

Labor & Employment

“I Quit – You’re Fired” – Certain Legal Aspects of Resignations

Contributed by

Michael J. Album., Esq., Kristine K. Huggins, Esq., and Brandon Welke, Proskauer Rose LLP

Employment Law

Michael Album, Kristine Huggins and Brandon Welke of Proskauer Rose LLP discuss the elements that make a resignation effective, whether an employee can revoke his or her resignation, and how an employer can recharacterize a resignation as a termination for cause. The authors also address issues for employers to consider when an executive or management-level employee's resignation triggers a contractual cash payout or other obligation pursuant to an employment agreement. [p3](#)

Employment Law

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Employee Benefits

A healthcare plan did not violate ERISA when it denied coverage to a participant based on a plan exclusion for psychiatric residential treatment but the healthcare plan was still required to provide coverage unless the treatment was not “medically necessary” under California's Mental Health Parity Act. [p25](#)

Employment Law

The First Circuit affirmed a jury's award of \$1.6 million for emotional damages in a physician's action alleging hostile work environment and retaliation where employer tolerated a hostile work environment and mandatory anger-management counseling that the employer ordered the physician to undergo was found to be an adverse employment action. [p7](#)

Employee Benefits

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Bridgit DePietto of Proskauer Rose LLP discusses the Tenth Circuit's decision in *Tomlinson v. El Paso Corp.*, which addressed the disclosure issues that arise when employers convert traditional ERISA-governed defined benefit pension plans to cash balance plans. [p18](#)

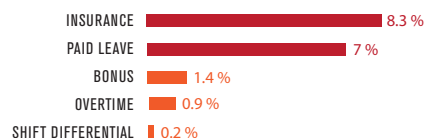
Contributed by Bridgit M. DePietto

WORKERS WHO GET OVERTIME

For many occupations in the US, supplemental pay - overtime, bonuses and shift differentials - is an important component of overall cash compensation. Percentage of workers who receive supplemental pay, by type:



How benefit costs compare: Cost to employers of supplemental pay and other benefits, as percentage of total employee compensation:



Source: Bureau of Labor Statistics, Employer Costs For Employee Compensation, December 2007 (Latest Data Available)

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Andrea Fitz, Esq. (Editor), Tracey Bellapianta, Esq.,
Peter O'Hara, Esq., George Patterson, Esq.

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please contact: Zoe McKelvey – Telephone: (212) 617-3139
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“I Quit – You’re Fired” – Certain Legal Aspects of Resignations



Proskauer»

Contributed by Michael J. Album., Esq., Kristine K. Huggins, Esq., and Brandon Welke, Proskauer Rose LLP

The highly-charged scene in which an employee quits and storms out of the office may make for good television, but in reality, an employee's resignation is often more subtle (and more troublesome). The nuances of a resignation and the circumstances surrounding it become particularly important in situations involving high ranking executives, who may have complicated employment agreements and compensation arrangements that condition large amounts of compensation -and other post termination obligations- on whether the executive simply “resigns” and “walks away” or instead had “good reason” to resign or was terminated by the employer without cause.

Even when there is no question that the employee is resigning voluntarily, the employee may attempt to “game” the resignation process in order to prolong the actual termination date, so as to earn additional sales commissions, vest in equity or qualify for bonus payments tied to certain future service dates. Conversely, the employer may require the executive to provide advance notice of resignation, as a trigger for a “garden leave” period, during which the employer expects the executive to remain on payroll and not commence competing employment.

This article addresses three practical issues that arise in the context of resignations: (i) what makes a resignation effective, (ii) can an employee revoke a resignation once given, and (iii) can an employer revisit a resignation and treat the termination as one for “cause”.

The case law is surprisingly sparse in this area. In recent years there has been considerable focus in New York on the “voluntariness” of a resignation, since under New York’s “employee-choice” doctrine, employees who voluntarily resign and compete can be subject to forfeiture provisions in compensation arrangements without any judicial review of the reasonableness of the competitive restrictions.¹ But with respect to other issues surrounding resignations, the case law is sporadic, and a search for legal authority often leads back to the Restatement of Agency and older cases.

What Makes a Resignation Effective?

Since the employer/employee relationship is fundamentally a principal/agent relationship, a legal analysis of the rights afforded to an employee to terminate that relationship begins with the Restatement (Third) of Agency (the Restatement). Section 3.10 of the Restatement sets forth the black-letter rule that an employee always retains the right to terminate his or her actual status as an employee (i.e., resign) at any time, notwithstanding any agreement between the employer and employee:

Notwithstanding any agreement between principal and agent, an agent's actual authority terminates if the agent renounces it by a manifestation to the principal or if the principal revokes the agent's actual authority by a manifestation to the agent. *A revocation or a renunciation is effective when the other party has notice of it.*²

The Restatement also defines “manifestation” – “a person manifests assent or intention through written or spoken words or other conduct” – and notice – “a person has notice of a fact if the person knows the fact, has reason to know the fact, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person.”³ Other legal hornbooks similarly address the effectiveness of resignation in terms of the notice given by the employee to the other party.⁴

The Comments to the Restatement provide additional clarification on what makes a resignation effective. Specifically, the Comments provide that the power to renounce or revoke actual authority is founded upon the idea that the principal/agent relationship is one of mutual consent; therefore, the consent of both parties is a necessary condition for the continuation of the relationship.⁵ It is not required that manifestations of revocation or renunciation be expressed in any particular form; manifestations may be made directly or indirectly, expressly or implicitly.⁶ The expressive conduct that may amount to a manifestation is not limited to spoken or written words; silence can also constitute a manifestation.⁷ The Restatement also recognizes that a manifestation does not occur in a vacuum. Context, surrounding facts and circumstances, ongoing relationships, and prior dealings can all help determine if a manifestation of revocation or renunciation, and consequently, a resignation, occurred.⁸

The general rules guiding the resignation of corporate directors or officers—also agents—provide for a similar approach and generally recognize that a resignation is complete the moment it is made to the proper officer or body, and the resignation does not need to be accepted or entered on the corporate minutes to be effective.⁹ For example, an officer has the authority to resign before his or her successor is duly elected, notwithstanding statute, charter or bylaw provisions to the contrary.¹⁰ Delaware limited liability law and the limited liability corporation (LLC) laws of other states including New York, also provide that a “Manager” of an LLC may resign from that capacity at any time, notwithstanding any provision of the LLC operating agreement to the contrary.¹¹

Against this legal backdrop, the practitioner must also consider the resignation and notice provisions of any applicable employment agreement (or related offer letter or equity or compensation

arrangement). These provisions do not control whether the employee or employer can in fact terminate their relationship, since the Restatement makes clear that an agent or principal always retains the right to terminate the relationship. However, these provisions are relevant to determine the contractual (economic) obligations of the parties upon termination of the agreement.

While employment agreements or offer letters generally will reference “resignation” by an employee as a termination event, the mechanics of the resignation procedure and the “effective date” of the resignation will vary depending on a number of factors. For example, sometimes the documentation will require that a resignation be in writing, or that it must be “accepted” by the employer, or that it will require some form of advance notice in order to be effective.

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As the highest Court in New York observed in 1837 in a case involving the disputed resignation of the District Attorney of Albany, it often is not easy to determine whether an employee or agent is expressing only an “intimation of an intention to resign” or an “actual resignation” to take effect at a future time.¹² Similarly, there may be a factual dispute as to whether the employer accepted the resignation.

Take the case of *Fisher v. A.W. Miller Technical Sales, Inc.*,¹³ in which a salesman for a machine tool company hand-delivered a letter to the vice-president on January 28, 2000, informing the company of his “intention to resign. . . effective January 31, 2000” and stating “I have decided to accept a sales management position with a company outside of the machine tool field. Thank you for the opportunity you provided. . . [and] I wish you [and the company] continued success.”¹⁴ On its face this set of facts looks like an “open and shut” resignation. The employment agreement,

however, provided that “[n]o sales commissions will be paid for orders received that ship *on or after the Salesman’s resignation is accepted* . . .”¹⁵ Plaintiff commenced full-time employment with another company on February 1, 2000. When Plaintiff and his former employer could not reach agreement on the commissions due to Plaintiff as of his resignation date, Plaintiff sued to recover commissions on two shipments that were made after he delivered his resignation letter. Defendant moved for summary judgment, on the grounds that the claim for the post-resignation shipments was barred by the clear language of the employment agreement.¹⁶

In denying Defendant’s motion for summary judgment, the lower court found there were triable issues of fact as to “when, if ever,” the plaintiff actually tendered his resignation and “when, if ever,” the defendant accepted the resignation.¹⁷ The Appellate Division affirmed, with two justices dissenting, on the grounds that there remained a number of factual issues in dispute as to whether the relationship between the parties really had ended, including that the defendant had continued to negotiate alternative compensation arrangements with the plaintiff, defendant had kept plaintiff on its mailing list, and plaintiff averred that he was free to service other companies because he never had a truly exclusive sales relationship with the defendant.¹⁸ The dissent, however, took the view that the salesman’s letter “unquestionably and unequivocally constituted a resignation” and that under common usage, the “resignation was ‘accepted’ when it was ‘received’ by the defendant’s vice-president.”¹⁹

In contrast to the *Fisher* case, consider the holding in the “lovers’ quarrel” case of *Rose v. Green*, a case involving the resignation of the president of a design company over a dispute with his girlfriend, the owner and founder of the company.²⁰ There, Plaintiff William Rose, the president of Joan Green Designs Associates, had a three year employment contract that provided for compensation even if he was discharged for cause.²¹ Mr. Rose, who had a romantic relationship with Ms. Green, the owner of the company, demanded that he be permitted to purchase a substantial equity interest in the company.²² When Ms. Green did not initially accede to this request, Mr. Rose submitted a “signed, unconditional letter or resignation,” which Ms. Green crumpled up upon receipt.²³ After further discussions, no progress was made and two days later Mr. Rose said he was “through with the business” and did not come in to work. When Mr. Rose called Ms. Green that day, she informed him that she had accepted his resignation.²⁴ Mr. Rose then sued, alleging that Ms. Green had breached his employment contract when she accepted his resignation. After trial, plaintiff prevailed on the grounds that Mr. Green had “manifest[ed] an intent merely to ‘propose’ resignation,” and that his “proposed resignation . . . had not been accepted and had not become effective.”²⁵ Defendants appealed on the grounds that the resignation was effective upon submission.

The Appellate Division reversed, finding that the resignation was unconditional, “freely and voluntarily tendered,” and nothing suggested that it was “feigned, illusory or intended to be construed as tentative or contingent.”²⁶ In addition, the Appellate Division rejected the argument that “acceptance” was necessary to make the resignation effective; instead, the court held that an

unconditional resignation, “which by its terms is to take effect immediately, is effective upon submission without regard to whether it has been accepted.”²⁷

One can foresee numerous variations of the scenarios in the foregoing cases, and even in the higher echelons of the business and finance world. Consider a senior investment banker saying: “Please be advised that I intend to resign 30 days from now, unless we can work things out now.” Or a member of a private equity firm saying: “Please be advised that I intend to resign 30 days from now unless we can work things out, and in the interim I will cease any further work on Deal X or other new matters.” Or, more simply, imagine an executive who turns into a “no show” for a number of days, and does not respond to e-mails, phone calls or other messages. In each of these scenarios the employer may be inclined to treat the executive’s actions as a resignation (or in the last case, even job abandonment). We suggest, however, that where an improper characterization of the termination of an employment relationship could give rise to economic exposure under existing contractual relationships (i.e., an after-the-fact allegation that there was no real resignation, coupled with a claim against the employer for damages for a termination without cause), the employer should consult with counsel to ensure that no ambiguities exist and that the resignation scenario has been reviewed and solidified to the greatest extent possible.

Can a Resignation Be Revoked?

What if an executive provides a clear and unequivocal resignation but then changes his or her mind before the effective date? The case law in this area is not particularly abundant. Some jurisdictions allow public officers to withdraw their resignations so long as it is prior to the commission of an act of relinquishment and the prospective effective date.²⁸ But for employees in the private sector, the right to withdraw a resignation is far more limited.

In some jurisdictions, there is case law holding that once an employee signs a letter of resignation he or she cannot unilaterally withdraw (rescind) his resignation unless contract principles would allow such a withdrawal. For example, in *Holland v. FEM Electric Association, Inc.*, a former employee attempted to rescind a voluntary resignation and sue for wrongful termination.²⁹ Applying principles of contract law to the issue of whether plaintiff’s rescission of his resignation was legally effective, the court looked to the South Dakota statute governing rescission, which provided that a contract could only be rescinded if it was entered into as a result of mistake, duress, fraud or undue influence.³⁰ The court then held that the same standard should apply to the resignation and that Plaintiff’s argument that the withdrawal of his resignation was effective because the Board had not yet acted upon it was unavailing. Rather, Plaintiff was required to “produce clear and convincing evidence of duress, fraud, or undue influence before the rescission of his resignation may be considered valid.”³¹

In *Hammonds v. Hyundai Motor Manufacturing Alabama, LLC*, the plaintiff, a process engineer in the plant paint shop, had made an internal complaint alleging that she had been sexually harassed by a co-worker.³² Following Hyundai’s investigation of the complaint,

the alleged harasser left Hyundai's employ. Shortly thereafter, Plaintiff resigned on two weeks notice; however, one day before the expiration of the notice period, Plaintiff sought to rescind her resignation and continue her employment with Hyundai. Hyundai did not accept the rescission, however, and Plaintiff's employment terminated the next day.³³ Plaintiff then sued Hyundai, alleging that Hyundai's refusal to permit Plaintiff to rescind her resignation constituted gender discrimination. In analyzing whether Plaintiff had suffered an "adverse employment action", an element necessary to establish a *prima facie* case of gender discrimination, the Alabama court noted that "[a]n employee's resignation is not an adverse employment action, absent evidence that it is the product of a constructive discharge."³⁴ Here, there were no allegations of "working conditions so intolerable that she was forced to resign," nor were there allegations that Plaintiff submitted her resignation as a result of coercion or duress. As such, the court granted Defendant's motion for summary judgment on the gender discrimination claim, holding that "so long as the resignation was voluntary and not a result of coercion or duress, there is no constructive discharge and the failure to accept rescission of a voluntary resignation is not an adverse employment action."³⁵

In a similar situation, a Texas District Court held that where an employee alleges discrimination based on the employer's refusal to permit rescission of the employee's resignation, the employer may also defeat an employee's discrimination claim that an employer has discriminated illegally by refusing to allow an employee to rescind a resignation, by demonstrating a history of refusing such requests. In *Simmons v. Navy Federal Credit Union*, the plaintiff alleged multiple violations of the Age Discrimination in Employment Act including in relation to the circumstances surrounding her resignation and the employer's eventual refusal to accept rescission of the resignation.³⁶ The court treated Plaintiff's claim "for discriminatory refusal to reinstate following . . . voluntary resignation" as a disparate treatment claim; because there was no evidence that the employer had ever allowed a younger employee to rescind a voluntary resignation, plaintiff's claim failed.³⁷

This outcome comports generally with arbitration decisions in the labor sector, where arbitrators generally affirm the discretion of employers to accept or reject an employee's retraction of a resignation.³⁸ There are arbitration cases, however, that find that an employee may rescind a resignation if the duration between notice and rescission is short and the employer had not detrimentally relied on the resignation.³⁹

Can an Employer Re-Characterize a Resignation and Terminate the Employee for Cause?

Employers must also consider whether or not circumstances will allow for the re-characterization of a resignation and instead allow the employer to terminate the employee for cause. In situations where notice of resignation has been given but the resignation is not yet effective, an employer may uncover evidence of misconduct that occurred prior to delivery of the notice, or the employee may engage in "bad acts" after giving notice but before the effective resignation date. In these situations, the employer

should retain the right to terminate the employee for cause, with the attendant results associated with a for-cause termination under the contract and ancillary agreements.

What about situations where the resignation has already occurred? Can the employer revisit the situation and after the fact, based on newly discovered evidence, subject the employee to consequences associated with a for-cause termination (e.g., forfeiture of equity that may have vested prior to the resignation date)? There are analogous situations under various legal doctrines that would allow the employer to look past the resignation and recast the termination of employment as one involving cause. For example, under New York's "faithless servant" doctrine, an employer who uncovers evidence of misconduct can seek to recover all compensation paid to the former employee during the employment period.⁴⁰ Alternatively, an employer could, based on after acquired evidence, revisit the former employee's vested interests in compensation arrangements that have continued in place, notwithstanding the former employee's resignation. An extensive discussion of the use of "after acquired evidence" is beyond the scope of this article, but employers should not assume that the "game is over" simply because a notice of resignation has been delivered or a resignation became effective.

Michael J. Album is a New York-based Partner in the Employee Benefits, Executive Compensation & ERISA Litigation Practice Center at Proskauer. Kristine K. Huggins is an Associate in the firm's Labor and Employment Law Department, and Brandon Welke is a third year law student at Columbia Law School who assisted in the preparation of this article while a Summer Associate at Proskauer.

¹ In these cases the only inquiry is whether the employee left voluntarily, so the doctrine is of considerable benefit to employers who want to structure "golden handcuffs." See *Morrison v. Schroder Capital Management International*, 445 F.3d 525 (2d Cir. 2006). In the Schroder decision, the New York Court of Appeals dealt a blow to plaintiffs, holding that the appropriate standard for determining "voluntariness" was the same standard applied to claims of constructive discharge in employment discrimination cases, i.e., were the work conditions so intolerable that no reasonable person could continue employment.

² Restatement (Third) of Agency § 3.10(1) (2006) (emphasis added).

³ Restatement (Third) of Agency §§ 1.03 and 1.04(4).

⁴ 3 Am. Jur. 2d Agency § 48.

⁵ Restatement (Third) of Agency § 3.10, comment b.

⁶ Restatement (Third) of Agency § 3.10, comment c. See generally *Security Services, Inc. v. K Mart Corp.*, 996 F.2d 1516, 1523 (3d Cir. 1993).

⁷ Restatement (Third) of Agency § 1.03, comment b.

⁸ Restatement (Third) of Agency § 1.03, comment e.

⁹ William Meade Fletcher, *Fletcher Cyclopaedia of the Law of Private Corporations* § 349 (rev. vol. 2011).

¹⁰ *Id.* See also *Briggs v. Spaulding*, 141 U.S. 132 (1891); *Dillon v. Berg*, 326 F. Supp. 1214 (D. Del. 1971), *aff'd*, 453 F.2d 876 (3d Cir. 1971).

¹¹ Del. Code Ann. § 18-602; N.Y. LLC Law § 415.

¹² *People ex rel. Livingston v. Albany Common Pleas*, 19 Wend. 27 (N.Y. Sup. Ct. 1837) (ultimately deciding the case on state constitutional grounds).

¹³ 306 A.D. 2d 829, 762 N.Y.S. 2d 205 (N.Y. App. Div. 4th Dept 2003).

¹⁴ *Fisher*, 306 A.D.2d at 833 (Hurlbutt and Lawton, JJ., dissenting).

¹⁵ *Id.* at 832. (emphasis added).

¹⁶ *Fisher*, 306 A.D.2d at 830.

¹⁷ *Id.* at 831.

¹⁸ *Id.* at 830–31.

¹⁹ *Id.* at 833 (Hurlbutt and Lawton, JJ., dissenting).

²⁰ *Rose v. Green*, 145 A.D.2d 618, 536 N.Y.S.2d 822 (N.Y. App. Div.2d Dept 1988).

²¹ *Id.* at 619, 536 N.Y.S.2d at 823.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 619–20, 536 N.Y.S.2d at 823.

²⁵ *Id.* at 620, 536 N.Y.S.2d at 823.

²⁶ *Id.*

²⁷ *Id.* at 621, 536 N.Y.S.2d at 824.

²⁸ See *State ex. rel. Ryan v. Murphy*, 30 Nev. 409 (1908); *State ex. rel. Almon v. Fowler*, 160 Ala. 186 (1908); but c.f., *Manheim v. McCarthy*, 118 N.Y.S.2d 231 (Sup. Ct. 1952) (finding that the power to determine the right of an employee to retract a prospective resignation is clearly lodged in the Legislature, and the Legislature had not acted yet). For public officials, it is often the case that for a resignation to be effective, the official must give notice of the intent to relinquish the office and there must be an act of relinquishment.

²⁹ 2001 SD 143, 637 N.W.2d 717 (S.D. 2001).

³⁰ *Id.*; 637 N.W.2d at 720.

³¹ *Id.*

³² No. 10-CV-103, 2011 BL 170082 (M.D. Ala. June 28, 2011).

³³ *Id.* at *2–3.

³⁴ *Id.* at *13–14, quoting *Rutledge v. SunTrust Bank*, No. 05-CV-536, 2007 BL 226853 (M.D. Fla. 2007), *aff'd* 262 Fed. Appx. 956 (11th Cir. 2008), citing *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 n.2 (11th Cir. 1997).

³⁵ *Id.* at *14–15.

³⁶ No. 10-CV-14, 2011 BL 141649 (S.D. Tex. May 26, 2011).

³⁷ *Id.* at *9, quoting *Landry v. Potter*, 182 Fed. App'x 303 at *1 (5th Cir. May 17, 2006). For a similar case involving alleged discrimination on the basis of national origin, see *Mamman v. Chao*, No. 06-CV-2688, 2011 BL 126634 (D. N.J. May 12, 2011).

³⁸ MB Labor and Employment Law § 239.03 (2011).

³⁹ *Id.*, citing *In re Consumers Union*, 22 Lab. Arb. Rep. (BNA) 238 (Gray 1953); *In re Muter Co.*, 47 Lab. Arb. Rep. (BNA) 332 (DiLeone 1966); *In re Jewish Chronic Disease Hospital*, 45 Lab. Arb. Rep. (BNA) 590 (Yagoda 1965); *American Bakeries Co.*, 34 Lab. Arb. Rep. (BNA) 360 (Sembower 1960).

⁴⁰ See, e.g., *Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184 (2d Cir. 2003); *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447 (S.D.N.Y. 2008); *Sanders v. Madison Square Garden*, 525 F.Supp.2d 364 (S.D.N.Y. 2007).

Employment Litigation

\$1.6 Million Award for Emotional Damages Based on Hostile Work Environment and Retaliation in Violation of Federal and Massachusetts Law Affirmed by the First Circuit

Tuli v. Brigham & Women's Hospital, Nos. 08-CV-2026, 09-CV-1597, 09-CV-1603, 09-CV-1731, 2011 BL 222756 (1st Cir. Aug. 29, 2011)

- ➔ Based on evidence that a hospital did not take corrective action in response to a physician's complaints about blatantly sexist, offensive, and belittling comments, the jury was entitled to find that the hospital was liable for tolerating a hostile workplace.
- ➔ The consequences of the mandatory anger-management counseling the hospital ordered the physician to undergo – including its possible impact on her employment and licensing elsewhere – “might have dissuaded a reasonable worker from making or supporting a charge of discrimination” and therefore constituted an adverse employment action for purposes of plaintiff's retaliation claim.
- ➔ A jury's award of \$1.6 million in damages in plaintiff's claims for hostile work environment and retaliation against her employer and supervisor in violation of federal and Massachusetts law was amply supported by the record and was not so “grossly excessive” as to require remittitur.

The First Circuit affirmed a jury's award of \$1,600,000 for emotional damages in a physician's action alleging hostile work environment and retaliation against her employer and supervisor. Based on evidence that the employer did not take corrective action in response to the physician's complaints about blatantly sexist, offensive, and belittling comments, the Court also found that the jury reasonably concluded that the employer was liable for tolerating a hostile workplace. The Court further held that the consequences of the mandatory anger-management counseling that the employer ordered the physician to undergo – including its possible impact on her employment and licensing elsewhere – “might have dissuaded a reasonable worker from making or supporting a charge of discrimination” and therefore constituted an adverse employment action for purposes of the retaliation claim.

The Brigham and Women's Hospital hired Sagun Tuli as an associate surgeon in the Department of Neurosurgery. In 2002–2003, Tuli served as the department's representative to the Hospital's Quality Assurance and Risk Management Committee