PROGRAM COURSEBOOK

PRESENTED BY
THE NETWORK OF
TRIAL LAW FIRMS

AUGUST 4, 2017 - NEW YORK, NY

Litigation Management in a New York Minute - 2017 Edition

- Litigation Management SuperCourse -
August 4, 2017
The City Bar Building; New York, NY

THE NETWORK trial.com

Focusing on Trial and Litigation, Dedicated to Continuing Legal Education

Over 5,000 Attorneys in 22 Separate and Independent Trial Law Firms Praticing in Over 120 Offices Throughout the United States

The Network is a not-for-profit corporation producing cutting-edge CLE.
The Network of Trial Law Firms, Inc. is a not-for-profit membership association. The goal of the 22 law firms participating in the Network is to provide their clients with high-quality trial and litigation representation through advances in education, technology, business and science. The Network sponsors activities to accomplish that goal, including research and study of advances in the state-of-the-art of legal representation, and sponsors continuing legal education seminars for corporate and outside counsel and insurance professionals. Our CLE programs aid in the dissemination of new information and effective techniques and technologies to attorneys and claims professionals serving corporations and insurers.

Since 1993 we have conducted two three-day CLE seminars each year. In 2000, we added one-day CLE seminars to our offerings. Our focus is always excellence in litigation management and trial results. We are the home of the "Litigation Management Supercourse," a program that our attorneys created in 1993 and have produced and updated more than 60 times since then together with various not-for-profit CLE organizations and bar associations.

The Network does not practice law and is neither a law firm nor a partnership of law firms. The Network does not render legal advice nor make referrals. Only the individual lawyers within each member law firm practice law and render legal advice. Each member law firm is solely responsible for the matters entrusted to its care. No member law firm is responsible for the work, professional service or legal advice provided by any other member law firm. The Network does not refer clients to law firms or to attorneys. The listing in these materials of any law firm's name is not an endorsement or recommendation of that law firm by The Network or by any law firm that may be a member of the Network.

Note: Each member law firm of The Network of Trial Law Firms, Inc. has attorneys who are licensed to practice in that firm's home office state. In addition, many member law firms have attorneys who are licensed to practice in other states. Please check with the individual firm in which you are interested for those states in which some or all of its attorneys are licensed to practice law.

Officers and Directors

Jessie Ziegler
Bass Berry & Sims
Chair

Jerry Glas
Deutsch Kerrigan
Vice-Chair

Steve Fogg
Corr Cronin
Treasurer

Nikki Nesbitt
Goodell DeVries
Secretary

Bobby Hood, Jr.
Hood Law Firm
Officer at Large

Lee Hollis
Lightfoot Franklin
Past Chair

Felice Wagner
Executive Director
and General Counsel

Edd Schillay
Director of Operations
and MCLE

Member Firm Profile

Akerman LLP is a leading transactions and trial law firm known for its core strengths in middle market M&A, within the financial services and real estate industries, and for a diverse Latin America practice. With more than 600 lawyers and government affairs professionals and a network of 20 offices, Akerman is ranked among the top 100 law firms in the United States by The American Lawyer (2015). Akerman also is ranked among the top 50 law firms for diversity in The American Lawyer's Diversity Scorecard (2015). More information can be found at akerman.com or twitter.com/akerman_law.

Miami, FL | Boca Raton, FL | Fort Lauderdale, FL
Jacksonville, FL | Naples, FL | Orlando, FL
Palm Beach, FL | Tallahassee, FL | Tampa, FL
West Palm Beach, FL | Chicago, IL | Dallas, TX
Denver, CO | Las Vegas, NV | Los Angeles, CA
Madison, WI | New York, NY | Salt Lake City, UT
Vienna, VA | Washington, DC

akerman.com

Firm Contacts

Christine Welstead
305.374.5600
Miami, FL

Larry Rochefort
561-671-3603
West Palm Beach, FL

James Miller
305.982.5624
Miami, FL

David Spector
561.653.5000
West Palm Beach, FL

Timothy McDermott
904.598.8611
Jacksonville, FL

Michael Marsh
305.982.5507
Miami, FL

BASS BERRY SIMS

CENTERED TO DELIVER.

For more than 85 years, the law firm of Bass, Berry & Sims PLC has provided superior client service and unsurpassed legal representation. Our more than 200 attorneys represent and advise Fortune 500 companies as well as regional and local businesses, including acting as the principal corporate counsel for approximately 30 public companies.

Our team of more than 80 litigators is ready to serve our clients' best interests and has a long track record of not only winning, but also understanding clients' business objectives.

We approach disputes by addressing not only the matter at hand, but also by analyzing litigation trends facing the client and suggesting creative solutions to minimize risk over the long term. Our focus is to serve each of our clients' best interests as efficiently and effectively as possible. We establish a course of action, propose alternative fee arrangements and evaluate early settlement possibilities or opportunities for an early dismissal to avoid expense and protracted litigation. That said, we are prepared to serve as resolution negotiator or staunch advocate; whichever is necessary. We utilize the latest advances in technology to improve communication, discovery and trial preparation, all leading to sound victories.

Our Litigation & Dispute Resolution Practice Group is built on great reputations in corporate and securities, government investigations, healthcare, financial services and commercial litigation. From that foundation, we are especially focused on significant and growing areas of litigation that affect our clients, and align with our unique strengths.

A few of our many representative matters include:

Lead counsel for a major retailer in successful and much-publicized prosecution of the company's rights under a $1.6 billion merger agreement; obtained order of specific performance and ultimately achieved a favorable settlement valued at approximately $215 million prior to the commencement of a related solvency proceeding in New York federal court.

Lead counsel for a nursing home company in consolidated litigation involving a multi-fatality nursing home fire, resulting in the successful resolution of 30 of the 32 cases within one year from the date of the fire and the two remaining cases within three years. The mediator, in his report to the court, described this process as "the most successful mass tort mediation in the jurisprudence of Tennessee.".

Defense of a major pharmaceutical company in 2,500 Federal Court lawsuits involving diet drug litigation; a team of 45 attorneys and legal professionals conducted fact discovery in the individual cases, expert selection and retention for nation-wide litigation, and discovery of plaintiff's experts.

Representation of numerous public companies in shareholder and securities class action litigation in Tennessee.

Nashville, TN | Knoxville, TN | Memphis, TN
Washington, DC

bassberry.com

Jessie Zeigler
615-742-6289
Nashville, TN

Overton Thompson
615.742.7730
Nashville, TN

David Esquivel
615-742-6285
Nashville, TN

David King
615.742.7890
Nashville, TN

bsp Bush Seyferth Paige
LAW OFFICES

The trial attorneys at Bush Seyferth & Paige PLLC ("BSP") try lawsuits across the country – with trial skills second to none. Some of America's best-known companies look to BSP to represent them in catastrophic injury cases, class actions, complex business litigation, and appeals.

In 2003, Cheryl Bush, Patrick Seyferth, and Raymond Kethledge formed BSK (now BSP). Each founding partner was committed to creating a firm of best-in-class trial attorneys, appellate attorneys, and defenders of class action lawsuits. Every BSP attorney has impressive academic and professional credentials. More than half of BSP's attorneys have held judicial clerkships, including several each from United States Courts of Appeals, United States District Courts, and the Michigan Supreme Court.

BSP's enduring vision is to deliver powerful, responsive corporate legal services without compromising these essentials: Personal attention from first-chair attorneys; Efficient case management based on a client's individual goals; Forceful, fearless presentations in court; and Consistent case evaluation, unchanged on the courthouse steps.

The firm has successfully handled complex, high-stakes litigation and appeals in over 30 states and several foreign countries. BSP is highly successful in winning complex cases, winning appeals, and defeating class certification.

BSP is a proud member of the National Association of Minority and Woman Owned Law Firms ("NAMWOLF") and the National Association of Women's Business Owners ("NAWBO") and is certified by the Women's Business Enterprise National Council ("WBENC").

Troy, MI

bsplaw.com

Cheryl Bush
248-822-7801
Troy, MI

Patrick Seyferth
248-822-7802
Troy, MI

Moheeb Murray
248-822-7809
Troy, MI

Stephanie Douglas
248-822-7806
Troy, MI

Roger Meyers
248-822-7844
Troy, MI

Michael Williams
269-820-4100
Kalamazoo, MI

CORR CRONIN MICHELSON BAUMGARDNER FOGG & MOORE LLP

CCMBFM

Corr Cronin Michelson Baumgardner Fogg & Moore LLP is recognized as one of the premier trial law firms in the Pacific Northwest, handling major cases in Washington, Oregon, Alaska, and Idaho for clients of all sizes – from individuals and regional companies to Fortune 500 corporations.

We combine the legal talent normally found in large law firms with the responsiveness and service of a boutique. Our founding partners are all former partners from the 200-lawyer firm of Bogle & Gates (including the former co-chairs of Bogle & Gates' Litigation Department).

We have been fortunate to have been recognized for our work by the following publications:

Global Law Experts: Named us 2011 Washington Litigation Law Firm of the Year. Chambers USA: Picked us as one of its "Leading Firms" in Washington for commercial litigation every year since 2003, and, in 2010, called us an "outstanding group" (the highest rating) and noted us as having been praised by sources as "lawyer-for-lawyer ... the finest firm in town."

Benchmark America's Leading Litigation Firms and Attorneys: Listed us as "Highly Recommended" (the highest rating) every year since 2008.

U.S. News & World Report: Included us in its 2010 and 2011 "Best Law Firms" editions with a "Tier 1" ranking (the highest possible) in Seattle for commercial litigation.

Best Lawyers: Called us among Washington's best for commercial litigation, injury defense litigation, and "bet-the-company litigation."

Seattle, WA

corrcronin.com

Steve Fogg
206.274.8669
Seattle, WA

Michael Moore
206.621.1502
Seattle, WA

Emily Harris
206.621.1477
Seattle, WA

Kevin Baumgardner
206.621.1480
Seattle, WA

DeutschKerrigan

Deutsch Kerrigan views the task of resolving a legal problem as a partnership between the client and its outside counsel. Our goal is to work closely with each client to provide high quality, effective legal service which exceeds the client's expectations.

Our clients have the confidence in us to represent them beyond Louisiana for the same reasons they trust us with their problems in Louisiana: we get results, and we get them efficiently. To do this, we begin by knowing our clients. We learn our clients' business, their business philosophy, their goals and how they achieve them. When faced with a particular problem, we combine this knowledge with our knowledge of the law and our familiarity with the agency, court or other tribunal that will apply that law to craft a solution that will best meet the client's goals.

With over 60 attorneys and a substantial support staff of paralegals and legal assistants, we apply our legal and support resources carefully to most effectively meet the needs of our clients. Every file is assigned to an experienced attorney who coordinates all work on the case and maintains ongoing communication with the client. With the client's permission, that attorney may handle the case alone or draw on the talents and skills of other attorneys in the firm.

Because regular communication with our clients is essential, in addition to meetings and telephone conversations, we use the latest technology to communicate. Each of our attorneys has access through a state-of-the-art network to e-mail, the Internet, database, word processing and calendaring programs. Our dial-up networking and Internet capabilities also allow us to share the information on our network with our clients. We are also developing an Extranet to expand this ability and provide for the management of complex litigation. Through our membership in The Network of Trial Law Firms, a separate non-profit organization that includes 2,700 attorneys nationwide practicing in 75 local offices in 24 separate and independent trial law firms, we use an Intranet to share information with other attorneys throughout the country. Our use of technology also extends to our communication with judges and juries. Our trial presentation capabilities were featured in a major California criminal trial, in which a Deutsch Kerrigan paralegal operated the same system that we use in our own cases.

The firm utilizes creative alternatives to traditional litigation procedures. We have successfully engaged ad hoc judges, arbitrators and mediators in resolution of such matters. We have convinced the courts to use mini-trials or selected issue resolution to bring practicality to complicated cases.

We provide our clients with a wide variety of legal services in most major practice areas, including, aviation, bankruptcy, commercial, commercial litigation, construction, energy, environmental, estate planning, fidelity & surety, franchising & distribution, intellectual property and technology, labor & employment, litigation, oil & gas, products liability, real estate, tax and toxic torts.

New Orleans, LA | Gulfport, MS

deutschkerrigan.com

Firm Contacts

Robert Kerrigan
504.593.0619
New Orleans, LA

Jerry Glas
504.593.0627
New Orleans, LA

Ted LeClercq
504.593.0647
New Orleans, LA

William Wright
504.593.0623
New Orleans, LA

Joe McReynolds
514.593.0606
New Orleans, LA

Nancy Marshall
504.593.0602
New Orleans, LA

FARELLA BRAUN + MARTEL LLP

Farella Braun + Martel LLP represents clients throughout the United States and abroad in sophisticated business transactions and complex commercial, civil and criminal litigation. We are known for our imaginative legal solutions and the dynamism and intellectual creativity of our lawyers. The attorneys in each practice group work cohesively in interdisciplinary teams to advance the clients' objectives in the most effective, coordinated and efficient manner. Founded in 1962, we are headquartered in San Francisco and maintain an office in the Napa Valley that is focused on the wine industry.

We are practiced trial lawyers. Our experience includes complex litigation involving class actions, antitrust, and unfair competition; business litigation involving securities, commodities and M&A disputes; intellectual property and technology litigation involving patents, trademarks, trade secrets and copyrights; and environmental litigation involving natural resources, federal and state cost recovery, CEQA, Proposition 65 and complex toxic torts. Farella Braun + Martel is regarded highly for our employment, construction, insurance coverage, and white collar criminal experience, and is regularly sourced for our proven appellate capabilities.

Our business attorneys advise clients in all aspects of corporate, partnership and LLC law. We represent public and family held companies with corporate and securities needs including public and private financing, international transactions, asset securitization, insolvency and loan workouts, tax and wealth succession planning. Our team works closely with our employment and intellectual property practice groups to provide a full complement of services to deal makers. We also offer comprehensive real estate, land use, environmental and construction departments that work together on commercial, brownfields, mixed used, industrial and large scale residential project development.

Since our inception, Farella Braun + Martel has received industry and peer recognition equal to any firm in the country. Our attorneys include fellows of the American College of Trial Lawyers, American College of Appellate Lawyers, American College of Construction Lawyers, American College of Environmental Lawyers and American College of Investment Counsel. Our environmental, construction, insurance, intellectual property, litigation and wine industry practices have been recognized in peer reviewed sources as the top in their practice including Best Lawyers, Chambers USA, U.S News and various practice specific honors.

San Francisco, CA | St. Helena, CA

fbm.com

Sandra Edwards
415.954.4428
San Francisco, CA

Brandon Wisoff
415.954.4449
San Francisco, CA

Jeff Fisher
415.954.4912
San Francisco, CA

FormanWatkins

Forman Watkins & Krutz was established in Jackson in December 1986 as a civil practice firm with a strong emphasis in product liability and commercial litigation.

Our firm is national and regional counsel for a number of major companies in many fields. Our clients include manufacturers, distributors, insurers, and financial and educational institutions. We practice in all courts and jurisdictions at all levels.

Our attorneys have substantial expertise in mass tort cases, commercial matters, environmental litigation, insurance, and anti-trust, bankruptcy, transportation, labor-management relations, securities, mergers and real estate. Many of our trial attorneys are nationally recognized in their fields and are often asked to assume responsibilities far outside of Mississippi in substantive areas involving widespread litigation.

Jackson, MS | New Orleans, LA | Houston, TX
Detroit, MI | Red Bank, NJ

formanwatkins.com

Joshua Metcalf
601.974.8722
Jackson, MS

Brian Hannula
601.974.8783
Jackson, MS

Tanya Ellis
601.960.3210
Jackson, MS

Jennifer Studebaker
601.973.5983
Jackson, MS

Freeborn

Your Future Is Our Purpose

Freeborn & Peters LLP is a full-service law firm, headquartered in Chicago, with international capabilities.

Freeborn & Peters supports its clients in the following legal disciplines: Litigation, Corporate Law, Real Estate, Bankruptcy and Financial Restructuring, and Government and Regulatory Law.

The firm is highly regarded for its ability to handle particularly complex commercial disputes, including those in the fields of antitrust, environmental, shareholders' rights, directors' and officers' liability, restrictive covenants and trade secrets, and intellectual property.

Freeborn & Peters is always looking ahead and seeking to find better ways to serve its clients. It takes a proactive approach to ensure its clients are more informed, prepared and able to achieve greater success – not just now, but also in the future.

While the firm serves clients across a broad range of sectors, it has also pioneered an interdisciplinary approach that serves the specific needs of targeted industries, including insurance and reinsurance; food; transportation, including railroads, trucking, and logistics; and private equity.

Freeborn & Peters is an organization that genuinely lives up to its core values of integrity, caring, effectiveness, teamwork, and commitment, and embodies these values through high standards of client service and responsive action. Its lawyers build close and lasting relationships with clients and are driven to help them achieve their legal and business objectives.

Chicago, IL | Springfield, IL | Richmond, VA

freeborn.com

David Gustman
312.360.6515
Chicago, IL

Jennifer Fitzgerald
312.360.3585
Chicago, IL

GIBBONS

Founded in 1926, Gibbons is ranked among the nation's top 250 firms by The National Law Journal. The firm provides transactional, litigation and counseling services to leading businesses regionally, nationally and internationally.

Gibbons expanded its Philadelphia office with the addition of 25 attorneys from Hecker Brown Sherry and Johnson, a prominent Philadelphia civil litigation boutique. This expansion is a key aspect of Gibbons' strategic plan to enhance its ability to serve clients from offices throughout the region.

Gibbons was recently ranked one of the top 100 firms in the nation for diversity by Multi-Cultural Law magazine, and Gibbons' attorneys are recognized among the nation's leading business attorneys by The Best Lawyers in America, Chambers USA Guide to America's Leading Business Lawyers and Super Lawyers publications.

The firm's 200+ attorneys counsel businesses and business owners in all legal areas including Business & Commercial Litigation, Corporate, Criminal Defense, Employment Law, Financial Restructuring & Creditors' Rights, Government Affairs, Intellectual Property, Products Liability, and Real Property & Environmental.

Philadelphia, PA | Newark, NJ | Trenton, NJ
New York, NY | Wilmington, DE

gibbonslaw.com

Alan Gries
215.446.6267
Philadelphia, PA

John Romeo
215.446.6223
Philadelphia, PA

Madeline Sherry
215.446.6201
Philadelphia, PA

Steve Imbriglia
215.446.6209
Philadelphia, PA

Goodell DeVries

Goodell, DeVries, Leech & Dann specializes in litigation and litigation management. Our firm was founded in 1988 by experienced trial lawyers who successfully defended product liability, professional malpractice, commercial, toxic tort and insurance coverage litigation. We offer our clients aggressive, high quality representation in the management and trial of sophisticated litigation traditionally handled by only the largest law firms while providing the personalized, cost-efficient service usually associated with smaller law firms.

Our firm's 65 attorneys offer a rich diversity of litigation expertise and experience, representing clients in the pharmaceutical and medical device, industrial and consumer products, healthcare, insurance, consumer finance, technology, electronics, automobile and construction industries.

The diversity of the specialized knowledge of our firm's lawyers allows complex litigation matters to be handled by an interdisciplinary team of lawyers able to contribute specific individual skills as needed. At the same time, the depth of litigation experience among the individual attorneys enables us to avoid overstaffing litigation matters. This flexibility in staffing, combined with a commitment to controlled, quality growth, permits Goodell, DeVries, Leech & Dann to provide effective representation at a reasonable overall cost.

Baltimore, MD | Philadelphia, PA

gdldlaw.com

Linda Woolf
410.783.4011
Baltimore, MD

Jeff Hines
410.783.4041
Baltimore, MD

Nikki Nesbitt
410.783.4026
Baltimore, MD

Rick Barnes
410.783.4004
Baltimore, MD

Donald DeVries
410.783.4006
Baltimore, MD

Tom Cullen
410.783.4019
Baltimore, MD

HOOD LAW FIRM LLC

The Hood Law Firm offers a wide variety of litigation services in all State and Federal Courts throughout South Carolina and the United States. The goal of the Hood Law Firm is to provide the highest quality legal services to our clients in a cost effective and professional manner. The firm combines the personal attention of the partners in every case with the assistance of well qualified associates and legal assistants as well as state-of-the-art computer technology.

The Hood Law Firm was established in 1985 by Charleston attorney Robert H. Hood, formerly a partner in the law firm of Sinkler, Gibbs & Simons. Specializing exclusively in civil litigation cases, the firm has grown rapidly since its inception and continues to grow to meet the needs of its diverse clients.

The majority of the firm's cases involve the defense of personal injury cases, specifically in the areas of professional malpractice, insurance (including coverage disputes), toxic torts, automobile accidents, general negligence, and products liability. Other types of cases include commercial, banking, business litigation, employment disputes, sexual harassment, civil rights and constitutional claims, collection and construction cases. The firm also handles plaintiff's cases involving contract disputes, commercial litigation, personal injury and product liability.

The firm and Mr. Hood are rated AV by Martindale-Hubbell. The firm is listed in the Bar Register of Preeminent Lawyers and in A.M. Best's Directory of Recommended Insurance Firms. Mr. Hood has been listed in The Best Lawyers in America since its first edition in 1978.

Charleston, SC

hoodlaw.com

Bobby Hood, Sr.
843.577.1201
Charleston, SC

Molly Craig
843.577.1215
Charleston, SC

Bobby Hood, Jr.
843.577.1219
Charleston, SC

James Hood
843.577.1223
Charleston, SC

Blanton O'Neal
843.577.1211
Charleston, SC

Barbara Showers
843.577.1207
Charleston, SC

LIGHTFOOT

Ranked as one of the top commercial litigation firms in Alabama by the current edition of Chambers USA: America's Leading Lawyers for Business, Lightfoot Franklin & White, LLC was founded on January 15, 1990 and we presently have over 60 lawyers. In order to focus on what we do best, we have restricted our practice to civil litigation matters, with the exceptions of environmental compliance advice, white-collar crime and internal investigations. Although we handle all types of civil litigation in state and federal courts, our primary areas of practice include commercial disputes, product liability, antitrust, consumer fraud, appeals, intellectual property, catastrophic personal injury and death, environmental/ toxic torts, class actions, professional malpractice, securities fraud, employment and communications.

Our stock in trade is our reputation of being able to take the most difficult cases to trial, when necessary, and to achieve excellent results. We will furnish, upon request, a summary of every jury verdict we have received since 1987, which demonstrates our trial record. While we are dedicated to trying and winning cases, we understand the need to control the cost of litigation. Therefore we only perform work that materially advances the interests of our clients, and we staff cases with the minimum number of attorneys necessary to perform that work. Additionally, we understand the importance of a client's desire sometimes to target certain cases for early settlement, and when that is the case, we expeditiously get those cases in a posture for early resolution. We are committed to the utilization of all forms of Alternative Dispute Resolution. Several of our partners serve frequently as mediators and arbitrators, and virtually all of our attorneys have successfully employed all types of ADR.

Our appellate practice also has a tremendous reputation. We are regularly retained post-verdict to handle post-trial motions and appeals of multi-million dollar verdicts. We have literally handled the largest appeals in the history of the state and take pride in our track record in the Supreme Court of Alabama, the Eleventh Circuit Court of Appeals and other appellate courts. We have participated in approximately 400 reported appellate decisions since the firm's formation in 1990.

We employ the latest technology and are committed to improving and upgrading to keep up with new technological advancements. All of our attorneys regularly communicate with clients electronically, not only by e-mail, but also via our secure extranet and our in-house video conference center, which improves communication and the speed with which legal services can be delivered. We use the latest research and presentation tools and have our own in-house document management and trial technology departments. These capabilities enable us to present our cases more effectively and at less expense. We are on the cutting edge of successful litigation capability, whether the criterion is technological, tactical or jury rapport.

Birmingham, AL

lightfootlaw.com

Lee Hollis
205.581.0766
Birmingham, AL

Jack Sharman
205.581.0789
Birmingham, AL

J. Chandler Bailey
205.581.1515
Birmingham, AL

Kevin Clark
205-581.5808
Birmingham, AL

Haley Cox
205-581.1519
Birmingham, AL

MASLON

Through decades of dedicated service, Maslon's Litigation Group has earned a reputation for being the lawyers to call when clients are facing the most complex legal issues and high stakes litigation matters. That's why Chambers USA ranks Maslon as one of the top commercial litigation firms in Minnesota. Past editions have described Maslon's Litigation Group as "[r]esponsive, insightful, innovative and intellectually strong, with attorneys who are loyal to the client and service-oriented" (2011), and have featured the following client statements:

"I have been extremely impressed with [Maslon's] litigation group as a whole. They are quick to assess a case and are extremely realistic about the likelihood of success. When they engage in litigation, they are outcome-focused." (Chambers USA, 2013)

"They have a broad range of commercial litigators and great products lawyers. They are rock-solid." (Chambers USA, 2012)

We offer clients a broad range and depth of experience, and regularly represent major manufacturers, financial institutions, utility companies, and corporate and individual clients in a wide variety of commercial cases. We have successfully resolved disputes in state and federal trial and appellate courts, as well as in various alternative forums and administrative agencies.

Maslon clients can expect to have a litigation strategy tailored to fit their specific needs, taking into account the amount or matter in controversy, each client's distinct business needs, its relationship with the community and employees, and its litigation philosophy. We also recognize that not every dispute requires litigation and are committed to thoughtful exploration of alternatives to litigation where practical. When litigation is necessary, we inform clients about innovative strategies to reduce the expense and uncertainty of litigation, such as arbitration, mediation, mini-trials and summary jury trials.

Our broad litigation experience includes: Appeals; Business Litigation; Competitive Practices/Unfair Competition; Construction and Real Estate Litigation; Corporate Trust Litigation, Employment Litigation; Insurance Coverage Litigation; Intellectual Property Litigation; Probate and Trust Litigation; and Tort and Product Liability.

With over fifty years in practice and more than 80 attorneys, Maslon is dedicated to achieving excellence in the practice of law, helping clients reach their most ambitious personal and business goals. In addition to our litigation services, Maslon offers extensive experience in the areas of advertising & marketing, business & securities, estate planning, financial services, labor & employment, and real estate.

Minneapolis, MN

maslon.com

David Suchar
612.672.8321
Minneapolis, MN

Terry Newby
612.672.8328
Minneapolis, MN

Nicole Narotzky
612.672.8373
Minneapolis, MN

Jason Lien
612.672.8319
Minneapolis, MN

Cooper Ashley
612.672.8363
Minneapolis, MN

Moore&VanAllen

Litigation: The firm conducts a broad civil litigation practice. Clients include businesses of all sizes, institutions, insurers, and self-insured companies. Our attorneys regularly appear in state and federal courts and before administrative agencies. We have experience in all alternate forms of dispute resolution, including mini-trials, mediation, and arbitration. We also have defended a large number of class actions. Our attorneys provide preventive counseling and litigation services on contract disputes; bankruptcy; lender liability; employment matters; product liability; construction disputes; entertainment; securities; franchising; collection of foreign debts and execution of foreign judgments in North Carolina; intellectual property disputes, including trade secrets, patents, trademarks and copyrights; environmental matters, including toxic torts; unfair trade practices, including antitrust, tying agreements, competitive bidding practices, promotional programs and practice, and exclusive dealing arrangements; confidentiality agreements; medical malpractice; suretyship; tax and estate matters; and title matters.

Employment: Moore & Van Allen Employment and Labor attorneys work hard to defend our clients' rights before government agencies, and arbitrators, courts and to solve our clients' problems short of litigation.

We take a proactive approach to labor and employment relations by understanding each client's business objectives, identifying risks, and assisting in developing strategies to achieve those objectives. In addition to providing management training and policy development, we advise clients daily on responses to labor and employment issues. This combination of education, guidance and prevention results in significant cost savings, as well as establishing a more productive work place.

We regularly represent clients from coast to coast in various state and federal courts, as well as before administrative bodies-- handling claims of unfair labor practices, discrimination, sexual harassment, employee misclassification and pay disputes, wage and hour disputes, wrongful termination, workers' compensation, denial of benefits, fiduciary liability, and employment contract disputes.

Our attorneys also represent companies in complex employment litigation involving class actions, collective actions, and actions concerning unfair competition, employee non-compete, nonsolicitation, and confidentiality covenants, as well as trade secret, tortious interference, and employee raiding claims.

Because we are part of a full service law firm, our clients also receive the benefit of the experience of attorneys in Moore & Van Allen's Employee Benefits, Immigration, Corporate, and Tax teams when any of these issues arises in an employment matter.

Charlotte, NC | Research Triangle Park, NC | Charleston, SC

mvalaw.com

Tony Lathrop
704.331.3596
Charlotte, NC

Tom Myrick
704.331.1128
Charlotte, NC

Bobby Bowers
704.331.3560
Charlotte, NC

Valecia McDowell
704.331.1188
Charlotte, NC

Scott Tyler
704.331.2463
Charlotte, NC

Nixon Peabody LLP is recognized as a “Global 100” law firm—one of the largest in the world. With 800 attorneys collaborating across major practice areas in 17 cities, including Boston, Chicago, London, Los Angeles, New York, Rochester, San Francisco, Shanghai, Silicon Valley, and Washington, DC, the firm’s size, diversity, and advanced technological resources enable it to offer comprehensive legal services to individuals and organizations of all sizes in local, state, national, and international matters. Our clients include emerging and middle-market businesses, national and multinational corporations, financial institutions, public entities, educational and not-for-profit institutions, and individuals.

While some firms possess litigators, few offer experienced and proven trial lawyers that keep clients trial-ready for any challenge across a broad spectrum of practices. And Nixon Peabody is one of the few firms with the experience and capability—and successful trial results—to serve as national trial counsel for clients who require a consistent approach to class action and aggregate litigation matters filed in multiple states.

Starting on day one, our clients are paired with courtroom veterans from Nixon Peabody’s trial team (NP Trial) who have a proven record of success trying cases to verdict in some of the most challenging venues. Our dedicated trial team provides early input on case strategy and contributes to the client’s case through all aspects of the life cycle until the matter is resolved. The unique approach of NP Trial not only keeps clients protected in and out of the courtroom, it offers the most efficient and effective means possible to reach a successful outcome—so our clients can get back to business.

Our diverse people and points of view allow us to attract the best people, and provide a rich and stimulating work environment that fosters innovation and a high-performance culture. Our atmosphere of mutual respect has helped Nixon Peabody earn recognition as a top employer. The firm has been ranked among the “Top 100 Law Firms for Diversity” (Multicultural Law Magazine 2009) and has earned the highest rating (100%) by the Human Rights Campaign Foundation’s Corporate Equality Index on lesbian, gay, bisexual, and transgender equality in corporate America. Nixon Peabody was recognized by FORTUNE magazine as one of the “FORTUNE 100 Best Companies to Work For®” in 2008, 2007, and 2006.

New York, NY | Boston, MA | Albany, NY
Buffalo, NY | Jericho, NY | Manchester, NH
Rochester, NY | Providence, RI | Chicago, IL
Hong Kong | London, UK | Los Angeles, CA
San Francisco, CA | Shanghai, China | Silicon Valley, CA
Washington, DC

nixonpeabody.com

Joseph Ortego
212.940.3045
New York, NY

Scott O’Connell
617.345.1150
Boston, MA

Vivian Quinn
716.853.8134
Buffalo, NY

Kevin Fitzgerald
603.628.4016
Manchester, NH

David Tennant
585.263.1021
Rochester, NY

Louis Dolan
202.585.8818
Washington, DC

Member Firm Profile

PMMC LAW

Parsons McEntire McCleary & Clark: We are courtroom lawyers, focused upon trials, appeals, arbitrations, and advocacy in all forums.

Today's business leaders need advocates skilled in resolving complex and costly business disputes. Our lawyers fit the bill. We have handled thousands of cases and appeared in hundreds of courtrooms and arbitral forums, across the nation. We have a keen understanding of judges, juries, arbitrators, and other decision makers. We rest our cases upon a firm legal foundation. We present the facts and law of each dispute simply, convincingly.

Our clients include Fortune 500 companies and other significant businesses and institutions. We work in small teams, honoring the Texas tradition of "One riot - - One Ranger". We strive for early analysis, planning, economy, and resolution in each case. We also provide pre-litigation counseling - - to help clients avoid litigation or prepare for a coming storm.

Houston, TX | Dallas, TX

pmmclaw.com

Firm Contacts

Roger McCleary
713.960.7305
Houston, TX

Jeff Parsons
713.960.7302
Houston, TX

Sawnie McEntire
214.237.4303
Dallas, TX

David Walton
214.237.4335
Dallas, TX

Kristen McDanald
713.960.7359
Houston, TX

PORZIO
BROMBERG&NEWMAN P.C.

Founded in 1962, Porzio, Bromberg & Newman, P.C. is a cutting-edge law firm representing a wide variety of industry sectors. With over 80 lawyers throughout offices in Morristown and Princeton, NJ, New York City, Washington, DC, and Westborough, MA, the firm is committed to serving clients, providing high quality work and achieving results. Porzio provides a broad array of litigation, corporate, transactional and counseling services to clients ranging from Fortune 500 corporations to individuals to public entities.

At Porzio, a dynamic approach to problem solving and client service creates the energy and passion that form the foundation of the firm. Porzio meets clients' rapidly changing needs by realigning our considerable resources to address demanding matters. Porzio is a business-oriented multidisciplinary law practice where attorneys collaborate with each other and with clients to find solutions to challenges and problems.

We strive to incorporate diversity and inclusion in our daily practices. By sharing the unique perspectives and capabilities of our people, we enrich our workplace and expand our potential, to the ultimate benefit of our clients.

Porzio is a workplace community dedicated to excellence, the highest quality client service, and our clients' success. We recognize that a high quality and diverse workforce is key to accomplishing these goals. Personal and professional integrity, collegiality, teamwork, mutual respect and commitment to one another are values we hold dear.

Our adherence to these core values enables us to accomplish our clients' objectives and achieve extraordinary results. We insist on fidelity to our core values. They are not mere words; they are the embodiment of who we are, what we do, and how we act.

Our clients are our paramount responsibility. We listen to them and understand their needs and goals. We efficiently employ our resources and substantive knowledge, skills, and experiences to achieve our clients' objectives. We provide premium client service, superior work product and bring value and exceptional results to our clients. Our culture inspires us to innovate.

Morristown, NJ | Princeton, NJ | New York, NY
Washington, DC | Westborough, MA

pbnlaw.com

Diane Averell
973.889.4150
Morristown, NJ

Vito Gagliardi, Jr.
973.889.4151
Morristown, NJ

Charles Stoia
973.889.4106
Morristown, NJ

SANDBERG PHOENIX & VON GONTARD P.C.

Sandberg Phoenix & von Gontard P.C. was founded in 1979 with nine attorneys. The firm has grown steadily to become one of the leading law firms in the St. Louis metropolitan area and the Midwest.

Regional Representation: The firm's main offices are located in downtown St. Louis, Missouri. The firm also maintains offices in Carbondale, Edwardsville, Alton, and O'Fallon, Illinois, in recognition of the regional nature of the St. Louis economy. All of the firm's attorneys become licensed to practice in both Missouri and Illinois.

Client Representation: Superior legal service, a cost conscious approach to the delivery of services, and client satisfaction are hallmarks of Sandberg, Phoenix & von Gontard, P.C. The firm recognizes that in a competitive economy, legal services must be delivered efficiently and economically. The firm provides detailed billing statements to clients and works with its clients to contain costs consistent with the nature of the particular case or project. During and at the conclusion of each matter, the firm sends questionnaires to its client requesting evaluation of the service provided by the firm.

Practice Development: Sandberg Phoenix & von Gontard P.C. recruits outstanding students from the top law schools of the region and the country. Most of the firm's attorneys were members or editors of their law school journals, and many served as judicial clerks before joining the firm. The firm sponsors a summer intern program under which outstanding students work for the firm, usually between their second and third years of law school. The summer program both accelerates the student's understanding of the practice of law and permits the firm to identify superior individuals who will become members of the firm after graduation. Internal continuing legal education programs, attendance at professional seminars, and training with senior attorneys assure continuing professional development.

Professional Affiliations: The firm is honored to have been nominated and elected into membership of The Network of Trial Law Firms. The Network of Trial Law Firms is a national organization comprised of a select number of premier law firms from around the country with practices concentrated in civil litigation.

St. Louis, MO | Clayton, MO | Edwardsville, IL
Carbondale, IL | O'Fallon, IL | Alton, IL
Overland Park, KS

sandbergphoenix.com

Teresa Bartosiak
314.446.4283
St. Louis, MO

John Sandberg
314.446.4214
St. Louis, MO

Lyndon Sommer
314.446.4264
St. Louis, MO

Mary Anne Mellow
314.446.4226
St. Louis, MO

Snell & Wilmer

Founded in 1938, Snell & Wilmer is a full-service business law firm with more than 400 attorneys practicing in nine locations throughout the western United States and in Mexico, including Phoenix and Tucson, Arizona; Los Angeles and Orange County, California; Denver, Colorado; Las Vegas and Reno, Nevada; Salt Lake City, Utah; and Los Cabos, Mexico.

As a large, full-service firm, Snell & Wilmer provides the competitive advantage of having the ability to call upon the diverse experience of our attorneys to address the particular and evolving legal issues of any engagement. A team of attorneys and support staff can be easily assembled for large scale projects or emergency situations. To maximize these advantages, Snell & Wilmer attorneys are organized into practice groups. This gives clients easy accessibility to the unique skills and knowledge of each attorney.

For more than seventy years, Snell & Wilmer has been dedicated to providing superior client service. As a result, we have earned a reputation for providing our clients with what they value - exceptional legal skills, quick response and practical solutions delivered with the highest level of professional integrity. Snell & Wilmer's attorneys and staff continue to be strongly committed to these objectives.

Phoenix, AZ | Tucson, AZ | Orange County, CA
Salt Lake City, UT | Las Vegas, NV | Los Angeles, CA
Reno, NV | Denver, CP | Los Cabos, Mexico

swlaw.com

Joel Hoxie
602.382.6264
Phoenix, AZ

Amy Sorenson
801.257.1907
Salt Lake City, UT

Greg Marshall
602.382.6514
Phoenix, AZ

Warren Platt
714.427.7475
Orange County, CA

Alex Fugazzi
702.784.5202
Las Vegas, NV

Swift Currie

At Swift, Currie, McGhee & Hiers, LLP, our mission is simple: to be your first choice. We aim to fulfill that mission by setting the standard for valuable and innovative solutions while building and maintaining mutually prosperous and lasting relationships with our clients.

In addition, we will maintain the highest ethical standards, as well as our reputation for courteous, respectful and professional behavior; foster an environment of cooperation and teamwork, mutual respect and an open exchange of ideas; help each other excel, market and succeed; attract, develop and retain diverse, talented and exceptional professionals; maintain an appropriate work/life balance; and invest our time and resources in the communities in which we work.

Atlanta, GA | Birmingham, AL

swiftcurrie.com

Terry Brantley
404-888-6160
Atlanta, GA

Brad Marsh
404-888-6151
Atlanta, GA

David Atkinson
404-888-6166
Atlanta, GA

THOMPSON HINE

Clients from a broad range of industries entrust us with their most complex conflicts, high-profile matters and potentially costly trials in courtrooms across the country. Our trial lawyers handle all types of disputes, from contract claims to major class actions, giving us the wide-ranging experience that enables us to develop strategies to achieve clients' goals. Every trial is different, and recognizing that enables us to bring a creative and thoughtful defense approach to each case after thoroughly evaluating it with our client and gaining a comprehensive understanding of their needs and objectives. Our extensive trial experience gives us an unparalleled grasp of the importance of understanding and explaining complex facts necessary to achieve success at trial whether in front of a judge or jury.

Our trial lawyers are widely acclaimed by clients and peers and have earned recognition by the American College of Trial Lawyers, Chambers USA, Benchmark Litigation and The Best Lawyers in America®. BTI Litigation Outlook 2015: Changes, Trends and Opportunities for Law Firms also lists us among the top firms in the country in four areas of litigation and Benchmark Litigation has named us its Ohio Litigation Firm of the Year.

By applying proven legal project management principles to each engagement, we create a precise, efficient method for overseeing all aspects of a trial. We monitor costs to budget and communicate frequently regarding progress, developments and changes in scope, timeline or budget. Careful analysis and planning allow us to staff a trial team appropriately, using resources that control costs while providing the highest-quality counsel and service.

Our trial lawyers have also been at the forefront of offering clients alternatives to the standard hourly-rate billing structure. We devise tailored, value-based pricing arrangements with a sharp focus on achieving maximum cost-efficiency and meeting clients' needs for more predictability and better alignment with business objectives.

Our SmartPaTH solution earned recognition from The Financial Times, which ranked us first in the category "Most innovative North American law firms 2015: New working models." We also have been recognized nationally by BTI as one of the top seven firms innovating by making changes others are not to improve the client experience and as one of the top 22 firms considered best at developing and implementing alternative fee arrangements.

Cleveland, OH | Cincinnati, OH | Columbus, OH
Dayton, OH | Washington, DC | New York, NY
Atlanta, GA

thompsonhine.com

Tony White
614.469.3235
Columbus, OH

Tony Rospert
216.566.5861
Cleveland, OH

Wheeler Trigg O'Donnell LLP

The 90+ trial-tested lawyers of the Denver civil litigation firm Wheeler Trigg O'Donnell ("WTO") are known for trying precedent-setting cases in difficult jurisdictions throughout the country. WTO has tried more cases to verdict than any similar-sized firm in the region – 43 trials and 41 arbitrations in the last five years.

WTO handles trials, appeals, arbitrations, and related areas of complex civil litigation, including class actions and multidistrict litigation, on a local, regional, and national basis. We serve as resolution and trial counsel for many of the nation's best-known companies, including Whirlpool, General Electric, Chrysler Group, Pfizer, McKesson, Mercedes-Benz, Advanced Bionics, Allstate, Ford, USAA, and United Airlines.

WTO has defended clients against allegations related to bad faith, breach of contract, breach of warranty, product liability, professional liability and malpractice, franchise and distribution matters, intellectual property infringement, personal injury, toxic torts, discrimination and employment management, and other legal issues related to business operations. We represent companies and individuals in such diverse industries as pharmaceuticals, medical devices, insurance, automotive, banking and financial services, construction and engineering, energy, consumer products and services, health care, law, accounting, natural resources, telecommunications, food service, asbestos, manufacturing, and franchise and distribution.

Our lawyers are admitted to practice law in 19 states and the District of Columbia. We have served as lead trial counsel in all 50 states and have tried cases to verdict in 45 states, Puerto Rico, the Virgin Islands, and the District of Columbia. We have appeared before the U.S. Supreme Court, most of the U.S. courts of appeals, two-thirds of the U.S. district courts, over a dozen state supreme courts, and several federal regulatory agencies.

WTO has been able to attract first-rate lawyers to complement the depth and experience of our original team because of our reputation for excellence, the quality of our clients, and the challenge of their legal problems. Six of our partners are elected Fellows of the American College of Trial Lawyers and firm chairman Mike O'Donnell is an ACTL Regent. Martindale-Hubbell has given the AV peer-review rating to over 60% of our partners. Over 70% of our associates have served a state or federal trial or appellate judicial clerkship. Our firm and lawyers consistently appear in local and national rankings surveys such as Best Lawyers, Chambers USA, The Legal 500 U.S., and Colorado Super Lawyers.

Beyond the courtroom, WTO's almost 200 employees make up the professional and collegial culture that has earned us a top-10 ranking for the past nine years in the annual Denver Business Journal's best places to work survey. WTO was number one in 2008, 2010, and 2012. Our community-mindedness is unmatched as evidenced by our selection to receive the Denver Business Journal's 2010 Partners in Philanthropy award for the volunteer hours and charitable contributions donated to the community through the WTO Foundation.

Denver, CO

wtotrial.com

Mike O'Donnell
303.244.1850
Denver, CO

Hugh Gottschalk
303.244.1858
Denver, CO

Mike Williams
303.244.1867
Denver, CO

Carolyn Fairless
303.244.1852
Denver, CO

John Fitzpatrick
303.244.1874
Denver, CO

TAMING THE E-DISCOVERY BEAST: PRACTICAL AND CREATIVE SOLUTIONS TO COMMON E-DISCOVERY CHALLENGES

Kathryn Walker
Bass Berry & Sims (Nashville, TN)
615.742.7855 | kwalker@bassberry.com

Each day, an almost unimaginable quantity of digital information is being created, shared and stored. For example, Google processes approximately 3.5 billion requests per day and stores about 10 exabytes of data (10 billion gigabytes). Similarly, across the globe each day, users upload over 300 million photographs onto Facebook. The same is true for businesses—with the average office worker sending and receiving between 150 to 300 emails on a daily basis. When these realities are thrown into the context of litigation, it creates a perfect storm where litigants are forced to sort through gigantic haystacks of "data" to find "needles" of relevance.

In William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Co., the court noted that "[e]lectronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI [electronically stored information]." William A. Gross, 256 F.R.D. 134, 136 (S.D.N.Y. 2009). While this court's directive is entirely "correct," in practice, it is far harder to achieve given the highly adversarial nature of litigation and varied levels of e-discovery experience/comfort among lawyers. Furthermore, if the parties were able to cooperate and be transparent, they would not likely be before the court on the underlying issues. Faced with these challenges, attorneys must fashion practical, creative and defensible solutions to tame the e-discovery beast. Technology got us into this mess and to some extent, it is helping get us out of it; however, human creativity, diligence and skill are essential elements to an efficient and successful project.

What follows are several common challenges and solutions.

Challenge No. 1: The ESI Ostrich Syndrome

Many litigators continue to suffer from the ESI Ostrich Syndrome—meaning they "put their head in the sand" with respect to ESI issues until ultimately forced to deal with electronic evidence—usually when responding to discovery requests on a deadline. The problem is, as with anything, delay and lack of attention are often the root causes of problems and increased costs. In short, people don't want to deal with things that make them uncomfortable or they simply don't like.

An effective "cure" to the ESI Ostrich Syndrome is committing to a meaningful Federal Rule of Civil Procedure 26(f) conference, which will ultimately create a strong foundation for the remainder of the litigation. It will force you to develop a plan early in your matter and (hopefully) avoid or minimize future discovery issues. Moreover, it is required by the Federal Rules; however, in my experience, this is a highly under-utilized rule.

Early in the case and prior to the initial case management conference, Rule 26(f) requires the parties to "discuss any issues about preserving discoverable information; and develop a proposed discovery plan." Pursuant to Rule 26(f)(3), the discovery plan "must state the parties' views and proposals on" several topics, including: (A) the timing of initial disclosures; (B) the subjects and timing of discovery, including if it should be conducted in phases or limited to certain topics; (C) any issues relating to discovery or preservation, including production formats; (D) how to handle privileged material, including claw-back agreements; (E) discovery limitations; and (F) any need for protective order.

In order to have an effective Rule 26(f) conference, you must fully understand your client's data landscape, including

identifying the types and locations of data involved and the key individuals who may possess it.[1] The most effective way of doing this is speaking directly with your client's information technology manager, but also key custodians about their preservation obligations and asking probing questions about the types of documents they create, where they are stored and any possible data loss issues. Not only does this process satisfy a counsel's preservation obligation, but also allows a lawyer to begin to develop a thoughtful discovery plan that is tailored to the unique needs of your particular case.

Challenge No. 2: Constant Fights Over E-Discovery & Exaggerating Burden

Litigation is contentious; however, when electronic discovery is used as a sword, it can become an expensive side-show. A meaningful Rule 26(f) conference where discovery issues are discussed up-front can avoid some of this and set a tone of trust, but not always. It is important to remember to pick your battles wisely and avoid fighting over every point. Consider taking the high road and being the reasonable adult in the room.

In Mitchell v. Reliable Sec., LLC, 2016 U.D. Dist. LEXIS 76128 (N.D. Ga. May 23, 2016), the parties in a pregnancy discrimination case ended up before the court on the format of production. The Plaintiff requested that emails and electronic documents be produced in their native format, which is the document's true and original format, but Defendant refused and argued that it was more burdensome to produce as they presently existed and sought a court order that they should be produced in PDF form.[2] In support of its PDF argument, Defendants greatly exaggerated the costs and expenses to bolster its excessive burden argument under Rule 26(b)(2)(B), which the Court quickly recognized and held:

> the Court remains—as it was at the time of the teleconference—at a loss to understand why the production of native documents is more costly than production of PDF files. The Court therefore finds that Defendant has not made an adequate showing that production of the native files is cost prohibitive.

Mitchell is a helpful study because the parties did engage in a Rule 26(f) process whereby the production dispute was identified early on by the Court, who requested a status report where the Defendant was to provide the court with an estimate of the production size and cost differential between the native and PDF productions. That being said, Defendants lost credibility with opposing counsel and the court by picking a silly battle and tweaking the "evidence" to support a position that did not advance Defendant's litigation position. Further, it is clear that any alleged cost savings sought by Defendant were lost arguing over a meaningless issue.

Before getting caught up in a discovery dispute over electronic evidence:

- Listen to your opposing counsel and don't reflexively say no. She/he may be making a valid point or legitimate reason.
- Consider if the request/issue is truly meaningful and whether fighting over it cost more than agreeing
- If you can't fully agree, is there a possible alternative position that you can propose?
- If you have a legitimate dispute, have solid evidence that you can support with affidavits. Never exaggerate or hide the ball.

Challenge No. 3: Large Data Volumes and Not Enough Time

Given the massive volumes of data involved in modern litigation and sometimes very tight deadlines, consider turning to technology as a possible solution when you are required to review and understand large volumes of data in a short period of time. Technology got us into this mess and it can help us out sometimes.

While each case needs to be considered on an individual basis, consider technology assisted review products as part of your possible solution to this challenge. In 2012, Judge Peck in the Southern District of New York approved the use of computer assisted review in appropriate cases. Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 190-191 (S.D.N.Y. 2012). Since then, additional courts have approved its use. Judge Buch in Dynamo Holdings Ltd. P'ship v. Comm'r of Internal Revenue, 143 T.C. 183, 190 (2014) granted Dynamo Holding's request to use computer assisted review and noted that:

> Predictive coding is an expedited and efficient form of computer-assisted review that allows parties in litigation to avoid the time and costs associated with the traditional, manual review of large volumes of documents.

While predictive coding may be the best and most efficient tool for most cases, courts are still wary to order parties to use technology because generally responding parties are best able to evaluate the most appropriate methods to

1 For companies with a robust and well-developed culture of information governance and retention, this step is usually efficiently accomplished; however, for those litigants with disparate and de-centralized data creation, storage and retention practices, this step can be very complicated and require a tremendous amount of work.

2 While there are valid instances where a native production is not appropriate, such as when redactions are needed (because you cannot redact a native document), that was not raised as an issue in Mitchell.

identify responsive ESI. See e.g. Hyles v. New York City, No. 10 Civ. 2119 (AT)(AJP), 2016 WL 4077114 (S.D.N.Y. Aug. 1, 2016) (citing Sedona Principles, Principle 6).

Given the increasing volume and rapidly developing data sources, these issues are here to stay for litigators. Dealing with these challenges will require creativity and cooperation.

Modern Digital Landscape

- Staggering volumes of digital information are created, shared and stored each day
  - Google processes 3.5 billion requests
  - 300 million photographs uploaded onto Facebook
  - Average office worker sends and receives between 150 to 300 emails

Nature of Litigation

The ESI Sandbox

Cooperation
&
Transparency

Challenge No. 1:
The ESI Ostrich Syndrome

Tendency to “put head in the sand” until ultimately forced to deal with the issue

Cure for the ESI Ostrich Syndrome

Meaningful Federal Rule of Civil Procedure 26(f) Conference

It ultimately creates a strong foundation for the remainder of the litigation.

Cure for the ESI Ostrich Syndrome

- Pursuant to Rule 26(f)(3), the discovery plan "must state the parties' views and proposals on" several topics, including:
  - (A) the timing of initial disclosures;
  - (B) the subjects and timing of discovery, including if it should be conducted in phases or limited to certain topics;
  - (C) any issues relating to discovery or preservation, including production formats;
  - (D) how to handle privileged material, including claw-back agreements;
  - (E) discovery limitations; and
  - (F) any need for protective order.

Cure for the ESI Ostrich Syndrome

- Develop a plan early in your case
  - Understand data landscape
  - Think about what you really need for your case

Challenge No. 2: Constant Fights Over E-Discovery & Exaggerating Burden

Electronic discovery used as a sword, often becomes an expensive and silly side-show

- Pick your battles wisely
- Consider taking the high road and being the reasonable adult

Challenge No. 2: Cure to Constant ESI Fights

- Before getting caught up in a discovery dispute over electronic evidence:
  - Listen to your opposing counsel and don't reflexively say no
  - Consider if the request/issue is truly meaningful and whether fighting over
  - If you can't fully agree, is there a possible alternative?

Challenge No. 2: Cure to Constant ESI Fights

- If you have a legitimate dispute:
  - Have solid evidence that you can support with affidavits
  - Never exaggerate or hide the ball

Challenge No. 3: Large Data Volumes & Not Enough Time

- In many cases, timelines are tight and volumes are large
- Challenge is to sort through a massive amount of information to identify key documents/evidence

Challenge No. 3: Cure for Large Data Volumes and Not Enough Time

- Each case is different, but consider using technology
  - Predictive coding is an expedited and efficient form of computer-assisted review

Kathryn Hannen Walker

Member
Bass Berry & Sims (Nashville, TN)

615.742.7855 | kwaker@bassberry.com
http://www.bassberry.com/professionals/w/walker-kathryn-hannen

Kathryn serves as assistant chair for the Litigation & Dispute Resolution Practice Group. Her practice focuses on complex commercial litigation and internal investigations, including international investigations. Kathryn has represented U.S. and foreign clients in jury and bench trials, mediations and arbitrations. She has extensive experience in data management and e-discovery, leading massive electronic data analysis projects in high-stakes litigation and investigations.

Related Services

- Litigation & Dispute Resolution
- Business Disputes
- Foreign Corrupt Practices Act (FCPA)
- Intellectual Property & Technology
- Compliance & Government Investigations
- Electronic Data & Technology
- Intellectual Property Litigation
- Privacy & Data Security
- Healthcare Disputes
- Corporate Governance

Representative Experience

- Successful Result in Case Involving Gas Hedging Charges - Represented the Town of Smyrna, Tennessee in a lawsuit against the Municipal Gas Authority of Georgia (MGAG) alleging unauthorized natural gas hedging charges imposed by MGAG. The case was resolved very favorably for the Town.
- Injunctive Relief for Software Company in Trademark Litigation - Representation of software company in “bet-the-company” litigation involving trade secret misappropriation, trademark claims, unfair competition, defamation, and various cyber-torts.
- Successful Representation of Trademark Protection for Restaurant Company - Successful representation of national restaurant company in suit to protect its concept’s most important trademark

Accolades

- Best Lawyers in America® — Commercial Litigation (2015-2017)
- Leadership Council on Legal Diversity (LCLD) — 2013 Fellows Program
- Nashville Business Journal “Best of the Bar” (2008)
- Vanderbilt Law Review — Executive Editor
- Phi Beta Kappa
- Presidential Scholar
- Henry Luce Fellow Finalist)

Education

- Vanderbilt Law School - J.D., 2000 - Order of the Coif
- Vanderbilt University - M.A., 1995
- Augustana College - B.A., 1993

THE ROLE OF EMOTION IN LITIGATION

Josh Lanning
Moore & Van Allen (Charlotte, NC)
704.331.3647 | joshualanning@mvalaw.com

A LAWYER'S APPROACH TO NEGOTIATION

- A lawyer's "go to" tools for negotiation are reason and logic.
- We idealize "rational" decisions and devalue "irrational" decisions or those made based on emotion.
- We look for what is "right" and reject what is "wrong" and we assume that "right" describes our client and "wrong" describes our adversary.
- No lawyer ever says: "We need to approach this problem with more emotion."

THE RATIONAL ARCHETYPE

- Spock – Vulcans suppressed emotions in search of "a complete mastery of logic."

- Sherlock Holmes – "Data! Data! Data! . . . I can't make bricks without clay."

- Plato's Chariot Driver

SHOULD SPOCK REPRESENT CLIENTS?

- Neuroscientist Antonio Damasio calls this the "high reason view" by which he means "rational processing must be unencumbered by passion."

- Despite persistence of the rational ideal – study after study shows:
  - All people (save sociopaths) experience emotion 100% of the time
  - Emotions are inseparable from and *essential to* good decision-making

- The Lesson: Even in the pursuit of the most reasoned approach, we cannot escape emotion, nor should we try.

RATIONAL SCIENTIFIC STUDIES (IRONICALLY) HIGHLIGHT CRITICAL ROLE OF EMOTIONS IN DECISION-MAKING

- Damasio's most famous patient "Elliot" lost the ability to feel emotion following brain surgery. In the absence of the ability to be happy, anxious, or sad Elliot:
  - Became paralyzed by every decision in life.
  - Could not manage time or prioritize tasks.
  - Lost his job because he could no longer complete projects.
  - Invested in a shady business scheme that resulted in bankruptcy.
  - Divorced, re-married and divorced again.

DAMASIO'S SOMATIC MARKER HYPOTHESIS

- Over life of a human – the brain "marks" input to the rational pre-frontal cortex from positive or negative emotions.
- Ultimately, these markers facilitate rapid decision-making by associating an anticipated outcome with an emotional response.
- Put simply, decisions are evaluated by anticipating how we expect to feel.
- In this respect, emotions are a feedback loop providing information on whether you will be happy with a particular choice.

EMOTION = REASON

- Feelings lay the groundwork for reason. We know this because brain-damaged patients with no emotions cannot make decisions.
- Theme throughout literature on this topic - all decision-making turns on preferences, which are most often driven by what we value. Reason cannot tell us what to value.
- "It is only once we have a propensity or aversion towards something that we can use reason to direct our action, and this requires passions." --Katharina Paxman.

EMOTIONS AND NEGOTIATION

- Three Premises:
  - We negotiate all the time. Virtually everything we do as lawyers boils down to convincing someone to make a decision.
  - We, and our clients, and our adversaries experience emotions 100% of the time and these are essential to decision-making.
  - To be effective persuaders, we must have a framework for addressing the importance of emotion.
- "The problem with negotiations is that no matter how often the deal is presented rationally, it is understanding irrationality that will help you gain what you want. Negotiating and arguing are dictated more by emotion than common sense." Fisher and Shapiro.

AWARENESS IS KEY – YOU CANNOT MASTER THEM ALL

MAKING MATTERS WORSE: EMOTIONS IMPACT NEGOTIATIONS IN CONTRADICTORY WAYS

- Happiness can facilitate rapport and information sharing, leading to a better deal for both sides.
- Happiness can lead to concessions that are unnecessary under the circumstances.
- Anger can stall conversation, prevent information sharing, reinforce an unwillingness to adapt viewpoint.
- Anger can signal confidence and convince the adversary that concessions will not be forthcoming.

FISHER AND SHAPIRO CORE CONCERNS

ADDRESSING CORE CONCERNS APPROPRIATELY

- Fairness: Do the players feel that they have been treated fairly.
- Honesty: Have you communicated authentically and does the adversary feel they are being deceived.
- Understanding: Does your adversary feel you have heard and understand their position, even if you do not agree with it.

BENEFITS OF ADDRESSING CORE CONCERNS

Core Concern:	My Core Concerns are Met When:	The Resulting Emotions Can Make Me Feel:	When this Happens, I Am Prone:
Appreciation	I am appreciated	Enthusiastic Caring	To cooperate
Affiliation	I am treated as a colleague	Compassionate Content	To work together
Autonomy	My freedom to decide is acknowledged	Comforted Pleased Hopeful	To be creative
Status	My high status is recognized where deserved	Proud Accomplished Courageous	To be trustworthy
Role	My role is fulfilling; it includes activities that convince me that I can make a difference	Calm Relieved Relaxed Happy	

RISKS OF IGNORING CORE CONCERNS

Core Concern:	My Core Concerns are Unmet Whenever:	The Resulting Emotions Can Make Me Feel:	When This Happens, I Am Prone:
Appreciation	I am unappreciated	Angry Impatient	To react negatively, contrary to my interests
Affiliation	I am treated as an adversary	Indignant Disgusted Resentful	To go it alone
Autonomy	My autonomy is impinged	Guilty and Ashamed Remorseful	To think rigidly
Status	My status is put down	Embarrassed Sad	To act deceptively and be seen as untrustworthy
Role	My role is trivialized and restricted	Envious and Jealous Anxious	

Joshua D. Lanning

Member
Moore & Van Allen (Charlotte, NC)

704.331.3647 | joshualanning@mvalaw.com
http://www.mvalaw.com/professionals-309.html

Josh Lanning brings considerable litigation experience to his cases with a wide-ranging background in complex commercial disputes and substantial tort claims.

Josh has represented plaintiffs and defendants in state and federal courts throughout North Carolina as well as in a number of other jurisdictions, having litigated significant disputes on behalf of his clients in Connecticut, Massachusetts, New York, New Jersey, Florida, Maine, Georgia, Utah, Nebraska, Texas, and Louisiana. In addition, Josh has managed multiple internal investigations for clients including Fortune 500 companies and local government bodies.

In the courtroom, Josh has tried numerous cases to court decision or jury verdict and has successfully argued state and federal appeals in areas ranging from constitutional law to securities entitlements. Josh focuses his practice on commercial litigation including matters involving complex contractual disputes; fraud and other business torts; Civil RICO; unfair commercial practices; securities fraud; intellectual property; and fiduciary duties. His clients are a diverse set of people and businesses ranging from individuals and families to large national banking institutions.

In addition, Josh has made pro bono matters an important part of his litigation practice. His experience includes representing prisoners in need of adequate medical care; advocating for special needs children requesting special education services under the federal Individuals with Disabilities Education Act; helping battered spouses obtain protective orders; representing families facing eviction; and assisting in obtaining debt relief for low-income families who were victims of a nationwide fraud ring.

Practice Areas
- Employment & ERISA Litigation
- Financial Services Litigation
- International Dispute Resolution, Regulatory Defense and Investigations
- Litigation
- Mediation and Arbitration Services
- Securities Litigation
- White Collar, Regulatory Defense, and Investigations

Of Note
- Served as a Henry Luce Foundation scholar in Kuala Lumpur, Malaysia assisting the Malaysian Bar Foundation in implementing its new Domestic Violence Act and in developing its new section on international mediation and arbitration.
- Served as a member of the North Carolina Law review.
- Order of the Coif.
- Named to the Access to Justice Pro Bono Partners 2013 Pro Bono Honor Roll by Legal Services of Southern Piedmont, Legal Aid of North Carolina–Charlotte, and Council for Children's Rights
- Selected for inclusion to the North Carolina Super Lawyers list in 2017 for Business Litigation
- AV peer rating from Martindale-Hubbell (2004 to present)

Education
- B.A., University of North Carolina, 1995 (Distinction, Highest Honors)
- J.D., University of North Carolina, 2000; Order of the Coif; North Carolina Law Review, Staff

INTERNAL INVESTIGATIONS: LESSONS FROM A GOVERNOR'S IMPEACHMENT

Jack Sharman
Lightfoot Franklin & White (Birmingham, AL)
205.581.0786 | jsharman@lightfootlaw.com

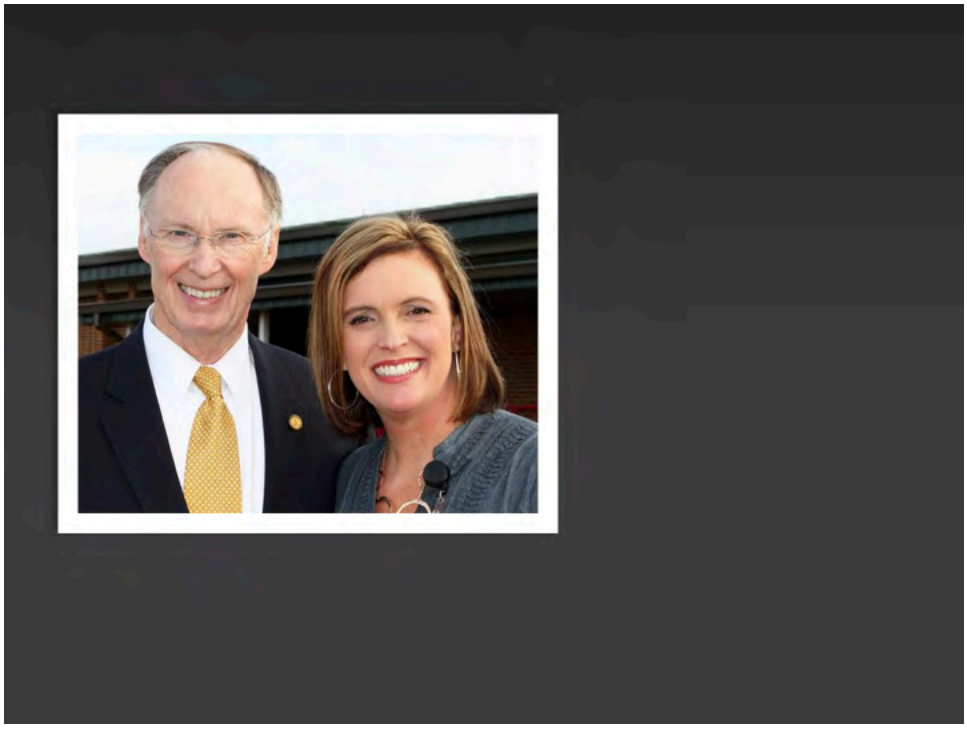
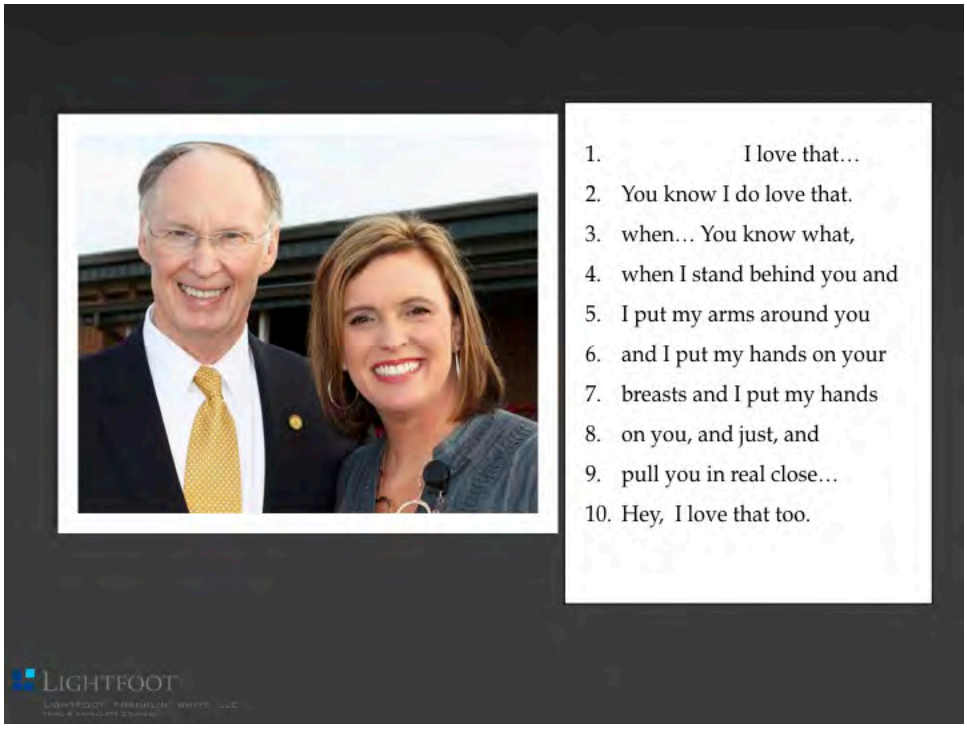
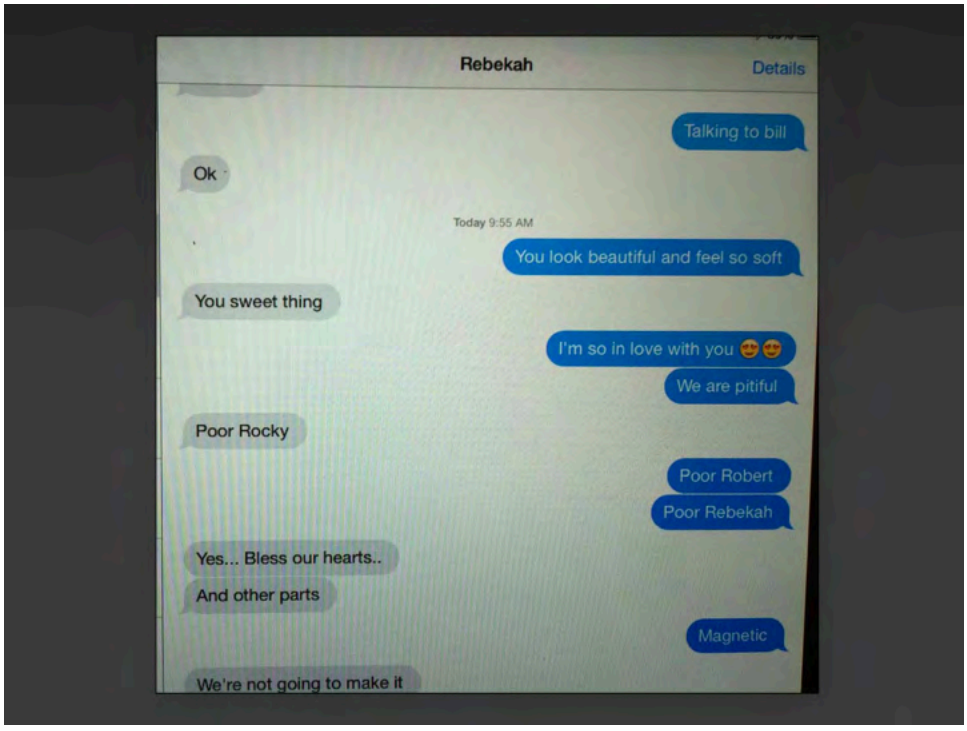
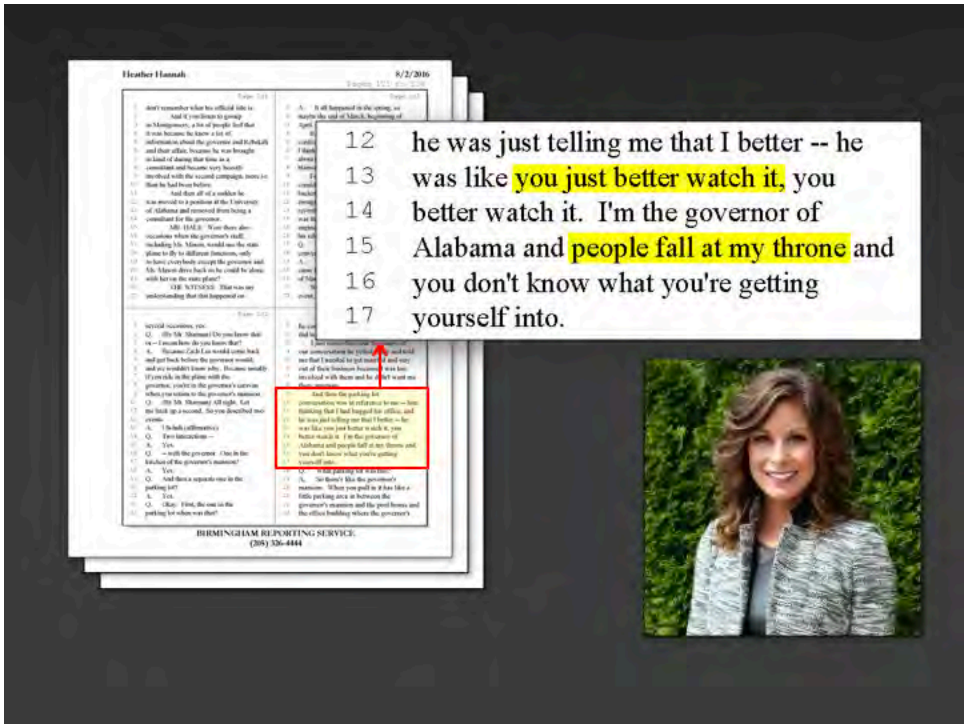
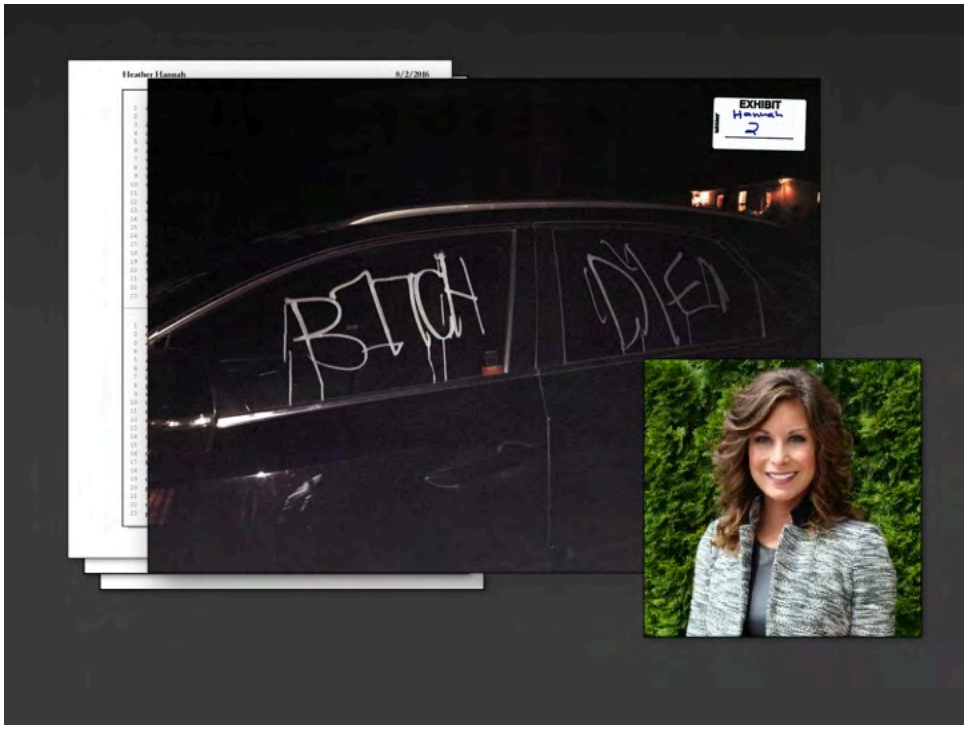


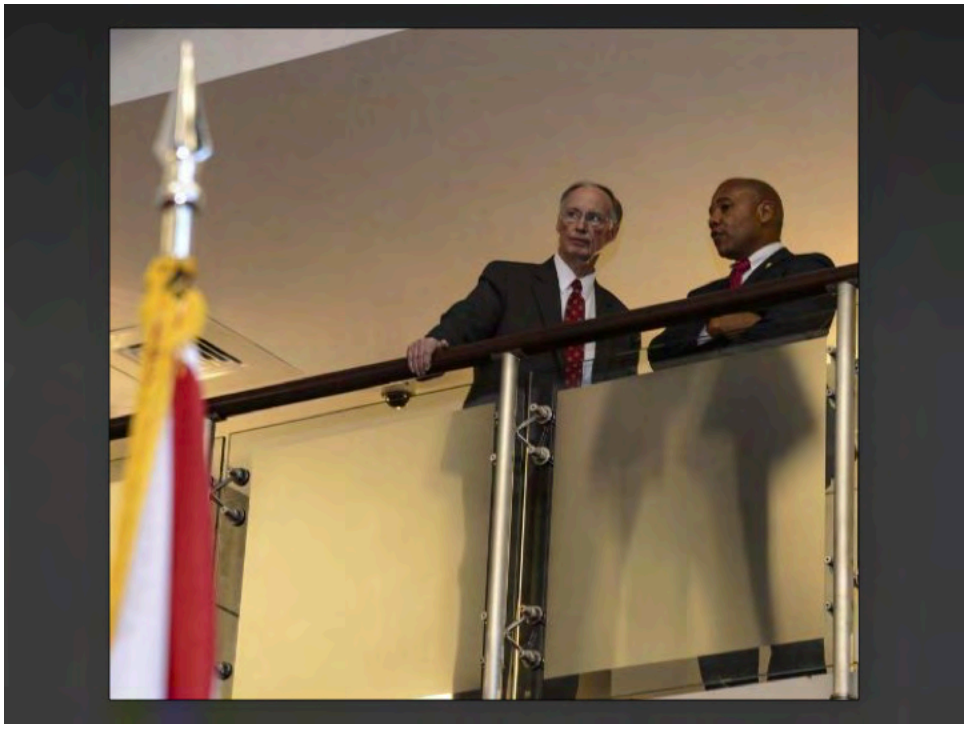

EXHIBIT
4
EXHIBIT
3

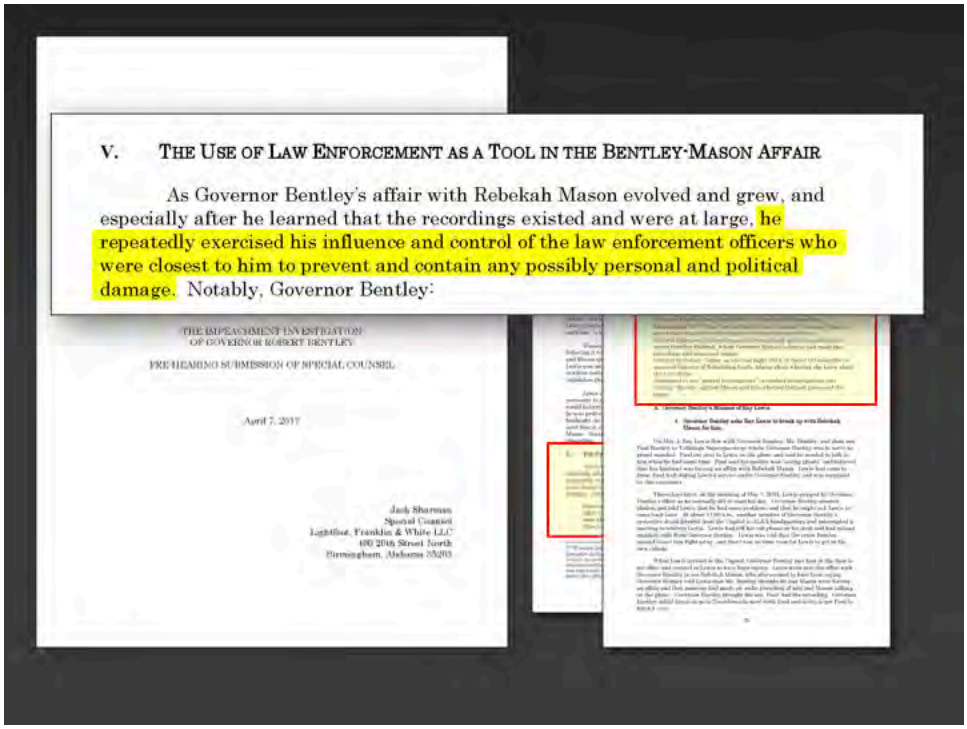

1. I love that…
2. You know I do love that.
3. when… You know what,
4. when I stand behind you and
5. I put my arms around you
6. and I put my hands on your
7. breasts and I put my hands
8. on you, and just, and
9. pull you in real close…
10. Hey, I love that too.
LIGHTFOOT


Rebekah
Details
Talking to bill
Ok
Today 9:55 AM
You look beautiful and feel so soft
You sweet thing
I'm so in love with you
We are pitiful
Poor Rocky
Poor Robert
Poor Rebekah
Yes... Bless our hearts..
And other parts
Magnetic
We're not going to make it


Heather Hannah
8/2/2016
BIRMINGHAM REPORTING SERVICE,
(205) 326-4444
12 he was just telling me that I better -- he
13 was like you just better watch it, you
14 better watch it. I'm the governor of
15 Alabama and people fall at my throne and
16 you don't know what you're getting
17 yourself into.


Heather Hannah
8/2/2016
EXHIBIT
Hannah
2
BITCH
DIE





V. THE USE OF LAW ENFORCEMENT AS A TOOL IN THE BENTLEY-MASON AFFAIR

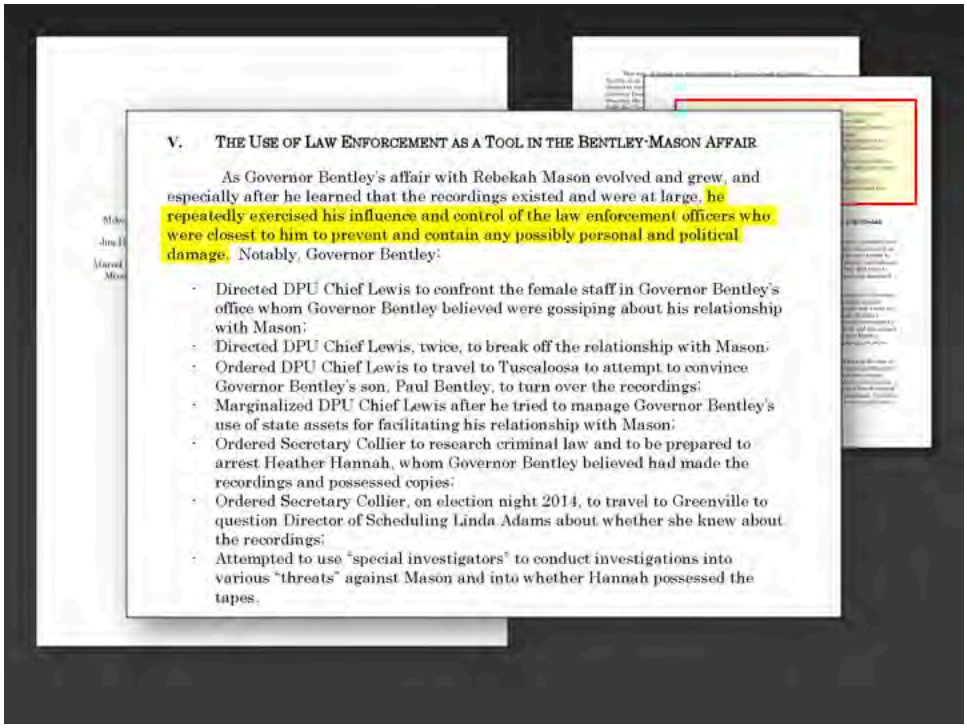
As Governor Bentley's affair with Rebekah Mason evolved and grew, and especially after he learned that the recordings existed and were at large, he repeatedly exercised his influence and control of the law enforcement officers who were closest to him to prevent and contain any possibly personal and political damage. Notably, Governor Bentley:

THE IMPEACHMENT INVESTIGATION OF GOVERNOR ROBERT BENTLEY

PRE-HEARING SUBMISSION OF SPECIAL COUNSEL

April 7, 2017

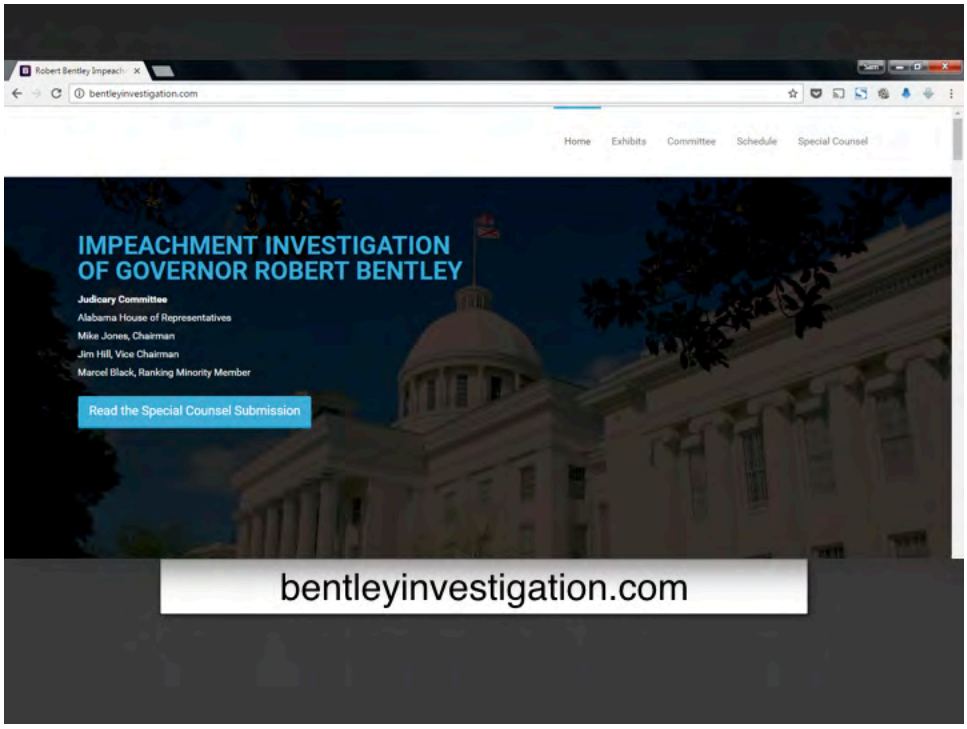
Jack Sharman
Special Counsel
Lightfoot, Franklin & White LLC
400 20th Street North
Birmingham, Alabama 35203

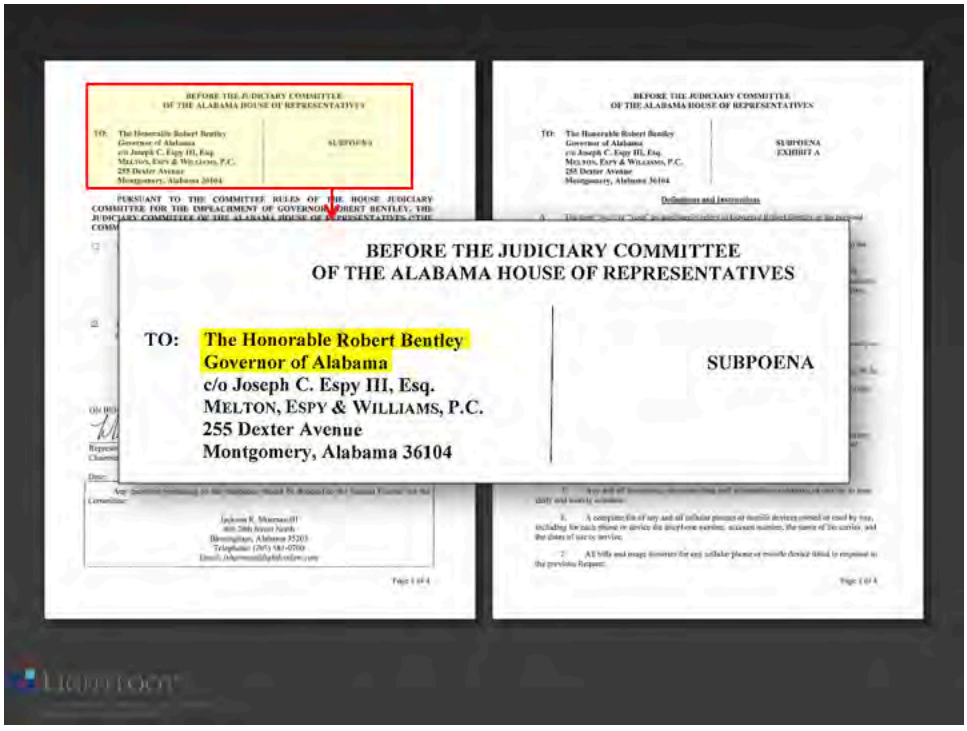


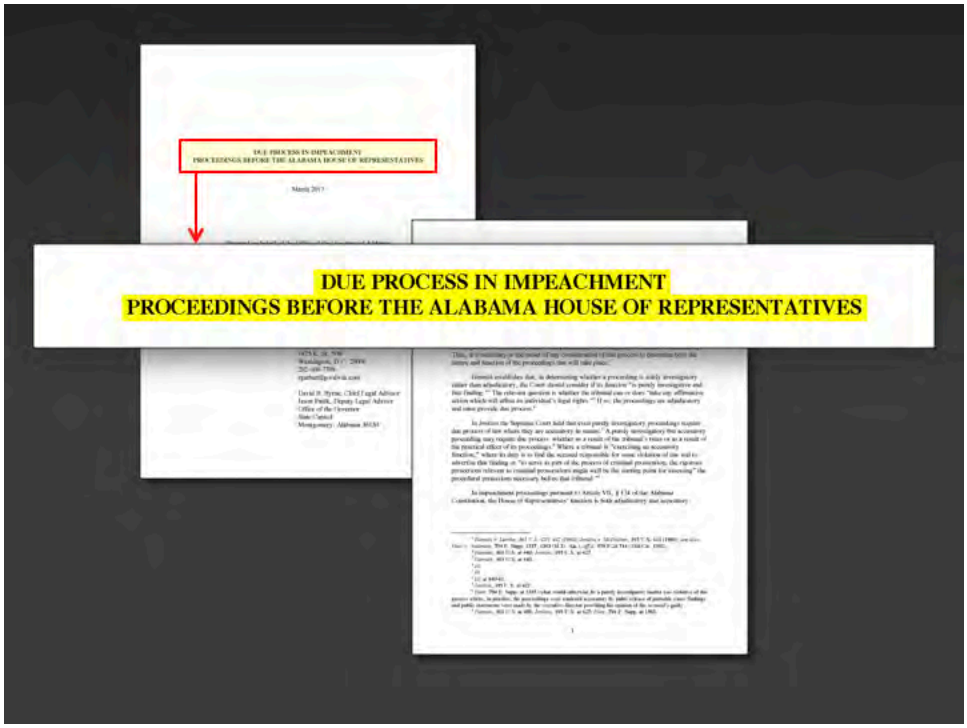
V. THE USE OF LAW ENFORCEMENT AS A TOOL IN THE BENTLEY-MASON AFFAIR

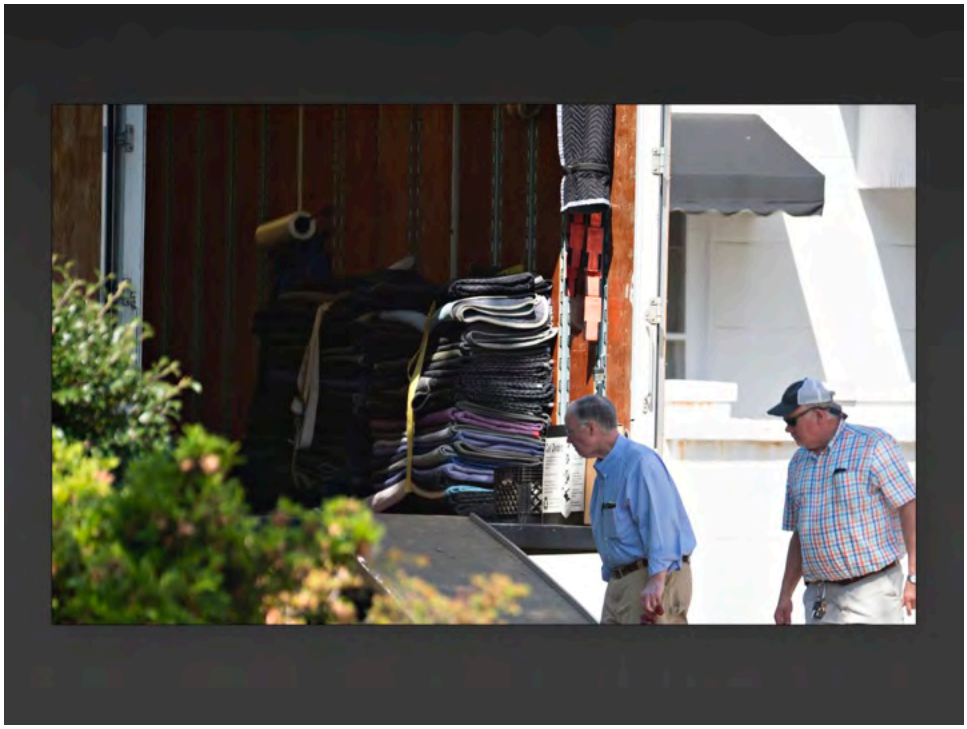
As Governor Bentley's affair with Rebekah Mason evolved and grew, and especially after he learned that the recordings existed and were at large, he repeatedly exercised his influence and control of the law enforcement officers who were closest to him to prevent and contain any possibly personal and political damage. Notably, Governor Bentley:

- Directed DPU Chief Lewis to confront the female staff in Governor Bentley's office whom Governor Bentley believed were gossiping about his relationship with Mason;
- Directed DPU Chief Lewis, twice, to break off the relationship with Mason;
- Ordered DPU Chief Lewis to travel to Tuscaloosa to attempt to convince Governor Bentley's son, Paul Bentley, to turn over the recordings;
- Marginalized DPU Chief Lewis after he tried to manage Governor Bentley's use of state assets for facilitating his relationship with Mason;
- Ordered Secretary Collier to research criminal law and to be prepared to arrest Heather Hannah, whom Governor Bentley believed had made the recordings and possessed copies;
- Ordered Secretary Collier, on election night 2014, to travel to Greenville to question Director of Scheduling Linda Adams about whether she knew about the recordings;
- Attempted to use "special investigators" to conduct investigations into various "threats" against Mason and into whether Hannah possessed the tapes.


bentleyinvestigation.com
Home
Exhibits
Committee
Schedule
Special Counsel
IMPEACHMENT INVESTIGATION
OF GOVERNOR ROBERT BENTLEY
Judiciary Committee
Alabama House of Representatives
Mike Jones, Chairman
Jim Hill, Vice Chairman
Marcel Black, Ranking Minority Member
Read the Special Counsel Submission
bentleyinvestigation.com


BEFORE THE JUDICIARY COMMITTEE
OF THE ALABAMA HOUSE OF REPRESENTATIVES
TO: The Honorable Robert Bentley
Governor of Alabama
c/o Joseph C. Espy III, Esq.
MELTON, ESPY & WILLIAMS, P.C.
255 Dexter Avenue
Montgomery, Alabama 36104
SUBPOENA


DUE PROCESS IN IMPEACHMENT
PROCEEDINGS BEFORE THE ALABAMA HOUSE OF REPRESENTATIVES



Jackson R. Sharman, III

Partner
Lightfoot Franklin & White (Birmingham, AL)

205.581.0789 | jsharman@lightfootlaw.com
http://www.lightfootlaw.com/attorney/jackson-r-sharman-iii/

I defend businesses and individuals in white-collar criminal cases, and I guide them through corporate internal investigations. What do I work on every day? Corporate internal investigations, kickback cases, government-contract fraud, grand jury investigations, gaming issues, defense of criminal environmental offenses, public-corruption enforcement, due diligence issues under the Foreign Corrupt Practices Act, Congressional investigations, election contests, defense of health-care entities in civil and criminal matters including Medicare fraud and qui tam lawsuits under the False Claims Act and investigations by military officials.

I blog on white-collar matters, White Collar Wire, and publish the firm's Twitter feed about white-collar crime and enforcement matters, @WhiteCollarWire.

Practice Areas
- White Collar Criminal Defense and Corporate Investigations
- Directors' and Officers' Liability
- Securities and Shareholder Disputes

Professional and Community Activities
- National Association of Criminal Defense Lawyers
- American Bar Association, White Collar Crime Committee of the Section on Criminal Justice
- Edward Bennett Williams American Inn of Court, former member (only Inn devoted solely to white collar crime)
- Birmingham American Inn of Court, Barrister
- Alabama State Board of Bar Examiners, former examiner
- Birmingham Bar Association, Grievance Committee, former chairman
- Washington & Lee University Alumni Association, former national president
- Mountain Brook Lacrosse Association, former president
- Cathedral Church of the Advent, former Vestry member

Seminars, Articles and Speeches
- "Corporate Internal Investigations," Alabama Chapter, Association of Corporate Counsel (2016)
- "Investigations," Legal Counsel Conference, Birmingham, Alabama (2016)
- "Civil Lessons from Criminal Trials," Network of Trial Law Firms, Chicago (2012)
- "Cost versus Value: Beyond Budgets, Towards Trust," Network of Trial Law Firms, New York, New York (August 7, 2009)

Education
- B.A., Washington & Lee University, 1983
- M.F.A., Washington University, 1986
- Certificate in European Studies, Institute for European Studies (Geneva, Switzerland), 1985
- J.D., Harvard Law School, 1989 Editor-in-Chief, Harvard Journal of Law & Public Policy

SUCCESSFUL STRATEGIES FOR MANEUVERING THE MINEFIELD OF CORPORATE REPRESENTATIVE DEPOSITIONS

Cheryl Bush
Bush Seyferth & Paige (Troy, MI)
248.822.7801 | bush@bsplaw.com

Jurors want to hear from the people actually involved in the dispute. In a lawsuit involving a company, that makes the company's employees the most important witnesses in the case. But most employees are not comfortable in that role. As their attorneys, we have to help them overcome that discomfort and develop into cogent, persuasive truth-tellers.

Before we can accomplish that goal, however, we have our own homework to do.

ATTORNEY PREPARATION - Know Your Witness

Successful witness preparations begin with some analysis of the witnesses themselves. Some of that analysis will involve more on-the-spot assessment, while other parts require a little work beforehand. But the careful attorney will:

ASSESS an employee's skill set to be a witness. Will this individual need two prep sessions? Ten?

DETERMINE who the employee is as a person. Does she have a big personality, or does she like to be the center of attention? Is she quiet and shy?

INQUIRE how the employee feels about what happened. Is he proud of the decisions he made? Embarrassed? Ashamed? Defensive?

ASK the employee why they did or did not do something. "Why?" is the question for which witnesses are most frequently unprepared.

TELL the witness what your objections mean.

FIND OUT if there is anything in the employee's work at the company or personal life that you need to know about. What questions do you really hope the other side won't ask? That's what needs to be talked about and worked through.

SET realistic expectations for what a single individual can deliver. Will she ever be an "A" witness who can explain everything the jury wants to know?

DETERMINE whether additional witnesses are needed. We are all under pressure to produce more, using less. Consider designating more company witnesses to effectively make the company's case. More employees often humanize the company.

LISTEN for "soundbites" your opponent is collecting to use as trial testimony. When your opponent is finished, consider doing a re-direct examination of your own. If your opponent attempts to use a sound bite at trial from a witness who will not appear live, you need to have enough testimony in the transcript to designate (under the rule of completeness), so that the jury is not just left with a lingering soundbite until your case starts.

Help Your Witness

Once you understand your witness better, you should know how to empower and equip that specific witness for his or her deposition. Still, a few steps should be taken with every witness.

Your witness needs to feel that you and she are on the same team. Explain that you are making objections to protect her. Explain, too, that when the opposing attorney is finished asking questions, you will be able to ask questions to clarify matters. Once more, talk to your witness about questions

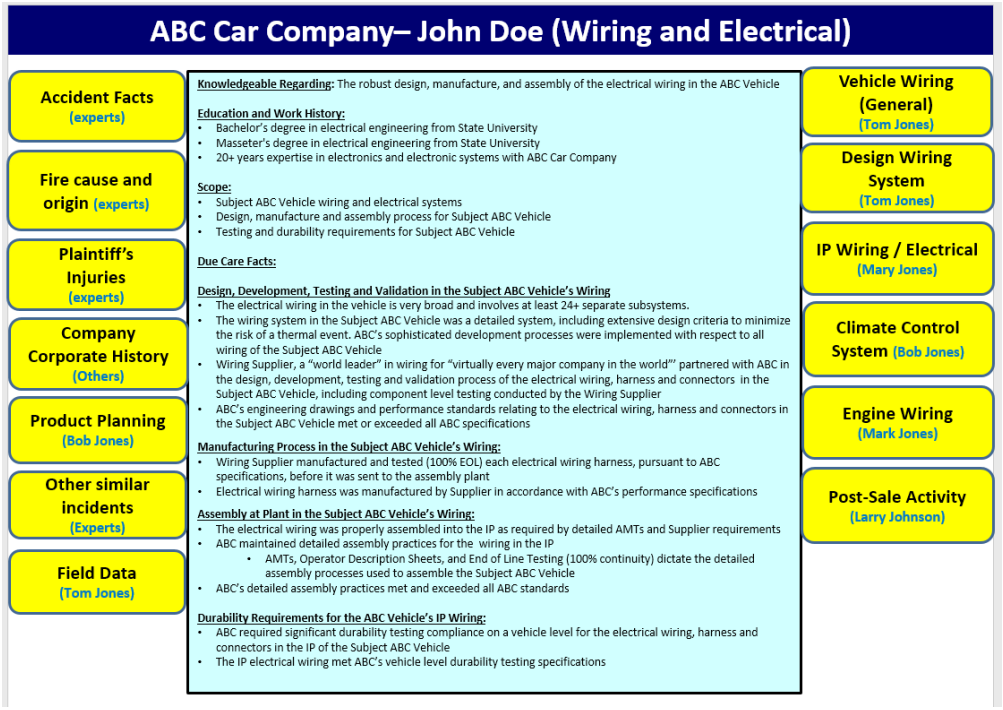
she really hopes won't be asked at the deposition. Tell your witness: "That's what we need to talk about and work through."

If a case is technical or document-intensive, or your witness feels overwhelmed, consider having the witness appear at the deposition with a binder of documents, understanding that the binder will be marked as Exhibit 1. Include documents that will help the witness remember and explain what happened, documents that your opponent may use, and documents that you may use — on re-direct.

Prepare the witness for the Immediate Fastball. Opposing counsel might come out of the gate with an unsettling question, such as, "Good morning Ms. Witness, my name is Mr. Opposing Counsel and I represent the parents of eight-year-old Susie Johnson who was killed in your store. Can you explain to the jury why Suzie is dead?" Be ready.

Work with your witness to create his or her own individual witness box. Witnesses sometimes feel pressure to answer questions to which they simply do not know the answer—but feel like they should. One way to get them comfortable in testifying is to use the analogy of a "witness box." Inside the witness box are the employee's education, experience, work history, and due care facts. If an employee is asked a question and the answer is not in the witness box, then the employee should feel free to refer the opposing attorney to the appropriate person or group at the company who may be able to answer that question.

If you and the witness create this together, then the document is not one that has been "reviewed" for the deposition (and need not be produced to the other side). Meanwhile, the witness will better understand which questions at the deposition should be referred to someone else. The box might look like this:



Above all, don't just tell the witness how to be a good witness. Show the witness through extensive practice Q and A. And then practice some more. Good witnesses are developed, not born. Bad depositions are usually the result of bad preparation or, unfortunately, bad lawyering. Ask the employee the toughest questions you can think of. Consider whether the "reptile" approach may be something that the plaintiff's lawyer engages in. If so, see how that plays out before the deposition. Ask the toughest question your opponent may ask. Your goal is to make the prep much more difficult that the deposition.

Witness Preparation

Different witnesses have different skill sets and different levels of experience. Some witnesses may only be able to absorb the basics, while others can effectively control a deposition.

In every case, though, here are some practical points to share with the employee:

- Tell the truth. To quote Judge Judy, if you always tell the truth you don't need a good memory.
- Be polite and respectful. Don't argue.

- Listen to the question asked. Do you understand the question? Do you understand how the opposing attorney is using every word in the question? Do you understand what the attorney means by "defect" or "concerned" or "contract"?
- Watch out for loaded words, such as "concerned." A question such as, "Did you follow up on that comment, or is that something you were just not concerned about?" is dangerous. When a jury hears that you were not "concerned," they may think you did not care.
- Once you understand the question, answer that question only. Resist the urge to "get this over with" or to "teach" the opposing attorney. The more you volunteer, the longer the deposition will last. Guaranteed.
- Wait until the question is completed before starting to respond. If the attorney questioning you interrupts your answer, stop talking, wait for them to finish, then say: "I would like to finish my answer."
- The opposing lawyer may show you documents that you have never seen before or have not seen in a long time. Read them before you answer any questions.
- You will likely be asked: "What did you do to prepare for this deposition?" Here again: tell the truth. It's ok to say that you met with your attorney.
- Be proud of your work and the decisions you made. Be confident.
- Explain why you did what you did.
- If you make a mistake in your testimony, say so.
- If you are asked to bring documents to your deposition, then be prepared to explain the efforts you undertook to look for and produce those documents. Remember that you are only required to provide those documents within your possession or control.
- Because you will be asked what you did to prepare for the deposition, talk to your lawyer before you go off and investigate.
- Be ready for rapid-fire questions. They do not require rapid-fire answers. Slow it down: "Could you repeat your question?"
- Bear in mind the difference between a deposition that is videotaped and a deposition that is not. If the deposition is not videotaped, then there is no clock ticking. Take your time. Think before answering. If pressed to rush an answer, explain that the question deserves a thoughtful response. Also, respond, "I take my oath very seriously." If the deposition is videotaped, then the jury will watch you thinking about your answer. Buy some time: "Madame Court Reporter, could you read back that question?"
- Listen to and understand your attorney's objections. If your attorney objects to "Foundation," ask yourself, "Am I the person to answer this question?"
- Do not anticipate the next question. Make the opposing attorney do the work.
- If asked whether a document still exists, before you say yes, you need to know exactly where to find it and be able to get it to me in 15 minutes.
- If your answer starts, "I think," or, "I believe," or, "I guess," consider whether you are speculating. If you are, do not provide that answer. If you are still not sure if you should be answering a question, then think of it this way: if your boss's boss's boss asked you the same question, would you answer it right then and there? Or would you explain that you would get back with them immediately with an answer to the question?
- Do not ask the plaintiff's attorney for help understanding a question. They will likely ask, "Which word don't you understand?" Instead, you can answer your own question: "As I understand your question, you are asking me…"
- Use your common sense. My mom, Veronica, finished the 9th grade and then dropped out of school. If she were sitting next to opposing counsel during the deposition, would she roll her eyes at the answer that you are thinking about giving?
- Before you say, "I don't know," ask yourself, "Should you know?" A more truthful response is to explain why you don't know. It may be that you are not the right person to answer that question. Perhaps you have never worked in that area of the company. If pressed, explain that you do not have the experience to answer that question. And if further pressed, explain why you need more than what you have. ("Because I am an engineer, I understand that you need a lot of information to evaluate….").
- Be careful about absolutes. It is rarely truthful to say "Never" or "Always."
- Do not make policy for the company. So, avoid language such as, "I would hope that we would always ...."

Jurors crave stories from real people. Company witnesses are the way to give them those stories. With preparation beforehand, some careful work with the witness, and anticipation about what might happen during the deposition, the company witness could very well prove to be the key to winning the most difficult case.

Win at Company Witness Depositions

Cheryl A. Bush, Managing Partner
Bush Seyferth & Paige PLLC
Troy, MI

bsp

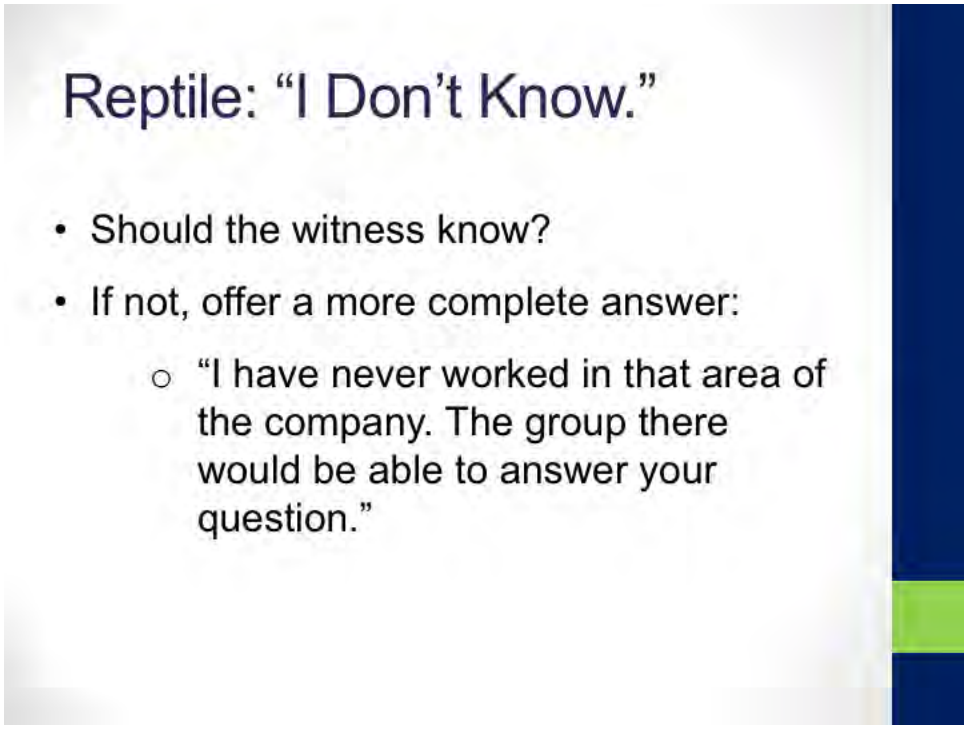

Intonation


NOV 18 2013
12:30:48 PM


Remember
You Are on
Video


APR 19 2013
12:24:18PM

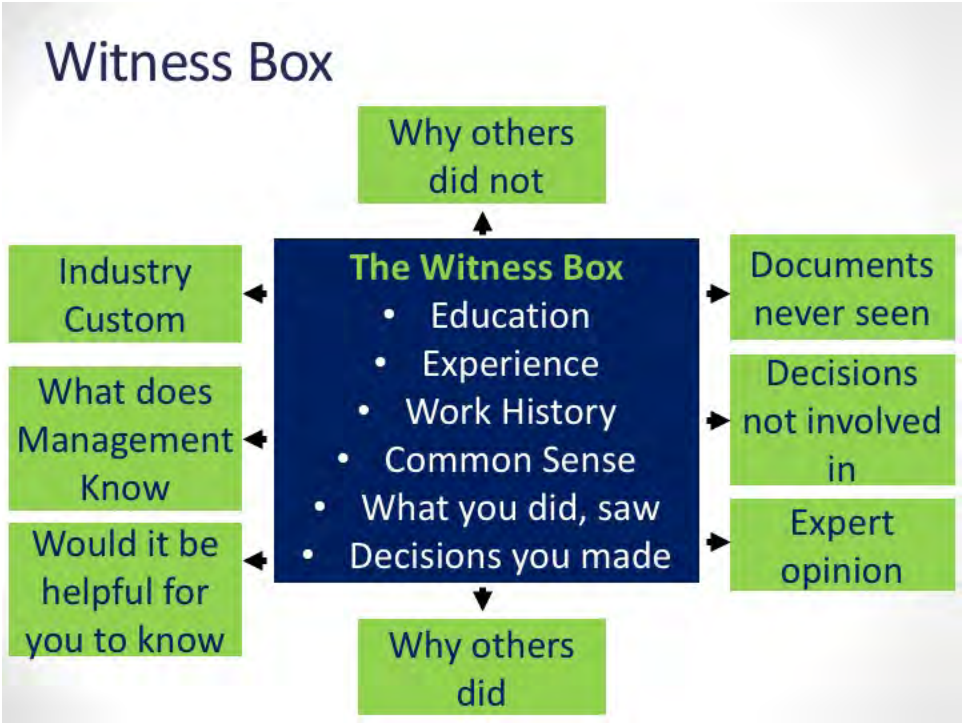

Know Your
Witness


Reptile: "I Don't Know."
• Should the witness know?
• If not, offer a more complete answer:
o "I have never worked in that area of the company. The group there would be able to answer your question."

Help your witness understand when the correct answer is: "I'm not the correct person to answer that."

=

My boss's boss's boss.




MAR 16 2006
7:28:22PM


Do a Direct of the Company Witness

If you don't prepare
=
Paula Deen

Okay. Have you ever used the N-word yourself?

Yes, of course.


PM 1:56
OCT. 28 2002

Cheryl A. Bush

Managing Partner
Bush Seyferth & Paige (Troy, MI)

248.822.7801 | bush@bsplaw.com
http://www.bsplaw.com/people/cheryl-a-bush/

Cheryl A. Bush has extensive first-chair trial experience and has obtained exceptionally positive results for her clients. She serves as National Counsel for a major automotive manufacturer, handling catastrophic air bag trials and coordinating discovery throughout the country. She has also tried and won cases for numerous other Fortune 500 companies. Her cases, which have spanned 30 states, often involve high-level nationwide media exposure.

Cheryl was inducted into the American College of Trial Lawyers in 2008. She is a board member of the Product Liability Advisory Council, a member of the American Board of Trial Advocates, and is engaged in the National Association of Minority & Women Owned Law Firms. Cheryl is also a strong supporter of Cornerstone Schools in Detroit.

Related Services
- Product Liability Litigation
- Commercial Litigation
- Financial Services Litigation
- Class Actions

Honors and Awards
- America's Top 100 Attorneys, 2017
- Leading Lawyers, 2014 – present
- Leon Hubbard Community Service Award, 2015
- Benchmark Litigation, Litigation Star, 2015
- Michigan Lawyers Weekly, Women in the Law, 2014
- Inclusion in The Best Lawyers in America Business Edition, 2013 - present U.S. News Best Lawyers ®, 2010-present
- DBusiness Top Lawyers, 2008-present
- Michigan Lawyers Weekly, Leader in the Law, 2010
- National Association of Women Business Owners, Breakthrough Award Michigan Super Lawyers, 2011-present
- AV Peer Review Rating from Martindale-Hubble

Professional Activities
- American College of Trial Lawyers, Michigan Vice Chair (2015-2016), Member of Jury Committee (2016-2017)
- American Board of Trial Advocates, Co-Chair of the Professional Education Committee Defense Research Institute, Member
- Product Liability Advisory Council, Vice Chair – Sustaining
- Women's Business Enterprise National Council, Member
- National Association of Minority and Women Owned Law Firms, Member National Association of Women Business Owners, Member
- Network of Trial Law Firms, Member of Board of Directors
- International Society of Barristers, Fellow
- Institute of Continuing Legal Education, Lecturer American Bar Association, Member

Education
- University of Michigan Law School; J.D., cum laude, 1984
- Wayne State University; B.A., magna cum laude,1981

DEFENDING AGAINST THE REPTILE

Trez Quinn
Sandberg Phoenix & von Gontard (St. Louis, MO)
618.624.3492 | uquinn@sandbergphoenix.com

When the Reptile sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community.

Reptile The 2009 Manual of the Plaintiff's Revolution, authored by David Ball and Don Keenan, presents a trial strategy for plaintiffs' attorneys with the goal to get the juror's brain into survival mode, a mode which is controlled by the "R Complex" or "Reptilian brain".[1] The major axiom of the Reptile strategy is: When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community.[2]

Dr. Paul D. MacLean, Yale Medical School & National Institute Mental Health Physician and Neuro-scientist, submitted that there were three parts to the brain. The Reptile strategy focuses on the part called the "Reptilian brain" also known as the "R-Complex" which is said to be the oldest part of the brain. The "Reptilian brain" is hypothesized to give rise to the rest of the brain, the parts that think and feel.[3] The major purpose of the "Reptilian brain" (hereinafter referred to as the Reptile) is to keep your genes alive and spread as many of them as possible into future generations. The Reptile strategy is premised on the notion that when the safety of our well-being or "genes" are in danger, the Reptile takes over.[4] An excellent example of this is "just as the fastest running occurs when running for one's life, so does the most powerful decision-making occur when survival is at stake". The plaintiff's presentation of the case is framed in terms of Reptilian survival.[5] Opponents of the Reptile strategy have stated that this strategy disregards the current legal standard for duty by creating a new standard and preys on jurors' inherent survival instinct. Further, it is the manipulation of the jury to make them not think about the facts of the case, but the impact the case could have on themselves and the community.[6]

A major principal of the Reptile strategy is that community safety is a legitimate concern for a jury. The Reptile strategy posits that by default, Americans believe that the purpose of the criminal justice system is to keep them safe. However, jurors do not automatically know that safety is also the purpose of the civil justice system.[7] Ball and Keenan point out that this is why mediocre criminal prosecutors with weak violent cases, despite a higher burden of proof, usually win while many of the best plaintiff's attorneys with the lower burden have trouble doing well even in strong cases.[8] The Reptile does not automatically get involved so the goal is to show the immediate danger of the kind of thing the defendant did and how fair compensation can diminish that danger within the community.[9]

The Reptile strategy focuses on three questions:

1. How likely was it that the act or omission would hurt someone?
2. How much harm could it have caused?
3. How much harm could it cause in other kinds of situations?

The purpose of these questions is to show the jury the gravity of the act's potential harm to the community. The Reptile is triggered when the jury believes that a bad outcome could

1 David Ball and Don Keenan, Reptile the 2009 Manual of the Plaintiff's Revolution, 17-18 (2009).

2 Id at 19.

3 Id at 13.

4 Id at 17.

5 Id at 18.

6 Jill Bechtold and Marks Gray, Reptile Tactics, Association of Defense Trial Attorneys Presentation, June 2014.

7 Reptile 2009 Manual of the Plaintiff's Revolution at 29.

8 Id.

9 Id at 30.

happen to them and others in their community and that this bad outcome could have been avoided if the defendant had followed basic rules.[10]

The first question (How likely was it that the act or omission would hurt someone?) focuses on the frequency of the harm. For example, freak accidents rarely trigger the Reptile because they cannot be prevented, however, when something happens often, the Reptile gets concerned. Hence, the goal of the plaintiff's attorney is to present to the jury statistics that focus the juror on the actual danger.[11] For example, the plaintiff's attorney will counter the defense expert's argument that brain damage is a rare complication of carpal tunnel surgery by showing that there have been blank number of brain damage cases resulting from carpal tunnel surgery. This number awakens the Reptile because the jury perceives the danger of brain damage resulting from carpal tunnel surgery despite the rarity of this occurrence.

The second question (How much harm could it have caused?) focuses on the maximum harm the act could have caused and not the harm that was actually caused.[12] The third question (How much harm could it cause in other kinds of situations?) attempts to explain how the harm in question can be analogized to other situations because the danger or the harm that is the subject of the specific case may be less familiar to the juror. The goal is to analogize the harm in question to other situations that may be more familiar to the juror in order to trigger the Reptile.

A key component to the Reptile strategy is to establish an "umbrella rule" that is the widest general rule the defendant violated enough to encompass every juror's Reptile.[13] For instance, the plaintiff's counsel may ask a defendant doctor:

1. A professional, such as a doctor, lawyer or accountant is not allowed to needlessly endanger the person who hired him, correct?
2. So a doctor is not allowed to needlessly endanger a patient's interest?
3. In any circumstance?
4. Why not?[14]

Once the plaintiff establishes the "umbrella rule", he then establishes case specific rules. For example:

1. A doctor must obtain cardiac enzymes on a patient who has a history of heart attack and who is complaining of chest pain because, otherwise, she would be needlessly endangering the patient?
2. A doctor is never allowed to needlessly endanger a patient?
3. In other words, a prudent doctor does not needlessly endanger a patient?
4. A doctor is not allowed to forego obtaining cardiac enzymes on a patient who is complaining of chest pain who has a history of heart attack?
5. So a prudent doctor, in order to be safe and not endanger the public, must obtain cardiac enzymes on a patient who has a history of heart attack and who is complaining of chest pain?
6. If the doctor does not obtain cardiac enzymes on this patient, he is not prudent because he is allowing unnecessary danger.[15]

The first step in defending against the Reptile strategy is to recognize the setup. The plaintiff will begin to establish the Reptile strategy as early as the pleading stage. Be aware of buzz words and phrases such as safety, needlessly endanger, safety rules, danger, unnecessary risk, safest available choice, responsibility, required and not allowed. Be sure the plaintiff's complaint complies with the law of your jurisdiction and be prepared to file motions, such as motions to dismiss and motions to strike, to clearly frame the issues in the case based on the relevant law.

Once you have clearly identified and framed the issues in your case based on the law of your jurisdiction, you must properly prepare for discovery based on the issues framed and the allegations of the complaint. Remember, the plaintiff will attempt to establish new standards of care based on new "safety rules" to act as the new liability standard. Again, watch for the buzz words in both written and oral discovery. Be prepared to make objections to Interrogatories based on the law of your jurisdiction, objecting on grounds such as relevance, beyond the scope of discovery, vague, overbroad and unlikely to lead to admissible evidence at trial.

Generally prepare your client regarding the method and goal of the Reptile strategy for deposition. Remember, the focus will be on the allegations that your client violated the newly created "safety rules" which created a danger to the patient and to the community. It is your job to know and focus on the actual legal duty and applicable standard of care for your client. Be ready to properly object to any improper questions at deposition and avoid using standing objections. Further, be prepared to have the objections heard and ruled upon before trial. Be sure that your client understands the standard of care for duty in the case and have the client prepared to answer the questions that the plaintiff will potentially ask using the Reptile strategy. It may be a good idea to obtain transcripts of plaintiff's counsel using the Reptile strategy. Consider motions for protective orders to limit and restrict plaintiff counsel's questions prohibited by the law. This will begin the indoctrination of the Judge on the Reptile strategy in preparation for pre-trial motions, such as motions in limine, as well as for the trial.

10 Bechtold and Gray, June 2014.

11 Ball and Keenan at 32.

12 Id at 33.

13 Id at 55.

14 See Id at 56-57.

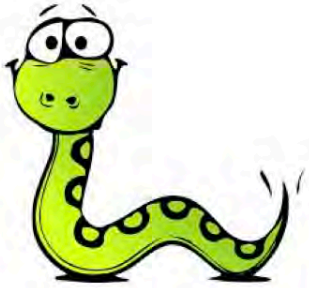
15 See Id at 62-63.

The key is to focus the case and the court on the law and to prevent the plaintiff from "creating" new law in the form of "safety rules" and standards of care. Be very thorough in preparing your motions in limine. Be prepared to make appropriate objections at voir dire and at trial.

The Reptile strategy is a very creative strategy in awakening the fear of the juror in order to focus on safety rules that are not based on the law. In doing so, the hope is the Reptile will protect its community and stop or prevent further danger by compensating the plaintiff to deter the defendant and others from any such acts of danger. It is the due diligence of the defense attorney to be aware of the Reptile strategy or any strategy that is not based on the law. Proper preparation of the attorney, as well as the client, will ensure the case is litigated based on the law of the applicable jurisdiction. The defense attorney should recognize the strategy at every level of the litigation process and be properly prepared to defend the case based on valid law.

Defending Against the Reptile

Untress L. Quinn



"When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community."

Reptile the 2009 Manual of the Plaintiff's Revolution

What is the Reptile Strategy?

- Trial strategy for plaintiffs' attorneys
- Goal to get the juror's brain into survival mode
- A mode controlled by the "R Complex" or "Reptilian brain"
- Major Axiom: *"When the Reptile sees a survival danger, she protects her genes by impelling the juror to protect himself and the community."*

Reptile Strategy Focuses on Three Questions

- How likely was it that the act or omission would hurt someone?
- How much harm could it have caused?
- How much harm could it cause in other kinds of situations?

How Likely Was It That the Act or Omission Would Hurt Someone?

- Focuses on the frequency of the harm
- Freak accidents rarely trigger the Reptile
- Reptile is triggered when something happens often

How Much Harm Could it Have Caused?

- Focuses on the maximum harm the act could have caused not on actual harm caused

How Much Harm Could It Cause in Other Situations?

- Attempts to explain how the harm in question can be analogized to other situations
- The danger or the harm could be less familiar to the juror
- Goal is to compare the harm in question to other situations more familiar to the juror

Umbrella Rule

- Widest general rule the defendant violated enough to encompass every juror's Reptile
- Plaintiff's counsel first establishes the Umbrella Rule
- Once Umbrella Rule is established, case specific facts are established

Umbrella Rule Example. . .

Defending Against the Reptile

- Recognize the setup
- Be aware of buzz words: ***safety, needlessly endanger, safety rules, danger, unnecessary risk, etc. . .***
- Ensure plaintiff's counsel complies with the law
- Be prepared to file motions to clearly frame the issues based on relevant law at pleading stage

- Once issues clearly identified, properly prepare for discovery
- Be aware of counsel's attempt to establish new standards of care based on new "safety rules"
- Watch for buzz words in both written and oral discovery
- Be prepared to make proper objections to written discovery
- Thoroughly prepare your client for deposition re Reptile tactics

- You must know and focus on the actual legal duty and applicable standard of care for your client
- Consider filing motion for protective order
- Be prepared to make objections at deposition to protect your client and have heard before trial (Avoid using standing objections)
- Obtain transcripts of counsel using the Reptile strategy to prepare

- The key is to focus case and court on the LAW
- Prevent counsel from "creating" new law in the form of "safety rules"
- Be very thorough in preparing pre-trial motions such as motions in limine
- Be prepared to make appropriate objections at void dire and at trial

Untress “Trez” Quinn

Counsel
Sandberg Phoenix & von Gontard (St. Louis, MO)

618.624.3492 | uquinn@sandbergphoenix.com
http://www.sandbergphoenix.com/attorneys-untress-quinn/

Untress Quinn joined Sandberg Phoenix in 2016 and splits his time between the O’Fallon, Edwardsville and St. Louis Offices. He focuses his legal practice on labor and employment, commercial and medical malpractice litigation. He has defended multiple catastrophic and complex litigation cases involving civil rights, labor and employment, product liability and medical malpractice cases which included neurologic, obstetric, neonatal, pediatric, cardio-thoracic and other traumatic injuries.

“Having worked with several Sandberg Phoenix attorneys in the past, I knew the high standard of quality the firm demands of its members,” Untress says.

As a Registered Nurse with experience in direct patient care, Untress understands the complex issues at play in medical malpractice litigation, which helps him better guide his clients through difficult legal issues.

“All of my past experiences, the military, a nurse providing direct care, an administrator and manager, and being a minority in civil litigation, give me a unique perspective that I put to work for my clients to ensure they are properly served and represented,” says Untress.

Outside the office, he enjoys playing golf and spending time mentoring youth, including his own. Untress also plays trumpet for local blues and jazz bands and enjoys writing, exercise training, cycling and photography.

Services
- Commercial Litigation
- Labor and Employment Counseling
- Medical Malpractice Defense
- Product and Toxic Tort Liability

Industries
- Drugs and Pharmaceuticals
- Hospitals
- Long-Term Care and Senior Living
- Medical Devices
- Physicians / Allied Health Professionals

Education
- Saint Louis University School of Law; J.D.
- United States Air Force Reserves - First Lieutenant; Meritorious Service Award
- 3790th Medical Service Squadron for Medical Service Specialists at Sheppard Air Force Base; Honor Graduate

ANTITRUST RESURGENCE: MANAGING CRIMINAL AND CIVIL EXPOSURE

Bill Hughes
Porzio Bromberg & Newman (Morristown, NJ)
973.889.4308 | wjhughes@pbnlaw.com

"I just received something from the U.S. Department of Justice. I don't know what it is, but it doesn't look good."

The calls from the clients can range from the quizzical to the hysterical, but the message is nearly the same. For the corporate legal advisor large and small, the receipt of a U.S. Department of Justice, Antitrust Division, Civil Investigative Demand or Grand Jury Subpoena quite often marks the beginning of an ordeal that is as much an exercise in compliance as it is strategy to limit or avoid exposure. The outcome may depend on the responsiveness of the clients and the tactics developed by counsel at the outset.

The Antitrust Division of the U.S. Department of Justice has many tools at its disposal to investigate the two laws with which it is principally charged to enforce: Sections 1 and 2 of the Sherman Act., 15 U.S.C. §§ 1 and 2. Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. . . ."[1] Section 2 of the Act states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . ." shall be guilty of a felony.[2] The violation of either section is a felony, and both carry potential maximum sentences of up to 10 years' imprisonment, a $1,000,000 fine for individuals and $100,000,000 fine for corporations.

Although both Sections 1 and 2 are defined in terms of criminal liability, Section 4 of the Act vests U.S. District Courts with jurisdiction and the U.S. Department of Justice with the authority to pursue injunctive civil remedies.[3] As a practical matter, criminal prosecutions in Section 2 monopolization cases are rare, and it appears that the last reported criminal prosecution under Section 2 occurred in 1974.[4] Section 1 criminal prosecutions, however, occur more frequently, albeit for specific types of conspiracies and restraints.

As a general proposition, only the most pernicious types of anticompetitive conduct are subjected to Section 1 criminal prosecution under the per se rule.[5] These arrangements include bid-rigging, price fixing, market allocation and group boycotts by horizontal competitors. Even then, the Antitrust Division frequently elects to proceed with civil, rather than criminal, investigations and actions.6 Whether by criminal or by civil investigation, the focus of per se conduct is whether the offending conduct occurred: i.e., whether competitors agreed to fix prices, allocate markets, rig bids or

1 15 U.S.C. § 1.

2 15 U.S.C. § 2.

3 15 U.S.C. § 4:

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

4 United States v. General Motors Corp., 369 F.Supp. 1306 (E.D.MI 1974) (dismissing Section 2 charge from indictment alleging conspiracy to monopolize).

5 Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 7–8 (1979) (footnotes omitted):

"In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, *8 the Court has held that certain agreements or practices are so "plainly anticompetitive," National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977), and so often "lack . . . any redeeming virtue," Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This pro se rule is a valid and useful tool of antitrust policy and enforcement. And agreements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the per se category."

6 See, e.g., United States v. Alex Brown & Sons, Inc., et al (NASDAq Market Makers), Docket No. 96-civ-5313 (S.D.N.Y. July 17, 1996) (Antitrust Division consent decree involving price fixing by certain NASDAq market makers relating to quoting conventions for specified stocks).

otherwise agree to act in an anti-competitive or coordinated matter. Because the focus in a per se case is on the illegal and anticompetitive conduct amongst competitors, there is no need for an examination into the relevant product or geographic markets, or market alternative or substitutes. In short, there is no examination into the reasonableness of the arrangement or the impact of the conduct upon competition because the conduct itself is already deemed per se anticompetitive.[7]

Outside of per se conduct and restraints, most other types of conduct and arrangements scrutinized under Section 1 are subjected to civil investigations and actions under the "Rule of Reason" test, which requires an in-depth analysis of the questioned conduct's impact upon interstate or foreign commerce. Under the Rule of Reason analysis, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[8] This analysis necessarily focuses upon whether the restraint "is one that promotes competition or one that suppresses competition."[9]

Civil non-merger investigations involving Section 1 Rule of Reason and Section 2 involve an in-depth examination of the product and geographic markets, actual and potential alternatives to the product, and the impact of the questioned conduct upon competition – both actually and potentially. How the investigations proceed, and whether to commence an action against one or more market participant, require extensive economic analysis as well as in-depth policy consideration. Because these types of investigations can be so large and laden with academic analysis, they are usually staffed with several Department of Justice Trial Attorneys and one or more Antitrust Division Economists under the supervision and watchful eyes of several layers of management who answer to political appointees in "the front office". It is therefore not surprising that trends of Antitrust Division enforcement actions often depend upon who sits in the White House. Although criminal enforcement generally does not change between administrations of different political parties, there is often a difference in the number and types of civil non-merger investigations.

The type of investigation commenced by the Antitrust Division will dictate its method of investigation and the opportunities for corporate and individual counsel to advocate their clients' respective interests to the Department of Justice. The two primary investigative tools utilized by the Antitrust Division are the Civil Investigative Demand (a "CID") and the Grand Jury Subpoena. Although the latter, by its very definition, signals the existence of a criminal investigation, the issuance of a CID does not mean that a criminal investigation will not ultimately occur. In both cases, counsel for the recipient – as with any other government investigation – should immediately determine the specific nature of the investigation and the client's position within it.

The hallmark of most Antitrust Division CIDs and Grand Jury Subpoenas is the sheer breadth of the documents and data they request. They quite literally ask for everything except for the kitchen sink, and even requests for documents describing market substitutes to the kitchen sink are not out of the question. For this reason counsel for the recipient should immediately contact the lead Antitrust Division Trial Attorney to negotiate the scope, method and timing of compliance. Like any other bureaucratic agency, the Antitrust Division has an extensive manual, issued to each employee, which outlines DOJ Antitrust Division policy and procedure.[10] Negotiation regarding CID and Grand Jury production compliance is expected, and even invited.[11]

These initial contacts are most important in determining the strategy moving forward, as well as the type and amount of resources the client will require. In civil investigations not involving per se illegal conduct, the Antitrust Division will almost always ask for extensive confidential information that is, often, proprietary and trade secret, such as competitive analyses and information, threat assessments, customer lists, and pricing reports. The CID statute contains provisions that purportedly protect the confidentiality of the information that recipients provide, but DOJ Antitrust Division Trial Attorneys are permitted to disclose these materials to anyone during CID deposition testimony and during trial.[12] Although discouraged, the Antitrust Division empowers its Trial Attorneys to agree to confidentiality provisions that extend beyond those contained in the Antitrust Civil Process Act of 1982.[13] Regarding Grand Jury Subpoenas, confidentiality is governed under Fed. R. Civ. P. 6(e), which prohibits the disclosure of production materials to third-parties unless under a court order or specifically excepted by the Rule. The point is that, whether by CID or by Grand Jury Subpoena, the recipient's counsel must immediately act to negotiate the highest level of protections possible.

Negotiations aimed at narrowing the request will also highlight the subjects of the investigation and the types

7 Catalano, Inc. v. Target Sales, 446 U.S. 643, 647 (1980) (per curiam); Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958) (Holding that in a per se analysis, conduct is presumed unreasonable "without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use."

8 Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977).

9 National Society of Professional Engineers v. United States, 435 U.S. 679, 691 (1978).

10 Antitrust Division Manual, 5th Ed (April 2015), https://www.justice.gov/atr/division-manual

11 Id., at page III-52:

. . . the Division generally serves CIDs with a cover letter inviting the respondent, or its counsel, to telephone an antitrust investigator identified in the letter in order to attempt to resolve any avoidable problems created by the CID. Responders to this invitation almost always engage staff in a compliance negotiation, seeking to modify the scope of the request and enlarge the time for response.

12 15 U.S.C. § 1313(c)(2) and (d)(1).

13 Antitrust Division Manual, at page III-63.

of conduct being investigated. Besides narrowing the breadth of documents, a negotiation into search terms for Electronically Stored Data will certainly reveal the focus of the inquiry. In criminal cases where the recipient is the target or the subject of the investigation, counsel should begin to identify individuals within the organization who may also be subjects and/or targets and discuss with management the benefits of retaining counsel for all individuals whose conduct may be implicated. A strong and united defense, supported by a joint defense agreement, often facilitates the most beneficial and efficient resolutions.

For Section 2 and Section 1 Rule of Reason cases, recipient's counsel should immediately begin thinking about the retention of economists who specialize in the markets and/or practice under scrutiny so they might develop a strategy that will appeal to Antitrust Division Economists. Even in Section 1 per se cases and criminal cases, the strategic use of outside economic experts may cause the Antitrust Division Attorneys to question whether a court might view the conduct to be more appropriately analyzed under the Rule of Reason rather than per se.

Finally, compliance with Grand Jury Subpoenas and CIDs is something that clients should take very seriously. Failure to produce materials specifically requested in a Grand Jury Subpoena risks serious consequences in later proceedings, ranging from exclusion of evidence to contempt. With respect to CIDs, there is no quicker way to turn a civil investigation into a criminal investigation than to destroy or otherwise hide documents and materials responsive to CID.[14]

A client's receipt of an Antitrust Division Grand Jury Subpoena or CID is often a shocking experience, but a focused and organized approach, as well as managing the client's expectations regarding potential outcomes and expense, can relieve some of the stress and maximize the chances of a positive outcome.

14 See, e.g., United States v. Moody's Investors Service, Inc., Docket No. 01-cr-339 (S.D.N.Y. April 10, 2001) (Criminal Information pursuant to a plea agreement charging Moody's with obstruction of justice pursuant to 18 U.S.C. § 1505 for destroying documents requested by CID in a civil investigation).

PORZIO
BROMBERG&NEWMAN P.C.

ANTITRUST RESURGENCE

Managing Criminal and Civil Exposure from the Outset of Department of Justice Investigations

Presented by:
William J. Hughes, Jr., Esq., Porzio

ANTITRUST ENFORCEMENT

ANTITRUST ENFORCEMENT

THE INVESTIGATION IS REVEALED


STARBUCKS
COFFEE

QUICK OVERVIEW OF THE SHERMAN ACT

SHERMAN ACT 15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . .

SHERMAN ACT 15 U.S.C. § 1

Key to Section 1:

Conspiracy

SECTION 1: TWO TYPES OF CASES

- **Rule of Reason Analysis: Examine the "Reasonableness" of the Restraint**
  - Relevant Product Market
    - Substitutes/Alternatives
    - "Elasticity of Demand"
  - Relevant Geographic Market
  - Weigh Pro-Competitive Aspects Against Anticompetitive Aspects

SECTION 1: TWO TYPES OF CASES

***Per Se* Analysis:**

Practices that have no competitive redeeming value are considered illegal per se, without any examination for their excuse or impact upon competition.

SHERMAN ACT 15 U.S.C. § 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

SHERMAN ACT 15 U.S.C. § 2.

Key to Section 2:

Intent to Monopolize or Maintain a Monopoly (and Attempts to do so)

U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION INVESTIGATIVE TOOLS

- Criminal Investigations: Grand Jury Subpoena – Fed. R. Crim. P. 6
- Civil Investigations: Civil Investigative Demand ("CID") – 15 U.S.C. § 1312

ANTITRUST GRAND JURY SUBPOENA

- Only for Section 1 Per Se Criminal Cases
- Generally Only Involving Horizontal Competitors
- Issued From Main Justice or from Field Offices (Task Forces Rare)

ANTITRUST GRAND JURY SUBPOENA

- Like other Grand Jury Subpoenas
  - Generally Served by an FBI agent
  - Seeks Documents and Data Related to Criminal Investigation
  - UNLIKE other Investigations, FBI Case Agent Generally does not Run the Investigation

ANTITRUST GRAND JURY SUBPOENA

- Voluminous
  - Seeks Nearly All Documents and Data Related to Investigation
  - Relatively More Focused than CID – Generally no Inquiry into Information Relating to Market Substitutes and Alternatives

ANTITRUST GRAND JURY SUBPOENA

- Negotiate Compliance
  - Timing and Scope
  - Determine Targets/Subjects
  - Keyword Searches
  - Establish Privilege Issues (Determine Scope of Investigation)

ANTITRUST GRAND JURY SUBPOENA

- Build the Team from Day One
  - E-Discovery Vendor
    - Cloud/Desktops
    - Laptops
    - Phones/iPads
  - Co-Counsel/Joint Defense
    - Corporation
    - Individuals
  - Investigators
  - Economists?
  - PR Crisis Management?

ANTITRUST GRAND JURY SUBPOENA

- Budgeting, Resources & Strategy
  - Develop a Flexible Strategy Immediately
  - Use Budget Constraints to Your Advantage in Subpoena Compliance
  - Use the Nature of Antitrust Division to Your Advantage
  - Open Dialogue for Non-Litigated Resolution to Begin Cost-Benefit Analysis

ANTITRUST CIVIL INVESTIGATIVE DEMAND

- Principal Civil Investigative Tool of the Antitrust Division
- Used for all Section 1, 2 and Merger Investigations
- Generally Issued from Main Justice

ANTITRUST CIVIL INVESTIGATIVE DEMAND

- VERY Voluminous
  - Seeks Sensitive Information from Market Players
    - Market/Competitive Data
    - Alternatives/Substitutes
  - CIDs Often Seek a Complete Document/Data Dump

ANTITRUST CIVIL INVESTIGATIVE DEMAND

- Negotiate Compliance
  - Timing – Generally, Only Merger Investigations Have Time Pressure
  - Determine Nature of Investigation
    - Section 1 or 2?
    - Horizontal or Vertical?
    - Per Se or Rule of Reason?
  - Witness or Focus of
  - Investigation?

ANTITRUST CIVIL INVESTIGATIVE DEMAND

- Build the Team from Day One
  - E-Discovery Vendor
  - Economist
  - Co-Counsel/Joint Defense
  - Class-Action Defense Counsel
  - Investigator?
  - PR Crisis Management?

ANTITRUST CIVIL INVESTIGATIVE DEMAND

- Budgeting, Resources & Strategy
  - Civil Investigations are Long and Expensive
  - Use Time to your Advantage
  - Use Nature of Antitrust Division to Your Advantage
  - Attack the Economic Theory

ANTITRUST GRAND JURY AND CID COMPLIANCE: A CAUTIONARY TALE

Department of Justice

FOR IMMEDIATE RELEASE
TUESDAY, APRIL 10, 2001
WWW.USDOJ.GOV

AT
(202) 616-2777
TDD(202) 514-1888

MOODY'S INVESTORS SERVICE INC. PLEADS GUILTY TO OBSTRUCTION OF JUSTICE IN ANTITRUST INVESTIGATION

WASHINGTON, D.C. -- Moody's Investors Service Inc., one of the largest credit ratings agencies in the United States, pleaded guilty and was sentenced to pay a $195,000 criminal fine today for obstructing justice by destroying documents called for during an antitrust investigation.

CONCLUSION

- Organize and Strategize from Day One
- Build Your Team
- Manage Client Expectations
- Use the Nature of Antitrust Division to Your Advantage

William J. Hughes, Jr.

Principal
Porzio Bromberg & Newman (Morristown, NJ)

973.889.4308 | wjhughes@pbnlaw.com
http://pbnlaw.com/attorneys/hughes-william/

William J. ("Bill") Hughes, Jr. is an experienced litigator representing clients in federal white collar investigations and criminal defense, complex commercial litigation in the areas of cybersecurity, antitrust, fraud, intellectual property, commercial and shareholder disputes.

With a background as an Assistant U.S. Attorney and Trial Attorney for the United States Department of Justice, Bill has a unique understanding of federal investigations and procedures. In his role as Assistant U.S. Attorney, Bill was responsible for litigating and investigating a variety of cases including: counterfeiting, bank robbery and theft, firearms violations, police bribery, assaults, narcotics cases - including Title III wiretaps and foreign extradition, money laundering, government loan fraud, credit card fraud, and criminal copyright and trademark infringement. As a Trial Attorney for the Department of Justice, Bill was assigned to the Computers and Finance Section of the Antitrust Division where he handled antitrust merger and civil non-merger investigations and litigation.

Bill has received numerous service awards from federal agencies including, U.S. Customs Service, U.S. Marshal's Service, U.S. Secret Service, Drug Enforcement Administration and United States Postal Service.
Prior to joining the Department of Justice, Bill served as a Judicial Clerk with the Honorable John F. Gerry, Chief Judge of the United States District Court for the District of New Jersey and Chairman of the Executive Committee for the United States Judicial Conference.

Practice
- Corporate, Commercial and Business Law
- Corporate Investigations
- Cyber Security
- Directors and Officers Liability
- Government Investigations and Compliance
- Intellectual Property Litigation
- Life Sciences Litigation
- Litigation

Industries
- Biotechnology
- Financial Services
- Life Sciences
- Pharmaceutical
- Telecommunications

Education
- Georgetown University Law Center, L.L.M. in Taxation, 1998
- Rutgers University Law School, Camden, NJ, Juris Doctor with Honors, 1993 - Dean's Scholar; Dean's List
- Eagleton Institute of Politics and Public Policy, Rutgers University, Master of Arts, Public Policy and Political Science, 1991 - Eagleton Fellowship
- Franklin and Marshall College, Bachelor of Arts, Government, 1989 - Pi Sigma Alpha National Political Honor Society

AN OPERATORS MANUAL FOR CONSOLIDATED ARBITRATIONS - WARNINGS AND DIRECTIONS FOR USE

Tom Bush
Freeborn & Peters (Chicago, IL)
312.360.6837 | tbush@freeborn.com

I. Introduction

Arbitrations of reinsurance disputes frequently involve issues that affect more than one reinsurer. The following are examples:

- Two or more reinsurers on the same contract and layer contest coverage of a particular loss.
- On excess of loss contracts, a dispute arises over whether a particular loss constitutes one or two events. Reinsurers on the lower layers prefer one event, while reinsurers on the upper layers prefer two.
- On a loss that spreads over multiple contract years, such as environmental liability, reinsurers on different contracts disagree over the allocation of the loss.

II. When should parties agree to consolidation?

Parties should agree to consolidation, obviously, when it benefits them. The primary benefit advanced for consolidating arbitrations usually is efficiency. A single, consolidated proceeding involving all reinsurers, instead of multiple proceedings with individual reinsurers on the same issues, can avoid duplication in discovery and in the hearing. Consequently consolidation can save costs.

These cost savings, however, typically will benefit only the cedent (party that gives up an interest or right), who otherwise would be engaged in multiple arbitrations. The reinsurers, by contrast, would participate only in one proceeding, whether or not consolidation is ordered. The impact of consolidation on the reinsurer is to make that one proceeding larger and more complex with higher stakes and a higher cost.

A second benefit commonly cited for consolidation is the avoidance of inconsistent awards. Consider the example of a dispute over the number of events on an excess of loss contract with multiple layers. If the results of separate arbitrations are that the lower layer reinsurers pay on one event and the upper layer reinsurers pay on two, the cedent could be left with an unintended gap in its reinsurance coverage. Similarly, on a loss spread across multiple contract years, separate arbitrations on the issue of allocation could result in a significant portion of the loss allocated to no contracts. A consolidated arbitration would result in a single, consistent result for all parties.

As with efficiencies, the benefits of consistent awards usually will fall primarily to the cedent. In the absence of consolidation, a reinsurer typically would be a party only to one arbitration proceeding and will not be affected by inconsistent results in a different proceeding.

Hence, consolidation can benefit the cedent, in circumstances where it avoids duplication or removes the threat of inconsistent awards, but it will seldom benefit the reinsurers. The reinsurers may be indifferent to consolidation, or they may be opposed. In cases where consolidation requires each reinsurer to participate in a proceeding that would be substantially larger and more complex than a separate arbitration, the reinsurers have good reason to reject consolidation, and the parties are unlikely to reach agreement on whether to consolidate.

III. Can consolidation be compelled?

Given the possibility of disagreement, can consolidation be ordered over the objection of one or more parties? The issue has come up frequently in court decisions, but always with reference to one, narrow question: who decides. Federal

courts applying the Federal Arbitration Act[1] have settled on the view that in the absence of express contractual language calling for consolidation, courts will not order consolidation but will leave the issue for the arbitrators to decide.[2]

Leaving the issue of consolidation for the arbitrators raises the question of which arbitrators will make the decision. One possibility involves the initial appointment of separate arbitration panels and a decision by each panel on whether to consolidate.[3] Other courts have delegated the decision on consolidation to the first arbitration panel to be formed.[4]

The arbitration statutes of some states, including New York, have been interpreted to authorize a court to order consolidation in an appropriate case.[5] In addition, § 10 of the Revised Uniform Arbitration Act, which has been adopted in 14 states and the District of Columbia, expressly authorizes a court to compel consolidation.[6]

Whether the decision-maker is a court or an arbitration panel, it no doubt can decide whether considerations of efficiency or consistency call for consolidation. Unless the contract expressly prohibits consolidation, and almost none do, no party has a legally enforceable right to duplicative proceedings or inconsistent awards.

IV. Should consolidation be compelled?

Whether considerations of efficiency and consistency actually favor consolidation will depend upon the facts and circumstances of each case. In a particular case, the efficiency gains for the cedent might be substantial, but they also might be small in comparison to the additional burdens imposed upon the reinsurers, and might be better addressed by alternative means.

In particular, a coordination of separate arbitrations might achieve many of the same efficiency gains. If two or more arbitrations are proceeding in tandem on common issues, the separate panels have the authority to coordinate their proceedings so as to avoid unnecessary duplication. They might, in appropriate circumstances, provide for parties to produce documents once for all proceedings and for witnesses to sit once for a deposition that could be used in all proceedings. They might even conduct a single hearing before all of the panels, with the individual panels then deliberating and deciding separately. Generally the separate panels have the ability to manage their coordinated activities, and to refrain from coordination in circumstances where it would be inefficient for some of the parties.

Similarly, the danger of inconsistent results is not necessarily a decisive reason for consolidation. Reinsurance contracts are private agreements, and no universal principle of justice or fairness says that private agreements among different parties must be interpreted and applied in a consistent manner. Moreover, the scenarios where inconsistent awards might result often can be foreseen at the time of contracting, and the cedent could have proposed arbitration clauses that require consolidation. That the cedent finds itself facing a risk of inconsistent awards in separate, bilateral arbitrations might to some extent be a problem of its own making.

And, as with efficiency, an alternative method might provide at least some protection against prejudice from inconsistent awards. In each separate proceeding, the confidentiality order could include a provision allowing any party to disclose the final award in other arbitrations involving common issues. Then, in any later arbitration, a cedent could submit the award from an earlier proceeding and argue for a consistent result. The arbitrators in the second proceeding might agree, and hence provide consistency, or they might disagree. The cedent would suffer inconsistent awards, however, only if the arbitrators decided that in the circumstances of the particular case, consistency was not required. In that situation, it is difficult to characterize inconsistent awards as prejudicial or as a procedural defect.

In summary, in cases where consolidation might offer the benefits of efficiency and consistency, the case for compelling consolidation over the objection of one or more reinsurers is not necessarily clear. The court or the arbitrators need to consider whether consolidation would prejudice the objecting reinsurers, by forcing them to participate in a larger and more complex proceeding, and whether alternative means are available to obtain the benefits of consolidation.

V. The consolidated arbitration panel

Efficiency and consistency do not exhaust the factors relevant to consolidation. The formation of an arbitration panel for a consolidated proceeding can present serious problems. Consider the following provision, which is representative of language found in arbitration clauses:

> Each of the contracting parties shall nominate an arbitrator within thirty days of being requested to do so, and the two named shall select an umpire before entering upon the arbitration.

1 9 U.S.C. §§ 1-16.

2 See Certain Underwriters at Lloyd's London v. Westchester Fire Insurance Co., 489 F.3d 580 (3rd Cir. 2007); Shaw's Supermarkets, Inc. v. United Food & Commercial Workers Union, 321 F.3d 251 (1st Cir. 2003); Government of the United Kingdom v. The Boeing Co., 998 F.2d 68 (2nd Cir. 1993).

3 See, e.g., Employers Insurance Co. of Wausau v. Century Indemnity Co., 443 F.3d 573, 575-76 (7th Cir. 2006).

4 See, e.g., Arrowood Indemnity. Co. v. Harper Insurance. Co, No. 12-civ-2 (W.D.N.C., Jan. 19, 2012); Avon Products, Inc. v. UAW Local 710, 386 F.2d 651 (8th Cir. 1967).

5 Sullivan County v. Edward L. Nezelek, Inc., 42 N.Y.2d 123, 366 N.E.2d 72 (N.Y. 1977).

6 The Revised Uniform Arbitration Act has been adopted in Alaska, Arizona, Colorado, District of Columbia, Hawaii, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah and Washington. It is under consideration the legislatures of Connecticut, Massachusetts, Michigan and Pennsylvania.

Assume a dispute under a standard arbitration clause with this provision. The cedent serves two or more reinsurers with a demand for consolidated arbitration and appoints a single arbitrator. If the reinsurers do not want a consolidated proceeding, each can then respond with its own party-appointed arbitrator. At that point, the panel consists of three or more arbitrators, and the umpire has yet to be selected.

In some reinsurance contracts, the arbitration clause expressly provides that in a dispute between the cedent and more than one reinsurer on the contract, the reinsurers shall ''act as one.'' Under this clause, the reinsurers must agree on a single party-appointed arbitrator. If they fail to agree, the arbitration clause provides for an alternative manner of appointment, either by the cedent or by the court, which creates an incentive for the reinsurers to agree on an arbitrator.

Most reinsurance contracts, however, do not have ''act as one'' terms in their arbitration clauses. Even where these terms are found, they usually apply only to reinsurers on the same contract. In disputes involving reinsurers on different contracts, for example on different layers of an excess of loss program or on different contract years, the contracts may not require the reinsurers to agree on a single arbitrator.

If each party is allowed to appoint an arbitrator, the consequence would be a panel with more than three members, contrary to the plain language of the arbitration clause in almost every reinsurance contract. A further problem arises with determining how the panel will reach its decision. The typical arbitration clause in a reinsurance contract contains a provision similar to the following:

> The decision in writing of any two of the three (two arbitrators and one umpire), when filed with the contracting parties, shall be final and binding upon both parties.

With more than three panel members, the decision of any two would not be a majority. If the reinsurers' arbitrators all agree on the issue in dispute, then they alone can, depending upon their number, either prevent a majority for an adverse decision or constitute a majority for a favorable decision. If the reinsurers' arbitrators disagree among themselves, then a majority might be formed by a combination of the cedent's arbitrator and some of the reinsurers' arbitrators. In either situation, the circumstances invite the panel to resolve the dispute on the basis of strategic alliances rather than on the merits.

Hence, in most cases where a cedent seeks consolidation, a panel that conforms to the contract terms is not possible, unless the parties agree to a deviation from the contractual term that each ''of the contracting parties shall nominate an arbitrator.'' For example, all of the reinsurers might agree on a single party-appointed arbitrator. Considering that in many cases where consolidation might be beneficial, the reinsurers will have different positions on the issue in dispute, reinsurers often will be unable to agree on a single arbitrator. Alternatively, the parties might agree to submit their dispute to a single neutral arbitrator or to a neutral panel, but those steps require unanimity, which is difficult to achieve in the context of a serious dispute among multiple parties. So long as each party insists on its right to appoint a separate arbitrator, no agreement to consolidate is possible.

VI. Can consolidated arbitration panels be compelled?

Consolidating arbitrations over the objections of a party, therefore, usually will involve denying one or more of the parties its right to appoint an arbitrator. As a practical matter, a court would have to take this action, because the panel would not be formed when this issue arises, but it is not clear that a court would have authority to appoint arbitrators in this situation.

The Federal Arbitration Act, states: ''If in the agreement provision be made for a method of naming or appointing an arbitrator . . ., such method shall be followed.''[7] The Act then provides that if ''any party thereto shall fail to avail himself of such method, or if for any reason there shall be a lapse in the naming of an arbitrator'' then ''the court shall designate and appoint an arbitrator.''[8] When the contract calls for each party to appoint an arbitrator, and each party makes an appointment, it is not plausible to say that any party has failed to avail itself of the contractually prescribed method or that there has been a ''lapse in the naming of an arbitrator.''

The Revised Uniform Arbitration Act has slightly different language. It allows a court to appoint an arbitrator when ''the agreed method fails.''[9] A court applying this statute might conclude that the contractually prescribed method ''fails'' when it yields more than one arbitrator on one side. On the other hand, it is hard to say that the method ''fails'' when each party follows it. At best, the authority of a court to appoint arbitrators for consolidated proceedings is open to debate in those states that have adopted the RUAA.

Even if a court has the authority to appoint the arbitrators for a consolidated proceeding, a court might hesitate to exercise that authority when it involves denying at least one party the right to appoint an arbitrator. Most contracts expressly grants this right to each party. Awards issued by arbitrators selected in a manner that deviates from the contractually prescribed method can be vacated.[10]

7 9 U.S.C. § 5.

8 Id.

9 RUAA § 11(a).

10 Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos, 25 F.3d 223 (4th Cir. 1994); Avis Rent A Car System, Inc. v. Garage Employees Union, 791 F.2d 22 (2nd Cir. 1986).

Denying a party its right to appoint an arbitrator may be too big a price to pay for the benefits of consolidation. It is one of the few procedural rights in arbitration that a party enjoys, and it can be important. Party-appointed arbitrators often advocate their party's position in panel deliberations. Even if they act independently of the parties that appoint them, party appointment gives assurance that the party's positions and evidence are fairly considered in the panel's deliberations, which otherwise are essentially beyond review. It also ensures that the panel includes at least one person with the background and expertise desired by the party, and where important, someone familiar with party's background, nationality and other distinctive attributes.

Moreover, a three-member panel that includes one arbitrator appointed by a single cedent and another arbitrator appointed by a court for a group of reinsurers with conflicting interests and positions is unbalanced in favor of the cedent. A court can avoid this problem by appointing an all-neutral panel, but that step involves depriving even more parties of their right to appoint an arbitrator and deviating even further from contractually prescribed manner of appointing a panel. At present, no clear solution exists to the problem of appointing panels for consolidated arbitrations. Unless a solution is developed for this problem, there will be limited opportunities to consolidate arbitrations.

Freeborn *Your Future Is Our Purpose*

FREEBORN & PETERS LLP

Operator's Manual for Consolidated Arbitrations

Warnings and Directions for Use

Thomas F. Bush

Agreement to consolidate

Duplicative proceedings

Inconsistent results

Compelling consolidation

Fed. R. Civ. P. 42(a): Consolidation

If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

Federal Arbitration Act: consolidation

this page is intentionally left blank

Selecting the arbitration panel

Contract term: appointment of arbitration panel

Each of the contracting parties shall nominate an arbitrator within 30 days of being requested to do so, and the two named shall select an umpire.

Contract term: appointment of umpire

> Each of the contracting parties shall nominate three candidates; each will strike two of the other party's nominees, and the umpire shall be selected by lot from the remaining two candidates.

AAA Commercial Arbitration Rules, R-12

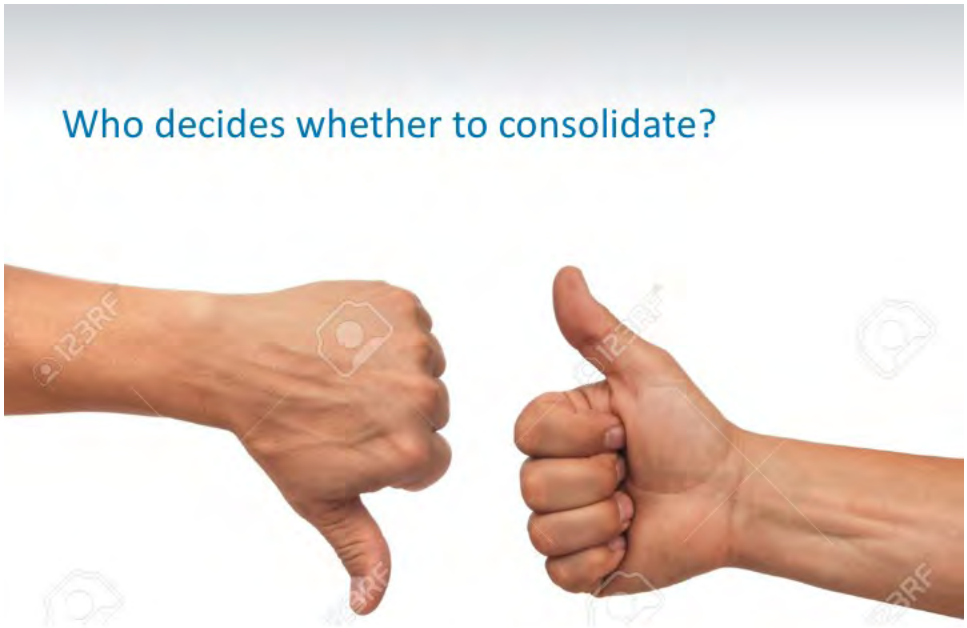
- AAA issues list of 10 arbitration candidates
- Each side –
  - Strikes unacceptable names
  - Ranks remainders by preference
- AAA selects arbitrator who is –
  - Acceptable to both sides
  - Highest level of mutual acceptance

Contract term: act-as-one clause

> If more than one reinsurer is involved in an arbitration, all such reinsurers will constitute and act as one party.

Federal Arbitration Act § 5

- If method for appointment of arbitrators is --
  - Not provided in contract; or
  - Provided but fails;
- Then "the court shall designate and appoint an arbitrator or arbitrators or umpire."


Who decides whether to consolidate?

Thomas F. Bush

Partner
Freeborn & Peters (Chicago, IL)

312.360.6837 | tbush@freeborn.com
https://www.freeborn.com/attorney/thomas-f-bush

Tom Bush is a Partner in the Litigation Practice Group and member of the Firm's Insurance/Reinsurance Industry Group. He has extensive experience in complex litigation involving antitrust, insurance and reinsurance matters, and, in particular, has been very actively involved in the representation of significant lawsuits and arbitrations for global reinsurers in disputes arising from large scale losses. Tom also represents and counsels insurance companies and investment firms on antitrust compliance and on competition issues arising in mergers and acquisitions.

Tom also serves as a commercial arbitrator and is listed on the American Arbitration Association's National Roster of Arbitrators.

Prior to joining Freeborn & Peters, Tom was a Partner at Locke Lord, where he was Co-Chair of the firm's Antitrust Litigation Practice Group. Tom also served as a law clerk to Chief Judge Collins J. Seitz, U.S. Court of Appeals for the Third Circuit.

Practice Areas
- Litigation
- ADR and Arbitration
- Reinsurance Disputes
- Antitrust

Representative Matters
- Defending a major Lloyd's underwriting syndicate in an antitrust class action
- In re Insurance Brokerage Antitrust Litigation, (District Court of New Jersey) Defending Alterra Capital against antitrust and RICO claims against major insurance companies and brokers, arising out of the investigations of the insurance industry by the attorney general of New York
- Representing a large insurance company in arbitration and litigation involving property damage and business loss claims at the World Trade Center
- Representation of leading life reinsurer in multiple arbitrations and litigation
- Represented an international insurance company in litigation and arbitration arising out of the collapse of the world's largest aviation reinsurance pool
- Represented several corporate executives in grand jury investigations involving possible antitrust law violations
- In mergers and acquisitions subject to review by antitrust enforcement agencies, regular advice to parties on filing requirements and antitrust risk and representation before the agencies
- Represented numerous global reinsurance companies in major arbitrations

Honors and Awards
- The International Who's Who of Insurance & Reinsurance Lawyers (2016)

Education
- J.D., University of Chicago Law School, Law Review
- A.B., Dartmouth College, magna cum laude

THE PRICE IS NOT RIGHT: CLASS ACTION RISKS OF COMPARATIVE PRICE ADVERTISING

Brandon Wisoff
Farella Braun + Martel (San Francisco, CA)
415.954.4449 | bwisoff@fbm.com

"Was that retail 'bargain' you received really a bargain?" That is the question being asked by a recent spate of lawsuits filed against prominent retailers. Most of these actions have been brought as private party class actions, but price discount claims have also attracted renewed regulatory attention in recent years. The facts and circumstances of these cases have varied. Some actions have challenged as false a retailer's assertion that a product is "on sale" or has been "discounted" from the retailer's former or regular price. Others have challenged a retailer's supposedly favorable price comparisons to prices of a competitor's same products or to prices of other "similar" products that are not actually of like grade and quality. Still others have challenged a retailer's supposed "discount" from a list price or MSRP at which the product has never sold. Despite these differences, the gravamen of the claim in each instance is typically the same: the retailer is allegedly misleading consumers into believing they are receiving a bargain when they are in fact paying the price at which the product normally sells.

While the majority of these cases have been brought in California (with the benefit of California's liberal consumer protection laws), cases are appearing nationwide and the publicity surrounding them suggests their numbers will only grow. That is especially true given the proliferation of internet price searching tools and the resulting pressure that retailers feel to compete on price and to respond to "bargains" being offered by their competitors. The risk to retailer clients is substantial: some of these claims have resulted in multimillion dollar settlements and/or regulatory fines. Even where cases are terminated early, defense costs can be significant.

In this article, I first summarize the historical background and legal bases of these "false discounting" claims. I review how the FTC, which had developed deceptive pricing guides and then vigorously pursued such claims in the 1960's, had – most likely for policy reasons – all but abandoned enforcement actions related to pricing by the 1980's. I also mention generally various state law deceptive pricing provisions, most of which derive from the FTC model. I next discuss the recent resurgence of these claims over the last few years, primarily via private class actions, but also by regulatory (primarily state regulatory) enforcement actions. After summarizing some of the cases and their outcomes, I conclude by suggesting a few measures that retailers can take to mitigate the risks.

FTC Guides Against Deceptive Pricing

The FTC developed "guides" against deceptive pricing in the late 1950's and subsequently amended them throughout the 1960's; the current guides still date back to 1967.[1] The guides do not have the force of law; they instead "provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry." 16 C.F.R. § 1.5. However, "[f]ailure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions." Id. Under Section 5 of the FTC Act, the Commission has authority to prevent "unfair or deceptive acts or practices in or affecting commerce" which are broadly declared as being "unlawful." 15 U.S.C. § 45. As discussed more fully herein, while there is no private right of action under Section 5 of the FTC Act, many state statutes addressing deceptive trade practices and unfair competition contain restrictions similar to those in the FTC guides. In addition, the guides are often cited in private litigation as setting the norms that should be enforced under state consumer protection law. The guides are thus a critical

1 Guides Against Deceptive Pricing, 23 Fed. Reg. 7965 (Oct. 15. 1958); 16 C.F.R. § 233.1(a) et seq.; 32 Fed. Reg. 15534 (Nov. 8, 1967).

starting point for analyzing the bona fides of an advertiser's pricing claims.

The guides specifically address several forms of pricing claims relevant here, including (1) "former price comparisons," i.e. claimed discounts from an advertiser's own normal price, 16 C.F.R. § 233.1, (2) "retail price" or "comparable value" comparisons, i.e., claimed discounts from what others in the locale are selling the same or similar product, id. § 233.2, and (3) claimed discounts from a list price or MSRP, id. § 233.3. The guides note, however, that "[t]he practices covered in the provisions . . . represent [only] the most frequently employed forms of bargain advertising," and warn that "there are many variations which appear from time to time and which are, in the main, controlled by the same general principles." Id. § 233.5 (emphasis added).

The FTC guides expressly address and provide commentary with examples concerning "former price comparisons," which are described as "[o]ne of the most commonly used forms of bargain advertising," i.e., the "offer of a reduction from the advertiser's own former price for an article." 16 C.F. R. § 233.1(a). While it is certainly risky to claim a discount from a former price at which substantial sales were not actually made, the guides note that "[a] former price is not necessarily fictitious merely because no sales at the advertised price were made." Id. § 233.1(b) They warn, however, that in such cases the advertiser "should be especially careful . . . that the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of his business, honestly and in good faith – and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based." Id. Each factor is important: thus, comparisons to prices that were not openly offered in the recent past for a reasonable period of time in the ordinary course of business are suspect. Id. § 233.1 (d). The guides also warn that comparisons to former prices may be scrutinized regardless of whether the advertisement expressly uses such words as "Regularly," "Usually," or "Formerly" to describe the former price. Id. § 233.1 (e). They also caution against misleading discount claims concerning trivial reductions, such as advertising that an item has been "' Reduced to $9.99,' when the former price was $10." Id.

The guides also expressly address "retail price comparisons" and "comparable value comparisons." Id. §233.2. A "retail price comparison" is where an advertiser "offer[s] goods at prices [claimed to be] lower than those being charged by others for the same merchandise in the advertiser's trade area." Id. § 233.2(a) (emphasis added). A "comparable value comparison" is "[a] closely related" claim where an advertiser "offer[s] a reduction from the prices being charged either by the advertiser or by others in the advertiser's trade area for other merchandise of like grade and quality." Id. § 233.2 (c) (emphasis added). Both types of pricing claims are treated similarly. For "retail price comparisons, the advertiser should "be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area." Id. § 233.2(a). For "comparable value comparisons," the advertiser should "be reasonably certain, just as in the case of comparisons involving the same merchandise, that the price advertised as being the price of comparable merchandise does not exceed the price at which such merchandise is being offered by representative retail outlets in the area." Id. § 233.2(c). Of course, "comparable value comparisons" carry the additional warning that the other comparable merchandise should "in fact, [be] of essentially similar quality and obtainable in the area." Id.

Finally, the guides expressly address price comparisons to a manufacturer's "list price" or "suggested retail price," i.e., MSRP.[2] The guides note that a claimed discount from MSRP can be misleading, reasoning that "only in the rare cases are all sales of an article at the manufacturer's suggested retail or list price." Id. § 233.3(c). They go on to state that "this does not mean that "all list prices are fictitious and all offers of reductions from list, therefore deceptive." Id. § 233.3(d). The guides reason that even if a list price is not the actual price for all sales, it may still be the actual price for many sales "at least in the principal retail outlets which do not conduct their business on a discount basis." Id. The guides thus conclude that an advertised discount from MSRP "will not be deemed fictitious if [the MSRP] is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area . . . ." Id. "Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price." Id. In addition to offering a few illustrative examples, the guides do recognize that one "who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles sold throughout so large a trade area." Id. § 233.3(g). However, they also warn that every advertiser must "in every case act honestly and in good faith in advertising a list price, and not with the intention of establishing a basis, or creating an instrumentality, for a deceptive comparison in any local or other trade area." Id. 233.3(i).

As can be readily seen, the guides talk in general undefined terms like "substantial sales," "reasonably substantial period of time," "recent past," "comparable merchandise," and "good faith." While this flexibility is perhaps needed for regulatory enforcement decisions, use of the guides for standard setting

2 The guides also expressly cover advertising of additional merchandise promised to a customer on the condition that s/he buy a particular other product at a particular price. Id. § 233.4. Litigation involving these types of claims has been less frequent and is not addressed herein.

in private litigation has led to much uncertainty, and thus risk.

Early FTC Enforcement, and Then Abandonment, of Deceptive Pricing Claims

While the FTC's 1960's-era pricing guides still remain in effect, vigorous FTC enforcement of the guides is now rare. So called "fictitious price claims" were in fact a prime focus of the FTC during the 1950's and 1960's, accounting for as much as 30 percent of the Commission's advertising related actions.[3] But as former FTC Chairman Robert Pitofsky noted in 2004:

> By the mid-1970's, however, the FTC's enthusiasm for these cases had cooled considerably. The FTC has not brought a single fictitious price case since 1979, and the last two chairs of the FTC – one presiding during a Democratic Administration and the other during a Republican Administration – have indicated that enforcement actions in the area often do more harm than good.[4]

The reasons for the FTC's change of direction can be surmised from public comments. Pitofsky has noted that a FTC Director of Consumer Protection attributed the Commission's cessation of enforcement in this area to an increase in state enforcement and an unwillingness to use Commission resources merely to "duplicate" those efforts.[5] But the reality is more complicated. Pitofsky himself has argued that FTC enforcement of pricing claims is unnecessary because consumers are in a position to check the validity of exaggerated claims and are unlikely to believe or rely on claims that are seriously exaggerated.[6] He has also argued that such enforcement may actually dampen the very vigorous price competition that ultimately benefits consumers. Because discounters are a natural target for discount pricing claims, aggressive FTC enforcement could raise the costs to sellers "of ascertaining whether particular discount claims are accurate [and thus] deter them from making such claims at all."[7] Another former FTC Chairman, Timothy Muris, has made similar arguments, noting the "risk that such an enforcement campaign will discourage exactly the kind of aggressive price competition that the government should seek to encourage . . . ."[8] In other words, cessation of aggressive FTC enforcement was likely related to economic policy concerns, namely a desire to encourage, rather than dampen, retailers' competition on price rather than just on service or reliability. Aggressive price competition is good for consumers and consumers have the ability, especially now with online price checking tools, to compare prices and evaluate the meaningfulness of claimed discounts.

These same policy concerns and conclusions do not drive the decision making of private class action plaintiff attorneys armed with the still-in-effect FTC guides and an arsenal of state consumer protection laws. Partly for this reason, Pitofsky and others argued in 2004 that "it is time for the FTC to formally abandon its Pricing Guides and for the states, perhaps through the leadership of the National Association of Attorneys General, to repeal their deceptive pricing statutes and regulations."[9] The recent explosion of pricing litigation, increased publicity around misleading pricing claims, and renewed regulatory interest all suggest that outcome is highly unlikely. Retailers, therefore, need to renew and, indeed, ramp up their attention to pricing policy and applicable law.

State Baby FTC Act Analogs for Deceptive Pricing Claims

In evaluating pricing policies, it is also important to take account of state law variations. It is beyond the scope of the article to address applicable law in the 50 different states, but most states have consumer protection statutes modeled on the FTC Act, sometimes called "baby" or "little" FTC acts, some of which expressly incorporate FTC guidance and standards. These state law provisions are typically broad enough to attack any "deceptive" sales practice, whether related to pricing or otherwise.[10] Some states also have statutes that expressly address some types of pricing claims.[11] These state laws vary in whether

3 R. Pitofsky, R. Shaheen and A. Mudge, Pricing Laws Are No Bargain for Consumers, 18-SUM Antitrust at 62 (citing to T. Muris, Economics and Consumer Protection, 60 Antitrust L.J. 103, 112 (1991)).

4 Id.; see also R. Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661 (1977).

5 Id. at 63.

6 Id.

7 Id.

8 T. Muris, Economics and Consumer Protection, 60 Antitrust L.J. 103, 113 (1991)

9 R. Pitofsky, R. Shaheen and A. Mudge, Pricing Laws Are No Bargain for Consumers, 18-SUM Antitrust at 64.

10 Many of these state law provisions are based on uniform or model acts approved by the National Conference of Commissioners on Uniform State Laws, including the 1964 Uniform Unfair and Deceptive Trade Practices Act ("UDTPA"), the 1971 Uniform Consumer Sales Practices Act ("UCSPA") and the 1971 Model Unfair Trade Practices and Consumer Protection Law ("UTPCPL").

11 See, e.g., Alaska Admin. Code tit. 9, § 05.030(1) (illegal to advertise a price comparison "which is based on any price other than the seller's own regular price, unless the seller discloses the nature and source of the referenced comparison price, such as 'manufacturer's list price' or 'comparable retail value.'"); Cal. Civ. Code § 1770(a)(13) (prohibiting "[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions."); Cal. Bus. & Prof. Code § 17501 ("No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement."); D.C. Code Ann. § 28-3904(j) (illegal to "make false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions, or the price in comparison to price of competitors or one's own price at a past or future time."); 815 Ill. Comp. Stat. Ann. 510/2(a)(11) (a seller violates the law if he "makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions"); 940 Mass. Code Regs. 6.05 (providing very detailed restrictions on comparative price advertising including both comparisons to former prices and to other seller's prices); Mich. Comp. Laws Ann. § 445.903, Sec. 3(1)(i) (unlawful to "make[] false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions"); Minn. Stat. Ann. § 325D.44, Subdivision 1 (11) (same); Ohio Statutes Title XIII, Commercial Transactions, Chapter 1345, Consumer Sales Practices, § 1345.02(B)(8) (unlawful to represent "[t]hat a specific price advantage exists, if it does not."); Ohio Administrative Code, Chapter 109:4-3-03 (providing detailed regulations of comparative price advertising for out of store ads); 73 Pa. Stat. Ann. § 201-2(4)(xi) (declaring as deceptive "[m]aking false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions"); Tex. Bus. & Com. Code Ann. § 17.46(b)(11) (declaring as deceptive "making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions"); Wis. Admin. Code ATCP § 124.03(1) (illegal to make price comparison "[b]ased on a price other than one at which consumer property or services were sold or offered for sale by the seller or a competitor, or will be sold or offered for sale by the seller in the future, in the regular course of business in the trade area in which the price

they permit private rights of action under their provisions, whether class actions are allowed and the types of remedies available. Understanding unique state law is obviously important to evaluating claims in any particular state. But also in any class action asserting nationwide or multistate claims, understanding and evaluating state law differences that can create individualized issues and help defeat class certification is essential.[12]

The Recent Resurgence of Comparative Pricing Claims

After decades of relative quiet, deceptive pricing, and related litigation, has again become headline material. A recent New York Times article headline proclaimed "Some Online Bargains May Only Look Like One," and its author opined that "[l]ist price is a largely fictitious concept, promoted by the brand or manufacturer and adopted by the retailer to compel the customer into pushing the buy button."[13] The sheer number of these headlines is a wake-up call for retailers: "More Retailers Accused of Misleading Consumers with Fake Price Schemes,"[14] "Los Angeles Sues Four National Retailers Over Sale Prices,"[15] "J.C. Penny Sued for Never Charging Full Price,"[16] "It's Discounted, but Is It a Deal? How List Prices Lost Their Meaning,"[17] "Fake Sales Can Cost You,"[18] "The Dirty Secret of Black Friday 'Discounts': How Retailers Concoct 'Bargains' for the Holidays and Beyond,"[19] "J. Crew Sued Over Misleading Online Sales,"[20] "Justice Stores to Give Refunds to Shoppers Through Class-Action Settlement,"[21] "DSW Class Action Says Pricing Strategy Deceives Customers,"[22] "TJ Maxx Sued Over 'Compare At' Prices,"[23] "Is the Price Right? Nordstrom Facing Class Action Over 'Compare At" Pricing,"[24], "Outlet Store Bargains May Be Cheaper Quality, Lawsuit Claims,"[25] "'Fake' Sales Trick Customers at Major Stores, Study Says."[26]

And this sampling of headlines is just that; there are many more articles, reports and cases out there – and not all lawsuits receive significant media attention so the numbers are probably higher than might otherwise be estimated. According to one source, the organization Truth In Advertising.org has recently been tracking 61 federal class actions alone involving alleged fictitious pricing.[27] Forty-nine of those cases had been filed in 2015-16 alone.[28] This, of course, does not account for state court actions or regulatory proceedings. So the numbers are clearly meaningful, perhaps to some even staggering, and on the rise.

Possible Explanations for The Renewed Interest in Pricing Claims

While it is not clear what triggered this avalanche of renewed pricing litigation, several factors undoubtedly contributed to the trend. The early 2000s' saw some isolated activity,[29] but perhaps the first truly high-profile case in recent years was the State of California's enforcement action against Overstock.com. In November 2010, a group of California District Attorneys sued Overstock.com in California state court in Alameda County alleging violations of various

comparison is made"); id. § 124.03(2) (illegal to make price comparison "[i]n which the consumer property or services differ in composition, grade or quality, style or design, model, name or brand, kind or variety, or service and performance characteristics, unless the general nature of the material differences is conspicuously disclosed in the advertisement with the price comparison"); Wis. Admin. Code ATCP §§ 124.04, 124.05 (providing detailed regulations for when price discounts can be claimed); Va. Code Ann. § 59.1-207.41 (provisions governing former price comparisons); id. § 59.1-207.42 (provisions governing comparing prices to competitor's prices); id. § 59.1-207.43 (provisions governing comparisons to market value, list price or MSRP).

12 See, e.g., Mazza v. American Honda Motor Co., 666 F.3d 581 (9th Cir. 2012) (vacating nationwide class certification order finding material differences in state consumer protection laws made class overbroad).

13 D. Streitfeld, Some Online Bargains May Only Look Like One, N.Y. Times, Apr.13, 2016, https://www.nytimes.com/2016/04/14/technology/some-online-bargains-may-only-look-like-one.html?_r=0.

14 B. Tuttle, More Retailers Accused of Misleading Customers with Fake Price Schemes, Money, Jan. 7, 2016 (mentioning suits against J.C. Penny, Kohl's, Macy's, Bloomingdale's and Jos. A. Bank), http://time.com/money/4171081/macys-jc-penney-lawsuit-original-prices/ .

15 Los Angeles Sues Four National Retailers Over Sale Prices, Wall St. J., Dec. 9, 2016 (AP) (describing four lawsuits filed against J.C. Penny, Sears, Macy's and Kohl's by the Los Angeles City Attorney's Office wherein the retailers were accused of "duping shoppers into believing they got bigger discounts than they actually did."), https://www.wsj.com/articles/los-angeles-sues-four-national-retailers-over-sale-prices-1481250632.

16 B. Tuttle, J.C. Penny Sued for Never Charging Full Price, Money, May 20, 2015 (claiming that: "items were given inflated original prices solely for the purpose of making the inevitable discounts seem more impressive. It's a classic sales strategy known as 'price anchoring,' and J.C. Penney is hardly the only store known to engage in the practice," and commenting "Let's hope that regardless of the results of any lawsuits, stores get the message that the common practice of listing items at inflated, meaningless original prices is bad for business."), http://time.com/money/3890762/jc-penney-lawsuit-deceptive-pricing/.

17 D. Streitfeld, It's Discounted, but Is It a Deal? How List Prices Lost Their Meaning, N.Y. Times, Mar. 6, 2016 (referencing lawsuits against Overstock, Amazon and Wayfair), https://www.nytimes.com/2016/03/06/technology/its-discounted-but-is-it-a-deal-how-list-prices-lost-their-meaning.html.

18 A. Giorgianni, Fake Sales Can Cost You, Consumer Reports, June 22, 2013, http://www.consumerreports.org/cro/news/2013/06/fake-sales-can-cost-you/index.htm.

19 S. Kapner, The Dirty Secret of Black Friday 'Discounts': How Retailers Concoct 'Bargains' for the Holidays and Beyond, Wall St. J., Nov. 25, 2013, https://www.wsj.com/articles/SB10001424052702304281004579217863262940166.

20 E. Adams & A. Chapin, J. Crew Sued Over Misleading Online Sales, Racked, Mar. 3, 2016 (noting lawsuits against J. Crew, T.J. Maxx, DSW, Guess, Kohl's and Burberry), http://www.racked.com/2016/3/3/11153726/j-crew-website-sale-lawsuit.

21 S. Harris, Justice Stores to Give Refunds to Shoppers Through Class-Action Settlement, Cleveland Plain Dealer, Mar. 12, 2015 (describing settlement in class action brought under Ohio's Consumer Sales Practices Act challenging illusory discounts), http://www.cleveland.com/consumer-affairs/index.ssf/2015/03/justice_stores_to_give_refunds.html.

22 P. Tassin, DSW Class Action Says Pricing Strategy Deceives Customers, Top Class Actions, June 17, 2016 (describing allegations in California lawsuit that DSW "uses . . . 'Compare At' prices to give customers the impression that the item is being offered at a bargain price, when in fact it's not being offered at any discount at all"), https://topclassactions.com/lawsuit-settlements/lawsuit-news/338103-dsw-class-action-says-pricing-strategy-deceives-customers/.

23 TJ Maxx Sued Over "Compare At Prices", ABC News, July 23, 2015, http://abcnews.go.com/Business/tj-maxx-sued-compare-prices/story?id=32636566.

24 A. Lupo, S. Bruno, E. Pulliam & T. Maginnis, Is the Price Right? Nordstrom Facing Class Action Over "Compare At" Pricing, Fashion Counsel, Dec. 1, 2015, https://fashioncounsel.com/articles/price-right-nordstrom-facing-class-action-over-%E2%80%9Ccompare-at%E2%80%9D-pricing.

25 R. Mac & C. Cutler, Outlet Store Bargains May Be Cheaper Quality, Lawsuit Claims, NBC Los Angeles, Nov. 25, 2015 (describing class action lawsuits filed against Michael Kors, Kenneth Cole, Nordstrom Rack, Columbia, Guess, Levi Strauss and Jos. A. Bank, alleging that their outlet stores carry cheaper, inferior versions of products sold in their regular stores, but misleadingly compare outlet product prices to the prices of the non-comparable regular store products), http://www.nbclosangeles.com/news/local/Outlet-Store-Bargains-May-Actually-be-Cheaper-Quality-Lawsuit-Claims-353906491.html.

26 H. Weisbaum, 'Fake' Sales Trick Customers at Major Stores, Study Says, NBC News, May 29, 2015, http://www.nbcnews.com/business/consumer/fake-sales-trick-customers-major-stores-study-says-n366676.

27 C. Salls, Group Tracking 61 Federal Class Actions Over Alleged Fictitious Pricing, Legal Newsline, July 12, 2016, http://legalnewsline.com/stories/510955269-group-tracking-61-federal-class-actions-over-alleged-fictitious-pricing.

28 Id. (noting 25 filed in 2015 and 24 filed in 2016). The article specifically discusses a false discounting claimed filed in Los Angeles federal court against Harbor Freight Tools.

29 Harris v. HSN LP, 2007 WL 61068 (Cal. App. 4th Dist. Jan. 10, 2007), State Unfair Trade Practices Law (CCH) ¶ 31,353 (unpublished and non-citable decision denying class certification of false pricing claims); Mahfood v. QVC, Inc., 2008 WL 5381088 (C.D. Cal. Sept. 22, 2008) (denying class certification of false pricing claims finding that individual issues predominated).

California consumer protection laws.[30] They alleged that Overstock deceptively displayed a "list price" above a price at which Overstock offered an item, with a representation of the supposed "savings" (in dollar amounts and as a percentage), and then also used the terms "compare at" or "compare" instead of "list price." Id. They alleged that the list price was false because Overstock instructed its employees to choose the highest price they could find as a reference price ("list price") or that they simply made up a reference price using a multiplier on Overstock's wholesale cost. Id. In 2014, following trial, the court rejected an award of consumer restitution, but awarded $6,828,000 in civil penalties, and an injunction against the conduct it found to be false or misleading. The judgment is now on appeal, but regardless of outcome, the publicity surrounding the case, especially in California, has no doubt spurred interest by the plaintiffs' class action bar in these types of cases.

This type of high-profile regulatory publicity has not been limited to California. While coming later in the timeline, the New York Attorney General began investigating Walgreens' advertising and pricing practices in early 2014. The investigation became public when in April 2016 it entered into a settlement with the retailer over allegations, among others, that Walgreen misrepresented some deals as "Smart Buy" or "Great Buy" when the advertised price was not different than the original selling price.[31] It also alleged that Walgreen's labeled some items as "Last Chance" or "Clearance" when the items would remain on sale for many months. Id. In addition to agreeing to a compliance program, Walgreens agreed pay the state $500,000 in penalties, fees and costs. Id. This renewed interest in pricing litigation by state authorities certainly helps to explain the willingness of class action attorneys to invest in these types of cases.

There has also been renewed interest in, and publicity concerning, pricing claims even at the federal level. On January 30, 2014, three U.S. Senators and a Congresswoman32 sent a letter to FTC Chairwoman Edith Ramirez, calling on the agency to look into claims that merchants may be selling lower quality items produced specifically for outlet stores without properly informing consumers about the difference between those items and the higher-quality products found in regular retail stores. The letter stated in relevant part:

> We have no objections to the evolution of the type of merchandise offered at outlets. However, we are concerned that outlet store consumers are being misled into believing they are purchasing products originally intended for sale at the regular retail store. Many outlets may also be engaged in deceptive reference pricing. It is a common practice at outlet stores to advertise a retail price alongside the outlet store price—even on made-for-outlet merchandise that does not sell at regular retail locations. Since the item was never sold in the regular retail store or at the retail price, the retail price is impossible to substantiate. We believe this practice may be a violation of the FTC's Guides Against Deceptive Pricing (16 CFR 233).[33]

Then, on Black Friday in 2014, Senator Blumenthal of Connecticut, one of the authors of the letter to the FTC, held a news conference warning holiday shoppers of deceptive price comparisons and mentioning his call to the FTC for action. At least one news report covering the press conference mentioned the California District Attorneys' case against Overtock.com and the $6.8 million in fines that the company was ordered to pay.[34]

But aside from publicity that regulatory action has generated, an important factor contributing to increased pricing litigation is the California Supreme Court's 2011 decision in Kwikset Corp. v. Superior Court.[35] That case did not involve deceptive pricing, but rather allegations that a lock manufacturer misrepresented its products as "Made in the USA," when in fact many of the lock components were manufactured abroad. The principal legal issue was whether the plaintiffs "had been injured in fact" and "lost money or property" as a result of the alleged misrepresentation, as required by the standing provisions of California's Unfair Competition Law, one of California's most prominent consumer protection statutes. The Supreme Court sided with plaintiffs, rejecting the argument that there had been no actual loss of money or property because the plaintiffs had received locksets that were not overpriced or defective. Id. at 331-32. The Court instead held that when a consumer relies on misrepresentations in purchasing a product that the individual would not have purchased but for the misrepresentation, the consumer has not received the "benefit of the bargain" even if the product is worth in market terms the price that was paid. Id. at 333-34.[36] Thus, while the decision did not address deceptive pricing, it provided at least the theoretical vehicle by which the private plaintiff's bar could claim class-wide damages in deceptive pricing cases; they could allege a false representation of price without –at least for standing purposes under California law – having to further allege (and then prove) that the products were not worth what was paid

30 People of Cal. v. Overstock.com, Inc., No. RG10-546833, Statement of Decision (Alameda Cnty. Super. Ct., Feb. 5, 2014).

31 In the Matter of the Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of Walgreen Co., Attorney General of the State of New York Bureau of Consumer Frauds & Protection, Assurance No. 16-085.

32 Senators Sheldon Whitehouse (D-RI), Richard Blumenthal (D-CT), Ed Markey (D-MA) and Rep. Anna G. Eshoo (D-CA).

33 Text of letter available at: https://www.whitehouse.senate.gov/news/release/sens-and-rep-to-ftc-outlet-stores-may-be-misleading-consumers

34 M. Pazniokas, On Black Friday, Blumenthal Shops for Media, The CT Mirror, Nov. 28, 2014.

35 Kwikset Corp. v. Superior Court, 51 Cal. 4th 310 (2011).

36 The Supreme Court offered several analogies, reasoning for example that a Jew or Muslim does not receive the benefit of the bargain in purchasing food falsely represented as kosher or halal even if the food is otherwise fairly priced from a general market perspective. Id.

(an issue that could implicate individualized issues in any putative class action case involving multiple products).[37]

The Ninth Circuit Court of Appeals then gave a boost to pricing litigation in its 2013 Hinojos v. Kohl's38 decision by applying the Kwikset holding in a deceptive pricing case. Plaintiffs there asserted class action claims under California's consumer protection statutes against a retailer accused of claiming its prices were discounted from the "original" or "regular" price when in fact the products typically sold at the supposed discounted price. The district court had dismissed the action for lack of standing because, unlike in Kwikset where the composition of the products (locksets) was different than represented (because they were not actually "Made in the USA"), the Kohl's plaintiffs received the exact items they wanted at the exact prices they agreed to pay. Whether or not those prices were in fact discounted did not, according to the district court, cause any economic injury to plaintiffs. The Ninth Circuit reversed finding that Kwikset controlled, thus signaling to the plaintiffs' class action bar that these kinds of actions were clearly in play, at least at the pleadings stage.

These California legal developments helped open to door to class action pricing claims which had previously been met with resistance in some jurisdictions that did not recognize actual loss based solely on the allegation of a false discount. Thus, in Kim v. Carter's, Inc., 598 F.3d 362, 363-64 (7th Cir. 2010), the Seventh Circuit dismissed false pricing claims under Illinois law, explaining: "The plaintiffs agreed to pay a certain price for Carter's clothing, which they do not allege was defective or worth less than what they actually paid. Nor have plaintiffs alleged that, but for Carter's deception they could have shopped around and obtained a better price in the marketplace." Id. at 365. The court concluded that the plaintiffs "got the benefit of their bargain and suffered no actual pecuniary harm." Id. at 366; see also Mulligan v. QVC, Inc., 888 N.E.2d 1190, 1197 (Ill. App. Ct. 2008) (finding that the plaintiff suffered no actual damage from QVC's listing its actual sales prices next to substantially higher, but allegedly fictitious "retail values" where the plaintiff "agreed to purchase some jewelry items for a certain price" and could not show "that the value of what she received was less than the value of what she was promised"). Some recent cases outside California still take that approach. Thus, in Shaulis v. Nordstrom Inc., 120 F. Supp. 3d 40 (D. Mass. 2015), the court accepted plaintiff's allegation that she would not have purchased a sweater but for an alleged false discount, but still dismissed the claim under Massachusetts law. The court reasoned that "there is no amount of money damages that could be awarded to plaintiff to make her whole" because, although "[s]he paid $49.97 for a sweater on the alleged belief 'that she saved at least 77% on her purchase,'" "it appears that she paid $49.97 for a sweater that is, in fact, worth $49.97" and plaintiff "still has the sweater in her possession." Id. at 51. The court concluded that "the fact that plaintiff may have been manipulated into purchasing the sweater because she believed she was getting a bargain does not necessarily mean she suffered economic harm: she arguably got exactly what she paid for, no more and no less." Id. at 51–52. While it is not yet clear what impact California's Kwikset/Hinojos decisions will have outside California, those decisions have clearly opened the floodgates to pricing litigation in California.

Also likely contributing to the increase in pricing litigation is the "the one thing begets another" syndrome: some recent class action pricing cases, including cases outside California, have resulted in substantial settlements. For example, in 2016, Justice Stores agreed in a federal action brought in Pennsylvania to create a $50.8 million settlement fund for the claims of class members who bought products advertised as 40% off when they in fact allegedly sold at the regular price.[39] In 2016, a court-approved settlement in New York required Michael Kors to create a $4.875 million settlement fund and pay $975,000 in fees to resolve allegations that it (1) advertised discounts in its outlet stores off supposed MSRPs that the products had never actually sold at and (2) falsely compared inferior products manufactured exclusively for its outlet stores to different products sold in its regular retail outlets.[40] These kinds of public settlements are, of course, the best advertising to get the plaintiffs' bar's further attention.

Finally, while strictly supposition, this author believes that the recent increase in false pricing claims results in part from an actual increase in deceptive pricing advertisements fostered by an internet economy. Because internet pricing tools have enabled consumers instantly to check prices across a wide spectrum of sellers, retailers are pressured to compete more and more on price. Whenever a retailer exaggerates pricing claims, others may likely feel compelled to follow or be left behind in the race to claiming the "lowest" price. Ironically, the ability of consumers to check prices, and thus exaggerated discount claims, also mitigates any claimed harm from such misrepresentations. Thus, the very factors that caused the FTC to stop policing these claims – the ability of consumers to protect themselves and the desire to promote vigorous price competition – have come full circle to the opposite result: an increase in pricing claim enforcement and litigation.

Some Recent Cases and Results

37 The Court was careful to note the issue of standing is distinct from the issue of restitution, so courts can still require evidence of economic harm in evaluating whether and in what amount restitution is appropriate. Id. at 335-37 & n. 15.

38 Hinojos v. Kohl's Corp., 718 F.3d 1098 (9th Cir. 2013).

39 Rougvie v. Ascena Retail Grp., Inc., No. CV 15-724, 2016 WL 4111320, at *1 (E.D. Pa. July 29, 2016).

40 Gattinella v. Kors, No. 14CV5731, 2016 WL 690877, at *1-*2 (S.D.N.Y. Feb. 9, 2016).

Although some of these recent cases have settled for substantial amounts, the results of cases actually litigated have been mixed. Aside from factual differences that drive different results, the courts have naturally been struggling develop a consistent approach to these claims given their sudden appearance in large volumes and the lack of any (yet) well-established appellate authority. But several cases are now pending on appeal, so the legal landscape is beginning to take shape. While the cases are too numerous to summarize, a few examples are illustrative.

A number of cases have been dismissed at the pleading stage because the court found the allegedly false representation to be too unspecific to be misleading or to pass muster under fraud pleading requirements. For example in Sperling v. DSW Inc., No. EDCV 15-1366-JGB (SPX), 2016 WL 354319, at *6 (C.D. Cal. Jan. 28, 2016), the court dismissed claims that DSW's "Compare At" prices falsely suggested that the same products regularly sold elsewhere at the "Compare At" prices when, according to plaintiffs, those prices were higher than actual market prices. The court found plaintiffs' allegations to be too conclusory and lacking the necessary specifics showing the actual prevailing prices elsewhere of the products she purchased at the time she purchased them. The decision is currently on appeal.[41]

Other courts have found similar allegations adequate to survive a motion to dismiss. Thus, in Branca v. Nordstrom, Inc., No. 14CV2062-MMA (JMA), 2015 WL 10436858, at *1 (S.D. Cal. Oct. 9, 2015), the court after partially granting an earlier motion to dismiss, denied a motion to dismiss an amended complaint challenging pricing comparisons at Nordstrom's Rack (outlet) stores. Id. at *1. The court found that plaintiffs had properly stated a claim by alleging that Nordstrom's "Compare At" price was misleading because it implied that the products had previously sold at Nordstrom or elsewhere for that amount when in fact the products were manufactured exclusively for Rack stores and thus never sold elsewhere at any price. Id. at *7. In Chester v. TJX Companies, Inc., No. 5:15-CV-01437-ODW (DTB), 2016 WL 4414768, at *7 (C.D. Cal. Aug. 18, 2016), the court denied a motion to dismiss by TJ Maxx, Marshalls and HomeGoods, finding that those retailers use of ambiguous "Compare At" pricing could falsely suggest that substantial sales of the products had occurred elsewhere at those prices. Similarly, in Jacobo v. Ross Stores, Inc., No. CV-15-04701-MWF-AGR, 2016 WL 3483206, at *3 (C.D. Cal. June 17, 2016), the court denied dismissal of certain of plaintiffs' claims finding adequate the allegation that consumers were misled by Ross' "Compare At" prices because those prices referred to similar, and not identical, items sold elsewhere.

Many of these recent pricing cases are still pending, on appeal or have settled, but a few examples of those that have proceeded past the pleading stage highlight the risks. Thus, in Spann v. J.C. Penney Corp., 307 F.R.D. 508, 517 (C.D. Cal. 2015), modified, 314 F.R.D. 312 (C.D. Cal. 2016), the court granted certification of a California class of purchasers who bought a private or exclusive J.C. Penney brand that was advertised at a discount of at least 30% off of a stated "original" or "regular" price and who had not received a refund. It found that class certification was appropriate because "the thrust of plaintiff's claim . . . is that defendant operated a systematic and pervasive unlawful price comparison policy" that did not require individual proof, and because "'causation, on a classwide basis, may be established by materiality, meaning that if the trial court finds that material misrepresentations have been made to the entire class, an inference of reliance arises as to the class[.]'" Id. at 522. Since the items at issue were sold only in J.C. Penney stores, it found that sales at J.C. Penney stores (and not sales of similar items in other stores) was the proper baseline for determining the actual prevailing prices. This also led the court to conclude that that common questions predominated. Id. at 523-27. Most troubling from a defense perspective was the court's analysis of possible classwide monetary relief which it concluded could be measured under various methods: "1) complete restitution, measured by the full purchase price paid by each class member; 2) restitution based on the false 'transaction value' promised by JC Penney, measured by the amount that each class member would have paid had JC Penney offered a discount from the actual 'regular' price; or 3) restitution in the amount that JC Penney profited from sales of products based on deceptive price comparisons." Id. at 529-31. Not surprisingly, the case settled soon after this ruling with J.C. Penny agreeing to pay up to $50 million in claims and to modify its sales practices. Spann v. J.C. Penney Corp., No. SACV 12-0215 FMO (KESX), 2016 WL 5844606, at *2-*3 (C.D. Cal. Sept. 30, 2016).

In Chowning v. Kohl's Dep't Stores, Inc., No. CV 15-08673 RGK(SPX), 2016 WL 1072129 (C.D. Cal. Mar. 15, 2016), the court took a different approach and granted summary judgment on plaintiffs' restitution claims. Citing to the Kwikset/Hinojos decisions, the court found that plaintiffs had sufficiently alleged economic harm for standing purposes under California law. Id. at *2. But it also found that to obtain restitution, plaintiff must abide by three principles: "restitution cannot be ordered exclusively for the purpose of deterrence"; "any proposed method [of restitution] must account for

41 See also Nunez v. Best Buy Co., 315 F.R.D. 245 (D. Minn. 2016) (dismissing false discount allegations under FRCP 9(b) for failure to provide details of the fraud including information showing that the advertised regular price for his product was different than represented on a date prior to his purchase); Waldron v. Jos. A. Bank Clothiers, Inc., No. 12CV02060DMCJAD, 2013 WL 12131719, at *3 (D.N.J. Jan. 28, 2013) (dismissing allegations that Jos. A. Bank falsely promotes "sales" of limited duration when in fact its products are perpetually on sale, finding that plaintiffs did not adequately allege that Jos. A. Bank's conduct deviated from the norm of reasonable business practices or that the purported "sale" price is the same as the true regular price.); but see Rubenstein v. Neiman Marcus Grp. LLC, No. 15-55890 (9th Cir. April 18, 2017) (reversing district court's dismissal at pleading stage of a complaint alleging that Neiman Marcus through the use of "Compare To" labels falsely compared prices of inferior Last Call outlet store products to regular products sold in traditional Neiman Marcus stores, holding that plaintiffs pled enough facts to raise plausible claim and that Rule 9(b) requirements can be relaxed where defendant has access to needed facts).

the benefits or value that a plaintiff received at the time of purchase"; and "the amount of restitution ordered must represent a measurable loss supported by the evidence." Id. at *6. Using these principles, the court found that plaintiff was not entitled to restitution. The court concluded that a "full refund" model (i.e., rescission) was inappropriate because it did not account for the value received. Id. at*7. The court also for the same reason rejected the notion that restitution could be measured by the profits earned on the deceptively labeled goods: "Plaintiff does not dispute that she gained some value from the mislabeled items. Therefore, a disgorgement of full profits would be inappropriate because the amount of Defendant's profit does not accurately represent the amount Plaintiff lost in this case." Id. at *9. Finally, the court rejected a restitutionary model whereby the plaintiff received the benefit of the discount she was promised in the deceptive labels because it is more akin to expectation damages instead of plaintiff's lost money. Id. at *10. Thus in short, although plaintiff suffered "lost money or property" (because she purchased a product she would not have purchased had she known the truth), the court found the plaintiff did not pay more than what she received and was not entitled to restitution and thus granted summary judgment as to the restitution claim in favor of the defendant. Despite this favorable defense outcome, Kohl's ended up having to pay a lot of money to resolve the claims. After granting Kohl's summary judgment, the Chowning court went on to deny class certification of an injunctive relief class, finding the Chowning action duplicative of another action against Kohl's brought by plaintiff Russell. See Chowning v. Kohl's Dep't Stores, Inc., No. CV 15-08673 RGK (SPX), April 1, 2016 Civil Minutes, Docket No. 123) (C.D. Cal.). But in the Russell v. Kohl's action, Kohl's ultimately settled with the court certifying a settlement class consisting of California consumers who purchased from Kohl's items at a discount of at least 30% off the stated "original" or regular price. See Russell v. Kohl's Dep't Stores, Inc., No. EDCV 15-1143 RGK (SPX), 2016 WL 6694958, at *3 (C.D. Cal. Apr. 11, 2016); see also id. at Docket Nos. 86-1 (8/15/16 Memo. In Support of Motion for Final Approval), 89 (9/12/16 Minutes Granting Approval). Under the settlement terms, Kohl's agreed to make available $6.15 million to resolve the litigation, with roughly $3.6 million available to the Class and to be distributed in the form of gift cards, and with the remainder set aside of administration costs, attorneys' fees, and class representative payments. Russell, 2016 WL 6694958, at *3; Docket No. 86-1 at 1.

In sum, there presently is no consistent outcome in these cases even on basic issues such as whether the term "Compare At" is alone actionable or whether restitution is available and if so how it is measured. The risks, especially of class certification, are thus substantial.

Some Modest Proposals for Mitigating the Risks

Retailers facing these risks can take several measures to help mitigate these growing risks.

First, and perhaps obvious, retailers should familiarize themselves with the laws applicable to their sales. As noted, the FTC guides are an important starting point, but some states have very specific requirements for making certain kinds of price comparisons and the rules do vary, sometimes significantly, by state.

Second, retailers should develop a pricing policy that is both substantively and procedurally defensible under applicable law. This will likely will mean putting into place more robust controls and practices around how a "comparable" price reference is derived. While retailers will not have access to competitors' sales information, they can research competitor prices online or at stores. Choosing as the comparison price only the highest price observed at a single outlet will be riskier than choosing a price advertised extensively by others. The latter is easier to defend as a "prevailing" price while the former could easily be discounted as isolated and insignificant. Retailers choosing to compare discounts to their own former prices should ensure that the products were offered at the former price for a reasonable period of time in the recent past. For example, some states, including California, require that former prices be the prevailing price at which the product was offered in the prior three months. See supra at n. 11. Pricing personnel should receive regular training on pricing laws and company policies. Comparison prices should be updated on a periodic basis so they do not become stale, and retailers, especially large retailers, should consider a periodic internal audit/approval process to ensure that comparisons are defensible.

Third, retailers should (1) document and (2) preserve records showing the work they put into deriving accurate and contemporaneous reference prices. Without written records of what was done, pricing personnel will unlikely remember what they did to verify any price, let alone the hundreds of prices over time that are typically at issue in any litigation. Factfinders may also disbelieve retailers who claim price verification without written records or at least conclude that the lack of written records demonstrates a lack of seriousness in documenting accurate prices. Whatever survey information was relied upon in adopting reference prices should be preserved for the length of any applicable statute of limitations period. In California, the four-year limitations period under the Unfair Competition Law would be a sensible guide.

Fourth, retailers should consider the context and ordinary meaning of terms used in any comparative pricing claims. For example, "Compare to MSRP" will be more meaningful

than simply "Compare At" if the reference is to MSRP.[42] Similarly, if the comparison reference price is at the higher end of the spectrum of observed prices elsewhere, consider adding descriptive language to the comparison, such as "up to__ elsewhere."

Fifth, retailers should where possible provide customers with accessible disclosure of the meaning of terms used in any comparative pricing claims. Thus, for example, if a "Compare At" price is meant to refer to a "comparable value," item, and not the same exact item, that fact should be disclosed to customers at point of sale. This is easier to do for online sales where terms and conditions can be provided to customers prior to check out. Even there, retailers should consider the conspicuousness considerations set forth in the FTC guides for .com disclosures or in other applicable state law. While point of sale disclosures are more difficult for brick and mortar stores, retailers should consider making the most important disclosures on any "Compare At" type labeling or at least on signage in the stores. If detailed disclosures are not practical, consider at least signage that says something like: "For more information on our 'Compare At' Prices, Please Consult A Sales Associate or visit www.___.com" Sales representatives should then be given scripts with appropriate disclosures that can be provided on request.

Sixth, certainly for any online sales, retailers should consider adding a class-waiver arbitration provision to the terms and conditions of service. The provision should clearly and conspicuously disclose that by buying items online, customers are (1) agreeing to individually arbitrate any disputes arising out of or relating in any way to their purchases, (2) waiving any right to a trial in court or by jury and (3) waiving any right to proceed in arbitration or elsewhere is a class or other representative capacity.

Seventh, retailers should consider offering a written price guaranty or other money back policy to dissatisfied customers who claim they were misled by any price comparison and should advertise the guaranty as part of any price claim. While perhaps not dispositive from a legal perspective, courts may be less likely to certify a class where consumers have a much simpler, convenient and expeditious remedy that would afford them complete relief.

42 This is example is used for illustrative purposes only. Thus, as described elsewhere herein, any reference to MSRP can be risky if actual sales do not occur at MSRP. But the point is to include enough information in the description so as to avoid misinterpretation.

Is Everything Perpetually On Sale?

Deceptive Pricing

- Pricing claims that create the illusion of a bargain where none exists
- Most common types of discount claims
  - Claimed discounts off one's own former or regular prices
  - Claimed discounts off prices that others are offering to sell the same or similar products
  - Claimed discounts off a list price or MSRP

FTC Guides

- 16 C.F.R. § 233 "Guides Against Deceptive Pricing"
- Not new
- First developed in late 1950's
- Current version dates back to 1967

Former Price Comparisons 16 C.F.R § 233.1

- Discusses reductions from the advertiser's own former price for an article.
- "A former price is not necessarily fictitious merely because no sales at the advertised price were made. " *Id*. § 233.1 (b)

Former Price Comparisons (cont.)

- FTC Will Scrutinize Whether:
  - the product was openly and actively offered for sale at the referenced former or regular price
  - for a reasonably substantial period of time
  - in the recent, regular course of business
  - honestly and in good faith, and not to establish an inflated price on which to base a supposed discount

Retail Price and Comparable Value Comparisons 16 C.F.R. § 233.2

- Retail Price Comparison: claiming prices that are lower than those being charged by others for the *same* merchandise.
- Comparable Value Comparison: claiming reductions from prices being charged either by the advertiser or by others for *merchandise of like grade and quality.*

Retail Price Comparisons

- Advertiser should "be reasonably certain" that the higher advertised price:
  - does not *appreciably exceed* the price
  - at which *substantial sales* of the article
  - are being made *in the area*. *Id*. § 233.2(a).

Comparable Value Comparisons

- Advertiser should "be reasonably certain" that the price advertised for comparable merchandise
  - does not exceed the price being offered by representative retail outlets in the area
  - and that the comparable merchandise is in fact of essentially similar quality obtainable in the area

Comparable Value Comparisons

- Advertiser should "be reasonably certain" that the price advertised for comparable merchandise
  - does not exceed the price being offered by representative retail outlets in the area
  - and that the comparable merchandise is in fact of essentially similar quality obtainable in the area

Discounts From List Price or MSRP 16 C.F.R. § 233.3

- Such comparisons will not be deemed fictitious if:
  - substantial (not isolated or insignificant) sales
  - are made at that price
  - in the advertiser's trade area

Discounts From List Price or MSRP (cont.)

- There is a "clear and serious danger" of the consumer being misled if the list price
  - is significantly in excess
  - of the highest price
  - at which substantial sales
  - are made in the trade area

State Pricing Regulations

- Most states have "Baby" or "Little" FTC Acts broad enough to prevent deceptive pricing
- Many have provisions specific to pricing
- Some are more restrictive than the FTC Guides
- These laws can vary significantly from state to state

FTC Deceptive Pricing Enforcement

- Prime FTC Focus in 1950's and 1960's
  - Accounting for up to 30% of the Commission's Advertising Related Actions
- Almost Non-Existent After Late 1970's

Possible Reasons for FTC Shift

- Increase in state enforcement and unwillingness to use Commission resources to duplicate those efforts
- Consumers' ability to check, and unlikelihood of relying on, seriously exaggerated claims
- Big one: economic policy concerns over stifling price competition

Views of Former FTC Chairs

- Timothy Muris has noted the "risk that such an enforcement campaign will discourage exactly the kind of aggressive price competition that the government should seek to encourage . . . ."
  - T. Muris, *Economics and Consumer Protection*, 60 Antitrust L.J. 103, 113 (1991)

Views of Former FTC Chairs (cont.)

- Robert Pitofksy has argued:"it is time for the FTC to formally abandon its Pricing Guides and for the states, perhaps through the leadership of the National Association of Attorneys General, to repeal their deceptive pricing statutes and regulations."
  - R. Pitofsky, R. Shaheen and A. Mudge, *Pricing Laws Are No Bargain for Consumers*, 18-SUM Antitrust at 64 (2004).

Not Likely to Happen

- Avalanche of recent deceptive pricing claims
- Truth In Advertising.org has recently been tracking 61 federal class actions alone involving alleged fictitious pricing
- Forty-nine of those cases had been filed in 2015-16 alone
  - C. Salls, *Group Tracking 61 Federal Class Actions Over Alleged Fictitious Pricing*, Legal Newsline, July 12, 2016

Some Recent Headlines

- "Some Online Bargains May Only Look Like One"
  - N.Y. Times, Apr. 13, 2016
- "More Retailers Accused of Misleading Consumers with Fake Price Schemes"
  - Money, Jan. 7, 2016
- "Los Angeles Sues Four National Retailers Over Sale Prices"
  - Wall St. J., Dec. 9, 2016

Some Possible Explanations

- Increased regulatory publicity
  - Overstock.com ordered in 2016 to pay $6,828,000 in civil penalties and subjected to injunctive relief (CA District Attorneys action – now on appeal)
  - Walgreens agreed in 2016 to pay $500,000 in penalties, fees and costs and institute compliance measures (NY Attorney General investigation)

Some Possible Explanations (cont.)

- Call to Action
  - 2014 letter to FTC from Senators Sheldon Whitehouse (D-RI), Richard Blumenthal (D-CT), Ed Markey (D-MA) and Rep. Anna G. Eshoo (D-CA)
  - Complaining about outlet stores claiming discounts for products never sold elsewhere

Some Possible Explanations (cont.)

- Legal Developments
  - *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011) (under CA law economic injury occurs where consumer is misled into purchasing a product even if the product has an objective value equivalent to the purchase price)
  - *Hinojos v. Kohl's Corp.*, 718 F.3d 1098 (9th Cir. 2013) (applying *Kwikset* holding to a deceptive pricing case)

Some Possible Explanations (cont.)

- Large Settlements
  - Justice Stores: $50.8 million
  - Michael Kors: $4.875 million settlement fund and $975,000 in fees

Some Possible Explanations (cont.)

- Increase in false price ads due to competitive pricing pressures in internet economy
  - Increased ability of consumers to shop price
  - Whenever a retailer exaggerates pricing claims, others may likely feel compelled to follow or be left behind in the race to claiming the “lowest” price

Litigation Landscape

- Uncertain – mixed results on basic issues
- Appellate authority not well developed
- Significant risk with courts sometimes certifying contested class actions

Mitigating the Risks # 1

- Understand applicable law
  - FTC guides are important starting place
  - But state laws are often more detailed

Mitigating the Risks # 2

- Develop substantively and procedurally sound pricing policy
  - Volume and variety of prices surveyed
  - Selection of prices to be used for comparison
  - Training of pricing personnel
  - Internal audit and updating

Mitigating the Risks # 3

- Document pricing research and preserve records for likely limitations period
  - Assist memory
  - Establish credibility
  - Demonstrate seriousness

Mitigating the Risks # 4

- Pay careful attention to context and ordinary meaning of terms used in pricing claims: e.g.,
  - "Compare to MSRP" will be more meaningful than simply "Compare At" if the reference is to MSRP
  - If the comparison reference price is at the higher end of the spectrum of observed prices, consider adding descriptive language to the comparison, such as "up to__ elsewhere"

Mitigating the Risks # 5

- Utilize best possible disclosure of meaning of terms used in pricing claims
  - Online easier, but pay attention to FTC.com guides concerning conspicuousness
  - Retail POS more difficult
    - Consider Signage: *e.g.*, "For more information on our 'Compare At' Prices, Please Consult A Sales Associate or visit www.___.com"
    - Give Sales Associates Scripts with Approved Answers to FAQ

Mitigating the Risks # 6

- Consider adding Class-Waiver arbitration provision to online terms and conditions of service
  - individual arbitration of any disputes arising out of or relating in any way to purchases
  - waiver of any right to a trial in court or by jury
  - waiver of any right to proceed in arbitration in a class or other representative capacity

Mitigating the Risks # 7

- Possible written price guaranty or other money back policy for customers dissatisfied with pricing claims
  - Not legally dispositive
  - But courts may be less likely to certify a class in the face of such a simple, convenient, expeditious and complete form of relief

C. Brandon Wisoff

Partner
Farella Braun + Martel (San Francisco, CA)

415.954.4449 | bwisoff@fbm.com
http://www.fbm.com/C_Brandon_Wisoff/

Brandon Wisoff has a broad-based commercial trial practice both in state and federal courts. Mr. Wisoff has extensive experience representing both plaintiffs and defendants in complex class action, securities, commodities, antitrust, financial institution and consumer unfair business practices litigation. He formerly served as chair of the firm's Business Litigation Group.

Mr. Wisoff, representing the qui tam plaintiff joined by the State of California and hundreds of local governments, was one of the lead trial lawyers in a precedent-setting class action false claims case brought against a paying agent bank which resulted in a $187.5 million settlement after the completion of the first phase of a bifurcated trial. In a case alleging unfair business practices against a major credit card company, he obtained outright dismissal of all claims against the company on the first day of trial. He obtained a defense judgment following trial for a long-distance telecommunications firm sued on behalf of the general public in a consumer unfair business practices action. As lead class counsel in a nationwide commodity fraud action, he recovered a $40 million settlement of investor losses following a five-month federal jury trial.

Mr. Wisoff is a frequent lecturer on consumer class action claims under California's Unfair Competition Law ("UCL"), False Advertising Law ("FAL") and Consumer Legal Remedies Act ("CLRA"). He has defended numerous businesses, including retailers, manufacturers, product distributors, pharmacies, leasing and financing companies, against consumer claims alleging false advertising, unlawful pricing practices, the sale of defective products, unlawful call recording and for violations of the Telephone Consumer Protection Act ("TCPA").

He has also defended numerous securities class action and derivative claims involving allegations of options backdating, unlawful revenue recognition and misleading proxy statements. These actions have frequently involved parallel SEC enforcement actions and DOJ investigations.

In the antitrust area, Mr. Wisoff obtained summary judgment in favor a nationwide retailer that had been named as a defendant class representative in a consumer class action alleging a vertical price fixing conspiracy. He also reached an early favorable settlement on behalf of an international oil company client that had been sued by the State of Hawaii for alleged horizontal price fixing of the gasoline market.

Mr. Wisoff is also experienced in the area of energy litigation, having represented California's electric grid operator in a variety of claims arising from extraordinary price volatility in the wholesale electricity markets. He is listed in The Best Lawyers in America in the area of Commercial Litigation and Northern California Super Lawyers in the area of Business Litigation.

Related Practices
- Antitrust
- Business Litigation
- White Collar Crime and Internal Corporate Investigations

Education
- University of California, Berkeley, School of Law (J.D., 1985), Order of the Coif; Executive Editor, California Law Review

DELAWARE BUSINESS LITIGATION: THE NATIONAL PRACTICE IN A LOCAL COURT

Chris Viceconte
Gibbons (Wilmington, DE)
302.518.6322 | cviceconte@gibbonslaw.com

GIBBONS

Delaware Business Litigation

The National Practice in a Local Court

Small Wonder

Statistics

- 2nd smallest State
- Fewer than 1 million residents
- 3 counties
  - Business and legal community concentrated in Wilmington

The First State

State of Incorporation

- More than 1 million business entities
  - Corporations
  - Alternative Entities – LLCs, LLPs, LPs
- More than 50% of all publicly-traded companies, including 60% of the Fortune 500

State Court System

- Supreme Court
  - One level of appellate review
- Trial Courts – Equity versus Law
  - Court of Chancery
  - Superior Court
    - Complex Commercial Litigation Division
- http://courts.delaware.gov

State Court Judiciary

- Supreme Court
  - 5 Justices
- Court of Chancery
  - Chancellor and 4 Vice Chancellors
- Superior Court
  - 20 Judges state-wide; 4 assigned to CCLD

State Court Judiciary

- Experienced
- Appointed to 12-year terms
- Political balance
- One Judge assigned to case
- Real trial dates
- 90-day decision rule
- Ranked #1 by U.S. Chamber of Commerce for fair and reasonable litigation environment

Court of Chancery

- Equity Jurisdiction
  - Equitable claim, equitable relief, statutory claim
  - Only tag along legal claims
- No Jury Trials / No Punitive Damages
- Expedited Proceedings
  - Statutory basis; application to Court

Court of Chancery

- The Guidelines
  - The "unwritten" rules
  - Model Scheduling Orders and Confidentiality Agreements
  - Discovery Protocols
    - E-Discovery
    - Privilege Issues
  - Pleadings and Motion Practice
  - Trial Procedures

Court of Chancery

- Technology Disputes
  - Special statutory jurisdiction
  - Claims for solely monetary damages allowed
    - $1 million or more in controversy
  - One party is a Delaware business entity; no party is a consumer
  - Consent of parties to jurisdiction by agreement or stipulation
  - Litigation or mediation

Arbitration

- Delaware Rapid Arbitration Act
  - Final award within 6 months
  - Agreement must reference Act
  - Party control over proceedings
  - No minimum amount at issue
  - Arbitration need not be in Delaware
  - Award deemed confirmed absent challenge
  - Limited review

Mediation

- "Mediation Only" Docket
  - Business disputes
  - One party is a Delaware entity; no consumers
  - $1 million or more in controversy (for disputes involving solely monetary damages)
  - Consent of parties
  - Confidential
- Pending Cases

Superior Court - CCLD

- Complex Commercial Litigation Division
  - Complement to Court of Chancery
    - Gap filler for legal claims that do not satisfy subject matter jurisdiction of Court of Chancery
  - Predictability and uniformity
    - Case management and discovery protocols
  - All cases in New Castle County - Wilmington

Superior Court - CCLD

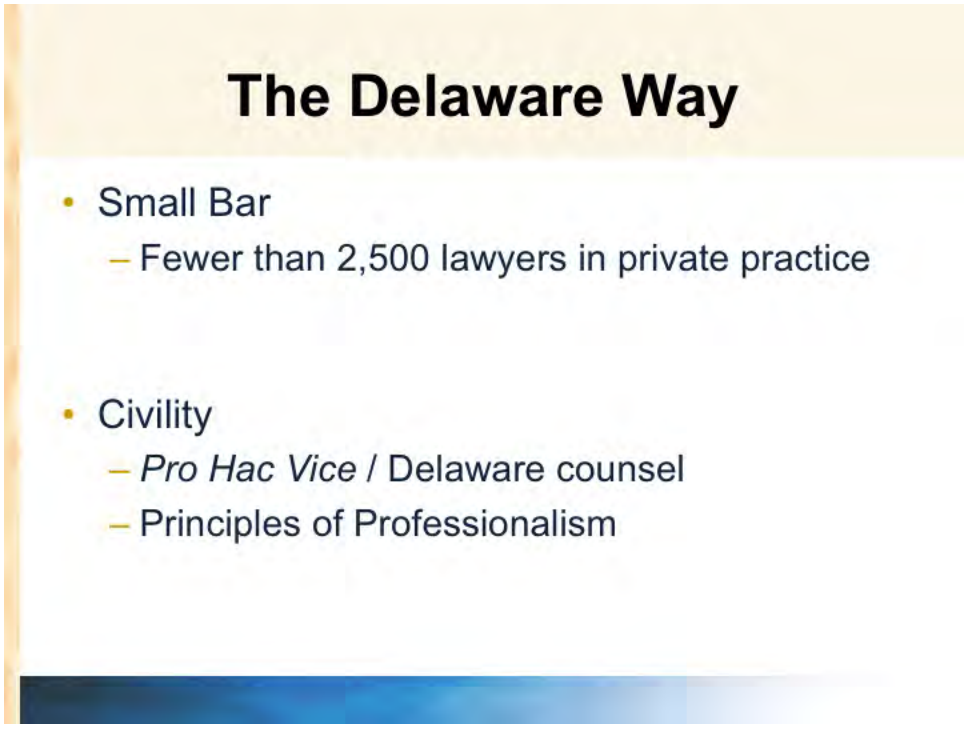
- Qualifications for CCLD
  - Limited to business disputes
  - $1 million or more in controversy
  - Exclusive choice of Court provision
  - Special designation by President Judge

Forum Selection

- Bylaws
- Contractual provisions
- Status as Delaware business entity

SCOTUS – Jurisdiction / Venue

- Daimler AG v. Bauman
- Bristol-Myers Squibb v. Superior Court of California
- TC Heartland v. Kraft Foods


The Delaware Way
• Small Bar
– Fewer than 2,500 lawyers in private practice
• Civility
– *Pro Hac Vice* / Delaware counsel
– Principles of Professionalism

Christopher Viceconte

Director, Business & Commercial Litigation
Gibbons (Wilmington, DE)

302.518.6322 | cviceconte@gibbonslaw.com
http://www.gibbonslaw.com/christopherviceconte/

Chris Viceconte defends complex commercial, business tort, and product liability claims. Resident in the firm's Wilmington, Delaware office, Mr. Viceconte also regularly serves as Delaware counsel for the firm's clients, as well as for out-of-state law firms, in a wide range of matters before Delaware's state and federal courts.

Mr. Viceconte regularly litigates lawsuits arising out of disputes among business owners, competitors and parties to business transactions involving claims for breach of contract, breach of the duty of good faith and fair dealing, breach of fiduciary duty, violations of restrictive covenants, unfair competition, tortious interference with contract and prospective economic advantage, fraud, and defamation.

Mr. Viceconte's products liability practice centers on the defense of personal injury and property damage lawsuits against industrial and consumer product manufacturers. Mr. Viceconte's practice also includes the defense of toxic tort lawsuits brought by nationwide plaintiffs in Delaware. He also represents employers and property owners in serious workplace accident and premises liability matters.

Mr. Viceconte's Delaware counsel practice spans Delaware's state and federal courts with a focus on corporate litigation in the Court of Chancery, commercial and product liability litigation in the Superior Court, and commercial and patent infringement litigation in the U.S. District Court for the District of Delaware.

Focus Areas
- Business and Commercial Litigation
- Products Liability
- Delaware Counsel

Honors and Awards
- Selected to Super Lawyers Rising Stars list, Civil Litigation Defense, 2006-2009

Publications and Features
- Delaware Supreme Court Clarifies Reach of Personal Jurisdiction Over Nonresident Directors and Officers of Delaware Corporations Under 10 Del. C. § 3114
- Business Organizations Seeking Quick and Inexpensive Resolutions of Business Disputes Need to Know About Delaware's Rapid Arbitration Act
- Retroactive Effect Given to Delaware Statute Authorizing Up to 20-Year Statute of Limitations for Certain Breach of Contract Actions
- Service of Discovery Also Subject to New Deadline in Delaware Federal Court
- Put Away that Midnight Oil: New Rule in the District of Delaware
- Delaware Enacts Legislation Authorizing 20-Year Statute of Limitations for Certain Breach of Contract Actions
- Delaware Adopts Less-Stringent Approach to Authentication of Social Media Evidence: The Jury, and Not the Trial Judge, Ultimately Decides

Education
- George Washington University Law School (J.D., with honors)
- University of Michigan (B.A., with high distinction)

WHEN TO PREPARE YOUR OPENING STATEMENT

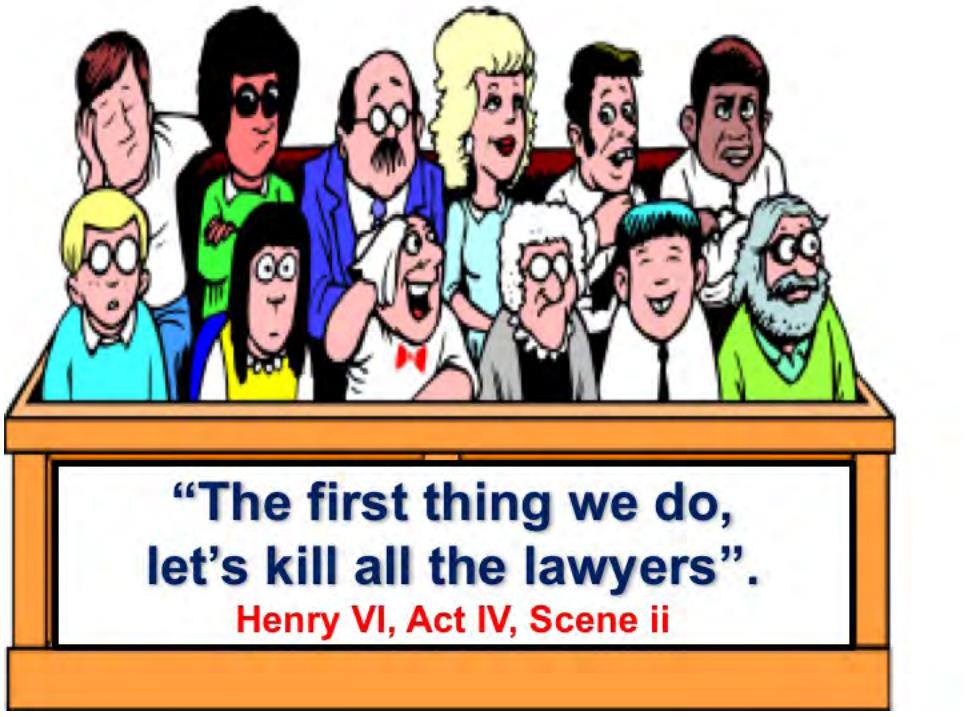
Sawnie McEntire
Parsons McEntire McCleary & Clark (Dallas, TX)
214.237.4303 | smcentire@pmmclaw.com

The Reptile Strategy

Opening Statement = The Challenge

- 1of 3 occasions when lawyers talk to jurors
- Average juror attention span = 7 minutes to 10 minutes
- Last seen…last heard…*last believed*
- Most cases are won or lost in the first few days

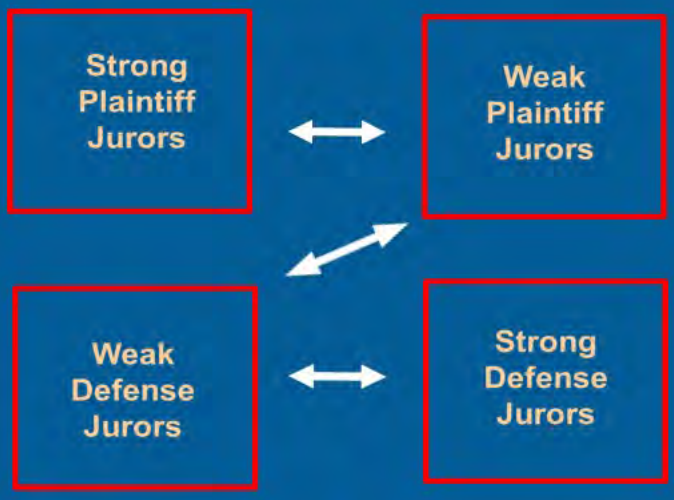

"YOU WILL NEVER
GET A SECOND
CHANCE TO MAKE
A FIRST IMPRESSION."
WILL ROGERS
ADDICTED2SUCCESS.COM


"The first thing we do,
let's kill all the lawyers".
Henry VI, Act IV, Scene ii

Other Rules of Engagement

- Know the Jury
  - Identify decision makers / potential forepersons
  - Focus on decision makers
- Trial Themes
  - Cogent trial themes
  - Simplify trial themes
  - Repeat trial themes
- Other Ways to Capture Attention
  - Use demonstratives / models / pictures
  - Use technology
  - Use short videos (if permitted)
- Don't Over Promise / Don't Exaggerate

Perceptions Ebb and Flow

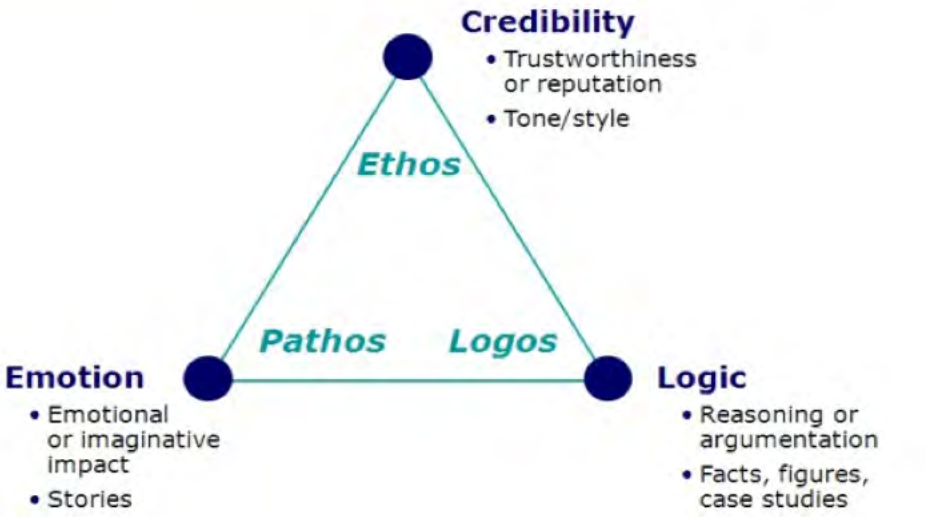


Opening Statement = Opportunity

- Provide a road map
- Provide simple, credible themes
- Highlight favorable evidence
- Neutralize unfavorable evidence
- Make a connection

→ Pathos, Logos, Ethos

Aristotle's 3 Cornerstones of Victory



Ethos = Credibility = Trust

"Character may almost be called the most effective means of persuasion".

Ethos = Credibility = Trust

	Objectives
Client	• Ethical
Storyline	• Moral
Opposing Party (Reverse)	• Principled • Social Conscience • Good Citizen • Credible • Trustworthy

Logos

The Road Map

The Story

The Explanation

The "Bad" Evidence

Objective

- Simple explanations
- Factually supported explanations
- Reasoned explanations
- Internally consistent explanations
- Keep the jury interested

Pathos = Emotional Reaction

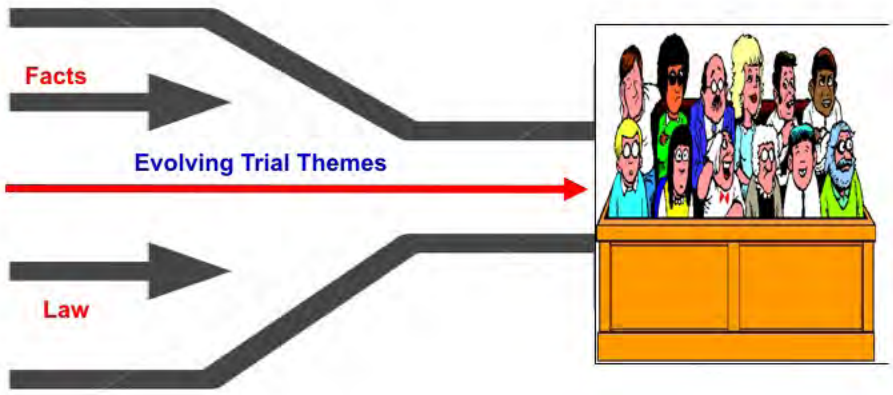
"Thus, every action must be due to one or other of seven causes: chance, nature, compulsion, habit, reasoning, anger or appetite".

Early Planning Is Critical

"Planning is bringing the future into the present so that you can do something about it now".

Alan Likein

Early Planning



1st Steps – Develop a Trial Plan

- Identify key legal principles early
- Identify favorable facts early
- Mold the law and the facts early
- Develop themes
- Identify negative facts early and plan to neutralize
- Develop key timeline

Next Steps

- Develop discovery plan to advance themes
- Narrow fact issues in *every* deposition
- Develop favorable testimony in *every* deposition
- Neutralize negative facts in *every* deposition
- *Every* deposition is a trial deposition

Final Steps

- Simplify themes
- Test themes
- Use demonstratives to enhance messages and themes
- Use selected evidence to drive home message

Understandable Trial Themes

ETHOS AND PATHOS

Suit to vacate security interests in client's assets that stunted client's ability to borrow money and grow

LOGOS

Suit defending real estate broker on lost sale and diminution of property value

Simple, Repeated Themes

Pathos

Suit involving control of a power plant by an F.O.E. [Friend of Enron]

Ethos and Pathos

Suit to maintain a residential airport adjacent to homes

Simple Explanations

LOGOS

Suit defending vehicle rollover case with fatal ejection of passenger

Address the "BAD"

LOGOS

Suit defending pharmaceutical company in acute reaction

The Challenge

Average attention span in 2015	8.25 seconds
Average attention span in 2000	12 seconds
% of teens who forget major details of close friends and relatives	25 %
% of people who forget their own birthdays from time to time	7 %
Average length watched of a single internet video	2.7 minutes

Statistic Brain, July 2016

Ingredients of First Impressions

- Thank the Jury
- Communicate fairness
- Communicate courtesy
- Don't exaggerate
- Don't waste time
- Don't lecture, but talk with the Jury
- Present appealing client / personify client
- Tell an interesting story
- Move about courtroom (if allowed)
- Make eye contact
- Strategic pauses

Trial Themes = Building Blocks

- Simple, logical, quickly understood explanations
- Repeat, repeat and repeat
- Simplify, simplify and simplify
- Build upon the 3 Cornerstones

Logos = Reason

"The use of reason is more distinctive of a human being than the use of his limbs".

Sawnie McEntire

Director and Shareholder
Parsons McEntire McCleary & Clark (Dallas, TX)

214.237.4303 | smcentire@pmmclaw.com
http://pmmclaw.com/attorneys/sawnie-mcentire

Sawnie McEntire has over 35 years of experience handling complex civil matters in federal and state courts throughout Texas and across the United States. Sawnie has tried dozens of difficult cases to jury verdict on a variety of subject matters, such as commercial, products liability, pharmaceutical, and real estate claims. Sawnie has served as national, state-wide, and regional counsel for many of his clients, has received many national and local accolades for his advocacy accomplishments, and has authored several publications on advocacy skills.

Admission to Practice
- Texas, 1980
- U.S. District Courts for the Northern, Southern, Eastern, and Western Districts of Texas
- U.S. Courts of Appeals for the Fifth and Ninth Circuits

Memberships and Affiliations
- State Bar of Texas
- Texas General Counsel Forum (Dallas Chapter) - Director
- American, Dallas and Houston Bar Associations
- Texas and Dallas Bar Foundations
- Federation of Defense and Corporate Counsel
- Environmental Law Institute Associates Program
- Dartmouth Lawyers Association - Life Member

Education
- Southern Methodist University Dedman School of Law; J.D., 1980
- Dartmouth College; B.A., magna cum laude, 1976

LITIGATION MANAGEMENT BREAK-OUT SESSIONS - SAMPLE AGENDA

IDENTIFYING THE INITIAL GOALS AND PLANS

- What is the primary goal from the start (Settlement or Trial)?
- What should be conveyed by in-house counsel on primary objective?
- What should be conveyed by outside counsel to client?
- Does exposure dictate how case is handled?
- Are the days gone where we take the case all the way to trial, regardless of cost/exposure formula?
- Is ADR or settlement talk ever effective early on in the case before discovery?
- At what point do you think parties should explore resolution?
- What are your experiences with having direct contact with in-house counsel and plaintiff's attorney to discuss resolution? Should this be done without outside counsel present?

MANAGING AND CONTROLLING THE LITIGATION

- How much of our strategy to we want to set out in paper discovery early on?
- Do we want to take depositions of everyone in sight, or selective depositions?
- At what stage do we get experts on board?
- Do we want to go with in-house experts AND outside experts, or one or the other?
- Do we want to depose opposing expert in every case, or are there advantages in not deposing experts?

- What is it that we want to accomplish by taking expert deposition? Do we really need to take a deposition to know what their opinions are? What is it we want to know for $500 an hour we are paying the expert?
- What are the difficult questions we want to ask the expert?
- How should in-house counsel and outside counsel coordinate and plan for experts?
- At what stage do we start planning for Frye/Daubert motions? Do we argue these motions only when we feel very confident that they will be granted pre-trial, or is there an advantage in arguing the motions and revealing our strategy to other side so they can be more prepared on voir dire of witness in trial?
- What are the most important things the in-house counsel wants from their trial counsel during discovery and pre-trial state?
- What are the most important things trial counsel wants from client and in-house counsel?

WINNING THE CASE AT TRIAL

- What is the most important part of the trial? (Voir Dire, Opening, Cross-examination, Direct Examination, Closing).
- Studies show 60-80% jurors form initial impression on liability after opening statement. What has been your experience?
- Do you put on a damage defense case?
- When do you attack damages?
- When, if ever, do you ignore damages?
- How do you handle punitive damages at trial?
- What are the advantages/pitfalls or bifurcation of liability and damages?
- Do you put on damage experts? (Product liability, construction litigation, etc.)
- Do use an economist or just attack plaintiffs?
- Do you use medical damage experts? (RN v. LPN v. Attendant care)
- What should role of in-house counsel be during trial?

FALSE CLAIM ACT LITIGATION: THE GOOD, THE BAD, AND THE UGLY

Brett Johnson
Snell & Wilmer (Phoenix, AZ)
602.382.6312 | bwjohnson@swlaw.com

As with any new presidential administration, especially when there is a change in political party control, there is an immediate rush to either change policies or reaffirm existing practices as the administration's own. In recent weeks, the Department of Justice (DOJ) has issued some guidance on how it intends to enforce corporate compliance laws, such as the Foreign Corrupt Practices Act (FCPA) and the False Claims Act (FCA). However, in comparing recent FCPA settlements and this latest guidance, it actually does little to alter or clarify how the DOJ will review cases or reward companies for significant cooperation in addressing international trade compliance laws.

The most heralded action so far by the new administration is in regard to the DOJ's Fraud Section issuing the "Evaluation of Compliance Programs." This guidance was issued quietly on February 8, 2017, the same date that Attorney General Jeff Sessions was confirmed. However, given the realities of government bureaucracy, this guidance likely was in the works for quite some time, potentially even as far back as November 2015, when the DOJ hired its first compliance officer to assist line attorneys and investigators in evaluating a company's corporate compliance program.

The guidance also comes on the heels of the DOJ's April 5, 2016 issuance of the Enforcement Plan and Guidance related to the FCPA. This plan set forth three steps aimed toward enhancing enforcement, cooperation with investigations and individual accountability. First, the DOJ vowed to significantly increase the amount of resources devoted to detecting and prosecuting violations of the FCPA. Second, the plan pledged to strengthen coordination between the DOJ and its foreign law enforcement counterparts. Third, the plan announced a new "pilot" program aimed at promoting greater accountability for culprits of corporate crime by incentivizing companies to have detailed compliance programs, test the programs regularly and report any suspicious activity through voluntary disclosures. This included an announcement that "mitigation credit" would be available only if a company disclosed "all" facts (without a definition or caveat for a "good faith" standard) related to involvement in the criminal activity by the corporation's officers, employees or agents. Interestingly, on March 12, 2017, the new DOJ administration extended this program, thus reaffirming the program as its own.

The 2016 (now 2017) plan was simply an extension of existing policy. Specifically, in 2015, Deputy Attorney General Sally Quillian Yates released a widely publicized "new" policy announcing increased accountability for individuals involved in any violations of the law, including the FCPA. This new guidance, at least in regard to the FCPA, reiterated the 2012 DOJ and SEC release of a joint Resource Guide intended to provide information on the FCPA.

As reflected by the multiple guidelines, prosecutions and settlements of FCPA matters, it is clear that FCPA enforcement will continue to be a favorite activity under the new administration. In recent years however, other international trade compliance laws have increased in stature, including those regulated by the U.S. Department of Treasury's Office of Foreign Assets Control, the U.S. Department of Commerce and the U.S. Department of State. Thus, the DOJ and federal investigative agencies have full quivers of options to inquire into international trade compliance.

A hallmark of U.S. enforcement of these international compliance laws, as reflected in the above referenced guidelines reaffirmed by the new administration, is the

concept of multilateralism enforcement, i.e., the coordination with other governments to enforce multiple countries' domestic laws concerning compliance at once. This was first reflected in the Siemens FCPA settlement – which was the largest at the time – that involved an investigation between Germany and the United States. This cooperation however, has always been based on the understanding that multilateral enforcement was the other side of the coin of international trade and economic compliance. Therefore, it is unclear whether a foundational pillar related to multilateral cooperation will be sustained if international trade expansion is restricted.

Regardless, even without the reiteration of multilateral cooperation, the new and reaffirmed guidelines are just recycled versions of longstanding policy. First, increased investigation and enforcement has been an objective for years. Second, private individual liability, apart and separate from corporate liability, is now well established and was reaffirmed by Attorney General Sessions during his confirmation hearing. However, it is likely that the DOJ will quickly issue a reiteration of the individual liability principle to remove the "Yates" moniker from the tag line after Acting Attorney General Yates refused to enforce a presidential directive concerning immigration enforcement. Third, as clearly outlined in the longstanding DOJ Principles of Federal Prosecution of Business Organizations, U.S. sentencing guidelines value cooperation on the part of companies, and in turn offer the reduction of penalties for companies that voluntarily disclose and accept responsibility. Of concern, however, the existing reaffirmed guidelines fail to give specific guidance on what type of information a company should disclose to the DOJ or the true extent of any credit to be obtained by cooperation.

The guidelines read in totality do not require a variation in long-standing guidance. Thus, a company's counsel still plays a pivotal role in any investigation. The attorney-client privilege remains essential in protecting companies while determining whether or not a violation has actually occurred. However, it is still a delicate situation to decide whether the company's legal department should handle the investigation or whether to engage outside counsel. If the current trend to hire outside counsel continues, the appropriate company official or committee may wish to provide written instructions and authority to these attorneys to conduct the investigation.

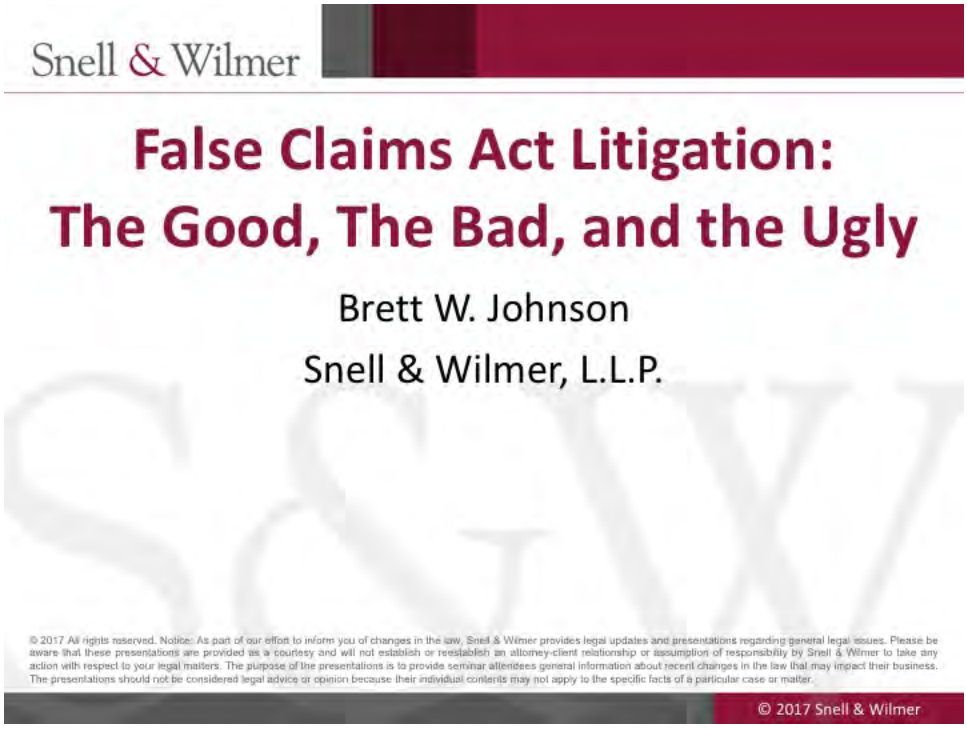
An international trade compliance program and senior management commitment to the program (including dedication of resources) are still key. The 'new' formal program elements stated by the DOJ are not in fact new, and include: (1) sound corporate policy, (2) training in regard to the policy and the law, (3) adequate staffing to monitor compliance and possibly an independent internal auditor or oversight committee, (4) proper standard clauses in all international agreements, (5) a reporting system for suspected violations and protection of whistleblowers, (6) delineated disciplinary procedures and (7) a recordkeeping system to ensure compliance with international trade laws.

When a potential international trade compliance violation occurs, the company should immediately investigate and stop the activity if it seems potentially unlawful. Best practices include that every alleged or potential international trade compliance violation have a documented investigation reviewed by both an internal and external source to determine if a violation has actually occurred. The DOJ specifically examines post-violation conduct to determine whether to charge a company or the individuals involved with a violation.

Remedial action is also crucial. This essentially requires the company to take actions after the event that it possibly should have taken before the alleged violation occurred, such as implementing an effective corporate compliance program, improving an existing compliance program, and disciplining wrongdoers.

Voluntary disclosures are still a growing trend in DOJ investigations. The possible benefit to voluntary disclosure is that the DOJ might be more likely to enter into a deferred prosecution agreement (DPA) with the company, as done recently in settlements with Embraer SA and Och- Ziff Capital Management. Interestingly, the DPAs in those two settlements provide a parallel roadmap to the reaffirmed guidance recently provided by the DOJ.

What remains clear in this flurry of activity is that the DOJ will continue to investigate and prosecute international trade compliance cases. Companies taking this reiterated emphasis seriously, may wish to ensure adequate compliance programs are in place, training on the policies regularly occurs, third party relationships undergo proper due diligence and a clear plan exists to handle any alleged violations.


Snell & Wilmer
False Claims Act Litigation:
The Good, The Bad, and the Ugly
Brett W. Johnson
Snell & Wilmer, L.L.P.
© 2017 All rights reserved. Notice: As part of our effort to inform you of changes in the law, Snell & Wilmer provides legal updates and presentations regarding general legal issues. Please be aware that these presentations are provided as a courtesy and will not establish or reestablish an attorney-client relationship or assumption of responsibility by Snell & Wilmer to take any action with respect to your legal matters. The purpose of the presentations is to provide seminar attendees general information about recent changes in the law that may impact their business. The presentations should not be considered legal advice or opinion because their individual contents may not apply to the specific facts of a particular case or matter.
© 2017 Snell & Wilmer


Anti-fraud: Key laws
• Procurement Integrity Act
◦ Prohibits disclosure or obtaining of procurement-sensitive information
◦ No employment discussions with certain current or former government officials
• Truth in Negotiations Act
◦ All government contractors must submit certified cost or pricing data over a certain threshold

Anti-fraud: Key laws

- **Federal False Claims Act**
  - Knowingly submitting, or causing others to submit, false claims for payment of government funds
  - Applies to payment for services not rendered, falsification of time and effort reports for reimbursement
  - Similar state false claims acts

"New" DOJ Guidance

- February 8, 2017: DOJ Fraud Section published its Evaluation of Corporate Compliance Programs (Evaluation Guidance)
  - new guidance issued, essentially confirming prior guidance
- Continued emphasis on multilateral enforcement
- Increased investigation and overall FCA/Fraud enforcement
- Private individual vs. corporate liability
- Voluntary disclosures

DOJ Compliance Guidance: Overview

- DOJ's corporate charging guidelines provide 10 "Filip Factors" that prosecutors are to consider when assessing whether to pursue an investigation, bring charges, or negotiate a settlement in cases of corporate wrongdoing.
- The Filip Factors include an evaluation of the corporation's:
  - Pre-existing compliance program
  - Remedial efforts "to implement an effective corporate compliance program or to improve an existing one"

DOJ Compliance Guidance: Overview

- The Compliance Guide is intended to provide insight into how prosecutors evaluate corporate compliance programs under the Filip Factors
  - Separated into 11 sections which include specific "topics and sample questions"
  - "Neither a checklist nor a formula"
  - "Each company's risk profile and solutions to reduce its risks warrant particularized evaluation"

DOJ Compliance Guidance: 11 Sections

1. Analysis and Remediation of Underlying Conduct
2. Senior and Middle Management
3. Autonomy and Resources
4. Policies and Procedures
5. Risk Assessment
6. Training and Communication
7. Confidential Reporting and Investigation
8. Incentives and Disciplinary Measures
9. Continuous Improvement, Periodic Testing, and Review
10. Third Party Management
11. Mergers & Acquisitions

The FCPA Pilot Program (relevancy across the board)

- The FCPA Pilot Program was created to motivate self-disclosure and cooperation through decreased fines and possible declinations to companies who voluntarily disclose FCPA misconduct, cooperate with subsequent investigation, and provide necessary remediation.
- The program took effect in April 2016 for a one-year trial period.
- A month before the program was set to expire, Acting Assistant Attorney General Kenneth Blanco announced that the program would continue indefinitely until DOJ could evaluate its "utility and efficacy."
- In the meantime, Blanco assured that the program would "continue in full force until we reach a final decision."

The Yates Memo:

- Issued September 9, 2015, by DAG Sally Q. Yates
- Formally Titled "Individual Accountability for Corporate Wrongdoing"

The Yates Memo is Here to Stay (For Now)

- April 24, 2017: Attorney General Sessions stated that the DOJ will emphasize prosecuting individuals involved in corporate misconduct, noting: "I just have always felt that having stockholders paying the price for corporate mismanagement isn't always the best solution."
- April 18, 2017: Acting PADAG Trevor McFadden echoed statements made by Sessions: "[T]he department continues to prioritize prosecutions of individuals who have willfully and corruptly violated the FCPA — Attorney General Sessions has noted the importance of individual accountability for corporate misconduct."

Government Contract Clauses – Reinforcing Compliance

- Federal Acquisition Regulation ("FAR") Part 3
  - FAR Subpart 3.10 – Ethics Clause
    - FAR Clause 52.203-13 (July 2015)
    - DFAR 203.10 – Specific DoD Ethics Requirements
- But, there are others…
  - FAR Subpart 3.1 – "Safeguards"
  - FAR Subpart 3.5 – "Other" Improper Business Practices

Noted FCA Trends

- Typical Contract Dispute = False Claims Act Claim
  - *Universal Health Servs., Inc. v. United States ex rel. Escobar* (Supreme Court 2016) – FCA not meant to be an "all-purpose" antifraud statute
  - Innocent mistakes can be excused. *Horn & Assocs., Inc. v. United States* (Fed. Cl. 2015)
- Target: Scienter Element
  - *United States ex Rel. Durcholz v. FKW* (7th Cir. 1999)
    - If the Government knows of the problem before claim is submitted, then FCA claim does not have merit

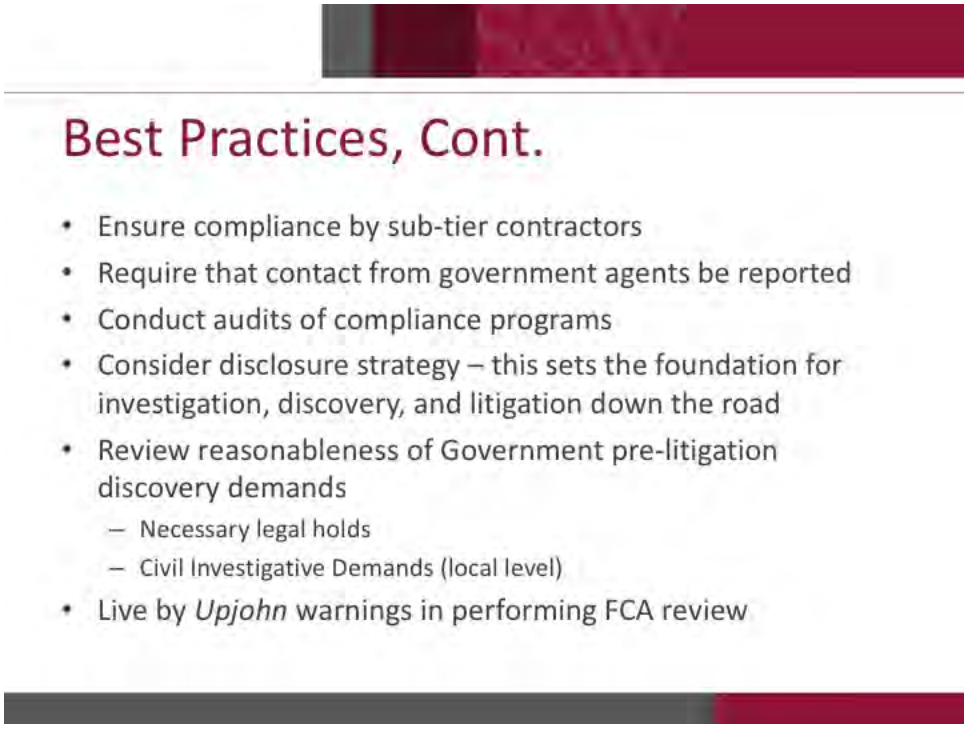
Key Take Away

Documentation of communication is key!

- *United States ex rel. Berg v. Honeywell International, Inc.* (D. Alaska 2016)
  - Meeting agenda
  - Meeting notes
  - Serialized written communication
  - Tracking of data provided

Best Practices

- Senior manager commitment – early and often
- Perform due diligence on any government submissions
  - Conflict of Interests; Access to Solicitation Data; Contact with Government
- Multiple reporting options (hotline, web portal, written memos)
- Ensure proper company policies are in-place
- Provide essential training
- Maintain documentation


Best Practices, Cont.
• Ensure compliance by sub-tier contractors
• Require that contact from government agents be reported
• Conduct audits of compliance programs
• Consider disclosure strategy – this sets the foundation for investigation, discovery, and litigation down the road
• Review reasonableness of Government pre-litigation discovery demands
– Necessary legal holds
– Civil Investigative Demands (local level)
• Live by *Upjohn* warnings in performing FCA review

Brett W. Johnson
Partner
Snell & Wilmer (Phoenix, AZ)

602.382.6312 | bwjohnson@swlaw.com
https://www.swlaw.com/people/brett_johnson

Brett Johnson represents businesses and individuals in government relations matters. His practice includes government regulatory compliance, export, government contracting, political and election law, and health care matters, including professional liability defense and commercial litigation. Brett regularly represents parties and witnesses involved with governmental investigations, including election law, governmental ethics, export control, False Claims Act, Foreign Corrupt Practices Act, and government procurement compliance laws and regulations. He has experience handling internal investigations and compliance audits for clients on a wide range of matters. Brett also provides training to businesses and governmental agencies concerning compliance matters and the drafting of related corporate policies.

Brett's political and election law practice includes advising candidates, initiative committees, consultants, lobbyists, political action committees (PACs), ballot measure and independent expenditure committees, political parties, municipalities, corporations, trade associations and other tax exempt organizations, and individual donors and political contributors on matters ranging from constitutional law, referenda for the ballot, campaign finance law compliance and election law complaints.

Brett advises and represents businesses in relation to negotiating and complying with government contracts. He negotiates and drafts government subcontracts and compliance programs related to, among others, the Buy American Act, Small Business Subcontracting Plans and Ethics policies. Brett also represents businesses before the Court of Federal Claims, Government Accountability Office, Boards of Contract Appeals, Small Business Administration, state, county, city, and other judicial bodies in regard to government procurement bid protests, claims, equitable adjustments, small business size determinations, certifications challenges and other disputes related to complying with government acquisition laws and regulations.

Brett also advises clients in regard to litigation subpoenas, Grand Jury Subpoenas, governmental administrative subpoenas, and other government requests for information. He regularly handles Freedom of Information Act and Privacy Act requests and defends against competitors who seek proprietary information through such authorities. Prior to joining the firm, Brett was a judge advocate with the United States Navy, regularly appearing in state and federal courts throughout the nation on behalf of the Department of Defense.

Professional Recognition and Awards
- Southwest Super Lawyers®, Rising Stars Edition, Government Contracts (2013-2014), Civil Litigation Defense (2012)

Education
- International Import-Export Institute - Certified U.S. Export Compliance Officer (2008); Certified ITAR Professional (2009)
- Lex Mundi Institute, Program in Cross-Border Dispute Resolution (Summer 2008)
- University of Maryland, University College (Masters, Int'l Management, 2006)
- United States Naval War College (Completed Program in Strategic Studies, 2004)
- The Hague Academy of International Law, the Peace Palace - The Netherlands (Summer 2003)
- University of San Diego School of Law (Masters of Law, International Law, 2001)
- Santa Clara University School of Law (J.D., 1999) - 1999 Honors Moot Court Board, Director; Phi Delta Phi Honors Fraternity, Secretary
- Santa Clara University (B.S., Political Science, Minor, English, 1996)

ETHICS: TOP 10 ETHICAL CONSIDERATIONS FOR IN-HOUSE COUNSEL FACING LITIGATION

Joe Ortego
Nixon Peabody (New York, NY)
212.940.3045 | jortego@nixonpeabody.com

TOP TEN ETHICAL MISTAKES OF IN-HOUSE COUNSEL

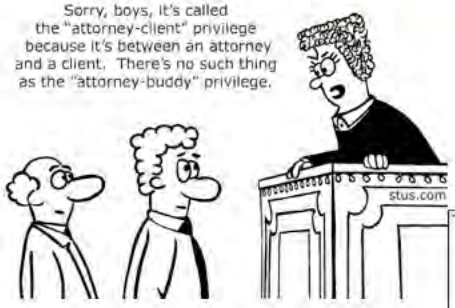
NIXON PEABODY

JOSEPH ORTEGO

#1 WHO IS MY CLIENT AGAIN?

#2 FAILURE TO RECOGNIZE CONFLICTS OF INTEREST

#3 MISTAKENLY WAIVING PRIVILEGE



#4 FAILURE TO INVESTIGATE

#5 PUFFERY TURNS TO LYING IN SETTLEMENT NEGOTIATIONS

#6 A DISHONEST CLIENT: HANDLING IT WITH GRACE

"I'm beginning to wonder if both you guys are lying."

#7 MANIPULATION OF THE JUDICIAL SYSTEM

"It might not have a bearing on the case, but the defendant has parked in your space."

"Your Honor, my client would like to change his plea to 'pretty please with sugar on it.'"

#8 LAWYER VS. BUSINESS PARTNER

"BEHIND EVERY GREAT BUSINESS DEAL IS A COMPANY LAWYER ADVISING AGAINST IT."

"Good news: First-quarter profits should be strong and second-quarter prison sentences should be light."

#9 ABUSE OF PLEADING IMMUNITY

#10 "WRONG PEOPLE, WRONG PLACE, WRONG TIME" MAMA ORTEGO

" You're the right man in the right place at the right time to be fired. "

Joseph J. Ortego

Partner
Nixon Peabody (New York, NY)

212.940.3045 | jortego@nixonpeabody.com
https://www.nixonpeabody.com/en/team/ortego-joseph-j

Joseph Ortego is the practice group co-leader of Nixon Peabody's Commercial Litigation practice, chair of NP Trial®, an international team of the firm's most successful and experienced trial lawyers, and chair of the firm's Aviation practice. He represents major private and publicly traded companies and their executives, having tried over 100 cases to verdict in both federal and state courts throughout the country and has successfully represented clients before arbitration tribunals around the world.

As technology evolves, companies are facing a new set of legal challenges manifesting themselves in both litigation and regulatory activities. We partner with clients, leveraging our successful trial and litigation experience, to develop innovative strategies to proactively address the issues presented by this new age.

Services
- Complex Commercial Litigation
- Appellate
- Products: Class Action, Trade & Industry Representation
- NP Trial®
- Aviation Product Liability
- Insurance
- Life Sciences
- Health Effects - Toxic & Complex Torts
- Environmental Litigation
- NP Second Opinion®
- Food, Beverage & Agriculture
- Arbitration
- Class Actions & Aggregate Litigation
- Labor & Employment
- Consumer Products
- Global Disputes
- Financial Services Litigation
- Data Privacy & Cybersecurity

Recognition
- The Best Lawyers in America© 2017 for Product Liability Litigation - Defendants in New York, NY.
- The Legal 500 United States 2016 - Product liability and mass tort defense.
- Benchmark Litigation - Toxic tort and Aerospace/aviation; New York local litigation star.
- Martindale-Hubbell Peer Review Ratings - AV Preeminent.
- New York Metro Super Lawyers

Education
- Boston University School of Law, J.D.
- Syracuse University, B.A., with honors

ETHICS: EXPERTS, SPOLIATION AND SANCTIONS

Emily Harris
Corr Cronin Michelson Baumgardner Fogg & Moore (Seattle, WA)
206.621.1477 | eharris@corrcronin.com

Claims of destruction of evidence bring up visions of spoliation motions and sanctions, but also raise serious ethical concerns under the Rules of Professional Conduct. The ethical concerns are elevated when the allegation involves spoliation by an expert witness hired by the attorney. It is not enough to know the applicable ethical rule. Understanding the interrelationships of civil discovery rules and expert witness discovery and privilege rules is essential to understanding an attorney's ethical obligations and also essential for success when seeking or opposing a sanctions motion for spoliation of evidence by an expert.

Ethical Rules

The ABA Model Rules of Professional Conduct are intended to regulate lawyer conduct through the disciplinary process. See The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates 20 (1987). In some instances, the RPCs are also used to inform the duty of care in a legal malpractice action.[1] Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992); [1] Legal Malpractice § 6:62 (Ethical regulations) (2017 ed.). And, by extension, violations of RPCs could also be used in the context of issuing sanctions for spoliation or may lead to disciplinary action following a finding of spoliation.

Rule 3.4 of the ABA Model Rules of Professional Conduct, which has been adopted by many jurisdictions, is directly in play when it comes to issues of spoliation. RPC 3.4, entitled "Fairness to Opposing Party and County" provides in relevant part:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.
>
> …
>
> (c) knowingly disobey an obligation under the rules of a tribunal…
>
> (d) in pretrial procedure… fail to make reasonably diligent effort to comply with a legally proper discovery request by opposing party;…

As the comments to RPC 3.4 make clear, the rule is directed, in large part, to ensuring fair competition in the adversary system by prohibiting the destruction or concealment of evidence. Comment on Rule 3.4 [1].

Expert Discovery and Duty to Preserve

The threshold question to examine when considering an attorney's duty under RCP 3.4 involving litigation experts is: what expert materials are discoverable? Does an expert have a duty to preserve notes, field observations, photographs, drawings, emails with other experts, or draft reports?

These are questions an attorney has a duty to research and understand to meet his or her ethical obligations under RPC 3.4 and also when seeking or responding to a motion for sanctions based on spoliation. The answer to these questions will depend on the applicable rules of civil procedure, which

1 A violation of the RPCs alone, however, does not give rise to a cause of action against an attorney by an opposing or third party. Baxt v. Liloia, 714 A.2d 271 (N.J. 1998); Am. Express Travel Related Serv. Co., Inc. v. Mandilakis, 675 N.E.2d 1279 (Oh. Ct. App. 1996); Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840 (Or. 1981).

may differ from state to state and with the federal rules.[2] As such, an attorney must undertake his or her due diligence on this topic for each jurisdiction and cannot assume that expert discovery obligations will be uniform across jurisdictions. For purposes of simplicity, this article addresses only expert discovery obligations under the federal rules.

Under the Federal Rules of Civil Procedure, a party is entitled to discover all information considered by a testifying expert, whether or not ultimately relied upon in forming his or her final opinions:

> [L]itigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Advisory notes to the 1993 Amendment to Fed. R. Civ. P. 26.[3] As the ABA Treatise, The Attorney-Client Privilege and the Work-Product Doctrine, further provides:

> An opposing party should be entitled to discover everything that went into an expert's opinion whether consciously so or not, particularly in light of the extraordinarily expanded role experts play in modern litigation.

E. Epstein, American Bar Association, The Attorney-client privilege and the work product doctrine (5th ed. 2007). To be clear, expert discovery under the federal rules is not limited to only that information that the expert relies upon in forming his or her final opinion. The term "considered" as used in FRCP 26 is much broader.

Following that logic, when a party retains several experts or a group of experts who collaborate to render opinions in a case, their communications between and among each other en route to forming opinions are discoverable. The court in Synthes Spine Co., L. P. v. Walden, 232 F.R.D. 460, 464 (E.D. Pa. 2005) states the operative rule:

> The Court finds that plaintiff must disclose all materials, regardless of privilege, that plaintiff's experts generated, reviewed, reflected upon, read, and/or used in formulating his conclusions, even if these materials were ultimately rejected by plaintiff's expert, including e-mails . . . .

Thus, courts have consistently required the production of email communications between and among experts, whether or not the expert claims that he or she ultimately did not rely on the material. Beachfront North Condo. Ass'n, Inv. v. Lexington Ins. Co., 2015 WL 4663429 at *1, 3, 5-6 (D. N.J. 2015) (court ordered production of all communications between and amongst experts and counsel that were considered to create expert reports, including material ultimately rejected); In re Application of Republic of Ecuador, 280 F.R.D. 506, 516 (N.D. Cal 2012), aff'd 742 F.3d 860 (2014) (ordering production of communications between experts).

While the 2010 amendments to Fed. R. Civ. P. 26 carved out exceptions for an expert's communications with counsel[4] and for draft reports[5], it did not do so for expert communications between and among each other. As the Court in Republic of Ecuador v. Hinchee explained, "Respondents cannot withhold communications between their testifying experts under a rule that protects only attorney-expert communications."

> In crafting Rules 26(b)(4)(B) and (C), the drafters easily could have also extended work-product status to other testifying expert materials, such as an expert's own notes or his communications with non-attorneys, such as other experts. But the rule drafters did not. This omission, if anything, reflects a calculated decision not to extend work product protection to a testifying expert's notes and communications with non-attorneys.

Republic of Ecuador v. Hinchee, 741 F.3d 1185, 1191-92 (11th Cir. 2013) (Citing the 2010 Advisory Committee Notes) ("[I]nquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule.").

Discoverable information considered by an expert extends to data supplied by a third party, Vitalo v. Cabot Corp., 212 F.R.D. 472 (E.D. Pa. 2002), as well as papers, notes, worksheets and other documents prepared by the expert witness. Quandrini v. Sikorsky Aircraft Div., 74 F.R.D. 594 (D. Conn. 1977).

2 For instance, the Federal Rules of Civil Procedure now protect draft expert reports from discovery. FRCP 26(b)(3)(A) & 26(b)(4)(B). Many state rules, however, have not adopted that change and continue to allow for the discovery of draft reports.

3 The "bright-line rule" envisioned by the 1993 amendments is remains largely intact after the 2010 amendments – the theories or mental impressions of counsel are protected – but "everything else is fair game". Yeda Research & Dev. Co., Ltd. v. Abbott GmbH & Co. KG, 292 F.R.D. 97 (D.C.C. 2013) (citing Fialkowski v. Perry, 2012 WL 2527020 at *3 (E.D. Pa. 2012)). Under the 2010 amendments, materials "considered by" an expert, including those "ultimately rejected", must be produced. E.g., Carroll Co. v. Sherwin-Williams Co., 2012 WL 4846167 at *3-5 (D. Md. 2012) (requiring production of communications that "at any time could have been the basis for [expert's] opinions").

4 Even with respect to communications with counsel, however, communications that "identify facts or data that the party's attorney provided and that the expert considered" and that "identify assumptions that the party's attorney provided" are discoverable. Fed. R. Civ. P. 26.

5 The comments to the 2010 Amendments to the Fed. R. Civ. P. 26 also clearly distinguish draft reports from expert communications by email: "The disclosure obligation extends to any facts or data 'considered' by the expert in forming the opinions to be expressed, not only those relied upon by the expert. . . . [T]he court must protect against disclosure of the attorney's mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert's own development of the opinions to be presented; those are subject to probing in deposition or at trial."

Experts also have a duty to preserve a product or tangible object at issue in litigation when they have been given possession of the object or when destructive testing is undertaken. Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995); Livingston v. Isuzu Motors, Ltd., 910 F. Supp. 1473 (D. Mont. 1995).

In sum, under the federal rules, there is a broad right to discovery of materials and information considered by an expert, with narrow exceptions for draft reports and certain communications with counsel subject to protection under FRCP 26(b)(4)(B)-(C). To the extent there is any question, at all, about whether an expert's documents or work may be discoverable at any point, these materials should be preserved. It is critical that attorneys understand expert discovery obligations and clearly and consistently communicate these obligations to retained experts.

Spoliation of Evidence and Sanctions

Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigiation." Masaid Tech., Inc. v. Samsung Electr. Co., Ltd.., 348 F. Supp. 2d 332, 334 (D. NJ 2004) (quoting Zubulake v. UBS Warburg LLC, 2004 WL 1620866 at *6 (S.D.N.Y. July 20, 2004)). "Spoliation occurs where: the evidence was in the party's control; the evidence is relevant to the claims or defenses in the case; there has been actual suppression or withholding of evidence; and, the duty to preserve the evidence was reasonably foreseeable to the party." Bull v. United Parcel Serv., Inc., 665 F.3d 68, 73 (3d Cir. 2012). Courts have inherent discretionary power to make appropriate evidentiary rulings and impose sanctions in response to spoliation of evidence.[6] Apple, Inc. v. Samsung Elect. Co., 881 F. Supp.2d 1132, 1135 (N.D.Cal. 2012). In determining the sanction for spoliation, courts look to, among other things, willfulness or bad faith, and prejudice to the adversary. Bull, 665 F.3d at 80.

Where a party knows of their duty to preserve evidence, destruction of that evidence is proof of willful spoliation and bad faith. See Leon v. IDX Sys. Corp., 464 F.3d 951, 959 (9th Cir. 2006) (employee acted in bad faith and his actions amounted to willful spoliation, "because he knew he was under a duty to preserve all data on the laptop, but intentionally deleted many files and then wrote a program to write over deleted documents."); Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 96 S. Ct. 2778 (1978) (where plaintiffs left crucial discovery substantially unanswered despite promises and commitments by counsel, conduct amount to the "callous disregard of responsibilities [that] counsel owe to the Court and to their opponents", exemplifying "flagrant bad faith"). While bad faith may not be required to warrant the imposition of sanctions, it is relevant to the level of sanction imposed. In re Napster, Inc., 462 F. Supp.2d 1060, 1066 (N.D. CA 2006).

Sanctions in spoliation cases range from monetary fines, exclusion of evidence or witnesses to default judgment, depending on the seriousness of offense and the degree of bad faith or willfulness. A default judgment or dismissal of claims may be an appropriate sanction where evidence is willfully destroyed and hidden from a party. Anheuser-Busch, Inc. v. Natural Beverage Distributers, 69 F.3d 337, 348 & 354 (9th Cir. 1995) (district court's dismissal of claim affirmed where concealment of evidence precluded party from using documents "to support the accuracy of its . . . analysis, to buttress the credibility of its expert, and to challenge [the spoliator's] testimony and the testimony of [the spoliator's] expert", thus "undermin[ing] the integrity of [the] judicial proceedings"); Leon, 464 F.3d at 955, 959-60 (district court's dismissal of claims was affirmed where employee's deletion of computer files were willful, and the deleted files "could have helped" the other party's case).

Where there is egregious behavior, such as the intentional destruction of documents, courts have explained that a sanction lesser than dismissal may not have a sufficient deterrent effect:

> One who anticipates that compliance with discovery rules and the resulting production of damning evidence will produce an adverse judgment, will not likely be deterred from destroying that decisive evidence by any sanction less than the adverse judgment [it] is tempted to thus evade. Willful spoliation of evidence deserves the harshest sanctions because it is antithetical to our system of justice.

Philips Elec. N. Am. Corp. v. BC Technical, 773 F. Supp.2d 1149, 1158 (D. Utah 2011). See also U.S. ex rel. Berglund

6 In addition to the courts' inherent power, the federal rules were amended in December 2015 to address the applicability of sanctions for spoliation of electronically stored information ("ESI"). GN Netcom, Inc. v. Platronics, Inc., 2016 WL 3792833 (D. Del. July 12, 2016). Under Rule 37(e):

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e).

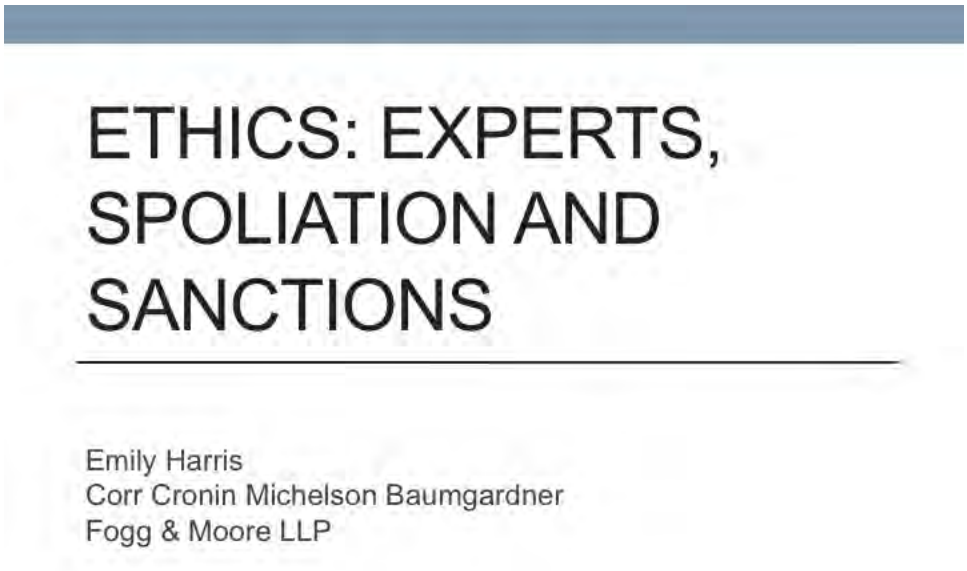
v. Boeing Co., 835 F. Supp.2d 1020, 1055-56 (D. Or. 2011) (dismissing a retaliatory lay-off claim due to the plaintiff's intentional destruction and alteration of evidence on his computer and lying about this conduct); Kvitka v. Puffin Co., L.L.C., No. 1:06-CV-0858, 2009 WL 385582, at *5-6 (M.D. Pa. Feb. 13, 2009) (dismissing the claims of a litigant who disposed of a laptop which contained emails and other electronic data essential to resolution of the case).

Exclusion of expert witness testimony may be particularly apt where an expert has examined evidence and then allowed it to be destroyed. See Dillon v. Nissan Motor Co., Ltd., 986 F.2d 263, 268 (1993) (where experts had extensively examined evidence and then allowed it to be destroyed, trial court properly refused to allow those experts to testify); In re Napster, Inc. Copyright Litigation, 462 F. Supp.2d 1060 (N.D. Cal. 2006) ("a court can exclude witness testimony proffered by the party responsible for destroying the evidence and based on the destroyed evidence").

One of the most prevalent sanctions for spoliation is an adverse inference jury instruction. An adverse inference instruction allows the court to instruct the jury that it may infer that the destroyed evidence would have been unfavorable to the spoliator had it been preserved. U.S. ex rel. Berglund v. Boeing Co., 835 F. Supp.2d at 1055 (finding prejudice as "neither the court nor [the defendant] can know the extent and relevance of all the missing or altered information" and "it is reasonable to presume that [the missing] evidence was relevant to either the merits of [the plaintiff's] claim or [the defendant's] defense of that claim").

Conclusion

Failure to ensure that experts understand their obligations to preserve discoverable expert materials may lead to motion for sanctions for spoliation, as well as potential malpractice claims for dismissal of claims or exclusion of key testimony arising from a spoliation sanction or disciplinary action for violation of RPC 3.4. When in doubt about whether expert materials are subject to discovery or an obligation to preserve, the better path is to preserve it.



ABA Model Rules of Professional Conduct: Rule 3.4

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

ABA Model Rules of Professional Conduct: Rule 3.4

A lawyer shall not:

...

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

New York Rules of Professional Conduct: Rule 3.4

A lawyer shall not:

(1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

...

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

Spoliation

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."

West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)

Fed. Rule Civ. Proc. 37(e)

The court:

(1) may order measures no greater than necessary to cure the prejudice; or

(2) If the party acted with the intent to deprive:

(A) presume the ESI was unfavorable to the party;

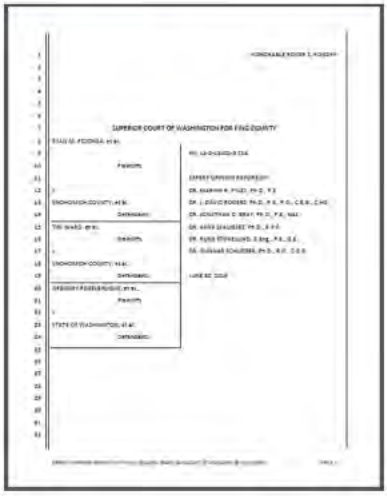
(B) instruct the jury the ESI was unfavorable to the party; or

(C) dismiss the action or enter a default.

CASE EXAMPLE: OSO LANDSLIDE

CASE EXAMPLE: OSO LANDSLIDE

- State's defense focused on its expert case
- State retained 7 experts
- Located across the country
- Inter-disciplinary team
- Prepared single joint report



Federal Expert Discovery

Federal rules of discovery for experts require production of:

- Reports
- All Materials considered or relied upon
- Communications between attorneys and experts that identify facts or data that the party's attorney provided, identify assumptions the attorney provided, or that relate to compensation.
- Expert to expert communications

Federal Expert Discovery

Federal rules of discovery for experts do not require production of:

- Draft reports
- Communications between attorneys and experts that reflect theories or mental impressions of attorneys

Lay of the Land

Discovery of experts included typical expert discovery requests, subpoenas for documents, and a document production protocol for expert materials:

Given the expert depositions being scheduled, plaintiffs propose that all parties agree to a standard protocol for the production of expert materials in lieu of individual document subpoenas. We propose that 14 days prior to the agreed deposition date, the attorney who retained the expert will produce (electronically to the extent possible) to all parties the following:

1. The materials relied upon by the expert in forming their opinions, including any work papers or notes. If the materials have been produced in the litigation and have bates numbers, this obligation may be satisfied by listing bates numbers.
2. Documents provided to, considered by or created by the expert that contain facts or underlying assumptions that the expert considered in forming his or her opinion.
3. Articles, papers or reports authored or co-authored by the expert in the last 10 years relating the area of expertise in their opinions.
4. Communications between the expert and any other expert in the case relating to Hazel Landslide or the Oso Landslide.

The Revelation

From: Hoosier, Diane (ATG)
Sent: Tuesday, July 26, 2016 11:46 AM
To: Lesnick, Ed
Cc: Harris, Emily; Tomisser, Rene (ATG)
Subject: RE: Storesund Production

The 04_Communciations folder is correctly empty.
The 02_OpinionsDocs contains the 6/30/16 Expert Report (also produced separately on 6/30)
The 01a_ExpertReport 2016-06-30 folder is correctly empty

From: Lesnick, Ed [mailto:elesnick@corrcronin.com]
Sent: Tuesday, July 26, 2016 10:09 AM
To: Hoosier, Diane (ATG)
Cc: Harris, Emily; Tomisser, Rene (ATG)
Subject: Storesund Production

Diane,
In going through the Storesund production you uploaded, we noticed a couple of folders that contained no documents. I just wanted to confirm that those folders are indeed empty. The folders that contained no documents are "01a_ExpertReport 2016-06-30", "02_OpinionDocs", "04_Communications".

The Revelation

A. Yes, there have been email exchanges.
Q. And did you provide a set of your emails to the State as part of your disclosures in this case?
A. I did not.
Q. And why was that?
A. The expert group decided at the beginning that we would delete all emails in the exchange between the experts, and so that's what I did. I deleted all of my emails. And I believe in my disclosure I included a note in there explaining that policy.

Expert Agreement to Destroy Evidence

Ex. R State_of_WA_ExpertCommunications

At the onset of this case, the State of WA experts instituted a policy of deleting any email communication. I did not engage in any USPS mail exchange. The majority of information sharing occurred via in-person meetings, teleconferences, and/or online Webex Meetings. All draft materials were discarded upon finalization of our Preliminary and Interim Expert Reports.

Rune Storesund
June 22, 2016

Directive to CC Attorneys

Q. And you produced no emails for after May 19th, is that correct?

A. Correct.

Q. And why is that?

A. We obtained clarification from Mark regarding which emails needed to be included in discovery. And as part of that instruction -- or as part of that, we were instructed that only -- that emails that included a state attorney as a CC or as a recipient did not need to be disclosed. So since that time, essentially all the experts as far as I know, are sending things -- are sending them and including a state attorney.

Development of the Spoliation Case

Reviewed all prior State discovery responses and document productions for its experts finding:

- 2014: 1 email
- 2015: 5 emails
- 2016: some emails, only from expert "in boxes," and very few after May 19th
- Two experts produced no emails for any time period

Development of the Spoliation Case

- State experts were deposed and confirmed the agreement to delete all of their emails with each other
- Sought to meet and confer with State, demanding production
- Developed detailed chronology of discovery

Development of the Spoliation Case

OSO LANDSLIDE LITIGATION
CHRONOLOGY OF STATE'S EXPERT EMAIL DESTRUCTION POLICY

July 1, 2014	Pszonka Plaintiffs filed and served their Complaint
July 1, 2014	**Plaintiffs served their first set of Interrogatories and Requests for Production on the State, including expert discovery.**
Oct. 16, 2014	State finally provided a response to RFPs. **State does not object to expert discovery.**
Feb. 19, 2015	Plaintiffs were forced to file a motion to compel against State for failure to produce other documents sought on July 1, 2014.
Feb. 27, 2015	Court granted the motion to compel against State, including for documents State had not produced since August 2014.
March 17, 2015	**Parties agreed to follow the federal rules with respect to expert discovery.**
March 23, 2015	**State's expert team met in person for the first time to discuss their expert plan (State attorneys present). State expert team agreed to read and then systematically delete all of its email communications.**
Nov. 6, 2015	Rogers Declaration submitted with State MSJ.
Nov. 13, 2015	**Subpoena issued to Dr. Rogers seeking email communications with other experts. State does not object.**
Dec. 1, 2015	Docs received in response to Rogers' Subpoena. Docs labeled "Privileged Attorney-Client Information" included. No emails produced.
Dec. 8, 2015	State's attorneys sought to "claw back" all of the documents that had been marked as privileged. **Plaintiffs pointed out communications conveying facts and data that were reviewed by experts were not privileged. State does not object.**

Categories of State Expert Materials Deleted & Withheld

- Communications between experts prior to writing final report
- Information and data developed as "consulting experts" prior to witness disclosure
- Information and materials considered to be "drafts" and not final opinions
- Communications cc'd to an attorney

Court Orders

- *In camera review* of internal State AG emails
- Forensic recovery of deleted emails, if possible, at State's expense
- Payment of attorneys' fees and costs
- Trebling as a monetary punishment
- Adverse inference jury instruction and cross-examination of experts on spoliation at trial

Adverse Inference Jury Instruction

"The State's experts on issues of liability willfully deleted emails that were sent amongst them, with the knowledge and approval of the State. You may, but are not required, to infer the contents of the deleted emails amongst the State of Washington's liability experts were favorable to the Plaintiffs' case or harmful to the State of Washington's case...."

Court Orders

"The Court finds that these violations occurred because:

(1) the State's lawyers did not, apparently, understand their discovery obligations under the rules by which they agreed to abide;

(2) the State displayed a degree of institutional arrogance;

(3) the State made bad decisions not to immediately come clean when it became clear discovery violations were occurring; and

(4) the State provided incomplete and inaccurate information to the Court about the timing and extent of their actions throughout the summer."

Oct. 4, 2016 Order at 5-6.

Court Orders

"The **State's behavior in this case was willful**. They knew they were deleting emails that contained potentially relevant **evidence…The possibility that the material might not require production does not excuse the decision to delete it.** That possibility does not make the decision to delete it any less willful, intentional or deliberate."

Oct. 4, 2016 Order at 25.

Court Orders

"The potential importance of these inter-expert emails should not be understated…This case presented a significant scientific component ... Thus, the decision to delete email among the scientists, created as they worked to establish their various opinions, was of critical importance. **Whether or not any of the emails actually contain 'a smoking gun,' is not of the utmost importance** to the analysis."

Oct. 4, 2016 Order at 25-26.

Impact on the Case

- Ability to prepare for trial was severely impacted.
- $1.2 million in sanctions.
- Negative press on the eve of trial.
- Two days after the Court's adoption of the adverse inference jury instruction, the spoliating party settled for $50 million.

Impact on the Attorney

Wash. State AG Fires Lawyer Involved In Evidence Deletion

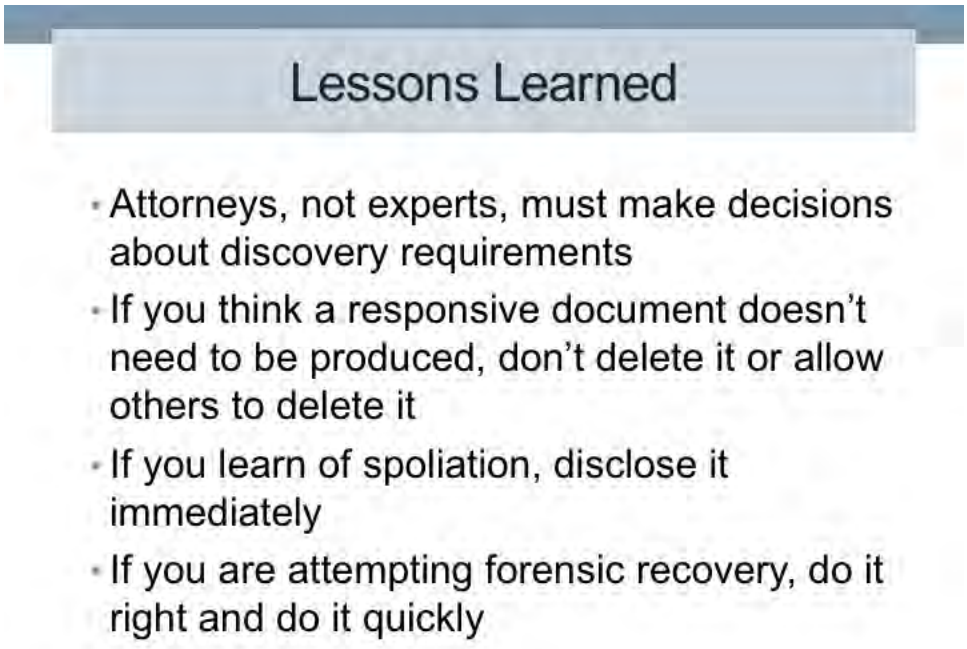
By Adam Lidgett

Law360, New York (October 5, 2016, 4:30 PM EDT) -- The Washington state Attorney General announced Tuesday that one of his attorneys, who knew evidence was being deleted by expert witnesses in a case over the liability in the 2014 Oso landslide that left 43 people dead, is no longer working for his office.

WASHINGTON STATE BAR ASSOCIATION
GRIEVANCE AGAINST A LAWYER

Lessons Learned

- Issue expert discovery early in the case
- Diligence, and more diligence
- Document discovery agreements and deficiencies, again and again
- Understand the rules for expert discovery
- Document that opposing counsel also understands expert discovery rules


Lessons Learned
• Attorneys, not experts, must make decisions about discovery requirements
• If you think a responsive document doesn't need to be produced, don't delete it or allow others to delete it
• If you learn of spoliation, disclose it immediately
• If you are attempting forensic recovery, do it right and do it quickly

Emily Brubaker Harris

Managing Partner
Corr Cronin Michelson Baumgardner Fogg & Moore (Seattle, WA)

206.621.1477 | eharris@corrcronin.com
http://www.corrcronin.com/profiles/emily-brubaker-harris/

Emily is the firm's managing partner. Her practice focuses on complex civil litigation, class action defense, products liability, real estate litigation, and employment litigation, at both the trial and appellate level. Emily is also one of the lead attorneys pursuing wrongful death claims against landowners and government entities arising from the 2014 Oso Landslide. Emily excels in handling large and complex matters that require creative problem-solving, diligence, and fine attention to detail.

Prior to joining Corr Cronin in 2004, Emily was a litigation associate at O'Melveny & Myers LLP in Los Angeles, and she clerked for the Honorable Thomas G. Nelson on the United States Court of Appeals Ninth Circuit. Emily has been selected to the "Rising Star" list in Seattle's legal community. She is licensed to practice in Washington and California.

Featured Cases

- Rails to Trails Class Actions – Defending King County in numerous cases challenging ownership of former railroad corridors valued at over $100 million. Defeated motion for preliminary injunction, secured dismissal of claims for quiet title and a declaratory judgment regarding ownership of the corridor and obtained judgments quieting title in King County.
- Oso Landslide – Pursuing wrongful death claims arising from the March 22, 2014 Oso, Washington Landslide. Obtained significant spoliation sanction order against State of $1.2 million. With co-counsel, obtained $60 million settlement from the State and Grandy Lake Forest Associates.
- Fiber Optic Right of Way Litigation – Defense of telecommunications company in multiple class actions in state and federal courts alleging claims of trespass arising from installation of fiber-optic cable on railroad rights-of-way.
- Class Action Jury Trial – Defense verdict in four-week jury trial defending a national transportation company against multi-million dollar claims that its independent contractor drivers were employees.
- Products Liability Trial – Successfully defended bottle manufacturer and winery against products liability claims seeking more than $900,000 in damages. After a four week bench trial, obtained a complete defense verdict.

Presentations and Publications

- Ethical Duties for Lawyers Working with Expert Witnesses, Landslides in Washington, Law Seminars Int'l, Seattle, Washington, March 2017
- Occam's Razor: Simplicity as an Effective Trial Tool, Network of Trial Law Firms, Napa, California, April 2015Class Action Jury Trials: Going the Distance, Network of Trial Law Firms, Naples Florida, May 2013

Education

- J.D., Loyola Law School of Los Angeles
- M.A., Annenberg School for Communications, U.S.C.
- B.A., Communications Studies, University of California, Santa Barbara

ETHICS: PITFALLS IN SETTLEMENT NEGOTIATIONS

Habib Nasrullah
Wheler Trigg O'Donnell (Denver, CO)
303.244.1960 | nasrullah@wtotrial.com

It is important for practitioners to keep in mind the many ethical constraints inherent in settlement negotiations. And while once settlement negotiations inevitably gain their own momentum, an occasional reminder of the governing ethics rules would serve even the most experienced lawyer well. Overall, this paper is divided into three separate segments. First, albeit somewhat obvious, who can the negotiating lawyer communicate with? Second, what are the ground rules for what can be said about the case and its value? Third, what terms can you ethically negotiate? The segments are based on the American Bar Association's Model Rules of Professional Conduct ("Model Rules") and related ethics opinions as well as interpreting opinions of various State Bar associations.

With respect to the first segments, it is fairly obvious that in both civil and criminal cases, the client has the final say - in the civil context of whether to settle or not, and in the criminal context of whether to accept a plea bargain. Model Rule 1.2(a) ("… [a] lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered…"). In other words, you must be communicating with your client about settlement.

Who can you communicate with on the other side? Clearly, if the other side is represented, you better be communicating with their lawyer, unless you have consent of the other lawyer, or you are authorized to communicate with the client on the other side by operation of law or a court order. Model Rule 4.2. A wise practice would be to ensure that, if you are communicating with a represented party, there is a clear paper trail that authorizes you to do so. Interestingly - and all of us have wondered about this at some point in our careers - a lawyer who makes an offer of settlement to the lawyer for the other side may not under Model Rule 4.2 ask the offeree-party whether the offer has been communicated, even if the offering side lawyer has "serious doubts" that it has been so communicated. ABA Formal Op. 92-362 at 1, (July 6, 1992). But, under the same opinion, the offering lawyer can counsel her client about the client's ability to communicate on the matter directly with the offeree-party and the lawyer's views on the most effective method for doing so. Id. at 3. This is consistent with the comment to Model Rule 4.2 that specifically states that "the parties to a matter can communicate directly with each other." In other words, the Model Rules mandate that, in order to fulfill your duty of representation, you should advise your client (i) as to your belief as to whether an offer has been communicated, (ii) the limits on your ability to communicate with the offeree-party, and (iii) the freedom of your client to communicate directly with the opposing offeree-party. Id.

Relatedly, you may assist your client regarding the substance of any proposed communication with the opposing client, but an ABA opinion prohibits "overreaching" in rendering such assistance. ABA Formal Op. 11-461 (August 4, 2011). A lawyer is permitted to render "substantial assistance" in these direct client to client communications. He may prepare a list of topics to be addressed, discuss issues to be raised, prepare talking points, redraft a letter that enables a client to better convey her position and not disadvantage herself, and even draft a settlement agreement ready for execution. But there are limits to this ability imposed by Model Rule 4.2, in order not to violate its prohibition against communications with a represented party. Model Rule 4.2, Comment [1]. Prime examples of overreaching include securing from a represented party an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel. Id. at

3-4. The way to avoid this type of overreaching is to ensure that any agreement or proposal includes language or a cover letter that has conspicuous language that warns the other party that he should consult with his lawyer before signing the agreement or acknowledging any proposal. Id. at 3.

What are the limitations on what can be said in settlement negotiations? Model Rule 4.1(a) makes clear that we may not knowingly make a false statement of material fact or law to a third person. Importantly, under Model Rule 4.1, in the context of a negotiation (including a mediation) one may not make false statements of material fact (for example, "I have three witnesses who will swear the light was green when you don't") but you may make statements about a party's negotiating goals or its willingness to compromise, as well as statements that can be fairly characterized as "puffing." Such puffery is not considered false statement of material facts within the Model Rules. ABA Formal Op. 06-439 at 1, (April 12, 2006). You may downplay a client's willingness to settle, or present a client's bargaining position without disclosing her bottom line position, in an effort to get a better result. Id. at 4. In the same vein are overstatements or understatements of a client's position in the litigation or expressions of the value or worth of the case. Id.

These types of statements are not material facts subject to Model Rule 4.1, or its prohibitions against false statements. The opinion notes that even though a client's Board of Directors may have authorized a higher settlement figure, a lawyer may represent that the client will not settle for greater than $50. Id. at 5. However, under Model Rule 4.1, that lawyer may not state that the Board of Directors had formally disapproved of any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum. Id. Importantly, there is no difference in the ethical principles governing lawyer truthfulness in mediation as opposed to other negotiation settings. Id.

A related question arises when a Judge compels a settlement conference and involves herself in the process. ABA Formal Op. 93-370 (February 5, 1993). In her attempts to get the case resolved, the judge may ask participating counsel the limits of his settlement authority or his advice to the client concerning settlement terms. Model Rule 1.6 prohibits the disclosure of information relating to the representation without the client's informed consent. The limits of settlement authority and the lawyer's advice regarding settlement are within the ambit of "information relating to the representation" under Model Rule 1.6. Thus, absent client consent, these matters may not be disclosed. ABA Formal Opinion at 1, 3. The best answer to a direct inquiry on the extent of authority or end game settlement terms is to decline to answer without express client consent. Id. Although Model Rule 1.6 permits lawyers to disclose to third parties information "relating to the representation" that is "impliedly authorized" in order to carry out the representation, such as routine stipulations and to admit matters not in dispute, the ABA has interpreted this exception as being inapplicable to disclosures of settlement authority or advice concerning settlement. This is because such information is confidential, and its disclosure cannot be said to be impliedly authorized. Id. at 2. This information consequently may not be disclosed to anyone, including a settlement judge or mediator, without informed client consent. The opinion notes that it is not appropriate for a judge to compel lawyers to make confidential admissions against their client's interests. Judges are required to be sensitive to lawyers' ethical constraints and should not push the inquiry despite their sincerity to try and resolve the case. Id. at 3.

There is, however, a duty to disclose the death of a client to opposing counsel. ABA Formal Op. 95-397 at 1, (September 18, 1995). The reasoning behind this conclusion is that upon the client's death, the lawyer has no client and, if he continues the representation, it would be for a different client, and the failure to disclose this event would be equivalent to making a false statement of material fact within the meaning of Rule 4.1(a). Id. at 3. Comment 1 to Rule 4.1 notes that misrepresentations can occur by virtue of a "failure to act." Id. Thus, continuing the representation after the death of the client is the equivalent of a knowing, affirmative misrepresentation should be lawyer fail to disclose that she no longer represents the now deceased client. Id. Similarly, the court must be advised of the client's death and the failure to do so would be considered a "false statement of material fact … to a tribunal." Model Rule 3.3.

Lawyers do not have a duty to inform the opposing party of the weaknesses of the client's case in settlement discussions or otherwise. ABA Formal Op. 94-387 (September 26, 1994). Specifically, there is no ethical duty to inform the opposing party in negotiations that the statute of limitation on a client's claim has run. Id. at 2. To do so without client consent is deemed unethical. Id. at 1. If the lawyer did not know that the statute barred the claim, he cannot on his own volition dismiss the claim or discontinue settlement discussions without express client consent. Id. at 2. Relatedly, and somewhat surprisingly, the ABA's position in the same opinion is that there is no ethical constraint on filing a time-barred claim, provided (i) no affirmative misrepresentations have been made, and (ii) state rules do not preclude this conduct. Id. at 3. The dissent to this opinion notes that it could encourage "sharp" practice and should be proscribed by Model Rule 8.4(c). Id. at 5. Specifically, 8.4(c) states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Id. The dissent notes that the majority's position is counterproductive to then ongoing ABA campaigns to improve the image of lawyers.

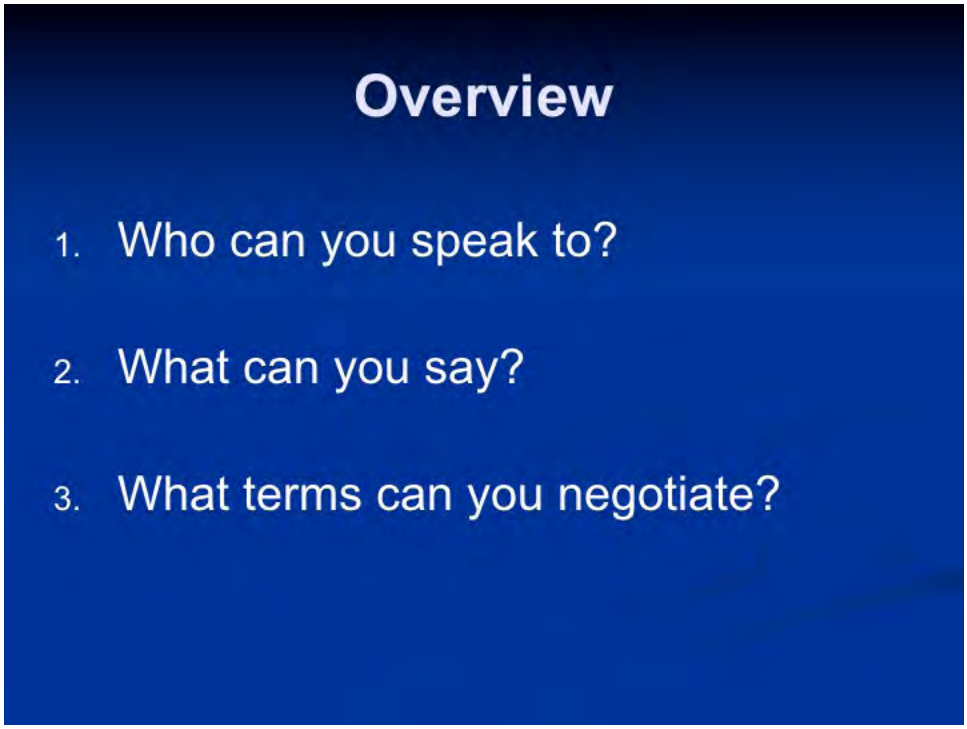
A common scenario in settlement is clients seeking to have particular opposing counsel restrained from accepting clients similar to the one whose representation is ending as a result of settlement. Model Rule 5.6(b) prohibits a lawyer from offering or making any "agreement in which a restriction on the lawyer's right to practice is part of the settlement of the client controversy." Not surprisingly, there is a formal opinion on point. ABA Formal Op. 93-371 (April 16, 1993). Defense lawyers may not restrict the right of plaintiff's counsel to represent clients and future claimants against a defendant as part of a settlement. Id. at 1. The inquiry arose in the context of a mass tort docket in which defendant sought to impose a settlement on not just the plaintiff law firm's current but future clients as well. Id. at 1-2. The putative settlement was structured to settle all current cases, and any which the plaintiff's counsel would be engaged for in the future. Id. The settlement contemplated predetermined settlement amounts depending on the level of injury, and if the client did not accept the negotiated terms, the case would proceed to litigation or be placed in a "deferred docket." Id. This docket was an inactive docket for those with lesser objective injury, until they developed a greater level of impairment. Id. The agreement tried to bind current and future clients, and had a maximum percentage of clients who could opt out of the deferred docket. Id. If the opt-outs exceeded the maximum percentage, the plaintiff's firm could not contractually represent the opt-out clients whether they were current clients when the settlement agreement was signed or later became clients. Id.

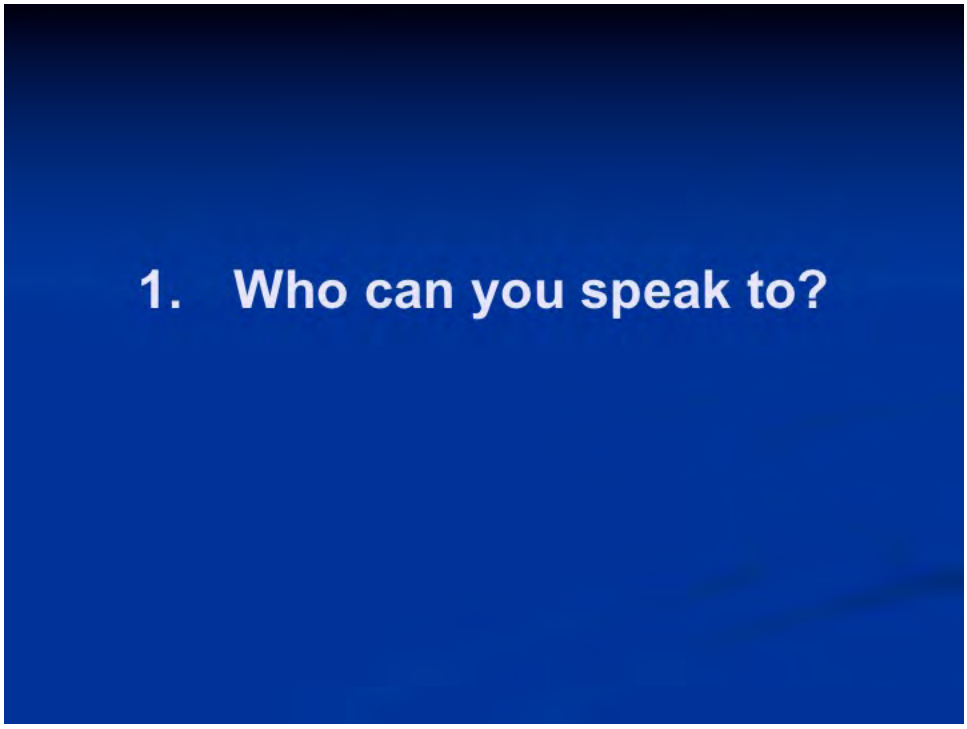
The Committee held that a lawyer may not offer, and opposing counsel may not accept, a settlement agreement which would limit the representation of future claimants. It recognized that despite all counsels' good faith efforts to resolve a complicated mass tort, Model Rule 5.6(b) cannot condone a settlement that restricts the public's right to lawyers who might be the best possible talent, and also the arrangement created conflicts among current and future clients. ABA Formal Op. 93-371 at 2. A similar Colorado Formal Opinion bars settlement agreements that try to limit the prosecutorial discretion of a plaintiff attorney on behalf of non-settling or future clients against the settling defendant by conditioning settlement on an agreement (i) not to subpoena specific documents or witnesses, (ii) not to use certain experts, (iii) requiring specific forums or venues, or (iv) prohibiting the referral of clients to other counsel. Colorado Formal Opinion 92 (Adopted June 19, 1993), relying on Rule 5.6(b) of the Colorado Rules of Professional Conduct. The opinion notes that the test of the propriety of a settlement term is whether it would restrain a lawyer's exercise of independent judgments on behalf of other clients. Id. at 1.

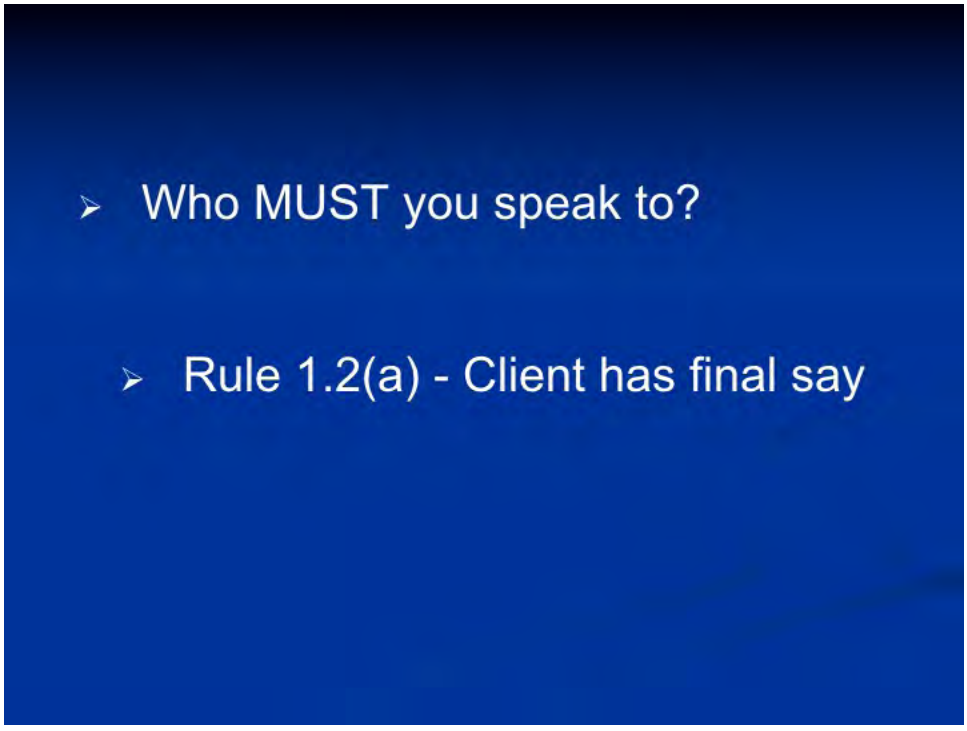
What about documents or information that a lawyer may get access to in discovery? Simply put, a settling defendant may not bind the opposing counsel in a settlement that bars him from using information obtained during the current representation in any future representation. ABA Formal Op. 00-417 at 1, (April 7, 2000). The reasoning in this opinion is that any such settlement term creates a potential conflict between present and future clients, and inevitably restricts the public's access to the best available legal talent for specific types of lawsuits. Id. Thus, the common thread running through opinions that examine conduct under Rule 5.6(b) is the strong public policy need to have unrestricted choice of counsel. Id. Thus, although you can require opposing counsel to abide by the terms of a Protective Order and restrict the dissemination of information learned in the litigation, there is an ethical prohibition, based on the right to practice, against a lawyer using information he learned in the representation in later representations against the same or related opposing party. Id. A State Bar of Arizona held similarly, but also made clear that a settlement cannot be conditioned upon the dismissal of disciplinary complaints against a former adversary, as any resulting prosecution was vested in the disciplinary authorities. State Bar of Arizona Ethics Opinion 90-06 at 4, (July 1990). Further, the opposing lawyer could not ethically identify any potential clients relating to the subject matter of the same or any other representation. Id. at 3.

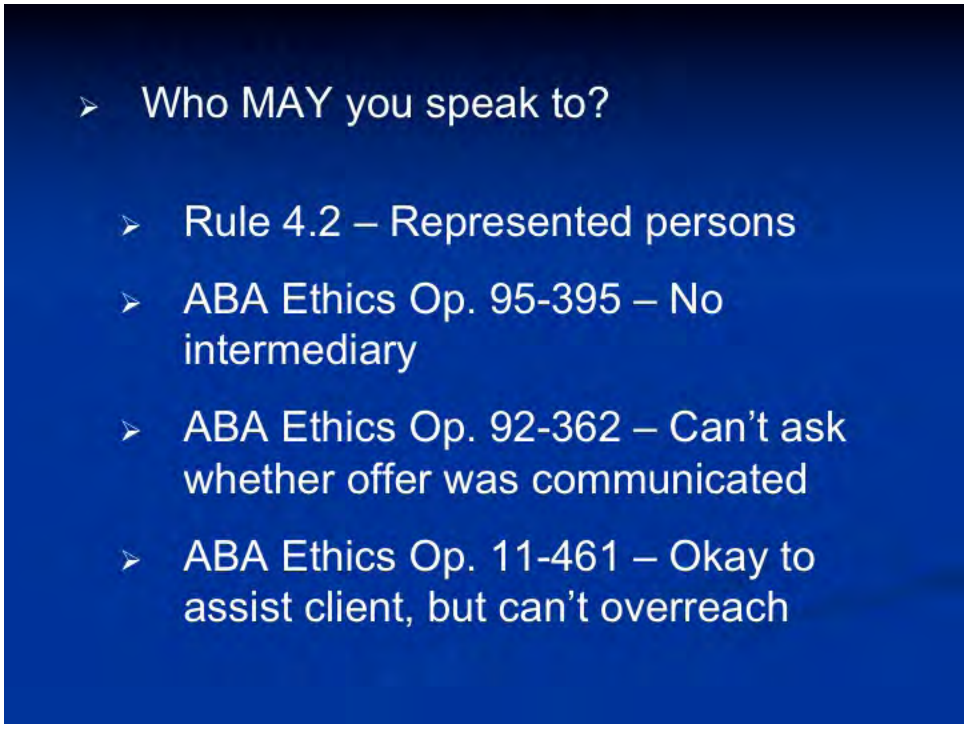
In conclusion, it is worth periodically revisiting the ethics guideline in your state, more so, while structuring settlements that have novel and atypical provisions.

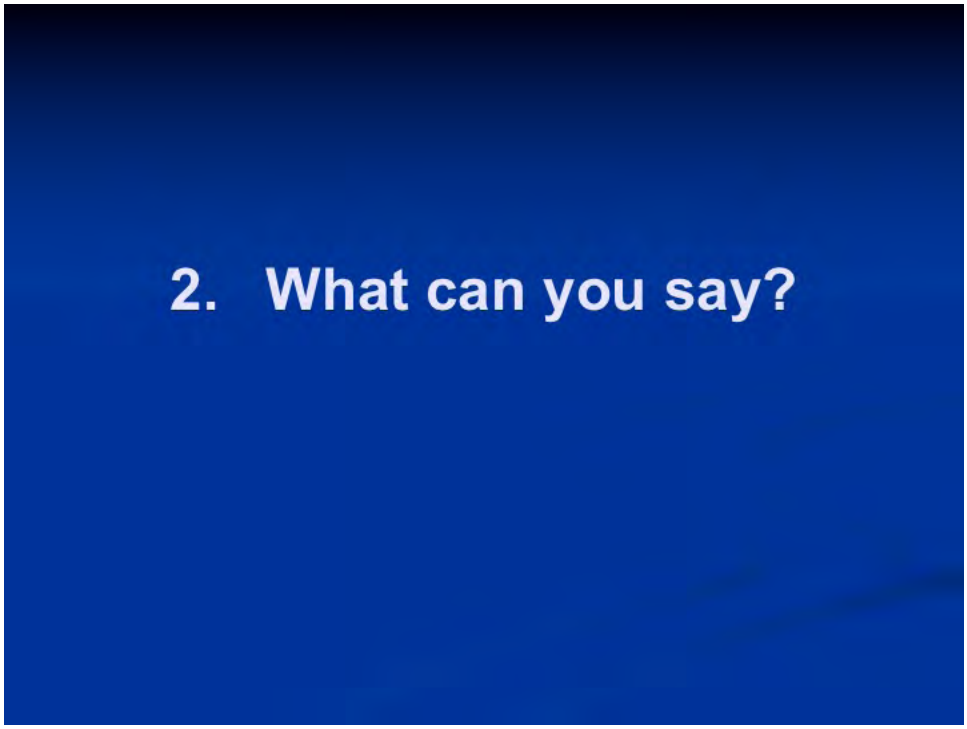

Ethics:
Pitfalls in Settlement Negotiations
Prepared By:
Carolyn Fairless
Habib Nasrullah
WHEELER TRIGG O'DONNELL LLP


Overview
1. Who can you speak to?
2. What can you say?
3. What terms can you negotiate?


1. Who can you speak to?

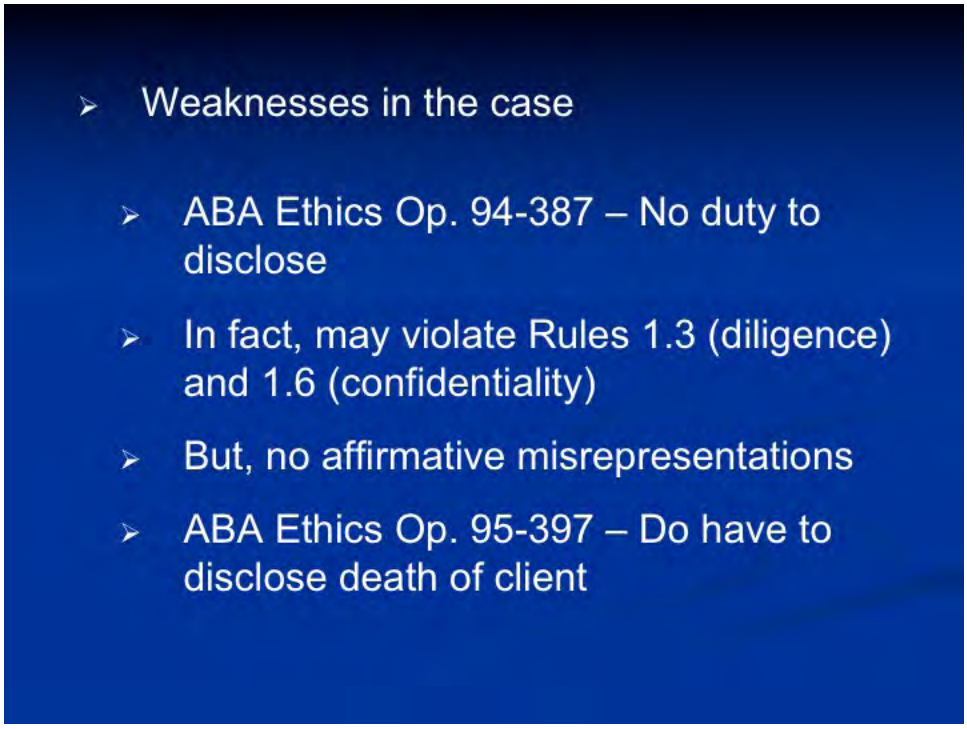

Who MUST you speak to?
Rule 1.2(a) - Client has final say

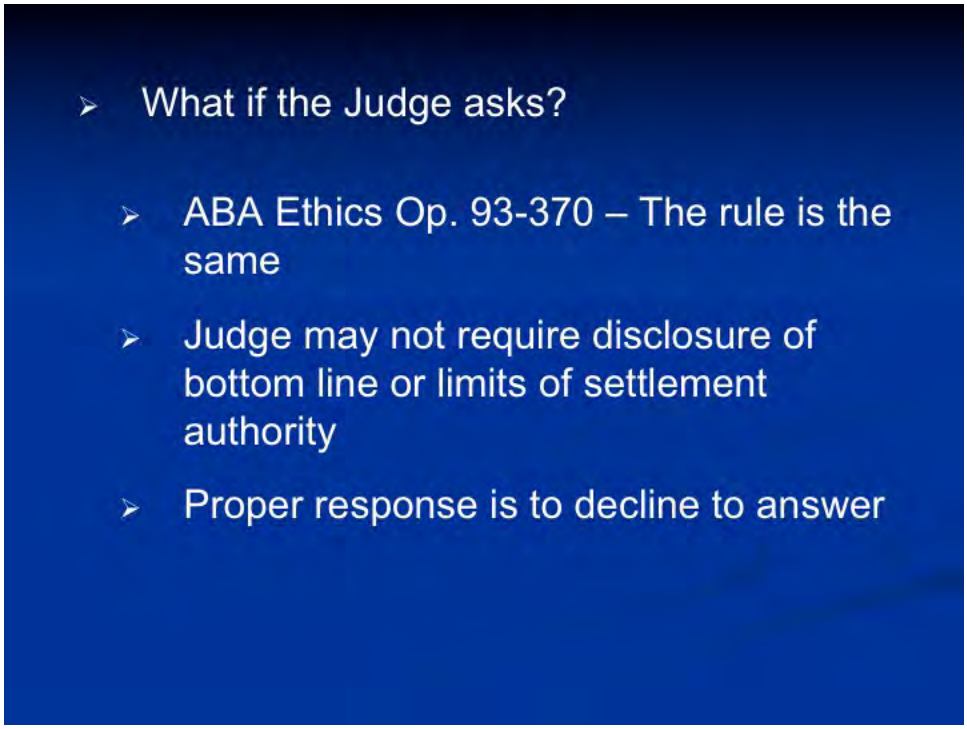

Who MAY you speak to?
Rule 4.2 – Represented persons
ABA Ethics Op. 95-395 – No intermediary
ABA Ethics Op. 92-362 – Can't ask whether offer was communicated
ABA Ethics Op. 11-461 – Okay to assist client, but can't overreach

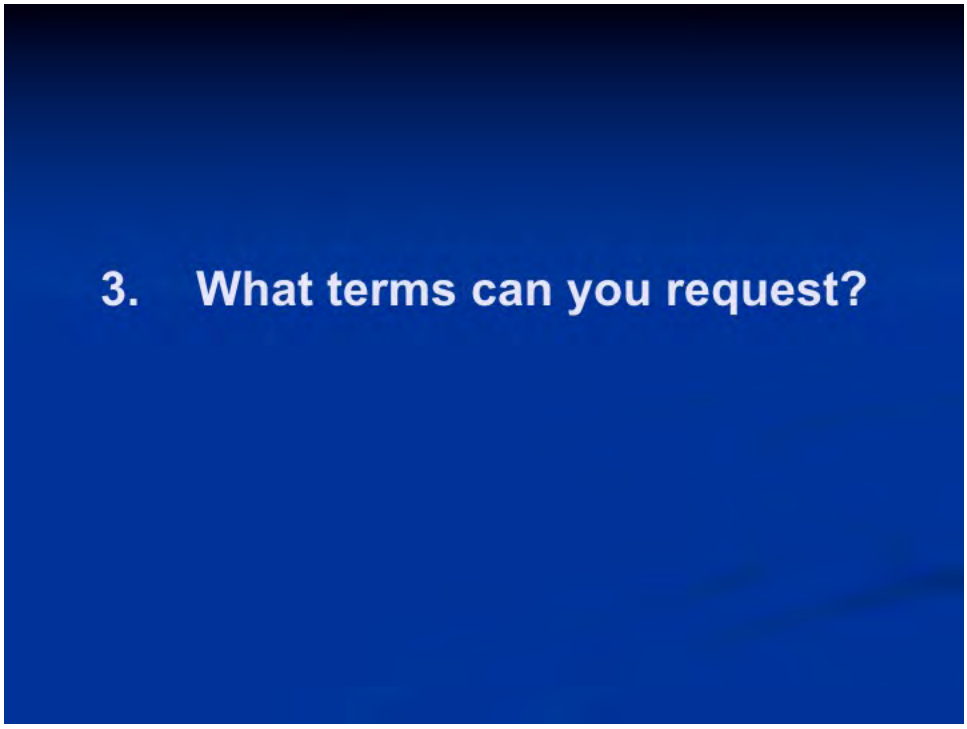

2. What can you say?

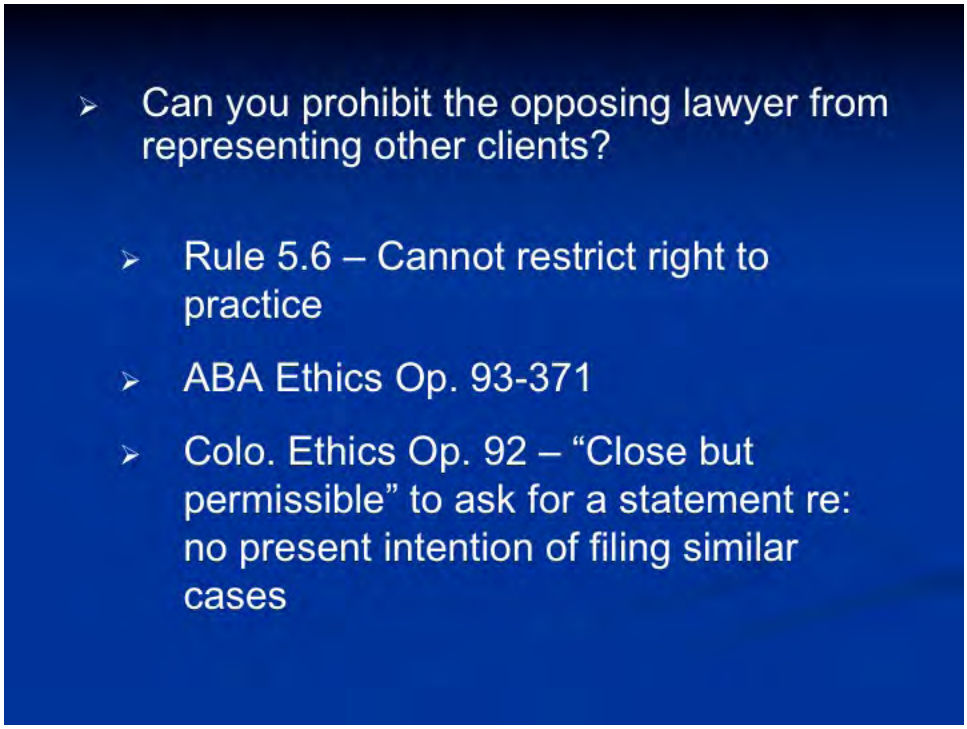
- The limits of dishonesty
  - Rule 4.1 – Cannot knowingly make a false statement of material fact or law
  - No clear definition
  - Comment 2 – Estimates of price or value; intentions as to settlement

- Puffery and posturing
  - ABA Ethics Op. 06-439 – Puffery okay
  - ABA Ethics Op. 93-370 – Bottom line or the limits of one's settlement authority are material facts
  - But, goals or willingness to compromise are not material facts


Weaknesses in the case
ABA Ethics Op. 94-387 – No duty to disclose
In fact, may violate Rules 1.3 (diligence) and 1.6 (confidentiality)
But, no affirmative misrepresentations
ABA Ethics Op. 95-397 – Do have to disclose death of client

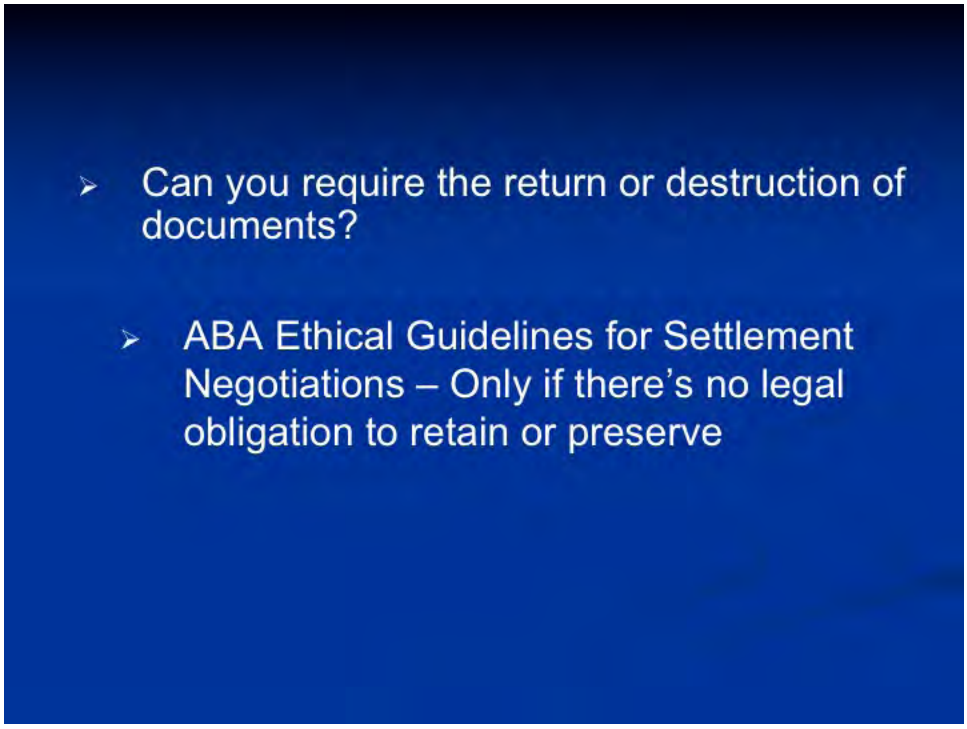

What if the Judge asks?
ABA Ethics Op. 93-370 – The rule is the same
Judge may not require disclosure of bottom line or limits of settlement authority
Proper response is to decline to answer

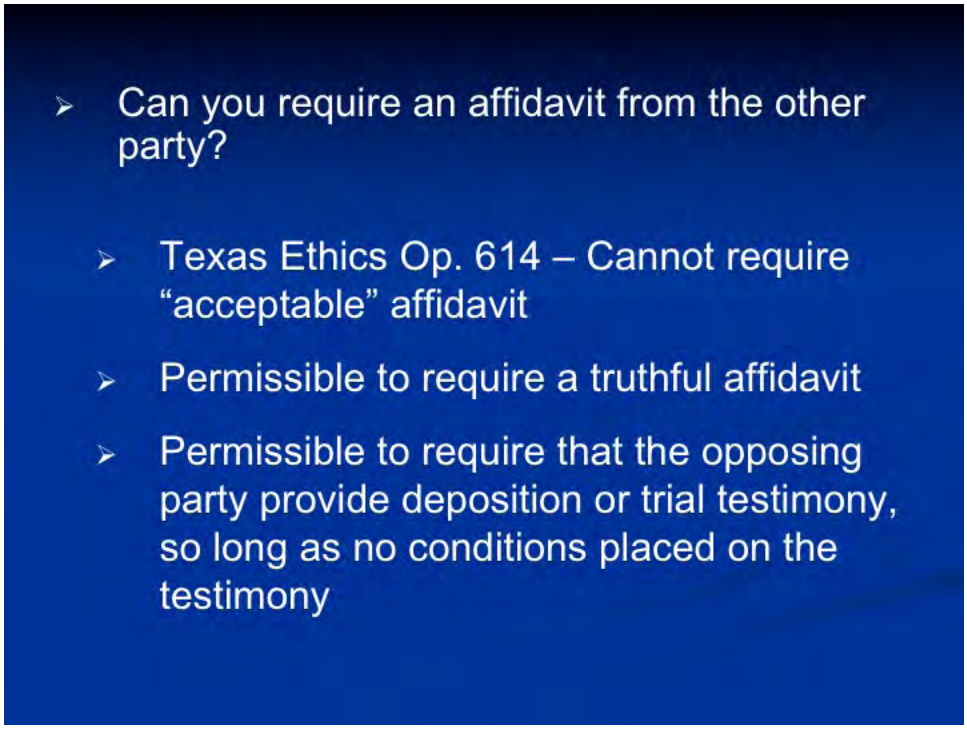

3. What terms can you request?


Can you prohibit the opposing lawyer from representing other clients?
Rule 5.6 – Cannot restrict right to practice
ABA Ethics Op. 93-371
Colo. Ethics Op. 92 – "Close but permissible" to ask for a statement re: no present intention of filing similar cases

- Can you prohibit the opposing lawyer from revealing information learned in connection with the representation of the settling client? From using that information in representing other clients?
  - ABA Ethics Op. 00-417 – Prohibition against revealing information is nothing more than what Rule 1.6 requires
  - But, cannot prohibit using the information

- Can you require the opposing lawyer to identify other clients?
  - Ariz. Ethics Op. 90-06 – Not absent those clients' consent


Can you require the return or destruction of documents?
ABA Ethical Guidelines for Settlement Negotiations – Only if there's no legal obligation to retain or preserve


Can you require an affidavit from the other party?
Texas Ethics Op. 614 – Cannot require "acceptable" affidavit
Permissible to require a truthful affidavit
Permissible to require that the opposing party provide deposition or trial testimony, so long as no conditions placed on the testimony

- Can you ask the plaintiff's lawyer to provide indemnity?
  - Va. Ethics Op. 1858 & Fla. Bar Op. 30310 – Unethical under Rule 1.8 (prohibiting financial assistance to client)

"Make sure everything is done ethically. Within reason, of course."

Habib Nasrullah

Partner
Wheeler Trigg O'Donnell (Denver, CO)

303.244.1960 | nasrullah@wtotrial.com
http://www.wtotrial.com/habib-nasrullah

Habib Nasrullah serves as trial and national coordinating counsel on mass tort and complex product liability lawsuits, including multidistrict litigation. He maintains a very active white collar and investigations practice and also represents sophisticated clients in complex commercial litigation. Habib's clients include Fortune 100 and other leading companies, and he has substantial experience in federal and state courts. Formerly, Habib served as Assistant U.S. Attorney for the District of Colorado.

Habib frequently manages mass tort litigation involving dockets of several thousand cases across multiple jurisdictions. He is currently defending a major healthcare industry client against more than 12,000 claims involving its dialysis products. In another matter, Habib is leading the litigation strategy involving more than 3,000 claims against a popular cholesterol drug. Recently, Habib negotiated the dismissal of a food distributor from wide-ranging litigation relating to the deadly 2011 Listeria outbreak linked to Colorado cantaloupes, which sickened hundreds and killed 33 people.

In all of his engagements, Habib works with clients and local counsel to conceptualize and implement coherent and effective litigation plans for multidistrict and complex litigation. Clients frequently retain him to try cases involving sophisticated expert and evidentiary issues with potentially high exposure when trial is imminent.

Habib's background as a federal prosecutor makes him particularly valuable to clients in criminal cases and civil cases in which there is a parallel criminal investigation. He strives to resolve these matters in the earliest possible stages, sparing clients the potential of facing criminal charges or intense public scrutiny. Habib also conducts internal investigations and counsels individual and corporate clients on a variety of federal and state compliance issues in the healthcare, aviation, and financial institution sectors..

Practice Areas
- Commercial Litigation
- Investigations & Compliance
- Personal Injury Defense
- Mass Torts
- Product Liability

Community Memberships, Activities, and Honors
- Founder and Advisor, Internet Safety Foundation, a coalition of Colorado educational, corporate, and law enforcement interests whose mission is to be a clearinghouse for Internet safety resources
- Colorado Association of Leaders in Educational Technology (CALET) - Outstanding Friend of Technology Award, 2008

Education
- Georgetown University Law Center, J.D., 1988
- University of Southern California, B.A., 1984, International Relations, magna cum laude - Phi Beta Kappa

ETHICS: LAWYERS BEHAVING BADLY – AVOIDING SANCTIONS YOU NEVER SAW COMING

Terry Newby
Maslon (Minneapolis, MN)
612.672.8328 | terry.newby@maslon.com

28 U.S.C. § 1927 Counsel's Liability for Excessive Costs

Sanctions are provided for under 28 U.S.C. § 1927, which provides: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Examples: pursuit of meritless arguments, positions or motions, needless or unnecessary discovery, duplicative proceedings or pleadings, etc.

Applies to: individual attorneys (and other persons admitted in the court to conduct cases) and law firms (depending on the jurisdiction)

Does not apply to: parties, even if pro se

Applicable sanction: excess costs, expenses and attorneys' fees reasonably incurred because of such conduct

How raised: motion by a party or order to show cause by court

Federal Rule of Civil Procedure 11: Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

Under Rule 11 of the Federal Rules of Civil Procedure, sanctions may be imposed based on the "signing, filing, submitting, or later advocating" a pleading, written motion or "other paper" to the court that was not formed based on a reasonable inquiry under the circumstances and: (a) is presented for an improper purpose such as to harass, unnecessarily delay or needlessly increase litigation costs; (b) presents claims, defenses and other legal contentions not warranted by existing law or by a non-frivolous legal argument; (c) presents factual contentions without evidentiary support or are unlikely to have evidentiary support after further investigation or discovery; or (d) presents denials of factual contentions that are unwarranted based on the evidence or that are not reasonably based on belief or lack of information.

Applies to: individual attorneys, law firms, pro se parties and parties

Does not apply to: disclosures and discovery requests, responses, objections or discovery motions, oral motions, attorney communications, trial misconduct, settlement discussions

Applicable sanction: non-monetary, or monetary only if "warranted for effective deterrence"; monetary sanctions are limited to paying a penalty into the court registry, or part or all reasonable attorneys' fees and other expenses directly resulting from the sanctionable conduct

How raised: separate motion from any other motion by a party or order to show cause by court; must serve Rule 11 motion on the party but not file for 21 days to allow withdrawal or correction of the offending pleading, motion or other paper

Federal Rule of Civil Procedure 26(g): Signing Disclosures and Discovery Requests, Responses, and Objections.

Sanctions may be imposed for: (a) initial or pretrial disclosures that are incomplete or incorrect at the time they are made; (b) formal written discovery requests, responses or objections that are (i) inconsistent with the Federal Rules of Civil Procedure, unwarranted by existing law or a non-frivolous legal argument; (ii) made for an improper purpose such as to harass, unnecessarily delay or needlessly increase litigation costs; or (iii) unreasonable, unduly burdensome or expensive considering the needs of the case, prior discovery in the case, amount in controversy and importance of the issues at stake.

Applies to: attorney signing the disclosures or discovery, or party on whose behalf the attorney signed the discovery

Applicable sanction: an appropriate non-monetary sanction or reasonable expenses and attorneys' fees caused by the violation

How raised: by motion or by the court

Note that, unlike Rule 11, there is no safe harbor under Rule 26(g) and sanctions may be imposed, for example, as soon as it is determined that initial disclosures are incomplete or incorrect.

Federal Rule of Civil Procedure 30(d)(2): Depositions by Oral Examination; Duration; Sanction; Motion to Terminate or Limit

The court may impose an "appropriate sanction," including reasonable expenses and attorneys' fees incurred by a party, against a person who "impedes, delays, or frustrates the fair examination of the deponent."

Applies to: attorney taking or defending the deposition

Applicable sanction: an appropriate non-monetary sanction or reasonable expenses (under Rule 37(a)(5)) and attorneys' fees incurred in order to bring a motion to terminate or limit the deposition due to the misconduct

How raised: by motion

Federal Rule of Civil Procedure 37: Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Rule 37(a): Motion for an Order Compelling Disclosure or Discovery - Sanctions may be imposed for (a) failure to make a Rule 26(a) disclosure; or (b) when a motion is granted to compel a discovery response (answer, designation, production, or inspection) or the disclosure or requested discovery response is provided after a motion to compel is filed; (c) failing to obey a discovery order; or (d) failing to comply with an order to produce a person for examination.

Applies to: parties and non-parties subject to disclosures or discovery and attorneys

Applicable sanction: reasonable expenses incurred in making the motion to compel, including attorneys' fees, unless the motion was filed before good-faith effort made to resolve to the issue before bringing the motion, the nondisclosure, response or objection was substantially justified or other circumstances make an award of expenses unjust

How raised: by motion

Note that if the motion is denied, then the movant, attorney filing the motion or both, pay the party who opposed the motion its reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the motion was substantially justified or other circumstances make an award of expenses unjust. Motions granted in part and denied in part may have reasonable expenses apportioned.

Rule 37(b): Failure to Comply with a Court Order - Sanctions may be imposed for: (a) failing to obey a discovery order; or (b) failing to comply with an order to produce a person for examination.

Applies to: parties, non-parties, and attorneys advising the party

Applicable sanction: - directing that the matters in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; striking pleadings in whole or in part; staying further proceedings until the order is obeyed; dismissing the action or proceeding in whole or in part; entering a default judgment against the disobedient party; or treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Instead of or in addition to the above, payment of reasonable expenses, including attorneys' fees, caused by the failure, unless it was substantially justified or other circumstances make an award of expenses unjust

Rule 37(c): Failure to Disclose, to Supplement an Earlier Response, or to Admit - Sanctions may be imposed for: (a) failing to provide information or identify a witness under

Rule 26(a) or (e); or (b) failing to admit a request under Rule 36.

Applies to: parties

Applicable sanction: For failure to disclose or supplement: prohibiting use of information or witness at issue unless the failure was substantially justified or harmless; reasonable expenses including attorneys' fees caused by the failure; jury instructions and other appropriate sanctions

For failure to admit: reasonable expenses, including attorneys' fees, incurred by a party to prove a document to be genuine or matter true at issue in the request to admit unless the request was held objectionable, of no substantial importance, reasonable ground to believe that party failing to admit might prevail or other good reason exists to fail to admit

How raised: by motion

Rule 37(d): Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection - Sanctions may be imposed for: (a) failing to appear at a properly noticed deposition; or (b) failing to serve answers, objections or written responses to properly served interrogatories or request for inspection.

Applies to: parties and attorneys

Applicable sanction: all relief identified as a sanction for Rule 37(b)

How raised: by motion

Rule 37(e): Failure to Preserve Electronically Stored Information ("ESI") - Sanctions may be imposed when: (a) the ESI at issue should have been preserved in the anticipation or conduct of litigation; (b) the ESI is lost; (c) the loss is due to a party's failure to take reasonable steps to preserve it; and (d) the ESI cannot be restored or replaced through additional discovery. If these four conditions are met, then look at whether: (a) the non-offending party has been prejudiced from the loss of ESI and/or (b) the offending party acted with the intent to deprive another party of the information's use in the litigation.

Applies to: parties

Applicable sanction: "measures no greater than necessary to cure the prejudice" caused by loss of the ESI; if intent found, then court may (a) presume that the lost information was unfavorable to the party, (b) instruct the jury that it may or must presume the information was unfavorable to the party, or (c) dismiss the action or enter a default judgment

How raised: by motion

Rule 37(f): Failure to Participate in Framing a Discovery Plan - Sanctions may be imposed for failing to participate in good faith to develop and submit a proposed discovery plan under Rule 26(f).

Applies to: parties and attorneys

Applicable sanction: reasonable expenses, including attorneys' fees, caused by the failure

How raised: by motion

The Court's Inherent Authority

Sanctions may be imposed for a wide variety of bad faith and improper conduct that may or may not also fall under one of the other bases for sanctions. In Chambers v. Nasco, 501 U.S. 32, 46 (1991), the Supreme Court recognized that statute or rule-based sanctions "reach only certain individuals or conduct" while the court's "inherent power extends to a full range of litigation abuses."

Applies to: parties, non-parties and attorneys

Applicable sanction: any appropriate non-monetary or monetary sanction at the court's discretion such as attorneys' fees and expenses, default judgments, contempt of court, etc.

How raised: by motion or by the court

EXAMPLES OF SANCTIONS CASES UNDER THE FEDERAL RULES

Improper Pleading and Disclosures

Penn, LLC v. Prosper Bus. Dev. Corp., 773 F.3d 764 (6th Cir. 2014) - In Penn, the Sixth Circuit joined the majority of circuits holding that an informal warning letter without service of a separate Rule 11 motion fails to trigger the 21-day safe-harbor provision under the rule. Id. at 768. Defendant's attorneys, the Arnold Firm, sent a letter to the plaintiffs, Plunkett & Cooney (P & C), that purported to satisfy Rule 11's requirements and threatened sanctions if P & C did not withdraw its complaint. Id. at 765. After P & C refused to withdraw the complaint and the court later dismissed the Arnold Firm from the action, the Arnold Firm served P & C with a proposed Rule 11 motion. Id.

The district court denied the Arnold Firm's Rule 11 motion, but noted that the question of whether a warning letter

satisfies Rule 11's safe-harbor provision remains "somewhat unsettled." Id. at 766. On appeal, the Sixth Circuit emphasized the plain text of the safe-harbor provision that "[t]he motion must be served under Rule 5" within 21 days. Id. at 767 (emphasis in original). The court noted that the Advisory Committee Notes to the 1993 amendments refer to letters as "informal notice" that cannot be deemed as adequate substitute for the motion itself. Id.

Besides the plain meaning, the pragmatic realities show that allowing warning letters or other types of informal notice would undermine the policy goal behind the safe-harbor provision. Id. A recipient of an informal letter can only guess at his opponent's seriousness in pursuing sanctions. By contrast, "a properly served motion unambiguously alerts the recipient that he must withdraw." Id. at 767-68.

Only the Seventh Circuit has ruled otherwise that counsel need only give notice to the other party to satisfy Rule 11's safe-harbor provision, whether by motion, letter, or demand. See Nisenbaum v. Milwaukee County, 333 F.3d 804, 808 (7th Cir. 2003). But the Penn court noted that Nisenbaum failed to address textual or policy concerns and other circuits have widely criticized the Seventh Circuit's decision. 773 F.3d at 768.

Barley v. Fox Chase Cancer Ctr., 54 F. Supp. 3d 396 (E.D. Pa. 2014) - A law firm's excessive redacting of an attorneys' fees request, unapologetic disregard for Rule 11's requirements, and an enormous request for attorneys' fees against an indigent and disabled plaintiff backfired in Barley, with the court turning sanctions around against the requesting firm and its client.

After prevailing on summary judgment against an employee's discrimination claim, Fox Chase sought $125,907 in sanctions under Rule 54(d)(2) and 42 U.S.C. § 12205, contending that the employee's claims under the Americans with Disabilities Act were frivolous. 54 F. Supp. 3d at 398. Fox Chase argued that they warned the employee that she was judicially estopped, but the court did not agree that merely filing a suit later defeated by an affirmative defense warrants sanctions, especially considering that Fox Chase's warning only arose well after filing its answer to the complaint. Id. at 404.

Fox Chase also filed a Rule 11 motion for fees related to opposing the summary judgment motion, but never complied with the 21-day safe harbor provision because it viewed it as "impractical" once plaintiff's summary judgment motion was filed. Id. at 406-07. The court rejected Fox Chase's Rule 11 motion in light of its failure to file a timely motion and insisted that "Rule 11's safe harbor is not optional." Id. at 407.

Along with the 126-page motion for attorneys' fees after prevailing on summary judgment, Fox Chase's counsel, Littler Mendelson, submitted 105 pages "in which every line describing the legal services rendered was redacted." Id. at 399. The seven-page motion under Rule 11 also redacted all legal services rendered, despite Rule 11's requirement of listing the work performed in detail. Id. "[A]s an afterthought dropped into a footnote," Fox Chase later offered to submit unredacted copies to the court upon request, but never to its adversary. Id. at 399, 406. The court rebuked Littler Mendelson for failing to meet its obligation to provide sufficient detail for a neutral judge to determine costs when it inexplicably blacked-out page after page "as if guarding top-secret information involving national security." Id. at 405-06.

In response, employee's counsel requested and was granted sanctions under 28 U.S.C. § 1927 against Littler Mendelson for unreasonably and vexatiously multiplying the proceedings. Id. at 398. The court found that Littler Mendelson could only have filed the motion for attorneys' fees (which was unsupported by billing records) and untimely Rule 11 motion for the improper purpose of harassing and burdening the plaintiff with a needless and costly defense. Id. at 408.

Sun River Energy, Inc. v. Nelson, 800 F.3d 1219 (10th Cir. 2015) - On an issue of first impression, the Tenth Circuit in Sun River Energy held that it could not sanction counsel based on Rule 37(c)(1). 800 F.3d at 1225. The plaintiffs here had a directors and officers ("D & O") insurance policy that potentially covered the defendants' counterclaims, which under Rule 26(a)(1)(A)(iv) required an automatic disclosure. Id. at 1222. Yet, Sun River, as defendant, failed to disclose the policy until after the coverage period had lapsed 18 months later and only after repeated pressure and a motion to compel. Id.

The magistrate judge granted sanctions under Rule 37(b)(2)(A) in the form of a default judgment against the defendants' counterclaims. Id. at 1223. Sun River's general counsel and outside counsel argued that they believed that the policy was irrelevant because no directors or officers were named in the counterclaim and D & O policies do not usually cover securities suits. Id. But counsels' failure to even look at the D & O policy despite its unimpeded access showed deliberate indifference in disregarding its Rule 26 obligations, especially given their own threat to sanction plaintiffs for seeking "nonexistent" insurance information. Id. Outside counsel, but not Sun River, was held personally liable for attorneys' fees. Id.

The district court did not sanction the general counsel under Rule 37(b)(2)(C) because the general counsel was not the attorney of record when the scheduling order was violated. Id. at 1224. Yet, once the general counsel appeared on Sun River's behalf he became responsible for supplementing

disclosures required under Rule 26(e), and as such the court allowed sanctions against him under Rule 37(c)(1). Id. at 1224-25. In sanctioning the general counsel under Rule 37(c)(1), the district court relied on its own textual analysis and diverged from the Third and Seventh Circuits, which hold that sanctions under Rule 37(c)(1)(A) relate only to parties, not counsel. Id. at 1224; see Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119, 141 (3d Cir. 2009); Maynard v. Nygren, 332 F.3d 462, 470 (7th Cir. 2003). To support sanctions against counsel, the district court noted that after the 1993 amendments, Rule 37(c)(1) only refers to "the party" once as an introduction and does not repeat any reference to the party as the intended target or sanctions. Id. at 1226.

The Tenth Circuit disagreed, pointing out that all of the alternative sanctions under subsection (c)(1) and the six additional sanctions incorporated from Rule 37(b)(2)(i)-(vi) by Rule 37(c)(1)(C) all apply only to the party, not counsel. Id. The district court referred to trends toward extending sanctions to counsel, but in all those instances the provision added a reference explicitly including counsel, which Rule 37(c)(1)(A) does not do. Id. at 1227. Instead of Rule 37(c)(1)(A), counsel in these circumstances may be sanctioned for unjustified disclosures under Rule 26(g)(3) for improperly certifying responses or under Rule 37(b)(2)(C) for failing to comply with a court order. Id.

The Tenth Circuit also declined to impose sanctions against the general counsel because the failure to disclose the insurance policy was not in bad faith or for oppressive reasons. Id. at 1228. Still, the court affirmed sanctions under Rule 37(b)(2) against the outside counsel. Id. It was not enough for the attorney to assume that general counsel had reviewed the policy, but rather counsel owes a duty to ensure that the client, including general counsel, complies with discovery obligations. Id. at 1229. Finally, the court rejected the contention that there is any inconsistency in finding Sun River not liable while sanctioning its employee as general counsel and outside counsel. Id. at 1230.

Multiplying Proceedings

MJS Las Croabas Props., Inc., 545 B.R. 401 (B.A.P. 1st Cir. 2016) - The MJS case addressed a circuit split as to whether 28 U.S.C. § 1927 allows courts to impose sanctions against a law firm as opposed to individual attorneys. Section 1927 provides that:

> Any attorney or other person admitted to conduct cases … who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. The Second, Eleventh, Eighth, Third, and District of Columbia Circuits have imposed § 1927 sanctions on law firms for the conduct of its attorneys while the Sixth, Seventh, and Ninth Circuits have not. 545 B.R. at 420-21. Citing Jensen v. Phillips Screw Co., 546 F.3d 59, 64 (1st Cir. 2008), the court in MJS found that the First Circuit had tacitly approved a court's power to impose sanctions against a law firm under § 1927. Id. at 421. The court reasoned that when § 1927 states that a person is "personally" responsible, it exclusively targets attorney conduct rather than an irresponsible party and thus is meant to ensure that the "attorney personally (and not the party)" remains liable. Id. 420.

The FDIC, the opposing party in this bankruptcy proceeding, had tried to contact the Castellanos Firm attorneys to no avail to resolve defects in a relief motion that the FDIC believed "had no legal justification whatsoever." Id. at 405-06, 412. The Castellanos Firm failed to respond to repeated voicemails or emails over the course of several weeks about negotiating an out-of- court resolution, which forced FDIC to move for extended time to reach the Castellanos Firm attorneys. Id. at 406. Hours before the hearing, as FDIC's in-house counsel was already in flight from Dallas to San Juan to attend, the Castellanos Firm filed a terse motion to withdraw the relief motion and vacate the hearing, offering no explanation for the change of course. Id. at 407.

In response to the withdrawal motion, FDIC sought sanctions relating to the filing of opposing motions and traveling to the hearing, among other things. Id. In light of these "serious allegations" of sanctions, the trial court explicitly granted the Castellanos Firm additional time to respond to the sanctions motion. Id. at 408. Instead of taking on a conciliatory tone or admitting any fault, the Castellanos Firm responded to sanctions by arguing for sanctions against the FDIC for making "heinous accusations." Id. at 409.

In addition to imposing sanctions under § 1927, the trial court also held the individual attorney and Castellanos Firm jointly and severally liable under its inherent powers for actions and motions which "constituted dilatory litigation" in bad faith. Id. at 413. Even without a specific finding of multiplication of proceedings, the First Circuit affirmed sanctions under § 1927 because the Castellanos Firm attorney's conduct showed "a disregard for the orderly process of justice, not negligence, inadvertence or incompetence." Id. at 421 (internal quotation marks omitted).

The outcome in MJS shows that although attorneys may vigorously and aggressively represent their clients, lack of cooperation with opposing counsel often reaches "stubbornly capricious conduct" that will lead to sanctions. Id. at 423.

Preservation and Spoliation

Day v. LSI Corp., No. CIV 11-186-TUC-CKJ, 2012 WL 6674434 (D. Ariz. Dec. 20, 2012) - The Day case shows that in-house counsel must carefully communicate with the IT staff on how best to retain relevant ESI. Further, in-house attorneys must continuously consider who to include and add in an ongoing litigation hold.

The plaintiff, Kenneth Day, sued his former employer, LSI Corporation, for discrimination and retaliation, among other claims. 2012 WL 6674434, at *1. When put on notice of Day's claims, LSI's general counsel implemented a limited litigation hold, but failed to notify Day's initial supervisor of the need to retain records. Id. at *8. As a result of a limited search, LSI produced documents relating to the supervisor's communications covering only four months. Id. at *11. Although LSI was put on notice of claims about which the supervisor may have had knowledge, LSI failed to uphold its duty to preserve the supervisor's documentation. Id.

The court found in-house counsel's action—or lack thereof—to be key in determining sanctions. The general counsel had knowledge of Day's discrimination complaints prior to Day's departure and nonetheless failed to sequester any records. Id. at *8. Further, the general counsel gave contradicting testimony on his instructions to IT staff to locate "any and all data" relating to the plaintiff, whereas the IT employee testified that he was only requested "to search for specific emails and data." Id. The court found a fair inference that the supervisor's evidence that was destroyed was highly relevant to the litigation. Id. at *12.

The court found that the general counsel had a culpable state of mind and acted willfully when he knew or should have known, considering he had access to Day's personnel file, that the supervisor had contact with Day during the hiring and performance review process. Id. The court also found it significant that the general counsel appeared to have "misstated the facts regarding what kind of directive he gave" for data searches and that LSI even failed to comply with its own document retention policy. Id. The court also found it important "that the individual determining the parameters of the retained documents was not simply a clerical employee, but LSI's in-house counsel." Id. at *14.

The court further found that LSI's spoliation of evidence substantially impeded Day in pursuing claims for his stock grants, resulting in entry of a default judgment. Id. Ultimately, for all claims (besides the stock grant claim), the court issued lesser sanctions of an adverse inference instruction at trial, as well as a $10,000 monetary award. Id. at *15-16. The court justified these sanctions because the general counsel was on notice of the claims, misstated facts regarding the type of directive he gave for searches of relevant documents, and knew or should have known that the supervisor was in contact with Day during the hiring and performance review process. Id. at *16.

Brown v. Tellermate Holdings Ltd., No. 2:11-CV-1122, 2014 WL 2987051 (S.D. Ohio July 1, 2014) - The Brown case highlights counsel's duty to actively supervise the discovery process, particularly when ESI is involved. The attorney here failed to uncover even the most basic information about an ESI database, took no steps to preserve the integrity of the database, and failed to learn about certain relevant documents from a prior discrimination suit until nearly a year later. 2014 WL 2987051, at *2. As a result of these failures, the defendant's attorney made false or misleading statements to opposing counsel that hampered their ability to carry out discovery. Id.

In this age discrimination case, the plaintiffs sought discovery from defendant Tellermate Holding's use of a salesforce.com database, which allows businesses to track sales activities. Id. at *3. Tellermate's attorneys repeatedly represented that Tellermate did not have access to salesforce.com's database when later fact testimony revealed that was not true. Id. at *5. In addition, Tellermate's attorneys made no effort to contact current employees to find out if they could recover information from their salesforce.com accounts for the lawsuit. Id. at *6.

Further, Tellermate and its counsel failed to disclose that the ESI stored on salesforce.com actually belonged to Tellermate. Id. at *8. Tellermate also failed to preserve its information from the salesforce.com database or ask salesforce.com to backup or maintain its emails longer than the typical three to six months. Id. at *9. As a result, the parties could not verify the integrity of the belated "data export" from Tellermate's salesforce.com accounts. Id.

Early on, the plaintiffs also requested documents relating to some employees' performance evaluations and Tellermate initially represented that it had an "unlimited" number of such documents. Id. at *12. But Tellermate seemingly changed its mind, first responding that it had no more documents and then only providing 20 such documents. Id. Ultimately, upon court order, Tellermate produced 50,000 pages of documents labeled as "attorneys' eyes only" that included a significant number of documents that it knew to be irrelevant and nonresponsive. Id. at *15. Tellermate also did not provide any reason why the documents were designated as attorneys' eyes only. Id. at *23. Nor did Tellermate create a privilege log for the numerous documents it withheld on a claim of privilege. Id. at *21.

The court imposed sanctions under Rule 37(a)(5)(a) for all motions related to the salesforce.com discovery issue because Tellermate's opposition to plaintiffs' discovery requests were

not "substantially justified." Id. at *25. Tellermate's conduct was particularly blameworthy because it took them almost two-and-a-half years to do anything to preserve information, even when Tellermate knew the information was subject to alterations. Id. The untrustworthiness of the data made it difficult to sanction Tellermate by having them pay the costs of data examination, or even precluding Tellermate from contesting the information, because any inaccuracies in the database might have actually favored Tellermate. Id. Instead, among other sanctions, the court ultimately precluded Tellermate from presenting evidence that it terminated plaintiffs for performance-related reasons. Id.

In its ruling, the court found it "just baffling" that Tellermate and its counsel failed to take steps to preserve information after suit began. Id. at *20. Counsel failed to meet its Rule 26(g) obligations to make a "reasonable inquiry" to ensure that all responsive and available information had been provided after a good-faith effort. Id. at *18. The blame did not entirely fall on Tellermate for failing to tell counsel what it knew or should have known about its ability to produce salesforce.com information. Id. at *20. Rather, counsel had an affirmative obligation to not only give a general directive, but to contact the key players and Tellermate so that they together could "identify, preserve, and search the sources of discoverable information." Id.

Haeger v. Goodyear Tire & Rubber Co., 793 F.3d 1122 (9th Cir. 2015), amended and superseded on denial of reh'g en banc by 813 F.3d 1233 (9th Cir. 2016), cert. granted in part, 137 S. Ct. 30 (Sept. 29, 2016) - In this case, the Ninth Circuit laid down more than $2.75 million in total sanctions against Goodyear for repeatedly hiding and lying about its test results in addition to requiring Goodyear to file a copy of this sanctions order in any subsequent related case.

Plaintiffs brought suit in this case after incurring serious injuries when one of the Goodyear G159 tires on their motor home failed on a highway and caused a crash. 793 F.3d at 1127. Throughout discovery, plaintiffs repeatedly asked for test results on the G159 tire, but Goodyear failed to search for and/or withheld the relevant tests in violation of its discovery obligations. Id. at 1126. Several emails between Goodyear's in-house attorneys, outside counsel, and tire engineers showed that they knew they should supplement discovery responses to show tests of the tire at various higher speeds. Id. at 1127-28. Nonetheless, Goodyear never supplemented its responses to include high speed tests of the G159 tire and misrepresented multiple times to the trial judge that it had "responded to all outstanding discovery." Id.

After the plaintiffs had settled their case with Goodyear, they learned that Goodyear had produced internal heat tests of the G159 in a separate case, even though Goodyear had withheld such evidence during discovery in their case. Id. at 1129. Plaintiffs moved for sanctions on the basis that Goodyear knowingly concealed these tests related to the G159's allegedly defective design. Id. Even after Goodyear was ordered to produce the test results at issue, it only produced the heat rise tests without mentioning any additional tests. Id. Only by apparent accident, in response to the proposed sanctions order, did Goodyear disclose the existence of additional G159 tests that had never previously been mentioned or produced in the case. Id.

Considering that Goodyear's failure to disclose led the plaintiffs to presumably settle for only a fraction of what they could or would have otherwise, the court issued $548,240 in fees and costs sanctions against local counsel and $2,192,961 jointly against Goodyear and its lead outside counsel based on the court's inherent power. Id. at 1126. In fact, had the case been ongoing, the court would have entered a default judgment with a trial on damages. Id. at 1135. But because the case had settled, the court had to determine attorneys' fees and costs based largely on Goodyear's past settlement sums in other G159 cases. Id.

Goodyear appealed the sanctions award on the grounds that Rule 37 was the exclusive remedy for inadequate discovery responses, but the Ninth Circuit rejected the argument because of the court's inherent power to sanction "even if procedural rules exist which sanction the same conduct." Id. at 1131-32. Under its inherent power, a court may sanction even when a party fails to move to compel under Rule 37. Id. The Ninth Circuit also had no trouble finding that Goodyear and its counsel acted in bad faith by hiding and lying about documents that were responsive to the first (of several) discovery requests. Id. at 1134. Goodyear, as a party, was held responsible for the discovery fraud because in-house counsel "maintained responsibility for reviewing and approving all the incomplete and misleading discovery responses." Id. at 1135.

The Ninth Circuit also affirmed the inherent authority of the district court to order Goodyear to file a copy of this sanctions order in every subsequent G159 case, particularly because of the high likelihood of future litigation in state court where attorneys would be unlikely to investigate the federal cases about the conduct of Goodyear and its counsel. Id. at 1142.

HM Elecs., Inc. v. R.F. Techs., Inc., No. 12CV2884-BAS-MDD, 2015 WL 4714908 (S.D. Cal. Aug. 7, 2015), vacated in part by, 171 F. Supp. 3d 1020 (S.D. Cal. 2016) - In this trademark infringement case, the magistrate judge recommended sanctioning the defendant, its CEO and attorneys based on multiple discovery violations. The defendant CEO signed discovery responses asserting documents did not exist, and that he had no knowledge that certain events occurred, when he knew his responses were false; the defendant intentionally withheld and destroyed highly relevant ESI;

and the defendant's attorney certified discovery responses without conducting a reasonable inquiry. 2015 WL 4714908, at *1. The magistrate also recommended imposing Rule 37 sanctions against the defendant company, its attorney, and law firm for withholding 150,000 pages of documents as privileged simply because the documents contained search terms like "confidential," which were included as a matter of course in every email sent by defendant. Id. at *9. The attorneys compounded the problem by failing to list documents on a privilege log or even reviewing a sample of the withheld documents to confirm their privileged status. Id. And yet defendant's attorney repeatedly represented that it had produced all responsive non-privileged documents. Id. at *10.

The magistrate further recommended sanctioning defense counsel under Rule 37 for failing to implement a litigation hold and failing to communicate the importance of preserving relevant documents to the defendant company. Id. at *1. The magistrate found it particularly egregious that counsel never learned about the company's ESI infrastructure and "disavowed any involvement or knowledge of the search methodology." Id. at *22. Further, no one made any effort to see if documents had been deleted or to recover any deleted documents. Id. at *9. The Rule 37 sanctions included defendants' attorneys' failure to produce 375,000 pages of responsive ESI until long after the close of discovery because of a failure to supervise the ESI vendor or conduct quality control checks. Id. at *11.

The magistrate recommended sanctioning the defendant company under Rule 37 as well because its CEO was found to have emailed the company's sales force to "destroy" documents relevant to the suit. Id. at *1. An unknown number of documents were deleted as a result of the CEO's instructions, as well as due to the failure to implement a litigation hold. Id. at *1. The magistrate ultimately recommended compensatory damages, sanctions that the company fabricated reports and figures, and an adverse inference instruction at trial because the company had spoliated relevant evidence. Id. at **31-32. In so recommending, the magistrate found that the attorneys should have familiarized themselves with the client's ESI and embraced a collaborative discovery approach rather than signing false discovery responses without making any effort to ensure their validity. Id. at *14. It was not reasonable for attorneys to accept the CEO's assurances about the nonexistence of documents without collecting or sampling documents. Id. at *15. Even if the CEO had lied to the attorneys, counsel was responsible for contacting custodians of ESI to determine whether they knew of the existence of documents. Id.

The magistrate further found that, even though plaintiff's diligence helped produce some documents, many relevant documents remained missing, which placed plaintiffs at a disadvantage to litigate on incomplete facts and uncover ESI that should have produced years earlier. Id. at *2. Notably, the defendant and its counsel were largely unrepentant and denied responsibility, only admitting that "mistakes were made." Id. In light of the defendant's intent to deprive plaintiff of relevant documents to the suit, the magistrate noted that even under the proposed (and now enacted) Rule 37(e) amendments, sanctions were still appropriate. Id. at *30. In the court's eyes, the attorneys' total abdication of their responsibilities and failing to comprehend their duty to actively supervise the discovery process warranted severe sanctions. Id. at *22, *26.

The defendant and counsel ultimately escaped sanctions in this case based on the parties' settlement. They objected to the magistrate's findings and recommendations, and the district court found that the parties' settlement had "bargained away" and mooted sanctions when the sanctions were compensatory, rather than punitive. 171 F. Supp. 3d at 1028-30. Since the mootness of the sanctions was dispositive, the district court did not address the magistrate's factual and legal findings and granted the objection. Id. at 1025.

Preservation and Spoliation: Interpreting the 2015 Rule 37(e) Amendments

In December 2015, the amendments to Federal Rule of Civil Procedure 37(e) went into effect with the intent of providing a clearer legal framework for courts to impose discovery sanctions for spoliated ESI. If the lost ESI prejudices a party, then the court may now only impose measures "sufficient" to cure the prejudice. Further sanctions require the court to find that the party responsible for spoliating did so with the intent of denying the ESI to the other side. Courts are beginning to issue opinions based on amended Rule 37(e) that will provide further guidance to parties and other courts as to what kind of measures may be "sufficient" to address prejudice suffered by a party as a result of spoliated ESI.

Nuvasive, Inc. v. Madsen Med., Inc., No. 13CV2077 BTM(RBB), 2016 WL 305096 (S.D. Cal. Jan. 26, 2016) - In an earlier July 2015 decision, the Nuvasive court had granted defendants an adverse inference jury instruction as sanctions for spoliation of evidence. 2016 WL 305096, at *1. After the amendments to Rule 37(e) took effect on December 1, 2015, however, the plaintiffs successfully convinced the court to vacate the adverse inference because earlier decisions had not found that NuVasive had intentionally failed to preserve text messages to prevent defendants from using them in litigation. Id. at *2. To distinguish between the measures employed under 37(e)(1) and those permitted under 37(e)(2), the court quoted the Advisory Committee Notes, which state:

> In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation.

Based on the language of (e)(2) and the accompanying Advisory Committee Notes, the court found that adverse inference instructions qualify as measures that were not permissible absent a finding of intent. Id. at *2. Because the trial was not scheduled until February 2016, the new rule was found to apply to the trial proceedings. Id. Again, following the Advisory Committee Notes, the court decided to allow both sides to present evidence for the jury to consider about the loss of ESI and the jury would be instructed that such evidence may be considered in making its decision. Id. at *3. Looking ahead, courts may follow Nuvasive's lead and allow juries to consider evidence of spoliation without an adverse inference instruction.

Cat3, LLC, et. al. v. Black Lineage, Inc., et. al., 164 F. Supp. 3d 488 (S.D.N.Y. 2016) - This case arose after the amendments to Rule 37(e), which aimed to address the burden incurred by parties who over-preserved data in the hopes of avoiding spoliation sanctions. Before 2015, federal circuits used varying standards for penalizing the loss of evidence, but the amended rule requires courts to find willfulness and an intent to deprive instead of mere negligence. Id. at
495. The Advisory Committee Notes on Rule 37(e)(2) note that "[i]t is designed to provide a uniform standard … when addressing failure to preserve [ESI]. It rejects cases such as Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."

The Cat3 plaintiffs produced email correspondence in discovery, but only after altering the email addresses and domain names. Id. at 492-93. The original emails with the correct addresses and domain names were deleted and replaced with an altered version as a result of intentional manipulation. Id. The plaintiffs argued that the court could not impose sanctions under Rule 37(e) because the information was generally recovered so no evidence was ultimately missing or destroyed. Id. at 493. Nonetheless, the court found that near-duplicate emails showing differing addresses casted doubt on the authenticity of both versions. Id. at 497.

Notably, the court noted that even if Rule 37(e) did not apply, it could still exercise its inherent authority to impose sanctions for spoliation. Id. The court found that it could use its inherent power to remedy abuses whether or not another procedural rule could address the conduct. Id. at 498. The falsification of evidence and attempted destruction of authentic, competing information warranted sanctions even if the authentic evidence was not successfully deleted. Id.

The Cat3 court found that an order of dismissal, an adverse inference, or a broader preclusion order would be unnecessarily severe in light of the new rule's requirement that courts impose "measures no greater than necessary to cure the prejudice." Id. at 501. Instead, the court precluded the plaintiffs from relying on the emails and ordered them to pay reasonable attorneys' fees incurred to establish plaintiffs' misconduct and secure relief. Id. at 502.

The result in Cat3 seems to run against the Advisory Committee Notes to Rule 37(e) that it "forecloses reliance on inherent authority or state law to determine when certain measures should be used" to cure spoliation. Courts have yet to resolve the exact relationship of the 2015 amendments to the existing case law and whether a party must satisfy Rule 37(e) before exercising its inherent authority. See Internmatch, Inc. v. Nxtbigthing, LLC, No. 14-CV-05438-JST, 2016 WL 491483, at *3 n.6 (N.D. Cal. Feb. 8, 2016).

Sanctions For Litigation Misconduct

THE NETWORK OF TRIAL LAW FIRMS, INC.
August 4, 2017

Terrance C. Newby
Maslon LLP
Minneapolis, MN

Federal Bases for Sanctions under Statutes and Rules of Civil Procedure

- Sanctions Under Federal Statutes.

- 28 U.S.C. § 1927: "Unreasonable and vexatious" conduct.

28 U.S.C. § 1927: Counsel's Liability for Excessive Costs

- Applicable on its face only to *individual attorneys.* Sometimes applies to law firms depending on the jurisdiction.
- Does not apply to parties, even *pro se* parties.
- Can be raised on motion by a party or an order to show cause by court.

When does 28 U.S.C. § 1927 apply to law firms as opposed to individual attorneys?

- *MJS Las Croabas Props., Inc.*, 545 B.R. 401 (B.A.P. 1st Cir. 2016).
- 28 U.S.C. Sec. 1927 permits sanctions against law firms, and not just individual attorneys, despite the apparently limiting language of the statute.

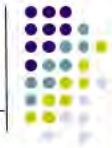
When does 28 U.S.C. § 1927 apply to law firms as opposed to individual attorneys?

- Conduct that led to the firm being sanctioned:
- Filing a frivolous motion for relief:
- Refusing to respond to adverse counsel's numerous attempts by phone and e-mail over the course of a month to resolve the motion short of a hearing:
- Withdrawing the motion the day before the hearing, after adverse counsel had already incurred travel expenses.
- Unapologetic attitude and subsequent motions and briefs showed "intransigence."

Rule 11: Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

- Rule 11 is based on the "signing, filing, submitting, or later advocating" a pleading, written motion or "other paper" to the court that was not formed based on a reasonable inquiry under the circumstances.

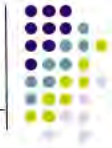
Who is Subject to Rule 11?



- Applicable to individual attorneys, law firms, *pro se* parties and parties.

- The motion must describe the specific conduct that violates Rule 11.

Rule 11 – Informal Warning Letter is Probably Not Enough for Sanctions



- *Penn, LLC v. Prosper Bus. Dev. Corp.*, 773 F.3d 764 (6th Cir. 2014).

- An informal Rule 11 "warning letter," never served under Rule 11, is insufficient notice.

- "We have no doubt that the word 'motion' definitionally excludes warning letters, and our reading of the rule's plain language finds support in the Advisory Committee's Notes." 773 F.3d at 767.

Rule 11 "Safe Harbor" provision is not optional.

- *Barley v. Fox Chase Cancer Ctr.*, 54 F. Supp. 3d 396 (E.D. Pa. 2014).
- Moving party filed a motion for Rule 11 sanctions, but did not serve the motion under Rule 5, or allow the opposing party 21 days to cure any defects.

Rule 11 "Safe Harbor" Provision is not optional.

- Court denied Rule 11 motion for failing to comply with procedural requirements:
- "Fox Chase's motion is untimely and its failure to comply with the safe harbor cannot be excused."
- Moving party also failed to include any billing records, or proof of how much time had been spent on the case.

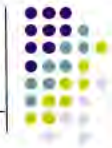
From Moving for Sanctions to Being Sanctioned – in the Same Proceeding

- Not only did the Court deny moving party's Rule 11 motion, the Court granted the non-moving party's separate motion for sanctions under Section 1927:
- "Because the [Rule 11] motions were so deficient, we find that they were filed for the improper purpose of harassing the opponent by burdening her with a needless defense."
- 54 F.Supp.3d at 408.

Discovery Sanctions Under Federal Rules

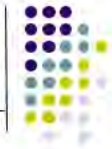
- Federal Rule of Civil Procedure 26(g): Signing Disclosures and Discovery Requests, Responses, and Objections.
- Federal Rule of Civil Procedure 30(d)(2): Depositions by Oral Examination; Duration; Sanction; Motion to Terminate or Limit.
- Federal Rule of Civil Procedure 37: Failure to Make Disclosures or to Cooperate in Discovery; Sanctions.

Sanctions Under Rule 26(g).



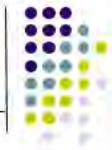
- Applicable to the attorney signing the disclosures or discovery, or party on whose behalf the attorney signed the discovery.
- Available sanctions include an appropriate non-monetary sanction or reasonable expenses and attorneys' fees caused by the violation.
- Can be raised on motion by a party, or by the Court on its own.
- Unlike Rule 11, there is no safe harbor under Rule 26(g). Sanctions may be imposed immediately for deficient disclosures.

Sanctions Under Rule 30(d)(2).



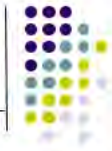
- "The court may impose an 'appropriate sanction,' including the reasonable expenses and attorney's fees incurred by any party, on a person who 'impedes, delays, or frustrates the fair examination of the deponent.'
- Applicable to the attorney taking or defending the deposition. Available sanctions include an appropriate non-monetary sanction or reasonable expenses (under Rule 37(a)(5)) and attorney's fees incurred in order to bring a motion to terminate or limit the deposition due to the misconduct.
- Can be raised on motion by a party.

Sanctions Under Rule 37



- A variety of sanctions may be imposed under Rule 37:
- failure to make a Rule 26(a) initial disclosure;
- when a motion is granted to compel a discovery response, or the disclosure or requested discovery response is provided after a motion to compel is filed;
- failing to obey a court's discovery order;
- failing to disclose, to supplement an earlier response, or to admit;
- failing to appear at one's own deposition, serve answers to interrogatories, or respond to requests for inspection.

Sanctions for Failing to Preserve ESI

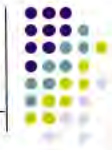


- Rule 37 also allows for sanctions for failure to preserve electronically stored information.

- *Day v. LSI Corp.*, No. CIV 11-186-TUC-CKJ, 2012 WL 6674434 (D. Ariz. Dec. 20, 2012).

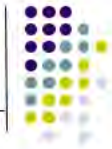
- Defendant's General Counsel notified several employees of the need to preserve relevant documents, but failed to include the relevant custodian – the person primarily responsible for hiring plaintiff.

Sanctions for Failing to Preserve ESI.



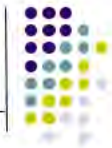
- *Day* Court awarded sanctions:
- Partial default judgment on one claim.
- "An adverse instruction at trial regarding Defendant's culpability.
- Defendant required to pay $10,000 in monetary sanctions "to represent the additional litigation efforts needed by [Plaintiff] to address the spoliation issues."

Sanctions for Failing to Verify Client's Assertions about ESI



- *Brown v. Tellermate Holdings Ltd.*, No. 2:11-CV-1122, 2014 WL 2987051 (S.D. Ohio July 1, 2014).
- Age discrimination case where Plaintiffs repeatedly sought information about Defendant's use of a database that tracked sales activities.
- Defendant and defense counsel said repeatedly they did not have access to the database, and could not produce it.
- All of Defendant's and counsel's statements about the database were untrue.

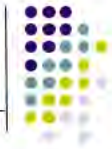
Sanctions for Failing to Verify Client's Assertions about ESI



- The Court found that Defendant Tellermate and its counsel failed to take steps to preserve information after suit began, including a litigation hold.

- Counsel failed to meet its Rule 26(g) obligations to make a "reasonable inquiry" to ensure that all responsive and available information had been provided after a good-faith effort.

Sanctions for Failing to Actively Manage Client's ESI



- *HM Elecs., Inc. v. R.F. Techs., Inc.*, No. 12CV2884-BAS-MDD, 2015 WL 4714908 (S.D. Cal. Aug. 7, 2015) *vacated in part by*, 171 F. Supp. 3d 1020 (S.D. Cal. 2016).
- Specific sanctionable conduct found by Magistrate Judge against defense counsel:
- Counsel's failure to design and implement a litigation hold to preserve relevant documents;
- Counsel's failure to produce hundreds of thousands of pages of electronically stored information due to a lack of effective supervision of client's ESI vendor;
- Defense counsel's attorney certified discovery responses without conducting a reasonable inquiry.
- Defense counsel never learned about the company's ESI infrastructure and "disavowed any involvement or knowledge of the search methodology."

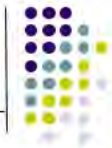
Sanctions for Spoliation of Evidence; Examining the 2015 Rule 37(e) Amendments

- The amendments to Federal Rule of Civil Procedure 37(e) went into effect December 2015.

Sanctions for Spoliation of Evidence; Examining the 2015 Rule 37(e) Amendments

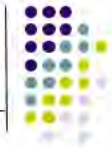
- *Cat 3, LLC, et. al. v. Black Lineage, Inc.*, et. al., 164 F. Supp. 3d 488 (S.D.N.Y. 2016).
- Plaintiffs produced differing versions of e-mails, including the original e-mails, and altered versions of those e-mails, containing different domain names and e-mail addresses.
- The discrepancies were never fully explained, but forensic evidence suggested the alterations were deliberate.

Spoliation Sanctions Must Be Narrowly Tailored



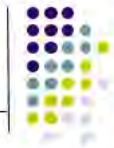
- As a sanction, the Court refused to allow Plaintiffs to use the altered e-mails.
- The Court also required Plaintiff to pay Defendants' costs and attorney's fees.
- But the Court declined harsher sanctions, based on the express language of Rule 37:
- "The relief outlined here . . . is also consistent with Rule 37(e)(1), as it is no more severe than is necessary to cure the prejudice to the defendants."

Lessons Learned



- In-house counsel must carefully communicate with the IT staff on how best to retain relevant ESI. Further, in-house attorneys must continuously consider who to include and add in an ongoing litigation hold for the duration of the case.
- Outside counsel must vigorously manage the discovery process, particularly when ESI is involved. Outside counsel has an affirmative obligation to verify information received from the client, and interview key client personnel.

Lessons Learned



- Outside counsel also has an obligation to understand the client's ESI procedures, manage outside ESI vendors, and implement preservation procedures if none exist.
- Outside counsel must work with in-house counsel to develop an ESI procedure, and advise key employees of that procedure.
- Spoliation sanctions for failing to preserve ESI must now be narrowly tailored, even where the spoliation was deliberate.

Terrance C. Newby

Partner
Maslon (Minneapolis, MN)

612.672.8328 | terry.newby@maslon.com
http://maslon.com/tnewby

Terry Newby is a partner in Maslon's Litigation Group and focuses his practice on intellectual property, e-commerce, and complex commercial litigation matters. He has extensive IP litigation experience, successfully representing clients in state and federal courts throughout the country in a broad range of infringement matters involving patent, trademark, copyright, and trade dress as well as licensing disputes. Terry has also represented clients in complex commercial litigation matters, including insurance disputes, civil RICO claims, breach of contract claims, and class actions.

Terry regularly helps clients navigate complex e-commerce matters. He evaluates software and license agreements, and he drafts and negotiates software licenses as well as confidentiality and non-disclosure agreements—all to ensure the client achieves optimal value from the venture.

Terry has significant appellate experience and has briefed and/or argued appeals involving complex commercial disputes and patents in various jurisdictions including the Federal Circuit Court of Appeals and appellate courts in Minnesota, Iowa, and Illinois. He is also licensed to appear before the United States Supreme Court.

Practice Areas
- Appeals
- Business Litigation
- Competitive Practices/Unfair Competition
- Insurance Coverage Litigation
- Intellectual Property Litigation

Representtaive Cases
- Lead counsel for client in patent infringement case venued in Texas federal court. Case settled in 2015 on terms favorable to client.
- Lead counsel for client in defense of lawsuit involving eight separate intellectual property licenses. Case was tried to an arbitrator in Minnesota, resulting in a favorable arbitration ruling in favor of the client. The arbitration award was upheld on appeal.
- Lead counsel for clients in numerous contract and license negotiations. Represented clients in negotiations with licensors and licensees involving trademarks, license rights, patents, and confidentiality agreements.
- Lead trial counsel for client in defense of patent infringement allegations. Client was sued in California federal district court in 2011 for patent infringement. Case was litigated for over a year in the Central District of California, with numerous fact and expert depositions and discovery. Negotiated a favorable settlement on behalf of client two days before the scheduled start of trial.
- Lead counsel for client in patent infringement case venued in South Carolina federal district court. Case was litigated for almost three years before the parties settled in 2007 on terms favorable to the client. Defendant continues to pay royalties to client.

Education
- William Mitchell College of Law; J.D., 1995
- University of Wisconsin, Madison B.A., 1989