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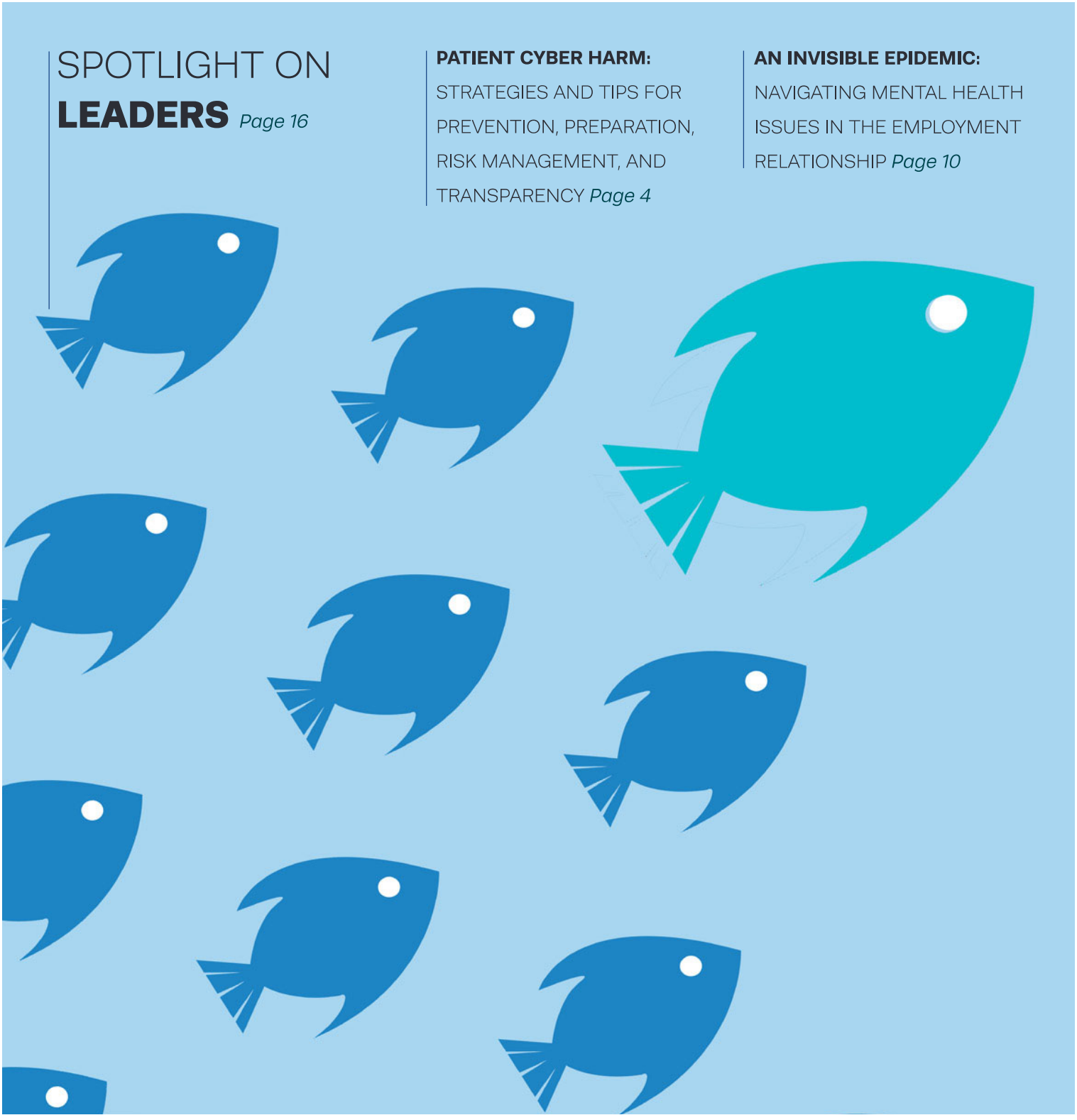

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Volunteerism As a Path to Leadership

Thomas N. Shorter
President, FY23
thomas.shorter@huschblackwell.com

What an incredible Annual Meeting in Chicago! For all of you who were able to attend, thank you for coming! It had been such a long time since we were able to gather, and it was so refreshing to see and talk with one another face to face. It is my hope that by following the public health safety guidelines diligently, we will continue to be able to safely have in-person programs and move toward pre-pandemic attendance numbers.

Attending the Annual Meeting in Chicago offered members the benefit of being part of a collective movement, where discussions on change and strategic direction occurred. To attend, listen, and become involved offered opportunities for the exchange of those ideas with others, which helps us stay current and up to date on health care industry trends. Listening to the multitude of speakers enhanced our overall knowledge. Best of all, attending the Annual Meeting in Chicago was fun, and the networking opportunities were priceless!

Attending AHLA in-person conferences is also an exceptional opportunity to enjoy an impromptu conversation with one of our over 115 AHLA Fellows. This unique group of talented and distinguished individuals are our ambassadors and serve as role models and mentors in the health care law industry. The AHLA Fellow distinction comes with significant credentials, which include:

- more than 15 years of sustained AHLA membership;
- substantial practice in health law or in a health-related profession for more than 15 years;
- considered a top health care professional in AHLA; and
- continuous service to AHLA in areas such as governance, networking, Board of Directors leadership, program planning leadership, speaking, writing, etc.

Through a spontaneous exchange with an AHLA Fellow, you might learn how they developed their career and volunteered to help lead AHLA. Each AHLA Fellow had a unique avenue in finding their AHLA leadership path. This applies equally to all members of AHLA. Each of us will gravitate to an area or two where we really enjoy dedicating our time. For some, it is authoring an article or a white paper, while others enjoy speaking on a presentation, podcast, or webinar. Still others shine while participating on a Practice Group or Program Planning Committee. The opportunities to volunteer with AHLA are boundless.

Volunteering among AHLA peers allows us to identify and enhance our strengths. By raising our hand, figuratively of course, to write an article, plan a webinar, speak at a conference, or become a leader, we are making it known that we are interested in making a difference in AHLA and furthering our careers.

The volunteer opportunities with AHLA are innumerable, as are the benefits. Each act of volunteering can be a step toward a new leadership role. Regardless of the long-term goal, finding your "sweet spot" is important. Be intentional about what type of leader you want to be, and find an area that is engaging and fulfilling for you.

The Annual Meeting is a compelling example of the collaborative collegiality our organization is based on, and experiencing it is inspiring. It is up to each of us to identify what we hope to gain. By making the decision to volunteer, you step forward in your career, gain the opportunity to lead, and develop a network of friends and colleagues.

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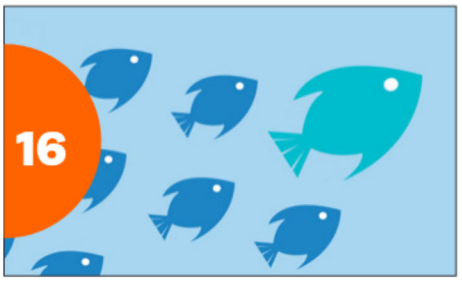

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HEALTH LAW CONNECTIONS
1099 Fourteenth Street NW,
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Washington, DC 20005
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Feature

Patient Cyber Harm: Strategies and Tips for Prevention, Preparation, Risk Management, and Transparency

Gerard Nussbaum, Zarach Associates LLC; **Elizabeth Hodge**, Akerman LLP; **Sean Sullivan**, Alston & Bird LLP; and **Scott Bennett**, Microchip Technology

In 2020, at the height of the COVID pandemic lockdown, Russian-affiliated cybercriminals planned to attack and bring down more than 400 U.S. hospitals. Thanks to action by U.S. authorities and security researchers, this plot was foiled.[1] While this particular attack failed, health care entities are routinely hit by cyberattacks, bringing down networks, applications, and communication systems. In general, health care delivery organizations (HDOs), which range in size from multi-hospital health systems to single physician practices, are not as well prepared as many other industries to prevent and respond to cyberattacks.[2]

Historically, much of the focus of cybersecurity in health care has been on preventing and responding to data breaches. That is still vitally important. However, as cybercriminals have shifted from stealing patient data to locking down HDOs' systems and data with ransomware, the risk has also shifted. Now, the risk is not just a potential breach of personal information, but patient harm; cyberattacks can and have resulted in physical injury or even the death of patients and staff members.

This article discusses how cyber events can put patients at risk and steps HDO boards and executives should take to minimize the impact of such events.

Cyberattacks Jeopardize HDOs' Ability to Care for Patients

A recent case in Alabama offers insights into the challenges of operating in the midst of a cyberattack outage.[3] In this situation, Springhill Medical Center suffered a cyberattack with a ransomware demand on July 9, 2019 that shut down its network and other systems.

[T]he standard is not perfection; rather, it is whether the board members conducted the appropriate level of due diligence to allow them to make an informed decision.

On July 16, 2019, a pregnant mother was admitted to the hospital, with the infant born the next day. Due to the cyberattack, fetal tracing, which shows when an unborn child may be in distress, was available only at the bedside; normally, fetal trace was displayed on large monitors at the nursing station to support rapid identification and intervention if needed. The electronic health record (EHR) also was not available, so the hospital was using paper charting. Tragically, the infant died. The mother filed a lawsuit against Springhill Medical Center alleging that her child's death was attributable to effects of the ransomware attack on the care provided by the hospital during her labor and delivery.

Also, according to the complaint, the hospital did not apprise the pregnant mother of the cyberattack at time of admission, which would have given her the opportunity to seek care elsewhere. Instead, the hospital stated publicly that it was providing the same high-quality care as normal. These types of stories raise several questions:

- How much do patients need to know about the impact of an ongoing cyberattack on the HDO's operations and its ability to provide care in order to provide informed consent for treatment?
- Does an HDO and its personnel commit malpractice by accepting a patient given their understanding of the impairment of the clinical systems and information flow?
- Can an HDO be held liable for misrepresenting, even unintentionally, its capability to care for patients?
- How much information do HDO staff need to exercise their professional judgement regarding the hospital's ability to provide appropriate levels of care?

Cyberattacks on HDOs Lead to Significant and Sustained Strain on Personnel[4]

Even with robust downtime procedures and a well-trained staff, the unavailability of electronic systems imposes a strain on the delivery of care. It can often take weeks before access to all critical systems is restored,

Cybersecurity has increasingly become a central compliance risk deserving of board level monitoring at companies across sectors.

and months before all systems are back in full operation. During this time, staff use unfamiliar procedures, extra effort must be made to assure clear and timely communications, higher staffing levels may be required to handle the additional workload, and other accommodations must be made. For example, when an HDO is forced to shift to paper charting, patient information is no longer available in real time to multiple personnel (as it would be in the EHR) and illegible handwriting can cause problems. These lingering effects of cyberattacks further burden staff, exacerbate staff burnout, and potentially degrade the ability to provide high quality care. This may lead to longer lengths of stay, poor treatment outcomes and higher complications, and ultimately, greater mortality.

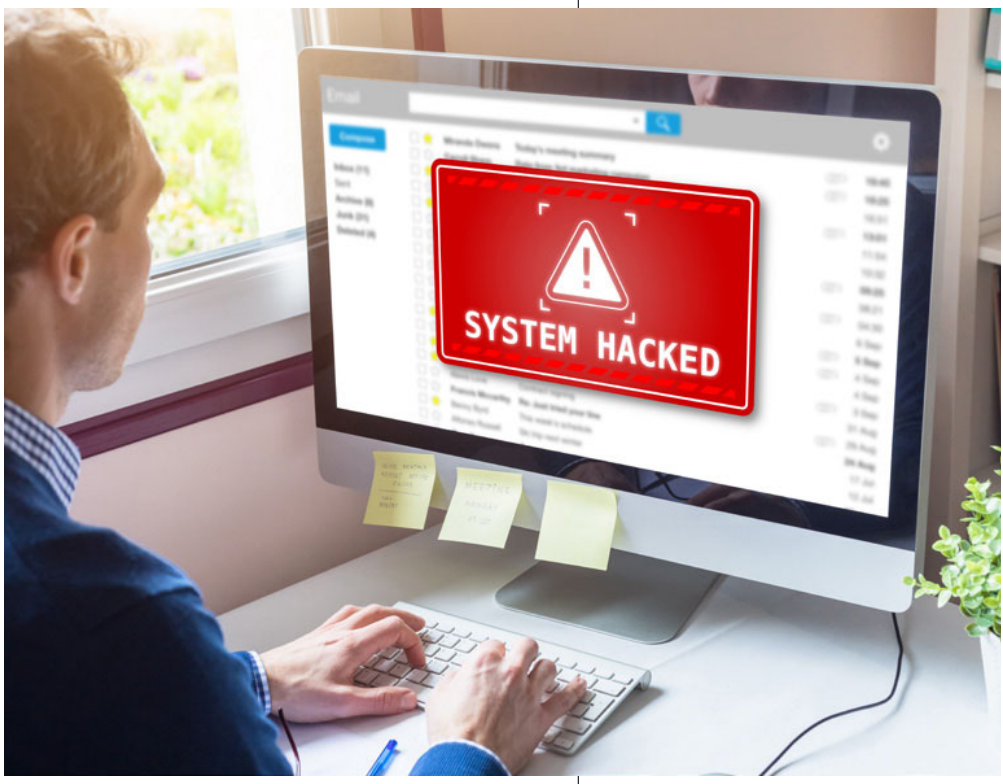
While cyberattacks affect an HDO's data, more importantly, they pose significant risks for harm to patients. Careful preparation and planning are essential to minimizing this danger.

A Culture of Cybersecurity Starts at the Top

According to one study, 23% of all health care data breaches are caused by technology issues, while 77% of breaches are caused by human error.[5] Focusing on the latest and greatest technology, like firewalls, spam filters, VPNs, and the newest encryption standards, will not necessarily prevent an employee from clicking on a malicious link, providing sensitive information to a cyber-criminal, or failing to recognize and report a data breach. For this reason, the most important defense to cyber-risks—more important than spending money on technology solutions—is cultivating a strong culture of cybersecurity within the organization.

An HDO's culture of cybersecurity starts at the top, which means the board of directors. On this point, it is helpful to understand the demarcation of responsibility between the organization's board of directors and its executive or management team. The board monitors and the executive team manages. Specifically, the board is responsible for:

- Approving corporate strategies;
- Selecting a chief executive officer (CEO);
- Overseeing the CEO and senior management, including the Chief Information Security Officer (CISO); and



- Setting the "tone at the top" for ethical conduct.[6]

In contrast, the CEO and executive team are responsible for:

- Developing and implementing corporate strategy; and
- Operating the organization's business under the board's oversight.[7]

The next sections discuss the specific obligations and best practices for HDO boards and executive teams when it comes to cybersecurity.

The Role of the Board

The board's responsibility to ensure the safety of the health care organization and its patients flows from its fiduciary duty to the company. That duty requires that board members act in good faith, exercising the care of an ordinarily prudent person under similar circumstances and in the best interest of the organization.[8] This duty applies to both the board's decision making and oversight functions. And the standard is not perfection;

[W]hen it comes to cyberattacks and technology failures, it is not if, but when.

Gerard M. Nussbaum BS, MS, JD, CPA, CMA, RCDD, CMMT, a Principal with Zarach Associates LLC, provides strategic guidance on the use and deployment of technology. From early-stage startups to large complex health systems and academic medical centers, health care entities turn to Gerard for proactive and concrete assistance. Gerard's guidance integrates multiple perspectives: Bridging Health, Technology and Law™. Gerard is a frequent speaker and author. Gerard may be contacted at: gerard@zarachassociates.com.

rather, it is whether the board members conducted the appropriate level of due diligence to allow them to make an informed decision. What is an appropriate level of diligence varies with the circumstances, though board members should have awareness of what is happening in the organization and the health care sector generally. For example, over the past couple of years, various federal agencies have issued alerts regarding the increasing number of ransomware attacks on health care providers. This publicity might mean that reasonably prudent board members should inquire of the CEO and management team what they are doing to protect the company and patients from this risk.

Increasingly, regulators, shareholders, and individuals affected by cybersecurity incidents are seeking to hold board members and executives responsible for compliance and cybersecurity matters. However, to date, lawsuits against board members for breaching their fiduciary duty with respect to the organization's cybersecurity preparedness have largely been unsuccessful. For example, in a derivative lawsuit brought in the Delaware chancery court against board members and executives of Marriott International, Inc. as a result of a publicized data breach, in ruling on a motion to dismiss, the judge stated, "Cybersecurity has increasingly become a central compliance risk deserving of board level monitoring at companies across sectors."[9] The judge then dismissed the derivative action, finding that the plaintiff did not show "that the directors completely failed to undertake their oversight responsibilities, turned a blind eye to known compliance violations, or consciously failed to remediate cybersecurity failures."[10]

However, when a judge and jury are presented with the right fact pattern, they may find that board members breached their fiduciary duty. In the meantime, regulators may have a more immediate impact on how board members view their responsibility for the organization's cybersecurity posture. Earlier this year the U.S. Securities and Exchange Commission (SEC) issued a proposed rule to "enhance and standardize disclosures regarding cybersecurity risk management, strategy, governance, and cybersecurity incident reporting by public companies."[11] Among other things, the proposed rule would require public companies to:

- Disclose, on the Form 10-K, management's role in implementing cybersecurity policies and procedures, and the board's oversight of cybersecurity risks; and
- Disclose, in proxy statements and annual reports, whether any board member has cybersecurity expertise.[12]

While most HDOs are not publicly traded, regulatory requirements such as these also affect the standard by which non-publicly traded HDOs may be judged. Even smaller HDOs need to pay attention to these duties, which may be exercised by the owners.

To effectively carry out their oversight role with respect to cybersecurity, the HDO's board members must understand that:

- Cybersecurity is a patient safety issue;
- HDOs are prime targets for malicious cyber actors;
- Cybersecurity should be addressed as an enterprise risk issue and not "just an IT issue"; and
- Cyber-risk cannot be eliminated, only mitigated.

To help board members become (and stay) educated about cybersecurity threats and risks to the organization, the board may want to consider:

- Requesting and receiving regular updates from the CISO or other knowledgeable C-suite executive regarding the organization's cybersecurity;
- Recruiting a board member (or members) with cybersecurity experience. The recent SEC proposed rule discussed above suggests an expectation by regulators and possibly investors that public companies have at least one board member with such expertise;
- Tasking a board committee with oversight of the organization's cybersecurity risk management; and
- Engaging outside resources to assist the board in acquiring cybersecurity knowledge and understanding the information that CISO and other C-suite executives present to the board.

The Role of the Executive Team

The executive team's role is to execute the board's vision for a strong cybersecurity culture within the HDO and to keep the board informed of the cybersecurity threats to the organization's operations, including patient safety, and the risk management strategies being implemented to manage that risk. Executives can do this by:

- Supporting enterprise risk management. It is important to recognize that a significant cyber event could affect not only access to the HDO's data, but also patient safety and the organization's financial health;

- Supporting business impact assessments that focus on impacts to data and patient safety when new technologies or new processes are implemented by the HDO; and
- Implementing the prevention and risk-mitigation strategies discussed below.

The HDO's cybersecurity lead should be someone with gravitas; other employees and leaders throughout the organization should look to that person as someone with authority, status, and independence, who will demand respect, but also be approachable and listen to concerns of others. Spearheaded by this cybersecurity lead, organizations should consider regular communications to employees highlighting technology-based risks to patient care and the importance of good cyber hygiene. Ultimately, every staff member should be empowered as a proactive defender of patients, their data, and the technology needed to provide their care.

Investing in People, Technology, and Preparation

HDOs need to adequately staff and compensate the information security and risk management functions; invest in technology to protect the organization's data, devices, and patients; invest in training staff on cybersecurity best practices; and invest in table-top and other pressure-testing/training exercises.

Contingency and Disaster Recovery Plans

Industry experts have made it clear that when it comes to cyberattacks and technology failures, *it is not if, but when.* Every health care organization that relies on technology should consider how it will, at a minimum, provide care to patients when such technology is not available, inform the public of cyberattacks, and respond to ransomware events.

How will a hospital document patient care when its EHR system is down? What about connecting rural patients with specialists if the telehealth platform is unavailable? Contingency planning should include *ensuring clinical staff can seamlessly shift to paper records,* is trained on how to chart by hand, and can re-integrate paper records into the electronic clinical record once the system is available again (which may require coordination with technology vendors). Every IT system handling patient information should be backed up, and those backups should be stored in secure, off-site locations and tested regularly. Similarly, when a technology used for patient care is unavailable, there should be a backup plan and downtime procedures to follow until technology is restored. This may mean connecting patients and providers using telephone or an alternative secure technology, or if automated alerts are unavailable, then staff should know how to monitor data feeds or devices manually and more frequently. And because cyber issues are unpredictable and even good downtime procedures will put considerable strain on a health care organization, larger providers should be prepared to operate under a contingency mode for several weeks if necessary.

Ransomware is a threat that providers need to be prepared for. Questions to consider before a ransomware event include whether data can be segmented to allow for small scale quarantines, when to contact law enforcement for assistance, what is the public relations plan, and who will be involved in key decisions during such an event. The most difficult question is often whether to pay a ransom, which may not be answerable without specific details, including scope and severity of the attack and the amount of the requested ransom. But if a health system has given these issues some thought—preparing IT systems, training personnel, developing decision trees for leaders, and establishing priorities in advance—then some of these difficult questions may be at least a little easier to address in the midst of a cyberattack.

Finally, providers should not rest after developing contingency plans accounting for downtime procedures, public relations, and ransomware responses. Clinical and administrative staff and leadership should train on these procedures, exercise them, and constantly refine them.

Planning for Diversion

One issue to consider during contingency planning is the need to divert patients to other HDOs because of a cyberattack. A tragic situation from Germany illustrates this. On September 9, 2020, a hospital in Germany was the victim of a cyberattack with ransomware demands. A flaw in the hospital's Citrix systems, which had been generally known since January 2020, was exploited by the hackers. The hospital determined that the cyberattack had impaired its ability to treat patients and went to diversion status. As a result, on September 11, 2020, they diverted a 78-year-old patient with a ruptured aorta to another hospital. Unfortunately, the patient died in transit. German authorities have charged the hackers with involuntary manslaughter/negligent homicide.[13]

Questions that should be considered in planning for diversion situations like this include:

- Who should participate in making the diversion decision?

Elizabeth (Betsy) Hodge is a partner in Akerman LLP's health care practice group and concentrates her practice on compliance and regulatory issues affecting health care providers, payers, and employer-sponsored health plans. Betsy has significant experience with HIPAA and the HITECH Act and assists covered entities and business associates in complying with these laws through the development of policies and procedures, workforce training, analysis of data incidents and notification of breaches, and assisting with government audits and investigations. Betsy also advises clients regarding compliance with a range of other federal and state privacy and data security laws and associated transactional issues. In addition, she counsels clients on state and federal health care regulatory issues.

During a cyberattack is the wrong time to develop a public relations strategy.

Sean Sullivan is a partner with Alston & Bird LLP's Health Care Group. Sean assists health care providers and business associates, including health care technology companies, in avoiding liability by ensuring regulatory compliance in operations; advising on business forms and transaction structures; investigating, disclosing, and resolving potential noncompliance; defending government investigations; and providing regulatory support to litigation and transactions as necessary. He also regularly advises private equity and other investors on the regulatory risks and structuring considerations associated with investing in the health care industry.

- What guidelines should HDOs adopt in advance to guide the diversion decision?
- Is there a need to triage patients before diversion, even when operations are impaired?

Evaluating Risk and Notifying Patients and Health Care Providers

HDOs should develop a framework to evaluate when patients' safety may be at risk due to a cyber incident, including when and how patients and the organization's health care providers will be notified of that risk. The framework should allow the board and the executive team to consider the likelihood and severity of harm to patients from a particular event against the potential reputational harm to the organization, possible unnecessary anxiety for patients, and costs to the health care organization from foregoing procedures, going on diversion, and the inability of downtime procedures to fully capture and bill for all procedures that were performed when information systems and medical devices were down.

In addition, HDOs should develop policies to address when and how patients will be notified of potential risks to their health and safety due to a cyberattack. Related to this, the board and leadership should consider:

- Who will approve the policy regarding providing notice to patients—is this a policy that should be approved by the board;
- Who should be involved in approving notice to patients;
- Who will actually communicate to the patients the potential risks to their health and safety due to the cyberattack; and
- What procedure is in place to document that the physician or other provider notified the patient of the risks created by the cyberattack.

Public Relations

During a cyberattack is the wrong time to develop a public relations strategy. While decision making should be fluid, providers should know what factors need to be considered and who will make decisions. Weighing potential patient safety risks and transparency against reputational risks and financial needs can be difficult, so HDOs should identify the relevant factors and establish decision-making procedures ahead of time.

A key element in handling an outage is clearly communicating with employees and staff, patients, the news media, law enforcement, and government officials. The HDO needs to speak with one voice to communicate in a clear and consistent manner as to the extent of the problem, how the HDO is addressing the situation, and the ability to continue to render quality patient care. This may be difficult in an evolving situation, particularly in this age of social media.

Providing regular updates to the press, even if there is minimal news to share, may be helpful to control the narrative. The HDO should avoid overcommitting as to its ability to render quality patient care. Every reporter seeks to humanize complex topics through patient stories, and patients, families, and the HDO's employees will share their own perspectives through social media. Responding to every story is likely impossible, risks creating patient privacy violations, and distracts from the main narrative. Getting into a war with the press is usually ill-advised.[14] Statements made during the fog of battle may later be used against the HDO in medical malpractice and negligence lawsuits.

Contract Terms

A fulsome cyber-risk mitigation program should include incorporating appropriate protections into agreements with vendors. Providers and their counsel should *never overlook risk-shifting provisions*, insisting on indemnification, limitations of liability, and minimum insurance requirements to ensure proper coverage for cyber events. Any health IT contract

*AHLA would like to thank the leaders of the **Health Information and Technology Practice Group** for contributing this feature article: **Kathleen Kenney**, Polsinelli PC (Chair); **Heather Deixler**, Latham & Watkins LLP (Vice Chair—Education); **M. Leeann Habte**, Best Best & Krieger LLP (Vice Chair—Education); **Elizabeth Hodge**, Akerman LLP (Vice Chair—Education); **Valerie Montague**, Nixon Peabody LLP (Vice Chair—Education); and **Adam Greene**, Davis Wright Tremaine LLP (Vice Chair—Member Engagement).*

should also include clear, understandable, and realistic performance standards, implementation timelines, and periodic reporting requirements.

Agreements should also account for downtime, with representations and warranties around uptime minimums, specifications on response time for technical support, ramifications and levers for minor noncompliance, and clear provisions around when downtime becomes a material breach of the agreement—regardless of force majeure events.

Insurance

All providers should consider *cyber insurance as a complement to existing coverage.* Cyber insurance may help pay for costs associated with a cyberattack such as ransom payments, lost revenue, and breach notification.

HDOs should not overlook other types of insurance, such as professional liability, directors and officers, and commercial general liability. It is critical for HDOs to make sure they have adequate insurance coverage for all potential risks from a cyberattack, including property damage, personal injury, and death.

Outside Consultants

Every HDO needs to recognize the limits of its expertise. Outside experts can help with IT security, dark web monitoring, media relations, incident response (both on the clinical and technology sides), tabletop exercises, technology procurement, ransomware negotiation, and of course, legal obligations. HDOs and their counsel should *develop these relationships before a cyber incident occurs*. HDOs that bring in the right expertise to evaluate weaknesses, understand what can go wrong, develop contingency plans, and exercise and reevaluate those plans, will not only be less likely to experience a significant cyber event, but will have a full roster of experts to help them when they do. Smaller HDOs may need to leverage outside experts to a greater extent as they do not have the same capabilities as larger HDOs: smaller size is not an excuse for failing to anticipate, prepare for, and appropriately respond to a cyberattack.

Providers and their counsel should never overlook risk-shifting provisions . . . .

Conclusion

While the outcome of the *Springhill Medical Center* litigation is unknown at this time, the case is a reminder to HDOs of the need to approach cybersecurity from an enterprise risk management perspective to understand *all* of the ways in which cyberattacks can harm the organization, and their patients and employees, including personal injury and even death. HDOs that are aware of these risks can adopt appropriate prevention and risk-mitigation strategies to protect patients, personnel, and the organization at large.

Scott Bennett is a Senior Corporate Counsel—Data Privacy for Microchip Technology in Phoenix, Arizona.

1 Robert McMillan, Kevin Poulsen, and Dustin Volz, *Leak Reveals Secret World of Pro-Russia Hacking Gang*, Wall St. J., Mar. 29, 2022.

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3 This matter is currently under litigation. We are using this particular incident as an example. We are not endorsing any specific outcomes to the litigation. Information in this section is drawn from the case filings *Kidd v. Springhill Med. Ctr.*, Civ. Action No. 02-CV-2020-900171 (Circuit Court of Mobile County, Ala.), and news reports, Kevin Poulsen, Robert McMillan, and Melanie Evans, *A Hospital Hit by Hackers, a Baby in Distress: The Case of the First Alleged Ransomware Death,* Wall St. J., Sept. 30, 2021, https://www.wsj.com/articles/ransomware-hackers-hospital-first-alleged-death-11633008116?st=704bxpzzldgdmnx&reflink=desktopwebshare_permalink.

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12 *Id.* at 16622-16623.

13 *Hacker-Angriff: Ermittlungen wegen fahrlässiger Tötung*, Sueddeutsche Zeitung, Sept. 18, 2020, https://www.sueddeutsche.de/gesundheit/krankenhaeuser-duesseldorf-hacker-angriff-ermittlungen-wegen-fahrlaessiger-toetung-dpa.urn-newsml-dpa-com-20090101-200917-99-598587; *German hospital hacked, patient taken to another city dies,* Assoc. Press, Sept. 17, 2020, https://apnews.com/article/technology-hacking-europe-cf8f8eee1adcec69bcc864f2c4308c94.

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Feature

An Invisible Epidemic: Navigating Mental Health Issues in the Employment Relationship

Kathleen D. Parker and **Erinn L. Rigney,** K&L Gates LLP

The COVID-19 pandemic has caused a sharp increase in mental health issues, including depression, stress, anxiety, obsessive-compulsive disorder, alcoholism, and substance abuse. Although the world is learning to live with the physical effects of COVID-19, many people continue to grapple with the mental health conditions the pandemic has triggered or exacerbated. For health care workers, many of whom have been on the COVID-19 frontlines since little was known about the virus, personal protective equipment was scarce, and temporary morgues were required, COVID-19 is or will be a key contributor to their long-term mental health issues.

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Although mental illnesses continue to be misunderstood and stigmatized, discussions about mental health have recently become more common, including at the highest level of government. For example, in March 2022, President Biden devoted a segment of his first State of the Union address to the mental health crisis and specifically focused on the mental well-being of health care workers. Among other things, the President highlighted his signing of the Dr. Lorna Breen Health Care Provider Protection Act into law, which "will invest $135 million over three years into training health care providers on suicide prevention and behavioral health while launching an awareness campaign to address stigmatization, promote help-seeking and self-care among this workforce."[1]

Public discourse about mental health is becoming increasingly normalized, including in the workplace, but many employees continue to be reluctant to discuss their mental health challenges with employers or seek workplace accommodations. However, the invisible mental health epidemic caused by living through two years of a global pandemic will make addressing mental illness in the workplace essential to employee retention and productivity, especially in the health care industry. This article addresses important considerations from both the employee and employer perspectives relating to mental health conditions and the workplace, with a focus on the health care industry, including mental health-related reasonable accommodations and employee well-being.

Overview of Mental Health Issues in the Health Care Industry

Though there are many definitions of "mental health condition," the National Alliance on Mental Illness defines the term as "a medical condition that disrupts a person's thinking, feeling, mood, ability to relate to

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others, and daily functioning."[2] It further explains, "[j]ust as diabetes is a disorder of the pancreas, mental illnesses are medical conditions that often result in a diminished capacity for coping with the ordinary demands of life."[3] Numerous studies have found that the COVID-19 pandemic caused a staggering increase in mental health conditions. For example, a report published by the Centers for Disease Control and Prevention (CDC) found "[e]levated levels of adverse mental health conditions, substance use, and suicidal ideation . . . reported by adults in the United States in June 2020," as compared to prior years.[4] Specifically,

> [t]he prevalence of symptoms of anxiety disorder was approximately three times those reported in the second quarter of 2019 (25.5% versus 8.1%), and prevalence of depressive disorder was approximately four times that reported in the second quarter of 2019 (24.3% versus 6.5%). However, given the methodological differences and potential unknown biases in survey designs, this analysis might not be directly comparable with data reported on anxiety and depression disorders in 2019. Approximately one quarter of respondents reported symptoms of a [trauma- and stressor-related disorder] TSRD related to the pandemic, and approximately one in 10 reported that they started or increased substance use because of COVID-19. Suicidal ideation was also elevated; approximately twice as many respondents reported serious consideration of suicide in the previous 30 days than did adults in the United States in 2018, referring to the previous 12 months (10.7% versus 4.3%).[5]

For health care workers whose jobs already presented mental health challenges due to regularly being involved in stressful and emotional situations, being exposed to human suffering, death, and hazardous working conditions, and being subject to long and unpredictable schedules,[6] COVID-19 magnified and exacerbated mental health issues to the point of creating symptoms similar to those attributed to post-traumatic stress disorder (PTSD).[7] For example, a 2020 Mental Health America study found that "[h]ealthcare workers were most likely to report that they had increases in emotional exhaustion in the last three months (82 percent) [,] . . followed by trouble with sleep (70 percent), physical exhaustion (68 percent), and work-related dread (63 percent)."[8] The study further found that "[o]ver half of healthcare workers also reported experiencing changes in appetite (57 percent), physical symptoms like headache or stomachache (56 percent), questioning their career path (55 percent), compassion fatigue (52 percent), and heightened awareness, worry or attention to being exposed (52 percent)."[9]

COVID-19's effect on health care employees' mental health is not limited to frontline workers. According to a survey of public health workers conducted by the CDC in March–April of 2021, "52.8% reported symptoms of at least one mental health condition in the preceding 2 weeks, including depression (30.8%), anxiety (30.3%), PTSD (36.8%), or suicidal ideation (8.4%)."[10] These studies and surveys only scratch the surface of the devastating effects COVID-19 has had on health care workers who were already facing a mental health crisis leading up to the pandemic.

As the nation's mental health crisis worsens, health care workers across the industry are experiencing burnout, stress, anxiety, and other conditions that are affecting the workplace. As a result, employers are facing increased requests for mental health-related accommodations, as well as charges of discrimination based on mental illness. For the past decade, charges of discrimination based on an underlying mental health condition have been steadily increasing. Based on charge processing data from the U.S. Equal Employment Opportunity Commission (EEOC), in 2021, allegations based on mental health discrimination accounted for about 30% of charges under the Americans with Disabilities Act (ADA), which represented an increase from the 20% a decade earlier. More specifically, in the prior five years, charges based on anxiety increased from 7.6% to 11.6% and those based on PTSD increased from 4.2% to 6.0%. Overall, in 2021, anxiety accounted for 38% of mental health disorder charges while depression accounted for 25% and PTSD for 20%.[11]

Addressing Mental Health Issues in the Workplace

Workplace Health Promotion Programs

The U.S. Department of Labor (DOL) has explained that "[w]orkplace practices inclusive of people with disabilities—whether they happen to be obvious to the eye or not—can deliver numerous bottom-line advantages, including greater productivity, reduced insurance costs, and improved employee retention and morale."[12] Employers in the health care industry (and all other industries) should include mental health when creating or improving their disability practices and policies, especially given the competitive job market. Employers should first focus on fostering a mental health-friendly

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Kathleen D. Parker is a partner in K&L Gates LLP's Boston office, where she is a member of the labor, employment & workplace safety practice group. Kathleen focuses her practice on counseling international and domestic businesses on various employment issues, including preparing and revising internal policies, navigating pre- and post-employment relationships, and properly classifying employees and contractors. She also regularly conducts discrimination and harassment prevention training for corporate clients, represents businesses in civil and administrative employment litigation matters, and conducts internal employment investigations on behalf of her clients. Kathleen is dedicated to working with her clients to achieve their business goals while ensuring compliance with constantly evolving employment laws.

work culture, which can be accomplished in many ways. For example, employers can encourage open and honest discussions with employees about mental health, make support networks available to employees, offer incentives to reinforce behavior that improves mental health, host seminars or workshops that address depression and stress management, offer health insurance that covers mental health services and medication, and provide managers with training to help them recognize the signs and symptoms of mental illness.[13] This not only helps health care employers combat the stigma associated with mental health issues, but it provides employees with services they might not be able to get outside the workplace due to the current shortage of mental health professionals.[14]

Overview of Legal Protections for Employees

Accommodations

When most employers think of an employee with a disability, they tend to focus on a physical condition that limits the employee's ability to perform essential functions of a job, such as limited mobility or difficulty hearing or seeing. This narrow view of what constitutes a disability under the law leaves employees with mental health issues, who may not present with obvious physical symptoms, facing skepticism when seeking an accommodation. In addition to this lack of understanding on the employer side, many employees may not be aware that their mental health condition could qualify as a disability that entitles them to a reasonable accommodation and gives them protection against discrimination under federal, state, and in some cases, local law.

The primary federal law that extends protections to employees with mental health conditions is the ADA.[15] Passed in 1990, the ADA applies to employers with 15 or more employees, and generally makes it unlawful to discriminate, harass, or retaliate against a qualified individual with a disability. Under the ADA, employers must reasonably accommodate a qualified individual with a disability unless doing so would cause an undue hardship on the employer. In addition, most states and many municipalities have legislation that prohibits disability-related discrimination regardless of the employer's size.[16] These laws largely track and typically protect employees with disabilities in a manner similar to the ADA, although some define disability even more broadly.[17]

The ADA[18] does not enumerate the specific medical conditions that constitute a disability. Rather, the law defines "disability" to mean "a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or is regarded as having an impairment."[19] Indeed, in 2008 the ADA was amended to provide that "disability" should be interpreted broadly and without extensive analysis.[20] The amendment also updated the ADA's definition of "disability" explicitly to include people with psychiatric disabilities or records of such disabilities.[21] Therefore, it is essential that employers understand the extensive scope of the ADA's protections—the law covers mental health conditions in the same way it covers physical health conditions, the law protects people with a history of an actual disability or who are regarded as having a disability, in the same way as those with an actual disability (physical or mental impairment that substantially limits a major life activity).[22] Employers often misunderstand the true scope of the ADA, as they improperly focus on physical, obvious disabilities, which can lead to legal issues.

One common error employers make when it comes to employees' mental impairments is failing to recognize an employee's request for an accommodation. Relatedly, employers struggle to identify a workable accommodation for a mental disability. For example, an employee may request an accommodation because they are experiencing stress or anxiety. Under the ADA, stress or anxiety may not always qualify as a disability. However, if the stress or anxiety limits one or more major life activity (for example, the person cannot sleep, concentrate, or care for themselves), it could qualify as a disability under the ADA. Because identifying and understanding an employee's disability—especially a mental impairment—can be difficult, where necessary, employers can request additional information, such as documentation from the employee's health care provider to determine whether an ADA (or state law equivalent) disability is present.[23] This documentation can also help the employer identify a reasonable accommodation, such as allowing the employee to telecommute, providing additional leave to seek treatment, giving more frequent breaks throughout the day, moving the employee's workspace to a quiet location without distractions, or providing the employee with additional training.[24]

Another error employers may make when it comes to mental disabilities is failing to recognize an employee's new or worsening mental health issues. For example, an employee may have suffered from mental health issues for many years but never exhibited or even hinted at any mental health challenges and never required an accommodation, but now does need an accommodation because the issues have been exacerbated or triggered by the pandemic. In fact, the EEOC's pandemic guidance expressly notes that "employees with certain

preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic."[25] Therefore, employees who did not require any accommodation pre-pandemic, may now be eligible, and employers must recognize this and respond appropriately.

Mental health-related protection under the ADA is further complicated when it comes to substance abuse and alcoholism. The ADA does not protect employees who are currently using illegal drugs and does not require an employer to allow employees to be under the influence of alcohol or illegal drugs while on the job.[26] However, employees who are recovering from or have a history of alcoholism or drug addiction may be entitled to a form of reasonable accommodation, such as a modified schedule or leave to obtain treatment.[27]

Evaluating Reasonable Accommodation Requests

In evaluating an accommodation request for an employee with a mental health condition, an employer may require documentation about the disability and the functional limitations from an appropriate health care professional including a doctor, psychiatrist, psychologist, nurse, or licensed mental health professional.[28] When requesting such documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for a reasonable accommodation. All information received by an employer during the interactive process should be maintained confidentially and separate from an employee's personnel file.[29]

Once an employer has determined that an employee has a disability, it must provide a reasonable accommodation unless it can demonstrate undue hardship. As noted above, such reasonable accommodations for a mental health condition may include "altered break and work schedules (e.g., scheduling work around medical appointments [or side effects of medication]), time off for treatment,[30] changes in supervisory methods (e.g., providing written instructions, or breaking tasks into smaller parts), eliminating a non-essential (or marginal) job function that someone cannot perform because of a disability, and telework."[31] If there is no reasonable accommodation that will allow the employee to be physically present to perform the current job, the employer must consider if remote work is an option for that particular job as an accommodation and, as a last resort, whether reassignment[32] to another position is possible. Employers should recognize that many of the accommodations for employees with mental health conditions may be relatively easy to implement and may not require a significant change to operations. For example, the DOL's Job Accommodation Network offers significant resources on addressing mental health conditions in the workplace and provides suggested accommodations.[33]

Undue Hardship Analysis

Under the ADA, employers must offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense.[34] A determination of undue hardship should be based on several factors, including the nature and cost of the accommodation; the overall financial resources, size, number of employees, and type and location of facilities of the employer; the type of operation of the employer, including the structure and functions of the workforce and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer; and the impact of the accommodation on the operation of the facility.[35] An employer cannot claim undue hardship based on other employees', customers', or patients' fears, biases, or prejudices toward the individual's disability,[36] which more commonly occurs for mental health disabilities, especially in health care. Moreover, an employer may not base undue hardship on the fact that a reasonable accommodation might negatively affect employee morale.[37] To the extent an accommodation may unreasonably disrupt other employees' ability to perform work, an employer may be able to establish undue hardship.

Employers should prepare for an increase in the number of accommodation requests based on an underlying mental health condition, especially for frontline workers as well as those who will be returning to the workplace after a significant period of remote working. Regardless of the type or number of requests, employers should adhere to their standard accommodation procedures, understanding that the interactive process may transpire differently for employees with mental health conditions. To start, employers should ensure that employees with mental health conditions have access to the same accommodation process, and that there is no stigma with respect to seeking out an accommodation. As with all reasonable accommodation requests, the diagnosis or medical condition underlying a disability must be maintained as a confidential medical record under the ADA. Employers should be cognizant of the stigma associated with mental health conditions and ensure that personnel responsible for handling accommodation requests maintain the confidentiality of the underlying diagnosis.

Best Practices for Employers

As health care employers continue to navigate the increased presence of mental health concerns in the workplace, there are many proactive steps they can take to create a workplace that is accommodating and free of harassment. Specifically, employers should consider doing the following:

Erinn L. Rigney is a partner in K&L Gates LLP's Chicago office, where she is a member of the labor, employment & workplace safety practice group. Erinn focuses her practice on counseling and advising clients on compliance with federal, state, and local antidiscrimination laws in conjunction with various employment actions; the provision of reasonable accommodations; compliance with the Fair Labor Standards Act and state wage and hours laws; and implementation of workplace policies and employee handbooks for both unionized and nonunionized employers, in addition to developing and leading anti-harassment training sessions for clients' workforces. Erinn has significant experience addressing the various employment issues that arise in the health care space, including the interpretation and application of employment laws in conjunction with health care regulations; drafting master services agreements for large and small health care systems; implementing policies on the protection of proprietary information and trade secrets; and advising on employment compliance issues arising in mergers and acquisitions for hospitals and biotechnology companies.

Managers and supervisors should communicate with employees about the importance of mental health, especially in the health care industry, and direct them to resources at work and in the community.

Promote Mental Health Resources

Employers should provide employees with access to mental health resources. For example, the DOL's Office of Disability Employment Policy identifies a number of resources to help ensure that disability-related policies and practices in the workplace take into consideration the needs of people with mental health conditions.[38] As with other workplace benefits, employers should highlight these types of resources, as well as Employee Assistance Programs, for employees though polices, newsletters, and messaging.

Evaluate Accommodation and Anti–Harassment Policies

Employers should ensure that their policies addressing harassment, discrimination, retaliation, and accommodation are up to date and expressly reference protection for employees with mental health conditions. These policies should be included in employee handbooks and be made accessible to employees on the intranet or other portals.

Combat the Negative Stigma Associated with Mental Health Conditions in Health Care

Managers and supervisors should communicate with employees about the importance of mental health, especially in the health care industry, and direct them to resources at work and in the community. Further, health care employers should be conscious of the language that they use when addressing mental health in the workplace to avoid further stigmatizing workers. Finally, human resources and other management professionals should treat mental health conditions in the same manner as a physical disability. By having management emphasize the importance of mental health, employees will be empowered to address mental health concerns before they negatively impact the workplace.

Train Managers and Human Resources Professionals on Addressing Mental Health Issues

Consider training and programming to educate employees about mental health issues and foster a supportive workplace for employees who may be facing mental health issues.[39] Employers should disseminate information about the signs of common mental health conditions such as anxiety, depression, and PTSD. Encourage employees to check in with one another and be aware of changes in their and their coworkers' behavior.

Conclusion

Though this crisis may seem invisible to the naked eye, many employees are suffering from mental health conditions while at work. As employers navigate these typically "unseen" issues, there are tangible actions they can take to address mental health concerns in the workplace and reverse the stigma associated with such conditions in the health care industry.

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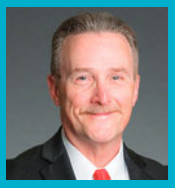

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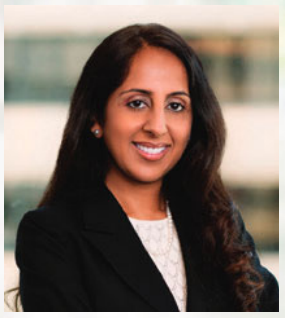

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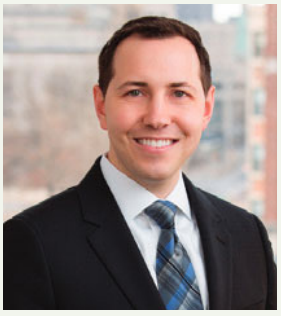
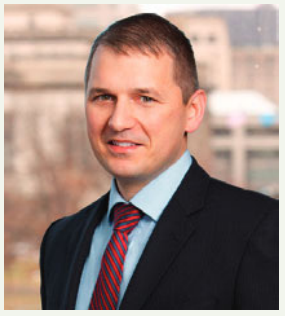


Joel Swider
Vice Chair
Education: Publishing



Joseph Wolfe
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Education: Programming, Fraud & Abuse Practice Group

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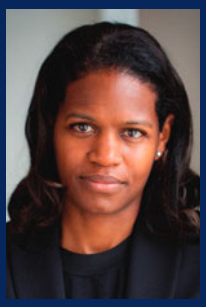

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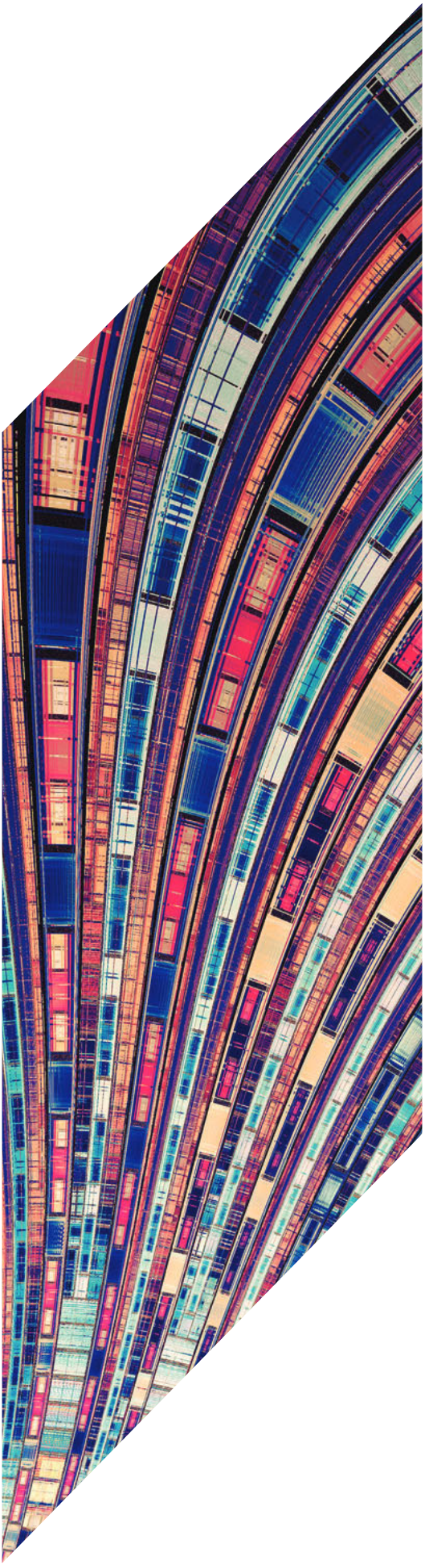

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Nelson Mullins congratulates partner

Patricia A. Markus

the 2023 – 2024 President-Elect of the
American Health Law Association

NELSON MULLINS

> **"I'm both honored to have been chosen to lead the effort in planning AHLA's 2023 Annual Meeting in San Francisco and delighted to work with AHLA's outstanding staff and members in appointing volunteer leaders for the upcoming year. Heartfelt thanks to my friends and colleagues within and outside of AHLA for supporting these and other efforts to promote and learn from the next generation of health law professionals."**
>
> — Trish Markus

Trish has been a member of AHLA's Board of Directors since 2015 after serving in various other leadership roles within and outside of AHLA. She brings years of experience working collaboratively with clients, colleagues, and others in the health law community to provide innovative solutions to complex healthcare regulatory compliance puzzles, while also providing substantial thought leadership on healthcare privacy, security, and technology issues.

Trish is a valued member of the Nelson Mullins healthcare team, which was recognized in 2022 Chambers USA as a leading national healthcare practice and boasts over 65 attorneys providing turnkey counsel to healthcare industry clients located across and beyond the firm's 25-office footprint. We are proud to be an AHLA Top Honors firm, and we celebrate Trish's service to AHLA in this key new role.

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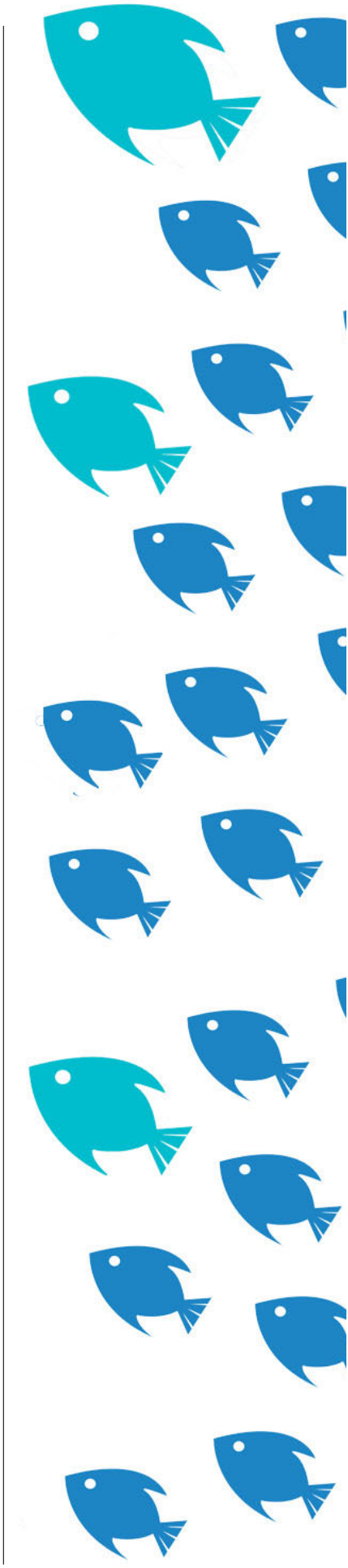
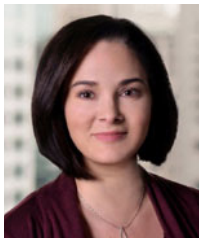


Rethinking the Law Firm? Four Lessons for In-House Lawyers Returning to Firm Life

Kimberly Gillespie,
Troutman Pepper



Kimberly Gillespie is a practical, results-oriented health care attorney with experience advising academic medical centers and health systems across the country. She is dedicated to partnering with her clients to fully understand their business goals and objectives and provide solutions to complex regulatory and operational issues.

Traditionally, lawyers who were interested in an in-house role started their career at a law firm, gained a few years of experience, and then transitioned to an in-house position in an industry of interest, with no desire to ever return to law firm life. However, during the pandemic, there has been a growing trend of in-house attorneys choosing to leave their current positions and return to law firms.[1]

Attorneys who left law firms for in-house positions were typically attracted to the promise of no billable hours and a more predictable schedule, the latter appealing especially to women who were often expected to juggle a disproportionate share of home and childcare responsibilities.[2] In-house positions also brought a broader variety of work and an opportunity to practice not only one's legal skills but one's business acumen.

That said, there were at least two well-known trade-offs. Attorneys making the move to in-house positions would generally have to: (1) take a pay cut, or at least accept that compensation would be capped, and (2) accept that upward mobility would be constrained (i.e., there's only one GC).[3] But the pros were generally seen to outweigh the cons, and once one made the move to an in-house role, a return to law firm life was unlikely.

During the last few years, however, there appears to have been a shift in the legal market. Many firms have had to sharply increase base salaries and bonus opportunities for associates in a battle to retain and hire much needed talent.[4] They also have had to adopt a more flexible mindset, especially as it relates to working from home.[5] While each firm is different in its approach, generally speaking, a work-from-home, or a hybrid model, seems to be more readily accepted in many law firms than in in-house positions. This is especially true in the health care industry, where in-house attorneys have missed few, if any, days in the office during the pandemic.

In addition, law firms appear to be more open to lateral hires from in-house positions today than they were previously.[6] This is particularly true for experienced lawyers. Many firms are seeing that the practical business perspective these attorneys can bring to the table is a tremendous complement to the more traditional experience of attorneys who have practiced exclusively at law firms.[7]

The confluence of these factors—increased salary and bonus opportunities, greater flexibility regarding work-from-home or hybrid models, and a greater appreciation by law firms of the business acumen and client perspective gained from in-house experience—may make re-entry to a firm more attractive to many in-house attorneys, including women. Additionally, given that the practice of health law is still a growing area, it is often of particular interest to many firms. As such, the perspective an experienced in-house health care attorney can bring to the table for a firm's health care clients can be invaluable.

I made the transition to a firm in early 2020 after having worked in-house for over 11 years. It has proven to be the perfect "next chapter" in my career. Below are a few lessons learned:

1. Develop a business plan and write it down.

Think about the areas of law you want to focus on and how you plan to build your portfolio in advance. Set specific goals and action steps you plan to implement along the way. Having a written plan will keep you accountable and provide focus as you transition. It also will help communicate your vision to the firm and create buy-in. However, as we all have learned over the last few years, life can be unpredictable, so be prepared to change as circumstances change.

2. Get ready for billable hours again (*they're not that scary!*).

While retraining yourself to track each .6 of an hour can be challenging at first, once you make the transition, there is a positive. As a young attorney, I thought of tracking my hours as a negative. I worried about meeting my goals, and tracking my time felt daunting. Now, although I admit it is still not my favorite part about private practice, I view it differently.

Many in-house attorneys put in far more hours than is expected of their counterparts at firms, but they typically go unnoticed, and at budget time, the legal

office is often viewed as just another cost center. At a firm, recording your hours, seeing that measurement build throughout the year, and having it result in the achievement of individual, team, and firm goals can be quite rewarding, in part, because it is mutually valued.

3. Internal networking is just as important as external networking.

One of the most important things you will want to do if you return to a firm is network with your colleagues.[8] My advice is to do it early and do it often. Meet with your new colleagues and share with them your experience and what you can bring to the table for their clients. Help them understand how you can complement the team and get to know their practice areas, too. This can be an excellent way to quickly integrate and develop your brand within the firm.

But also be mindful that when your new colleagues open the door and introduce you to that client, they are putting a lot of trust in you. In a way, they also become your "client" as you build your practice.[9] Do not take this trust lightly. They will expect you to treat their client as your own and deliver.

4. Decide your path upfront and communicate it.

A growing number of law firms are recognizing that not every lateral hire wants to enter as a partner and/or work their way into a partner role. As such, there is a growing acceptance of alternative career paths to include potentially setting limits on hours. While the business case must be made, and there will likely be trade-offs (like compensation level), having this type of option is incredibly liberating.

There are many factors to consider when weighing a transition back to law firm life, but as you do your research, you may find that many of the "rules" you thought you knew have changed.

1 "From In-House To Law Firm: Returning To Private Practice Is A Growing Trend," Above the Law, October 15, 2021, https://abovethelaw.com/2021/10/from-in-house-to-law-firm-returning-to-private-practice-is-a-growing-trend/; "A Big 2021 Trend: Big Law Lawyers Take In-House Plunge," Law.com, December 29, 2021, https://www.law.com/corpcounsel/2021/12/29/a-big-2021-trend-big-law-lawyers-take-in-house-plunge/.

2 "From In-House To Law Firm: Returning To Private Practice Is A Growing Trend," Above the Law, October 15, 2021, https://abovethelaw.com/2021/10/from-in-house-to-law-firm-returning-to-private-practice-is-a-growing-trend/.

3 *Id.*

4 "Cravath Tops Rival Davis Polk's Associate Pay Scale, Up to $415k," Bloomberg Law, February 28, 2022, https://news.bloomberglaw.com/business-and-practice/cravath-tops-rival-davis-polks-associate-pay-scale-up-to-415k; "Big Law Talent Battle: Natural Selection or Artificial Scarcity?," Bloomberg Law, March 3, 2022, https://news.bloomberglaw.com/business-and-practice/big-law-talent-battle-natural-selection-or-artificial-scarcity?context=search&index=9.

5 "Senior-Level Associates Are Demanding Flexible Work Arrangements," Bloomberg Law, August 10, 2021, https://news.bloomberglaw.com/us-law-week/senior-level-associates-are-demanding-flexible-work-arrangements.

6 "Transitioning to Private Practice From an In-House or Government Position," Law.com, June 30, 2021, https://www.law.com/thelegalintelligencer/2021/06/30/transitioning-to-private-practice-from-an-in-house-or-government-position/.

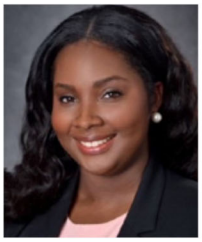
7 "In-House Lawyers Are Taking Their Business Expertise to Private Practice," Law.com, September 16, 2021, https://www.law.com/corpcounsel/2021/09/16/in-house-lawyers-are-taking-their-business-expertise-to-private-practice/.

8 "Transitioning to Private Practice From an In-House or Government Position," Law.com, June 30, 2021, https://www.law.com/thelegalintelligencer/2021/06/30/transitioning-to-private-practice-from-an-in-house-or-government-position/.

9 *Id.*

Three Tips for Networking on LinkedIn

Taylor Hall
Michigan State University College of Law



Taylor Hall is a 3L at Michigan State University College of Law, where she is the President of the Black Law Students Association, research assistant for the Citing Slavery Project, participant of the Trial Practice Institute, and moot court competitor. Prior to attending law school, she received a B.S. from Western Michigan University. Additionally, Taylor volunteered as a mediator in the metro-Detroit area after completing the 40-hour certificate program.

"It's not what you know, but who you know." I am sure we have all heard this old saying before. A more accurate saying should be: "It's what you know and who you know!" Law school and past experiences make up "what you know," but to build "who you know," LinkedIn is a great tool to build your network.

Due to the pandemic, more professionals are willing to meet and dispense advice to early career professionals via zoom. However, being accepted as a new "connection" from an attorney you would like to chat with can be daunting. Here are three tips to ensure you can connect and meet with an attorney you didn't previously have any connections with!

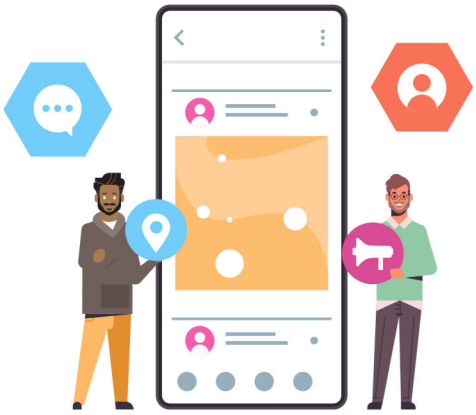
1. Know Your Why

There are several reasons why you may be reaching out to an attorney on LinkedIn. After finding someone you want to chat with via zoom or an old-fashioned phone call, determine why you want to connect with them. As an early career professional your reason most likely falls into one of these categories:

- ***A potential mentor:*** A mentor can help guide you through your law school journey and early career.
- ***A lifeline to a future employer:*** You may want to practice at a specific company but may need more experience before applying to that job. Connecting to learn about that company through a person will allow you to build connections now to ensure you get the job later.
- ***General information about a role or a person's career journey:*** This reason is most common for law students. Connecting with people to determine if you would enjoy their type of work is helpful for determining your career path.

2. Connect with the "right" people

Connecting with the "right" people is subjective to what your goals are. Because it may feel disingenuous to reach out to a stranger, it is important to connect with a specific reason. Connecting blindly to people who have a lot of connections or is an industry leader appears



unorganized. A person reviewing your page may think your sole purpose for connecting with them is to inflate your own number of connections. LinkedIn should not be a popularity contest. Connect with people you could see yourself working with in the future who could give you insight into what working in a particular area of law is like.

3. Send a personalized note

After finding someone you would like to connect with send a personalized note after hitting the "connect" button. You may be tempted to just hit "send" but sending a note lets the person know: (1) who you are and (2) why you would like to connect with them.

Example: "Hello, I am a 2L in law school interested in learning about the role of in-house counsel in a hospital. Do you have time for a brief chat? I appreciate your time." This short note allows you to stand out from other connection requests!

Putting these tips into practice can help determine your career path, grow your network, and open doors to new opportunities. It may shock you how willing people are to help an early career professional. My first year of law school was completely virtual! Although I was able to get the full 1L experience in class, networking events were moved onto zoom and could be a little awkward. However, I am glad I attended those events because it gave me the courage to reach out to people on LinkedIn. It can feel intimidating to reach out to people you have never met, but what you are feeling is the possibility of facing rejection. I'm here to tell you to not worry about that! Even if they don't respond or say no, it's all a part of the journey!

Annual Meeting Discussion of *Dobbs v. Jackson*

The Supreme Court's *Dobbs v. Jackson* ruling has far-reaching implications for the delivery of women's health care. The decision overturning *Roe v. Wade* was handed down two days before this year's In-House Counsel and Annual Meeting and was a major topic of discussion among attendees who were already fielding questions from their health care clients about the shifting legal landscape. In response, AHLA initiated an impromptu session that was attended by over 150 health law professionals from across the United States who gathered in the early morning on the last day of the conference to share their initial thoughts, questions, and collective expertise on the impact of this landmark decision.

"We have a colleague here who is less than an hour away from getting on a call to provide real-time legal advice," said David S. Cade, chief executive officer of AHLA. "We have teams and organizations who are rapidly working day and night because your clients need the information day and night. We are capturing the issues and collaborating with you to provide the best information possible to help you better take care of your clients moving forward."

The wide range of potential issues discussed during the one-hour session underscored the general sense of confusion and uncertainty, with many questions and few answers. With abortion rights now left up to individual states, health care providers are facing a patchwork of evolving legal requirements that vary by jurisdiction. Health law professionals will need to consider and track not only current law in a particular state, but also pre-*Roe* laws, criminal statutes, and litigation.

State abortion restrictions already in place also raise a host of unanswered questions. For example, Texas SB8, which bans abortion after cardiac activity can be detected, usually around six weeks, authorizes private individuals to initiate civil actions against anyone who "aids or abets" an abortion. Attendees wondered what constitutes "aiding and abetting," posing examples such as counseling, employee benefits, or referring a woman for out-of-state abortion care.

The *Dobbs* ruling impacts providers across the health care delivery system, from hospitals, to physicians, to pharmacists, to telehealth providers and health IT vendors. Hospital emergency departments and OB-GYNs specifically are raising questions about their potential exposure when providing reproductive health care, including for women experiencing miscarriages and ectopic pregnancies, and for others in need of life-saving procedures. Hospital emergency departments also need to consider their obligations under the federal Emergency Medical Treatment and Labor Act in these scenarios.

Attendees also noted that privacy protections for reproductive health information is a key issue. The Health Insurance Portability and Accountability Act does not require the disclosure of protected health information to law enforcement but does permit it pursuant to a court order. Attendees also discussed how information available on patients' electronic medical records could be accessed and noted that the impact of the new information blocking rules is another open question.

Beyond the direct provision of health care, medical schools in states where abortion is illegal are asking whether they can continue to teach abortion procedures to their students as part of their educational curriculum. And employers, including health care providers, are considering the potential implications of offering travel benefits to women seeking reproductive care in states where abortions are legal.

As a supportive partner for the health law community, the American Health Law Association will continue to provide educational resources to help its members navigate these challenging issues.

Member News

Congratulations to this Year's David J. Greenburg Award Recipient

AHLA is pleased to announce that this year's recipient of the David J. Greenburg Award is Robert "Bob" Homchick from Davis Wright Tremaine LLP. The David J. Greenburg Service Award is awarded annually to an individual who has shown great loyalty to the Association throughout their career and has made a significant contribution to the growth and development of AHLA. The Greenburg Award is the highest and most prestigious award offered by AHLA.

"We are pleased to present this prestigious award to a long-standing member of the AHLA community," said David S. Cade, Chief Executive Officer of AHLA. "Bob has served for many years as a thought leader on many important health law issues and has been an invaluable source of wisdom and expertise regarding Stark Law and fraud and abuse."

"Bob epitomizes the qualities of the namesake for the David J. Greenburg Award," said Cynthia Y. Reisz, Board President of AHLA in FY 2022 and member of Bass Berry & Sims PLC. "He has spent his career committed to educating and mentoring others in health law. Bob's vision, commitment to excellence, collegiality, and loyalty to AHLA are aspirational to us all."

Bob obtained a Bachelor of Arts at the University of Puget Sound and a Juris Doctorate at the University of Notre Dame Law School, *summa cum laude*. Bob has been a practicing attorney since 1983. He has served within AHLA as a chair of the Association's Fraud and Compliance Forum Planning Committee and the Fraud and Abuse Practice Group. Bob is a member of the Board of Directors and is an AHLA fellow. He has additionally served as chair of the Health Law Section for the Washington State Bar Association and as president of the Western District of Washington for the Federal Bar Association.

Throughout his professional career, Bob has been regularly recognized for his outstanding contributions to the health law profession. He was named one of "America's Leading Lawyers for Business" by *Chambers USA* in Health Care and received the "Band 1" ranking for health care in 2020-2022. In 2017, he was awarded the John M. Davis Award for Outstanding Legal Expertise by Davis Wright Tremaine and was named the "Seattle Best Lawyers Health Care Lawyer of the Year" in 2012 by Woodward/White.

"Bob is a leader, mentor, and true visionary at DWT and in the larger health law community," said Hope Levy-Biehl, Partner and Co-Chair of Davis Wright Tremaine's Health Care Practice Group. "DWT is thrilled that AHLA is honoring and recognizing him by awarding him the Greenburg Service Award."

We offer our congratulations to Bob for earning this prestigious honor. He has given invaluable contributions, insights, and expertise to AHLA throughout the years, and we look forward to seeing what he will accomplish in the future.

Wyatt Tarrant & Combs LLP is pleased to announce that one of its Partners, **Christopher Melton**, has been invited to join Leadership Kentucky's Class of 2022. Leadership Kentucky is an organization that brings together a select group of people who possess a broad variety of leadership abilities, career accomplishments, and volunteer activities to gain insight into complex issues facing the state. Melton is a former Kentucky Assistant Attorney General who concentrates his practice in the area of health care law with an emphasis in Medicaid and Medicare claims litigation, including actions arising under the Federal False Claims Act.

Member Spotlight

Erin A. Aebel

Trenam Law
Tampa, FL
www.trenam.com

Are you a collector of anything?
Sunglasses and handbags. I have way too many. I love interesting artistic pieces over brand names.

What book is on your nightstand?
Finding Me by Viola Davis. It is an incredible autobiography.

What is your favorite form of exercise?
Dancing. I take Zumba and hip–hop classes weekly.

What is your favorite meal to cook for friends?
Whatever meal that my husband makes as he is a trained chef.

What was your first job?
My first job was during high school, and I sold pretzels at Hot Sam's in the mall. I made less than $4.00 an hour, and I learned a lot of life lessons you cannot learn in school.

What was the best concert you ever went to?
Every Lady Gaga concert I ever attended.

What movie have you watched multiple times?
Trois Couleurs: Rouge by Krzysztof Kieslowski. The entire trilogy Rouge, Bleu, and Blanc is incredible and so artistic. The sound track is amazing and the filmmaker died too young.

Which actor or actress would play you in a movie about your life?
Reese Witherspoon if she would go brunette.

What television show would you like to make a guest appearance on?
How to Get Away With Murder. I would like to play a trial lawyer on television even though I am a business transactions attorney in real life.

What board game do you remember playing most as a child?
Scrabble. I spent hours playing Scrabble by the pool with my grandmother and English teacher mother. I am very good at it and know a lot of two letter obscure words.

What was your best vacation?
The three weeks I spent in Namibia, Botswana, and South Africa with my husband.

Would you like to be featured in our Member Spotlight section? Please contact agreene@americanhealthlaw.org. We'd love to hear from you!

AHLA Partners with The Diversity Movement to Promote a Culture of Inclusion

AHLA has initiated a strategic partnership with The Diversity Movement (TDM) as part of its commitment to offer superior educational resources to its diverse membership. TDM offers an employee experience application suite that personalizes diversity, equity, and inclusion (DEI) and focuses on building workplace excellence via a data-driven approach focused on business results.

The two organizations share a commitment to inclusion, diversity, equity, and accessibility (IDEA), and their strategic partnership will enable both to combine their expertise to promote meaningful, positive changes in the U.S. health care system through education, information, and dialogue.

"Our constant goal as an Association is to ensure that every member can participate in a collegial, friendly, and mutually respectful environment as we work together to serve the health law community," said David S. Cade, Chief Executive Officer of AHLA. "We are excited to continue our partnership with TDM as we work together to create an inclusive and equitable forum for all AHLA members."

"AHLA has been a terrific client: thoughtful, committed, and ready to do the work to prepare for the future. This partnership allows our organizations to tap each other's strengths and resources to improve equity, reduce disparities, and create cultures of inclusion throughout the health care industry and the legal sector," said Donald Thompson, Chief Executive Officer at The Diversity Movement. "Together, our potential for impact is tremendous."

AHLA invites all members to experience TDM's high-quality educational programming, diversity certifications, digital accessibility solutions, and technology products. As one of TDM's 100+ clients, the AHLA Board of Directors has participated in TDM's educational programs and has seen first-hand their impact.

Email our Member Services Center team at msc@americanhealthlaw.org to take advantage of TDM's educational offerings and services.

WLC WOMEN'S Health & Wellness

AHLA's Women's Leadership Council (WLC) will be spotlighting different topics each month across a mix of social media platforms, with a focus on women's health and wellness. We hope to add knowledge, power, and inspiration to your newsfeed. If you have comments, suggestions, or ideas for future topics, we would love to hear from you!

Examples of prior discussion posts include:

Pelvic Health Care: https://bit.ly/3S4khUq

World Blood Donor Day & Maternal Health: https://bit.ly/3oB1keA

Mental Health: https://bit.ly/3bdyePd

The WLC looks forward to connecting with you and encourages you to join the discussion!

Volunteer Recognition May 2022

Programs and Distance Learning

Health Plan Law and Compliance Institute

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Xavier Baker, Sheppard Mullin Richter & Hampton LLP
Luke Boyett, MTS Health Partners
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A Look at Behavioral Health Delivery Models Within Health Systems

Isa Diaz, Acadia Healthcare
Paul Gomez, Polsinelli PC
Kyle Kirkpatrick, JTaylor
Gregory Moore, Dickinson Wright PLLC
Heather Rae
Amanda Thompson

Antitrust Compliance: How to Structure a Compliance Program and How to Avoid Breaches

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Margia K. Corner

Hilary L. Isacson, Sutter Health

Volunteer Pool and Complete Your Volunteer Profile

AHLA has revised the volunteer process. To opt-in to the Volunteer Pool and complete your Volunteer Profile, visit www.americanhealthlaw.org/volunteer. This will help us know what kind of volunteer opportunities you are interested in. Going forward, you will receive email alerts when we think you'll be a good fit for a new volunteer opportunity.

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State Health Care Fraud Law Toolkit: 50-State Survey with Summaries and Links

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Lynn M. Barrett, Barrett Law, PA
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The Lighter Side of Health Law – May 2022

Norman G. Tabler Jr, Faegre Drinker Biddle & Reath LLP

Upcoming Events

August 25

Delivery of OB/Gyn Healthcare to Women Who Are Pregnant that May Result in an Abortion—Out of State Patients and Best Practices for Providing Care to Women Eligible for Healthcare Public Funding

August 30-31

Virtual Collaborative Compliance Conference co-sponsored with AAPC

September 1

Delivery of OB/Gyn Care to Women in Abortion-Restricted States After Dobbs

September 14

Thought Leader Webinar: What Lawyers Need to Know About Shadow Information And How It Contributes To An Organization's Risk For Data Exposure

IPRO has provided sponsorship of the webinar.

September 28-30

Fraud and Compliance Forum
Baltimore, MD

Platinum Sponsor: HealthCare Appraisers, Inc.

BRG, Carnahan Group, Coker Group, Ntracts, Pinnacle, and PYA have also provided sponsorship in support of this program.

October 11

In-House Counsel Arbitration Essentials from General Counsel-Arbitrators

October 24-25

Tax Issues for Health Care Organizations
Washington, DC

Deloitte, EY, KPMG, and Willamette Management Associates have provided sponsorship in support of this program.

November 9-11

Fundamentals of Health Law
Chicago, IL

Hall Render and Ntracts have provided sponsorship in support of this program.

December 5-8

Virtual Health Care Arbitration Training

January 30-31

Academic Medical Centers and Teaching Hospitals Institute
Orlando, FL

January 30-February 1

Physicians and Hospitals Law Institute
Orlando, FL

March 1-3

Long Term and Post-Acute Care Law and Compliance
New Orleans, LA

March 22-24

Institute on Medicare and Medicaid Payment Issues
Baltimore, MD

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Please note that the actual number of credits may vary from state to state.

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The maximum number of credits available is 15.25 (including 1.0 legal ethics) for a 60-minute state and 18.3 (including 1.2 legal ethics) for a 50-minute state.

Sponsored by Wipfli LLP.

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AHLA considers the health and safety of all those attending our in-person programs to be our top priority and we are committed to providing a safe and healthy environment for our participants and staff. Although attendees should recognize that there is risk involved in attending, AHLA has adopted preventative measures to reduce the potential spread of the COVID-19 virus at our in-person programs in accordance with guidance provided by the U.S. Centers for Disease Control, local authorities, and our partnering hotels, including:

- Proof of vaccination (two injections of the Pfizer-BioNTech or Moderna vaccines or one shot of the Johnson & Johnson vaccine) OR a negative PCR test within 72 hours of the program is required for all attendees
- Mask wearing required for all attendees
- Social distancing
- Personal hygiene and hand sanitization
- Adherence to pathway signage
- Self-monitoring and self-reporting

For updates on requirements and on-site processes and to access AHLA's Duty of Care, please visit our website.

For more information on all AHLA events and to register, go to www.americanhealthlaw.org/education-events or call (202) 833-1100, prompt #2.

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- Access career resources and job searching tips and tools.
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Online Career Center Snapshot

3615+
Employers

1340+
Job Seekers

265+
Open Positions

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JOURNAL OF HEALTH AND LIFE SCIENCES LAW

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Hospital-Employed Non-Physician Practitioners and Community Physicians: Billing and Stark Law Considerations

Sven C. Collins, Amy M. Joseph, and Charles B. Oppenheim

Hospitals are increasingly employing nonphysician practitioners (NPPs) to help improve the quality, timeliness, and cost-efficiency of inpatient care; however, this trend may also give rise to potential billing and Stark law compliance issues where non-hospital employed community physicians bill Medicare for inpatient care that inappropriately "piggybacks" on care provided by the hospital-employed NPPs.

In addition, significant recent changes to the "split (or shared)" billing rules further impact the analysis. These regulatory developments present an opportune time to take a fresh look at potential issues where hospital-employed NPPs and community physicians provide overlapping care and to revisit existing policies for continued compliance. This article outlines the relevant legal issues and developments and offers some practical tips to limit the compliance risks these increasingly common arrangements present.

September 28–30, 2022 | Baltimore, MD

Fraud and Compliance Forum

The Fraud and Compliance Forum brings together legal counsel, compliance officers, and government representatives for invaluable learning and networking opportunities. The planning committee is working hard to generate a program that will address emerging regulatory trends, highlight recent case law and legislative developments, and focus on how these developments will affect legal and compliance practices in health care.

For More Information, visit:
www.americanhealthlaw.org/FraudandCompliance