



## Executive Editor's Report

By John G. Kelly, B.Com., DPIR, F.CIS, L.L.B, M.S.Sc., M.A. (Jud. Admin)

### About John Kelly

John G. Kelly is a Toronto law professor and professional services strategist to consultants and vendors in the corporate legal department and law firm communities on the development of value-added client-centered legal services in the new professional services paradigm. He has developed billings management models that utilize the Uniform Task Based Management System (UTBMS) as a platform for project management applications, metrics measurement and performance management through Balanced Scorecarding. John is the author of the The Legal E-Business Guide, published by The Association of Legal Administrators (ALA).

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This issue starts with a heads-up. The Big Ideas article is an account of my sojourn to Legal Tech New York 2010. Litigation managers need to be aware and wary of new vendors who may come calling on them. They were out in full force at Legal Tech. The article by Dan Costello, Michael Halverson and Matthew Morrison on Measuring the Value of Counsel validates my message by providing litigation managers with insight on the technology required to support sophisticated performance measurement in insurance defense litigation management. Tim Lynch's article on the Council of Litigation Management's release of its CLM Litigation Guidelines is the product of two years' worth of substantive work. This has been an ambitious undertaking. Now comes the really hard part: convincing the insurance litigation community to adopt them as a standard. Stay tuned for an update in a forthcoming issue of the LMR. The law firm profile of **Anderson Crowley & Burke (ACB)** takes litigation managers into the Deep South and dispels the myths we've all heard about those southern jury trials. ACB is as sophisticated a firm as you'll find in any urban region, and when you read about their firm culture you may well want to pass this on to some of your supposed more sophisticated service providers in urban areas. **The Game Change** is already being touted as one of the best insider account gossip books in recent years. I've given you just a taste of many paragraphs of juicy morsels on all the 2008 presidential candidates. There's much more on many others in the book if you're intrigued about this campaign. **Freefall** by Nobel Laureate Joseph Stiglitz is a serious but extremely readable account of why and to what extent so many things went wrong in the most recent financial services meltdown. However, it is his prescription for a return to wellness that garnered rave reviews for this book.

Enjoy the read.

John



# Big Ideas

By John G. Kelly

## Legal Tech New York

Legal tech vendors went through a major meltdown in 2008/09 as the service economy tanked. Some didn't make it. Others have merged out of necessity or been acquired by former competitors with deeper pockets and the resource capability to survive and prosper from the shakeout. There were two obvious signs of this at New York Legal Tech 2010. The number of exhibitors was down (not really a bad development, given the overcrowding in previous years) and former independent brands were now incorporated into banners as divisions of what are becoming umbrella providers offering a 'family of services.' The obvious candidates, Thomson/Westlaw, Wolters Kluers/CCH and Lexis Nexis/Quick Law, now have gargantuan booths.

The number of exhibitors may be down but the crowds are back. It appears as though law firms and corporate legal departments are emerging from the aftershocks of the 2008/09 melt-down and are once again in a technology acquisition mode. And vendors are responding with aggressive product and service promotions. There's good and bad news in all of this. The good news is that customers are being presented with attractive pricing and service proposals. The bad news is that vendors are, in some instances, veering outside their competency parameters and pitching to clients in legal services verticals that they have neither the technology nor service capability to support.

'Family of services' is a dangerous services provider territory fraught

with less than satisfactory after-the-fact tales of woe. What niche users like litigation managers need to be cognizant of is that "big" doesn't necessarily mean "better," particularly when it comes to customized applications. 'Family of service' vendors often neglect to invest the resources in technology and knowledge management necessary to support high-end applications. What you get is a menu to choose from. Depending on the menu items you pick, you get price-point discounts. However, the products provided tend to be of the very basic "meat and potatoes" variety. To continue with this analogy, you don't get the gravy. In other words, the systems fall short on providing the type of metrics and knowledge management capability critical to outside counsel to support performance measurement and management. What you gain in price can be quickly lost through lack of litigation management support.

Within the corporate legal department vertical, a somewhat different development is taking place. Matter management technology vendors dominate this space. Many corporate legal departments have reduced their matter management legal spend. Although they haven't eliminated vendors, what they have done is cut back on the volume of services. The cut-back is due to a combination of budget restraints and the general decrease in activity. Acquisitions and mergers are at a standstill. Transactions have decreased. In short, matter management revenues are down.

The matter management

technology providers are looking for new clients as a mechanism for bolstering revenues. The search is inducing them to venture beyond their technology and knowledge management competency borders and extend their reach into areas such as bill review management. Matter management vendors have had e-bill transmission features embedded in their systems for some time. In the past they've been marketed as options to clients with low-level e-bill transmission requirements.

For example, a corporate legal department whose primary focus is document/transaction work usually has a balance of work that is done in-house and with outside counsel. Much of the outsourced work is done through flat fee/alternative billing arrangements or dictated by RFP contracts. All the corporate legal department requires to manage outside legal bills is a straightforward e-bill transmission system that enables them to perform a cursory check on the accuracy of the bill submission and conformance with straightforward billing guidelines. In short, there is no substantive bill review capability nor is there any semblance of the analytics capability that litigation managers need to utilize for the sophisticated e-bill management systems required to manage insurance defense counsel.

However, matter management systems vendors that service high end corporate legal departments have developed sophisticated analytical tools for clients that are relevant to tracking and managing the data relevant to the conventional legal department

mandate of matter management. For example, a general counsel might also serve in a dual role as corporate secretary or V.P. Corporate Affairs. Those in that position need to be kept up to date on ongoing developments for compliance with Sarbanes Oxley (SOX) and the U.S. Patriot Act. The matter management system will provide them with a platform to compile and analyze regulatory data and track their firm's compliance with reporting requirements.

Matter management systems vendors looking for new markets are tempted to embrace and espouse what they define as a data logic model. A datum is a piece of information. Data consists of pieces of information gathered together for analysis. A system with data management capability can be adapted to provide an analytical service for whatever the need might be within a broad spectrum of the market for which it has been developed. However, it's critical that one define the market accurately.

If legal services is a broad, all-encompassing market with a uniform boundary, then data management capability for matter management in the corporate legal department sector of the market is transferrable to the insurance claims management sector. But what if this isn't the case? What if legal services is actually comprised of a number of markets that aren't necessarily comparable or even compatible?

There are two examples that provide glaring illustrations of the extent that legal services

matter management and insurance litigation management are neither comparable nor compatible. Statistical reports on corporate legal department legal spend invariably show that transactional matter management work comprises the largest category of in-house legal services; litigation in general and insurance litigation in particular, is outsourced. The outsourcing of litigation reflects the extent to which it is a distinct category of legal services in its own right. In fact, companies with corporate legal departments that are predominately matter management focused often go one step further and outsource insurance claims and corresponding litigation to third party administrators (TPAs). In short, matter cost management and litigation cost management are two completely different animals.

Fifteen years ago I was part of the initial UTBMS implementation mission team under the auspices of then Price Waterhouse. A coalition of in-house legal counsel and law firm lawyers had developed the UTBMS Litigation Management Code Set. The in-house counsel contingent was dominated by lawyers with expertise in matter management while being woefully deficient in litigation and insurance defense litigation management. At the time of development, the insurance sector in general and the workers compensation bar in particular raised the issue of whether and to what extent there was a need for specific insurance and workers compensation code sets. The coalition, (that

realized in hindsight that it lacked membership from the insurance community), held firm to an opinion that was based on the following logical premise: litigation was common to all areas of law and the one uniform code set could accommodate all manner and type of budgeting and billing requirements.

Ask any insurance litigation manager or insurance defense lawyer about their experience with "task based billing" in those early years and they'll provide you with great examples of the false logic inherent in that model. Insurance litigation management, with its unique tri-partite relationship between insurers, clients and insurance defense firms and emphasis on cost effective litigation management, is a distinct vertical within the legal services market that encompasses a niche within litigation. In 2007, a coalition of knowledgeable insurance litigation managers and insurance defense firms put paid to that false logic and developed an insurance specific UTBMS Litigation Management Code Set with a follow up UTBMS Workers Compensation Code Set being unveiled in 2010.

Now let's bring this back to what I was exposed to at Legal Tech New York. As always, there's no place like Legal Tech to get the opportunity to take a peek at several vendors at your own speed in one location. I was provided with an opportunity to take the usual prospective client look at several vendors' matter management sites accompanied

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# Performance Management

By Daniel Costello, Michael J. Halverson & Matthew S. Morrison



Daniel P. Costello

*Daniel Costello, Founder of Daniel P. Costello & Associates, LLC, has years of experience concentrating in complex litigation, construction litigation, litigation management, and insurance coverage. He has successfully handled over 100 major jury trials, arbitrations, and mediations.*



Michael J. Haverson

*Michael Haverson is the principal of Haverson Consulting and is a litigation management/insurance consultant with expertise in best practices, counsel performance, alternative billing models, data tools and insurance coverage/bad faith issues. Mr. Haverson has over 25 years of nationwide experience both managing complex litigation and legal service relationships with outside counsel and was formerly Vice President of Claims Legal for Zurich North America.*



Matthew S. Morrison

*Matthew Morrison has years of experience focusing on complex litigation and insurance coverage from both the perspective of an insurer as well as an attorney in private practice. In his current position with QBE the Americas he is responsible for providing legal counsel on complex insurance coverage issues, management of extra contractual litigation and litigation management programs. He is also responsible for management of Environmental/ Mass Tort claims as well Staff Counsel Operations.*

At the 2010 CLM Annual Conference, Daniel P. Costello, Michael J. Haverson and Matt Morrison presented a panel discussion on the topic "Measuring the Value of Counsel." The presentation provided a road-map for carriers and corporate law departments to manage and control litigation expenses. The purpose of the presentation was to outline using analytics and metric tools to create actionable approaches to measure the value of counsel and manage litigation performance and expense. By utilizing the comprehensive performance management approach outlined by the panelists, insurers and other corporations managing litigation will improve communication, quantify and measure quality,

provide transparency and feedback to the litigation management process and provide for continuous performance improvement.

Litigation expense is a major cost driver. One major study of litigation in the insurance industry found that litigated cases comprise up to 15.2% of total pending claims. This is significant as the same study found that litigation expenses are 42.5% of total claims costs. Even the incidental costs in litigation expense, exclusive of attorney fees, have trended up from \$712 to \$1852 per suit file over the past ten years, an increase of nearly 250% in that span. This number was only half the picture, as costs per litigated files as an industry were as much as \$15,000

per case for commercial lines cases.

What tools can stem the tide of ever-growing expenses and costs? The presentation details how litigation costs can be better controlled. Using most of the techniques outlined in their presentation, one national property & casualty carrier achieved an ALAE reduction from \$120 million to \$30 million in six years. This example showcases how control of litigation costs can be a major driver of business line profitability.

The panelists discussed how the rising cost of services combined with diminishing returns creates an inefficient business model for managing litigation. A major culprit is the billable hour

compensation model, which derives profitability for law firms based upon a growing scale of work and increase in hourly rates. This creates competing business objectives on the part of the law firm and client by giving clear economic incentives to prolonging litigation as opposed to shortening potential litigation with more efficient productivity levels. A more efficient model would reward law firms that focus and deliver on productivity, efficiency and cost control, providing quality work product that is done better, faster and with less expense. Bill review programs and billing guidelines treat the symptom but not the root cause of the problem. Crafting an actionable solution on behalf of insurers and other corporations to achieve efficiency involves defining metrics, aligning carrier and counsel goals, developing actionable data and rewarding performance.

The presentation emphasized that a successful performance solution requires measuring what matters in the litigation process. What should be measured will be determined by identifying what is important to the insurance carrier/corporate client. Quality of results, good case communication, case planning, case reporting and expense management/budgeting are typically important considerations when evaluating the effectiveness of litigation management. Managing expenses requires the efficient utilization of litigation resources, accurate budget forecasting, correct forecasting and allocation of reasonably foreseeable budgeting activities.

So, what is required to devise and implement a quality performance management system? The panelists noted that an initial diagnostic review should be conducted to initially assess where things stand, including evaluating compliance with current litigation management/billing requirements and to identify and prioritize action areas. Next, an ongoing continuous quality control process should be established to implement action areas, provide a means for ongoing measurement/feedback, prioritize new action areas and to measure ongoing quality and performance gains.

Critical to the performance management process is the use of continuous, systematic audits and metric analysis to drive results. Metric analysis should assess variables such as case volume, efficiency and expense control. Metric analysis may be applied to analyze data relating to volume, efficiency and quality. Areas for metric review may include closed and pending case loads, closing ratios, attorney costs per case or phase per case, cycle times, case staffing, case results, trial percentages and many other variables. Metrics can be used to analyze case specific information, aggregate information or average per case, comparing cases handled within a particular firm or comparing cases handled by different firms. Data metrics can be used to track litigation trends over periods of time regarding staffing, expenses and results. Metrics can also be used for scorecarding and benchmarking performance. This involves utilizing data to establish

baselines for reviewing objectives that can then be measured and analyzed on a continuous basis through the receipt of additional data. Data is also necessary to analyze case pricing - an important element of any alternative billing model. Without data, the ability to critique the effectiveness of alternative billing models may be impaired or compromised.

A continuous quality control process requires continuous, systematic audits coupled with metric analysis of the audit results. Moreover, evaluation of metric data can be a critical component relating to both the creation of the audit process and the ongoing assessment of audit results. For example, metric data can be used to assist in the initial selection of cases for baseline audits as well as to provide an additional framework for continuous audit file selection through issue spotting and setting the parameters for file review. Systematic audits should be used to analyze all critical aspects of the litigation management process which can potentially impact both cost and performance, including claims handling, in-house litigation management oversight and outside counsel performance. The effective use of continuous audits will drive performance results.

Under this approach, continuous audits and metric measurement are integrated into a comprehensive performance management system. Use of a performance management system like Athenium's

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# Process Improvement

By Tim Lynch, Managing Partner, Lynch & Associates, P.C.



Tim Lynch

## Counsel on Litigation Management Releases Guidelines

The long-sought goal of a national standard for litigation guidelines took a major step forward in February with the release of the Council for Litigation Management (CLM) Litigation Guidelines, [www.litmgmt.org](http://www.litmgmt.org), Press Section. A committee of 37 representatives from the insurance industry, law firms and litigation support entities began work in September, 2008 to create this document.

The makeup of the committee is indicative of the wide range of experience and information that was brought to the process. The committee was chaired by Chris Carucci, Vice President of Litigation Management for Everest National Insurance Company, Domenick DiCiccio, Executive Vice President & General Counsel for Alexander Gallo Holdings, and John Mannato, Chief Litigation Counsel for Harleysville Insurance. The total membership of 37 included 12 from various insurance companies, 16 from law firms across the country and nine from various national adjusting firms

and support service providers. This broad spectrum insured that, when completed, the full spectrum of competing interests had been heard and addressed.

At five pages in length with five appendixes, the guidelines appear at first glance to be more complicated than those that are generally issued by carriers to their panel counsel. However, a careful review demonstrates that the drafters have created a process by which within 30 days of the assignment the claims professional and panel counsel can start to get on the same page with regard to how to efficiently and economically best represent the insured's interests in a third-party action and the insurer's interests in a coverage matter. This is accomplished through the creation of an Initial Evaluation and Litigation Plan (IELP).

The broad range of experience of the committee members is best demonstrated in Appendix 2, the IELP for coverage matters, and Appendix 3, the IELP for third-party defense matters. Both documents are a veritable anatomy lesson in the management of litigation. The drafters have dissected these two types of cases and identified the critical structural elements of both. For coverage cases, the IELP isolates seven "key points" regarding the underlying action and 16 with regard to the assigned coverage case. For third party defense cases, they identify 11 "key points" of background information and legal theories to be analyzed and 11 questions to be answered in order to develop a "strategy for resolution and recommended activities."

One of the beauties of the overall structure of the CLM Litigation Guidelines is that the analysis and recommendations for action, i.e. Appendix 2 and 3, are separated from development of the phased budget, Appendix 4. Therefore, if the IELP is completed before an attempt is made at developing a litigation budget, the resulting budget should be realistic at the outset and allow enough flexibility to amend as more information is developed. This will then allow the adjuster and the attorney to consult and make early decisions regarding case management and litigation strategy rather than simply react as the case unfolds.

The CLM Litigation Guidelines call for the submission of the IELP within 30 days following assignment. In the absence of some extremely unusual circumstances, this should be sufficient time for the claims professional to deliver all of the relevant documents in his or her possession to panel counsel. It should also be sufficient time for the attorney to make an initial contact with the insured and to analyze the information he or she has been provided. Any shorter time will not permit the attorney to provide an initial report containing sufficient detail that will allow the adjuster to take control of the matter and to direct future activities. A significantly greater period of time before the adjuster is provided with much of the information sought in the IELP could result in positions being taken that are not in line with the adjuster's view of the case. If two of the three participants in the tripartite relationship have differing expectations as to the conduct of the case, the result

will be higher costs and more time being spent on administration issues. The high costs associated with litigation today dictate that the critical players have a single view of the way the case will be conducted as early as possible.

Of the 11 “key points” sought in the IELP for defense matters, all but two, (i.e. plaintiff’s damages and the evaluation of liability) are substantially information that is or, possibly should be, in the possession of experienced panel counsel (e.g. an analysis of any potential conflicts of interest, an outline of the facts giving rise to the litigation, the legal issues known at that time, the available defenses, the availability of counter and cross-claims, a history of settlement efforts to date, evaluation of the judge and opposing counsel, and the possible sources of other insurance coverage).

At the very least, by developing this information as early and as completely as possible, the attorney will then be in a position to respond more thoroughly to the 11 questions regarding “strategy for resolution and recommended activities.” These questions go to the heart of managing virtually every size third party action. They range from the very typical early concerns of removal to federal court, a decision that must be generally made within 30 days of service of the complaint, to a review of any available fee shifting statutes. In between, the adjuster will be advised of the potential for early dispute resolution, possible tenders of defense, investigation and discovery needs, areas and identities of potential experts, and the insured’s document retention policies (if applicable to the case).

The IELP, while being provided very early in the case, is not cast in stone. It is anticipated that it, like the phased budget, will be updated as the need arises. The result of both the adjuster and the attorney developing the IELP and then building on it is that it provides value to the litigation management process by adding a greater level of predictability as to costs, which every insurer needs. It also should assist the attorney to avoid surprising the adjuster with costs that were not anticipated.

As a case in point, the issue of experts is addressed as follows: “Is this a case that will require the use of one or more experts? If so, discuss your recommendation as to experts, including when to engage the expert and cost.” This is information which an experienced attorney should be able to determine from the initial documents. Just because a field of expertise is identified at the outset does not mean that it becomes a “self-fulfilling prophecy.” Later discovery and analysis could just as easily demonstrate that it is not. Or, if discussed early enough, a defense strategy could be adopted that avoids the necessity of hiring one or more high-priced experts. By providing the adjuster with an estimate as to when it will be necessary to begin to incur these costs, initial litigation strategy, including employment of ADR can be meaningfully considered. Similar types of detail are asked for in the questions involving, for example, the insured’s document retention policies, witness locates and potential coordination with other defense counsel in the case of multi-party litigation.

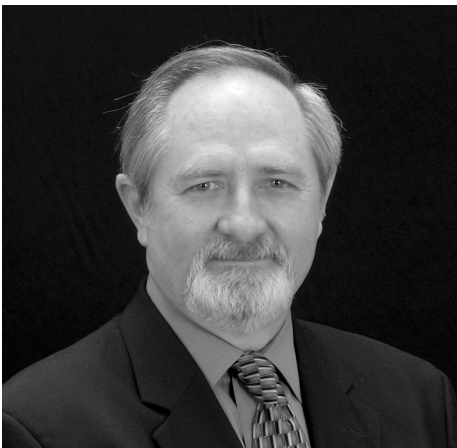
The IELP for coverage cases found in Appendix 2 is likewise derived from a dissection of many such cases into their component parts. Responding to it requires the attorney to address seven key points with regard to the underlying case and nine points with additional sub-topics and alternative points depending upon the type of case with regard to the matter assigned to him or her. Once these are addressed, there are seven questions to answer to develop the plan for going forward.

The benefits of compliance in this area are equal to those found in the use of Appendix 3. If anything, they should provide an ever greater benefit to defense counsel as it requires him or her to look at a multitude of issues very early in the process and evaluate their impact.

The billing procedures in Appendix 5 are standard and very similar to those provided in a multitude of insurer guidelines. There should be no surprises. What is critical to note is that these litigation guidelines are an attempt to take the process beyond simply stating what services and costs can be billed to the carrier and how the bill is to be presented. It is an effort to make the budgeting process a value added event by combining both cost projection and strategic planning to enhance the ability of the claims professional to oversee the litigation and not to tangle defense counsel up in the frustrating and time consuming work of defending what was done after the fact. This should be a “win-win” for everyone. ■

## Law Firm Profile

By: James M. (Jim) Anderson, Managing Partner, Anderson Crawley & Burke and Timothy D. (Tim) Crawley, Attorney and Shareholder, Anderson Crawley & Burke



James M. (Jim) Anderson

Anderson Crawley & Burke, PLLC, is a Mississippi law firm headquartered in Jackson, Mississippi with additional offices in North Mississippi (Tupelo) and on the Mississippi Coast (Gulfport).

Although ACB was established in 2003, the cumulative experience of its attorneys is nearly a couple of centuries old. The firm has endeavored to create a culture in the firm that subscribes to what many call the "Golden Rule." ACB was founded with the desire to focus on what it calls its "CROP," an acronym for Competent, Rational, Objective Professionalism. By trying to do the right thing at the right time and for the right reasons in client-, court-, and opposing counsel interactions, the firm has prospered and grown.

James M. (Jim) Anderson is the managing partner of the firm. In addition to his 30 years in private practice, he has participated in the industry as an administrator, as claims professional, as a consultant, and as general



Timothy D. (Tim) Crawley

counsel. Jim has also led the firm in founding the STAR Law Network, a coalition of law firms designed to provide legal services, training, consulting, and other services to clients which the firms share in common.

Timothy D. (Tim) Crawley has an extensive general insurance defense practice and is actively engaged in business, political and professional communities in Mississippi and nationally.

*Jim, would it be fair to say that your firm was founded by lawyers wanting to promote a professional culture and not just for the business reasons? If so, tell me a bit about that culture.*

That's a good way to put it. We have a very comfortable relationship in the way we work with one another, with our clients, with opposing counsel, and the courts before which we practice. We try to interact respectfully with one another and believe that disagreeing on issues does not require being disagreeable.

*Tim, can you expand on this?*

We treat each other as family. This extends beyond day to day business relationships. It includes our employees as well as attorneys. For example, recently we were confronted with a winter storm that resulted in school closures. Employees were faced with the dilemma of having to miss work to look after their children. We resolved it by inviting employees to bring their children to the office. We set aside the conference room for the children. That's the sort of thing that makes us unique: the willingness to think outside the box when it comes to being fair to our employees.

*Jim, as managing partner, what are some of the initiatives you undertake to promote this culture?*

We have an annual retreat with all of the partners designed to strengthen the bond between us. Every other year we expand the retreat to include all associates, and sometimes we include the paralegals as well. The retreats aren't restricted to professional development, although that too is always a component. We encourage everyone to mingle and get to know one another better and try to foster an environment designed to build our esprit de corps.

All of our attorneys meet weekly over lunch to discuss what is going on with one another's practices, analyze the cases handed down by the courts the previous week, and to keep one another up to date on client issues. It is very much an open environment designed to share



information, authority and responsibility to maintain a team effort.

*Tim, do clients appreciate this?*

Let's be honest. Clients are not a monolithic body. Some respond to this approach better than others. Clients willing to reach out beyond the narrow confines of referral and appreciate the value of developing a well rounded working relationship certainly benefit from it.

*Jim, how does your firm culture impact on your relationships with opposing counsel and the courts?*

I believe that it is appreciated. We are a well respected firm. We had a situation recently where a judge hired an attorney from our firm to help in understanding the facts and details of a particularly complicated case. That speaks to the integrity and reputation of our firm.

*Jim, you have a substantial insurance company client list. What have you done that's enabled you to become a major insurance defense firm in the state?*

My own approach to insurance defense is getting to know the clients personally through personal and face-to-face interaction. I have travelled a fair bit to meet with clients in their offices, and I try to be there to answer questions to help keep them from being sued. I have done a lot of training for their staff inside their offices. Those efforts seem to have been appreciated by insurers, employers, and TPA's. Tim compliments this by having an impressive knowledge of the

applicable law in all the areas in which we work.

*Is this approach to practice attractive to younger lawyers?*

*Are you able to attract good new talent in what is now a marketplace to grind out billable hours?*

Prospective attorneys interviewing with us invariably comment that they like the culture as described on our website. Many of the young lawyers that are entering practice today, however, aren't used to putting in the developmental time necessary to build practices and client relationships like Tim and I had to when we started. We hear the same things from our competitors. Overall, however, we are pleased with the young attorneys we now have and believe that they understand and appreciate our focus, what is needed to succeed, and we are excited with the progress they are making.

*Jim and Tim, we've all heard the stories about the Mississippi jury awards. How much of this is myth and is there a grain of truth in it?*

The reality is very different. Tim just won a significant insurance defense verdict before a jury where our client was a trucking company, a "deep pocket" target within the myth of "jackpot justice." There are stories circulating about justice not being done consistently, but the bottom line is that there are 82 counties in Mississippi and two Federal Court districts. You've got to know your venue, judge, lawyers and parties. There are good and bad venues. We can do a map of the venues

that identify the "good" and "bad" counties from a verdict potential standpoint, but certainly not every venue is a disaster.

*How critical is it that clients retain a firm like yours that knows the lay of the land in Mississippi?*

It is critical. Tim tried a case in one of the rural counties and the out-of-state law firm on the other side showed up with a silver pitcher for their water that was placed on the counsel table for the jury to see. Tim, on the other hand, was ready to drink water out of a mason jar just like the local folks. These are the sort of optics that are important and are part of knowing the lay of the land.

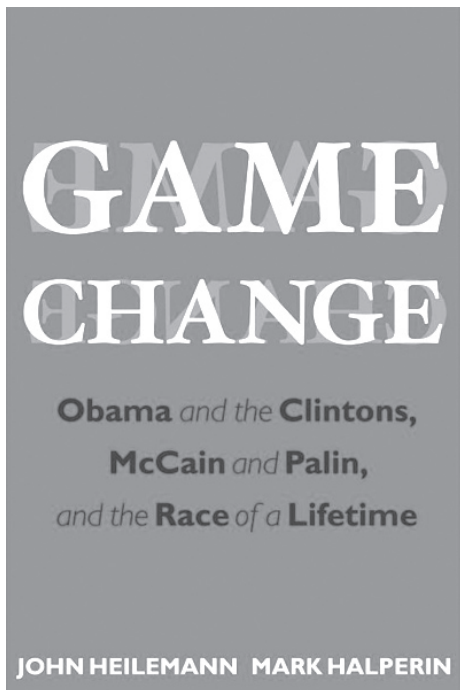
*Tim, in a smaller state like Mississippi where judges and attorneys know one another, how important is it that you have a lawyer who has the respect of the local judiciary?*

It is absolutely critical. An example I recall involved a case where we had gone to trial with an out-of-state co-counsel who had failed to disclose information. The judge could have granted sanctions, but since he had known me for some time and appreciated that this was not something I would have purposely done, he stayed the order and permitted me to file the document without sanctions being imposed. This is the sort of credibility you build up with time and exposure in a court before a judge.

*Tim, what sort of actions does your firm take to ensure that*

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## Must Reads



### Game Change

**John Heilemann and  
Mark Halperin**

*Harper Collins (2010)*

Everyone is fascinated with good gossip; even those at the center of the storm. Among British playwright Oscar Wilde's oft quote quips is the observation that "There's only one thing worse than having everyone talking behind your back; having no one talking behind your back." *Game Change*, written by two politically well-connected New York journalists, provides those of us on the outside with the ultimate insiders' renditions of everything we wanted and didn't even know we wanted to know about the Obama/Clinton and McCain campaigns for the presidency. Even Obama was known to remark at one point in his frenetic race for the presidency being waged on two fronts, the bitter battle for the Democratic

nomination with Hillary Clinton and simultaneously with John McCain for the presidency, that "[t]his shit would be truly interesting if we weren't in the middle of it."

Among the more salacious bits of gossip in the book are insights into the "real" John and Elizabeth Edwards. Whatever his previous reputation as a populist and man of the people may have been in previous incarnations, his reincarnation as an aspiring presidential nominee is one of a person so full of himself that it approaches egomania. His relationship with his wife is exposed as a façade. His flaunting of an affair with a woman (yes, the person whose child John finally acknowledged as being his, two years after a cover up) for all to see while his wife battled with cancer is shocking to those on his campaign team and even a hardened media. And his wife, well before being diagnosed with cancer, is portrayed as a callous, rude, shallow person who made life for those working for her miserable. "What the world saw in Elizabeth: a valiant, determined, heroic woman. What the Edwards insiders saw: an abusive, intrusive, paranoid, condescending crazy woman."

One can't talk of either Bill or Hillary Clinton as individual personas. This dynamic duo has been on the campaign trail for 35 years since they met at Yale. The authors dub the Clinton campaign as "Hillaryland," and the book devotes considerable space

to telling a tale of woe about a person whom everyone, including Barak Obama, has tremendous respect for and admires in one way but decides at the end of the day this is not to be her time. And both Hillary and Bill feel the pain and take it hard. For example Hillary, to many politico's surprise, had turned out to be an excellent senator and legislative team player with her colleagues. She presumed she had earned their respect, loyalty and support. It was payback time, or so she and her husband thought. "It would be many months before the Clintons gained any awareness of the incipient betrayal of Hillary by her colleagues in the Senate. And it would hit them like a ton of bricks in their psychic solar plexus."

And what about Bill? The book deals with the "Bill" issue on a number of levels. There's the absolute loyalty and commitment he has to support Hillary in the role he believes she was always destined to fill: America's first female president. There's the bull in the China shop Bill that on more than one occasion creates havoc in Hillaryland by going off script. But it all comes down in the end to one more portrayal of why Bill is the ultimate "comeback kid." He's an absolutely brilliant political campaigner. "Even at his most scandalous, most inconvenient, she still found her husband a marvel. 'When he dies, they should study his brain,' she'd say."

As for John McCain, well what you see is what you get. There are no surprises. We all know of his integrity and temper. What many readers wouldn't be fully

aware of until reading the book is the extent to which he relies on gut instinct to make judgment calls on even the most important matters. They chronicle his decision on impulse to halt his campaign in the midst of the 2008 financial crisis and fly to Washington to help resolve it. Once on the ground and in the corridors of power he had no coherent strategy nor was he even up to speed on the extent and depth of the problem. Moreover he demonstrated little interest in taking the time and effort to become fully informed. The chronicle of this event culminates in a meeting with senior white house officials convened by President Bush at McCain's urging with the President in attendance where he blusters on and Obama, who's also invited, demonstrates the extent to which, in stark contrast to his rival, he's done his homework and is capable of working with the stakeholders to formulate solutions. President Bush is, on the one hand, genuinely impressed with Obama and, on the other hand, dismissive of McCain. Their account of how McCain chose Sarah Palin as his vice presidential running mate is instructive on the McCain modus operandi.

*But although McCain didn't know much about Palin, what he did know he liked. She reminded him a lot of himself: the outsider's courage, the willingness to piss all over her party. (He loved that she'd taken on that pork-barreler Ted Stevens, whom he despised). He saw in Palin a way of seizing back and amplifying*

*his own message of change – real change, not the bogus Obama version. "Trust your gut John," Cindy told him and McCain knew she was right.*

However, the book goes beyond providing readers with titillating gossip. It's an insightful perspective on how presidential campaigns work and the tensions that are constantly percolating among team members with ambitions that conflict to the point of rivaling those of the candidate. Case in point, many American voters were left with an opinion of Sarah Palin that was less than flattering during the campaign only to be surprised to encounter what seems to be a somewhat more impressive person in her re-emergence as a major presence in the "Tea Party." According to the authors, many of the embarrassments Palin encountered were due to handlers more focused on what they could use her for rather than how they could support her candidacy.

*The truth was that the McCain people did fail Palin. They had, as promised, made her one of the most famous people in the world overnight. But they allowed her no time to plant her feet to absorb such seismic shift. They were unprepared when they picked her, which made her look more unready than she was. They banked on the force of her magnetism to compensate for their disarray. They amassed polling points and dollars off for fiery charisma, and then left her to burn up in the inferno of public opinion.*

Barack Obama was in the process of becoming Mr. President during the course of this campaign. The book provides a multi-faceted

perspective Barack the man, Barack the family man, and Barack an aspiring presidential candidate. The book provides a number of examples of the extent to which Obama has a strong healthy relationship with his wife who and bonds with his two daughters. He's first and foremost a family man and no decisions are made nor are any courses of action taken without his wife and children taken into account. Michelle is an accomplished woman in her own right who has no compunction about wanting to remain so even though she supports her husband.

On the political level he's a quick study. Although supremely self-confident in his abilities, the book portrays him as a person very much aware of the fact that this was very much a learning experience for him. He was the new kid on the block. In the early part of this campaign he was quite prepared to let his team of politically experienced handlers handle him. As the campaign progressed he demonstrated his ability to take control of the campaign and transform himself into the leadership mode that fits with a president in waiting. In the financial crisis meeting with President Bush orchestrated by John McCain referred to above Barack Obama did his homework and, unlike McCain, appeared presidential in the manner in which he dialogued with the people in the room.

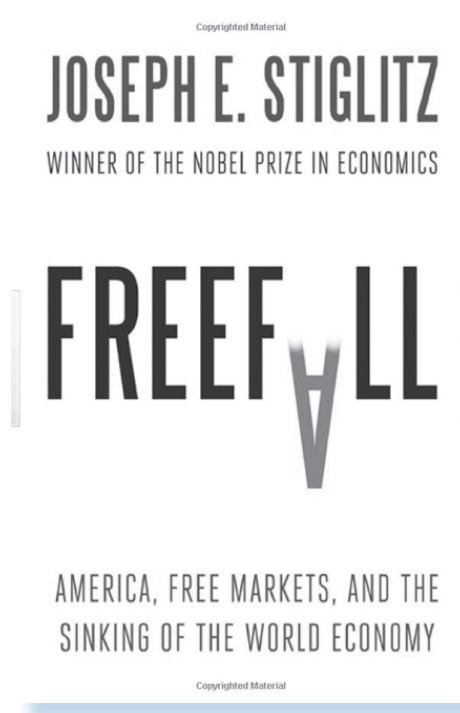
The most telling portrayal of Barack Obama as the man who should be president is at the very

*continued on page 12*

end of the book when immediately after the election he informs his staff that he wants Hillary Clinton to be Secretary of State. As die hard partisans, none of them are in favor of rewarding a bitterly fought opponent a prestigious appointment that would in effect make her America's ambassador to the world second only to the president himself. However, he is now President Barack Obama and he believes that putting Hillary in this position would be the best fit for the country at this juncture and an important step in uniting the party and country behind him. He may be president but like so many Americans he realizes the country needs the expertise and presence that Hillary can project in the international arena. The book recounts how he reaches out to her and convinces her that he as president must call upon her to serve her country and she as an American who has demonstrated an extraordinary commitment to her country must answer that call,

### Quotable Quote

*"It was November 20. The election was sixteen days in the past. But today, Obama had pulled off the grandest game changer of them all. On the brink of great power and awesome responsibility, he and Clinton were on the same team."*



### Freefall

Joseph Stiglitz

W.W. Norton (2010)

How comforting it is when you can read a book by a Nobel Laureate and understand everything he writes because he makes it common sense out of complexity! Joseph Stiglitz is a world renowned economist, advisor to presidents, holder of senior portfolios with the IMF and, with this book, the purveyor of arguably the best common sense guide on how the U.S. financial system verged on total collapse in recent years. Whether you agree with his prescription for a cure may well be open to argument. However, he's dead-on with his diagnosis of what the disease is and how it set in. In this sense he's like the good doctor who can explain a complicated illness to the layperson using language and

examples that just make sense. Here's an example of his common sense explanation of why the banks got greedy and went out of control, because left to their own devices, they're just like you and me:

*We have to be wary of too facile explanations: too many begin with the excessive greed of bankers. That may be true but it doesn't provide much of a basis for reform. Bankers acted greedily because they had incentives and opportunities to do so, and that is what has to be changed. Besides, the basis of capitalism is the pursuit of profit; should we blame the bankers for doing (perhaps a little bit better) what everyone in the market economy is supposed to be doing?*

So what went wrong? First and foremost was the inevitable consequence of de-regulation of the financial services sector. Economic booms and busts are common...too common. That's why one of the outcomes of the Great Depression was to enact regulations to minimize both their potential for occurrence and their impact when they did occur. Although far from perfect, the regulatory regime did work. American's experienced nothing that resembled the financial collapse of the Great Depression for more than half a century. Once de-regulation gained favor in the 1990's and the prevailing mindset embraced the concept of the inherent intelligence of the marketplace, it was only a matter of time, and not too long a time at that, until the U.S. would stumble into the financial abyss.

Banks serve an important social purpose in a capitalist economy. We tolerate them making profits because they help society profit.

People borrow money to buy houses. This contributes to financial security. Small and medium businesses borrow money to start and expand business. This creates jobs. The key point to keep in mind is that lending money only generates wealth to the extent that it acts as a medium. Banks lost their focus in the past decade of de-regulation and became obsessed with lending money for the sake of making money.

Take the example of the housing bubble that burst once what Stiglitz labels as the “mortgage scam” ran its course. Banks shifted their focus from reconciling mortgage approvals based on the ability to pay to designing mortgages that could be pushed on people who would never realistically be able to afford to keep payments up to date in the long term. However, by stretching out the payment cycle to unrealistic lengths they were able to make handsome profits in the short term by charging mortgage approval and renewal fees. Eventually when mortgage rates were adjusted to reflect their true cost borrowers defaulted en masse.

Securitization is another example. Mortgages, commercial loans, commodity futures, you name it, were bought and sold as pure speculative investments. Buyers of these securities thought they were buying blue chip assets because they were being purchased from the big banks and securities dealers. However, these third-party purchasers had no actual knowledge of the real value of the securities they were purchasing. The banks and investment companies were under no real pressure to conduct due diligence on the true value of what they

were securing because they were passing them on to third parties and earning a handsome short term transaction fee in the process. This bubble ultimately burst and came close to dragging the entire financial system down the drain with it because of the multiple associations securitization creates between bulk buyers.

So why did the banks take these types of risks, knowing that although they would profit in the short term there might well be a massive bubble burst down the road? As everyone seems to be aware in hindsight they determined that in the process as they grew in size they would become too big to be allowed to fail.

*They knew that if they got into trouble, the government would rescue them. This was true even of the banks that did not have deposit insurance, like the investment banks. Second, the decision makers – bankers – had perverse incentives that encouraged shortsighted behavior and excessive risk taking. Not only did they know the bank would be rescued if it got into trouble, but they knew they would be well-off even if the bank was allowed to fail. And they were right.*

The real loss in this past decade of runaway financial hubris isn't the cost to taxpayers or the tragedy of people losing their homes; some of who were just as eager speculators as the banks that overleveraged their financing capability. What's been lost in America is the real purpose of money: not to generate profits for the banker but to create wealth and grow the economy. And that's what governments, public policy experts and even ordinary main street people are becoming concerned with. In

Stiglitz's Noble Prize level opinion, getting America back of track as a world class wealth creator and generator rather than restoring big banks and investment dealers to their former gargantuan status must become the focus of financial reform.

## Quotable Quote

*“I have described how our financial markets misallocated capital. But the real cost of our runaway financial sector may well have been far greater: it led to the misallocation of our scarcest resource, our human talent. I saw too many of our best students going into finance. They couldn't resist the megabucks. When I was an undergraduate, the best students went into science, teaching, the humanities, or medicine. They wanted to change the world by using their brains.”*



## About Litigation Management Report

### Mission

The Litigation Management Report provides litigation managers in the insurance defense community with strategic insight on best practices in the application of subject matter expertise to legal expense management with leading edge e-billing technology platforms and business intelligence systems.

### Vision

Cost effective legal expense management of insurance defense through the leveraging of subject matter expertise into e-billing solutions.

Teamthink® will allow insurers and other corporate clients to (1) structure the performance measurement process; (2) develop a measurement system; (3) standardize the measurement process through calibration and benchmarking; (4) measure large number of cases; (5) measure and improve gaps in best practices and (6) continuously define opportunities for improvement. By measuring and managing what matters most in the litigated file handling process, insurers and other corporations can mitigate financial exposures, manage best practice compliance and help ensure positive financial outcomes.

This requires a three-step solution. The first step is to conduct a diagnostic assessment, which includes a litigation “State of the Union” analysis and metric-driven review which is based upon understanding what is important to the carrier/corporate client in the context of litigation. A review of litigation best practices, data analysis, baseline audits and other tools are used to develop a comprehensive assessment of current performance and data-driven recommendations for improvement. As part of step one, key metrics are identified and an initial assessment is conducted to prioritize going forward action areas. Step two involves creating an ongoing continuous quality control process to implement action areas and provide for ongoing, steady feedback and measurement. An important component of step two involves implementation of a systematic audit process to continuously measure individual and organizational performance, delivering quantitatively driven reports to analyze trends, issues and costs. These reports, in

turn, will enable management to develop and execute metric based plans for improvement and to deliver meaningful feedback. The third step is to create and implement a consistent quality improvement methodology plan at all relevant office and organizational levels. Key elements of this process includes data driven issue identification and analysis, developing improvement objectives, deploying action steps and implementing a plan to validate success.

Significant benefits are achieved by measuring what matters in the litigation process through the development and implementation of a comprehensive performance management system. These benefits include the creation of a litigator meritocracy, where companies can objectively reassign and reallocate legal spend to counsel whose quality value as demonstrated through metrics exceed the competition. Moreover, this approach will help surface root causes of issues involving all key parties to the process that negatively impact litigation spend at all stages of the litigation process. This approach will also provide actionable data that can be used to hold all parties accountable for performance against best practices. Other benefits include the ability to identify top internal performers and new best practices, while continuously improving litigation management performance.

Overall, the key to measuring counsel and the litigation management process is to develop, analyze, and create measurable actionable plans for improvement. Simply put, “what gets measured gets done.” Billable hours, however measures time, not value. The goals of counsel and client are aligned through the use of incentive based alternative fees and metric driven compensation which

rewards performance, productivity, efficiency and cost control. A metrics driven continuous quality improvement culture should be created to drive consistency in planning and execution processes at all organizational levels. By measuring what matters, the deployment of a comprehensive performance management system utilizing audits and the metric assessment of actionable data can improve litigation performance and help effectively manage litigation spend. ■

with logical the explanations referred to above of why these were applicable to comprehensive bill review and data analytics applications in insurance defense litigation.

There was an over-emphasis on technology in the demonstrations. Vendors focused on telling me that their technology platforms were of the latest generation and weren't legacy systems. However, a system is only in the legacy category if it isn't capable of responding to demands of comparable systems in the market in which it competes. Knowledge management, not technology as such, is the key to cost effective insurance defense litigation management. When evaluated in that context, these systems were in fact in the legacy category. In short, bill review management and the systems that support sophisticated applications at the analytics level are operating at one or more generations beyond the matter management vendor systems.

The lesson that needs to be remembered in what may be an attempted invasion of an entirely new breed of systems vendors into the insurance litigation

management vertical is, to put it bluntly, that insurance defense bill review is a special breed of animal that requires technology geared to add value to the service mix and not technology to support lateral transfers within the legal services market place. ■

*Law Firm Profile  
continued from page 9*

*the judiciary recognizes and appreciates your commitment to integrity?*

For one thing we strive to always deport ourselves in an upright and ethical manner. The legal community in this state is relatively small, and in the personal injury litigation field, we come across the same attorneys over and over again. I know almost every attorney in the State who is regularly involved in the kinds of personal injury litigation we are hired to handle.

*What is your firm noted for?*

Because my career has had such a protracted focus on the area, Workers' Compensation is clearly one of the areas of practice for which we are well known. We also do all types of personal injury defense and have cases flowing from the transportation, construction, medical, and products areas as examples. In addition, we are also frequently called on to provide coverage analysis and opinions for our insurance clients.

Other than specific areas of practice, however, I believe we are best known by our client base for providing quality legal services at a reasonable price.

*Jim, you have an exemplary record of service to the profession over the past 30 years. You've served on a number of bar*

*committees. What's been your motivation?*

I have enjoyed the fact that in workers' compensation practice, I have found an area of the law where a file is not just a name with a number on it. The claimants on the other side of the claim are real people. While recognizing that some claimants do not have honorable intentions in pursuing their claims and that a vigorous and aggressive defense is warranted, balancing that with the human side where the right result is achieved for legitimate claims has provided its own rewards.

*Tim, you're very involved in state matters. You're on the Mississippi Economic Council. To what extent does participation in these areas add value to the service you provide to your clients?*

It gives me the opportunity to interact with the legislative leaders of our State even before the legislature convenes. If an issue arises that is of concern to our clients, we notify them, provide insight, seek feedback, and try to be a resource to the legislative leaders for finding appropriate solutions to the problems being addressed.

*Tim, you've been very active on the lecture circuit. What is the nature and type of lecturing you do?*

Over the years I have lectured frequently on Federal Court practice, civil litigation practice, and discovery practice. I have also lectured on mediation techniques as well as given seminars on how to conduct depositions to both bar members and industry groups. Last year I delivered a series of four lectures for the Council on Litigation Management on a variety of issues to industry groups.

*What's the future look like for insurance litigation in Mississippi?*

We have a good insurance commissioner who has done a great job of learning the business of insurance regulation. Although he is not a pawn for the insurance community to give them whatever they want, he understands the issues and does not "pretend" to regulate as a way to get noticed for a higher position.

Some quality tort reform has been passed by the Mississippi legislature over the past few years, and we have seen a dramatic reduction in litigation as the result of those changes. Of course, we recognize that the pendulum swings both ways, and we expect some erosion in those improvements through case law evolution, but for the immediate future, we believe we have a market that is viable for the insurance community.

Mississippi has a well organized and politically aggressive trial lawyer lobby that historically has used its funding to secure the elections of liberal judges and legislators to push their agenda. That effort resulted in the National Chamber of Commerce referring to Mississippi as a "judicial hellhole" in the late 1990's. The business and defense community remains vigilant to protect and enhance the strides made in the past decade in the area of tort reform, and ACB stands at the front ranks of that effort. ■

## Events and Happenings

### PIAA Annual Meeting

Sheraton Chicago Hotel and Towers, Chicago IL  
Wednesday, May 12 - Friday, May 14, 2010

[www.piaa.us](http://www.piaa.us)

### American Claims Event (ACE)

Bellagio Hotel, Las Vegas NV  
Tuesday, June 22 – Thursday, June 24, 2010

[www.americanclaimsevent.com](http://www.americanclaimsevent.com)

### 65th Annual Workers' Compensation Educational Conference & 22ND Annual Safety and Health Conference

August 15 - 18, 2010

For more information call FWCI at (850) 425-8156

### NAMIC Annual Convention

Manchester Grand Hyatt, San Diego CA  
Sunday, September 19 – Wednesday, September 22, 2010

[www.namic.org](http://www.namic.org)

### Stone River Summit

Fairmont Resort, Scottsdale, AZ  
September 20 – 23, 2010

[www.stoneriversummit.com](http://www.stoneriversummit.com)



The Voice of the Defense Bar

### 2010 Annual Meeting

San Diego Marriott Hotel & Marina 333 West Harbor Drive  
San Diego, CA 92010

Wednesday, October 20, 2010 - Sunday, October 24, 2010

<http://www.dri.org/>

### 19th Annual Workers' Compensation and Disability Conference & Expo

Las Vegas Convention Center  
Wednesday Nov 10th- Friday Nov 12th 2010

[www.wconference.com](http://www.wconference.com)

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