LEGALLY SPEAKING

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Data Integrity and Class Actions: What Your Business Should do to Protect Itself

BY GABRIELA CHAMBI, ESQ

In 2018, there were 1.244 million recorded data breaches in the United States with over 446.5 million records exposed. Historically, data breaches have consisted of exposing an individual's personal information. Now, as these attacks have become more sophisticated, these attacks are shifting focus from the customer to the organization and their data. Hackers can now feed misinformation into data sets over a long period of time, leading to the possibility that a company may end up providing inaccurate information to its customers. Thus, safeguarding the integrity and veracity of data is one of the most important challenges in the digital world.

What is Data Integrity and why does it matter?

Data integrity is a fundamental component of information security. Usually, businesses that become victims of data breaches go through a process of determining what, if any, data and information was stolen and/or corrupted. Specifically, a company should verify its data integrity to validate what occurred and to make sure other systems have not been compromised. Additionally, a company should ensure that the user relying on the company's data is receiving accurate and uncorrupted data.

Data Integrity and Class Actions

Recently there have been two major instances of data breaches that have compromised a company's data integrity. The first instance involves Swift, the global financial messaging network that banks use to move billions of dollars. In the Swift attack, the attackers used malware to delete outgoing financial transfer requests. The attackers also amended customer accounts and even intercepted and changed PDF statements to cover their tracks.

The second instance involves Electronic Health Records, a vendor for eClinical works. As a result of the compromised data integrity, this cloud-based system failed to provide reliable health information to millions of patients. Electronic Health Records' software had several data deficiencies; meaning that millions of patients had their medical records

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Gabriela Chambi is a litigation attorney who focuses her practice on employment and labor law, civil rights, professional malpractice and complex litigation.

Prior to joining Carr Maloney, Gabriela was a Law Clerk for the Montgomery County (MD) District Court, where she drafted written opinions for all twelve District Court Judges while managing the civil motions docket caseload.

Gabriela graduated from the American University Washington College of Law, where she was the Note and Comment Editor for the American University International Law Review. In addition to being a Bar Association (DC) Public Interest Fellowship Recipient and Reif Fellowship Finalist, she co-authored "Anti-Money Laundering and Counter Terrorist Finance: Regulatory Response in the European Union" in the American Bar Association's 2017 'Year in Review'.

While attending Law School, Gabriela was also a Law Clerk for both the United States Department of Justice's Office of Foreign Litigation and for the Honorable Robert A. Salerno, Associate Judge for the District of Columbia Superior Court.

Gabriela is fluent in Spanish.

compromised and could no longer rely on the accuracy and veracity of their medical records. These two examples demonstrate that businesses must have the ability to maintain and monitor its data internally both before and after a data breach. If a business does not have the proper procedures in place, then it is ultimately vulnerable to a class action. Imagine a company where users rely on the accuracy of the company's data and make financial, medical, and legal decisions based on that data. But the hackers have created a stream of misinformation within the company's data sets. What happens when the company does not provide accurate and reliable data due to that hack? Ultimately, the company's compromised data integrity results in the disbursement of inaccurate information to the public and to its customers.

Further, companies should have procedures in place for their vendors. Like the eClinical case, vendors are also susceptible to these class action claims because most companies use third party vendors to store their data. Thus, businesses should be prepared to spend the time and resources on integrity checks after a breach and should put in place policies and procedures that allow businesses to verify their data either after a data breach or merely to monitor the software they are using. Businesses should work to ensure not only that a user can rely on their data but that the business itself can rely on its data.

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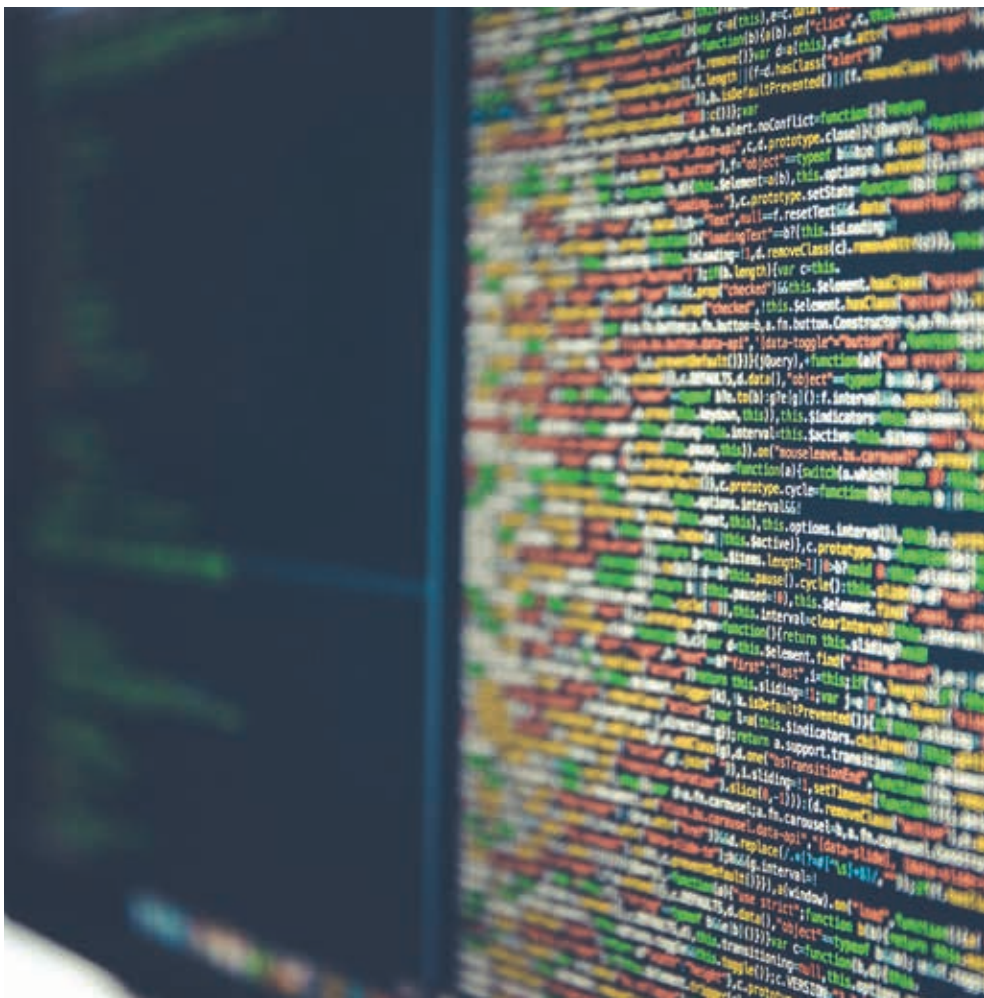

Calculating The Overtime Rate May Change

BY EDWARD J KRILL, ESQ

Current Overtime Requirements:

Currently hourly and other non-exempt employees are entitled to time and one-half for all hours of work in one week that exceeds 40 hours. This rate is to be based on the employee's "straight time rate of pay." Overtime pay is due for all time worked in excess of 40 hours, regardless of whether or not approved in advance or thereafter, since the Fair Labor Standards Act requires overtime for all work actually done and "suffered or permitted" by the employer.

The Fair Labor Standards Act does not permit employers and employees to make special arrangements with employees that are inconsistent with its requirements. Employees may not validly waive entitlement to overtime pay in consideration of factors such as job security or a higher base rate.

The overtime rate must include all compensation paid to an employee during the relevant period. This requirement has been interpreted to include tuition reimbursement, holiday bonuses, seminar and meeting attendance, wellness programs and other more recent forms of compensation. This factor is frequently not addressed. Many employers use the base hourly rate and do not include, for example, a second shift premium, vacation period adjustment or a Sunday rate. All adjustments to the base hourly rate should be included in the calculation of the "straight time rate of pay" that is the basis for the time and one-half calculation.

A workweek may start and varying times, such as at midnight on each Saturday or at close of business each Sunday, but this period of 168 hours must be consistently followed week after week. Further, averaging hours of work over a period of, for example, two weeks, is not permitted. Each week stands on its own and carrying over extra hours into the following week as a "comp time" plan does not comply with the FLSA.

When an employee works at different rates within a single week, the straight time rate of pay is a blended, weighted average of the hourly rate for that week.
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Ed Krill has been practicing business law with a focus on health care and hospitals for more than 35 years. He helps clients find solutions to regulatory and contractual problems that make business sense and that avoid litigation and protracted controversy.

Ed counsels healthcare providers and professionals on a variety of issues, including credentialing and accreditation standards, licensure, discipline, labor and employment matters, practice structure and the buying and selling of practices and interests in practices. He is well-versed in Medicare regulations and other professionals. Ed assists physicians and hospitals with regulatory compliance, sanctions, and the continuous changes in U.S. health policy and regulation.

For example, if an employee works 25 hours at $20 per hour and 25 hours at $30 per hour within one week, the overtime rate is one and one-half times $25.

Paying a fixed sum for varying amounts of work on a single day to an employee otherwise paid on an hourly basis does not meet FLSA requirements when the actual hours of work for that week exceed 40. In that case, if the base rate is $10 per hour and 40 hours are worked at that rate, paying the employee a flat sum of $50 for 5 hours of work on that Sunday within that week does not meet the time and one-half requirement. An additional $25 would be due.

The Department of Labor Overtime Calculator Advisor provides assistance to employers to accurately calculate the overtime rate. This is available on the Wage and Hour Division website and is part of the elaws advisory system.
Proposed Changes:

As employers have added various non-cash benefits and employee "perks" the FLSA Regulations have not kept up with these changes. Considerable confusion has developed over whether the value of such programs should be added to the employee's "straight time rate of pay." Adding the value of programs that permit voluntary participation, such as gym access, have been especially problematic since some employees take regular advantage of those facilities, others use it once in a while.

On March 29, the Department of Labor has proposed clarifying the identification of an employee's base or straight time rate of pay by excluding the following from that calculation:

- Paid out unused sick leave or vacation
- Meals whether provided or reimbursed
- Compensation for time during meal breaks
- Reimbursement for employee work related expenses
- Travel when the cost is reasonable according to Government standards
- Discretionary performance and company achievement bonuses
- Service benefits plans such as injury, loss of income and legal services
- Tuition reimbursement and forgiveness of educational and training debt
- Gym, wellness, clinical treatment and fitness programs
- Other non-cash or reimbursement benefits yet to be defined

Employers can expect that there will be many comments on these proposals, which are due by May 28, 2019. The complete text of this proposal can be accessed at www.regulations.gov in the Rulemaking Docket RIN 1235-AA24. When the revised proposal is available, probably by August 1st, the modifications will be brought to your attention.

For more information, please contact
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Protecting Yourself From A Legal Malpractice Suit

BY DENNIS QUINN, ESQ &
ELIZABETH BRIONES, ESQ

Any lawyer would find it frightening to think about their name transitioning from the signature block to the case caption of a legal malpractice complaint. This scenario becomes all the more frustrating when the lawyer knows that their conduct did not constitute malpractice. While it's impossible to completely protect oneself from a legal malpractice suit, there are practices through which lawyers can minimize the risk.

> "While it's impossible to completely protect oneself from a legal malpractice suit, there are practices through which lawyers can minimize the risk."

Create a written record

Lawyers often lecture their clients about the importance of documenting everything, but they usually do not follow their own advice. Documenting is not just a solid piece of advice for clients but it is also a good practice in the legal profession. It is difficult to defend a lawyer in a legal malpractice suit when his or her file is empty.

A lawyer engages in effective risk management when they put their analysis and case strategy into writing. The reality is that many significant decisions regarding the case and strategy will occur in phone conversations or during client meetings. Decide what the strategy will be for each aspect of the case. It may seem time-consuming but lawyers should develop the practice of summarizing these conversations, decisions, and strategies in writing. Sending your client an email summarizing telephone conversation and in-person meetings is

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Dennis Quinn has over 25 years of experience in ethics counseling, professional liability, and commercial litigation. Dennis regularly advises lawyers and law firms on ethical issues and has successfully represented hundreds of clients in legal malpractice actions, accounting malpractice actions, and in ethical complaints. Dennis also serves as Carr Maloney's General Counsel.

Dennis remains active in numerous bar activities and is currently serving as member of VSB Standing Committee on Legal Ethics, and as an Elected Member of VSB Council. He formerly served on the Faculty of VSB Harry Carrico Professionalism Course, and on the VSB Legal Malpractice Committee. He regularly speaks to bar associations and professional groups on ethics, risk management, and how to avoid malpractice claims and bar complaints.

Elizabeth Briones is a litigation attorney who focuses her practice on employment and labor law, civil rights, general liability and complex litigation.

Prior to joining Carr Maloney, Elizabeth was a Law Clerk to the Honorable Patricia A. Broderick, Associate Judge for the District of Columbia Superior Court. As Judge Broderick's law clerk, she authored reports and made recommendations on criminal proceedings including alleged ineffective assistance of counsel, the Incarceration Reduction Amendment Act and other post-conviction claims.

Elizabeth graduated from the George Washington University Law School, where she was an Executive Board member of the Latino Law Students Association, served on the Student Affairs Committee of the Hispanic Bar Association of DC, was an Executive Member of the Moot Court Board, and chaired the 2017 Harold H. Green & Joyce Hens Green National Security Law Moot Court Competition. She also served as judicial intern to the Honorable Anna Blackburne-Rigsby, Chief Judge of the District of Columbia Court of Appeals.

Elizabeth graduated magna cum laude with a Bachelor of Arts in English Literature from The Catholic University of America, where she was Team Captain of the Women's Basketball team and a member of both the President's Society and the Pi Eta Sigma honor society.

an excellent and easy risk-management practice. Once anything is determined, lawyers should put the decisions in writing and send to the client. Even if the notes do not involve a significant decision or strategy idea, make sure to save all of the notes to the file for safe-keeping rather than leaving them on legal pads scattered around the office.

While the client may find all of this documentation repetitive, it allows the lawyer to create a written a record of the litigation. Proper documentation protects lawyers from entering "he said-she said" territory in the event of a malpractice suit. Thus, the seemingly miniscule memos and emails documenting communications between lawyers and their clients often become key exhibits in depositions and during motions practice or trial.

The earlier the better

We are all guilty of checking the calendar, seeing an upcoming deadline, and thinking, "Well, I still have a few more weeks to do it." Whatever the "it" is, start it early. Form the good habit of working on things in advance. Waiting until the last minute increases the risk for error. In addition, completing a task at the final hour leaves lawyers vulnerable to missing a deadline if an unexpected technological hiccup occurs or if they misremembered the actual deadline. For a busy lawyer, the last scenarios are unfortunate possibilities. This practice not only minimizes the risk of missing a deadline but it also shows the client that their lawyer cares about their case.

Proper calendaring is one of the most effective risk management practices. Setting reminders about upcoming deadlines allows for proper notice, time for preparation, and opportunity for revision as well as review. However, it is important to double check calendar dates, especially if the lawyer delegates the task of entering the dates to a legal assistant or paralegal. Calendaring allows lawyers the reassurance that certain tasks are not slipping through the cracks. There is nothing worse than missing a deadline. Properly tracking deadlines is an easy way to avoid a malpractice suit. Nonetheless, cases are worth doing promptly even if they do not have a deadline.

Maintain a good relationship

A lawyer's relationship with their client can contribute to whether a claim ultimately evolves

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into a lawsuit. The number one complaint clients have against their lawyers is failure to return phone calls and respond to emails. Communicate with your client as the case develops. A good practice is to provide the client with written reports regarding the status of their case. Try to avoid the practice of only connecting with the client when a major development arises in the case. Even if nothing substantial has occurred, a short email communicating such shows the client that their lawyer is invested in them and their issues have not been forgotten.

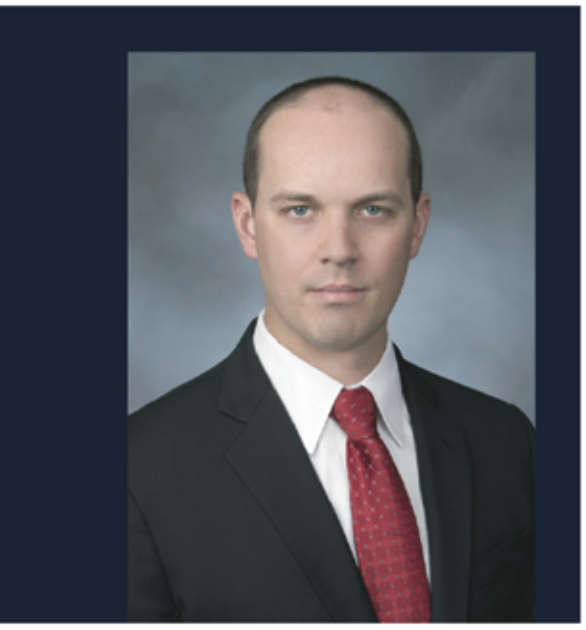
Know your limits

If the client's issue falls in a subject area the lawyer is not familiar with, a good option is to refer the client to another lawyer. One of the most common reasons for legal malpractice suits is a lawyer who takes a case in an area of law in which that lawyer has no previous experience. While it may be tempting to accept new work, the client's interest must come first. Lawyers cannot be afraid to decline employment for which they are not competent. Lawyers have an ethical duty to be competent. While lawyers can study and learn a new area of the law, there is the possibility that the subject is too much to comprehend in a short time period. Risk of legal malpractice increases in this scenario as it might be difficult to demonstrate competency if one lacks a background in the specific area.

In the event that a lawyer takes a case in an area in which they have no previous experience, it is important to employ careful and methodical research and case review. Further, engaging a competent practitioner to assist protects the client's interest and further protects the lawyer from a malpractice suit. At the end of the day, it may not be possible to prevent a legal malpractice suit, especially if the case involves an unreasonable client. By employing the practices described in this article, lawyers can strengthen their available defenses and create the paper trail to defeat the legal malpractice case.

For more information, please contact dennis.quinn@carrmaloney.com or elizabeth.briones@carrmaloney.com

Carr Maloney P.C. Attorney, J. Peter Glaws IV, Promoted to Member



Carr Maloney P.C. is pleased to announce that J. Peter Glaws, IV has been promoted to be a member in the Firm.

Peter is a skilled and tenacious advocate. Clients have frequently praised his persuasive legal arguments," said managing partner, Kevin Murphy. "In addition to his litigation practice, Peter regularly works with clients, particularly professional firms on complex business agreements, contracts, acquisitions, and risk management issues. The firm is pleased to be able to offer his unique skill set to our clients."

Glaws, an experienced litigator represents clients in complex commercial disputes, construction litigation, corporate disputes, trust and estate, litigation, and intellectual property litigation. He has extensive experience representing licensed professionals (accountants, lawyers, architects, and others) in malpractice claims and before state and national licensing and regulatory boards. Glaws also serves as outside counsel to large and

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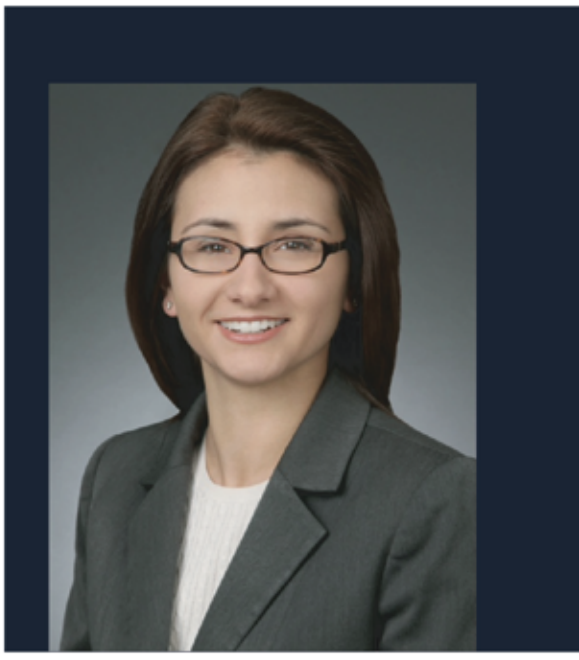
Members Matthew D. Berkowitz and Jim Steele to Participate in Strafford Webinar, *"Leveraging Rule 68 Offers of Judgment in Settlement Negotiations"*

On May 29, 2019 at 1PM, this CLE webinar will analyze Rule 68- Offer of Judgment, how defense counsel can leverage the rule to induce settlement, issues and and consequences of making the offer, and considerations for plaintiffs in rejecting the offer. The panel will also discuss Rule 68 as a tool in class action suits after the Supreme Court's ruling in Campbell-Ewald Co. v. Gomez

To watch and listen to this conversation, please click on this announcement.

Member Kelly Lippincott Set To Speak at Annual Medical Device Seminar In A Presentation Titled, "Lessons Learned: Two Recent Medical Device Trials"



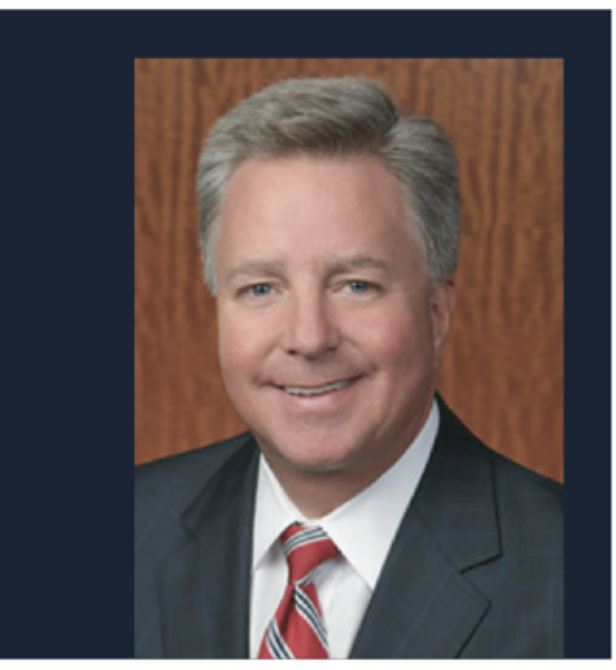
Please join Carr Maloney P.C. member, Kelly Lippincott as she speaks at the Annual Medical Device Seminar in a presentation titled, "Lessons: Learned: Two Recent Medial Device Trials" June 5-7, 2019 in Lost Pines, Texas.

Since its inception in the 1980s, the Annual Medical Device Seminar, sponsored by Medmarc, has been dedicated to bringing together Medmarc personnel, defense attorneys, and policyholders in a joint effort to study medical products liability claims and learn how to most effectively defend them.

Member Dennis Quinn To Participate In The Knowledge Group's Webcast, *"Strengthening Your Compliance and Ethics Program: Best Practices You Should Consider"*

Join a panel of key though leaders and practioners assembled by The Knowledge Group on June 6, 2019 at 12-2 PM as they present an in-depth disussion of the fundamentals of a compliance eand ethics program from lawyers in the 2019 landscap. Speakers will dig deeper as they analyze critical issues and compliance hurdles, and offer latest insights on how to strengthen your compliance and ethics program in this rapidly changing legal climate

To watch and listen to this conversation, please click on this announcement.



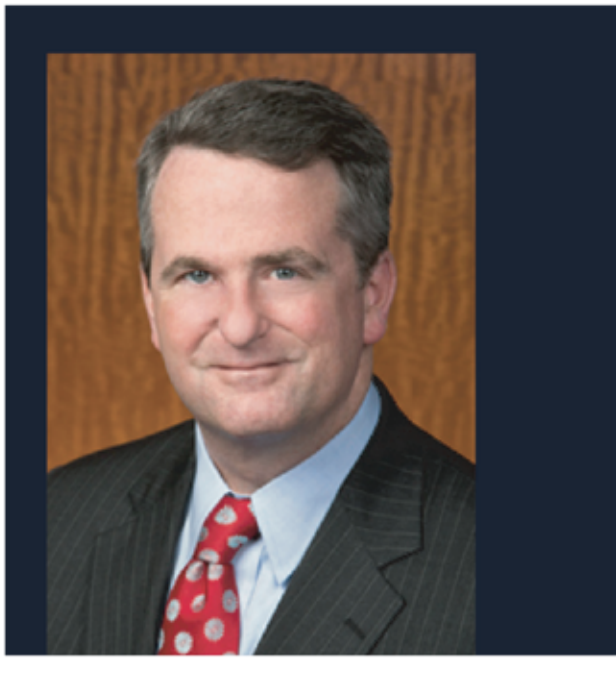
Member Thomas McCally To Participate In American Bar Association Webinar, *"Protecting Law Firms Against Management Liability Threats"*

On June 24, 2019, please join member Thomas McCally in an American Bar Association webinar titled, "Protecting Law Firms Against Management Liability Threats." The discussion will explain why law firms are not immune to the same risks as corporations. Tom and the rest of the panel will discuss the unique challenges these management liability claims pose for law firms and provide insight on risk management, the insurance, and strategy a firm can take to avoid liability claims.

Thomas McCally, Partner, Carr Maloney P.C., Washington, DC
Scott Gagliardi, Vice President, Sompo International, New York, NY
Eileen Garczynski, Senior Vice President, Ames & Gough, McLean, VA
Matthew Faenza, Underwriting Consulting Director, CNA, New York, NY

Please follow us on LinkedIn, Facebook, or check our site for more information on the time of this webinar.

Member Jim Steele Participates in AM Best Insurance Webinar Panel, "Heads Up: How Drones, Satellites, and Aerial Data-Gathering is Remaking Insurance Claims."



Please join Carr Maloney P.C. member, Jim Steele as he participates in a panel with Am Best Insurance titled, "Heads Up: How Drones, Satellites, and Aerial Data-Gathering is Remaking Insurance Claims" on July 16, 2019, 2-3PM.

The panel will discuss drones and how this is but one of the copious amounts of types of data unmanned aerial vehicles (UAVs) can obtain to support the insurance industry.

To watch and listen to this panel, please click on this announcement.