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Seventeenth Annual Judicial Symposium
Lessons Learned, Challenges Ahead:
Emphasizing the Importance of the Judiciary in the New Normal

July 9–10, 2021
Join us in-person at the
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Message from the President

NFJE Is Ready for a New Normal

By Laura E. Proctor, NFJE President

What a year this has been! As the country continues to deal with the realities of COVID-19, we find that every aspect of our lives has been challenged. Social norms are no longer the norm, business as usual is no longer usual, and legal rules are no longer rules but guidelines. Although many of the measures taken were necessary to get through these difficult times, the impact of these changes and their lasting effects on the rule of law will eventually fall to you, the appellate judges, to sort out. You will be called upon to review rulings that focused on unprecedented actions related to social distancing, shelter-in-place orders and face-covering mandates as well as procedural questions that were complicated by the use of virtual jury trials. Your rulings will have the greatest impact on how the law operates in a post-COVID-19 world.

We are excited to address some of these issues during this year's in-person seminar in Chicago in July. Based on the comments and the registration numbers, we know you too are excited to get back together to see colleagues and friends. The content of the program is highlighted in more depth in this newsletter. I hope after reading about all we have planned, you will register, if you have not already done so.

This year, as part of our overall theme, we want to celebrate and recognize the importance of our judicial branch of government and say thank you for the role you play in this vital aspect of our democracy. As Justice Black wrote for the court in *Chambers v. Florida* in 1940, "No higher duty, or more solemn responsibility rests upon this Court than that of translating into living law and maintaining this constitutional shield ... for the benefit of every human being subject to our Constitution — of whatever race, creed, or persuasion." We thank you all for taking on this higher duty and for your service that benefits us all.

See you in Chicago in July.

Laura E. Proctor serves as associate general counsel, litigation and employment, for Numotion in Nashville, where she has responsibility for managing all aspects of the company's litigation and for advising on employment and human resources matters. Prior to working with Numotion, Proctor served as deputy general counsel for Louisiana Pacific Corp. in Nashville. She currently serves as president of NFJE and has been a member of its executive committee since 2017. She is an active member of DRI, the largest organization of civil defense lawyers, and served as its president in 2015-2016. She was the organization's first corporate counsel president and its third female president. Proctor also served on DRI's executive committee from 2010 to 2017 and on its board of directors as a national director from 2007 to 2010. She is active in several DRI committees including DRI's Corporate Counsel Committee, of which she is a founding member. In addition to her involvement with DRI, Proctor also is a member of the International Association of Defense Counsel, where she served on the Corporate Counsel College Advisory Board and the Tennessee Defense Lawyers Association. She also serves on President's Cabinet for the University of Alabama. Proctor is a graduate of the University of Alabama and earned her J.D. at the University of Alabama School of Law.

Image by Oleksandr Baiev via Unsplash

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2021 NFJE Symposium Preview

By Amy L. Miletich, 2021 Symposium Chair

The 2021 NFJE Symposium marks the 17th year that appellate court judges from more than 40 states will come together to share legal knowledge and to promote the continued administration of justice. In light of COVID-19's profound impact on our nation's legal system, this year's symposium works to merge continuing legal education with a broader understanding of how the rule of law has been impacted by both prior adversaries and the latest global pandemic. This year's symposium is entitled "Lessons Learned, Challenges Ahead: Emphasizing the Importance of the Judiciary in the New Normal." The program is focused not only on the past challenges faced by the judiciary but also on how the legal community has and will continue to change and adapt to such tests.

Recently featured on an episode of PBS' "American Experience," the Honorable Richard Mark Gergel's book "Unexampled Courage: The Blinding of Sgt. Isaac Woodard and the Awakening of President Harry S. Truman and Judge J. Waties Waring" details how the horrendous racial injustice faced by Sgt. Woodard forever changed the course of civil rights in America. Judge Gergel will begin the symposium by sharing Sgt. Woodard's story and his impact on President Truman and Judge Waring, which includes a legal legacy that laid the framework for *Brown v. Board of Education*.

Against the backdrop of the challenge of COVID-19 and the pandemic's impact on the judicial system, the symposium also will highlight the innovation that has arisen from a need to be 6 feet apart, including the adaptation of court hearings to fit a virtual space. Symbolic of the lessons and advancements of 2021, innovation, cybersecurity, and racial equality and justice will be explored during this year's symposium. In his presentation, "Hopeful Signs from a Hard Year," the Honorable Jeremy Fogel, executive director at the Berkeley Judicial Institute, will focus on the legacy that the COVID-19 era has left on our judiciary, from combating structural inequality to strengthening judicial independence.

We also will hear from a panel of members from the plaintiffs' bar and the defense bar about how virtual trials represent both new possibilities and difficulties. In addition, the symposium will include a program entitled, "Unringing the Cybersecurity Bell: The Court's Role in Mitigating Cybersecurity Risks Invited During the Discovery Process." The panel, which will provide insights from defense counsel, a cybersecurity expert and the Honorable Joseph C. Iannazzone, will explore the balance among confidentiality, security and truth finding when faced with disclosing sensitive information in discovery.

The Honorable Tanya M. Bransford, the Honorable Susan F. Maven and the Honorable Veronica Galván will discuss the commitment by many state courts to combat racism and promote equality and justice for all since the tragic deaths of George Floyd and others in 2020 in their presentation, "Ensuring Racial Equality and Justice for All in State Courts."

The symposium will conclude with a panel of all the speakers.

I am honored to be a part of this year's program, and I thank all the participants and attendees for their involvement. I am so thankful we will be able to, once again, see one another in person.

Amy L. Miletich is a founding member of the Denver-based firm Miletich PC. Her practice is focused on employment law matters, civil litigation and insurance law. Miletich has extensive experience with employment law matters and has represented domestic and international private employers and public employers in the defense of claims alleging violations of federal and state employment laws. She serves on the boards of directors of NFJE and the Federation of Defense and Corporate Counsel. She also is a former national director of DRI and a former chair of DRI's Employment and Labor Law Committee. Miletich's work has led to several honors, including being listed in "The Best Lawyers in America" and being named one of the Top 50 Women Colorado Super Lawyers.

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Feature Articles

Truly Understanding NFJE's Diversity

By Edward S. Sledge IV

NFJE annually opens its NFJE Symposium to appellate judges from all over the country and from all walks of life without regard to race, ethnicity, socioeconomic status, gender identity or sexual orientation. But NFJE leadership's reflections on audience participation in years past recalled a rather homogeneous group. This raised questions about whether the reflections were grounded in reality and, if so, what could be done to increase symposium participation by appellate judges who have lived and served in the historically underserved communities of our country. The NFJE president at the time, Dan D. Kohane, commissioned a diversity review to address these issues.

NFJE joined forces with the International Association of Defense Counsel (IADC) Foundation board, the charitable arm of the IADC, to learn more about NFJE symposium's participants and their views in the hopes of creating discrete calls to action. The joint efforts are mission focused and get to the core of both organizations' reasons for existence.

The mission of NFJE focuses on the judiciary: "Address important legal policy issues affecting the law and civil justice system by providing meaningful support and education to the judiciary, by publishing scholarly works, and by engaging in other efforts to continually enhance and ensure judicial excellence and fairness for all engaged in the judicial process." The IADC Foundation's mission is similar: "To support the rule of law and access for all to a fair and just legal system through education and research, strategic partnerships, and relevant projects."

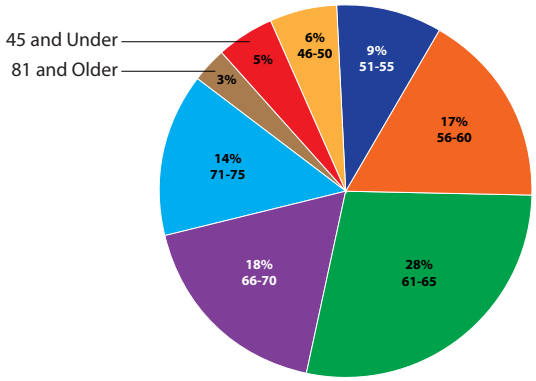
Initially, NFJE needed to see itself from an audience participation standpoint — the baseline, if you will. This involved preparing a survey for the past attendee-judges of the symposium to complete. Gino Marchetti, past president of both NFJE and the IADC; Joe Cohen of IADC's Diversity and Inclusion Committee; and I worked together to frame 10 survey questions. The survey included two parts: The first focused on the demographic makeup of the judges, and the second focused on those judges' responses to questions related to diversity.

The 10-question survey was sent to attendees of the 2016-2019 NFJE symposiums. We received responses from 66 past attendees.

Here is what we learned:

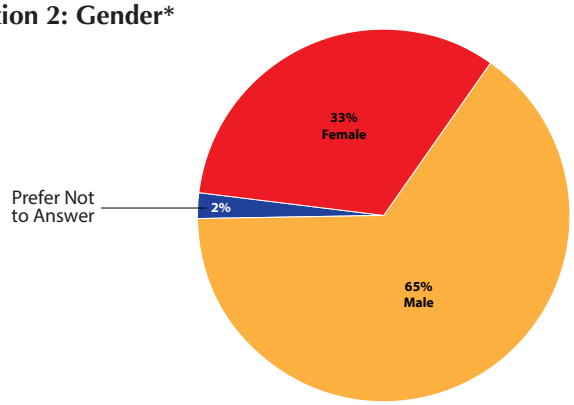
The Demographic Makeup of Survey Participants

Question 1: Age*



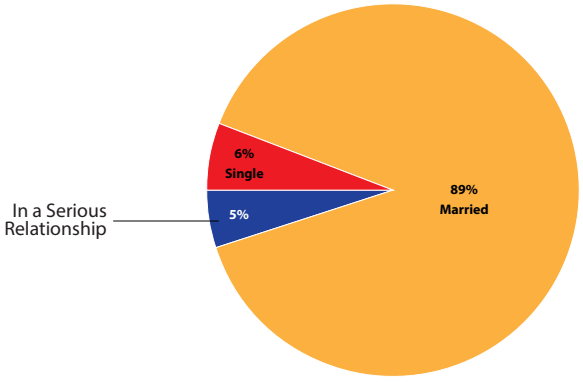
* No respondents selected the 76-80 age option.

Question 2: Gender*

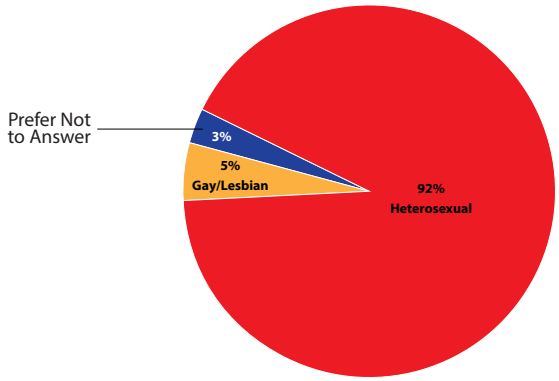


* No respondents selected the Transgender Male, Transgender Female or Gender Variant/Non-conforming options.

Question 3: Relationship Status

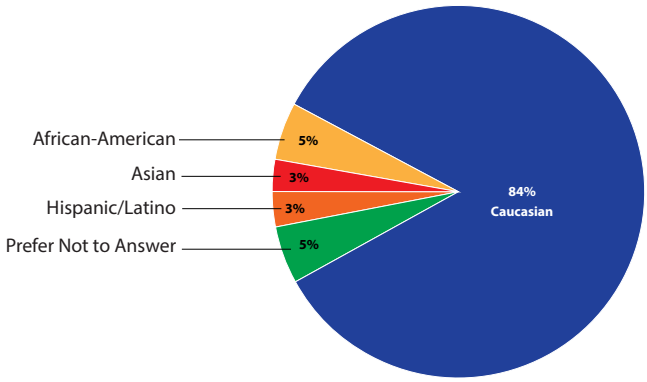


Question 4: Sexual Orientation*



* No respondents selected the Bisexual/Pansexual option.

Question 5: Ethnicity*

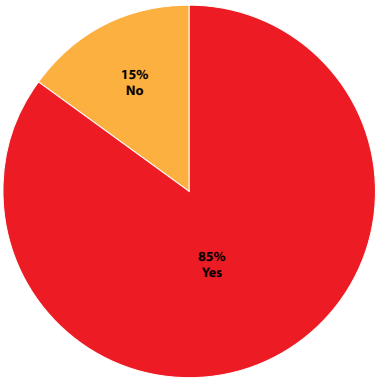


* No respondents selected the Native American, Pacific Islander or Other options.

As shown, the pool of audience-respondents was largely middle-aged or senior, male, married, heterosexual, and Caucasian appellate judges. This was not an altogether surprising outcome, as this is generally reflective of the judiciary's makeup nationwide.

But what did these respondents have to say about their observations of the judiciary and diversity? NFJE asked them a variety of questions about the judiciaries on which they serve. Although some consistency in response arose, particularly because of the binary nature of the yes-or-no questions presented, the comments revealed the nuances, complexities and challenges associated with the interplay of diversity and the judiciary.

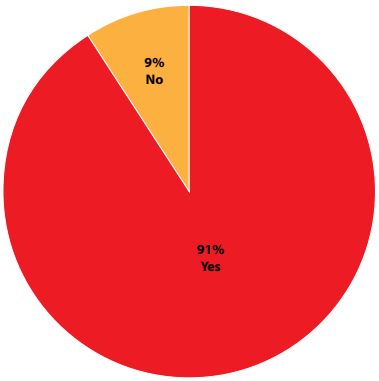
Question 6: The judiciary leadership responds effectively to inappropriate behavior related to diversity.



Selected comments:

- My impression is that the judiciary responds slowly — sometimes very slowly — with the result being that discipline is administered in a tardy fashion, and outsiders conclude there is little concern for the matter(s).
- The correct answer is sometimes. We need more education. We need frameworks to check ourselves.
- Because some have implicit biases, others do not believe certain conduct is wrong
- I have not personally seen or experienced inappropriate behavior, but I believe generally the leadership responds well.
- We tend to ignore [this] as if it doesn't apply or exist.

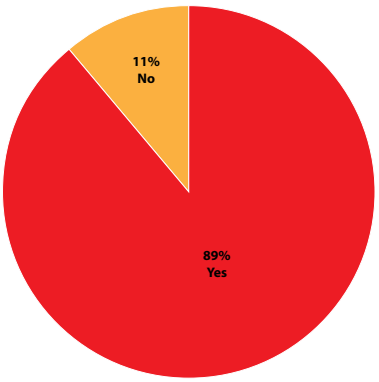
Question 7: Differences of people are valued in the judiciary.



Selected comments:

- I can think of a recently released opinion (The rehearing was denied.) in which the court deliberately misgendered a petitioner.
- If they seem to blend in. Diversity of thought — not so much.
- The courts as a whole are very traditional and very slow to change.

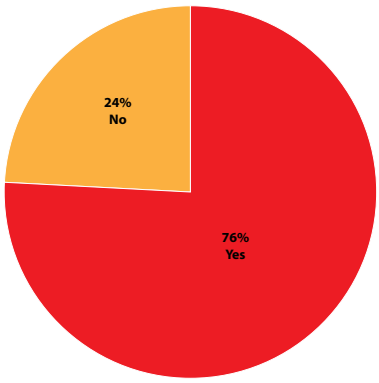
Question 8: Different cultures are welcomed and respected in the judiciary.



Selected comments:

- I think we are one generation away from this. I still hear comments that concern me.
- If you are not Catholic or Baptist, you are not respected.
- Equal rights under the law is not just a quaint notion!

Question 9: The judiciary actively recruits people from different cultures and backgrounds.



Selected comments:

- In Missouri, our appellate courts and metropolitan circuit courts are using the nonpartisan merit selection process. This helps a wide diversity of applicants for Missouri judicial positions.
- But it is tough to get them to apply in my state even though the governor, who has the appointment authority, is supportive of greater diversity on the bench. Many of the best from diverse backgrounds are reluctant to give up lucrative salaries in private practice. Almost all of our minority/diverse judges end up coming from public service positions.
- I think courts typically don't do much recruiting at all, especially with respect to law clerks. They apply whether recruited or not.
- I recruit the best person. Period.

Finally, NFJE asked the judges what NFJE could do to actively promote diversity. This question generated lots of great ideas, some of which are already underway:

- Ask frequent attendees to invite a diverse judge.
- Have a white judge talk about why diversity matters to him or her.
- Recruit faculty participation from historically black colleges and universities' law schools.
- Continue to ensure our organization and our symposium, along with the symposium's speakers and panels, are led by and made up of visibly diverse people. Create an annual Diversity Lecture and present it during lunch on Saturday. Initiate a Diversity Forum. Establish an online clearinghouse for comments and complaints about diversity in the judiciary.
- Urge state bars and the decision-makers who appoint judges to encourage a diverse array of people to seek careers in the judiciary.
- Invite former dean of Yale Law School Anthony Kronman to discuss his book, "The Assault on American Excellence," and diversity at the conference.
- Become involved in activities like Washington State's Judicial Institute that actively recruit a diverse population to become interested.

> ***If you are reading this article, please consider yourself tapped to purposefully engage with members of the judiciary to attend the symposium, especially those who have lived in and serve in the underserved communities.***

Calling on you for action

NFJE wishes that every appellate judge would attend its symposium; network with colleagues; and engage in interactive, thought-provoking programming. If you are reading this article, please consider yourself tapped to purposefully engage with members of the judiciary to attend the symposium, especially those who have lived in and serve in the underserved communities. Although some of the ways in which diversity can be promoted are involved and will take time, other ways can begin immediately:

- Pick up the phone and call a diverse judge in your state and invite them to attend.
- Give the name of a diverse appellate judge in your state to NFJE leaders so they can make the invitation and facilitate participation.

It is only through the collective, concerted work of many that we can improve diverse participation at the symposium and in the judiciary generally, effect positive change, and ultimately fulfill not only the missions of NFJE and the IADC Foundation but also a larger mission of humanity to adhere to and apply the rule of law in the way we all expect: with due understanding and respect for the differences inherent in all people and in equal application of the rule of law to all. If we can look out in the audience in the years to come and see those differences with our own eyes, we'll have made progress.

Edward S. Sledge IV is a partner at Bradley LLP, where his national practice focuses on complex business and commercial litigation in courts across the country. He also routinely represents businesses in bet-the-company litigation including high-exposure personal injury and wrongful death matters. Sledge has tried cases in multiple state and federal courts and in arbitration and is a frequent lecturer and author on civil litigation and trial issues. He also is a Fellow of the American Bar Foundation and has been listed among "The Best Lawyers in America," Mid-South Super Lawyers and the top 50 Alabama Super Lawyers, among other honors.

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Image by Tumisu via Pixabay

Feature Articles

Artificial Intelligence Breakthroughs in Health Care: How should the civil justice system respond?

By: Phil Goldberg and Tatiana Rice


The use of artificial intelligence (AI) and sophisticated algorithms will revolutionize health care throughout the next couple of decades. These technologies can shorten the pathway to new medicines, help detect diseases earlier, and increase the accuracy of diagnoses and treatments. They also hold the keys to personalized medicine, which will allow pharmaceutical and medical device manufacturers to give physicians the tools to treat each individual patient in specialized ways that can achieve the best therapeutic benefits with the fewest side effects.

Already, pharmaceutical companies are using AI and other sophisticated technologies to make the research and development process more effective and less costly. Throughout the past decade, companies have spent $1.3 billion on average to bring a new drug to market, with the U.S. Food & Drug Administration (FDA) approving only 9% of new drug applications. AI can help process big data sets, fine-tune drug designs, and identify subtle patterns in diagnostic images to help researchers develop effective drugs and gain approvals.

On the medical device front, manufacturers are working on sophisticated devices that can fundamentally change the care people receive. For example, some devices can disconnect care from the physician's office and provide targeted treatment at home or on the go. Take chronic conditions, such as diabetes, for example. Devices can monitor blood glucose levels by analyzing data generated from glucose sensors and provide insulin in doses and at times that meet the patient's real-time needs, rather than relying on a pre-determined shot regimen. Sophisticated devices also can identify infections or tumors earlier, leading to faster treatment and better recovery.

Undoubtedly though, there also will be drug and device failures, which can lead to litigation. How courts establish the rights and responsibilities of patients, manufacturers and physicians with regard to these new technologies will have a direct impact on the future of these innovative health care options.

What is AI, and how is it regulated?

AI in medicines and medical devices means the use of machine-learning algorithms and software to mimic human analysis and understanding. Sometimes people use AI to refer to highly sophisticated but locked algorithms that provide the same result each time the same input is provided. True AI, though, refers to continuous learning or unlocked algorithms that continually take in data and adjust their outputs based on a defined learning process. This also is known as machine learning. Both types of AI are discussed in this article.

Currently, the FDA regulates locked algorithms as software as a medical device. Locked algorithms used for diagnostic purposes must demonstrate sensitivity and specificity based on their purported outputs, in addition to meeting general repeatability, reliability and performance criteria. The FDA has not yet approved machine learning, which is trickier to regulate because, while the process is defined, the outcomes change. Ordinarily, an entity would

USES OF AI IN HEALTH CARE

Pharmaceutical research and development: Some enterprises are using AI to calculate a drug's chance of success based on the FDA's criteria for approval. Some enterprises also are using AI to make development decisions regarding a product's form and cost.

Device delivery of medicine: Medical device manufacturers are utilizing AI to continually monitor a patient's health data to deliver automated messages and give recommend doses of medicine, such as with diabetes and cholesterol.

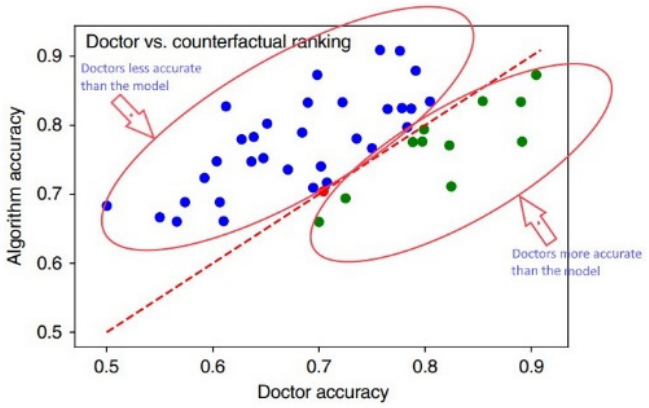
Medical imaging: AI also is being used by health care entities to better identify medical conditions, such as tumors, and facilitate proper wound care. The AI is trained on large data sets of medical imaging and is able to spot subtle patterns missed by the human eye.

need to submit a device modification application when it alters outcomes. With machine learning, the modification takes places as the device or software is being used.

In April 2019, the FDA published a discussion paper "Proposed Regulatory Framework for Modification to Artificial Intelligence/Machine Learning-Based Software as a Medical Device" that describes the potential approach the FDA may take. The key proposals included:

- Creation of a risk-categorization framework based upon the significance of the information provided by the AI to the health care decision and the state of the health care situation on a scale from non-serious to critical.
- Identification of different types of AI-based modifications — performance, inputs and intended use — in order to decide whether a modification warrants FDA review.
- Establishment of practices and evaluation components for pre-market review to demonstrate the safety and effectiveness of the product. Manufacturers would be able to submit a plan during pre-market review for data management as well as any retraining and model update strategies and an algorithm change protocol for implementing those changes in a controlled manner.

In January 2021, after receiving stakeholder feedback, the FDA refined its guidance. It intends to follow an action plan that includes, among other things, developing guidance for an algorithm change protocol, creating consensus standards for machine learning development and supporting efforts to evaluate algorithmic bias.



Reasonable practice: When considering the reasonableness of AI's application to health care, it is important to remember that well-trained AI models are 72% more accurate than human doctors. *Jonathan G. Richens, Ciarán M. Lee, and Saurabh Johri, "Improving the accuracy of medical diagnosis with causal machine learning," Nature Communications 11, article no. 3923, 2020.*

Liability issues for AI

Given the transformative nature of this new technology, courts will be asked to assess the rights and responsibilities of manufacturers, physicians, users of AI in health care and others. There are going to be failures, just as there are failure rates in drugs and devices today. For example, a device using AI could give an incorrect dosage of insulin or fail to diagnose a tumor. However, these mistakes will occur more often when AI is not used. Further, there is a concern in many settings that, depending on its programming, AI could make decisions that are beneficial to most but not beneficial or even risky for a few. This is a topic that warrants a different article analysis by itself.[1]

Courts assessing allegations of wrongful harm in such cases will first have to decide which body of law to apply: traditional negligence, products liability or something else. We can anticipate plaintiffs will be seeking to apply near absolute liability against the product manufacturers under the theory that the program should have accounted for any given situation. But, the answer may not be that simple. For example, how do you assess whether a decision by AI that otherwise would have been made by a person is reasonable and therefore not negligent? In a products liability case, how would the risk-utility test apply if the product represents a substantial improvement in overall care, even if it did not work in an individual case? How do we guard against hindsight bias and deep-pocket jurisprudence, where liability is not based on fault but the party most able to pay, both of which undermine the ability of the courts to achieve justice?

When evaluating and judging AI, the core liability concepts that are prevalent today should remain intact:

1. **The regulatory structure:** The new technologies will be regulated by the FDA under the drug approval process or the medical device approval or clearance processes. It is critical that courts assess the proper role of the FDA's regulatory processes and determinations in establishing liability. In some cases, FDA approval will preempt liability, as it does today. For others, it is critical that judges and juries make liability decisions with a full understanding of how the manufacturers worked with the FDA to bring the product to market. Specifically, many devices may be cleared through the FDA's 510K process, and that information should be

admissible in court.

2. **Standards of care:** Courts need to ensure that each party is held to its appropriate standards of care, whether under negligence or strict liability, and not subject to liability merely because a product failed in a particular instance. For example, a physician may have decided to use an AI drug or device in an improper circumstance, a programmer may not have accounted for a foreseeable risk, or the user may not have updated the software on a device in a timely fashion. Liability must still follow traditional tort law principles.
3. **Learned intermediary doctrine:** The learned intermediary doctrine allows a manufacturer to fulfill its duty to warn when it provides the necessary information to the physician who prescribes use of the product. For AI, the same principles should apply. In the insulin example, the physician will be responsible for assessing the technology and deciding if it is appropriate for the patient but not for the exact dosages and the time of day the medication will be administered.
4. **Cybersecurity:** Many AI devices will use the internet to convey information to physicians and manufacturers and to receive software updates. As a result, there will be cybersecurity risks. The number of cyberattacks has been increasing substantially,[2] and health care organizations have been major targets because of their financial resources and access to sensitive information.[3] Courts should enforce proper standards of care, such as ensuring manufacturers use reasonable security measures and only allowing recoveries for those who can demonstrate actual harm from the breach. Novel theories that try to turn every potential data breach into a class action should be avoided.

AI has and will continue to be transformative in the health care industry, but it is not without risk. Courts and legislatures looking to assess and manage these risks should be guided by traditional liability principles. Each party should be accountable for defined risks and subject to proper standards of care. Patients wrongfully injured should be fairly compensated, as with today, and courts will have to be vigilant to make sure that improper or excessive liability does not discourage the development of these lifesaving and life-enhancing technologies.

Phil Goldberg is the office managing partner of Shook, Hardy & Bacon LLP in Washington, D.C., and co-chair of its Public Policy Practice Group. With more than 25 years of experience with high-stakes and high-profile liability-related public policy, public affairs and public relations issues, he has become a leading voice for common sense liability policies. His practice involves counseling businesses and their trade associations on some of the most cutting edge liability issues of the day.

Tatiana Rice is an associate at Shook, Hardy & Bacon LLP in Washington, D.C. She is a member of Shook's biometric privacy practice and Shook's privacy and data security group, where she helps clients navigate the evolving legal landscape of privacy and data security and solves complex issues related to compliance and defense of technological and innovative products. As a Certified Information Privacy Professional/Europe through the International Association of Privacy Professionals, she directs client biometric privacy compliance programs and assists enterprises in privacy and data-related litigation and investigations.

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[1] In a study published in October 2019, scientists found that an algorithm widely used in U.S. hospitals to allocate health care to patients was less likely to refer African-American people than Caucasian people who were equally sick to treatment programs.

[2] In April, the Federal Bureau of Investigation (FBI) reported a 400% increase in cybersecurity complaints compared with before the pandemic. Maggie Miller, "FBI sees spike in cyber crime during coronavirus pandemic," The Hill, April 16, 2020, https://thehill.com/policy/cybersecurity/493198-fbi-sees-spike-in-cyber-crime-reports-during-coronavirus-pandemic.

[3] Luke Barr, "'Alarming' rate of cyberattacks aimed at major corporations, governments and critical infrastructure amid COVID-19: Report," ABC News, August 4, 2020, https://abcnews.go.com/Politics/alarming-rate-cyberattacks-aimed-major-corporations-governments-critical/story?id=72164931.

Featured Articles

The Nuts and Bolts of Cybersecurity Litigation

By Sean C. Griffin

Judge Nafjee put on her reading glasses and looked at the complaint. "If I understand what I'm reading, Acme Hospital suffered a data breach and is now being sued."

E. Larry King stood to address the court on behalf of Acme. "That's correct, Your Honor."

"And the hackers held Acme's data for ransom."

"Your Honor, Acme Hospital was hit with a ransomware attack. The hackers installed a program that encrypted my client's data."

"What does that mean?"

"The hackers managed to install a malicious software program, called malware, onto Acme's computer servers. This malware translated all of Acme's computerized records — its patients' medical records, its administrative records, its contracts, everything — into a code that its computers could not read. This rendered Acme unable to function. Then the hackers demanded a payment to decode Acme's data and restore functionality."

"And the patients whose data was translated are suing Acme?"

"That's correct, Your Honor."

"Mr. King, I have not seen your initial disclosures yet, but will insurance be an issue in this case?"

King took a deep breath.

Many data-breach cases concern not the breach itself but insurance coverage for the breach. After the Fourth Circuit decided *Travelers Indemnity Co. v. Portal Healthcare Solutions, LLC*, 35 F. Supp. 3d 765 (E.D. Va. 2014), *aff'd*, 644 F. App'x 245 (4th Cir. 2016), many observers believed that insurance companies would exclude damages from data breaches from their commercial general liability (CGL) policies and begin covering such damages only through policies or endorsements specifically written to address cybersecurity.

However, coverage uncertainty and questions regarding pricing led many companies to offer cybersecurity insurance in other policies, such as business owner's insurance. These policies often left openings as to whether a particular data event was covered, and often, parties filled these openings with litigation. For example, an insurance company denied coverage for a ransomware attack on the grounds that it did not inflict "direct physical loss" upon the insured, but the U.S. District Court for the District of Maryland disagreed, awarding the plaintiff summary judgment against the insurer in *Nat'l Ink & Stitch, LLC v. State Auto Prop. & Cas. Ins. Co.*, 435 F. Supp. 3d 679 (D. Md. 2020). In California, Vizio recently sued two of its insurance companies under its CGL policy, alleging that its insurers denied coverage for its data misuse claims in bad faith.

Thus, the *Travelers* decision has affected the cybersecurity insurance industry but not in the manner many observers expected. Rather than increasing cyber insurance policy sales, it has encouraged parties to insert cybersecurity insurance into other policies. The resulting lack of clarity often ends up before a judge.

Testing the foundation

"We have insurance coverage, Your Honor, and we have disclosed that coverage to Plaintiff's counsel."

Judge Nafjee set down the complaint and picked up another filing. "I see you have filed a motion to dismiss for lack of subject matter jurisdiction. If I may ask you, Mr. King, what does a case involving credit reporting have to do with a ransomware attack?"

In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Supreme Court addressed the issue of standing in the context of information security. There, a plaintiff alleged that the defendant had gathered and disseminated inaccurate information about him, and the Supreme Court held that he lacked subject matter jurisdiction because he could not allege an injury sufficient to support Article III jurisdiction.

Because many data privacy statutes protect rights that can be considered purely procedural, many observers thought Spokeo heralded a new age in Article III standing, particularly with regard to data-breach lawsuits. These observers predicted that plaintiffs alleging a data-breach

without any consequent concrete harm could not allege an injury-in-fact sufficiently concrete to satisfy Article III.

These predictions met with mixed success. Sometimes the defense worked, such as in *I Tan Tsao v. Captiva MVP Restaurant Partners, LLC*, No. 18-14959 (11th Cir. 2021), and *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017). Other times, however, courts held that an unauthorized disclosure of personal information, without more, inflicted an injury sufficiently concrete to establish Article III standing because of the increased risk of identity theft or other harm, such as in *Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017). Indeed, on remand from the Supreme Court, the Ninth Circuit held that the plaintiff in *Spokeo* had satisfied the injury-in-fact prong because the "interests protected by FCRA's procedural requirements are 'real,' rather than purely legal creations," in *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1114 (9th Cir. 2017). The Supreme Court denied certiorari on this decision.

Perhaps recognizing *Spokeo's* limits, some defendants are recasting their standing arguments as proximate causation arguments. For example, the defendants in the Capital One data breach moved to dismiss the plaintiffs' data-breach claims because of a failure to allege proximate causation, without even mentioning *Spokeo*. If defendants were trying to sidestep *Spokeo*, it didn't work; the court cited standing cases in denying the defendants' motion in *In Re: Capital One Customer Data Security Breach Litigation*, case number 1:19-md-02915 (E.D. Va. September 18, 2020).

In short, *Spokeo's* impact on data security litigation remains uncertain. Standing law with respect to data-breach cases will probably remain unsettled until the Supreme Court revisits the issue.

The people's defense

Judge Nafjee said: "I'll take your motion under advisement, Mr. King. Meanwhile, because this will be a bench trial, I'd like counsel to explain for me the issues I can expect the trial to address."

King said, "Your Honor, Acme admits that it suffered a ransomware attack. It appears as though the malware was downloaded by an employee who clicked on a phishing link."

"A what?"

"A phishing scheme is a scam whereby a malicious hacker basically attempts to trick a person with access to the targeted computer system into downloading malware. This is often accomplished by sending a company's employees emails that look legitimate and ask them to click a link to download something.

"In this case, it was not an employee of Acme," King continued. "Someone working for one of Acme's vendors received an email that purported to be from his immediate supervisor that instructed him to click a link to download Acme's newest COVID-19 protocols. When he clicked the link, he inadvertently downloaded the malware. The malware eventually made its way to Acme's servers."

"Wow," Judge Nafjee said. "That sounds like a big screwup. Why didn't the vendor employee know any better?"

Employee training and awareness play a big role in data security generally and in data security lawsuits specifically. Besides technological sophistication, employees need training about recognizing phishing schemes and other scams. Recently, Interpol issued a notice advising that cybercriminals are deploying COVID-19 phishing emails to trick victims into providing their personal data, such as user credentials and passwords, or downloading malicious content. Typically, these phishing schemes will involve:

- False government orders and financial support initiatives.
- Fake payment requests and money reimbursements.
- Offers of a fake COVID-19 vaccine or medical supplies.
- Malicious COVID-19 tracking apps for mobile phones.
- Investments and stock offers.
- COVID-19-related charity and donation requests.

If a company suffers a successful cyberattack, that company could find itself in the crosshairs of a lawsuit alleging, among other things, that the company was negligent in safeguarding the plaintiffs' data. In such a case, a company will have to prove its reasonableness both technologically and practically. That is, the defendant will have to show that its information technology was reasonably fortified against such an attack and that it properly trained its employees to recognize and rebut a cyberattack.

After the trial, Judge Nafjee and Mr. King ran into each other at a conference. After the initial pleasantries, talk turned to the Acme trial.

"That was a tough case you had, Mr. King."

"Yes, it was."

"I was thinking that hard decisions make bad law."

"Well, the appeals court agreed with you, so I guess you made good law."

"You made good arguments. And as I said in the opinion, your witnesses were impressive. You did an excellent job of walking me through the technical and logistical issues."

Judge Nafjee excused herself. King looked around the room, saw Acme's in-house counsel, and figured that this was a good time to get his client to buy him a drink or two.

Sean C. Griffin litigates complicated contract disputes, many of which involve allegations of fraud. He represents various organizations — including government contractors, transportation companies and law firms — in Washington, D.C.; Maryland; Virginia; and around the country. Additionally, as an International Association of Privacy Professionals Certified Information Privacy Professional, he helps clients establish and maintain data security, respond to data breaches, and litigate privacy cases. Applying his experience as a former Department of Justice trial attorney, Griffin also provides counsel regarding compliance issues, including government contract compliance, and he assists in responding to state and federal subpoenas.