. Judge Martinez agreed.

Plaintiff *R.K.* also argued that *Tegman* did not apply because the Church's alleged negligence had failed to prevent Loholt's abuse of plaintiff and thus was the cause of the intentionally based damages. Plaintiff cited the dissent's comment that "the majority opinion does not reach the related, but separate, question of negligent supervision."[20] Judge Martinez was not persuaded, noting that "plaintiff fails to acknowledge that Justice Chambers also specifically acknowledged that *Tegman* involved the duty to prevent another's tortious conduct."[21] Indeed, Justice Chambers' dissent specifically recognized that Tegman was itself a "failure to protect" type of case:

> The duty to prevent another's tortious conduct is particularly compelling in the instant case because Camille H. Jescavage and Lorinda S. Noble were both lawyers who represented Tegman to protect her legal interests. *They failed to protect Tegman, and this Court should not shield them from liability for a harm a judge concluded they had a legal duty to prevent.*[22]

Plaintiff also claimed that *Tegman* itself had limited its scope, citing the court's statement that "the legislative scheme also serves to provide some relief to negligent defendants whose conduct is not as egregious as the intentional tortfeasor, nor the cause of intentionally based damages."[23] While Judge Martinez did not address this argument, this sentence appears merely to provide examples of those who are afforded relief by *Tegman*. The word "also" cannot be read as introducing words of limitation. In any event, the fact that Tegman itself was a failure to protect case negates the notion that it does not extend to other such cases.

Finally, plaintiff argued that *Tegman* does not apply unless the defendant proves that damages are divisible, citing *Aba Sheikh*, *Cox* and *Phennah*. However, those cases apply Restatement and common law principles, whereas *Tegman* was explicitly driven by the demands of Chapter 4.22 RCW. There is no burden upon the defendant to prove divisibility because the segregation is *required* by the structure of the statute. "[U]nder RCW 4.22.070, the damages resulting from negligence must be segregated from those resulting from intentional acts . . . ."[23] *Tegman* thus characterized the segregation as a statutory imperative, not a feature of common law.

Moreover, plaintiff's argument that *Tegman* applies only to cases involving divisible damages was nonsensical because *Tegman* itself was not such a case. Indeed, notwithstanding Justice Chambers' concurrence in *Aba Sheikh*, where he argued that *Tegman* does not apply to cases of indivisible damages, his dissent in *Tegman* explicitly acknowledged that *Tegman* itself involved indivisible damages.[25] Moreover, the *Tegman* majority was not troubled by *Tegman*'s application to cases of indivisible damages.

> The dissent protests that the required segregation will be baffling. Segregating damages in cases of "indivisible" harm has been a part of this State's law since adoption of comparative negligence (internal citation omitted).

Not surprisingly, then, Judge Martinez rejected the notion that the Church had to prove divisibility, holding that "*Tegman* clearly involved indivisible damages, and the court ordered segregation in spite of that fact."[26]

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The Verdict

Pursuant to its pre-trial *Tegman* ruling, Judge Martinez instructed the jury to segregate the damages caused by the intentional tortfeasor from those caused by at-fault parties. This had a dramatic effect on the outcome. The jury found that 75 percent of plaintiff's damages were caused by the intentional tortfeasor, and 25 percent by the at-fault parties. Among the at-fault parties, the jury found the Church 25 percent responsible, dividing the other 75 percent among three non-parties, plaintiff's parents, and Loholt's landlord, each of whom had knowledge of Loholt's abuse of plaintiff. Thus, on damages of $1.4 million, judgment was entered against the Church for only $87,500.

When faced with the typical policy-based or common law arguments raised by plaintiffs seeking to avoid *Tegman*, defense counsel is well-advised to tie plaintiff's arguments to similar or identical arguments made by the dissent and rejected by the majority. A fair reading of *Tegman* yields the conclusion that all of these arguments were considered and rejected by the Supreme Court, thus leaving no room to argue that *Tegman* does not apply to a negligent supervision or failure to protect case. *Tegman* itself was just such a case.

Judge Martinez's order applying *Tegman* is analytically sound. It should mark the advent of a new embrace of Tegman's logic by trial courts. If that happens, however, defense counsel can expect that the Supreme Court will eventually revisit *Tegman*, and that the plaintiff in such a case will be arguing *Tegman* was wrongly decided or should be limited to cases of indivisible damages. Defense counsel, and the justices that made up the *Tegman* majority, will then have to respond specifically to Justice Chambers' argument from *Aba Sheikh* that *Tegman* must be limited so as to be harmonized with *Cox* and *Phennah*.

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2 *Tegman v. Accident and Medical Investigations, Inc.*, 150 Wn.2d 102, 75 P.3d 497 (2003).

3 *R.K. v. The Corporation of the President of The Church of Jesus Christ of Latter-day Saints*, No. C04-2338 RSM, (W.D. Wash., filed August 28, 2006) (hereafter, "R.K"). At the time of this order, the case was captioned *Fleming v. Corporation of the President, et al*. However, Fleming and two other plaintiffs had already settled and the case was subsequently renamed *R.K. v. COP*.

4 *Id*. at 119-20.

5 *Id*. at 109.

6 *Washburn v. Beatt Equip. Co.*, 122 Wn.2d 246, 294 n.7, 840 P.2d 860 (1992).

7 *Welch v. Southland Corp.*, 134 Wn.2d 629, 952 P.2d 162 (1998).

8 *Tegman*, 150 Wn.2d at 110.

9 *Id*. at 112 (emphasis in original).

10 C*hristensen v. Royal School Dist. No. 160*, No. C.V. 02-185 FVS (E.D. Wash., filed August 3, 2006).

11 *Aba Sheikh v. Choe*, 156 Wn.2d 441, 128 P.3d 574 (2006).

12 *Id*. at 460 (Chambers, J., concurring) (citations omitted).

13 *Id*. at 462 (Chambers, J., concurring).

14 Former RCW 26.44.030(1). "[I]n 1975 the Legislature amended the statute by deleting the reference to clergy members." *State v. Motherwell*, 114 Wn.2d 353, 359, 788 P.2d 1066 (1990).

15 Defendant's Motion to Segregate Damages Resulting from Intentional Sexual Abuse at 7, *R.K.*, (filed July 20, 2006, Dkt. No 123).

16 *Tegman*, 150 Wn.2d at 127 (Chambers, J. dissenting) (italics in original, underlining added) (citation omitted).

17 *Id*. at 116.

18 Order Granting Defendant's Motion to Segregate Damages Resulting from Intentional Tortfeasor at 2, *R.K.* (filed August 28, 2006, Dkt. No. 153) (hereafter, "*R.K.* Order").

19 *Tegman*, 150 Wn.2d at 114 (emphasis added).

20 *Tegman*, 150 Wn.2d at 128, n.14 (Chambers, J., dissenting).

21 *R.K.* Order at 3.

22 *Tegman*, 150 Wn.2d at 128-129 (Chambers, J., dissenting) (emphasis added).

23 *Tegman*, 150 Wn.2d at 119.

24 *Tegman*, 150 Wn.2d at 105.

25 The trial court found Tegman was entitled to $15,000 in compensatory damages. The trial court concluded that these damages were indivisible, and Noble did not assign error to this conclusion. *Tegman*, 150 Wn.2d at 134 (Chambers, J., dissenting).

26 *R.K.* Order at 4.

Mold Claims Don't Pass the Scientific Sniff Test

By Stacey Fitzpatrick, Groff Murphy

Toxic mold was once labeled the "the new asbestos". With the onslaught of media coverage on the supposed health effects of mold and the highly publicized jury awards in mold cases, property owners and builders quickly became targets of plaintiffs claiming millions in damages for personal injury. Fortunately, defense attorneys are beginning to see a decrease in the number of mold cases coming through their doors. This is due in large part to the increasing difficulty on the part of plaintiffs to prove causation.

In the last few years, several leading scientific organizations have published articles and studies that show that the current scientific data does not support a causal connection between exposure to mold and most of the ailments alleged by plaintiffs in mold cases. Thanks to these recent articles and studies, one of the most effective tools in the defense counsel's arsenal to dispose of a mold case or significantly limit potential damage exposure is to mount a *Frye* challenge to the admissibility of the plaintiffs' scientific evidence.

> "...one of the most effective tools in the defense counsel's arsenal to dispose of a mold case or significantly limit potential damage exposure is to mount a *Frye* challenge..."

Washington Courts use the test set forth in *Frye v. United States*[1] to determine the admissibility of scientific evidence. Under the *Frye* test, evidence derived from a scientific theory or principle is admissible only if the theory or principle has achieved general acceptance in the relevant scientific community.[2] "The core concern of *Frye* is only whether the evidence being offered is based on established scientific methodology. This involves both an accepted theory and a valid technique to implement that theory."[3] For example, in *Ruff v. Department of Labor and Industries*, the Court affirmed a trial court's exclusion of evidence relating to multiple chemical sensitivity based on *Frye*. The plaintiffs' medical experts diagnosed her with "toxic effects of chemicals resulting in a disorder of porphyria metabolism and multiple chemical sensitivities" and "chronic porphyria activated by chemical exposure."[4] The Court of Appeals affirmed the trial court's exclusion of the testimony of the experts regarding causation because the experts' "causation theory...has not achieved general acceptance among porphyria experts necessary for admission."[5]

"[S]cientists in the field must make the initial determination whether an experimental principle is reliable and accurate."[6] "The *Frye* standard recognizes that 'judges do not have the expertise required to decide whether a challenged scientific theory is correct,' and therefore courts 'defer this judgment to scientists.'"[7] As such, "[t]he court does not itself assess the reliability of the evidence."[8]

The proponent of the evidence bears the burden of establishing by a preponderance of the evidence the general acceptance of the underlying scientific principles and methodology.[9] Such evidence of general acceptance includes testimony that asserts it, articles and publications, widespread use in the community, and the holdings of other courts."[10] The court then makes its determination regarding the admissibility of the evidence. "'If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted.'"[11]

Plaintiffs in mold cases typically allege adverse health effects due to exposure to the toxins produced by some molds, such as stachybotrys chartarum, including severe fatigue, cognitive impairment, depressed immunity, gastrointestinal tract problems, fevers/chills, hair loss, arthritis, and even cancer. However, recent statements made by leading medical organizations show that these kinds of health complaints are not generally accepted by experts as being caused by exposure to "toxic mold".

For example, in 2005 the Institute of Medicine published "Damp Indoor Spaces and Health", in which it found that while there is sufficient evidence of an association between an exposure to mold and some respiratory health outcomes, such as upper respiratory tract symptoms, cough, wheeze, and asthma symptoms in sensitized asthmatic persons, there is inadequate scientific information to determine whether there is a causal link between the presence of mold and other health outcomes, such as asthma in otherwise healthy adults, mucus membrane irritation symptoms, lower respiratory tract illness in otherwise healthy adults, rheumatologic or other immune diseases, skin symptoms, GI symptoms, fatigue, neuro-psychiatric symptoms, and cancer, among others.[12]

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In 2005, the American College of Allergy, Asthma & Immunology published a paper in which it concluded that "health effects [related to mold] generally occur due to allergy or irritation to fungal substances" but that "[t]oxic reactions, although receiving much attention in the media, have not been shown to be a significant health problem."[13]

In 2006, the American Academy of Allergy, Asthma, and Immunology ("AAAAI") published its position paper titled "The Medical Effects of Mold Exposure", in which it concluded that "[t]he occurrence of mold-related toxicity (mycotoxicosis) from exposure to inhaled mycotoxins in nonoccupational settings is not supported by the current data, and its occurrence is improbable."[14] Furthermore, the AAAAI concluded that "[e]xposure to molds and their products does not induce a state of immune dysregulation (e.g., immunodeficiency or autoimmunity)."[15]

Plaintiffs in mold cases often also rely on certain tests showing raised antibody levels to prove that they have been exposed to mold toxins. However, it is not generally accepted by experts in the field of allergy that mycotoxin antibody testing has any diagnostic value whatsoever. For example, the AAAAI concluded "[t]esting for antibodies to mycotoxins is not scientifically validated and should not be relied upon."[16] In a recent California case, the court of appeals affirmed the trial court's exclusion of mycotoxin/antibody testing, holding that the appellants failed to meet their burden to prove that such evidence has gained general acceptance in the relevant scientific community.[17]

The benefit of using publications from the AAAAI, ACAAI and the Institute of Medicine is that regardless of whether the plaintiffs' experts agree with the findings of these organizations, it shows that there is, at the very least, a significant dispute in the scientific community on the matter. Under the Washington *Frye* standard, such a dispute is sufficient to warrant exclusion of the evidence at trial. For this reason, more and more Washington courts are excluding evidence of health effects of mold.

For example, in 2006, in a case involving allegations of personal injuries arising from mold exposure, a Thurston County Superior Court Judge excluded expert testimony relating to all of the health complaints of the plaintiffs with the exception of those relating to allergies to mold, stating "the vast weight of the evidence considered by this court is clearly against extending the causal connection to the...conditions diagnosed by plaintiffs' experts. Even the proponents of the causal connection admit theirs is a distinct minority view."[18]

Even in jurisdictions that have adopted *Daubert*, which is considered to be a more lenient test than that of *Frye*[19], the courts are excluding expert testimony relating to the health effects of mold exposure. For example, in 2006 and 2007, the Fourth Circuit, Ninth Circuit, and Eleventh Circuit all affirmed rulings by the trial courts excluding such evidence.[20] Notably, in *Whisnant v. United States*, the United States District Court for the Western District of Washington excluded the testimony of Dr. Gordon Baker, a frequent plaintiff's expert in Washington mold cases, because it found his methodology to be unreliable and that the antibody blood tests upon which he based his opinions had already been deemed to be unreliable by the United States Department of Health and Human Services and a number of courts, including the Ninth Circuit.[21]

In light of the continuing developments with respect to the state of the science relating to the health effects of mold and the increasing willingness on the part of the courts to exclude plaintiffs' expert testimony on the health effects of mold, defense counsel would be well advised to seek exclusion of the scientific testimony that the plaintiffs plan to admit into evidence at trial early on in the case. Such efforts can potentially lead to summary dismissal of a case or a significant decrease in the potential exposure that a defendant builder or landlord may face.

1 *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C. Cir. 1923).

2 *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994); *Ruff v. Department of Labor and Industries of State of Wash.*, 107 Wn. App. 289, 299-300, 28 P.3d 1 (2001).

3 *State v. Cauthron*, 120 Wn.2d 879, 889, 846 P.2d 502 (1993).

4 *Ruff*, 107 Wn. App. at 293-95.

5 *Id.* at 302.

6 *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996).

7 *Copeland*, 130 Wn.2d at 255 (quoting *Cauthron*, 120 Wn.2d at 887).

8 *Copeland*, 130 Wn.2d at 255.

9 *State v. Kunze*, 97 Wn. App. 832, 853, 988 P.2d 977 (1999); *State v. Carlson*, 80 Wn. App. 116, 125, 906 P.2d 999 (1995); see also *State v. Phillips*, 123 Wn. App. 761, 770, 98 P.3d 838 (2004).

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10 *Kunze*, 97 Wn. App. at 853.

11 *Copeland*, 130 Wn.2d at 255 (quoting *Cauthron*, 120 Wn.2d at 887).

12 Institute of Medicine of the National Academies, *Damp Indoor Spaces and Health* 9-10 (National Academies Press 2005).

13 Jay M. Portnoy , MD, et al., *Health Effects of Indoor Fungi*, Ann Allergy Asthma Immunol, 94:317 (2005).

14 Robert K. Bush, MD, et al., *The Medical Effects of Mold Exposure*, J Allergy Clin Immunol, 117:329 (2006).

15 *Id*. at 330.

16 *Id*. at 331.

17 *Geffcken v. D'Andrea*, 137 Cal. App.4th 1298, 1309, 41 Cal. Rptr.3d 80 (2006).

18 *Dolan et al. v. Shelton Property Ventures, et als.*, No. 03-2-0140-2, Superior Court of Washington, Thurston County, Court's Opinion (March 28, 2006).

19 *Cauthron*, 120 Wn.2d at 886.

20 *Jazairi v. Royal Oaks Apartment Associates*, No. 06-15389, 2007 WL 460843 (11th Cir. Feb. 13, 2007) (unpublished); *Kilian v. Equity Residential Properties Trust*, Nos. 04-16723, 04-17538, 2006 WL 1876907(9th Cir., June 15, 2006) (unpublished); *Roche v. Lincoln Property Company*, No. 03-2064, 2006 WL 910241 (4th Cir., April 7, 2006) (unpublished).

21 *Whisnant v. United States*, No. C03-5121, 2006 WL 2861112 (W.D. Wash., October 5, 2006).

Legislative Report

By Melvin N. Sorensen, Carney, Badley, Spellman

Senate Concurs in House Amendments to Bill Allowing Punitive Damages for First Party Bad Faith Claims; Measure Goes to Governor Gregoire

On Saturday, April 14, the Washington State Senate voted to concur in an amended version of SB 5726 that was passed by the Washington State House of Representatives in early April. The vote in the Senate was 31-18. The bill now goes to Governor Gregoire.

Insurers, national insurance trade associations, agent and broker groups, and prominent business leaders will be meeting with the Governor or writing to her arguing that the bill should be vetoed because it does not require proof of malice for bad faith actions that seek punitive damage: a standard that prevails in most other states that allow punitive damages in bad faith actions against insurers.

House Kills Controversial Measure Relating to Single Family Construction

The House has killed ESSB 5550 when the measure was not brought to a vote on the House floor prior to the cutoff on Friday, April 13. In widely-reported comments, House Speaker Frank Chopp has indicated that he would like to see further study of the issues relating to the bill.

The bill would have required warranties on the sale or construction of new homes. It would have also increased the statute of repose from six to ten years, except for home construction performed by non-profit programs. The statute of repose for construction performed by non-profits would have remained at six years. The bill would have also established a study committee to review issues facing the residential construction industry and consumers, including standards for quality construction, improved inspections, and related issues. The construction industry, insurers, the Washington Defense Trial Lawyers, Weyerhaeuser, and others have opposed the bill, expressing concern regarding the adverse impact on the cost of housing, affordability and availability of contractor liability insurance.

President's Column

By Steve Stocker

When I took office as WDTL's President, one of my main goals this year was to expand WDTL's outreach efforts – to the legislature, to other business and other like minded organizations, to the judiciary, and to our colleagues across the aisle – WSTLA. And since my term is almost up – I wanted to report back to our members about the progress we've made so far in this effort. While I won't take complete credit for this effort since it was started by previous WDTL presidents – Jeff Frank and Jill Haavig Stone and supported by the efforts of past and current WDTL board members, I will point out the various steps we are taking to reach this goal.

As you all know, it was a difficult legislative year for most of our clients; our legislative consultant, Mel Sorensen of Carney Badley probably didn't sleep or eat from January to April in his efforts to combat the flood of reformist and/or draconian legislative efforts. Working with the Association of Washington Businesses, the Association of General Contractors, The Washington State Medical Association and the Washington Self Insured's Association to name a few, we helped keep some of the worst bills from passing, promoted compromises to make other bills more fairly balanced for all involved and got our name in front of the legislature overall as a prominent voice for civil justice in the State of Washington. I would like to personally thank the many members that donated their time and talent to testify before committees in Olympia, usually on very short notice, and especially, Jayne Freeman of Keating Bucklin, who orchestrated the WDTL's efforts as chairperson of the Legislative Liaison Committee.

In addition to our legislative labors, we have made more of a push this year to explore future collaborations with other business associations; hopefully, providing more venues for our members to meet future clients, discuss legal and legislative issues confronting their members and provide the opportunity for our members to offer legal education assistance for business owners and various professionals. These collaborations will further strengthen our future legislative and public education efforts as well.

In the area of judicial outreach, WDTL launched our first judicial brown bag meeting in collaboration with the Washington State Trial Lawyers Association. We took suggestions from the King County judiciary on topics of interest to the bench and focused our first meeting on construction defect case issues with both defense and plaintiff's counsel providing their viewpoints. The presentation was an acclaimed success by the judges and another presentation is planned for June. We anticipate expanding these meetings to other counties if the judges desire. We also had three judicial networking events this past year – one in Seattle in October, one in the South Sound in January and one in Spokane last month. All were well attended, a lot of fun and a great way to "humanize" our colleagues in the black robes.

We are hoping to continue to increase judicial attendance at each of these – so when they are announced, please encourage the judiciary and members of your firm to attend.

Last month Rick Roberts and Kristin Lewis met with their counterparts at the Washington State Trial Lawyers Association over lunch to discuss potential areas of cooperation (besides the judicial brown bags). It was encouraging to hear that there are areas of possible legislative partnership in the future; especially regarding court funding, discovery reform and working with the Washington State Medical Association regarding witness fees and the 'rules of engagement' between lawyers and physicians. Both sides are interested in increasing collegiality across the bars and are thinking of ways to do this.

All in all – I am pleased on where we have been going in the past ten months I've been president; there remains a lot to do but I know that Rick Roberts will continue to strongly lead the organization toward the goals that the board and my predecessors have chosen. I want to thank all the members of the Board of Trustees and the Past Presidents' Committee for their very active participation and counsel.

In the next couple of months – we will be resurveying our members to determine what benefits the organization brings to your practice, garner ideas for new projects, identify other organizations we should approach for outreach and identify members who would like to take a more active role in the organization's management. Please give thought to these topics and take the time to respond to the survey. I wish everyone an enjoyable summer and hope to see many of you at the Annual Convention in Vancouver B.C.

Assessing the Psychiatric Sequelae of Trauma:
Psuedo-PTSD and Other Concerns

By Gerald M. Rosen, Ph.D.[1]

Posttraumatic Stress Disorder (PTSD) was introduced in the third edition of the American Psychiatric Association's Diagnostic and Statistical Manual (DSM-III, 1980). Although the diagnosis has been revised in subsequent editions (e.g., DSM-III-R, 1987; DSM-IV, 1994), one core assumption has always distinguished PTSD from other psychiatric disorders. This assumption involves the concept of a "specific etiology," wherein a distinct class of traumatic events (the "stressor criterion" or Criterion A) is causally linked to a distinct clinical syndrome. Criterion A events are defined as life threatening or potentially injurious traumas that are experienced with a sense of fear, helplessness, or horror.

The presumed causal link between a traumatic event and subsequent clinical problems makes the diagnosis of PTSD particularly attractive in the furtherance of personal injury claims. One commentator observed, "In tort litigation, PTSD is a favored diagnosis in cases of emotional distress because it is incident specific. . . [P]laintiffs can argue that all of their psychological problems issue from the alleged traumatic event and not from myriad other sources encountered in life. A diagnosis of depression, in contrast, opens the issue of causation to many factors other than the stated cause of action."[2] Another psychologist considered the matter and quipped, "If mental disorders were listed on the New York exchange, PTSD would be a growth stock to watch."[3]

Early commentators were correct, and PTSD is now widely applied as a diagnosis for the psychiatric sequelae of trauma. Yet, the diagnosis is not without its issues and controversies. In this paper, three key issues are considered that are of particular relevance to professionals who evaluate stress-related personal injury claims.

PTSD Can Be Malingered

The PTSD clinical syndrome is defined by 17 symptom criteria, grouped into three clusters (Criteria B through D). These symptom criteria are accessible in the media, mostly subjective and relatively easy to imitate.[4] The most dramatic demonstration of this point was made in a study that employed six actors who simulated PTSD symptoms after a supposed motor vehicle accident.[5] Comprehensive assessment efforts were provided at a PTSD specialty clinic, after which all six actors were accepted as valid PTSD cases. Other studies demonstrate the occurrence of falsified reports, coached symptoms, and the failure of clinicians to detect feigned presentations of PTSD.[6]

In 1994, the fourth edition of the DSM provided a specific guideline in its text on PTSD to caution clinicians to rule out malingering.[7] Unfortunately, clinicians and researchers too often ignore this guideline and naively rely on self-reports when determining the presence of symptoms and/or the occurrence of events.[8]

Not All Posttraumatic Reactions Are Symptoms of PTSD

Emotional reactions after traumatic events are not necessarily symptoms of a disorder. Labeling understandable emotions or upsetting thoughts as "symptoms" of PTSD, can be akin to saying that someone who coughs in a smoky tavern has a symptom of respiratory disease. Such leaps of logic "medicalize" normal human emotions, and can give rise to iatrogenic misapprehensions that contribute to chronicity.[9]

Even when posttraumatic reactions are severe, interfere with functioning and warrant psychiatric attention, PTSD is not necessarily the most appropriate diagnosis. Analysis of the DSM reveals how symptoms required for a PTSD diagnosis can overlap completely with a

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Psuedo-PTSD *From Page 12*

combination of criteria defining major depression and specific phobia.[10] In other words, PTSD symptoms can result from an amalgam of alternative and equally well-established psychiatric conditions. These alternative diagnostic frameworks may benefit a clinician's analysis of a case and treatment planning.[11]

Finally, some patients present "factitious" forms of pseudo-PTSD.[12] Unlike malingering, in which an individual is motivated by financial or other situational goals, factitious forms of PTSD are adopted in the service of diverse motives and/or other psychiatric needs.[13]

Criterion Creep

Since the creation of PTSD the scope of its defining criteria has expanded, a phenomenon referred to as "criterion creep" or "conceptual bracket creep."[14] This has occurred both in regard to the type of events that put people at risk for the disorder (Criterion A), and in regard to the defining symptoms (Criteria B through D).

Criterion creep is illustrated in the proposal that certain forms of sexual harassment can lead to PTSD by creating the expectation of future, and more severe trauma. The authors of this proposal argued that female victims of unwanted sexual comments might worry that if a male perpetrator was capable of the norm violation of, for example, comments about breasts, then he might also be capable of inappropriate touching or assault.[15] This proposal suggests that all types of non-traumatic events (e.g., a small fender bender with no threat of personal injury) could be capable of producing PTSD by creating a heightened awareness of more horrific possibilities (e.g., life-threatening accident on the freeway). Advancing such a position creates the conceptual equivalent of "pretraumatic" stress disorder.

Criterion creep is a problem in so far as it trivializes PTSD by applying the diagnosis to an ever expanding array of events and reactions.[16] This does a disservice to the diagnosis itself, as well as to the victims of significant trauma.

Implications

Introduction of the PTSD diagnosis in 1980 has led to a burgeoning body of research on posttraumatic reactions. In this regard, the diagnosis has greatly advanced our knowledge and understanding of posttraumatic reactions. We now know that most individuals are resilient and do not develop PTSD after life-threatening events; posttraumatic reactions typically present in the immediate aftermath of trauma and subside on their own over time; and the majority of individuals who meet PTSD benefit from treatment.[17]

PTSD also has brought with it a number of distinct problems and issues. Of greatest concern, the diagnosis is increasingly employed by clinicians as a catch-all to be applied after stressful life events. Adding to this concern is the favored position PTSD holds in personal injury cases because it posits a specific etiology. Consequently, attorneys join with clinicians in needing to understand the issues and controversies surrounding the diagnosis.

1 Gerald Rosen is a clinical psychologist who has practiced in Seattle since 1976. He holds licenses in Washington, Alaska and Oregon. Dr. Rosen has an appointment as clinical professor with the Department of Psychology at the University of Washington, and with the Department of Psychiatry and Behavioral Sciences at the University's School of Medicine. His edited book, "PTSD: Issues and Controversies," was published in 2004 by John Wiley. Recently, Dr. Rosen served as a guest editor for the Journal of Anxiety Disorders on a special issue concerned with PTSD.

2 Ralph Slovenko, *Legal Aspects of Post-Traumatic Stress disorder*, 17 PSYCHIATRIC CLINICS N. AM. 439, 441 (David A. Tomb ed., 1994)

3 Paul R. Lees-Haley, *Pseudo Post-traumatic stress disorder*, TRIAL DIPLOMACY J., Winter 1986, at 17-20.

4 See Gloria D. Eldridge, *Contextual Issues in the Assessment of Posttraumatic Stress Disorder*, 4 J. TRAUMATIC STRESS 7-23 (1991). Also, Landy R. Sparr & Roland M. Atkinson, *Post-traumatic Stress Disorder As an Insanity Defense: Medicolegal Quicksand*, 142 AM. J. PSYCHIATRY 608-613 (1986).

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Smoke and Mirrors:
The Fabrication and Alteration of Electronic Evidence

By Sharon D. Nelson, Esq. and John W. Simeki[1]

"Sufficiently advanced technology is indistinguishable from magic."

- Arthur C. Clarke

Welcome to the Digital Tech Fun House of the next millennium. Does some putz at NBC want Katie Couric to look 20 pounds slimmer? A wave of his electronic wand, and it is so. Does a Reuters freelance photographer in Beirut want his photos of violent explosions to have a greater "shock and awe" factor? No sweat - he just uses a graphics program to darken the explosions. Mad at your former lover and want to put her head on a porn queen's body and post it on your website? A quick cut and paste . . . presto change-o . . . . it is done.

Nothing in the world is really new, so they say. In truth, the alteration of photos is an old story – remember all the UFO photos of the 50s that turned out to be an aluminum wrapped, gussied up version of Mom's dinner plate? If you don't, shame on you for being so young!

The digital alterations of things can be charming – witness the use of digital alteration in Forrest Gump to make him a part of history. Absolutely inspired. Then look again – at *Time* magazine's bizarre editorial decision to artificially darken O.J. Simpson's face on its cover. Dispiriting how far we, as a society, have **not** come.

Someone, presumably not a Kerry fan, stitched together two separate photos to make a composite allegedly showing him speaking with Jane Fonda at an anti-war rally. When you see the original photos, you can see what happened. But barring that, your eyes would likely believe what they see – and therein lies the great danger of accepting things electronic as real.

How do the pros spot digital alteration? Often, by blowing things up. When viewed at the pixel level, doctored photos don't "fit." Rarely does anyone doctor photos with so much precision that the doctoring can't be seen when enlarged. What is not apparent to the naked eye becomes readily apparent when looking at a photo under the equivalent of a microscope. Today, there are even mathematical algorithms to help determine whether a photo has been altered.

There are harmless and even fun uses for digital alteration – a charming but fake photo of President Clinton in a pink tutu, which made the Internet rounds some years ago, comes immediately to mind. But there are grave uses, many with criminal complications. The most common one, by a country mile, is e-mail spoofing.

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5 Edward J. Hickling, Edward B. Blanchard, Elizabeth Mundy, & Tara E. Galovski, *Detection of Malingered MVA Related Posttraumatic Stress Disorder: An Investigation of the Ability to Detect Professional Actors by Experienced Clinicians, Psychological Tests and Psychophysiological Assessment*, 21, J. FORENSIC PSYCHOL. PRACTICE 33-53 (2002).

6 Frueh and colleagues found that Vietnam related PTSD claims were made by veterans whose records indicated they had never been sent to combat. B. Christopher Frueh et al., *Documented Combat Exposure of US Veterans Seeking Treatment for Combat-related Posttraumatic Stress Disorder*, 186 BRITISH J. PSYCHIATRY 467-472 (2005). Rosen found evidence of symptom sharing and attorney coaching among a group of litigating survivors of a maritime disaster. Gerald M. Rosen, *The* Aleutian Enterprise *Sinking and Posttraumatic Stress Disorder: Misdiagnosis in Clinical and Forensic Settings*, 26 PROF. PSYCHOL.: RESEARCH & PRACTICE 82-87 (1995). Findings from the *Aleutian Enterprise* crew led to a consideration of attorney-client communications and the assessment of PTSD claims. Robert H. Aronson, Lonnie Rosenwald, & Gerald M. Rosen, *Attorney-client Confidentiality and the Assessment of Claimants Who Allege Posttraumatic Stress Disorder*, 76 WASHINGTON LAW REVIEW 313-348 (2001).

7 The text of the DSM-IV states: "Malingering should be ruled out in those situations in which financial remuneration, benefit eligibility, and forensic determinations play a role." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 427 (4th ed. 1994)

8 For a discussion of this issue, see Gerald M. Rosen, *Litigation and Reported Rates of Posttraumatic Stress Disorder*, 36 PERSONALITY AND INDIVIDUAL DIFFERENCES, 1291-1294 (2004). Also, Gerald M. Rosen, *DSM's Cautionary Guideline to Rule Out Malingering Can Protect the PTSD Database*, 20, J. ANXIETY DISORDERS 530-535 (2006).

9 Derek Summerfield, *Cross-cultural perspectives on the medicalization of human suffering*, in POSTTRAUMATIC STRESS DISORDER: ISSUES AND CONTROVERSIES 233-244 (Gerald M. Rosen ed, 2004).

10 AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994). Also see, Robert L. Spitzer, Michael B. First, & Jerome C. Wakefield, Saving PTSD *From Itself in DSM-V*, 21 J. ANXIETY DISORDERS 233-241 (2007).

11 Paul R. McHugh, & Glenn Treisman, *PTSD: A problematic diagnostic construct*, 21 J. ANXIETY DISORDERS 211-222 (2007).

12 Gerald M. Rosen & Steven Taylor, *Pseudo-PTSD*, 21 J. ANXIETY DISORDERS 201-210 (2007).

13 Roy B. Lacoursiere, *Diverse Motives for Fictitious Post-Traumatic Stress Disorder*, 6 J. TRAUMATIC STRESS 141-149 (1993).

14 Gerald M. Rosen, *Traumatic Events, Criterion Creep, and the Creation of Pretraumatic Stress Disorder*, SCIENTIFIC REVIEW OF MENTAL HEALTH PRACTICES 39-42 (2004). Also see, Richard J. McNally, *Progress and Controversy in the Study of Posttraumatic Stress Disorder*, 54 ANNUAL REVIEW PSYCHOLOGY 229-252 (2003).

15 Claudia Avina & William O'Donohue, *Sexual Harassment and PTSD: Is Sexual Harassment Diagnosable Trauma?*, 15 J. TRAUMATIC STRESS 69-75 (2002).

16 Sparr observed, "PTSD should be diagnosed if the facts fit, but only if they fit. To do otherwise dilutes and trivializes the diagnosis." Landy F. Sparr, *Legal Aspects of Posttraumatic Stress Disorder: Uses and Abuses*, in POSTTRAUMATIC STRESS DISORDER: ETIOLOGY, PHENOMENOLOGY, AND TREATMENT 239-264 (Marion E. Wolf & Aron D. Mosnain eds, 1990)

17 See Rachel Yehuda & Alexander C. McFarlane, *Conflict Between Current Knowledge About Posttraumatic Stress Disorder and Its Original Conceptual Basis*, 152 AMER. J. PSYCHIATRY 1705-1713 (1995). Also, Edna B. Foa, Terence M. Keane, & Matthew J. Friedman (eds.), EFFECTIVE TREATMENTS FOR PTSD (2000).

Legal Clients with Psychological and Personality Difficulties

By Steven Fey, Ph.D.[1]

Claimants entering the legal arena often bring with them a variety of long-standing and acquired psychological issues that can be challenging to handle from an attorney's perspective. This is particularly the case then when personal injuries are the reason for the legal activity. Attorneys, whether representing the plaintiff or defense, can expect to see a cross section of psychological syndromes, and may have to adapt their strategies around the conditions presented. Claimants commonly present with psychological problems generated in the course of their medical condition. Many of these may be unrecognized by their medical care providers. They may also present with long-standing (pre-injury) problems that have been exacerbated by their injuries. These combined with the stress of the legal process can produce some challenging case management problems.

Claimants also come into the legal system with strong feelings related to their injuries. These include feelings of blame, victimization, guilt, revenge, and entitlement. They have often endured a long medical course, had their private issues opened up, put lives on hold, experienced long legal delays, experienced financial stress, and had no closure to their difficulties. Often their expectations are unrealistic, fueled by the media and the attorney advertising that is all too common now. For example, on a recent trip to a nearby Northwest city, I saw a yellow pages ad for a maritime attorney who took out a full page ad listing different musculoskeletal injuries and what each was "worth" in monetary amounts. Not one was less than a million dollars. The following short article is a primer on some of these basic psychological problems and how attorneys can better recognize them and deal with their challenges more effectively.

The first and likely most common group of syndromes include some of the DSM-IV Axis One diagnoses. Depression and anxiety are frequently nested within complex injury and medical situations. Often they are unrecognized by medical providers, especially if the claimants have been circulating through a lot of "specialists" for their care, who are focusing on small parts of a larger problem. Many times these depression and anxiety syndromes have pre-existing features and complex reasons for their development, where the injury is only partially responsible. Troublesome symptoms include poor sleep, energy loss, mood dysphoria, cognitive and memory changes, heightened somatic preoccupation, and embellished perceptions of victimization, loss, and blame. Pain perceptions and suffering are also significantly magnified in depressions. Depressed claimants can appear to be resistant and rigid in their decision making and in some cases be unable to make decisions at all.

I have always been an advocate of all parties encouraging treatment of these conditions regardless of their causality. Common depressions are usually easy to treat and skilled psychological examiners can usually determine what aspects were pre-existing and/or injury related for legal purposes. I have often seen dramatic progress in the ease with which cases can be resolved when depressions were adequately treated. There is the common fear that acknowledging and treating depressions will open the "Pandora's Box" of psychological claims. Rarely, is the treatment expensive, long lasting, and there typically are no permanent residuals. Tips for dealing with people with these disorders involve a lot of patience and understanding. They are usually quite miserable with their symptoms but often fear the stigmata associated with getting help. Family members can often be helpful in urging then into treatment.

Another, more complex group of Axis I disorders, are the somatization disorders. They are almost always pre-existing or greatly influenced by pre-existing traits, and cause heightened pain and symptom pre-occupation, exaggerated and inconsistent disability patterns, unrealistic expectations of compensation, and often dramatic and showy pain complaints and pain behaviors. People with these disorders lack the suffering and dysphoria of depressed people and often gain a lot of social reinforcement for their symptoms and use them to control others around them. They have the words of pain but lack the emotional "music". They can appear superficially to be resilient people but in reality have low self-esteem, heightened anxiety, and shrink easily into the sick role when stressed. They can also have real medical problems which makes their management problematic in the physician's office. Most often however, their symptom patterns and recovery time exceed what is reasonable based on their objective findings. They are heavy health care utilizers, patronize doctors who tell them what they need to hear, consume a lot of fringe treatments, and often get into problems

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with prescription medications. Their long term complaints and controlling pain behaviors, often result in tangled family dynamics, where over solicitous family members unwittingly reinforce the disability for years and patients find it impossible to "save face" and adopt more healthy behavior patterns. They are also rarely able to adopt more healthy patterns while there is ongoing litigation.

My experience is that attorneys on both sides are acutely aware of claimants with these problems but feel powerless to do much about it. They present challenges for both the plaintiff and the defense sides. For the defense, they contribute to escalated and often unnecessary health care costs; and for plaintiff's counsel, these personalities often play out poorly in front of juries who have a remarkable ability to detect people, who in Shakespearian terms, "protest too much". Again, this is another type of claimant where getting some professional psychological help can make a big difference. A good examination can help unravel these conditions and determine the extent of pre-existing problems and how they have influenced the current situation. Many of these people have learned early in life to buffer life stresses with illness complaints and their current injury problems are just another chapter in a long story. Understanding all the issues at play can frequently bring a complex case to a settlement quickly.

A second, less common group of claimants falls into the DSM-IV Axis Two category. These are the people with character (personality) disorders who can be quite challenging for all involved. These people have long standing behavior patterns that are resistant to change and they alter their behavior only when externally controlled. They are impulsive, manipulative, controlling, and have little appreciation or concerns for the feelings of the people around them. They may have histories of anti-social behavior. In a medical/legal situation they often try to manipulate and control the situation with anger and intimidation. They often have chemical dependency problems and when prescription drugs are involved, they are skilled at engineering their symptoms to obtain drugs. They can be very strident and dramatic with their complaints but show none of the emotions suggesting they are truly suffering. Perhaps their most challenging characteristic is their ability to control information and selectively report the facts or important aspects of their histories.

For example, I had one case where a worker's compensation claimant, unbeknownst to attorneys on both sides, was found to have ongoing claims in three separate states for the same condition. This was discovered after we completed

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Don't forget to register for the convention on the WDTL website at www.wdtl.org

Countdown to the Convention in Vancouver, B.C.

There is no mistaking why Travel Magazine, Condé Nast, rates Vancouver, B.C. as one of the most cosmopolitan cities in the world. In addition to designer and eclectic shopping on Robson Street, Vancouver is also known as a gastronomic paradise. While each neighborhood has its distinctive and flare and ethnic flavor, if you want to eat what the top chef's in town eat and some of the best breads and sausages in North America, then the Grandville Island Public Market really is all you need.

Grandville Island is located south of downtown. You can drive there, but parking is limited. Probably the easiest and cheapest ways is to use the water taxi for a 2 minute ride across Fault Creek to Grandville Island. Grandville Island is 37 acres of boutiques, fish and chip cafes, little theaters and kayak rental centers. The public market however is its anchor. In the mornings, restaurant chefs stroll through the market chatting with vendors looking for inspiration because of the wide variety of Asian and European produce, spices and gourmet food and the freshest seafood. Fresh produce is available from the Okanogan Valley; the "Stock Market" is known for its fresh soups and the best chicken soup in town, and Terra Bread is known for its freshest and intriguing nut and herb bread. Another place that stands out is the Oyama Sausage Company which makes Kalbi beef sausages.

While the meat and produce may beg for a kitchen for preparation, it is very easy to pick up a number of items for a picnic lunch on the waterfront.

Getting There:
Aquabus is a water taxi that offers service departing every 5 minutes. You can get more information at www.aquabus.bc.ca. There is also a service provided by Fault Creek Ferries, or www.grandvilleislandferries.bc.ca.

Market tours:
Edible British Columbia Culinary Experiences offers a 3 hour food tour around the market every Wednesday and Saturday mornings for $55 (Canadian) that includes food sampling from about a dozen gourmet vendors. For $25 more you can get a 3-course lunch.(604) 662-3606 or www.edible-britishcolumbia.com.

For more information on Grandville Island can be found at www.grandvilleisland.com.

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a treatment evaluation of the claimant and did some careful medical record sleuthing. In another situation, I was asked to testify in court for a patient by his attorney for a motor vehicle crash. The patient had been rear-ended and had neck pain. On cross examination by the defense attorney, I got the dreaded "would it surprise you know doctor" question. It turned out that my patient had indeed been rear-ended with a very low-velocity impact, but then in impulsive anger and in front of many witnesses, put his car in reverse and violently rammed the car that had hit him.

The most important tip in dealing with this type of claimant is to learn to trust your own emotions. If you feel threatened, intimidated, or manipulated, you probably are. Do a careful research job on their records, especially their medical records. Get some record review help if needed. Often many inconsistencies will appear and trails to other (unknown) parts of their history will be discovered. If something doesn't make sense, assume you're probably missing something important. Don't expect their doctors to know the whole story. They are usually the most easily manipulated of all the parties involved. Make it clear that you don't trust them and are carefully examining the information supporting their claim. Often just the process of uncovering information can bring a case to a quicker resolution.

1 Reprinted with permission from Objective Medical Assessments Corporation.

Fabrication *From Page 14*

E-mail Spoofing: Who Do You Want To Be Today?

Stealing someone's identity by using their e-mail address is done all the time – the average 13 year old knows how to create and transmit falsified e-mail. Look at all the spam that we receive every day, where the messages appear to come from people we know or from what appear to be otherwise legitimate sources. Viruses and worms are also known to gather e-mail addresses from an infected machine and send messages appearing to come from one of the newly harvested addresses. Unfortunately, there is nothing you can do to stop someone else from sending an e-mail appearing to come from you. Even if you do succeed in tracking them down, they are often in foreign countries where the incentive to cooperate with U.S. authorities is non-existent. Imagine our embarrassment several years ago when pornographic spammers were sending rather risqué e-mail messages, complete with images, with made up addresses from our domain name. You can't imagine our relief when they moved on to some other hapless victim.

Although you can't directly stop falsified transmissions, how do you determine if the e-mail is authentic or spoofed? If you are involved in a case where e-mail is at issue, do not accept the presentation of the message on paper. Anybody can use a typical word processor package to create a document that looks like a printed e-mail. Get the message in electronic form so that you can interrogate the headers. Don't know what an e-mail header is? The message header is electronically stored information that shows values such as sender, recipient, message ID number, routing information (the servers and devices that transmitted the message along its path), priority level and other similar information. Viewing the header information varies depending on the e-mail client that is used. As an example, to view the header data in an open message using Microsoft Outlook, select 'view' and then 'options,' which will then show the information in the dialog box.

How do you read a header or even understand it? Probably one of the

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most popular software tools for decoding headers is a product called Sam Spade. The official web site for Sam Spade has been having technical difficulties for several months, but a Google search should show alternate locations to download the software. You read e-mail message headers from the bottom up. Figure 1 shows a sample of a recently received message.

Received: from mail126c25.carrierzone.com ([64.29.147.196]) by ffx3975.senseient.com with Microsoft SMTPS-VC(6.0.3790.1830); Mon, 18 Dec 2006 15:02:23 -0500

MIME-Version: 1.0

Content-Type: multipart/alternative;

boundary="----_=_NextPart_001_ 01C722DF.6E7BB180"

Received: from intern (static-68-236-214-31.nwrk.east.verizon.net [68.236.214.31]) (authenticated bits=0) by mail126c25.carrierzone.com (8.13.6.20060614/8.13.1) with ESMTP id kBIJo28u026412; Mon, 18 Dec 2006 19:50:04 GMT

Return-Path: <markszep@sandpiperpartners.com>

X-Mailer: Microsoft Office Outlook, Build 11.0.5510

X-OriginalArrivalTime: 18 Dec 2006 20:02:23.0636 (UTC) FILETIME=[6EDCBD40:01C722DF]

X-MimeOLE: Produced By Microsoft Exchange V6.5

X-Authenticated-User: markszep.sandpiperpartners.com

Content-class: urn:content-classes:message

Subject: Your Nomination for The E-Discovery Special Master and Expert Witness Directory

Date: Mon, 18 Dec 2006 14:50:03 -0500

Message-ID: <200612181950.kBIJo28u026412@mail126c25.carrierzone.com>

X-MS-Has-Attach:

X-MS-TNEF-Correlator:

Thread-Topic: Your Nomination for The E-Discovery Special Master and Expert Witness Directory

thread-index: Acci3bWn9hp+8QoPTROaF3Gji23D9Q==

From: "Mark Szep" <markszep@sandpiperpartners.com>

To: "Mark Szep" <markszep@sandpiperpartners.com>

Figure 1

As you read from the bottom up, go until you reach the first "Received:" information (marked in grey in Figure 1). In our example (headers from a real message) the originating e-mail server is named "intern" and has an IP address of 68.236.214.31. This is the first point to determine if the message is spoofed. Spammers will normally "bounce" their messages off of an unsecured server. In those cases, the transmitting server has no relationship to the originating domain. As you can see, decoding headers can get very complicated, but it is absolutely essential in determining the authenticity of the message. Is this a do-it-yourself proposition? Probably not, unless you are pretty tech-savvy.

In the typical case we see, angry ex-spouses or significant others spoof the e-mail of their former loved one to prove that they wrote hateful or threatening messages to them, usually for the purpose of gaining an advantage in a custody battle, but sometimes just to humiliate them, or to try to cause them to lose their jobs. We've even seen an angry supervisor pretend to be his own employee writing threatening e-mails to the supervisor for the purpose of laying the groundwork for firing him. It's a wacky world out there.

Fabrication That Pays Handsomely: Phishing

We've all gotten them - those fraudulent e-mails that purport to be from our bank or credit card company asking us to kindly verify our financial information. The number of new phishing sites has spiked dramatically from 4367 in October of 2005 to 37,444 in October of 2006, according to the Anti-Phishing Working Group. Gone are the days when the e-mail was clearly written by someone for whom English was a distant second language ("Please to come to our site to complete you're Citibank data securities form"). Gone are the clumsy attempts to replicate graphics. Now the phishing e-mails are so clever that even the experts sometimes have trouble discerning the fakes. For those poor saps who are taken in, they click on "their bank's" link, only to find themselves in a clever imitation of their bank's website where they obligingly fill out the requested financial data form and thereby ensure that their real bank account will soon be substantially lightened. The best of these bogus sites are a real tribute to

Continued on Page 20

the ingenuity of the criminal mind - and a continual thorn in the side of law enforcement as these sites are shifted from server to server in a matter of days, making these operations nearly impossible to track down and shut down.

Metadata: Pay Very Close Attention to the Man Behind the Curtain

More and more attorneys are becoming familiar with metadata, especially as it relates to documents and spreadsheets. Generally, metadata refers to "data about data," which isn't a very helpful definition. When referring to a Word document, metadata would be such information as the author, last date printed, file creation, number of words, tracked changes, etc.

So how do you tell if an electronically produced document is authentic? Viewing the metadata can determine if there may be suspicions that the document is falsified. Perhaps you receive the Word document from your client, which is a contract supposedly drafted by the president. However, when you look at the metadata it shows the author as being a competitor and further reveals that the document was created several years earlier. Your radar should light up like a Christmas tree.

How do you see the metadata? The simplest way is to go to 'File' and then 'Properties.' Using this method doesn't show all of the available metadata, but is enough for many purposes. Another alternative is to use a product that removes metadata (a good thing for you) but also shows you metadata in documents received from someone else (often a bad thing for the other side). Several well known software applications for viewing and "scrubbing" metadata are Metadata Assistant, Workshare Protect and iScrub. We've had many a case where metadata was important, but here's one that lawyers should heed. An attorney up on disciplinary charges for mishandling a case suddenly produced a letter to his client which stated that, on her instructions, he would do nothing further in the case. The problem? The metadata proved conclusively that the letter had been created **after** the disciplinary proceedings had been filed. This brings to mind the old adage about going from the pot directly into the fire. To no one's surprise, his license was suspended.

Windows Metadata: Toying with the Fourth Dimension

There is also metadata for the operating system. We'll address Microsoft Windows metadata since it is the most widely used operating system. Windows metadata is the information that a user can observe by selecting 'file' and then the 'properties' function. The most commonly known metadata values are known as MAC (modified, accessed, created) dates. These times/dates can be used to identify when files were created, or perhaps accessed. Internet searching activity on a computer may have great significance when dealing with child custody cases and determining the fitness of a parent, particularly where there are allegations of Net pornography addiction or searching for child pornography. Authentication of the MAC values assumes that the clock on the computer was accurate at the time the files were created or accessed. This can be problematic since the computer clock is so easy to change. Before you get paranoid about the file dates on your client's computer, clock manipulation is not normally seen in the "real world" and those that attempt it are usually caught. There are several ways to determine if an intentional clock change has occurred. The simplest way is to look at the system logs using the Event Viewer application in Windows. The Event Viewer can be accessed from the 'Administrative Tools' group. When the Event Viewer is opened, observe the entries in the System and Application logs. Entries in these logs are written in a sequential fashion, therefore the date and time entries should be consistently decreasing as you read down the entries. There will be an obviously gap or jump in the dates if the computer clock has been intentionally modified. There are other methods to determine clock manipulation, but those are best left to forensic technologists. The good news is that the Windows MAC values are typically what they purport to be.

Though we've rarely seen clock manipulation, there was a case in which a computer savvy wife planted child pornography on her husband's computer changing the clock so the created dates would indicate only times when he was home and she was not. She obviously had not read the paragraph above.

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Fabrication *From Page 20*

Law Enforcement's Continual Black Eye: Stomping on the Evidence

Sometimes the alteration of evidence can be the answer to an attorney's prayer. In spite of a concerted effort by law enforcement to teach first responders how to properly seize electronic evidence, we still see instances where the last access dates of files have been altered by officers looking at the evidence post-seizure. It appears to be particularly alluring to "take a peek" at anything involving sex, but trampling on the evidence in their eagerness to see what they have provides (for the ardent defense counsel) a happy result in which proper forensic procedures were not followed and the dates of last access by the defendant are now unknown.

Are there hundreds of other examples of digital alteration? Sure . . . and stay tuned, because they are appearing more and more often in the courts. The good news is that we have gotten better and better at detecting the alteration of electronic evidence. More good news is that most people who try to fabricate or alter evidence aren't the brightest bulbs in the chandelier and are easy to catch. The bad news is that there is a cadre of unprincipled criminals who are doggone good at evidence alteration - and they are often one step (and sometimes light years) ahead of the good guys.

1 The authors are the President and Vice President of Sensei Enterprises, Inc., a legal technology and computer forensics firm based in Fairfax, VA. 703-359-0700 (phone) www.senseient.com Reprinted with permission from Sensei Enterprises, Inc., 2007.

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