

# The Precipice Episode 3

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**PLUS Staff:** Welcome to this PLUS podcast, The Precipice. Before we get started, we would like to remind everyone that the information and opinions expressed by our speakers today are their own and do not necessarily represent the views of their employers or of plus the contents of these materials may not be relied upon as legal advice.

And with that, I'd like to turn it over to our host, Peter Biging.

**Peter Biging:** Thanks, Tyla. Hello again, and welcome to Episode 3 of The Precipice, the podcast devoted to discussing what's coming next in management and professional liability, cyber, and D&O risks. On today's episode, we're going to talk about where things appear to be heading in regards to lawyers professional liability.

I'm fortunate to have an incredibly smart group of people on the podcast today, who each manage or have substantial oversight responsibilities with respect to sizable books of lawyers' professional liability claims. With today's conversation, we're going to try to shed some light. What they think will be the biggest drivers of lawyers professional liability claims in the next [00:01:00] three to five years, what claims trends they are already beginning to see, what impacts they think these trends may have on underwriting of these risks, and recommendations they may have for how to try to mitigate the most worrisome risks on the horizon.

My guests today are Megan Zurn, Ryan Kelly, and Melissa Dammon. Megan Zurn is a Claims Manager for AXA XL's commercial E&O team and sits in AXA XL's Atlanta office. Prior to the acquisition of XL Catlin, Megan joined Catlin in 2015 as a Senior Claims Examiner and has been promoted through the ranks to her current position of Manager.

Megan manages an experienced claims team of licensed lawyers who handle a variety of professional liability matters nationwide with a concentration on lawyers professional liability claims. Before becoming a claims professional, Megan was a practicing attorney in Atlanta, [00:02:00] Georgia, where she litigated a wide breadth of commercial litigation with a focus on the representation of policyholders insurance coverage disputes including litigated

declaratory judgment actions in state and federal court. In her time as a litigator, she tried numerous cases, both civil and criminal in nature.

Megan graduated cum laude from the University of Georgia Law School of Law after earning a B.A. cum laude and with distinction in all subjects from Cornell University. Welcome Megan.

**PLUS Staff:** Thanks, Peter. Glad to be here.

**Peter Biging:** Ryan Kelly is a Claims Team Lead for Berkley Select in Chicago, Illinois, where she leads a team of legal and accountant professional liability and management liability specialists.

Ryan also continues to handle claims with a focus on legal professional liability claims. Prior to joining Berkeley Select in 2017, Ryan spent nearly a decade as an insurance defense [00:03:00] litigator. She spent most of her career at Lipe, Lyons, Murphy, Nahrstadt, and Pontikis. You got to give me a difficult one, Ryan.

**Ryan Kelly:** Close enough.

**Peter Biging:** Where she made partner before transitioning over to work for an insurance company. While working in private practice, Ryan defended a wide variety of matters, including legal and medical malpractice cases, construction litigation, and premises liability cases.

Ryan's practice focused primarily on litigation and also included numerous trials. Ryan attained her undergraduate degree from Indiana University and her Juris Doctorate from DePaul University College of Law. Welcome, Ryan.

**Ryan Kelly:** Thanks for having me, Peter. I'm excited for our conversation today.

**Peter Biging:** Me too. Very much.

And the last person on the panel is Melissa Demmon who is Vice President Claims Counsel for SOMPO, where she supervises the Lawyers Malpractice and Accountants Malpractice Claims team. [00:04:00] Prior to joining SOMPO, Melissa was Claims Counsel for a major insurance company in St. Louis, Missouri, where she managed a large caseload of LPL claims against policies with limits of up to 5 million dollars.

Melissa also has a history as a litigator in private practice before she took the plunge into insurance professional liability claims, including a time where we crossed paths briefly at a firm many years ago. Melissa is a member of the New York, New Jersey, and Missouri Bars, and is also admitted to the United States District Courts for the Southern and Eastern Districts of New York and the District of New Jersey.

She received a J.D. from St. John's University School of Law and a B.A. from Columbia College, Columbia University, and is a member of the American Bar Association, the Professional Liability Underwriting Society, and the Claims and Litigation Management Alliance. Welcome, Melissa.

**Melissa Demmon:** Thank you very much. Excited to be here.

**Peter Biging:** [00:05:00] Alright, I'm really excited to talk to the three of you and to set the stage, I wanted to talk a little bit about a recent survey released by the risk management advisory firms Ames and Gough. In the survey, which was reported on in the American lawyer, Law 360, and other legal industry publications, it was noted that most legal malpractice claims come from three practice areas: trust and estates, business transactional work, and corporate and securities work. The survey also noted that, “conflicts of interest producing disquieting and number of legal malpractice claims, as well as ethics complaints and law firm disqualification. Despite the fact that most firms now have practices and procedures in place to avoid them.”

In terms of what keeps insurance companies claims executives up at night, the survey went on to mention growing cyber risks as well as law firms [00:06:00] being sued for their association with the client's crimes. With an example being given of the claims Sullivan and Cromwell is facing from cryptocurrency investors stemming from the firm's representation of FTX Group and the firm's alleged aid and encouragement of founders Sam Bank and Freed's criminal activity.

In terms of size of verdicts, the report noted that the insurers they spoke with had acknowledged a number of settlements between 2020 and 2024, exceeding nine figures. 11 of the 13 who participated in the survey had participated in claim payouts in excess of 100 million dollars and four had actually paid out claims in excess of 300 million dollars.

Interesting survey results to be sure. With that as preamble, let's start our conversation. So first let me ask the group, is it attorney victimization resulting in [00:07:00] payments to fraudsters as a result of hacking into law firm email

accounts and issuing fraudulent wire instructions or otherwise inducing payments that end up in the hands of criminals.

Is that yesterday's problem, today's problem, tomorrow's problem? What do you guys think?

**Megan Zurn:** Alright, Peter, I think I'm going to take the lead on this one. The wire fraud schemes. These, all of us, I think, will shake our heads that we get these, probably on a daily basis. But as far as emerging risks, I think I would argue it's more yesterday's problem, today's problem and tomorrow's problem, maybe all of them.

I think I got my first wire fraud case in 2017, early 2017. And when I got that claim file in, I looked at it and said, wait, our insured law firm, they weren't hacked. It was the client that was hacked. They thought that they were emailing the client's actual email address. It was like a Yahoo email address.

And [00:08:00] they received new wire instructions, but it was in the middle of a chain where they were talking with their client. How were they to know? They'd have no idea. And the thought at that point in early 2017 that you had to go to, you had to call the client to verbally confirm, or call the bank, or have these kind of other communications.

That wasn't the standard of care in 2017, in early 2017. This was, at that point, I think it was a very emergent risk. And no one really knew about that. I think that today, the standard of care has changed pretty drastically in this particular area. And that there may be the standard of care may be to verbally confirm if you suddenly get an email even if it's in the same chain that's, it says, Oh, instead of that bank, let's send it to this other bank.

Whenever there's a change later that has been now identified as a potential red flag when you get a sudden change of payment instructions. So, it's an interesting area that it, how often we're still seeing it seven [00:09:00] years later. I don't know what Ryan and Melissa, how have you guys experienced this trend?

**Ryan Kelly:** Yeah. I certainly agree with you that it is yesterday's problem, but it is still today's problem and probably will still be tomorrow's problem. And I think as our insureds are getting more risk management tips and learning things make sure you call and independently verify the wire instructions before you make the transfers.

I also think the fraudsters schemes have gotten much more sophisticated. So, it's much easier for the insured to fall for these things. But I still think the tried and true, independently verify. Put some independent thought into it. We had a claim that came in here where an insured had dealt with a client historically on multiple real estate transactions and knew this client banks at a local bank in Rhode Island.

And all of a sudden, last minute change. I want my funds from this real estate closing wired to a big box bank in Texas and the [00:10:00] insured just followed the email trail and sent the wire for 1.7 million dollars over to this big box bank in Texas and never thought to himself gee, I've dealt with this client for years and I know this isn't his pattern of business. Maybe I should call and verify it.

And if you look at the email chain, it would have been nearly impossible for the insured to catch the fraudsters emails and what they had changed to insert themselves into this conversation. But I do think some independent thought in that instance would have led them to stop, slow down and make, the extra steps to verify.

**Melissa Demmon:** I absolutely agree with everything you've both said and to calling the standard of care larger now, one thing we've recently seen, which was a wake up call for me as well was the standard of care now has to encompass not only the attorney, but the attorney's support staff, be that a law secretary, a paralegal, or an accounts payable [00:11:00] individual because often the client might convey truthfully to an attorney.

I want my payment instructions changed. Okay, fine. And then that's conveyed. But what if a threat actor gets their way to the accounts payable person? And not into the partner and the accounts payable person does what they do off you go. So, I think any risk management really needs to involve the holistic organization so that everyone as tiresome as it may feel in the heat of the moment of getting a payment out checks with each other and, we'll get into topics of hybrid working, but even more.

So, as we're spread out a bit old school phone calls tend to work, whether that's calling the client to confirm, whether that's calling your partner, if you're the accounts payable clerk, whether that's calling your accounts payable clerk, if you're the partner initiating the payment, and I would hazard to say this is true for any sized firm.

There is, the only difference between the firm sizes might be the size of the [00:12:00] payment being made. So, it behooves everybody to really get on board with that.

**Peter Biging:** So, it's interesting, I was struck by what Ryan was mentioning about how ingenious they are with these things. I'm handling a case now where they inserted themselves in the middle of a conversation, and I think, Megan, like you said, first it was send me a check, then it was like no, we're having problems with our bank, don't send a check, wire it.

And the spoofed email, one of the firms was XYZLaw.com. So instead of Law, they had LAVV. You had to really look closely to see that it was V as opposed to W. And then the other firm was XYZFirm.com. And so instead of M at the end, they had RN right next to each other. And it looks like an M and it's just, it's ingenious.

And yeah, it's funny. I had a case; a long case had been around forever, and we finally settled it. And they sent me prior instructions on the email, and I said no. And they gave me, and they said, all right, so [00:13:00] I said no, I'm going to, we're going to need to speak with a person. And not only do we need to speak with a person, we're going to need to be able to call that person, not on a number that you give me.

I want to, I'm going to call the number on your firm's website for the general number. And you need to send that person in, whether she's working remotely or not. She's got to go in here. She's got to go in and field that call and confirm the wire instructions because it's just it's crazy.

So what advice--maybe you've already touched on this, do you have advice or recommendations for risk management for law firms trying to avoid being the latest victim on these cases, you say you're seeing a couple of week?

**Ryan Kelly:** I actually, I heard from a nursing friend not too long ago, the phrase slow is smooth and smooth is fast. And subsequent to that, I heard it's actually a Navy SEAL motto, but I feel like that is so applicable in these situations because often wire frauds are wrapped around some sort of [00:14:00] closing.

That's a high stress situation. You're trying to figure things out in a very short amount of time, and I think that's where these mistakes happen that people are moving so rapidly and trying to accommodate last-minute client changes

requests to get to some sort of deadline. So, they aren't slowing down enough to make sure that they're moving in a way that they aren't going to make a mistake.

So, I would say, slow down, make sure you're dotting your I's, crossing your T's, you're making the phone calls that Peter referred to. I think Melissa's advice to make sure everyone in your organization knows that as well, not just the partner involved, or the associate involved is also great advice.

**Melissa Demmon:** And I think you have to be willing to ask the question. In this day and age, people are so afraid to ask what they fear is “a stupid question.” I don't know about you guys, but if I'm closing on a transaction, and I hear from my lawyers, paralegal or whomever, they get a phone call, they call me saying, is this the [00:15:00] account you'd like us to send it to? I know you've confirmed it a couple of times in writing.

I welcome that question, because I don't want to sit and wonder, is it going to get sidetracked? Is something going to go wrong? So don't be afraid to ask the question and a client who doesn't welcome the question, you might have other risk management issues there with that client.

**Peter Biging:** So we know that the sources of these types of scams are often criminal fraudsters hacking into the email accounts of a particular firm. And I guess it's probably not uncommon for them to find a plaintiff's law firm that handles a lot of cases and will be getting settlement payments made to them or in the context of real estate cases where, they'd be getting closing payments made to them.

And so, then one firm relies on information fraudulently sent posing as the other firm. Have you had any [00:16:00] instances or success where you've pointed, tried to point fingers back at the firm that got hacked? Say it isn't just our fault for having fallen for this misleading instructions, it's your fault for not having done enough to protect your systems or having perhaps been theoretically put on notice that your system may have been hacked and not having gone given notice to other people who are doing business with you.

Have you run into that? Have you tried to do it and you've had any success in making that argument?

**Megan Zurn:** Yeah, I think each instance of these is unique a unique set of circumstances, but it's not uncommon that things could have been done better by multiple parties, that, missed flags, missed red flags from one party, but

failure to verbally confirm by another party, a hacking on a third party, because when it comes down to it, a lot of these situations, it's a crime.

There's a threat actor who has perpetrated a crime, and everyone's a victim in this. Things maybe could have been done better by [00:17:00] certain parties to potentially stop that crime at certain points. But that's a lot of the approach, approach to these has been, where it's alright, this crime has occurred. How do we address it? Can we address it in a reasonable manner pre-litigation or does it need to be litigated if we can't figure that out amongst ourselves? Those are the kind of conversations we typically have pretty early on in these matters.

**Melissa Demmon:** I have found when it's quite obvious that another party is the source of the breach, we'll say, it's a pretty easy conversation to have because one, they either know or need to know that they are exposed and then it becomes a process.

Then it becomes allocation, really.

**Peter Biging:** Okay. Alright. Last question I have for you on this topic is, do you see lawyers professional liability insurers addressing this risk, which has been around for a while?

Megan said it, her first case involved this in 2017. Do you see them [00:18:00] trying to address this risk either through new underwriting criteria, higher deductibles, perhaps placing sub-limits on these types of risks? And I know you may have limitations on how much you can talk about underwriting, but to the extent you can, do you see that even if it's in generalities?

Do you see that? As being a way for legal professional liability insurers to navigate this ongoing risk.

**Melissa Demmon:** I know it's on the forefront of my underwriters' inquiries when they are meeting with existing insureds and prospective insureds. I'll leave it to them to do those evaluations, but yeah, it's an ever present issue and to bring it back to the original question of a problem of the past, present, or future it's universal. It will continue to be here and it will continue to be a point of inquiry by the underwriters in their process.

**Megan Zurn:** I think our focus continues to be risk management. [00:19:00] And having conversations like this, this is a trend yesterday, today, and tomorrow. And making sure that everyone knows that even if it feels really silly to call a long time client to verify, verbally confirm settlement instructions, that

it feels less silly than calling your insurer saying that money has been stolen by a fraudster. So having those conversations and with risk management, making sure everyone's aware of it and thinking about it all the way down for the support staff as well to make sure they know that what they do is important.

It might seem ministerial and just like drudgery work, but it really makes a difference and needs to be done.

**Peter Biging:** Alright, let's move to another topic area, which was one of the practice areas mentioned. In the Ames and Gough survey, which is trusts and estates, this area of practice has traditionally been a major component of lawyers professional liability claims. Do you see it continuing to be a practice area [00:20:00] that drives claims either in terms of volume or severity or both?

And if so, why?

**Melissa Demmon:** I'll take the lead on that. I absolutely see it continuing in both. And I can speak to what we're seeing on our book of business as well as what you're reading in the legal malpractice media, if there is such a thing. The volume is increasing, and I think that is probably for someone who can crunch the numbers correlated to aging population.

There are a lot of estates coming to fruition, for lack of a more sensitive way to put it, at this point. And thus, the errors within those estates, whether when they were established and or modified over the years, are emerging. And even if there was no error, there might be family dynamics or "heir" dynamics that are emerging that have nothing to do with whether an attorney drafted it correctly, but unfortunately they're in the sites.

They're the collectible pocket if someone who believed they were a beneficiary is in [00:21:00] fact not. So that's to the volume or the frequency. It's also pretty well known that we've seen and are in the midst of the largest transfer of wealth on a generational basis perhaps ever, I would need to be fact checked on that.

But the Boomer generation was incredibly adept at fortune building and those fortunes are passing to the younger generation at this point. And what you have and what I've seen directly is attorney client relationships that perhaps started back 30, 35, 40 years ago when a family business was simply that, a storefront of small value, minor asset capability that grew successfully and by several multiples.

The question I'm often confronted with is as that attorney client relationship continued and the client became [00:22:00] ginormous, for lack of a better term, did the firm's sophistication, infrastructure, and risk management grow in tandem with it? And usually, the answer is no. You'll have a regional firm that stayed at a comfortable size and maintained their level of expertise and their level of coverage, but they've got billion-dollar clients.

And if something goes wrong with that estate, you're not talking about the value of the firm, you're talking about the value of the estate. And therefore, you've got a mismatch. So yeah, severity is a very real thing.

**Peter Biging:** Ryan or Megan, any thoughts?

**Ryan Kelly:** Yeah, this is historically, I think, been a hot area for legal malpractice claims. I think it continues to be. And I think, as Melissa points out, I think it will be an ever-increasing area for all the reasons Melissa highlighted.

I think everyone in this industry knows these claims are notoriously difficult to [00:23:00] defend. We have often estate plans that were put together decades ago with attorneys and witnesses who may no longer be with us at the time the documents were put together. We probably don't have digitized documents or good document retention policies or document management systems.

In terms of witnesses and documents, it's going to be a challenge in defending these cases. I think we also all acknowledge that in these cases often estate plans relates to family dynamics, they're often difficult to navigate because what motivates a lot of these cases is not money, and whenever you have a case that is motivated, not by money, but by a difficult family dynamic, or a second marriage or something to that effect. Sibling infighting, it makes these cases hard to settle because people are not acting as you would expect, a rational actor in a business transaction would act.

Not only are we seeing these cases [00:24:00] pick up just because of the frequency of these estates passing, but we have always known them to be difficult cases to defend, difficult cases to get into a settlement posture. So, I think yeah they're just challenging cases and will continue to be into the future.

**Megan Zurn:** And to build on what Ryan was saying, particularly in the trust world, sometimes the damages models are just so speculative and challenging to wrap your head around because, sometimes it's like a dynasty trust that if it had been drafted the way they wanted it to be drafted, they would have invested in this particular company and would have made, a fuffillion dollars.

They're very challenging damaging models at times with just astronomical alleged damages, which can be difficult to go against when you have these very fact sensitive or fact intensive patterns that may otherwise preclude summary judgment, which is just an additional dynamic of difficulty [00:25:00] in defending these matters.

**Peter Biging:** I think I recall when we were talking about this prior to recording, you were talking, I think, Melissa, about some of the complexities that, you know, because of the size of these states there may be tax, complex tax issues involved.

There may be IP that's being transferred. And so, there's IP issues involved. Could you go into a little bit about that? It sounds like there's the bigger the estates now, the more involved, the riskier the, of the severity, but also the more involved of just the cost and complexity of litigating these kinds of cases.

**Melissa Demmon:** Absolutely, and it, in fact, goes to before that because, and this was the point I was going to make, trust and estates is one of those areas that I feel should be uber-specialist, but we all know the law firms that have trust and estates people because someone asks them to put their estate [00:26:00] plan together for them.

And suddenly that develops into a practice area. Unfortunately, there is a phenomenon of large T&E claims arising out of practitioners who perhaps should have brought in extra help who specialized. That goes right into your question. These estates often, particularly those that involve very successful businesses or ginormous sums of money, will involve either an intellectual property component, because that's what the foundation was, or the estate was founded on, or will involve incredibly complex tax considerations or the tax considerations were never, ever involved in the planning and you have, 20 years later, several administration changes, several revisions to the tax code and everything is not as expected.

We've had all of these things and to unwind [00:27:00] them is so cost intensive because you have to get a standard of care expert, you have to get an intellectual property expert, or in the tax case, you have to get a tax expert. And to your point, these are fact intensive. These are not questions of law in most cases.

And the sheer bringing of the case has an instant intrinsic value because we can anticipate that this is going to be a costlier one to defend. Whether or not there's an error at the time, you have to look back in time and look at the code at the time if it's a tax question or look at the intellectual property.

Was it going to get off the ground? Are we talking about, the George Foreman grill or are we talking about a little countertop appliance that no one's ever heard of? And so, to drill down into those details and really determine whether there is value to the claim automatically places a cost value to the claim.

And yeah, like I said, the Boomer [00:28:00] generation was very creative, very innovative and very successful. And so, we now are in a situation where they're trying to successfully pass on their estates and you've got an up and coming generation of folks who might have a dispute about what piece of that they're entitled to.

**Megan Zurn:** And I think on the risk management side, I think we'd all agree that no one should dabble in trust and estates. Oh, Lord, no. I think that is the, I think that should be the takeaway here.

**Melissa Demmon:** I would hazard the, yeah, in fact, I just counseled my sister. She said, can you do this for me? I said, absolutely not. You live in Florida.

Why would I want to touch it with a 10-foot pole? I will find you somebody in Florida to do it for you. That is my service to you.

**Peter Biging:** I think somebody also mentioned that there's long tail issues with this too. It's funny, it's rife with potential for problem too because you hear all the time from people who do trust and [00:29:00] estate works, like, how often do people change their will at the last minute?

Oh, all the time! All the time. Literally on their deathbed, they will change it and you're just like writing it down and you've got to witness and. That's ripe with possibilities for complaining that this is the last, this change wasn't done with competent, competently, or was manipulated in some way, or there's some kind of fraud involved.

And then, the other side of it too, it's funny, I don't know if it was like, exactly like bleak house, but, we thought we had resolved the case. We thought it was done. It was all resolved. And then suddenly one of the interested parties' children, a guardian ad litem was appointed. And suddenly the guardian ad litem was involved.

And now we were off for another five years of trying to negotiate. The resolution we thought we had to make sure that the guardian was satisfied that the kids were not getting screwed out of everything. So, it's an interesting area. It's [00:30:00] very complex. It's rife with potential problems.

It's, God bless you for the work you do on those things. They're interesting.

**Megan Zurn:** And Peter, you mentioned the changing of the will at the last minute. I think that's like a whole separate dynamic. So setting aside how complex and difficult and just niche that trust in a state law can be, then you have this added component of potential undue influence or capacity issues that you as a lawyer and, when you're doing this kind of law must be cognizant of as well, and you know how we're not doctors were lawyers. So trying to assess capacity at that moment isn't always a very simple thing. And then you have these allegations that come after the fact saying that the lawyer should not have changed the will and what's the proper will, and people pointing fingers at the lawyer and often blaming the lawyer then for the ensuing litigation that occurred after the fact of having to fight over the will in the first place because the argument is the lawyer never should have allowed the client to sign that will that should have realized that the client was [00:31:00] incapacitated and it's the lawyer's fault we spent three years and five million dollars fighting each other over this. So, I mean, there's this whole other aspect of it too that is a just a completely different consideration in this particular area of law.

**Melissa Demmon:** And I think another piece of it is the risk management. This is one of those areas of law where relationships are long. And as long as a relationship goes with an attorney, the attorney tends to put down some of those protective risk management protocols. They don't double down on their scope of work.

They don't, you know, renew an engagement letter, and so you'll often see continuous representation arguments that have no real defense to them and the relationship might have gone on for 30 years and you've got verbal testimony at that point, and that's about it as to what my client told me they wanted in 1985.

But in [00:32:00] 2015, when they were dying, they wanted me to change it to this, and I did. Great. Did you change the engagement letter before then? Had you updated it? What was your scope of representation? Was there tax advice implicated? Was there transactional real estate work implicated? And none of that happens because these are the “my lawyer became my friend” scenarios.

And I hate those.

**Megan Zurn:** Me too. But you know what I love? A disengagement letter. Yes. Yes. The statute of limitations has commenced. Woo! Let's write more of those. Let's stop making friends and let's disengage from representations. And maybe then your friendship could begin after that. Play pickleball, but that's it.

**Peter Biging:** If you take two pieces of advice from Megan, it's stop making friends and disengage.

**Megan Zurn:** And verbally confirm settlement instructions and don't, maybe don't do T&E law. [00:33:00]

**Peter Biging:** Alright, so let's move away from trust and estates. I realize now, we're now a couple of years removed from the heart of the COVID-19 pandemic, but do any of you see any after effects driving claims in the years ahead?

And with that, let me also ask a couple of that with the rapid move that the pandemic precipitated to either hybrid work environments for lawyers or move to fully or at least almost fully remote environments at law firms that was jump started as a result of the pandemic. Do you see these factors contributing to an uptick in the LPL claims moving forward?

And if so, why?

**Ryan Kelly:** Yeah, I think I can field that one, Peter. A couple of thoughts on this first. I think it's pretty well documented and discussed at this point that the rapid change to a lot of firms working fully remotely during the pandemic led to a lot of problems that people didn't anticipate lack of [00:34:00] mentorship, lack of supervision, particularly for young attorneys, is I think we are all old enough if I may say so, that we've benefited from, being trained by older attorneys in the office, we could pop down to their office. That was 3 doors down from ours and ask a quick question.

When things transition very quickly to a remote work environment, I think a lot of firms were not equipped to adapt to that quickly enough to provide that sort of training, that sort of mentorship in that environment. I think, because that has been so widely discussed at this stage. I think firms are adapting. I've seen strategies like having one mandatory day in the office where everyone in a particular practice group has to come in and there's a meeting that everyone discusses, things that they're seeing on their cases.

They discuss anything that's on their mind. And I've also seen firms having mandatory Zoom mentorship. Calls once a week with a mentor that's assigned in the firm. So, I'm seeing good strategies developing from a lot of firms. I think where firms [00:35:00] are still struggling in a remote or hybrid environment is if that firm is stretched very thin, and they just don't have the resources or the time to devote to things like that.

I think that is definitely still an area where people can continue to provide that mentorship and guidance to young attorneys. To make sure they aren't acting on their own and making the mistakes that would lead to the legal malpractice claims that we all see on our desk. The second area of concern that I am seeing now emerging recently in both LPL and EPL claims is from mental health concerns.

I think there's emerging research and information coming out that there's a mental health crisis coming from the pandemic and remote work environment. So, what do you do in cases where you had a formerly high functioning attorney that was operating pretty much independently that people were not providing a whole lot of oversight to that suddenly because they're having a mental health issue, their [00:36:00] work product starts to suffer.

They're missing deadlines. They aren't filing complaints timely. They aren't communicating with clients. Things like that are happening. Does anyone in the firm even know what's happening? If they do know, how do you have that conversation? It's an HR nightmare to even begin to have that conversation.

What do you say? How do you say it? Do you start by auditing their files? And then where does that conversation go? So, I think that for me is an emerging area where I'm starting to see both LPL and as I said, EPL claims starting to emerge.

**Megan Zurn:** Yeah, I'd agree with everything Ryan said. And I think to dovetail some of those comments too not only the newer attorneys have been affected, but I feel like on the other end of the spectrum, the attorneys who've been here a super long time, because a lot of firms these days don't have mandatory retirement ages.

And so attorneys who maybe are still practicing very late in the game, and during the pandemic have been more siloed and remote and the other partners don't necessarily know that some things [00:37:00] may be going on without attorneys capacity with other things that attorney may not even be aware of themselves has led to some issues to with the remote work environment and people I think just practicing a lot longer than people used to.

And as Ryan said, burnout is real. I think that even I know our company has a lot of both resources and trainings and conversations about what burnout is, how to prevent burnout and because I think there is the fear in every job and every industry that the effects of the pandemic on a lot of people and just the idea that

some people are struggling and it may affect their work and they may try and identify and support those people.

How do we best do that?

**Melissa Demmon:** And I would add that I think firms need to come to the realization that it's never going to go back to the way it was. Yes, there will be firms large and small who mandate 5 days. They're going to have retention and [00:38:00] attraction issues. Then there will be firms that will say we're happy hybrid.

They might have risk management issues. Then you've got this new-aged firm that is fully remote. And they've got to manage things in a different way as well. And whether that's hierarchical changes, whether that's mentorship programs, firms have to get their heads wrapped around the fact that we're done waiting for it to go back to normal.

This is normal. Normal is choose your own adventure, but you have to react to that, and you have to address it, and you have to hire the right people who can guide you in that, whether that's, I've got one firm that they've come up with the idea of a remote office manager, which is completely different than their facilities manager.

This person's sole role is really designed around checking in on folks in a Zoom format and being accessible if things go south, and helping them find the best way to [00:39:00] streamline, helping them find the best ways to connect, they're a bit of a cruise director and an I.T. department and a risk management officer all wrapped up into one.

And it's genius.

**Ryan Kelly:** I have not heard that yet. Melissa. That's a great idea.

**Megan Zurn:** Yeah, I have a friend whose firm recently created a role for an associate manager position, and it's an attorney or she used to be a practicing attorney and does, I think, a little for the firm, but mostly her job is almost HR and is doing those kind of weekly check ins with all their associates and kind of addressing some of those more HR related issues, which I thought was also a very proactive approach.

**Peter Biging:** A lot of our experience is anecdotal, right? But it's interesting people, you have conversations. People say, why do you like what you do? Isn't

it just always about money? And I say, it isn't just always about money. A lot of the times, I'm representing professionals who, and lawyers in particular, who have failed in some [00:40:00] manner or gotten themselves into trouble in some manner, it's been driven by issues with regard to medical issues with regard to drug abuse or alcohol abuse they've fallen down in their life and then it's infected their professional life.

And I say when I help those people it's really meaningful to me. It's not just about dollars. I'm helping them through a big problem in their lives. I'm helping them save their license, help rebuild their lives. But I note that. I think I was struck by all, what all of you said was, you used to go in the office and somebody would be showing up erratically, or they'd be wearing the same shirt, or it'd be really pretty wrinkled, or they hadn't shaved in a couple of days and you could tell, hey, maybe this person's having something of an issue, and you'd get cues. I think it's easier to fake it on Zoom, you get yourself together enough for the Zoom call.

So, I like the idea of the Zoom HR [00:41:00] person. That sounds like a really, that sounds like something that's going to be a big thing in the future. But I guess the remote issue is always going to be, it makes it more complicated, I think, to identify the person who's fallen before it's a really big problem.

I guess we'll have to learn how to deal with that. I think during one of our calls, too, when we were preparing for this Melissa, I think you also said something about one of the issues is we don't know what we don't know. And, you've got a, not a generation, but you've got some lawyers who've had three or four years, maybe during their formative years, where they just haven't learned about some basic practice things that you would expect to do and it wasn't really drilled into them because they weren't there learning blasphemous and just being able to just to be pestered by people on an ongoing basis.

Do you see that, is that as an ongoing problem or something like that's maybe peculiar to the pandemic generation of new lawyers? [00:42:00]

**Melissa Demmon:** I think it's going to be an ongoing problem in that we're going to continue to have claim emergence for, I would say, probably the next three to five years, that temporally go back to COVID, but aren't because someone came down with the virus, right? It goes back to that period from March 2020 to say March, 2023, when then junior associates or junior partners were in that sweet spot of soaking up that mentorship, soaking up that experience passively via osmosis, as you say, and didn't get that opportunity.

And yet, they're now senior associates or achieving partnership on an equity basis, and they don't know what they don't know, but they are first-chairing trials. They are leading transactions, and there are mistakes, and I'm seeing them. They're coming through in my claims, and it's not quite obvious every time, but I've had a few files where I can really look back into it, look at the mistake, and then with my own experience, build [00:43:00] in the timeline and say, yeah, I would, okay, put this in the bucket of a COVID claim per se because of the timeline.

That is going to continue until those folks backfill their training or learn from their mistakes. And that's probably a three to five year window, which, typical tail for LPL. But then in this new normal, as I said before, it's never going to go back to the way it was.

So, if firms are not coming up with ways to backfill that training, that's going to be a continuing problem. You're going to have people maturing into their careers who aren't getting as much as we got when we were in practice.

**Megan Zurn:** Yeah. No. And I think we're also even seeing that in our industry too, right?

With our claims teams, like we're doing like lunch and learns on where informal ones with the team, where we talk about an issue that is complex, that recurs just because we're not all in the same office anymore sitting next to each other where you overhear what people are doing because we have [00:44:00] an open office. So, you learn a lot on it's like the Lloyd situation like on the floor, like you hear what everyone's doing and you learn a lot about claims handling just through listening. And some people didn't really get that experience for several years when our offices were just closed. So we're trying to make up for that too on our side with having people create lunch and learns and other Zoom team meetings, but people have to seek it out.

**Melissa Demmon:** They have to know that they're, it's horrible to say this, but they have to know that they're lacking in something so that they can seek it out. I'm running across attorneys and claims professionals who don't feel like they're lacking anything at all. And candidly, they're the ones who keep me up at night. And nobody on my team; I must caveat.

**Megan Zurn:** Right? Or even just ask a question. Like sometimes when you get a question asked, that's when you realize, oh, there might be a bunch of people that don't know this, that should know this. And that's where it's like the impetus for the lunch and learn.

So, I think that's puts it on firms too. When partners get asked the question to think, [00:45:00] okay, this one person had this question. I bet a lot of people also have this question. Let's have a group meeting and let's take some time out and discuss this so that everyone gets the benefit of this training.

**Peter Biging:** Yeah. I wonder again, if this is going to be an underwriting issue as well, as if, as we move towards more largely remote and if not fully remote law firms, because it's just the economic imperative you talked about, unless you're going to get, you're going to be able to get higher quality applicants.

You're going to have cost issues, savings issues, pricing issues. It's competitive issues. I think that, I wonder if that's going to be an underwriting criteria as well. It's what are you doing to address the learning by osmosis issue that you're losing? Or just the checks and the things that you're doing to make sure you're not making mistakes.

That would come from everybody coming to the office every day that you're not getting anymore. I don't know how you ask underwriting questions like that, but I wonder if that will become a an underwriting issue in some regards.

**Melissa Demmon:** I think you'll see it as people start looking at loss [00:46:00] histories.

You'll see underwriters starting asking creative questions. It used to be, how many people do you have? Now it'll be, how many people do you have? Where are they? What do they work out of? And who are they talking to?

**Peter Biging:** Alright, so another driver of claims continues to be conflicts of interest. And again, I was really struck by the quote that I read about the disquieting number of lawyers professional liability claims arising out of conflicts of interest and ethics complaints. Do you see this continuing to be a significant driver of lawyers professional liability claims moving forward? And if so, why?

**Ryan Kelly:** Yes, Peter, I do think that this certainly is going to be a driver of claims moving forward.

I am seeing a lot of people, I think, reluctant to turn down claims that they historically may have. I think Megan referred to the phrase earlier as dabblers. People that are reaching across lines of business that they've, perhaps didn't used to practice in, but I think that they are wanting to retain cases because [00:47:00] of the economic climate.

I think people are reluctant to turn away business. I think they're reluctant to do anything that may have a negative impact on their firm or their book of business. I think people are not turning away cases that historically they may have turned away. So, I think we are seeing an uptick in conflict cases because of that.

I do remember. Ages ago, my very first mediation on this side of the fence when I was a claims professional, it was a conflict case, and I remember the mediator in that mediation telling me, juries hate conflict cases, you should settle this right now for basically a blank check, because you can never defend a conflict case.

And I remember at the time, I just brushed it off with the same thing you hear, that juries hate lawyers, you have to settle all these claims because no one's ever going to side with you. And I remember brushing it off at the time and not really understanding the importance of complex cases are hard to defend.

Juries do not like attorneys who have a perceived divided loyalty that they are not [00:48:00] getting impartial judgment from their own attorney. And these cases are challenging, and they do have an inherent value to them that the mediator tried to tell me about many years ago. And at the time, I don't think I really understood how hard these cases can be to defend.

So, I think we are seeing both an uptick in frequency in them, and perhaps an uptick in severity. Of them, I think Megan said earlier today about the wire fraud cases being yesterday's problem, today's problem, and probably tomorrow's problem as well. I think that is true for conflict cases as well. I think they have been around for a long time, and they will continue to be around for a long time.

**Megan Zurn:** Yeah, I would agree with all of that. I think with conflicts, oftentimes our biggest defense is causation and damages, but those aren't as you mentioned, those are not really juried for. Sometimes, because jurors don't necessarily understand, a lay juror hearing that the attorney [00:49:00] had a conflict, had that divided loyalty, and continued to represent can often be challenging for a juror to understand yeah, but that had nothing to do with what actually happened and the alleged damages.

They're not causally related but sometimes, same, we have this in the more prototypical legal malitude, where like a mis-statute or something like just causation is hard because they're like jurors will hear a lawyer made a mistake

and want to pay people without regard to the, whether damages naturally float from that mistake or not.

So, I think that can be the challenge there. And I think what Ryan was saying with people not wanting to turn away work, we see this especially where it's like an institutional client, a long-time client of the insured, where the law firm really wants to keep this client, doesn't want anyone else to get a foothold in with this client.

And so, they're going beyond what their real expertise is to handle some other side matters. for this large client, and that can get them [00:50:00] in trouble. We're also seeing it on big firms that have both transactional and litigation expertise where the insured firm will assist with the transaction, then the transaction has a dispute among the parties that lead to litigation of this transaction.

And the same law firm, our same insured firm that worked on the transaction now has their litigation team step in and assist with the litigation that has come from that transaction. And then, when that goes poorly, everyone, both the litigation team and the transaction team are embroiled in this claim against the law firm that the insured essentially doubled down on their mistake is the argument by the other side.

**Melissa Demmon:** And it's not even we're having this conversation, assuming there is an actual conflict. We're seeing plenty of cases where there is really and truly, legally, no conflict, but to your point, the cost of getting to that finding is high. [00:51:00] And if you have a judge, as I may or may not have recently had, who is not willing to make the proper ruling, in my opinion, it is now going to go to a jury.

Talk about boring. Explaining actual conflict versus yeah, the optics aren't great, but there's no legal conflict here. Forget about it. And that is sloppy on the part of the firms because they're hiding behind the fact we checked with our ethics council and there is no conflict here.

Yeah, but does it smell bad? And they don't want to give up the business. They're willing to hold their nose. Yeah, that's a problem.

**Megan Zurn:** And it's, if you check with your ethics counselor on it, maybe you should pass. Because if it's something that you think, I should check with my ethics counsel on this, then there's something there that you even ran by someone that maybe that's one that you should let go.

Because I love conflicts waivers, but if you, if it's something that you're considering a conflict waiver, I think still think, is this [00:52:00] something we really want to do?

**Melissa Demmon:** Do I want to fight for this?

**Peter Biging:** I think somebody also mentioned, too, that sometimes it can just be a product of laziness that you could waiver your way out of it.

You could actually document your way out of the conflict if you just took the time to do and so that's another issue, too, you've got to, if you see that there's any possibility of a conflict, you've got to really address it head on and also either walk away from it or figure out a way to document that it's not going to be a conflict.

Alright. So final question for each of you. We're seeing rapid transformational advances in technology. We live in a data driven world. The sources of available data are growing exponentially on literally a daily basis and everyone's thinking about how we as a legal community can make beneficial use of AI.

Do you see the continued rapid growth in the available technologies, the need to try to be on the cutting edge in using technologies and offering your [00:53:00] services potential risks in failing to stay up to date with the latest technology? Do you see any role of those things as drivers of future lawyers professional liability risks and if so, why?

**Megan Zurn:** I think the answer to that is yes, but also to harken back to what Melissa said earlier, you don't know what you don't know. And I feel like we're in that phase of this right now with generative AI. It's been moving so quickly and everyone's trying to grasp where it's going to go. And I don't think we really know yet.

I think I saw this week that Thompson Reuters, that Westlaw came out with their generative AI kind of GPT product that's being launched now, so I know we all saw that case that what was it last year with the hallucinations on the briefing that, that ChatGPT or whatever, just made up a bunch of cases to support a brief that's obviously not great. But now, Westlaw has apparently made something that hopefully avoids that going [00:54:00] forward, so I think there is going to be a point where it can be a very useful tool, and it's just a matter of seeing how the technology develops and seeing how it can be used.

I think also right now, is it the ABA or is it someone has like a repository that shows all the different jurisdictions and because they all have different rules on disclosing generative AI if you're using it letting the court know, letting the client know. So, it's right now a hodgepodge, I think, of what you're supposed to do as a lawyer when you are using these tools, so hopefully that will become more clear and more centralized because right now it seems a little bit of the wild west on trying to keep up with ethical obligations generally and responsibly use this.

So, I think it will be interesting. I think it has to be part of how the practice evolves because I don't think anyone's going to want to pay an associate to do 50 hours of research and brief writing if there is a generative AI option that will cut that down to four hours of reviewing checking all the cases and [00:55:00] refining.

So, I think it'll be interesting how it affects the industry.

**Ryan Kelly:** Yeah, and I think as this is developing, Megan, to piggyback on that, I think right now, what we can caution all of our lawyers, especially smaller practitioners about is just a common-sense approach. That famous hallucination case where an attorney used it, AI in their briefing, and it was made up cases.

I think the problem there was, first of all, that they didn't check any of it. They didn't go over the sources that were cited, but then I think they doubled down to the court on, no, we didn't use AI at first. I think that was part of the problem. But I think if you are using these tools, treat it as if you were overseeing an associate or a paralegal in your firm, make sure you're checking the case citations.

How did they get to this work product? Make sure the briefing actually reads correctly. Make sure you're using common sense right now. If you are actually uploading things into some sort of database or AI tool, make sure you're redacting client information or any [00:56:00] sort of confidential information so that you don't have any concerns if there's a data breach or things like that. I think if you're applying common sense while this is emerging, I think you're probably going to be hopefully okay.

But certainly, you have to be applying those things as this is emerging.

**Melissa Demmon:** Yeah, I would just say avoid laziness. Pure and simple. You have to check it. It is not, it's a shortcut, but it is not a shortcut without pitfalls. And it's here to stay. Just like the new working environments, it's here to stay.

Adapt to it, make it work for you, and don't let it be a liability.

**Peter Biging:** Alright, I think that's going to have to be our last word on that, because we've gone for a very long period of time. I seem to say this every episode, but once again, it's true. I feel like I could talk to the three of you for hours. But I think this is a good place to stop.

I want to once again, thank my terrific guests, Megan Zurn of AXA XL, Ryan Kelly of Berkley Select, [00:57:00] and Melissa Demmon of SOMPO for their time and their insights. And a conversation I think anyone involved in ensuring a lawyer's professional liability will take great interest in. And once again, I want to thank all of you who have taken the time to listen to this podcast.

The goal of the podcast is to engage in meaningful conversations with industry insiders, business about what's coming around the corner, and management and professional liability, cyber, and D&O liability. Future podcasts will address issues specific to insurance agents and brokers, accountants, financial service professionals, directors and officers, and miscellaneous professionals.

Until our next episode, this is Peter Biging, taking you to The Precipice.

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