OVERCOMING THE OCEAN OF COMPLAINTS, TRIALS AND MOTIONS

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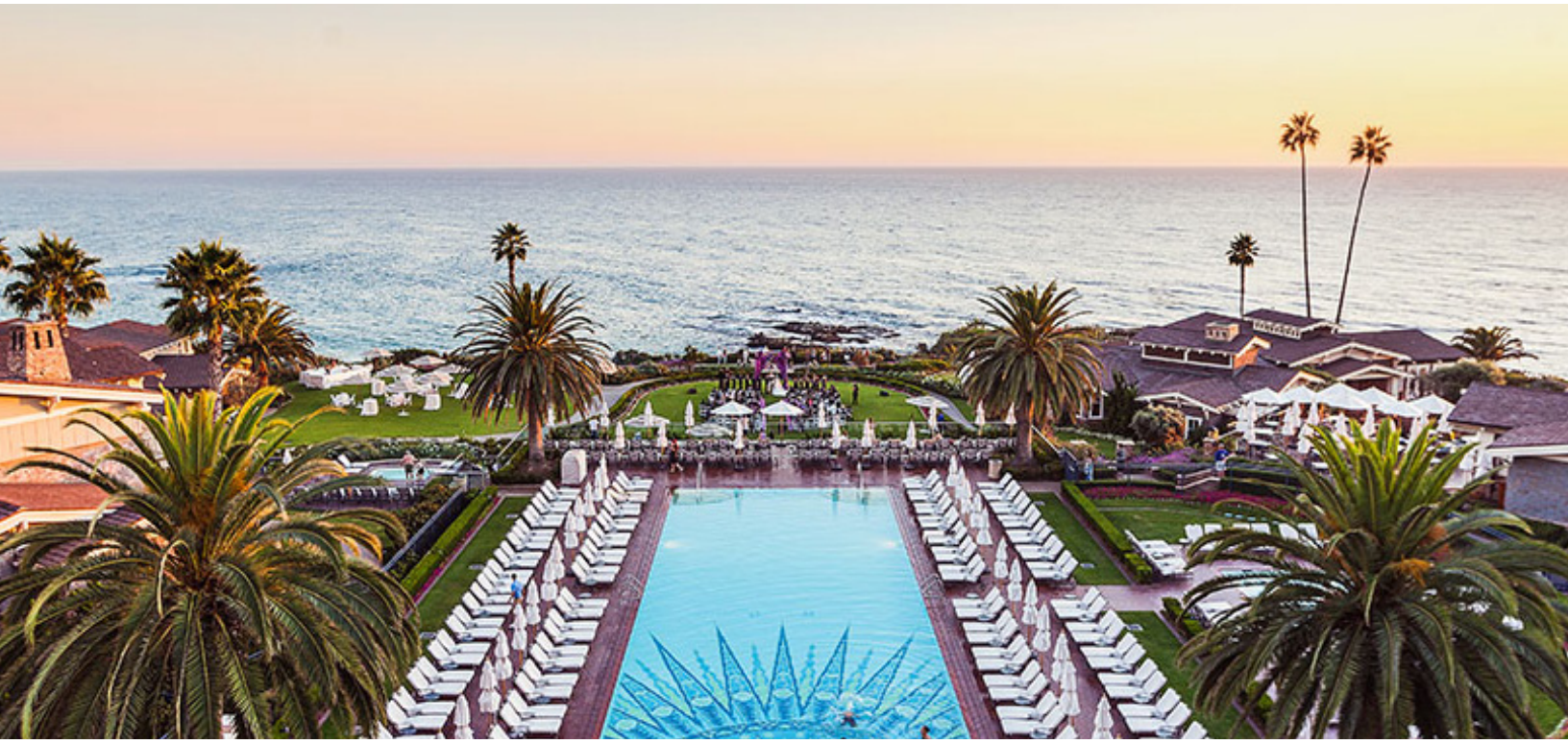

APRIL 19-22, 2018 **THE MONTAGE LAGUNA BEACH**

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OVERCOMING THE OCEAN OF COMPLAINTS, TRIALS AND MOTIONS

LITIGATION MANAGEMENT SUPERCOURSE

APRIL 19-22, 2018 **MONTAGE LAGUNA BEACH**

THE NETWORK TRIAL.COM

Our mission is straightforward: Connect the world's leading corporations with world-class legal experts. It is this driving force that has led us to over 5,000 attorneys in 22 separate and independent trial law firms practicing in over 120 offices throughout the United States.

Founded in 1993, The Network of Trial Law Firms, Inc. remains committed to the art of strengthening strategic business relationships amongst the country's leading trial law firms. To that end, our meticulously selective membership process is centered on smart growth. A brief glance at our membership will show preeminent legal representation within key geographical jurisdictions. Leading publications and legal awards consistently recognize our members as dominant in their respective fields.

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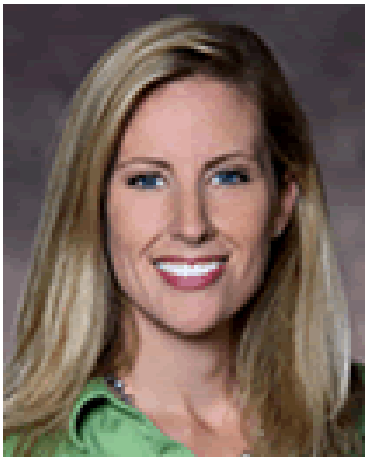

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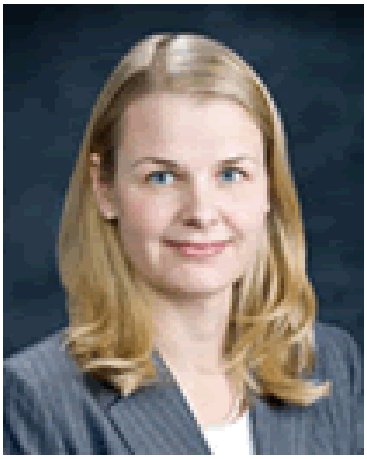

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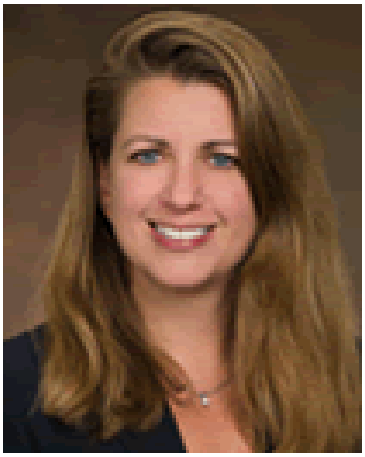

Jessie Zeigler
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FLORIDA

We collaborate with the world's most successful enterprises and entrepreneurs to navigate change, seize opportunities, and overcome barriers to innovation and growth. Within our communities, we work to create better opportunities for the future. Akerman is a client-driven enterprise, recognized by Financial Times as among the most forward thinking law firms in the industry. We are known for our results in middle market M&A and complex disputes, and for helping clients achieve their most important business objectives in the financial services, real estate, and other dynamic sectors. We are ranked among the top 100 law firms in the United States, Our inclusive culture impacts the way we see the world and deliver results. We are a perpetual insurgent, infusing startup agility with nearly a century of enterprise stability and we try not to take ourselves too seriously along the way.

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With more than 300 attorneys representing numerous publicly traded companies and Fortune 500 businesses, Bass, Berry & Sims PLC has been involved in some of the largest and most significant business transactions and litigation matters in the country. Bass Berry & Sims' 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, the firm is especially focused on significant and growing areas of litigation that affect clients, and align with unique strengths.

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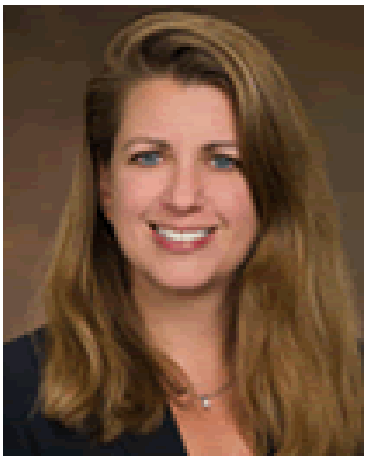

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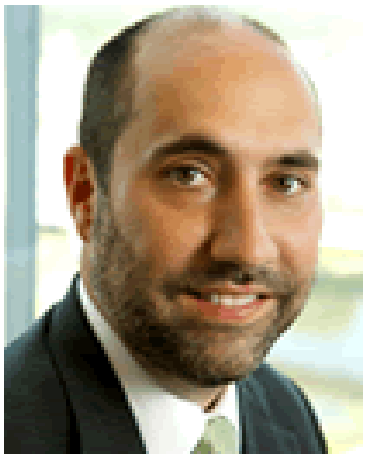

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NETWORK MEMBER FIRM PROFILE

MICHIGAN

Based in Troy, Michigan, Bush Seyferth & Paige PLLC is a specialized firm providing national-caliber litigation services with trial skills second to none. Some of America's best-known companies look to BSP for successful results in complex commercial, employment, class-action, and tort litigation. This distinctive litigation practice applies aggressive advocacy to resolve claims or disputes. BSP attorneys are trial experts who meet challenges confidently, rather than pushing to settle. BSP blends world-class capabilities with the agility, personal attention, and efficiency of a boutique firm. The firm's high-profile trial experience in state and federal courts from coast to coast includes first-chair corporate defense work, class actions, and product-liability matters.

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NETWORK MEMBER FIRM PROFILE

WASHINGTON

Corr Cronin Michelson Baumgardner Fogg & Moore LLP is recognized as one of the premier trial law firms handling major cases in Washington, Oregon, Alaska, and Idaho for clients of all sizes – from individuals and regional companies to Fortune 500 corporations. For two decades, Corr Cronin has set the standard for high-stakes litigation in the Pacific Northwest. Attorneys are consistently ranked among the best in their field, and the firm is recognized time and again as one of the top litigation firms in Seattle. Founded by former big law partners, Corr Cronin combines the sophistication and expertise of a big firm with the lean and client-centered focus of a boutique.

corrcronin.com

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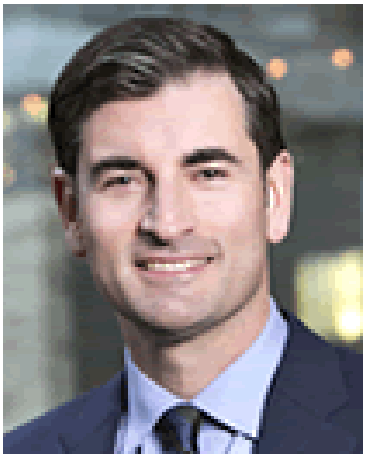

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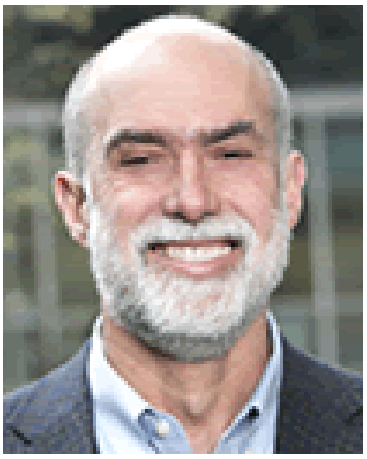

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LOUISIANA

Founded in New Orleans in 1926, Deutsch Kerrigan LLP is built on the foundation of being problem-solvers, applying enduring principles of craft to serve clients effectively and efficiently. The firm is committed to providing a sensible approach to litigation to its local, regional, and national insurers, corporations, and Fortune® 500 clients. Using a sensible approach to litigation, Deutsch Kerrigan helps clients resolve disputes by balancing desired business outcomes with what is smart economically. Attorneys relentlessly move cases forward to keep cases in the “red zone” where matters get resolved and cases don’t collect dust.

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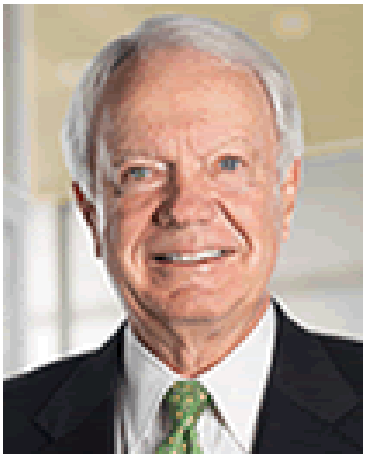

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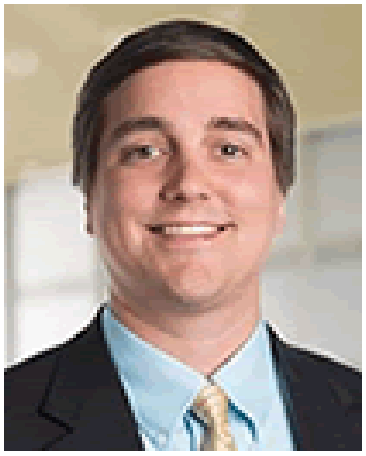

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CALIFORNIA

Farella Braun + Martel LLP is a leading Northern California law firm representing corporate and private clients in sophisticated business transactions and complex commercial, civil and criminal litigation. Clients like 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.

fbm.com

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NETWORK MEMBER FIRM PROFILE

MISSISSIPPI

Forman Watkins & Krutz LLP ("Forman Watkins") is a general litigation firm with a strong emphasis in multi-district tort, environmental, and complex commercial litigation. Founded in 1986 in Jackson, Mississippi, the Firm has continuously provided clients with consistency, efficiency, and economic savings by pioneering innovative and creative solutions to national litigation management. The litigation team at Forman Watkins delivers solutions. Some of our solutions are traditional, most are creative, all are specifically designed to achieve the most successful outcome in the most economical way possible. We are known for our aggressive but thoughtful approach to litigation, and we bring technology, trial experience, and subject matter expertise to every case. Our practice areas include complex commercial litigation, lender liability, insurance coverage, employment litigation, personal injury, product liability and professional liability.

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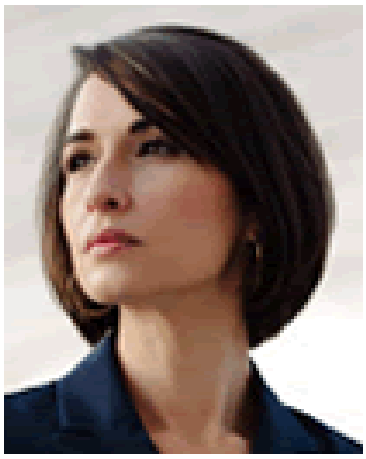

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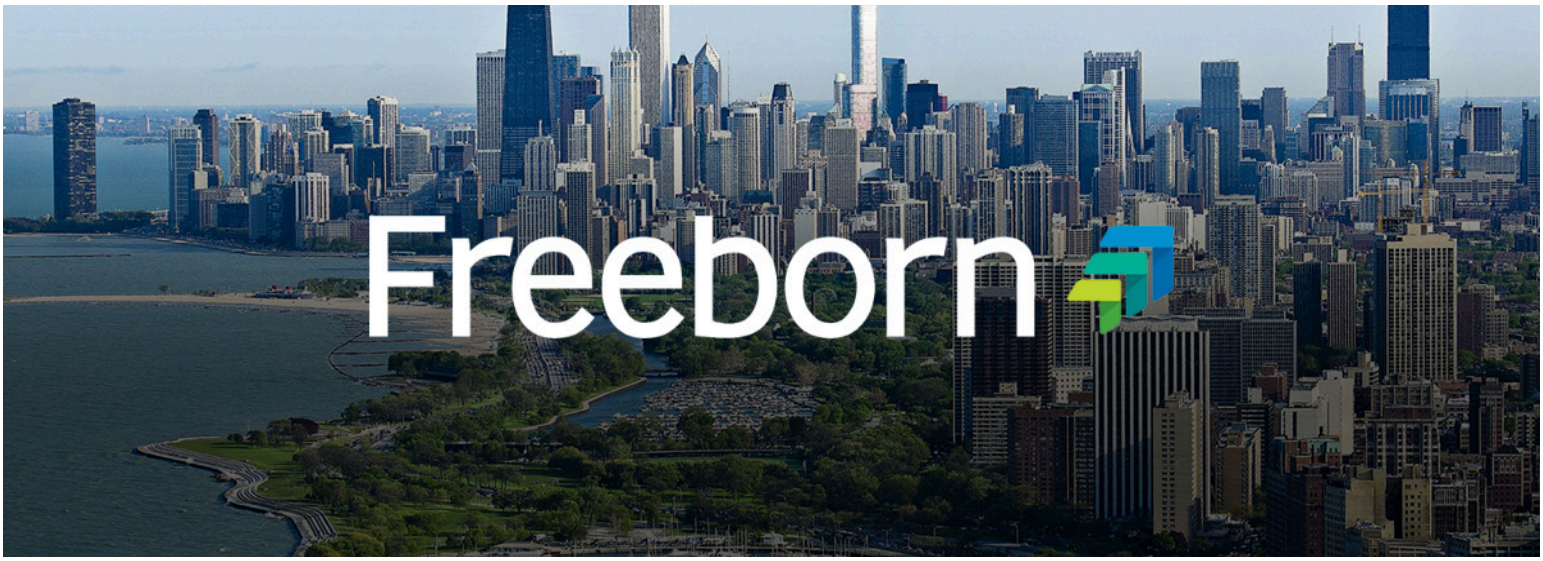

NORTHERN ILLINOIS, CENTRAL ILLINOIS

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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. 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.

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Founded in 1988, Goodell, DeVries, Leech & Dann specializes in litigation and litigation management. The diversity of the specialized knowledge of the 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 helps 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.

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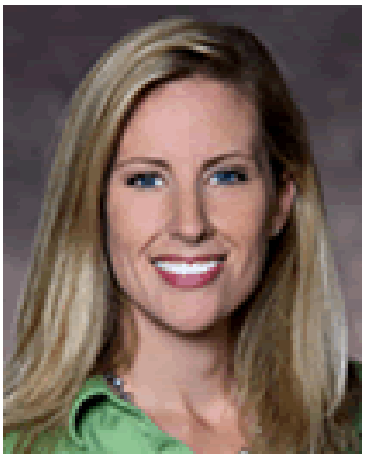

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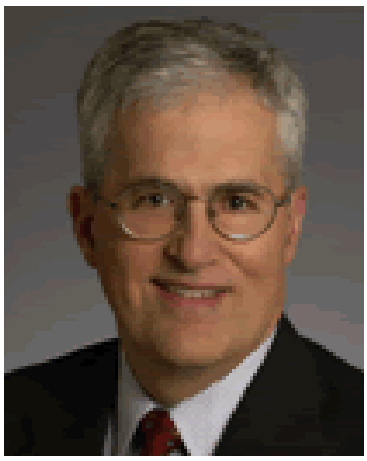

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SOUTH CAROLINA

The Hood Law Firm, LLC is a boutique trial law firm. Established in 1985 by Robert H. Hood, Sr., the Hood Law Firm has grown to more than 25 lawyers who are dedicated to providing their clients with top-quality trial litigation services in state and federal courts. For over thirty years, the Hood Law Firm, LLC has consistently maintained its focus on trial practice. This singular focus serves the firm's clients well whether a good result is defined as early resolution, verdict or appeal. The Hood Law Firm, LLC represents individuals and corporate clients throughout the country in addition to serving as national trial counsel. As a trial law firm, the scope of practice for the firm is broad including, but not limited to, product liability, drug and medical device litigation, professional negligence, commercial litigation, maritime, construction litigation, nursing home litigation, Section 1983 claims and insurance coverage and bad faith.

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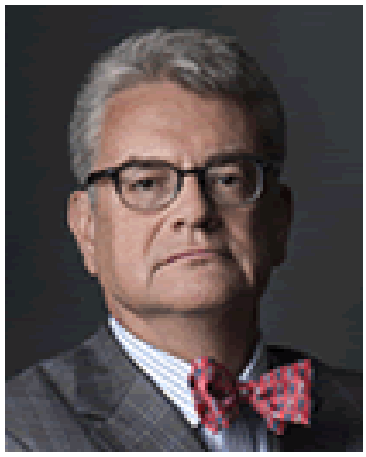

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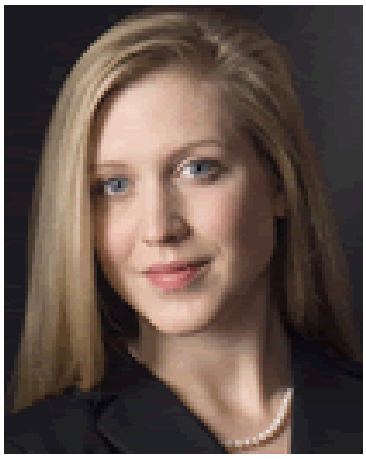

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MINNESOTA

Business Smart. Litigation Strong. Global-leading manufacturers, financial institutions, utility companies, corporate, and individual clients regularly turn to Maslon for representation across a broad spectrum of commercial cases. Through decades of dedicated work, the firm has earned a reputation for being the lawyers to trust with the most complex legal issues and high-stakes litigation matters. Maslon is nationally recognized in the areas of Tort & Product Liability, Business Litigation, Construction Litigation, and Appeals. Chambers USA recognized Maslon as one of only four select firms to receive the highest possible ranking for Litigation in Minnesota -- based on extensive client interviews and research to assess technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment, and other qualities most valued by clients.

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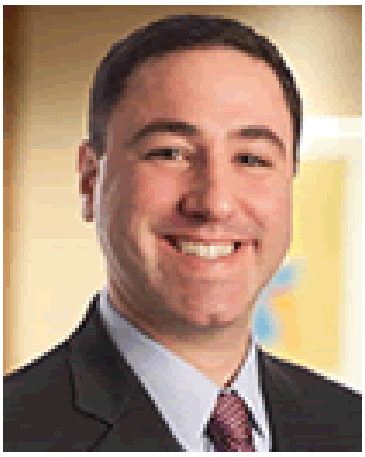

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NORTH CAROLINA

Moore & Van Allen conducts a broad civil litigation practice. The firm is experienced in all alternate forms of dispute resolution, including mini-trials, mediation, and arbitration. 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.

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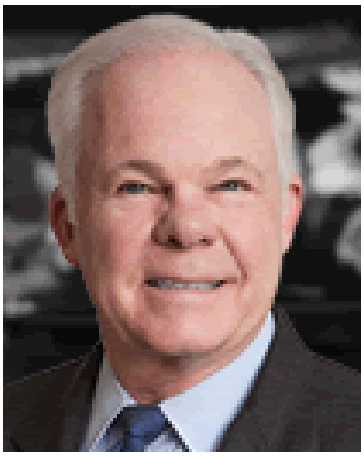

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NEW YORK, MASSACHUSETTS

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. Nixon Peabody is one of the few firms with the experience and capability—and successful trial results—to serve as trial counsel for clients who require a consistent approach to class action and aggregate litigation matters. Nixon Peabody LLP is recognized as a “Global 100” law firm—one of the largest in the world. The firm’s size, diversity, and advanced technological resources enable it to offer comprehensive legal services to individuals and organizations of all sizes. Clients include emerging and middle-market businesses, national and multinational corporations, financial institutions, public entities, educational and not-for-profit institutions, and individuals.

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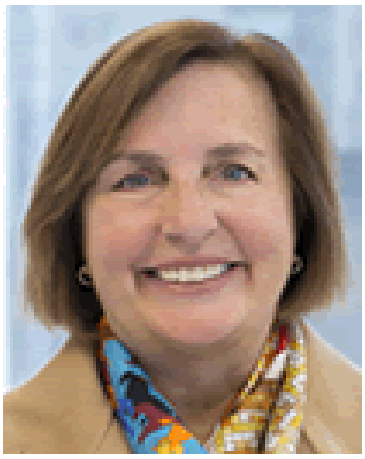

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TEXAS

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.

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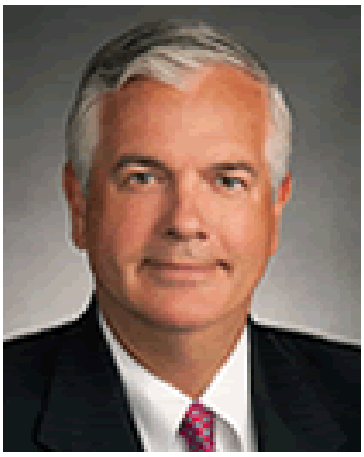

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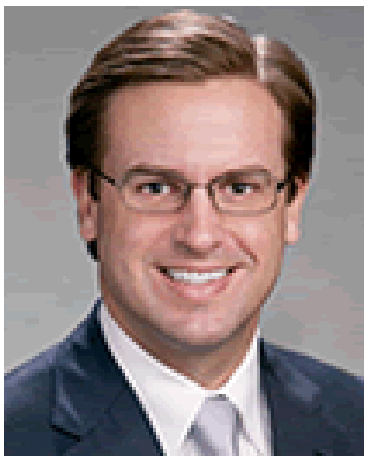

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NETWORK MEMBER FIRM PROFILE

NEW JERSEY

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.

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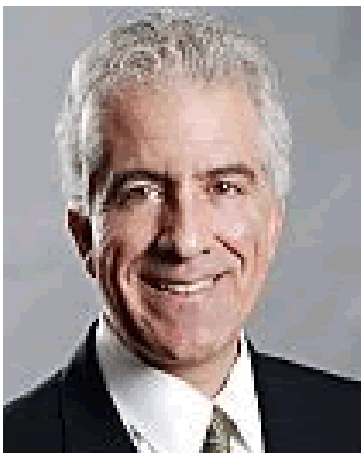

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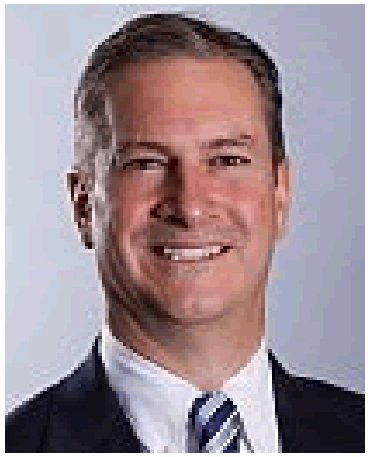

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NETWORK MEMBER FIRM PROFILE

MISSOURI, KANSAS, SOUTHERN ILLINOIS

Sandberg Phoenix includes more than 125 attorneys offering services in more than 35 areas of law, covering medical malpractice, professional malpractice, products liability, insurance defense, business litigation, transactional, wealth/estate planning and trusts, and more. The firm includes clients from across the country and is recognized as being extremely effective in providing local/regional counsel in Missouri, Southerm Illinois and Kansas. Sandberg Phoenix is built on a values driven foundation and was one of the first U.S. firms to offer clients a service guarantee. Structured with the goal of providing clients with strategic local representation, the firm includes offices in St. Louis, Clayton and Kansas City Missouri; Alton, Edwardsville, O'Fallon and Carbondale, Illinois; and Overland Park, Kansas.

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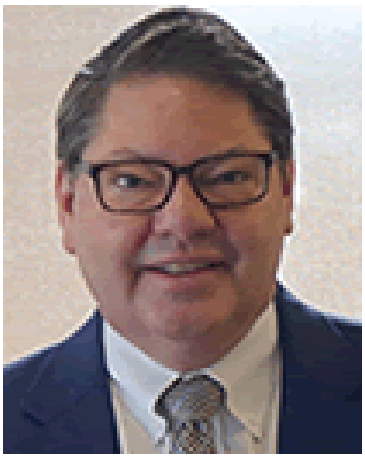

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NETWORK MEMBER FIRM PROFILE

ARIZONA, UTAH

For more than seventy years, Snell & Wilmer has been dedicated to providing superior client service. As a result, the firm has earned a reputation for providing 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. Founded in 1938, the firm represents clients ranging from large, publicly traded corporations to small businesses, individuals and entrepreneurs. 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.

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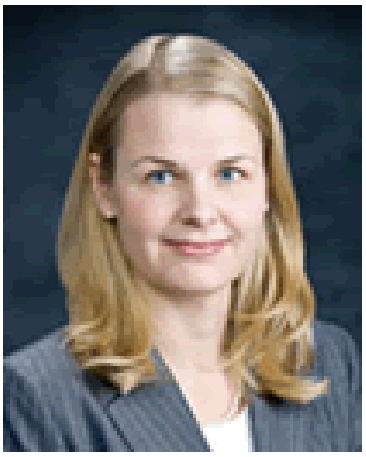

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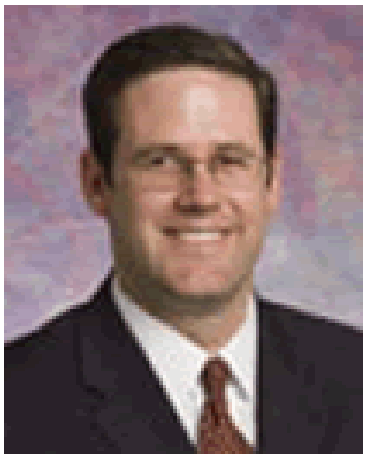

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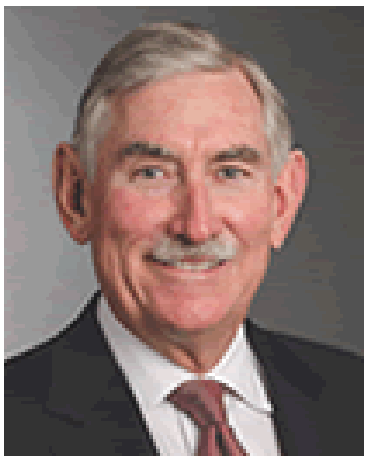

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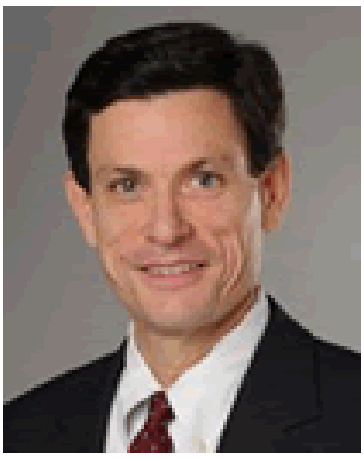

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NETWORK MEMBER FIRM PROFILE

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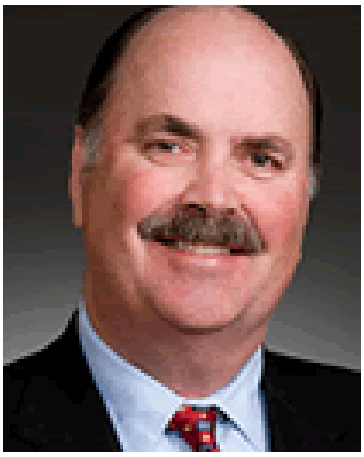
The 100+ trial lawyers and litigators of Denver-based Wheeler Trigg O'Donnell (WTO) are known for trying precedent-setting cases in difficult jurisdictions nationwide. In the past decade, WTO attorneys have won 83 trials, 68 significant appeals, and 41 complex arbitrations. We don't know of any similarly sized firm in our region that has achieved more trial and litigation success for its clients. WTO serves as national resolution and trial counsel for many of the nation's best-known companies, including Advanced Bionics, Electrolux, FCA, Foster Wheeler, Ford, General Electric, McKesson, Mercedes-Benz, Michelin, Pfizer, USAA, and Whirlpool.

wtotrial.com



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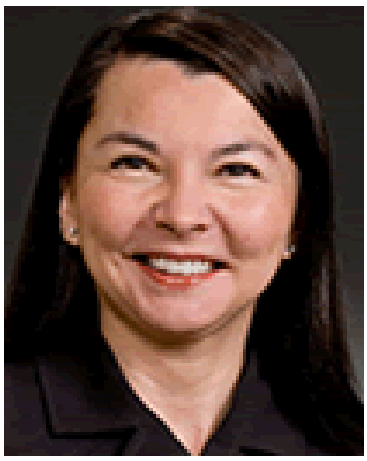

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THE LEAD DOMINO: THE EXPONENTIAL IMPACT OF IMPROVING COMPANY CULTURE

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On February 5, 2018, The Financial Times reported that an AmLaw 100 firm terminated a partner after allegations surfaced that he had sexually assaulted a female associate. The article indicated that the law firm downplayed the event, which it said took place "several years ago".

The associate made a complaint to the firm's Human Resources department and later agreed to leave the firm after signing a non-disclosure agreement. The firm was apologetic, saying: "We are really sorry this incident ever happened and we acknowledge we should have handled it better." However, The Financial Times article reported that the partner remained at the firm for years after the event took place and only departed after the event became public.

Imagine this was your firm? Could you explain away the event as an isolated incident? Perhaps. But consider another example outside of the legal profession.

Beginning in 1979, Harvey Weinstein ran two of the most successful production companies in the world, Miramax and the Weinstein Company. Miramax's success led to Disney's 1993 purchase of the company. During this time, Weinstein created such award-winning pictures as The English Patient, Good Will Hunting, Shakespeare in Love and Pulp Fiction. Weinstein's success continued with The Weinstein Company, which he started in 2005. The hits continued with Lion, Django Unchained, Silver Linings Playbook and The King's Speech.

After nearly 40 successful years in the industry, Weinstein's hidden decades-long history of sexual assault and sexual harassment broke when 84 accusers spoke out. On February 26, 2018, The Weinstein Company filed for bankruptcy.

Forty years? Eight-four accusers? Two companies (one owned by Disney)? How does this happen?

Enormous Consequences

One event can turn a most-admired company into the focus of public scorn and drive a most-admired CEO to resign in disgrace. Quite often, history reveals the bad behavior was not aberrant, but had existed for years and worsened over time. The company culture tolerated and thus enabled the bad behavior.

Just as pernicious is the less stark behavior: yelling, bullying, intimidation, scapegoating and gossip. Such behavior, when tolerated, leads to less visible symptoms: The talented associate that quietly left for better "work-life balance", the respected partner who started a new firm to "do his own thing", the valued staff member whose exit interview noted intimidation "from time to time". What about the dozens of talented, dynamic people that never applied because of the "challenging" company reputation?

The Perils of Incrementalism

A toxic culture does not happen overnight. It happens daily, decision-by-decision and behavior-by-behavior.

Toxic culture develops when one bad behavior is excused, ignored, or discounted.

Harvey Weinstein's decades-long campaign of sexual harassment occurred in a culture that allowed it to occur. The behavior continued because questionable comments, overtures and actions went unaddressed. When a company fails to address bad behavior, the company tacitly endorses the behavior.

Take a hard look at your firm or company? Do you have a bad apple? Were the behaviors there during their first year at your firm? Most likely their bad behavior was ignored or rewarded. Over time, people repeat behavior because it works. And the more talented they are, the more a company will overlook.

If you want to know what your company values, look at who you pay the most. Look at who you put in the positions of power. That is the behavior you are rewarding. That is the behavior you value.

Tae Hae Nahm, Managing Director of Storm Ventures, said it well: "People seeing who succeeds and fails in the company defines culture. The people who succeed become role models for what's valued in the organization and that defines culture." Good or bad, those people are emblematic of the culture in your firm. They rose to that level not overnight but because their behavior worked and they were rewarded for it.

"Culture Eats Strategy for Breakfast"

At our firm, we had a culture problem. For years, our firm suffered from a difficult reputation, significant attrition, and complaints of poor work/life balance. As good as our lawyers were, we found it harder and harder to attract and keep key quality talent. This, in turn, significantly impacted our bottom line. So, in 2013, the firm decided to become very intentional about improving company culture. Much like bad culture is developed incrementally over time, good culture develops the same way. Much like toxic culture is defined by strong, toxic personalities in leadership, good culture is developed and ratified by strong leadership that rewards and enforces core values.

Over a five-year period, the firm developed 10 Core Values and a Core Values Committee, specifically focused on culture development. The initiative had full buy-in of leadership and full buy-in of our partners. Over time, the core values became an integral part of our interview questions, evaluation process, member compensation, the firm strategic plan, our partnership criteria, and our partnership compensation. The firm developed dozens (literally) of initiatives to weave the core values of the firm into the day-to-day consciousness of each and every member.

For example, every new member's first experience at our firm is "Day One, Hour One", where their first contact at the firm is an hour with the Managing Partner to discuss firm culture and our core values.

To be clear, the firm has made many mistakes over the past five years. However, the firm has also worked hard to be transparent and address each of those missteps. When behavior is off the mark, the firm invests in coaching and development to assist its members in improving behavior and self-awareness. After all, Core Value #1 is "Put People First."

Since undertaking our core values initiative in 2013, our firm has seen marked results. The firm has experienced attorney growth of nearly 33% during an era when the industry has experienced relatively flat demand. Moreover, we have seen attrition slow below the industry average and significant improvement in employee satisfaction. The firm has flattened its hierarchy and created an environment where new ideas are welcomed and fostered, and innovation is incentivized. On multiple occasions new clients specifically cited their investigation into employee satisfaction and firm culture as a major rationale in retaining the firm. The efforts were recognized in 2018, when The St. Louis Business Journal named Sandberg Phoenix as a finalist in the "Best Places to Work" in St. Louis. No other law firm appears in the top two largest categories.

Does Culture Really Matter?

Make no mistake; culture is a key competitive differentiator. If you are competing on price alone, you are losing. Your people are your greatest asset. Successful firms must find ways to attract top talent while providing the best environment for that talent to thrive. Gone are the days where you can simply outbid your competition for quality employees.

Clients are becoming much more cost-conscious and are asking their law firm partners to do more with

less. Firms can no longer compete for talent by simply raising rates. Firms must compete for talent by offering a better work environment, one that promotes diversity and inclusion, one that provides an appropriate work/life balance, one that allows for autonomy and innovation, and one that prizes an amazing company culture.

Your Clients are Watching

By 2025, Millennials will comprise 75% of the US workforce and Millennials value company culture more than any other generation that's come before them. [1] On average, millennials are willing to give up $7,600 in salary every year to work at a job that provides a better environment.[2] Your Millennial employees deeply care about the culture of the company where they work. But consider this – those same Millennials will soon be your clients.

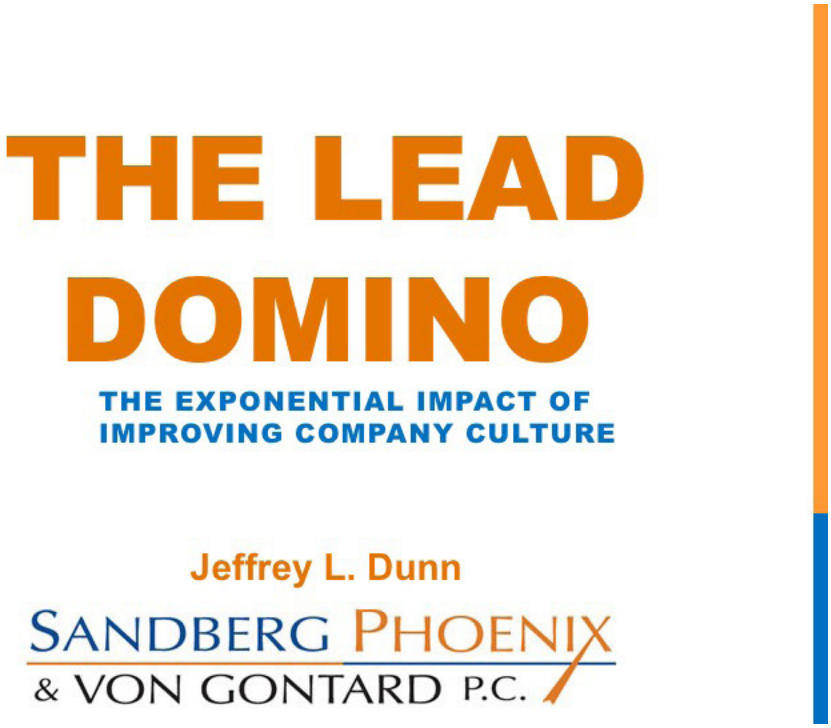
In February 2018, an attorney Claims Handler for ProAssurance, a major insurance company, posted publically on LinkedIn the factors he considers when hiring counsel. He also made it quite clear what attributes will remove a firm from his list:

"Because, I read their Glassdoor reviews and see how they treat associates and support staff and I don't feel they meet our corporate values of integrity and treating people fairly."

You might not think your culture is important. But, your employees and potential hires do. So do your clients. And they are all watching.

1 Workforce 2020: What You Need To Know Now, Forbes, May 5, 2016.

2 *How Millennials Are Reshaping What's Important in Corporate Culture*. Forbes. June 20, 2017.



Our industry is very difficult...

1 in 3 practicing lawyers are **"problem drinkers".**

28% suffer from **depression.**

The **#1 worst job overall** was **Associate Attorney**, with a 2.89 out of 5 Bliss score.

https://www.nytimes.com/2016/02/05/business/dealbook/high-rate-of-problem-drinking-reported-among-lawyers.html
https://abovethelaw.com/2013/03/unhappiest-job-in-america-take-a-guess/

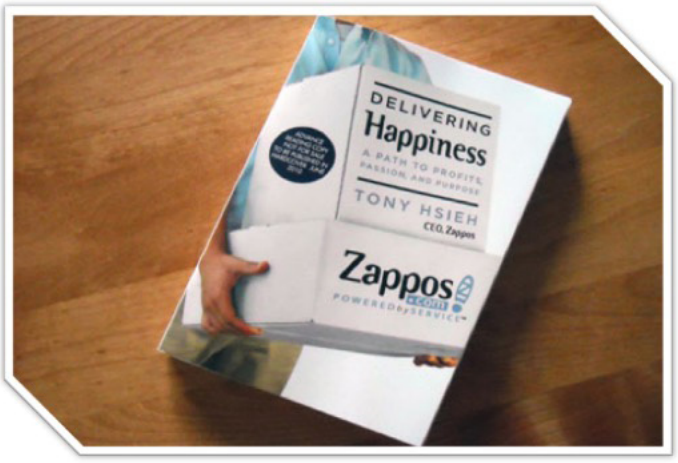
Stare Decisis: Law Firms are Resistant to Change

GLASSDOOR.COM
ACTUAL SANDBERG REVIEW

"Toxic culture. Firm allows a few bad apples with questionable ethics and appalling treatment unchecked"

2013

DELIVERING HAPPINESS



CORE VALUES: BORN OR MADE?

1. Full Representation
2. Ask
3. Collaborate
4. Start broad
5. Focus, revise
6. Build buy-in

TEN CORE VALUES

1. Put People First
2. Deliver Amazing Client Service
3. Exemplify Unquestionable Integrity In All You Do
4. Build a Fun and Enjoyable Work Environment
5. Pursue Continuous Development and Learning
6. Invest and Improve the Communities We Serve
7. Build a Positive Team and Collaborative Environment
8. Take Personal Responsibility
9. Treat Everyone with the Highest Degree of Respect and Empathy
10. Deliver Value and Excellence to Client and Firm

DRAFTING YOUR VALUES: WORDS MATTER

"DELIVER"

"BUILD"

"PURSUE"

INCORPORATING YOUR VALUES

- Candidate Interviews
- Member Evaluations
- Member Compensation
- Shareholder Criteria
- Firm Strategic Plan
- Shareholder 360s
- Shareholder Compensation

HOW TO DO IT

Be real. Be honest. Be authentic.

Celebrate your successes.

Own your failures.

...This takes time.

BRINGING THE VALUES TO LIFE

BBQ FOOD TRUCKS AND ICE CREAM SOCIALS

VALUES CHAMPS

INVEST IN OUR ATTORNEYS

A platform for feedback

- Partner 360s

Give individuals a voice

- "Ideathon"

Meaningful benefits

- Associate Vacation Credit
- Uber Allowance
- Nanny Allowance

. . . All ideas directly from *asking* Associates

BENEFITS OF A STRONG CULTURE

BENEFITS

- Build a sense of community and team
- Improve retention
- Increase employee engagement
- Foster innovation
- Promote diversity and inclusion
- Engage Millennials
- Promote cross-generational collaboration
- Grow revenue and increase profitability
- Develop new business and client relationships

GLASSDOOR.COM

"The firm culture emphasizes teamwork … the negative atmosphere that plagues most law firms has been eliminated."

June 16, 2017

"People seeing who succeeds and fails in the company defines culture. The people who succeed become role models for what's valued in the organization, and that defines culture.'

Tae Hea Nahm
Managing Director of Storm Ventures

WHAT EXACTLY HAVE WE DONE?

Core Values

Core Values Committee

Recruiting Materials

Recruiting Interview Strategies

Evaluations

Firm/Company Strategic Plan

Shareholder Criteria

Shareholder Compensation

360s – Questions, platform, implementation, coaching

Coffee, Cookies, and Conversation – (open communication strategies)

Ideathon

Day 1, Hour 1

Coaching

Kudos Bars

Values Plaques

Values Shirts

Values Videos

Values Champions

Values Week

Reward/Acknowledgement Systems:

- Charity Day Off
- Staff Birthday Day Off
- Taco Tuesday
- Ice-cream and BBQ Trucks
- Trip to Mexico
- Uber Allowance
- Two-Week Vacation Credit

THE VALUE OF CULTURE

Millennials value company culture more than any other generation that's come before them.

On average, Millennials would be willing to give up $7,600 in salary every year to work at a job that provided a better environment for them.

How Millennials Are Reshaping What's Important in Corporate Culture. Forbes. June 20, 2017.

"Because, I read their Glassdoor reviews and see how they treat associates and support staff and I don't feel they meet our corporate values of integrity and treating people fairly."

ProAssurance, Claims Handler
Via LinkdIn

JEFF DUNN

Shareholder

SANDBERG PHOENIX & VON GONTARD (ST. LOUIS MO)

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Jeff is an equity shareholder of Sandberg Phoenix, a member of the firm's Executive Committee and former leader of the firm's Health Care Services Practice Group. Jeff's practice is focused on providing practical solutions to the health care industry. The ever-changing healthcare regulatory and business environment has created both risk and opportunity. Jeff's health care clients seek his advice and judgment to successfully navigate these waters.

Throughout his career, Jeff has represented a wide range of health care clients including: nursing homes, assisted living facilities, residential care facilities, group homes and intermediate care facilities for the developmentally disabled, physicians, hospitals, nurse practitioners, allied health professionals and pain management clinics.

Jeff's litigation experience includes the representation of health care providers, product manufactures and a wide range of businesses.

Services
- Commercial Litigation
- Fire / Arson Defense
- Health Care Regulatory
- Personal Injury and Tort Defense
- Product and Toxic Tort Liability

Industries
- Consumer Products
- Hospitals
- Hunting and Sporting Goods
- Long-Term Care and Senior Living
- Physicians / Allied Health Professionals
- Recreational Products
- Trucking

Recognitions
- From 2013 – 2017, Missouri and Kansas Super Lawyers named Jeff a "Super Lawyer" in the area of Medical Malpractice. In both 2011 and 2012, the same publication named Jeff a Super Lawyer "Rising Star."
- In 2006, Jeff was named by Missouri Lawyers Weekly as one of Missouri's "Up and Coming Lawyers."

Education
- Jeff earned his Juris Doctor from Saint Louis University School of Law in 1999 where he was President of the Health Law Association and winner of the school's moot court competition. He was also awarded the Dowd Award for Appellate Advocacy.
- In 1996, he earned his B.A. with a double major in Speech Communication and Political Science from the University of Illinois.

COMBATTING DEFAMATION AND BUSINESS DISPARAGEMENT IN THE AGE OF SOCIAL MEDIA

Emily Harris
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False statements published about a business or its corporate leaders can cause not only reputational harm but severely impact share price, venture capital raising efforts, and enduring customer relationships, as well as personal relationships. With the internet providing a worldwide audience and content hosts like Yelp!, WeChat, and Twitter shielding posters, defamers have unprecedented ability to spread false statements with impunity. Moreover, traditional deterrents to defamation, like large damage awards or loss of professional reputation, do little to discourage internet defamers, who have limited assets or no reputation to protect. Increasingly, the only practical solution to defamation is injunctive relief seeking removal of offending posts.

Requests for injunctive relief are very often met, however, with the argument that the speech cannot be enjoined due to the broad protections of the First Amendment. Indeed, according to scholarly work, a majority of courts faced with the question have declined to grant an injunction because it would constitute a prior restraint on speech.[1] Often overlooked, however, is the authority illuminating several paths to obtain injunctions and the increasing number of injunctions granted in the internet age.

This article examines the hurdles to obtaining injunctive relief against defamers and content hosts, as well as some solutions to achieve relief from offending posts.

Paths to Injunctive Relief Against a Defamer

As a Florida court[2] opined:

> Angry social media postings are now common. Jilted lovers, jilted tenants, and attention-seeking bloggers spew their anger into fiber-optic cables and cyberspace. But analytically, and legally, these rants are essentially the electronic successors of the pre-blog, solo complainant holding a poster on a public sidewalk in front of an auto dealer that proclaimed, "DON'T BUY HERE! ONLY LEMONS FROM THESE CROOKS!" Existing and prospective customers of the auto dealership considering such a poster made up their minds based on their own experience and research.

The court continued:

> The same well-developed body of law allows the complaining blogger to complain, with liability for money damages for defamation if the complaints are untruthful and satisfy the elements of that cause of action. Injunctive relief to prohibit such complaints is another matter altogether.

But as discussed, liability for money damages is often not the deterrent in the internet age it might have once been. So what is a plaintiff to do? The same court hints at the solution, noting:

> If and when a hypothetical complainant with the poster walked into the showroom and harangued individual customers, or threatened violence,

1 For an overview of cases in which parties have sought injunctive relief, see David S. Ardia, Freedom of Speech, Defamation, and Injunctions, 55 Wm. & Mary L. Rev. 1 (2013).

2 *Chevaldina v. RK/FL Management*, 133 So.3d 1086 (Fl. Ct. App. 2014).

> however, the previously-protected opinion crossed the border into the land of trespass, business interference, and amenability to tailored injunctive relief.

Broadly, and while state law varies, courts have relied on four exceptions to the First Amendment protections against injunctive relief in the defamation context. Injunctions have been granted: 1) when the speech impugned a plaintiff's property, business or product interests; 2) if the defendant engaged in a continuing course of tortious conduct that caused the plaintiff harm; 3) if there is a statutory basis for injunction, such as a Deceptive Trade Practices Act claim or Lanham Act claim; or 4) if the speech has been adjudged to be defamatory. While the fourth prong may be difficult to achieve in the pre-trial context, the first three offer windows of hope to a plaintiff seeking to obtain a temporary restraining order or preliminary restraining order to stop defamatory speech.

If the defamation relates to a plaintiff's property or business interests, courts have been more willing to consider injunctive relief. The willingness to grant injunctive relief in this circumstance goes hand in hand with the concept that commercial speech is generally given a lower level of constitutional protection. Thus, where a claim for tortious interference with business or disparagement of services offered is involved, courts have been more inclined to give injunctive relief.[3]

Similarly, when a plaintiff can show an additional harm, such as harassment, stalking, or other crime or tort related to the defamatory statement, courts are more inclined to grant injunctive relief. For example, if your client "Mr. Jones" came to you because his neighbor had tweeted "My neighbor watched Police Academy 4[4] last night at the movie theater on 4th Ave and I could tell he really enjoyed it," the court might not grant injunctive relief on the basis of the defamatory statement, but it might if the facts support a claim that Mr. Jones' neighbor was stalking him – particularly if it was part of a repeated pattern or with indications that the behavior will not stop. Thus, factual scenarios where the defamer is participating in some other form of unlawful activity, like repeated stalking or harassment, may mean that injunctive relief is an available remedy.

Courts may also be more likely to grant injunctive relief when the defamatory conduct is subject to a statutory claim that expressly permits injunctive relief as a remedy. A good example of such a statute is the Uniform Deceptive Trade Practices Act, which a number of states have adopted and which specifically provides for injunctive relief. For instance, Nebraska's Uniform Deceptive Trade Practices Act, defines a deceptive trade practice to include an act that "[d]isparages the goods, services, or business of another by false or misleading representation of fact." Neb. Rev. Stat. 87-302(9). The act also expressly provides that "[a] person likely to be damaged by a deceptive trade practice of another may bring an action for, and the court may grant, an injunction under the principles of equity against the person committing the deceptive trade practice." Neb. Rev. Stat. 87-303(a). A number of other states have very similar provisions indicating that injunctive relief is available for false statements of fact regarding a business, goods or services. See 815 ILCS 510/2(8) [add citations]. In the proper context, asserting claims under the applicable state's Deceptive Trade Practice Act may provide an additional avenue of obtaining injunctive relief for false statements made by a business competitor.

Last, the most well-worn path to injunctive relief against speech is by obtaining a judicial determination that the speech is, indeed, false and defamatory. As one oft-quoted California opinion puts it: "Prohibiting a person from making a statement or publishing a writing before the statement is spoken or the writing is published is far different from prohibiting a defendant from repeating a statement or republishing a writing that has been determined at trial to be defamatory and, thus, unlawful."5 And, while courts vary on applying this rationale for injunctive relief, at least some have held that injunctive relief is also proper when the adjudication was part of a preliminary injunction proceeding.6 In sum, once a court has determined that the speech is unlawful, the injunctive relief can no longer be deemed a prior restraint.

Obtaining Relief Against Anonymous Posters and Content Hosts

Obtaining injunctive relief – or any relief for that matter – for online defamation can also be hindered if the real-life identity of a defamer is unknown. Sites like Yelp! and Twitter allow users to remain anonymous

3 *Amalgamated Acme Affiliates, Inc. v. Minton*, 33 S.W.3d 387, 394 (Tex. App. 2000).

4 One of a number of movies with a 0% approval rating on Rotten Tomatoes.

5 *Balboa Island Village Inn v. Lemen*, 156 P.3d 339, 344-45 (Cal. 2007).

6 *San Antonio Cmty Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997).

or difficult to identify. In some circumstances, courts have been willing to order the unmasking of defendants. While the First Amendment protects the rights of individuals to make anonymous statements, and courts have recognized various motivating factors for remaining anonymous, in the internet age courts have increasingly been willing to use balancing tests to weigh First Amendment protections against the potential unmasking of anonymous defendants. These balancing tests, however, vary by jurisdiction and are themselves in a state of evolution. Some courts have declined to adopt new tests, others require plaintiffs to make a prima facie showing of the claim for which the plaintiff seeks the unmasking, others focus on the balance between a party's fair opportunity to defend itself and the protections on anonymous speech, while others require the plaintiff to be able to survive a hypothetical summary judgment motion or make a good faith effort to provide notice to the anonymous party.[7]

In some situations, however, the speaker is truly undiscoverable or the challenged statement has been posted by a now defunct account. In such circumstances, the only path to addressing the defamation may lie through the content host.

Section 230 of the Communications Decency Act has been a long standing safe harbor for providers of interactive computer services. Not only does Section 230 provide "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," it also releases a services provider from liability even if that provider edits or removes some, but not all, of the materials posted by its users. Effectively, it allows content hosts like Yelp!, Twitter, and Facebook to police their users' comments and posts at their discretion, while sheltering them from any liability related to their decisions not to remove otherwise defamatory speech.

Courts, however, are beginning to erode the harbor walls. Where content hosts have encouraged users to provide illegal content, developed rating systems giving user reviews different weights, or otherwise participated in the development of content or the ways in which that content was aggregated beyond a mere pinboard, courts have shown a willingness to allow plaintiffs to recover from the hosts themselves. Additionally, some courts have issued orders to content hosts after findings of defamation against individual posters, requiring the hosts to remove defamatory posts.[8] While some critics have raised due process concerns, it is a potential solution worth considering once your client has won a judgment against an anonymous or non-functioning defaming account.

Alternatives to Injunctive Relief in Defamation Cases

While the defamed party would prefer an injunction against harmful speech, there may be alternatives available to achieve some or all of the relief sought. Consideration should be given to seeking a voluntary or statutory retraction of the defamatory statements. Not all states have retraction statutes, and those that do vary greatly. As a general matter, however, retraction statutes provide that the plaintiff serve a notice on the publisher of a statement that it is defamatory and gives the publisher an opportunity to retract it, with varying impacts on the defamation claims.[9] See Ariz. Rev. Stat. Ann. § 12-653.02; Cal. Civ. Code § 48a(1); Mass Gen. Laws c. 231, 93; Wash. Rev. Code § 9.58.040 [add citations]. Where available, a defamed party may be able to obtain removal or retraction of the false statements through this device, to the same effect as an injunction. Consideration should also be given to exploring stipulations among the parties to voluntarily stand-down in making additional public comments during the pendency of the litigation. This too may offer some of the same benefits sought by injunctive relief. Last, consideration should be given to use of content host's removal process for abusive and harassing posts or other online reputation management services.

Conclusion

Like the internet, online defamation is here to stay. And, while defamation law still lags behind the change in technology, courts are increasingly adopting new solutions to protect those victimized by defamers. Those trends include a greater acceptance by the courts – albeit in certain limited categories – to grant injunctive relief against false and harmful speech.

7 *In re Anonymous Online Speakers*, 661 F.3d 1168, 1175–76 (9th Cir. 2011) provides a detailed inspection of various tests applied by courts considering whether to unmask anonymous speakers.

8 *See Hassell v. Bird*, 247 Cal.App.4th 1336, 1346–47 (2016).

9 Some retraction statutes are prerequisites to commencing a defamation action or seeking exemplary damages. [add cites: Michigan; Mississippi; South Dakota]. In some states, failure to retract a statement after request can be deemed evidence of malice. [cite: District of Columbia] And, a retraction can be used by a defendant in support of mitigation of damages. [cite: Louisiana].

Combatting Defamation and Business Disparagement in the Age of Social Media

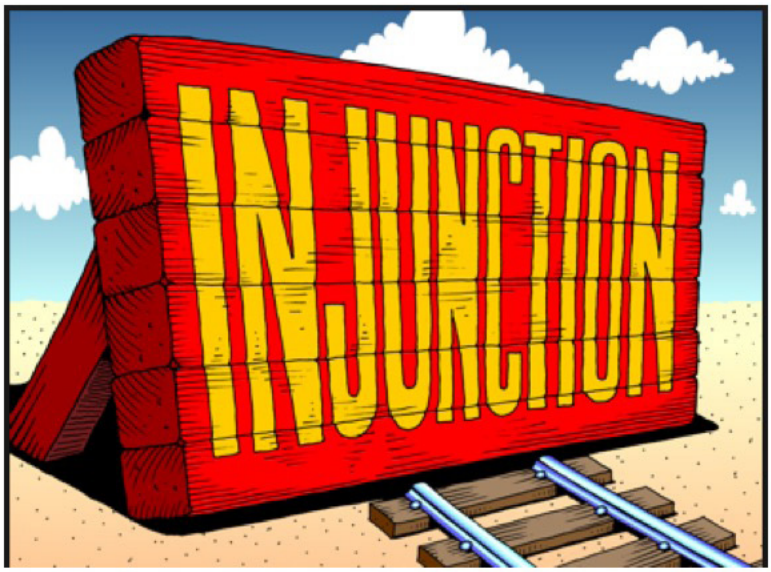
Emily Harris
Corr Cronin

Defamation Basics

- Unprivileged Publication
- False statement of fact
- Made negligently or with actual malice
- Causes harm or per se harmful

Business Disparagement Basics

- False statement about business, goods or services
- Publisher knows statement is false or acts in reckless disregard of truth
- Intends to cause pecuniary loss
- Pecuniary loss results


INJUNCTION


The New York Times
SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS
Nixon Says Turks Agree To Ban the Opium Poppy
Pentagon Papers: Study Reports Kennedy Made 'Gamble' Into a 'Broad Commitment'
Soviet Starts an Inquiry Into 3 Astronauts' Deaths
U.S. and Diem's Overthrow: Step by Step

Paths to Injunctive Relief

- Impugns property, business or product interests
- Part of continuing course of tortious conduct or intentional tort
- Subject to statutory claims
- Adjudicated as Defamation

Impugns Property, Business or Product Interests

While speech is involved, gravamen involves commercial harm in addition to personal reputation:

- Quality of services or products
- Legitimacy of patents or intellectual property
- Interference with business relationships

Continuing Course of Tortious Conduct or Intentional Tort

While speech is involved, facts indicate continuous harassment or intentional acts:

- Stalking
- Intentional infliction of emotional distress
- Invasion of privacy
- Trespass
- Forgery

Statutory Claim with Injunctive Remedy

Some statutes expressly include injunctive relief remedies:

- Uniform Deceptive Trade Practices Act
- Lanham Act

Adjudication of Defamation

Where a court has determined the specific speech at issue is defamatory:

- Preliminary injunction
- Evidentiary hearing
- Trial

Hurdles of Anonymity and Content Host Immunity

Relief Against Anonymous Posters

Once a defamation lawsuit is filed, courts will consider requests to unmask anonymous speakers.

Various legal tests:

- Prima facie showing
- Balancing of interests
- Good faith notice to anonymous party

Immunity of Content Hosts

Section 230 of Communications Decency Act (1996) provides safe harbor to content hosts:

> "[n]o provider or user of interactive computer service shall be treated as a publisher or speaker of any information provided by another content provider."

47 U.S.C. § 230(c)(1)

Paths to Content Removal by Hosts

- Orders against defamers that require content removal
- Host encouraging illegal content, rating systems, or participating in content development

Alternatives to Injunctive Relief

Because injunctive relief may be difficult or expensive to obtain, consider alternatives:

- Retraction statutes
- Stand-down stipulations
- Content host removal process

Online Defamation is Here to Stay

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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 Californias.

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

Professional Associations

- Washington State Bar Association
- California State Bar Association
- International Association of Defense Counsel
- The Network of Trial Law Firms

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

PANEL: THE SECOND LABOR OF HERCULES – BATTLING GOVERNMENT INVESTIGATIONS

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Recent Department of Justice ("DOJ") guidance regarding corporate leniency has important implications for the conduct of internal investigations. In particular, at the March 2018 American Bar Association (ABA) White Collar Conference, DOJ representatives recently announced the extension of the Foreign Corrupt Practice Act ("FCPA") Corporate Enforcement Policy to crimes beyond FCPA violations. Prior to the expansion, business organizations that self-reported most FCPA violations and cooperated with the DOJ could expect to avoid criminal prosecution, absent certain aggravating factors. Now, the DOJ has expanded the same policy to certain criminal violations beyond the scope of the FCPA.[1]

This article will discuss the recent expansion of the DOJ's policy of leniency for self-reporting and remediation, the origin of the policy, the practical consequences for corporate investigations, and factors senior executives and in-house counsel may want to consider before and during an investigation based on DOJ's focus on individual culpability.

The FCPA Corporate Enforcement Policy and Its Recent Expansion

The original DOJ policy of leniency for FCPA violations was adopted in 2016 as a one- year pilot program, and made permanent in November 2017. The program was designed to incentivize companies to self-disclose FCPA-related misconduct and remediate flaws within their internal compliance programs.[2] Importantly, the current FCPA Corporate Enforcement Policy now includes a "presumption of declination," meaning that companies enjoy a presumption that DOJ will decline to prosecute if they self-report FCPA violations, so long as certain aggravating factors do not exist.

Under the FCPA Corporate Enforcement Policy, when a company cooperates and remediates, and also voluntarily self-discloses misconduct, it is eligible for a full range of potential mitigation credit. The DOJ provided guidance criteria for a company to qualify for credit in three different categories: (a) voluntary self-disclosure; (b) cooperation; and (c) remediation.[3]

More specifically, to receive credit for self-reporting, a company must make the disclosure within a reasonably prompt time after becoming aware of the offense and before there is a threat of disclosure by someone else or a government investigation relating to the conduct.

To qualify for cooperation credit the DOJ has set forth a number of requirements that must be met. For example, some of the prerequisites include: (a) "disclosure on a timely basis of all facts relevant to the wrongdoing at issue;" (b) "[p]roactive cooperation, rather than reactive; that is, the company must disclose facts that are relevant to the investigation, even when

1 Jody Godoy, DOJ Expands Leniency Beyond FCPA, Lets Barclays Off, Law 360 (March 1, 2017) available at https://www.law360.com/banking/articles/1017798/doj-expands-leniency-beyond-fcpa-lets-barclays-off?nl_pk=e236481d-a4e5-44e1-8244-99658ee781ab&utm_source=newsletter&utm_medium=email&utm_campaign=banking.

2 Press Release, United States Department of Justice, Criminal Division Launches New FCPA Pilot Program (April 5, 2016) available at https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program.

3 U.S. Attorney's Manual, § 9-47.120 – FCPA Corporate Enforcement Policy, available at https://www.justice.gov/criminal-fraud/file/838416/download

not specifically asked to do so;" (c) "[p]reservation, collection, and disclosure of relevant documents and information relating to their provenance;" (d) "where requested, de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that [DOJ] intends to take as part of its investigation;" and (e) "where requested, making available for interviews by the Department those company officers and employees who possess relevant information."

A company seeking leniency under the FCPA Corporate Enforcement Program must also undertake appropriate remediation consistent with DOJ guidelines.

This so-called "self-reporting credit" positions DOJ's FCPA Unit to decline to file criminal charges at all, offer non-prosecution or deferred prosecution agreements, or make available more lenient plea agreements when appropriate. Further, where the existence of aggravating factors requires prosecution, the FCPA Corporate Enforcement Policy requires DOJ to accord a 50% reduction off the bottom of the applicable guideline sentencing range. Of note, the DOJ's guidance makes clear that to obtain any mitigation credit, a company that voluntarily self-discloses, fully cooperates, and remediates will be required to disgorge all profits resulting from the FCPA violation.

The recent guidance announced by DOJ at the ABA's March 2018 White Collar Conference expanded DOJ's corporate leniency program beyond FCPA violations. In particular, DOJ officials announced that they will use the FCPA Corporate Enforcement Policy as nonbinding guidance in other criminal cases. In particular, John Cronan, the acting head of DOJ's Criminal Division stated, "We intend to embrace, where appropriate, a similar approach and similar principles — rewarding voluntary self-disclosure, full cooperation, timely and appropriate remediation — in other contexts."

The Yates Memo – Guidance on Self-Reporting

The FCPA Corporate Enforcement Policy and its recent expansion must be considered in conjunction with a memorandum released by then-Deputy Attorney General Sally Yates in September 2015 (the "Yates Memo").[4] The Yates Memo impacts corporate investigations conducted across DOJ by emphasizing a focus on individual culpability.

The Yates Memo is the latest in a long line of guidance memos extending DOJ's policy to hold individual wrongdoers accountable in the course of corporate investigations. In 1999, then-Deputy Attorney General Eric Holder issued a memo entitled "Bringing Criminal Charges Against Corporations." The Holder Memo focused on individual liability, noting that DOJ "is committed to prosecuting both the culpable individuals and, when appropriate, the corporation on whose behalf they acted." Since 1999, DOJ has offered several other memos—in 2003 ("Thompson Memo"), 2006 ("McNulty Memo"), and 2008 ("Filip Memo")—to clarify the principles that DOJ Trial Attorneys and Assistant U.S. Attorneys should consider in conducting corporate investigations and prosecutions.

In support of its emphasis on pursuing individual wrongdoers, the Yates Memo outlines six "key steps" that are meant to guide prosecutors and civil attorneys at DOJ in conducting and evaluating corporate investigations:

1) "In order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct"

The biggest change brought about by the Yates Memo is that corporations may no longer receive partial credit for their cooperation in investigations. And DOJ's articulated standard —that "corporations must provide . . . all relevant facts" — has not been further clarified by DOJ or tested in the courts.

2) "Criminal and civil corporate investigations should focus on individuals from the inception of the investigation"

Although investigating individual liability has always been a component of government investigations, the Yates Memo highlights the significant role that individuals will now play in the investigation of a corporation as a whole. Traditionally, in some respects, it has been easier for DOJ to bring a case against a corporation because the collective knowledge doctrine allows the government to gather evidence from many different corporate actors to make a combined

4 The Yates Memo, a memorandum addressing "Individual Accountability for Corporate Wrongdoing," was issued by Deputy Attorney General Sally Yates to all Department of Justice components and United States Attorney's Offices on September 9, 2015.

case against the corporation. By contrast, when the government focuses on individuals, it may be more difficult to assign intent or culpability to a particular person in the corporation in order to hold him or her accountable for corporate action. At the same time, by focusing the investigation on senior management, lower-level employees may feel pressured to provide embellished information against higher-ups rather than the less helpful objective information they may possess.

3) "Criminal and civil attorneys handling corporate investigations should be in routine communication with one another"

Government attorneys have always tried to keep open lines of communication when an investigation may lead to both criminal and civil enforcement actions. The Yates Memo is a reminder to line attorneys to look at all angles of an investigation to identify all potential charges. It is also a sign that the government will attempt to find some basis on which to find liability, either civil or criminal.

4) "Absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation"

Put simply, DOJ attorneys will no longer agree to any settlement or corporate resolution that dismisses charges or provides immunity for individual officers or employees. The only exception is when DOJ determines that undefined "extraordinary circumstances" are present.

5) "Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases"

A decision to resolve a corporate case, without simultaneously settling individual liability, will require the DOJ attorney to demonstrate, to his or her supervisor, a clear plan for resolving any related individual cases promptly and before the statute of limitations expires. Further, if the decision is made not to proceed against individuals, the justification for such a decision must be memorialized and approved by the relevant U.S. Attorney or Assistant Attorney General overseeing the investigation.

6) "Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay"

According to Mr. Baer's June 9, 2016 statement, there are reasons the government may pursue an individual beyond recovering money: "Holding accountable the people who committed the wrongdoing is fundamental to ensuring that the public has continued confidence in our justice system." Mr. Baer's comments are another warning that the DOJ will not shy away from pursuing individuals through civil enforcement actions, even when they do not have an ability to pay a potential judgment.

What this Means for Corporate Executives and In-House Counsel

Senior executives and in-house counsel may want to prepare now for future investigations based on how government attorneys will conduct civil and criminal investigations in light of the Yates Memo.

The most striking change dictated by the Yates Memo is the all-or-nothing nature of cooperation credit. That is, a corporation is now expected to "identify all individuals involved in or responsible for the misconduct at issue . . . and provide to the Department all facts relating to that misconduct." From now on, given the growing prevalence of cooperation clauses, companies will be required to continue this same level of cooperation as a term of any settlement or plea agreement. Indeed, according to Yates, "A company's failure to continue cooperating against individuals will be considered a material breach of the agreement and grounds for revocation or stipulated penalties."[5]

In light of the requirements to receive cooperation credit, a corporation may want to review its ability to meet this heightened bar. Further, given the more stringent standard for cooperation credit, the assessment of whether to voluntarily disclose potential wrongdoing becomes more difficult. In making this assessment, it remains critical for businesses to develop as full and thorough a set of facts as possible when responding to government scrutiny.

Regarding exactly which executives, managers,

5 Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing, Sept. 10, 2015, *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

or employees a corporation must identify for DOJ, the Yates Memo does not provide clear guidance; instead, it states broadly that "the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority." But companies may want to be careful about who they identify and why. As Ms. Yates quipped in an interview with the New York Times, "We're not going to be accepting a company's cooperation when they just offer up the vice president in charge of going to jail."[6] Thus, companies, as a general rule, may want to consider focusing on executives who are high enough in the organization to have knowledge of general business goals and strategies and who also exercised operational control and management within the affected business unit (i.e., those who DOJ is likely to point to as having combined knowledge and misconduct).

In addition to this new individual-centric paradigm, senior executives and in-house counsel also may want to keep in mind other consequences the Yates Memo will have on the nature of internal investigations. The most obvious issue is how the attorney-client privilege will apply. Now that DOJ requires "all information," it may be more difficult for a corporation to maintain the privilege while at the same time disclosing the quantum of information demanded by the government.

Ultimately, the best defense to the new requirements set forth in the Yates Memo may be a proactive business response to possible violations. In that regard, corporations may want to review their existing policies and procedures to both avoid violations that may lead to an investigation and to be prepared if and when an investigation begins. Although the existence of a compliance program is not a bar to prosecution or investigation, companies may want to review their existing ethics and compliance policies and, if necessary, bolster them to deter possible violations. Ultimately, companies also may want to create a robust compliance policy and devote sufficient resources to it to train employees and provide executives and the board direct oversight. This close supervision will allow management to respond quickly to issues and remedy them before they become significant or to adapt the compliance program to address new issues not previously considered. Equally important, companies may want to maintain documentation demonstrating that executives and others in management are following the ethics and compliance policies as stated.

6 Matt Apuzzo, "Justice Department Sets Sights on Wall Street Executives," New York Times (Sept. 9, 2015), *available at* http://www.nytimes.com/2015/09/10/us/politics/new-justice-dept-rules-aimed-at-prosecuting-corporate-executives.html?_r=0.

Snell & Wilmer

The Second Labor of Hercules: Battling Government Investigations

Panelists

Amy Sorenson, Moderator
Snell & Wilmer

James Melendres
Snell & Wilmer
Chair, White Collar Defense and Investigations

Eugene Litvinoff
Chevron
Senior Counsel, Litigation

Overview

1. **DOJ Corporate Leniency Policies**
2. The Yates Memo
3. Best Practices for Corporate Internal Investigations

FCPA Corporate Enforcement Policy

- Full range of mitigation credit based on following criteria:
  - –Voluntary self-disclosure
  - –Cooperation*
  - –Remediation
- Presumption of declination (assuming absence of a non-exclusive list of "aggravating factors")

FCPA Corporate Enforcement Policy

- Cooperation*
  - Disclosure on a timely basis of all relevant facts
  - Proactive cooperation, rather than reactive
  - Preservation, collection, and disclosure of relevant documents and information relating to their provenance
  - De-confliction of witness interviews and other investigative steps
  - Officer and employee interviews

FCPA Corporate Enforcement Policy

- Expansion announced by DOJ at March 2018 ABA White Collar Conference
- Nonbinding guidance in other criminal cases
- John Cronan, the acting head of DOJ's Criminal Division stated, "We intend to embrace, where appropriate, a similar approach and similar principles — rewarding voluntary self-disclosure, full cooperation, timely and appropriate remediation — in other contexts."

Overview

1. DOJ Corporate Leniency Policies
2. **The Yates Memo**
3. Best Practices for Corporate Internal Investigations

Yates Memorandum

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

Yates Memo issued to:

- Antitrust Division
- Civil Division
- Criminal Division
- Environmental and Natural Resources Division
- National Security Division
- Tax Division
- FBI
- All 94 United States Attorneys Offices

Yates Memo: Increased Focus on Individuals

- *"One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing."*
- *"Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, in ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system."*

Yates Memo: Six Key Points

1. To qualify for cooperation credit, corporations must provide to DOJ all relevant facts relating to individuals responsible for the misconduct;
2. Criminal and civil corporate investigations should focus on individuals from the beginning;
3. Criminal and civil attorneys should be in routine communication with one another;

Yates Memo: Six Key Points cont'd

4. DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation (absent extraordinary circumstances);
5. DOJ attorneys should not resolve matters with corporations without plan to resolve individual cases; and
6. Civil attorneys should focus on individuals and companies based on considerations beyond an individual's ability to pay.

Changes Regarding Cooperation

- New change to both civil and criminal matters:
  - To receive **ANY** consideration for cooperation under Sentencing Guidelines, the company must "completely disclose" to DOJ all relevant facts about individual misconduct.
    - No partial credit.
  - If company declines to learn relevant facts about individuals, cooperation will no longer be considered a mitigating factor under USAM § 9-28.700 *et*.

Corporate Resolutions Can No Longer Provide Protection for Individuals

- Absent extraordinary circumstances or approved DOJ policy
  - Antitrust leniency policy
- Applies to both Civil and Criminal Divisions
- Process set forth for declinations

The Yates Memo is Here to Stay

- 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."

Overview

1. DOJ Corporate Leniency Policies
2. The Yates Memo
3. **Best Practices for Corporate Internal Investigations**

What Prompts an Investigation?

- Whistleblower / Hotline complaint
- An inquiry or investigation by a governmental agency, such as DOJ, a State Attorney General or the Securities and Exchange Commission
- Notice from outside auditors
- News articles
- A shareholder lawsuit or demand

Investigative Process

- Document preservation
- Preliminary "document interviews"
- Document collection
- Document review
- Witness interviews
- Conclusions

Document Preservation

- Hold notice
- Appropriate employees
- Outside directors
- Engage with IT staff to understand status of systems and equipment used
- Suspend routine document destruction or deletion of files

Preliminary "Document Interviews"

- Short interviews with key witnesses
  - –Goal: identify the issues presented, individuals with relevant knowledge, and potential document sources.
- Investigative scoping is critical

Document Collection and Review

- Types of documents
  - –Hard copy documents
  - –Electronic files and data
    - Email
    - Mobile devices
    - Information in the cloud

Document Collection and Review

- Work with IT staff and data collection, including email and imaging hard drives
- Consider need for eDiscovery vendor
- Consider whether search terms need to be vetted with appropriate stakeholders
- Review appropriate hard copy documents and electronic data, including e-mails
- Assess documents for use in investigation

Witness Interviews

- **"Corporate Miranda"/Upjohn disclosure**
  - Counsel is representing the company or board
  - The attorney does not represent the employee personally
  - Although the conversation is protected by the attorney-client privilege, the company may choose to disclose information to third parties

Witness Interviews

- Address key documents and facts with witnesses
- Form of recording information from interview
- Persons attending interview
  - Witness may ask for counsel

Conclusions

- Prepare findings
- Share conclusions with client
- Form of report
  - –Written report or outline
  - –Oral presentation
  - –Combination of oral and written report

Conclusions

- Presentation to any other appropriate audiences
  - –Auditors
  - –Regulators
  - –Shareholders
- Be cautious about privileged information

PANELISTS:

James Melendres is chair of the White Collar Defense and Investigations practice and co-chair of the Cybersecurity, Data Protection, and Privacy practice. He focuses on white collar criminal defense and government investigations as well as cybersecurity incident preparation and emergency response and related regulatory compliance and civil litigation. Drawing on his extensive experience as a former federal prosecutor, James also focuses his private practice on representing companies in high stakes civil litigation and advising clients on crisis and risk management. Prior to joining Snell & Wilmer, James served in the leadership offices at the Department of Justice as Counsel to the Assistant Attorney General where he oversaw legal and policy issues regarding sensitive cyber matters.

Gene Litvinoff is currently Senior Counsel, Litigation at Chevron. Following law school, he served as a judicial law clerk to Ninth Circuit Court of Appeals Judge Melvin Brunetti, and then as a judicial law clerk to U.S. District Court Judge D. Lowell Jensen in the Northern District of California. He then joined the U.S. Department of Justice's Antitrust Division through the Attorney General's Honors Program. Upon leaving the Antitrust Division, Gene served as an Assistant United States Attorney in the Southern District of California. After leaving government service, he joined McDermott Will & Emery LLP, where his practice included government investigations, white collar defense, and complex civil litigation. Gene has spent the last 6 years at Chevron managing a portion of the Company's international criminal and civil disputes.

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Amy Sorenson is a regional civil litigator, defending business litigation matters in Utah, Nevada and California at trial, in arbitration and on appeal. Her complex commercial litigation practice includes general business litigation claims in the federal and state courts, including dealer termination litigation and arbitrations, False Claims Act lawsuits, non-compete, contract and unfair competition claims, business torts and intellectual property and professional liability claims for a wide variety of businesses and industries.

Amy also co-chairs the firm's Financial Services Litigation group, and manages and defends financial services clients in regional defense programs involving high-volume and pattern litigation. Her financial services litigation experience extends to the representation of lenders, servicers and other financial industry clients in a wide variety of litigation matters including those involving lien priority disputes, servicing errors, origination claims, consumer disputes, statutory foreclosure mediations and petitions for judicial review, SEC receiverships, qui tam claims, MERS issues and HOA disputes.

Related Services

- Commercial Litigation
- Financial Services Litigation
- Intellectual Property and Technology Litigation
- Professional Licensure
- Real Estate Litigation

Representative Presentations and Publications

- "After the Worst Happens: The Punitive Damages Award on Appeal", Speaker, Network of Trial Law Firms Litigation Management Supercourse, Kiawah Island, SC (October 2016)
- "Punitives Slashed in Wyoming Carbon Monoxide Case: In a win for tort reformers, an appellate court embraces a 1-1 ratio of punitive compensatory damages," Featured, The American Lawyer (May 2016)
- "How Do Law Firms Retain Women, and Why It Matters," Panel Speaker, Utah State Bar 2016 Spring Convention, St. George, UT (March 11, 2016)

Professional Recognition and Awards

- Chambers USA, America's Leading Lawyers for Business®, Litigation: General Commercial (2017)
- The Best Lawyers in America®, Commercial Litigation (2014-2016, 2018)
- 2013 Top Rated Lawyer in Technology, The American Lawyer & Corporate Counsel (June 2013)
- Utah's Legal Elite: Civil Litigation, Utah Business Magazine (2007-2009, 2012-2015, 2017-2018)
- Mountain States Super Lawyers®, Civil Litigation: Defense (2013-2017); Top 50 Women Lawyers (2014-2015); Rising Stars Edition (2012)
- Litigation Counsel of America, Fellow (2009)

Education

- University of California, Berkeley, Boalt Hall School of Law (J.D., 1997) - California Public Employee Relations Journal, Berkeley, California (1995-1997); Recipient, American Jurisprudence Award, White Collar Crime (1996); Recipient, Dragonette Memorial Award for Outstanding Achievement in Civil Litigation Trial Practice (1997); Recipient, Prosser Prize, Civil Trial Practice (1997)
- Yale University (B.A., English, cum laude, with distinction, 1994)

PREPARING THE CORPORATE WITNESS FOR A SUCCESSFUL 30(B)(6) DEPOSITION

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Federal Rule of Civil Procedure 30(b)(6) allows a party to depose a corporation or other organization by serving a deposition notice which describes the subject matter of the proposed deposition and requires the corporation to designate a representative to testify on its behalf.[1] Because the Rule 30(b)(6) witness is testifying on behalf of the organization, it is critical to present the right person to testify on behalf of the corporation and to make sure that he or she is properly prepared. A poor performance by the witness can greatly harm the company's position in the case, while a well-prepared witness can put a human face on the company and help the organization present the facts in a favorable manner.

What does Rule 30(b)(6) require of each party?

The procedure for Rule 30(b)(6) depositions was created in 1970 as a supplement to the existing practice where the deposing party, rather than the organization, was required to designate the corporate witnesses to be deposed. The amendment served three primary purposes: (1) to reduce the difficulty the requesting party experienced in trying to determine whether a particular organization's employee was a managing agent; (2) to curb the "bandying" by which officers of the corporation were deposed in turn but each one disclaimed knowledge of facts that would be clearly known to the organization; and (3) to protect the organization by eliminating unnecessary and unproductive depositions of employees who have no knowledge of the issues of the litigation.[2]

The text of Rule 30(b)(6) provides as follows:

Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.[3]

"Reasonable Particularity"

Rule 30(b)(6) imposes separate obligations on each party. First, Rule 30(b)(6) requires that the deposing party describe with "reasonable particularity the matters for examination" in its notice. In other words, the notice must be specific enough that it allows the organization to identify the outer limits of the testimony requested so that it can meaningfully prepare its representative

1 Please note that this article discusses Fed. R. Civ. P. 30(b)(6). Most jurisdictions have modeled their corresponding rule after the federal rule, so the discussions herein should apply to most jurisdictions.

2 See Fed. R. Civ. P. 30(b)(6) advisory committee note to 1970 amendments.

3 Fed. R. Civ. P. 30(b)(6).

to testify.[4] This commonly includes listing discrete subject areas that the deposition will cover and listing the specific information sought. Notices that contain language that the areas of inquiry will "include, but not be limited to," state that the inquiries may extend beyond the enumerated topics, or seek testimony on "any matters relevant to [the] case" are overly broad and do not comply with Rule 30(b)(6).[5]

"Known or Reasonably Available"

In turn, the corporation is obligated to designate a representative that will testify on its behalf based on information "known or reasonably available" to the organization. This requires that the designated representative have knowledge regarding the subject matters identified in the notice, even if it extends beyond the representative's own personal knowledge.[6] Accordingly, the organization is required to prepare whatever witness it selects so that he or she may give complete, knowledgeable, and binding answers on behalf of the organization.[7] As discussed more fully below, this may require the corporation to prepare the witness through the use of documents, interviews with past and current employees, or other sources.[8]

How should a corporation respond to an overly broad notice?

If the notice is impermissibly broad and does not enable the corporation to adequately prepare its representative, the defending lawyer may wish to contact opposing counsel and attempt to clarify the scope of the notice or limit any objectionable topics. If the opposing party will not agree to limit the scope of the notice, then the responding party should object to the Rule 30(b)(6) notice by moving for a protective order pursuant to Fed. R. Civ. P. 26(c).[9] The corporation bears the burden of demonstrating that the notice is objectionable or insufficient, so the corporation should delineate in its motion what parts of the notice are overly broad.[10] Failing to object prior to the deposition and arriving with an insufficiently prepared witness can potentially result in an award of sanctions against the noticed party.[11]

Identifying the Witness

If the notice describes the topics for the deposition with reasonable particularity, the responding party's next step is to identify the corporate representative to testify on its behalf. A corporation should not take this task lightly because the person selected will be the face and voice of the company. There are many considerations in selecting the proper witness. Although it may be practical to select a person within the organization who already possesses knowledge regarding the topics identified in the notice, the most knowledgeable person may make for a poor witness. Because it is not necessary that the representative have personal knowledge of the topics identified in the notice, a corporation may decide to select a more presentable or experienced witness to be the representative of the company.[12] When selecting a witness, the corporation is not limited to current employees; the corporation may, at its discretion, designate a former employee or officer that can speak on the corporation's behalf on matters reasonably known to the corporation.[13]

Before designating a witness, the attorney and client should determine whether the witness is capable of being educated on a large volume of materials. In addition, the witness should be able to successfully express the corporation's position on the matters contained in the notice. The ideal corporate witness will be credible, articulate, and confident.

4 Dennis v. United States, No. 3:16-CV-3148, 2017 U.S. Dist. LEXIS 174856, at *25 (N.D. Tex. Oct. 23, 2017) (finding that a notice was overly broad because it failed to describe the testimony sought with reasonable particularity to enable Defendant to reasonably identify and marshal the facts as to which it must prepare its corporate representative to testify); Reed v. Nellcor Puritan Bennett & Mallinckrodt, 193 F.R.D. 689, 692 (D. Kan. 2000) (finding a Rule 30(b)(6) notice to be overbroad because the defendant could not identify the outer limits of the areas of inquiry noticed).

5 See Alexander v. FBI, 188 F.R.D. 111, 114 (D.D.C. 1998) (rejecting a notice to depose on "any matters relevant to this case" as not meeting the "reasonable particularity" requirement); Reed, 193 F.R.D. at 692 (finding a Rule 30(b)(6) notice to be overbroad where the plaintiff listed the areas of inquiry for which the 30(b)(6) designation was sought, but indicated that the areas of inquiry would "include, but not [be] limited to" the areas specifically numerated); Tri-State Hosp. Supply Corp. v. United States, 226 F.R.D. 118, 125 (D.D.C. 2005) (finding that listing several categories and stating that the inquiry may extend beyond the enumerated topics defeated the purpose of having any topics at all); Dennis, 2017 U.S. Dist. LEXIS 174856, at *25 (finding that seeking testimony on "all facts upon which defendant bases denials and affirmative defenses stated in its amended answer" was overly broad).

6 Alexander, 186 F.R.D. at 141.

7 Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 75 (D. Neb. 1995).

8 Id.

9 Beach Mart, Inc. v. L & L Wings, Inc., 302 F.R.D. 396, 406 (E.D.N.C. 2014) ("The proper procedure to object to a Rule 30(b)(6) deposition notice is not to serve objections on the opposing party, but to move for a protective order"); New England Carpenters Health Benefits Fund v. First Databank, Inc., 242 F.R.D. 164, 165-166 (D. Mass. 2007) ("Unlike the procedure with respect to interrogatories, requests for production of documents and requests for admissions, there is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued.").

10 Robinson v. Quicken Loans, Inc., No. 3:12-cv-00981, 2013 U.S. Dist. LEXIS 59127, at *3 (S.D. W. Va. Apr. 25, 2013).

11 Artic Cat, Inc. v. Injection Research Specialists, Inc., 210 F.R.D. 680, 681-83 (D. Minn. 2002) (finding that sanctions were warranted for a corporation's failure to provide a representative that could meaningfully respond to the deposition questions because any alleged ambiguity in the notice was not addressed by a protective order prior to the deposition).

12 Reed v. Nellcor Puritan Bennett & Mallinckrodt, 193 F.R.D. 689, 692 (D. Kan. 2000) (concluding that a defendant is not required to designate someone with "personal knowledge" to appear on its behalf at the Rule 30(b)(6) deposition, and is only required to designate a person to testify as to matters "known or reasonably available to the organization").

13 Beauperthuy v. 24 Hour Fitness United States, Inc., No. 06-715, 2009 U.S. Dist. LEXIS 104906, at *17 n.5 (N.D. Cal. Nov. 10, 2009).

Does the corporation have a duty to disclose the identity of the witness in advance of the deposition?

Once the corporation selects the representative to be deposed, the corporation is not required under Rule 30(b)(6) to disclose the identity of the witness in advance of the deposition. Rather, the corporation satisfies its responsibility to designate a corporate representative by producing them at the deposition.[14] Courts have reasoned that Rule 30(b)(6) only requires that the corporation designate a representative to testify on its behalf; the identity of the corporate representative is not relevant.[15] There are strategic advantages to not disclosing the identity of the corporate representative in advance, such as limiting the ability of the opposing party to prepare questions related to the personal knowledge of the corporate representative that are outside of the scope of the notice (yet permissible under the Rules).

Duty to Prepare the Witness

The corporation responding to the Rule 30(b)(6) notice has the duty to provide a witness that is knowledgeable regarding the subject matters identified in the notice.[16] This duty is not synonymous with providing a witness who has prior or personal knowledge of the subject matters identified in the notice. Rather, the corporation is obligated to prepare its representative beyond his or her personal knowledge so that he or she may answer fully, completely, and unevasively the questions posed by the opposing party on matters contained within the notice.[17]

The preparation should be comprehensive enough to enable the representative to testify as to any matters that would be reasonably known to the corporation.[18] The preparation should include reviewing documents related to the subject matters identified in the notice, speaking with current and past employees with personal knowledge, and using other information that is available to the corporation.[19] This may also include reviewing past depositions related to the litigation. If there are no current employees at the corporation with knowledge relevant to the subject matter identified in the notice, the corporation must also contact former employees of the corporation and review former employees' files to ascertain the information.[20]

Ideally, only one witness should be selected as the 30(b)(6) representative, as that eliminates the possibility that corporate representatives will give conflicting testimony. There will be situations, however, where it is simply not possible for one witness to cover every topic in the notice.

The time and resources needed to sufficiently prepare a deponent may be burdensome, but the repercussions for failing to properly prepare the witness can be severe. At least one court has determined that sanctions were warranted for an organization's failure to provide a witness that was knowledgeable about the subjects listed in a notice because the opposing party later determined that such information was available to the corporation.[21] Therefore, an answer such as "I don't know" or "I don't remember" is only acceptable where the corporation does not have the information reasonably available to it.[22] Moreover, it is no excuse that the documents needed to prepare the deponent are voluminous or burdensome; the representative is still required to review them.[23] If the corporation selects a representative that is ill-prepared to testify regarding the subject matters outlined in the notice, the court may order the corporation to provide a substitute Rule 30(b)(6) designee.[24]

Preparing the Corporate Witness

Because the corporate representative must be informed regarding all matters within the reasonable knowledge of the corporation, the attorney should take several steps to ensure that the witness is sufficiently prepared. First, the attorney should review with the Rule 30(b)(6) representative the topics that will be covered during the deposition and confirm that

14 Roca Labs, Inc. v. Consumer Opinion Corp., No. 8:14-CV-2096, 2015 U.S. Dist. LEXIS 191723, at *4-5 (M.D. Fla. May 29, 2015).

15 Id.

16 Alexander v. FBI, 186 F.R.D. 137, 141 (D.D.C. 1998).

17 Reed, 193 F.R.D. at 692.

18 Alexander, 186 F.R.D. at 141; Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 433 (5th Cir. 2006).

19 Crawford v. George & Lynch, Inc., 19 F. Supp. 3d 546, 554 (D. Del. 2013).

20 In re Brican Am. LLC Equip Lease Litig., 10-MD-02183, 2013 U.S. Dist. LEXIS 142840, at *10 (S.D. Fla. Oct. 1, 2013) (finding that the duty to prepare a witness may including reviewing "former employees' files and, if necessary, interviews of former employees or others with knowledge.")

21 Resolution Trust Corp. v. S. Union Co., 985 F.2d 196, 197 (5th Cir. 1993) (holding that sanctions were warranted against an organization the failed to designate a knowledgeable witness when corporation document's clearly identified another employee as having the requisite knowledge).

22 Dravo Corp. v. Liberty Mut. Ins. Co., 164 F.R.D. 70, 76 (D. Neb. 1995) (noting that the obligations of Rule 30(b)(6) cease if the corporation does not have knowledge as to prepare an employee because the rule only requires testimony as to matters known or reasonably available to the organization).

23 TIG Ins. Co. v. Tyco Int'l Ltd., 919 F. Supp. 2d 439, 454 (M.D. Penn. 2013) ("Even if the documents are voluminous and the review of the documents would be burdensome, the deponents are still required to review them in order to prepare themselves to be deposed.").

24 Heartland Surgical Specialty Hosp., LLC v. Midwest Div. Inc., NO. 05-2164, 2007 U.S. Dist. LEXIS 26552, at *26-27 (D. Kan. Apr. 9, 2007).

the witness can testify about them on behalf of the organization. Second, the attorney should determine the scope of the selected witness's knowledge on the identified topics in order to pinpoint the areas on which the witness will need further education. If the witness already possesses prior or personal knowledge of the listed topics, the attorney should confirm that the representative's testimony aligns with all of the other information known by the corporation. This should include the corporation's position, subjective beliefs, and opinions regarding topics identified in the notice.[25] The corporate representative should also be prepared to explain the organization's interpretation of documents, give reasons for the interpretation, and stand subject to cross-examination.[26] It is helpful to remind the witness that he or she is testifying as the representative of the corporation and instruct the witness to refrain from answering questions based on his or her personal opinions or belief.

After determining any deficits in the witness's knowledge, the attorney should review all relevant documents with the selected representative and conduct interviews with any employees within the organization that may have knowledge to fill in any gaps in information. As discussed above, this may include contacting former employees or officers of the corporation to determine whether they have knowledge regarding topics identified in the notice that no current employee possesses.

Once the representative has been properly educated regarding the identified topics, the attorney should conduct a mock deposition with the witness. It is often helpful to videotape the mock deposition so that the representative may see the weaknesses in his or her testimony. The attorney should cover all conceivable questions that may be posed and test the witness's memory regarding the relevant facts and the company's positions, opinions, and beliefs.

If the witness has difficulty remembering the facts and the company's positions, the attorney may wish to consider using a "cheat sheet" with a summary of relevant information responsive to the topics to assist the witness. This type of document may help refresh the recollection of the witness and help the witness identify the source of the information he or she conveys. Because the opposing party may be entitled to view this sort of document, it is important to ensure that it contains no privileged information. At times, the attorney taking the deposition will follow the outline on the information sheet, so that the deposition follows an order that is comfortable for the witness.

Scope of the Examination

Most courts agree that the scope of the examination is not limited to the matters identified in the notice of deposition.[27] However, if the deposing party asks questions outside of the scope of the notice, such answers will not bind the organization and the organization cannot be penalized if the representative does not know the answer.[28] If the deposing party begins to question the witness on matters outside the scope of the notice, the defending attorney should object in order to preserve the record and to clarify that the witness is answering the question as an individual and not as a corporate representative. Although it is permissible to make an objection on the record to the question, it is inappropriate to instruct the witness not to answer.[29] In contrast to questions that are within the scope of the notice, this may be a good time for a witness to say "I don't know," as the corporation cannot be penalized for the lack of knowledge if the question falls outside of the topics described in the notice. The witness can also respond that he or she has no opinion on certain topics.

Effect of the Testimony

Rule 30(b)(6) testimony is binding on the corporation in the sense that the deponent's testimony can be used against the corporation.[30] While the corporation may still later correct, explain, or supplement the deponent's statement, it is worth remembering that, if the corporation's position or testimony changes over time, such changes could be used as impeachment material at trial and will affect the corporation's credibility.[31] Moreover, the "sham affidavit" rule

25 Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 433 (5th Cir. 2006) (finding that a corporate representative should be able to testify on behalf of the corporation not only as to facts, but also subjective beliefs and opinions).

26 FDIC v. 26 Flamingo, LLC, No. 2:11-CV-01936-JCM, 2013 WL 3975006, at *15-16 (D. Nev. Aug. 1, 2013).

27 King v. Pratt & Whitney, 161 F.R.D. 475, 476 (S.D. Fla. 1995); Crawford v. George & Lynch, Inc., 19 F. Supp. 3d 546, 554-55 (D. Del. 2013); EEOC v. Freeman, 288 F.R.D. 92, 99 (D. Md. 2012); Am. Gen. Life Ins. Co. v. Billard, No. C10-1012, 2010 U.S. Dist. LEXIS 114961, at *11-12 (N.D. Iowa Oct. 28, 2010); EEOC v. Caesars Entertainment, Inc., 237 F.R.D. 428, 432 (D. Nev. 2006); Overseas Private Inv. Corp. v. Mandelbaum, 185 F.R.D. 67, 68 (D.D.C. 1999); but see Paparelli v. Prudential Ins. Co., 108 F.R.D. 727, 730 (D. Mass. 1985).

28 EEOC v. Freeman, 288 F.R.D. 92, 99 (D. Md. 2012).

29 Detoy v. City and County of San Francisco, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000).

30 Keepers, Inc. v. City of Milford, 807 F.3d 24, 34 (2d Cir. 2015).

31 Id. at 34-35.

prevents the corporation from manufacturing issues of fact by submitting an affidavit in opposition to summary judgment that contradicts a deponent's previous Rule 30(b)(6) deposition testimony.[32] Similarly, if a corporation produces a witness who cannot testify as to the corporation's collective knowledge, then the corporation cannot later offer contrary evidence at trial.[33]

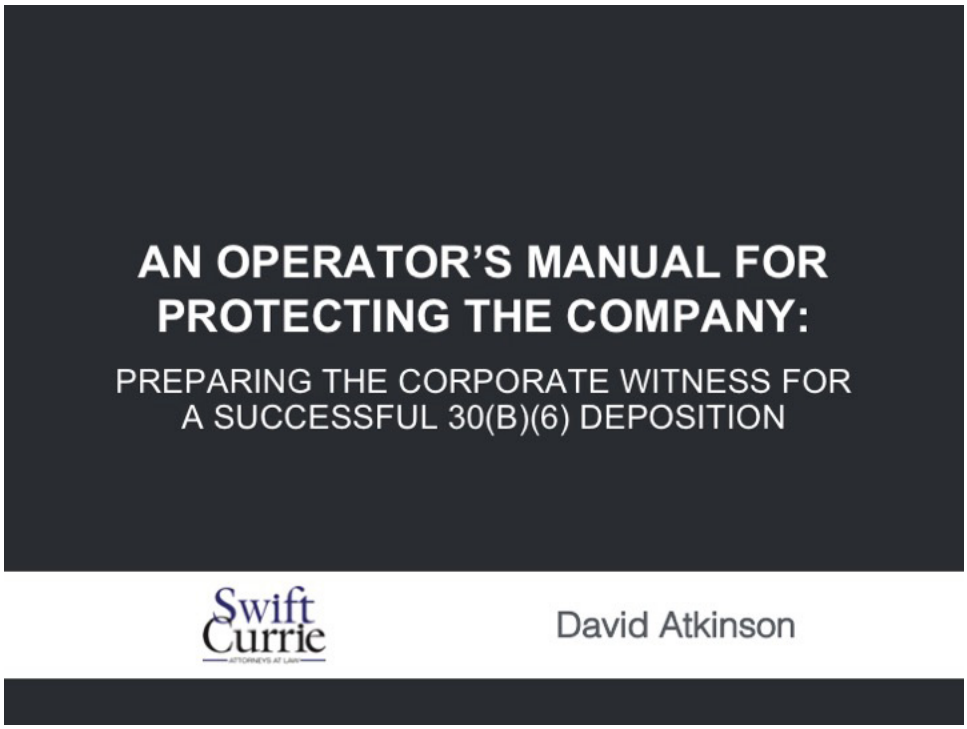
There is a growing trend in some jurisdictions where the deposing party will offer a videotaped deposition as evidence during trial even though the corporate representative is available to testify live. Although it appears that such a practice would be impermissible under the Federal Rules of Evidence if the corporate representative is available for trial, be aware that the opposing party may attempt to use a corporate representative's videotaped testimony at trial in certain jurisdictions where this practice is allowed. And videotaped testimony may be used for impeachment purposes in almost all jurisdictions. Given these trends, it is critical to ensure that the corporate representative is properly educated and prepared prior to the deposition. The defending attorney may also consider a brief direct examination to clear up or explain any problematic testimony.

32 Id. at 35.

33 QBE Ins. Corp. v. Jorda Enterprises, Inc., 277 F.R.D. 676, 700 n.18 (S.D. Fla. 2012).

Conclusion

When a corporation receives a Rule 30(b)(6) deposition notice, the defending attorney should take care to first determine the exact scope of the proposed topics in order to sufficiently prepare the corporate representative. Next, it is important to select the appropriate representative to testify on behalf of the organization and then ensure that they are properly prepared. By adequately preparing the corporate representative for the deposition, the corporation will avoid the costly and binding repercussions that can result from providing an unknowledgeable or unprepared witness.



What could go wrong?

Fed. R. Civ. P. 30(b)(6):

Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Fed. R. Civ. P. 30(b)(6):

Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination.

"must describe with reasonable particularity the matters for examination"

- Responding party must be able to identify the topics to be covered
- Must list subject areas that the deposition will cover and the specific information sought

"must describe with reasonable particularity the matters for examination"

Not acceptable:

- "including, but not limited to"
- "any matters relevant to case"
- "may go beyond enumerated topics"

Duty to Respond

"The persons designated must testify about information known or reasonably available to the organization. "

"Known or Reasonably Available"

- Representative must be prepared to testify regarding the subject matter or topics identified in the notice
- Even if it extends beyond the representative's own personal knowledge
- Duty to educate witness

"Known or Reasonably Available"

- May be some areas beyond the organization's knowledge
- Not everything is "reasonably available"

Overly Broad Notice

- Confer first
- If that fails: motion for protective order
- Don't just appear and object
- Burden on objecting party

Identify the Right Witness

The Right Witness

- Face and voice of the Company
- Most knowledgeable person may be a poor witness
- Experience testifying
- Credible
- Articulate
- Confident
- Know your audience

The face and voice of the company

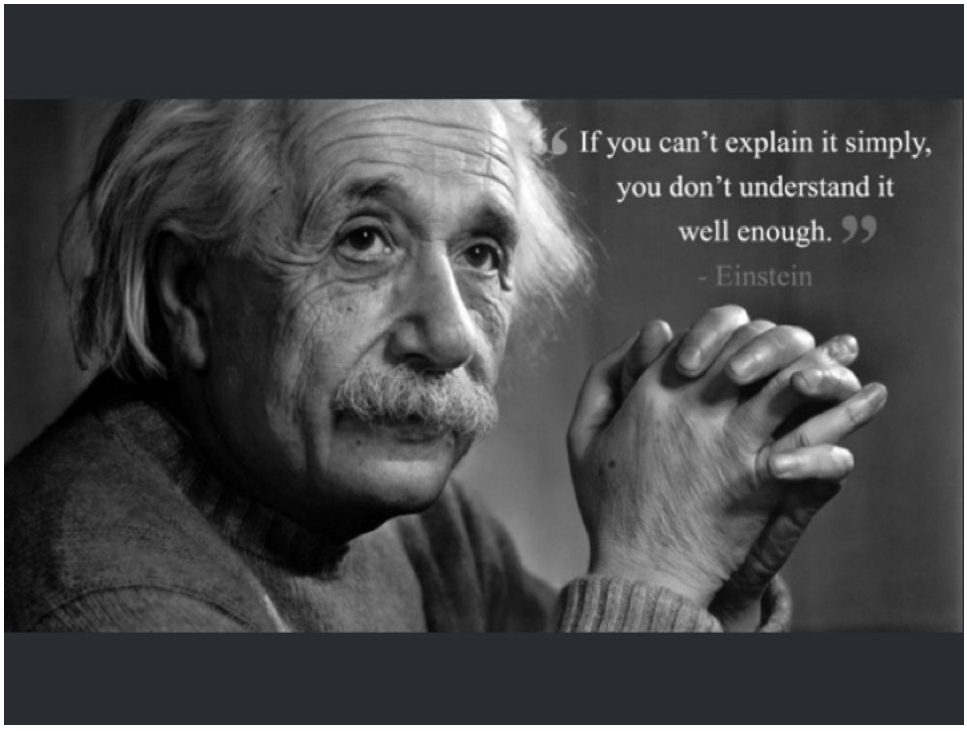
Who is the right witness?

- Does not have to have personal knowledge
- Someone who can be educated
- Good memory
- Confident – can handle the "gotcha" question
- Former employees

Duty to disclose witness in advance?

- Most courts do not require advance disclosure of the witness
- Strategic reasons to wait
- Know your jurisdiction

Preparing the witness



The Three Rules:

- Understand the question
- Make sure you know the answer (don't guess)
- Answer only the question that has been asked (don't volunteer information)

Preparing the witness

- Review the notice
- What topics can the witness cover?
- More than one representative?

What should the witness review?

- Documents
- Company materials (website, advertising)
- Pleadings
- Testimony by other witnesses
- Speak with other employees or even former employees

Scope of testimony

- Knowledge of the organization
- Corporation's position on issues
- Corporation's opinion(s)
- Personal knowledge

Preparing the witness

- Stay in your area
- How to handle emotion
- When to say yes
- You are in control

Keep your cool…

Help me help you

- Outcome will depend on what resources are provided
- It takes time to prepare
- Stress the importance to the company
- Sound bites can and will hurt the case

Practice, Practice, Practice

- Builds confidence
- Exposes weaknesses
- Video

CARNEGIE HALL

Not a Memory Test

- Bring documents to deposition
- Cheat Sheet

"I Don't Know"

- Almost never acceptable
- If you can't remember, don't guess

Watch out for hypotheticals

- "I don't have an opinion about that"
- "I can't answer that question" not "I refuse to answer"

Scope of the Examination

- Allowed to go beyond topics
- Personal knowledge
- Don't instruct witness not to answer
- Object – make a record that the witness is not testifying for the corporation
- Good time for "I don't know"

Use of the 30(b)(6) deposition

- Corporation bound by testimony
- Pretrial pleadings
- Impeach at trial
- Some jurisdictions: allow attorney to play video even if representative present at trial

Good Luck!

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Partner

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David M. Atkinson has been a trial lawyer for 25 years, focusing on civil litigation defense, including tort claims, construction litigation, insurance coverage, business disputes and intellectual property. He has served as lead trial counsel in federal and state courts throughout Georgia and the Southeast, as well as appellate counsel before the Georgia Supreme Court, the Georgia Court of Appeals and the Eleventh Circuit Court of Appeals. Mr. Atkinson joined Swift Currie as a partner in April 2016.

He regularly speaks on insurance and litigation matters and has chaired an annual seminar presented by The Seminar Group entitled, “Bad Faith Claims: Extra-Contractual Liability in Georgia.” Mr. Atkinson is a member of the State Bar of Georgia (Litigation Section), American Bar Association (Litigation Section, Tort and Insurance Practice Section and Insurance Coverage Litigation Committee), Atlanta Bar Association, Defense Research Institute, Georgia Defense Lawyers Association, Federal Bar Association, Lawyers Club of Atlanta and Atlanta Volunteer Lawyers Foundation. He has also been elected as a fellow in the Litigation Counsel of America, an invitation-only trial lawyer society.

Practice Areas
- Appellate
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- Commercial Litigation
- Construction Law
- Insurance Coverage
- Intellectual Property
- Premises Liability
- Products Liability
- Trucking Litigation

Publications and Presentations
- ”The Known Loss Doctrine and Liability Insurance,” Claims Journal, February 2018
- “Applying the Known Loss Doctrine to Liability Insurance,” ABA Coverage Journal, May 2017g

Awards and Recognitions
- Georgia Super Lawyer Rising Star by Atlanta Magazine
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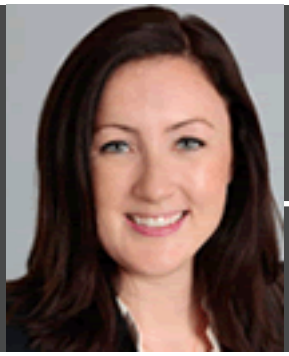

NEW LAWS IN CALIFORNIA AND OTHER STATES FURTHER RESTRICT JOB APPLICANT INFORMATION

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The state of California has long led the nation in regulating the employment relationship. From continuously expanding the classes of employees protected under its anti-discrimination laws, to passing one of the nation's most comprehensive equal pay statutes, to establishing and enforcing penalties for failing to comply with wage and hour requirements, California has demonstrated a longstanding commitment to advancing the rights and interests of employees by heavily regulating employers. Most recently, California's legislature has focused on attempting to increase employment opportunities by restricting the information that employers can obtain and consider in making hiring and salary decisions. In 2017, the California legislature passed two new laws restricting employers from inquiring about job applicants' criminal conviction histories or prior salaries in an effort to reduce disparities in its workforce and equalize employment opportunities across demographic groups. Other states have already undertaken similar efforts as well, with even more states expected to follow suit as these laws take effect. This article and the accompanying presentation will highlight California employment laws relating to job applicants, discuss nationwide employment law trends in this area, and define best hiring practices for companies with employees in California.

California Has Increasingly Restricted Employers From Inquiring into Applicants' Criminal Backgrounds

Collecting and relying on information about an applicant's criminal history in making hiring decisions has long been a subject of scrutiny due to concerns about the disparate impact of this practice on certain groups. As of 2016, more than 70 million Americans had some kind of criminal record, with 600,000 Americans released from state and federal prisons each year.[1] Roughly seven million Californians, or nearly one in three adults, have an arrest or conviction record.[2] In order to improve the employment prospects for individuals with criminal records, policymakers nationwide have proposed "ban[ning] the box," or preventing employers from asking about an applicant's criminal history until after the employer has already assessed the applicant's credentials and determined whether the applicant meets the criteria for the job.

Stakeholders disagree about the utility of "ban the box" initiatives. Proponents of such legislation contend that "[e]arly inquiries into an applicant's criminal history may discourage motivated, well-qualified individuals who have served their time from applying" for jobs and result in the disqualification of otherwise qualified candidates, regardless of whether the employer has a legitimate business justification for considering an applicant's criminal history.[3] To the contrary, detractors

1 U.S. Department of Justice, "Fact Sheet: During National Reentry Week, Reducing Barriers to Reentry and Employment for Formerly Incarcerated Individuals" (Apr. 29, 2016), accessible at https://www.justice.gov/opa/pr/fact-sheet-during-national-reentry-week-reducing-barriers-reentry-and-employment-formerly.

2 2017 Cal. Legis. Serv. Ch. 789 (A.B. 1008) (WEST).

3 U.S. Department of Justice, "Fact Sheet: During National Reentry Week, Reducing Barriers to Reentry and Employment for Formerly Incarcerated Individuals" (Apr. 29, 2016), accessible at https://www.justice.gov/opa/pr/fact-sheet-during-national-reentry-week-reducing-barriers-reentry-and-employment-formerly.

argue that limiting employers' access to applicants' criminal records could cause employers to use other information – such as race or gender – to "guess" which applicants might have a criminal record and then reject them, leading to further discrimination against groups which the laws were intended to help.[4]

Over the years, California has passed a series of "ban the box" measures restricting employers' ability to rely on criminal history information in making employment decisions. In 2013, California banned state and local government agencies from asking applicants to disclose criminal history information until after determining that the applicant meets the minimum employment qualifications for the position. In passing the law, the legislature declared that "reducing barriers to employment for people who have previously offended, and decreasing unemployment in communities with concentrated numbers of people who have previously offended, are matters of statewide concern."[5] In 2014 and 2016, San Francisco and Los Angeles passed "ban the box" ordinances prohibiting public and private employers within those cities from inquiring about applicants' criminal records until specified points in the hiring process.[6]

In March 2017, the California Office of Administrative Law approved several amendments to California's Fair Employment and Housing Act (FEHA) further restricting the use of criminal history in employment decisions. Under these amendments, public and private employers relying on criminal history for employment decisions where such a practice would create an adverse impact on specified groups must show that the practice is "job-related and consistent with business necessity."[7] This requires a showing that the practice would bear a "demonstrable relationship to successful performance on the job and in the workplace and measure the person's fitness for the specific job" taking into account the nature and gravity of the offense or conduct, time passed since the offense, conduct, or completion of the sentence, and the nature of the job held or sought.[8] In addition, the 2017 amendments created a requirement that employers assessing applicants' criminal histories provide notice to any individual excluded through the screening and a reasonable opportunity for a response and consider additional information provided by the applicant to rebut the information in the applicant's record.[9]

Later that year, in October 2017, the California legislature passed a bill further expanding prohibitions on asking applicants to disclose their conviction histories to include any employer (public or private) with five or more employees.[10] Now, such employers may not inquire into or consider an applicant's criminal history until after that applicant has received a conditional job offer. Further, employers are fully restricted from considering, distributing, or disseminating information related to prior arrests that did not result in convictions, referrals to pretrial or post-trial diversion programs, or convictions that have been sealed, dismissed, expunged, or eradicated pursuant to law.[11]

The new law also established parameters for employers who intend to rely upon applicants' criminal records in making employment decisions. Any employer who intends to deny an applicant a position of employment solely or in part due to that applicant's conviction history is required to make an individualized assessment of whether the applicant's conviction history has a "direct and adverse relationship with the specific duties of the job," considering the nature and gravity of the offense, time passed since the offense or conduct and completion of the sentence, and nature of the job held or sought.[12] If an employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant from employment, the employer must notify the applicant of the preliminary decision in writing.[13] The applicant must be given at least five business days to respond to the notice and be allowed to provide evidence challenging the accuracy of the conviction history report before the decision becomes final.[14]

Many Other States and Jurisdictions Have Taken Steps to "Ban the Box"

The "ban the box" movement has gained national attention and momentum, with a number of other states and localities enacting similar measures to restrict

4 Jennifer Doleac, "Ban the Box Does More Harm than Good," Brookings Institute (May 31, 2016), available at https://www.brookings.edu/opinions/ban-the-box-does-more-harm-than-good/.

5 2013 Cal. Legis. Serv. Ch. 699 (A.B. 218) (WEST).

6 San Francisco Ordinance No. 17-14 (Feb. 3, 2014); Los Angeles Ordinance No. 184852 (Dec. 13, 2016).

7 Cal. Code of Regulations § 11017.1.

8 Cal. Code of Regulations § 11017.1(e).

9 Cal. Code of Regulations § 11017.1(e)(4).

10 Cal. Gov. Code § 12952(a).

11 Cal. Gov. Code § 12952(a)(3).

12 Cal. Gov. Code § 12952(c)(1).

13 Cal. Gov. Code § 12952(c)(2).

14 Cal. Gov. Code § 12952(c)(3).

employers from obtaining and considering applicants' criminal histories. To date, over 150 cities and counties have adopted "ban the box" policies requiring that employers consider a job candidate's qualifications before analyzing that applicant's criminal history.[15] Thirty states have adopted laws or policies restricting public employers' use of criminal history in employment decisions.[16] In addition to California, this includes Arizona, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, and Wisconsin.[17] In 2016, the federal Office of Personnel Management issued a regulation preventing the federal government from asking job applicants about their criminal records until after a job has been offered.[18]

In addition to the jurisdictions with "ban the box" policies applicable to public employers, ten states have required that private employers remove conviction history questions from job applications: California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont.[19] In 2017, New Mexico came close to passing statewide "ban the box" legislation applicable to private employers, and Washington is currently considering such legislation.[20] It is likely that additional states will pass such legislation in the near future.

Further, in 2012 the U.S. Equal Opportunity Employment Opportunity Commission (EEOC) issued guidance on the use of arrest and conviction records in employment decisions, stating that in some instances, the use of criminal history in making employment decisions may violate Title VII of the Civil Rights Act of 1964 because of the potential for disparate impact on protected classes.[21] The EEOC recommended that employers eliminate policies or practices which exclude people from employment based on criminal background, develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct, and limit inquiries into criminal records consistent with business necessity.[22] Thus, even in states whose legislatures have not specifically outlawed the use of criminal history, employers should carefully consider whether the practice of relying on applicants' criminal records in making employment decisions could violate federal or state anti-discrimination law under a disparate impact theory.

In 2015, President Obama announced the "Fair Chance Pledge," a White House initiative asking employers to voluntarily commit to banning the box, providing opportunities to individuals with criminal records, and training staff on making fair decisions regarding applicants with criminal records.[23] A number of national employers signed on to the pledge, including American Airlines, CVS Health, Coca-Cola, Facebook, Gap, Google, Kellogg Company, Kroger, LinkedIn, Lyft, Microsoft, Monsanto, Pepsico, Starbucks, Target, Uber, and Walmart.[24]

In 2017, California Banned Employers From Soliciting Applicants' Prior Salaries

Another recent area of interest for California legislators has been how to reduce the wage gap between female and male workers. In 2016, female employees working full time made, on average, 80.5 cents for every dollar earned by men, signifying a gender wage gap of 19.5%.[25] To address this issue, policymakers have considered prohibiting employers from asking applicants about their prior pay during salary negotiations. Proponents of such a measure argue that requiring applicants to disclose their current or past salaries puts women at a disadvantage by perpetuating preexisting salary inequalities and causing women to continue earning less than their male counterparts.[26] Those who oppose salary history bans have argued that they infringe on an employer's ability to gain important information during the hiring process, are

15 National Employment Law Project, "Ban the Box" Guide (Feb. 2018), available at http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf.

16 *Id*.

17 *Id*.

18 5 C.F.R. § 330.1300 ("A hiring agency may not make specific inquiries concerning an applicant's criminal or credit background … unless the hiring agency has made a conditional offer of employment to the applicant.").

19 National Employment Law Project, "Ban the Box" Guide (Feb. 2018), available at http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf.

20 National Employment Law Project, "Seven States Adopted Fair Chance Policies in 2017" (Jan. 19, 2018), available at http://www.nelp.org/blog/seven-states-adopted-fair-chance-policies-in-2017/.

21 EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, available at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

22 *Id*.

23 Obama White House Archives, "Take the Fair Chance Pledge," https://obamawhitehouse.archives.gov/issues/criminal-justice/fair-chance-pledge (accessed March 2, 2018).

24 *Id*.

25 Institute for Women's Policy Research, "Fact Sheet: The Gender Wage Gap: 2016," https://iwpr.org/wp-content/uploads/2017/09/C459_9.11.17_Gender-Wage-Gap-2016-data-update.pdf (September 2017).

26 National Women's Law Center, "Asking for Salary History Perpetuates Pay Discrimination from Job to Job" (Jun. 2017), available at https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/06/Asking-for-Salary-History-Perpetuates-Discrimination.pdf.

vague and difficult to comply with, fail to account for the complexities surrounding wage negotiations, will burden employers with unwarranted litigation, and are not supported by evidence suggesting that they will alleviate inequality.[27]

In 2016, the California legislature passed a bill precluding employers from asking for applicants' prior salaries but Governor Jerry Brown vetoed the bill, expressing concern that it would prevent employers from "obtaining relevant information with little evidence that this would assure more equitable wages."[28] In June 2017, San Francisco passed an ordinance prohibiting all employers from considering an applicant's current or past salary in determining whether to hire an applicant or what salary to offer the applicant.[29] Later in 2017, the California legislature again passed a bill restricting employers from obtaining and relying on salary history information in making employment decisions. This time Governor Brown signed the bill into law.[30]

The new California law, which applies to all employers in the state, prohibits employers from "rely[ing] on the salary history information of an applicant for employment in determining whether to offer employment to an applicant or what salary to offer an applicant."[31] It also prohibits employers from orally, in writing, personally, or through an agent seeking salary history information, including compensation and benefits, about an applicant for employment.[32] The law also creates a new requirement that employers, upon reasonable request, provide to job applicants the pay scale for a position.[33]

Notably, the law does not prohibit an applicant from voluntarily and without prompting disclosing salary history information to a prospective employer, and does not prohibit an employer from considering or relying on that voluntarily disclosed information in setting that applicant's salary.[34] It also does not prohibit employers from considering salary information that is publicly available.[35] However, the law is clear that an applicant's prior salary, by itself, is not sufficient to justify any disparity in compensation.[36]

State and Local Governments are Increasingly Passing Laws Prohibiting Employers from Considering Salary History

The potential utility of legislation banning employers from obtaining applicants' salary history is currently being considered and debated across the United States. In addition to California, several other states recently enacted laws restricting employers from inquiring into or relying upon an applicant's salary history in making employment decisions, including Delaware, Massachusetts, and Oregon.[37] The local governments in New York City, Philadelphia, and Albany County, New York[38] have enacted ordinances prohibiting employer inquiries into salary history. Other jurisdictions, including Rhode Island, Florida, and Mississippi, are considering similar legislation.[39] Even in jurisdictions where employers are allowed to request an applicant's salary history, employers should exercise caution in using that information; since 2000, the EEOC has instructed that reliance on prior salary alone cannot justify a compensation disparity.[40]

Because laws banning employers from obtaining applicants' salary histories are so recent, their impact will not be known for some time. But a recent survey of 108 companies suggests that many employers do not think a prohibition on considering salary history will significantly improve pay disparities; two-thirds of the companies surveyed said they thought the measures would not, or would only to a small extent, improve pay differentials.[41] Despite this, some companies have publicly announced that they will no longer consider salary history in making employment

27 Rob Wonderling, "Chamber CEO: Mayor Kenney, Veto the Salary History Bill," Philadelphia Business Journal (Jan. 13, 2017), available at https://www.bizjournals.com/philadelphia/news/2017/01/13/chamber-ceo-mayor-kenney-veto-the-salary-history.html; Bloomberg Editorial Board, "A Gag Rule Won't Help Women Advance," Bloomberg View (Apr. 11, 2017), available at https://www.bloomberg.com/view/articles/2017-04-11/a-gag-rule-won-t-help-women-advance.

28 Margot Roosevelt, "California Bosses Can No Longer Ask You About Your Previous Salary," O.C. Register (Oct. 12, 2017), available at https://www.ocregister.com/2017/10/12/in-bid-to-fight-gender-pay-gap-gov-jerry-brown-signs-salary-privacy-law/.

29 San Francisco Ordinance No. 142-17 (Jun. 21, 2017).

30 2017 Cal. Legis. Serv. Ch. 688 (A.B. 168) (WEST).

31 Cal. Lab. Code § 432.3(a).

32 Cal. Lab. Code § 432.3(b).

33 Cal. Lab. Code § 432.3(c).

34 Cal. Lab. Code § 432.3(g), (h).

35 Cal Lab. Code § 432.3(e).

36 Cal. Lab. Code §§ 432.3(i); 1197.5(a)(3).

37 Del. Code Ann. tit. 19, § 709B; Mass. Gen. Laws ch. 149, § 105A; Or. Rev. Stat. §§ 652.220(1) and 659A.001 *et seq*.

38 New York City Admin. Code § 8-107; Phila. Code tit. 9, §§ 9-1103, 9-1131; Albany County Local Law No. P (2016).

39 Jena McGregor, "Bank of America is the Latest Company to Ban this Dreaded Job-Interview Question," Washington Post (Jan. 29, 2018), available at https://www.washingtonpost.com/news/on-leadership/wp/2018/01/29/bank-of-america-is-the-latest-company-to-ban-this-dreaded-job-interview-question.

40 Equal Employment Opportunity Commission Compliance Manual: Compensation Discrimination, available at https://www.eeoc.gov/policy/docs/compensation.html (last accessed Feb. 25, 2018).

41 Jena McGregor, "Those Bans on Asking About Salary History? Most Employers Don't Think They'll Work," Washington Post (Nov. 16, 2017), available at https://www.washingtonpost.com/news/on-leadership/wp/2017/11/16/those-bans-on-asking-about-salary-history-most-employers-dont-think-theyll-work.

decisions, including Wells Fargo, Amazon, Bank of America, Google, Facebook, Cisco, and American Express.[42] Given that these laws are increasingly being considered and enacted, other employers may want to consider examining their hiring practices and policies to prepare.

Relying on Criminal Records or Salary History in Employment Decisions Will Lead to Significant Litigation Risk

In recent years, employers have seen an uptick in litigation challenging hiring practices, including costly class action cases. After the EEOC issued its 2012 guidance concerning the consideration of arrest and conviction records in employment decisions, it filed a number of new charges and initiated investigations relating to employers' use of criminal background checks. For example, in 2013, the EEOC filed a case against a BMW manufacturing facility in South Carolina, alleging that it violated Title VII by using a criminal background policy that allegedly disproportionately screened out African Americans and rejected job applicants without considering whether the conviction was job-related and consistent with business necessity. After two years of litigation, a federal district court judge approved a Consent Decree, reflecting a settlement requiring BMW to (1) discontinue the criminal record screening policy at issue in the litigation, (2) utilize an updated criminal record screening policy modeled after the EEOC's recommended best practices, (3) pay $1.6 million to 56 claimants, in addition to other applicants that had not been identified, (4) offer those 56 claimants (plus others) employment through a logistics labor contractor, and (5) train its hiring personnel on the proper use of criminal background checks.[43] The EEOC also recently settled similar litigation against Pepsi ($3.13 million) and Schenker, Inc. ($750,000).[44] Thus, employers who rely upon applicants' criminal histories in making employment decisions should exercise caution, or else they may see themselves facing costly litigation.

The laws prohibiting employers from inquiring into applicants' salary histories are relatively new and have not yet formed the basis for significant litigation. But employers should expect to see this practice challenged in the courts over the next few years as more and more states pass salary history legislation.

Best Practices for California Employers

Employers with employees in California should account for California's stringent employment laws when developing their hiring processes and policies. Below is a list of best practices related to job applicants for organizations hiring employees in California:

1. Ensure that job applications and online postings do not seek information about criminal history or salary history.

2. Establish a salary range or fixed salary for every position and ensure that salary negotiations take place within those parameters. Be prepared to provide a pay scale to job applicants upon request.

3. Train interviewers to avoid questions about salary history or criminal background.

4. Carefully consider whether, and to what extent, the consideration of an applicant's conviction history is consistent with business necessity.

5. Establish a consistent and neutral individualized assessment policy for the consideration of applicants' criminal backgrounds which complies with FEHA regulations and considers the factors articulated in Cal. Gov. Code § 12952(c).

6. Develop a process which allows applicants to challenge adverse employment decisions based on criminal background in compliance with FEHA regulations and the provisions of Cal. Gov. Code § 12952(c).

42 Madison Alder, "Amazon, BofA Join Employers that Won't Ask for Pay History," Bloomberg News (Jan. 30, 2018), available at https://www.bna.com/amazon-bofa-join-n73014474798/; Jena McGregor, "Bank of America is the Latest Company to Ban this Dreaded Job-Interview Question," Washington Post (Jan. 29, 2018), available at https://www.washingtonpost.com/news/on-leadership/wp/2018/01/29/bank-of-america-is-the-latest-company-to-ban-this-dreaded-job-interview-question.

43 EEOC Press Release, "BMW to Pay $1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit," https://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm (Sept. 8, 2015).

44 EEOC Press Release, "Pepsi to Pay $3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans," available at https://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm (Jan. 11, 2012); EEOC Press Release, "Schenker Inc to pay $750,000 to Conciliate EEOC Class Investigation," available at https://www.eeoc.gov/eeoc/newsroom/release/10-26-16.cfm (Oct. 26, 2016).

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Blindfolding Employers: New Laws in California Restrict Job Applicant Information

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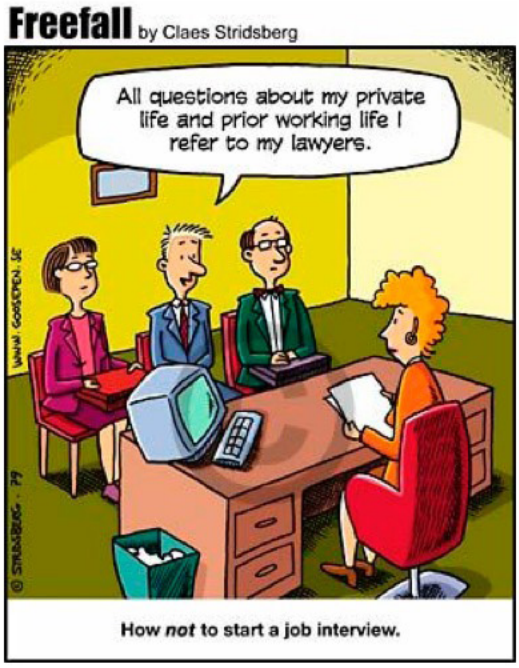
"I believe the courts have recently ruled that asking questions of an applicant, during an interview, is illegal."



California Employment Laws

- Employee-friendly
- Regulate employers heavily
- More stringent than federal law
- Violations come with damages plus penalties
- Govern employment relationship from application to termination

California Law Governing Job Applicants

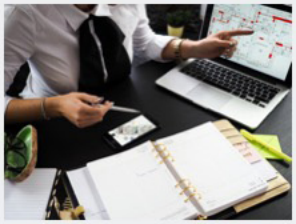
- New legislation limits employer inquiries into:
  - Applicants' criminal backgrounds
  - Applicants' salary histories

California "Ban the Box"

- Effective January 1, 2018, employers with 5 or more employees cannot:
  - Ask about criminal history until after conditional job offer
  - Consider, distribute, or disseminate information about certain records

California "Ban the Box"

- Business necessity:
  - Demonstrable relationship to successful performance on the job and in the workplace



Denial Due to Criminal Record

- Individualized assessment
- Direct and adverse relationship with specified job duties
  - Nature and gravity of offense
  - Time passed
  - Nature of job held or sought

Notice of Decision

- Written notification of preliminary decision
- Five business days to respond
- Opportunity to provide evidence

"Acquitted, acquitted, acquitted. Very impressive."

Ban the Box: Other Jurisdictions

- Over 150 cities and counties
- Public employers: 30 states and the federal government
- Private employers: 10 states
  - New Mexico and Washington considering

EEOC Guidance

- Eliminate exclusionary policies
- Develop narrowly-tailored written policy and procedure
- Limit inquiries into criminal records consistent with business necessity

Fair Chance Pledge

California Salary History Ban

- Effective January 1, 2018, employers cannot:
  - Ask applicants to disclose salary history
  - Seek salary history about applicant through other means
  - Includes compensation and benefits

California Salary History Ban

- Must provide pay scale upon "reasonable request"

California Salary History Ban

- Does not prohibit:
  - Voluntary and unprompted disclosures
  - Relying on voluntarily disclosed information
  - Considering publicly-available salary information

California Salary History Ban

- Applicant's prior salary cannot justify any disparity in compensation

Salary History: Other Jurisdictions

- States: Delaware, Massachusetts, Oregon
  - Rhode Island, Florida, Mississippi considering
- Localities: New York City, Philadelphia, Albany County (NY)

No Longer Considering Salary History

WELLS FARGO

facebook

amazon

CISCO

Bank of America

Google

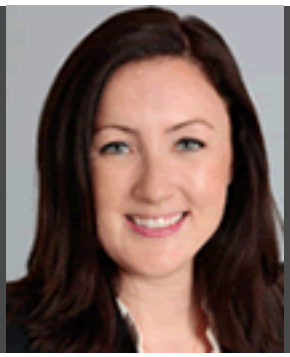
AMERICAN EXPRESS

Best Practices: California and Beyond

- Revise postings and applications
- Establish salary range and pay scale
- Retrain interviewers

Best Practices Continued

- Consider business necessity
- Establish neutral, individualized assessment policy
- Develop process for challenging adverse decisions



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Rebecca Stephens counsels clients on developing and implementing sound workplace policies and helps them navigate the complex landscape of state and federal employment law.

Ms. Stephens represents employers in a wide variety of matters including wage and hour disputes and wrongful termination, retaliation, and discrimination cases. She regularly advises employers regarding workplace policies, investigations, and separations from employment.

In her litigation practice, Ms. Stephens has experience with class actions and single-plaintiff cases in federal and state courts and before arbitrators. She also represents clients before administrative agencies including the EEOC and the DFEH.

Ms. Stephens maintains an active pro bono practice, representing and advising clients in employment matters. She also serves on the development committee for Mission Graduates, a nonprofit whose mission is to increase the number of K-12 students in San Francisco's Mission District who are prepared for and complete a college education.

Ms. Stephens served as a law clerk and attorney-advisor to the Honorable Jennifer Gee of the U.S. Department of Labor's Office of Administrative Law Judges and as a judicial extern to the Honorable Ruben Castillo of the U.S. District Court for the Northern District of Illinois.

Related Practices
- Employment

Publications
- California Court Confirms that Vacation Accrual Can Be Restricted for New Employees

Affiliations
- Member, Barristers Labor & Employment Executive Committee, Bar Association of San Francisco

Bar Admissions
- California
- Illinois

Education
- Northwestern University School of Law (J.D., 2013), cum laude, individual comment editor, Journal of Criminal Law and Criminology
- University of Maryland (B.A., 2007)

NAVIGATING THE RELATIONSHIP BETWEEN IN-HOUSE COUNSEL, OUTSIDE COUNSEL AND THE INSURER

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The relationship between insurance counsel, inside counsel and the carrier can be seamless. For the vast majority of cases, there is no divergence as the three parties work to successfully resolve cases, most often towards a settlement. However, one of the things that we will talk about today is what happens when the seamless relationship frays at the margin, especially for the bigger cases and/or the ones which get tried. In particular, we will take a look at cases involving these several areas:

1. Choice of Counsel;
2. Settlement;
3. Coverage;
4. Declaratory Judgment Actions;
5. Privilege; and
6. Criminal and Civil Collisions.

For these particular areas, we will take a look at some cases where things have not gone smoothly. The goal is to use these cases as stepping stones for a lively group discussion regarding these issues and the different experiences of those who join us for our session. After each case, there are a series of questions about your experiences with these issues that we can discuss together at our gathering.

1. A. Choice of Counsel; Reservation of Rights; Conflict?

First, we will take a look at cases involving the right of an insurance company to select counsel for the insured. We all know the general rule under a duty to defend policy - - the insurance company gets to choose the lawyer to defend the case. What creates a conflict on counsel choice and who prevails? For example, what happens when the insurance company issues a reservation of rights?

> Magnolia Healthcare, Inc. v. Hartford Financial Services Group, Inc., 2006 WL 3347952 (N.D.Miss. 11/17/06), Case No. 4:04-370.
>
> This Mississippi case holds that an insurance company has to provide independent counsel when defending under a reservation of rights. In Mississippi, it was an automatic conflict. Other states may require a showing of a conflict, a sometimes complicated process that may require predictions about what is to come.

In this declaratory judgment action, arising out of nursing home litigation where the insured was named in the 14 different lawsuits, the insured wanted to select its own attorneys. Hartford wanted to appoint panel counsel of its own choosing. The result hinged on which state's law applied, Louisiana or Mississippi. The insurance policy had no choice of law provision. The court had to determine whether Louisiana or Mississippi law governed the policy. The court concluded that it was reasonable to presume that Mississippi law would determine the questions of liability arising out of the policies covering the Mississippi corporation's Mississippi properties, especially since the corporation

was a named insured and its only covered properties were in Mississippi.

While Louisiana was silent on the issue, at the time of this case, the Mississippi Supreme Court had directly held in Moeller v. American Guarantee and Liability Insurance Company, 707 So.2d 1062 (Miss. 1998) that a conflict of interest for involved attorneys occurs when an insurer agrees to defend an insured under a reservation of rights. Therefore, in Mississippi, the insurer must provide independent legal counsel to the insureds. Thus, the court concluded Mississippi has the most significant relationship to the event and parties, and as a result, the insurance defendant was required to provide the insured with independent counsel. Hartford lost its declaratory judgment and the insured got to select its own lawyers for all 14 then pending lawsuits.

How often do you have reservations of rights in one of your cases? Did it create a conflict in your view? Have you ever insisted on using your own counsel? On the insurance side, how often does this arise? Is this dispute primarily driven by cost on the insurance side? On the insured side, what is driving your choice on these issues and how hard are you willing to fight over it with the carrier?

B. Choice of Counsel; If The Reservation of Rights Is Withdrawn, May Insured Be Forced To Insurer's Choice? When Does The Conflict End?

> Perma-Pipe, Inc. v. Liberty Surplus Insurance Corporation, 38 F.Supp.3d 890 (N.D.Ill. 4/21/14).
>
> The insured selected independent counsel to defend it when the insurer issued a reservation of rights. However, the insurer ultimately withdrew its reservation of rights and wanted the insured to dismiss its counsel and go with the insurer's selection of counsel. The insured fought to keep their selected counsel. Because excess exposure still created a conflict, the court declined the insurer's request to choose counsel and forced the insurer to pay the counsel of the insured's choice.

A catastrophic pipe failure occurred in 2010 in California, and Perma-Pipe was put on notice that its pipe failed. It had only a $1 million CGL policy from Liberty and the policy had a duty to defend. Although Liberty agreed to defend Perma-Pipe, it reserved its rights. Consequently, Perma-Pipe retained independent counsel because of the conflict of interest created by the reservation. Under Illinois law, when a reservation of rights was issued, Perma-Pipe had a right to choose its own counsel.

In 2012, the University and a subrogated insurance company sued Perma-Pipe in lawsuits arising out of the pipe failure, one of which was seeking more than $35 million in damages. Liberty immediately withdrew all its previously asserted reservations of rights. Liberty further stated it would exercise its right to defend Perma-Pipe through Liberty's choice of counsel. Perma-Pipe, however, responded that a conflict still existed due to the real possibility of an excess judgment mandating Perma-Pipe be allowed to continue to retain its independent counsel. Liberty, after withdrawing all reservations, wrote to the insured and said, from that day forward, it would refuse to pay the legal bills and expenses of the firm the insured had used up to that moment. The insured responded that the potential for an excess judgment meant that a conflict with Liberty still existed, and the insured asked Liberty to withdraw its panel counsel appointment and reappoint the insured's counsel of choice. Liberty declined. The insured then sued Liberty for bad faith and contract breach.

The initial issue for the court was, again, choice of law in interpreting the policy, and they concluded Illinois law governed. The policy had no rule as to which law should apply. How many people have policies which specify which state's law is to apply? Even though the damage and lawsuit for which Perma-Pipe sought coverage was in California, and Liberty is located in Massachusetts, the court found Illinois had the most significant contacts because it was where the insured was located and the last acts giving rise to the contract occurred there.

Perma-Pipe was being sued for more than $40 million, and the Liberty policy provided only $1 million per occurrence. There was, therefore, a "nontrivial probability" that there would be an excess judgment in the underlying suit. The governing 7th Circuit case was R.C. Wegman Constr. Co. v. Admiral Ins. Co., 629 F.3d 724, 729 (7th Cir. 2011), which said a conflict exists when there is a nontrivial probability of an excess judgment in an underlying suit. Therefore, the

Court held that the record established that there was a conflict between Perma-Pipe and Liberty, and that Liberty breached its duty to defend Permanent-Pipe by refusing to pay for counsel of Perma-Pipe's choosing. Consequently, the court granted summary judgment against Liberty.

How often do you withdraw, or see withdrawn, a reservation of rights? What drives those decisions? How much of the time are these choice of counsel issues worked out amicably? On the insurance side, what can and will you offer to work these issues out? Were Liberty's actions here typical? What about a choice of law for your insurance policies - - how many people here have a broker negotiate that point at placement? Why is it potentially significant? Anyone had it be used in a case?

C. Choice of Counsel; Hourly Rates?

> Feld v. Fireman's Fund Insurance Company, 206 F.Supp.3d 378 (D.Ct. D.C. 9/12/16). (Appeal filed 12/11/17)
>
> This case involves choice of counsel issues and the importance of having a clear understanding of hourly rates, even when there is a reservation of rights. The insured was permitted his choice of counsel when the insurer undertook defense under a reservation of rights. The dispute at the end was whether the hourly rate was $500, the rate the firm had with the insured; or $250, the insurance rate. The underlying case was lengthy and highly publicized. Subsequently, this case was filed to recover attorney fees when the underlying action generated a $4.5 million dollar legal bill. Firemen's Fund paid $2 million of those fees, but the insured filed this suit to recover the rest.

Initially, FFIC was denied late notice as a defense to coverage, even though the insured notified FFIC of the claim nearly two years after he first hired his attorney to represent him in the litigation. The court found Maryland law governed the contract and under that law, FFIC had to show prejudice to assert late notice as defense to coverage. Here the court found that there was no prejudice because although it had been two years, only an answer and motion to dismiss had been filed.

Thereafter, the remaining issue was whether the rates that FFIC would pay for representation of the insured were set by prior agreement. FFIC asserted, even with the reservation of rights, that during phone call exchanges, it stated it would pay $250 an hour for partners, $200 and hour for associates, and $95 an hour for paralegals. At the time, the insured's counsel was charging $500 an hour. The exchanges involved a request to increase the rates, but FFIC's representative again represented the limits of what it would be willing to pay. FFIC's representative further sent a confirmation email. The email stated that any amount in excess of those rates would be the insured's responsibility. The insured contends this statement suggests no agreement on rates was ever reached. The court agreed that there was room for interpretation. However, the "budget" ruled the day. The independent counsel had submitted a budget to FFIC that used the rates of $250, $225, and $100, and the cover letter said it was a good faith estimate of the amount of time and expenses but was not a binding representation. The Court decided this budget confirmed an agreement to the reduced rates.

The Court concluded that this was an example of two parties determined to disagree on everything. The Court said that after review of everything, there was a time when the insured agreed to the hourly rates proposed, and therefore, the insured is not entitled to the lion's share of the disputed $2.1 million in fees. Further, the court found he could not state a claim for breach of implied duty of good faith and fair dealing.

How many people have had a rate-cap asserted by a carrier following a choice of counsel dispute precipitated by a reservation of rights? Is this the carrier's preferred way to deal with the cost issue? What would you do as the insured's counsel under similar facts about the rates?

D. Choice of Counsel; Insurer Waives Right To Select Counsel.

> Haley v. Kolbe & Kolbe Millwork Co., Inc., 97 F.Supp.3d 1047 (W.D. Wis. 4/1/15).
>
> This case involves choice of counsel issues. The court held the insurers were estopped from requiring insured to switch counsel as court said the insurer waited too long.

In a proposed class action, plaintiffs alleged Kolbe sold them defective windows. Fireman's Fund Insurance Company and Kolbe filed dueling motions for summary judgment in which they sought declarations on the

question of whether Kolbe, the insured, may keep the counsel that was representing it throughout the case or whether the insurers may require the insured to accept counsel chosen by Fireman's Fund. FFIC also filed a motion to dismiss counterclaims for bad faith and breach of the duty to defend for conduct related to the parties' dispute about counsel. The court granted the insured's motion and denied the insurer's motion. The court reasoned that the insurers did not choose counsel for defendant until the lawsuit was well underway and then waited several more months to bring the issue to the court's attention. Thus, the court found that the insurers were equitably estopped from forcing defendant to switch counsel now.

Under Wisconsin law, an insurer that agrees to defend and indemnify an insured gets to control the defense. However, under that same law, if the insurer waits until the prior selected counsel has already invested significant time and resources into the case, then the insurer cannot force change in counsel. The case was filed on February 13, 2014. On February 21, 2014, Kolbe notified FFIC that it wanted to coordinate a discussion on selection of outside counsel. On March 3, 2014, FFIC retained counsel to request a coverage opinion. In an email on March 4, 2014, Kolbe notified that it had retained the outside counsel it discussed with FFIC on February 24, 2014. On March 5, 2014, FFIC began discussing alternative counsel. On March 28, 2014, after receiving its first invoice from the attorney retained by Kolbe, Kolbe wrote FFIC asking for its coverage position. On April 22, 2014, FFIC acknowledged its defense obligation. On June 18, 2014, FFIC agreed to two different firms. By June, 2014, the independent counsel retained by Kolbe had already answered, prepared initial disclosures, filed a motion for protective order, issued discovery, reviewed plaintiff's discovery responses, conducted initial interviews, began locating documents, and retained an expert. Thus, in a letter on June 24, 2014, Kolbe wrote to FFIC that they had forfeited their right to choose counsel when they agreed to provide a defense with a reservation of rights. The dispute continued.

The court found the insurer not only delayed in choosing counsel, but delayed in seeking relief from the court when Kolbe rejected their choosing counsel. By the time that FFIC had filed their motion for summary judgment on the selection of counsel issue, the case had been pending for 10 months. The court does note that neither side addressed any argument as to whether there should be a "reasonable rate" cap on the independent counsel, so it would be premature to address that issue in this opinion.

In what fashion would you have dealt with the counsel choice issue here? Is much of this issue driven on the carrier side by the attorney fee cost differential?

2. A. Settlement; How Heavy Is That Hammer Clause?

Hammer Clauses come in different strengths and formulas, but generally they are a carrier tool to either force settlement and/or limit further exposure. The use of a "Hammer Clause" is likely to create a lot of ill-will, so when do they get used? Is any settlement rejection a basis to use it or must the rejection be "unreasonable." The language of the particular clause is key and whether it says anything about reasonableness. The first and the third case in this section reach opposite results on that basis.

> Security National Insurance Company v. City of Montebello, 680 Fed.Appx. 525 (9th Cir. 2017).
>
> This case deals with differences in settlement postures. The city didn't want to settle where it was conditioned on granting the plaintiff continued employment. The excess insurer wanted to settle and pay its portion. When the city refused, the excess insurer successfully obtained declaratory judgment that it could invoke its hammer clause which permitted it to tender its portion and be discharged from further liability, regardless of whether the rejection of the offer was unreasonable. The Hammer Clause language, said the court, is not limited to instances where the insured unreasonably rejects an offer.

The Court of Appeals held that an employee's offer to settle a lawsuit against a city was made in good faith, although the city rejected the offer, and thus the insurer was entitled to invoke the policy's hammer clause to terminate its liability. The excess liability insurer tendered $550,000 as its portion to its city insured to settle a racial discrimination lawsuit. The settlement offer was for $1.5 million and included continuing employment. The city refused the settlement due to the continuing employment condition.

The excess insurer filed a declaratory judgment action seeking to apply the "hammer clause" of its policy,

which allows the insurer to accept a "bona fide, good faith settlement demand...the payment of which would result in the full and final disposition" of the lawsuit. In the event that the settlement demand is not acceptable to the insured, the insurer can tender to the insured an amount equal to the difference between the insured's retained limit, less incurred defense costs, and the plaintiff's settlement demand, and be discharged from liability.

At the district court level, the city insured was successful as that court held that the employee's settlement demand was not made in good faith because it was not reasonable that a rational employer would pay $1.5 million to settle a lawsuit with a demand of continuing employment and with threats of additional litigation arising from that employment. The Ninth Circuit reversed. Remarkably, it said the settlement demand was made in good faith. It was substantially less than previous offers, and it was made honestly, without intention to defraud, and according to reasonable standards of fair dealing. The settlement offer would have resulted in a full and final disposition of the employee's claims against the city, for it included an offer to dismiss the action with prejudice and a general release covering acts and omissions through the date of settlement and all claims made or that could have been made in the action.

The court explained that the hammer clause, as written, did not limit the insurer's right to invoke the clause to instances where the insured was unreasonable in rejecting an offer. The court explained that, to hold otherwise, would impermissibly rewrite the hammer clause to the policy holder's benefit. Thus, the case was remanded to adjust the amount of the tender to provide for the full amount of fees and expenses incurred by the city through the tender date.

Who has had a "hammer clause" issue arise and what were the circumstances and the resolution? Who has had a broker negotiate "hammer clause" language? Any other policy provisions impact settlement more than a "hammer clause" for you?

B. Settlement; Hammer Clause Use Threatened But Not Enforced; Scope Of Duty To Defend Lawyer In Fee Dispute Case.

Illinois State Bar Association Mutual Ins. Co. v. Burkart, 2015 IL App. (4th) 140936-U (9/24/15).

This case is a threatened, but not used, hammer clause example. It also exposes the limits of the duty to defend on a fee dispute issue.

The insured was an attorney that handled a real estate transaction, which resulted in a $30,000 favorable result. However, he sought $35,000 in attorney fees from his clients. Litigation resulted and he received about 2/3rds of the judgment. The former clients, however, then filed an injunctive action about the lawyer publicizing the former litigation on his website and, for good measure, a claim seeking return of attorney fees. The former clients also filed a malpractice action.

The Illinois State Bar Association Mutual Ins. Co. did not represent the lawyer with regard to the injunction but did represent the lawyer in the other matters. The ISBA then negotiated a settlement with the lawyer's former clients for $62,500. Despite the ISBA warning it would invoke the "hammer clause" in the lawyer's policy, the insured attorney still refused to consent to the settlement.

As a result, the ISBA then filed a lawsuit with multiple grounds on the basis that they did not owe a duty to defend either of the former clients' lawsuits against the lawyer. This court agreed that the litigation was entirely a fee dispute, and, therefore, did not allege any damages within the meaning of the policy. As a result, the court found the insurer lacked even a duty to defend.

While the insurer had suggested it would invoke its hammer clause, that issue became moot as the insurer ultimately argued it had no duty to even defend the insured in the underlying lawsuits. Therefore, by failing to agree to the settlement, the insured lost the defense of the insurer.

Since we all know that the duty to defend, where it applies, is quite broad, how often does the duty to defend issue arise? What's the best way to deal with that issue where it can't be resolved?

C. Settlement; May The Carrier Get The Benefit Of the "Hammer Clause" Only If The Insured's Consent is Unreasonably Withheld? The Court Says Yes Because of the Wording of the Hammer Clause.

Freedman v. United Nat. Ins. Co., 2011 WL 781919 (C.D.Cal. 3/1/11), No. 09-5959.

In this case, a professional liability insurer and its insured, an attorney, brought this action to request the court interpret the "Hammer Clause" in the policy issued to Freedman by United National Insurance Co. The clause at issue involved two sentences. The first sentence stated that the insured shall not settle any claim without written consent of the named insured which consent shall not be "unreasonably withheld." The sentence provided that if the named insured refused to consent to settlement recommended by the insurer and elected to contest the claim or continue the proceedings then liability will not exceed the amount for which the claim could have been settled. The attorney insured asked the court to find that the "Hammer Clause" could only be invoked if the insured unreasonably withheld consent to settlement. The insurer argued only the second sentence was the "Hammer Clause" and the insurer could limit its liability regardless of reasonableness. The court found in favor of the attorney insured's interpretation.

The court explained that the first sentence of the Hammer Clause empowered the insured to refuse settlement, so long as his refusal is reasonable. Under the insurer's interpretation, no matter how reasonable the insured's refusal to settle, the insurer could limit its liability. The court explained that this would render the second sentence meaningless. However, that problem would be avoided if the sentences are read together. Based on persuasive case law and the court's interpretation of the policy language, the court found that the policy was unambiguous and the "Hammer Clause" may be invoked only if the insured unreasonably refused to consent to settlement.

Have any of you refused to settle at some point in one of your cases and had a subsequent discussion with a carrier on that refusal?

3. A. Coverage; Late Notice Successfully Used To Defeat Coverage.

Late notice can sometimes be a carrier coverage defense. Jurisdictions often require a showing of "prejudice" for it to work.

> United National Insurance Company v. 515 Ocean LP, 2011 WL 9153460 (E.D.NY 2/22/11).
>
> This case deals with coverage disputes and when notice must be given.

United National filed a declaratory judgment action seeking a ruling that it had no obligation to defend or indemnify 515 for the alleged $3 million in property damage because, in part, it said it did not receive timely notice after the demand letter. 81 days lapsed between the demand letter receipt and insurer notice. The parties filed cross-motions for summary judgment. The standard here was not prejudice but whether the delay was reasonable or not. United National issued a Commercial Insurance policy to 515 for the period of December 8, 2004, to April 17, 2005. The policy was renewed until April, 2007.

On December 22, 2005, the New York City Department of Buildings (DOB) received a complaint that the construction at 515 was weakening the foundation of a neighboring building. No violation, however, was found. Another complaint was made about cracks and damage to neighboring property, and again, the DOB found no violation. A construction manager for 515 was notified at some point about the complaints. A manager of the neighboring property stated that the construction manager had viewed the damage in July 2017.

In a letter dated September 10, 2007, the neighboring property sought 515's insurance carrier and advised of damage to the property due to work performed by their employees, contractors, and agents. The letter was received by Jack Laboz, who was in charge of day to day construction and he passed away on October 1, 2007. His son did not go to his father's office until October or November, and at that point found the letter among his father's things. United National did not receive notice of the insurance claim until November 29, 2007 or November 30, 2007.

United National argued summary judgment was merited because the 515 Defendants failed to meet the insurance policy's notice requirement. The insured must notify the carrier promptly if it reasonably anticipated a claim. The court said by July 2007, or at the latest September 2007, the insured should have put the carrier on notice. Under New York law, notice policies are enforceable but in certain circumstances delayed notification is excused. However, the court said the death of a managing member and the intervening Jewish holidays was not an excuse because of the time elapsed. The court granted United National's summary judgment motion finding that United National

had no obligation to defend or indemnify 515 on the basis they did not meet the notice requirements of the insurance policy.

How often does a late notice issue come up? What's your practice for notifying carriers and what standard do you use for how far up the insurance tower to notify? The standard in New York is reasonable anticipation of a claim - - what's your threshold for putting carriers on notice?

4. Privilege.

As we know, the attorney-client privilege may block disclosure of communications between lawyer and client where the communication seeks or imparts legal advice. When the insurance company is also involved, are there particular privilege problems?

A. Privilege; Potential Waiver.

> Lectroalarm Custom Systems, Inc. v. Pelco Sales, Inc., 212 F.R.D. 567 (E.D.Ca. 10/18/02), No. 01-6171.
>
> Potential privilege waiver where insured had independent counsel and communicated with carrier after reservation of rights issued.

Lectroalarm sued Pelco after it reverse engineered one of Lectroalarm's patented systems. Fireman's Fund insured Pelco and defended Pelco under a reservation of rights.

During the litigation, Pelco provided Fireman's Fund with information to permit Fireman's Fund to evaluate settlement and participate in the ongoing defense. All their communications were expected to remain confidential between the parties.

Lectroalarm sent a discovery request to Pelco, and a subpoena to Fireman's Fund, basically seeking production of all communications between Pelco and Fireman's Fund in regard to this litigation. Fireman's Fund sought a protective order, seeking to quash the subpoena on the grounds that the request sought documents subject to attorney client and work product privileges. They argued that the documents reflected a candid analysis of the factual and legal issues in the case as well as the risk of exposure presented by Lectroalarm's claims. They further argue that with respect to the defense, their interests were aligned, so that no waiver occurred from the disclosure of the privileged documents. Lectroalarm argued the parties did not share a common interest sufficient to shield the totality of the communications.

The court explained that Lectroalarm sought to obtain "all documents" relating to communications between Pelco and its liability insurance carrier - a carrier that was actively involved and paying at least a portion of the costs of defense for this action. Thus, the court found that the request was unreasonable, duplicative, overly broad, and propounded for the improper purpose of harassment and obtaining information to which Electroalarm was clearly not entitled. The insured and its independent counsel owed a legal duty to disclose information to the insurer. The Court said Electroalarm was trying to discover the thoughts, opinions, and strategy of its opponent in the litigation. To order discovery in this situation would not only be inequitable but would create a wedge between an insured and its carrier that would have a negative impact far beyond this case.

The Court said that where an insurer is providing a defense subject to a reservation of rights, then their communications are not privileged per se. However, the court found that in the underlying lawsuit, there was a "common interest" between Pelco and Fireman's Fund such that disclosure of privileged information by Pelco to Fireman's Fund does not waive the attorney-client privilege or the work product doctrine. The Common Interest Doctrine provides that where there is a commonality of interest, then there is no waiver as a result of disclosures between the parties.

B. Privilege; Legal Invoices?

> Los Angeles County Board of Supervisors v. Superior Court, 2 Cal.5th 282 (2016).
>
> Privilege may cover legal invoices.

In this case, the ACLU sought to compel production of legal invoices, under the Public Records Act, submitted to Los Angeles by outside counsel in the defense of excessive force lawsuits filed by inmates. The County argued the detailed description, timing, and amount of attorney-work performed, which communicates to the client and discloses attorney strategy, tactics, thought processes and analysis, were privileged and therefore exempt from disclosure.

The court framed the issue as whether invoices for work on currently pending litigation sent to the county of Los Angeles by an outside law firm are within the scope of the attorney-client privilege, and therefore are exempt from disclosure. The Court said the invoices in pending and active legal matters are so closely related to the attorney-client communications that they clearly implicate the privilege. Therefore, the privilege was held to protect the confidentiality of invoices for work in pending and active legal matters.

The court explained that in order for a communication to be privileged, it must be made for the purpose of legal consultation, rather than some unrelated or ancillary purpose. Thus, the court further explained that while billing invoices are generally not made for the purpose of legal representation, the information contained within certain invoices may be within the scope of the privilege. When a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees. This is because, even though the amount of money paid for legal services is generally not privileged, an invoice that shows a sudden uptick in spending may very well reveal an agency's investigative efforts and trial strategy. Midlitigation swings in spending, for example, could reveal an impending filing or outsized concern about a recent event.

5. Declaratory Judgment Action or Not?

Many of these cases in the materials involve multiple litigations. When should the carrier or the insured be bringing a declaratory judgment action? Who has been involved in a Declaratory Judgment action with a carrier and to what result?

6. The Intersection of Criminal Prosecutions/ Pleas/Convictions And The Related Civil Litigation.

Professional liability policies often exclude dishonest, fraudulent or criminal acts that have been "finally adjudicated." Consequently, the action in a criminal case can have serious consequences in the subsequent civil cases. How does that criminal plea relate to intentional act questions? Finally, can you settle without insurer's consent and still have it covered?

> Federal Insurance Company v. SafeNet, Inc., 817 F.Supp.2d 290 (S.D.N.Y. 9/9/11).
>
> This case involved issues relating to excess D&O coverage, and how it can be affected by an employee's or agent's decision to plead guilty to a crime and, secondarily, the failure to include the insurer in settlement negotiations and to settle without consent of the insurer.

In this case, the Chief Financial Officer of a company providing information security technology pleaded guilty to securities fraud. The CFO admitted to having acted willfully and with the intent to defraud when the CFO altered information and caused the public filings to be inaccurate. A class action was filed and, in separate litigation for a declaratory judgment, the Excess Insurer sought rescission of the policy on the grounds that the CFO pled guilty to securities fraud. The policy did not provide coverage for liability arising out of or based upon or attributable to the committing of any deliberate criminal or fraudulent act by an insured, if a judgment or final adjudication is adverse to the insured establishing the intentional act was committed. The class action resulted in $30 million in defense costs, and $10 million were fees for defense of the CFO.

The court found that the CFO's guilty plea rendered the policy void ab initio as to SafeNet and its CFO. The policy would only provide coverage for an officer who could establish they lacked knowledge of the facts that were not accurately and completely disclosed. The CFO's knowledge, however, was imputable to SafeNet as its CFO, such that the policy would be rescinded as to the CFO individually and the company itself.

Secondarily, the company had settled the lawsuit for $25 million without notifying or obtaining consent from the excess insurer. The excess policy contained a consent to settle provision, which required written consent. Therefore, coverage failed also because the company failed to comply with the consent to settle provision.

When criminal charges are brought against an officer of the company, the civil claims cannot be too far behind. Has anyone had to navigate these issues? The triage list gets complicated and conflicted pretty quickly. Since the intentional act exclusion usually applies where that issue has been finally adjudicated, what can a company facing these problems do to prevent coverage being lost?

How about the consent to settle issue? If the policy requires consent, is the carrier likely to give it before

the criminal case has finished?

CONCLUSION:

The relationship generally works between the carrier, in-house counsel and outside counsel. We hope these cases regarding choice of counsel, settlement, coverage, declaratory judgment actions, privilege and civil/criminal collisions have resonated with you and suggested examples from your practice to share. We look forward to a fun and robust exchange together on these topics. Join us.

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Frederic Theodore 'Ted' Le Clercq sees himself as the "problem solver" for his clients. He represents clients faced with labor & employment law, professional liability defense, civil rights litigation, and constitutional law claims.

Knowing that each client and business is unique, Ted listens carefully to what is driving a client on a particular case or what the client's concerns are. He carefully presents the best options for his clients then offers prompt legal solutions to their concerns while avoiding costly litigation.

His experience includes developing a national coordinating counsel program for a Fortune 200 national retailer. He currently serves as that client's national coordinating counsel for high-value personal injury claims.

Mr. Le Clercq is a frequent speaker for a variety of professional groups in his practice areas and also provides training to companies on personnel issues.

Practices
- Professional Liability of Attorneys, Accountants, Agents and Brokers
- Labor and Employment Litigation

Industries
- Health Care
- Insurance
- Retail and Restaurant

Accolades
- AV Preeminent Martindale-Hubbell® Peer Review Rating™
- Best Lawyers® in America List, 2007-2018
- "Louisiana Super Lawyers" List, 2007, 2009-2017
- Leadership in Law: Top 50 Lawyers in New Orleans, 2015, 2012, 2010

Speaking Engagements and Publications
- Why Not Take the Gloves Off? Problems with Professionalism
- Protecting Your Business When Employees Leave

Professional Associations
- American Bar Association - EEO Subcommittee
- Louisiana State Bar Association - Labor and Employment Section Member
- Mississippi State Bar Association - Labor and Employment Law Section
- New Orleans Bar Association
- International Association of Defense Counsel
- Professional Liability Attorney Network - Director at Large

Education
- J.D., University of Tennessee at Knoxville, 1989
- B.A., cum laude, Washington & Lee University, 1986 -- Special Honors in Philosophy

ADAPTING TO A BRAVE NEW WORLD: HOW BUSINESSES ARE RESPONDING TO #METOO

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In October 2017, in an article in The New Yorker, five actresses and an office assistant went on the record to accuse studio president Harvey Weinstein of allegations of sexual misconduct.[1] This came right on the heels of a New York Times' report that Weinstein's company had paid off sexual harassment accusers for decades in exchange for non-disclosure agreements.[2] By the time Gwyneth Paltrow and Angelina Jolie joined the chorus of accusers, Harvey Weinstein was out as President of The Weinstein Company and the #metoo movement was born.

If some thought the emergence of #metoo in late 2017 was just a moment, without the staying power to become a movement, they might not have been paying attention. It was February of 2017, when engineer Susan Fowler quit her job at one-time high flying tech start up Uber and detailed the reasons why on her personal blog post, Reflecting On One Very, Very Strange Year At Uber.[3] By the time Fowler joined, Uber was no longer a start-up, but a good-sized company with an HR department and policies against sexual harassment and discrimination in place. Nonetheless, when she reported unwanted sexual advances made by her direct superior she was told she could change teams or be prepared to suffer negative performance evaluations because her boss was seen as a "high performer." Fowler chose to change teams and in the process met more women engineers in the company who recounted similar stories, even about the same manager, who was clearly not a first offender. Fowler continued to encounter what she described as a sexist atmosphere and saw the number of women engineers at the company drop from 25% to 6%. Her documented reports to HR were finally met with a threat of termination if she continued to send documented reports to HR. Fowler had a new job offer a week later.

The blog post soon hit viral status, was cited -- and oftentimes linked to -- in articles in the Wall Street Journal, Forbes, New York Times and countless others.[4] Uber's CEO described the revelations as "abhorrent and against everything Uber stands for" and hired a law firm to conduct an internal investigation[5]. The law firm's report led to the termination of at least 20 employees. By June, about three months after Fowler self-published her personal account of sexual harassment, the CEO of Uber had resigned.

Now through the first quarter of 2018, published complaints of sexual harassment or misconduct have toppled not just media executives and talent, but also affected industries as diverse as education, government and hospitality. While the law has not changed since 2017 (for sexual harassment to be actionable the conduct needs to be severe or pervasive) the response to these allegations appears to have

1 From Aggressive Overtures To Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories, by Ronan Farrow, The New Yorker, October 23, 2017 issue.

2 Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades, by Jodi Kantor and Megan Twohey, October 5, 2017, New York Times.

3 www.susanjfowler.com/blog/2017/2/19/reflecting-oon-one-very-strange-year-at-uber

4 Uber Scrambles To Investigate Shocking Sexual Harassment Claim, by Brian Solomon, February 20, 2017, Forbes; Crisis of the Week: Uber Faces Workplace Harassment Concerns, by Ben DiPietro, February 27, 2017, The Wall Street Journal.

5 Uber's CFO promises an "urgent investigation" into former employee's sexual harassment claims, by Kurt Wagoner, February 19, 2017, recode.net.

shifted dramatically. The old economic imperative to try and protect a "high performer" now may pale to the economic reality that such conduct by a key employee could put an entire brand at risk.

The mantra of many employment lawyers has long been that it is worse to have a policy you do not follow than to have no policy at all. Now is the time to revisit training on company policies to determine whether it is designed to change behavior or is it just designed to create awareness of a written policy. Is a 30 minute on-line course as effective as a two-day in person seminar with role play and real situations? The goal of future training may be to empower people to speak up. The working theory on encouraging and empowering employees to report concerns and needs, is that it gives the company the chance to address the concerns before reading about them in the press. If there are problems brewing inside an organization where employees are feeling excluded by the company culture or that their concerns are going unheeded, turnover rates increase and more complaints about bad behavior appear outside the company and out of your control.

Experienced in-house legal departments know that Title VII is not a general civility code, and not everything is harassment, but the questions legal departments ask themselves about new claims are certainly changing.[6] If you once questioned, "Can I beat this case on summary judgment under the Mendoza standard?" you may now be wondering, "Am I going to do reputational damage to the whole corporation if I take an action less than termination against this harasser?"[7] While the EEOC has not yet reported an uptick in charges of discrimination based on sexual harassment filed from October through December, legal and human resources departments are already allocating resources to help avoid claims rather than defending against them.

Susan Fowler did not stop taking a stand when she left Uber, next she took a stand at the United States Supreme Court. In August, Fowler filed an amicus brief in a trio of workplace cases challenging mandatory arbitration agreements and class action waivers by employees.[8] In her brief, Fowler describes being subject to a class action waiver when she was employed at Uber. Such waivers and arbitration clauses are not exclusive to tech companies. They are almost ubiquitous in some segments of retail or physical security companies. The Supreme Court is being asked to decide whether federal labor law, which says these agreements are not legal, or the federal arbitration act, which says they are, governs, and the decision is expected to have wide-ranging effect. Oral arguments were heard on October 2, 2017 and decisions are expected before June.

6 "Title VII neither is a 'general civility code' nor does it make actionable the 'ordinary tribulations of the workplace.'" Gunnell v. Utah Valley State Coll., 152 F.3d 1253, 1265 (10th Cir. 1998); citing Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S.Ct. 2275, 2283–84, 141 L.Ed.2d 662 (1998).

7 In Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir.1999) (en banc), the Eleventh Circuit set out the elements that an employee must establish to support a hostile environment claim under Title VII based on harassment by a supervisor. An employee must establish:

(1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment must have been based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable.

It is often this fourth element—that the conduct complained of was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment"— that tests the durability of most sexual harassment claims. This requirement is regarded "as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'" Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81, 118 S.Ct. 998, 1003, 140 L.Ed.2d 201 (1998).

8 In January 2017, the Supreme Court agreed to hear the cases of: Epic Systems v. Lewis, 16-285; Ernst & Young v. Morris, 16-300; and National Labor Relations Board v. Murphy Oil, 16-307.

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Board Certified by the Florida Bar in Civil Trial Law, Christine Welstead has more than two decades of experience representing clients in litigation before state and federal courts throughout Florida. Her breadth of experience includes defending claims involving catastrophic injury or wrongful death, civil rights, product liability, and premises liability. Christine also advises property owners and security companies, having tried to verdict numerous jury trials.

A recognized authority on the topic of negligent security, Christine has spoken extensively, including for The Network of Trial Law Firm's Litigation Management program.

Areas of Expertise

- Litigation
- Employment Litigation
- Hospitality
- Intellectual Property Litigation
- Product Liability and Mass Torts
- Hospitality and Restaurant
- Hospitality Dispute Resolution

Notable Work

- Products Liability: Represented a consumer products manufacturer in the defense of claims of catastrophic injury due to an "exploding" tire.
- Wrongful Death: Represented Caribbean hotel sued for wrongful death in Southern District of Florida.
- Personal Injury: Represented golf course operator in jury trial of claims made by player injured on course by fellow player in case of "golf rage."
- Civil Rights: Represented police officers in a civil rights case tried before a jury in the Southern District of Florida where Plaintiff claimed use of excessive force.
- Products Liability: Represented a ladder manufacturer and retailer from claims of design defect.
- Personal Injury: Represented an aviation repair facility from a claim of catastrophic brain injury due to alleged unsafe equipment.
- Whistleblower Claims: Represented private security company in Miami-Dade County jury trial against whistleblower claims made by five former employees.
- Qui Tam Litigation: Represented private security firm with large government contract in qui tam litigation.
- Negligent Security Action: Represented private security company at jury trial of negligent security action brought by a homeowner in an exclusive gated community who suffered serious injuries in a dispute with a fellow homeowner.

Honors and Distinctions

- Board Certified in Civil Trial Law, The Florida Bar Board of Legal Specialization and Education

Education

- J.D., University of Miami School of Law, 1992, American Jurisprudence Book Award for Insurance Law, Recipient
- B.A., Tulane University, 1987

EFFECTIVE LEGAL PROJECT MANAGEMENT

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A Recipe For Legal Project Management: Look To BBQ Champs

Outside the courtroom, one of my hobbies is judging competition barbecue. As a master certified barbecue judge with the Kansas City Barbeque Society, I recently had the honor of judging the Sam's Club National BBQ Championship in Bentonville, Arkansas. Fifty of the top professional BBQ teams in the country competed for $150,000, the richest purse in competition BBQ. One thing I noticed was that the same small group of pitmasters always seems to excel — their teams are consistently in the money at any given competition no matter the geographic location or the mix of judges. The judging process is double-blind, so these pitmasters are not winning based on reputation. It made me wonder: What gives them an edge? What is driving their excellence in BBQ? Is it their sauce and spice rubs? Is it knowing how to select the choice cuts of meat? Do they have the best equipment?

While all of these factors are important, I believe the real reason is simple: The top pitmasters have developed a consistent, disciplined, comprehensive and repeatable process in planning and executing their BBQ entries. Following a consistent process in approaching each and every competition results in top performance, higher scores and continuous improvement.

The same can be said about applying project management principles to working on legal matters. Intelligent lawyers recognize that using legal project management (LPM) tools and techniques to actively manage engagements helps optimize performance, reduce costs and improve predictability, enabling them to provide clients with superior service and value. Employing project management principles is the "secret sauce" that can help both lawyers and BBQ competitors achieve success.

Develop a Recipe for Success: Plan and Prepare

Advance planning and preparation for any project is necessary to provide direction, continuity and coordination. The top pitmasters use a formal planning process before each competition. They don't just show up the day of the competition, fire up their pits and start smoking their chicken, ribs, pork and brisket. A successful BBQ begins well in advance of the competition by outlining a detailed plan. Champion pitmasters work backward from the turn-in time for each of the four meat categories to develop a schedule setting forth specific tasks that need to be completed at given time intervals. These schedules list not only the tasks that must be performed, they also designate which team member is responsible for each task. Successful pitmasters do not just decide as they go; they drill down on the details of the plan to achieve the perfection that high-level competition demands. Many also use checklists and templates to ensure consistency and predictability. Because situations inevitably arise that require a change in the schedule (e.g., the pit temperature spikes or the meat temperature plateaus), the pitmaster's plan is flexible enough to accommodate changes and can be revised as needed.

Similarly, LPM requires that lawyers employ a formalized process in planning and executing an engagement. This includes developing a schedule that defines which member of the legal team will perform each task and provides a timeline for completing those tasks. Having a road map showing how a legal project will be executed and how the matter will run start to finish is essential to reaching a project's objectives and achieving the client's goals. A defined, detailed plan also provides the context for team members to understand expectations and outcomes. Engaging in a planning process at the outset of each matter allows lawyers to gain a competitive edge by having a strategic playbook to guide the legal team throughout the engagement.

In law or competition BBQ, having a plan in place avoids inconsistency and inefficiency and helps the team deliver a superior product in a timely fashion.

Trim the Fat: Create and Stick to a Budget

Pitmasters have to be cost-conscious and adhere to a defined budget. Participating in any BBQ competition requires a significant monetary investment to cover the entry fee, bulky specialized equipment and the means to transport it, and meat, spices, rubs and other supplies. Some teams purchase special meats from specialty butchers, which alone can increase costs by hundreds of dollars. However, with the exception of a few national competitions, the available prize money does not justify a win-at-all-costs approach. So the top pitmasters will work within a defined budget based on the available prize money at a given competition. For example, instead of cooking the typical two pork shoulders, two briskets, 12 to 16 pieces of chicken and three racks of ribs, the pitmaster may decide to cook half as much to reduce expenses. This not only helps manage costs, it requires a more thoughtful, measured cooking strategy, as there is less room for error in producing a quality entry. As part of a comprehensive, disciplined approach to managing legal projects, lawyers and their clients also develop budgets as a concrete way to help control costs, improve efficiency and provide the transparency and accountability clients need to better manage resources and expectations. A well-designed budget is more than a financial estimate; it sets priorities and reflects strategy. Using budgets helps lawyers manage legal matters more effectively so they can provide better client service, improve results and reduce costs. Important elements of any legal budget include a consistent format across types of matters, the ability to modify quickly and the ability to reflect actual costs against budgeted amounts. Creating a budget enables the lawyer and client to make proactive strategic decisions about the matter and determine whether the costs justify a particular course of action.

Ultimately, the goal of the budgeting process for lawyers and pitmasters is the same — containing costs without sacrificing quality.

Tend the Fire: Monitor Progress

Creating a plan and budget is only half the job. Successful pitmasters are laser-focused on their goals, and they constantly monitor their progress to ensure that they are on track throughout the BBQ process. One key item that needs to be closely monitored during a BBQ competition is pit temperature. Indeed, fire management is a critical component — it is impossible to cook great BBQ with unstable temperatures. It is so crucial that most teams will have members sleep in shifts so the smoker can be tended and the temperature can be monitored throughout the night. The top pitmasters also rely on technology to monitor their smokers; many use a specially calibrated fan system that feeds the right amount of oxygen into the smoker to ensure a consistent pit temperature.

Likewise, to ensure proper execution, work plans and legal budgets must be monitored through the use of metrics and reporting. A best LPM practice is to implement a consistent, periodic reporting process that keeps the client and legal team informed on progress and keeps the matter on task. Technology tools, such as monitoring software, ensure efficiency and accuracy in measuring metrics including budget-to-actual spend, percentage of completion and cycle time for aspects of the project. Moreover, during the life of a case or transaction, situations often develop that suggest the need for revising the project plan, timeline or budget. When the lawyer is closely monitoring the matter, he or she can act quickly and proactively to collaborate with the client to identify the impact of the change on legal strategy, timeline and budget options. Together they can agree on the appropriate adjustments and revise the project tasks as needed to ensure the project is completed on time and in furtherance of the client's goals. The monitoring process also promotes

open communication between lawyer and client, which facilitates predictability of costs and helps avoid unhappy surprises.

Tracking project-related metrics, including team performance and task duration, identifying potential problems and taking corrective actions are all keys to success, whether one is handling a legal matter or competing for BBQ bragging rights.

Perfect the Process: Conduct an After-Action Review

Every project yields information that will be useful in planning future projects. Pitmasters receive feedback following each competition in the form of a score sheet listing judges' scores for the appearance, taste and tenderness of the team's meat entries. In addition, judges sometimes provide the cooks with comment cards containing constructive feedback on improving the team's entries. For example, a judge may indicate that the chicken was too salty or that the ribs were slightly overcooked. Some teams use software to track feedback and results, taking into account common BBQ variables such as temperature and cook duration, the sauce/rub combination, or even the type of wood used or the weather at the time of the cook. The pitmaster then can use this information to perfect their process for the next big competition.

A completed case or transaction also provides useful information regarding the resources used and time required to complete the project, as well as its costs. The key is to gather information by conducting an after-action review to take advantage of prior efforts and results. At the end of an engagement, a lawyer should conduct post-mortems with the legal team and with the client to review successes and failures and suggest modifications to approach and process to improve performance on future engagements. For example, the team might consider using a different process or sequence for some discovery or due diligence tasks. The goal of this review is to evaluate performance and find areas needing improvement so the LPM process is constantly refined. Capturing the lessons learned through an after-action review ensures that efficient, repeatable processes are continually improved based on practical experience and the use of internal systems and tools.

Whether striving to stay ahead of the competition on the BBQ circuit or to achieve positive outcomes for clients, continuous improvement should always be a goal.

The Meat of the Matter

Historian, philosopher and author Will Durant, paraphrasing Aristotle, had it right when he said: "We are what we repeatedly do. Excellence, then, is not an act, but a habit." As I hope this article has illustrated, successful lawyers and champion pitmasters alike can employ project management principles to achieve their common goal of reaching a favorable outcome. The key — or "secret sauce" — is to consistently apply these basic fundamentals to each engagement and continually seek to refine the processes to achieve continuous improvement.

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As a partner in the Business Litigation group, Tony helps clients overcome legal obstacles in order to protect their assets and manage litigation risk in pursuit of their strategic goals. He believes that a big part of his job is assessing risk for his clients in order to help them make the best possible decision. Tony also views himself as a legal quarterback for in-house counsel by matching the needs of his clients to the resources of Thompson Hine in order to ensure success.

Tony has a passion for helping his clients succeed by treating them like his best friends by being loyal, well-connected and honest with them about the strengths and weaknesses of their legal positions. As a result, clients rely on Tony as a "go-to" litigator for their most significant matters. Outside the courtroom, Tony is a certified BBQ judge and judges 7-10 sanctioned competitions per year.

Tony focuses his practice on complex business and corporate litigation involving financial service institutions, real estate development and management companies, commercial and contract disputes, indemnification claims, shareholder actions, business transactions, class actions and D&O litigation.

Litigation can prove time-consuming and become costly, so for many disputes there may be more effective methods of resolution than traditional court litigation. Although Tony has an impressive record of courtroom achievements, he seeks to optimize case outcomes while managing the costs, time and stress of a lawsuit by regularly using arbitration, mediation and other forms of alternative dispute resolution (ADR) as pragmatic ways to meet his clients' needs.

Areas of Expertise
- Business Litigation
- Securities & Shareholder Litigation
- Environmental

Legal Project Management Publications
- "A Recipe For Legal Project Management: Look To BBQ Champs," Law360, October 27, 2017
- "5 Critical Components of an Early Case Assessment," LinkedIn Pulse, September 2017
- "Early Case Assessments Promote Cost Effective and Efficient Litigation," LinkedIn Pulse, August 2017
- "Budgeting for Litigation: Obtaining Efficiencies and Meeting Client Goals," Benchmark Litigation, November 13, 2014

Distinctions
- Member of Crain's Cleveland Forty Under 40 Class 2013
- Listed as an Ohio Super Lawyers ® Rising Star in Business Litigation, 2009, 2010, 2013, 2016 and 2017

Education
- Vermont Law School, J.D., magna cum laude, senior editorial board, business manager, Vermont Law Review
- John Carroll University, B.A., magna cum laude, Outstanding Political Science Major

HOT TOPICS IN CLASS ACTION PRACTICE

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The Rapid Transformation of Class Action Jurisprudence Continues

Class action jurisprudence has undergone rapid development over the last six to seven years on multiple fronts at the state and federal levels. At the highest level, the U.S. Supreme Court has issued multiple decisions that have defined and redefined several aspects of class action litigation.

Major U.S. Supreme Court Cases: 2009-2011

Class arbitration may not be ordered where there is no contractual basis to find that parties agreed to it. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010)

Heightened standards for establishing commonality at class certification. Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011)

Class arbitration waivers enforceable. AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011)

Major U.S. Supreme Court Cases: 2011-2012

Materiality does not need to be proven at the class cert. stage in fraud-on-the-market securities fraud cases. Amgen Inc. v. Connecticut Retirement Plans and Trust Funds, 133 S. Ct. 1184 (2013)

Court did not answer question certified for review regarding need to resolve whether the plaintiff class had introduced admissible evidence, including expert testimony at class certification stage. Instead, it held that certification of class improper because plaintiffs failed to establish that damages could be measured on class-wide basis. Comcast Corp. v. Behrend, 133 S.Ct. 1426 (2013)

Plaintiffs may not stipulate to limit class damages below the jurisdictional amount to avoid federal jurisdiction under CAFA. Standard Fire Insur. Co. v. Knowles, 133 S.Ct. 1345 (2013)

Class arbitration waiver cannot be invalidated due to high costs associated with proving federal antitrust claim through an individual action. Amer. Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304 (2013)

Satisfaction of named plaintiff's claim in FLSA collective action renders claim moot & action dismissed. Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523 (2013)

Major U.S. Supreme Court Cases: 2013-2014

Parens patriae action filed by State attorneys general on behalf of their citizens does not constitute a mass action under CAFA and is not removable. Mississippi ex rel. Hood v. Au Optronics Corp., 134 S.Ct. 736 (2014)

Fraud-on-the-market theory established by Basic remains intact, but defendants have right to rebut the Basic presumption of class-wide reliance during class certification phase. Halliburton Co. v. Erica P. John Fund, Inc., 2014 U.S. LEXIS 4305 (2014) (Halliburton II)

Major U.S. Supreme Court Cases: 2014-2015

All that is required in a CAFA removal notice is a "plausible allegation" that the amount in controversy threshold is met. Dart Cherokee Basin Operating Company, LLC v. Owens, 135 S.Ct. 547 (2014)

Major U.S. Supreme Court Cases: 2015-2016

FAA Pre-empts State Court Interpretation of Arbitration Agreement. DirectTV, Inc. v. Imburgia, 136 S. Ct. 463, 577 US __ (Dec. 14, 2015)

Unaccepted Rule 68 Offer Does Not Moot Class Action. Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 577 US __ (Jan. 20, 2016)

Use of Statistics/Representative Evidence Permitted to Certify Class in FLSA Action. Tyson Foods v. Bouaphakeo, 136 S. Ct. 1036, 577 US __ (Mar. 22, 2016)

Analysis of Standing Based Solely on Statutory Violation Still Requires Injury to be "Concrete" and "Particularized." Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 578 US __ (May 16, 2016)

Plaintiffs had been dealt multiple blows over several years, as the majority of the Supreme Court class action decisions between 2010 and 2015 have been viewed as more pro-defendant, including Stolt-Nielsen, Wal-Mart, Concepcion, Comcast, Standard Fire, Halliburton II, Amex, Genesis Healthcare, and Dart Cherokee. Pro-Plaintiff decisions, including Amgen and Au Optronics, were rare until 2016 when we had to question whether the balance was shifting in plaintiffs' favor with the High Court's plaintiff-leaning decisions in Tyson Foods, Campbell-Ewald, and arguably Spokeo.

In the past year, however, companies have seen a shift in their favor with several developments that will benefit them in defending against class actions in state and federal court. North Carolina, for example, created new appellate rights for class action defendants, while the U.S. Supreme Court curbed plaintiffs' ability to force an appeal of class certification. The U.S. Supreme Court took on the viability of class arbitration waivers in employment contracts, while the Consumer Financial Protection Bureau (CFPB) banned the use of class waivers in certain consumer financial agreements, and Congress swiftly moved to negate the CFPB rule banning class waivers. Congress also was considering a major overhaul of class action procedure, while proposed amendments to Federal Rule of Civil Procedure 23 are on track to become effective in December 2018.

Class Action Impact & Trends

Class action litigation consumes considerable corporate resources and poses significant risk of millions or billions of dollars in exposure. For most individuals "lawsuit" is synonymous with "class action." If an individual has a claim against a company, they are most likely not to pursue it unless it is via a class action lawsuit. According to the CFPB, an average of approximately 32 million consumers are eligible for relief through consumer financial class action settlements alone each year,[1] and a study of all federal class action settlements for a two-year period revealed that District court judges approved 688 class action settlements valuing almost $33 billion – approximately $28 billion (85%) was awarded to class members and the remaining $5 billion (15%) was awarded in attorneys' fees.[2] The reality facing corporations is that once a class is certified, settling is often more efficient than continuing with the risks and costs of defending the litigation, even in meritless cases. Therefore, companies have a vested interest in continuing to limit plaintiffs' access to the class action mechanism and heightening the hurdles that plaintiffs must overcome to succeed at certifying a class and establishing damages to class members.

A snapshot of recent data illustrates the magnitude of the impact that class action litigation has on companies. A 2017 class action survey of 387 general counsel and chief legal officers from corporations representing more than twenty-five industries revealed that class actions are becoming part of everyday business. The number of companies facing class action litigation hit a high of nearly 61% in 2015 and then declined back to "historical levels" of 53.8% in 2016 with more than 69% of the companies involved in class actions managing one or more class actions on a regular basis.[3] On average, companies anticipated managing about 6 class actions in 2017.[4] Class action spending constituted 11.2% of all U.S. litigation spending, according to survey data, having risen for

1 Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), Consumer Financial Protection Bureau, March 2015, available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

2 Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, Journal of Empirical Legal Studies, Volume 7, Issue 4, 811–846, December 2010.

3 The 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation [hereinafter "2017 Class Action Survey"], Carlton Fields Jorden Burt, available at http://classactionsurvey.com/.

4 Id.

the second consecutive year and breaking a previous downward trend in class action costs.[5] Class actions were ranked as the second most concerning area of litigation due to the financial exposure, legal costs, and prevalence.[6]And the stakes in class action litigation continued to rise. The percentage of cases considered to be high-risk ($0.8 million - $15 billion exposure) and bet-the-company ($1 billion - $110 billion exposure) cases rose from 9.5% the previous year to 25.3%, with even routine class actions increasing by more than 10% year-over-year.[7] Not surprisingly, the majority of class action cases settled – 62.5% in 2016 – with the majority settling prior to a class certification decision.[8]

The most prevalent categories of class actions that companies reported facing has shifted in the last year, with labor/employment related cases taking the top spot from consumer fraud cases in 2017 survey data.[9] The volume of labor/employment class actions reported by surveyed companies rose by half from 2015-2016 – from 24% to 37.7% and consumer fraud cases declined from 24.6% to 19%.[10] There also was a notable rise in intellectual property related cases from 0.1% to 7.5%.[11] Data privacy class actions were no longer predicted to dominate class litigation dockets. In 2014 and 2015, counsel predicted data privacy and security class actions to be the next big wave. However, there was a substantial change in responses in 2017 survey data indicating that wage and hour and Telephone Consumer Protection Act (TCPA) compliance cases are now expected to be the next wave. 25.9% of counsel predicted wage and hour and 22.2 % predicted TCPA cases will dominate.[12]Only 11.1% of counsel predicted data privacy vs. 25% in the previous years' survey.[13] Counsels' emphasis on wage and hour issues is consistent with the rise seen in existing labor and employment matters.

Recent Legal Developments

Companies and plaintiffs alike continue to push for clarification of the boundaries of class action litigation. Several issues remain at the forefront of class action developments and are being addressed on multiple fronts, including class waivers, class arbitration, class certification, class settlements, attorneys' fees, the CFPB Ban on class waivers, ascertainability, the Basic Presumption, and more. Recent judicial, legislative, and regulatory developments have and will continue to shape how businesses operate to mitigate class action risk/exposure and how companies manage class action litigation that arises. For example: should contracts be reviewed and revised to require arbitration and class waivers; will contracts need to be modified to remove class waivers – e.g. financial services, employment; how will company management be structured and policies set; whether to challenge plaintiffs' appeal of an order denying class certification after a voluntary dismissal of the claims; whether to appeal a class certification decision; whether to challenge ascertainability of class members; what settlement terms are advisable to secure court approval.

a. Recent U.S. Supreme Court Decisions & Keys Issues Under Consideration

i. No Appellate Jurisdiction to Review Order Denying Class Certification or Striking Class Allegations After Named Plaintiffs Voluntarily Dismiss Claims with Prejudice: Microsoft Corp. v. Baker, 137 S. Ct. 1702, 582 US __ (June 12, 2017)

The U.S. Supreme Court unanimously agreed that plaintiffs do not have unilateral power to force federal appellate courts to immediately review an order denying class certification or striking class allegations by dismissing their claims. 28 U. S. C. §1291 limits courts of appeals to reviewing only "final decisions of the district courts." Plaintiffs' legitimate path to appellate review of the court's decision striking their class claims included several options: (1) seeking the discretionary immediate appellate review available under Rule 23(f), which they did and were denied; (2) proceeding with the individual claims and seeking reconsideration of the class decision, or (3) proceeding with the individual claims to final judgment and seeking appellate review of the class decision at that time. Plaintiffs instead chose to dismiss their individual claims with prejudice to manufacture the finality § 1291 requires for appellate review. The Ninth Circuit allowed the appeal, reasoning that Plaintiffs' voluntary dismissal was sufficiently

5 Id.

6 2017 Litigation Trends Annual Survey, Norton Rose Fulbright, Oct. 25, 2017, available at http://www.nortonrosefulbright.com/news/157900/norton-rose-fulbright-releases-2017-litigation-trends-annual-survey

7 2017 Class Action Survey

8 Id.

9 Id.

10 Id.

11 Id.

12 Id.

13 Id.

adverse (since it was not part of a settlement) and final to qualify for appellate review under §1291.[14] A unanimous Supreme Court disagreed and reversed the Ninth Circuit. Although unanimous in judgment, the Justices differed on whether the U.S. Constitution or §1291 was the basis for denying plaintiffs the ability to force immediate review of class certification related decisions. Justice Ginsburg wrote the majority opinion grounded in §1291's concept of finality. Justice Thomas wrote the opinion concurring in judgment based on the U.S. Constitution's Article III granting the appellate courts jurisdiction over "cases" and "controversies. Justice Gorsuch took no part in the decision.

The Microsoft Majority held voluntary dismissal of plaintiffs' remaining claims does not qualify as a "final decision" for purposes of §1291: "Plaintiffs in putative class actions cannot transform a tentative interlocutory order into a final judgment within the meaning of §1291 simply by dismissing their claims with prejudice—subject, no less, to the right to "revive" those claims if the denial of class certification is reversed on appeal." Plaintiff's position would "subvert the balanced solution Rule 23(f) put in place for immediate review of class action orders." Accordingly, the Majority chose to respect "Rule 23(f)'s careful calibration—as well as Congress' designation of rulemaking 'as the preferred means for determining whether and when prejudgment orders should be immediately appealable.'" In the concurring Justice's view, the plaintiffs' voluntary dismissal was "final" for purposes of § 1291, and the limits on interlocutory appeals prescribed by Rule 23(f) should not have guided and "warped" the majority's argument regarding finality. Justices Thomas, Roberts, and Alito grounded the concurrence on a Constitutional Article III argument: (1) Jurisdiction of the federal courts is limited to "cases" and "controversies" by Article III of the Constitution; (2) When plaintiffs voluntarily dismissed their claims, "they consented to the judgment against them and disavowed any right to relief from Microsoft." Therefore, they could not appeal the voluntary dismissal; (3) The class allegations that were struck did not give rise to a "case" or "controversy" in and of themselves – without underlying individual claims, class allegations are insufficient to confer jurisdiction; (4) The class allegations: "are simply the means of invoking a procedural mechanism that enables a plaintiff to litigate his individual claims on behalf of a class….Thus, because the Court of Appeals lacked Article III jurisdiction to adjudicate the individual claims, it could not hear the plaintiffs' appeal of the order striking their class allegations." As it stands, federal class action plaintiffs are bound by Federal Rule of Civil Procedure 23(f) in seeking appellate review of orders denying them class status – The appellate court determines if immediate review is available.

ii. Viability of Class Waivers in Individual Employment Agreements & The National Labor Relations Act: Epic Systems Corp. v. Lewis (No. 16-285), NLRB v. Murphy Oil (No. 16-307), and Ernst & Young LLP, et al. v. Morris (No. 16-300), Argument Oct. 2, 2017.

To kick off the new term, the U.S. Supreme Court took on the fight the National Labor Relations Board started when the it ruled in the *D. R. Horton, Inc.*[15] *case* that class waivers in individual employment agreements violate the National Labor Relations Act (NLRA) by preventing employees from engaging in concerted action related to their employment. On October 2, 2017, the Court heard consolidated arguments in *Epic Systems Corp. v. Lewis* (No. 16-285), *NLRB v. Murphy Oil* (No. 16-307) and *Ernst & Young LLP, et al.v. Morris* (No. 16-300), three cases representing a circuit split that developed on this issue. *D.R. Horton* has marked the employment/labor context as a tough and legally significant battleground for companies seeking to use the class waiver; the Federal Arbitration Act (FAA) is pitted against federal labor statutes that arguably speak to the issue, unlike in AT&T Mobility LLC v. Concepcion[16] where a commercial contract and state law were at issue. The Fifth Circuit Court of Appeals struck down the NLRB's decision,[17] and while this was a significant victory for employers, the NLRB asserted that it was not bound by Circuit Court of Appeals opinions and it would continue to strike down class waivers unless and until the U.S. Supreme Court rules against it on the issue. The agency reiterated its firm position several times, and explicitly reaffirmed its *D.R. Horton* ruling in Murphy Oil, USA, Inc. and Sheila M. Hobson.[18] The Fifth Circuit struck down the NLRB's *Murphy Oil* decision,[19] as well, while the Seventh and Ninth Circuits subsequently sided with the NLRB and held that the class waivers at issue

14 Baker v. Microsoft, 797 F.3d 607 (9th Cir. 2015).

15 357 N.L.R.B. 2277 (2012), enforcement denied in part, 737 F.3d 344 (5th Cir. 2013).

16 563 U.S. 333 (2011).

17 D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013).

18 361 NLRB No. 72, 2014 WL 5465454 (N.L.R.B. Oct. 28, 2014).

19 Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir.2015).

in *Epic Systems*[20] and *Morris*[21] violated the NLRA. The Supreme Court has yet to rule on the matter. It was estimated that the Court's ruling in these cases will affect the contracts of nearly 25 million employees who are employed under individual employment agreements that contain class wavers in arbitration clauses.

iii. State Court Jurisdiction Over Covered Class Actions that Allege Only Securities Act of 1933 Claims: Cyan v. Beaver County Employees Retirement Fund (No. 15-1439) Argument Nov. 28, 2017

The Securities Act of 1933 stated in 15 USC § 77v that the "district courts shall have jurisdiction, concurrent with State courts, of actions to enforce any liability created by [the Securities Act of 1933]." The Securities Litigation Uniform Standards Act of 1998 (SLUSA) places a limitation on state jurisdiction by qualifying Section 77v, which now provides that state courts exercise concurrent jurisdiction "except as provided in section 77p … with respect to covered class actions." Subsection 77p(b) completely bars any state-court class action raising claims under state law, so long as the action is a "covered class action" and involves a "covered security." "Covered Class Action" and "Covered Security" are defined as follows: a securities class action is "covered" if it involves 50 plaintiffs and a security is "covered" if it is traded on a national exchange. Section 77p does not explicitly restrict the jurisdiction of state courts over actions to enforce the federal Securities Act of 1933. The question presented was does §77v then bar from state court both mixed class actions (those presenting claims under federal and state law) AND federal class actions (those presenting claims only under the Securities Act), or only mixed class actions? The defendant company Cyan argued that the provision bars concurrent jurisdiction over all "covered class actions," whether based on state law or federal law, based on the definition of covered class actions. Plaintiffs argued the provision bars jurisdiction over only "mixed" state and federal law actions, based on §77p's bar on state-law based securities class actions. And the government agreed with plaintiffs that only actions based on state law are barred but argued that defendants can remove all actions based on state or federal law from state court to federal court. During oral argument, Justices rejected each of the interpretations offered during arguments, with some Justices referring to the statute and arguments as "gibberish." Justice Alito went so far as to suggest that SLUSA's provision ultimately may be meaningless: "I mean, all the readings that everybody has given to all of these provisions are a stretch. I'm serious. Is there a certain point at which we say this means nothing, we can't figure out what it means, and, therefore, it has no effect, it means nothing?"

iv. Whether the rule of American Pipe and Construction Co. v. Utah tolls statutes of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period: China Agritech v. Resh, (No. 17-432) Argument set for March 26, 2018.

In American Pipe and Construction Co. v. Utah,[22] the U.S. Supreme Court established that the filing of a class action tolls the statute of limitations period for the individual claims of the purported class members. This case presents the question of whether American Pipe also tolls the statute of limitations with respect to subsequent class claims. Two class actions were filed during the limitations period and ultimately failed to be certified. Absent class members filed a third class action outside of the limitations period and the Ninth Circuit Court of Appeals reasoned that American Pipe tolled the limitations period and allowed the third class action.[23] The defendant company asserted that the Circuit Courts of Appeals are split on this issue with the First, Second, Third, Fifth, Eighth, and Eleventh Circuits having found that American Pipe tolling for individual actions does not extend to multiple class actions,[24] and the Ninth, Sixth and Seventh holding the opposite.[25]The plaintiffs, however, argued that there is no split on the issue in that the courts that have considered the issue post-Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.,[26] and Smith v. Bayer Corp.,[27] have found that a plaintiff is entitled to assert timely claims on behalf of all asserted members of a class and that a previous denial of certification in an earlier case cannot bar a plaintiff with timely

20 Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016).

21 Morris v. Ernst & Young, LLP., 834 F. 3d 975 (9th Cir. 2016).

22 414 U.S. 538 (1974)

23 Resh v. China Agritech, 857 F.3d 994 (9th Cir. 2017).

24 Griffin v. Singletary, 17 F.3d 356, 359 (11th Cir. 1994); Basch v. Ground Round, Inc., 139 F.3d 6 (1st Cir. 1998); Korwek v. Hunt, 827 F.2d 874 (2d. Cir. 1987); Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334 (5th Cir. 1985).

25 Phipps v. Wal-Mart Stores, Inc., 792 F.3d 637, 652 (6th Cir. 2015); Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 16 560 (7th Cir. 2011).

26 559 U.S. 393 (2010).

27 564 U.S. 299 (2011).

claims from seeking class certification in a later case. The Supreme Court granted certiorari review and is scheduled to hear arguments in the case on March 26, 2018.

v. Review of Circuit Split on Ascertainability Denied

Rule 23 of the Federal Rules of Civil Procedure has been found to implicitly require a showing that members of a proposed class are readily identifiable or "ascertainable" for a class to be certified. The Third Circuit was first to articulate a heightened standard for establishing ascertainability, requiring that "the class is 'defined with reference to objective criteria,' and (2) there is a 'reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'"[28] The split among the Circuit Courts of Appeal developed around this administrative feasibility requirement, with the Third, Fourth, and Eleventh Circuits holding that plaintiffs must show there is an administratively feasible way to determine whether an individual falls within the defined class,[29] and the Second, Sixth, Seventh, Eighth, and Ninth Circuits[30] rejecting an "administrative feasibility" requirement to demonstrate ascertainability at the class certification stage. The split will remain for the time-being, as the Ninth Circuit's 2017 ConAgra decision was denied certiorari review by the U.S. Supreme Court in October 2017.

b. CFPB Arbitration Rule Banning Class Waivers

The Consumer Financial Protection Bureau (CFPB) was granted the authority under Dodd-Frank to limit or prohibit use of class waivers in broad range of consumer finance contracts. The agency released its Arbitration Study in early 2015, which was critical of the use of arbitration agreements and class waivers limiting plaintiffs' access to recovery. In October 2015, the CFPB announced it was considering a proposal to prohibit use of class waivers in consumer finance arbitration agreements, and on May 24, 2016, the long-anticipated proposed rule prohibiting the use of class action waivers in consumer finance arbitration agreements was published and opened for comment. The CFPB took 370+ pages to explain and justify its proposal, which boils down to consumers of financial products do not typically pursue redress via individual means of enforcement due to costs and lack of knowledge, so the class action mechanism must be preserved to ensure that companies do not insulate themselves from compliance with the law or shield themselves from liability from wrongdoing. The Final Rule was announced July 10, 2017 and published in the Federal Register on July 19, 2017.

The Final Rule imposed two main requirements on affected providers: (1) that they refrain from the use of waivers in consumer finance arbitration agreements that prevent consumers from participating in class actions and (2) that they submit data to the CFPB, so the agency can monitor and assess the effectiveness and fairness of arbitration moving forward. Section 1040.4 of the Rule prohibited providers from relying on arbitration agreements for seeking to stay or to dismiss any class action, or for any other aspect of a class action, unless and until the trial court and/or appellate court have determined that the case cannot proceed as a class action. As described by the CFPB, the Proposed Rule applies to most of the products and services subject to the agency's oversight, including "those related to the core consumer financial markets that involve lending money, storing money, and moving or exchanging money." The Final Rule was set to take effect September 18, 2017 (60 days after publication) and to apply to contracts entered into on or after March 19, 2018 (180 days after effective date). However, immediate opposition by Congress and concerns from Office of the Comptroller of the Currency (OCC) threatened the viability of the Rule.

The Rule was criticized, among other reasons, for being based on a flawed data and the result of the agency overreaching. The Financial Stability Oversight Council (FSOC) has responsibility to identify and respond to risks to the stability of the country's financial system. FSOC has authority to set aside a final regulation issued by the CFPB if it will "put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." The day the CFPB released the Final Rule, the Office of the Comptroller of the Currency (OCC), an FSOC member agency, initiated an exchange of letters with the CFPB, raising concerns regarding rule's impact on the federal

28 Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013) (quoting Carrera v. Bayer Corp., 727 F.3d 300, 303-04 (3d Cir. 2013))

29 Karhu v. Vital Pharmaceuticals, Inc., 621 F. App'x 945, 947-48 (11th Cir. 2015); EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014).

30 Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017); In re Petrobras Sec. Litig., 862 F.3d 250, 264 (2d Cir. 2017) moving away from previous decision in Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 2015) ("the touchstone of ascertainability is whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member")(internal quotation and citation omitted); Sandusky Wellness Center, LLC v. Medtox Scientific, Inc., 821 F.3d 992, 996-97 (8th Cir. 2016); Rikos v. Procter & Gamble Co., 799 F.3d 497, 525 (6th Cir. 2015); Mullins v. Direct Digital, LLC, 795 F.3d 654, 659-60 (7th Cir. 2015).

banking system. Under Dodd-Frank § 1023, the OCC could have petitioned FSOC to set aside or delay the CFPB rule by filing a petition within 10 days of the rule's publication in the Federal Register. However, on July 31, 2017, Acting Comptroller Noreika issued a statement explaining the OCC's decision to forgo filing the petition. Noreika noted the insufficiency of the timeframe in which the agency would have to review and analyze the CFPB's data and placed his hope in the ongoing Congressional effort to nullify the rule under the Congressional Review Act. The day after the final rule was published in the Federal Register, Congress took steps to nullify the Rule with the issuance of joint resolutions under the Congressional Review Act (chapter 8 of title 5, United States Code). On July 20, 2017, the U.S. House Financial Services and Senate Banking Committees issued joint resolutions H.J. Res. 111 and S.J. Res. 47. Just days later, the House approved its resolution, sending it to the Senate for consideration. On October 24, 2017, a 51-50 Senate vote – via a tie-breaking Vice-Presidential vote – approved the resolution to strike down the CFPB rule. The Congressional resolution was presented to the President for consideration, who publicly "applaud[ed]" Congress for striking down the rule. President Trump signed H.J. Res. 111 into law on November 1, 2018.

c. Proposed Amendments to Federal Rule of Civil Procedure 23

In 2011, the Judicial Conference Advisory Committee on Civil Rules formed the Rule 23 Subcommittee to consider modifying the rule governing class actions for the first time since the 2001-2003 amendment cycle. In October 2014, the Subcommittee reported to the Advisory Committee on its activities and presented an initial list of "front burner" issues on which it subsequently gathered industry input. After several mini-conferences and meetings, the issues were narrowed and reported by the Advisory Committee to the Standing Committee on Rules of Practice and Procedure for its January 7-8, 2016 Meeting, along with a December 2015 Department of Justice request to extend the Rule 23(f) time to appeal. Proposed amendments finally were published for public comment on August 12, 2016 addressing seven issues: (1) Requiring that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; (2) Clarifying that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); (3) Clarifying in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; (4) Updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; (5) Establishing procedures for dealing with class action objectors; (6) Refining standards for approval of proposed class settlements; and (7) A proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party. The Advisory Committee approved two areas explored by the Rule 23 Subcommittee for further study: (1) defendants' attempts to pick off named plaintiffs and moot class actions with offers of complete relief; and (2) whether members of the proposed class are sufficiently ascertainable for purposes of class certification. Both issues continue to develop in the lower courts.

Following evaluation of comments submitted, minor changes were made to the proposed rule language and revisions to the committee notes to increase clarity. Each of the proposed amendments was unanimously approved by both the Civil Rules Advisory Committee and the Standing Committee. On September 12, 2017, the proposed amendments were approved by the Judicial Conference, and they were transmitted to the Supreme Court on October 4, 2017. If the Court adopts the proposed amendments and transmits them to Congress by May 1, 2018, they will take effect on December 1, 2018, absent congressional intervention.

d. Federal and State Legislative Efforts

i. North Carolina H.B. 239

On April 26, 2017, the North Carolina General Assembly passed H.B. 239, over Gubernatorial veto,[31] which allows appeals of class certification decisions directly to North Carolina Supreme Court. The legislation parts from North Carolina case law precedent and eliminates the need for the NC Supreme Court to invoke its supervisory authority to review a grant of class certification prior to resolution of a trial, as the court had done in Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp..[32] North Carolina case law

31 The bill granting a right to appeal class certification decisions was vetoed by Governor Cooper because it was packaged with the reduction of the number of judges on the Court of Appeals from fifteen to twelve. The Governor objected to that portion of the bill due to the increasing burden it would place on the court and his belief that it is unconstitutional.

32 794 S.E.2d 699, 2016 N.C. LEXIS 1120, (NC Dec. 21, 2016).

recognized that the denial of class certification affects a substantial right of plaintiffs because it determines the course of the case for the plaintiffs. Therefore, plaintiffs could immediately appeal a class certification denial to the North Carolina Court of Appeals. However, the courts had found that "no order allowing class certification has been held to similarly affect a substantial right such that interlocutory appeal would be permitted."[33] H.B. 239 does not single out company defendants for benefit in its language, but in effect it secures a guaranteed avenue for early review of class action cases not available to companies before and it minimizes the delay and costs associated with a two-step appellate process. Resolution by the NC high court at that stage provides a defendant company with a level of certainty from which to proceed with litigation. H.B. 239 recognizes the reality that for company defendants the granting of class certification can be equally case determinative as a denial for plaintiffs. H.B. 239's broad language includes: initial grant or denial of class certification and arguably also includes any other "decision regarding class action certification," e.g. subsequent motions to decertify a class, possibly motions to strike class allegations.

ii. Proposed Federal Legislation - H.R. 985: Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017 (FICALA)H.R. 985: Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017 (FICALA)

Ten years ago, Congress tackled several perceived abuses of the class action mechanism by passing the Class Action Fairness Act of 2005 ("CAFA"), which allows defendants to remove certain class actions filed in state court to the more neutral ground of the federal system. In February 2015, the House Judiciary Committee held a hearing to examine the state of class action litigation and current concerns, beginning the process of crafting legislation to address the perceived fairness of class action litigation. As a next step towards overhauling class action procedure, the U.S. House of Representatives passed H.R. 985 – The Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017 (FICALA), which was purportedly meant to benefit both defendant companies and deserving class action plaintiffs. Similar to H.R. 1927, which was passed by the House the previous year, FICALA sought to limit the courts' ability to certify classes in which members have not suffered the same types of alleged injury/damages. Classes that contain uninjured members have been criticized as wasting the courts' and parties' resources, and extracting from defendants overinflated damages, while diluting the recovery of those plaintiffs in the class who were injured. With FICALA, the House meant to clarify that uninjured class members "are incompatible with Rule 23(b)(3)'s current requirement that classes should not be certified unless common legal and factual issues predominate in the class action." FICALA went further than H.R. 1927 (which stalled in the Senate) to address several additional issues considered to be critical in curbing abuses of the class action system.

Several of the issues addressed in FICALA were raised as front-burner issues during the Advisory Committee's process to initiate proposed Rule 23 amendments. Many of the issues ultimately were set aside by the Committee but were taken up by Congress in FICALA. FICALA: (1) prohibited class actions in which named plaintiffs/class representatives are relatives or employees of class counsel, to quell lawyer-driven class actions that arguably benefit only the lawyers; (2) required a showing by plaintiffs that there is a mechanism for identifying members of a class and a feasible way to administer any monetary awards directly to a substantial portion of a defined class, prior to class certification; (3) prohibited the granting of any attorneys' fees until distribution of any award to the class is complete, and requires that any fee award be limited to a reasonable percentage of either the money distributed to the class or the value of an award of equitable relief; (4) required class counsel to file an accounting detailing information regarding payments to class members, (5) prohibited certification of a class for a single issue ("issues classes") unless an entire claim satisfies the requirements of Rule 23; (6) stayed discovery in all class actions while dispositive motions are pending (*e.g.* motions to dismiss, strike class allegations, etc.), unless discovery is necessary to preserve evidence or to prevent undue prejudice to a party; (7) required the disclosure of any contract with a third-party funding litigation; and (8) granted an immediate right to appeal a court's decision denying or granting class certification. FICALA has been criticized as leaning too far in favor of corporate defendants. The bill was sent to the Senate Judiciary Committee for consideration, with no reported action.

33 Frost v. Mazda Motor of Am., Inc., 353 N.C. 188, 193, 540 S.E.2d 324, 327 (2000).

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Tony Lathrop is a seasoned corporate trial lawyer with extensive experience in the areas of complex commercial litigation, zoning and land use, planning and transportation. Lathrop partners closely with his clients to handle trials, litigation and corporate needs in ways that maximize value for their businesses. He uses his experience as a trial attorney, certified mediator, and a state and local appointed official to develop strategies for obtaining optimal trial results or other resolutions in high-stakes matters and to advise his clients regarding strategies to meet their objectives and reduce future risk.

Tony has experience representing a diverse portfolio of clients in a broad range of complex civil litigation and administrative matters. He has represented his clients successfully in the state and federal courts of North Carolina, before mediators and arbitrators, and before North Carolina administrative courts and agencies.

Tony was appointed by Governor Roy Cooper in March 2017 to serve a four-year term on the North Carolina Board of Transportation, where he serves as Chair of the Funding & Appropriation Strategies (FAST) Committee.

Practice Areas

- Class Actions & Multi-District Litigation
- Commercial and Industrial Real Estate Litigation
- Construction and Construction Litigation
- Employment & ERISA Litigation
- Employment & Labor
- Environmental Litigation & Toxic Torts
- Intellectual Property Litigation
- Litigation
- Mediation and Arbitration Services
- North Carolina Business Court Litigation
- Real Estate
- Trade Secrets Litigation
- Transportation & Logistics
- Workers Compensation & Workplace Safety

Speaking Engagements

- “Keeping Pace: Recent Developments in Class Actions,” UNC Festival of Legal Learning, February 10, 2018
- Panel Discussion: “Public Transit and Urban Prosperity: What’s Next?”, November 16, 2017
- Centralina Council of Governments Autonomous Vehicles Workshop, October 25, 2017
- Shifting the Balance: Recent Developments in Class Action Litigation, UNC Festival of Legal Learning, February 11, 2017
- Grimes and Lathrop presenting at the 2016 UNC Festival of Legal Learning, February 2016
- What’s Keeping In-House Counsel Awake at Night?, August 7, 2015, Discussion Group at the Network of Trial Law Firms

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- B.A., University of North Carolina at Chapel Hill, 1983
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PERSONAL JURISDICTION AND PATENT VENUE IN THE WAKE OF BRISTOL-MYERS SQUIBB, BNSF RAILWAY AND TC HEARTLAND

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Introduction

Lack of personal jurisdiction and improper venue are two of the many defenses available to corporate defendants in litigation. Typically, these are not defenses that will end the lawsuit. But they will, or at least should, result in the lawsuit's being brought in the proper place.

Why do jurisdiction and venue matter? Beyond the more lofty Due Process considerations at play, that is, whether a state may exert power over a company which resides beyond its borders, there are a variety of legal and practical differences among jurisdictions. There may be differences in substantive and procedural laws that may apply to your case. There obviously are also differences between each jurisdiction's lawyers, judges, jury pools and potential verdicts. Some jurisdictions (or venues) are seen as more plaintiff-friendly, while others are more defense-oriented, or at least middle of the road.

Plaintiffs naturally seek to file their cases in the jurisdictions they deem the most advantageous to them within the allowable limits of personal jurisdiction and venue. In mass tort litigation, this has included jurisdictions that have little to no connection to the plaintiff, the corporate defendant, or the claims. In patent infringement litigation, the Eastern District of Texas, though not "home" to many corporate defendants, has developed a very busy patent docket and reputation as a friendly jurisdiction for patent plaintiffs.

In its ongoing efforts to curtail the expansion of personal jurisdiction, two decisions of the United States Supreme Court within the last year – BNSF Railway and Bristol-Myers Squibb – have further limited plaintiffs' ability to obtain personal jurisdiction over nonresident corporate defendants with respect to nonresident plaintiffs' claims. A third decision – TC Heartland – has redefined the venue in which patent infringement lawsuits may be brought. These pro-business decisions are already having a significant impact on tort and patent litigation throughout the country.

Personal Jurisdiction Overview

There are two forms of personal jurisdiction -- that is, jurisdiction over the "person" or company, as the case may be -- general jurisdiction and specific jurisdiction. General jurisdiction or "all-purpose" jurisdiction is defined by the residence or activities of the defendant generally. If the company is "at home" in the jurisdiction -- i.e., if the jurisdiction is its state of incorporation or its principal place of business or the company has some other "exceptional" presence in the jurisdiction -- it is subject to general jurisdiction and can be sued there regardless of the residence of the plaintiff or the location of the events underlying the lawsuit.

Specific jurisdiction is different. It derives from the facts of the case and the defendant's related contacts to the jurisdiction. In order for a court to exercise specific jurisdiction over a company, the lawsuit must arise out of or relate to the company's contacts with the jurisdiction. It is case-linked jurisdiction. The company

can be sued there only if the case arises in or is linked to the defendant's contacts to the jurisdiction.

BNSF Railway Co. v. Tyrrell - General Jurisdiction Only Exists Where the Company Is "At Home"

BNSF Railway Co. v. Tyrrell, 137 S. Ct. 1549 (2017), is the Supreme Court's most recent decision regarding the parameters of general jurisdiction. It involved claims brought in Montana state court under the Federal Employers' Liability Act ("FELA") by plaintiffs from North Dakota and South Dakota. Neither plaintiff was a resident of Montana or injured in Montana. Moreover, BNSF Railway was not incorporated in Montana and did not maintain its principal place of business in Montana.

While BNSF Railway is incorporated in Delaware and has its principal place of business in Texas, it has 2,061 miles of railroad track in Montana, approximately 2,100 workers there, generates nearly $2 billion annually in revenue in the state, and recently had invested almost half a billion dollars in Montana. Relying on certain provisions of FELA and Montana's long-arm statute, the Montana Supreme Court found that that activity was sufficient to satisfy general personal jurisdiction over BNSF Railway with respect to the nonresident plaintiffs' claims. The U.S. Supreme Court, relying on its decisions in Goodyear Dunlop Tires Operations, S.A. v. Brown (2011) and Daimler AG v. Bauman (2014), disagreed.

In so doing, the Court invoked the "at home" language of Daimler and explained that the "paradigm" forums in which a corporate defendant is "at home" are the corporation's place of incorporation and its principal place of business. In addition to the "paradigm" forums, the Court, again invoking Daimler, explained that general jurisdiction can exist in the "exceptional case" in which a corporate defendant's operations in another forum are "so substantial and of such a nature as to render the corporation at home in that State." Notwithstanding BNSF Railway's extensive activity in Montana, the Court was not impressed and, perhaps sounding the death knell for the "exceptional case" category of general jurisdiction, repeated the observation made in Daimler that "[a] corporation that operates in many places can scarcely be deemed at home in all of them."

As Justice Sotomayor's dissenting opinion notes, under the majority's rationale, it is "virtually inconceivable" that large multistate or multinational corporations that operate across many jurisdictions will ever be subject to general jurisdiction in any location other than their states of incorporation or principal places of business. Query whether that is a significant problem given that plaintiffs can still sue in jurisdictions where they live and are affected by a corporate defendant's conduct – that is, where there is specific jurisdiction over the defendant. Nevertheless, "at home" general jurisdiction (with respect to plaintiffs and claims unrelated to the jurisdiction in which the lawsuit is brought) certainly appears to be more limited under BNSF Railway. Accordingly, in the wake of BNSF Railway, absent some truly unusual circumstances, plaintiffs can expect to have a very difficult time establishing general jurisdiction over a company in any jurisdiction other than its state of incorporation or principal place of business.

Bristol-Myers Squibb Co. v. Superior Court of California - Denying Specific Jurisdiction with Respect to Nonresidents' Claims

While BNSF Railway addressed general jurisdiction, Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773 (2017), addressed the parameters of specific jurisdiction. The case involved claims brought in California state court by mostly non-California residents against Bristol-Myers Squibb ("BMS"), alleging harm from ingesting Plavix. The non-California resident plaintiffs did not obtain Plavix from a California source, were not injured by Plavix in California, and did not treat for their injuries in California. BMS is incorporated in Delaware and headquartered in New York with substantial operations in New York and New Jersey. Although it engages in business activities in California and sells Plavix there (nearly $1 billion worth in California during the relevant time period), BMS did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for Plavix in California.

Despite all of these facts, the California Supreme Court held that the California courts had specific jurisdiction over BMS with respect to the nonresidents' claims by applying a "sliding scale approach" to specific jurisdiction. The California court concluded that BMS's "wide ranging" contacts with the state, along with the fact that the nonresidents' claims were similar in many

ways to the California residents' claims, were enough to support a finding of specific jurisdiction over BMS with respect to the nonresidents' claims. The majority of the U.S. Supreme Court did not take kindly to this approach.

Relying on 14th Amendment Due Process considerations and what it deemed "settled principles" of personal jurisdiction, the majority of the Court rejected the California Supreme Court's "sliding scale approach" as resembling a "loose and spurious form of general jurisdiction" and "difficult to square with" the Court's precedents which require, in order to find specific jurisdiction, an "affiliation between the forum and the underlying controversy, principally [an] activity or an occurrence that takes place in the forum State." Where no such connection exists, the Court held that specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the state. Further, the mere fact that other plaintiffs (but not the nonresident plaintiffs) were prescribed, obtained, and ingested Plavix in California does not allow California courts to assert specific jurisdiction over the nonresidents' claims. Additionally, the Court did not find it sufficient or relevant that BMS conducted research in California on matters unrelated to Plavix.

Justice Sotomayor, again dissenting, took issue with the majority opinion and its potential consequences. According to Justice Sotomayor, a finding of specific jurisdiction was warranted by prior precedent and "commons sense" as to the nonresidents' claims, at least where they were joined to identical claims brought by residents, in a case such as this "brought against a large corporate defendant arising out of its nationwide conduct." Justice Sotomayor observed, disapprovingly, that the effect of the majority's opinion is to eliminate nationwide mass actions in any state other than those in which a defendant is "essentially at home" and to may make it impossible to bring certain mass actions against two or more defendants headquartered and incorporated in different States, as there may be no state where those defendants are "at home," and so no state in which the suit can proceed. Judge Sotomayor concluded that "[i]t does not offend 'traditional notions of fair play and substantial justice,' …, to permit plaintiffs to aggregate claims arising out of a single nationwide course of conduct in a single suit in a single State where some, but not all, were injured."

Whether you agree with the majority or Justice Sotomayor, the effects of Bristol-Myers Squibb were quickly felt around the country's state and federal courts. Many courts have readily dismissed a variety of out-of-state plaintiffs' claims where specific jurisdiction could not be established. While the products vary, the courts' rationales have been similar in rejecting a finding of specific jurisdiction over a nonresident company where the nonresident plaintiff has not been prescribed or ingested or been exposed to the drug or product or suffered any injury or received any treatment in the forum state. See, e.g., Jordan v. Bayer Corp., et al., No. 4:17-CV-00865-AGF, 2018 WL 837700 (E.D. Mo. Feb. 13, 2018); Siegfried v. Boehringer Ingelheim Pharm., Inc., No. 4:16-CV-1942-CDP, 2017 WL 2778107 (E.D. Mo. June 27, 2017). Moreover, those courts rejecting a finding of personal jurisdiction have not credited a defendant's development, testing, performance of clinical trials, packaging, marketing or sale of the product or drug in the forum state, where that activity is not linked to the nonresident plaintiff's claim. See, e.g., Jordan v. Bayer Corp., et al., supra, 2018 WL 837700; Dyson v. Bayer Corp., et al., No. 4:17-CV-2584-SNLJ, 2018 WL 534375 (E.D. Mo. Jan. 24, 2018).

Not all courts, however, have dismissed nonresidents' claims. For example, a Missouri trial court found specific jurisdiction with respect to the claim of a Virginia plaintiff who allegedly developed ovarian cancer from Johnson & Johnson's talc product where there was evidence that the talc was supplied to Johnson & Johnson by a company conducting business through a Missouri company and the products at issue were manufactured, labeled and packaged at Johnson & Johnson's direction by a Missouri company. See Lois Slemp v. Johnson & Johnson, 22nd Judicial Circuit Court of Missouri (City of St. Louis), No. 1422-CC09326-02, November 29, 2017. In addition, the Philadelphia Court of Commons Pleas denied Johnson & Johnson's motion to dismiss all but one of 71 cases by nonresidents in the pelvic mesh litigation. Although the Court did not provide an explanation for its decision, according to plaintiffs, the implants at issue were made using a mesh manufactured by a company in Pennsylvania. See In Re: Pelvic Mesh Litigation, case number 140200829, in the Philadelphia Court of Common Pleas, December 4, 2017. Each of those trial court decisions is currently on appeal.

Furthermore, Bristol-Myers Squibb has called

into question the continued viability of nationwide class actions except in jurisdictions where there is general jurisdiction over the defendant, that is, in the defendant's "home" state. See, e.g., DeBernardis v. NBTY, Inc., No. 17 C 6125, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018).

TC Heartland LLC v. Kraft Foods Group Brands LLC - "Residence" Is Limited to Defendant's State of Incorporation

While different from the personal jurisdiction jurisprudence of BNSF Railway and Bristol-Myers Squibb affecting mass tort litigation, the U.S. Supreme Court's decision in TC Heartland LLC v. Kraft Foods Group Brands LLC, 137 S. Ct. 1514 (2017), analyzing the patent venue statute, is having its own significant impact on where patent infringement cases are being filed and further highlights the significance of a corporation's state of incorporation for litigation purposes.

The patent venue statute, 28 U.S.C. §1400(b), provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business." TC Heartland addresses the meaning of "resides" in the first prong of §1400(b) and instructs that, as applied to domestic corporations, "reside[nce]" refers only to the state of incorporation of the defendant. In so holding, the Court found that the general venue statute, 28 U.S.C. §1391, which provides that "[e]xcept as otherwise provided by law" and "for all venue purposes," a corporation "shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question," does not apply to patent actions and, therefore does not supply the definition of "resides" in §1400(b).

Before TC Heartland, patent plaintiffs relied on §1391 and precedent from the Federal Circuit that interpreted "resides" to include essentially anywhere that alleged infringing products or services reached. In many instances, this allowed for proper venue in virtually any judicial district in the country and resulted in the Eastern District of Texas's becoming the most popular venue for patent plaintiffs. TC Heartland put an end to that. Since it was decided, filings in the Eastern District of Texas have dropped significantly and the District of Delaware, where many companies are incorporated, has become the nation's top spot for patent filings. In addition, defendants in pending cases have been successful in asserting the venue defense even if it was not previously raised given a Federal Circuit decision in late 2017 that TC Heartland brought about an intervening change in the law.

While TC Heartland's holding with respect to the "reside[nce]" prong of §1400(b) is straightforward, the second prong of §1400(b) -- "where the defendant has committed acts of infringement and has a regular and established place of business" -- is fact-intensive and continues to be litigated.

Conclusion

Although they involve different substantive areas of the law, BNSF Railway and Bristol-Myers Squibb, in the tort realm, and TC Heartland, in the patent realm, each provide another arrow in the quiver of defendants which have been sued in jurisdictions having little to no connection to the parties or the claim. Whether to use that arrow in a particular case remains a decision to be made based on all of the relevant factors – legal and practical – facing that particular defendant. Notwithstanding those particularized considerations, the good news for corporate defendants, thanks to BNSF Railway, Bristol-Myers Squibb and TC Heartland, is that they continue to be empowered to challenge cases that simply do not belong where they have been filed.

GIBBONS

There's No Place Like Home

Personal Jurisdiction and Patent Venue in the Wake of BNSF Railway, Bristol-Myers Squibb and TC Heartland

Chris Viceconte

Why does jurisdiction and venue matter?

- Substantive laws
- Procedures
- Judges
- Jury pool
- Verdicts
- Corporate defendant's "home" state(s)
- Forum shopping

Personal Jurisdiction 101

- General Jurisdiction
  - All Purpose
- Specific Jurisdiction
  - Case-Linked

BNSF Railway Co. v. Terrell
General Jurisdiction

- Montana State Court
- Plaintiffs Not from Montana
- Plaintiffs Not Injured in Montana
- BNSF Railway Not Incorporated or Have Principal Place of Business in Montana
- Montana alleged "wild west" for FELA claims

BNSF Railway Co. v. Terrell
General Jurisdiction

- BNSF Railway's Activities in Montana
  - 2,061 miles of railroad track
  - 2,100 workers
  - Nearly $2 billion in annual business
  - Nearly half a billion dollars in recent investments

BNSF Railway Co. v. Terrell
General Jurisdiction

- "At home" jurisdiction further defined
- "Paradigm" forums
  - State of incorporation
  - Principal place of business
- "Exceptional case" non-existent?
  - Justice Sotomayor's Dissent

BNSF Railway Co. v. Terrell
General Jurisdiction

- Evolution of general jurisdiction
  - "continuous and systematic" operations in forum State – *International Shoe*
  - "so 'continuous and systematic' as to render [it] essentially at home [there]" – *Goodyear* and *Daimler*
  - "at home" limited to "paradigm" forums – *BNSF Railway*

Bristol-Myers Squibb Co. v. Superior Court
Specific Jurisdiction

- California State Court
- Nonresident Plaintiffs
  - Not prescribed drug in California
  - Did not ingest drug in California
  - Not injured in California
  - Not treated in California
- BMS did not develop, create marketing strategy, manufacture, label, package, or work on regulatory approval for drug in California

Bristol-Myers Squibb Co. v. Superior Court
Specific Jurisdiction

- BMS not incorporated or headquartered in California
- Extensive business activities in California
  - Research facilities
  - Sales force
  - $1 billion in sales

Bristol-Myers Squibb Co. v. Superior Court
Specific Jurisdiction

- California applies "sliding scale approach" to personal jurisdiction
- BMS's "wide-ranging" contacts with California
- Nonresidents' claims similar to California residents' claims

Bristol-Myers Squibb Co. v. Superior Court
Specific Jurisdiction

- Specific jurisdiction requires an "affiliation between the forum and the underlying controversy, principally [an] activity or an occurrence that takes place in the forum State."
- Where no such connection exists, there can be no specific jurisdiction regardless of the extent of a defendant's unconnected activities.

Bristol-Myers Squibb Co. v. Superior Court
Specific Jurisdiction

- Justice Sotomayor's Dissent
  - Advocates for aggregation of claims against large corporate defendants "arising out of a single nationwide course of conduct in a single suit in a single State where some, but not all, were injured."
  - Efficiency and expediency versus Due Process and predictability

Bristol-Myers Squibb Co. v. Superior Court
Specific Jurisdiction

- Many state and federal courts immediately follow *Bristol-Myers Squibb*
  - Nonresident plaintiffs
  - Activity of defendants in forum State not linked to nonresidents' claims
    - Marketing campaigns
    - Testing
    - Clinical trials

Bristol-Myers Squibb Co. v. Superior Court
Specific Jurisdiction

- Courts finding personal jurisdiction as to nonresidents' claims
  - *Slemp v. Johnson & Johnson*, 22nd Circuit Court of Missouri (on appeal)
    - Talc supplied and products manufactured, labeled and packaged by Missouri-based company
  - *In Re: Pelvic Mesh Litigation*, Philadelphia Court of Common Pleas (on appeal)
    - Implants made with mesh made by Pennsylvania company

Bristol-Myers Squibb Co. v. Superior Court
Specific Jurisdiction

- End of nationwide class actions?
  - Unless based on general jurisdiction
- Jurisdictional discovery
  - Invasive and expensive

TC Heartland LLC
Patent Venue

- 28 U.S.C. §1400(b) -- "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business."
- "Reside[nce]" refers only to the State of incorporation of the defendant.

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- District of Delaware filings surpass E.D. Texas
- 2nd prong of 28 U.S.C. §1400(b) – "where defendant has committed acts of infringement and has a regular and established place of business" – is fact-intensive and continues to be litigated

Strategic Considerations

- Timing of assertion of defense
- Avoid being lone defendant in separate lawsuit
- Contribution among joint tortfeasors
- Jurisdictional discovery
- Relationships with counsel and Court

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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.

Focus Areas

- Business and Commercial Litigation - 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.
- Products Liability - 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.
- Delaware Counsel - 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.

Honors and Awards

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

Publications

- Delaware Supreme Court Gives Preclusive Effect to Federal Court Dismissal of Derivative Suit for Failure to Show Demand Futility
- 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
- New Patent Case Scheduling Order Seeks to Achieve Efficiencies in Delaware
- Proposed Amendment to Delaware's LLC Act Addresses Existence of Default Fiduciary Duties of LLC Managers

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WE'RE NOT (STAYING) IN KANSAS ANYMORE: WINNING THE PERSONAL JURISDICTION CHALLENGE

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In the wake of the United States Supreme Court's decisions in Daimler and Bristol-Myers, personal jurisdiction challenges are being filed in massive numbers, particularly in those jurisdictions typically favored by plaintiffs. Courts historically hesitant to render decisions are now forced to adjudicate the issues. Indeed, the national impact of Daimler and Bristol-Myers is playing out in real time across the country, with federal and state courts redefining the approach and often granting defendants' motions to dismiss or for mistrials and reversing jury verdicts.

That said, lawyers and clients should not reflexively file such motions without first assessing and counseling their clients on the controlling laws of the alternative forums and evaluating the prospect of litigating the same case in different jurisdictions. This article details the new parameters by which courts will resolve personal jurisdiction challenges, and outlines critical issues that counsel should consider with their clients before asserting them.

The New Parameters For Establishing Personal Jurisdiction

At the outset of every litigation, a preliminary question is asked - does the court have personal jurisdiction over the defendant? Without personal jurisdiction, the court lacks the requisite authority to adjudicate a case. Where a defendant – either an individual or corporation – does not reside in a jurisdiction, a court may exercise personal jurisdiction only to the extent permitted by the Due Process Clause of the United States Constitution. This requires a showing that the defendant has sufficient contacts with the forum state so the court's exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice." BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1558 (2017) (internal quotation marks and citation omitted). While the interests of the forum and the plaintiff's choice of forum are factors to be considered, the "primary concern is the burden on the defendant," and the primary focus of the "personal jurisdiction inquiry is the defendant's relationship to the forum State." Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty., 137 S. Ct. 1773, 1779 (2017) (internal quotation marks and citation omitted).

Personal jurisdiction can be "general" - meaning, all-purpose jurisdiction - or it can be "specific" - meaning, conduct-linked jurisdiction. Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014). For general jurisdiction, the nonresident defendant must have connections to the forum state that are so "continuous and systematic" as to render the party essentially at home there. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011). "Specific" jurisdiction may be asserted if the lawsuit arises out of the defendant's contacts with the forum state. Bristol-Myers, 137 S. Ct. at 1780; Goodyear, 564 U.S. at 919. The distinction between these concepts is critical to understanding the limits of a court's jurisdictional reach.

A. General Jurisdiction

The Supreme Court has addressed the limits and

requirements for general jurisdiction in a series of recent decisions. In these cases, the Court explained that "the paradigm forum for the exercise of general jurisdiction" over a corporation is one in which the corporation is (a) incorporated or (b) has its principal place of business. Goodyear, 564 U.S. at 924; see also Daimler, 134 S. Ct. at 760. However, there are "exceptional circumstances" where general jurisdiction can be established in a forum state that differs from the corporation's place of incorporation or principal place of business. In these rare instances, jurisdiction may be found where the entity's connections to the forum are "so substantial and of such a nature as to render the corporation at home in that State." Tyrrell, 137 S. Ct. at 1558 (quoting Daimler, 134 S. Ct. at 761, n.19). Such exceptional circumstances have been found where the corporation conducts its management activities within the forum, such as distributing salaries, holding board meetings, and authorizing purchases. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

B. Specific Jurisdiction

Specific jurisdiction derives from "the relationship among the defendant, the forum, and the litigation." Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014) (internal citation and quotations omitted). "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." Id. at 1122. "In other words, there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." Bristol-Myers, 137 S. Ct. at 1780. For specific jurisdiction to attach, "even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales." Goodyear, 564 U.S. at 930, n.6.

In Bristol-Myers Squibb Co. v. Superior Court of California, the Supreme Court was asked to evaluate whether California had specific jurisdiction over a class action that asserted state-law claims for injuries allegedly caused by the Bristol-Myers drug, Plavix. The affected plaintiffs did not reside, were not prescribed Plavix, did not purchase Plavix, did not ingest Plavix, and were not injured by Plavix in California. Bristol-Myers sold the medication in California and engaged in substantial business activities there, including maintaining five research and laboratory facilities which employed approximately 160 employees, a small state-government advocacy office in Sacramento, and about 250 sales representatives in California. However, Bristol-Myers "did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for Plavix in [California]." Bristol-Myers, 137 S. Ct. at 1775. The facts confirmed that the plaintiffs' product liability claims related to the alleged defects in the warnings, design, and manufacture of Plavix did not arise from Bristol-Myers's business activities conducted in, or directed from, California. The Court therefore determined that the California court did not have specific jurisdiction over the plaintiffs' claims because there was no "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." Id. at 1781.

Critical Factors When Considering a Personal Jurisdiction Challenge

Prevailing on a personal jurisdiction challenge likely will not end the litigation for the moving defendant unless the claims are barred for some other reason; instead, it merely means that the plaintiff can re-file all or some of the claims in another forum. Accordingly, there are a number of strategic issues to consider when deciding whether to assert or oppose a challenge.

The analysis begins with identifying the state(s) where the plaintiff has a reasonable basis to establish either general or specific jurisdiction. These other forums could include states where the defendants are "at home," that is the state of incorporation or principal place of business. The alternate forums could include states where key events occurred that gave rise to plaintiffs' claims, e.g., where the plaintiff purchased or used the product at issue, or where the defendant developed, created a marketing strategy for, manufactured, labeled, packaged, or worked on the regulatory approval for the product. Bristol-Myers, 137 S. Ct. at 1775. Armed with a map that plots plaintiff's potential alternative forums, counsel must conduct a comparative analysis of the potential benefits and pitfalls posed by litigating the plaintiff's particular claims under each state's laws. The critical inquiries include:

A. Does the Alternative Forum's Law Favor Your Client?

Counsel must evaluate the available claims and

defenses under the alternative forum's law as well as its standards for deciding dispositive motions. For example, a manufacturer defending a product liability claim with strong evidence that its product conformed with the state-of-the-art at the time of manufacture will fare better in jurisdictions like New York, which recognizes this defense, rather than New Jersey, where the state-of-the-art defense has been rejected in failure-to-warn cases involving asbestos exposure claims. See e.g. Magadan v. Interlake Packaging Corp., 845 N.Y.S.2d 443 (2d Dept. 2007); see also Fischer v. Johns-Manville Corp., 103 N.J. 643 (1986).

Practitioners defending a toxic tort case based on weak exposure proofs might prefer to litigate and move for summary judgment in a jurisdiction like New Jersey, where the plaintiff must prove that the alleged exposure was a substantial factor in causing the plaintiff's disease, as opposed to California, where the plaintiff must prove that the alleged exposure was a substantial factor in increasing the risk of the exposure-related injury, or New York, where the moving defendant has the burden to demonstrate that the alleged exposure could not have contributed to the causation of the plaintiff's injury. See Sholtis v. American Cyanamid Co., 238 N.J. Super. 8 (App. Div. 1989). See also Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203 (Cal. 1997); Koulermos v. A.O. Smith Water Prods., 27 N.Y.S.3d 157 (1st Dept. 2016).

Layered on top of these issues are those involving choice of law principles and whether the relevant substantive or procedural law principles are critical to the ultimate decisions in the case or whether certain law will apply, regardless of the ultimate jurisdiction/ venue of the case.

B. Does Your Client Prefer to be in a Frye or Daubert Jurisdiction?

Defense counsel also must compare the original forum's evidentiary standards versus those applied by the alternative jurisdictions. Critical to product liability and toxic tort cases is whether the state law applies the Daubert or Frye or a hybrid test to gauge the admissibility of expert testimony. The Frye standard requires trial judges to admit expert evidence that comports with "generally accepted" knowledge within the relevant scientific community. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Thus, expert evidence that comports with a "generally accepted" principle but is derived from an otherwise weak foundation or methodology might be admitted in a Frye jurisdiction. States like Illinois and Kansas restrict the application of their versions of Frye to scientific testimony, but not necessarily medical testimony. See Warstalski v. JSB Const. & Consulting Co., 892 N.E.2d 122 (Ill. App. 2008); State v. McHenry, 136 P.3d 964 (Kan. App. 2006).

Conversely, trial judges in Daubert-like jurisdictions must assess the reliability of expert evidence. Daubert v. Merrell Dow. Pharms., Inc., 509 U.S. 579 (1993). The Daubert standard evaluates the admissibility of expert testimony on the basis of four factors: (1) whether such evidence was generally accepted by the relevant scientific community; (2) whether the methodology was published and subject to peer review; (3) whether the methodology has a known or potential rate of error; and (4) whether the results are testable. Legal pundits acknowledge the stated rigors of the Daubert standard, while worrying that causation theories based on "junk science" can survive exclusion by merely claiming adherence to a legitimate methodology. These concerns often turn on whether the trial judges shy away from the required reliability assessment under Daubert and forego evaluating the basis and methodology underlying an expert opinion for fear of sliding into an impermissible credibility assessment of the challenged expert evidence. Because the gatekeeping role can be carried out differently on a state-by-state basis – and possibly even on a courthouse by courthouse basis – practitioners must dig into recent decisions to determine how the relevant judges discharge their gatekeeping duties when faced with the type of expert proofs anticipated in their cases.

C. Will Your Client's Potential Exposure Be Impacted in the Alternative Forum?

Critical to the analysis is whether the current or alternative forums have caps on compensatory damage awards or if other types of damages, like punitive damages, are barred entirely. Three states – Michigan, Nebraska, and Washington – do not permit punitive damage awards. See Rafferty v. Markovitz, 602 N.W.2d 367 (Mich. 1999); Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566 (Neb. 1989); Dailey v. N. Coast Life Ins. Co., 919 P.2d 589, 590 (Wash. 1996). Three states – Louisiana, New Hampshire, and South Dakota – only permit punitive

damage awards in certain statutorily created causes of action. See Mosing v. Domas, 830 So.2d 967, 973 (La. 2002); N.H. Rev. Stat. Ann. § 507:16; S.D. Codified Laws § 21-1-4. Twenty-seven states permit punitive damage awards but impose caps on the quantum of punitive damages that may be recovered.

Most states do not limit the non-economic damages that a party may recover. However, in product liability and other personal injury lawsuits, eleven states, including Alaska, Colorado, Hawaii, Idaho, Kansas, Maryland, Mississippi, Ohio, Oklahoma, Oregon and Tennessee, have statutorily imposed ceilings on pain and suffering awards. Alaska Stat. § 09.17.010(b); C.R.S. 13-21-102.5; Haw Rev. Stat. § 663-8.7; I.C. § 6-1603; K.S.A. § 60-19a02; 60-1903; Md. Code Ann. Cts & Jud. Proc. § 11-108; Miss. Code § 11-1-60(2)(a)-(b); Ohio Rev. Code § 2314.18(B)(2); Oklahoma Stat. § 23-61.2(B); ORS 31.710; Tenn. Code Ann. 29-39-101, et seq.

Even fewer states - Colorado, Indiana, Louisiana, New Mexico and Virginia - cap both economic and non-economic damages, and these limitations apply to medical malpractice actions only. C.R.S. 13-64-302; I.C. § 34-18-14-3, 34-13-3-4; La. R.S. § 40:1299.41, et seq.; N.M. Stat. § 41-5-1, et seq.; Va. Code § 8.01-581.15.

D. Will Your Client Gain Access to Federal Court?

The alternative forums also might create complete diversity among the parties and provide an opportunity for removal to federal court. Consider whether the alternative forum might be where key events gave rise to the claim – e.g., the state where the plaintiff alleges product exposure – which often differs from both the plaintiffs' home state and the state where the defendant was either incorporated or has its principal place of business. For one reason or another, a party may prefer federal court, particularly where there is concern about a hometown advantage. Federal courts have been known to follow more stringent pleading requirements, utilize more uniformly applied procedural and evidence rules, draw from larger jury pools, and be less influenced by local factors or issues. In certain jurisdictions, having federal judges who are appointed rather than elected may provide the parties with more confidence in the process. A federal court venue will also assure that the Daubert standard will govern the admissibility of expert-related and novel scientific evidence.

E. Will Joint and Several Liability Apply?

In cases involving multiple defendants, it is important to evaluate the joint and several liability laws in the potential forum states, which impacts the extent to which a party is expected to bear the risk that a plaintiff will be unable to recover damages from an insolvent party. This analysis should include an evaluation of how settled parties are treated at trial. Some jurisdictions use a pro tanto approach in which a non-settling defendant's liability is reduced by the amount paid by a settling defendant. Others use a pro rata approach where liability is distributed equally among liable defendants, regardless of fault. In some pro-rata jurisdictions, like Massachusetts, settled parties do not appear on the verdict sheet and the liable defendants may be entitled to a set-off for any settlements, making these jurisdictions particularly unattractive for cases involving a likely allocation of liability among several defendants. Other jurisdictions, like New Jersey, use a modified pro rata approach where a jury apportions liability among defendants, including settled parties and bankrupt entities, based on each party's relative degree of fault.

F. Will Your Client Be The Only Defendant at Trial and on the Verdict Sheet?

Allocation becomes critically important where a successful personal jurisdiction motion leaves a party defending the case in a new forum while a parallel action continues in the original jurisdiction. Counsel should consider the potential downside of a client standing as the only defendant at trial or on the verdict sheet if no other defendants are subject to jurisdiction in the re-filed or transferred action. The jurisdictional arguments can be used as a sword in certain settings and a shield in others. New York's civil procedure rules provide that a defendant may seek an apportionment of fault to nonparties in an action, but a recent decision barred this practice if the plaintiff "proves that with due diligence he or she was unable to obtain jurisdiction over" the nonparty tortfeasor in the action. See CPLR § 1601; Artibee v. Home Place Corp., 28 N.Y.3d 739 (2017).

Other jurisdictions, like New Jersey, permit juries to allocate fault to a nonparty that settled in a separate but concurrent tort action arising out of the same injury and events. See Carter by Carter v. Univ. of Med. and Dentistry of New Jersey – Rutgers Med. Sch., 854 F.

Supp. 310 (D.N.J. 1994). New Jersey does not require the defendant to implead the nonparty, provided that the plaintiff had more than "last minute" notice that such an allocation would be sought. Id.; see also Kranz v. Schuss, 447 N.J. Super. 168 (App. Div. 2016). In such situations, defendants would be wise to utilize the first pleading or discovery responses to notify all parties of the identities of any non-parties against whom an allocation will be sought.

Jurisdictions such as Indiana and Arizona have comparative fault statutes that specifically permit defendants to assert a "nonparty" defense so that the defendant can seek an allocation of fault against a nonparty without resorting to impleader. See e.g. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 911 (Ind. 2001); A.R.S. §§ 12–2501 to 12–2509; Larsen v. Nissan Motor Corp. in U.S.A., 194 Ariz. 142, 978 P.2d 119 (Ct. App. 1998). Similar to the New Jersey cases, these statutory schemes require the defendant to disclose of the identity of all nonparties against whom an allocation is sought within a particular time frame. See id.

G. Is the Venue Favorable to Your Client?

The proverbial caution "Be careful what you wish for" is no more relevant than with personal jurisdiction challenges that might cause a case to move from one plaintiff-friendly jurisdiction to another even less hospitable place. Imagine the conversation scheduled to explain justification for the lawyer time and expense to achieve such a result. Practitioners would be wise to understand and communicate the risks associated with potential alternative forums and obtain informed consent from the client before a jurisdictional challenge is lodged or waived.

H. What Is the Deadline for Asserting a Personal Jurisdiction Challenge?

The process and deadlines for asserting personal jurisdiction challenges vary significantly on a state-by-state basis. For instance, in Pennsylvania, within 20 days of service of the complaint, defendants must file preliminary objections outlining the salient facts concerning the lack of personal jurisdiction, while in New Jersey, defendants are afforded a longer time period to act and only need to move to dismiss within 90 days of filing the Answer. See 231 Pa. Code Rules 1017, 1026 and 1028; see also New Jersey Rule of Court 4:6-3. Failing to act within the window can forfeit the opportunity to escape an undesirable jurisdiction. With this in mind, the potential outcomes and client goals must be researched and factored into the decision-making process. On a simultaneous and parallel track, counsel must also work with the client to compile all of the important information necessary to demonstrate that there is neither general jurisdiction over the company in that state nor specific jurisdiction over the plaintiff's claim.

Laying the Groundwork for A Successful Personal Jurisdiction Challenge

A successful personal jurisdiction challenge must be made by motion or application accompanied by a supporting affidavit signed by a representative who is familiar with the company's current or historic contact with the particular state and those activities that are specific and relevant to the plaintiff's claims. The substance of the affidavit must satisfy the mandates of Daimler and Bristol-Myers and demonstrate that the entity (1) is not "at home" in the forum; and (2) conducts no business activities in the forum that give rise to the plaintiff's claims. The affiant might be deposed, and so his/her knowledge and presentation as a witness must be considered.

A. Defeating General Jurisdiction

To defeat general jurisdiction, the affidavit must identify the entity's state of incorporation and the location of the entity's principal place of business, which is typically defined as "the place where a corporation's officers direct, control and coordinate the corporation's activities … And in practice it should normally be the place where the corporation maintains its headquarters …" Hertz Corp. v. Friend, 559 U.S. 77 (2010). Under the guidance of Daimler and Perkins, the affiant should attest that the entity does not hold board meetings, shareholder meetings or other management meetings in the jurisdiction and that the entity does not maintain bank accounts there, and if it does, that the entity does not pay salaries or make purchases from the jurisdiction.

Clients should be aware that plaintiffs often oppose jurisdictional challenges by arguing that a corporate defendant consented to general jurisdiction by registering to do business in the forum state. Numerous courts have rejected this argument and confirmed that

corporate registration in a state is insufficient to impose general jurisdiction. See Dutch Run-Mays Draft, LLC v. Wolf Block, LLP, 450 N.J. Super. 590 (App. Div. 2017) (a plaintiff must show more than that the defendant engaged in some business or complied with corporate registration requirements of the forum); Genuine Parts Co. v. Cepec, 137 A.3d 123, 137 (Del. Sup. Ct. 2016); ("[Daimler] made clear that it is inconsistent with principles of due process for a corporation to be subject to general jurisdiction in every place it does business."); Chatwal Hotels & Resorts LLC v. Dollywood Co., 90 F. Supp. 3d 97, 105 (S.D.N.Y 2015) ("After Daimler, with the Second Circuit cautioning against adopting 'an overly expansive view of general jurisdiction,' the mere fact of [defendant's] being registered to do business [in New York] is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business.") (quoting Gucci Am. v. Weixing Li, 768 F.3d 122, 135 (2d Cir. 2014)); Magill v. Ford Motor Co., 379 P.3d 1033, 1039 (Colo. 2016), (despite Ford's extensive activities in Colorado, "Nothing about Ford's contacts with Colorado" including maintaining a registered agent, "suggest that it is 'at home' here"); State ex rel Norfolk Southern Ry. Co. v. Dolan, 512 S.W.3d 41 (Mo. 2017); First Community Bank, N.A. v. First Tenn. Bank. N.A., 489 S.W.3d 369 (Tenn. 2015); Segregated Account of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.,-- N.W.2d --, No. 2015-AP-1493, 2017 WL 2824607 (Wis. Jun. 30, 2017); Wal-Mart Stores, Inc. v. LeMaire, 395 P.3d 1116 (Ariz. App. Div. 2017); Brown v. Lockheed Martin Corp., 814 F.3d 619 (2d Cir. 2016).

At least one district court and one state court have held that registering to do business does confer personal jurisdiction. Bors v. Johnson & Johnson, 208 F.Supp. 3d 648 (E.D. Pa. 2016); Kearns v. New York Community Bank, No. 115, 470, 2017 WL 114818 (Kan. Ct. App. March 24, 2017) (unpub.) (citing Merriman v. Crompton Corp., 146 P.3d 162, 177 (Kan. 2006) ("When a corporation applies to do business in Kansas, it consents to personal jurisdiction. Consenting to jurisdiction in Kansas by applying to do business in the state does not violate the requirements of due process."). Clients should be mindful of state statutes that explicitly warn that registration will subject the entity to the state's personal jurisdiction. Pennsylvania has such a statute and, thus far, recent district court opinions interpreting this statute have affirmed that a corporation consents to general jurisdiction when it registers to do business in Pennsylvania. See Bors, 208 F.Supp. 3d 648; Hegna v. Smitty's Supply Co., No. 16-03613, 201 WL 2563231 (E.D. Pa. Jun. 13, 2017). However, one Pennsylvania state trial court recently rejected this argument and held that the non-resident defendants' respective registration as foreign corporations with the Commonwealth did not confer general jurisdiction. See Smith v. United States Steel Corporation, et al, Philadelphia Court of Common Pleas, Case No. 170207648. (Jul. 20, 2018); Davis v. United States Steel Corporation, et al, Philadelphia Court of Common Pleas, Case No. 170401879. (Nov. 3, 2017).

B. Defeating Specific Jurisdiction

Defeating specific jurisdiction under Bristol-Myers requires the defendant to establish that its business activities had no relationship to the plaintiff's claims. In product liability actions, the defendant must establish that the plaintiff neither purchased or used the identified product in the forum. The defendant must next confirm that it did not develop, manufacture, package, label or direct marketing for the identified product in the forum, thereby establishing that it conducted no activities in the forum that would give rise to the plaintiff's claims that the product is defective in design, manufacture or warnings. This process is significantly more complicated in multi-defendant toxic tort claims where plaintiffs typically do not identify the specific products to which they were allegedly exposed at any particular time, but instead allege exposure only to a particular type of product. In response, the defendant should try to develop facts to show that plaintiff's chosen forum was not where it developed, manufactured, and directed labeling and marketing activities for the alleged product type.

This requires a careful examination of the history of the product from its initial product development phase, even if these events took place before the alleged period of use or exposure. The resulting corporate affidavit will help make an appropriate record and confirm that the forum has no relationship to where the product was designed and formulated, from whom and from where the company purchased the raw materials used to make the product, including any alleged to be defective, where relevant testing of the product took place, where the product was manufactured, where the company performed quality control functions, where the

product labels were prepared, designed, manufactured and placed on the product, where the products were packaged, and finally, from and to where the product was ultimately distributed. Even if this investigation excludes the current forum as the place where all of these functions took place, the affidavit should also ideally confirm that no meetings or inspections took place or decisions related to these tasks were made in the forum.

Defendants also should not discount the Bristol-Myers Court's suggestion that it might have found jurisdiction had Bristol-Myers contracted with its third-party distributor in California to distribute the products used by the plaintiffs. Thus, the investigation ideally should determine whether there were company contracts with any in-state third-parties, and, if so, whether those contracts involved functions related to the development, manufacture, and marketing of the product within the forum. If the defendant contracted with an in-state third-party, then the affidavit should concisely detail the extent and nature of these contracts, affirm that the third-parties have no managerial or supervisory functions over the defendant, and indisputably confirm that these third-party contracts were unrelated to any products that plaintiffs allege are causally connected to their injuries.

C. Responding to Jurisdictional Discovery

While the Daimler and Bristol-Myers decisions give practitioners new clarity on personal jurisdiction standards, what remains far from clear is whether a court can order a party to engage in limited jurisdictional discovery before the court decides the motion. Ideally, any affidavit that accompanies a jurisdictional motion should leave no relevant corporate questions unanswered. However, if this is not possible, and additional information is sought through discovery requests, whether court-sanctioned or not, clients are best served by lodging objections to the discovery that explicitly state that the discovery is improper due to the Court's lack of jurisdiction over the defendant. The objections should state that the defendant preserves its jurisdictional defenses and its responses to discovery or deposition notices do not constitute waiver of any jurisdictional defenses. A motion for a protective order should be considered where the plaintiff seeks discovery or depositions that go beyond the scope of the corporate background deemed relevant to general and specific jurisdiction in Daimler, Perkins and Bristol-Myers.

Conclusion

The Daimler and Bristol-Myers decisions have combined to define the limits of general and specific jurisdiction and thus fortify – perhaps even restore— the Due Process rights of corporate defendants who are sued in jurisdictions where they are neither at home nor have conducted activities that even remotely gave rise to the plaintiff's claim. Defendants can and should endeavor to exit those jurisdictions where they do not belong, but only after confirming that the potential alternative forums are less hazardous than plaintiff's chosen forum. Otherwise, counsel and their clients could find themselves jumping out of the frying pan and into an inferno.

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We're Not (Staying) in Kansas Anymore: Winning the Personal Jurisdiction Challenge

Presented by:

Diane Fleming Averell

Due Process Rights of Corporate Defendants Restored Under *Daimler and Bristol-Myers*

- The "primary concern is the burden on the defendant"
- The primary focus of the "personal jurisdiction inquiry is the defendant's relationship to the forum State"

Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty., 137 S. Ct. 1773, 1779 (2017)

Approach Trends with Caution

3

Look before you leap, otherwise…

4

Identify The States Where Personal Jurisdiction Can Be Established

Daimler AG v. Bauman, 134 S.Ct. 746 (2014)	*Bristol-Myers Squibb Co. v. Superior Court of California*, San Francisco Cty., 137 S. Ct. 1773 (2017)
General Jurisdiction: • State of Incorporation • Principal place of business • Exceptional Case: where the entity's connections are "so substantial and of such a nature as to render the corporation **at home** in that State" • Created via relocation of management team and activities during WW II. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).	**Specific Jurisdiction**: Activities in the forum must give rise to plaintiff's claim: • Where plaintiff allegedly purchased, used, and was injured by defendant's product • Where defendant developed, created a marketing strategy for, manufactured, labeled, packaged, or worked on the regulatory approval for the product in controversy

5

Evaluating the Alternative Forum

- What are the available claims, defenses, and summary judgment standards?
- Is it a *Frye* or *Daubert* jurisdiction?
- What type of damages are available?
- Is there an opportunity for removal to federal court?
- Will joint and several liability apply?
- Will your client be alone at trial and on the verdict sheet?
- Is the venue plaintiff friendly (or worse – a judicial hellhole)?
- What is the deadline and process for asserting a personal jurisdiction challenge?

6

The Anatomy of a Successful Challenge

- Motion
- Written Discovery
- Deposition of a Corporate Representative
- Successful challenge likely will not end the matter

Laying the Groundwork for a Successful Challenge

- Motion must be accompanied by an affidavit of a Corporate Representative
- Affiant must be familiar with the company's current and historic contacts with the challenged forum
- Affiant likely will be deposed - carefully select your representative

Defeating General Jurisdiction

- The affidavit must:
  1) Identify the state of incorporation and principal place of business
  2) Attest that the corporation does not hold board meetings or shareholder meetings in the forum
  3) Deny that management functions are directed from the forum
  4) State that the corporation does not maintain bank accounts in the forum; and if it does, clarify that it does not pay salaries from the forum

Defeating General Jurisdiction

- Corporate Registration – Consent to General Jurisdiction?
- States that have rejected this theory:
  - New Jersey, Arizona, Colorado, Delaware, Missouri, New York, Tennessee, and Wisconsin
- Kansas – registering to do business confers personal jurisdiction
- Pennsylvania – conflict between E.D. Pa decision and recent rulings in the Court of Common Pleas, Philadelphia County

Defeating Specific Jurisdiction

- The affidavit must:
  1) Establish that its business activities within the forum, if any, have no relationship to the plaintiff's claims
  2) Rely on the Complaint to show that plaintiff neither purchased nor used the identified product in the forum
  3) State that the corporation did not develop, manufacture, package, label, or direct marketing or regulatory affairs for the identified product in the forum

Defeating Specific Jurisdiction

- Third-party relationships – potential avenue to confer personal jurisdiction
  1) The affidavit should deny that it contracted with third parties within the forum that handled the functions outlined in *Bristol-Myers*
  2) If a third party within the forum *did* contribute to the product, then the affidavit should concisely detail the extent and nature of these activities to establish that the third party's conduct did not give rise to the plaintiff's claim

Use *Daimler* and *Bristol-Myers* to Define the Scope of Discovery

- Written Discovery
  - Objections must state: (1) discovery is improper due to the Court's lack of jurisdiction over the defendant; (2) defendant preserves its jurisdictional defenses and its responses to discovery or deposition notices do not constitute waiver of any jurisdictional defenses
  - Provide substantive answers to questions relevant to the *Daimler* and *Bristol-Myers* criteria

13

Use *Daimler* and *Bristol-Myers* to Define the Scope of Discovery

- Deposition
  - Serve written objections to the deposition notice
  - State that the witness will be prepared to answer questions relevant to the *Daimler* and *Bristol-Myers* criteria
  - File a motion for a protective order if necessary
  - At the deposition, question your witness to cover the criteria
  - Supplement the motion record with the deposition transcript

14

DIANE AVERELL

Principal

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Diane Averell is a member of the firm's Management Committee. Diane strives to serve the best interests of her clients by understanding their business, products, and long-term goals. She works to understand the business environment behind the case in order to define what will constitute a "win" for her clients. Armed with this insight, Diane is a fearless advocate and works tirelessly to defend her clients while respecting their business objectives.

Diane has handled business-to-business disputes and defended personal injury claims on behalf of publicly traded companies, privately held corporations, and family-owned enterprises. Representing manufacturing companies, she has also defended failure-to-warn product liability claims related to prescription and over-the-counter drugs, industrial chemicals and minerals, petroleum products, power tools, and tobacco products. Although she handles all aspects of complex litigation, her passion is working with toxicologists, epidemiologists, and physicians to defend her clients' products on the issues of general and specific causation. Diane has tackled medical and scientific literature related to a wide range of human cancers (bladder, liver, kidney, prostate, breast, ovarian, uterine, lung, leukemia and non-Hodgkin's lymphoma) as well as stroke and cardiac disease. The culmination of her careful research and preparation is the strategic and surgical depositions of the plaintiffs and their experts, always with an eye towards summary judgment or eliminating the claims remaining for trial.

Practice
- Litigation
- Life Sciences Litigation
- Product Liability
- Toxic and Environmental Tort
- Business Disputes and Counseling

Industries
- Chemical
- Life Sciences
- Manufacturing

Honors and Awards
- Recognized on the New Jersey Super Lawyers List, Personal Injury-Products: Defense, 2016 - 2018
- Recognized by New Jersey Law Journal in their annual "40 Under 40" list of attorneys, 2011
- Recognized on the New Jersey Super Lawyers "Rising Stars" List, 2009 -2010, 2013

Education
- Villanova University School of Law, Villanova, Pennsylvania, J.D., 2000 - Champion, 1999 National Family Law Appellate Moot Court Competition; Best Brief, 2000 National First Amendment Appellate Moot Court Competition
- Villanova University, Villanova, Pennsylvania, B.A., cum laude, 1997 - Phi Kappa Phi National Honor Society; Phi Sigma Alpha National Political Science Honor Society

PANEL: CHARTING A COURSE INTO THE FUTURE PRACTICE OF LAW

Moderator: Jason Lien
Maslon (Minneapolis, MN)
612.672.8319 | jason.lien@maslon.com

Visions of the future do not always age well. Some predictions are too stuck in the present: in 1993, AT&T predicted that we would be sending faxes from the beach.[1] Some predictions are too optimistic: an artificial intelligence pioneer claimed that automation would replace all human labor within 20 years, in 1965.[2] And some visions of the future are downright terrifying, like when The Simpsons posited a world without lawyers, which made attorney Lionel Hutz shudder at the thought of everyone getting along.[3]

Predictions that fare better focus on the needs of people and imagine how technology and industry will meet those needs.[4] Therefore, charting a path for the future of law must envision the future needs of lawyers' clients. We should not forget that lawyers cannot practice law without clients.[5] After all,

> lawyers do not initiate business deals; clients bring the deals to them. Lawyers may contribute to negotiating and documenting transactions, but the underlying economic activity has little to do with the lawyer's role. So, too, with litigation. For the most part, lawyers do not initiate disputes. Clients bring them controversies, some of which may lead to litigation, but the level of litigiousness tends to have more to do with the clients' activities than it does with how lawyers would prefer to use their time.[6]

Thus, the future of the practice of law is really the future of our clients.[7] That is a future of increased competition and increased opportunities from globalization.[8] The future also contains an inevitable increase in automation and artificial intelligence within all industries—from the semi-truck cab[9] to the surgical suite.[10] Our clients see these forces at play in their businesses, and these forces both contribute to and attempt to solve "an inexorable pressure for cost control."[11]

Successful lawyers will prepare themselves to meet the needs of clients impacted by these changes. Therefore, here we will consider how lawyers will meet the needs of globalized clients, who will expect service that has been cost-controlled through automation. Globalization presents two knowledge needs: vertical and horizontal. Vertically, the lawyer will need to more deeply understand local factors for each dispute. Horizontally, the lawyer will need to more broadly

1 Chris Weller, *22 Years Ago, AT&T Made Scarily Accurate Predictions about Modern Technology*, Business Insider (Nov. 24, 2015), http://www.businessinsider.com/att-you-will-ads-predicted-the-future-in-1993-2015-11.

2 James E. Gaskin, *What Ever Happened to Artificial Intelligence?*, Computerworld (Jun. 24, 2008), https://www.computerworld.com/article/2534413/business-intelligence/what-ever-happened-to-artificial-intelligence-.html.

3 *The Simpsons: Marge in Chains* (FOX television broadcast May 6, 1993).

4 *See* Eugene Kim, *Bill Gates Made These 15 Predictions in 1999 – It's Scary How Accurate He Was*, Business Insider (Apr. 28, 2015) http://www.businessinsider.com/bill-gates-15-predictions-in-1999-2015-4 (Gates prediction price-comparison websites so people could "effortless[ly] find the cheapest product"; small devices that would allow people to "constantly stay in touch and do electronic business from wherever they are"; and "[p]rivate websites for your friends and family will be common, allowing you to chat and plan for events").

5 Thomas D. Morgan, Educating Lawyers for the Future Legal Profession, 30 Okla. City U. L. Rev. 537, 538 (2005).

6 *Id.*

7 *Id.*

8 Martin Reeves & Johann Harnoss, *An Agenda for the Future of Business*, Harvard Business Review (Feb. 27, 2017), https://hbr.org/2017/02/an-agenda-for-the-future-of-global-business

9 Alex Davies, *Self-Driving Trucks Are Now Delivering Refrigerators*, Wired (Nov. 13, 2017) https://www.technologyreview.com/s/603493/10-breakthrough-technologies-2017-self-driving-trucks/.

10 Erica Strickland, *Autonomous Robot Surgeon Bests Humans in World First*, IEEE Spectrum (May 4, 2016), https://spectrum.ieee.org/the-human-os/robotics/medical-robots/autonomous-robot-surgeon-bests-human-surgeons-in-world-first.

11 Morgan, *supra* n.5 at 541.

understand legal and business issues that cross political boundaries. And automation and artificial intelligence enables the lawyer the time to develop the knowledge required by globalization.

Globalized clients with localized needs

Without a seismic shift in its philosophical underpinnings, the law remains territorial. Hence, there remains and will remain the need for highly-localized lawyers. While legal subject matter can be developed from anywhere, intimate knowledge of an area's economy, society, and politics is easier to develop from within the area. For example, a global energy conglomerate may have a need for a "lawyer with a specialized understanding of how to get environmental approval for a project in Oklahoma."[12] The lawyer would of course apply subject matter expertise – expertise that a lawyer from Boston, Phoenix, or Anchorage could also provide. However, the Oklahoma lawyer would know the political pressures within Oklahoma facing the project – which may be more determinative of environmental permitting.

Lawyers also develop localized relationships with and knowledge of bench and bar. Through litigation battles, lawyers understand how frequent opponents operate. Judges are former colleagues, opponents, or classmates. Understanding the tendencies or interests of an assigned judge or an opposing counsel will be beneficial to global clients involved in local disputes.

The local lawyer will also better understand local substantive and procedural law. Perhaps even more important will be the lawyer's ability to communicate the quirks of local law to the client. Global clients, exposed to many laws, will inevitably compare those laws and prefer certain ones to others. At the same time, "clients are likely to become increasingly impatient with what they see as the complexity and inflexibility of legal rules."[13] It can be difficult explaining Minnesota's law to your Floridian client. It is another thing to explain Minnesota's law to an Australian. It is still another thing to explain Minnesota's law to a client unfamiliar with common law. To communicate the law, a deep sense of the purpose and history of local laws will likely be helpful.

Further, the local lawyer will also know the jurisdiction's relative receptiveness to a client's position. Already certain jurisdictions are considered hostile or in need of reform.[14] The local lawyer can advocate for legal reform within a locality. At the same time, a landscape of various legal innovations tends to create a complex patchwork of laws, which in turn creates increased compliance costs.[15] Thus, the local lawyer can also advocate to bring local laws into accord with national or international law. Taking these considerations together, the local lawyer can advise whether advocacy for reform, and what type of reform, would be beneficial to the global client.

In other words, the local lawyer will leverage her locality. Many business have already begun developing a network of firms throughout the country to serve as local counsel. For example, a product manufacturer might coordinate defenses of various products liability suits centrally through its general counsel, while each local lawyer can contribute to the strategy with knowledge of how the strategy would likely fare in each locality. In this, the local lawyer will serve a valuable role to the global client.

Local clients with globalized needs

Already, the American lawyer is well aware of how substantive law shifts from state to state. We know that even the Uniform Commercial Code is not always so uniform.[16] To protect our clients' interests, then, we often advise the use of choice-of-law contractual provisions. As businesses expand to different countries, however, our clients will face global competition, utilize global supply chains, and form global partnerships. To protects our clients' interest across the globe, lawyers' skills and knowledge should also expand.

Foreign language proficiency will, of course, be una buena idea, eine gute Idee, and một ý tưởng tốt. In a global world, business will need to understand cultural differences.[17] In the practice of law, there will also be the increased need to understand different legal customs. For instance, consider the different cultures in which negotiation takes place: throughout much of

12 *Id.* at 545.

13 *Id.* at 540.

14 *See* American Tort Reform Association, Judicial Hellholes Report, http://www.atra.org/2017/12/05/judicial-hellholes-report/.

15 Morgan, *supra* n.5 at 542.

16 *See, e.g., Pulte Home Corp. v. Ply Gem Indus., Inc.*, 804 F. Supp. 1471, 1481 (M.D. Fla. 1992) (noting Florida has repealed the Uniform Commercial Code's statute of limitations).

17 *E.g.*, Carlist.my, The Honda that Nearly Became the Worst-Named Car – Why the Fit, Jazz Name (July 16, 2014) https://www.carlist.my/news/honda-nearly-became-worst-named-car-why-fit-jazz-name/21810/ (Honda's planned launch of a subcompact car called the "Fitta" was almost stalled when Honda discovered the word was a vulgarity in Swedish, and close to vulgarities in Spanish and Italian).

Europe, negotiators may not move with the urgency that we may expect; while German or Scandinavian negotiators may seem highly formal, or even off-putting, to the ill-prepared; while in India, negotiations are often exhaustive and delicate, and often re-visited. Further, knowledge of specific legal customs will also provide critical leverage points.

Advising clients regarding these cultural mores may prove more valuable than understanding the foreign country's substantive law. That said, however, a proficiency in foreign law will become increasingly important.[18] The following comes from a Chinese news site:

> As China interacts with the rest of the world, we need a common legal architecture upon which to build an edifice of a successful common and prosperous future. This starts by promoting partnerships that improve our understanding and make each others' laws more accessible.[19]

As discussed above, global clients will be exposed to many various laws and will, inevitably, prefer certain laws to others. In making that assessment, the lawyer should be ready to analyze and apply those various laws.

Additionally, globalized clients will be governed by ever-shifting treaties between nations.[20] Clients must deal with the aftermath of new treaties, or abandoned ones.[21] The successful lawyer must understand how these treaties impact her clients. As one example, when global business disputes arise, the lawyer to the globalized client should understand how to effectuate service of process in a foreign country.[22]

The successful lawyer, then, will deepen local knowledge and broaden global knowledge. The question that follows: who has the time? The answer: lawyers that effectively employ technology.

Automation and Artificial Intelligence as the Lawyer's Tool

A future of artificial intelligence and increased automation is coming. Sorry, that sentence is now obsolete: artificial intelligence and increased automation are here.[23]

Of course, automation, artificial intelligence, and analytics have already influenced the legal industry.[24] For example, by selecting a form and entering a few fields, software can generate an entire contract or will.[25] Automation is one thing; artificial intelligence seems to be another. Usually, it isn't newsworthy when a firm hires a new research assistant. But it was news when BakerHostetler hired Ross, a robot powered by IBM's Watson, "responsible for sifting through thousands of legal documents to bolster the firm's cases."[26] This robot replaced the jobs "typically filled by fresh-out-of-school lawyers early on in their careers."[27] Both the law firm and the company that built Ross agree that the robot "is not a way to replace … attorneys." (Tell that to the fresh-out-of-school lawyers.)

But for all the doomsaying, technology is not likely to replace lawyers. Consider the automated teller machine. The machine is so ubiquitous that you may have taken a moment to realize an automated teller machine is an "ATM." These machines were introduced in the 1970s and took off in the 1990s; at the time, predictions were that bank teller jobs would disappear.[28] The opposite happened:

> [T]he average bank branch in an urban area required about 21 tellers. That was cut because of the ATM machine to about 13 tellers. But that meant it was cheaper to operate a branch. . . . And when it became cheaper to do so, demand for branch offices increased. And as a result, demand for bank tellers increased.[29]

18 Eugene Clark, *Comparative Law Study Important to a Global Economy*, China.org.cn, (December 12, 2012) http://www.china.org.cn/opinion/2012-12/28/content_27540762.htm.

19 *Id.*

20 Kathryn Gordon and Joachim Pohl, *Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World*, OECD Working Papers on International Investment at 9-11 (2015), OECD Publishing. http://dx.doi.org/10.1787/5js7rhd8sq7h-en

21 N.Y. Times, How 'Brexit' Could Change Business in Britain (September 17, 2017) https://www.nytimes.com/interactive/2016/business/international/brexit-uk-what-happens-business.html.

22 Jennifer Scullion, Adam T. Berkowitz and Charles Sanders McNew, *International Litigation: Serving Process outside the US*, Proskauer Rose LLP, (2011) http://www.proskauer.com/files/News/5b04a3dd-34ab-40f4-a64f-3bc52468277a/Presentation/NewsAttachment/db2a546c-d01c-4ce3-815a-43df368f05c8/Proskauer_122011_Practical%20Law%20Company_Scullion_Berkowitz_McNew_International%20Litigation_Serving.pdf.

23 And with it, new legal issues. *See, e.g.* Joseph Savirimuthu, *Google Car Crash: Who's to Blame When a Driverless Car has an Accident?*, The Conversation (March 3, 2016) http://theconversation.com/google-car-crash-whos-to-blame-when-a-driverless-car-has-an-accident-55664.

24 Deloitte, The Legal Department of the Future at 3 (2017) https://www2.deloitte.com/content/dam/Deloitte/us/Documents/finance/us-advisory-legal-department-of-the-future.pdf.

25 Morgan, *supra* n.5 at 541.

26 Karen Turner, *Meet 'Ross,' The Newly Hired Legal Robot*, The Washington Post (May 16, 2016) https://www.washingtonpost.com/news/innovations/wp/2016/05/16/meet-ross-the-newly-hired-legal-robot/?utm_term=.6c414e72adad.

27 *Id.*

28 James Pethokoukis, *What the Story of ATMs and Bank Tellers Reveals about the 'Rise of the Robots' and Jobs*, AEIdeas, (June 6, 2016), http://www.aei.org/publication/what-atms-bank-tellers-rise-robots-and-jobs/.

29 *Id.* A similar phenomenon occurred in law firms: "When legal offices started using, beginning in the late 1990s, electronic discovery software for doing discovery of documents in lawsuits, the number of paralegals increased rather than decreased." *Id.*

What changed, however, was the role of the teller:

> [C]ash-handling has obviously become less important for tellers. But their ability to market and their interpersonal skills in terms of dealing with bank clients has become more important. So the transition–what the ATM machine did was effectively change the job of the bank teller into one where they are more of a marketing person. They are part of what banks call the 'customer relationship team.' But it's a different sort of skill. . . . [I]n a whole variety of ways we are seeing changes of this sort where the nature of occupations is getting up-skilled in some fashion. Often very specific skills [are] related to the particular technology, the particular job. This is happening across the board. And that's part of the challenge that technology is posing for us: How do we develop all of these new skills?[30]

Similarly, the automation of certain tasks – e.g., e-discovery, corporate and regulatory reporting, contract creation and management[31] – will likely free up lawyers to focus their efforts elsewhere. Legal research will become increasingly automated, or even replaced by artificial intelligence. Perhaps even strategic decisions may be informed by artificial intelligence simulations. The lawyer can then deepen knowledge and hone skills the global client needs.

In the future, clients will be "even more likely to want their lawyers to resemble multi-disciplinary consultants than legal technicians."[32] Successful lawyers will assign the "legal technician" aspects of the profession to technology, so that the lawyer can become the consultant that clients need. Not only that, but successful lawyers will also understand that these artificial intelligence tools are just that, tools. The tools will not be the same as lawyering. Until the judge and jury is automated, disputes will be resolved by persuading humans. Judgments on how to best persuade those humans may be, and should be, informed by artificial intelligence or analytics. But complete reliance on automation may ultimately be less persuasive. The successful lawyer will understand that, and will utilize the tools to the advantage of the client.

Conclusion

Of course, more will change about the practice of law than we can know. Lawyers will need to react to any number of unforeseen – and unforeseeable – developments. But lawyers should prepare for the same future that our clients are preparing for: a global economy impacted by technology. The global economy will require an ability to articulate deep local knowledge within a broad global context. And efficiencies brought about by technology permit lawyers the time to develop the knowledge and skills required by the global economy. Thus, we can prepare to meet our clients' needs by partnering with our clients to not only embrace this technology, but by learning to use it effectively.

30 *Id.*

31 Deloitte, *supra* n.24 at 3.

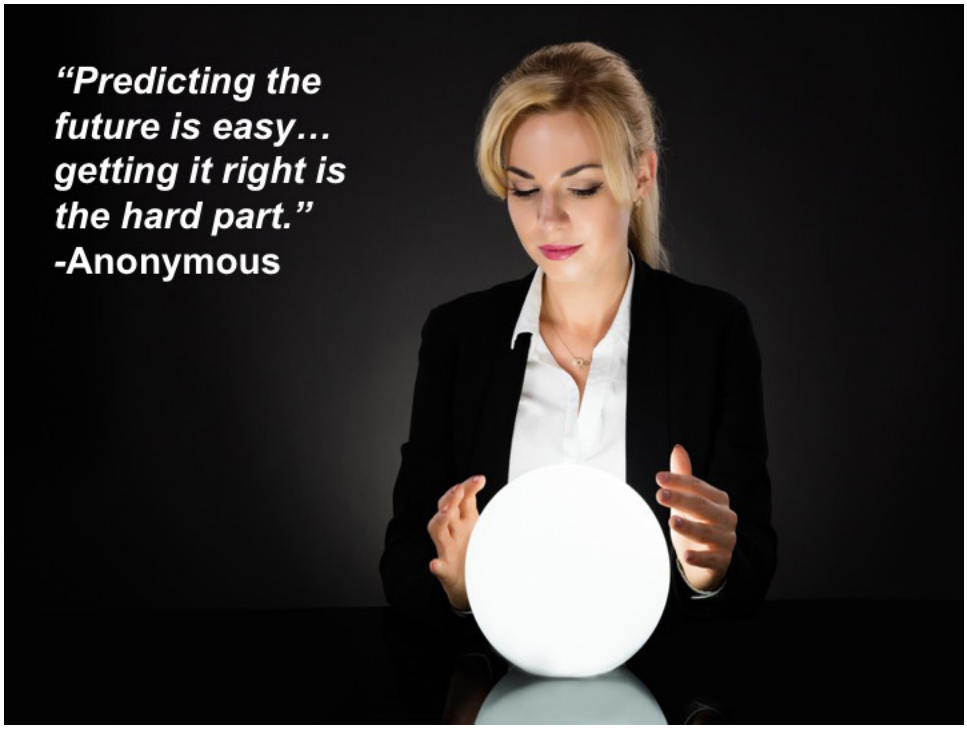
32 Morgan, *supra* n.5 at 540.

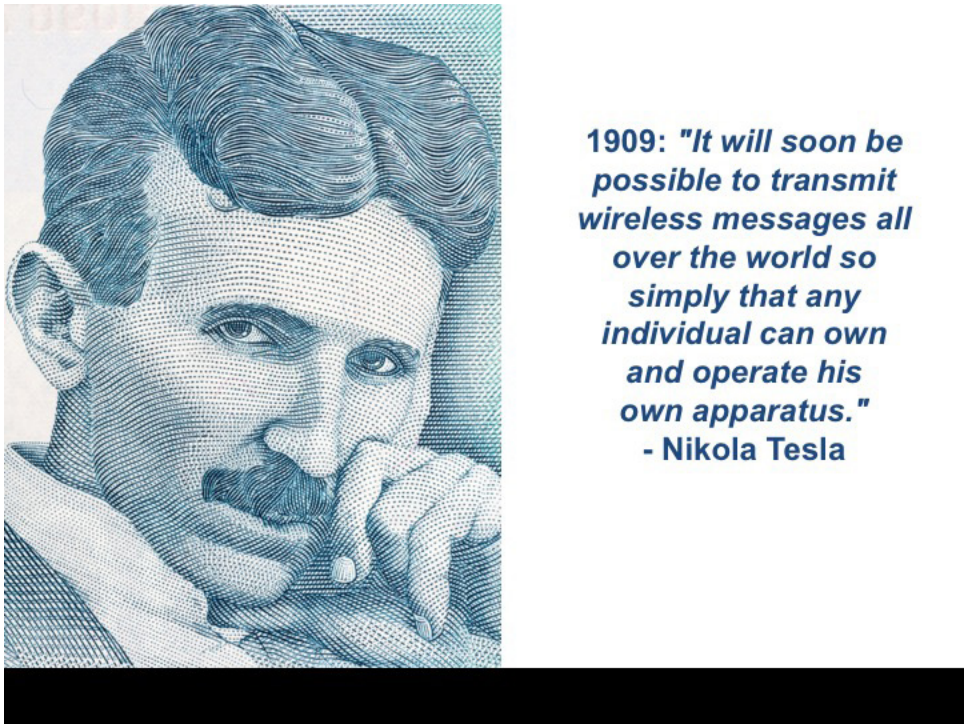
Charting a Course into the Future Practice of Law

Panelists:
Perry Sekus - Medtronic
Jeff Harrington - Michael Foods
Mike Johnson - Wells Fargo
Ryan McManis - CenturyLink

Moderator:
Jason Lien - Maslon LLP

MASLON

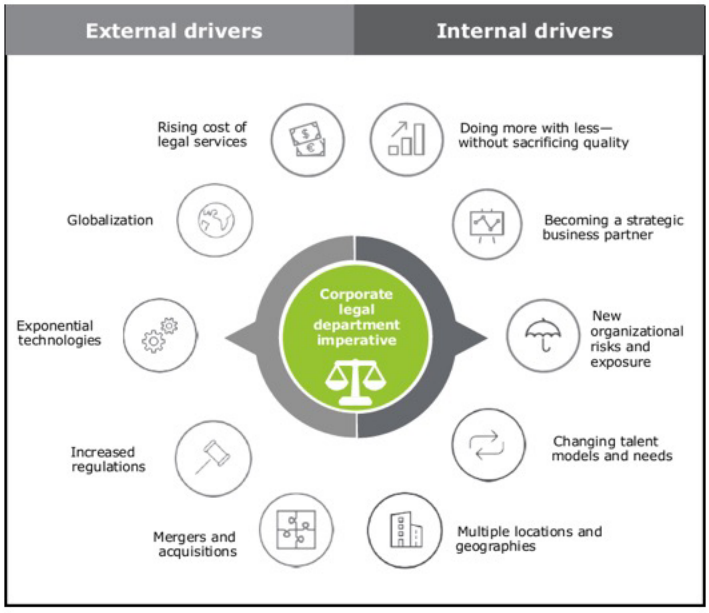



1909: "It will soon be possible to transmit wireless messages all over the world so simply that any individual can own and operate his own apparatus."
- Nikola Tesla


2007: "There's no chance that the iPhone is going to get any significant market share." - Steve Ballmer, Microsoft CEO


What will the practice of law look like in 2025?


OLD WAY
NEW WAY
How will the role of the GC change?



Source: Deloitte, *The legal department of the future* (2017)

MASLON

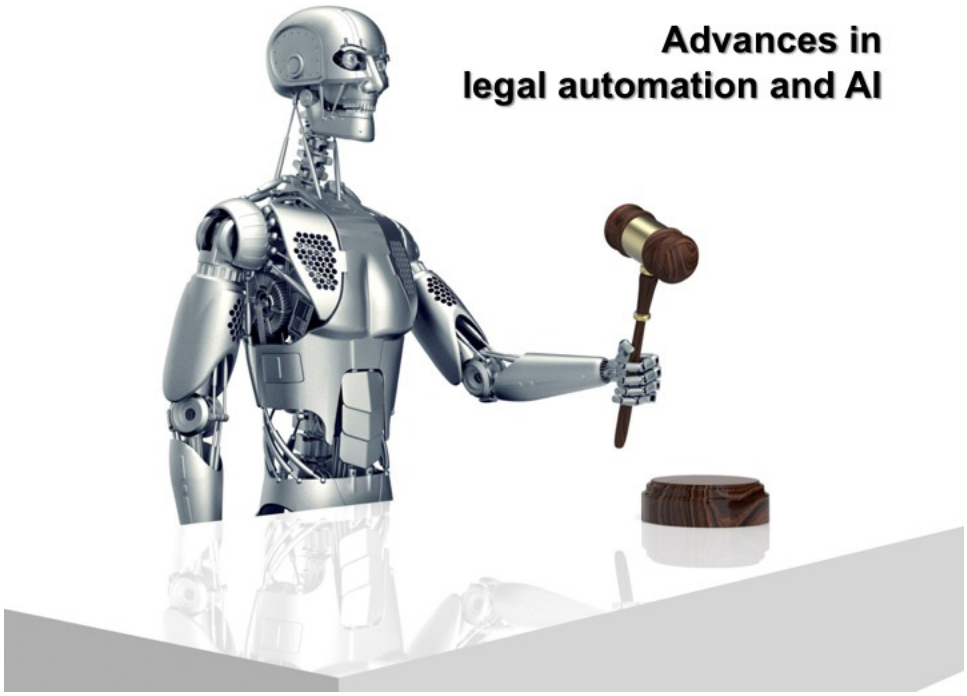
What is Legal Ops and what is its future at your company?

Source: https://cloc.org/what-is-legal-operations

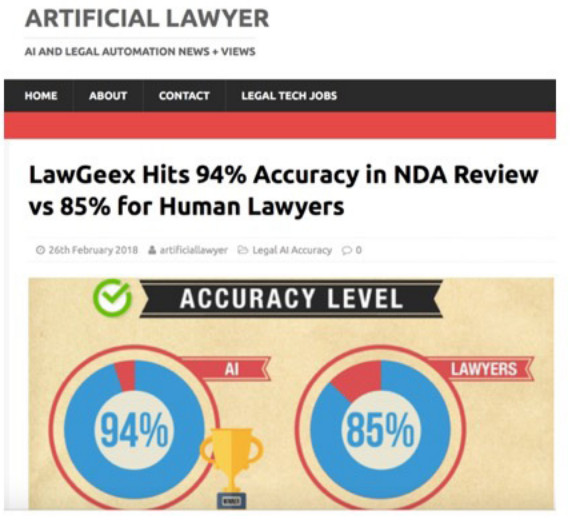

Will you use preferred provider programs, outsourcing and insourcing?
OUTSOURCE
IN-HOUSE


How about matter management software, budgeting and AFAs?
BUDGET


REVENUE
450.0K
↑12%
55%
45%
12%
8%
25%
50%
75%
2012 ↑6%
2013 ↓2%
2014 ↑3%
2015 ↑4%
2016 ↓1%
2017 ↑5%
How will "big data" and metrics be used by corporate legal departments?


Advances in legal automation and AI

February 26, 2018 LawGeex Study



Source: https://www.lawgeex.com/

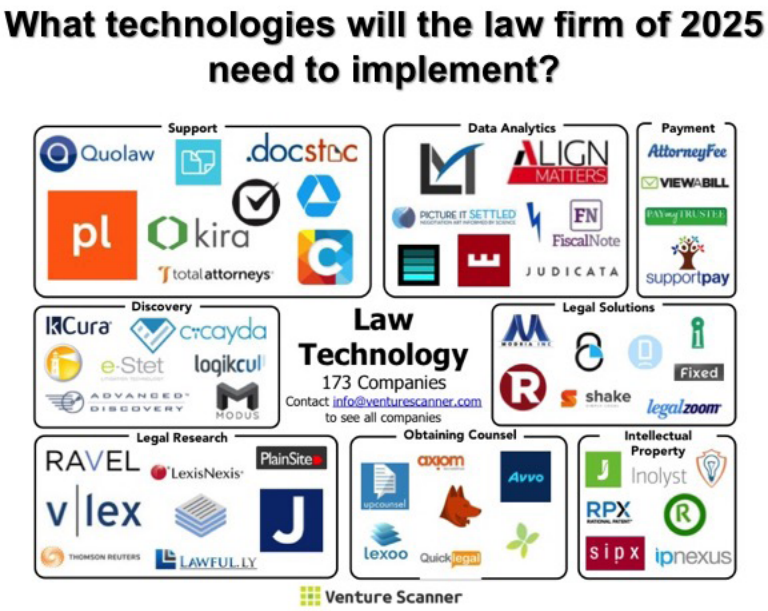
How will your legal department implement advances in legal automation and AI?

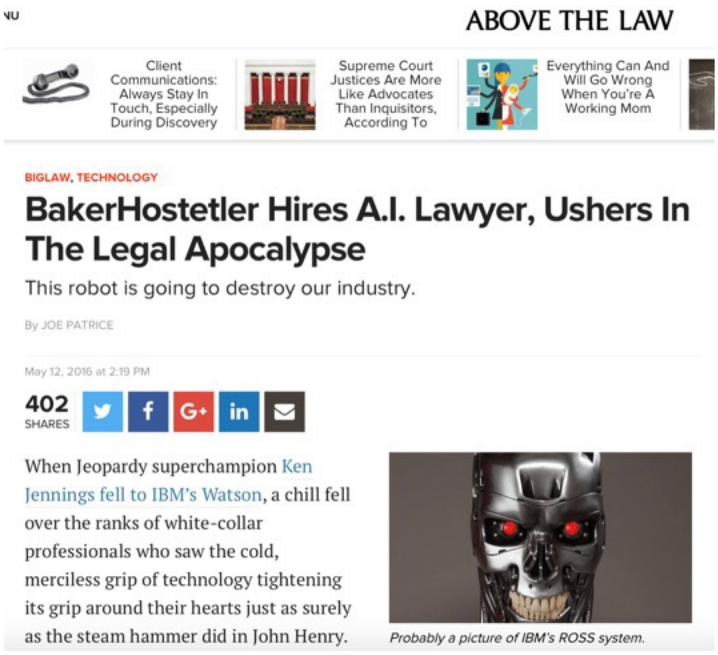
2017 Thomson Reuters Survey

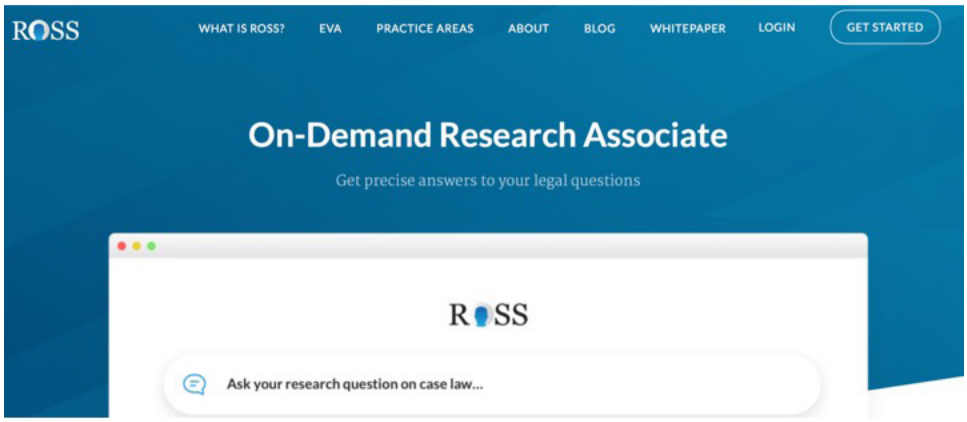
CURRENT PERCEPTIONS OF AI USE IN CORPORATE LEGAL DEPARTMENTS

	TOTAL (N=207)	DEPT. < 6 ATTYS (N=105)	DEPT. 6-10 ATTYS (N=30)	DEPT. 11+ ATTYS (N=72)
Not familiar with AI in Corp Legal	34%	45%	35%	30%
Still in beta/infancy	6%	7%	7%	6%
Could be effective/helpful	6%	2%	7%	11%
Best suited for large departments	5%	6%	–	6%
Negative/can't replace humans	8%	7%	7%	19%
None	22%	27%	27%	14%

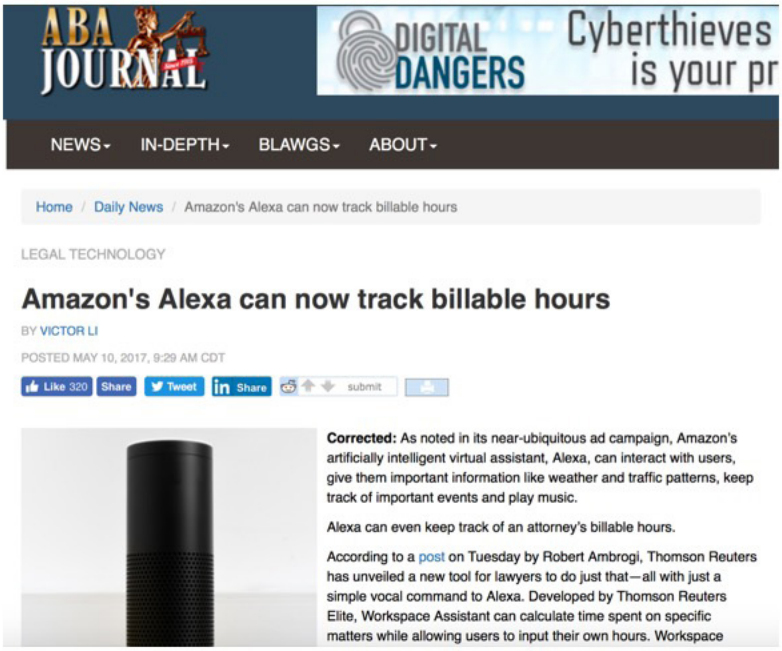
Source: Thomson Reuters, *Ready or Not: Artificial Intelligence and Corporate Legal Departments* (2017)


What technologies will the law firm of 2025 need to implement?
Support
Quolaw
.docstoc
pl
kira
totalattorneys
Data Analytics
ALIGN MATTERS
PICTURE IT SETTLED
FiscalNote
JUDICATA
Payment
AttorneyFee
VIEWABILL
supportpay
Discovery
kCura
Crayda
e-Stet
logikcull
ADVANCED DISCOVERY
MODUS
Law Technology
173 Companies
Contact info@venturescanner.com
to see all companies
Legal Solutions
Fixed
shake
legalzoom
Legal Research
RAVEL
LexisNexis
PlainSite
v|lex
THOMSON REUTERS
LAWFUL.LY
Obtaining Counsel
axiom
Avvo
lexoo
Quicklegal
Intellectual Property
Inolyst
RPX
sipx
ipnexus
Venture Scanner


ABOVE THE LAW
Client Communications: Always Stay In Touch, Especially During Discovery
Supreme Court Justices Are More Like Advocates Than Inquisitors, According To
Everything Can And Will Go Wrong When You're A Working Mom
BIGLAW, TECHNOLOGY
BakerHostetler Hires A.I. Lawyer, Ushers In The Legal Apocalypse
This robot is going to destroy our industry.
By JOE PATRICE
May 12, 2016 at 2:19 PM
402 SHARES
When Jeopardy superchampion Ken Jennings fell to IBM's Watson, a chill fell over the ranks of white-collar professionals who saw the cold, merciless grip of technology tightening its grip around their hearts just as surely as the steam hammer did in John Henry.
Probably a picture of IBM's ROSS system.



Source: https://rossintelligence.com/



PANELISTS:

Perry Sekus is the Vice President for Legal Operations and Risk Management at Medtronic, plc. Perry began his legal career clerking on the United States District Court for the District of Maryland. He then spent four years in private practice before joining the Department of Justice in 1995, where he served as an Assistant U.S. Attorney and Civil Chief in Maryland and later Minnesota. In 2007 Perry joined UnitedHealth Group, where he managed litigation for UHG's benefits businesses. In 2013 Perry joined Option, UHG's health services and solutions company, as a Senior Vice President for Operations. In 2016, Perry joined Medtronic to lead it's Legal Operations and Risk Management functions. Perry lives in Minneapolis with his wife, Melissa. Their two daughters are in college in warm climates.

Jeff Harrington is Senior Attorney at Michael Foods, Inc. in Minnetonka, Minnesota. Prior to joining Michael Foods, Jeff was an Assistant Attorney General at the Minnesota Attorney General's Office and an Associate at Leonard, Street and Deinard in Minneapolis. Jeff earned his law degree from the University of Minnesota Law School, where he was a member of the Minnesota Law Review. Following law school, Jeff clerked for the Honorable Richard H. Kyle of the United States District Court for the District of Minnesota. Jeff earned his bachelor's degree from the University of Notre Dame.

Mike Johnson, a Vice President and Managing Counsel at Wells Fargo Bank, manages a team of attorneys responsible for defensive litigation involving the wholesale bank, including investment banking, corporate trust, business banking, international banking, commercial lending and credit card processing. Prior to joining Wells Fargo in 2016, Mike was a partner at Alston & Bird LLP in New York City, where he handled litigation and arbitration matters, primarily for financial services clients. Mike is a graduate of Earlham College and New York University School of Law, and he currently resides in Minneapolis, MN.

Ryan McManis is Vice President and Deputy General Counsel at CenturyLink, a global telecommunications provider with operations in more than 60 countries, annual revenues of approximately $24B and 51,000 employees globally. Ryan's responsibilities include management of the company's litigation portfolio, antitrust matters and investigations and/or inquiries by state and federal governments. Prior to this role, Ryan was at Level 3 Communications, which merged with CenturyLink in November 2017. At Level 3, he led the litigation, employment and investigations group, and assisted with M&A matters, real estate matters and the company's ERISA plans. Ryan was in private practice at an insurance defense firm prior to joining Level 3.

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Jason Lien focuses his litigation practice on representing clients from the construction, real estate, financial services, and food industries. He also frequently represents policyholders in insurance coverage and bad faith disputes. Prior to joining Maslon in 2002, Jason honed his trial and appellate skills as a Naval Officer with the United States Navy Judge Advocate General's Corps, where he led hundreds of courts-martial, administrative hearings, and military appeals.

Jason regularly appears in federal and state court on behalf of design-build firms, general contractors, architects, engineers, specialty contractors, property management companies, real estate owners, and lenders. He has also litigated disputes involving product liability, insurance coverage, international trade, land use, business torts, unfair competition, intellectual property, healthcare fraud, non-compete agreements, and medical malpractice.

In addition to his litigation practice, Jason serves as vice chair of the firm's Governance Committee. He was also selected for inclusion on the 2015-2017 Minnesota Super Lawyers® lists as well as the 2006-2009 and 2011-2012 Minnesota Rising Stars lists.

Outside of the office, Jason is an avid triathlete and a two-time Ironman finisher.

Areas of Litigation Practice
- Appeals
- Business Litigation
- Competitive Practices/Unfair Competition
- Construction & Real Estate Litigation
- Insurance Coverage Litigation
- Tort & Product Liability

Recognition
- Notable Practitioner in Minnesota for Construction, Chambers USA, 2018
- Recognised Practitioner in Minnesota for Construction, Chambers USA, 2016-2017
- North Star Lawyer, Minnesota State Bar Association, 2015 (North Star Lawyer is a designation that recognizes members who provide 50 hours or more of pro bono legal services in a calendar year.)
- Recognized on Minnesota Super Lawyers® list, 2015-2017 (Minnesota Super Lawyers® is a designation given to only 5 percent of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2006-2009, 2011-2012 (Minnesota Rising Stars is a designation given to only 2.5 percent of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- Named JAG of the Quarter by the Navy Judge Advocate General and JAG of the Year for the region by the Commanding Officer of the Naval Legal Service Office Central, 2001
- Corpus Juris Secundum Award, Civil Procedure, 1996

Education
- University of Minnesota Law School - J.D., cum laude, 1998
- Hamline University - B.A., cum laude, 1994; Majors: Political Science, Legal Assistance

E-DISCOVERY IS COSTING YOU, BUT IT DOESN'T HAVE TO

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Introduction

Twenty years ago, a commercial contract dispute would regularly involve each party producing approximately five to ten boxes of hard copy documents. Taking a hypothetical 1995 vintage contract dispute, each side would provide one box of documents related to pre-contractual negotiations, a box of documents related to the contract itself and a handful of boxes related to contractual performance leading up to the dispute. Even if they existed, it was rare for electronic documents to be exchanged in any format other than being printed out and included with other hard copy documents.

Fast forward ten years, and the same dispute would involve approximately the same volume of hard copy documents but would also involve the parties jockeying to obtain (or prevent the other side from obtaining) electronic documents related to the contract and dispute. In those intervening ten years, emails and other forms of electronic communication had largely taken the place of more formal, hard copy correspondence. The ease of sending such instantaneous communications resulted in a substantial increase in the amount of communication between counter-parties. But the dramatic growth in communication was not immediately met by changes in the law, including rules regarding discovery of such electronic communications. And with most jurisdictions having no rules in place to handle such discovery disputes, the parties' ability to obtain access to electronically-stored information ("ESI") varied greatly from jurisdiction to jurisdiction, and even within jurisdictions.

In 2006, the Federal Rules of Civil Procedure were amended to include explicit provisions for handling discovery of ESI. As a result, discovery in our hypothetical contract dispute began to include fewer boxes of hard copy documents but a dramatic increase in the amount of ESI being collected, reviewed and potentially produced. Counsel and parties quickly learned that ESI was more likely to contain admissions or other damaging information as the parties were less likely to closely review every email, text message or electronic document created. Instead, such materials were found to frequently provide your opponent's most embarrassing communications and most competitively valuable information. Cue the vendors. The vendors that previously focused on reproduction of hard copy documents and related services supposedly became e-discovery experts overnight. And the fees they charged for their e-discovery services quickly eclipsed the costs previously associated with hard copy document discovery. The increased fees combined with dramatic increases in the volume of data being collected, exchanged and reviewed led many clients to begin to focus on resolving cases much earlier in their life cycle.

We are now twelve years past the original ESI amendments to the Federal Rules of Civil Procedure. Additional amendments have attempted to limit or contain the costs of e-discovery, but the burden still weighs on clients and their strategies for resolving

disputes.

There are strategies that clients and their counsel can implement to help manage and dramatically reduce this burden. The following article will discuss several of the strategies that we have implemented since 2006 to allow clients to continue to make strategic decisions about their disputes based on the merits instead of based on upon the cost of e-discovery.

Pre-Litigation – Steps You Can Take Today to Reduce Cost and Risk

A. Data Mapping and Legacy Systems

Litigation can be all consuming. It can distract a company's senior leaders and quickly absorb other resources such as its legal budget. But there are many steps a company can take before litigation occurs to reduce the costs of its compliance with discovery and its risk.

One of the first steps that we recommend to clients is to map out all sources of its data. Many companies have never focused on this effort with litigation in mind. Once they prepare such a data map, they see the combinations of various legacy systems put in place over the growth cycle of the company. A useful data map has to include all sources of data including collaboration systems, legacy systems, third party or cloud data storage, archive systems and backup systems. The data map needs to be updated as the company grows or makes changes to its IT structure.

Legacy data storage systems are an important consideration in any data map. Legacy systems are data storage systems that have been in place for a substantial period of time, and are no longer easily supported in terms of maintenance or spare parts. And while such systems may be working well for a particular company, as those systems age, they can require specialized expertise to collect data from them or even migrate the data to a new system for collection, review and eventual production.

Starbucks Corp. v. ADT Sec. Servs., Inc., 2009 WL 4730798 (W.D. Wash. Apr. 30, 2009) illustrates the risk of reliance on legacy systems. In that case, Starbucks filed a motion to compel seeking, inter alia, production of email from the years 2003 through 2006 regarding five specifically identified current and former ADT employees. ADT did not store or archive emails between 1997 and 2003, but agreed to produce emails from this time period to the extent they were stored on individual hard drives or laptops. From 2003 to 2006, ADT archived emails on a systems that it described as "so cumbersome" that it was not "reasonably accessibly because of undue burden or cost." Accordingly, ADT objected to their production. Id. at *2. Specifically, ADT estimated that it would take approximately 4 years to retrieve the data and cost over $800,000 to do so. Importantly, ADT never incurred the cost of migrating the 2003-2006 vintage data to its newer systems, and instead continued to rely upon the legacy "cumbersome" system to retrieve that data from time to time. Id. at *6.

In analyzing Rule 26(b)(2)(C) of the Federal Rules of Civil Procedure, the court found that ADT exaggerated its estimates of the time and cost involved in producing the subject emails. In addition, the court refused to find that the ESI sought was "not reasonably accessible" given the fact that ADT continued to use the "cumbersome" system. Id. at *6. The court stated, "[t]he fact that a company as sophisticated as ADT . . . chooses to continue to utilize the [cumbersome] system instead of migrating its data to its now-functional archival system should not work to plaintiff's disadvantage." Id. Even if the data was not "reasonably accessible," the court found that good cause existed under Rule 26(b)(2)(C) to order the production. The court required ADT to produce the requested data using the methodologies identified by Starbucks to help contain the costs and burden involved.

Given the result in Starbucks, clients should be counseled regarding the pros and cons of continuing to use legacy systems identified in the data-mapping process. While continuing to use such systems may avoid the capital expenditure to migrate the data over to a current system, the impact of such a capital expenditure should be weighed against the costs likely to be incurred if or when such data is the subject of litigation. This would include an analysis of what data is actually stored on the legacy system, how much data is stored on that legacy system, how long such data needs to be preserved given the company's document or data retention plans and any existing or reasonably anticipated litigation, and the likelihood of the company having to produce the data from the legacy system.

B. Centralized Data

Based on our experience, the first time a client maps its data often results in the realization that its employees are storing large amounts of data locally on a variety of devices. These devices can include individual hard drives (e.g., desktop files), thumb drives, personal devices such as laptops, tablets or phones, and even personal cloud storage.

We recommend eliminating the need or ability to store data locally on such devices. There are numerous benefits to doing so. First, once the ability to store data locally has been eliminated, a litigation hold instituted at the network level will greatly reduce the risk of spoliation of evidence. If a litigation hold is implemented at the network level, but individual custodians have been permitted to store unique data locally, it will be difficult to ensure compliance with the litigation hold. In addition, data is often helpful to clients in litigation. For example, in trade dress cases, we often find email discussions among client representatives regarding efforts they have taken to make their trade dress unique and differentiated from their competitors. If such files are permitted to be stored locally, they may be missed in a collection effort focused at the network level. In addition, permitting data to be stored locally prevents teams of employees from efficiently collaborating. Finally, being able to contain the data (or "ring fence" it) will result is less overall data to collect and review for litigation which we have found to be the best method to reduce litigation costs.

NuVasive, Inc. v. Madsen Med., Inc., No. 13cv2077 BTM (RBB) (S.D. Cal. July 22, 2015) demonstrates the importance of preventing custodians from locally storing data. In that dispute, the defendant contended that text messages could have been evidence of secret coordination between the plaintiff and former employees of the defendant. The court found that the plaintiff had notified its employees of a litigation hold in August, 2012. Between then and when the plaintiff attempted to collect data from four of its employees' cell phones in 2013 and 2014:

- one employee had wiped his phone clean of any data before giving the phone to his son;
- another employee's text messages were wiped as a result of an iOS software update;
- a third employee's text messages were lost when the phone was wiped and recycled by a third party vendor;
- and a fourth employee admitted that he "may have deleted relevant text messages" before his phone we collected.

As a result, the court found that the plaintiff failed to enforce compliance with its litigation hold. The court held that a properly tailored adverse inference instruction was appropriate.

C. Records Management Systems

A reliable or defensible data map must identify who owns the data (generally the relevant business group) and who is responsible for the data (usually the IT group at the company). We have also found that it is a best practice for the company's outside counsel to have a current copy of the company's data map to minimize time spent identifying sources and custodians of data subject to a litigation hold.

One way to limit the amount of data to be collected, reviewed and potentially exchanged during discovery is to adopt a records management system. Many clients have legacy document retention plans, but we often find they need to be updated to include electronic documents or ESI in general. A thorough records management system can be an effective tool to cut down on the amount of data that a company retains. Unnecessary data that is retained beyond its useful life simply serves an impediment to separating the wheat from the chaff once litigation arises and it is necessary to collect and process data.

Once a records management system is adopted, it is important to audit compliance with it. We have litigated cases where our opponent deleted data prior to the timeframe identified in their own records management system and were able to use that fact to obtain an adverse inference instruction along with other relief. It is also important to suspend data destruction pursuant to a records management system when a litigation hold is put in place.

Crews v. Avco Corp., No. 70756-6-1, 2015 WL 1541179 (Wash. Ct. App. Apr. 6, 2015) demonstrates the importance of suspending a records management policy and also precisely identifies how it applies to

requested documents. Crews was a wrongful death action brought against multiple defendants including the manufacturer of an aircraft engine. Id. at *1. The plaintiffs alleged that a defective carburetor float caused the aircraft's engine to fail, resulting in the death of the pilot and two passengers. The plaintiffs also alleged that Avco was aware that the carburetor float was defective. Id. In response, Avco asserted numerous defenses, including that it was not involved with the manufacture of the carburetor or float. Id.

During discovery, the plaintiffs served requests for production that pertained to both the carburetors and the floats. Avco initially did not produce any documents and objected to sixty-eight of the seventy-three requests. Avco further indicated it would produce documents with its answer and affirmative defenses. In response to a second set of requests for production, Avco objected to twenty-seven of the thirty requests for production and stated that responsive documents "had already been provided." Id. at *2.

The plaintiffs moved to compel and included an email between Avco and the manufacturer of the float that noted the potential for the floats to leak which could "lead to functional issues on engine installa[t]ions." Id. The court granted the motion to compel and ordered Avco to respond to the requests for production and identify by bates label which documents were responsive to each request or interrogatory. Id. Avco responded that responsive documents had either been produced or were being made available for inspection. Plaintiffs moved to hold Avco in contempt.

In its defense, Avco asserted that it had a records management policy and that many of the documents at issue were "beyond the various retention periods." Id. at *3. After further pretrial wrangling, the court found that it was unclear whether the records management policy applied to the documents at issue. Id. at *4. The court rejected Avco's reliance on the records management policy and found that the categories identified in the policy (and Avco's counsel's assignment of various production requests to that policy) were too vague. The sanction awarded by the court was severe – it established liability and causation in favor the plaintiffs and left the jury to determine the amount of compensatory and punitive damages. Id. The jury returned a total verdict for one plaintiff of $17,283,000, including both compensatory and punitive damages.

While Crews illustrates many problems or pitfalls that clients and their counsel should avoid, it is a great case for teaching the importance of understanding your records management policy and being able to communicate effectively about it.

Litigation – Choosing An E-Discovery Vendor/ Partner

Earlier we referenced the large number of e-discovery vendors that emerged at or around the time of the 2006 amendments to the Federal Rules of Civil Procedure. While many of those vendors have come and gone, there is a wide variety of choices available to today's practitioner. In our experience, there are three basic models.

The first is a vendor model which is used by the overwhelming majority of law firms. In this model, the vendor usually includes a per unit (gigabyte, document or page) charge, a per gigabyte charge for processing and a per gigabyte charge for hosting the data during the pendency of the case. Given that complex commercial litigation increasingly involves processing and hosting large amounts of data, clients can incur hosting charges of several hundred thousand dollars during the pendency of a dispute.

The second model is identical to the first but for the identity of the vendor. In this model, the client's law firm replaces the outside e-discovery vendor.

The third model is the most rare – the law firm serves as the primary e-discovery vendor and outsources certain tasks such as creation of forensic images of drives. However, in contrast to the pricing models described above, the law firm charges an hourly rate for para-professionals trained in e-discovery (including collection, processing and review tools) and does not charge a hosting charge for the data. This model creates significant savings for the clients. It is a model we have used since 2006, and it has allowed our clients to resolve more cases on the merits rather than being forced to resolve them on the economic terms dictated by the other two models.

E-Discovery – Reducing Collection, Processing and Review Costs

In our experience, reducing collection and review costs depends on the ability to conduct a defensible collection.

This involves an understanding by both counsel and the client of what cannot be efficiently searched, what collection tools are available, conducting and documenting custodian interviews and implementing and auditing litigation holds. Whatever vendor you choose, you need to ensure that the collection, processing and review tasks are being performed to a degree that will satisfy the court.

Conclusion

We hope that this article assists you as you navigate the numerous decisions that can help to reduce the risk and cost of your future e-discovery productions.

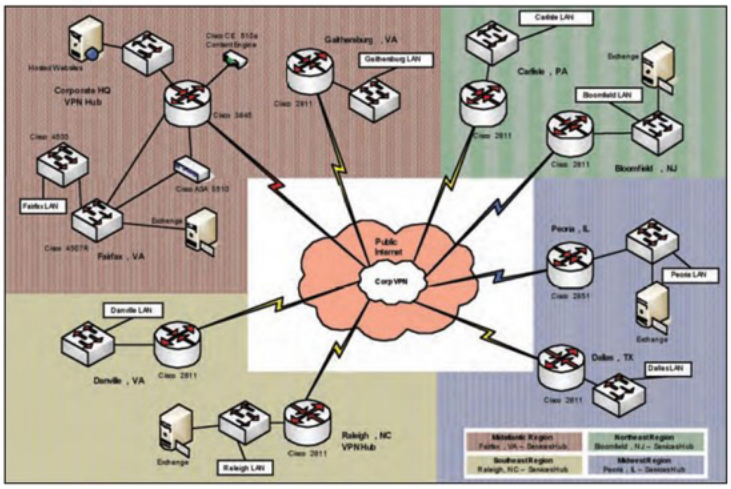
Background

- 1995 Vintage Commercial Litigation
  - 5 boxes of paper documents
  - no electronic documents
- 2005 Vintage Commercial Litigation
  - 5 boxes of paper documents
  - struggle to access electronic documents
- 2006 Vintage Commercial Litigation
  - 2 boxes of paper documents
  - 500 "boxes" of electronic document

Agenda

- Pre-Litigation: Things to do Today to Reduce Cost and Risk
- Litigation: Choosing the Right Partner
- E-discovery: Reducing Collection and Review Costs

Prelitigation Steps to Reduce Cost and Risk



Reducing ESI Costs and Risks: Identify Data Sources

- Map out all sources of data
  - Collaboration systems
  - Legacy systems
  - 3rd party storage
  - Archive systems
  - Backup systems
- Identify who owns the data – business group
- Identify who is responsible for data – IT technician
- Best Practice
  - Backup tape rotation 30-60 days
  - Convert legacy data to new system

Reducing ESI Costs and Risks: Gone Wrong

Starbucks Corp. v. ADT Sec. Servs., Inc., 2009 WL 4730798 (W.D. Wash. Apr. 30, 2009)

- ADT email archived in "cumbersome" old system;
- Accessing e-mails would be disruptive, take 4 years and cost $834,285;
- Plaintiff should not be disadvantaged because sophisticated company chose not to migrate the e-mail to the now-functional archive system;
- Even if information was ruled not reasonably accessible, good cause existed to order production.

Reducing ESI Costs and Risks: Centralized Data

- Eliminate the need/ability to store data locally on devices
  - Less data to collect and review for litigation – reduce overall cost of litigation
  - Litigation hold applied at network level – reduce risk of spoliation
  - Reduce likelihood of missing sources of data
- Solutions
  - Shared network drives
  - Data archive
  - Enterprise text messaging

Reducing ESI Costs and Risks: Gone Wrong

NuVasive, Inc. v. Madsen Med., Inc., No. 13cv2077 BTM(RBB) (S.D. Cal. July 22, 2015)

- Defendants contended that text messages could have been evidence of secret coordination between plaintiff and former employees of the defendant;
- One employee wiped phone and gave it to his son;
- Second employee turned in phone almost 2 years after litigation hold put in place and texts from relevant time period were gone;
- Third employee had his phone wiped twice before turning it in;
- Fourth employee stated he may have deleted some relevant messages before he surrendered his phone;
- Court ruled NuVasive was at fault for not enforcing compliance with litigation hold;
- Adverse inference instruction was appropriate in light of all the text messages that were lost or deleted.

Reducing ESI Costs and Risks: Remote Access

- Eliminate need to work from home PC
- Eliminate need to use personal e-mail
- Eliminate need to copy data to removable storage
- Solutions - remote access:
  - Citrix
  - Virtual Network Connection (VNC)
  - Mobile devices

Reducing ESI Costs and Risks: E-Mail

- Do not allow archiving or local creation of PST's
- Do not use synchronized mailstores with laptops – OSTs and orphaned OSTs
- Business-related emails should be stored in a project centric repository such as a Document Management System or ShareFile
  - Mail servers are not central repositories - personal mailboxes
- Control e-mail volume
  - Auto-delete deleted items after 7 days
  - Auto-delete sent items after 60 days
- Solutions
  - E-mail archives
  - Document Management Systems

Reducing ESI Costs and Risks: Litigation Preparedness

- Records Management Systems
  - What documents are needed to be retained for regulatory, business or legal needs
  - Determine document retention period for each class of documents (HR, accounting, business)
  - Destroy documents in accordance with the retention policy
  - Suspend document destruction when a litigation hold is put in place

Reducing ESI Costs and Risks: Gone Wrong

Crews v. Avco Corp., No. 70756-6-I, 2015 WL 1541179 (Wash. Ct. App. Apr. 6, 2015)

- Defendant explained that "under its records management policy, many of the documents that another party produced were no longer in its possession;"
- Trial court rejected Defendant's reliance on its document retention policy as an explanation for why the information was unavailable;
- Defendant's continued disregard and violation of the discovery and contempt orders was willful;
- Court imposed severe sanctions, including that all allegations against defendant were deemed admitted and that all Defendant's defenses were stricken;
- Jury awarded one plaintiff $17,283,000.

Choosing the Right Partner

Choosing the Right Partner: Vendors and Law Firms

- Vendor pricing model
  - Per unit charge (GB, Document, Page)
  - Per GB charge for processing
  - Per GB charge for hosting
- Law firm using vendor pricing model
  - Per unit charge (GB, Document, Page)
  - Per GB charge for processing
  - Per GB charge for hosting
- Law firm using a client-focused pricing model
  - Hourly rates for para-professionals
  - No hosting charge

Choosing the Right Partner: Pricing Comparisons

Size of Data	Average Vendor Charge	Freeborn Charges	Savings	Percentage Savings
235 GB	$57,351.33	$6,468.00	$50,883.33	88.72%
336 GB	$58,043.00	$13,790.00	$44,253.00	76.24%
1,876 GB	$257,743.67	$46,556.50	$211,187.17	81.94%

15

Choosing the Right Partner: Our Model
Case Study

- Clients sold their company subject to a $25 million earn-out;
- Earn-out agreement required buyer to maintain data and provide to sellers;
- During discovery, buyer's IT director admitted that after it anticipated the earn-out litigation with the buyers and in violation of its own data retention policy, it shredded thousands of backup tapes as part of a migration to a new system because it "***didn't want to take any chances***;"
- We filed an emergency motion requesting that the Court order the buyer to suspend any further data destruction and turn all remaining back-up tapes over for searching;

Choosing the Right Partner: Our Model
Case Study

- Buyer argued doing so would cost $3,000,000 and take 1.5 years.
- We said our lab could do it for $80,000 and complete it in 60 days.

Choosing the Right Partner: Our Model

Case Study

Court ordered that Black Hills turn over all existing data to the Freeborn lab, with privilege filters, for our review and analysis!

Choosing the Right Partner: Leveraging Our Model

Case Study

- Upon presenting proof of destruction of relevant data, Court agreed to consider spoliation instruction…
- Case settled at 94.8% of maximum value, matching our decision tree analysis.

Reducing Collection and Review Costs

Reducing Collection and Review Costs: Defensible Collections

- Understanding technology and what cannot be searched
  - Attachments
  - Image based files
  - Archive or container files
  - Password protected files
- Understanding collection tools
  - Limitations of tool
  - Destruction of metadata
  - Collection log
- Custodian interviews
  - Identify all locations of potentially relevant information
  - IT may have policies in place but employees can typically get around them
- Litigation holds
  - Send out holds when a dispute reasonably anticipated
  - Explain the hold to each individual

Reducing Collection and Review Costs: Gone Wrong

Sloan Valve Company v. Zurn Industries LLC, (N.D. Ill., No. 10-cv-204, 5/23/12)

- Zurn searched over file names, not file contents across shared servers and employee folders;
- Boolean searches were done by outside counsel using "visual inspection;"
- Litigation hold was not sent to a number of key individuals and some who received the hold were unaware what the hold meant and continued to delete e-mail as they normally would;
- Zurn ordered to repeat extensive searches of electronic databases and submit declarations detailing past searches, litigation holds and preservation measures.

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Todd Ohlms is a Partner in the Litigation Practice Group and is Co-Leader of the Commercial Litigation Team and the Private Equity and Venture Capital Industry Group.

His practice involves advising and representing clients on their business-critical litigation matters. He has substantial experience in actions involving temporary restraining orders, preliminary injunctions and in the substantive areas of intellectual property, fiduciary litigation, securities and shareholder litigation, antitrust and trade regulation and complex/ multi-jurisdictional disputes.

In addition, Todd has extensive experience in creating and implementing electronic discovery strategies and protocol for clients. Since 2006, he has actively participated in the Firm's development of its own in-house E-Discovery Lab, which clients use to dramatically reduce their costs associated with identifying, collecting, analyzing, and producing electronic discovery information in disputes.

He is often retained by private equity firms to counsel their portfolio companies on a wide range of matters and is frequently selected to serve as outside general counsel to their portfolio companies. Todd has frequently spoken regarding uses to help portfolio companies implement litigation avoidance strategies and address other legal challenges while simultaneously managing the cost of their legal services. He has also represented clients involved in disputes over family owned enterprises where sensitive and complex relationships often play as large a role in determining the result as the actual legal theories at issue.

Practice Areas
- Litigation
- General Commercial Litigation
- Private Equity and Venture Capital
- Banking & Finance Litigation
- Family Offices

Industries
- Private Equity and Venture Capital

Honors and Awards
- Chicago Daily Law Bulletin and Chicago Lawyer – 40 Under Forty Illinois Attorneys to Watch – 2002
- Leading Lawyers - Commercial Litigation
- Illinois Leading Lawyers - 2017

Education
- J.D., Washington University in St. Louis School of Law
- B.S., University of Missouri, Rolla, - Aerospace Engineering

BEST LAID PLANS: HOW TO PREPARE FOR AND LITIGATE DEALS GONE BAD

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Businesses constantly are sourcing supplies and services, arranging financing, licensing intellectual property, and even acquiring and divesting businesses. Such transactions—or "deals," for short—are a ubiquitous feature of modern commerce. When everything goes right, deals can be engines for growth. Inevitably, though, some transactions do not work out, and even result in litigation.

This article briefly explores a handful of topics in such "deals gone bad" litigation: arbitration provisions, attorney-client privilege, integration clauses, and jurisdiction. The goal is not to address all possible problems that can arise across all types of transactions, but rather to use a sampling of issues to illustrate the impact that "after-thought" provisions—ones on which the business people may not be focused—can have in commercial litigation. And, because our focus is on demonstrating broad approaches, we intentionally discuss authority from a wide range of jurisdictions.

Arbitration Clauses and Non-Parties

We start with a classic feature of modern contracting, the arbitration clause. The question for purposes of this article is not whether arbitration clauses are desirable or undesirable; that depends on a host of client- and deal-specific factors. Rather, our question is whether a client can take advantage of an arbitration clause contained in a contract to which he or she is not a party. This question often arises when an officer, director, member, or shareholder of one contracting party ends up on the receiving end of individual liability claims asserted by the other contracting party.

To answer that question, we begin with a review of the background legal principles applicable to enforcement of arbitration clauses. The Federal Arbitration Act ("FAA") reflects a strong federal policy in favor of arbitration agreements. Javitch v. First Union Sec., Inc., 315 F.3d 619, 624 (6th Cir. 2004). Most states likewise have adopted arbitration acts of their own. See, e.g., http://uniformlaws.org (detailing adoption of the Arbitration Act (1956) and the Revised Uniform Arbitration Act (2000)). But the policy favoring arbitration "is at bottom a policy guaranteeing the enforcement of private contractual arrangements." Mitsubishi Mot. Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985).

As a general rule, a person or entity who is not a party to a contract has no standing to compel arbitration. Britton v. Co-op. Banking Grp., 4 F.3d 742, 744 (9th Cir. 1993). But a majority of courts agree that, if a plaintiff "can avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as defendants in his complaint, or signatory parties in their individual capacities only, the effect of the rule requiring arbitration would, in effect, be nullified." Arnold v. Arnold Corp., 920 F.2d 1269, 1281 (6th Cir. 1990); see also Hilti, Inc. v. Oldach, 392 F.2d 368, 369 n.2 (1st Cir. 1968). Thus, the Supreme Court has held that a litigant who was not a party to the arbitration agreement may compel arbitration if state contract law allows him to enforce the agreement. Arthur Andersen

LLP v. Carlisle, 556 U.S. 624, 632 (2009). The most common arguments deployed for that purpose are agency, equitable estoppel, and third-party beneficiary status.

Courts widely agree that agency is an effective basis upon which non-parties can enforce arbitration agreements. When "a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements." Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1121 (3rd Cir. 1993); see also Arnold, 920 F.2d at 1281–82; Letizia v. Prudential Bache Sec., 802 F.2d 1185, 1187–88 (9th Cir. 1986). Thus, a party cannot avoid arbitration simply by suing a nonsignatory agent, rather than the contracting principal.

The court in MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999) articulated a widely accepted second approach for non-party enforcement, under the doctrine of equitable estoppel. Under MS Dealer, arbitration may be compelled through equitable estoppel "when the signatory . . . 'must rely on the terms of the written agreement in asserting [its] claims' against the nonsignatory." Id. at 947 (quoting Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993)). Equitable estoppel also applies when the allegations are of "'substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.'" Id. (quoting Boyd v. Homes of Legend, Inc., 981 F. Supp. 1423, 1433 (M.D. Ala. 1997)). Numerous jurisdictions have followed the MS Dealer formulation. See, e.g., Grigson v. Creative Agency L.L.C., 210 F.3d 524 (5th Cir. 2000); CD Partners, LLC v. Grizzle, 424 F.3d 795, 798–99 (8th Cir. 2005).

A third basis on which courts may allow a non-party to compel arbitration is intended third-party beneficiary status. To qualify as an intended third-party beneficiary, the original agreement must have been executed "for the primary and direct benefit of" the non-party. Peters v. Keyes Co., 402 Fed. App'x. 448, 451 (11th Cir. 2010); see also Fundamental Admin. Servs., LLC v. Patton, 504 Fed. App'x. 694, 701 (10th Cir. 2012); Superior Energy Servs., LLC v. Cabinda Gulf Oil Co. Ltd., 635 Fed. Appx. 375, 376 (9th Cir. 2016) (permitting the non-party defendant to compel arbitration "where the contracting parties intended for the payments to go to the third party").

What each of these three doctrines have in common, however, is uncertainty. In each instance, the would-be enforcer of the arbitration provision will first be asked to make an unexpected threshold showing, the nuances of which may well vary depending on the particular law that governs the dispute. The better practice is to avoid that uncertainty at the outset, by clearly spelling out within the four corners of the contract who may enforce the provision.

Privilege After Company Sale

We next turn to the question of attorney-client privilege. The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Id. But what happens to that privilege in the context of litigation following the sale of a company? Can the buyer use against the seller otherwise privileged documents located in the company's files?

The default rule is that control of a company's attorney-client privilege rests with the current managers of the company, even when their interests may differ from the interests of the managers who were actually involved in the communications at issue:

> "[W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers installed as a result of a takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors. Displaced managers may not assert the privilege over the wishes of current managers . . . ."

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349 (1985); see also In re Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001) ("After all, the law is settled that a corporation's attorney-client privilege may be waived by current management.") Indeed, Delaware's General Corporation Law expressly provides that the surviving corporation following a merger or acquisition shall control "all property, rights,

privileges, powers, and franchises" of the predecessor. 8 Del. C. § 259. And the Delaware Chancery Court has clarified that the attorney-client privilege is no exception to this rule. Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 158 (Del. Ch. 2013).

Not all states follow that default rule, at least with respect to communications about the deal itself. New York, whose law is frequently adopted to govern transactions, has recognized a significant exception to the general rule. There, the attorney-client privilege as to general business communications passes to the successor corporation but the privilege remains with the predecessor corporation as to communications about the deal itself. Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 139, 674 N.E.2d 663, 671–72 (1996). The Tekni-Plex Court recognized that the attorney-client privilege is meant to encourage "full and frank communication" between an attorney and client. The Court held, "Where the parties to a corporate acquisition agree that in any subsequent dispute arising out of the transaction the interests of the buyer will be pitted against the interests of the sold corporation, corporate actors should not have to worry that their privileged communications with counsel concerning the negotiations might be available to the buyer for use against the sold corporation in any ensuing litigation. Such concern would significantly chill attorney-client communication during the transaction." Id.

So, under the default rule, new management can waive the attorney-client privilege as to communications that took place before new management was in charge, even as to communications about the transaction that led to the new management. Under the New York approach, the deal communications themselves would remain privileged. And sometimes, even figuring out which rule applies will require a preliminary conflict-of-laws analysis: Consider what might happen in the not-uncommon situation where two companies organized under Delaware law engage in a transaction but include a New York choice-of-law provision.

Importantly, the entire issue may well be avoidable with thoughtful drafting at the outset. The Delaware Chancery Court confirms, "Of course, parties in commerce can—and have—negotiated special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation." Great Hill Equity Partners, 80 A.3d at 160. As Edna Selan Epstein, an expert on the attorney-client privilege, succinctly puts it, "When the means to preserve the privilege are so readily at hand, companies should avail themselves of the obvious solution by including a clause addressing privilege issues in the transaction documents." Edna Selan Epstein, Acquisition and Merger: Whose Privilege Is It Now?, Litigation News, 2017.

Integration and Non-Reliance

Having discussed a relatively narrow issue in control of the attorney-client privilege after a sale, our next topic addresses a nearly ubiquitous one: the integration clause. Almost every written contract has an integration clause stating that the contract is the entire agreement and supersedes all prior agreements. Some clauses go further, providing that the parties agree and acknowledge that there are no other representations, warranties, or promises other than those expressly set forth in the contract. So, when it comes to later allegations of oral misrepresentations and omissions, no problem? Not necessarily.

The traditional approach to such allegations is a motion to dismiss on the basis that a party cannot justifiably rely on a representation that—by their own acknowledgement—does not exist. See, e.g., H-M Wexford LLC v. Encorp, Inc., 832 A.2d 129, 142 (Del. Ch. 2003) (holding that the plaintiff could not "profess ignorance" in the face of an integration clause and a disclaimer of accuracy in extrinsic materials, "and state that it justifiably relied" on the extrinsic material).

Despite the logic of that position, however, many courts have come to draw a distinction between saying that other representations do not exist and saying that you are not relying on them. See, e.g., Abry Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1032, 1059 (Del. Ch. 2006) ("[M]urky integration clauses, or standard integration clauses without explicit anti-reliance representations, will not relieve a party of its oral and extra-contractual fraudulent representations."); Vigortone AG Prod., Inc. v. PM AG Prod., Inc., 316 F.3d 641, 644–45 (7th Cir. 2002) ("Since reliance is an element of fraud, the [no-reliance] clause, if upheld—and why should it not be upheld, at least when the contract is between sophisticated commercial enterprises—precludes a fraud suit[.]"); but see Sunquest Info. Sys., Inc. v. Dean Witter Reynolds,

Inc., 40 F. Supp. 2d 644, 653 (W.D. Pa. 1999) (holding that an ordinary integration clause without no-reliance language barred claims of fraudulent inducement).

Why do many courts say that it is not enough to say there are no extrinsic representations at all, but also that reliance on those non-existent representations must be expressly denied? It apparently is an attempt to balance the ability of sophisticated parties to freely contract—including the assignment of certain risks—with the law's general abhorrence for fraud and concerns about "boilerplate, unnegotiated disclaimer language." See Great Lakes Chem. Corp. v. Pharmacia Corp., 788 A.2d 544, 555-566 (Del. Ch. 2001) (dismissing fraud claims in the face of a "carefully negotiated and crafted Purchase Agreement" that otherwise "would . . . not be worth the paper it is written on").

As we have already observed, this is another situation where thoughtful drafting at the outset can alleviate both uncertainty and unexpected consequences when the deal goes bad. Representations that are important to one contracting party or the other should be memorialized within the agreement itself. And because a "standard" integration clause may not be enough to protect against later accusations of extrinsic misrepresentations and omissions, express disclaimers of reliance should be included either within the integration clause or as a correlating provision.

Jurisdiction

We started with an effort to get out of court entirely, in favor of arbitration. We close with a different question that nevertheless goes to where and how this deal-gone-bad will be litigated: What happens when your client is stuck in a court it does not want to be in—perhaps state court in a state where your client believes he or she has no meaningful connections? As usual, the answer depends on a wide range of factors; and we touch on just two issues that commonly arise in deal litigation.

The first common question is whether you can get the dispute out of state court and into federal court. This is a question of removal jurisdiction. Removal to federal court generally is permitted whenever the federal court would have had original jurisdiction over the action. 28 U.S.C. § 1441(a). Although some deal litigation will involve federal claims, given rise to original jurisdiction under 28 U.S.C. § 1331, the typical basis for original jurisdiction over run-of-the-mill contract and business-tort claims will be diversity of citizenship under 28 U.S.C. § 1332.

Diversity jurisdiction has two threshold requirements. First, the amount in controversy must exceed $75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a). Second, there must be complete diversity of citizenship between all plaintiffs and defendants. 28 U.S.C. § 1332(a)(1). Any non-diverse member or partner bars removal. See, e.g., Pramco, LLC ex rel. CFSC Consortium, LLC v. San Juan Bay Marina, Inc., 435 F.3d 51, 54 (1st Cir. 2006).

Individuals are citizens of the state in which they are domiciled. Corporations, in contrast, can have citizenship in more than one state: the state where it was incorporated and, if different, the state where it has its principal place of business. Hertz Corp. v. Friend, 559 U.S. 77 (2010). With unincorporated entities such as limited liability companies and partnerships, the analysis is more complex. The state under whose laws they are established is immaterial. Belleville Catering Co. v. Champaign Market Place, L.LC., 350 F.3d 691, 692 (7th Cir. 2003). Rather, such entities are citizens of every state in which any member or partner is a citizen. Carden v. Arkoma Assoc., 494 U.S. 185, 195–96, (1990) (limited partnership); Pramco, LLC ex rel. CFSC Consortium, LLC v. San Juan Bay Marina, Inc., 435 F.3d 51, 54 (1st Cir. 2006) (limited liability corporation). And, when a member or partner is itself an unincorporated entity, that analysis must be repeated all the way up the ownership chain until a natural person or corporation is reached. Thomas v. Guardsmark, LLC, 487 F.3d 531, 534 (7th Cir. 2007).

Thus, when limited liability companies and partnerships are parties to a case, the issue of diversity jurisdiction becomes significantly more complex, and the potential increases that incomplete diversity will destroy original jurisdiction and preclude removal. Moreover, the burden to show original jurisdiction is on the removing party. Carson v. Dunham, 121 U.S. 421, 425 (1887). Thus, when filing a notice of removal based on diversity, the removing party must expressly allege the citizenship of all parties (necessarily including the members and partners of unincorporated entities). Settlement Funding, L.L.C. v. Rapid Settlements, Ltd., 851 F.3d 530, 536 (5th Cir. 2017); Thomas, 487 F.3d at 534. Failure to do so may result in remand. See

Lindley Contours, LLC v. AABB Fitness Holdings, Inc., 414 Fed. Appx. 62, 64–5 (9th Cir. 2011).

The second common question is whether you can get the dispute out of the chosen state. This is a question of personal jurisdiction (and perhaps, eventually, transfer or forum non conveniens). For personal jurisdiction to attach, both constitutional and statutory requirements must be satisfied.

On a constitutional level, due process requires that the nonresident defendant have sufficient minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. See Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Where those contacts are so "continuous and systematic" as to render the defendant essentially at home in the forum state, general personal jurisdiction will lie over any and all claims against the defendant. Goodyear Dunlop Tires Ops., S.A. v. Brown, 564 U.S. 915, 919 (2011). Otherwise, limited (or specific) personal jurisdiction may be exercised only if the claims arise from or relate to the contacts on which jurisdiction is asserted. Int'l Shoe, 326 U.S. at 316. When determining whether specific jurisdiction exists, courts determine whether the "defendant purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958).

On a statutory level, the state itself must have determined—typically through the enactment of "long-arm statutes"—that certain conduct suffices to give rise to personal jurisdiction in the states' courts. Some states have enacted long-arm statutes that authorize personal jurisdiction to the full limits permitted under the Constitution. See, e.g., 16 ARS § 4.2(a) (Arizona); Cal. C.C.P. § 410.10 (California). Other states have enacted "enumerated" long-arm statutes listing specific conduct that gives rise to personal jurisdiction. See, e.g.,10 Del. C. § 3104 (Delaware); CPLR § 302(a)(1) (New York).

We return to the opening hypothetical, the client (perhaps) without meaningful connections. A personal jurisdiction analysis routinely will look at factors such as whether the non-resident defendant transacts any business or performs work or services in the state, causes tortious injury in the state, or has real estate interest in the state. In addition to such overt conduct, and of particular note in deal litigation, simply serving as an officer, director, manager, or trustee of a company organized under the laws of a state—even when those responsibilities are performed outside that state—can suffice to establish personal jurisdiction. See, e.g., 10 Del. C. § 3114(a) (Delaware); MCL 600.705(6) (Michigan). The only outcome that can be predicted with some certainty is a costly fight without a clear outcome.

By now, you will have become accustomed to our suggestion that good drafting at the front end can do a great deal to avoid uncertainty at the back end. For that, we turn to the forum-selection clause.

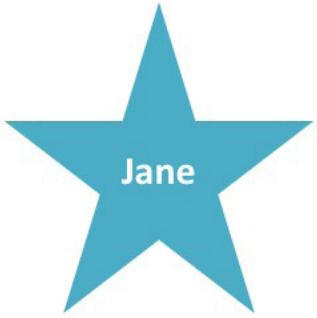
A forum-selection clause designates the court and location where the parties would like to have their legal dispute decided. When parties have agreed to a forum-selection clause, they waive the right to consider arguments about the parties' private interests and the "district court should ordinarily transfer the case to the forum specified in that clause . . . in all but the most exceptional cases." Atlantic Marine Const. Co., Inc. v. U.S. Dist. Ct. for W. Dist. Tex., 134 S. Ct. 568, 579–82 (2013). Indeed, when there is a valid forum-selection clause, "[t]he plaintiff's choice of forum merits no weight" and he "bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted." Id. at 581. A well-drafted forum-selection clause also can avoid personal-jurisdiction disputes by including express consents to personal jurisdiction and waivers of objections based on personal jurisdiction.

Conclusion

The issues discussed in this article are just a few of the icebergs in the ocean of potential problems in deal litigation. There are many other hazards also deserving of attention: Are the representations and warranties being made by the right party (the one against whom enforcement will be sought)? Is there a sensible choice-of-law provision? Will the indemnification provision (if any) really work the way your client expects? The list goes on.

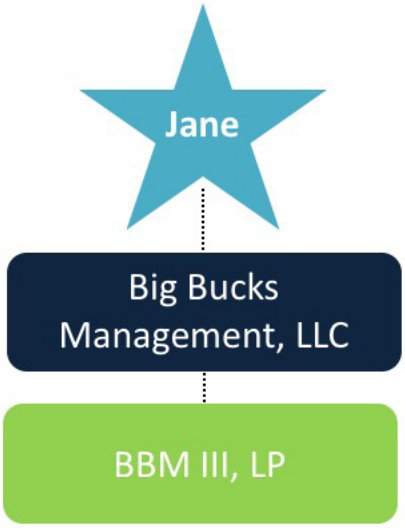
At bottom, we leave you with two takeaways. First, careful drafting at the outset, in view of the types of problems that frequently arise in litigation, can avoid a great deal of surprise and uncertainty. Second, litigating deals gone bad is rarely as simple as might appear initially. And knowing how to spot and address

issues like these can make a critical difference in the outcome for your client.



SETTING THE STAGE

SETTING THE STAGE



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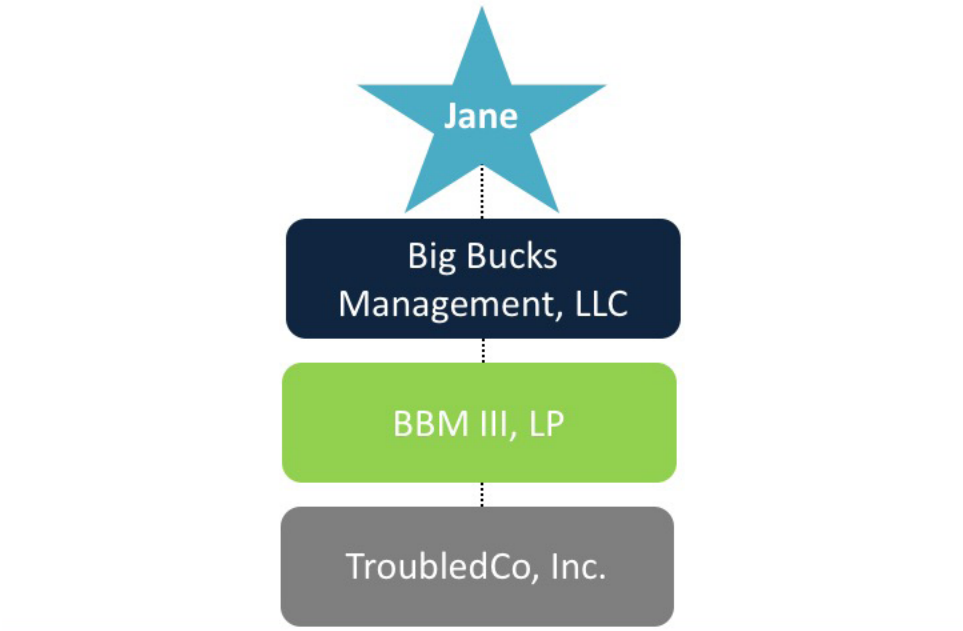

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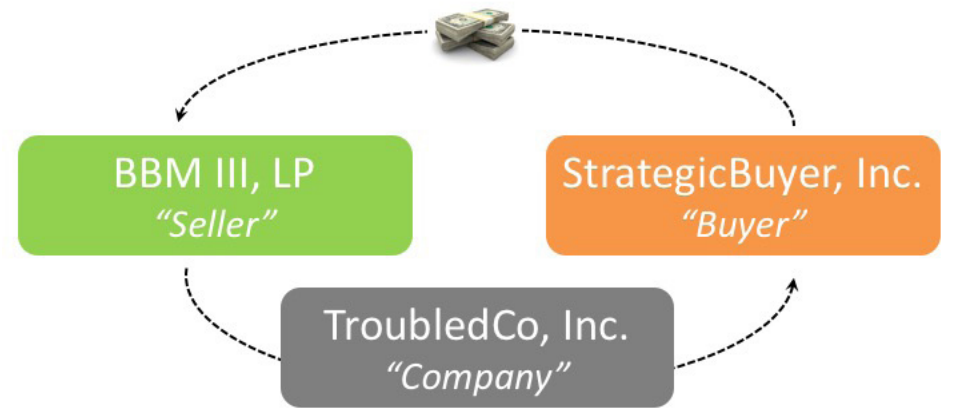


THE DEAL

1 "no known or anticipated material liabilities other than those listed"

2 mandatory arbitration

3 integration

THE AGREEMENT

16 months later…

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

StrategicBuyer, Inc.,

Plaintiff,

v.

Jane Doe,
Big Bucks Management, LLC

Defendants.

Case No. 2018-000000-CB

Hon.

COMPLAINT AND DEMAND FOR JURY TRIAL

LAWSUIT

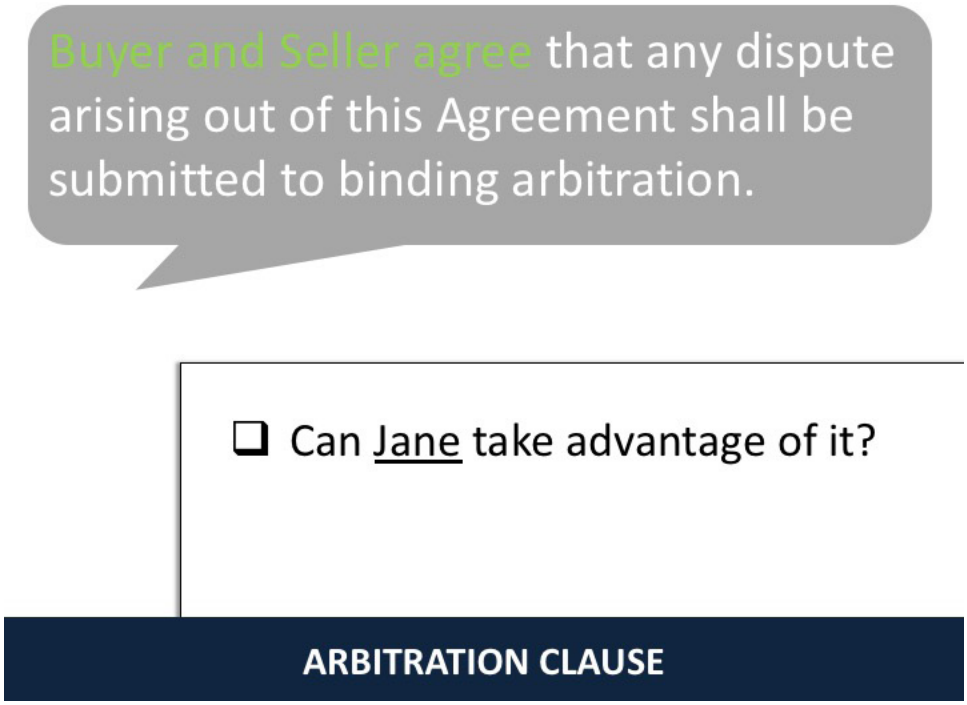
intentionally concealed a potential liability

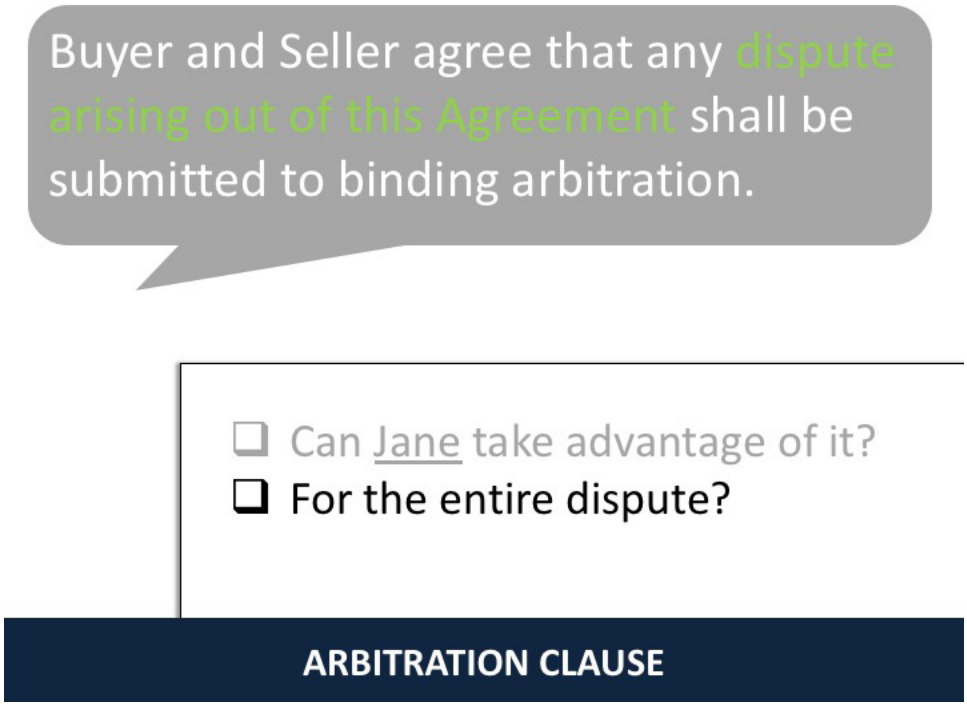
promised a major new customer and market that never materialized

THE ALLEGATIONS

Buyer and Seller agree that any dispute arising out of this Agreement shall be submitted to binding arbitration.

ARBITRATION CLAUSE


Buyer and Seller agree that any dispute arising out of this Agreement shall be submitted to binding arbitration.
❑ Can Jane take advantage of it?
ARBITRATION CLAUSE


Buyer and Seller agree that any dispute arising out of this Agreement shall be submitted to binding arbitration.
❑ Can Jane take advantage of it?
❑ For the entire dispute?
ARBITRATION CLAUSE

Buyer and Seller agree that any dispute arising out of this Agreement shall be submitted to binding arbitration.

- ❑ Can Jane take advantage of it?
- ❑ For the entire dispute?
- ❑ What would have helped?

ARBITRATION CLAUSE

The Parties, for themselves, Company, and their respective officers, directors, managers, and members, agree that any dispute arising out of or relating in any way to this Agreement shall be submitted to binding arbitration. This provision may be enforced by any of the foregoing persons.

ARBITRATION CLAUSE

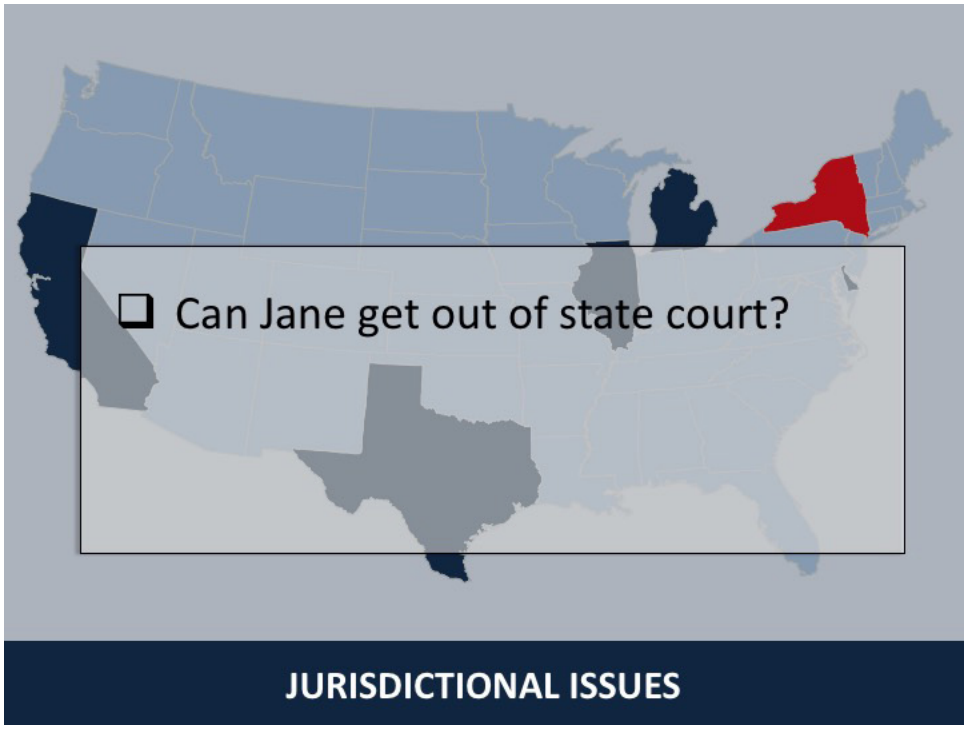

JURISDICTIONAL ISSUES


JURISDICTIONAL ISSUES


JURISDICTIONAL ISSUES


JURISDICTIONAL ISSUES


JURISDICTIONAL ISSUES

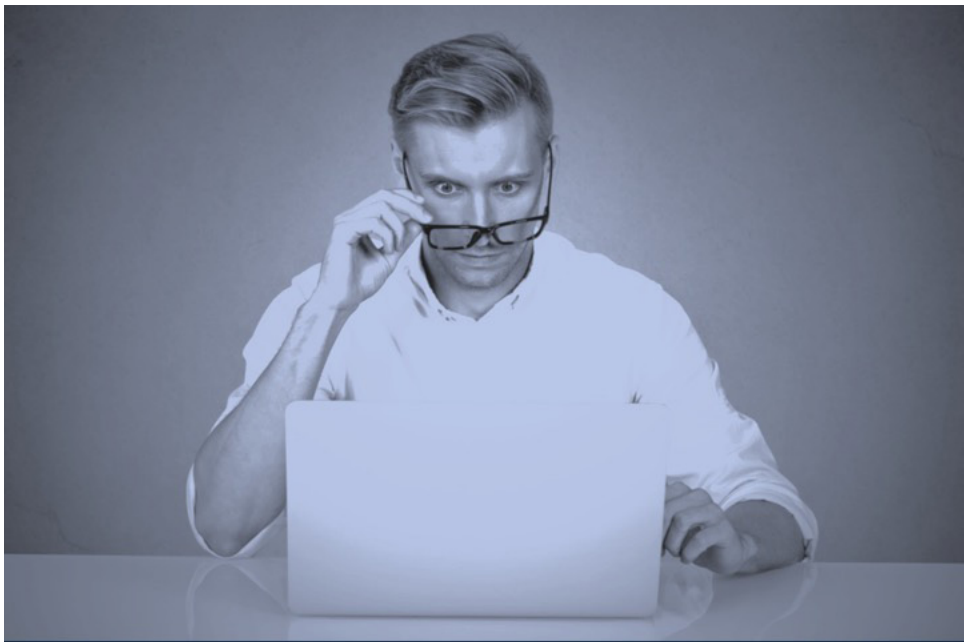

❑ Can Jane get out of state court?
JURISDICTIONAL ISSUES


Can Jane get out of state court?
Can Jane be sued in Michigan?
JURISDICTIONAL ISSUES


Can Jane be sued in Michigan?
Is there any way to get this out of state court?
What would have helped?
JURISDICTIONAL ISSUES

The parties agree that the exclusive forum for any proceeding arising out of or relating in any way to this Agreement shall be Texas, and each of them waives any objection to personal jurisdiction in Texas for such proceeding.

JURISDICTIONAL ISSUES

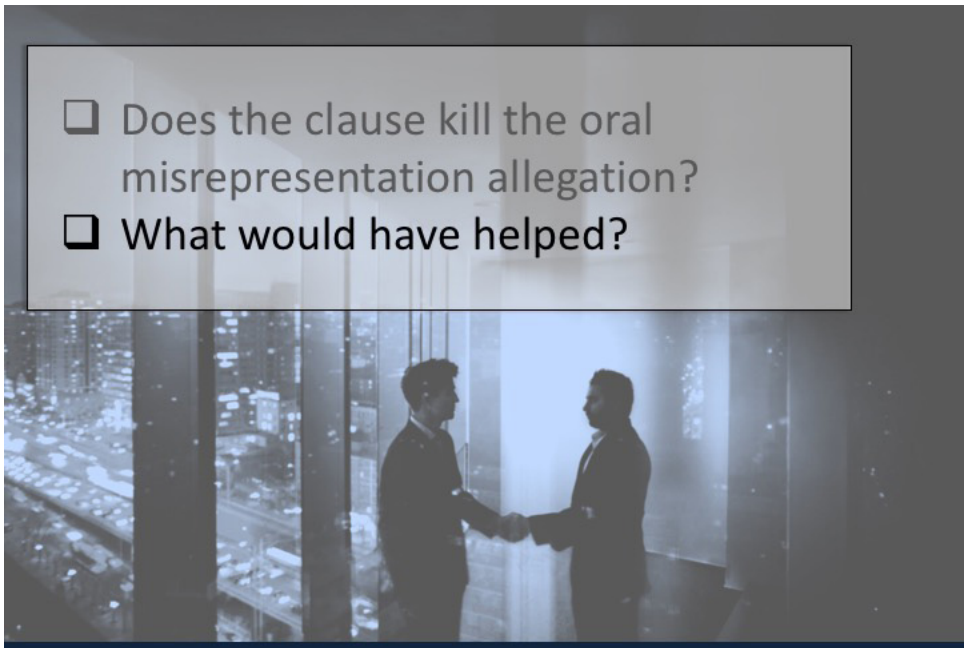


PRIVILEGE

This Agreement embodies the parties' entire agreement and understanding. There are no representations, warranties, or undertakings other than those expressly set forth in this Agreement.

INTEGRATION CLAUSE

INTEGRATION CLAUSE



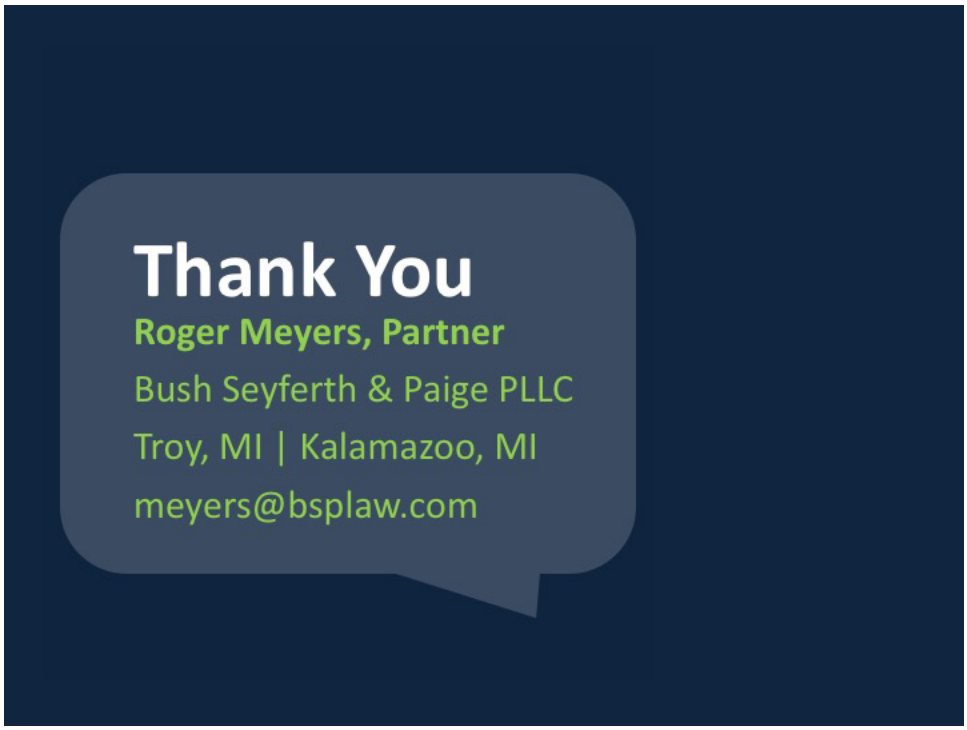
INTEGRATION CLAUSE

This Agreement embodies the parties' entire agreement and understanding. There are no representations, warranties, or undertakings, other than those expressly set forth in this Agreement.

Buyer expressly disclaims reliance on any representation, warranty, or undertaking that is not expressly set forth in this Agreement.

INTEGRATION CLAUSE


Insurance
Indemnification
Right Parties
Choice of law
TIP OF THE ICEBERG


Thank You
Roger Meyers, Partner
Bush Seyferth & Paige PLLC
Troy, MI | Kalamazoo, MI
meyers@bsplaw.com

Seller represents and warrants that, except as listed on Schedule L, there are no known or threatened liabilities that are reasonably expected to have a material adverse effect on the Company.

REPRESENTATION AND WARRANTY

Seller represents and warrants . . .

- ❑ Missing something?

REPRESENTATION AND WARRANTY


Seller represents and warrants that, except as listed on Schedule L, there are no known or threatened liabilities that are reasonably expected to have a material adverse effect on the Company.
❑ Missing something?
❑ What would have helped?
REPRESENTATION AND WARRANTY


Seller and Manager represent and warrant . . .
❑ Missing something?
❑ What would have helped?
REPRESENTATION AND WARRANTY

ROGER MEYERS

Partner

BUSH SEYFERTH & PAIGE (TROY, MI)

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Roger P. Meyers leads the firm's complex business and commercial litigation practice. He has handled disputes involving business ownership, corporate acquisitions, commercial contracts, director and officer liability, business torts, securities, health care, unfair competition, intellectual property, and trade secret matters. Representative clients include FCA US LLC, Wells Fargo Advisors, Health Alliance Plan, Roush Industries, Edw. C. Levy Co., Dialog Direct, and others.

Related Services

- Appellate
- Class Action
- Complex Commercial Litigation
- Financial Services Litigation
- Intellectual Property

Representative Matters Lead counsel for technology company in multi-million dollar fiduciary duty and ownership dispute.

- Obtained dismissal of franchise, fraud, and other business tort claims against international importer.
- Defending major automobile manufacturer in significant securities class action.
- Counsel for leading truck manufacturer in $80 million supply dispute.
- Represented major automobile manufacturer in state attorney general consumer protection action.
- Trial and appellate counsel for a high-tech manufacturing portfolio company in a $4 million royalty dispute involving extensive electronic discovery issues and an accounting before a special master.
- Lead counsel for a mining company in $25 million breach of lease action involving complex hydrogeology and geology issues.
- Defended the CEO of a closely held financial-services company through trial and appeal in litigation involving claims of shareholder oppression, breach of contract and breach of fiduciary duty.
- Represented a major marketing and business-services company in non-competition, confidentiality, and trade-secret misappropriation action against former executive team.
- Counsel for a prosthetics and medical equipment company in a multi-million dollar trademark and post-closing adjustment action arising out of divestiture of a line of business.
- Counsel for private acquirer of a multi-state fast food franchisor in the defense of a $3.5 million action involving contractual and business tort claims.
- Represented a Fortune 100 petroleum company against shareholder claims for declaratory and injunctive relief.
- Lead counsel for defendant racing corporation in shareholder action for oppression, breach of fiduciary duty, and books and records.

Honors and Awards

- Michigan Super Lawyers, Rising Star, 2012 – Present
- Legal Aid Defender Association, Recognized for Pro Bono Service, 2012
- University of Michigan Law School, Order of the Coif

Education

- University of Michigan Law School, J.D., magna cum laude, 2009
- Suffolk University, B.S. Business Administration – Computer Information Systems, summa cum laude, 2003

THE ENEMY OF MY ENEMY IS MY FRIEND: MANAGING THE INSURED/INSURER RELATIONSHIP IN LITIGATION

Lee Hollis
Lightfoot Franklin & White (Birmingham, AL)
205.380.0766 | lhollis@lightfoootlaw.com

Introduction

It has been said that no one can serve two masters, but in the legal world, where many insurance cases arise under the representative arrangement, counsel must sometimes do just that—at least to a certain degree. Under a typical insurance contract, one of the obligations of the insurance company is to defend the policyholder against brought claims. Referred to as the "tripartite relationship," the insurance company will retain defense counsel to represent both the insured and the company because they have (in theory) the same stake in the outcome. Within this relationship, it is often a beneficial, though not well understood, necessity for the parties and the attorney to share information in order to reach the desired outcome of the litigation.

Running within this tripartite relationship, as with any attorney-client relationship, is the concept of attorney-client privilege. The attorney-client privilege exists to facilitate open communications between the client and counsel so that counsel can effectively prepare representation without the client fearing that sensitive information could possibly fall into the wrong hands. Although communications between insurer and insured are ordinarily not privileged, the representative arrangement of the tripartite relationship allows those communications and communications between those parties and the attorney to be protected under the attorney-client privilege. However, the relationship also creates some unique challenges to safeguarding sensitive information. While the tripartite relationship often proceeds through litigation without issue, a rub exists when sensitive information is shared between counsel and insurer or counsel and insured when the parties' interests may soon diverge—particularly regarding coverage issues.

This article examines how different jurisdictions deal with the attorney-client privilege as it pertains to defense of insurance cases. Part I of this article looks at the different theories states apply to the attorney-client privilege in the tripartite relationship and the effects that those theories have on the sharing of information within the tripartite relationship. Part II discusses the practical effects of jurisdictional laws on privilege in the tripartite. In Part III, this article examines how jurisdictions handle the effects that a reservation of rights have on the attorney-client privilege.

Who Owns the Attorney-Client Privilege in a Tripartite Relationship?

A. Relatively few states have established a bright-line approach.

Courts in only a few states have specifically laid out whether attorney-client privilege applies within the tripartite relationship. Still, caution should be exercised even in jurisdictions that recognize a bright-line privilege because potential for the policyholder and insurance company to become adverse to one another always exists.

1. When privilege applies to all members of the tripartite:

In states adopting a bright-line approach for attorney-client privilege in a tripartite relationship, "confidential communications between either the insurer or the insured and counsel are protected by the attorney-client privilege, and both the insurer and insured are holders of the privilege." Bank of Am., N.A. v. Superior Court of Orange Cnty., 151 Cal. Rptr. 3d 526 (2013); Ratcliff v. Sprint Missouri, Inc., 261 S.W.3d 534, 548 (Mo. Ct. App. 2008). Most states adopting this approach reason, as explained by the Illinois Court of Appeals, that "the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured." Holland v. Schwan's Home Serv., Inc., 992 N.E.2d 43, 84-85 (Ill. App. Ct. 2013); Shahan v. Hilker, 488 N.W.2d 577, 581 (Neb. 1992). Others explain that the attorney-client privilege applies to the tripartite because "the carrier is required to represent the insured and the insured is obligated to cooperate with the carrier . . . ." Kentucky v. Melear, 638 S.W.2d 290 (Ky. Ct. App. 1982) (citing Asbury v. Beerbower, Ky., 589 S.W.2d 216 (1979)).

2. When privilege does not exist between the insured and insurer:

As discussed below in single-client theory, some states predicate the lack of privilege on the grounds that no attorney-client relationship exists between the insurance company and an attorney hired to represent the insured. E.g., Koster v. June's Trucking, Inc., 625 N.W.2d 82, 84 (Mich. App. 2000).

B. Several jurisdictions apply a hybrid approach to privilege with varying degrees of limitations.

Other jurisdictions recognize the existence of privilege to the extent it applies to parties outside of the tripartite, but not to subsequent disputes between the insured and insurer. Nationwide Mut. Fire Ins. Co. v. Bourlon, 617 S.E.2d 40, 47 (N.C. App. 2005); Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh Pennsylvania, 623 A.2d 1118, 1123 (Del. Super. 1992); Dumas v. State Farm Mut. Auto. Ins. Co., 274 A.2d 781, 784-85 (N.H. 1971); Chitty v. State Farm Mut. Auto. Ins. Co., 36 F.R.D. 37, 41 (E.D.S.C. 1964); Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920 (Iowa 1958); Shapiro v. Allstate Ins. Co., 44 F.R.D. 429 (E.D.Pa. 1968); Horowitz v. LeLacheure, 101 A.2d 483 (R.I. 1953). In such instances, the communications against outside parties are often protected by the common-interest or joint-client exceptions. Bourlon, 617 S.E.2d at 47. While some states allow the existence of attorney-client privilege even when it appears that the insurer and insured could end up as adversaries, other states sever the tripartite when the insured and insurer take adversarial positions at the outset, and thus, communications made between the insured and the attorney are not protected by the attorney-client privilege. Hutchinson v. Farm Family Cas. Ins. Co., 867 A.2d 1, 10 (Conn. 2005) (citing Liberty Mutual Fire Ins. Co. v. Kaufman, 885 So. 2d 905, 908 (Fla. Dist. Ct. App. 2004)). In these jurisdictions, "if the insured or the insurance company retained separate attorneys to represent only that party's specific interests, they should each be able to preserve their respective attorney-client privilege as to their communications with their own lawyers." Progressive Exp. Ins. Co. v. Scoma, 975 So. 2d 461, 466-67 (Fla. Dist. Ct. App. 2007).

Some states limit the privilege by acknowledging that, while it ordinarily does not apply to statements between an insurer and a policyholder, it does apply "where it can be shown that the [insurer] received the communication at the express direction of counsel for the insured." Langdon v. Champion, 752 P.2d 999, 1004 (Alaska 1988); Ballard v. Eighth Judicial Dist. Court of State In & For Cnty. of Clark, 787 P.2d 406, 407-08 (Nev. 1990); DiCenzo v. Izawa, 723 P.2d 171, 176-77 (Haw. 1986). This distinction is based upon the idea that adjustors and others working for the insurance company act as "'one employed to assist the lawyer in the rendition of professional legal services,' thus making him a 'representative of the lawyer.'" Langdon, 752 P.2d at 1004.

This exception is limited though, as it likely applies only when the communication was made for "the dominant purpose of the defense of the insured by the attorney and where confidentiality was the reasonable expectation of the insured." Pfender v. Torres, 765 A.2d 208, 212-13 (N.J. Super. Ct. App. Div. 2001); Cutchin v. Maryland, 792 A.2d 359, 366 (Md. 2002). A court applying this rule likely will look to factors such as: (1) "whether the statement was made at the direction of an attorney;" (2) "whether there was anything indicating the insured was seeking legal advice;" (3) "whether there was pending litigation;" and (4) "whether the

insurance company might have interests other than protecting the insured's rights." Id. One key factor that should be considered is whether the information is "part of the regular business of an insurance company," in which case the information would be discoverable. Melworm v. Encompass Indem. Co., 951 N.Y.S.2d 829, 831-32 (N.Y. Sup. Ct. 2012). These cases show that, while courts seem willing to allow communications between members of the tripartite relationship, counsel should always caution parties to be judicious in their discussions; the privilege cannot be relied upon to completely screen such communications from later adversarial discovery by the insurer.

C. The majority of jurisdictions have not yet decided the issue.

The America Bar Association established in a formal opinion that an attorney hired in the tripartite relationship may represent (1) the insured alone, (2) both the insured and insurer, or (3) the insured and the insurer for limited purposes only. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-403 at 2 (1996); see David H. Anderson, Balancing the Tripartite Relationship Between Defendant, Defense Counsel, and Insurer, 88 Ill. B.J. 384 (July 2000) ("Depending upon the jurisdiction and the circumstances of the engagement, the defense attorney might have two clients, the insurer and the insured."). These three options reflect the decisions made by states mentioned supra, and also provide guidance for courts deciding the issue in jurisdictions where no determination has been made yet.

As its name suggests, the attorney-client privilege covers only those communications between an attorney and that attorney's client or an authorized agent of the client. Richard C. Giller, Confidentiality and Privilege in the Insurer–Policyholder–Defense Counsel Relationship, American Bar Association, http://apps.americanbar.org/litigation/committees/insurance/articles/marapr2012-confidentiality-privilege.html#_ednref3 (last visited October 30, 2013) (citing United States v. Mass. Inst. of Tech., 129 F.3d 681 (1st Cir. 1997); In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules and Procedures, 299 Mont. 321 (Mont. 2000)). In jurisdictions where courts have yet to decide whether attorney-client privilege applies to the tripartite, the linchpin in evaluating the issue is a relatively straightforward question: who is the client?

1. When a state applies a single-client theory:

Although gaining in popularity, the single-client theory is still considered the minority approach. Under the single-client theory, the policyholder alone is the attorney's client. See e.g., Pine Island Farmers Coop v. Erstad & Riemer, 636 N.W.2d 604 (Minn. App. 2001); In Re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806 (Mont. 2000); Givens v. Mullikin ex. rel. McElwanney, 75 S.W.2d 383, 386 (Tenn. 2000); Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Cor., 730 A.2d 51 (Conn. 1999); Safeway Managing General Agency, Inc. v. Clark & Gamble, 985 S.W.2d 166, 168 (Tex. App. 1998); Finley v. Home Insurance Company, 975 P.2d 1145, 1153 (Hawaii 1998); Colorado Bar Association Formal Ethics Opinion 91 (1993); Gibbs v. Lappies, 828 F.Supp. 6, 7 (D.N.H. 1993); Continental Cas. Co. v. Pullman, Comley, Bradley, & Reeves, 929 F.2d 103, 108 (2d Cir. 1991); Atlanta Int'l Ins. Co v. Bell, 475 N.W.2d 294 (Mich.1991); First Am. Carriers, Inc. v. Kroger Co., 787 S.W.2d 669, 671 (Ark. 1990); In re A.H. Robins Co., 880 F.2d 694, 751 (4th Cir. 1989). The Third Restatement of the Law Governing Lawyers § 134 (2000) reflects this theory, stating, "a lawyer designated to defend the insured has a client-lawyer relationship with the insured" and "[t]he insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer." Those states that follow the single-client model but still recognize the existence of the privilege often do so under the common-interest exception or joint defense doctrine. E.g., Hoechst Celanese Corp., 623 A.2d at 1123-24; Bourlon, 617 S.E.2d at 47; Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 642 (Iowa 2004).

Absent special cause or a carved-out exception, in single-client jurisdictions, the insured-attorney communications are privileged, not only with regard to the traditionally adversarial parties, but also with regard to the insurers within the tripartite. On its face, this seems like the easiest approach to protect communications from disclosure, but tactically it can be burdensome for the tripartite. Insurance providers will seek certain information in order to better understand and analyze their position in the case, and while "this seems innocuous enough, [a lawyer] providing those status reports—which often contain privileged strategy discussions—may waive the attorney-client privilege that otherwise protects [those discussions with the insured] from disclosure." Stephen L. Cope, Unholy

Alliance: Defending The Client On The Insurer's Dime, California Litigation Report (September 2008) available at http://www.whitecase.com/files/Publication/1e161b03-1c3a-468a-9bfe-644cca90ada9/Presentation/PublicationAttachment/2b4c0f48-aa46-4a59-b12b-66733935 f052/California_Litigation_Report_September_2008_2.pdf (discussing the attorney-insurer relationship prior to the insurer accepting defense of the case). Because of the risk associated with waiving privilege, the attorney should refrain from providing potentially privileged information to the insurer.

Whether communicating directly or using counsel as a pass-through, the insured and insurer must necessarily limit their sharing of information because the risk of waiving privilege is high. As a result of this limitation, counsel must exercise particular caution to avoid unnecessarily disclosing information that would destroy its privileged nature.

2. When a state applies a dual-client theory:

The majority of states have adopted the position that counsel represents both the insurer and the insured. See, e.g., Restatement of The Law Governing Lawyers Sections 26(1) and 215; ABA Model Rule 1.7(b), comment 10, and Rule 1.8(f); Cincinnati Insurance Company v. Wills, 717 N.E.2d 151, 161 (Ind. 1999); Waste Management v. International Surplus Lines Insurance Company, 144 Ill.2d 178 (1991); Mitchum v. Hudgens, 533 So.2d 194, 198 (Ala. 1988); Squeller Feeds v. Pickering, 530 N.W.2d 678 (Iowa 1995); Hodges v. State Farm Bureau Cas. Ins. Co., 433 So. 2d 125, 132 (La. 1983); McCourt Co., Inc. v. FPC Properties, Inc., 434 N.E.2d 1234, 1235 (Mass. 1982); Goldberg v. American Homes Assurance Company, 439 N.Y.S.2d 2, 5 (N.Y. App.Div. 1st Dep't 1981); Lieberman v. Employers Insurance, 419 A.2d 417, 424 (N.J. 1980); Nezley v. Nationwide Mutual Insurance Company Company, 296 N.E.2d 550, 561 (Ohio App. 1971). Generally, under this theory, "[w]hen an insurance company retains an attorney to defend an action against an insured, the attorney represents the insured as well as the insurance company in furthering the interests of each." Mitchum, 533 So.2d at 198. However, some states, such as California and Arizona, narrow the scope slightly, viewing the policyholder as the "primary client." This naturally implies that the lawyer has at most a secondary obligation to the insurer. Paradigm Ins. Co. v. Langerman Law Offices, 24 P.3d 593, 602 (Ariz.2001); State Farm Mut'l Auto v. Federal Ins. Co., 86 Cal.Rptr.2d 20 (1999).

At least at first blush, dual representation appears highly beneficial to the functionality of the tripartite. The attorney may more freely communicate between parties without fear of destroying privilege, allowing for more thorough preparation of the defense. As a result, both the insured and insurer are provided with better quality legal work. The insurer also benefits from a more through litigation analysis. However, with that increased ability to share information also comes an increased risk that, should the insured and insurer become adverse to one another at a later point, information that would otherwise be privileged may be accessible by the opposition.

The Theory a State Chooses has Practical Impacts on Communication.

A. When in a single-client state:

1. Providing information to the insurer may lead to destruction of the privilege.

Though it may not be ideal, a reality of insurance representation is that the insurer likely will seek to discuss the case with defense counsel even if counsel represents the insured alone. Stephen L. Cope, Unholy Alliance: Defending The Client On The Insurer's Dime, California Litigation Report at 4-5 (September 2008). This type of conversation is permissible, provided that informed consent has been given by the insured, but an "attorney must understand that he is speaking to a third party [when speaking to the insurer] and make sure that no confidential or privileged information is disclosed in that conversation." Unholy Alliance: Defending The Client On The Insurer's Dime.

Similarly, the client should take caution not to unwittingly destroy privilege. As a matter of course, counsel should inform individual clients that the insurance company may approach them for information, but any disclosure could result in a waiver of privilege with regard to both the current adverse party and the insurer, should litigation arise against the insurer in the future. Pine Island Farmers Coop v. Erstad & Riemer, P.A., 696 N.W.2d 444, 452 (Minn. 2002) (discussing the implications and risks involved with creating dual representation); *see* Pearson v. Miller, 211 F.3d 57, 67 (3d Cir. 2000)

("Federal courts have never recognized an insured-insurer privilege as such.") (quoting Linde Thomson Langworthy Kohn & VanDyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508 (D.C. Cir. 1993) (internal quotations omitted)). In theory, the insurer should not approach the client if an adversarial relationship exists; however, an insurer may seek information from a client prior to an adversarial relationship forming. Because of these considerations, clients should be informed that neither federal law nor the vast majority of states recognize any type of insurer-insured privilege. Giller, Confidentiality and Privilege in the Insurer–Policyholder–Defense Counsel Relationship. Therefore, anything the client tells the insurer, even if pursuant to a requirement under the policy, can destroy privilege.

The premise for handling these matters should be simple and straightforward: just don't disclose information that should not be disclosed. However, the roles of the tripartite relationship can place the attorney in an awkward position. On one hand, the attorney owes his professional ethical duties to his client: the insured. On the other hand, a tension can arise from a likely business relationship between the attorney and the insurer. As such, the attorney needs honor his or her duty of loyalty to the insured, while providing the insurance company with the information it desires, so that the company will retain the attorney to represent insureds when future needs arise.

While certainly more easily said than done, counsel faced with these circumstances should revert back to the rules of professional conduct. In particular, counsel should always seek to "represent a client zealously within the bounds of the law." ABA Canon 7. Counsel should recognize that "[a]ny persuasion or pressure on the advocate which deters him from planning and carrying out the litigation on the basis of 'what, within the framework of the law, is best for my client's interest?' interferes with the obligation to represent the client fully within the law." Thode, The Ethical Standard for the Advocate, 39 Tex. L. Rev. 575, 584 (1961). Perhaps the best way to approach this dilemma is to explain to the insurance company a lawyer's ethical obligations at the outset of the relationship. Clearly defining these ethical obligations from the beginning should help reduce the likelihood of the lawyer being placed in a difficult position.

2. Use of the insurer as a lawyer's representative could avoid destruction of the privilege.

One possibility to ensure preservation of the attorney-client privilege while facilitating communications to the insurer is to utilize the insurer as a lawyer representative. See, e.g., Ala. R. Evid. 502(b). This workaround is premised on the idea that "privileged persons" include "communicating" and "representing" agents of an attorney. Restatement (Third) of the Law Governing Lawyers § 120. In jurisdictions that have accepted this premise, statements of the insured made to an insurer investigating the matter at the request of a lawyer with the intent that the information will be subsequently communicated to the lawyer in preparation for litigation are privileged. As the Kentucky Supreme Court stated, "an insured would normally confide in counsel" following a claim-triggering event, however the insured "has paid an insurance company to exercise that choice for him"; therefore, the insured "should not be penalized for his prudence" in communicating with the insurer. Asbury v. Beerbower, 589 S.W.2d 216, 217 (Ky. 1979).

In order for privilege to apply under this workaround, the agent must be working on behalf of an attorney, not simply gathering information that may be used by an attorney in the future. E.g., Pasteris v. Robillard, 121 F.R.D. 18, 21-22 (D. Mass. 1988). This reasoning echoes that of those states discussed supra that have refused to apply attorney-client privilege when the communication was not for the dominant purpose of the defense. This problem often arises when information is shared early in the investigation prior to the insurer hiring counsel for the insured. To avoid this type of issue, insurance providers should consider either immediately retaining counsel when a claim is reported or training frontline investigators to recognize attorney-hiring triggers—situations that would necessarily require the preservation of privilege.

Though this approach has its perks, ultimately, communications considered privileged in the context of the dispute between the united insured-insurer and a third party may lose that privilege when those same communications are offered in a subsequent dispute between the insured and the insurer. E.g., Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., 654 F. Supp. 1334, 1365 (D.D.C. 1986). While this might not pose a problem in many cases, when an insurer defends under a reservation of right, insureds may unwittingly divulge information to a wolf

in sheep's clothing. To combat this problem, counsel should discuss the risks associated with the client and analyze the likelihood that the parties will become adverse at some point in the future.

3. Utilizing a state's common interest or joint defense doctrine may preserve the privilege.

While not a privilege itself, the "joint defense" or "common interest" doctrine protects information shared among parties engaged in the joint defense of a claim who are represented by separate counsel. G. Andrew Rowlett, The Common Interest Doctrine: Key Practices for Maintaining Confidentiality, Subrogator 72 (2011). The common interest and joint defense doctrines were "established to facilitate communications between aligned parties to protect their common interests in a litigated matter with respect to communications designed to further that joint legal effort" by allowing disclosure of "privileged information to one another without destroying the privileged nature of those communications." Giller, Confidentiality and Privilege in the Insurer–Policyholder–Defense Counsel Relationship. To utilize this strategy, parties should consider entering into a joint defense agreement, expressly "acknowledging that the carrier and the policyholder are aligned in their desire to work together to evaluate and assess the risks of the underlying litigation in order to resolve that litigation as efficiently, expeditiously and economically as possible." Richard C. Giller, D&O Insurance: The cooperation clause and privileged communications, 27 Westlaw Journal Corporate Officers & Directors Liability (2011) (available online at http://www.alston.com/Files/ Publication/9e7d279c-1cd8-4768-95cd-158030aa8ad3/Presentation/Publication Attachment / f69c928d-4933-4382-b410-1768fb56cffd/Giller2.pdf) (discussing In re Imperial Corp. of Am., 167 F.R.D. 447 (S.D. Cal. 1995)). To further express the intent that the communications be considered privileged, the parties can also consider entering into a confidentiality agreement. Id. Finally, procedures should be implemented (just as in any other case) to safeguard the information from inadvertent disclosures that would destroy privilege. Id. Of course, each situation should be evaluated to determine the best approach based upon the facts and the governing law. In some instances such agreements need to be in writing, while in other situations, oral agreements are allowed, and indeed preferred, to minimize the risk of the agreement being subject to discovery.

B. When in a dual-client state:

Typically, counsel operating in a dual-client jurisdiction would have optimal conditions for sharing information because of the theory's protective nature. While litigating under this theory allows for free-flowing communications between the tripartite parties, it also will open up both insurer and insured to non-privilege should they become adverse to one another. As discussed supra, "where the same attorney represents two parties having a common interest, and each party communicates with the attorney, the communications are privileged from disclosure at the instance of a third person. Those communications are not privileged, however, in a subsequent controversy between the two original parties." Simpson v. Motorist Mut. Ins. Co., 494 F.2d 850, 855 (7th Cir. 1974).

Some states have predicated the existence of a dual representation on the grounds that the insured received an explanation of the advantages and risks associated with entering into a dual-client relationship with an attorney. Pine Island Farmers, 649 N.W.2d at 452. That premise has even been extended such that an attorney may be held liable to a client who suffers damages caused by the destruction of privilege when the attorney failed to make a full disclosure of the risks involved in a dual-client relationship. Lysick v. Walcom, 65 Cal. App. 2d 136, 147 (1968). Regardless of whether the dual-client state imposes such liability, attorneys should provide the insured with a complete disclosure to best protect the client's—and his or her personal—interests.

A Reservation of Rights has Profound Effects on Privilege.

As touched on throughout this article, the issue of attorney-client privilege in the tripartite relationship comes to a head when the insurance company and the policyholder become adverse parties. While some circumstances are easily recognized as adverse, an insurance company's decision to defend the original claim under a reservation of rights represents the possibility that the parties could become adverse. As a result of the reservation of rights, the insurer and the insured have a joint interest during the defense of the original claim, but the insurer could later sue the insured to recover any monies paid to a third party when the claim should have been denied. Amber Czarnecki, Ethical Considerations Within the Tripartite

Relationship of Insurance Law – Who is the Real Client?, 74 Def. Couns. J. 172, 183-84 (April 2007). Some courts have found that, in this situation, the attorney-client privilege does not prevent the use of statements made by the insured for purposes of defending the original claim in the subsequent dispute between the insurer and insured. E.g., Chitty v. State Farm Mut. Auto. Ins. Co., 36 F.R.D. 37 (E.D. S.C. 1964) (action by insured against insurance company for bad faith failure to settle); Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920 (Iowa 1958) (action for bad faith and negligence on part of insurer); Brasseaux v. Girouard, 214 So. 2d 401 (La. Ct. App. 3d Cir. 1968) (communications made by insured to insurer's counsel during period of simultaneous representation are not privileged); Dumas v. State Farm Mut. Auto. Ins. Co., 274 A.2d 781 (N.H. 1971). This creates a number of potential conflicts of interest, including that "the insurer may gain access to confidential or privileged information which it may later use to its advantage." Danny M. Howell, Defense Counsel and Coverage Implications of the Tripartite Relationship, 13 Coverage (Nov/Dec 2003).

The dilemma is even further exacerbated when the privileged information includes facts indicative of fraud or intentional acts that would result in a denial of coverage. Czarnecki, 74 Def. Couns. J. at 184. In jurisdictions that subscribe to the dual-client theory of representation, which likely coincides with recognition of a tripartite privilege, commentators have noted "[t]here can be no secrets in the tripartite relationship. When either client imparts relevant information, it must do so with the understanding that defense counsel can share the information with the other client." Id. (quoting Danny M. Howell, Defense Counsel and Coverage Implications of the Tripartite Relationship, 13 Coverage (Nov/Dec 2003)). From a practical standpoint, this circumstance places counsel in a difficult position because of the duties owed to clients with conflicting interests.

A. Appointing independent counsel may be necessary.

One of the first solutions for handling this dilemma is by determining whether the jurisdiction's laws require the appointment of independent counsel. The law for independent counsel can be generally categorized two ways: automatically applying or applying only to prevent unauthorized access.

1. When independent counsel automatically applies:

Some courts have stepped in to protect attorney-client privilege by granting an insured the automatic right to independent counsel whenever an insurer defends under a reservation of right. Jurisdictions adopting this approach include Alabama, Arizona, Florida, Kentucky, Louisiana, Massachusetts, Missouri, Texas, and Washington. See L&S Roofing Supply Co., Inc. v. St. Paul Fire & Marine Ins. Co., 521 So. 2d 1298 (Ala. 1987); United Services Auto. Assoc. v. Morris, 741 P.2d 246 (Ariz. 1987); F.S.A. §627.426(1)(b)(3) (2005); Medical Protective Co. v. Davis, 581 S.W.2d 25 (Ky. App 1979); National Union Fire Ins. Co. v. Circle, Inc., 915 F.2d 986 (5th Cir. 1990); Three Sons, Inc. v. Phoenix Ins. Co., 257 N.E.2d 774 (Mass. 1970); State Farm Mut. Auto. Ins. Co. v. Ballmer, 899 S.W.2d 523 (Mo. 1995); Rhodes v. Chicago Ins. Co., 719 F.2d 116 (5th Cir. 1983); Britt v. Cambridge – Mut. Fire Ins. Co., 717 S.W.2d 476 (Tex. Ct. App. 1986); Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133 (Wash. 1986). Understandably, this method is the easiest to implement because it either applies or it does not—if a reservation of rights is enacted, the insurer gets independent counsel.

2. When a treat to the insured's defense requires independent counsel:

Other jurisdictions are less clear, though. Within the tripartite relationship, the danger exists that the insurer will seek to influence the defense in a manner so as to uncover information that would typically be privileged, but is not because of the tripartite relationship. Because of this risk, courts in some jurisdictions have found independent counsel is due to be appointed in cases where the insurer may be defending with an ulterior motive of obtaining privileged information. For example, when a claim involves both negligent and intentional claims, a court will not allow a common defense of the negligence claim because it would result in the insurance company obtaining information about the intentional tort which could then be used in a denial of coverage claim. Jurisdictions that have adopted this approach to handling reservation of rights include California, Illinois, New York, and Pennsylvania. See Cal. Cal. Civ. Code §2860(b); Illinois Masonic Med. Center v. Turegum Ins. Co., 522 N.E.2d 611 (Ill. Ct. App. 1988); Public Service Mut. Ins. Co. v. Goldfarb, 425 N.E.2d 810 (N.Y. 1981); Pennbank v. St. Paul Fire

& Marine Ins. Co., 669 F. Supp. 122 (W.D. Pa. 1987); St. Paul Fire & Marine Ins. Co. v. Roach Bros. Co., 639 F. Supp. 134 (E.D. Pa. 1986).

While these jurisdictions certainly provide for the appointment of counsel, the case law does not provide a blueprint for arranging such counsel. The responsibility appears to be placed on the attorney to recognize the existence of a potential conflict and then take appropriate actions to obtain independent counsel for the client. Whether this means the original attorney stays with the insurer or the insured is a matter of the arrangement between the insurer and the attorney. From an ease-of-operation standpoint, attorneys in a jurisdiction that takes this approach should have a pre-arranged plan for when such situations arise.

B. A cooperative defense and privilege can coexist.

A reservation of rights does not necessarily mean that a cooperative defense and sharing information must cease. Given appropriate measures, the insured and insurer can work together to win the suit against the outsider and avoid the necessity of subsequent litigation.

1. When independent counsel is assigned:

A reservation of rights that results in appointment of independent counsel does not necessarily mean the end of shared information between insurer and insured. In fact, in terms of privileged communications, the arrangement can be treated just as the tripartite would be treated in a state subscribing to the single-client theory of representation. As discussed supra, communications can be facilitated through the use of a lawyer's representative or by communicating under the common interest exception to the general attorney-client privilege rule. However, care should be taken by the insured's counsel to make certain that the insured makes no comments during the course of open communications which would result in a denial of any claim by the insurance company.

2. When the tripartite remains intact:

Even if independent counsel is not assigned, the Model Rules of Professional Conduct and most states require that the lawyer's allegiance be to the insured client because a "lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Model Rules of Prof'l Conduct R. 5.4(C). It follows then that in some jurisdictions, an attorney may disclose to the insurance company some facts as they relate to whether the company will continue to defend the client. However, an attorney may not reveal confidential information to the insurer if that information goes to prove that the insured actually is not entitled to coverage for the claim. American Mut. Liab. Ins. Co. v. Sup. Ct., 38 Cal.App.3d 579, 592 (1974); Employers Casualty Company v. Tilley, 496 S.W.2d 552 (Tex. 1973); Ill. Rules of Prof'l Conduct R. 1.8(b) and (f) and 5.4(c); Opinions of Committee on Professional Ethics, New York County Lawyers Association, No. 669 (89-2). In fact, some courts have held that if an attorney representing dual clients tells the insurance company such information, the insurer is estopped from denying coverage. See, e.g., Parsons vs. Continental National American Group, 550 P.2d 94 (Ariz. 1976); Employer Casualty Co. v. Tilley, 496 S.W.2d 552 (Tex. 1973).

This type of representation is particularly problematic to the attorney because the determination of what may or may not be revealed to the insurer lies squarely on the attorney. What may seem like an innocent enough statement could lead to prejudicing a party. Therefore, counsel must take great care to evaluate all information that is potentially impactful to a denial of coverage claim prior to revealing that information to the insurer.

Conclusion

Prior to agreeing to become an attorney in a tripartite relationship, counsel should methodically determine how the jurisdiction treats the attorney-client privilege within the relationship. Laying out expectations at the relationship's inception will potentially save a lot of heartache—for both counsel and client—later on, whether against a common opponent or in subsequent litigation between insurer and insured. By understanding how the jurisdiction treats the relationship and taking steps to protect the information shared within, counsel can not only protect information from discovery, but also develop a means for facilitating the common defense: a win for all involved.

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Lee has tried numerous serious wrongful death, personal injury and commercial cases to defense verdicts. Currently, Lee spends most of his time defending high exposure personal injury cases. He is frequently retained by major excess insurance carriers as high exposure cases approach trial. In that role, Lee serves as either trial counsel or appellate counsel at trial. He also spends a significant amount of time handling commercial cases on behalf of plaintiffs and defendants. He is admitted to practice in all State and Federal courts in Alabama, as well as the Eleventh Circuit Court of Appeals and the United States Supreme Court, and frequently practices pro hac vice in courts around the country.

Lee has been recognized by the Alabama and Mid-South editions of Super Lawyers since 2010 for product liability defense. The Best Lawyers in America by Woodward White, Inc. selected Lee for his work in commercial and personal injury litigation in its 2018 edition.

Lee is currently a member of the firm's management committee and serves as chair of the firm's business development committee. Previously, he served as a member of and chair of the recruiting committee.

Representative Matters

- Won a $70 million jury verdict on behalf of a major chemical manufacturer in a breach of contract case.
- Won a defense verdict in a Mississippi Federal Court trial involving 15 deaths and 15 injuries arising out of a bus crash, in spite of the fact that sanctions imposed because of the conduct of the case before he was retained severely restricted the arguments the defense was allowed to make.
- Defeated class certification on behalf of Fortune 10 company in Louisiana state court arising out of allegedly infected endoscopes. Subsequently summary judgment was granted for our client.
- Successfully brought a breach of contract case on behalf of a Swedish air carrier arising out of defective modifications to three Boeing 737-300 aircraft.
- Won a defense verdict in a wrongful death product liability case involving a tractor rollover.
- Won a defense verdict in a wrongful death product liability case involving a fall from a utility pole.
- Tried a double wrongful death case on behalf of a road builder to a hung jury in a county that had not had a defense verdict in a civil case in 20 years. (Believe me, the client considered the hung jury a win.)
- Served on one of 5 designated trial teams for a Fortune 10 company in nationwide pharmaceutical litigation.
- Serves as national coordinating counsel for the nation's largest biomedical services company, handing cases throughout the country.
- Defended a Fortune 100 pharmaceutical company in a birth defect case.
- Defended multiple automobile manufacturers in dealer litigation.

Accolades

- AV rated by Martindale-Hubbell
- Best Lawyers in America—commercial litigation
- Mid-South Super Lawyers—personal injury defense
- Benchmark Litigation—"Future Star"
- Benchmark Litigation — "Litigation Star"

Education

- B.S., Washington & Lee University, 1986 cum laude
- J.D., Vanderbilt University Law School, 1992

INTERNAL INVESTIGATIONS - BEST PRACTICES FOR SUCCESS

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Overview

Internal investigations are a necessary tool for entities to get to the root cause of institutional problems that may cause liability and reputational harm. These internal reviews, when handled correctly, can be valuable tools to identify and account for misconduct, to restore brand confidence, to help victims heal, to educate regulators on corrective action and to set the institution on a new path. When handled poorly, the investigation can cause more problems than it resolves.

Every investigation has its own context, parallel processes and impacted constituencies. Those circumstances must inform and control the internal review process. There are, however, overarching considerations that can help shape the contours of an investigation and set it on a path for success. Detailed below are practical considerations designed to identify common "traps for the unwary" that can impair or derail the investigation. Careful and thoughtful preparation, together with consistent practices by all team members, can avoid failure. Attention to these issues can be the difference-maker for a successful process.

Threshold Issues

Before undertaking the investigation, it is essential that the following questions be clearly established. Navigating through the many challenges, competing considerations and interested constituencies that often surround investigations is greatly simplified when the following ground rules guide decision making.

Who is your client?

This is a simple question that can get murky during the investigation. Public companies, private business entities, colleges and universities, churches, and other nonprofit organizations, such as health systems or charitable organizations are run by individuals. Officers, directors, trustees and special committees all perform important roles with associated duties in the governance and/or operation of the entity. Any of these constituencies in their respective roles may feel compelled to initiate an internal investigation in furtherance of some important institutional purpose. Any of these constituencies may make contact with outside counsel to get the process started. When such contact is made, the first questions must be: "Who is the client?" "From whom do I take direction?" and "To whom do I direct the report of investigation?"

Too often in the private practice of law, it is expedient to conflate the interests, desires and goals as expressed by a senior executive who is directing a project as being co-extensive with the interests of the institution. This is not a surprising circumstance, because all entities operate through the actions of their leaders. Internal investigations bring into sharp focus the potential problems with such conflation. Because the investigation is focused on activities of personnel that may have diverged from the interests of the entity, it is essential that the client be identified and its interests segregated, maintained and pursued. Indeed, actions of individuals instrumental in commissioning the

investigation may be part of the inquiry. The potential conflicts resulting from this dynamic are manifest and must be managed to ensure the integrity of the review.

For these reasons, the first action is to identify the client and the person or persons who are permitted to speak for the client with regard to the investigation. Often, because the internal inquiry may directly or implicitly criticize the actions of current management, good practice compels that the oversight of the investigation be vested with an outside director/trustee or a special committee of the Board of Directors/Trustees. This practice helps ensure that the inquiry is not tainted by apparent or actual influence by those who are being investigated. Once defined, these details should be documented in an engagement letter specific to the inquiry.

What is your mandate and scope?

The mandate and scope of an investigation must be defined. Misalignment between the client's expectation and the work contemplated by the investigative team can lead to material problems. Some investigations can be discrete undertakings, yet, as a result of mismanaged expectations, balloon beyond reasonable scale and cost. Other investigations, such as those involving allegations of sexual abuse, may require special considerations for privacy and victim protection. Considerable additional damage can be caused when an investigation fails to properly balance important considerations such as protecting victims while still attempting to get to the truth. The client must set the tone and the rules for what prevails when the search for the truth threatens other constituencies or threatens to cause harm to important cultural values. To paraphrase Hippocrates, on the way to doing something good, do no harm.

With the goal of doing no harm, it is helpful when the client articulates at the beginning of the engagement—as best as it can subject to learning more information as the investigation unfolds—what it wants investigated and what special considerations should prevail. This should include important information such as subject matter, time period, functional area, types of conduct, relevant individuals, documents, data and other evidence. Also, the client may wish to detail things that should be excluded from investigation. With this information, the investigative team should build a work plan and budget to address the mandate and scope identified. This exercise should quickly reveal any disconnects between the client and the investigative team concerning the invasiveness, disruption, cost and other collateral consequences resulting from the investigation. Further, the client should provide instructions on any special circumstance—such as the handling of victims—and how the investigation should yield to these important special circumstances. If the scope needs to be adjusted as the investigation proceeds, communicate that to the client and modify the work plan accordingly. In short—get aligned and stay aligned.

Who are the intended recipients of the report of investigation?

Is the report of investigation an internal confidential document not intended for disclosure and subject to privilege protections? Is the report intended for use with regulators, courts, customers or the public? Is there a possibility of a criminal proceeding, and the attendant prospect of a waiver of the attorney-client and work product privileges as a condition of a negotiated resolution?[1] All of these are relevant considerations for the logistics of the investigation.

As a practical matter, all investigations start as a privileged undertaking. Care must be taken to mark the report and all drafts with appropriate legends (i.e., "Confidential," "Attorney Client Privilege," "Attorney Work Product Prepared in Anticipation of Litigation"). If some form of disclosure is contemplated, or reasonably anticipated, it is essential that the investigative team not include in the report any confidential or privileged information that must be protected, as there would likely be a reasonable argument for waiver in that circumstance.

Often the client simply does not know as the investigation is unfolding how the report will be used. In such circumstances, it is a best practice to treat it and all drafts as confidential as well as to maintain all of the formalities of the applicable privileges. It is the client's privilege to waive. In certain circumstances, the client may determine that it needs to disclose the report or use it with regulators, courts or others. In such situations, it is critical for counsel to determine the scope of the waiver under applicable law. Because the client's decision needs to be informed by the

1 *See infra* at Section 20, "Individual Accountability for Corporate Wrongdoing," Sally Quillian Yates, Deputy Attorney General (Sept. 9, 2015) for further discussion of this issue. A copy of the Yates Memo can be found at https://www.justice.gov/archives/dag/file/769036/download

scope of the waiver, this determination ideally should be made early, before the report is drafted, to guide discussions about disclosure. For example, a "subject matter" waiver may expose the client to the disclosure of other privileged information beyond the report of investigation. Similarly, if less than a "subject matter" waiver is permissible in the relevant jurisdiction, a clear writing from the client concerning the scope of the waiver should accompany the disclosure. Finally, if the risk of subject matter waiver is significant, the client may consider appropriate redactions to preserve claims of privilege. Of note, and as discussed more fully below, clients and counsel dealing with the government should not assume that selective waiver will be upheld.

If the report is intended for a third party and not the client, is the investigation team independent?

Not all internal investigations are the same. Some are prepared with the intent for use with third parties, such as regulators or courts, that will scrutinize whether the investigation was performed with sufficient safeguards of independence to bolster its credibility and reliability. Where the review and acceptance by a third party is essential, the efficacy of the investigation is only as good as its independence. Even a brilliantly executed investigation may be worthless in the eyes of these third parties if serious questions arise about the team's independence. A critical threshold issue—and one that often needs to be reexamined during the life of the project—is whether the investigation team is sufficiently independent of the client and the issues being investigated.

The contemplated benefit of the investigation for use with third parties is to get an unvarnished report of what actually occurred, the actual or potential consequences, and the suggested remedial or mitigating actions. Investigators acting out of a real or perceived conflict may diminish or erode the impact of the report. Recipients of the report who believe that its conclusions and recommendations were improperly influenced by those who might be impacted by the report may dismiss it out of hand. This is particularly problematic if the intended recipients of the report are regulators, courts or other constituencies who may question the integrity of the report.

An ongoing business relationship with the client, work performed or advice given concerning the subject being investigated, or a previously existing reporting relationship to someone at the client who is being investigated, are common examples of circumstances that can undermine a claim of independence. In such a situation, the perception of a conflict may be as damaging as an actual conflict. When such circumstances exist, or arise during the project, the investigation team must examine whether it can perform the independent investigation.

Who has the ability to edit the report before it is finalized?

Determining who will have the right to review and propose edits before the report of investigation is finalized is another important matter to consider. This is very closely related to the questions regarding defining who the client is and how the independence of the investigation can be assured. While there can be material benefits to having various constituencies, such as directors, trustees, and officers reviewing the report for accuracy, completeness and consistency with corporate values and norms, such further review may compromise the independence of the report and, therefore, its efficacy with the target audience. Depending on the scope of the investigation and the circumstances under which it arose, it may be necessary, and prudent, to restrict review and editing of the final report to a small group of decision-makers for the client. For example, if an entity is performing a new investigation because a prior one was viewed as being manipulated by the board of directors or management, to avoid the same pitfalls the new investigators should run a process that insulates the report from such repeated criticism.

Best practices require that review of the report by those whose conduct is implicated, including the direct actors as well as officers, directors, trustees, consultants, or lawyers who may have been on watch at the time of the offending conduct, should not be part of the review and finalization process except to confirm facts. Similarly, best practices suggest that those who have a direct or material stake in the report because they were victims or whistleblowers should also be managed carefully through the review and finalization process. The investigation team may believe it is necessary or advisable to have victims or whistleblowers review portions of the final report to ensure accuracy or that privacy has been protected, but input from those parties into the conclusions or recommendations can

be problematic and impugn the independence of the report. Tread carefully into these turbulent areas with clear boundaries as to what is permissible and what is not.

Will the investigation require special procedures for dealing with "victims"?

Investigations often require interviewing victims of improper conduct or whistleblowers who purport to be witnesses to unlawful or improper conduct. Both categories present unique issues for the client's consideration.

With regard to victims of improper conduct—such as sexual assault—the client may want the investigation team to take special precautions during the interview process and in the final report and work papers. For example, private schools that have reported the results of investigations about past sexual assaults by faculty and administration have been accused after the fact of being insensitive to the privacy concerns of victims and to the additional harm to the victims caused by the report of investigation. To avoid such criticisms, the use of pseudonyms to anonymize victims is a well-developed convention to protect privacy yet also report the information learned during the investigation. Unfortunately, it is not always possible to fully protect a victim by simply using a pseudonym. Other facts revealed may allow certain readers to deduce the identity of the victim(s). In such circumstances, the rehabilitation and goodwill expected from the investigative report can be diminished or overshadowed by the re-victimization of those originally harmed. Forethought, planning and clear direction from the client should help avoid such a circumstance.

Will the investigation involve interviewing and/or investigating "whistleblowers"?

Similarly, whistleblowers—individuals who disclose suspicions of unlawful, unethical or prohibited corporate conduct—present special circumstances in an internal investigation. Special handling is essential in light of the protections that a whistleblower may have. A patchwork of federal[2] and state[3] laws provide

2 Federal statutes with whistleblower provisions include: Affordable Care Act (ACA), Section 1558 29 U.S.C. 218C; Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2651; Clean Air Act (CAA), 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610; Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C.A. § 5567; Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087; Energy Reorganization Act (ERA), 42 U.S.C. § 5851; FDA Food Safety Modernization Act (FSMA), § 402, 21 U.S.C. 399d; Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109; Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367; International Safe Container Act (ISCA), 46 U.S.C. § 80507; Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171; National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142; Occupational Safety and Health Act (OSH Act), Section 11(c), 29 U.S.C. § 660; Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129; Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i); Sarbanes-Oxley Act (SOX), 18 U.S.C.A. § 1514A; Seaman's Protection Act (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281, 46 U.S.C. § 2114; Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105; Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121.

3 See generally, Richard A. Leiter and William S. Hein & Co., Inc., 50 STATE STATUTORY SURVEYS: EMPLOYMENT: EMPLOYEE PROTECTION, "Whistleblower Statutes," which contains the following compendium of state statutes: ***ALABAMA***, ALA.CODE § 25-5-11.1 (1975), ALA.CODE § 25-8-57 (1975), ALA.CODE § 36-26A-1 (1975); ***ALASKA***, ALASKA STAT. ANN. § 39.90.100 (West, Westlaw through 2017 Legis. Sess.), ALASKA STAT. ANN. § 18.60.088 (West, Westlaw through 2017 Legis. Sess.), ALASKA STAT. ANN. § 18.60.089 (West, Westlaw through 2017 Legis. Sess.), ALASKA STAT. ANN. § 18.60.095 (West, Westlaw through 2017 Legis. Sess.); ***ARIZONA,*** ARIZ. REV. STAT. ANN. § 38-531 (2011), ARIZ. REV. STAT. ANN. § 23-425 (West, Westlaw through 2017 Legis. Sess.), ARIZ. REV. STAT. ANN. § 23-418 (West, Westlaw through 2017 Legis. Sess.); ***ARKANSAS***, ARK. CODE ANN. § 16-123-107 (West, Westlaw through 2017 Legis. Sess.), ARK. CODE ANN. § 16-123-108 (West, Westlaw through 2017 Legis. Sess.); ***CALIFORNIA***, CAL. LAB. CODE § 1102.5 (West 2016); ***COLORADO***, COLO. REV. STAT. ANN. § 24-50.5-101 (West 2016), COLO. REV. STAT. ANN. § 24-114-101 (West, Westlaw through 2017 Legis. Sess.); ***CONNECTICUT***, CONN. GEN. STAT. ANN. § 4-61dd (West 2015), CONN. GEN. STAT. ANN. § 31-51m (West 2014); **DELAWARE**, DEL. CODE ANN. tit. 29, § 5115 (West, Westlaw through 2017 Legis. Sess.), DEL. CODE ANN. tit. 19, § 1701 (West, Westlaw through 2017 Legis. Sess.); ***DISTRICT OF COLUMBIA***, D.C. CODE § 1-615.51 (West, Westlaw through 2017 Legis. Sess.); ***FLORIDA***, FLA. STAT. ANN § 112.3187 (West 2002); ***GEORGIA***, GA. CODE ANN. § 45-1-4 (West 2012); ***HAWAII***, HAW. REV. STAT. § 378-61 (West, Westlaw through 2017 Act 34); ***IDAHO***, IDAHO CODE ANN § 6-2101(West, Westlaw through 64th Reg. Sess.); ***ILLINOIS***, 740 ILL. COMP. STAT. 174/10 (2004), 20 ILL. COMP. STAT. 415/19c.1 (West, Westlaw through 2017 Reg. Sess.); ***INDIANA***, IND. CODE ANN. 4-15-10-4 (West 2012), IND. CODE ANN. 36-1-8-8 (West, Westlaw through 2017 Reg. Sess.), IND. CODE ANN. 22-5-3-3 (West 2016); ***IOWA***, IOWA CODE ANN. § 70A.28 (West 2013), IOWA CODE ANN. § 70A.29 (West, Westlaw through 2017 Reg. Sess.); ***KANSAS***, KAN. STAT. ANN. § 75-2973 (West, Westlaw through 2017 Reg. Sess.); ***KENTUCKY***, KY. REV. STAT. ANN. § 61.101 (West, Westlaw through 2017 Reg. Sess.) KY. REV. STAT. ANN. § 338.121 (West 2010), KY. REV. STAT. ANN. § 338.991 (West 2010); ***LOUISIANA***, LA. REV. STAT. ANN. § 30:2027 (West, Westlaw through 2017 First Extra. Sess.), LA. REV. STAT. ANN. § 42:1169 (2014); ***MAINE***, ME. REV. Stat. Ann. tit. 26 § 831 (West, Westlaw through 2017 Reg. Sess.); ***MARYLAND***, MD. CODE. ANN., STATE PERS. & PENS. § 5-301(West, Westlaw through 2017 Reg. Sess.), MD. CODE. ANN., STATE FIN. & PROC. § 11-301 (West, Westlaw through 2017 Reg. Sess.); ***MASSACHUSETTS***, MASS. GEN. LAWS ANN. ch. 149 §185 (West, Westlaw through 2017 Ann. Sess.); ***MICHIGAN***, MICH. COMP. LAWS. ANN. §15.361 (West, Westlaw through 2017 Reg. Sess.); ***MINNESOTA***, MINN. STAT. ANN. § 181.931 (West 2013); ***MISSISSIPPI***, MISS. CODE ANN. § 25-9-171 (West, Westlaw through 2017 Reg. Sess.); ***MISSOURI***, MO. ANN. STAT. §105.055 (West 2010), MO. ANN. STAT. § 287.780 (West 2010); ***MONTANA***, MONT. CODE ANN. § 39-2-901(West, Westlaw through Sept. 2016 amendments); ***NEBRASKA***, NEB. REV. STAT. ANN. § 81-2701 (West, Westlaw through 2017 Reg. Sess.), NEB. REV. STAT. ANN. § 48-1114 (West, Westlaw through 2017 Reg. Sess.); ***NEVADA***, NEV. REV. STAT. ANN. § 281.611(West, Westlaw through 2017 Reg. Sess.), NEV. REV. STAT. ANN. § 618.445 (West, 2013); ***NEW HAMPSHIRE***, N.H. REV. STAT. ANN. § 98-E:1 (2008), N.H. REV. STAT. ANN. § 275-E:1 (2012); ***NEW JERSEY***, N.J. STAT. ANN. § 34:19-1 (West, Westlaw through 2017 Legis. Sess.); ***NEW MEXICO***, N.M. STAT. ANN. § 50-9-25 (West, Westlaw through 2017 Legis. Sess.); ***NEW YORK***, N.Y. LAB. LAW § 740 (McKinney 2006), N.Y. CIV. SERV. § 75-b (McKinney 2015); ***NORTH CAROLINA***, N.C. GEN. STAT. ANN. § 126-84 (West, Westlaw through 2017 Reg. Sess.), N.C. GEN. STAT. ANN. § 95-240 (West, Westlaw through 2017 Reg. Sess.); ***NORTH DAKOTA***, N.D. CENT. CODE ANN. § 34-11.1-04 (West, Westlaw through 2017 Reg. Sess.), N.D. CENT. CODE ANN. § 34-11.1-07 (West, Westlaw through 2017 Reg. Sess.), N.D. CENT. CODE ANN. § 34-11.1-08 (West, Westlaw through 2017 Reg. Sess.); ***OHIO***, OHIO. REV. CODE ANN. § 4113.52 (West, Westlaw through 2017 Reg. Sess.), OHIO. REV. CODE ANN. § 124.341 (West 2013); ***OKLAHOMA***, OKLA. STAT. ANN. tit. 74§ 840-2.5 (West, Westlaw through 2017 Reg. Sess.), OKLA. STAT. ANN. tit. 40 § 417 (West, Westlaw through 2017 Reg. Sess.); ***OREGON***, OR. REV. STAT. ANN. § 659A.200 (West, Westlaw through 2017 Reg. Sess.), OR. REV. STAT. ANN. § 654.062 (West, Westlaw through 2017 Reg. Sess.), OR. REV. STAT. ANN. § 659A.199 (West, Westlaw through 2017 Reg. Sess.); ***PENNSYLVANIA***, 43 PA. CONS. STAT. § 1421 (West, Westlaw through 2017 Reg. Sess.); ***RHODE ISLAND***, R.I. GEN. LAWS ANN. § 28-50-1 (West, Westlaw through 2017 Reg. Sess.); ***SOUTH CAROLINA***, S.C. CODE ANN. § 8-27-10 (2015), S.C. CODE ANN. § 41-15-510 (West, Westlaw through 2017 Act No. 36), S.C. CODE ANN. § 41-15-520 (2012); ***SOUTH DAKOTA***, S.D. CODIFIED LAWS § 20-13-26 (West, Westlaw through 2017 Reg. Sess.), S.D. CODIFIED LAWS § 60-11-17.1 (West, Westlaw through 2017 Reg. Sess.), S.D. CODIFIED LAWS § 60-12-21(West, Westlaw through 2017 Reg. Sess.); ***TENNESSEE***, TENN. CODE ANN. § 50-1-304 (West 2014), TENN. CODE ANN. § 50-3-106 (West 2008), TENN. CODE ANN. § 50-3-409 (West 2008), TENN. CODE ANN. § 8-50-116 (West, Westlaw through 2017 Reg. Sess.); ***TEXAS***, TEX. GOV'T CODE ANN. § 554.001 (West, Westlaw through 2017 Reg. Sess.), TEX. LAB. CODE ANN. § 21.055 (West, Westlaw through 2017 Reg. Sess.); ***UTAH***, UTAH CODE ANN. § 67-21-1 (West, Westlaw through 2017 Gen. Sess.); ***VERMONT***, VT. STAT. ANN. tit. 21§ 231 (West, Westlaw through 2017-2018 VT. Gen. Assembly), VT. STAT. ANN. tit. 3§ 973 (West, Westlaw through 2017-2018 VT. Gen. Assembly); ***VIRGINIA***, VA. CODE ANN. § 40.1-51.2:1 (West, Westlaw through 2017 Reg. Sess.), VA. CODE ANN. § 40.1-51.2:2 (West, Westlaw through 2017 Reg. Sess.); ***WASHINGTON***, WASH. REV. CODE ANN. § 42.40.010 (West, Westlaw through 2017 Reg. Sess.), WASH. REV. CODE ANN. § 49.60.210 (West 2011); ***WEST VIRGINIA***, W. VA. CODE ANN. § 6C-1-1 (West, Westlaw through 2017 Reg. Sess.), W. VA. CODE ANN. § 21-3A-13 (West, Westlaw through 2017 Reg. Sess.); ***WISCONSIN***, WIS. STAT. ANN. § 230.80 (West 2015); ***WYOMING***, WYO. STAT. ANN. § 27-11-109(e) (West, Westlaw through 2017 Gen. Sess.), WYO. STAT. ANN. § 9-11-103 (West, Westlaw through 2017 Gen. Sess.).

protections to bona fide whistleblowers. While there are clear differences between and among these statutes, one common principle is there can be no retaliation against whistleblowers for disclosing offending conduct. Investigators must be knowledgeable about these protections and conduct the investigation in ways that do not erode or impair these protections.

It is common during an investigation to learn that there are independent bases to take a job action against the whistleblower, unrelated to his/her disclosures. In some circumstances, the whistleblower's disclosures are nothing more than a cynical attempt to thwart an impending job action. In other circumstances, the whistleblower participated or contributed to the offending activity being investigated. Because of these complicating dynamics, the whistleblower often will have retained counsel who wants to participate in any interview with her/his whistleblower-client.[4] The protections afforded whistleblowers make it more challenging, but not impossible, to get to the truth of the allegations and for the investigators to make appropriate remedial action recommendations, including termination of the whistleblower, if the protections have not been appropriately implicated.[5] All of these issues require careful management and particular attention to the governing law.

While the whistleblower has certain rights, the investigation team has a mandate that must be fulfilled. When confronted with these dynamics, it is important to understand the governing law and whether the whistleblower protections have been validly implicated, to disaggregate and isolate the issues investigated into those that may receive protection and those that do not, and to make specific recommendations to the client regarding these different buckets of protected and unprotected conduct.

Establishing the privilege: Upjohn warnings

The ability of an entity to conduct and preserve as privileged an internal investigation rests on certain requirements recognized by the United States Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1981)[6]. The Court recognized that an organization's attorney client privilege where: (a) the communication was made by an entity's employee, (b) to counsel for the entity acting as such, (c) at the direction of corporate superiors, (d) in order to secure legal advice from counsel, (e) concerning matters within the score of the employee's duties and (f) the employee was aware that the purpose of the questioning was so that the entity could obtain legal advice. Id. at 390-91.[7]

From these principles have sprung standard warnings for witness interviews, called Upjohn warnings or sometimes "corporate Miranda warnings," designed to ensure that the elements of the attorney-client privilege are established for the benefit of the corporation, not the individual witness. The essential information that the entity's counsel must convey includes instructing the witness that: (1) the attorney represents the entity alone and not the individual (unless a joint representation is expressly contemplated, in which case such representation should be carefully delineated); (2) the attorney is investigating facts for the purpose of providing legal advice to the entity; (3) the communication is protected by the attorney-client privilege, and that the privilege belongs to the entity alone, and not to the witness (unless a joint representation is expressly contemplated, which, again, should be carefully considered and delineated); (4) the entity may choose to waive the privilege and disclose

4 On the duty to cooperate, *see Merkel v. Scovill, Inc*., 787 F.2d 174, 179 (6th Cir.1986) (reversing a finding by the district court that the plaintiff's non-participation in the investigation was "protected activity," holding that "discrimination against an employee for lack of participation or nonparticipation in an investigation would not be a violation of the ADEA."); *Thomas v. Norbar, Inc*., 822 F.2d 1089 (holding that since there was no evidence that plaintiff's supervisors had pressured him to lie or give information regarding matters about which he had no knowledge, his refusal to participate in the investigation was not protected activity.); *City of Hollywood v. Witt*, 939 So. 2d 315, 317 (Fla. Dist. Ct. App. 2006) (holding that the verdict on the whistle-blower claim could not stand because "the existence of reasons for termination, apart from any alleged whistle-blowing, constitutes a defense that is expressly recognized by the whistle-blower act.") On no right to counsel, *see In re Carroll*, 339 N.J. Super. 429, 440, 772 A.2d 45, 52 (App. Div. 2001). (Holding that "the Sixth Amendment right to counsel does not extend to internal investigations); *Williams v. Pima Cty.,*791 P.2d 1053 (Ct. App. 1989).(Holding that the right to counsel under the Sixth Amendment applied only to criminal proceedings, and did not confer right to counsel upon an officer being interrogated by sheriff's department during internal affairs investigation).

5 On whistleblower protections *see Somers v. Digital Realty Trust Inc.*, 850 F.3d 1045, 1048 (9th Cir. 2017)(*citing* 15 U.S.C.A. § 78u-6). ("No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—(i) in providing information to the Commission in accordance with this section; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission."); *Grisham v. United States*, 103 F.3d 24, 26 (5th Cir. 1997). *See* 5 U.S.C. § 2302(b)(8). ("The Whistleblower Protection Act was enacted in 1989 to increase protections for whistleblowers by prohibiting adverse employment actions taken because a federal employee discloses information that the employee reasonably believes evidences a violation of any law or actions that pose a substantial and specific danger to public health or safety). On requirements for a whistleblower protection claim *see Willis v. Dep't of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998). (regardless of whether the adverse personnel action is taken in retaliation for a protected disclosure, or is a result of the disclosure, the whistleblower need only demonstrate that the protected disclosure was one of the factors that affected the personnel action); *Hickson v. Vescom Corp.*, 2014 ME 27, ¶ 17, 87 A.3d 704; "To prevail on a [WPA] claim, an employee must show that (1) he engaged in activity protected by the WPA; (2) he experienced an adverse employment action; and (3) a causal connection existed between the protected activity and the adverse employment action." *See Also* Galouch v. Dep't of Prof'l & Fin. Regulation, 2015 ME 44, ¶ 12, 114 A.3d 988, 992; *See also Miller v. City of Millville*, 2014 WL 10122644 (N.J.Super.L.), 6.("In order to establish a prima facie case of retaliation under CEPA, the plaintiff must demonstrate the following elements: 1. he reasonably believed illegal conduct was occurring; 2. he disclosed or threatened to disclose the activity to a supervisor or public body; 3. retaliatory employment action was taken against him; and 4. a causal connection exists between the whistle-blowing and the adverse employment action."); *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983).

6 In an earlier case, *Hickman v. Taylor*, 329 U.S. 495 (1947), the Supreme Court recognized and defined the contours of the attorney work product doctrine, which protects against disclosure of work product prepared by or for counsel in anticipation of litigation.

7 *Upjohn* articulates that protections available under federal law. While many states have adopted the principles of *Upjohn*, others have not. The investigation team must consult the potentially applicable state law on this privilege issue and conduct the interviews accordingly.

the substance of the communication to third parties, including the government; and (5) the communication is confidential and must be kept that way by the witness and not disclosed to third parties except counsel.[8] Care should be taken to make sure that the investigation and the associated privilege belongs to the entity.[9]

Regarding confidentiality, which is distinct from privilege, counsel should be aware of limitations applicable to witness interactions. Counsel can ask a witness to keep an interview discussion confidential, and can explain the purpose and importance of doing so (including preservation of the privilege), but cannot instruct the witness that he or she is forbidden from discussing the matter, especially concerning any communications or potential communications with the government. Nor will written confidentiality agreements be enforceable if they unreasonably restrict the employee's ability to report information to the government.

When an internal investigation can be undertaken for many different purposes, the availability of the privilege turns on the purpose. Many courts apply a "primary purpose test" to determine if the primary purpose of the investigation was to provide legal advice or to prepare for litigation. If so, the attorney client privilege and work product doctrine protect attorney notes, memoranda and other materials generated during the investigation.[10] If the primary purpose of the investigation was not to seek legal advice or prepare for potential litigation, however, the privilege and the work product doctrine may not apply.

Practitioners differ on whether Upjohn warnings should be provided orally or in writing and, if in writing, whether the witness should sign an acknowledgment. Some fear that overly formal warnings will chill candor from the witness. Others contend that oral warnings present proof problems if later challenged. This is a judgment call that must be made in each situation. At a minimum, counsel who elect to forgo the written acknowledgment should document in the memorandum and notes summarizing the interview that the witness received the warnings and confirmed his or her understanding. Privilege challenges from individuals who have close working associations with outside counsel are a common occurrence. In such situations, the individual often associates the outside counsel as representing her/his interests because in past circumstances there has been complete alignment between the individual and the entity. This can lead to confusion on the part of the individual that, if viewed by a court as reasonable, can put the privilege at risk. Where such a situation exists, thought should be given as to whether there is utility and net benefit for written warnings and a signed acknowledgement.

Where joint representation is contemplated, a conflict may arise between the entity and the individual regarding the waiver of the attorney-client privilege. This issue should be addressed in an engagement letter providing the entity with the sole authority to waive the privilege. If the individual is not comfortable with such a delegation, the ability to undertake a joint representation should be revisited.

Ethical requirements for dealing with witnesses

Two important ethical rules govern the investigator's conduct with regard to witnesses. Model Rule of Professional Conduct 1.13(f) details what a lawyer needs to do when dealing with an entity's directors, officers, employees, members, shareholders and other constituencies that have interests adverse to the client.[11] Specifically, in this situation, further care is required for counsel to identify that she/he represents the entity alone. This elevates one of the important aspects of Upjohn warnings to the level of an ethical violation if omitted.

Model Rule 4.3 details what an attorney must do when dealing on behalf of a client with a witness who is not represented.[12] These are particularly tricky

8 Courts are split on the issue of whether the *Upjohn* privilege extends to former employees. A number of courts have held that *Upjohn* applies to communications with former employees so long as the communication relates to the former employee's conduct and knowledge gained during employment. *See, e.g.*, *Export-Import Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 112 (S.D.N.Y. 2005); *Peralta v. Cendant Corp.*, 190 F.R.D. 38, 41-42 (D. Conn. 1999); *see also In re Allen*, 106 F.3d 582, 605-06 (4th Cir. 1997) (holding Upjohn applies with equal force to former employees). However, not all courts have agreed. *See, e.g.*, *Clark Equip. Co. v. Lift Parts Mfg. Co.*, No. 82 C 4585, 1985 U.S. Dist. LEXIS 15457, 1985 WL 2917, at *5 (N.D. Ill. Oct. 1, 1985) (holding former employees are not the "client," and that "post-employment communications with former employees are not within the scope of the attorney-client privilege"), *Newman v. Highland Sch. Dist. No. 203*, 381 P.3d 1188 (Wash. 2016).

9 Individual claims of ownership of a corporate privilege are often analyzed under the so called *Bevill* factors which include: (1) the employee sought legal advice from the company's counsel; (2) in an individual rather than a representative capacity; (3) the attorney, aware of the potential conflict of interest gave the advice sought; (4) the conversation was confidential; and (5) the substance of the conversation did not involve corporate matters. *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.,* 805 F.2d 120, 125 (3rd Cir. 1986). Tailoring *Upjohn* warnings to ensure that the witness cannot establish the *Bevill* factors may be appropriate in certain situations.

10 *See In re Kellogg Brown & Root Inc., 756 F.3d 754 (D.C. Cir. 2014)* and *In re GM LLC Ignition Switch Litig.*, 80 F.Supp.3d 521 (S.D.N.Y. 2015).

11 Rule 1.13(f), Organization as Client, states: In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

12 Rule 4.3, Dealing With Unrepresented Person, states: In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

situations because the witness often has legitimate questions about the purpose of the investigation and whether it creates jeopardy for the witness, which can risk confusion about the attorney's role vis à vis the individual. The investigating team needs to be careful not to provide legal advice to the witness. For example, if the witness asks if she/he needs representation, the investigator should not answer this question with anything other than "I cannot advise you on that question as I represent the entity and not you." It also may be appropriate to remind witnesses of their ability to consult with their own legal counsel. It is also important to communicate with the client, upfront and later as needed, regarding whether there are any witnesses for whom the client wants to provide individual counsel. Clients can pay for the costs of an employee's counsel if they so choose (or if a relevant policy, such as a director and officer liability policy, requires indemnification). Paying for counsel does not give the client any ability to direct the representation or the employee's decisions, however.

Protecting notes of witness interviews and related work product

The mental impressions, strategy and analysis of any attorney formulated during an interview of a witness are generally protected from disclosure. Facts learned from a witness, without more, are generally not protectable. As a consequence, when making notes of witness interviews, it is important that the investigator mark the work product as "Attorney Work Product". Additionally, noting that a summary or set of notes is prepared in anticipation of litigation, and for the purpose of providing legal advice to the client, is prudent. It is helpful to make sure that notes are not a running transcript of the witnesses' answers to questions, but are rather imbued with counsel's mental impressions. Work product with these features often receives protection from disclosure where mere transcripts of a witness's answers do not.

Recording interviews and creating transcripts

Recordings are seldom protected because, unlike notes, the questions and answers simply do not convey the mental impressions, strategy and analysis of counsel that would warrant opinion work product protection.[13] It is highly probable, therefore, that disclosure of recordings or transcripts may be compelled.[14] Whether such disclosure creates issues for the client is a fact-specific inquiry. Thought should be given to this issue upfront, and the implications of disclosure discussed, before recordings or transcripts of witness interviews are generated.

Other considerations may weigh against recording interviews. There is no uniform rule regarding whether counsel must inform the witness of the recording before it begins and obtain the witness's consent to record. Rather, the legality of one-party recording is an issue that must be examined on a state-by-state basis. In jurisdictions where consent must be obtained, counsel may determine that seeking consent would chill witness candor to the detriment of the interview(s), and may elect to proceed without recording.

Compelling witness participation

Employees of public or private entities are usually required to cooperate with internal investigations as a responsibility of employment. Review of the entity's policies and procedures regarding what employees are required to do, as terms of their employment, is a useful first step. Those unwilling to be interviewed may be subject to some form of progressive discipline or job action.[15] The specter of such actions is usually sufficient to secure participation.

Former employees present a different issue. Unless there are contractual requirements that survive the employee's separation from the entity, participation in an internal investigation by a departed employee is entirely voluntary. Participation can often be secured when the witness is informed that some manner of formal process may issue from the government or a potential party to litigation. Often the witness wants to know what those processes will entail and what she/he may be asked to do. When providing this information, it remains important that the entity's counsel not provide legal advice, as prohibited by the Model Rule of Professional Responsibility 4.3, and that counsel clearly define its role as counsel to the entity. Counsel also must assess whether Upjohn warnings apply. Additionally, it is prudent to recognize that

13 *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 148-50 (D.C. Cir. 2015) (holding that fact work product is subject to disclosure on a showing of "substantial need" and "undue hardship" but opinion work product is subject to heightened protection); FED. R. CIV. P. 23(b)(3(B) (if a court orders disclosure of work product, "it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories" of counsel, which constitutes opinion work product).

14 *See e.g.*, *United States v. Nobles*, 422 U.S. 225 (1975) (affirming the trial court's finding that an investigator's report containing statements by a witness were not protected by, *inter alia*, the work product doctrine).

15 There often are differences in what actions private entities can take over employees versus public entities. These differences may drive the strategy and tactics employed to secure participation.

former employees do not have the same job-related motivations as current employees, and may not heed counsel's request not to discuss the content of the interview.

Witness's access to counsel during the interview

Internal investigations involving private entities ordinarily do not implicate a witness's right to have counsel participate in the interview. Nevertheless, there may be special circumstances—including interviews of victims or whistleblowers—where the client may permit such participation. These are fact-specific determinations made to enhance the efficacy of the investigation. It may be that a witness simply will not cooperate at the level necessary without her/his counsel in the room. The net benefit of getting better cooperation and candor may outweigh the anticipated downsides of participation by the witness's counsel.

When permitting counsel to participate, it is often helpful to set ground rules. Among other things, counsel is there to observe and not participate in the questions and answers. It is not a deposition, there is no right to object and the counsel cannot behave is a way that disrupts the investigation. Further, the counsel needs to agree to maintain the process as confidential.

Work papers and drafts of the report of investigation

All work papers and drafts of the report should be labeled as "Confidential Attorney-Client Communications and Attorney Work Product," and also as drafts. The materials should be treated and maintained as confidential and should be shared only on a "need to know basis." Disclosure should be limited to members of the investigative team or certain select decision makers of the client. Counsel also should be mindful that disclosure of drafts to third parties may waive privilege protections. By maintaining strict formalities, the chances of sustaining the privileges and protections through challenges are increased. Conversely, lack of diligence on these issues puts the protections at risk of waiver, which, as discussed above, can vary in scope.

Circulation and control of the final report of investigation to maintain privilege

If the client wants to maintain privilege of the final report of investigation, strict precautions must be used to limit circulation. Counsel should consider issuing individually numbered reports to specifically identified decision makers at the client. Express written warnings should accompany the circulation of the report and should detail the consequences of circulating the report beyond the defined audience. Presenting the report through a secure read-only platform that limits the reader's ability to copy or forward the report may be useful to control circulation to only the intended audience.

Disclosure of report of investigation and implications on privilege

If the client wants to disclose the report to a third party, careful consideration of the scope of the waiver is important. To the extent permitted by law, the investigative team should help to narrow the breadth of the waiver as much as possible. Detailing what is intended to be waived versus what is not may prove helpful if a third-party later moves to compel more information on the basis of partial waiver.

A client considering disclosing some, but not all, of its investigation report should consider that not all jurisdictions recognize selective waiver. Moreover, disclosure of some or all of the report in one proceeding can have an unintended adverse effect in a future or parallel proceeding in which it may be sought, such as a shareholder derivative suit. Care and consideration must be given to the potential effects of even limited waiver of privileged material.

Waiver of privileges through use of information in proceedings

In addition to disclosure of the actual work product, the use of information obtained through an internal investigation in defense of regulatory or civil claims can result in waiver of associated privileges. Once the material is put at issue and used for offensive purposes, courts are reluctant to maintain privilege protections. The simple reality is that privilege cannot be used both as a sword for offensive purposes and a shield to protect against disclosure. Selective disclosure seldom stands when challenged. Accordingly, if the client needs to use the information obtained during the investigation to defend against regulatory or civil claims, it should do so knowing that the privileges associated with the gathering of this information will likely be waived. This could have a direct effect in future actions, such as shareholder derivative suits,

and in parallel proceedings.

Voluntary waiver of privilege to earn cooperation credit

In recent years, the United States Department of Justice ("DOJ") has put increased focus on individual accountability for corporate wrongdoing. In September 2015, the DOJ issued the so-called "Yates Memorandum," which detailed new policies and practices for dealing with the prosecutions of corporations. The memorandum emphasizes that "fighting corporate fraud and other misconduct is a top priority" of the DOJ and details "six key steps to strengthen [DOJ's] pursuit of corporate wrongdoing." These steps include: (1) to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals, as well as the company, and evaluate whether to bring suit against an individual as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

In the wake of the Yates Memorandum, cooperation credit for timely, diligent, thorough, proactive and speedy internal investigations now turns on the complete disclosure of facts learned about individuals responsible for the misconduct. Unlike past policy, the Yates Memorandum calls for disclosure of "all relevant facts" relating to individual misconduct. No longer can a corporation lean on the diffuse nature of corporate responsibility. Further, settling the corporate wrongdoing will not occur unless there is a "clear plan" to resolve cases against individuals. Taken together, this has put tremendous pressure on entities to waive privileges associated with the internal investigation in order to do a fulsome disclosure about individual malfeasance necessary to earn cooperation credit as part of the case resolution.

As a practical matter, such a disclosure pits the interests of the corporation to reach a resolution against the individuals responsible for the misconduct. In essence, the corporation is incented to root out corporate wrongdoing at the individual level and help deliver the facts supporting the individual misconduct to the DOJ. Such a dynamic often creates material conflicts between the corporation and the individuals responsible for the misconduct.

The Yates Memorandum's "all-or-nothing" approach to cooperation credit, and its mandate that the DOJ resolve corporate matters only after articulating a plan to pursue individuals, arguably dissuades corporations from cooperating in investigations. Practically, prolonged investigative effort means that corporations face longer periods of bad press, and that press is less likely to be remediated by acknowledgement of the corporation's cooperation. This complicates internal investigations, with entities and individuals fearing liability potentially assuming recalcitrant or defensive postures earlier on.

Joint defense/common interest agreements and protecting privilege

Practitioners have long used so-called joint defense or common interest agreements to share information gathered between and among counsel for the client and individuals involved in the investigation. This is a useful tool for protecting privilege when interests are aligned. When it becomes evident that interests are not aligned, the client must have a method for exiting the agreement and using its information in an unfettered way.[16]

The Yates Memorandum adds some complexion to this well-used practice. The mandated factual disclosures associated with earning cooperation credit may create tension or limitations on the nature and extend of an agreement that can be entered with counsel for individuals. Certainly, agreements with counsel for individuals responsible for the misconduct presents real issues and may impair the ability to secure cooperation credit. Care must be taken to ensure that

16 The nature and extent to which these joint defense/common interest agreements provide protection may be an issue of state law.

benefits associated with such an agreement are not out-weighed by the impacts on cooperation benefits.

Conclusion

Internal investigations require careful planning, foresight and execution to avoid many and varied traps. Attention to the threshold issues, care in preserving the applicable privileges and thoughtful analysis as to when the client may need to waive these privileges to secure appropriate benefits in various proceedings are key drivers for success.

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- 2015 Tier One national recognition in Best Lawyers in Mass Tort Litigation & Class Action defense
- Chambers USA: America's Leading Lawyers for Business (2008 to present)—Clients rate Scott O'Connell as an "expert on class actions." He is commended for his "well-thought arguments," his ability to "think on his feet" and his strong command of technical legal points.
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A MATCH MADE IN HEAVEN: PRO BONO PARTNERSHIPS – LAW FIRMS AND IN-HOUSE LEGAL DEPARTMENTS

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As part of the public trust associated with being licensed to practice law, lawyers are asked to contribute to the public good through work pro bono publico. The American Bar Association asks lawyers to perform at least 50 hours of pro bono work each year, and many state rules of professional conduct set the same aspirational goal.

Incentives and opportunities for lawyers to do pro bono work can take many forms. These include collaborations between in-house legal departments and their outside counsel. Creating a shared pro bono program strengthens relationships between the client and its law firm, provides skills training to in-house and firm lawyers, and gives in-house counsel an additional tool to evaluate outside lawyers.

Collaboration between firms and in-house counsel also leads to innovation. One example of how collaboration between firms and in-house counsel can lead to innovation is described in the following case study, based on our firm's experience with Nashville law firms and corporate legal departments.

Case Study – "Pillar Firm" Program

Making pro bono programs succeed in highly specialized law firms and in-house legal departments requires different strategies than those that are effective for solo practitioners and smaller, general-practice firms. Several years ago, our firm began discussing this issue with other large law firms and in-house legal departments in Nashville to share ideas – strategies that worked, strategies that didn't work, and how we could individually and collectively increase the amount of pro bono we were doing.

We soon discovered a couple of important things. First, in-house and law firm lawyers with specialized practices have almost no practical legal skills to help economically disadvantaged people. Most of us can't draft a will, complete a parenting plan, represent a tenant in a dispute with her landlord, or even know what a slow-pay motion is, much less how to file one. We were terrified at the lists that Legal Aid sends around with pro bono clients in need of lawyers, each of whom had a different problem, and none of which we knew how to solve. We were far more comfortable with specialization – being good at solving legal problems in very particular circumstances.

The second insight we had is that we like to work in teams. We value having colleagues around us who can give us advice when we don't know the answer, who can help us think through problems, and learn new areas of the law. When we don't know how to do something, we have come to rely on the fact that someone else in our office, or someone at our outside counsel, usually does.

So why not create a pro bono program that's tailored to the way we practice law in specialized law firms and in-house legal departments? We decided that each of our firms and legal departments would pick a substantive area of law that pro bono clients need. We would get training and start developing expertise in each of our

firms or offices in that substantive area. We would pair up—law firms and in-house legal departments—for training and, in some cases, representing clients or staffing legal clinics. We called our initiative the "Pillar Firm" pro bono program.

Law firms like to say they are a "go-to" firm for certain practice areas. Each of the Nashville firms and in-house legal departments that became part of the Pillar Firm program resolved to become the "go-to" firm for the subject matter area we chose. Those substantive areas included landlord-tenant cases, appeals of Medicaid benefit denials, adoptions, and creditor-debtor litigation.

The Pillar Firm model has seen good success. Law firm lawyers and in-house counsel are better informed and feel more comfortable in advising pro bono clients in their substantive focus areas. Legal services organizations work more efficiently by referring cases to a built-in, substantively focused referral network. In-house lawyers and their outside counsel strengthen their relationships and rely on the different resources and expertise that each organization brings to the table.

Conclusion

The Pillar Firm model is just one example of how corporate legal departments and their outside counsel can collaborate on pro bono work. By working together, law firms and their clients can incentivize pro bono work, strengthen their relationships, and find innovative solutions to the unmet legal needs in their communities.

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David's experience in financial services compliance programs, government investigations, and regulatory proceedings is complemented by his engagement by the New York Stock Exchange (NYSE) to serve as a regulatory auditor. For seven years, David frequently worked on-site at the NYSE conducting interviews, reviewing regulatory programs, providing recommendations, and rendering bi-annual reports to the NYSE and Securities and Exchange Commission regarding the NYSE's compliance with federal securities laws and regulations.

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- Tennessee Supreme Court — Access to Justice Commission
- Leadership Nashville Class of 2011
- Conexion Americas — President, Board Member (2011-2013)
- Tennessee Immigrant & Refugee Rights Coalition — Advisory Board Member
- Tennessee Bar Association — Leadership Law Class of 2007
- Nashville Public Library Foundation — Board Member
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IS THE HILL WORTH TAKING? IDENTIFYING THE APPROPRIATE CASES TO TRY AND WIN

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We all have encountered and reviewed multiple publications, articles, and presentations on trial preparation, trial techniques, and trial strategy. Despite the plethora of information available on these topics, there is scant information on developing a global approach on how to best determine which cases to try to verdict. The likely reason for this void is that there is no easy, one-size-fits-all approach. Selecting which cases to try depends on factors unique not only to each company but also to each product or service. In this article, we explore relevant factors to consider in developing an effective approach to select cases to try and how such an approach can be implemented as part of a company's litigation management strategy.

Developing Your Approach to Case Management and Trial Selection

To develop the appropriate approach, in-house counsel must consider internal factors regarding the product or service at issue and the company itself.

Internal Factors:

- Nature of the product or service;
- Relationship/importance of the product or service to the company's brand;
- Scientific and legal support for the claim – defensibility/validity;
- Impact of negative publicity and/or questions raised regarding the product or service;
- Prospect and/or existence of serial litigation;
- Internal resources necessary to defend the product or service; and
- The company's risk tolerance.

After analyzing and evaluating these internal factors, in-house counsel must also consider external factors that vary by case.

External Factors:

- Amount in controversy;
- Venue and jury pool;
- Trial judge;
- Competence of opposing counsel;
- Litigation costs – fees for professional services;
- Case evaluation; and
- Settlement posture.

While the external factors will play a significant role in determining a case specific trial strategy, this article primarily focuses on the internal factors that must be considered when developing an overall strategic approach to trial and litigation management.

Nature of the Product or Service and Relationship/ Importance to the Company's Brand

In-house counsel must first gain a thorough understanding of the product or service at issue. It is therefore imperative that a comprehensive internal review of the product or service be completed at an early stage. Counsel must consider whether the product use or service issue was unexpected or not likely to occur again in the future. Counsel must also consider the life of the product or service in the marketplace. If the litigation involves a foreseeable use of a product or service that is currently on the market and that will remain on the market for several years, these factors must be assessed in making any decision regarding litigation management and trial strategy.

It is important to involve outside counsel in this process once outside counsel is fully versed in the background of the product or service at issue. Outside counsel must have the opportunity and ability to investigate so that they can fully understand the relevant aspects of the product's or service's design, development, and, if applicable, approval process. A thorough investigation will necessarily require outside counsel to develop relationships with the engineers, scientists, or service providers most knowledgeable about the product or service itself, as well as the precise issues at hand.

Litigation involving state-of-the-art product or services—products that implement current design technology, that will be on the market for several years, and/or that define the company's brand—require a thorough review and analysis of how litigation can impact the product or service at issue. In-house and outside counsel must consider how the litigation may impact the current design or product labeling and must assess the potential implications of a negative jury verdict. Also important is an assessment of the level of scrutiny and concern that the litigation may raise within the company.

Scientific and Legal Support for the Claim – Defensibility/Validity

Once the above assessment has been made by both in-house and outside counsel, an evaluation of the defensibility of the claim and/or issues can be made. The handling of any claim will be dependent upon this assessment. Defensibility/validity factors can range from a recall situation where the product at issue was recalled for an issue or problem identified by the manufacturer to a failure to warn claim where there has been no scientific or medical support for the alleged complication or adverse event. Key to this assessment is identifying the core facts surrounding the claim or issue, understanding those facts, and objectively assessing them. This assessment requires a self-critical analysis of company decisions regarding the design of the product or service at issue, the science or engineering behind those decisions, and how the decisions will play out before a jury.

Impact of Negative Publicity and/or Questions Raised Regarding the Product or Service

In addition to understanding the product or service itself, in-house counsel must understand how negative publicity and questions raised about the brand could impact the company. For example, the analysis and impact of a design defect claim against a company's most recent product model is very different than the same claim against the design of a 20-year-old product that has not been manufactured in 15 years. Similarly, the analysis and impact of a design defect claim against a product or service of limited value to the company differs from the same claim against the company's most popular product or service.

It is critical to assess the impact litigation may have on the brand and the product or service at issue at the outset of the case. In-house counsel should consider the following:

- Will litigation positions impact customer relationships?
- Will company customers somehow become involved in the defense or prosecution of the claims?
- Will questions or issues raised in the litigation affect competitive issues within the product line?
- Does the theory of the case implicate competitor innovations or highlight differences between the company's product or service and competing products or services?

All of these considerations will help in-house counsel determine whether the case or litigation is a "hill worth taking" or defending.

Prospect and/or Existence of Serial Litigation Several factors must be considered when determining the potential for future claims. The number of units at issue, the number of individuals exposed to those units, and the likelihood of injury per exposure are just a few of the factors to be assessed when making this prediction. In litigation involving products or services currently on the market, the company must assess future exposures and the potential risks involved. Other questions which must be addressed include whether the science or engineering will materially change or evolve as the case progresses and whether the science or engineering supporting the product or service will likely become more or less favorable throughout the life of the litigation.

When there is a significant prospect for repeat or continued litigation, decisions regarding initial handling become both more important and more difficult. Decisions made early on in the case will affect the company's legal and factual defenses, the amount and identity of internal resources required to defend the product or service, the company's flexibility regarding the relevant science and engineering, and the company's responses to certain scientific, medical, or engineering claims. As a result, responses to initial fact discovery, initial testimony from company witnesses, and initial company legal positions should be carefully scrutinized, both at the beginning of and throughout the litigation. The earlier a company can evaluate and implement its global approach to litigation and trial, the more likely the decided-upon approach can be consistently followed and applied throughout the litigation process.

Internal Resources Necessary to Defend the Product or Service

The assessment of in-house internal resources necessary to defend litigation will guide decisionmakers in terms of assessing the appropriate litigation management strategy. However, the amount of internal resources needed to defend the product or service should be determined only after an assessment of the defensibility/validity of the claims. The amount of resources needed will vary from case to case and will likely depend on factors including whether the product or service was developed at the company or purchased or acquired elsewhere; how many individuals at the company were involved in the development, marketing, and promotion of the product or service; and where the medical, scientific, or engineering knowledge regarding the product or service is housed. Litigation involving the knowledge of a small number of individuals will require less internal resources than litigation requiring the knowledge of many individuals or departments throughout the company. It is imperative that the company strategically assess who should be involved in its defense and not allow plaintiffs' lawyers to make that determination through discovery. A company must then adequately support the internal resources in their litigation support roles.

Accordingly, soon after a claim has been assessed, in-house counsel should work with outside counsel to determine the individuals who can provide the support necessary for both in-house and outside counsel to thoroughly evaluate, assess, and defend the litigation. In-house resources can uncomplicate the most scientifically complex matters for all counsel involved. It is important that those resources be used by all counsel from the outset. Too often, both in-house and outside counsel are left to investigate the validity and defensibility of scientific claims without access to internal expertise and knowledge. This situation not only unnecessarily complicates the investigation process but also puts the thoroughness of the investigation at risk.

The Company's Risk Tolerance

When evaluating the appropriate global strategic approach, in house and outside counsel must understand and assess the company's risk tolerance. In-house and outside counsel must evaluate whether the company is willing to expend the resources necessary to actively defend against the litigation or whether the company prefers a more conservative approach. In-house and outside counsel must also ensure that the company understands the consequences of its strategic decisions. For example, publicity may attach to an aggressive defense of the litigation. The company thus must be able to and willing to deal with such publicity.

A global strategic approach that includes trial of several matters necessarily involves risks and benefits. The risks at trial can be managed to a great extent, but ultimately the decision will lie with a group of individuals with limited information about the product or service at issue. Our jury system necessarily involves taking risks that can be mitigated but not eliminated. In-

house counsel must prepare its clients to understand the risks and benefits to stay the predetermined course. Understanding the culture of the company's risk tolerance will assist in managing the expectations and gaining support for the global strategy.

The Impact of External Factors and How They Can Impact a Global Strategic Approach

Once the internal factors are assessed and a global strategic approach is agreed upon and implemented, there may be external factors that require counsel to reevaluate a specific claim. While every rule does have its exception, it is important that consistency be a hallmark of any strategic approach. It is all too easy to avoid risk by arguing that these external factors make this matter unique or so distinct that a different approach is necessary. In-house counsel should avoid making independent decisions on each claim once a global strategic approach is in place.

Where a global approach has been agreed upon that involves aggressively trying several cases upfront to impact the value of future claims, it is important to not allow plaintiffs' counsel to determine which cases should be tried. Plaintiffs' counsel will regularly assess initial claims and attempt to dismiss and/or resolve at a very low value claims that they perceive do not advance their strategic interests. It is important that the defense team not allow plaintiffs' counsel to succeed in these efforts by quickly settling the claims with limited validity and only allowing the most difficult claims to proceed to trial. Once a decision has been made to try a lawsuit in line with a company's global strategic approach, only rarely should that decision be revisited to allow plaintiffs' counsel to bail out or dismiss a claim with limited costs to both parties. Defense counsel is already at a strategic disadvantage in scheduling and/or trying cases due to plaintiffs' inherent ability to file claims in certain jurisdictions at certain times. This disadvantage should not be compounded by allowing plaintiffs' counsel, after extensive discovery and focus on the weaknesses of individual claims, to settle a claim for a limited value and not incur the risks of trial. Plaintiffs' counsel cannot be allowed to dictate defense strategy by controlling the selection of cases to try.

On the other hand, there may be claims that are so unique or distinct in terms of the risks presented that decisions outside of the global strategic approach are both warranted and necessary. These cases should be carefully considered and discussed amongst all counsel and the company. Choosing a different approach to these cases may be beneficial and strategically advantageous. However, all counsel should avoid being nearsighted. All counsel and the company should consider how deviating from its strategy may affect the company's global approach.

This presentation is not intended to answer every question regarding the selection of appropriate cases to try and win and implementing a global strategic approach to litigation. Due to the variances in litigation and the myriad, potential legal and factual scenarios, we have attempted to outline a process that should be undertaken to assure that the appropriate questions are raised and a comprehensive assessment is made before a global strategic approach is adopted.

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Mr. Cullen has represented clients in complex pharmaceutical, product liability and toxic tort litigation for over 25 years. He has taken cases to trial in over 15 states while representing clients as both national and trial counsel. In 2015, Mr. Cullen was designated by ACQ5 and the ACQ Law Awards as the U.S. – Mass Tort Litigation Lawyer of the Year.

Mr. Cullen has represented several clients in the pharmaceutical industry, including Bayer, Pfizer and Eisai. He has represented Bayer as national and trial counsel for more than 25 years in various litigations including – HIV litigation from blood products, PPA litigation, Hepatitis C litigation, Baycol litigation, YAZ litigation, and litigation stemming from Bayer's anti-infective medications, CIPRO and Avelox. Mr. Cullen has represented Eisai as national trial counsel in product liability, qui tam and anti-trust litigation. He has worked closely with many companies including Bayer and Eisai in risk assessment and litigation management, as well as the defense of thousands of individual product liability actions.

Mr. Cullen also serves as national counsel for Crown Equipment Corporation in catastrophic injury product liability litigation. As national trial counsel for Crown, Mr. Cullen has tried 20+ catastrophic injury actions in numerous states across the country. These cases have involved allegations of defective designs, inadequate warnings or failure to meet appropriate standards of care.

Further, Mr. Cullen has also been involved in the defense of toxic tort litigations including commercial talc, carbon monoxide, lead paint exposure, as well as exposure to many other chemicals and pesticides. Mr. Cullen has participated in the defense of thousands of toxic tort and product liability actions and tried numerous toxic exposure cases in the Mid-Atlantic Region to verdict.

Mr. Cullen has been honored as a Best Lawyer in America, U.S. News and World Report, in Mass Tort Litigation/Class Action, Product Liability Litigation and Personal Injury Litigation from 2011 to the present. He has also been named a Maryland Super Lawyer in Product Liability and Personal Injury Defense from 2007 to the present. Mr. Cullen regularly presents at and has chaired conferences on Trial Practice and Product Liability topics nationally.

Practice Areas

- Pharmaceutical and Medical Device Litigation
- Construction Equipment and Related Litigation
- Toxic Tort and Environmental Litigation

Hoonors and Awards

- ACQ5 Law Awards, US- Mass Tort Lawyer of the Year (2015)
- Best Lawyers in America, Mass Tort Litigation/Class Action, Product Liability Litigation, Personal Injury Litigation (2011-2017)
- Maryland Super Lawyers, Product Liability and Personal Injury Defense (2007 - 2015)
- The Daily Record - Leadership in Law Award (2008)

Education

- University of Memphis (B.A. 1984)
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