MASS DLA

MASSACHUSETTS DEFENSE LAWYERS ASSOCIATION

2022 Annual Meeting

Back Together! Face-to-Face in the Courtroom and the Conference Room and Recent Developments in Civil Litigation

June 3, 2022

InterContinental Boston Hotel

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Cyberliability for Law Firms

John J. Jablonski, Esq., *Gerber Ciano Kelly Brady LLP*

John J. Jablonski

John is the firm's Managing Partner. He chairs the firm's Cyber, Technology and Social Media Practice Group. He also chairs the firm's Toxic Tort and Environmental Practice Group, as well as its Employment and Labor Practice Group. He has over 20 years of experience advising clients on enterprise-wide initiatives involving data privacy and security, information governance, IT governance, litigation readiness, privacy and security of enterprise technology, applications and cloud-based systems (including click-wrap and browse-wrap agreements, terms and conditions, master services, service level and software licensing agreements and website privacy statements), matter management software, enterprise-wide electronic evidence preservation and e-discovery solutions. John's passion for technology, process improvement and governance makes him uniquely qualified to solve complex legal problems at the intersection of security, privacy and information governance. John's analytical skills also support due diligence and portfolio analysis related to insurance portfolio transfer engagements of the firm's Insurance Solutions practice group and development of the firm's alternative fee agreements. He is the editor and author of the leading text on e-discovery and legal holds (7 Steps for Legal Holds of ESI and Other Documents). His vision for delivering legal services through innovation, efficiency and cost certainty is a driving force behind the firm's business model.

John's strength is delivering results-oriented legal advice that is sensitive to the business needs of his clients. He quantifies legal risks and devises mitigation strategies designed to proactively comply with legal, privacy, security and industry standards through procedures, policies and enterprise governance. John also understands that enterprise risk management and mitigation strategies are not one-size fits all. He helps organizations of all sizes with baseline assessments, developing organizational goals for governance, process and security improvements, identifying and implementing IT governance frameworks, maturity assessments, compliance assessments and ongoing legal support for privacy, security and governance projects. In addition to consulting, he has brought these skills to bear in resolving complex litigation, including jury trials, in the transportation, business, retail, product liability and environmental realm.

John is a frequent author, speaker and national authority on preservation of evidence, information governance, data privacy, data security and e-discovery in the United States. John develops litigation readiness and e-discovery procedures for clients, including developing vendor relationships and RFPs. John develops and manages e-discovery strategy, including participation in Rule 26(f) and Rule 16 conferences, negotiating protective orders, negotiating e-discovery protocols, defense of 30(b)(6) depositions and motion practice defending preservation, collection, privilege and production processes. He has managed e-discovery projects involving terabytes of data and hundreds of reviewers, including contract review teams, quality assurance and processes to protect attorney-client privileged ESI.

John is a jury-tested litigator, taking cases to verdict in state and federal court. He has multiple trial and summary judgment wins on multi-million dollar exposures. He represents major Class I railroads on toxic tort, asbestos and personal injury exposures. He is currently statewide counsel for a manufacturer on hundreds of hearing loss claims. John is also an accomplished commercial litigator in business-to-business disputes, commercial real estate and leasing disputes and proceedings in bankruptcy court. Clients seek out his counsel for large-scale environmental loss, including oil spill claims under New York's Navigation Law, NYDEC regulatory violations, NYDEC remediation and hazardous waste site litigation under CERCLA.

John's clients value his analytical skills in support of loss portfolio analysis involving large data sets of claims data in the United States, including use of various computer

analytics tools, artificial intelligence initiatives, keyword searching strategies, technology-assisted review platforms, and individual document review by attorneys who have substantive experience in the claims and jurisdictions being analyzed (including confirming/challenging/setting liability and expense reserves). John's analysis has been used by clients for their own internal analysis of existing portfolios, auditing claims within a portfolio, and due diligence in support of mergers and acquisitions. John uses loss portfolio analysis to develop alternative fee pricing models for firm clients, including developing and managing targeted programs for early case resolution, settlement programs, alternative dispute programs and other strategies to introduce economic efficiencies, claim process improvements, claim mitigation strategies and cost certainty in loss portfolio resolution.

John is admitted to all state courts in New York. He is admitted in federal court in the Western, Northern and Eastern Districts of New York, the U.S. Bankruptcy Court for the Western District of New York and the United States Court of Appeals for the Second Circuit. He has received numerous awards and honors for his professional and community service.

John is an avid rugby fan and former competitive player making frequent trips to the elite eight and sweet sixteen of the U.S. National Championships with his club side over his playing career, including multiple tours to England, Ireland, Scotland and France. John achieved a life-long dream when he attended the 2015 World Cup Finals in England, witnessing the New Zealand All-Blacks achieve back-to-back World Cup championships. John's three children share his passion for sports, with all three playing at the highest level of competition in their age groups in soccer, hockey and baseball. John and his wife share a love of travel, with recent trips to the U.S. Virgin Islands, Tahiti, England, Germany and Italy.

Cyber-liability for Law Firms

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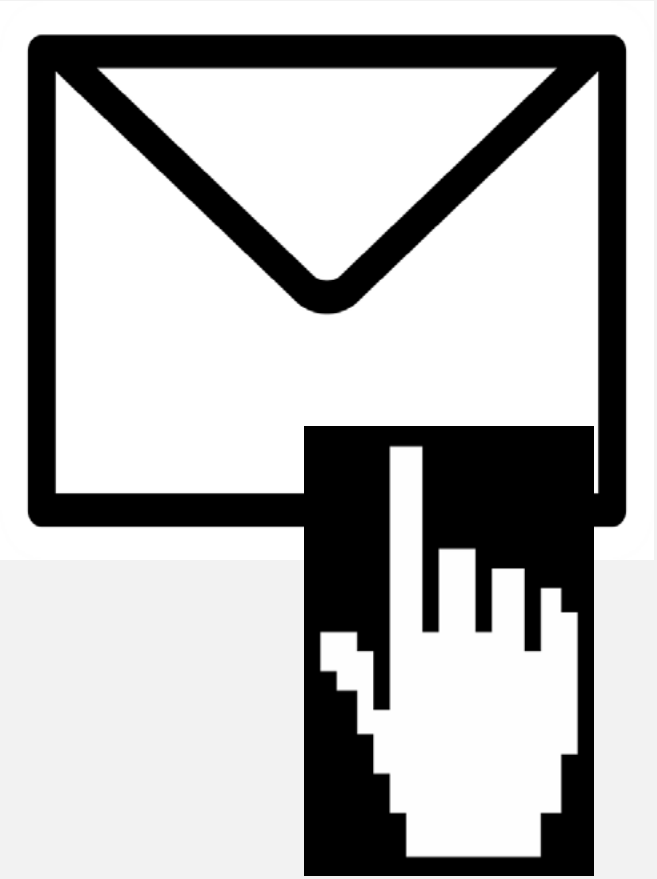
Overview

- Trends
  - Threats
  - Ransomware
- Solutions
  - Insurance
  - Incident Response
  - Improving Cybersecurity

Technophobia

Over 8 million results of phishing tests were compiled by Verizon



2,400,000 opened emails

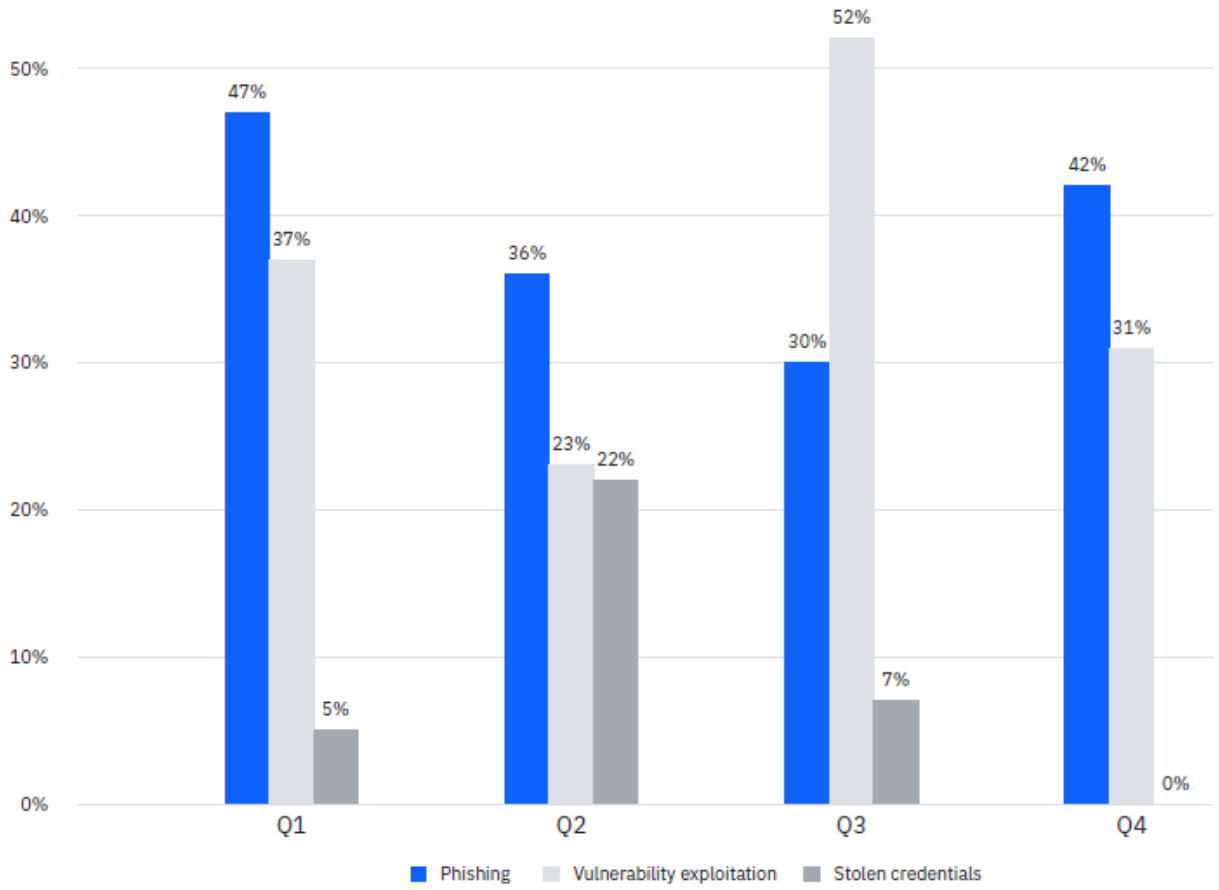
960,000 clicked the link

Verizon 2016 Data Breach Investigation Report

1. Once a clicker always a clicker
2. Over 78% of the participants fail to report the campaign to IT!

Figure 13. Click rates of users based on historical performance in phishing tests (n=2,771,850)

Verizon 2018 Data Breach Investigation Report



222,127

phishing attacks in June 2021, setting an all-time record high

Top 11 most spoofed brands of 2021

1. Microsoft
2. Apple
3. Google
4. BMO Harris Bank (BMO)
5. Chase
6. Amazon
7. Dropbox
8. DHL
9. CNN
10. Hotmail
11. Facebook

IBM X Force Threat Intelligence Report - 2021

Threats - Means and Methods

- Phishing
- Ransomware
- Exploitation of weak passwords
- Spear phishing
- Spoofing
- Pretext Scams
- Malware
- Direct hacking by exploiting vulnerable software

Trends - Ransomware

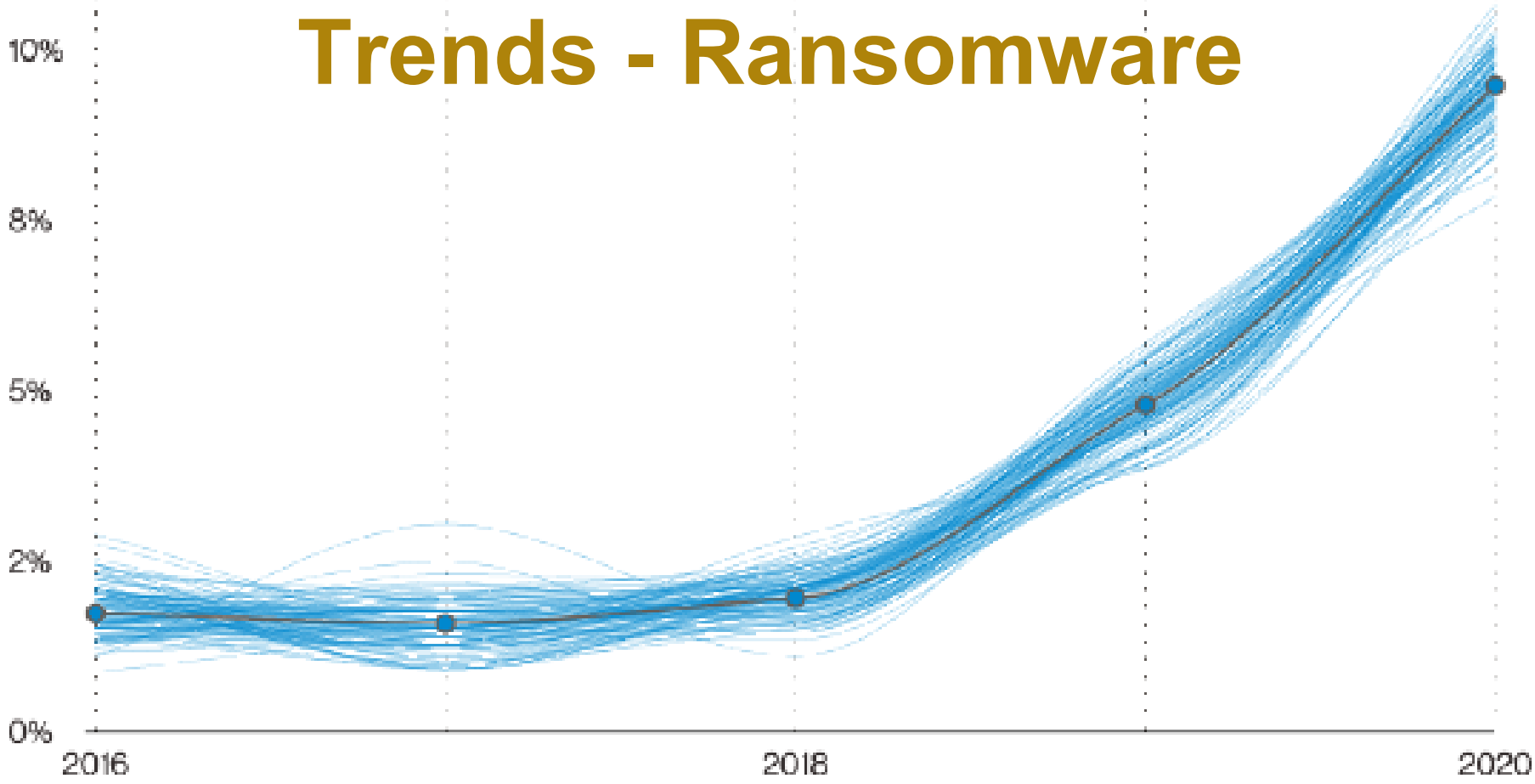


Figure 83. Ransomware in breaches over time

Verizon 2021 Data Breach Investigation Report

Trends - Ransomware

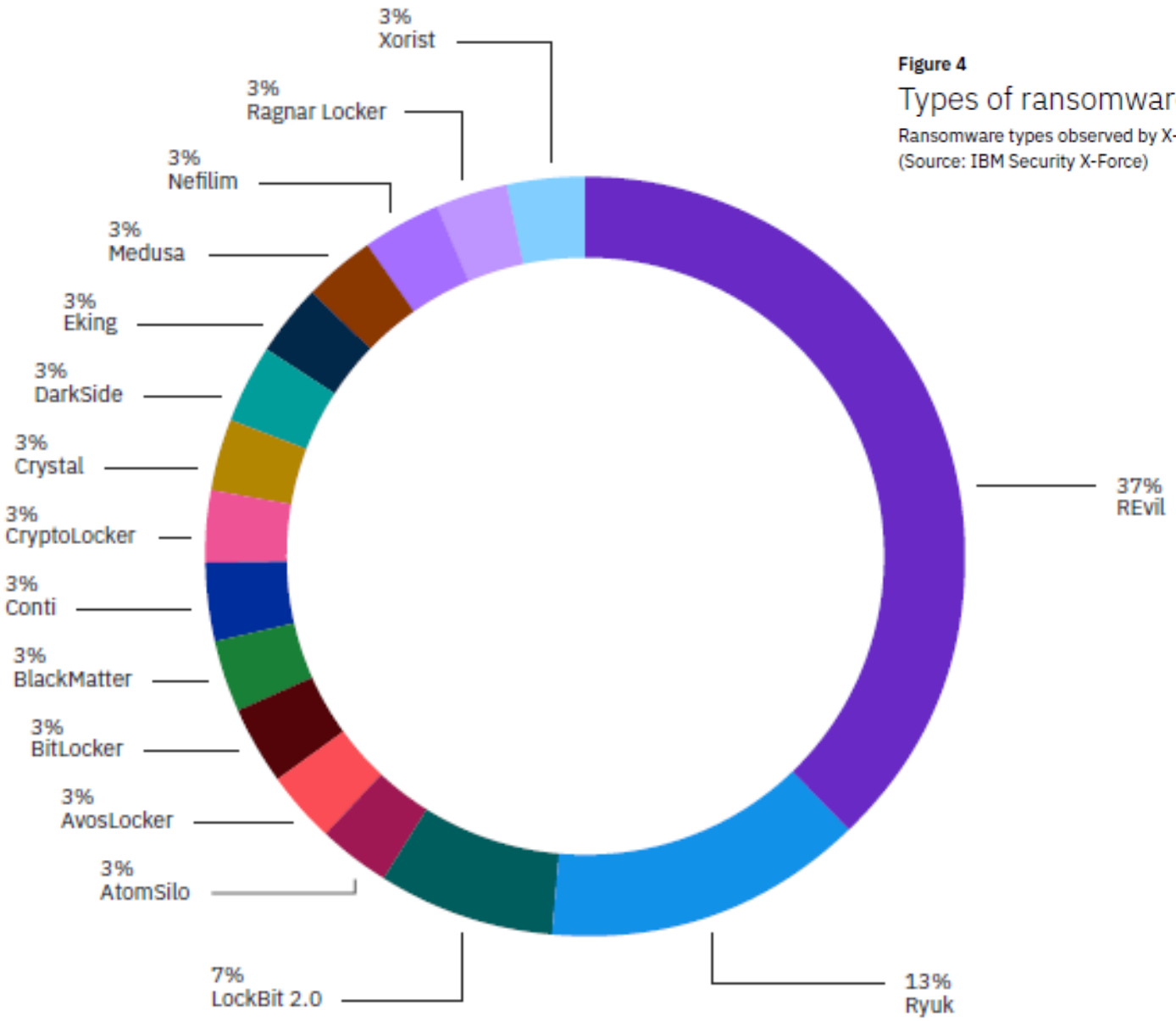


Figure 4

Types of ransomware observed in 2021

Ransomware types observed by X-Force Incident Response in 2021
(Source: IBM Security X-Force)

Trends – Targeting of Payment Data is Down

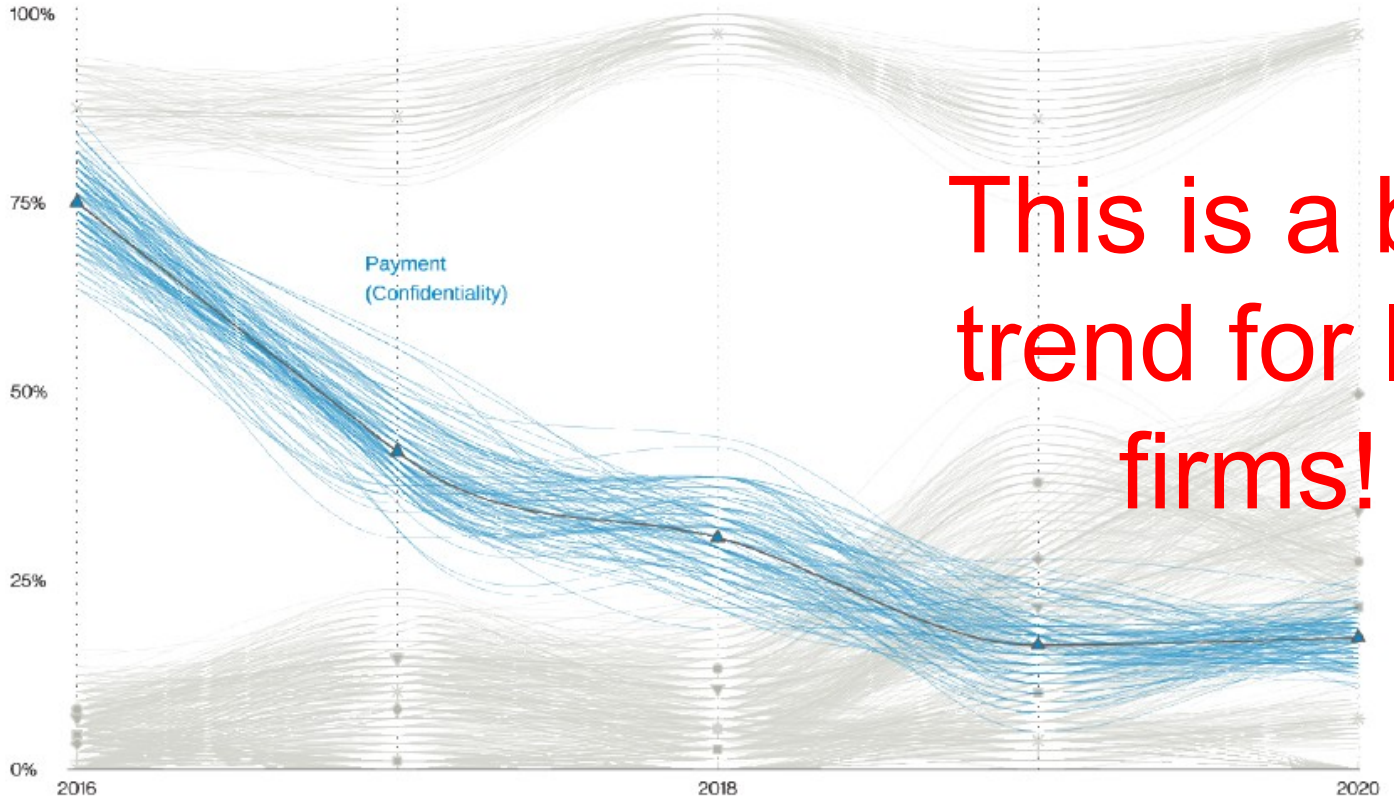
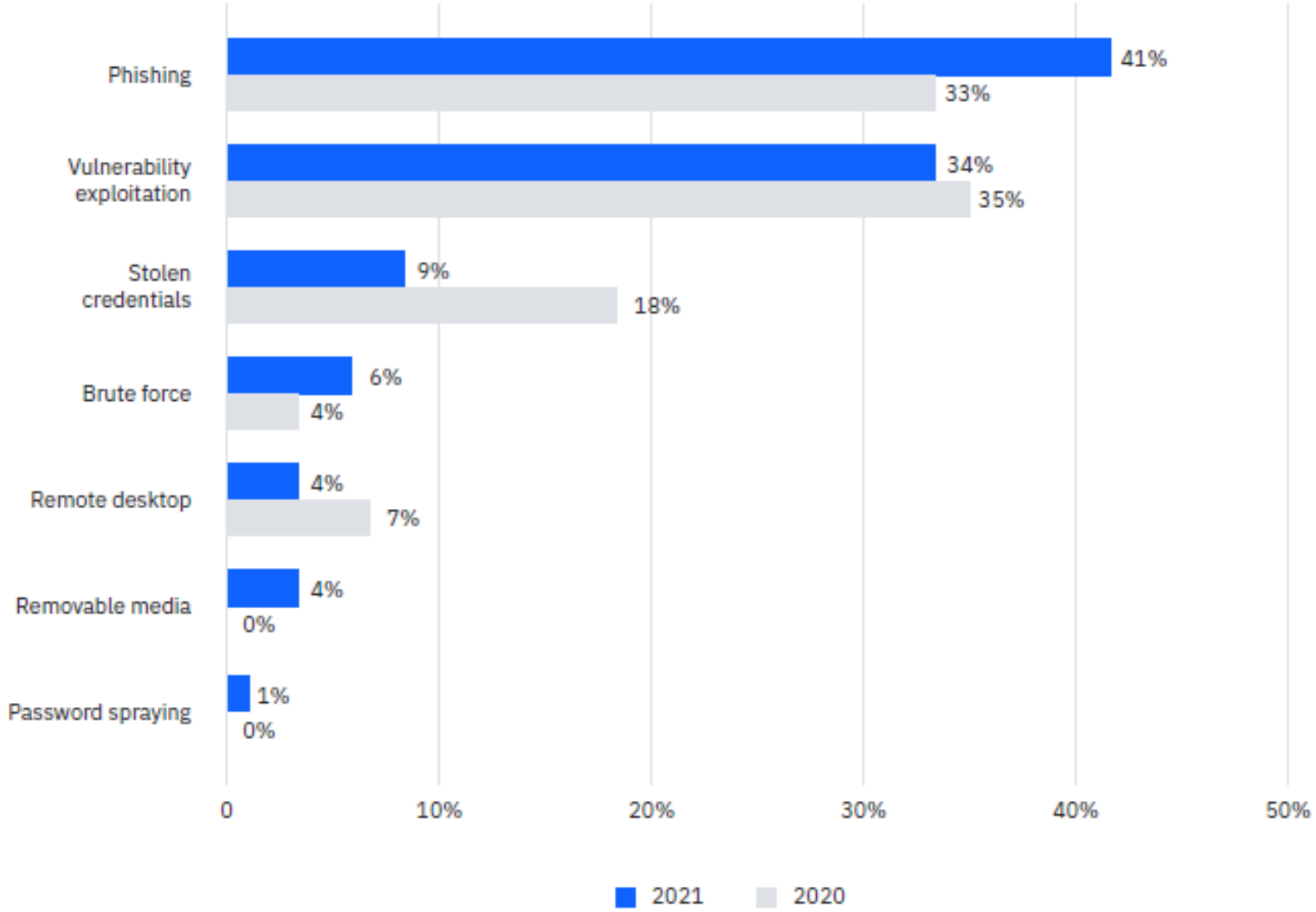


Figure 85. Attribute varieties in breaches over time

This is a bad trend for law firms!

Verizon 2021 Data Breach Investigation Report



IBM X Force Threat Intelligence Report - 2021

Top attacked industries

1.	Manufacturing	28%
2.	Professional and business services	15%
3.	Retail and wholesale	11%

1. Phishing (47%)
2. Vulnerability Exploitation (29%)
3. Removable Media (12%)
4. Brute Force (9%)
5. Stolen Credentials ((9%)

Why are law firms easy targets for bad guys?

- Sensitive data
- Cannot afford down time
- Reputational Risk
- Easy to phish
- Easy to hack
- Lack of MFA
- Lack of complex passwords

IBM X Force Threat Intelligence Report - 2021

Fallout – U.S. Data Breach Cost

2018 Cost

- $148 per record
- $3.86 million = total average cost paid

2019 Cost

- $150 per record
- $3.92 million = total average cost paid

2020 Cost

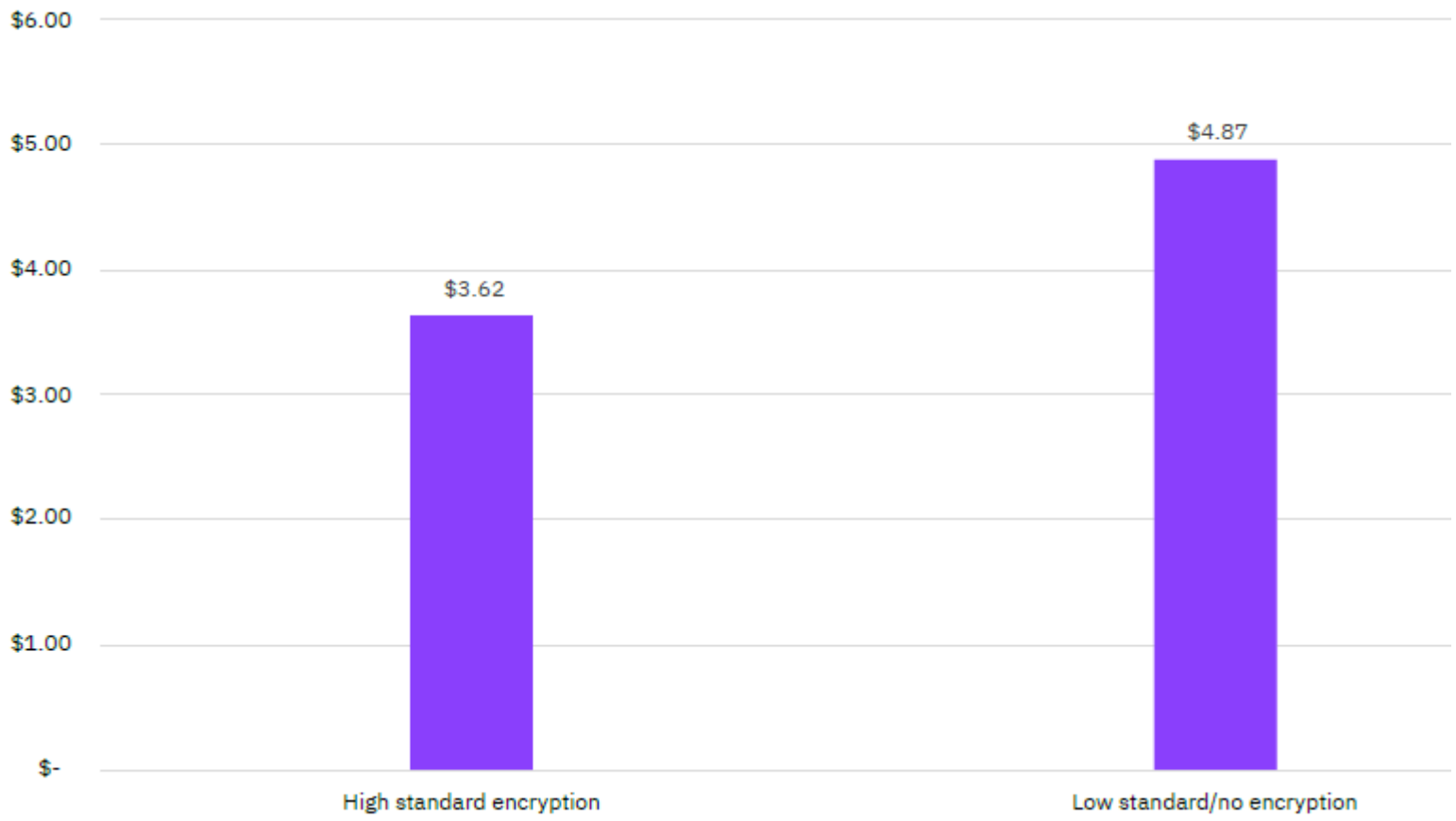
- $146 per record
- $3.86 million = total average cost paid

2021 Cost

- $161 per record
- $4.24 million = total average cost paid

Cost of a Data Breach Report (Ponemon Institute) (2021 Annual Report)

Encryption



Cost of a Data Breach Report (Ponemon Institute) (2021 Annual Report)

Reputational Damage

- **Can we quantify the reputational impact of a data breach?**
  - Impact on revenue
  - Loss of client trust
- **Is the public desensitized?**
  - Will clients care? (Hint: They do care)
- **Reputation resiliency?**
  - Impact on law firms—hackers and cybercriminals are opportunistic
  - What about a second breach?
  - **BUSINESS FAIL?!**

Cyber Liability Insurance

- Must have
- Clients often require
- Will help defray costs in the event of a breach
- Resources provided by carrier

Cyberinsurance Myths

- Traditional insurance products are sufficient
- Policy wordings vary wildly from carrier to carrier

Typical Cyber Cover

- Trigger: Unauthorized Access to Personal Information
- Investigation
- Breach Coach
- Notice / Reporting
- Credit Monitoring
- Remediation

Types of Cyber Cover

First-Party Coverage

- Business interruption
- Property Damage
- Digital asset restoration
- Extortion

Third-Party Coverage

- Civil Suits
- Regulatory proceedings
- Payment card industry liability
- Response costs

Security Breaches (Chapter 93H)

"Personal information" a resident's first name and last name or first initial and last name in combination with any 1 or more of the following data elements that relate to such resident:

(a) Social Security number;

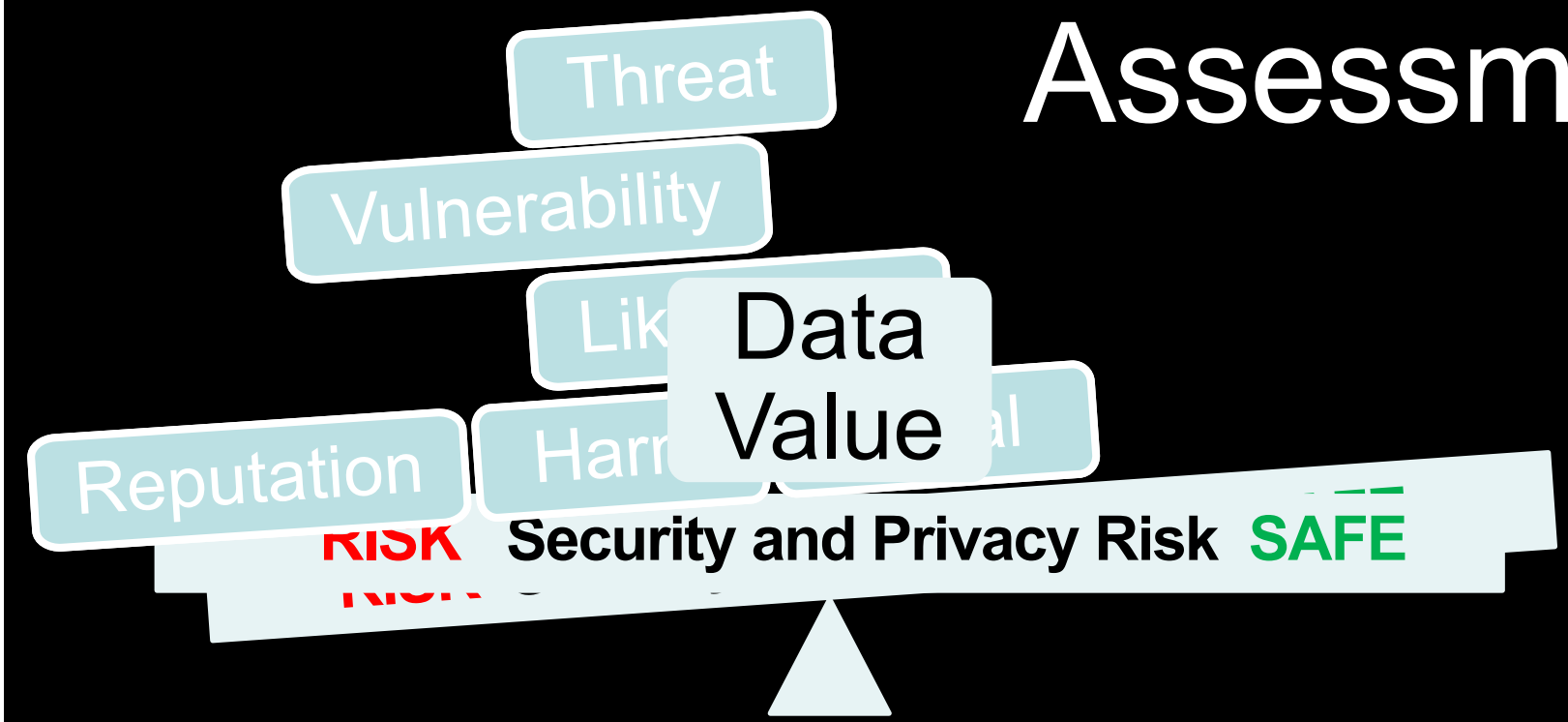
(b) driver's license number or state-issued identification card number; or

(c) financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, that would permit access to a resident's financial account; provided, however, that "Personal information" shall not include information that is lawfully obtained from publicly available information, or from federal, state or local government records lawfully made available to the general public.

Data Breach Response

Improving Cybersecurity

Risk Assessment



Planning

- Build the Team
- Initial Decisions
- Data Privacy
- Data Security Policy
  - Policy Development
  - Key Considerations
- Purpose of Written Document
- Specific Procedures for Data Security / Privacy
- Incident Response
- Compliance

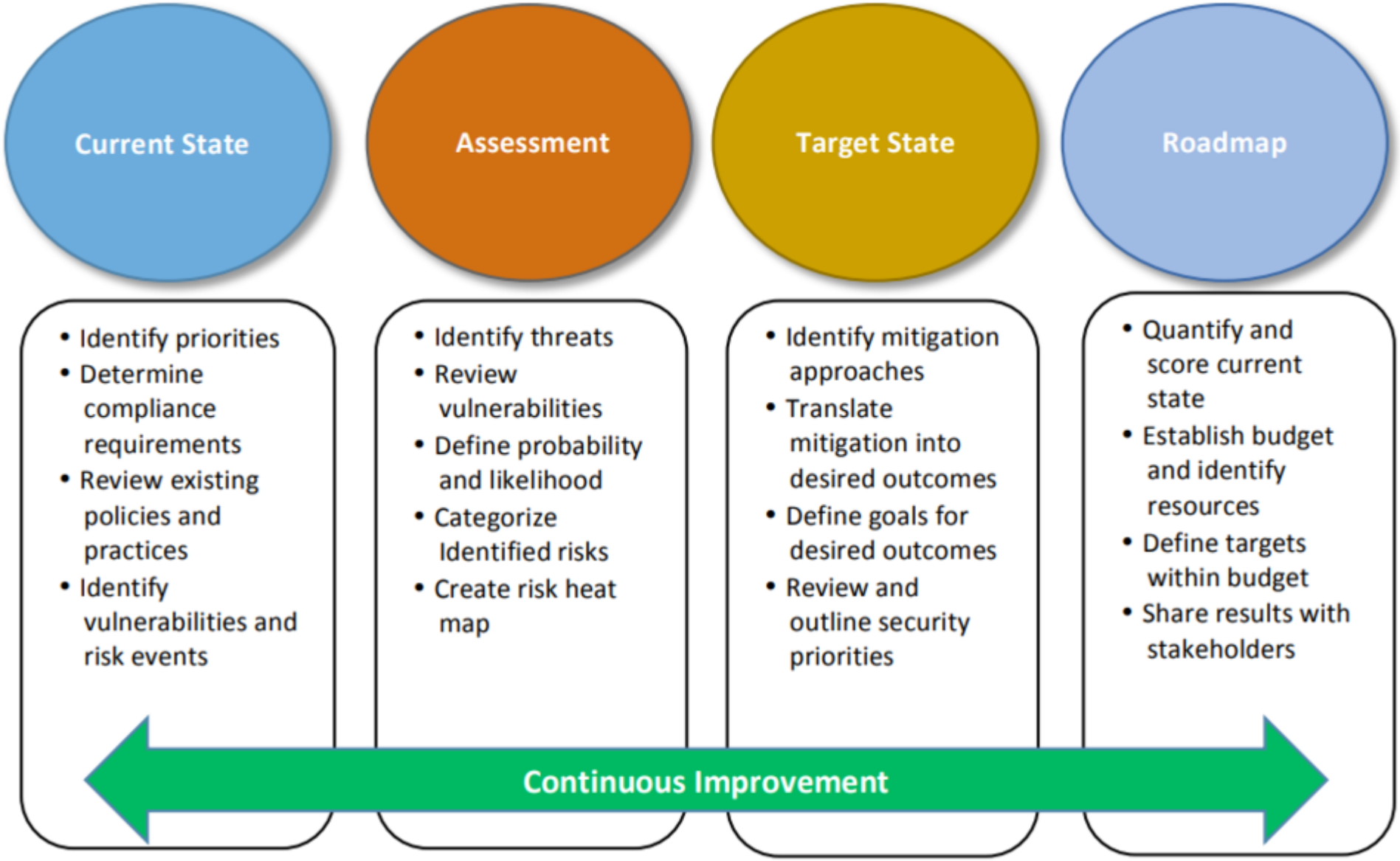
Governance

- Written
- Build Awareness
- Training
- Enforcement
- Gradual vs. Immediate – Consequences?
- Needs vs. Wants
- Cultural Hurdles
- Contract Requirements
- Vendor Management
- Audits

Implement the Plan

- Champion Cultural Change
- Maturity Assessment
- Training
- Internal Auditing
- Penetration Testing
- Continual Process Improvement
- Reporting (Measuring Success)
- Addressing New Threats
- Incident Response Drills
- Legal Risk Management
- Audits (Vendors)
- Contract Terms (Vendors)
- Data Breach Response Vendors

Implementing a Cybersecurity Plan



https://www.nist.gov/cyberframework/online-learning/uses-and-benefits-framework

Key Security Requirements

- Can you demonstrate compliance with a known security framework (ISO 27001, COBIT or NIST)?
- Do you have written policies? Knowledgeable person in charge? Highest levels of management approved?
- Do you evaluate vendor's cybersecurity practices?
- Do you protect client data with
  - Access controls,
  - Encryption,
  - Additional protections for Personal Information?
- Controls for Personal Information
  - Encryption?
- Do you have a plan for cutting off access? Termination? End of case?
- Tested disaster recovery?
- Secure remote access?
- Multifactor authentication?
- Annual penetration testing?

Thank You

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Recent Developments in Defense Practice

Martin J. Rooney, Esq., *Curley & Curley, P.C*

Employment – Domestic Violence and Abuse Leave Act

Osburne- Trussell v. The Children's Hospital Corp. 488 Mass. 248 (2021

This matter involves the new Domestic Violence and Abuse Leave Act (c.49, §52E)(DVLA). The statute prohibits taking adverse action against, or otherwise discriminating against, an employee who exercises, or attempts to exercise rights under DVLA. (Such as leave from work for court hearings, etc.)

Plaintiff alleged she had been discharged from her nursing position after the Hospital became aware of her domestic violence victim status. The SJC upheld the denial of a motion to dismiss on technical issues relating to the employment status of plaintiff prior to termination made by the employer.

The SJC also set out the requirements of a prima facia case for retaliation under the DVLA.

It is important to remember that in MA protected status categories now include victims of domestic violence along with race, color, religion, etc.

Enforcement of a Settlement

CP State, LLC v. CIEE, Inc., 488 Mass. 847 (2022)

The SJC addressed in this case two reported questions: 1) whether the doctrine of present execution permits an immediate appeal of an order denying a motion to enforce a settlement agreement; and 2) whether the e-mails in the case constituted an enforceable settlement agreement.

The Court answered question 1 No, and did not reach question 2. In declining to allow an immediate appeal the SJC followed federal precedent, Digital Equip. Corp. v. Desktop Direct, Inc., 511 US. 863, 873 (1994). A party losing a Motion to Enforce must wait until the end of the case to appeal the alleged failure to enforce the agreement.

The Mass DLA filed an amicus in this case.

First Amendment

Shurtleff v. City of Boston

596 US _____, 2022 U.S. LEXIS 327 (May 2, 2022)

In this case of notable public interest the SCOTUS held that the City of Boston violated the First Amendment rights of Plaintiff. The City maintains 3 flagpoles outside of City Hall. On one pole it had historically allowed many groups over the years to hold a flag flying ceremony and to fly the group's flag for an hour. The City did have some time, place, and manner regulations concerning such flag flying. It had no written policy governing the content of the flags. Hundreds of groups had flown their flags and no group had been refused the right to raise its flag.

Plaintiff sought to raise a "Christian" flag. Fearing that allowing such a flag raising would run afoul of the Establishment Clause of the First Amendment the City refused permission to raise the flag. Plaintiff sued, alleging violation of his Free Speech rights.

The Supreme Court held that, on the facts, the City's flag flying program was not an exercise in governmental speech to communicate its message but rather a public forum where it allowed citizens to express their own views. As such, the City engaged in viewpoint discrimination by denying the Christian group the same rights and opportunities it afforded other groups.

Interestingly, the case gave rise to three separate concurring opinions, each proffering a variation on the theme as to the proper method of analysis of this type of case.

Governmental Liability

Roy v. Winchendon 100 Mass. App.Ct. 1124, 2022 Mass.App.Unpub. LEXIS 109 (2022)

Plaintiff decedent was stopped for driving under the influence, passed a field sobriety test and was then driven home by police. The police took her to her house but did not assist her to enter the house. Plaintiff walked to the back door of the house, not visible from the street and driveway. The officer departed. Plaintiff froze to death overnight.

The Appeals Court upheld summary judgment for the Town under c.258 §10(j). Under that section, a governmental entity is immune from suit for claims based on an action or failure to act to prevent or diminish the harmful consequences of a condition or situation not originally caused by the public entity. Originally caused requires an affirmative act of the entity, not simply a failure to act. The action must contribute to causing the specific condition that resulted in the harm.

Here the original cause of the death was the freezing temperatures. Impounding plaintiff's car and driving her home were not the original causes of her death. Failing to escort Plaintiff into the house was not an affirmative act. Accordingly, the Town was not liable.

Insurance Coverage – Inherent Diminished Value

McGilloway v. Safety Ins. Co.; 488 Mass 610 (2021)

The SJC holds in this case that under the standard auto policy, insurer are required to pay not just for the physical damages sustained by a vehicle involved in an accident, but are also required to cover claims for inherent diminished value (IDV).

IDV reflects the concept that a vehicle's fair market value may be less following collision repairs.

The McGilloway court held that claimant must establish both that the vehicle suffered IDV, and the amount of IDV owed. The ruling is in accord with many other jurisdictions across the country. The Court did not specifically address how a claimant will need to prove the IDV loss and amount of the loss.

Insurance Coverage – Uninsured Property

Norfolk & Dedham Mutual Fire Ins. Co. v. Norton; 100 Mass.App.Ct. 476 (2021)

Homeowners argued that the owned property that is not an insured location exclusion in a homeowner's policy did not apply to property owned at the time of the events giving rise to the third-party claim, but no longer owned during the policy period. The Appeals Court rejected that strained interpretation. What matters for the purposes of the exclusion is whether insured owned the property at the time of the alleged misrepresentations, the conduct giving rise to the potential liability, and whether they purchased additional coverage for said location.

Insurance Coverage – COVID

Vervine Corp. v. Strathmore Ins. Co.; 459 Mass 534 (2022)

This matter concerns whether various losses which stemmed from the COVID-19 pandemic constituted "direct physical loss of or damage to" properties owned by 3 restaurants under their business owner's policies covering various types of property damage. The businesses suffered serious losses during the pandemic and the related governmental restrictions on operations.

The SJC held such losses were not within the scope of coverage and affirmed the Superior Court's judgments for the insurers. As the Court held, a "'direct physical loss of or damage to' property requires some 'distinct, demonstrable, physical alteration of the property'". The type of losses in issue simply were of a different kind.

Insurance Coverage – Emotional Distress

Liberty Mutual Ins. Co. v. Correia; 100 Mass App.Ct. 629 (2022)

Applying McNeil v. Metropolitan Prop & Liab. Ins.Co., 420 Mass. 587 (1995), the Appeals Court held that wife who was not physically injured despite being at the scene of the accident that killed her husband could not recover under the auto policy for her emotional and psychological injuries. Wife would only recover the per person limit of coverage for her husband's death. The wife's emotional distress was not a separate "bodily injury".

Issue Preclusion

Laramie v. Philip Morris USA, Inc., 488 Mass. 399 (2021)

The question in this tobacco litigation suit was whether a wrongful death claim for punitive damages by an individual plaintiff was barred by an earlier settlement in a case brought by the Attorney General under c.93A. The court held Plaintiff was not barred and upheld the $10 Million punitive judgment award.

Where an Attorney General litigates on behalf of its citizens on common public rights, judgments resulting from such litigation bind the state's citizens and have preclusive effect. However, such judgments do no bar those citizens from recovering for injuries to private interests as opposed to public interests.

Holding that the award of punitive damages for the injuries to and wrongful death of Plaintiff were not a common public right within the scope of the Attorney General's suit, but rather personal rights related to the deceased, the SJC denied preclusive effect to the prior consent decree and final judgment effectuating the settlement agreement of the parties.

Limitation of Liability – c.93A

H1 Lincoln, Inc. v. South Washington Street, LLC, 489 Mass. 1 (2022)

The SJC holds in this matter that a contractual limitation of liability provision limiting liability for violations of c.93A §11 is not enforceable, at least where the Defendant willfully or knowingly engaged in unfair or deceptive conduct.

The case arose from a commercial property lease. The lease contained a provision immunizing the property owners from "consequential damages caused by Landlord's failure to perform its obligations under [the] lease."

The Landlord's violations of c.93A §11 related to various misrepresentations and extortive use of pretextual reasons in order to terminate the lease. While a limitation of liability under c.93A §11 clause may be enforceable in some situations, See eg. Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369 (1990), enforcement of such a clause where the Defendant engaged in a violation of the statute in a knowing or willful manner would violate the public policy underlying §11 as a matter of law.

Mistrial – New Trial – Closing Arguments

Fitzpatrick v. Wendy's Old Fashioned Hamburgers of NY, Inc., 487 Mass. 507 (2022)

In this interesting case, Plaintiff's attorney made a very provocative closing argument. Plaintiff had been injured when she ate a hamburger containing a piece of bone. During closing arguments, Plaintiff's attorney argued to the jury that it should decide the case on an "us versus them" basis, that it should depart from neutrality, it should engage in bias against large corporations, and to act as the voice of the community. He asked the jury to identify with the Plaintiff, interjected personal opinions, and generally used "reptile" litigation tactics which were aimed at triggering the jurors a fear of harm to their community.

Defendant moved for a mistrial at the conclusion of the argument. The trial court reserved ruling on the motion until after the verdict.

The jury returned a verdict of $150,005.46, despite having been given a curative instruction by the court.

The trial judge then allowed the motion for a mistrial. At the retrial (apparently without the inflammatory closing argument) the jury returned a verdict of $10,000.

On appeal the SJC held first that the proper procedure henceforth is for the trial court to rule on the motion for mistrial (in civil cases) immediately and may not reserve ruling on the motion. If the motion is denied, the proper procedure thereafter would be a motion for a new trial.

Second, the SJC agreed with the Superior Court that Plaintiff's counsel's closing argument did constitute an improper appeal to the juror's emotions, passions, prejudices, or sympathy. As such, the trial court was correct in granting the new trial.

Products Liability

Main v. R.J. Reynolds Tobacco Co.; 100 Mass. App.Ct. 827 (2022)

Main is a design defect products liability case. At issue was the jury instruction on a reasonable alternative design. In order to prove a design defect in a product it must be established, inter alia, that the foreseeable risks of harm posed by a product could have been reduced or avoided by adoption of a reasonable alternative design.

The question in Main was when was the reasonable alternative design available. The Appeals Court held the Plaintiff bore the burden to prove that a reasonable alternative design was or reasonably could have been available at the time of sale or distribution of the product. (Relying upon Evans v. Lorillard tobacco Co., 465 Mass. 411 (2013).

As the Court noted, "if a manufacturer continues to make and sell a harmful and addictive product even though a safer alternative is available, the fact that the consumer is addicted to the product makes it more – not less – important for the manufacturer to adopt the available safer alternative."

In considering whether a reasonable alternative design existed, the jury may consider whether the alternative design "unduly interfered" with the performance of the product from the point of view of a rational, informed consumer, whose freedom of choice is not substantially impaired by addiction.

Products Liability

Nemirovsky v. Daikin North America, LLC; 488 Mass. 712 (2021)

The case in issue involved a product incorporated into a portion of an HVAC system. Generally, a manufacturer of a component part of a final product is not liable for any harm caused by the integrated product, unless the component part itself is defective or if the component part manufacturer is substantially involved in the integration of the component, the integrated part causes the final product to be defective and the defect in the integrated whole product causes the harm to plaintiff.

Contrary to plaintiff's arguments in this case, the component part need not be a standalone part. Likewise, the fact that the component part were produced specifically for the integrated final product and distributed exclusively for use in that system does not change the general rule.

Property Liability – Duty

Heath-Latson v. Styller, 487 Mass. 581 (2021)

Plaintiff Heath was shot to death at a party held at a rented house. The rental was a short-term internet rental. The Superior Court dismissed the case.

On appeal the SJC held that the dismissal was proper. Generally, a property owner owes a duty to maintain the property in a reasonably safe condition to avoid foreseeable injuries to all lawfully on the premises. This duty does not generally extend to taking affirmative steps to protect against the dangerous or unlawful acts of third parties. The exception to this rule is where there is a special relationship between the property owner and a plaintiff (e.g., college-student, bus terminal-passenger, hotel-guest, etc.)

In the absence of any evidence that short term rentals are correlated with a notable increase in violent crime, or a history of violence on the specific property during such rentals, the SJC applies the general rule that the property owner had no duty to protect Plaintiff from the violent actions of a third party. Similarly, there was no evidence that owner voluntarily assumed such a duty.

It is noteworthy that the court focused on the foreseeability of danger rather than the status of the parties.

Res Ipsa Loquitor

Kennedy v. Abramson 100 Mass. App.Ct. 775 (2022)

Res Ipsa Loquitor remain as alive and well as in MA.

Plaintiff was eating lunch on the outdoor deck of a restaurant. The plastic chair he was sitting in collapsed beneath him and he suffered injuries. Plaintiff argued that the evidence permitted a jury to infer that the chair would not ordinarily collapse unless the property owners were negligent under the ancient res ipsa loquitor doctrine. The Appeals Court agreed, reversing the Superior Court's award of summary judgment.

Plaintiff presented no direct evidence that the owner breached its duty of care. He relied solely on the inference of such negligence. Under the doctrine, a trier of fact may draw an inference of negligence when an accident is of the kind that does not ordinarily happen unless the defendant was negligent in some respect and other responsible causes, including the conduct of the Plaintiff, are sufficiently eliminated by the evidence.

A defendant's exclusive control over the instrumentality that caused the accident is one way of proving responsibility and eliminating other causes, but not the only way to prove the case.

Interestingly, the Appeals Court cited old cases going back a century in which the doctrine was applied to incidents involving collapsing chairs. Apparently, collapsing chairs is an age old problem!

The Court added that the absence of evidence that an owner conducted reasonable inspections of its chairs would permit an inference of negligence "from the mere occurrence of the accident." The issue of whether the defective condition would have been disclosed by a reasonable inspection is a question of fact for the jury.

There are many ways for a creative plaintiff's counsel to present a case to a jury. On either side of the "versus", remember that sometimes old doctrines may still apply.

Rule 35 Exam – Neuropsychologist

Ashe v. Shawmut Woodworking and Supply, Inc., 489 Mass. 529 (2022)

The SJC holds in this appeal that a neuropsychologist is within the definition of a "physician" for the purposes of an exam ordered under Mass.R.Civ.P.Rule 35(a). The Court affirmed the Superior Court's interpretation of the Rule, looking to the common and usual mean of the words and the intent of the Rule.

Both Mass DLA and MATA filed amicus briefs in this noteworthy case.

Statute of Limitations – COVID Orders

Shaw's Supermarkets, Inc. v. Melendez. 488 Mass. 338 (2021)

The SJC applies liberally the extension of the statute of limitations ordered by it during the COVID pandemic. The Court's tolling orders included all causes of action for which the relevant limitations period ran between, or through, the tolling dates.

MATA filed an amicus brief supporting plaintiff in this case.

Statute of Repose – Medical Malpractice

Moran v. Benson, 100 Mass. App. Ct. 744 (2022)

Under the medical malpractice statute of repose, c.260, §4, a Plaintiff has 7 years to file an action from the act or omission alleged to have caused the injury to Plaintiff.

Plaintiff alleged a failure to disclose a diagnosis of multiple sclerosis and a failure to treat that condition. She alleged that each separate encounter with the providers where the providers did not advise her of her MS were separate negligent acts. By that analysis it was the date of Plaintiff's last encounter that determined the trigger date.

The Appeals Court rejected that analysis, holding that the cause of action arose from the initial failure to inform her of her test results and to treat her accordingly. The subsequent encounters were not separate acts of negligence, but part of a continuing plan of treatment. There is no continuing treatment exception to the statute. See also, Rudenauer v. Zafiropoulos, 445 Mass. 353 (2005).

Statute of Repose

Szulc v. Siciliano Plumbing and Heating, Inc., 99 Mass. App. Ct. 729 (2021)

In this wrongful death case, Plaintiff suffered severe burns and died allegedly due to the negligent installation of a hot water heater. Defendant had installed a hot water heater in a building with 6 apartments and a laundry facility. Defendant had tested the water temperatures in each apartment and made any necessary flow adjustments to the system.

The claims were barred by the Statute of Repose, having been filed over 7 years after completion of the project. The Appeals Court rejected the argument on the facts that the actions of the plumber in this case did not evidence use of individual expertise. Compare Columba v. Fulchini Plumbing, 58 Mass. App. Ct. 901 (2003) (mere installation of a boiler did not involve the type of design, planning, construction or administration required by the Statute of Repose.)

The key to these cases is a detailed analysis of the minutia of the work performed by the defendant contractor.

Trial Litigation Committee Presentation Doull Case

Rebecca L. Dalpe, Esq., *Foster & Eldridge, LLP*
Noel B. Dumas, Esq., *Morrison Mahoney, LLP*

Noel is a partner in the Boston office of Morrison Mahoney. With nearly twenty years of trial practice and civil litigation experience, Noel's practice has concentrated in the areas of professional liability and aviation law. His professional liability practice encompasses the defense of all types of healthcare providers including physicians, nurses, mental health providers, and allied health professionals in a broad range of subject matters. Noel's aviation practice includes the defense of aircraft manufacturers and maintenance facilities in claims typically arising out of catastrophic aircraft crashes. He also holds a private pilot certificate.

Noel has lectured and published on the topic of risk management in his areas of practice to both private clients as well as organizations such as the American Academy of Pediatrics, the American Association for the Treatment of Opioid Dependence (AATOD), the American Academy of Child and Adolescent Psychiatry, and Coverys.

SPEAKING ENGAGEMENTS

- "Emerging Risk of Cannabis in Medicine," Massachusetts Society of Health Care Management Annual Meeting & Conference (MSHRM), September 20, 2019

MEMBERSHIPS

- Defense Research Institute
- Professional Liability Defense Federation
- Aviation Insurance Association (AIA)

REPRESENTATIVE EXPERIENCE

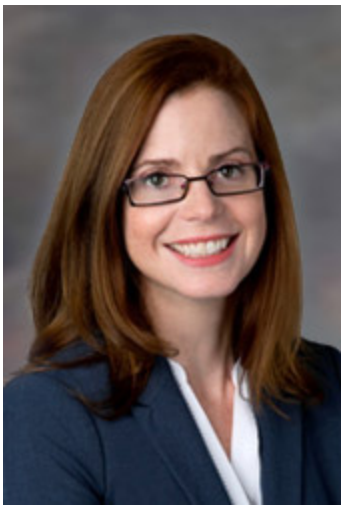
- Successfully represented dozens of clients in jury trials as well and bench trials in a wide range of cases. These cases include:

1. Defense verdict obtained during a jury trial in Plymouth Superior Court. Plaintiffs alleged negligent maintenance resulting in the crash of a $2,000,000 aircraft
2. Defense verdict obtained during a jury trial in Hampden County Superior Court Plaintiff alleged the death of a small child was due to the failure of the defendant to diagnose and treat sepsis
3. Defense verdict obtained during a jury trial in United States District Court (District of MA). The plaintiff alleged the defendant nurse failed to diagnose and treat his kidney stones
4. Defense verdict obtained during a jury trial in Worcester Superior Court. The plaintiff alleged that the defendant physician failed to diagnose his cancer
5. Defense verdict obtained during a jury trial in Essex County Superior Court. The plaintiff alleged medical malpractice in the performance of orthopedic surgery as well as negligence in the post-operative care
6. Defense verdict obtained during a jury trial in Hillsborough County (South) Superior Court (New Hampshire). The plaintiff alleged medical malpractice in the performance of orthopedic surgery as well as negligence in the post-operative care resulting in permanent deformity and pain
7. Defense verdict obtained in a Wrongful Death case brought against a diagnostic radiologist in Bristol County Superior Court. The plaintiff alleged a failure to diagnose an abnormality on a chest x-ray which was alleged to have resulted in a delay in diagnosis of lung cancer and the subsequent death of the patient

HONORS & AWARDS

- Elected by his peers to *The Best Lawyers in America*© Medical Malpractice Defense guide (2022)
- Selected to the Massachusetts *Super Lawyers* magazine list in Personal Injury - Medical Malpractice: Defense (2019-2020)
- Selected to the Massachusetts *Super Lawyers* magazine list as a «Rising Star» in Personal Injury - Medical Malpractice: Defense (2009-2012, 2016-2017)

Rebecca L. Dalpe



Rebecca Dalpe obtained her BA from the University of Rochester where she graduated in 1999, cum laude and with highest distinction and high distinction in each of her majors. Rebecca obtained her law degree in 2002 from the State University of New York, University at Buffalo School of Law where she graduated with a concentration in Intellectual Property. Rebecca has also pursued additional education in the Biological and Chemical Sciences at the State University of New York, Buffalo State College. Prior to joining Foster & Eldridge, LLP, Rebecca practiced civil and commercial litigation in Buffalo, New York.

Rebecca's areas of practice include: Medical Malpractice Defense, Health Care Law, Representation of Medical Professionals before Regulatory Boards, Agencies and Committees, Premises Liability, Commercial Liability, General Liability, and Civil and Commercial Litigation. Rebecca is admitted to practice in the State of New York, the Commonwealth of Massachusetts, the United States District Court for the District of Massachusetts, Rhode Island, the United States District Court for the District of Rhode Island and the State of New Hampshire. Additionally, Ms. Dalpe is admitted to practice before the United States Patent and Trademark Office.

Ms. Dalpe has received an AV Preeminent Rating, the highest rating for Ethical Standards and Professional Excellence

from the international rating directory, Martindale-Hubbell. Rebecca has been repeatedly named as a Massachusetts “Rising Star” and “Super Lawyer” attorney by Boston Magazine. She has been named by Boston Magazine as one of the top 50 women lawyers in Massachusetts. Boston Magazine has also named her as one of the top 50 women lawyers in New England.

Rebecca is a member of the Board of Directors of Help A Little One (H.A.L.O.), a non-profit agency committed to addressing the needs of neurologically impaired children. She has previously served as the President of the Cambridge-Arlington-Belmont Bar Association and currently serves as a Member of its Board of Directors. Other memberships include: Massachusetts Bar Association, Boston Bar Association, Rhode Island Bar Association, Women’s Bar Association, Massachusetts Defense Lawyers Association, Rhode Island Bar Association, Rhode Island Women’s Bar Association, New Hampshire Bar Association, and the Defense Research Institute.

Rebecca L. Dalpe
Email: rdalpe@fosteld.com

Doull v. Foster et al.

The Death of Substantial Contributing Cause

Presented By: **Rebecca Dalpe and Noel Dumas**

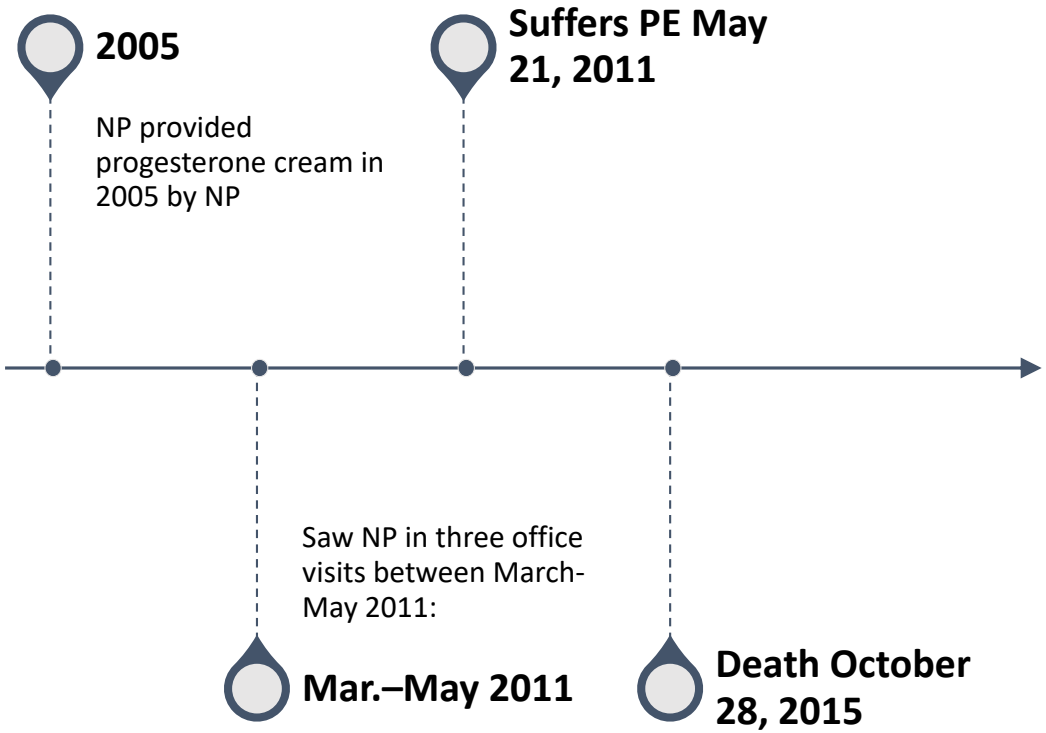
Doull v. Foster: Basic Facts

Decedent 43-year-old female

- Married
- Mother of 2
  - Son with considerable neurologic issues requiring her 24/7 care

Defendants: PCP (Nurse Practitioner and Internal Medicine Supervisor)

Doull v. Foster: Basic Facts



Doull v. Foster: Basic Facts

- Suffered Stroke in May 2011
- Diagnosed with Chronic Thromboembolic Pulmonary Hypertension (CTEPH)
- CTEPH- rare clotting disease
- Clots accumulate in lungs including distal vessels
- Causes blockage; increased lung and blood pressure
- Extensive treatment (anticoagulation and surgery)
- Died of CTEPH in 2015

APR 28 2011

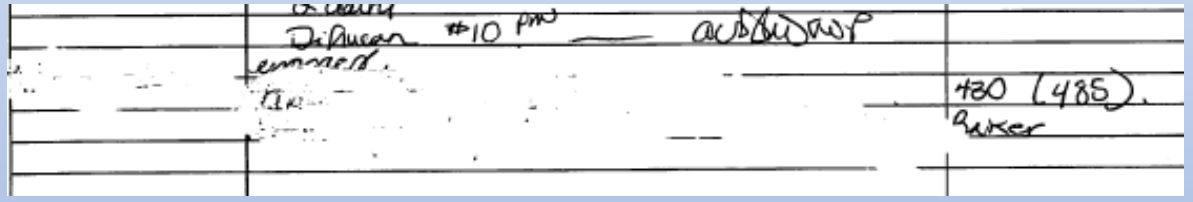
[redacted] Finish prednisone which helped. Doing albuterol 1-2x/day + Flovent BID.
Itchy eyes scratchy throat, clear mucus
PK 350-450. (at home).

[redacted] PF 450 / 475.
LS 3 wheezes, rales or crackles.
Afebrile, looks well. ⊖ nodes.
PR 88 rrr.
? Allergies ↑ S/S at Mom's house while outside esp. itchy eyes.

Corrected on Albuterol + Flovent dosage (QID + BID). Final of Zyrtec over weekend. Tc Mon. E update
— ACKNOWLEDGE

	[illegible]	
5/10/2011	S/O	
[illegible]	F/U asthma exacerbation. Clarinex not	
	working very well. Improvement with	
	albuterol + Proventil ↓ use of albuterol.	
	Pt uses Yankee Candle candles in	
	home almost always. Discussed	
	allergens, sensitization at length.	
	PA for Clarinex sent in. Saw	
	improvement.	[illegible signature]
	? ~~Acupuncture~~ Referral to K. Dean for acupuncture.	
	~~[illegible]~~. F/U 1 week. CXR. + ref. to Dr. [illegible].	
error	~~Pulmonary [illegible] 100.~~	

Using White Out is Always A Good Idea…



Doull v. Foster: Claims

Two Primary Claims:

Defendants failed to provide proper informed consent as to alleged risk of pulmonary embolism (PE) associated with progesterone cream

Defendants failed to properly diagnose and timely refer for care for signs and symptoms of PE during March-May and prior to May 2011 stroke

Potential for Multiple Causes of Ms. Doull's Death:

- Two defendants and their independent duty to Plaintiff to intervene
- Prescribing Progesterone Cream (increased risk of clots)
- Underlying CTEPH

Doull v. Foster: The Fight Over Causation Begins

- Defendants submit Trial Briefs prior to trial on applying "but for" causation.
- Plaintiff files jury instructions seeking "substantial contributing cause."

Trial Begins With a Rocky Start:

PLAINTIFFS' OPENING STATEMENT

MR. SOBCZAK: Good morning. More than 400,000 patients die per year to preventable medical errors. According to --

MR. DUMAS: Objection.

THE COURT: Sustained.

MR. SOBCZAK: Okay. What brings us to Franklin County Superior courthouse, they are patient safety rules, not only --

MR. DUMAS: Objection.

THE COURT: Sustained. Please just limit yourself not to policy, Mr. Sobczak. You're to speak about what you expect the evidence will show in this case.

MR. SOBCZAK: Yes, your Honor. I am.

THE COURT: Well, I'm instructing you to move on from this particular part of your opening. Okay. Go ahead.

Trial Begins With a Rocky Start:

THE COURT: Mr. Sobczak, this case has nothing to do with protecting all of us. You are to restrict your opening to the evidence you expect to produce on behalf of your clients. I do not want to keep on -- to -- to interrupting, but you're using this language about patient safety rules, and then segueing into protecting all of us. That is not what this case is about. And I will continue to interrupt, and -- unless you restrict yourself to a proper opening statement. Please.

Plaintiff's Exam of Defendant Miller Not So Smooth…

Q No. And you raised your card a third time. Why was that?

A There was one comment you had made incidentally but -- a name people -- I'm literally (indiscernible -- low audio at sidebar at 11:08:36) referred to Mr. Miller, and I don't know if it came from this case or other cases, but they refer him as Killer Miller.

Plaintiff's Exam of Defendant Miller Not So Smooth…

Q All the notes from spring of 2011, you have zero documentation to show that PE was even consider and/or ruled out, correct?

A Yes.

Q And the last thing, Doctor, why is your nickname in the community Killer Miller?

MR. DUMAS: Objection.

THE COURT: Oh my, members of the jury, you will absolutely disregard that comment. And it's absolutely improper. I will see counsel at sidebar.

(On-the-record sidebar discussion with Mr. Sobczak, Mr. Dumas and Ms. Dalpe. Defendant not present.)

Plaintiff's Exam of Defendant Miller Not So Smooth…

THE COURT: I don't know if it's appropriate to order a mistrial at this point. That is the most improper, outrageous comment I've ever heard an attorney make in a courtroom. That particular comment, as you know, was grounds for excusing a juror, and now you put it squarely in front of the jury. I'm going to admonish them in the strongest terms and over lunch hour determine whether or not there ought to be additional sanctions.

But that is absolutely outrageous.

Plaintiff's Expert Testfies:

- No evidence that natural progesterone any safer than standard cream including as to risk of Clots/PE
- Defendants failed to so inform the decedent
- Defendants failed to further investigate complaints of SOB and do differential diagnosis
- As to Internal Medicine Physician: owner of practice; failed to have standards for documentation and differential diagnosis; failed to ensure proper informed consent including ensuring patient informed that natural progesterone not shown to be any safer than standard progesterone; failed to ensure NP properly treated the decedent

Defense Experts Testify

Defense Experts:

1. Dr. Jennifer Potter (internal medicine)
2. Dr. Ken Miller (hematology)
3. Dr. Nicholas Hill (pulmonology)

- No deviation from SOC as to office visits and decedent did not present with signs or symptoms of PE
- No lack of informed consent; no known risk of PE with natural progesterone
- No evidence that natural progesterone cream has same risks including as to PE as estrogen containing HRT products
- Decedent did not have risk factors associated with PE or CTEPH

Causation Testimony: Plaintiff

- Progesterone cream was cause of decedent's blood clot condition which led to CTEPH
- Decedent died due to CTEPH
- "Earlier " diagnosis would have been "better" and "possibly" prevented CTEPH

Causation: Defense Testimony

- Diagnosis and treatment in March-May 2011 would not have prevented outcome
- Following stroke diagnosed with CTEPH which had been present for “weeks or months” (“likely longer”)
- CTEPH “sneaky,” “insidious” disease that does not usually present until stroke event; chronic not acute disease
- Clots can be small and lodge in distal vessels causing scar tissue and be asymptomatic
- Earlier treatment would not have changed outcome evidenced by lung scan, and failure of extensive anticoagulation treatment and surgery
- Certain CTEPH cases unresponsive to therapies

Trial and Verdict

Two-weeks of testimony over three weeks

Three days of deliberation

Charge Conference Over Causation

- Hearing after the close of evidence to argue disputed instructions.
  - Here, causation standard had been disputed since pre-trial motion
    - Defendants sought “but for” causation

29. In other words, in order for you to find in favor of the Plaintiff, even were you to find that the Defendant was negligent as I have defined that term to you, you also must find that whatever injuries or damage, if any, you find that Laura Doull sustained would not have occurred but for the negligence, if any, of each of the Defendants.

Charge Conference Over Causation

- Hearing after the close of evidence to argue disputed instructions.
  - Plaintiff argued for the application of "substantial contributing cause"

37. If you find that the Defendant(s) was negligent, you must then determine whether his/her/its negligence was a proximate cause of Plaintiff's damages. Proximate cause in this case is the legal term used to describe the relationship between the conduct of the Defendant and the damages that flows from the conduct of the Defendant. The proximate cause need not be the sole cause, or even the predominant cause. We all know that many events in life are the product of more than one cause. In order to be legally responsible for the Plaintiff's injuries, the Defendant's negligence need only be a substantial contributing factor in bringing about those injuries. *Matsuyama v. Brinbaum*, 452 Mass. 1, 30 (2008); *O'Connor v. Raymark Industries, Inc.*, 401 Mass. 586, 589 (1988). A "substantial contributing cause" is "something that makes a difference in the result. There can be and often are more than one cause present to produce an injury". *O'Connor v. Raymark Industries, Inc.*, 401 Mass. 586, 589 (1988) Thus, if upon a consideration of all the evidence presented you find that it was [redacted] You must remember that the Plaintiff do not have to show that the Defendant's conduct absolutely caused injury to Plaintiff, but instead the Defendant's conduct probably or more likely than not resulted in injury.

Charge Conference Over Causation

- Hearing after the close of evidence to argue disputed instructions.
  - Court agrees that “but for” should apply and plaintiff responds as follows:

But I'm satisfied about reviewing the theory in this particular case that the appropriate instruction is but for. Your objection is noted, Mr. --

MR. SOBCZAK: Your Honor, then perhaps the Court should reread the Matsuyama case. It specifically says it's not but for. But again --

THE COURT: The Court has --

MR. SOBCZAK: -- you ruled. Thank you for the ticket for immediate reversal.

Charge Conference Over Causation

- Hearing after the close of evidence to argue disputed instructions.
  - Court agrees that “but for” should apply and plaintiff responds as follows (cont.):

THE COURT: I'm sorry.

MR. SOBCZAK: Thank you for the guaranteed reversal by right. When the Court instructs the wrong instruction on the law, then it's reversible error per say.

Trial and Verdict

Q.1. Did the defendant, Anna C. Foster, N.P., fail to disclose material medical information to Laura Doull with respect to use of the prescribed progesterone cream?

A.1. **YES** _____ **NO** ✓

Q.8. Did the defendant, Robert J. Miller, M.D., fail to disclose material medical information to Laura Doull with respect to use of the prescribed progesterone cream?

A.8. **YES** _____ **NO** ✓

Trial and Verdict

Q.5. Was the defendant Anna Foster, N.P. negligent in her care and treatment of Laura Doull?

A.5. **YES** ___√___ **NO** _____

(If your answer to Q.5 is "YES", go to Q.6. If your answer is "NO", go to Q.8.)

Q.12. Was the defendant Robert Miller, M.D. negligent in his care and treatment of Laura Doull?

A.12. **YES** ___√___ **NO** _____

Trial and Verdict

Q.6. Was the negligence of Anna Foster, N.P. the legal cause of injury or harm to Laura Doull from May 2011 until her death in October 2015?

A.6. **YES** _____ **NO** ✓

Q.13. Was the negligence of Dr. Miller the legal cause of injury or harm to Laura Doull from May 2011 until her death in October 2015?

A.13. **YES** _____ **NO** ✓

Primary Issue on Appeal: Causation Instruction

- Court instructed jury on causation using "but for" and did not use "substantial factor" as requested by plaintiff's counsel

- Essence of factual causation instruction:

"Even if you find the Defendant in question was negligent, that Defendant is not liable to the Plaintiffs unless his or her negligence caused the harm suffered by [decedent]. To meet this burden, the Plaintiff need only show that there was a greater likelihood or a greater probability that the harm of which they have complained was due to causes for which the Defendant in question was responsible rather than any other cause……the Defendant in question's conduct was a cause of the plaintiff's harm. That is [decedent's] harm, if the harm would not have occurred absent, **that is but for** the Defendant's negligence. **In other words if the harm would have happened anyway, that Defendant is not liable.**"

Substantial Factor: Multiple Causes

- Examples:
- Preexisting Injury and Negligence
- Dueling motorcycles (Corey v. Havener)
- Converging Fires

Doull v. Foster

Not the same as dueling motorcycles, converging fires or asbestos: not an aggregation of separate causes where impossible to say whether one or the other were a cause of the harm

No showing that use of “substantial factor” would have affected outcome particularly given weak expert evidence including lack of opinion that intervention would have prevented stroke or death

Possible could not say with reasonable degree of medical certainty

Decision (5-2)

Holds: (1) But for is to be used in most tort cases including multiple defendants and multiple causes and as such no error in use in case; (2) Substantial contributing factor or cause is no longer to be used except in toxic tort cases; and (3) will address propriety of substantial factor test in toxic case when appropriate case is presented

"But for applies in most cases involving multiple causes of multiple defendants"

"the substantial factor test is unnecessarily confusing and we discontinue its use even in multiple sufficient cause cases"

"R2 caused confusion by merging but for test with substantial factor test" and "blurring line between factual and legal cause"

"there is nothing preventing a jury from assessing the evidence and determining which of the causes by the plaintiff were actuall necessary to bring about the harm and which had nothing to do with the harm"

Dissent (Graziano, Lowy)

"Today the court abandons decades of precedent in an attempt to clarify confusion that does not exist"

"Abandoning the substantial contributing factor instruction in circumstances where there is more than one legal cause of an injury will, in my view, inure to the detriment of plaintiffs with legitimate causes of action while not clarifying the existing law on causation"

Reaction

- “Doull v. Foster: The New Normal for Causation Analysis”
- “Massachusetts Supreme Judicial Court Strikes a Death Blow To Substantial Contributing Factor Causation in Most Cases: Is Asbestos Litigation Next”
- “High Court Streamlines Med Mal Standard on Death Cases”
- “Supreme Judicial Court Restricts Standard of Causation in Cases Involving Multiple Tortfeasors”
- “State Supreme Court Upends Causation in Tort”

Significance and Takeaways

-Eliminates substantial factor concept and parlance from all cases including medical malpractice and cases involving multiple causes or multiple defendants.

-Significant change and refinement as SCF used for over 100 years

-1 of 3 states to do so

-Likely impetus for other states and courts to follow

-Decision expressly indicated it will address whether SCF should be continued to be used in toxic tort case when appropriate presented

Significance and Takeaways

-Attorneys/courts will need to adjust to new terminology and definition

-Enhances argument as to causation for the defense (without which it would not have occurred)

-Fundamental change is terminology

-Analysis of claim not changed; accentuates need in evaluation to isolate causation element and understand evidence and argument both for and against and as to each defendant

-Potentially raises more opportunity to seek rulings as a matter of law on the causation element as well as utilization of Daubert motions.

Practice Points:

- In cases with multiple defendants and potential multiple causes, analyze each defendant independently.
- Ask defense counsel how “but for” applies to these types of cases and whether it impacts causation in your cases.

Practice Points: Model Instruction

- If you find that DFT was negligent, then you must decide whether PLF proved that, more likely than not, DFT's negligence caused PLF's injuries [caused PLF's injuries to get worse]. You must ask: "Would the same harm have happened without DFT's negligence?"
- In other words, did the negligence make a difference? If DFT's negligence had an impact on PLF's injuries, then it caused those injuries. But if the negligence had no impact on PLF's injuries and the same harm would have happened anyway, then DFT did not cause the injuries. Often, an injury has more than one cause. If DFT's negligence was one of those causes, that is enough. PLF does not have to show that DFT's negligence was the only cause of the injuries. Nor does s/he have to show that the negligence was the largest or main cause of the injuries, as long as the injuries would not have occurred without DFT's negligence.

Practice Points: Model Instruction

- Uses “impact” —not focus of Doull decision. -Term without which it would not have occurred-not included. (“[T]he focus instead remains only on whether, in the absence of a defendant's conduct, the harm would have still occurred.”).(“DFT caused PLF’s harm if the harm would not have occurred absent, that is but for, DFT’s negligence.” See Doull, 487 Mass. at 6, quoting trial judge’s charge) (a defendant is a factual cause of a harm if the harm would not have occurred "but for" the defendant's negligent conduct”).

  -Term “Necessary” nowhere to be found contrary to Doull (“Another way to think about the but-for standard is as one of necessity; the question is whether the defendant’s conduct was necessary to bringing about the harm”).

Young Lawyer Division Presentation Artificial Intelligence and its Impact on The Future of Legal Practice

Michael P. Dickman, Esq., *Kenney & Sams, P.C*

Michael P. Dickman, Kenney & Sams, P.C.

MassDLA Young Lawyers Division, Co-Chair

June 3, 2022

Michael P. Dickman

Michael Dickman is a fourth-year associate at Kenney & Sams, P.C. Mike is a litigator who resolves business, construction, and insurance coverage disputes. An integral part of the firm's trial team, Mike touches all stages of trial preparation for the civil litigation process including substantive research, written discovery, depositions, motion practice, and witness preparation. His experience includes advising clients on matters spanning the construction, automotive, pharmaceutical, real estate, and insurance industries.

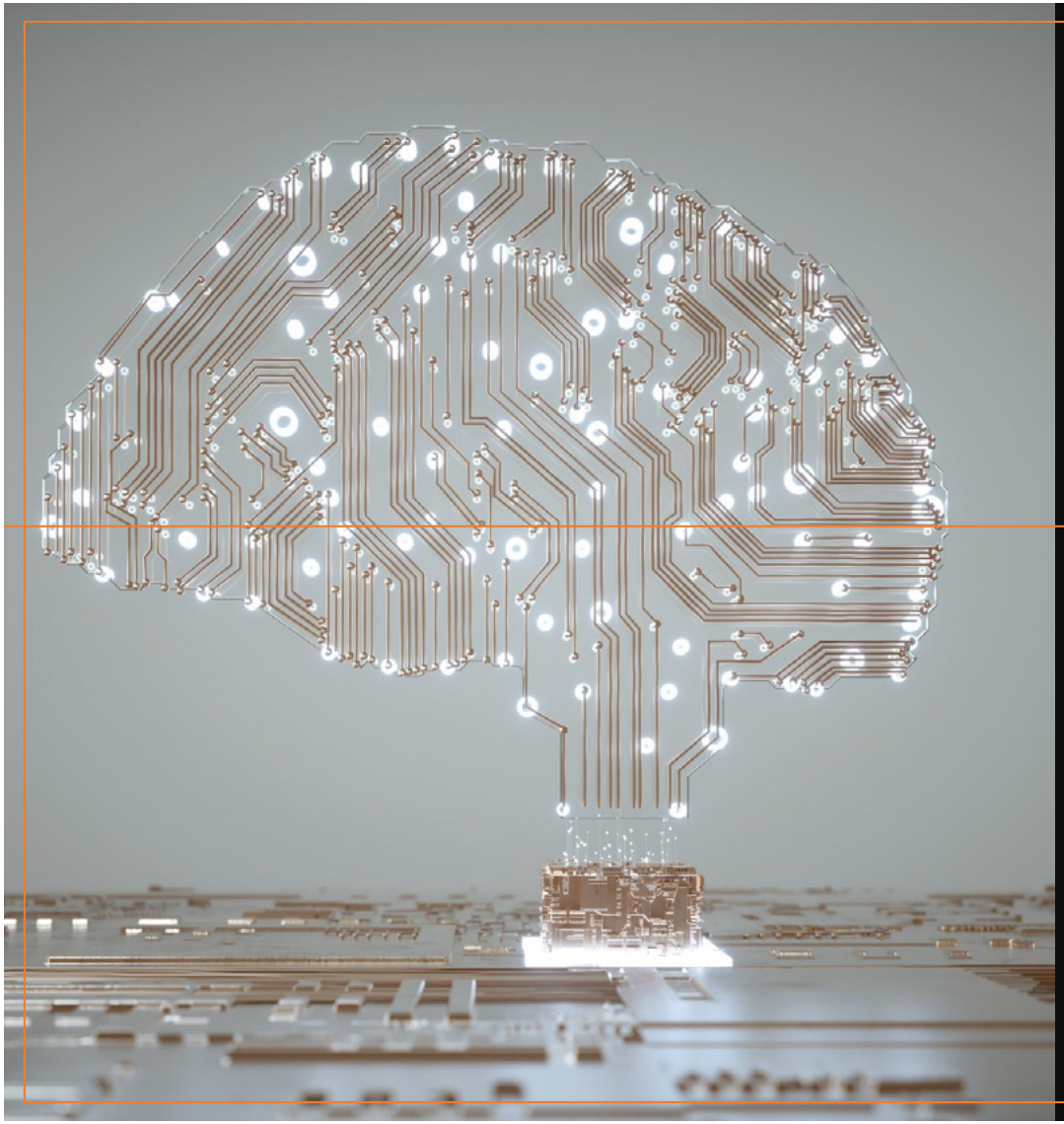
Mike is the co-chair of the MassDLA Young Lawyers Division and was also a graduate of this year's Massachusetts Bar Association Leadership Academy.

Mike received his Juris Doctorate from Northeastern University School of Law in 2018. He is a 2015 cum laude graduate of Boston College, receiving bachelor's degrees in History and Political Science.

Artificial Intelligence and Its Impact on Legal Practice: Now and Moving Forward

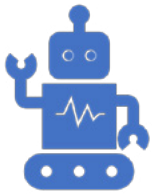
What is Artificial Intelligence?


JUDE LAW
HALEY JOEL OSMI
A STEVEN SPIELBERG FILM
A.I.
ARTIFICIAL INTELLIGENCE



Machine (Not Human) Intelligence

Categories of Artificial Intelligence

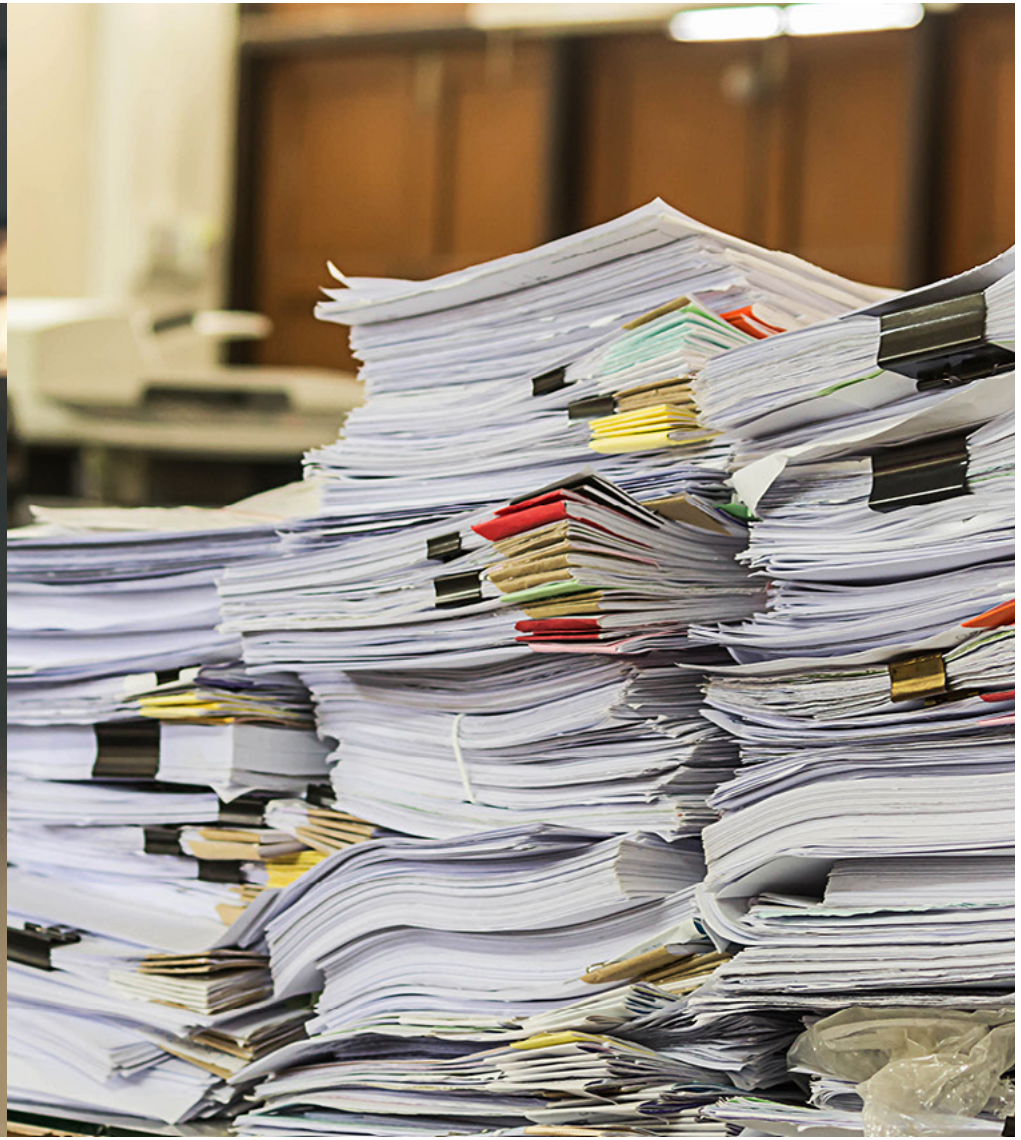


Robotics

Natural Language Processing

Machine Learning

Artificial Intelligence and Legal Practice




The
Guardian

Artificial Intelligence

- **Robotics** – repetition of physical tasks
- **Natural Language Processing** – interaction with written/spoken word
- **Machine Learning** – data collection/analysis, pattern recognition, and predictive outcome

Natural Language Processing

- Conversational Legal Robots
- Digital Legal Assistants
- BERT (Bidirectional Encoder Representations from Transformers)

Machine Learning

- eDiscovery/Document Review
- Contract Review
- Legal Research
- Litigation Finance
- Timekeeping
- Marketing

The Usual Suspects

- eDiscovery/Document Review
- Contract Review
- Legal Research

Prediction

Outside the Box

TIMEKEEPING

MARKETING

Benefits of AI in Legal Practice

Drawbacks of AI in Legal Practice

- Cost
- Fear of job elimination
- Invasion of privacy

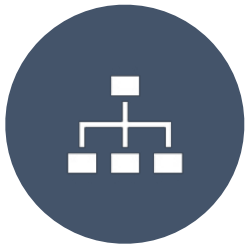
What Some Have Said

Ethical Pitfalls of AI in Legal Practice

UNAUTHORIZED PRACTICE OF LAW

COMPETENCE

CONFIDENTIALITY



SUPERVISION

Looking Ahead

Uncertainty

Continuing technological expansion

Augmented intelligence

Thank you!

Reevaluating Remote Depositions Best Practices and Cautionary Tales

Kyle E. Bjornlund, Esq., *CETRULO, LLP.*

Kyle practices in the Toxic Tort Litigation Group of Cetrulo LLP. He is part of a team that represents Fortune 100 companies as local, regional, and national coordinating counsel in toxic tort litigation. Kyle has successfully defended clients in the state and federal courts of Massachusetts, Maine, Missouri, New York, Rhode Island and Vermont in multi-party, multi-jurisdictional, mass tort litigation alleging injuries from exposure to asbestos, lead pigment, benzene, talc, and radiation. He has also been retained by prospective buyers to perform risk management assessments of the toxic tort liabilities of acquisition "target" companies.

KYLE E. BJORNLUND is a litigation partner in the Boston office of CETRULO LLP. Mr. Bjornlund has defended clients in the state and federal courts of California, Connecticut, Hawaii, Maine, Massachusetts, Missouri, New York, Rhode Island and Vermont in multi-party, multi-jurisdictional, mass tort litigation alleging injuries from exposure to pharmaceuticals, asbestos, lead pigment, benzene, talc, and radiation. He is a member of the Defense Research Institute and the International Association of Defense Counsel. Mr. Bjornlund is the Treasurer of the Massachusetts Defense Lawyers Association, and also chairs the MASSDLA's Toxic Tort Substantive Law Committee. Mr. Bjornlund has authored numerous Amicus Briefs submitted to the Supreme Judicial Court of Massachusetts on product liability-related issues. Mr. Bjornlund is also the co-author of the 2020-2021 edition of the Toxic Torts Litigation Guide available through Thomson Reuters. Mr. Bjornlund received a B.A. from Nazareth College of Rochester and a J.D. from Suffolk University Law School.

CETRULO LLP

Reevaluating Remote Depositions – Best Practices and Cautionary Tales

Kyle E. Bjornlund, Esq.
CETRULO LLP

Remote Deposition Checklist

➢ **Pre-Deposition Considerations**

- Is this a deposition that should be conducted in-person?
  - Offering factual evidence?
  - Veracity, credibility, and demeanor to be evaluated and tested?
  - Misc. considerations (ex: translators; hearing limitations, etc.).
- If remote, confirm where all participants will be located prior to the deposition (e.g., all remote; hybrid – witness accompanied by counsel only; counsel present, but court reporter remote).
- Either confirm acceptance of the proposed location arrangement or object – do not wait until the start of the deposition to object.
- To the extent practicable, identify any exhibits that may be exchanged prior to the deposition.

➢ **Stipulations**

To the extent a remote deposition is the option selected, consider adoption of a stipulation confirming:

- No access to emails, chats, texts, or parallel Zoom feeds during questioning.
- Witness will not use their computer to access their files / library to supplement previously produced "file" absent agreement of counsel.
- Counsel will work collaboratively and in good faith to address any technological issues that arise during the deposition.

- Two cameras are trained on the witness (one from behind or to the side) to ensure that the witness is not relying on or referencing memory prompts or other resources.
- Counsel present with a witness during a remote deposition will remain on camera during questioning.

➢ **Technical Requirements**

- Test your computer, camera, and microphone.
- Test the platform connection in advance of the deposition.
- Test the witnesses' router and internet bandwidth.
- Familiarize the witness with Zoom/Webex/Microsoft Teams.
- Overhead lights should be dimmed and window shades closed to allow for a transition from a washed out image to a more natural appearance.
- If the deposition is video-recorded, it is recommended to use two separate channels of recording, one for the witness, and another for the exhibits.

Case Dismissed! The Metal Halide Lamp Warehouse Fire Mystery Solved

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Dr. Peter Lindahl, Ph.D., CFEI
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Dr. Harri K. Kytomaa, Ph.D., P.E., CFEI, FASME

Dr. Kytömaa specializes in mechanical engineering and the analysis of thermal and flow processes. He applies his expertise to the investigation and prevention of failures in mechanical systems. He also investigates fires and explosions and their origin and cause. He consults in the utilities, oil and gas, and chemical industries. Dr. Kytömaa's project experience includes consumer products, intellectual property matters, automobiles, aircraft, turbines, compressors, boilers, steam generators, pneumatic and hydraulic systems, instrumentation, nuclear waste management, heat transfer systems, fuel distribution, delivery and storage systems, including LNG facilities.

Dr. Peter Lindahl, Ph.D., CFEI

Dr. Lindahl's education and training is in electrical engineering with expertise in power systems, sensors and instrumentation, electromechanical machinery (motors and generators), electrochemical systems (e.g. batteries, fuel cells, and their associated electronics), renewable and distributed energy systems, industrial controllers such as variable speed motor drives, and consumer appliances and electronics. His professional activities involve, amongst others, conducting complex investigations related to product safety, reliability, failures, and standards compliance; advising clients and providing engineering services on matters concerning intellectual property; and developing condition monitoring and fault detection and isolation techniques.

Prior to Exponent, Dr. Lindahl was a postdoctoral associate at the Massachusetts Institute of Technology. While there, he conducted research and oversaw graduate student projects related to smart grid power management and control, condition monitoring in electrical and mechanical systems, and smart building technology development including capacitive occupancy sensing and HVAC performance tracking via smart meter measurements. He received his PhD from Montana State University for his work devising sensing methods and power control management schemes for solid oxide fuel cell systems.

Throughout his career, Dr. Lindahl has provided technical and scientific services to clients in a variety of industries including aerospace, construction, electrical power, oil and gas, automotive and marine transportation, and defense including the U.S. Navy, Coast Guard, Army, and Air Force. He's co-authored over two dozen research articles in high-impact academic journals and conference proceedings. His research work has also been featured in news outlets and engineering society magazines including MIT News, the SNAME Marine Technology Magazine, and the IEEE Instrumentation & Measurement Magazine.

Dr. Paul M. Verghese, Ph.D., P.E., CRE

Dr. Verghese specializes in materials engineering, and is experienced at failure analysis, product development, reliability engineering, material characterization, and materials selection. He has investigated materials issues in a number of areas, including glass articles (containers, windows/glazing, guard rails, electronic displays, tables/shelves, laminated glass, toughened glass), consumer electronics, consumer appliances, active and passive medical devices and implants, semiconductor devices, fiber optic subsystems and components, electric power infrastructure, building materials, and fittings and fasteners.

Exponent® Case Dismissed! The Metal Halide Lamp warehouse fire mystery solved.

Abstract:

A critical component of the scientific method used in fire investigations is the consideration of all feasible alternative hypotheses so as to not fall victim to expectation bias, where premature conclusions are reached without properly examining all relevant data. In this warehouse fire case study, investigators quickly concluded that a metal halide lamp ruptured and caused hot fragments to fall and ignite combustible materials. The lighting fixture, the fractured arc tube and numerous lamp fragments were found in the area of origin, including a fragment with the accused manufacturer's logo. And there were no other viable ignition sources in the area of origin. On its face, this seemed to be a reasonable hypothesis. However, multiple unanswered questions remained. Join us to learn the answers to those burning questions as we shed light and illuminate the facts through our systematic investigation that ultimately led to a complete dismissal of the lamp manufacturer from the case!

Date of Webinar: Friday, June 3, 2022

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Key Takeaways:

- Adherence to the scientific method through the course of an incident investigation mitigates risks associated with expectation bias and overlooked hypotheses.
- Integrating multi-disciplinary experts in a collaborative team enables thorough analysis of incident investigations, minimizes redundancies, and creates value for clients.
- Regular communication among legal and technical experts minimizes gaps in the expert opinions and improves the overall presentation of the case in dispute resolution proceedings.