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LITIGATION MANAGEMENT CLE SUPERCOURSE

OCTOBER 25-28, 2018 **RITZ-CARLTON HALF MOON BAY**

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IN-HOUSE COUNSEL FACING THE MUSIC

A LITIGATION MANAGEMENT CLE SUPERCOURSE

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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 23 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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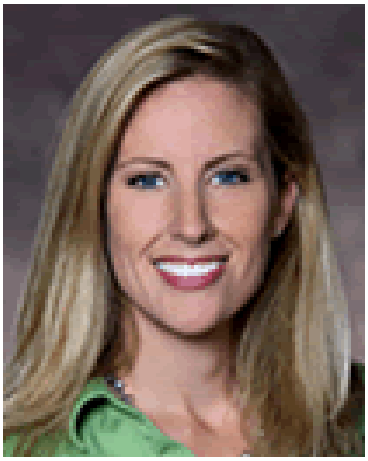

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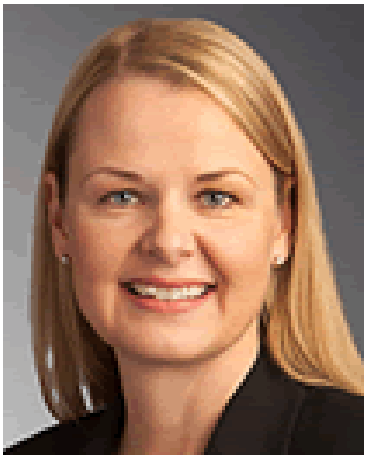

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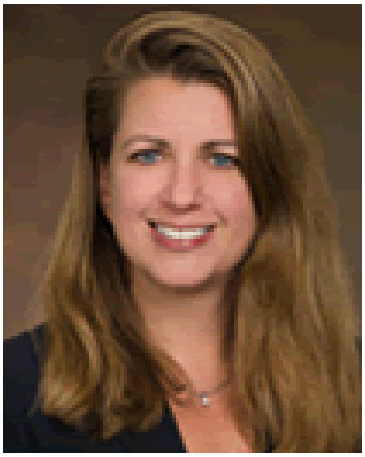

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NETWORK MEMBER FIRM PROFILE

FLORIDA

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, with a reach that extends across the Americas and globally. Assembling a hand-crafted team for every client engagement, we leverage our more than 700 lawyers and business professionals across 24 offices. Akerman's formidable team of litigators is ranked Tier One in the United States in Commercial Litigation and Appellate Practice by U.S. News – Best Lawyers and as a leader in International Arbitration across Latin America by Chambers Global. With more than 350 litigators across the firm, many with first-chair trial experience, we field one of the largest and most sophisticated trial teams across the Americas.

akerman.com

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TENNESSEE

With 300+ lawyers, Bass, Berry & Sims is committed to achieving excellent results for clients at every stage of litigation. We collaborate with network firms to deliver seamless client service, expand relationships and provide successful outcomes. Across the country, we are known for leading bet-the-company litigation including class actions, MDLs, trials and appeals, and government investigations. Our core practice areas include products liability and torts, securities litigation, privacy and data security, financial services, and healthcare fraud. We are dedicated to improving diversity within the legal profession and bettering our communities through pro bono work.

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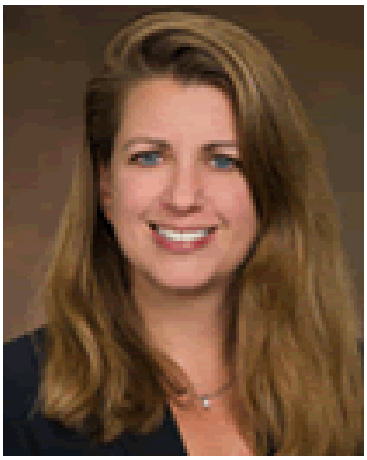

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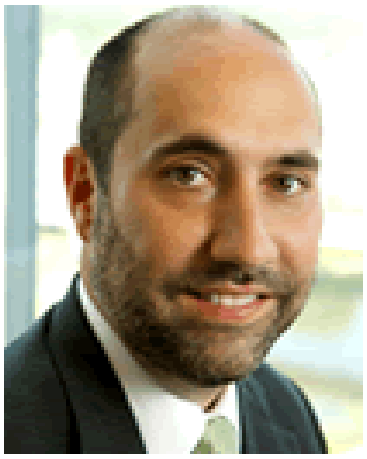

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NETWORK MEMBER FIRM PROFILE

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.

bsplaw.com

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VIRGINIA

Christian & Barton, L.L.P., maintains a broad-based civil practice, serving clients throughout the United States. Our offices are located in Richmond, the capital of Virginia. Our clients range from Fortune 500 companies to closely-held businesses, and include governmental entities, nonprofit organizations and individuals. Many firm clients are entrepreneurs engaged in high technology businesses, real estate ventures and expanding professional groups. Others engage in banking, communications, health care, insurance and transportation. One of Virginia's foremost firms, Christian & Barton traces its origins to 1926, when Andrew Christian and Robert Barton established a law practice to provide legal services at competitive rates while maintaining the highest professional standards. We strive to maintain these traditions while evolving to meet the needs of our clients.

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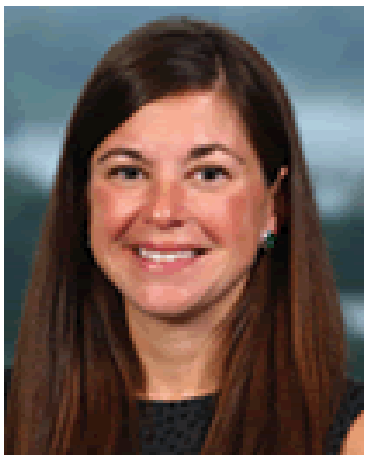

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WASHINGTON

Corr Cronin 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.

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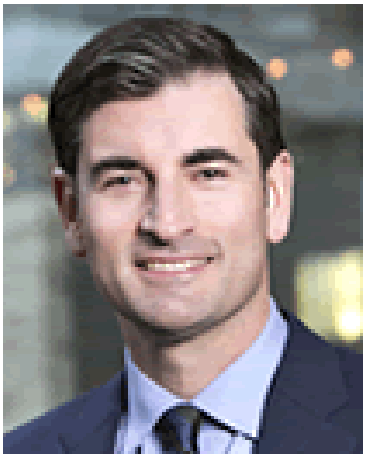

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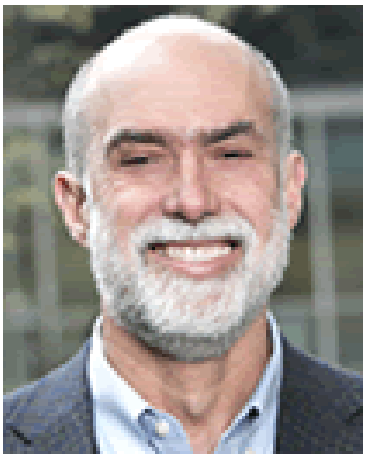

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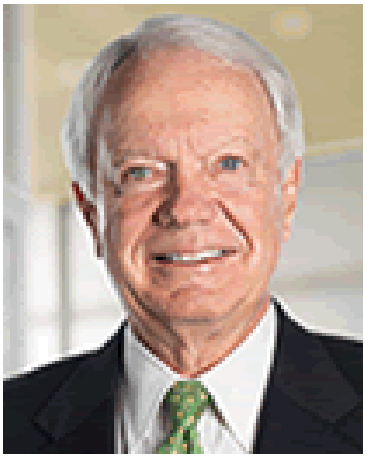
LOUISIANA

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.

deutschkerrigan.com



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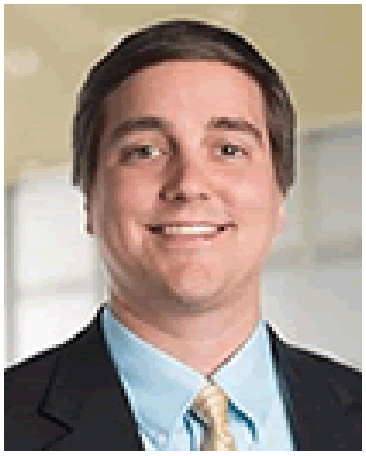

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CALIFORNIA

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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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.

formanwatkins.com

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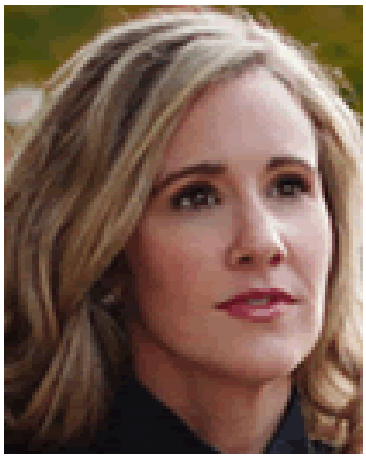

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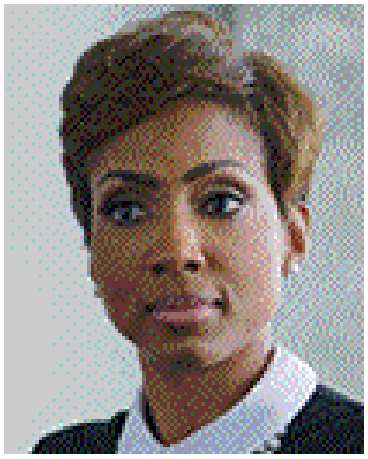

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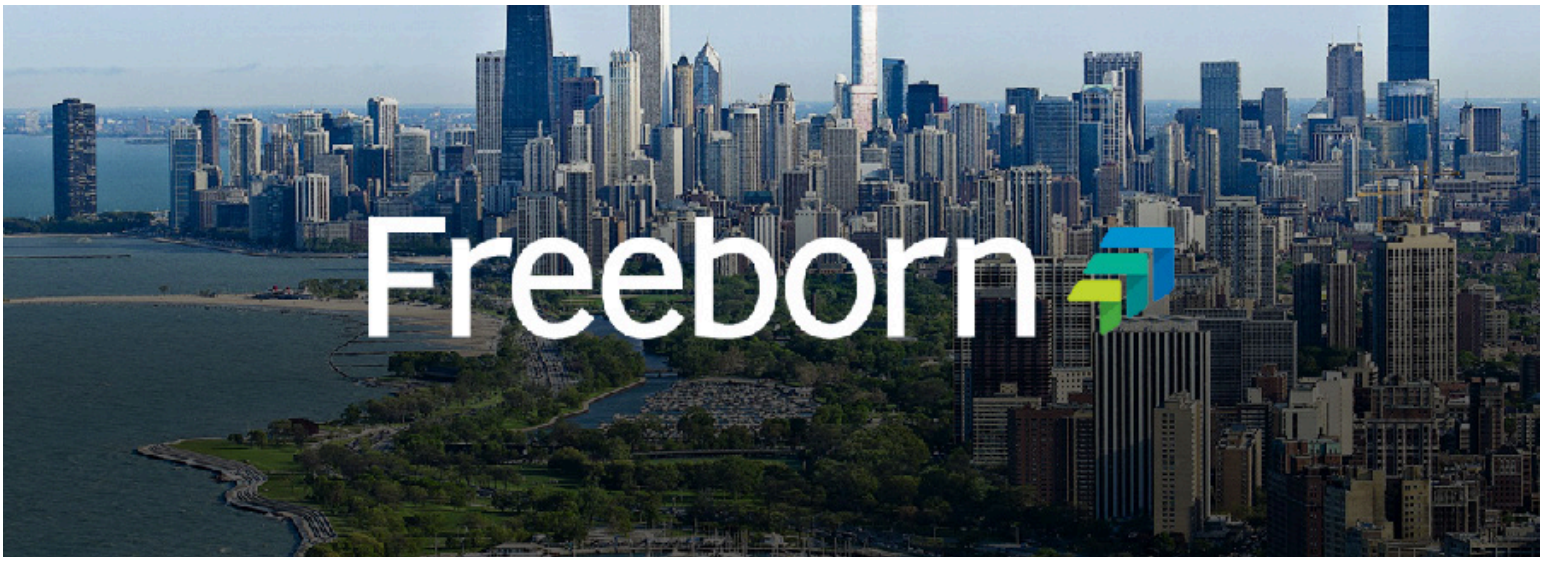

NORTHERN ILLINOIS, CENTRAL ILLINOIS

A litigation powerhouse, Freeborn has more than 60 litigators in its Chambers-ranked Litigation Practice Group. Known for its deep bench of experienced trial lawyers who handle all areas of complex disputes and litigation, we vigorously advocate for our clients in such areas as antitrust, insurance and reinsurance, product liability, breach of contract, intellectual property, restrictive covenants, labor and employment, professional liability, class actions, and securities, among many others. In addition, our in-house E-Discovery Lab is recognized as a trailblazing innovation among law firms for its high-quality, low-cost approach to the preservation, review and production of electronically stored information.

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PENNSYLVANIA

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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NETWORK MEMBER FIRM PROFILE

MARYLAND

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.

gdldlaw.com

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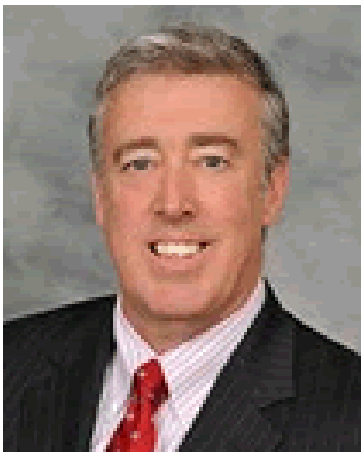

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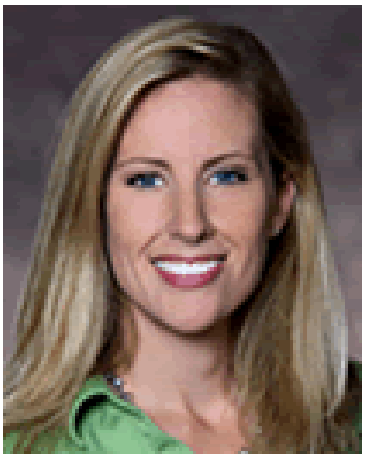

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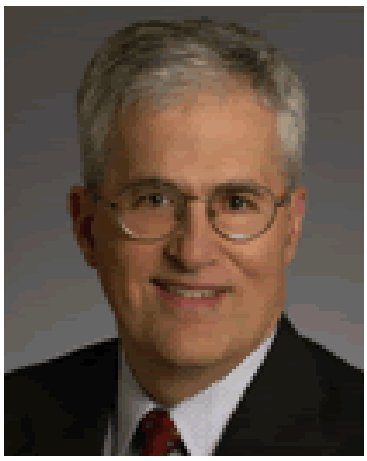

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SOUTH CAROLINA

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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NETWORK MEMBER FIRM PROFILE

ALABAMA

Lightfoot, Franklin & White represents clients in litigation, compliance and investigations across the country. Selected by Benchmark Litigation as the “2018 Alabama Firm of the Year,” the firm’s 65 lawyers represent industry-leading American and multinational companies across a broad range of sectors, including many members of the Fortune 500. The Chambers USA Leading Law Firm has six partners who are Fellows of the American College of Trial Lawyers, one of whom is founding partner Sam Franklin, the current ACTL president. Lightfoot’s lawyers regularly handle cases involving insurance and financial services, healthcare and energy, white collar and internal investigations, product liability and catastrophic injury, collegiate athletics, pharmaceuticals and the media.

lightfootlaw.com

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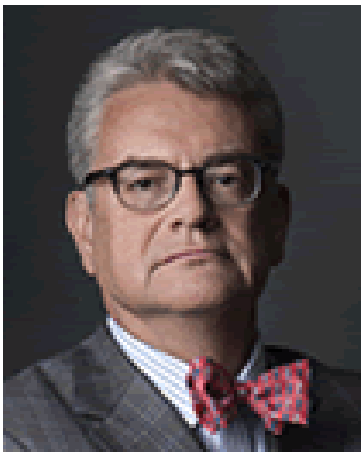

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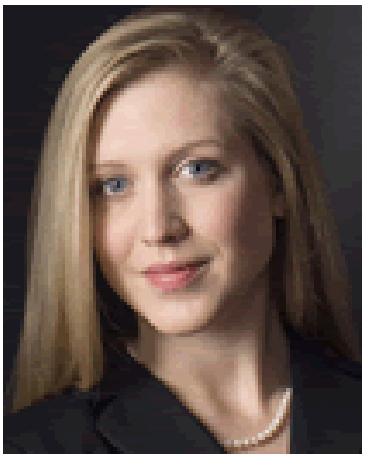

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NETWORK MEMBER FIRM PROFILE

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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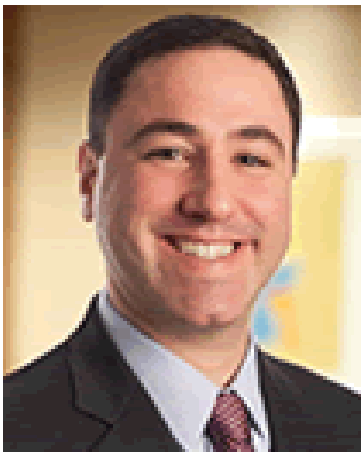

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NORTH CAROLINA

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.

mvalaw.com

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NETWORK MEMBER FIRM PROFILE

NEW YORK, MASSACHUSETTS

Nixon Peabody LLP is recognized as a “Global 100” law firm—one of the largest in the world. Nixon Peabody’s size and diversity allow it to tap collective intelligence to offer comprehensive legal services to individuals and organizations of all sizes. The firm’s talented trial attorneys possess deep industry knowledge across a variety of sectors and demonstrated experience in a wide range of domestic and international disputes. NP is one of the few firms with the proven experience and capabilities to serve as trial counsel in class action and aggregate litigation matters. Clients include emerging and middle-market businesses, corporations, financial institutions, public entities, educational and nonprofit institutions and individuals. From negotiating settlements to seamlessly collaborating on multiparty cases, clients benefit from Nixon Peabody’s industry knowledge and commitment to providing creative, cost-effective and impactful legal solutions that are compatible with their overall business priorities.

nixonpeabody.com

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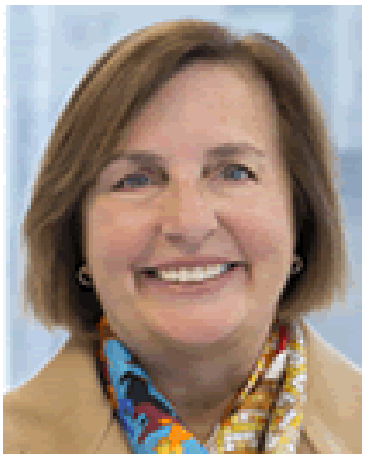

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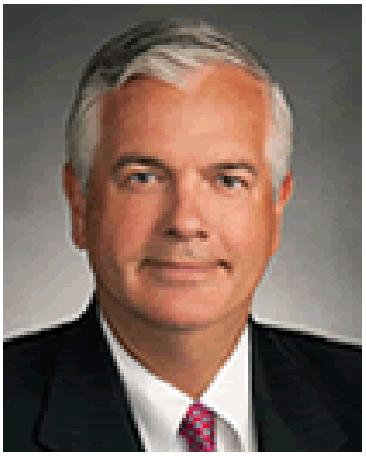
TEXAS

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.

pmmclaw.com



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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.

pbnlaw.com

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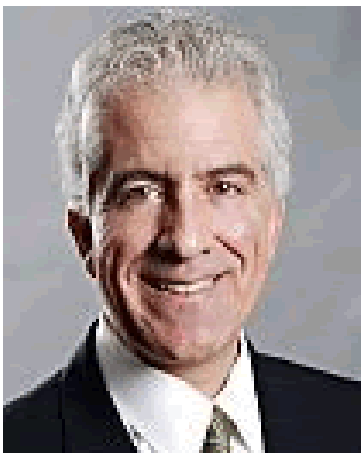

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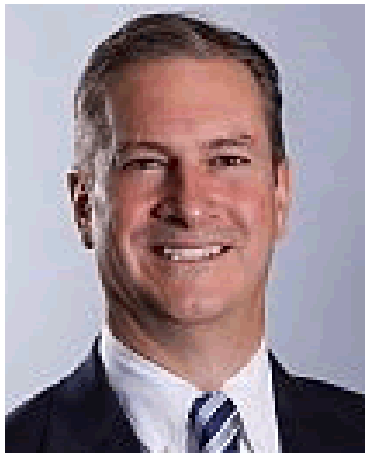

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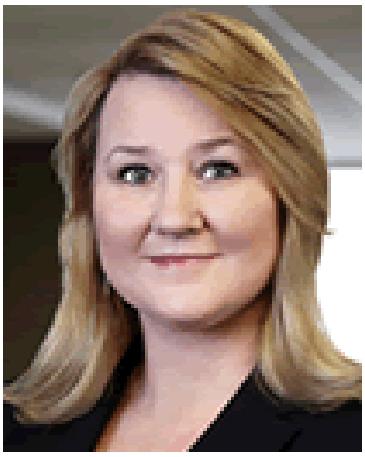
NETWORK MEMBER FIRM PROFILE

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.

sandbergphoenix.com



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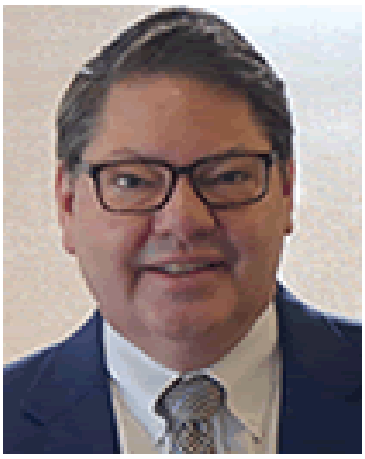

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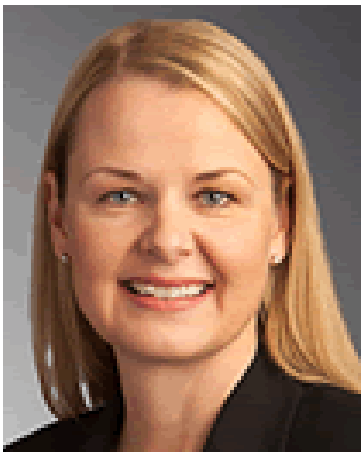

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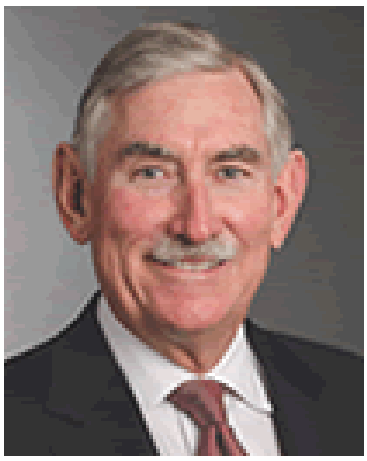

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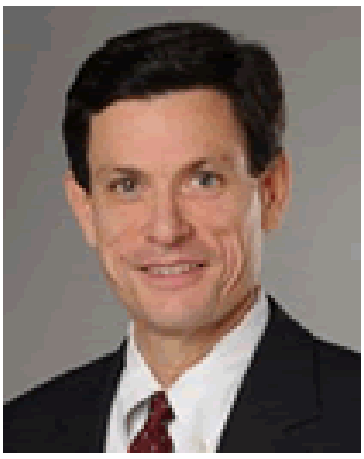

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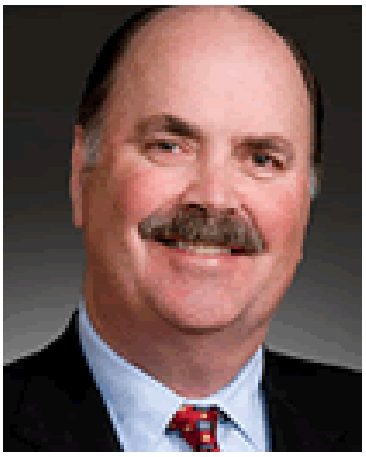

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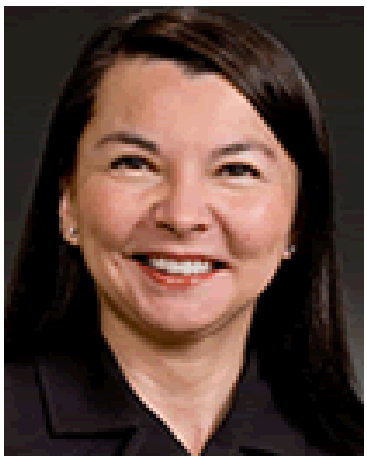

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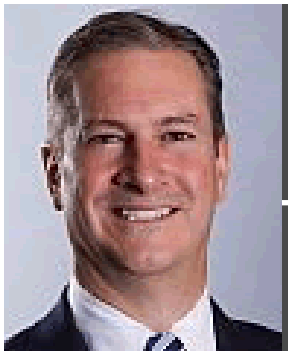

TAMING THE REPTILE AT CORPORATE REPRESENTATIVE DEPOSITIONS

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Everybody Walk the Dinosaur - Taming the Reptile at Corporate Representative Depositions
Charles J. Stoia

Over the last few years, more and more plaintiffs' counsel have attempted to incorporate the Reptile Theory in litigation. The Reptile approach is based on a book titled, Reptile: The 2009 Manual of the Plaintiff's Revolution by David Ball and Don Keenan. Defense counsel must be prepared to deal with the Reptile Theory during all aspects of litigation, including, most importantly, at depositions of corporate representatives. By selecting the appropriate corporate witness for deposition, and preparing that witness for Reptile questions, defense counsel can "Tame the Reptile."

Reptile Theory

To present a counter-attack to Reptile Theory, one must understand Reptile Theory. While an exhaustive discussion is beyond the scope of this article, Reptile Theory is centered on the concept that when jurors are presented with a danger or fear for the safety of the community or public, their "Reptile Brain" will instinctively seek to protect the community. There has been much debate about the science, or lack thereof, of the Reptile Theory. By way of example, Dr. Bill Kanasky, a litigation psychologist, points out that jurors are never themselves placed in danger or fear so the "Reptile Brain" can never be triggered or engaged at trial. Notwithstanding this debate, it is indisputable that several plaintiffs' counsel have achieved significant verdicts utilizing the Reptile approach.

While the science of Reptile Theory is unclear, the methodology is not. Plaintiffs utilize various points in the litigation process to set up absolute "Safety Rules" and to suggest that breach of any such Safety Rules is a danger to the community or public that must be punished to protect the public good. The basic formula is "Safety Rules + Danger = Reptile."

Reptile Questions at Corporate Representative Depositions

While plaintiffs may provide hints about the use of Reptile Theory in their initial pleadings, it will certainly manifest at the deposition of a defendant's corporate witnesses. In general, plaintiff's counsel will present questions with absolute "Safety Rules" that are designed to challenge the credibility or intelligence of the witness if he/she disagrees. These Safety Rules are generalizations that state an absolute "safety" norm or standard:

> "Would you agree that a Company should not manufacture products that present a needless risk of injury to consumers?"

> "Would you agree that a commercial truck driver that has exceeded the mandated driving hours is more likely to be fatigued and inattentive to the roadway?"

> "Shouldn't a Company always do everything it can to make its products safe?"

One of the goals of these questions is to condition the jury, consciously or subconsciously, to believe that these Safety Rules are what should determine liability as opposed to the legal standard of care presented during the jury charge. Absolute Safety Rules do not work in real life. The facts and circumstances applicable to each situation dictate appropriate conduct. Absolute Safety Rules are not legal standards. For example, in a typical negligence claim, the legal issue is not whether defendant did everything possible to ensure the safety of the plaintiff. The legal standard is whether defendant acted reasonably in the specific circumstances. The push-back against plaintiffs' absolute Safety Standards must be a constant theme throughout the litigation, especially the corporate representative deposition.

Taming the Reptile

The two most significant considerations in blunting the Reptile approach at deposition are witness selection and preparation of the witness. To properly respond to Reptile theory, the corporate witness must actively engage in a "word war" with the questioner. Of course, this is contrary to the traditional instruction that lawyers provide to their clients to answer "yes" or "no" to most questions and to refrain from volunteering any information. Such traditional tactics will not work when trying to neutralize the Reptile approach.

(i) Selection of Witness

Because a corporate witness must be ready to go toe-to-toe with a plaintiff's counsel during deposition, identifying the proper witness is critical. The key to any witness testimony is whether it's believable. Honesty leads to believability. The model witness will be someone who makes a good overall presentation to the jury.

The witness must be able to maintain a calm, attentive demeanor throughout the exchange with a plaintiff's counsel. If the witness appears agitated or argumentative, plaintiff will be scoring points because jurors rely on nonverbal cues as well as the witness testimony. The corporate representative must maintain a steady consistent pace and not be impacted by the speed or variability of the questioning. Finally, the model witness should be modest and unpretentious. The witness must be willing to admit the limits of his/her knowledge and be able to say "I don't know" with conviction and without hesitation.

(ii) Preparing the Corporate Witness

Once the appropriate corporate representative has been selected, the real work begins. The witness must be properly educated on 1) the Reptile Theory and the type of Reptile questions that can be expected, 2) the themes for the defense of the case; and 3) the facts/science and standards or duties related so the specific claim at issue. Because the witness must spar with the plaintiff's counsel on the Reptile questions, the witness must have total command of the applicable facts and law to properly engage. This type of deposition preparation often requires multiple days of intense interaction with defense counsel. A simple meeting the day before the scheduled deposition is not sufficient to prepare the witness for Reptile questions.

It is critically important that the witness buy into the defense of Reptile questions without anger, resentment or sarcasm. Any type of attitude in responding to the Reptile questions could be seen as trying to avoid the question or hide the truth. If the responses to such questions are genuine, consistent and honest, the responses will be believable.

Once the witness has been educated, a thorough mock exam should be presented to help the deponent identify the Reptile questions. Because such questions typically deal with absolutes, common buzz words are: needlessly, never, always, unnecessary risk and top priority. If possible, the witness should be provided with transcripts from other matters where the plaintiff's counsel has pursued reptile questions.

When presented with the Reptile questions the witness must follow three rules: 1) avoid "yes" and "no" responses; 2) never surrender on absolute Safety Rules; and 3) always bring the answer back to the Company's specific conduct at issue.

Reptile questions based on absolute Safety Rules

must not be answered with a “yes” or “no”. The witness must respond with the actual facts and the actual legal standards. Words such as reasonable, facts, and circumstances, are helpful in responding to Reptile questions.

Reptile Question: “Do you agree that a company’s top priority must always be to make its product’s safe?”

Proper Response: “I don’t know what you mean by “top priority” and “always,” but Company X takes all reasonable steps to ensure that its products are safe under the circumstances in which the product is to be used.”

Reptile Question: “Would you agree that a commercial truck driver who violates federal regulations as to hours of driving is more likely to be fatigued and inattentive while driving?

Proper Response: “No. I don’t agree. That driver may not be in compliance with the federal regulations, but you need to look to the specifics of that individual to determine if he was fatigued or inattentive while driving.”

Reptile Question: “Should the manufacturer of an unsafe product be responsible for the damages caused by that product.”

Proper Response: “I don’t know. That is a legal issue best answered by lawyers,”

The witness must be diligent in maintaining a steady and consistent response to these type of questions. The corporate designee must also consistently challenge non-Reptile questions that do not have full factual predicates or it will appear that the witness is treating the Reptile questions differently. Often, these depositions become endurance battles where the participants compete to determine who will give up first, the questioner or the witness. The witness must be trained to endure this line of questioning for the entire deposition.

Conclusion

Reptile Theory is not a magic formula for excessive verdicts. It is a methodology pursued by plaintiffs in which they seek and utilize sound bites created by questions based on absolute Safety Rules and insufficient facts. At corporate representative depositions, these tactics can be neutralized by careful witness selection and thoroughly preparing the witnesses for the expected Reptile questions.

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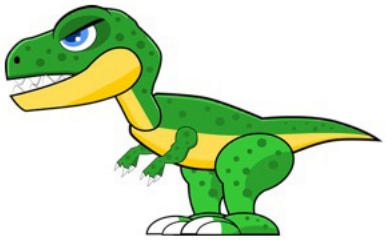
Everybody Walk the Dinosaur:

Taming the Reptile at Corporate Representative Depositions



Presented by:
Charles J. Stoia, Esq.

REPTILE THEORY

- Litigation tactics to stimulate certain instinctive response to fear or danger: "Reptile Brain"
- Reptile Brain responds by going into survival mode
- When in survival mode, reptile seeks safety

SURVIVAL REACTION

- "High Road" Cognitive Processing
- "Low Road" Cognitive Processing
- Startle Response

JURY WILL RELY ON:

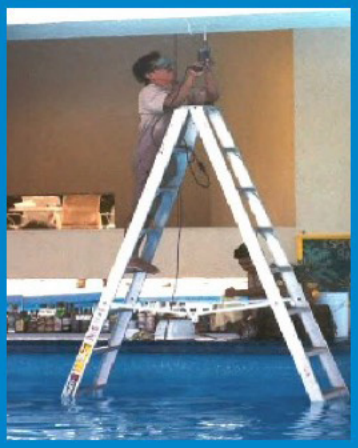
- Reasoning
- Logic
- Common Sense

REPTILE FORMULA

Safety Rules + Danger = Reptile

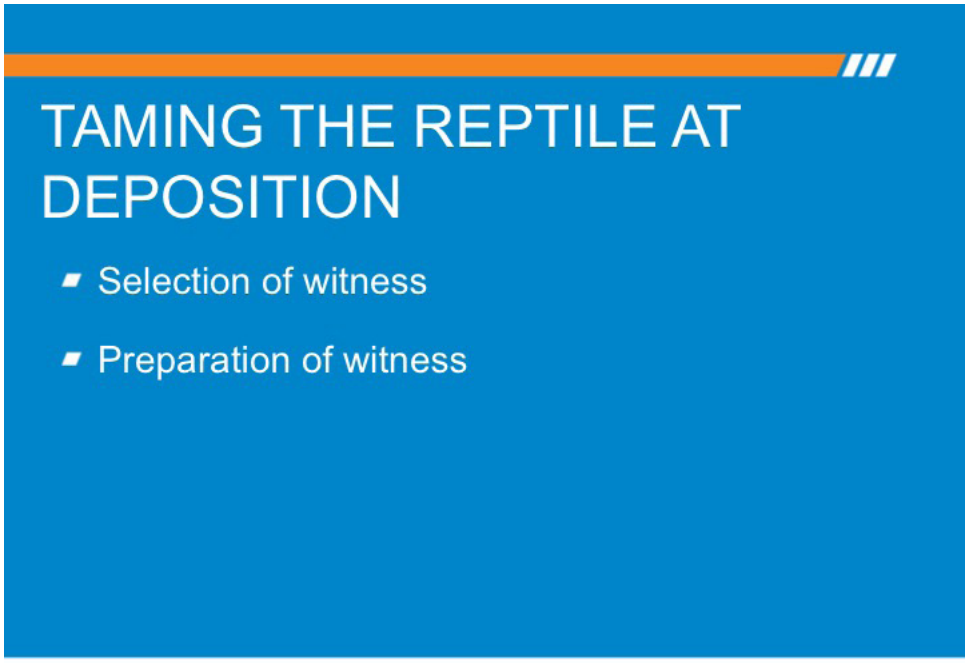
WHAT ARE SAFETY RULES?

- Generalization that states a "safety" norm or standard



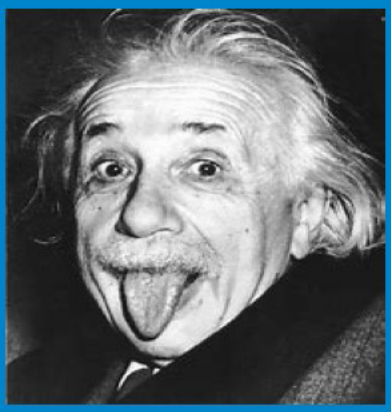
- "Do you agree that chemical companies should never poison the neighboring residents?"
- "Should companies needlessly expose consumers to unsafe products?"
- Designed to challenge credibility of witness (or intelligence) if they disagree


OVERALL DEFENSE THEME
Absolute Safety Rules do not work in real life
Safety Rules are not legal standards
Circumstances and Facts matter


TAMING THE REPTILE AT DEPOSITION
Selection of witness
Preparation of witness

MODEL CORPORATE WITNESS

- Smart
- Articulate
- Patient
- Smart



WITNESS PRESENTATION

- Demeanor
  - Honest/Attentive
- Pace
  - Consistent Response
- Humility
  - Stay in your lane

CORPORATE REPRESENTATIVE MUST UNDERSTAND

- Reptile Theory and type of Reptile Questions to be presented
- Themes for defense of the case
- Facts/Science/Standards

RESPONSES TO REPTILE QUESTIONS

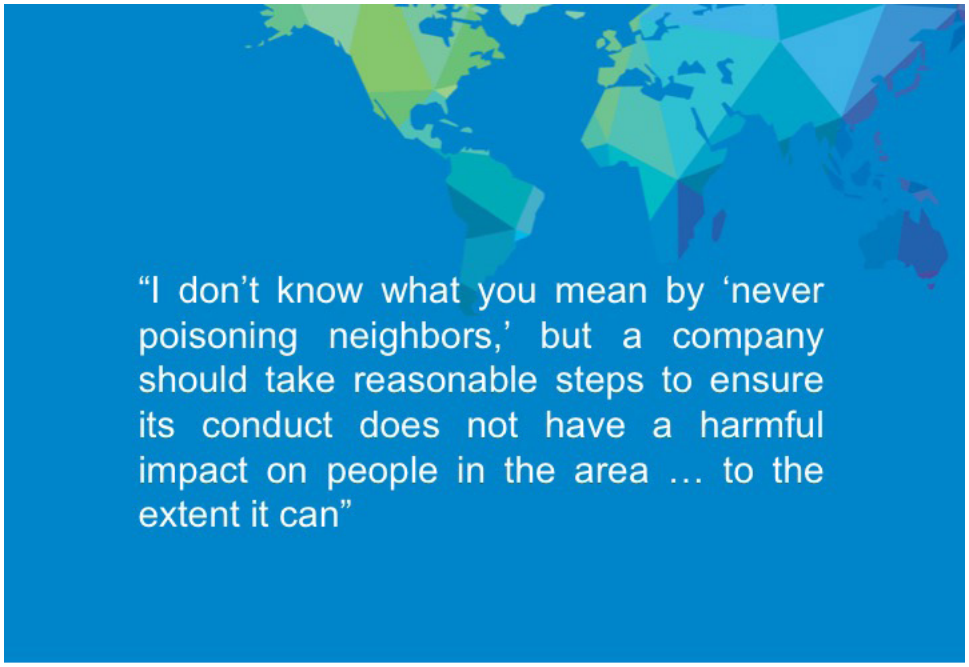
- Must be **honest**
- Genuine + Consistent + Honest = Believable
- Must concede what is necessary…yet provide missing context

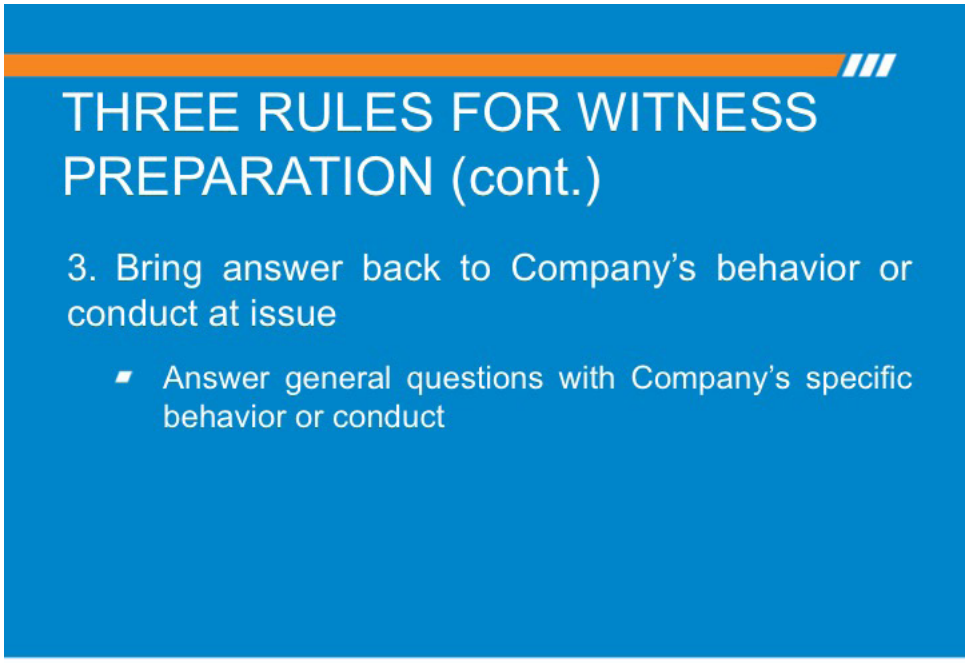
THREE RULES FOR WITNESS PREPARATION

1. Prepare for "word war"
   - Avoid "yes" or "no" responses
   - Be ready for "Reptile Questions"
   - Buzz Words – **needlessly, never, always, top priority, unnecessary risk, public, community**

THREE RULES FOR WITNESS PREPARATION (cont.)

2. Never retreat – never surrender on Safety Rules
   - Never agree to absolutes
   - Never agree to insufficient facts
   - Safe Harbor words: **reasonable, facts, circumstances**


"I don't know what you mean by 'never poisoning neighbors,' but a company should take reasonable steps to ensure its conduct does not have a harmful impact on people in the area … to the extent it can"

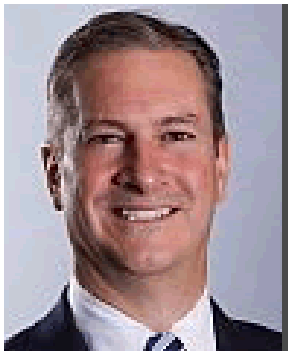

THREE RULES FOR WITNESS PREPARATION (cont.)
3. Bring answer back to Company's behavior or conduct at issue
Answer general questions with Company's specific behavior or conduct

"Company X reasonably believed that the filters it paid millions of dollars for on the refinery smoke stack were removing all of the harmful chemicals from the smoke going out of the stack."

BOOM BOOM ACKA-LAKA LAKA BOOM

OPEN THE DOOR, GET ON THE FLOOR

EVERYBODY KILL THE DINOSAUR!



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For almost 25 years, Charlie has represented litigants in commercial, insurance and environmental matters in the state and federal courts of New Jersey and New York. His extensive litigation and trial experience has earned Charlie a reputation as a hard-nosed litigator who is not afraid to take significant cases to trial. Charlie prides himself on determining his clients' individual goals in litigation and directing the litigation to achieve those specific goals. He has achieved success for clients handling commercial litigation matters while utilizing creative fee structures.

Representative Matters

- Successfully represented a multi-national company in insurance coverage litigation valued at more than $250 million against dozens of insurers involving multiple sites across the United States.
- Obtained an arbitration award in favor of a national airline in defense of a contractual indemnity claim alleging liability for environmental damages estimated at over $25 million.
- Represented the majority shareholder of a publicly traded company who sold his controlling ownership in the company for $7.5 million. When the purchaser failed to pay the balance of the sale price due under a promissory note, Charlie obtained a $5.4 million judgment against the surety company that issued a bond to secure the promissory note. When the judgment proved uncollectable, he successfully settled and obtained a jury verdict against the insurance brokers who negligently placed the promissory note with a surety company that was not authorized or admitted to issue surety bonds in New Jersey.
- Successful at trial in defense of an environmental contamination matter seeking $7 million alleging that client who operated a vapor degreaser at the site was responsible for costs to investigate and clean up environmental contamination.

Practice

- Business Disputes and Counseling
- Corporate, Commercial and Business Law
- Environmental Litigation
- Litigation

Honors and Awards

- New Jersey State Bar Foundation, Trustee
- Certified by the Supreme Court of New Jersey as a Civil Trial Attorney
- Martindale-Hubbell Law Directory, AV Rating (highest rating)
- Recognized in Best Lawyers in America, Commercial Litigation, 2015 - 2018
- Recognized on the New Jersey Super Lawyers List, Business Litigation, 2009 – 2018
- Recognized in 2011 Super Lawyers Business Edition, Business Litigation
- Lifetime Achievement Award, Patriots Path Counsel, Boy Scouts of America, 2003
- Bayley-Ellard Regional High School Alumni Hall of Fame, inducted 1998
- New Jersey Supreme Court Commission on Professionalism in the Law, 1995 – 1997

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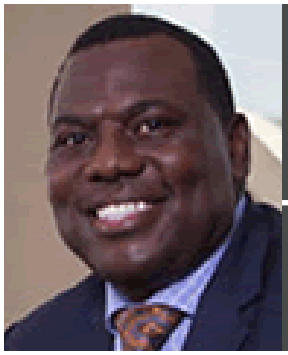

MASTERING THE ART OF EXPERT CROSS

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Mastering the Art of Cross Examination
Untress Quinn

The cross-examination of an expert witness can be a very intimidating and difficult task if the attorney is not properly prepared. The expert will likely have years of experience in his area of expertise and will likely be the most knowledgeable person in the room with regard to that expertise. To make matters more challenging, the expert witness can be a very experienced witness with hundreds of depositions and years of trial testimony given. This experience may far exceed that of the attorney who will be conducting the cross-examination. The effective cross-examination of the expert witness will increase the likelihood of success at trial. The attorney must be prepared for what can be a daunting task. The following points are not exhaustive, but when done thoroughly and properly, they will aid the attorney in mastering the art of cross-examination.

Target Qualifications

We have all seen or heard of situations where someone pretends to be something that they are not. We have seen doctors who are not actual doctors, lawyers who are not actual lawyers, and other examples of similar situations in other areas of life. The cross-examiner must do the homework. Is the expert really an expert? The attorney must investigate and attack the expert's credentials for legitimacy.

The education and professional training of the expert can be very important to the jury. Most often times the difference between the other party's expert and your expert is their education and training. An expert who has attended a very prestigious educational institution will likely be better received and believed by a jury than an expert who has not.

Additionally, you want to expose the expert's weaknesses in his experience on the specific subject matter. The expert may be more than qualified to opine in one area, and not so much in another. The attorney should highlight the weaknesses of the expert in that area. Has the expert published on this specific subject matter? Does the expert have any practical/real world experience? The expert who actually works in the real world with practical experience will likely be better received than an expert who is a professional expert, or who is strictly in academia.

The attorney should also explore the number of areas of expertise the expert claims to have. This can be done by conducting a thorough background check on the expert. The background check should examine prior deposition and trial testimony given by the expert. Further, are there any relevant certifications the expert does not have that are beneficial to the specific case issues? The attorney should confront the expert on this issue.

Expose Bias/Preference

Expert bias/preference is a fundamental challenge that the attorney must conduct on cross-examination. This information should be brought out in the expert's deposition. At time of trial, it should be well established what the expert's bias and preferences are. For example, has the expert worked for the opponent attorney or attorney's firm in the past? Explore the percentage of work the expert has done for plaintiffs versus defendants. Inquire as to whether the expert advertises and if the advertisements target specific groups. The attorney should question whether the expert is a member of an organization that is relevant to the subject matter of the case. The attorney should also question the expert as to any professional or personal relationship the expert may have with the retaining attorney, his or her firm, or the parties to the case.

The attorney must confront financial bias. This would include the number of cases and courts in which the expert has testified, as well as the number of areas of expertise. Financial bias includes the percentage of income derived from expert testimony. In some jurisdictions, the amount of money earned from expert work can be brought out. In doing so, the expert can be exposed simply as a professional expert or hire gun.

Use the Expert as Your Own

The attorney must capitalize on general propositions that support her/his case that the expert cannot refute. The attorney should start with general propositions and move to specifics of the case. For example, in a lawsuit involving a lung infection in which the allegation is delayed treatment with antibiotics, the attorney should ask:

> Q: Doctor, you do agree that a temperature of 98.7 is not a fever?
>
> Q: Doctor, in this case, you do agree that the plaintiff's temperature was 98.7?
>
> Q: So you do agree that the plaintiff did not have a fever?

The attorney cross-examining should use the expert's prior testimony on relevant topics to support her/his case. This can be done by obtaining prior deposition and trial transcripts in which the expert has given testimony that is relevant to the present case. It is advisable to box the expert in with regard to her/his prior testimony that supports your case at the expert's deposition. If the expert changes the testimony at trial, impeachment is on!

The attorney should highlight favorable opinions and facts that support her/his case, of which the expert must agree or, at least, cannot refute. Know the expert's report thoroughly to ascertain any concessions or "sound bites" that support your case and be sure to, again, box in the expert in on those points at deposition. Be sure to limit the expert's opinions at trial to those disclosed in the expert's report and offered at deposition (to the extent allowed by the law of the jurisdiction). At deposition, ask the expert, "Have we discussed all of your opinions that you will be offering in this case?" or "Does your report and your testimony given today discuss all of your opinions that you will be rendering in this case?"

Attack Opinions with Authoritative Text

Authoritative texts have two main purposes: (1) to explain opinions; and (2) to impeach opinions on cross-examination. Federal Rule 703 and 705 permit reference to otherwise inadmissible materials that serve as a basis of the expert's opinion.[1] The cross-examiner laying proper foundation or the court taking judicial notice of the authoritative text, will allow the cross-examiner to use the authoritative text for impeachment purposes. Be careful in this area because you are directly attacking the substance of the expert's opinions. You are operating in the expert's wheelhouse, going toe-to-toe. Please proceed with caution.

Uncover Expert's Lack of Knowledge About the Facts of the Case and Faulty Assumptions

No one should know the facts of the case better than the attorney. The attorney should uncover every piece of paper or other material the expert reviewed to assist the expert in rendering the opinions in the case. The attorney should establish what documents or other items the expert has not reviewed. Correspondence from the retaining

1 See Fed.R.Evid. 703,705

attorney and/or the expert report will contain the items the expert has reviewed. With this tactic, you again want to establish facts that will support your case that the expert cannot refute and, without a doubt, the expert will admit to not knowing or recalling certain facts. Use this to your advantage.

The lack of information or knowledge of facts may lead to fault assumptions by the expert. Explore these assumptions that are not consistent and not based on the facts in the case. You want to attack these opinions that are based on faulty assumptions. For example, when the expert opines that the lung infection worsened due to a delay in prescribing antibiotics, the attorney can establish:

> Q: Doctor, your opinion is that the lung infection was worsened due to a delay in prescribing the antibiotics?
>
> Q: Doctor, let's assume that there is no lung infection. You would agree that if there is no lung infection, then there is no way the infection could have worsened.

In this way, the attorney is debunking the assumption that there was, in fact, a lung infection, and he then will establish that no competent evidence confirms that there was such an infection.

Undermine Methods Used to Formulate Opinions

For instance, Federal Rule of Evidence 702(c) states that the testimony has to be a product of reliable principles and methods.[2] If the expert overlooked relevant evidence in rendering his opinions, it can be argued that this was a deviation in the protocol or method required to formulate a reliable opinion. Additionally, the attorney should determine what standard the expert applied to formulate her/his opinions. The standard used by the expert may be the wrong standard. For example, the expert cannot apply the standard for a doctor to opine against a radiology tech.

Attack any witness credibility opinions rendered by the expert because the credibility of a witness is within the province of a jury and not an appropriate subject matter for expert testimony. The attorney should confront whether the expert deviated from recognized protocol in analyzing the issue to render the opinion. Establish that the expert did not follow the standard for analyzing the issue. For example, every profession has a standard for performing professional activities within that discipline. For example, in order for a doctor to diagnose a patient, there should be a history and physical exam performed. The results of the history and physical may lead to diagnostic testing and ultimately to a diagnosis. If the expert witness has not reviewed any of his data, then he or she has failed to follow the standard protocol in analyzing the issue. The expert cannot look at a family photograph to opine that the patient suffered from a lung infection.

Further, in determining whether there was a deviation from the recognized protocol in analyzing the issue, the attorney must include both additions and omissions to the protocol. Did the expert add an extra step to the protocol? Also, establish the expert conducted a retrospective review rather than a prospective review, if applicable. This means the expert knew the conclusion of the case before he conducted the review and started with that conclusion and worked backwards. This method should be attacked to demonstrate the opinions expressed by the expert may not be objective opinions that followed the recognized protocol in analyzing the issue at hand because the expert's target would not have had the benefit of hindsight.

Conclusion

The cross-examiner of an expert witness must use a focused and concentrated attack. It is not a time to show you are smarter or savvier than the expert. In most cases, it will be difficult to get the expert to concede on his substantive opinions. However, when properly prepared, the attorney can score huge points and increase the chances of prevailing at trial.

2 Fed.R.Evid. 702(c).

From Kind of Blue to Birth of the Cool: How Mastering the Art of Expert Cross Will Turn You Into the Miles Davis of Defense Attorneys

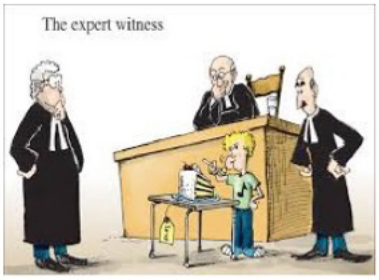
Untress L. Quinn, Shareholder
Sandberg Phoenix & von Gontard P.C.

Kansas | Missouri (800) 225-5529 sandbergphoenix.com SANDBERG PHOENIX & VON GONTARD P.C.

Let's Dance

- Can be a struggle if not prepared
- Expert has years of experience in her/his area of expertise
- Most knowledgeable person in the room
- Can be a very experienced witnesses
- Meet the expert you are to cross examine at trial

Target Qualifications



- Is the expert really an expert
- Investigate and attack credentials; Are they real?
- Education and professional training?
- Expose weaknesses in his experience on the specific subject matter
- Does she/he have practical/real-world experience vs. academia

- Number of areas of expertise
- Relevant certifications expert does not have

Expose Bias/Preference

- Prior work with opponent attorney or firm
- Percentage of work for plaintiffs vs. defendants
- Does expert advertise? Does advertisement target specific groups?
- Membership in organization can show bias or interest
- Hire Gun - Simply a professional expert

- Financial bias (# of cases and # courts in which testified; # of areas of expertise)
- Percentage of income derived from expert testimony
- Personal or professional relationship with party in case

Use the Expert as Your Own

- Capitalize of general propositions - general to specific
- Use expert's prior testimony on relevant topics to support your case
- Impeach if expert changes testimony at trial
- Highlight favorable opinions and facts that support your case
- Know the expert's report thoroughly to ascertain concessions and "soundbites" that support your case (be sure to box in expert to opinions at deposition)

Attack Opinions with Authoritative Texts

- Authoritative texts have two purposes: explain and impeach
- Impeach opinions with authoritative texts on cross examination
- Federal Rules 703 and 705 permit reference to otherwise inadmissible materials that serve as basis of the opinion
- Proper to use authoritative texts with either judicial notice or cross examiner lays proper foundation
- BE CAREFUL - THIS IS "TOE TO TOE"

Uncover Expert's Lack of Knowledge about the Facts and Faulty Assumptions

- Know the facts thoroughly!
- Explore every piece of paper the expert has reviewed to assist him in rendering his opinions
- Establish what documents or other items the expert has not reviewed
- The expert report and/or correspondence will contain items sent to expert
- Establish facts that will support your case that the expert cannot refute

- Inevitably, the expert will admit to not knowing or recalling certain facts - USE THIS TO YOUR ADVANTAGE
- Lack of information and knowledge of the facts may lead to faulty assumptions by the expert
- Explore the assumptions that are not consistent with and based on the facts in the case
- Attack opinions that are based on faulty assumptions

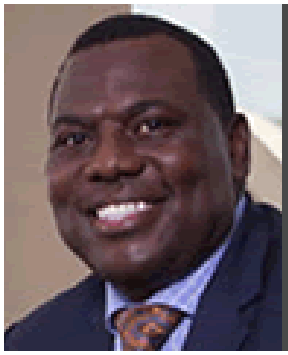
Undermine Methods Used to Formulate Opinion

- Federal Rule of Evidence 702(c): the testimony is the product of reliable principles and methods
- Did the expert overlook relevant evidence in rendering the opinions
- Determine what standard the expert is applying to formulate his opinions - it may be the wrong standard
- Attack any witness credibility opinions rendered - province of the jury and not appropriate subject matter for expert testimony

- Did expert deviate from recognized protocol in analyzing the issue to render the opinion
- Establish that expert did not follow the standard for analyzing the issue
- Includes omissions and additions to the recognized methods of analyzing issue to render opinion
- Confront the expert as conducting a retrospective review (the expert knew the conclusion at the outset of the review)

Conclusion

- Target Qualifications
- Expose Bias/Preference
- Use the Expert as Your Own
- Attack Opinions with Authoritative Texts
- Use Expert's Lack of Knowledge and Faulty Assumptions against her/him
- Undermine Methods Used to Formulate Opinion



UNTRESS QUINN

Shareholder

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

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

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

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

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

Services

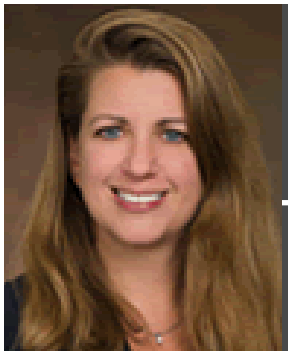
- Commercial Litigation
- Labor and Employment Counseling
- Medical Malpractice Defense
- Product and Toxic Tort Liability

Industries

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

Background

- Earning his Juris Doctor from the Saint Louis University School of Law, Untress also received a Health Law Certificate from the school's Health Law program. Prior to his legal career, Untress served as a director of medical-surgical services, as well as a supervisor of interventional radiology and healthcare administrator, totaling more than ten years of experience in the healthcare field. Untress has also served his country as a member of the United States Air Force Reserves for 13 years, where he achieved the rank of First Lieutenant and was awarded the Meritorious Service Award. He was an honor graduate at the 3790th Medical Service Squadron for Medical Service Specialists at Sheppard Air Force Base, Texas, in 1990.



LESSONS FROM THE OPIOID LITIGATION FOR ALL PRODUCT MANUFACTURERS

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Plaintiffs' Increasingly Creative Attempts to Expand Corporate Liability Under the Doctrine of Public Nuisance

Jessie Zeigler and Micael Kapellas

William Prosser posited in his Handbook of the Law of Torts, that "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition." Id. § 86, at 571 (4th ed. 1971).[1] This nebulousness has led courts to recognize that, allowed to proceed unabated, nuisance law has the potential to "become a monster that would devour in one gulp the entire law of tort . . . ." Tioga Public School District #15 of Williamson County v. United States Gypsum Co., 984 F.2d 915, 921 (8th Cir. 1993).

At the turn of the last century, perhaps not surprisingly, plaintiffs increasingly began venturing into this impenetrable jungle to exploit the ambiguity of public nuisance, and the tort awoke from "a centuries-long slumber." Donald G. Gifford, Public Nuisance As A Mass Products Liability Tort, 71 U. Cin. L. Rev. 741, 743 (2003). Most notably, plaintiffs began applying the doctrine, with varying levels of success, to claims against tobacco manufacturers,[2] handgun manufacturers,[3] paint manufacturers who included lead pigment in their products,[4] and companies that used methyl tertiary butyl ether (MTBE) in gasoline.[5] In recent years, the tort of public nuisance has been used in increasingly novel ways, and with similarly varying levels of success, including in claims related

1 Prosser further explained that few terms have "afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interests is characterized as a 'nuisance,' and there is nothing more to be said." Id.

2 See, e.g., Moore ex rel. Mississippi v. Am. Tobacco Co., No. 94-1429 (Miss. Ch. Ct. Jackson County May 23, 1994); McGraw v. Am. Tobacco Co., No. CIV. A. 94-C-1707, 1995 WL 569618 (W. Va. Cir. Ct. June 6, 1995). By mid-1997, "forty of the fifty state attorneys general had filed suit against tobacco companies," suits which were eventually settled between the state attorneys general and tobacco companies for $206 billion. See Maria Gabriela Bianchini, The Tobacco Agreement That Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation, 87 Cal. L. Rev. 703, 712 (1999).

3 See, e.g., People ex rel. Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003) (affirming dismissal of common-law public nuisance claims against handgun manufacturers, wholesalers and retailers and reasoning that "giving a green light to a common-law public nuisance cause of action today will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities."; City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002) (reversing appellate court decision dismissing city's claims for, inter alia, public nuisance against gun manufacturers); City of Gary ex rel. King v. Smith & Wesson Corp., 801 N.E.2d 1222, 1228 (Ind. 2003) (allowing the city to proceed on public nuisance claims against gun manufacturers and other defendants); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004) (refusing to create "an entirely new species of public nuisance liability" in affirming the trial court's dismissal of public nuisance claims against gun manufacturers). The Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C.A. § 7901, et seq., significantly limited the right to bring public nuisance and other claims related to firearms by "prohibit(ing) causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." But see Chiapperini v. Gander Mountain Co., 13 N.Y.S.3d 777, 789 (N.Y. Sup. Ct. 2014) (allowing claims for public nuisance and negligent entrustment to go forth against gun sellers).

4 Plaintiffs continue to enjoy success in some instances with their claims that lead paint producers are liable under public nuisances theories. See, e.g., People v. Conagra Grocery Prod. Co., 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017), reh'g denied (Dec. 6, 2017), review denied (Feb. 14, 2018) (upholding a finding that lead paint qualified as a public nuisance, while modifying the trial-court's award).

5 See, e.g., In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig., 415 F. Supp. 2d 261 (S.D.N.Y. 2005) (allowing claim for public nuisance under Indiana law to proceed against petroleum companies who allegedly contaminated groundwater with the MTBE additive).

to gang activity[6] and priest sexual abuse.[7]

While an exact or comprehensive definition of nuisance has proved elusive, most states utilize the Restatement (Second) of Torts definition of public nuisance, which defines it as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1). The Restatement further explains:

> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Id.

As one commentator has explained, the traditional doctrine of public nuisance, which requires that a party prove an injury that is "different-in-kind" and not just "different-in-degree" from the general public who may be affected by the nuisance, "presents a paradox: the broader the injury to the community and the more the plaintiffs injury resembles an injury also suffered by other members of the public, the less likely that the plaintiff can bring a public nuisance lawsuit." Denise E. Antolini, Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 Ecology L.Q. 755, 761 (2001).

Attorneys representing manufacturer defendants need to be aware of their clients' potential exposure to nuisance claims. It is not difficult to envision that the doctrine might be utilized by creative plaintiffs' attorneys to assert claims against manufacturers and other entities operating in heretofore unimagined realms. Two industries that have faced increased potential liability in recent years based on claims that their actions have created public nuisances are prescription drug manufacturers, particularly those who manufacture and distribute opioids, and fossil-fuel companies, who plaintiffs allege have engaged in actions that have contributed to climate change.

In December 2017, the Judicial Panel on Multidistrict Litigation transferred 62 opioid-related civil actions to the United States District Court for the Northern District of Ohio. See In re Nat'l Prescription Opiate Litig., No. MDL 2804, 2018 WL 2012878 (U.S. Jud. Pan. Mult. Lit. Apr. 23, 2018). Since then, 487 additional actions were transferred to the Northern District of Ohio. Id.[8] The more than 500 actions consolidated in the multidistrict litigation have been brought by cities, counties and Native American tribes, and do not account for the dozens of additional cases being brought by in state courts around the country by various municipal and other entities.

Public nuisance actions based on the alleged effects of climate change preceded by years the claims related to opioids made against prescription drug manufacturers. See Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011). In American Electric Power Company, the Supreme Court left it to the Second Circuit to determine whether state-law nuisance claims were pre-empted by the Clean Air Act, id. at 430, a question left open when the plaintiffs subsequently withdrew their complaints. See "20110902 Letter withdrawing by plaintiffs in AEP v Connecticut (American Electric Power)," link available at http://climatelawyers.com/post/2011/09/21/Connecticut-v-AEP-The-End-Is-Very-Near.aspx.

More recently, several coastal cities and states have

6 See People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 1120, 929 P.2d 596, 615 (1997) (finding valid claims that gang members violated the public nuisance statute in part because the "hooligan-like atmosphere that prevails night and day in [their neighborhood]—the drinking, consumption of illegal drugs, loud talk, loud music, vulgarity, profanity, brutality, fistfights and gunfire—easily meet the statutory standard" of being "'indecent or offensive to the senses' of reasonable area residents.")

7 See, e.g., Doe 30 v. Diocese of New Ulm, 2014 WL 10936509, at *11, 13 (Minn. Dist. Ct.) (trial court order declaring that alleged victim of priest sexual abuse had no standing to maintain a private action for the alleged public nuisance because he, at most, sustained damages different in degree from the general public. The court determined that he lacked standing because he and did not sustain "special or peculiar damage" that was not common to the general public, which is a prerequisite to seeking a private remedy to a public nuisance under Minnesota law and elsewhere.)

8 United States District Judge Dan Aaron Polster, who is presiding over the multidistrict litigation, appears eager for a quick resolution to the MDL cases. At the January 9, 2018, first meeting of counsel he told the parties that he did not "think anyone in the country is interested in a whole lot of finger-pointing at this point, and I'm not either. People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unravelling complicated conspiracy theories. So my objective is to do something meaningful to abate this crisis and to do it in 2018." (Doc. 58, No. MDL 2804, "Transcript of Proceedings Before the Honorable Dan A. Polster United States District Judge and Before the Honorable David A. Ruiz United States Magistrate Judge," at 4:17-25.) (Transcript also available at https://assets.documentcloud.org/documents/4345753/MDL-1-9-18.pdf).

also applied the theory of public nuisance in lawsuits filed against entities such as BP, ExxonMobil, Chevron, ConocoPhillips and Shell, alleging that the companies knew of the harms that global warming posed. In a nod to the earlier public nuisance lawsuits against tobacco companies, some of the lawsuits even allege that the fossil fuel companies "borrowed the Big Tobacco playbook in order to promote their products" by "engag[ing] in advertising and public relations campaigns intended to promote their fossil fuel products by downplaying the harms and risks of global warming." See State v. BP P.L.C. et al., Case No. RG17875889 (Superior Court of the State of California, County of Alameda, Sept. 19, 2017) (Complaint at ¶ 63). The City of Oakland brought the lawsuit in Alameda County against the fossil fuel companies listed above, as well as other unknown entities. The lawsuit alleges that Oakland will be required to expend billions of dollars to confront the climate change injuries it will suffer, and requested an abatement fund be established to provide for infrastructure so that the city can adapt to global warming impacts such as sea level rise. The same day that the City of Oakland filed its complaint, San Francisco's city attorney filed a similar complaint against the same entities. See State v. BP P.L.C. et al., Case No. CGC-17-561370 (Superior Court of the State of California, County of San Francisco, Sept. 19, 2017). On July 17, 2017, California's San Mateo and Marin counties, as well as the City of Imperial Beach, filed similar lawsuits alleging public nuisance and other claims against the same fossil fuel companies and others that are named in the Oakland and San Francisco complaints.

Whether the entities that have brought suit against prescription drug manufacturers and fossil fuel companies succeed in their claims based on public nuisance remains to be seen. It is possible that the players in either or both industries follow the template laid out in the early tobacco cases, in which the manufacturers entered into master settlement agreements which netted states significant payouts. It is also possible that Congress intervenes in one or both industries to curtail the potential liability of the prescription drug manufacturers and fossil fuel companies with something similar to the Protection of Lawful Commerce in Arms Act, which severely curtailed the right to bring lawsuits against firearms manufacturers, distributors, and dealers when the firearms or ammunition functioned as they were designed and intended but were used unlawfully.

Whether either of the above described scenarios— or, perhaps some other outcome— ultimately ends up playing out, what seems inevitable is that companies and industries will continue to see increasingly novel uses of the public nuisance doctrine and need to prepare accordingly.

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Fight Song: Lessons from the Opioid Litigation for All Products Manufacturers

The New (Ab)Normal

- States have enacted state products liability acts
- Plaintiffs' attorneys are now getting creative in response:
  - New twists on common-law actions
  - Manipulation of narrow statutorily based actions
- There is often no case law on point, so we are in an untested, wild frontier in the products cases

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State Product Liability Acts

- Tennessee Example:
  - Compliance with state or federal laws raises a rebuttable presumption the product is not dangerous
  - No duty to warn of obvious dangers or hazards

  - Manufacturer not liable for alterations

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In response, plaintiffs' attorneys are getting creative…

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4

Common-Law Claims

- **Plaintiffs' attorneys are manipulating older actions in new ways:**
  - **Nuisance**
  - **Fraud and Fraudulent Misrepresentation**
  - **Unjust Enrichment**

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Drug Dealer Liability Act

- Model Act created by the American Legislative Exchange Council
- Assesses costs related to an *individual's* use of *illegal* drugs to drug dealers dealing in the same geographic area
- Plaintiffs attorneys and governmental officials are suing to try to apply the DDLA to manufacturers, whose activities are already highly regulated by state and fed govt.
  - Reported cases have rejected similar theories:
    - *Ashley County v. Pfizer*, 552 F.3d 659 (8th Cir. 2009)
    - *Schafer v. Shopko Stores, Inc.*, 741 N.W.2d 758, 760–61 (S.D. 2007)

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Nuisance

- **Tobacco**
  - *e.g., State of Texas v. Am. Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997), *subsequent mandamus proceeding sub nom. In re Fraser,* 75 F. Supp. 2d 572 (E.D. Tex. 1999)
- **Handguns**
  - *e.g., People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003)
- **Alcohol**
  - *e.g., Alston v. Advanced Brands and Importing Co.*, 494 F.3d 562 (6th Cir. 2007)
- **Lead Paint**
  - *e.g., People v. Conagra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017), *reh'g denied* (Dec. 6, 2017), *review denied* (Feb. 14, 2018)

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Unjust Enrichment

- **Tires**
  - *e.g., In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig., 155 F. Supp. 2d 1069, 1104 (S.D. Ind.), on reconsideration in part, No. MDL NO. 1373, 2001 WL 34691976 (S.D. Ind. Nov. 14, 2001), and on reconsideration in part sub nom. in re Bridgestone/Firestone Inc. Tires Prod. Liab. Litig., 205 F.R.D. 503 (S.D. Ind. 2001), rev'd in part sub nom. In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002)*
- **Pet Food**
  - *e.g., Adkins v. Nestle Purina PetCare Co., 973 F. Supp. 2d 905 (N.D. Ill. 2013)*
- **Hair Relaxer**
  - *e.g., In re Amla Litig., No. 16-CV-6593, 2018 WL 3629226 (S.D.N.Y. July 31, 2018)*

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Trespass

- **Pokémon Go**
  - *Pokémon Go Nuisance Litigation*, case number 3:16-cv-04300, (N.D. Cal.)
- **Oil**
  - *State v. N. Atl. Ref. Ltd.*, 160 N.H. 275, 999 A.2d 396 (2010)
- **Drywall**
  - *Employers Mut. Cas. Co. v. Holman Bldg. Co.*, 84 So. 3d 856, 857 (Ala. 2011)

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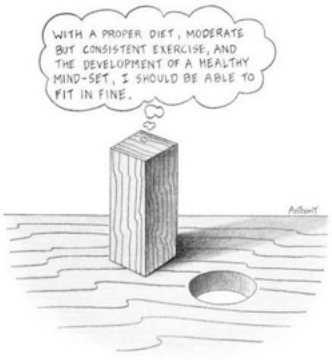
Statutory Claims

- **Pre-existing statutory rights of action**
  - **Drug Dealer Liability Act**
    - State Opioids Cases
  - **RICO**
  - **Consumer Protection Act**



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Consumer Protection Act

- **Asthma medication (No PLA preemption)**
  - *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 323, 858 P.2d 1054, 1067 (1993)
    - PLA preempted common law claims, but no pre-emption under Washington law, because CPA was specifically exempted from the Products Liability Act
- **Fuel (specifics of CPA claim)**
  - *e.g., In re Duramax Diesel Litig., No. 17-CV-11661, 2018 WL 3647047, at *5 (E.D. Mich. Aug. 1, 2018)*
    - Claims brought under the a variety of states' case law with allegations that engines were not both high performance and low emission.
    - Argued Mississippi and Idaho Consumer Protection Act claims were barred because plaintiffs did not satisfy the attorney general's approval or settlement processes required by the state for such claims.

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New Theories of Damages

- **Costs of prosecution**
- **Costs of rehab programs**
- **Unemployment insurance costs**
- **Costs of climate change**

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Competing Cases

- Federal cases
- State cases

"We have too many cooks in the kitchen."

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13

Fight Creativity With Tried and True Defenses

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14

Combat New Strategies

- **Novel Claim Theories**
  - Preemption/Conflict Between Laws
    - FDCA
    - Products Liability Statutes
    - FIFRA (Federal Insecticide, Fungicide, and Rodenticide Act)
    - National Childhood Injury Vaccine Act
  - Statutory Language
  - Remedy-specific limitations
- **Novel Damages Theories**
  - Causation
  - Standing
  - Look to other industries, such as the gun litigation for nuisance claims
- **New Parties**
  - Standing/Real Party in Interest
    - First-filed doctrine
  - Authority to Sue on Behalf of a Government or Governmental Entity

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Proactive Strategies

- **Warnings**
- **Review Marketing Material (Training documents, etc.)**
- **Review Existing Legislation (look for attorney's fees!)**
- **Stay Up-To-Date on Litigation Against Manufacturers of Other Products**
- **Consider Proactive Legislation**

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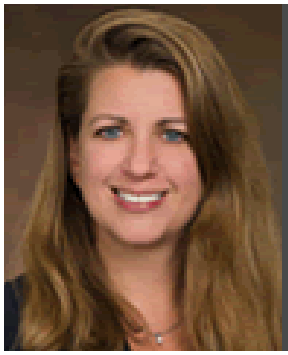

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Whether representing a Fortune 500 company or one of the largest municipalities in Tennessee, Jessie Zeigler has returned successful results for 100 percent of the cases she has handled for clients in a wide range of litigation matters. Her counsel has saved clients millions in losses across various industries – including automotive, food and beverage, healthcare, consumer products, pulp and paper, general manufacturing, chemical, pharmaceutical/life sciences, and medical device – as they have faced claims related to crisis management, environmental, natural gas hedging, health & safety, products liability, healthcare liability, or contracts. Jessie represents clients in claims related to deceptive business practices under the Tennessee Consumer Protection Act (TCPA) and the False Claims Act (FCA). She also has more than 23 years of experience in representing clients in environmental, health and safety matters.

Jessie is chair of the firm's Products Liability & Torts Practice Group.

Related Services

- Products Liability & Torts
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- Healthcare Disputes
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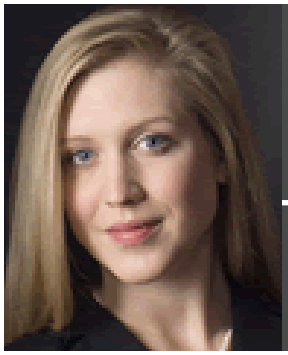
- Nashville Bar Association — President's Award (2014)
- Mid-South Super Lawyers (2009-2017)
- Top 50 Women Mid-South Super Lawyers (2011-2012, 2016)
- Phi Beta Kappa

Publications

- Jessie Zeigler and Chad Jarboe Examine Witness Preparation in Trials for ABA Publication - December 4, 2017
- Jessie Zeigler Outlines Key Steps for Managing Plant Disasters - October 18, 2017
- Jessie Zeigler Co-Authors Article on Component Supplier Liability in Medical Device Cases - September 26, 2014
- Products and Mass Torts: 2014 Industry Group Developments- February 13, 2014
- Jessie Zeigler Co-Authors Article for Defense Counsel Journal - July 31, 2013
- Law360 Publishes Article on Gas Utility Decision in Favor of Firm's Client - July 23, 2013

Education

- Vanderbilt Law School - J.D., 1993 - Order of the Coif
- Syracuse University - B.A., B.S., 1990 - summa cum laude



PANEL DISCUSSION WITH JUDGES

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Hemingway's Lessons for Trial Lawyers
Haley Cox and Clint South

Ernest Hemingway nicknamed himself "Papa" when he was a twenty-seven-year-old living in Paris. He grew into the epithet by becoming one of America's greatest storytellers. By his early fifties, his simple journalistic style shined in The Old Man and the Sea, the Pulitzer Prize-winning fiction novel published in 1952. After Hemingway's tragic death nine years later, he told us the secrets to storytelling in his memoir, A Moveable Feast. Here are a few that trial lawyers, all of whom are storytellers at their core, would be wise to incorporate when telling their clients' stories.

Tell the truth

"All you have to do is write one true sentence," Hemingway wrote. "Write the truest sentence that you know."

In a small rural venue plagued by unemployment, a defendant's corporate representative and CEO took the stand and testified that he had brought executives with him to trial to scout property. "We're moving a manufacturing arm here in a few months," he told the jury. They perked up.

The plaintiff's lawyer rolled his eyes, but he had no way of disproving the CEO. The judge had doubts because it seemed scripted. Otherwise, it was a blip. The defendant won, but probably not because of the CEO's pandering.

The jury never found out that the CEO had given them false hope. But the judge did. Six months later, venue discovery in a related case revealed it. In denying the defendant's transfer motion, the CEO's prior sworn testimony was the only thing the judge cited.

Lies, half-truths, and exaggerations of all sizes can hurt. Corporate representatives are particularly vulnerable to injuring credibility with anything less than the truth. Aside from fibs, corporate representatives damn their company's defense if they parachute into trial without enough knowledge to give jurors the whole truth. Jurors of all walks of life can tell when a witness—or a lawyer—is disingenuous, untruthful, or unknowledgeable. The most critical thing a trial lawyer and her client can do in every phase of litigation is to be truthful, and to bring the truth to the judge and jury in a clear and compelling way.

Every case, every trial is a race for credibility. In every action the lawyers and witnesses take, they are either building or destroying credibility. Guarding credibility means not only telling the truth; it means revealing the bad facts—the "spilled milk" inevitable in every case—and neutralizing the facts in a truthful way.

In another high-stakes trial, a defense lawyer started his cross-examination of the plaintiff's technical

expert with a simple question. It came across as a warm-up.

“Did you write your expert report?” The lawyer asked.

“Yes, of course,” the expert said.

“What about this paragraph here?” The lawyer asked. “Did you write that one?”

“Yes,” the expert said. “I wrote that one.”

“Well,” the lawyer said. “Have you ever seen this?”

The lawyer slid a piece of paper onto the projector. The jury saw the same paragraph the lawyer had just asked the expert about, word-for-word, along with a web address at the top of the page, revealing that he had cut and pasted a portion of his report from the internet. Days after the lawyer’s impressive impeachment, the jury swiftly reached a defense verdict.

The outcome might have been different if the expert had told the truth. The paragraphs that he or a lawyer had copied from the website were not controversial. They described basic technical concepts. The right answer to the lawyer’s question was the true one: “Mostly. But not every word.”

Paint

“I was learning something from the painting of Cézanne,” Hemingway wrote, “that made writing simple true sentences far from enough to make the stories have the dimensions that I was trying to put in them.”

In one of Hemingway’s first short-stories, The Short Happy Life of Francis Macomber, first published in Cosmopolitan in 1936, Hemingway painted. One of the antagonists, Robert Wilson, was “the white hunter . . . about middle height with sandy hair, a stubby mustache, a very red face and extremely cold blue eyes with faint white wrinkles at the corners that grooved merrily when he smiled.” The protagonist, Macomber, “was very tall, very well built if you did not mind that length of bone, dark, his hair cropped like an oarsman, rather thin-lipped, and was considered handsome.”

After closing Wilson and Macomber’s suspenseful run-in with the big lion, he suddenly switches to the lion’s point of view. “Thirty-five yards into the grass,” he wrote, “the big lion lay flattened out along the ground. He could hear the men talking and he waited, gathering all of himself into this preparation for a charge as soon as the men would come into the grass.”

Hemingway mastered words, which allowed him to paint. He also mastered point of view, which allowed him to paint more of what needed to be painted. Trial lawyers also paint with words. Trial lawyers are tasked with telling the client’s truth in a way that is compelling and persuasive. The most talented trial lawyers paint their clients’ stories by using true, repeatable themes that connect with the decision-makers in the jury box and on the bench. The goal is that every argument, every witness, every piece of evidence reinforces those themes, making it easy for the decision-makers to understand and believe in the story.

Even beyond their written and spoken words, trial lawyers paint with every single thing they do in the courtroom. Effective trial lawyers use crisp graphics, photographs, and memorable visual aids that help bring the truth to the decision-makers. They call witnesses who tell the story from different perspectives, like the lion in The Short Happy Life. They construct diverse trial teams-varying in age, experience, background, race, gender, and more—where each member brings a unique point of view and skillset. They wear a poker face, even when things are not going their way. They treat the Court, the opponents, and the witnesses with respect, even in times of conflict. They move in the courtroom with intention and purpose. No detail is left unchecked.

Cut ornament

“If I started to write elaborately,” Hemingway explained, “or like someone introducing or presenting something, I found that I could cut that scrollwork or ornament out and throw it away and start with the first true simple declarative sentence I had written.” In a rural venue in the South, a defendant’s lawyer, a big city rainmaker from a leading Am Law 100 firm, came to trial wearing a tan suit and a new-looking pair of boots. In his opening statement, he stepped away from the podium as often as he could,

revealing himself to the jurors. Many of them were wearing cowboy boots too, something the lawyer had learned from his associate's loud whisper before standing up. After the plaintiff's eight-figure verdict, during the jury interview, the jurors wearing the boots started joking about the lawyer's outfits. "During his opening statement," one of them said, "all I could think about was how he looked like he was on safari in the African bush." The lawyer had drawn the attention to himself, rather than to his case.

Trial lawyers are often ornamental, from the dress, to the flamboyance, to an attitude of autocracy. These things detract from the facts, but the facts are what juries crave and need. Lawyers may be tempted to make the case about themselves in an effort to connect with the jury. They may fall prey to their own egos by trying to assert themselves as the alpha dog. These temptations should be avoided at all costs. Instead, trial lawyers should focus on delivering the full story to the jury in a way that is genuine and earnest.

Be concise

"It wasn't by accident that the Gettysburg address was so short," Hemingway wrote in a 1945 letter to his editor. "The laws of prose writing are as immutable as those of flight, mathematics, of physics."

All judges and legal writing scholars long for brevity. Juries do too. Hemingway prescribed something more. "Write the best story that you can and write it as straight as you can," as he described it in The Feast. Being brief is one thing. Painting a story with as few words as possible is another. Legend goes that Hemingway won a bet by writing a six-word short story: "For sale: baby shoes. Never worn."

Wordiness ruins a straight line. So does repetition. "The unbelievably long book called The Making of Americans," as Hemingway described it in the Feast, "began magnificently, went on very well for a long way with great stretches of great brilliance and then went on endlessly in repetitions that a more conscientious and less lazy writer would have put in the waste basket."

Great trial lawyers can tell or write a straight story, and the most skillful can do it without wasting the time of the Court and the jury. Of course, the lawyer needs to create a record, but he should strive to do so efficiently, using only the words and time that are necessary to deliver the complete story. One of the most difficult, yet critical, things a trial lawyer must learn is when to stop talking and sit down. While there is almost always another question one could ask or another argument one could make, the real question is whether it should be done.

Judges can help the lawyers with efficiency, whether at the lawyers' request or chagrin. Some judges pre-admit exhibits and deposition testimony, eliminating the commercial-like interruptions and side bars jurors usually suffer through. Others set time limits, keeping trials to a certain number of hours or days, no matter how complex. These things straighten the story by forcing lawyers to focus only on the facts that must be developed. They also preserve the vanishing jury trial. Without a quick and efficient way for busy courts to resolve disputes by jury, the Seventh Amendment starts to crumble.

Know or learn the audience

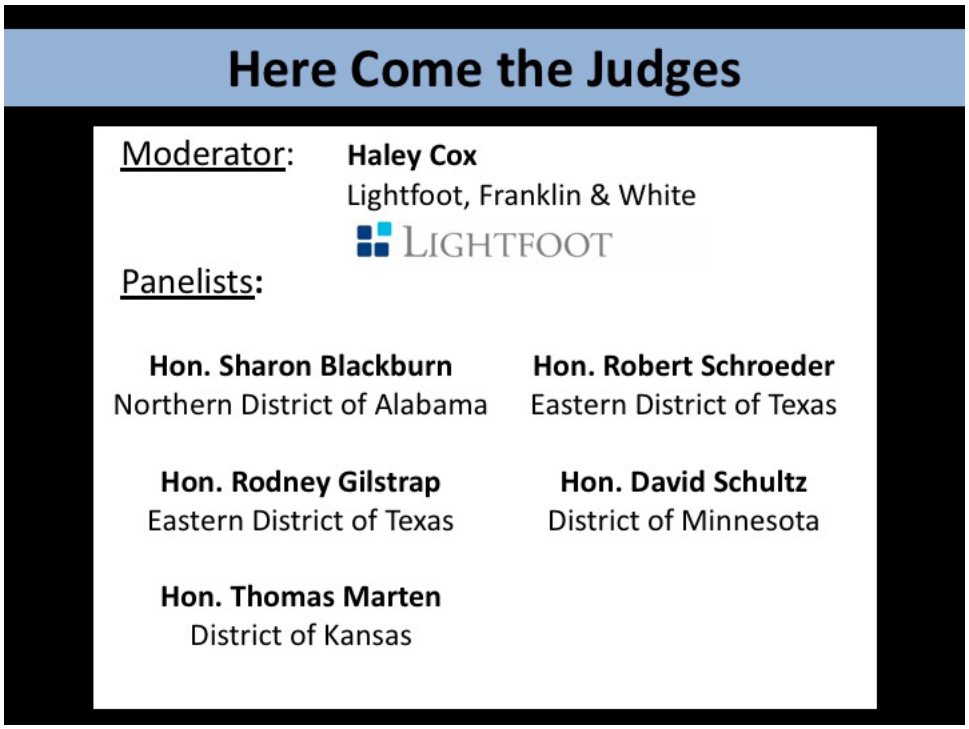
Hemingway didn't write about this last secret in The Feast. But he knew his audience. It was everyone. The first sentence of The Short Happy Life was one that everyone could understand and see: "It was now lunch time and they were all sitting under the double green fly of the dining tent pretending that nothing had happened."

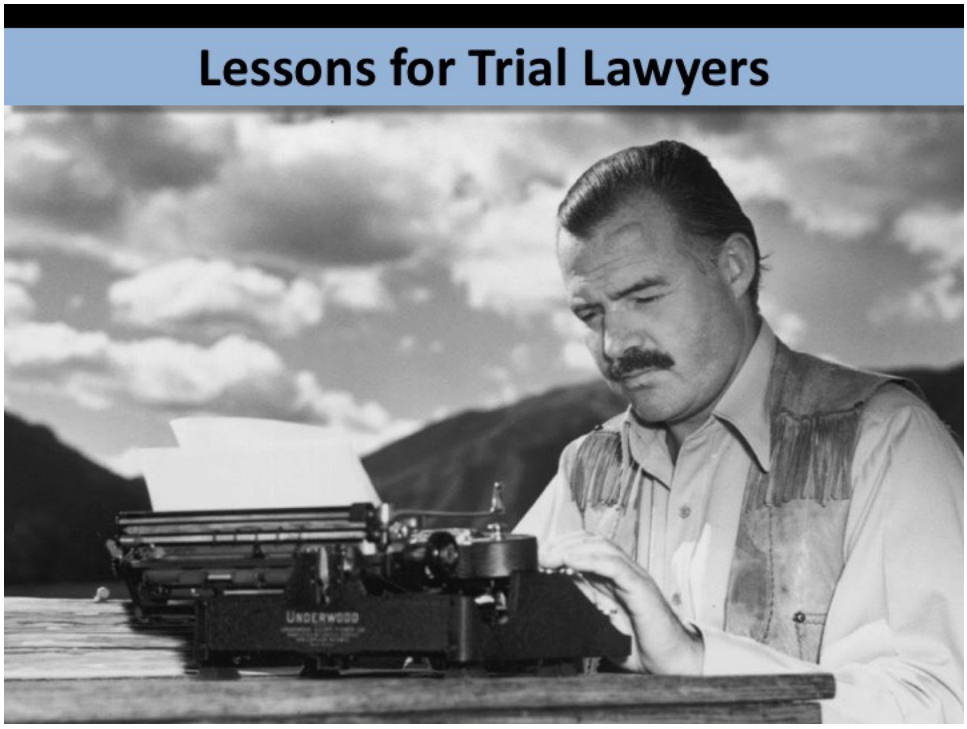
The jury is the trial lawyer's audience, which means the lawyer must understand them as much and as early as possible. Before the first moments of trial, social media research (that's inside the judge's lines) and juror questionnaires can shed light and help the lawyer prepare to meet his audience. Consider working with opposing counsel and the Court to agree to a juror questionnaire that provides real information about the jurors, tailored to the facts and issues in the case. Jurors are sometimes more comfortable answering candidly on paper than in open court, and this process can be immensely informative and can streamline jury selection.

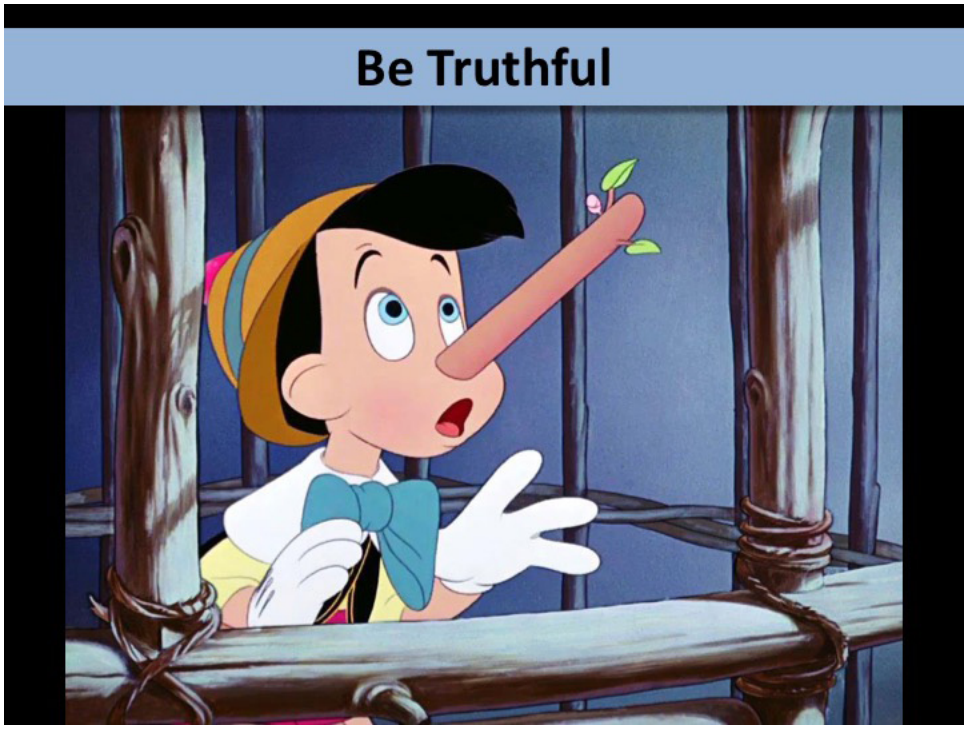
The most gifted trial lawyers find a way to connect with the audience during jury selection, not by talking about themselves or arguing their case, but

by using carefully constructed, thematic questions that engage jurors in a conversation with the lawyer. And the lawyer must listen. She must listen carefully to what the jurors are telling her with their words, and also with their nonverbal cues and reactions. When trial lawyers understand their audience, they are able to reach them and persuade them.

These are a few of Hemingway's lessons in storytelling that will make all trial lawyers better.

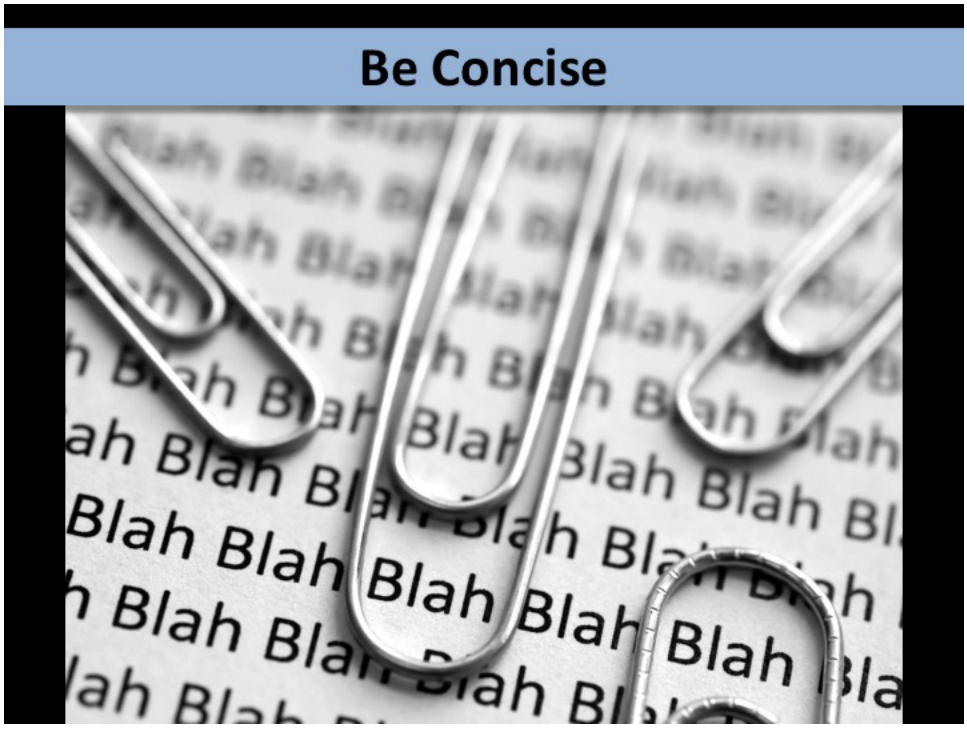



Lessons for Trial Lawyers
UNDERWOOD


Be Truthful


Be Artful


Focus On What Matters
FOCUS


Be Concise
Blah Blah Blah
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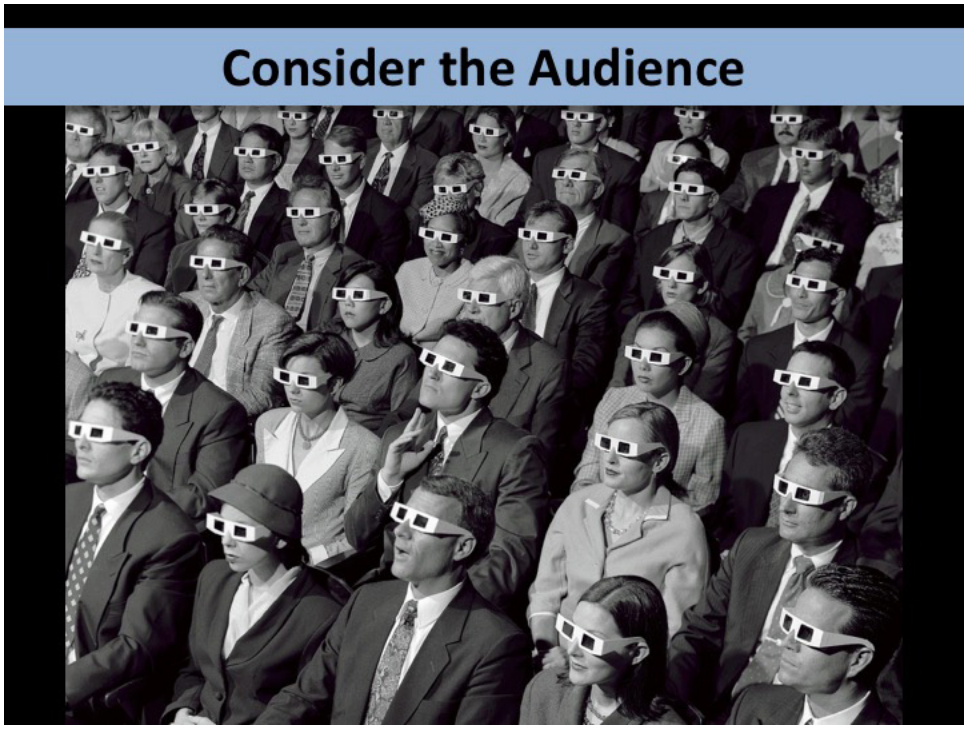
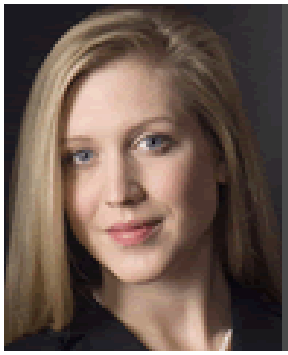
Blah Blah Blah


Consider the Audience

Conclusion

- Target Qualifications
- Expose Bias/Preference
- Use the Expert as Your Own
- Attack Opinions with Authoritative Texts
- Use Expert's Lack of Knowledge and Faulty Assumptions against her/him
- Undermine Methods Used to Formulate Opinion



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Haley Cox tries cases and leads defense teams in a broad range of matters and venues. Haley handles claims of product defect, medical malpractice, serious personal injuries and other high-stakes matters. She holds licenses in Alabama and Texas, and she has litigated in more than a dozen states.

Haley understands what it takes to win: the truth, hard work, and delivering the client's story so it resonates with judges and juries. Haley also understands that winning is different to every client and in every case. A win may be a fair and swift resolution, or it may mean fighting all the way to a verdict. Either way, opponents know that Haley, like every Lightfoot lawyer, is prepared to take the case as far as it needs to go.

For more than ten years, Haley has been instrumental in recruiting the next generation of Lightfoot lawyers to serve the firm's clients. Haley is committed to carrying out Lightfoot's mission of hiring only the most talented, driven, and diverse lawyers, and then training them the right way.

Benchmark Litigation recognized Haley as a 2018 "Local Litigation Star." Since 2015, Haley has been named annually as a Super Lawyers Mid-South Rising Star. Haley has been selected for the Alabama State Bar's Leadership Forum, and in 2018, she was named as a Birmingham Business Journal Rising Star of Law.

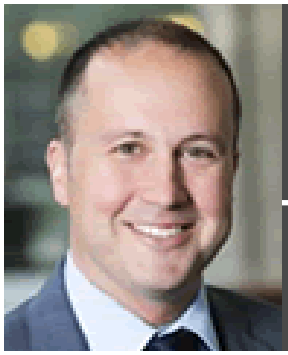
Outside of work, Haley's true loves are her family, Alabama football, running, and good wine.

Practice Areas

- Automotive
- Transportation
- Product Liability
- Medical Malpractice
- Catastrophic Injury
- Consumer Fraud and Bad Faith
- Professional Liability Litigation

Education

- B.S., University of Alabama, 2003 summa cum laude
- J.D., Cumberland School of Law - Samford University, 2006 magna cum laude



A CONTRARIAN VIEW ON WITNESS DEPOSITION PREPARATION

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Let It Be: A Contrarian View on Witness Deposition Preparation
Blake Marks-Dias

Introduction

Deposition testimony can make or break a case. Preparing your key witnesses is an important task, and should be done thoughtfully. Lawyers, however, too often stray from healthy preparation into counterproductive overload. Everyone has heard of the old "2 hours of prep time for every one hour of deposition" rule of thumb. On top of this, how-to-testify videos and articles exist to give the witness more to worry about before you even meet. Trial consultants now offer full menus of witness preparation services. The average person can't handle—and certainly won't thrive with—this inundation. An over-prepared witness is likely to give pre-formed answers, appear disingenuous, and grow to hate the process of working with you. For these reasons and more, over-preparing your witnesses can be just as dangerous as under-preparing them. Rather, preparation should allow you to discover what your witness knows so that you can do your job protecting them, make them comfortable with being deposed, whatever else the circumstances require – and no more.

The Capacity to Remember

Over-preparing a witness is a waste of both your and the deponent's time. A person simply doesn't have the capacity to remember all of the rules, strategies, and pre-formed answers that attorneys try to pack into marathon preparation sessions. In fact, many studies found that the brain remembers information best if presented in properly timed and packaged fifteen or twenty-minute increments.

A. The Average Attention Span

According to numerous sources, college-aged students have an attention span of around fifteen to twenty minutes.[1] The retention process can then be restarted by "changing-up" the presentation, or by engaging the listener in a new way. Thus, a teacher should "adopt[] a varied approach . . . and deliberately and consistently intersperse[] their lectures with illustrative models or experiments . . . short problem solving sessions, or some other form of deliberate break . . ."[2] These principles translate cleanly into witness preparation. Lawyers should remember that after fifteen to twenty minutes of focusing on a single topic or issue, the preparation session should move to reviewing visual evidence, practicing questions, or some other method of reinvigorating the brain to retain information.

A modern example of this in action are the popular TED Talks series, which limits all presentations to eighteen minutes (And also, of course, the Network presentations!). TED curator Chris Anderson has

1 Joan Middendorf &Alan Kalish, The "Change–up" in Lectures, TRC Newsletter (Fall 1996).

2 Id. citing Johnstone, A. H., & Percival, F., Attention breaks in lectures, Education in Chemistry, 50 (1976).

explained the reasoning behind this mandate:

> It [18 minutes] is long enough to be serious and short enough to hold people's attention. It turns out that this length also works incredibly well online. It's the length of a coffee break. So, you watch a great talk, and forward the link to two or three people. It can go viral, very easily. The 18-minute length also works much like the way Twitter forces people to be disciplined in what they write. By forcing speakers who are used to going on for 45 minutes to bring it down to 18, you get them to really think about what they want to say. What is the key point they want to communicate? It has a clarifying effect. It brings discipline.[3]

The same can be said for witness preparation. If you limit a two-day preparation session to, say, four hours, you will be forced to prepare only the most important materials, and to cover the most vital information. Your session will be more valuable, more engaging, and more productive.

The timing of a preparation session can also alter its effectiveness. It has been found that immediately after a 10-minute presentation, listeners only remember 50% of what was said, and by the next day that retention drops to 25%.[4] The busy schedules of both witnesses and lawyers mean that witness preparation cannot always be done the day before a deposition. That is why it is more important to make your witness comfortable, and mentally prepared, than it is to bombard them with excessive rules and tips to forget.

B. Tools to Improve Memory

In a study conducted on pre-clinical medical students, researchers tested what type of impact the timing of a lecture and the learning devises used in that lecture had on student memory.[5] In comparing visual and verbal presentations of lecture information there was a clear superiority of visual information over verbal in both immediate and long-term (four-month) memory. For your witnesses, this means that you should have with you during preparation sessions the key pieces of evidence likely to be addressed in their deposition. Make the most of the time you spend with the witness, and maximize their memory, by incorporating evidence as a visual aid.

The study also determined that information presented to the listener between the fifteenth and thirtieth minutes of a lecture is recalled best, while the worst information recall falls in the first fifteen minutes. Use this information to your advantage in preparing your witness by spending the first fifteen minutes orienting your witness and making them comfortable, and turning to the most important and specific information in the fifteen to thirty minute range.

Striking the Right Balance

A. The Duty to Prepare

Striving to avoid over-preparing your witness should not be mistaken for choosing not to prepare your witness. Indeed, most agree that lawyers have a duty to prepare their witnesses competently. In a survey, 74 percent of lawyers responded that they felt a professional duty to prepare witnesses for trial.[6] Lawyers have a duty to zealously represent their clients, and part of adhering to this standard requires attorneys to "maximize the value of witnesses and their testimony."[7] Besides helping tell the client's story more effectively, thorough preparation of witnesses "normally benefits the judicial system as a whole, by stressing the importance of truthful testimony, enhancing the accurate transmission of facts from the witness to the jurors, and preventing potential disruption of the trial process."[8] Striving to avoid inundating your witness, or overloading their capacity to remember, is in no way an argument to avoid the necessary and highly significant task of preparing your witnesses to testify.

B. Where to Focus

There are elements of witness preparation that apply across all cases. The witness needs to understand

3 Carmine Gallo, The Science Behind TED's 18-Minute Rule, LinkedIn (March 13, 2014).

4 Jack Malcolm, How Much of Your Presentation Will They Remember?, available at http://jackmalcolm.com/2012/08/how-much-of-your-presentation-will-they-remember/.

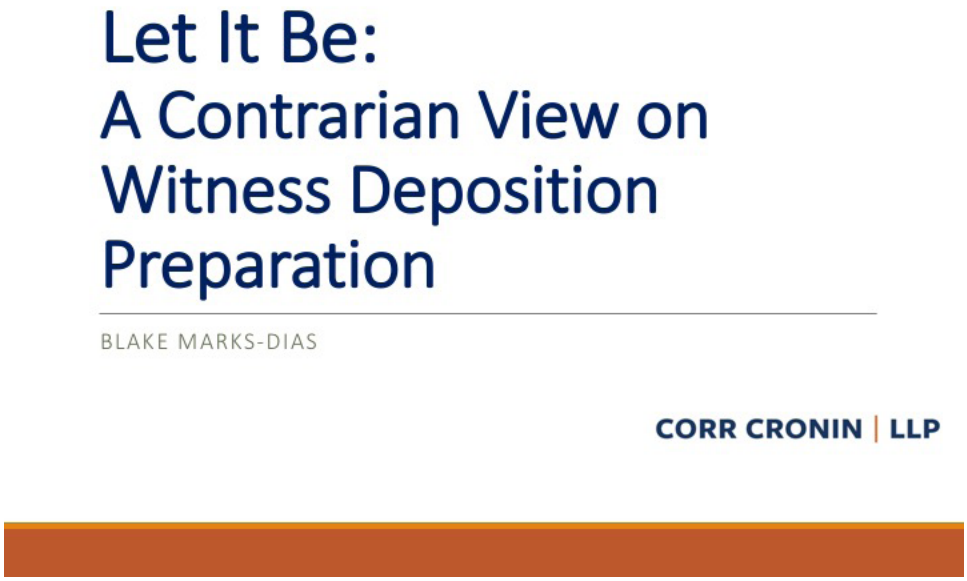
5 Giles RM, Johnson MR, Knight KE, Zammett S, Weinman J. Recall of lecture information: a question of what, when and where, Med Educ 16: 264-268 (1982) available at https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1365-2923.1982.tb01262.x.

6 R. Aron & J. Rosner, How to Prepare a Witness for Trial, 309-10 (1985); see also 3 Wigmore on Evidence, (3d Ed.) § 788 (recognizing "the absolute necessity of such a conference for legitimate purposes"); John S. Applegate, Witness Preparation, 68 TEX. L. REV. 277, 278-79 (1989) ("American litigators regularly use witness preparation, and virtually all would, upon reflection, consider it a fundamental duty of representation and a basic element of effective advocacy.").

7 J. Piorkowski, Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limits of "Coaching," 1 Geo. J. Legal Ethics, 389, 389 (1987).

8 Id. at 409.

the process of testifying, the importance of telling the truth, and what your role will be as their attorney during questioning. Attorneys need to gain an overall understanding of the witness's knowledge about the key issues of the case and learn what type of answers and testimony can be expected from the witness. And, finally, the witness needs to be comfortable. A witness who has been torn apart by fake cross-examination for hours by your trial team is more likely to suffer from anxiety than to learn how to answer questions elegantly. So keep it simple, keep it concise, and enjoy watching your witnesses thrive.



Ten Commandments for Preparing the Deposition Witness

Witness Preparation: Teach the Second Level of Response

25 Tips for Expert Witnesses

Checklist for Preparing Your Witness for Trial

Don't Overwhelm Your Witness

Avoid Marathon Preparation Sessions

Changing Up the Process

- Learn Their Role
- Review Evidence
- Practice Questions
- Discuss Issues
- Make It Interactive

People
Remember
Concise
Lessons

Striking the Right Balance

"I love my testimony. You've really captured my voice."

Ethical Duties In Preparing Your Witness

Model Rule 3.4(a)

A lawyer shall not "unlawfully alter, destroy or conceal . . . material having potential evidentiary value . . . Nor counsel or assist another person to do any such act."

Ethical Duties In Preparing Your Witness

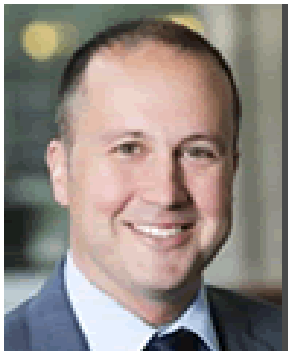
Model Rule 3.4(b)

A lawyer shall not "counsel or assist a witness to testify falsely."

Ethical Duties In Preparing Your Witness

Model Rule 3.3(a)(3)

A lawyer shall not knowingly "offer evidence that the lawyer knows to be false."



BLAKE MARKS-DIAS

Partner

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Blake is a partner in the firm. His practice focuses on cases which the client "must win" and, when necessary, which must be tried. Blake has been widely recognized by his peers for his trial skills. He has consistently been listed as a Washington Super Lawyer (top 5% of attorneys statewide), and in 2016, 2017, and 2018 was listed as a Top 100 Super Lawyer. He is on the faculty of the National Institute for Trial Advocacy.

Blake is also actively engaged in the community. He is the President of the Board of Northwest Health Law Advocates (NoHLA) and is a member of the Board of Trustees for Childhaven.

Prior to joining the firm, Blake was a partner at Riddell Williams where he represented a broad mix of clients in complex litigation. In college, he earned the award of the top individual debater in the nation. He and his partner finished second in the 1995 national tournament (final round transcript published in one of the leading college speech and communications textbooks: Freeley and Steinberg, Argumentation and Debate (12th ed. 2009)).

Featured Cases

- Defense verdict for Fortune 50 client following jury trial in employment discrimination case.
- Defense verdict following a three-week jury trial on behalf of the University of Washington in alleged employment discrimination case.
- Defense verdict following a three-week jury trial in Portland, Oregon, on behalf of client weatherproofing membrane manufacturer and its product consultant. The case involved a mix of product liability and professional liability claims.
- Currently representing a defendant former property owner in multi-million-dollar MTCA lawsuit.

Presentations and Publications

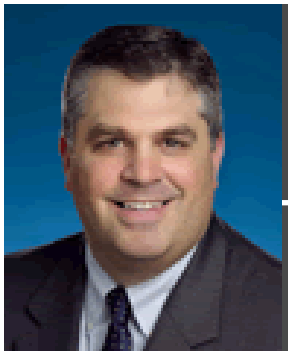
- Serving Clients: What Makes Good Client Service and What are Our Key Ethical Obligations?, William L. Dwyer Inn of Court presentation, March 13, 2018
- Changing the Narrative in Employment Discrimination Cases, KC Bar Bulletin 2018
- How Privileged is Communication with Your Firm's In-House Counsel?, NWLawyer, February 2014

Professinal Associations

- American Bar Association
- King County Bar Association
- Washington State Bar Association
- Founding member and Board of Directors, William L. Dwyer Inn of Court
- President of the Board of Directors, Northwest Health Law Advocates
- National Institute of Trial Advocacy, Faculty

Education/Background

- B.A., Gonzaga University, 1995 (cum laude)
- J.D., University of Washington School of Law, 1998



LEGISLATIVE RESPONSES TO THE #METOO MOVEMENT

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Legislative Reponses to the #MeToo Movement
John Romeo

It is safe to say that nearly everyone has become all too familiar with the #MeToo movement. The movement, started by activist Tarana Burke, is dedicated to ending sexual violence and has steadily dominated news headlines for over a year. The sexual assault accusations against Harvey Weinstein catapulted the #MeToo movement, particularly within the context of the workplace, into the public eye, and garnered more steam with allegations against Matt Lauer, Charlie Rose, Senator Al Franken, and Louis C.K.. While sexual harassment and assault in the workplace may not be new, the emergence of the #MeToo movement has encouraged women to speak out against past and current sexual violence.

But it's not just sexual harassment victims who are responding to the movement. The #MeToo movement has the attention of the government, particularly legislative bodies. Legislation, both federal and state, aimed at effectively responding to and ending sexual harassment is being introduced at a rapid rate. Lawmakers seem to agree that the strategy to eliminate workplace harassment must be multi-pronged, and the recent wave of proposed legislation is reflective of this comprehensive approach. This article will highlight the recent legislation that has been introduced and, in some cases, adopted in response to the #MeToo movement.

Confidentiality of Settlement Agreements

The genesis of the #MeToo movement centered on empowering sexual assault victims to speak out and no longer feel silenced by fear and intimidation. One need look no further than the recent allegations against Harvey Weinstein and Larry Nassar to see the impact confidentiality can have on future victims. Such cases have resulted in a backlash against the use of nondisclosure provisions in settlement agreements resolving claims of sexual harassment and sexual assault. It is argued that nondisclosure provisions enable bad actors, particularly repeat offenders, to continue to engage in misconduct. The use of nondisclosure provisions in settlement agreements relating to workplace sexual harassment claims has garnered attention from legislatures.

In December 2017, Congress signed into law the Tax Cuts and Jobs Act, which discourages the use of nondisclosure provisions in settling claims of sexual harassment and sexual abuse. Under the Tax Cuts and Jobs Act, employers will no longer be able to deduct settlement payments or associated attorney fees related to claims of sexual misconduct, as business expenses for tax purposes if the settlement agreement is subject to a nondisclosure agreement. Currently, the law does not specify whose legal fees may not be deducted, meaning that the restriction applies to both the accused and

the victim. There have since been legislative efforts, albeit unsuccessful, to amend the law so that only the legal fees of the accused are subject to the elimination of the tax deduction. Since the passage of the Tax Cut and Jobs Act, many states have introduced aggressive legislation that outright bans the use of nondisclosure provisions. It should be noted that, perhaps in response to concerns raised by harassment and assault victims, many of the proposed bills concerning nondisclosure provisions have some variation of an exception that permits nondisclosure provisions in settlement agreements where the victim has a desire for confidentiality.

By way of example, New York passed legislation banning the use of nondisclosure provisions in "any settlement, agreement or other resolution, the factual foundation for which involves sexual harassment," unless the confidentiality provision is the preference of the complainant. If the complainant does not have a preference for confidentiality, he or she must be presented with the nondisclosure provision and be given 21 days to consider the language of the provision. In the event the complainant agrees to the nondisclosure provision after the 21-day period, the preference must be memorialized in a written agreement and signed by all parties. The complainant must then be given at least a seven-day revocation period, and it is not until the revocation period has ended that the agreement becomes effective.

Likewise, California's state legislature recently passed the Stand Together Against Non-Disclosures (STAND) Act, which declares that after January 1, 2019, nondisclosure provisions in settlement agreements that prevent the disclosure of factual information related to sexual harassment, sexual assault or sex-based discrimination claims in the workplace are prohibited. Similar to the New York law, the STAND Act creates an exception for any provision that conceals the identity of the complainant or information that would lead to the discovery of the complainant's identity, if such provision is included at the request of the complainant. Additionally, California has passed legislation that will prohibit an employer from requiring, as a condition of employment, that an employee, independent contractor, or applicant agree to hold confidential any instance of sexual harassment that the employee or independent contractor suffered, witnessed, or discovered in the workplace. Both pieces of California legislation are awaiting signature by California's Governor.

Similarly, although not yet passed, Pennsylvania's State legislature has introduced Senate Bill 999, which would void any agreement, settlement, or contract provision that "prohibits or attempts to prohibit the disclosure of the name of any person suspected of sexual misconduct; suppresses or attempts to suppress information relevant to an investigation into a claim of sexual misconduct... or requires or attempts to require any person to expunge information pertaining to a claim of sexual misconduct from documents maintained by the person, unless due investigation determines the claim to be false." The bill creates an exception for provisions that serve to conceal the name of the complainant and the monetary consideration provided in settlement of the claim.

New Jersey also has proposed legislation, and while it does not explicitly ban nondisclosure provisions, it nevertheless holds them unenforceable against an employee who is a party to the agreement—thereby giving the employee the option to reveal details of the claim if he/she so chooses. The bill further provides that a nondisclosure provision is unenforceable against the employer only if the employee publicly discloses sufficient details of the claim so that the employer is reasonably identifiable. To ensure that the employee fully understands the consequences of his/her own disclosure, the amended bill requires a "bold, prominently placed" notice in the settlement agreement advising the employee that the employer will no longer be held to confidentiality if the employee decides to publicly reveal details of the claim. The bill is unique because it is not limited to sexual harassment or abuse claims, but would apply to any type of discrimination, retaliation, or harassment claim under New Jersey's Law Against Discrimination.

Similar bills have been passed and adopted in Arizona, Maryland, Tennessee, Vermont, and Washington. It is expected that more states will continue to follow this trend in banning or limiting the use of nondisclosure provisions in settling sexual harassment claims.

Arbitration Provisions

Despite a judicial trend enforcing arbitration agreements, mandatory arbitration agreements also have been considered to be used as a mechanism to silence victims of sexual misconduct. Although arbitration is often a faster and less costly process than litigation, there is expressed concern that many arbitration proceedings lack the same transparency that litigation affords. In December 2017, U.S. Representative Cheri Bustos and Senator Kirsten Gillibrand introduced into Congress the "Ending Forced Arbitration of Sexual Harassment Act of 2017," a bill that would amend the Federal Arbitration Act (FAA) and make unenforceable "any agreement to arbitrate a [sex discrimination] dispute that [has] not yet arisen at the time of making the agreement." The amendment creates an exception for collective bargaining agreements. The bill has bipartisan support, but has not yet received a vote. In the meantime, states have begun taking their own action in limiting the use of mandatory arbitration provisions. Although the enforceability of nearly all of the state legislative action concerning arbitration agreements has been called into doubt, due to a strong likelihood that the FAA preempts such state action, this has not stopped efforts.

For example, employers in New York are no longer permitted to include "any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment," and all such mandatory arbitration provisions will be deemed void. In addressing the possibility that the law is preempted by the FAA, the law creates an exception in the event it is inconsistent with federal law. Further, as with the federal bill, there is an exception for collective bargaining agreements.

Similarly, other states, including Pennsylvania, New Jersey, Maryland, California, Vermont, and Washington have proposed legislation that prohibits contractual provisions that allow employees to waive their procedural and substantive rights relating to claims of sexual harassment. Washington's bill, which already has been enacted, "preserv[es] an employee's right to publicly file a complaint or cause of action for discrimination in employment contracts and agreements," and deems unenforceable a provision that "requires an employee to resolve claims of discrimination in a dispute resolutions process that is confidential." As of October 1 of this year, Maryland employment contracts may not include any provisions that waive substantive or procedural rights relating to a future claim of sexual harassment "or retaliation for reporting or asserting a right or remedy based on sexual harassment." Further, Maryland employers cannot retaliate against an employee for refusing to enter into an agreement that waives their aforementioned rights. Pennsylvania, New Jersey, and California have all introduced similar legislation—California's bill has passed in the legislature and is awaiting signature from the Governor, while Pennsylvania's and New Jersey's bills are still pending (both would prohibit employees from being required to agree to waive their substantive and procedural rights under that states respective employment discrimination and harassment laws).

Mandated Training

In an effort to prevent sexual misconduct in the workplace, renewed attention has been paid to educating employees on how to identify harassing and discriminatory behavior. State legislatures have begun proposing bills that require mandatory employee interactive training on the prevention of sexual harassment. There were, however, some states that led the charge long before the #MeToo movement, specifically Connecticut and California. California's training law was enacted in 2004 and has continued to expand in the wake of the #MeToo movement. Most recently, California amended its training requirement law so that it applies to employers with at least five employees, instead of 50 as previously required. Further, the law previously required two hours of training every two years only for "supervisory employees," but now requires that non-supervisory employees also receive one hour of training. California will provide employers with an electronic record keeping system for employees who have completed training.

New York's training law requires that all employees in the state receive training by January 1, 2019, and

that it be provided on an annual basis. New York's training law applies to all employers in the state—no matter their size—and even New York contractors. The law requires that the training include the following information:

> (i) an explanation of sexual harassment consistent with guidance issued by the department in consultation with the division of human rights; (ii) examples of conduct that would constitute unlawful sexual harassment; (iii) information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment; and (iv) information concerning employees' rights of redress and all available forums for adjudicating complaints.

New York also included a model training program that employers are required to utilize, unless they create their own training program that "equals or exceeds the minimum standards provided by such model training." Additionally, New York City has passed its own training requirement law, effective April 1, 2019, which applies to employers with at least 15 employees, and mandates annual training for full-time or part-time employees who work more than 80 hours in a calendar year.

Likewise, Delaware's sexual harassment training law goes into effect on January 1, 2019, and applies to all employees at companies where there are 50 or more employees. It should be noted that Delaware's training law includes unpaid interns, applicants, joint employees, and apprentices within its definition of employee. Delaware employers must conduct training every two years, and it must address the illegality of sexual harassment and retaliation; the definition of sexual harassment under state law, illustrated through examples; the legal remedies and complaint process provided by Delaware's Department of Labor; and the Department's contact information. Similar to Pennsylvania's proposed legislation, Delaware supervisors will be required to receive additional training that details their specific role in "the prevention and correction of sexual harassment." All training must be conducted by January 1, 2020, for existing employees and within one year from the start of employment for new employees.

Pennsylvania has pending legislation that would require employers to provide interactive training concerning discrimination, harassment, and retaliation to "all current employees" every two years. Along with basics like the definition and examples of harassment, discrimination, and retaliation, and the procedures to report such conduct, the training must also include "bystander intervention and other strategies that are found to be effective in the prevention of harassment; [and] the effects of discrimination and harassment on victims and the workplace." Lastly, employees must also be made aware of the consequences for violating federal and state laws that prohibit harassment, discrimination, and retaliation. If passed, Pennsylvania supervisors would be required to attend additional training that relates to the supervisor's role in identifying, responding to and preventing harassment, discrimination, and retaliation. Pennsylvania's training legislation has a record keeping requirement, which mandates that employers retain documentation of training for at least three years. As in New York, the Pennsylvania Human Relations Commission would create an online training module, which employers may use to satisfy the training requirement. There is also a civil penalty for employers that violate the training law, which can be as high as $5,000 per violation.

Other Creative Solutions

Much of the legislation that has been proposed in response to the #MeToo movement falls within one of the aforementioned categories; however, there are a handful of other creative initiatives that state lawmakers have introduced in their efforts to combat sexual harassment and discrimination in the workplace. For example, effective October 9, 2018, New York employers are required to implement sexual harassment prevention policies and provide such policies to employees; employers are free to adopt the model policy provided by the state or establish its own policy that equals or exceeds the minimum standards provided by the model policy.

Maryland now requires that employers with at least 50 employees submit a survey to the Maryland Commission on Civil Rights, which indicates "the number of settlements made by or on behalf of the employer of an allegation of sexual harassment by an employee; the number of times the employer

paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and the number of settlements made of an allegation of sexual harassment that included a confidentiality provision." The aggregate results of the survey will be made available for public viewing.

California has passed legislation, which is awaiting a signature from the Governor, that employers with at least 50 employees would be forced to retain, for five years, records relating to any sexual harassment complaints. The five-year period would trigger after the accused or complainant's last day of employment, whichever is later.

Not only has there been a flurry of proposed legislation in response to the #MeToo movement, but the endless number of recent publicized allegations has led to defamation lawsuits by the accused. Nearly every day, there is an allegation published that outs another high-level business executive, athlete, actor, or government official as a harasser. These claims of sexual misconduct often are evaluated in the court of public opinion. A mere allegation of sexual misconduct—without even the thought to examine its truthfulness—can ruin the career and reputation of the accused. This has led to conversations about due process for the alleged harasser. Now, defamation lawsuits are being filed by men who argue that they have been unfairly treated due to a false allegation or complaint. Recently, Brett Ratner, a film director, was accused of rape on a woman's Facebook post and has since sued the accuser for defamation. The woman moved to dismiss the case, but Ratner's claim was allowed to move forward and is currently pending. Actor Geoffrey Rush sued the Daily Telegraph for defamation after it released an article claiming that the actor behaved "inappropriately" against a fellow actor.

The #MeToo movement started over a year ago, but the implications of the movement are just beginning to reveal themselves. Employers should become knowledgeable about how the legislation, both pending and approved, will affect their practices. Employment and settlement agreements may need to be updated to comply with new federal, state, and local laws. If sexual harassment training is not currently offered by an employer, now is the time for that employer to consider implementing a training program—even if not legally required. The #MeToo movement has encouraged people to think more critically about identifying sexual harassment in the workplace; thus, it is imperative that employers ensure that they are adhering to updated harassment policies and laws and are effectively responding to, and preventing complaints of, sexual misconduct.

GIBBONS

A Change is Gonna Come:
Legislative Responses to the #MeToo Movement

John C. Romeo, Esq.

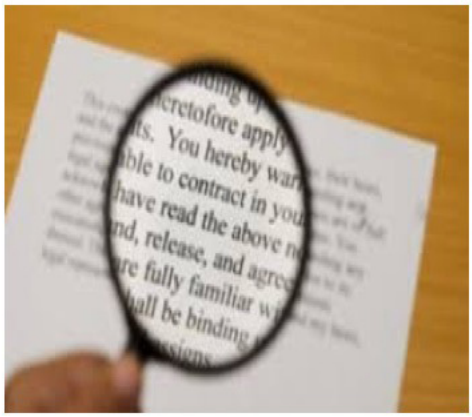
Not Just Hollywood . . .

The Problem Persists…

- EEOC charges alleging sex-based harassment
  - 2011: 12,461
  - 2013: 12,379
  - 2015: 12,573
  - 2017: 12,428
- 2016 Select Task Force on the Study of Harassment in the Workplace
  - 85% do not file harassment complaints with EEOC

Legislative Responses:
A Comprehensive Approach

- Increase public disclosure
  - Banning nondisclosure provisions in settlement agreements
  - Banning arbitration agreements
- Increase knowledge and awareness
  - Mandated training
  - Record keeping
- Prevent Reoccurrences



Settlement Agreements:

- Federal Action: "Tax Cut and Jobs Act"
  - Discourages nondisclosures through elimination of business expenses for settlement payouts and attorney fees
- State Action: Banning nondisclosures
  - Exceptions for victims desiring confidentiality

Arbitration Agreements:

- "Ending Forced Arbitration of Sexual Harassment Act of 2017" (Amends FAA)
  - Bans mandatory arbitration of "sex discrimination disputes"
- Ban waivers of procedural and substantive rights relating to sexual harassment claims

Mandated "Interactive" Training:

- Required curriculum
  - Defining harassment, using examples
  - Reporting procedures
  - Remedies
- Annual/biennial requirement
- Record keeping

Training:

- Understand what training is required in your jurisdiction and stay on top or relevant legislative changes.
- Training for all employees
  - Supervisory training
  - Be practical/Avoid legal jargon
- Record keeping (even if no requirement)

Other Relevant Legislation:

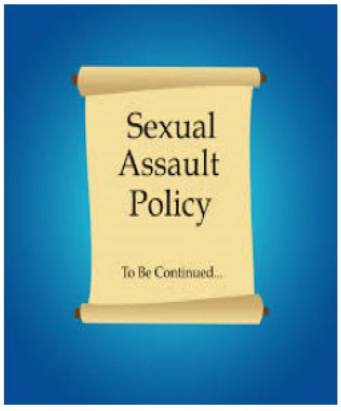
- Implementation of sexual harassment policies
- Sexual harassment settlement surveys
- Retention of all sexual harassment complaints

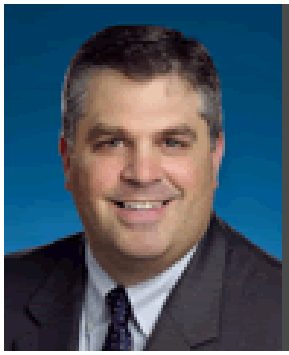
What about the Alleged Harasser?

- Due process for accused
  - Published allegations
  - Avoid the "rush to judgment"
  - Defamation/wrongful termination claims
- *Ratner v. Melanie Kohler, et al.*
  - Ratner, sued his accuser for defamation after she accused him of rape on a Facebook post. Motion to dismiss was denied and the case is pending.

Employer Policies:

- Become knowledgeable about relevant legislation, both pending and approved
- Develop and update policies
- Adhere to updated harassment policies and laws
  - Prevention & effective response





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Mr. Romeo represents both private and public employers in all aspects of federal and state labor and employment laws. He routinely provides practical strategic advice to clients dealing with difficult employee issues involving all aspects of the employment

Prior to joining Gibbons, Mr. Romeo was Labor & Employment Counsel and Chief Ethics & Compliance Officer for American Water Works Company, Inc.

As Chief Ethics & Compliance Officer, Mr. Romeo oversaw American Water's ethics and compliance program. He served as Secretary to the Company's Ethics Committee and was responsible for providing regular reports to the company's Board of Directors.

Mr. Romeo is a former member of the Association of Corporate Counsel's Labor and Employment Committee and was active with the organization's Delaware Valley Chapter (DELVACCA), where he served as the Co-Chair of the Chapter's Compliance & Ethics Committee. Recently, he has given several presentations to DELVACCA audiences, on topics including the negotiation of CBAs in a down economy; use of social media in employment; and the Dodd-Frank whistleblower provisions.

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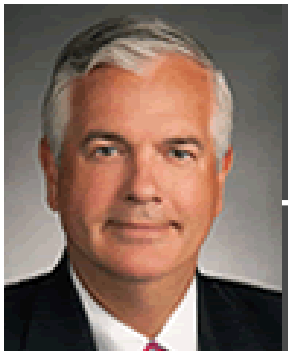

SHELTER FOR MY INTELLECTUAL PROPERTY

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Misappropriation of Trade Secrets: Suggestions for the Office and the Courtroom
Roger L. McCleary

"Just because you're paranoid doesn't mean they aren't after you." (Joseph Heller, Catch-22)

If you are not already paranoid about your company's trade secrets – you should be paranoid about it!

Threats abound. Once trusted employees join a competitor for more money – and leave with a USB flash drive loaded with valuable company trade secrets! Your business unit leader just signed a confidentiality agreement with a potential business partner (who could become a potential competitor) affording trade secret/confidential status to information supplied by that potential business partner – but information also already known and used by your company! A hacker in Russia, China, North Korea, or Kansas City accesses your public company's computer network, using an employee's easy to remember password – "Password," and downloads business plans and drawings for the new product! The possibilities are enough to keep in-house counsel up at night (as if they needed any other reasons).

In fact, a pronounced rise in already widespread trade secret litigation has occurred since passage of the Federal Defend Trade Secrets Act (DTSA), which became effective in May 2016. Last July, legal data analytics firm Lex Machina released its Trade Secret Litigation Report. The findings indicate an almost thirty percent increase in federal court trade secret claims filed in 2017 compared to 2016. The increase is projected to be somewhat higher in 2018, based on federal court filings during the first half of the year.

This article is intended to offer some brief practical suggestions for protecting your company's trade secrets – both in the office and in the courtroom.

First, a brief review of DTSA - in comparison with a recently amended Texas state trade secret act, the Texas Uniform Trade Secret Act (TUTSA) - is provided below for information and context.

DTSA

DTSA created a new federal civil action for misappropriation of a trade secret. Under DTSA, an owner of a trade secret that is misappropriated may bring a civil action if the trade secret is related to a product or service used in, or intended for use in, interstate, or foreign commerce. With DTSA, Congress granted original jurisdiction to federal district courts to decide trade secret cases, but DTSA provides that it does not preempt state law.

The elements of a DTSA misappropriation of trade secrets claim consist of a trade secret, misappropriation, and use in interstate commerce. The terns "trade secret" and "misappropriation" are defined within DTSA. A trade secret means:

> "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—
>
> A. the owner thereof has taken reasonable measures to keep such information secret; and
>
> B. the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information."[1]

Misappropriation means:

> A. acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> B. disclosure or use of a trade secret of another without express or implied consent by a person who—
>
> i. used improper means to acquire knowledge of the trade secret;
>
> ii. at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was—
>
> I. derived from or through a person who had used improper means to acquire the trade secret;
>
> II. acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or
>
> III. derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or
>
> iii. before a material change of the position of the person, knew or had reason to know that—
>
> I. the trade secret was a trade secret; and
>
> 2. knowledge of the trade secret had been acquired by accident or mistake.[2]

DTSA does not include reverse engineering within its definition of improper means. Under DTSA, a plaintiff may obtain an injunction or an award of damages for actual loss and damages for any unjust enrichment that is not included in the actual loss. Alternatively, a reasonable royalty may be awarded. Exemplary damages of not more than two times actual damages and attorneys' fees may be awarded for willful and malicious misappropriation. DTSA also provides for an ex parte injunction and a seizure order for recovery of the trade secret with the help of federal law enforcement.

The statute of limitations for a DTSA claim is three years after the date the misappropriation is or should have been discovered by the exercise of reasonable diligence.

TUTSA

TUTSA was passed in 2013 to conform Texas law with the forty-six other states that had adopted the Uniform Trade Secrets Act. TUTSA expressly preempts Texas common-law misappropriation claims.

TUTSA was amended in 2017 to adopt a similar, though not identical, definition of a trade secret as compared to DTSA. TUTSA's definition of a trade secret includes a broader reference to all forms and types of information, but TUTSA is otherwise very similar to DTSA in how a trade secret is defined.

TUTSA's definition of misappropriation is also very similar to DTSA's definition. Unlike DTSA, however, TUTSA expressly identifies proper means to acquire knowledge of a trade secret, including discovery by independent development, reverse engineering unless prohibited, or any other means that is not improper means.

Importantly, TUTSA shares the DTSA requirement that the owner of a trade secret must take reasonable measures to keep that information secret.

TUTSA provides for damages and injunctive relief similar to DTSA, but punitive damages are recoverable under TUTSA only if the

1 18 U.S.C. § 1839(5).

2 18 U.S.C. § 1839(5).

misappropriation was done willfully and maliciously based on clear and convincing evidence.

A provision in TUTSA not found in DTSA allows the court to preserve the secrecy of the alleged trade secret by reasonable means. This provision effectively creates a presumption in favor of granting protective orders in favor of the party asserting trade secret.

The statute of limitations for a TUTSA claim is also three years after the date the misappropriation is or should have been discovered by the exercise of reasonable diligence.

Suggestions

1. Comprehensive Trade Secret/IP Protection Program. Virtually every business has trade secrets that must be protected from misappropriation. Most have policies in place that are intended to protect against misappropriation. Unfortunately, just having such policies, or even having a more comprehensive program in place, does not ensure that the policies or program are current, adequate, or even followed. Many programs and policies exist in name only. As DTSA and TUTSA require, reasonable measures must be used to maintain the secrecy of trade secret information in order to pursue civil remedies against misappropriation. If your business does not already have a robust, comprehensive trade secret/ IP program (Program) in place and in use, your business needs one.

2. Identify the Program Leader. Also, while every employee should understand the employee's responsibility to protect the company's trade secrets, a single officer or manager should be assigned specific supervisor responsibility for the Program. When everyone is responsible, unwarranted assumptions are more likely to exist that everyone is behaving appropriately and that trade secrets are protected – until it is too late. However, when an officer or manager is assigned specific responsibility for the existence, development, implementation, and enforcement of such a Program (with the assistance of qualified IT, legal, and other experts) - with the express understanding that the Program leader's future success with the company is dependent on the success of the Program - attention is paid where it otherwise would not be paid and things get done. All other things being equal, choose a Program leader who will be a good witness for the company. A smart Program leader with a pleasing demeanor will be of great help in presenting courtroom evidence of protective measures in a fashion a judge or jury will be inclined to find reasonable.

3. Identify the Trade Secrets. Trade secrets take many forms. By definition, they can include financial, business, scientific, technical, economic, engineering, and other information. If a business does not make a regular effort to determine what trade secrets are in need of protection, many trade secrets are likely to be exposed and lost. A thorough review of the company's business should be undertaken, with involvement from virtually every significant part of the company – not just the C-suite, but also from product development, information technology, engineering, sales, accounting, and so on through human resources departments – to identify the information requiring protection under the Program and to determine what measures are best suited to provide that protection.

4. Access Controls. The Program should include an information management program limiting trade secret access to only those employees who must have access to the information and whose identities are thoroughly verified. These controls must be established and implemented in consultation with IT professionals. The controls should include a strong encryption program and a requirement of multiple forms of identification for access to sensitive networks and databases.

5. Employee Handbooks. Every company should have employee handbooks or other written policies that explain employees' responsibility to maintain in confidence and not improperly disclose the company's trade secrets and other confidential information – and which require an employee's signature to acknowledge receipt. While perhaps most companies have employee handbooks and policies of this nature, it is surprising how many fail to properly document employee receipt of such material. The Program must ensure that such acknowledgments are obtained, preserved, and accessible. They are good evidence in the courtroom. Document retention policies must take this into consideration.

6. Regular Training. Another important aspect of an effective Program are regular, documented training and refresher sessions. Otherwise, the prior training is forgotten by employees and the Program becomes dormant. If the company is unable to present documented evidence of such training, it is more likely that employees will engage in improper behavior and less likely the company can present a credible case of reasonable measures to protect trade secrets.

7. Regular Audits. Regular audits should be scheduled and conducted to ensure the Program is used; training takes place; acknowledgments, NDAs, and other related documentation are signed and available; and that information management is effective.

8. Employee Non-Competition/Non-Disclosure Agreements. While written employee non-disclosure agreements (NDAs) are commonly enforceable, non-competition agreements tend to be less predictable. The law on enforcement of non-competition agreements has evolved considerably and that evolution continues. Such agreements should be evaluated, developed, used, regularly reviewed, and revised in the context of the law of the jurisdictions where the company's employees are located and the agreements will potentially be enforced. Unless outright prohibitions against such agreements exist, consider having employees enter into such agreements even when enforcement is questionable at best. While the same non-competition agreement that will be enforceable in Texas may well be unenforceable in California, merely having such a signed agreement can dissuade an employee from leaving with company trade secrets to work for a competitor.

9. Care Regarding Confidentiality Agreements with Third Parties. Trade secret claims are often asserted as breach of contract claims. For example, parties often sign confidentiality agreements (CAs) to facilitate the exchange of information needed to determine whether to engage in business together. If one party later decides to assert the other party misappropriated the first party's trade secrets, a claim for breach of contract is often asserted with or without associated tort/statutory causes of action. These CAs can be traps for the unwary!

Consider the following CA language from an actual lawsuit:

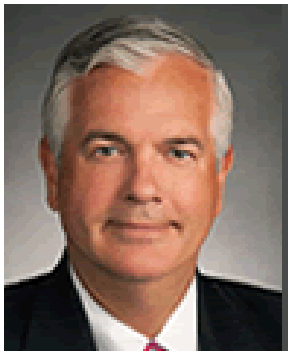
> Confidential Information. For purposes of this Agreement, "Confidential Information" means any information about a party furnished by it or its Representatives (as defined below) to the other party regardless of the manner in which it is furnished. Confidential Information includes, but is not limited to, information relating to trade secrets, inventions, patents, patent applications, copyrights, trademarks, service marks, other proprietary rights, existing and proposed products, prices, pricing and marketing plans, business projections and forecasts, policies and strategies, operations methods, current and potential customers and suppliers, financial data, and any information marked as "proprietary" or "confidential". Confidential Information does not include information which (a) is or becomes generally available to the public other than as a result of disclosure by the Receiving Party (or its Representatives), (b) is or becomes available to the Receiving Party on a non-confidential basis from a source other than the Disclosing Party (or its Representatives), provided that such source is not prohibited from disclosing such information to the Receiving Party by a contractual, legal or fiduciary obligation to the Disclosing Party (or its Representatives), or (c) is independently developed by the Receiving Party prior to disclosure to it by the Disclosing Party (or its Representatives).

This CA language literally classified "any information about a party" as confidential information. The receiving party contracted away the usual burden on the disclosing party to prove that the information it provided was, in fact, a proprietary trade secret or otherwise legitimately confidential information. The disclosed information did not even have to be marked "proprietary" or "confidential." The receiving party effectively assumed the burden to demonstrate the information at issue was already generally available to the public, was already available to the receiving party on a non-confidential basis, or was independently developed by the receiving party prior to disclosure by the disclosing party. When possible, contractual descriptions of confidential information should be more narrowly defined to avoid confusion and misplaced burdens of proof.

10. Trial Lawyer Review. Have confidentiality

agreements and other key contract documents evaluated by a trial lawyer before they are signed. Business people tend to believe they know what a contract means and how it should be interpreted and enforced. However, it will be a judge or jury that interprets and applies the contract language. A trial lawyer can often identify contract issues that are not apparent to business people. The document may then be revised to avoid issues that would otherwise result in litigation, or at least to improve the company's posture if litigation arises.

Will following these suggestions eliminate the risk of losing trade secrets or the risk associated with a misappropriation lawsuit? Of course not. However, it will help reduce those risks.



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Roger has handled commercial and personal injury matters in state and federal courts across the U.S. and has successfully handled dozens of trials in a wide variety of cases. A significant portion of his experience is in complex business, construction, energy, insurance coverage, products liability, and other personal injury litigation.

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Memberships and Affliliations
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Admission to Practice
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- Southern Methodist University Dedman School of Law; Dallas, Texas - J.D., 1984
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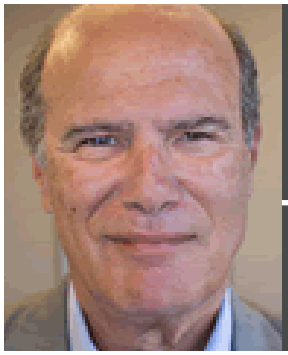

EFFECTIVE INTERNAL INVESTIGATIONS - AVOIDING PITFALLS OF THE UNWARY

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Key Considerations Internal Investigations: Scope, Method, and Deliverable
J. William Codinha and Ronaldo Rauseo-Ricupero

An anonymous tip is called into a corporation's anti-fraud hotline alleging an improper payment made by a sales team member in a foreign country in order to win a major contract. The chief technology officer reports that the data security software has found suspicious transfers of electronic files made from the trade secret file repository to an IP address associated with a direct competitor timed just before a key executive left the company. A state attorney general's office requests a business unit's billing records for the past five years after receiving a whistleblower allegation of false provision of services. A pattern of product defect reports leads the engineering department to suspect that a manufacturing failure may be more prevalent than the batch of product originally identified, with potentially widespread impact on consumer safety.

The need to conduct an internal investigation can be sparked for myriad reasons, but the decision of how to conduct the inquiry represents a key decision point in the lifespan of a legal matter. With carefully considered strategic choices, a well-planned and well-executed investigation can create a clear record that allows a company to debunk a misconception, gain insight into potential problems, and develop a plan to improve its internal controls and implement needed corrections with precision and speed, all while protecting the company's rights and limiting damages. A poorly executed investigation can hamper a company's ability to address an issue that needs attention, increase exposure to liability for the corporation or its employees, heighten costs or damages, all while leading to years of unwarranted scrutiny by regulators, defections by shareholders, and civil actions by plaintiffs.

Experience suggests that there are three key decision points that counsel will face during the course of an internal investigation: First, what is the scope of the investigation – who is the 'client' doing the investigating, and how broad is the scope, and why. Second, what is the method – how can counsel increase the likelihood of collecting useful information while preserving the company's privileges and protecting its legal position. Third, what is the desired deliverable – what form should the result of the investigation take, and what goals should it achieve. Each investigation will fill a different need, but the considerations discussed below will help lead to constructive uses of time and resource devoted to the effort.

First, a reality check and personal bias – companies are rarely staffed with the appropriate personnel to conduct a well-planned and executed internal investigation. The skill set required and often the resources necessary, are simply unavailable to most companies. Further, there may be an implicit bias invoked by an outside observer (regulator,

prosecutorial agency, investigator, or plaintiffs' class action firm) as to whether the investigation was conducted properly, and wasn't simply a "white wash" or "cover up." My personal recommendation is that you engage experienced outside counsel at the earliest reasonable point to advise the company on risks and begin the process of planning and executing the necessary investigation.

Scope – The Who and The Why

An investigation may be commenced by the legal department of a corporation, a board of directors, or a subcommittee of the board and coordinated by outside counsel. For purposes of the investigation, the 'client' is the entity that is commencing the investigation and to whom the results of the investigation will be reported. That entity will, in turn, have the responsibility for analyzing the results, and, based on recommendations from the team, weigh potential action steps, including decisions about whether to report the results further 'up the chain', or whether to make a self-disclosure to regulatory agencies or civil or criminal enforcement authorities.[1]

Sometimes, the outlines of the facts are straightforward and the engagement can be executed in short order. For example, if a company's human resources department anticipates that the dismissal of a certain employee for misconduct that violates company policies but does not violate state or federal laws, the legal department may design an engagement in which outside counsel is brought in solely for the purpose of conducting key witness interviews to determine whether the conduct of the particular employees is part of a wider pattern. That type of engagement, which may be completed within a few months, may find the outside counsel gathering facts and assessing witnesses to advise the legal department about how to identify additional misconduct but not necessarily making a report to the board of directors or outside authorities. The scope of that engagement may be limited to analyzing certain employees' disclosures during the interviews and sharing a candid assessment of the viability of potential claims orally without further written charge. In those situations, counsel should be sure that the engagement letter clearly delineates the expectations of the deliverable, and is clear about what process should be followed in the event that the investigation results in the disclosure of unforeseen conduct.

In other circumstances, the legal department may have information about potential misconduct and is engaging outside counsel to assist in assessing the validity of the claim of a more systematic problem; in that case, the scope may involve making a report that will eventually be presented to senior executives and/or the board. In such cases, which occur most often in private companies, the scope of the investigation may be initiated by an executive, but counsel should clarify which entity will be the 'client' for reporting purposes, and have a direct conversation with the executive that he or she may not be fully apprised of the results of the investigation before it is reported to the board depending upon the nature of the conduct uncovered.

Finally, a major investigation undertaken for a public company concerning a whistleblower complaint of substantial potential financial fraud where the manner and means of the conduct is unclear and there is potential that executives may be witnesses or participants in problematic conduct, the 'client' will most likely be a committee of the board comprised of outside directors as empowered by resolution to undertake the investigation. Retained counsel will most often be different than from regular counsel to the company, as part of an effort to maintain an increased measure of independence and credibility. The scope of investigation initiated by the board committee must be carefully delineated, as results of the investigation by the outside committee may not always perfectly coordinate with advice provided by in-house or normal outside counsel to the corporation, and such disputes may become relevant in derivative actions.

Method - Establishing Privilege and Ensuring Preservation

Whether the call comes from the organization's legal department or is initiated by outside committee of the board, the start of the investigation is most often the time that complementary legal obligations and legal privileges attach. On the one hand, when litigation is reasonably anticipated, the company's duty to

1 In certain circumstances, the discovery of material violations of the securities laws places a burden on securities counsel to report such conduct further up the chain of responsibility. 15 U.S.C. § 7245.

preserve documents related to the subject matter likely attaches, and outside counsel has an obligation to implement steps to preserve documents. On the other hand, documents concerning the investigation will now enjoy privileges, including attorney-client privilege and work product privilege and will thereby be protected from disclosure.[2]

With respect to the preservation obligation, "[c]ourts have found the duty to preserve to be triggered based on an internal investigation into an incident."[3] In such circumstances, "a party's duty to preserve arises when it has notice that the [evidence] might be relevant to a reasonably-defined future litigation."[4]

In most internal investigations, this will involve initiating immediate contact with the entity's information technology staff to disable auto-delete functions in order to preserve emails and documents, and any additional communications and electronic data (sales reports, transaction records, voicemail, travel records) that could provide relevant information to the investigation. While it will largely depend on the substantive law of the state, generally employees have no expectation of privacy in their work emails,[5] and therefore investigators on behalf of the entity have full ability to review employee's emails on their work computers in accordance with their technology policies.[6] However, investigators must also be aware that key employee communications may be held in internal or external messaging programs such as Slack, Jabber, WhatsApp, or Wicker, where preservation can be much more challenging, but may be crucial to uncovering key facts. Counsel may also be obligated to issue a legal hold notice to employees in order to preserve records that cannot be centrally controlled.[7] Management of the subsequent hold will also fall to issuing counsel, and particularly, outside counsel if the matter results in subsequent investigation or litigation.[8]

Depending upon the size and nature of the collection of electronic data, investigative teams may wish to employ technology-assisted review to aid in the culling and prioritization of the review of voluminous materials. Aside from the administrative benefit of easily searching, producing, and presenting such documents in interviews and reports in an organized way, more sophisticated data management platforms can also aid teams in developing relationship maps among key witnesses, creating timelines, discerning patterns in employee communications or file transfers, or otherwise providing analytical support for getting the most value out of the collected source materials in a way that can substantially aid an investigation.[9]

As the D.C. Circuit recently clarified, attorney-client privilege will apply to communications related to the investigation as long as the provision of legal advice is a "significant purpose" of the investigation: "In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy."[10]

As the materials are collected in a major investigation, counsel may next seek to engage the services of various technical experts, such as forensic accountants, as appropriate, to analyze any complicated financial or other data in understanding the conduct at issue; "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege."[11] Such engagements should be made through the retention letters with the

2 United States v. Rockwell Int'l, 897 F.2d 1255, 1266 (3rd Cir. 1990);

3 Marshall v. Target Corp., No. 17-CV-00880-WYD-STV, 2018 WL 3475204, at *3 (D. Colo. July 19, 2018) (quoting Zbylski v. Douglas Cty. Sch. Dist., 154 F. Supp. 3d 1146, 1164 (D. Colo. 2015)) (citing Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)).

4 Id.

5 Garrity v. John Hancock Mutual Life Ins. Co., 2002 U.S. Dist. LEXIS 8343 (D. Mass. 2002); Falmouth Fire Fighters' Union Local 1497 v. Town of Falmouth, 2011 Mass. Super. Lexis 362 (Mass. Super. Feb. 2, 2011) (employees have no expectation of privacy in work emails).

6 While outside the scope of this article, the treatment of corporate 'personal data', including data that identifies an employee by email address, in Europe, must be compliant with the 2018 European Union's General Data Privacy Regulation (https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN)

7 Although one particularly influential court stated that the failure to serve a written hold notice constituted gross negligence per se, that holding was overruled in a later case by the Second Circuit. The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (failure to issue written litigation hold constitutes gross negligence), overruled in part by Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135 (2d Cir. 2012) (rejecting notion that failure to institute written litigation hold constitutes gross negligence per se; failure to adopt appropriate preservation practices is but one factor to consider in determining appropriate sanctions; finding of gross negligence permits, but does not mandate, imposition of adverse inference instruction).

8 See In re Ebay Seller Antitrust Litig., 2007 U.S. Dist. LEXIS 75498, *7–*8 (N.D. Cal. Oct. 2, 2007)

9 Da Silva Moore v Publicis Groupe, 287 F.R.D. 182 (S.D.N.Y. 2012) (explaining the benefits of technology- assisted review).

10 In re Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014)

11 Id. at 758.

law firm in order to clarify that these professionals are operating as agents of the firm conducting the investigation – and not as the 'regular' accountant to the company – in an manner that preserves the attorney-client privilege and attorney work product privilege to the extent possible.[12] The work product doctrine, while not an absolute privilege like the attorney-client privilege, can also afford some added layer of protection to the materials generated during the investigation.[13]

As documentary evidence is analyzed and the investigatory team begins to interview witnesses, counsel will face some of the most complicated strategic choices of the investigation – dealing with employees whose conduct may be imputed to the corporation but whose current interests may or may not be adverse to the company. Absent a "smoking gun" document implicating an employee in wrongdoing, the status of the employee will not generally be clear until after that person participates in an interview. During an internal investigation interview, a key obligation of counsel is to clarify that the counsel for the company does not represent the employee; this is achieved by administering a "Corporate Miranda Warning."[14] In 2011, a Special Task Force of the White Collar Crime Committee of the American Bar Association's Section on Criminal Justice advised model language:[15]

- I am a lawyer for or from Corporation A. I represent only Corporation A, and I do not represent you personally.
- I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.
- Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.
- In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss this discussion.
- Do you have any questions?

Some common questions from employees include whether they should obtain their own counsel; generally, because company counsel is not in a position to assess this, company counsel can advise the employee that they are free to do so but should not provide advice on that question directly, as it may constitute legal advice. If, as a natural follow-up, an employee asks whether they will be indemnified for the cost of retaining counsel, company counsel should refer that matter back to the human resources or legal department of the company. Language of company employment agreements and insurance policies will govern the answer to this question. While employment agreements may require employees to comply with all company internal investigations, such agreements can never include provisions which would prohibit an employee from making his or her own report of perceived illegality to regulatory or enforcement authorities.

In some circumstances, it is advisable for the corporation to arrange for a group of employees to be indemnified and represented by separate and 'pool counsel' who can provide their independent professional legal advice to each employee while achieving economies of scale by representing similarly situated employees (i.e. all sales

12 Samuels v. Mitchell, 155 F.R.D. 195, 201 (N.D.Cal.1994) (deciding that disclosure did not constitute a waiver of the work product privilege because the accounting firm was acting as a consultant, not a "public accountant," at the relevant time).

13 Merrill Lynch & Co. v. Allegheny Energy, Inc., 229 F.R.D. 441, 445 (S.D.N.Y. 2004) (holding that the work product doctrine "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." The policy underlying work product protection is "to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.") (quoting United States v. Adlman, 134 F.3d 1194, 1196 (2d Cir.1998) and United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C.Cir.1980)).

14 *Upjohn v. United States*, 449 U.S. 383 (1981); *United States v. Ruehle*, 583 F.3d 600, 604 (9th Cir. 2009).

15 ABA White Collar Crime Committee Working Group, Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees (July 17, 2009), http://demo.acc.com/advocacy/loader.cfm?csModule=security/getfile&pageid=704931&page=/legalresources/resource.cfm&qstring=show=704931&title=ABA%20UpJohn%20Task%20Force%20Report&recorded=1

representatives who worked in a relevant territory during a relevant time period). This is especially useful if it is anticipated that subsequent government investigators will seek to interview such employees as witnesses and they are unlikely to become targets. Such individuals may, depending on the situation, enter into oral or written joint defense agreements with the corporation, which can facilitate communication for the duration of the investigation.

Even after providing the Corporate Miranda, the interview of the employee can still create challenges if counsel reasonably anticipates that the investigation will be pursued by the U.S. Department of Justice because of a recent memorandum on "Individual Accountability for Corporate Wrongdoing" issued by former Deputy U.S. Attorney General Sally Quillian Yates in 2015.[16] This memorandum has had the effect of increasing the tension, and, in certain respects, reducing the candor, between corporate counsel and employees during interviews because it states that companies are obligated to disclose "all relevant facts" concerning individual conduct before receiving any cooperation credit in federal investigations.[17] This sweeping change to previous guidance had immediate impact on corporations, as DOJ attorneys also were encouraged to proactively investigate individuals (instead of waiting for companies to provide information) and to compare the information provided by the company with the results of their own investigation to determine whether the company's disclosure is adequate. Additionally, in situations where the corporation settles with the government while investigations of individual employees are ongoing, the corporation's settlement agreement will require the company to continue to provide the government with information about the individuals.

In this context, many companies may eventually choose to waive the attorney-client privilege in a limited manner concerning the facts that an individual provides in an interview. While it is the company's right to do so in pursuing its interest, the net effect is an increased hesitancy on the part of employees to speak candidly or enter joint defense agreements with the company. This in turn leads to a reduced ability for the investigation to gather facts as quickly as was once expected. This can have implications on the company's substantive ability to obtain cooperation credit: where a corporation is making a good faith effort to quickly understand the breadth of an issue before reporting it to regulators, while at the same time an employee is incentivized to forego the internal compliance process and report directly to regulators in order to collect a 'bounty' such as that offered by the Securities and Exchange Commission's Whistleblower's Program,[18] delay caused by employee reticence can severely impact a company's ability use its investigative tools and gain a comprehensive understanding of the conduct at issue before and employee reports. A late disclosure is viewed as much less useful by the regulators. Reticent employees can also lead to a company underreporting an issue to regulators, or not implementing sufficient remediation programs to address the breadth of an issue.

A successful investigation will help employee witnesses to understand that candor will only help the company succeed in gathering sufficient facts to most efficiently end potential misconduct and advance its goals of achieving compliance and good business practices.

Deliverable

Depending on scope requested by the 'client' of the investigation, the end product may be either oral or written. Oral reports can be useful in situations where the company or its board can take decisive action to adjust a clear policy, discipline an individual employee,[19] or rule out a negative assumption that had been perceived prior to the investigation. If potential legal exposure of substance is uncovered, there is likely to be a written disclosure at some level, though full reports are less common because

16 Available at https://www.justice.gov/archives/dag/file/769036/download

17 The "Yates Memorandum" is the latest in a long line of guidance documents that shape the enforcement landscape of white collar matters, but it is the first to place individual culpability front and center. In 1999, then-Deputy Attorney General Eric H. Holder issued a policy memorandum entitled "Federal Prosecution of Corporations" that set forth factors to guide Department attorneys in deciding whether to charge a corporation with a crime. In December 2006, Holder's successor, Paul J. McNulty, issued a memorandum that revised those charging guidelines to require prosecutors to consider a company's cooperation and self-disclosure in deciding whether to charge the company. Most recently, in 2008, then-Deputy Attorney General Mark Filip issued his own memorandum on the topic, which revised the previous memoranda and established the operative Department guidance on prosecuting business organizations.

18 15U.S.C. 78a § 21E.

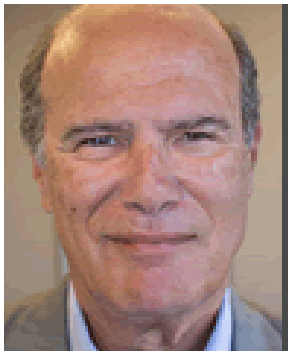
19 If a recommendation for adverse employment action against an employee is contemplated, even when the employee is a participant in damaging conduct, extreme care must be taken to avoid even the appearance or retaliation for any individual who has reported alleged wrongdoing by the company. The Sarbanes-Oxley Act, 18 U.S.C. § 1514A, and its regulations at Section 806 at 29 CFR 1980 prohibit retaliatory actions against employees who report allegations of 8 U.S.C. § 1341 (fraud and swindles by mail or other interstate carrier); 18 U.S.C. § 1343 (fraud by wire, radio or television); 18 U.S.C. § 1344 (defrauding a financial institution); 18 U.S.C. § 1348 (frauds involving securities); SEC rules; or other fraud against shareholders.

of the risks associated with generating potential admissions, providing a blueprint for a plaintiff or regulator that analyzes the undesirable conduct in more detail than they would likely be able to do otherwise, the risk of inadvertent disclosure or leak to the press, and the reality that circumstances and potential defenses can shift substantially over time. Often an executive summary that documents the scope and timeline, describes the conduct and the key witnesses, and focuses heavily on remediation will suffice.

For public companies, some findings, such as environmental issues,[20] trigger mandatory reporting, other disclosures will be made based on an assessment of whether the company views them as material. However, the timing of the disclosure may have to be balanced against a potential voluntary disclosure of such information to an enforcement authority. Current practice is to provide enforcement authorities with the underlying key exhibits gathered and used during an investigation, while either withholding or redacting memoranda that were prepared pursuant to the privilege. Hollinger Int'l Inc. v. Hollinger Inc., 230 F.R.D. 508, 515 (N.D. Ill. 2005) (company waived privilege to provide factual portion of investigation report to the SEC, but was not obligated to disclose redacted content that included mental impressions of counsel). The ability to directly utilize the source documents, which are not themselves privileged, can allow the company to disclose its conduct in a manner that most directly responds to the government's view of the case, leading to a more tailored resolution and a reduced prospect of follow-on litigation.

Even in cases where a fine or other penalty from a regulator cannot be avoided, using the knowledge gained through an internal investigation to craft a comprehensive settlement proposal that contextualizes the conduct, offers thoughtful mechanisms to end and prevent misconduct, and demonstrates a good faith effort remediate its effects, will likely result in a more favorable disposition from the enforcement agency and advance the client's goal of returning to compliant business practices as expeditiously as possible.

20 17 C.F.R. § 229.101.



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Moving between the public and private sectors, Bill Codinha has led some of the highest profile governmental investigations conducted in the past 20 years and now defends corporations and individuals caught up in similar investigations. Bill brings his unique and effective experience to the defense of all of his clients..

Bill leverages his years of experience defending individuals and corporations who are the subject of government investigations. As a prosecutor, Bill tried jury trials in all of the courts in Massachusetts and ran major investigations for the federal government in Washington, DC. Currently, Bill focuses on the defense of investigations and cases brought by myriad federal agencies and United States Attorneys' offices as well as investigations and cases brought by the various state attorneys general offices.

Services

- Government Investigations & White Collar Defense
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Recognition

- Selected by his peers for inclusion in The Best Lawyers in America© 2019 in the field of Commercial Litigation; listed in Best Lawyers since 2014.
- Recognized for exceptional standing in the legal community in Chambers USA: America's Leading Lawyers for Business 2018 for Litigation: White-Collar Crime & Government Investigations (Massachusetts); also recognized in Chambers in previous years
- Named as one of "Boston's Top Rated Lawyers" in the 2012-2016 Editions, White Collar
- "Massachusetts Super Lawyer" in Criminal Defense, White Collar, based on a peer-review survey by Thomson Reuters (2004–2016)
- Appointed by the Massachusetts Supreme Judicial Court as Special Counsel to the Commission on Judicial Conduct to investigate a sitting Massachusetts judge (2011–2013)
- Commissioner, Massachusetts Judicial Nominating Commission, by appointment of Governor Deval L. Patrick (2013–2015)
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A Recipe For Legal Project Management: Look To BBQ Champs
Anthony Rospert

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.

Budgeting for Litigation: Obtaining Efficiencies and Meeting Client Goals
Brian Lamb and Tony Rospert

"We must consult our means rather than our wishes," George Washington prudently observed. Although he was addressing wartime budgeting, his words resonate with today's corporate clients who are pressing their inside and outside litigation counsel to rein in litigation costs. Since 2009 clients have increasingly sought to reduce litigation costs by asking outside law firms to cut their rates. But cutting rates alone is not a sustainable strategy to achieve long-term savings when managing complex or recurring business disputes. That's why some forward-thinking clients are requiring more from outside law firms to control costs and deliver more value.

So what can outside lawyers do to control costs and deliver more value to clients? There are many tools in the toolbox, including legal project management (LPM), process improvement, alternative fee arrangements/value billing and flexible staffing models. Thompson Hine embraces all of these in its approach to innovative service delivery. LPM tools and methodologies drive greater predictability and client communication, ultimately maximizing value to clients. Streamlined and standardized processes yield more efficiency and additional cost savings. Value pricing arrangements, as an alternative to the traditional billable hour, can meet a client's need to cap risk or achieve predictability. And flexible staffing models allow the law firm to use the right lawyer at the right price for each task in the litigation, thereby containing costs without sacrificing quality. Consider one other useful but underutilized tool for delivering more value: a customized litigation budget. Of all the crucial documents a trial lawyer will create during the life of a complex dispute – such as a well-drafted complaint, a comprehensive motion for summary judgment or flawless jury instructions – a sound litigation budget is arguably one of the most important. Outside counsel should view preparing a litigation budget not as a burden, but as an opportunity – an opportunity to collaborate with the client, to demonstrate a willingness to share risk, to minimize surprises and to maximize the chances bills will be paid without issue or delay. Moreover, a sound legal budget enhances communication and transparency regarding the ongoing progress of the matter, a goal shared by the client and the trial lawyer.

Litigation Budgeting: Thompson Hine's Standardized Approach

The challenge for a law firm is to build a culture that embraces budgeting as an opportunity, despite the uncertainties of litigation. At Thompson Hine, we have rallied around four key principles:

1. Standardize and simplify the budgeting process.

2. Give trial lawyers the right technology.

3. Take advantage of prior efforts and prior results.

4. Demonstrate commitment inside and outside the firm.

Using these principles, we have designed our own proprietary budgeting software that is available on every trial lawyer's computer. With this software, the trial lawyer can readily create a customized budget with sufficient detail to enable the client to make informed choices about scope, staffing and resources.

Our proprietary budgeting program is the product of collaboration among trial lawyers, IT specialists and our Director of Legal Project Management. Its user-friendly interface includes a series of prompts, drop-down menus and suggested possibilities drawn from the collective experience of our entire litigation group. Similar to a tax preparation program, the budgeting software asks questions and prompts the attorney to consider various aspects of the litigation planning process. It allows the lawyer to adjust standard budget elements for maximum customization of the budget, while still drawing on the collective wisdom of the firm's past engagements. And it automatically performs all calculations, eliminating the potential for errors due to incorrect (or deleted!) spreadsheet formulas or manual miscalculations.

At its heart, the budgeting software prompts the lawyer to plan the anticipated work on the matter by reference to the standard ABA litigation task codes plus a proprietary set of firm-developed sub-task codes. Using high/low ranges to bracket the expected spend for each timekeeper and task,

the program accounts for some of the uncertainty inherent in budgeting long-term future events. The software also accounts for the element of time: The lawyer estimates the start and end date of each task (or phase), giving the client a good picture of the expected timing of its legal expenditures in future periods.

Tracking Performance

After one creates a litigation budget, the job is only half complete. An important element of LPM is regular periodic reporting of actual billings versus budgeted billings throughout the life of the matter. Thompson Hine has invested in Budget Manager, a comprehensive software package that tracks budget-to-actual data. Whether the client requests it or not, our timekeepers code time entries for all matters; these codes correspond to the budgeted task codes, enabling Budget Manager to track budget-to-actual data in real time. We then can create reports that contain detailed budget-versus-actual statistics by timekeeper, phase and task, and share them with the client. If the unexpected happens, we are in a position to promptly advise our client and discuss options.

Takeaways

In light of escalating litigation costs and organizations' shrinking budgets for legal services, corporate clients are challenging their law firms to offer new and innovative ways to achieve their goals more economically. As part of a comprehensive, disciplined approach to managing legal projects, trial lawyers and their clients should embrace litigation budgeting as a positive, concrete way to help control costs, improve efficiency and provide the transparency and accountability clients need to better manage their resources and expectations, ultimately increasing the value clients receive for their legal spend.

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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.

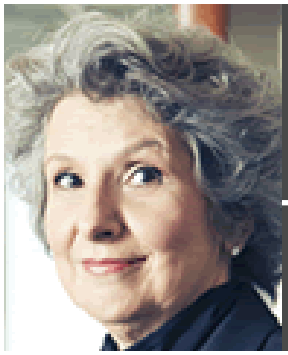
Litigation can prove time-consuming and become costly, so for many disputes there may be more effective methods of resolution than traditional court litigation. Although Tony has an impressive record of courtroom achievements, he seeks to optimize case outcomes while managing the costs, time and stress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

Practice Areas
- Business Litigation
- Securities & Shareholder Litigation
- Environmental

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
- Benchmark Litigation Under 40 Litigation Hot List, 2018
- 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



CRISIS MANAGEMENT AND PROVIDING THE SUPPORT YOUR CLIENT NEEDS

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Don't You Worry 'Bout a Thing: Crisis Management and Providing the Support Your Client Needs
Cheryl A. Bush and Lena Gonzalez

Product recalls. Regulatory investigations. Mega lawsuits. Every day, they are all over Twitter. Yikes.

Most old adages are old for a reason. They're true: Failing to plan is planning to fail. So, what can corporate leaders do – now – to keep their Company out of the news in the future? The answer lies in strong preventative measures, quick movement in response to potential problems, and measured remedies that don't do more harm than good.

Establish scrupulous ethics and compliance strategies

Study the investigation protocols and expectations of government agencies that regulate (or just comment on) your industry. These provide the framework for corporate preparedness. For example, published memos and the U.S. Attorney's Manual tell us that the Department of Justice considers "the existence and effectiveness of a corporation's pre-existing compliance program" in evaluating its liability.[1] (Note the word "pre-existing.") And, if a corporation has "established corporate governance mechanisms that can effectively detect and prevent misconduct," then DOJ charges are less likely.[2] (Note again the word "established.") Impactful compliance programs should include fully informed, independent directors, a Code of Conduct signed by each employee, independent auditing procedures, fulsome information sharing among appropriate Company employees, a structure to escalate potential recall or investigations issues, and effective reporting processes that protect against retaliation. And, if the Company is investigated, the DOJ, like other agencies, consistently emphasizes the importance of speedy and thorough cooperation.

Create a rulebook

But a compliance program can only be effective if the Company understands the rules of the game. What regulations must the Company comply with? In addition to these "minimum" standards, what internal processes does the Company require? What variation from these regulations or processes is cause for concern? At what point is the project manager advised? Upper management? Create a decision tree. Differentiate a crisis from an emergency response. Scenarios designated "emergency" require immediate intervention and assistance, while those designated "crisis" may not. Involve the marketing and public relations divisions. Customer satisfaction and company reputation must be protected. And put it all down in writing—that leaves no room for debate if problems arise later.

1 U.S. Attorney's Manual 9-28.300 (U.S.A.M.).

2 U.S.A.M. 9-28.800.

Establish a chain of command

Assign a potential recall or investigation to one senior executive. Choosing the right individual to be "Lead" depends on big picture concerns: the gravity and complexity of the investigation, the authority that executives will need to execute appropriate strategy, the size of the company, and its organizational structure. The decision might also be guided by the subject-matter of the investigation: Is this a "Safety Office" concern? One for the Legal Department? Human Resources? But these institutional considerations aside, the selection also depends on more personal ones. Has the individual being considered for Lead ever been at the "root cause" of a prior recall or investigation? Do they have the authority to form, propose, and execute an appropriate strategy? Are they able to project calm, be the center of the hurricane? Can they make employees feel "safe" enough to be truthful and see the Company through this? A structured chain of command with a single strong manager guiding the team provides clear direction and stability in a time of uncertainty.

Identify the team

Once selected, the Lead should put together a cross-functional, comprehensive team and identify and communicate roles and responsibilities of each member. One member must oversee and report on daily (or even hourly) progress. It is crucial to establish relationships across the disciplines to ensure effective communication.

In the case of an internal investigation for a matter of "crisis" proportions, the team will ideally be staffed (mostly) with individuals outside the corporation. While outside lawyers are more expensive than in-house counsel, they add experience and expertise in corporate investigations, different resources, and opinions that are impartial (or more likely to be viewed that way). In-house staff can assist these outside experts by guiding them through company structures and helping identify key personnel.

Manage the message

Before a crisis arises, identify the communications team who will work with the Lead and advise internal (management, finance, compliance, marketing, public relations) and external (reporting to government agencies, company auditor) stakeholders.

When an event happens, the communications team should swiftly draft a holding statement: the initial statement to manage the message to the public. The holding statement should include the essential, indisputable facts of the incident and outline a preliminary response plan sufficient to assure the public that the company is actively pursuing a solution. An effective holding statement will (i) reach the public quickly, (ii) be informative but easy to read (i.e., not technical), (iii) highlight public safety as a priority, (iv) provide a timeline and forum for questions and comment, and (v) provide a timeline for the release of follow-up information.

Establish scope of event

On the investigation side, the investigation team should evaluate and define the seriousness and scope of the investigation. The DOJ says that the investigation should be "tailored to the scope of the wrongdoing."[3] The company must therefore develop an investigation sufficiently broad to obtain all appropriate information while keeping the investigation manageable and cost-effective. The DOJ acknowledges that "it is reasonable to take resources—time and money—into account."[4] And in truly serious cases where government involvement is all but assured, a wise company will work with the relevant government agency to craft a sufficiently comprehensive investigation that still appropriately conserves resources. Assistant Attorney General Leslie Caldwell has described what some limits might look like:

> [I]f a company discovers a[]…violation in one country, and has no basis to suspect that violations are occurring elsewhere, we would not necessarily expect it to extend its investigation beyond the conduct in that country. On the other hand, if the same people involved in the violation also operated in other countries, we likely would expect the investigation to be broader… To the extent a company decides to conduct a broader survey of its operations, that decision,

3 Acting Associate Attorney General Bill Baer Delivers Remarks at the Individual Accountability at American Bar Association's 11th National Institute on Civil False Claims Act and Qui Tam Enforcement, Washington, D.C. (Thursday, June 9, 2016).

4 Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the Compliance Week Conference, Washington, D.C. (Tuesday, May 19, 2015).

> and any attendant delay and cost, are the result of the company's choices, not the department requirement.[5]

Ultimately, a government agency will hold the corporation responsible not only for the underlying events, but also for manner in which the investigation is conducted.

If it's not in writing, it never happened

When directing a corporate investigation, whether initiated internally or externally, documentation is critical. Before a crisis happens, establish documentation protocols for investigation procedures, ordinary business practices, and the rulebook described earlier. For example, documentation of projected and updated timelines, meeting minutes, product decisions and findings should be generated real-time as a matter of course. With regard to recalls, documentation should include decisions and implementation of decisions; reasons for decisions; internal and external communications relating to the events underlying the recall and the recall itself; timelines, both projected and actual; course of action to ascertain the appropriate recall scope; and engineering directives and root cause analysis. As to more routine events, standardized investigation reporting forms ensure that all relevant information is collected and disseminated in the right way.

Even the best executed investigation may fail to bear fruit. In that case, the company must be able to demonstrate exactly what action was taken and what information was collected. Frequent communication with the appropriate governmental agencies, well-documented protocols and procedures, and careful documentation concerning the information that is collected should be helpful to demonstrate that the investigation was appropriate and thorough.

Aggressively pursue all appropriate information

Another true adage: The cover-up is often worse than the crime. So, to head off a later suggestion that the company destroyed evidence along the way, the company should take all available steps to identify and preserve relevant evidence as quickly and efficiently as possible. An advisable first step is instituting an information hold. The investigation team should next be given complete access to all sections of the company where relevant documents might live. The company should also consider making available to the investigation team employees with special knowledge of corporate structures (e.g., human resources, information technology, general counsel's office, and accounting). If a company is concerned about document destruction, it might consider retaining a third-party document collection vendor to protect existing documents or a computer forensics expert to recapture deleted information.

Organize attorney-led employee interviews

The vigilant company should use outside lawyers at every stage of an important investigation, including witness interviews. Attorney involvement can better protect sensitive information gathered during the investigation, shielding attorney-client communications and providing work-product to investigation-generated documents. Attorneys also provide substantive expertise on the subjects under investigation and may help to forecast potential pitfalls. But note that the "privilege advantage" could be defeated if the attorneys record interviews, which arguably lack an attorney's mental impressions and analyses, and are more likely to be considered "purely factual" and subject to discovery. A privilege fight might also develop if attorneys themselves fail to handle the interviews. So, if attorneys do not conduct the interviews, investigation protocols should be clear that (1) the interviews are conducted at the direction of counsel; and (2) the primary purpose of the interviews is to assist counsel in rendering legal advice to the corporation.

Recent investigations demonstrate the importance of lawyers in an investigation. An internal investigation involving Kellogg Brown and Root spurred a protracted fight over privilege—in part because lawyers were not in control of every relevant stage of the investigation.[6] And at the ugly end of the spectrum, in Wultz v. Bank of China Limited, the court found that an investigation was not at all privileged, where attorneys really only became involved after the investigation had been

5 Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the New York University Law School's Program on Corporate Compliance and Enforcement, New York City, NY (Friday, April 17, 2015).

6 In re Kellogg Brown & Root, Inc., 796 F.3d 137 (D.C. Cir. 2015); In re Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).

completed.[7]

Identify and address conflicts inherent in witness interviews

When conducting witness interviews, the company must be mindful that its interests and an individual's interests may not be entirely aligned. Witnesses must be so advised. The interviewing attorney should issue what are known as Upjohn warnings, termed for the groundbreaking Supreme Court decision delineating the attorney-client privilege in the corporate context. These warnings should explain that the attorney's role is as lawyer for the corporation, stress that the lawyer does not represent the employee, explain that the privilege belongs to the corporation alone, describe the purpose of the investigation, and request that the interviewee keep the matter confidential. Neglecting to extend such disclaimers could make it difficult to use employee statements in later legal proceedings.

And individual employees must understand that the risk to them is real, as the DOJ has not-so-long-ago described its plans to pursue corporate individual wrongdoers. The DOJ has since successfully prosecuted the former CEO of Peanut Corporation of America (after a salmonella outbreak). Given that the DOJ has increasingly scrutinized individuals and given that it has also encouraged corporations to identify those individuals who may have been involved in misconduct, companies should consider whether even more comprehensive interview warnings are appropriate. Such warnings might remind employees of their Fifth Amendment rights, advise them of their option to retain personal counsel, or perhaps caution the employee that their statements could be surrendered to government investigators who could use the information to pursue civil or criminal action against the employee.

Undoubtedly, these disclosures will be unsettling and may cause employees to become fearful of incriminating themselves. As a result, they may also negatively impact the effectiveness of the investigation and, ultimately, company morale. But transparency is the more prudent course, as the company—or even the investigating attorney—could otherwise face claims of ethical wrongdoing.

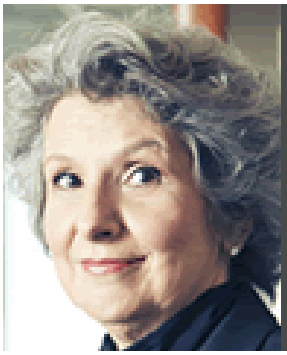
Report with caution

Although attorney-client privilege and work-product protections apply in many (if not most) attorney-led internal investigations, those privileges can be waived if a company creates a lawyer-supplied fact-intensive report of the investigation or distributes an investigation report too broadly. The question of how much to disclose to government agencies such as the DOJ, for example, is one of the toughest questions a company faces in conducting an internal investigation. Officers and directors are often reluctant to make disclosures of any kind, while the agencies expect complete candor when determining whether to dole out any kind of cooperation credit—the key mitigation tool for a company facing a criminal investigation. And although the DOJ no longer requires corporations to waive applicable privileges as an express condition of receiving cooperation credit, they still may not react favorably if a company repeatedly asserts privilege. As a result, the company may be faced with a difficult question - whether to waive privilege in the course of making its disclosures. Few courts have sanctioned "selective waiver," which allows disclosure to government regulators without otherwise waiving applicable privileges. Thus, reports to governmental agencies should be carefully drafted to include only the factual information that is of direct interest to the relevant external authority. These reports should not include attorney analyses or extensive discussions regarding how facts were determined.

Conclusion

Prepare before a crisis strikes. That preparation will allow for swift, thoughtful, and decisive action to minimize corporate exposure and stay off Twitter.

7 304 F.R.D. 384 (S.D.N.Y. 2015).



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Cheryl A. Bush has extensive first-chair trial experience and has obtained exceptionally positive results for her clients, including Fortune 500 companies, by winning 95.97% of her jury trials. She serves as National Counsel for a major automotive manufacturer, handling catastrophic air bag trials and coordinating discovery throughout the country. Her cases, which have spanned 30 states, often involve high-level nationwide media exposure.

Cheryl teaches regularly on trial advocacy, particularly in the area of automotive product liability. She is a Fellow in both the American College of Trial Lawyers and the International Society of Barristers. She is a member of the Product Liability Advisory Council and is engaged in the National Association of Minority & Women Owned Law Firms.

Services

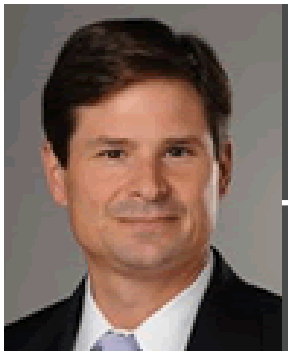
- Advanced Technologies
- Business and Commercial
- Class Actions
- Product Liability
- Securities / Finance

Representative Matters

- Won summary disposition in a multi-million dollar employment suit brought by an executive of a major automotive manufacturer and then successfully defended the win on appeal.
- Secured settlement shortly before trial for pharmaceutical manufacturer.
- Obtained numerous favorable settlements in high-exposure product liability actions across the country against a major automotive manufacturer, including cases involving alleged traumatic brain injury, paraplegia, and other serious alleged injuries.
- Represented a major automotive manufacturer in wrongful death action and secured favorable settlement through strategic motions in limine.
- Obtained no cause following one-week jury trial in case involving negligence allegations related to the death of a truck driver.
- Obtained no cause following two-week jury trial in product-liability action relating to severe upper body injuries suffered in high-speed crash.
- Obtained no cause following three-week jury trial in product liability action arising from accident in which eight-year-old was rendered a ventilator-dependent quadriplegic.
- Obtained no cause following two-week trial involving closed head injuries and broken bones sustained teacher in accident in which vehicle went over a cliff.
- Obtained no cause in highly publicized four-week trial involving seven-year-old child purportedly killed by passenger airbag in a 1995 minivan.
- Obtained no cause following one-week trial in which a 17-year-old attempted to pass another car on a two-lane road.

Education

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



LEGAL TRENDS FOR THE NEXT TEN YEARS AND BEYOND

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Roll with the Changes: Legal Trends for the Next 10 Years and Beyond
Terry Brantley

As with other industries, the legal field has seen significant changes over the past 50 to 75 years. For example, in the 1950s there were only 220,000 lawyers in the United States — one lawyer for every 687 U.S. citizens. Currently we are blessed with 1.3 million lawyers — one for every 246 U.S. citizens.[1] In 1960, the largest law firm in the U.S. was comprised of approximately 125 lawyers.[2] Today, we have international firms like Baker McKenzie with 4,200 lawyers in 77 offices located across 47 countries. In 1961, tuition at Harvard Law School was $1,250 per year.[3] With inflation, the current cost for that same tuition is approximately $10,000 per year. Now, tuition for one year at Harvard is in excess of $60,000.

After steady and consistent change for decades, advances in technology and the 2008 recession dramatically increased the pace of change for lawyers. The recession rocked almost every industry in the U.S. and across the world and law firms were no exception. Clients began demanding more from their law firms for less. They sought higher predictability and a reduction in their legal spend. They also focused on value, efficiency, effective use of information technology and accurate budgets. In sum, clients wanted lawyers and law firms focused on solving their problems with minimum legal spend. There is no doubt the recession drove these changes, but the increasing cost of legal services, coupled with law firms' reluctance to find efficiencies, cannot be overlooked. Indeed, many clients began moving work in-house, thereby reducing demand for legal services. Despite an overall decrease in demand, however, data shows firms willing to adapt to change experienced greater demand, grew consistently and realized higher profits. But, do not be mistaken — change at a law firm is difficult and almost invariably met with resistance.

Change — we all know it is necessary, so why is it so hard?

Despite knowing change is necessary given developments in information technology, as well as client demands, law firms inevitably push back and resist. A recent survey found 69 percent of law firm partners resist most change efforts.[4] This statistic is particularly troubling given 70 percent of law firms not only acknowledge the need for change, but also recognize the pace is increasing rapidly with advancements in information technology and the expectations that come along with those advancements.[5] Moreover, resistance to change is particularly troubling as there is a general understanding law firms are already behind. For

1 What's to Become of the Legal Profession, Michael H. Trotter, 2-5 (2017).

2 Id.

3 Id.

4 Thomas S. Clay & Eric A. Seeger, Law Firms in Transition, An Altman Weil Flash Survey, 15 (2018).

5 Id. at 2.

example, only 5.6 percent of firms are confident they are fully prepared to keep pace with the challenges of the new workplace.[6] Another way of putting it — approximately 95 percent of law firms are not fully prepared to keep up and thrive. This statistic, coupled with the fact pace of change is increasing, does not bode well for firms currently behind. Indeed, it will become more difficult for firms to "catch up" with every passing year.

However, a bigger issue may exist. It is too easy for law firms to believe their resistance to change and failure to keep up is merely an internal problem and not recognized by their clients. Unfortunately for law firms, this simply is not the case. Although 60 percent of law firms believe they are not serious about change due to the resistance of their partners, 90 percent of clients believe law firms are not serious about change.[7] For example, most clients are already keeping data or "scorecards" on how their firms are performing. They are tracking information on case outcomes, how long it takes to close a case and other metrics. Through these analytics, they are gaining competitive intelligence to make meaningful decisions on who to employ.

Of course, this presents great opportunities for firms who can keep pace with necessary changes, making those firms excellent choices for clients who may not have considered using them before the recession.

So, what does this mean and how does it affect our work and relationships with our clients?

Lack of adaptation and inability to keep pace will likely result in several issues. First, as we have already seen, clients will continue with the trend of moving work in-house. Clients are simply unwilling to continue to pay legal fees to those who have not taken the time nor shown the willingness to maximize the value associated with their legal services. Second, clients will look for other ways to pay their lawyers, such as alternative fee arrangements. Third, laws firms will continue to see more pressure with respect to rates, discounts, write-offs and other methods to reduce legal spend and incentivize change aimed at providing more value.

What changes are necessary?

As an initial matter, litigation has become too expensive in the U.S. In most mediations involving commercial litigation, my favorite mediator is known to say, absent resolution of the case, the legal fees incurred by both parties in the case will likely come close to or exceed the amount in controversy. Unfortunately there is a lot of truth to his statement. Given the foregoing, there are options available to law firms wanting to use change to their advantage which include:

I. Demonstrating a Willingness to Re-engineer the Work Processes

Many law firms continue to use the same work processes that have been in place for decades, ignoring the many advancements and changes that have occurred with respect to technology and the increased ability of their staff. Specifically, many law firms are continuing to use young lawyers to perform administrative or process-based work, which is not seen as valuable by the client. There is also an expectation the work can be handled in a more efficient manner and as such, law firms must adapt by identifying and developing more efficient processes. Indeed, recognizing the need for processes in developing more efficient work flows is a key differentiator for many law firms. A recent study indicated that only 19 percent of firms are systematically re-engineering their work processes to account for technological advancements.[8] Given the pressure placed on in-house counsel with respect to legal spend, developing processes to minimize the fees associated with repetitive tasks can greatly assist with retention and development of new business.

II. Providing a Differentiator

Traditionally, differentiators have included items such as practice range, industry experience, geographic footprint, best-in-class quality, expertise and size. Going forward, however, law firms must also account for service delivery, pricing models, project management, technology systems and utilization. With respect to service delivery, two questions arise: who is delivering the service on behalf of the client and is the client receiving the appropriate value associated with that service? More specifically, is the person

6 Id. at 21.

7 Id. at 13-14.

8 Id. at 53.

who is uniquely qualified to handle the task the one performing it? Is there someone at the firm who is just as well qualified to handle the task? If so, could the other person perform the task in a less-expensive manner? Clients expect service to be delivered in an efficient and cost-effective method.

III. Trying Something New

Only 38 percent of law firms are actively engaged in experiments to test innovative ideas or methods.[9] Again, the inactivity of law firms provides a great opportunity for those who are willing to make the effort and expend resources necessary to pursue ideas or methods that may not be commonplace throughout the legal industry. Examples include developing a portal to allow clients to access bills or case files on a real-time or routine basis. Such a system is clearly valued by clients as many corporate clients already have this functionality in place. Certainly a transition to a paperless or semi-paperless environment is an area to investigate. Lastly, perhaps develop or spend resources on what appears to be an emerging practice area or expand to a geographic region important to the clients.

IV. Recognizing Commoditization and Addressing it Head On

Law firms understand technology has allowed many of the functions performed by lawyers to become commoditized. It appears law firms have dealt with this issue in one of two ways. The majority has continued with business as usual, thinking and alleging the work provided is unique or otherwise different. Rarely does this tactic work and, if it does, it has a relatively short shelf life. Other firms have recognized the areas in which commoditization is occurring and have attempted to deal with it by either changing the personnel associated with the work, or engaging project management software or other technological advancements to handle the work more efficiently. Various opportunities exist in this regard including hiring contract employees to handle the work, offshoring the work, outsourcing the work, inshoring the work and computerizing work. Obviously, the appropriate resolution for any commoditized legal work depends on the nature of the work and complexity associated with this type of practice; however, ignoring the issue is never the answer.

Roll with the changes or become obsolete?

It is clear more changes are coming and law firms have to adapt in order to retain clients, attract new clients and remain relevant and prosperous. That said, most law firms still resist changing their business model, despite growing competition. Legal technology continues to take more work from lawyers and law firms need to adjust their traditional practice model to stay in the game. Will your firm roll with the changes or become obsolete?

9 Id. at 17.

History of Change

1950	Today
220,000	1.3 million
1:687	1:246
125	4,200
$1,250	$60,000

Catalysts for Change

70% of law firms acknowledge pace of change is increasing

Uphill Battle

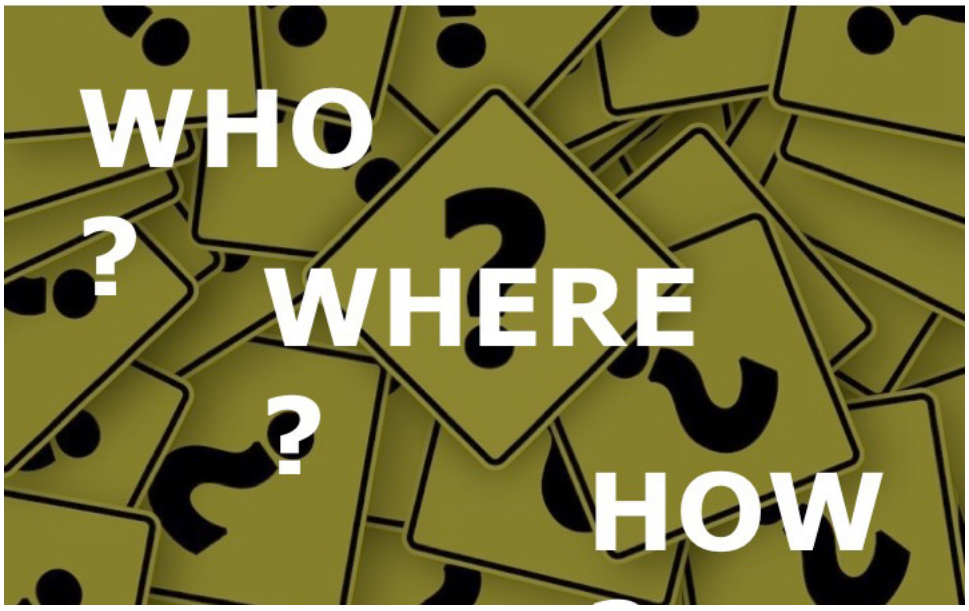
95% of law firms are not fully prepared to keep pace

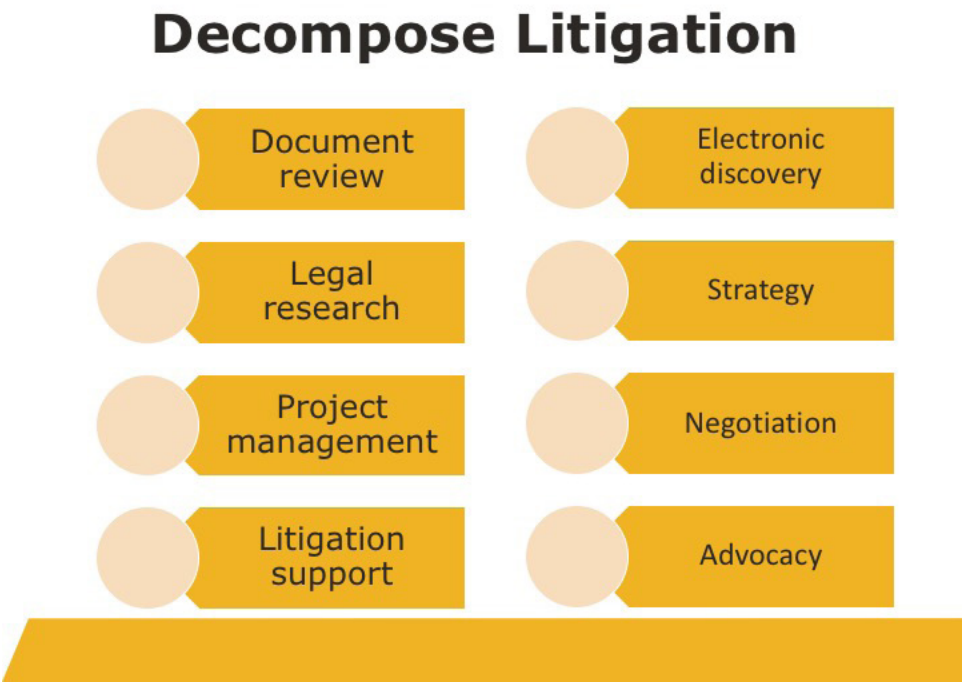
- 90% of clients believe law firms are not serious about keeping pace with change
- Only 19% of firms are systematically re-engineering their processes
- 69% of partners resist change

Change Is Necessary

- Work is moving in-house
- 40% of firms have reported growth in each of the past 3 years
- 63% of firms say they aren't making major changes to their business model because "clients aren't asking for it"

What Change?




Decompose Litigation
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Electronic discovery
Legal research
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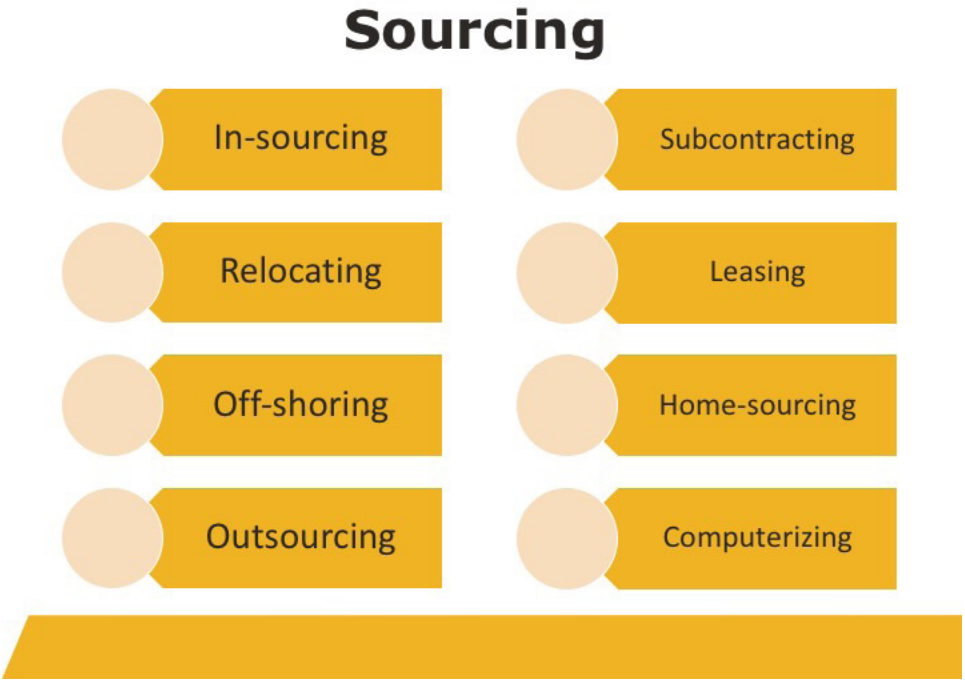
Project management
Negotiation
Litigation support
Advocacy


Sourcing
In-sourcing
Subcontracting
Relocating
Leasing
Off-shoring
Home-sourcing
Outsourcing
Computerizing

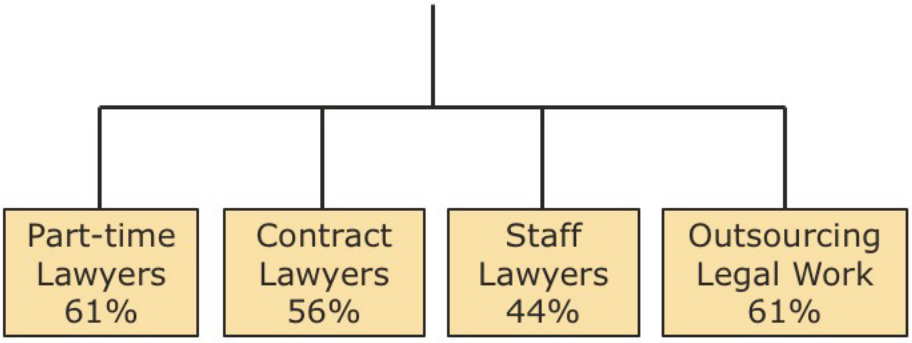
Litigation Sourcing

- Document review
  - Outsourcing
- Legal research
  - Leasing/Outsourcing/Home-sourcing
- Project management
  - In-sourcing
- Litigation support
  - Relocating/outsourcing

Litigation Sourcing

- Electronic discovery
  - Outsourcing/leasing/relocating
- Strategy
  - Traditional
- Negotiation
  - Traditional
- Advocacy
  - Traditional

Sourcing of Work



Establish a Differentiator

- Only 50% of firms believe they have a differentiator
- Differentiated firms significantly outperform non-differentiated firms

Differentiator – Old

- Practice area
- Expertise
- Industry experience
- Geographic footprint
- Quality
- Size

Differentiator – New

- Access to billing
- Metrics
- Access to file
- Semi-paperless
- Alternative fee arrangements

Differentiator – New

- Alternative sourcing for client work
- Develop an emerging practice area
- Project management training
- Innovation summit with clients

Legal Process Management

- Set objectives and define scope
- Identify and schedule activities
- Assign tasks and manage the team
- Plan and manage the budget
- Assess risks to budget and schedule
- Manage quality
- Manage clients and communications

Artificial Intelligence

- Machines completing tasks that typically require human intelligence
- Israel and South Korea are using killer robots- On auto mode they can decide whether to kill or not- without the approval of a human operator.

Take Advantage of the Disruption

- Innovative and differentiated law firms outperform non-innovative and non-differentiated law firms
- Only 38% of firms are engaged in experiments to test innovative ideas or methods

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Terry O. Brantley currently represents clients in Georgia and South Carolina in a wide variety of tort actions involving both personal injury and property damage. Although Mr. Brantley has handled a broad variety of litigation, his practice primarily focuses on premises liability, products liability, intentional torts, environmental litigation and automobile litigation.

Mr. Brantley has served as lead counsel for large corporate clients, individuals and insurers handling their litigation needs throughout the states of Georgia and South Carolina. This representation has involved advising clients pre-suit, as well as defending the matters through jury trial and appeal.

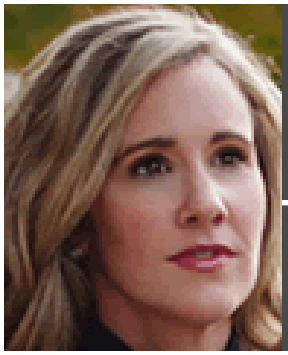
Mr. Brantley graduated from Jacksonville University, cum laude, with a B.S. degree in Mathematics. He received his J.D. degree from the Walter F. George School of Law at Mercer University. While attending Mercer, Mr. Brantley was selected as a member of the Mercer Law Review, Moot Court Board, Order of Barristers and Mercer's National Moot Court team.

Following graduation from the Walter F. George School of Law in 1997, Mr. Brantley began his legal career by representing plaintiffs in lawsuits similar to those he currently defends. In 1999, Mr. Brantley joined Swift Currie's litigation team and began his defense practice.

Practice Areas
- Automobile Litigation
- Bad Faith Litigation
- Catastrophic Injury & Wrongful Death
- Environmental Law
- Premises Liability
- Products Liability
- Professional Liability
- Real Estate Litigation
- Trucking Litigation

Awards and Recognitions
- AV Preeminent® Rating, Martindale-Hubbell Peer Review
- Premier 100 Designation from the American Academy of Trial Attorneys (2015)
- 2015 USA – Premises Liability Attorney of the Year (ACQ Global Awards Category Winner)
- Awarded 2015 Premises Liability Attorney of the Year in Georgia by Global Law Experts
- Awarded 2014 and 2015 Premises Liability Attorney of the Year in Georgia by Corporate Intl Magazine
- MS Leadership Class of 2010

Education
- Walter F. George School of Law at Mercer University
- Jacksonville University



THE PRACTICAL EFFECTS OF DAIMLER AND OTHER JURISDICTIONAL RULINGS

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Daimler: Subsequent Confusion and Questions
Mary Clift Abdalla

Despite declining to address personal jurisdiction issues for approximately twenty-five years, the Supreme Court altered personal jurisdiction standards in recent years – in many ways changing the landscape of litigation across the country. Defendants cheered as each of these opinions narrowed the personal jurisdiction doctrine, however, the ramifications are wide-spread. Both defendants and plaintiffs are faced with new challenges and uncertainty as parties deal with the fallout of these opinions. While these opinions appear to balance the scale of jurisdictional issues, Defendants must proceed with caution and examine an array of issues before deciding whether or not to file a motion to dismiss for lack of personal jurisdiction. The need to proceed with caution is juxtaposed with the necessity to file a motion to dismiss for lack of personal jurisdiction at the outset of litigation to avoid any waiver of the defense.

There is no doubt that these uncertainties are causing an increase in litigation costs associated with jurisdictional challenges that did not exist prior to these recent opinions. Defendants are now expending resources litigating personal jurisdiction issues that would have previously been so well settled that there would not have been any valid reason to brief or argue the issues. These costs and uncertainties include expenses associated with jurisdictional discovery, costs associated with the additional motion practice, and costs associated with defending parallel actions in multiple jurisdictions. Additionally, there are still areas of question regarding the ramifications of Daimler, including the status of jurisdiction in class actions and whether or not courts will enforce consent-based jurisdiction. As such, despite the recent Supreme Court's recent attempts to clarify personal jurisdiction, it is obvious that jurisdictional debates are not disappearing but simply finding new avenues of dispute.

What we know:

The Supreme Court's recent personal jurisdiction opinions have clarified that despite deference to plaintiffs' selection of their chosen forum, personal jurisdiction solely concerns the defendants' relationship with the forum. Beginning with the Court's decision in Daimler AG v. Bauman[1] and its subsequent progeny, plaintiffs have faced a higher burden to prove that jurisdiction where they have chosen to file suit is proper, and that prosecution of the suit would not violate the due process rights of non-resident defendants.

In Daimler, the Supreme Court held that general personal jurisdiction could only exist in a forum where a defendant is "at home" which is limited to the corporation's place of incorporation or principal

1 571 U.S. 117, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014). In Daimler, foreign plaintiffs sued foreign corporations in California for acts that occurred in a foreign country. Plaintiffs predicated personal jurisdiction on the fact that one foreign defendant had an American subsidiary that sold products in California.

place of business, unless there are exceptional circumstances. Following Daimler, the Court in Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.[2] clarified that in order to find specific jurisdiction, "the suit must arise out of or relate to the defendant's contacts with the forum."

What is unknown:

A. Consent to Jurisdiction:

An area of law that is ripe for review is whether or not general personal jurisdiction is satisfied through state registration statutes. Although there is an indication that limiting these "consent" statutes aligns with the Court's recent jurisdictional decisons, there is still a conflict among courts as to the applicability of state laws requiring businesses to submit to general jurisdiction as a condition of doing business in that State.[3] Currently, thirty-eight states have rejected that this notion, four states have current precedent in support of enforcement of jurisction, and in eight states, this issue is unclear. Allowing such submission to general jurisdiction pursuant to conditional requirements of doing business in a certain State would obviously expand the jurisdictional reach of States. These ramifications could be far-reaching as noted by the Delaware Supreme Court when it ruled that jurisdiction could not be enforced as part of a requirement to do business in the State.[4]

B. Jurisdictional Discovery:

The Supreme Court has noted that "where issues arise as to jurisdiction or venue, discovery is available to ascertian the facts bearing on such issues."[5] Contrast this emphasis on discovery availability with the recent limitation on the discovery rules, and we are once again left with an unfamiliar situation following Daimler and its progeny. Coupled with the fact that lower court judges are afforded tremendous leeway in making discovery decisions, jurisdictional discovery rulings are haphazard and hit-or-miss.

Prior to the 2015 amendments, Rule 26 of the Federal Rules of Civil Procedure authorized discovery of "any non-privileged matter that is relevant to any party's claim or defense." Rule 26 now authorizes:

> discovery of any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit.

This change is substantial, though it is not yet clear how this change might be utilized in jurisdictional discovery.

Jurisdicational discovery rulings vary across the circuits and include the following general approaches. First, plaintiffs in certain jurisdictions are presumptively entitled to jurisdictional discovery, as long as the jurisdictional facts or allegations are not frivolous.[6] Second, some circuits require that plaintiffs satsify a defined jurisdictional burden before being allowed to conduct jurisdictional discovery.[7] Lastly, some circuits leave the issues as to the availability of jurisdictional discovery to the district court's discretion.[8] Clearly, theses differences should be examined by defendants before deciding whether or not to file a motion to dismiss based on lack of personal jurisdiction.

If the court allows jurisdictional discovery, defendants must then look at what the scope of that discovery might be. State court judges are often notorious for allowing broad discovery in favor of plaintiffs to the detriment of corporate defendants. Even with the federal relevancy require, if necessary facts

2 137 S. Ct. 1773, 1778, 1780, 1781, 198 L. Ed. 2d 395 (2017). In Bristol-Myers, the majority of defendant's operations were in other States and the non-resident plaintiffs did not allege they were prescribed or took the drug at issue in California. The lower court found general jurisdiction existed due to the defendant's activities in the State. The Court of Appeals found general jurisdiction lacking under Daimler, but upheld specific jurisdiction. The California Supreme Court agreed.

3 See Acorda Therapeutics, Inc. v. Mylan Pharm. Inc., 78 F. Supp. 3d 572, 587 (D. Del. 2015), aff'd, 817 F.3d 755 (Fed. Cir 2016), cert. denied, 2017 WL 69716 (U.S. Jan. 9, 2017) (No. 16-360) (holding general jurisdiction existed over defendant because Mylan Pharma consented to jurisdiction when it complied with the Delaware business registration statute by appointing a registered agent in Delaware to accept service of process) compare with In re Syngenta AG MIR, 162 Corn Litig., MDL 2591, 2016 WL 2866188, at *6 (D. Kan. May 17, 2016) ("[E]ven if the Kansas statute requiring consent to general jurisdiction were not deemed improperly discriminatory, it would nonetheless fail to pass muster under the applicatble balancing test.") and Brown v. Lockheed Martin Corp., 814 F.3d 619, 641 (2d Cir. 2016) ("[W]e conclude that the Connecticut business registration statute did not require Lockheed to consent to general jurisdiction in exchange for the right to do business in the state.").

4 See Genuine Parts Co. v. Cepec, 137 A.3d 123, 142 (Del. 2016) ("Our citizens benefit from having foreign corporations offer their goods and services here. If the cost of doing so is that those foreign corporations will be subject to general jurisdction in Delaware, they rightly may choose not to do so.").

5 Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n.13 (1978).

6 See Surpitski v. Hughes–Keenan Corp., 362 F.2d 254, 255–56 (1st Cir. 1966).

7 See Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 456 (3d Cir. 2003) (noting a "threshold showing" required)

8 See Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC, 878 A.2d 567, 583-84 (2005).

are uncertain, the scope of jurisdictional discovery might be so broad as to overshadow the reasons for filing a jurisdictional motion.[9] Additionally, many states might not adopt amendments similar to the federal rules. The timing of jurisdictional discovery presents an additional obstacle. Defendants must be prepared and ready to respond to jurisdictional discovery requests once a motion to dismiss is filed. In a rather ironic twist, in an attempt to escape a certain court, a defendant may open itself up to that court's pro-plaintiff leanings at early stages of the litigation and could quite possibly be forced to produce discovery that could have far-reaching negative implications in not just the current case, but in other jurisdictions. This uncertainty is often a concern for discovery-sensitive corporate defendants with numerous cases across the country.

C. Personal Jurisdiction Over Non-Resident Defendants in Class Actions

The recent jurisdictional changes have also led to a split between federal courts regarding how to determine jurisdiction in class action litigation. Although the Bristol-Myers opinion stated it would not prevent resident or non-resident plaintiffs "from joining together in a consolidated action in the States that have general jurisdiction over [a non-resident defendant],"[10] Justice Sotomayor's dissenting opinion expressed concern that the holding could result in piecemeal litigation and "make it impossible to bring a nationwide mass action in state court against defendants who are 'at home' in different States."[11] She noted, "[t]he Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there."[12]

The concern was not misplaced, as "district courts are in disagreement as to whether, in a class action context, courts can assert personal jurisdiction over the claims of the non-resident, unnamed class members."[13] In a recent case in the Federal District Court for the Western District of Virginia, Morgan v. U.S. Xpress, Inc., a defendant argued the court lacked personal jurisdiction by stating Bristol-Myers "was a 'seminal' case that revolutionized class action practice."[14] The court, however, stated it did "not believe Bristol-Myers Squibb upended years of class action practice sub silentio, . . ."[15]

Instead, the Morgan court explained it agreed with, "'most of the courts that have encountered this issue . . . that Bristol-Myers Squibb's holding and logic do not extend to the federal class action context."[16] These courts have made this finding on two bases. The Morgan court explained firstly, Bristol-Myers only held "the suit" must arise out of the defendant's contact with the state. It noted Bristol-Myers involved a group of individual plaintiffs with individual suits that had merely been joined, a typical "mass-tort" suit. However, a class action involves only one suit, where one or more resident plaintiffs represent other class members. Thus, the question of whether specific jurisdiction exists is based on the one suit which usually involves a resident plaintiff's claim that "does arise out of or relate to Defendant's contacts with the forum."[17] Secondly, these courts hold Rule 23's requirements for class actions (including numerosity, commonality, typicality, adequacy of representation, predominance, and superiority), supply the due process safeguards that were lacking in Bristol-Myers.[18]

On the other hand, other courts have found the Bristol-Myers decision does bar the exercise of personal jurisdiction over claims of non-resident class members against non-resident defendants.[19] Such courts have found that, "[n]othing in Bristol–Myers suggests that it does not apply to named plaintiffs in a putative class action; rather, the Court announced a general principle—that due process requires a 'connection between the forum and the

9 See Daimler AG v. Bauman, 571 U.S. 117, 155, 134 S. Ct. 746, 770–71, 187 L. Ed. 2d 624 (2014) (Justice Sotomayor's concurring opinion that "[t]he majority's approach will also lead to greater unpredictability by radically expanding the scope of jurisdictional discovery.").

10 Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty., 137 S. Ct. 1773, 1778 (2017).

11 Id. at 1784.

12 Id. at 1789 n.4.

13 Sobol v. Imprimis Pharm., 2018 WL 2424009, at *2 (E.D. Mich. May 29, 2018) (citing Chernus v. Logitech, Inc., 2018 WL 1981481, at *7 (D.N.J. Apr. 27, 2018)).

14 2018 WL 3580775, at *3 (W.D. Va. July 25, 2018).

15 Id. at *3.

16 Id. at *5 (quoting Chernus v. Logitech, Inc., 2018 WL 1981481, at *7 (D.N.J. Apr. 27, 2018) (collecting cases)).

17 Id. (emphasis added).

18 Id.

19 See Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840, 860 (N.D. Ill. 2018) (rev'd on class certification issue).

specific claims at issue.'"[20] One court explained:

> Plaintiffs attempt to side-step the due process holdings in Bristol-Myers by arguing that the case has no effect on the law in class actions because the case before the Supreme Court was not a class action. This argument is flawed. The constitutional requirements of due process do [sic] not wax and wane when the complaint is individual or on behalf of a class. Personal jurisdiction in class actions must comport with due process just the same as any other case.[21]

Thus, the Bristol-Myers opinion has left a split in the federal courts on how to treat claims asserted by non-resident plaintiffs in class action lawsuits against non-resident defendants when those plaintiffs' claims do not arise directly from the defendants' activities in the forum state.

D. Access to Federal Court:

In contrast to the above-discussed class action questions, practical application of Daimler and its progeny provide access to federal courts for defendants in cases where that was once an impossibility. The Supreme Court's recent decisions effectively curb plaintiffs' tactics of allocation non-diverse plaintiffs in mass tort actions for purposes of defeating diversity jurisdiction. For example, in a mass action with thousands of plaintiffs, the plaintiffs' attorney would sprinkle plaintiffs from the defendant's home state in actions across the country, thus defeating diversity jurisdiction and preventing removal to federal court. Without the plaintiff from defendant's home state, the case would otherwise be removed. Now with jurisdiction clearly tied to the defendant's home state(s) and/or where the cause of action occurred, plaintiffs' attorneys can no longer strategically scatter the home state plaintiffs for purposes of defeating diversity. If a plaintiff is only connected with a forum state through aggregation with other plaintiffs and the action is not brought in the defendant's home state, then that non-diverse plaintiff should be dismissed for lack of personal jurisdiction and the case should be removed to federal court.

E. Parallel Actions:

Defendants who have a national presence and are named in suits across the country with numerous co-defendants are facing an especially unique challenge. In cases that would once have been brought in one jurisdiction, there are now parallel cases being litigated in multiple jurisdictions. Defendants are named in an initial suit, participate in litigation, and then receive a unilateral dismissal from plaintiff. Subsequently, these defendants are named in parallel litigation in a plaintiff-friendly court where personal jurisdiction exists for claims arising from the same alleged conduct and injuries at issue in the initial case. Although dismissed from the original action, these defendants still have cross-claims pending against them in the original suit and must continue to actively defend in parallel actions in multiple jurisdictions. This results in significant prejudice to a defendant's ability to mount a fair, effective and cost-efficient defense.

Defendants are grappling with how to prevent plaintiffs' manipulation of Daimler and its progeny and how to avoid talking out of both sides of their mouths, so to speak. To allow plaintiffs to proceed with these parallel actions gives plaintiffs an unfair advantage because they get multiple opportunities at every stage of the litigation, including multiple judicial rulings on motions and discovery issues, multiple trials on the same issues and potential double-recovery. In some states, defendants are not allowed to put on evidence of other potentially negligent entities who are not a party to the case. At the same time, defendant is unable to access all potentially liable parties for purposes of allocation of fault and litigation of cross-claims because the court lacks jurisdiction over those parties.

This appears to be a rather new strategy of plaintiffs' attorneys across the country, and as of drafting this article, we are unable to locate any published opinions directly on point. However, some defendants have looked to the following legal arguments when faced with this situation. Do sufficient grounds exist for filing a forum non-conveniens request for dismissal in the subsequent court? Does the jurisdiction recognize a First-Filed Rule? Does the jurisdiction have an Entire Controversy Doctrine, or something

20 Greene v. Mizuho Bank, Ltd., 289 F.Supp.3d 870, 874, 2017 WL 7410565, at *4 (N.D. Ill. Dec. 11, 2017).

21 In re Dental Supplies Antitrust Litig., 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017); see also DeBernardis v. NBTY, Inc., 2018 WL 461228, at *1 (N.D. Ill. Jan. 18, 2018) ("it is more likely than not based on the Supreme Court's comments about federalism that the courts will apply Bristol–Myers Squibb to outlaw nationwide class actions ... where there is no general jurisdiction over the Defendants.").

similar[22] requiring the litigation present all aspects of a controversy in one legal proceeding? Regardless, the argument should be made that such dismissals and refilings are for the sole purpose of gaining an unfair advantage in certain jurisdictions and amount to nothing more than deliberate manipulation and forum shopping that is to be circumvented by courts.

F. Recovery of Costs:

Defendants have a possible avenue for recovery of costs in those situations where plaintiff has filed multiple actions against a defendant and has subsequently dismissed the defendant from one or more actions. Rule 41(d) seeks to prevent forum shopping and other vexatious conduct by plaintiffs by allowing defendants to recover costs they expended in a previous suit, if that suit is voluntarily dismissed and later refiled.

However, there is a split among the federal appellate courts as to whether attorneys' fees are considered "costs" that can be awarded pursuant to this Rule. The Second, Eighth, and Tenth Circuits have upheld attorney fees awarded pursuant to Rule 41(d).[23] On the other hand, the Sixth Circuit has ruled that attorneys' fees can never be assessed pursuant to the Rule, as attorney fees have not been considered "costs" in other litigation contexts.[24] The Fifth and Seventh Circuits agreed Rule 41(d) did not alter the American Rule that attorneys' fees are not generally recoverable as discussed by the Sixth Circuit. However, they determined such fees may be granted if the substantive statute which formed the basis of the underlying suit explicitly allowed an award of such attorneys' fees as costs.[25] The Fourth Circuit agreed with the Fifth and Seventh Circuits in finding attorneys' fees were proper if allowed by a statute on which the suit was brought. However, it went further to find that since the purpose of the rule was a deterrent for "forum shopping and vexatious litigation," that a finding of such vexatious conduct could also support an award of attorneys' fees under the Rule.[26]

Conclusion:

As discussed in this article, it is apparent that despite defendants' initial relief and optimism at the Court's decisions in Daimler and its progeny, defendants are still faced with uncertainties and a continual effort to circumvent conservative jurisdictions and forum-shop by plaintiffs. However, there certainly remain avenues of relief for defendants that did not exist prior to the Court's recent jurisdictional opinions.

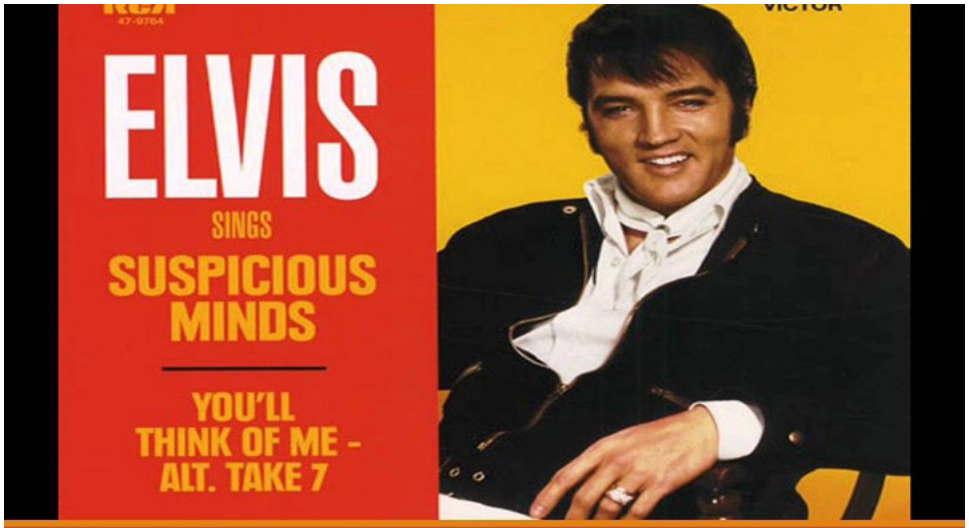
22 New Jersey's "Entire Controversy Doctrine" has been discussed as being the same as res judicata, collateral estoppel, or claim preclusion-type defenses. Rycoline Prod., Inc. v. C & W Unlimited, 109 F.3d 883, 886 (3d Cir. 1997) ("The Entire Controversy Doctrine is essentially New Jersey's specific, and idiosyncratic, application of traditional res judicata principles. . ."). But even this doctrine has been declared inapplicable in certain situations. See York v. Medco Health Sols. of Netpark, LLC, 2009 WL 585885, at *1 (M.D. Fla. Mar. 6, 2009) (plaintiff sued a defendant for the same injuries which were the basis of her suit against two defendants in a prior New Jersey action, but the court refused to apply the entire controversy doctrine to insulate the defendant from suit noting the failure to join the defendant in the original action was not unreasonable, the defendant did not suffer prejudice, and the defendant would not have been subject to jurisdiction in New Jersey at any rate).

23 See Horwitz v. 148 South Emerson Associates, LLC, 888 F.3d 13 (2nd Cir. 2018) (finding the purpose of the Rule would be undermined if the court could not award attorneys' fees); Robinson v. Bank of Am., N.A., 553 F. App'x 648 (8th Cir. 2014) (unpublished) (citing Evans v. Safeway Stores, Inc., 623 F.2d 121, 122 (8th Cir. 1980)); Meredith v. Stovall, 216 F.3d 1087 (10th Cir. 2000).

24 See Rogers v. Wal-Mart Stores, 230 F.3d 868 (6th Cir. 2000).

25 See Portillo v. Cunningham, 872 F.3d 728, 738–39 (5th Cir. 2017); Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000).

26 See Andrews v. America's Living Ctrs., LLC, 827 F.3d 306, 311 (4th Cir. 2016).



Suspicious Minds – Litigation Post-*Daimler*

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JACKSON, MS

2

Life before *Daimler*

Specific Jurisdiction

Cause of action is related to or arises out of forum conduct

Purposeful availment

Reasonable

Focus on conduct

General Jurisdiction

International Shoe – "Continuous and systematic contacts" with forum

Goodyear – Are contacts so "continuous and systematic such that the defendant may be "fairly regarded as home?"

3

Life after *Daimler*

Specific Jurisdiction:

Bristol-Myers Squibb- activities in the forum must give rise to plaintiff's claim

General Jurisdiction:

Daimler – "at home"

- principal place of business
- place of incorporation
- exceptional case

BNSF Railway – "a corporation that operates in many places can scarcely be deemed at home in all of them"

4

Domino Effect – *Daimler* New Standard/New Issues/Lower Court Interpretation

- Major change to litigation landscape
- Required re-writing every first-year Civil Procedure casebook
- Defendants who previously did not bother to contest jurisdiction, suddenly raising personal jurisdiction defenses, even in long-running cases

6

Current Concern: Consent Based Jurisdiction

- "ALL PURPOSE JURISDICTION"
- "grasping" & "exorbitant" - similar theories rejected in *Daimler*
- 38 states (plus DC and VI) - rejected
- 4 states (Iowa, Minnesota, Nebraska, Pennsylvania) – current precedent supports
- 8 states (Alabama, Georgia, Hawaii, Kansas, Kentucky, New Hampshire, Tennessee, Virginia, and Wyoming) - unclear

7

Brown

v.

Lockheed-Martin Corp

"If mere registration and the accompanying appointment of an in state agent – without an express consent to general jurisdiction – nonetheless sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and [Bauman's] ruling would be robbed of meaning by a **back-door thief**."

814 F.3d 619, 640 (2d Cir. 2016) (applying Connecticut law) (emphasis added).

8

Jurisdictional Discovery

- Rulings vary across circuits
- Be prepared to respond to discovery immediately after filing MTD
- Scope will vary at whim of court – might outweigh advantages of filing MTD
- Time presents obstacle – waiver if don't move quickly but many facets to examine

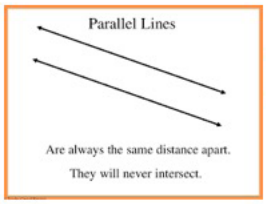
9

Did *Daimler* upend years of class action practice?

- Justice Sotomayor's Dissent in *Bristol-Myers* – makes it "impossible"
- Split among courts:
  - N.D. Ill. – applied *Bristol-Myers* to "outlaw" nationwide class actions
  - W.D. Va. – declined to follow *Bristol-Myers* in defeating jurisdiction

10

Parallel Litigation Common in Mass Tort Cases



- Pre-*Daimler* – case brought in one jurisdiction against numerous defendants
- Post-*Daimler* – parallel cases in multiple jurisdictions
  - New version of forum shopping
  - Cross-claims
  - Missing parties on verdict forms
  - Allocation of fault

11

Rule 41(d) – Recovery of Costs

- Allows for recovery of costs if P voluntarily dismisses and later refiles
- Circuit split whether attys' fees are included as costs
- Purpose to prevent forum shopping and other vexatious conduct by Ps

12

Conclusion

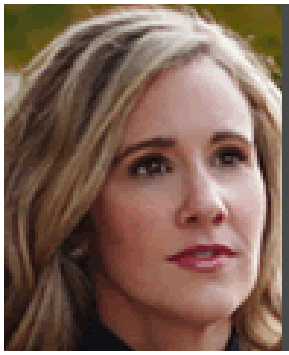
Grass is not always greener... know the other jurisdiction

Be aware of issues at outset of litigation... WAIVER if not timely

Be prepared for jurisdictional discovery

Look for Ps' forum shopping – still happening

Be wary of parallel litigation and savvy about how to avoid



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Going straight into law school from undergrad, Mary Clift was determined to immediately exercise her love for reading and writing, as well as her intense work ethic. Now, as an attorney and a mother, each day is an opportunity for her to do both. Creative and hard-working, Mary Clift is driven by the daily challenges that come with practicing law. To her, work is an opportunity to learn, each day offering her a chance to work harder and be better. As an avid football fan, Mary Clift understands the importance of strategy and approaches her cases with innovative concepts and solutions. When working with Mary Clift, a client can expect to receive exceptional effort from a lawyer who counts every day as a blessing and takes great delight in working hard for her family and her clients.

Practice Areas

- Asbestos
- Benzene
- Product Liability
- Workers' Compensation

Important Litigation Involvement

- Represented a large premises defendant before the South Carolina Workers' Compensation Commission against claims that hundreds of former plant workers developed neurological, cardiovascular, and/or pulmonary injuries as a result of alleged workplace chemical exposure. After a two week trial, our team received extremely favorable rulings. The Commissioner completely zeroed out the claimants in nine of the thirteen cases and found another defendant completely responsible for a tenth case. As cases were pending on appeal, the parties reached a global settlement for the entire inventory of hundreds of pending claims.
- Represented a commercial real estate company in federal court in a case involving the flooding of a shopping center and involving a FEMA Letter of Map Revision. Plaintiff sought compensation related to the flood damage and for the store's closure for 10 months in the amount of approximately $2.5 million. Our team filed a motion for summary judgment, which was granted by the Court; all claims against the client were dismissed, and subsequently the client obtained an award of a portion of costs and fees.

Professional Recognition

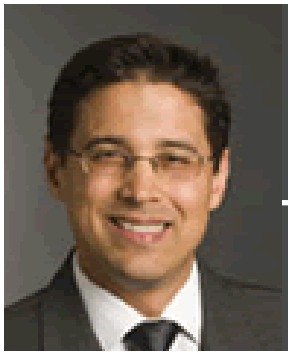
- Top 50 Leading Lawyers selected by the Mississippi Business Journal
- Mid-South Rising Star, Super Lawyers
- Best Lawyers in America®: Product Liability – Defendants

Pr Bono and Community Service

- Jackson Arts Council, Board Member
- McClean Fletcher Grief Center, volunteer
- Mississippi Museum of Art, Spring Gala planning committee
- Junior League of Jackson
- Habitat for Humanity, volunteer

Education

- University of Mississippi School of Law, J.D. (cum laude)
- University of Mississippi, B.A. (summa cum laude)



PANEL DISCUSSION: PREPARING FOR TRIAL FROM THE IN-HOUSE COUNSEL PERSPECTIVE

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Panel: Getting Ready – The Challenges In-House Counsel Face Preparing for Trial
Greg Marshall

When deciding to go to law school, I did not envision my professional days spent emailing and taking conference calls, but in court arguing motions and trying cases. I suspect most outside counsel thought the same, only to discover that the practice of civil litigation is nothing like its portrayed. There's no need to cite the statistics. We all know the vast majority of cases settle or resolve through motion practice, often with the litigants never having stepped inside the courthouse.[1] For that reason, those few times we're called to trial as outside counsel, it's cause for excitement, if not outright celebration. We're finally going to showcase our finely tuned advocacy skills too long suppressed by the daily grind of modern civil litigation.

But while as outside counsel we are fist pumping and slapping high fives, our in-house counsel clients don't often share our enthusiasm. While trials can be necessary to protect the company's reputation and dissuade meritless litigation, trying cases isn't a particularly good way of resolving them from in-house counsel's perspective. In-house attorneys are generally charged with resolving litigation quickly and efficiently, and to do so in a way that does not distract the company from its revenue generating activities. That typically means resolving cases through dispositive motion practice or settlement. Contrary to business objectives, trials often present undefined monetary exposure and reputational risk. They require the business to devote resources to activities that typically do not generate revenue.

Once that last summary judgment motion is denied, and that final mediation concludes without a settlement, getting ready for trial presents many challenges that mostly lie on the shoulders of in-house counsel to meet. Unlike the often singularly-minded objective of outside counsel (to win the case), in-house counsel are balancing lots of competing interests, only one of which is to win. We're going to explore some of them.

Can I get a witness?

Identifying the right company witnesses is often the hardest task of in-house counsel. Aside from those few companies who specifically employ individuals whose job description is to provide testimony for the company, no one wants to assume this role. Asking can lead to endless buck passing and ultimately relegation to someone unsuited to the task. That's not surprising. These employees have many competing responsibilities, both professional and personal. Preparation is tedious. The stakes can be high, as juries tend to decide cases based on the relative strength of the live witness testimony. Testifying isn't any fun either. Opposing counsel can be belligerent, and the process can smack of

1 Rodolfo Rivera & Frank Morreale, Can We Learn Anything from Mock Trial Exercises If We Rarely Go to Trial?, 35 No. 4 ACC Docket 58 (2017) ("It is widely accepted that since 2009 almost 99 percent of civil cases are resolved before trial.")

gamesmanship.

The process of designating the right company witnesses generally starts during the discovery phase, so we'll start there. Arguably the most intrusive discovery tool in the arsenal of lawyers suing big companies is Federal Rule of Civil Procedure 30(b)(6) or its state rule equivalent. The Rule obligates a company to designate one or more witnesses to respond to one or more topics of the noticing party's choosing. As the Rule provides no limit on the number of topics, and their scope is limited only by the liberal rules underlying discovery, the Rule is often the source of angst for in-house counsel.

It's not unusual for Rule 30(b)(6) deposition notices to have dozens of topics. They often involve varied areas of the business ranging from engineering to accounting, varied geographic regions, and varied times that may span decades. They may call for knowledge uniquely in the possession of apex level officers, whom the company can't afford to be distracted with litigation. As outside counsel, we guard the gate, ensuring the topics are described with "reasonable particularity,"[2] within the bounds of discovery, and proportionate to the needs of the case, and challenging them when they are not. But once the topics are set, the task of identifying the right witnesses falls squarely on the shoulders of in-house counsel.

There's rarely an opportunity for in-house counsel to identify one or even a small, discrete group of employees with personal, substantive knowledge that cover all the topics, meaning that in-house counsel must often create a witness from whole cloth prepared to testify about "all information known or reasonably available to the organization." Unlike fact witnesses, who are not expected to know everything, Rule 30(b)(6) deponents are answering on behalf of the company. Answering "I don't know" comes with peril, as the mere fact that the company doesn't know something can have great significance.[3]

But it's important to appreciate that the work of in-house counsel identifying company witnesses does not end when discovery concludes, because the company's trial witnesses may not be the same as those designated to testify in response to Rule 30(b)(6) notices. Unlike Rule 30(b)(6), the rules of evidence generally require a foundation in personal knowledge before the witness may testify.[4] In other words, the witnesses the company designated to respond to discovery may be entirely unsuited to present the company's case at trial.[5] Getting ready for trial often requires in-house counsel to start the process anew.

Preparing the witness

With the exception of those few businesses with heavy litigation caseloads who employ individuals whose job description is to provide testimony on behalf of the company, chances are that the employees in-house counsel have identified to present the company's case at trial have little or no litigation experience, and likely have a limited understanding of what the case is about. Preparation starts with educating the witnesses with what the case is about, where their anticipated testimony fits with the company's defense or prosecution of the case, identifying research tasks for the witness to prepare to give their best, most accurate testimony, and then practicing examinations and cross examinations until the witness is comfortable with the process.

When it comes to witness preparation, in-house attorneys have competing interests to balance. Businesses view witness preparation time as a resource allocation question. These employees were presumably hired because they would help the company make money. Every hour spent on the litigation is another hour they are not doing their work. Depending on the employee's position, their distraction can have an appreciable, negative effect on the company's bottom line. While as outside counsel, our primary concern may be winning the case, the concerns of our in-house counterparts

2 William A. Yoder, Amy M. Crouch, & Melissa M. Plunkett, Reasonable Particularity: The Starting Point for Effective Rule 30(b)(6) Depositions, 56 No. 7 DRI For Def. 48 (2014) (analyzing Rule 30(b)(6)'s "reasonable particularly" standard).

3 William Yoder & Melissa Plunkett, Adequate Preparation: Avoiding Pitfalls and Using the Rule 30(b)(6) Deposition to Strengthen Your Client's Themes, 12 No. 2 In-House Def. Q. 16 (2017) (collecting cases that answers during a Rule 30(b)(6) deposition may not bind the corporation in the sense of a judicial admission, but may be used for impeachment purposes).

4 Stephen J. O'Neil, Rule 30(b)(6) Witnesses at Trial, 60-Sep Fed. Law. 70 (2013) (observing that Rule 30(b)(6) does not require "personal knowledge," as the corporation is the deponent and accordingly the witness "presents the knowledge, opinion, or position of the corporation, not of the witness himself or herself.")

5 Of course, the opposing party can generally use the corporation's deposition at trial for any purpose. See, e.g., Fed. R. Civ. Proc. 32(a)(3) and Fed. R. Evid. 801(d)(2) (admission by party opponent), but that does not mean the corporation can introduce the testimony on its own behalf.

and clients are not so narrowly focused.

This tension between the needs of the business and pending litigation can be exacerbated when domestic litigation involves foreign business interests and employees. While most companies with a significant U.S. presence appreciate that litigation is generally the cost of doing business in this country, foreign businesses (or foreign divisions of the same business) may not. The U.S. legal system is unique and does not easily translate to other cultures. With cultural differences and English as a second (or third) language, preparing foreign witnesses for trial in the U.S. presents a different set of challenges that in-house counsel must meet when getting ready for trial.

In electronic data we trust

Business memory does not primarily reside in the memory of its employees. It resides in the company's electronic data, which creates unique challenges when it comes to getting ready for trial. While the duties and hardships imposed on in-house counsel are many and varied when it comes to ESI – commencing with litigation holds and preservation activities with respect to systems that were not likely designed with evidence preservation in mind – getting ready for trial switches the inquiry from location, preservation, and disclosure, to admissibility.[6] Finding the evidence is often the easiest part.

Business data is classic hearsay, inadmissible unless an exception applies. The most often utilized exception is the so-called "business records exception." See Fed. R. Evid. 803(6) (records of a regularly conducted business activity). The exception permits the introduction of business records if: (A) the record is made at or near the time by – or from information transmitted by – someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business …; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness…; and (E) the opponent does not show … a lack of trustworthiness.

The systems businesses establish to house electronic data are set up for efficiency, not admissibility in U.S. courts. The data relevant to any pending case might be several systems removed from the system of record, archived, and awash with codes no longer used. It might be legacy data from an acquisition or merger. The electronic data may be computer generated or auto populated. For these reasons, there may be no one with knowledge to testify about how data was entered into the system or how it was maintained in the ordinary course of business. Or, that person may be located half-way around the world and retired, with no pragmatic means to bring them into a U.S. court to establish foundation.[7] These challenges can be complicated by global privacy laws, restricting the means and process of in-house counsel securing the information from foreign divisions.

While we as outside counsel advise our in-house counsel clients of what is needed, ultimately, the burden of securing the witnesses and information needed to seek admissibility of the company's electronic data at trial is a heavy one that ultimately falls on in-house counsel.

Litigation consultants and mock trials

Another consideration of in-house counsel is when and whether to mock try their cases. There is a robust industry that provides trial consulting services ranging from focus groups, mock trials, and shadow juries, but convincing business leaders that the expense is worthwhile is not always easy. Outside lawyers are experts in logical thinking, but juries are not composed of lawyers. Consultant-led focus groups and shadow juries can help outside counsel develop themes that resonate with prospective jurors, test how potential jurors may react to complex facts and arguments, and can provide insight into whether settlement should be reprioritized. Mock trials can be used as a tool for witness preparation, particularly when the company faces pattern litigation. With the expense of mock trials – and the associated outside counsel fees – ranging in the six figures, the decision to take on this

6 Robert Trenchard & Paul Kremer, Corporate Governance and eDiscovery, in eDiscovery for Corporate Counsel (Thomas West ed., 2018) (analyzing recent cases discussing the perils of failing to issue litigation hold notices and otherwise ensure evidence preservation) and Krystin M. Frazier, Lets Talk Trash: Highlighting How New Case Law Development and the Amended Rules of Civil Procedure Have Fine Tuned the Duty to Preserve, 11 No. 3 In-House Def. Q. 34 (2016) (comprehensive review of the duty to preserve evidence).

7 Daniel J. Capra, Electronically Stored Information and The Ancient Documents Exception To The Hearsay Rule: Fix It Before People Find Out About It, 17 Yale J. L. & Tech. 1 (2015) (theorizing that the ancient records exception to hearsay may apply to electronic data that is over 20 years old, but advocating to abrogate the rule).

expense is not an easy one for in-house counsel to make when getting ready for trial.[8]

Victory at all cost – Not!

Outside counsel fees are treated as a cost center, and those costs escalate dramatically when getting ready for trial. So while as outside counsel we're often singularly focused on victory, our in-house counsel counterparts – and the company we both represent – are focused on cost forecasting and setting reserves. The needs of the business demand predictability and accuracy. In-house counsel do not have the luxury of responding that outside counsel fees are just too hard to estimate, or depend on too many variables. And while it might seem that over-budgeting is prudent, coming in under-budget is just as problematic when the time comes for in-house counsel to explain why so much company money was set aside for litigation when it could have been used for something that might have generated income for the company.

As outside counsel, getting ready for trial – and trying cases – is often the highlight of our practice, but recognizing and treating the challenges it imposes on our in-house counsel counterparts and clients may control whether we get the chance to do so again.

8 See Dahlia S. Fetough & Christopher Land, Mock Jury Exercises, Practical Law Practice Note (Thomas Reuters, 2014), available at http://www.whoi.edu/fileserver.do?id=197864&pt=2&p=205930 for a discussion of the effective use of mock juries.

Panelists

Charlotte Ritz
Associate General Counsel, Fannie Mae

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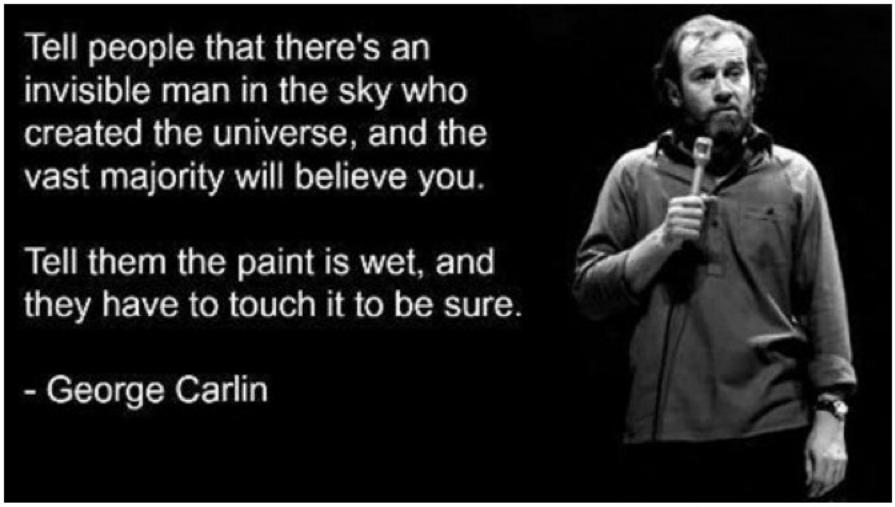
Senior Vice President, Litigation & IP, T-Mobile, USA

Christina Diaz
Assistant General Counsel, GlaxoSmithKline

Vincent J. Montalto
Senior Counsel, Litigation, BASF

F.R.C.P. 30(b)(6)

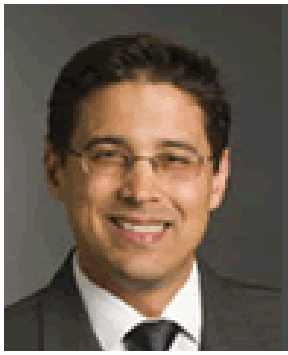
- ✓ The party "may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity."
- ✓ The party "must describe with reasonable particularity the matters for examination."
- ✓ The company "must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify."
- ✓ "The persons designated must testify about information known or reasonably available to the organization."


Tell people that there's an invisible man in the sky who created the universe, and the vast majority will believe you.
Tell them the paint is wet, and they have to touch it to be sure.
- George Carlin

Fed. R. Evid. 803(6)

Records of a Regularly Conducted Activity

- ✓ Made at or near the time by … someone with knowledge
- ✓ Kept in the course of a regularly conducted activity of a business
- ✓ Making the record was a regular practice of that activity…
- ✓ All these conditions are shown by testimony…
- ✓ Opponent does not show that … lack of trustworthiness.



GREGORY J. MARSHALL

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Mr. Marshall co-chairs the firm's Financial Services Litigation Group, focusing his practice on the defense of banks and lenders. Mr. Marshall's clients include national and international banks, regional banks, mortgage lenders and servicers, credit card issuers, automobile finance servicers, credit unions, and money transmitters. Mr. Marshall's practice includes management of regional and national defense programs involving pattern litigation. Mr. Marshall has defended clients in a wide variety of litigation and regulatory matters, including qui tam, class action, and multi-district litigation (MDL). Mr. Marshall has substantial experience litigating claims involving the Dodd-Frank amendments, CFPB regulations, U.S. Treasury regulations and directives, HAMP and HARP, MERS, and lien priority disputes. Mr. Marshall also has substantial experience defending claims arising under the Truth in Lending Act (TILA), the Real Estate Settlement Procedures Act (RESPA), the Fair Credit Reporting Act (FCRA), the Telephone Consumer Protection Act (TCPA), the Unfair Debt Collection Practices Act (UDCPA), and state unfair and deceptive acts or practices (UDAP) statutes.

Related Services

- Class Action Litigation
- Commercial Litigation
- Financial Services Litigation
- Insurance
- International
- Non-Profit/Tax-Exempt Organizations
- Product Liability Litigation

Representative Experience

- Defended and tried bellwether case involving Fair Credit Reporting Act claims against secondary mortgage market participant.
- Defended national mortgage servicer against putative class action claims challenging servicing fees.
- Defended national banks in pattern qui tam litigation regarding unpaid transfer taxes.

Professional Recognition and Awards

- Southwest Super Lawyers, Rising Stars Edition, Banking (2012-2013)
- Arizona's Finest Lawyers
- Top 50 Pro Bono Attorneys, Arizona Foundation for Legal Services & Education (2011)

Representative Presentations and Publications

- "'Show Me The Note' Claims Find New Life in Recent Arizona Decision," Co-Author, Financial Services Litigation Bulletin (February 11, 2014)
- "Ninth Circuit Opens Door for Protracted HAMP Litigation," Co-Author, Snell & Wilmer Financial Services Litigation Bulletin (August 2013)
- "Tax Lien Purchasers Must Give MERS Notice, Says Arizona Appeals Court," Author, Snell & Wilmer Financial Services Litigation Bulletin (June 2013)

Education

- Emory University School of Law (J.D., 1999) - Dean's Fellow; Order of the Barristers; Order of the Advocates
- University of Arizona (B.A., cum laude, 1995)

EFFECTIVE IN-HOUSE/OUTSIDE COUNSEL PARTNERSHIPS

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Time After Time: Effectice In-House/Outside Counsel Partnerships
Keiko L. Sugisaka

Utilizing outside counsel has become a fact of life for most businesses, even in light of increasingly sophisticated and extensive in-house legal departments and a growing trend by companies to bring more legal work in-house. The fact of the matter is that in-house counsel typically face a multitude of demands on a daily basis from internal business clients, human resources, marketing, finance and IT, besides managing litigation and/or internal or external investigations. As a result, in-house counsel often does not have the time or ability to develop a litigation or case management system or obtain substantive knowledge in every legal area the company may encounter. These are all needs that can be fulfilled by able outside counsel. Yet outside counsel can and should do more than simply react to the latest lawsuit brought against a particular client or duly file the client's action as directed. Effective outside counsel seek to build productive and long-term partnerships with their clients and are conscientious about the ways they can make their in-house counterparts' jobs easier, more efficient and with better outcomes for their cases.

The Value Proposition

One of the keys to a successful and effective partnership is recognizing that in-house legal departments are generally considered cost centers for a business and thus need to demonstrate how they—and their outside counsel—are creating value for the company. It is often repeated that every dollar spent for legal is a dollar that cannot be used for R&D, marketing, technology improvements, hiring talent, or meeting shareholder expectations. And when a legal department's budget is often largely consumed by ongoing litigation costs and outside counsel spend, it can be challenging to make a showing of value when the company only sees dollars outgoing, rather than incoming. Besides providing competent and well-priced legal services, however, there are myriad ways that outside counsel can contribute to this value proposition regardless of whether they act as national coordinating counsel for all of the client's litigation, work on a specific portfolio of matters, or are simply handling a one-off lawsuit. While there is no one-size-fits-all model for a working relationship between in-house and outside counsel, the best partnerships occur when a company's business purpose and needs are aligned with its legal goals for a particular matter or matters, which outside counsel accomplishes in a way that minimizes the burden and expense on the client. But how can in-house counsel evaluate and measure the value provided by outside counsel other than just case results? Some key criteria to consider are outside counsel's strategy, quality, cost, communication and collaboration. Value can be achieved when outside counsel is the best fit for a particular matter or matters in light of this criteria.

"One way or another, I'm gonna win ya…" - Blondie

Strategy. Outside counsel should understand the goals, objectives and priorities of the business and in-house team in order to make informed case strategy decisions. These goals and objectives include understanding how important the lawsuit is to the client and how it may or may not impact its business either positively or negatively. Is the case likely to have significant adverse publicity that needs to be quickly quelled and managed? Will the outcome have the potential to significantly impact the company's products or services by protecting or knocking out key intellectual property or competitors? What is the potential impact on relationships with key employees/customers/vendors? Another key consideration is the client's appetite for risk – is the company not afraid to go to trial? Or does the company never want the uncertainty of a trial outcome? It is also important to understand the company's preferred approach for resolving a particular case or type of case. Is early settlement and a quick resolution desired to try and keep costs down and avoid business disruptions? Or will early settlement send the wrong message to other similar pending cases or encourage more claims? Does the company want an aggressive and thorough defense to send a message to other plaintiffs that they cannot count on a quick and easy settlement? Or will prolonged litigation be too much of a drain on internal business and in-house legal resources? And if settlement is the goal, are there timing or approval obstacles for when settlement funds are available? These are just some examples of issues that outside counsel needs to understand to make the decisions that will align with the client's needs and drive strategy. In addition, if the company's goals, objectives or priorities change during the course of the litigation, then those changes need to be timely communicated to outside counsel to determine if any "course corrections" should be made based on the new information. In-house and outside counsel should be in complete alignment on the strategy for a particular case and the reasons underlying that strategy.

Outside counsel can also help clients develop a uniform litigation strategy for a particular type of case or recurring legal issue. Companies shouldn't have to re-invent the wheel with each new lawsuit. Rather, a consistent and consistently executed plan for repeat litigation should be well-thought out and intentional, rather than post hoc. An intentional and consistent strategy is particularly important if a company seeks to develop or establish precedent—or change the law—for certain types of cases or in a particular jurisdiction to further business or legal goals. This long view of strategy, however, is not limited to influencing the "big-picture." Coordinated preparation of company witnesses and expert witnesses, who may appear in more than one case for the client, is also important in order to avoid credibility or impeachment issues caused by inconsistent testimony or opinions. Outside counsel can assist with the tracking and evaluating of witnesses to quickly identify appropriate corporate representatives and experts by specific knowledge and/or testifying skills or experience. Likewise, outside counsel can track and house model pleadings and discovery for similar matters. Consistent written discovery responses and document productions can help avoid accusations of discovery improprieties. Indeed, some national plaintiff firms are becoming familiar with the key documents for a company in similar repeat litigation and are even seeking "sharing provisions" in protective orders to spread knowledge about this information. It is also easier than ever to find written discovery responses and deposition testimony from electronic legal research platforms and on the internet generally. Outside counsel can also help ensure that legal positions taken by the company across cases or jurisdictions are consistent. These are all tasks which inside counsel can and should seek assistance on from outside counsel.

"You're simply the best, better than all the rest…" – Tina Turner

Quality. Quality is not just excellent work product. Quality is also being able to present the client's best case effectively by being able to accurately analyze and assess a case and its strengths and weaknesses, spot issues and key challenges, and develop the critical facts and evidence. Outside counsel provide quality and value when they have the required expertise and experience in the relevant legal subject matter and are well-regarded in this area. Reputation and credentials can and

do make a difference in how opposing parties and judges treat litigants and how they view your case. Expertise and experience also allow outside counsel to knowledgeably predict a case's worth or exposure by either settlement or jury verdict, and thus provide in-house counsel and the company with realistic expectations of case outcomes. The quality and value outside counsel can bring to a case also includes experience with and knowledge of opposing counsel, the assigned judge, local practices or jurisdictional nuances, the applicable jury pool and potential verdicts. In fact, a good relationship or rapport with opposing counsel can help resolve cases, or disputes within cases, quickly and cooperatively and avoid expensive drawn-out litigation. This relationship with opposing counsel can be even more important at the claim level, when outside counsel can facilitate claim resolution and have direct negotiations with opposing counsel rather than incurring much greater legal costs associated with filed lawsuits, unnecessary discovery, motion practice and trial. Quality outside counsel will also be able to leverage local experts and trusted mediators or arbitrators to best help resolve cases.

Many outside counsel also utilize predictive modeling tools, early case assessment tools and other knowledge management resources to assess case risk based on data collected from their firm's own work or data analytics providers, which can provide potential case outcome information for a wide variety of matters and further inform strategy. Moreover, outside counsel's litigation technologies should be leveraged to handle e-discovery and collection of ESI and host document review and production platforms (or use trusted vendors). The services provided by outside counsel should ideally cover all potential needs for the case and client in a cost-effective manner using a firm's economies of scale.

"Come on, come on, listen to the money talk…" - AC/DC

Cost. One of the top priorities of most legal departments is controlling outside counsel costs. While hourly rates are an easy target when considering costs, they are not necessarily a good indicator of how much total litigation costs will be incurred, or whether that counsel will be efficient and cost-effective. What is usually of concern for companies is the variability and unpredictability of legal costs for a matter or matters in the inherently variable and unpredictable world of litigation. Fortunately, a variety of pricing models and alternative fee arrangements exist to accommodate every type of case and pricing pressure including flat or fixed fees, phased fees, capped fees, partial contingencies/success fees/holdbacks or incentive fees, to name some of the common arrangements. No single AFA is typical, rather the best AFA is one that aligns the parties' interests and provides value to both sides, e.g., predictability to the client and profitability to outside counsel. Even if an AFA is not used, budgets—and budget limits—should be established early and clearly. Not only do AFAs and budgets provide desired cost predictability to the client, they also allow outside counsel to plan appropriate staffing for the case and incentivize efficiency.

The use of scoping documents in conjunction with budgets and certain AFAs is another potential tool to address variability and predictability, especially in significant litigation matters. Scoping documents describe the scope of work for a specific matter, e.g., number of witnesses, likely volume of discovery, experts, anticipated motion practice, number of trial days, etc., which can be broken down by phase, e.g., initial investigation, fact discovery, expert discovery, pre- and post-Markman (for patent cases), dispositive motion, trial prep and trial. Legal fees, whether by budget or AFA, can be associated with particular phases and/or tasks. A scoping document should also identify the risks and variables present with respect to the jurisdiction, judge, opposing counsel, local rules and other relevant factors. Scoping documents are helpful to keep in-house and outside counsel on the same page with respect to strategy and work flow, and can be a helpful reference when reviewing how a case is progressing.

Finally, as legal operations and legal practice management personnel become more prevalent, establishing relationship managers, either at outside counsel or in-house, who are responsible for billing reviews, enforcing a client's billing guidelines, tracking matter progress compared to budget or

AFAs, and identifying opportunities for minimizing or reducing expenses are useful to increase efficiencies and help control costs. Moreover, they can make sure the client is receiving necessary fee or billing updates, accruals or forecasts, and manage work flow on the case team.

"Hello, it's me." - Adele

Communication. A key component to any good partnership between in-house and outside counsel is regular and clear communication from both sides where concerns and issues can be raised early and candidly. Every client has different communication preferences so it is imperative to establish who the point(s) of contact are at the client, their preferred form of communication, e.g., email, phone, formal report, text, and how often they want communications and for what, e.g., daily, weekly, monthly or as-needed case updates, copies of every email to opposing counsel, etc. Regardless of form or format, outside counsel should regularly report on the progress of the case to the client, which also provides the opportunity to raise unforeseen circumstances and mitigate surprises. Outside counsel should also know the "lead time" needed by in-house counsel to review and sign off on pleadings, discovery responses, briefs, key correspondence, settlement demands and the like. More often than not, in-house counsel must run these items by internal business partners or stakeholders, which can take significantly more time than simply needing legal department review.

Effective communication between in-house and outside counsel also includes honest feedback, both during a matter and as part of any post-matter review. Outside counsel should solicit feedback from both in-house counsel and internal business partners about what went well and what could have been done better or differently and why. Were there "lessons learned" with respect to witnesses, documents, vendors or strategy decisions? Likewise, there should be a discussion of whether the matter outcome was successful or not and the factors that contributed to that outcome. This post-mortem review should be aimed at replicating favorable outcomes for future similar matters and avoiding unfavorable outcomes or repeatable mistakes.

"We are family…" – Sister Sledge

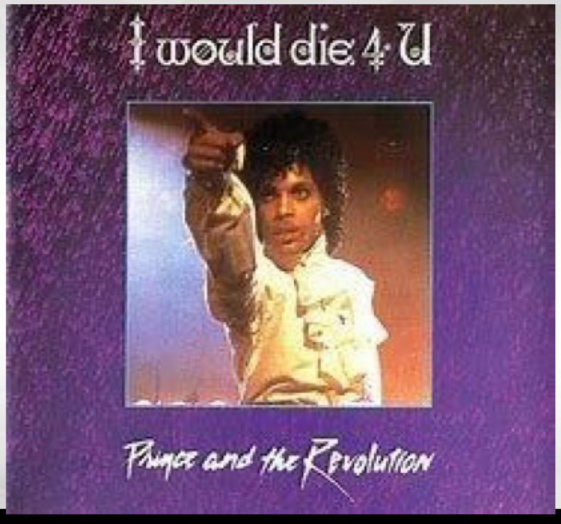
Collaboration. Outside counsel should take advantage of opportunities to collaborate with in-house counsel on issues important to the client. For example, based on either observations from the client's particular case or from other experiences, outside counsel can help identify how a business can improve its internal processes or policies to avoid future litigation and minimize risk. Is there relevant industry news or competitive intelligence that outside counsel can share with the client? Does the firm offer educational or training programs that would be of interest and helpful? Outside counsel should find out what the pressing and recurring issues are for the legal department and business and how they might assist in addressing these issues. This type of collaboration helps deepen relationships with the client – not only does the firm get to showcase its attorneys' expertise in an area or areas, it also allows outside counsel to learn more about the client's corporate culture, business, strategies and needs.

Time After Time: Effective In-House/Outside Counsel Partnerships

Keiko L. Sugisaka
Maslon LLP

MASLON

In-house and outside counsel relationship?



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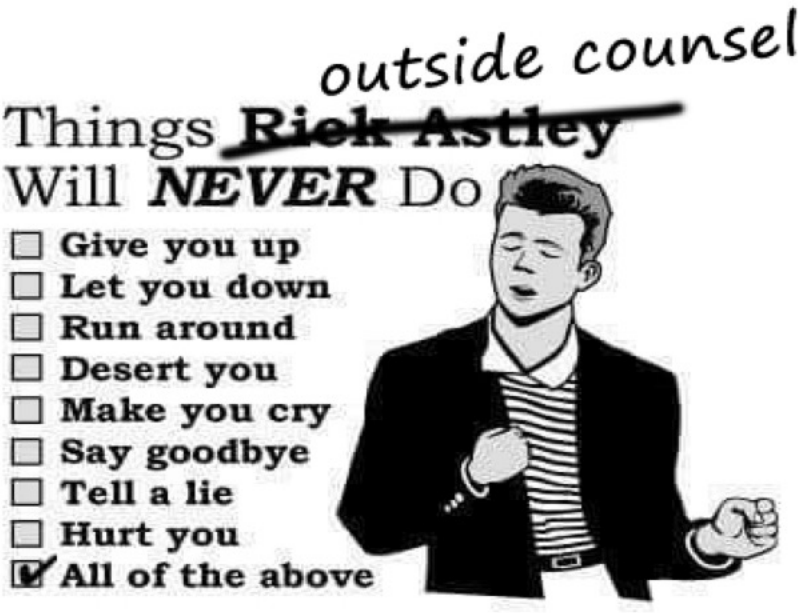
outside counsel
Things ~~Rick Astley~~
Will NEVER Do
☐ Give you up
☐ Let you down
☐ Run around
☐ Desert you
☐ Make you cry
☐ Say goodbye
☐ Tell a lie
☐ Hurt you
☑ All of the above


Providing Value - Strategy
BLONDIE
ONE WAY
OR ANOTHER
britney spears
oops!...I did it again
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Providing Value - Quality

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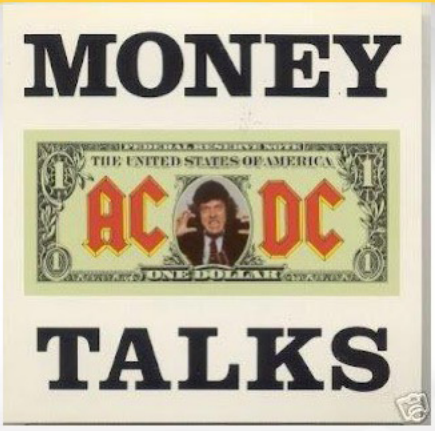
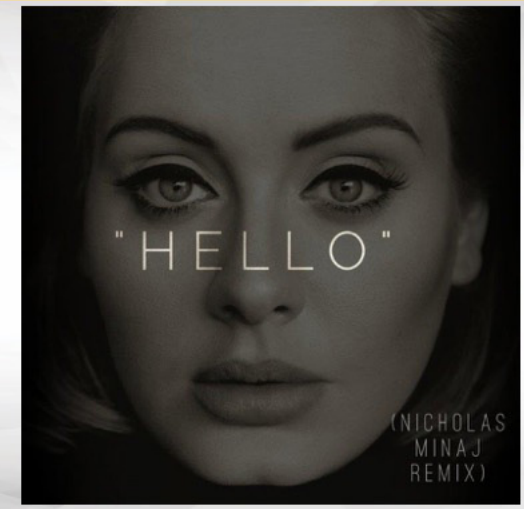
Providing Value - Cost



MASLON

Providing Value - Communication



MASLON

Providing Value - Collaboration

MASLON

In-house and outside counsel relationship?

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Keiko Sugisaka is co-chair of Maslon's Tort & Product Liability Group as well as a partner and trial lawyer in the firm's Litigation Group. She focuses her practice primarily on product liability, complex business, and intellectual property cases, including consolidated and multi-district litigation. Keiko has broad experience successfully representing clients in federal and state courts nationwide involving product liability defense; patent, trademark, and copyright infringement; director/officer liability; trade secret misappropriation; unfair competition; and commercial disputes. She also has extensive experience in all stages of complex and large-scale discovery and e-discovery issues. At Maslon, Keiko serves as a member of the firm's recruiting committee, chair of its technology committee, co-chair of its diversity committee, and as Maslon's member representative in Twin Cities Diversity in Practice, a nonprofit association comprised of Twin Cities law firms whose vision is to create a vibrant and inclusive legal community.

Prior to joining Maslon, Keiko practiced intellectual property litigation with a large national law firm and was an Assistant Attorney General in the Minnesota Attorney General's Office where she represented the State of Minnesota enforcing laws regulating nonprofit corporations, management of charitable assets, and litigating high-profile matters such as health care audits, insurance industry investigations, and fraud cases.

Keiko earned her law degree, cum laude, from the University of Minnesota Law School and earned her bachelor's degree, cum laude, with a double major in speech communication and law and society from Macalester College. She also completed a judicial clerkship with Justice Alan C. Page of the Minnesota Supreme Court (1996-1997).

Areas of Practice

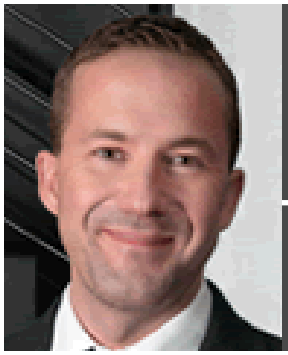
- Business Litigation
- Competitive Practices/Unfair Competition
- Government & Internal Investigations
- Intellectual Property Litigation
- Tort & Product Liabilityn

Recognition

- 2017 Women in Business Award Winner, Minneapolis/St. Paul Business Journal
- North Star Lawyer, Minnesota State Bar Association, 2014-2017 (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, 2017-2018 (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.)
- Top Women Attorneys in Minnesota® list, 2018 (The annual edition of the Top Women Attorneys in Minnesota list features attorneys who received the highest point totals in the previous year's Minnesota Super Lawyers® and Rising Stars balloting, research, and blue ribbon review process.)
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2004, 2009, 2011 (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.)

Education

- University of Minnesota Law School - J.D., cum laude, 1996
- Macalester College - B.A., cum laude, 1993; Majors: Speech Communication, Law and Society



HOW TO OPTIMIZE DISCOVERY IN THE AGE OF SOCIAL MEDIA

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Digging for Gold in a WhatsApp World - How to Optimize Discovery in the Age of Digital Media
Josh Lanning

A few decades ago, a renowned North Carolina trial lawyer was known to grumble that the practice of law was ruined by the Xerox machine. Discovery, and the need to sort through so many separate documents, he complained, had eclipsed the creative, strategic, and rhetorical activities that were the hallmark of good lawyering. But – to understate things - he had no idea what was coming. Lawyers today can only wistfully imagine what it was like to practice in a world where their biggest discovery headache was how many boxes of documents they needed to review. One where they could dictate a letter, and then nothing would happen in a case until, days or weeks later, they received a similarly dictated letter back from their opponent. That world is inarguably quaint compared to today's, in which the practice of law – particularly litigation - is always in the fast lane. In this respect, the practice of law tracks modern trends in society and business, where everyone is a tech addict. Most of you will probably check your cell phone at least once while reading this article. And the same is true of the people and corporate entities that make up our clients.

From a discovery perspective, the exponential increase in methods of communication and data storage can create a huge headache. When preparing a discovery plan, it is hard enough to get a handle on how a company stores and accesses the records on its own systems. A whole new set of problems arises when trying to grapple with the fact that a substantial amount of a company's business occurs on mobile devices that the company does not own. The days of company-issued devices that are strictly controlled by company IT staff are gone for the most part. Today's employees do not want to carry two devices (one work and one personal), particularly when their personal device is often more modern and more capable than anything they might get from work.

So the trend is for companies to adopt Bring Your Own Device ("BYOD") policies, which permit an employee to use a personal device for work purposes. There are many advantages. BYOD encourages employees to keep all information on one device. IT groups are less strained since maintenance issues are handled by a third party. And the up-front cost to the employer tends to be much lower. On the other hand, the BYOD-adopting company has now created a (sometimes very large) set of siloed data repositories that it does not own and over which it may have very little control. Company information may be stored or even transmitted using applications that have no connection to the company's network. And employees may conduct business through mediums that provide the company with very little oversight.

The complexities arising from the BYOD era

are ndless. This article focuses only on a small, but very important issue, namely the litigating company's duties with respect to company data stored on personal devices. Some of that data is less problematic. For example, if the employee uses the device for e-mail using an account that is hosted on the company's Exchange server, those communications should already be present on the company's system. However, where an employee conducts business through the use of a private e-mail account; or text messages; or (even worse) an encrypted communications application like WhatsApp or Signal, the issues are murkier. The law is, of course, rapidly evolving in this area – but some of the general principles relating to how this off-the-grid data will be treated in discovery are set forth below.

Legal Principles for Personal Device Discovery

By this point, it is already well-accepted that a company's electronically stored information ("ESI") is fair game in litigation, and managing ESI discovery has quickly become a very time-consuming and expensive staple of modern litigation. The discovery rules have evolved accordingly (albeit slowly) to address the substantial burdens ESI places on the discovery process. F.R. Civ. P. 26(b)(2)(B) now provides that a "party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost" which designation may be challenged via motion to compel. F.R. Civ. P. 37(e) now provides the framework for courts facing a party's failure to take reasonable steps to preserve ESI in the face of real or anticipated litigation. Upon a finding of prejudice, the court "may order measures no greater than necessary to cure the prejudice." Upon finding that "the party acted with the intent to deprive another party of the information's use in the litigation" the court may make an adverse inference, instruct the jury that it may or must make an adverse inference, or dismiss the action or enter a default judgment.

There is no special rule or statute for discovery of employee-owned devices. However, it is generally accepted that company-related ESI is discoverable even on personal devices. In May 2018, the Sedona Conference published its Commentary on BYOD: Principles and Guidance for Developing Policies and Meeting Discovery Obligations (the "BYOD Principles"). The Sedona Conference has been cited hundreds of times by courts struggling with the paucity of helpful precedent on e-discovery issues, and its BYOD guidance will likely shape the jurisprudence on this issue. The BYOD Principles expressly states: "Parties cannot ignore their discovery obligations merely because the ESI is on a device that is mobile or owned by an employee."

Principle 3 of the BYOD Principles provides that "[e] mployee-owned devices that contain unique relevant ESI should be considered sources for discovery." Conversely, Principle 5 holds that ESI that is not relevant or that is stored in other (more accessible) places, is not subject to discovery from employee-owned devices. Drawing on well-developed general rules and principles from discovery jurisprudence, the Sedona Conference advises that courts also consider the following: (1) whether the organization has possession, custody, or control over the ESI; (2) whether the ESI is unique or duplicative of other ESI that is more readily accessible; and (3) whether discovery of the ESI is proportional.

Practice Pointers: The BYOD Policy and Other Rules for Company ESI

The Written BYOD Policy: The accepted best practice for a company permitting employees to use personal devices for business is to adopt a formal, written BYOD policy. Such a policy is essential for addressing many non-litigation related issues with personal devices, such as protection of intellectual property and employee privacy concerns. Moreover, the improving ground rules for such policies can be very helpful in litigation. A well-written BYOD policy should, among other things, establish a mechanism for tracking which employees are using personal devices for work; which devices are in use; which applications are authorized for work related use; how the company monitors data use on personal devices; what level of consent the employee has given for the company to access a personal device; types of information that can be stored on the personal device; and company practices for separating personal and business information. Thinking back to the BYOD Principles established by the Sedona Conference,

all of these items will be important in determining whether information on employee-owned devices is in the company's "possession, custody, or control", whether such information is likely to be duplicated on the company's servers, or elsewhere, and whether discovery of such information falls into the developing body of "proportionality" jurisprudence. A party's first set of document requests should include a demand for any written BYOD policy for the time period at issue.

Regulatory Requirements: Beyond the mere duty of preservation in the conduct or anticipation of litigation, the regulatory requirements for numerous industries have their own preservation obligations. Commentary to the 2015 Amendment to F.R. Civ. P. 37(e) notes:

> Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources – statutes, administrative regulations, an order in another case, or a party's own information-retention protocols.

In the financial sector, for example, the Securities and Exchange Commission requires members, brokers, and dealers to preserve communications related to their "business as such"; the Office of the Comptroller of the Currency requires that a bank's management ensure its adoption of "any communications technology" continues to allow for an examiner to access bank records; FINRA requires all books and records to be preserved in a compliant format. Outside of the U.S., in the Investment Industry Regulatory Organization of Canada requires retention of "electronic correspondence and records supervision"; the UK's Financial Conduct Authority requires firms to take reasonable steps to record relevant communications; and the European Securities and Markets Authority requires firms to keep records of electronic communications relating to "business transactions."

The commentary to Rule 37(e) cautions that such "independent" preservation obligations may protect interests that are irrelevant to litigation, and in such cases "the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case." However, it is not hard to imagine numerous scenarios where regulatory ESI retention requirements are designed to protect consumers or competitors from the same types of conduct that might give rise to a lawsuit. Looking again at the financial industry, in the recent past there have been numerous high-profile scandals that were facilitated, at least in part, by employees' use of off-the-grid applications on their personal devices. In her article Wall Street's New Favorite Way to Swap Secrets Is Against the Rules[1], journalist Laura Keller notes the proliferation of encrypted messaging apps like WhatsApp and Signal. She notes that "just about everyone in finance is embracing these apps as an easy, and virtually untraceable, way to circumvent compliance, get around the HR police and keep bosses in the dark." And the regulators have taken notice. In 2017 the FCA fined Barclay's Bank £284,000,000 for inadequate electronic messaging oversight; in 2017 the FCA fined a Jeffries trader for sharing confidential information on WhatsApp; in 2015 the Securities and Futures Commission (Hong Kong) suspended a trader for WhatsApp texts; and in 2016 FINRA fined RBS $2,000,000 for poor electronic messaging retention and oversight.

Accordingly, it is important to understand any and all records-related rules and regulations for a company's particular industry.

Conclusion

A well-developed understanding of a party's IT infrastructure (be it your client or their adversary) including their use of "off-the-grid" devices and applications, is a critical in modern litigation.

1 Laura Keller, Bloomberg, March 30, 2017. Accessed on 5/1/18 at https://www.bloomberg.com/news/articles/2017-03-30/wall-street-s-whatsapp-secret-illegal-texting-is-out-of-control.

Digging for Gold in a WhatsApp World

Josh Lanning
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Member, Moore & Van Allen

What is in a BYOD Policy?

Regulated Industries

- Financial Services
- Healthcare/Medical Services
- Legal
- Real Estate
- Professional Services

BYOD Legal Principles

- Rule 26(b)(2)(B)
  - Undue burden or cost?
- Accessibility Standard
  - Is the expenditure of resources necessary to access the information reasonable?
- Discoverability Factors
  - Employer possession, custody and control
  - Uniqueness
  - Proportionality
  - Personal privacy concerns

Possession, Custody & Control

- Are the devices actually under the control of the producing party?
- "Concept of control can be particularly murky and ripe for disputes."
  - Limited case law
- 3 standards
  - Legal Right Standard
  - Legal Right + Notification Standard
  - Practical Ability Standard
- Consent or acknowledgement agreement signed by employee likely gives organization possession, custody or control.

End-To-End Encryption Messaging Apps

WhatsApp

Signal

Telegram

Wickr

ChatSecure

Secure Chat

Self/Automated Destruction Messaging Apps

Telegram

Wickr

Signal

Secure Chat

SnapChat

Uniqueness

- Requested data cannot be duplicative of data that can be collected from a more accessible source.
  - Requesting duplicative data creates an undue burden for the producing party.
  - Example: Emails sent from personal smartphones that are synched/backed-up on a corporate email server
- If there is no independent value to the ESI, personal devices are likely not subject to discovery for that information.

Proportionality

- Rule 26(b)(2)(C) of the Federal Rules of Civil Procedure requires that discovery, including electronic discovery, should be proportional to the needs of the lawsuit, and not place an undue burden on the responding party.
- **Proportionality** requires a consideration of whether "the burden or expense of the proposed discovery outweighs the likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

Privacy

- Personal devices will typically contain sensitive information that is virtually intertwined with work related information.
- Some courts put a heavy emphasis on whether individuals have reasonable expectations of privacy for their BYODs.
- The nature of the requested information might pose significant threat to owner's privacy. *See* ***Angie's List***
- Case Study → ***In re Cook Med., Inc.***

Duty to Preserve

- Amended Rule 37(e) **Failure to Preserve Electronically Stored Information**
  - 3 conditions must be met before Rule 37(e) remedies can be invoked
    1. ESI that should have been preserved in the anticipation or conduct of litigation is lost;
    2. A party failed to take reasonable steps to preserve the information; and
    3. The information cannot be restored or replaced through additional discovery.
  - If these 3 conditions are satisfied, then:
    - Upon a finding of prejudice to another party from the loss of the information, the Court may order measures no greater than necessary to cure the prejudice; or
    - Only upon a finding that the party acted with intent to deprive another party of the information's use in the litigation, it may:
      - (A) Presume that the lost information was unfavorable to the party;
      - (B) Instruct the jury that it may or must presume the information was unfavorable to the party; or
      - (C) Dismiss the action or enter a default judgment.

Remedies & Sanctions

- Most courts faithfully adhere to Rule 37(e) guidelines.
- Sanctions depend on the type of spoliation that occurs (3 main types)
  - Intentional conduct to delete and deprive
  - Lack of process or effort to preserve ESI
  - Organization perilously relies on custodian self-collection
- Intent to deprive leads to most severe sanctions.
  - ***Organik Kimya, San ve Tic. A.S. v. Int'l Trade Comm'n*** **(Fed. Cir. 2017)**
- **Remember** that remedies for spoliation are to be no greater than necessary.
  - Extreme remedies require significant prejudice.
  - ***Simon v. City of New York*** **(S.D.N.Y. 2017)**

Recommendations (for the client)

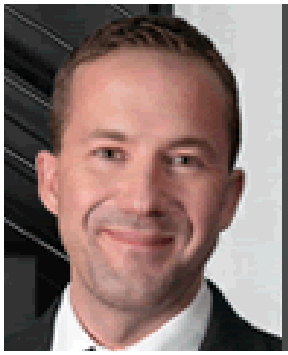
- Carefully consider BYOD policy that asserts ownership.
- Make employees fully aware of the specifics of the BYOD policy.
- Factor into BYOD policies the likelihood that personal information will be stored on BYOD devices.
- Consider employee privacy interests before collecting ESI from employee owned devices.
- Utilize tools that minimize the commingling of personal and organizational data.
- NEVER terminate or threaten employees who refuse to turn over devices.

Recommendations (for counsel)

- Develop a deep understanding of your client's BYOD policy
  - Both the theoretical policy and how it is practiced in reality
- Confer with client to determine cost and expense (reasonableness) of producing certain types of ESI.
- First look into more accessible sources of relevant discoverable information before going to less accessible sources
- Remember that device content may be accessible for business needs and still not be proportional for purposes of discovery
- Be aware of the ways in which Courts will balance data protection laws with discovery obligations

Recommendations (for counsel) cont.

- **30(b)(6) Depositions**
  - The role of the 30(b)(6) witness has become tremendously important.
  - Can help uncover what discoverable ESI a party has, how it is stored and mechanisms for uncovering it
  - Most medium to large sized companies employ a wide array of information technology personnel.
- **Pointers for Selecting and Prepping 30(b)(6) Witnesses**
  - Identify an ESI issue witness at the beginning of the discovery process.
  - Consider demeanor.
  - In preparing witnesses, focus on enabling them to address primary ESI issues.



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

Lanning has represented plaintiffs and defendants in state and federal courts throughout North Carolina as well as in a number of other jurisdictions.

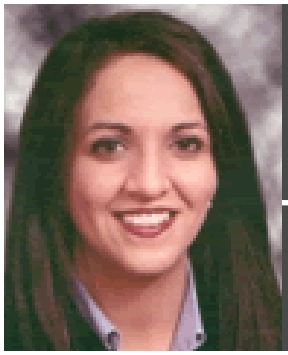
In addition, Lanning has managed multiple internal investigations for clients including Fortune 500 companies and local government bodies.

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

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

Representative Matters
- Defending large financial institution in class actions arising from alleged manipulation of foreign exchange markets;
- Defended several prominent construction companies against competitors' Civil RICO claims alleging public bid-rigging scheme;
- Represented a family business in action for securities fraud to recoup investment funds obtained by material misrepresentation;
- Represented a national banking institution in defending lender liability claims based on breach of fiduciary duties related to investment accounts;
- Represented a prominent real estate investment group in obtaining emergency receivership to preserve collateral in the face of covert dissipation of assets;
- Represented investors in obtaining emergency relief in connection with breach of joint venture agreement to buy and sell business aircraft;

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



STRATEGIES FOR A SUCCESSFUL MEDIATION

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The Psychology of a Mediation
Irene Bassel Frick

Mediation at its core is a process by which litigants reach an amicable resolution through compromise with a neutral and impartial third party. We all understand and appreciate that such compromise saves time and expense and mitigates risk. Further, in modern civil litigation, approximately 95% of lawsuits settle prior to trial; often either at after voluntary or court ordered mediation. It is no longer a question of whether to mediate but when to mediate. As mediation continues to evolve, certain factors should be considered at the outset to place the parties in an optimal position to settle a lawsuit. These factors include timing, the selection of the mediator, and mediation preparation.

The Timing of a Mediation

Many courts and judges recognize the importance of mediation and require mediation before trial. Therefore, timing is key. Parties should not approach scheduling and conducting mediation in a linear fashion to be conducted at a specific date or time in the lawsuit, but it should be individualized to the lawsuit. For example, if a summary judgment is anticipated, will it create the biggest impact before or after it is filed? Or if an offer of judgment or a proposal for settlement will be made, should mediation occur before or after it is made? Is discovery necessary and if so, what discovery is important to conduct prior to the mediation to create the most leverage? If there are key depositions, will a party pull its punches or not be forthcoming if a mediation occurs prior to the key depositions? Additionally, a marathon one day mediation session may be appropriate for one lawsuit, while shorter mediation sessions that start early in the litigation process may provide the best opportunity to ultimately resolve a particularly complex dispute.

Thus, it is very important that a party frames its goals and risks and re-evaluate regularly when considering the appropriate time to schedule a mediation. Along with determining a party's goals and risks, one should also thoughtfully consider the opposing party's goals at mediation. There is a temptation to superficially focus on the monetary aspects of a dispute – the demand amount, the costs of litigation and perhaps an allocation of risk as applied to the demand amount based on the strengths and weakness of the factual and legal positions. However, consideration should be given to external issues such as the current or prospective financial positions of the parties, regulatory implications, the state of the law (including pending appellate cases or anticipated changes in the laws or regulations that may impact the dispute or the parties). Additional consideration should be given to whether there are existing business or professional relationships either between the parties or with non-parties that may be affected either by the litigation or a resolution of the dispute.

Also, and seemingly obvious, all of the appropriate parties should be engaged for a mediation to be successful. If insurance coverage is triggered, demands for coverage should be made and coverage positions received and evaluated prior to a mediation. If multiple policies are potentially triggered, multiple insurers and the insured(s) must themselves communicate and negotiate about the underlying dispute before a successful mediation can occur. Just as important, parties must evaluate whether there are indispensable non-parties. Occasionally one party or both sides to a dispute may become aware that a desired resolution may require the participation of a non-party. In some instances, a non-party may become aware that it may be implicated by the adjudication or resolution of a dispute and may seek to intervene formally or informally. I have represented non-parties previously in these situations and have occasionally "ghosted" in litigation and mediation. In one particular instance, a client became aware of a product liability litigation that could impact the client and we informally participated, rather than formally intervene (intervention was unlikely as discovery had mostly concluded and trial was set). As a "ghost," we worked with and directed the party defendants to take certain actions and orchestrated a mediation but did not formally participate in the mediation as a party in the joint sessions. Rather, we participated as a third party in a separate room and had no contact with the plaintiffs. The parties to the litigation mediated the dispute directly with the mediator and concurrently, the mediator mediated a possible indemnification claim between my client and the defendants. The case ultimately resolved with no publicity and preserved the business relationship between the defendants and my client (both strong objectives of my client).

Next, information and strategic use of information is key to timing a mediation. Parties are understandably loathe to spend money in a formal discovery process and engage in discovery battles if they can be avoided. However, it is often necessary to obtain reliable and verifiable information to assess risk and settlement. It may be necessary to take key depositions and obtain records and information. Parties may disagree about the scope of the dispute and the scope of discovery and in those situations, formal discovery and adjudication of some threshold issues may actually bring the parties closer to a resolution. The risk in these situations is that parties may form an irrational attachment to the litigation. In reality, lawyers and litigants should constantly battle the fallacy that past expenses justify a commitment to invest more resources in a case when it is does not make economic or business sense. As a corollary, a party may possess a "smoking gun" that is most impactful at a deposition or another point in the litigation process. If that is the case, mediation should be timed after that revelation.

Finally, data analytics is playing an increasing role in timing mediation. There are numerous tools that have currently become available to evaluate both the opposing party and counsel and the court. These tools, like Ravel Law or Westlaw Edge, collect data on lawyers, parties, and judges and can reveal information such as other litigations involving the parties or the parties' lawyers as well as statistics of the judges and the jurisdictions. This information includes data like the length of time for the judge to rule on particular types of motions and percentages of how often a judge grants motions to dismiss, summary judgments or motions to exclude experts or evidence. This data is increasingly being used to evaluate the timing for all aspects of a litigation including mediation.

Selection of a Mediator

One of my favorite mediation stories is one involving a mediator crushing a can during a caucus to demonstrate to my client the other side's view of the case. This illustration, while memorable, was not effective in that particular case, but it brings up a newer trend of parties to seek an "evaluative" mediator. There are generally two types of mediators, "facilitative" or "evaluative" mediators. An evaluative mediator is one who will offer an opinion about the weaknesses of a party's case. Generally, for court ordered mediations, courts will require parties to select a "certified" mediator. Often rules for mediator certifications prohibit a mediator from offering an opinion of the case.[1] Some mediators are foregoing certification as some rules have relaxed to permit the parties to mediate before a person whom the parties

1 Florida Rule for Certified and Court Appointed Mediators 10.370(c) provides:

Personal or Professional Opinion. A mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue. Consistent with standards of impartiality and preserving self-determination however, a mediator may point out possible outcomes of the case and discuss the merits of a claim or defense. A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute.

mutually agree "to promote conciliation, compromise and the ultimate settlement of a civil action".[2] The more common approach to a mediation involves using a "facilitative" mediator. This type of mediator works toward a negotiated outcome that the parties create, but typically does not offer opinions or predict what might happen if the case were to go to trial. When determining which type of mediator to select, one should consider the litigants and the particular demands of the case and which type of mediator will be most effective. In the example of the mediator that crushed the can, the litigants where put off by that tactic and "evaluations" of their respective positions which resulted in the litigants becoming more entrenched in their positions. In other situations, litigants may be looking for an evaluation of their positions or want the mediator to opine on the outcomes. In those situations, an evaluative mediator can be effective – the parties should however be prepared that the mediator may express an opinion on the both side's positions.

Increasingly, former and sitting judges will preside over a mediation or a settlement conference. Very rarely, when parties consent, a presiding judge may act as a mediator; however, this is potentially at odds with one of the foundations of a mediation: confidentiality.[3] Many certified mediators tout confidentiality as a reason that mediations succeed; parties can tell a mediator confidential information that they instruct the mediator not to use or disclose to another party which information may be essential to the ultimate resolution of the case. When a presiding judge serves as a mediator, confidentiality is no longer assured. It is much more common for magistrate judges or retired judges to serve as mediators and in those situations, unless parties consent, the judge will generally not preside over disputes between the parties. Another consideration when a magistrate judge or retired judge mediates a dispute or facilitates a settlement conference, is that they often have standing orders regarding the required submissions and attendance which may differ from mediators and are orders with which parties have to comply.[4] Judges, even if not presiding over a dispute, are cloaked both literally and figuratively with authority that can work to the benefit of the parties, but the parties also have to be aware that they must conduct themselves differently than in an ordinary mediation. Recently, I mediated a case with a Magistrate Judge who convened the mediation in his courtroom wearing his robe and chastised the parties when he felt that the parties were not affording him (the Court) with the appropriate deference. Judge often cannot separate their role as a judge with the role of a mediator to facilitate a mutually agreeable resolution. By their very stature and nature, most judges that fill the role of mediator or facilitator of a settlement conference, are "evaluative." This can often result in the parties reaching a resolution, but parties must be aware that the mediation process dramatically changes and be prepared.

Preparing for the Mediation

The third consideration when evaluating mediation strategy is the necessity to prepare for mediation. First, to prepare for mediation, the parties need to evaluate and prepare the representative who will attend the mediation on the party's behalf. Virtually all courts have rules prescribing mediation party attendance requirements, see S.D. Fla. L.R. 16.2(e) and Fla.R.Civ.P. 1.720(b). Courts also typically enter case specific orders containing mediation party attendance requirements. Courts require parties to have fully authorized representatives attend the mediation in person. A party must therefore prepare the representative both on the facts and the legal positions but must also vest in the representative full settlement authority. When considering the representative to attend on a party's behalf, it is necessary to know the identity of the representative of the opposing party. Consideration should also be given to the opposing party's counsel and the identity of the mediator. If the dispute is an employment dispute, one should consider whether the direct supervisor of the plaintiff should represent the defendant and whether that would facilitate settlement or not. If the dispute is a business dispute and a future business relationship is contemplated, perhaps the opposing party's representative should be the business contact vested with authority not only on monetary terms but also with knowledge and authority to consider and agree to non-monetary terms.

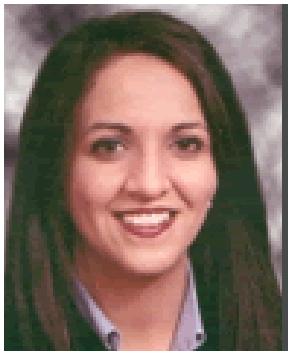
2 Southern District of Florida Local Rule 16.2 (a) which defines mediation as a "supervised settlement conference presided over by a qualified, certified, and neutral mediator, or anyone else whom the parties agree upon to serve as a mediator, to promote conciliation, compromise and the ultimate settlement of a civil action."

3 See Alternative Dispute Resolution Procedures in the Northern District of California.

4 Id.

Next, when preparing for a mediation, one best practice is to think through the potential settlement terms and perhaps even prepare a draft settlement agreement, especially where non-monetary terms may be critical to reaching a resolution. This provides a framework by which a party may anticipate and provide its representative with settlement authority to reach a resolution. As a corollary, it is important to try and reverse roles and consider the positions and desired outcomes of the opposing party. If the opposing party is seeking damages, one must determine the amount of the damages (even if liability is contested). Mediation is an opportunity to evaluate and question the opposing side's positions and analyzing the demand prior to mediation may create opportunities to determine the questions to ask the opposing side to justify its demand. Next, without question, it is critical to understand and appreciate the facts and the legal positions. Mediators are increasingly asking parties to identify the strengths and weakness of their case. Parties are obviously reluctant to identify weaknesses to a mediator much less the opposing side, but it is important to at least internally consider both, especially the weaknesses and how they can be overcome. Finally, realistic alternatives to a negotiated settlement should be considered, including a litigation budget, the likelihood of success or failure, the timing for an adjudication, and resources (such as company time) that will be spent to litigate.

Also, when preparing for mediation, thought should be given to the mediation process. Parties are commonly required to provide the mediator with a mediation statement. It is less common, but often more effective, to provide a statement to the opposing side. Increasingly, mediators ask lawyers to participate in separate or joint pre-mediation sessions with the mediator. Again, if these pre-mediation sessions educate the mediator about the dispute or the parties so that an effective mediation strategy can be devised, they can optimize the chances of reaching a resolution. One of topics that can be discussed at pre-mediation conferences with the mediator is the necessity or desirability of opening statements, convening the mediation in a common joint session or immediately starting with caucuses. Opening statement can be very effective. It is an opportunity to speak directly to the opposing party and frame the dispute. Visual presentations during opening statements such as power point presentations can be especially powerful when there are strong images that convey a party's position. One of the most powerful mediation opening statements that I conducted involved a forgery case in which we visually presented the real signature of my client and the forged signatures which were undeniably different. In that situation, we considered it necessary to conduct an opening statement to powerfully convey the facts. In other situations when an opening statement may be met with hostility and may make the opposing party intractable, dispensing with a joint session may be most conducive to reaching a settlement. One final thought, while preparation is key to a successful mediation, psychologically and strategically, it is most important when preparing for mediation to remain open to listening to the opposing side. Any information or positions presented by the opposing side, even unanticipated positions or information or information that is seemingly illogical or inconsistent, are ultimately useful if a settlement is not reached as one prepares for litigation. After all, forewarned is forearmed.



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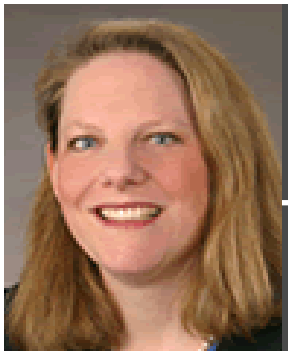
Irene Bassel Frick serves as the managing partner of Akerman's Tampa office. A trial lawyer with experience in state and federal court, arbitrations, and administrative proceedings, Irene has a multifaceted litigation practice encompassing contractual disputes, class action defense, fiduciary duty claims, business torts, non-compete litigation, construction disputes, and commercial foreclosure litigation. Her clients include employers, insurers, employee benefit plans, and third party providers; architects, engineers, and contractors; and developers, owners, lenders and financial services institutions.

In addition to her general commercial litigation experience, Irene has extensive class action experience in the context of contractual and commercial disputes as well as in the employee benefits practice area. Irene also has significant experience in employee benefits litigation in general, including ERISA litigation. Within the context of employee benefits, Irene litigates claims related to retirement income plans such as ESOP or profit sharing plans and welfare plans, such as life, health, and disability plans. Irene also assists clients in enforcing and defending non-compete disputes in the context of commercial transactions. With respect to her experience representing lenders and financial services clients, Irene has defended lender liability claims, and handled all aspects of commercial litigation including the enforcement of commercial loans and prosecution of commercial foreclosures, appointment of receivers, and bankruptcy and deficiency litigation. Within the construction context, Irene litigates defects, liens, and bonds

Areas of Experience
- Commercial Disputes
- Litigation
- Commercial Mortgage Foreclosures and Receiverships
- Construction Litigation and Dispute Resolution
- Distressed Property
- Employee Benefits and Executive Compensation
- Employee Benefits and ERISA Litigation
- Insurance Litigation
- Preference and Fraudulent Transfer Litigation
- Financial Services

Honors and Distictions
- The Best Lawyers in America 2016-2019, Listed in Florida for Commercial Litigation
- Super Lawyers Magazine 2014-2018, Listed in Florida for Business Litigation
- Florida Association for Women Lawyers 2016, Recognized as a "Leader in the Law"
- Florida Trend's Legal Elite 2014-2016, 2018, Listed for Commercial Litigation and Business Law
- Florida Trend's Legal Elite 2012, Listed as an "Up & Comer"
- Tampa Bay Business Journal 2010, Recognized as an "Up & Comer"

Education
- J.D., University of Florida Levin College of Law, 1998, with honors
- B.A., University of Florida, Political Science, 1995, with honors, National Merit Scholar; Phi Beta Kappa Scholar



LITIGATION BRINGS THE HEAT

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Hot Hot Hot
Jennifer Fitzgerald

Litigation. The word itself can cause stress but, it does not have to. With a bit of planning, the initial stages of litigation can become systematic and procedural. Having a worn path should alleviate stress and provide the relevant structure to maintain productivity and focus on business tasks even when litigation is Hot Hot Hot.

Regardless of which side of the table you are on, preparation is a must. Being proactive is to your benefit. It is imperative to be conscious of impending disputes and consistently watch for opportunities to resolve issues prior to litigation. Creative solutions are often the best way to achieve an early and optimal result. Was there a breach with a supplier? Contemplate a discount on future work instead of being punitive. Are you looking to switch supplier? Provide a lot of notice and work on transition instead of shocking that supplier.

Of course avoiding litigation is not always possible. As the odds grow ever more likely that litigation will ensue, we suggest following these steps.

1. Conduct an Early Case Assessment

This involves an evaluation of the importance of the dispute to the company. Is it a bet-the-company matter or standard fare? What are the political and public implications? What are the best and worst case outcomes? What is your desired outcome? What would be an acceptable outcome? How do costs of litigating balance against the business's interests on the matter?

This phase also involves talking with potential external counsel for the matter. Is this a matter you believe can be handled using only internal resources or will it require engaging that external counsel? What relevant experience does your outside counsel need? Does your current counsel have this skill, or do you need to look further? Don't hesitate to consult with your current counsel – most counsel will honestly consider with you whether the matter is appropriate for handling by internal resources and/or whether a new counsel with particular expertise should be engaged instead of, or along with, your current counsel. In all, you want to make sure you have the appropriate resources in place for this fight.

Furthermore, consider jurisdictional issues? Do you need local counsel or should you just hire counsel within the relevant jurisdiction? In reviewing jurisdictions, also consider the variances in local judicial outcomes for the type of matter presented. Can you find more than one jurisdiction that is legally proper? If so, evaluate each. If you've been sued already, is this a bad jurisdiction for you? Can you remove to Federal Court, transfer to another venue, or compel arbitration? All can be improvements to the institution of a lawsuit in the venue of the claimant's choosing.

Also evaluate the key documents at issue. Many cases turn on just a few documents. Gather the significant documents together (contract, patent or trademark registration) so that you have them available at a moment's notice. It is also important to consider the litigation hold memo. Is it time to issue the hold? Keep track of who they are issued to, and collect signed copies of the acknowledgement. Document the identities of the persons to whom they are issued and periodically revisit the list ensuring that if new custodians are identified a hold letter is issued to them as well.

Finally, do not overlook any insurance coverage you may have. The earlier you advise your broker of a potential issue, the better. Collect any relevant insurance policies, and the notice provided to the insurer and keep with the case assessment. If insurance must provide a defense, evaluate if the insurance-provided defense will be adequate for your goals.

2. Claim Analysis

With the initial case assessment complete, time should be dedicated to listing each of the potential claims (or counterclaims) and the legal requirements of each. By listing the elements, and any possible damages/recovery, discovery in the case can be streamlined to address the needs of the case. Beyond reviewing relevant case law in the jurisdiction, turn to the local model jury instructions. An early look at the relevant instructions will give you the playbook, and assist as a roadmap in developing the relevant evidence.

Furthermore, begin to consider whether or not an expert is needed and whether or not the right type of expert can be identified early. With more time, there are opportunities to interview and select an expert with the perfect qualifications for your matter. Additionally, in cases where the expert needs to conduct surveys or analysis, the more time they have available, the more thorough and complete the final report.

3. Adversary Assessment

Beyond analyzing your own case, it is important to understand your adversary, opposing counsel and each of their litigation experience along with their experience with this particular type of litigation. An analysis of opposing counsel and the adversary's experience with litigation will provide a better insight into the adversary's risk tolerance, as well as the possibility for an early settlement.

4. Periodic Case Assessment

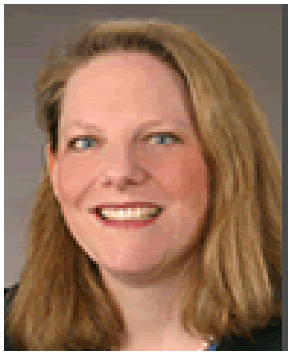
Once the initial case assessment is complete, the case basics should be laid out. However, for effective management, it is imperative to revisit the case assessment periodically. Further, it is essential to evaluate any additional claims brought against the company, and to outline the causes of action, potential damages, discovery needs for those claims, once known, as well. Changes in the facts, parties, and case law should be monitored so that initial case assessments can be modified and refined as necessary. Similarly, as the case develops, you should have periodic discussions regarding desired and acceptable outcomes .

5. Key Evidence Chronology

As the case develops, it may be helpful to develop a key document/testimony chronology built off of the claim analysis discussed above. Keep this document in outline form and concise, but ensure that it gives reference points to sources and includes enough information to be meaningful so that the reader does not need to pull the source document to know what it says. Annotate the chronology with inconsistencies uncovered during discovery. If your software management system is up to the task, use hyperlinks to the relevant documents so that they remain available at a moment's notice. Be mindful in adding data points to the chronology. Constantly ask yourself "what element of the claim does this prove or disprove?" Finally, if a Key Evidence Chronology is created, make sure that the team has access to it and that it is reviewed frequently.

Conducting an early case assessment and creating an outline corralling all of the pertinent information for your litigation matters is a relatively simple way to take positive steps towards resolution of matters. Forcing yourself, and your organization, to consider potential outcomes and be proactive before litigation in even pending makes litigation less stressful and more procedural. When you have an early assessment of the claim and issues

that need to be address, filling in the blanks means that the company, and its counsel, are thinking, not just acting. It also helps makes sure that tasks undertaken are likely to result in less discovery, earlier settlement and more efficient litigation overall. There are enough unknowns in litigation but if the entire litigation team is working off of the same set of facts, and with the same understanding of the goals and potential outcomes, litigation won't be HOT HOT HOT.



JENNIFER L. FITZGERALD

Partner

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Jennifer Fitzgerald is a Partner in the Litigation Practice Group and has extensive business litigation experience in matters involving intellectual property, securities, antitrust and general commercial litigation throughout the United States. Her legal experience includes trial and appellate work on behalf of both plaintiffs and defendants in a wide range of complex litigation matters.

As a registered patent attorney, Jennifer has the ability to discuss inventions at their most scientific level but she also is skilled in the art of explaining technical issues to lay persons. She has advised clients and litigated patents throughout the U.S. on topics as varied as golf clubs, windshield wipers, diet modification software, visual skills enhancement, package design, medical products, acoustic echo cancellation technology, RFID technology and wireless communications.

She assists clients with prosecution and protection of trademarks and copyrights worldwide. She has organized raids against counterfeiters in China, actively assisted a client in the “reclamation” of trademarks in Europe and recovered U.S. domain names from cybersquatters. She maintains contacts with a worldwide set of foreign counsel to serve the international needs of her clients.

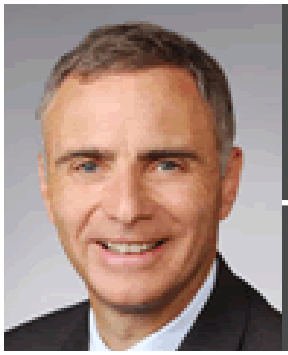
Initially stemming from her intellectual property and litigation backgrounds, Jennifer regularly advises clients in the area of product recalls. Having represented clients before the Consumer Products Safety Commission, National Highway Transportation Safety Administration and the U.S. Coast Guard, she is skilled in the assessment and management of a product recall, recognizing the sensitivity in protecting a brand and consumers alike. She also assists clients in evaluating internal practices and procedures related to recall preparedness. In these advisory roles, Jennifer and clients work together to minimize the impact of a recall on the company as a whole.

Areas of Experience

- Litigation
- Intellectual Property
- Patent Litigation and Counseling
- Trademark Protection, Enforcement and Counseling
- Intellectual Property Litigation
- Trade Secret Protection and Enforcement
- Copyright Protection and Enforcement
- Restrictive Covenants and Trade Secrets
- IP Licensing and Transaction Counseling
- Antitrust
- Purchasing and Supply Chain Management

Education

- J.D., Loyola University Chicago School of Law - Case reporter for the Consumer Law Reporter and participated in the London Advocacy Program in 1994-1995
- B.S., University of Southern California



ARBITRATION BENEFITS, MYTHS AND REALITIES

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You Can't Always Get What You Want: Arbitration Benefits, Myths and Realities

C. Brandon Wisoff

Arbitration clauses are ubiquitous in today's commercial and consumer contracts. The proliferation of contractual mandatory arbitration provisions has led some commentators to question whether arbitration is privatizing the justice system and undermining the public rule of precedential law.[1] The often stated benefits of arbitration over litigation driving this shift include greater efficiency, cost savings, confidentiality, flexibility and finality.

But as with all things, perception does not necessarily equal reality. These perceived benefits of arbitration do not always materialize and when they do they often come with other costs. Arbitration will no doubt remain the preferred dispute resolution vehicle for many businesses in many types of cases. But it is helpful to revisit and to question the perceived benefits of arbitration over litigation before reflexively (1) including mandatory arbitration provisions in every contract; or (2) demanding arbitration that is available once sued in court.

Efficiency and Cost Considerations

Efficiency and cost considerations are interrelated. Arbitration is often viewed as more streamlined, i.e., efficient, and thus less costly than litigation notwithstanding the added (and often substantial) fees that must be paid in arbitration. Some commentators have noted that administrative fees and arbitrator compensation typically comprise only a small portion of the overall cost of arbitrating a dispute.[2] If true, then streamlined proceedings in arbitration relative to litigation could more than offset these added costs.

These savings can come in several areas. Discovery, arguably one of the most time consuming and thus costly drivers in litigation, is typically limited in arbitration. While impactful in domestic arbitrations, this consideration has particular importance in international disputes since international arbitrations typically provide for even less discovery. Additionally, evidentiary standards are more relaxed in arbitration, arguably leading to less costly hearing preparation than would be required to meet evidence admissibility standards in court. Finally, the significant and costly pretrial motion practice prevalent in litigation (e.g., motions to dismiss, summary judgment motions) is generally absent in arbitration where most disputes are presented and decided at a single final hearing or series of hearings.

These benefits will be compelling for many cases

1 E.g., J. Silver-Greenberg and M. Corkery, In Arbitration, a 'Privatization of the Justice System', The New York Times (Nov. 1, 2015). Available at: http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html; J. R. Sternlight, Is Alternative Dispute Resolution Consistent with the Rule of Law?: Lessons from Abroad, 56 DePaul L. Review 569 (2007). Available at: https://via.library.depaul.edu/law-review/vol56/iss2/15

2 E.g., E. Marine, Restoring the Promise of Arbitration, Fordham Journal of Corporate & Financial Law (Oct. 29, 2017). Available at: https://news.law.fordham.edu/jcfl/2017/10/29/restoring-the-promise-of-arbitration/

or types of cases, but one size should not fit all. Indeed, the lack of pretrial motion practice, often cited as a significant cost saving in arbitration, can ironically have the precise opposite effect. Many cases resolve at the motion to dismiss stage, with no or minimal discovery. Others resolve at summary judgment, eliminating the need for trial and associated pre- and post-trial briefing. The reality is that the vast majority of cases, and certainly the vast majority of commercial cases, do not go to trial.

Weighing the relative efficiency and cost benefits of arbitration versus litigation therefore involves much more than calculating the cost of taking a case to final trial or hearing. The calculus must also include the probability that a particular case or type of case will be resolved before trial if litigated in court. Because, while theoretically possible, it is rare for arbitrators to bifurcate and resolve case-dispositive issues prior to final hearing absent agreement of the affected parties or other compelling circumstances.[3]

The reasons for an almost certain hearing (i.e., trial) in arbitration may be impacted by a number of factors. In "locker room" talk, lawyers sometimes privately speculate and worry that financial incentives subconsciously and perversely motivate arbitrators to drive cases to a final hearing, rather than to resolve them quickly by bifurcating dispositive issues. Arbitrators are paid for their continuing service while judges receive the same salary regardless of how quickly they resolve cases or how many cases are on their docket. Judges therefore have every incentive to weed out weak cases quickly while arbitrators may not.

Regardless of whether this concern has any merit, and I suspect it would apply if at all only in a small fraction of instances, the traditions and rules around arbitration provide significant disincentives for pre-hearing resolution of cases. First, by tradition, arbitrations are typically resolved at a hearing where all issues are vetted and each party feels it has had its "day in court." Indeed, some commentators have noted that the cathartic, psychological benefits of a likely hearing on the merits in arbitration (versus an unlikely trial in court) lead to better claimant satisfaction.[4] For cases where this is an important consideration (e.g., where the parties may have an ongoing relationship), this benefit may outweigh or counterbalance any adverse cost considerations.

Second, and perhaps most significantly, arbitration enforcement law principles likely cause arbitrators to err on the side of allowing all issues to go to hearing rather than resolving a case early based on an arguably dispositive issue. The statutory grounds for vacating an arbitration award are narrow and few, but refusal to hear evidence on a material issue is on that short list in most jurisdictions.[5] Thus, while trial is unlikely in most litigation, its equivalent hearing in arbitration is all but ensured. This dynamic can eliminate the expected efficiencies and cost savings of arbitration in many cases that might be resolved early in litigation. This can be particularly problematic in cases where the facts eventually presented at hearing create an emotionally sympathetic story for the claimant. The inability to dispose of such a case early on legal grounds not only leads to additional presentation costs, but increases the risk of an unfavorable liability outcome overall.

Thus, while arbitration may in some cases lead to better efficiency and lower costs, the opposite can be true as well. Parties considering whether to require pre-dispute arbitration provisions in a contract or to demand available arbitration once a dispute has arisen should carefully weigh the competing considerations.

Confidentiality Considerations

The ability to resolve disputes privately in arbitration, rather than publicly in court, may in some cases be a decisive factor. This is especially true in professional liability matters, such as medical malpractice cases, where even meritless claims could, if filed publicly, have damaging reputational ramifications. Because confidentiality if one of the most-touted benefits of arbitration over litigation, clients often assume

3 While arbitrations typically go to final hearing, most arbitration providers have rules authorizing bifurcation and decision of dispositive issues under certain circumstances. See, e.g., AAA Commercial Arbitration Rules (Effective Oct. 1, 2013), R-33 (Dispositive Motions) ("The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."); JAMS Comprehensive Arbitration Rules & Procedures (Effective July 1, 2014), Rule 18 (Summary Disposition of a Claim or Issue) ("The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request.").

4 E. Rolph, E. Moller and J. Rolph, Arbitration Agreements in Health Care: Myths and Reality, Law and Contemporary Problems, Vol 60: No.1, Page 153, at 155 (1997). Available at: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1036&context=lcp

5 E.g, 9 U.S.C. § 10(a)(3)("refusing to hear evidence pertinent and material to the controversy"); Cal. Civ. Proc. Code § 1286.2(a)(5)("the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title"); see id. at §1283.4 (requiring the award to "include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy").

that the details of arbitrated disputes will remain private. It is common for parties to agree either in an arbitration provision itself or at arbitration to keep the proceedings and any information exchanged confidential. Most, if not all, arbitration providers have rules providing for the confidentiality of arbitration proceedings.[6] One commentator has emphasized the point, explaining that "[Confidentiality] is what God made arbitration for."[7] But while arbitration is clearly more confidential than litigation, arbitration parties are sometimes unpleasantly surprised to learn that arbitration confidentiality has its limits.

These limits are most often tested during judicial confirmation proceedings. An arbitration award represents only a contractual right to recover and must be confirmed in court and reduced to judgment before it is legally enforceable against a party who does not voluntarily comply with its terms. Once a successful party moves in court to confirm the award, or an unsuccessful party moves to vacate an award, all bets are off on whether a court will honor the confidentiality restrictions that the parties agreed to, and the arbitrators blessed, during the arbitration. Unlike arbitration forums with rules providing for confidential proceedings, court proceedings are presumptively public and courts are bound by statutes, rules and common law that limit a judge's discretion to close proceedings or seal documents from public access.[8]

Given this strong presumption of public access to judicial records, courts have generally rejected efforts by parties to keep the details of their arbitration confidential during judicial enforcement proceedings.[9] Courts have reasoned that the parties' private agreements to keep information confidential cannot bind courts or undermine the public's right to access.[10]

Judicial confirmation proceedings for arbitration awards are common, even routine, and while petitions to vacate an award are less common, they do occur. Thus, arbitration parties cannot assume that the details of their dispute will remain confidential. To the contrary, they should assume that any material information bearing on the decision at arbitration will be publicly revealed in any enforcement proceeding. The award itself, central to any enforcement proceeding, is particularly at risk of disclosure.

Parties can try to mitigate these risks by, for example, agreeing to (1) allow the arbitrator to issue an unreasoned arbitration award that does not disclose any details of the underlying dispute; (2) waive any right to challenge the award in court; or (3) limit the materials that are submitted to a court in any enforcement proceedings. But these partial solutions will not be appealing, satisfactory or workable in many cases.

Flexibility and Finality

Arbitration's often-touted flexibility and finality benefits are independent considerations. But, as discussed below, they can also give rise to interrelated concerns.

Because arbitration is a creature of contract, the parties to arbitration can by agreement enjoy much more flexibility in terms of scheduling than would be available in litigation where judges remain masters of their docket. But perhaps the most oft-cited flexibility benefit of arbitration is the ability of the parties to avoid a jury trial and to choose their decision-maker or at least to choose the qualifications and attributes

6 E.g., JAMS Comprehensive Arbitration Rules & Procedures (Effective July 1, 2014), Rule 26(a) (Confidentiality and Privacy) ("JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision."); AAA Statement of Ethical Principles (Confidentiality) ("An arbitration proceeding is a private process. In addition, AAA staff and AAA neutrals have an ethical obligation to keep information confidential. However, the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement . . . .")

7 R. A. Baines, Keeping arbitration disputes 'under the radar,' Los Angeles Daily Journal, May 15, 2012 (quoting Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press). Available at: https://www.jamsadr.com/files/uploads/documents/articles/baines-keeping-arbitration-disputes-2012-05-15.pdf

8 E.g., Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98 (1978) ("[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); L.J. Aurichio, The Effect on Confidentiality of Petitions to Vacate, Modify or Confirm Arbitral Awards, Arias U.S. Quarterly, First Quarter 2015 (hereinafter "Aurichio Article") (discussing how a majority of the federal circuits apply a "compelling reasons" standard under which "only the most compelling reasons can justify non-disclosure of judicial records.") Available at: https://www.butlerrubin.com/wp-content/uploads/ARIAS-Quarterly-1st-Q-2015-LJA.pdf . See also California Rule of Court 2.550(d) ("The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest."); but see Mercury Interactive Corp. v. Klein, 158 Cal. App. 4th 60, 96-97 (2007) (explaining that stringent sealing standards may not apply to documents and information that is not considered or relied on by the court in adjudicating any substantive controversy since public access to such information will not be relevant to scrutinizing judicial fairness).

9 For a robust discussion of relevant case law, see, e.g., Aurichio Article, supra; J.T. Tompkins, The Loss Of Confidentiality In NY Arbitral Enforcement Cases, Law 360 (Feb. 27, 2017). Available at https://www.shearman.com/-/media/Files/NewsInsights/Publications/2017/02/The-Loss-Of-Confidentiality-In-NY-Arbitral-Enforcement-Cases.pdf ; L.E. Hassett and C. Chang, Public Access v. Arbitration Confidentiality: A Balancing Act That Tilts Towards Access (first appearing in the June 29 2008, edition of Mealey's Litigation Reports: Reinsurance). Available at: https://www.mmmlaw.com/files/documents/publications/article_360.pdf

10 E.g., Century Indem. Co. v. AXA Belgium, No. 11-cv- 7263 (JMF), 2012 WL 4354816, at *14 (S.D.N.Y. Sept. 24, 2012) (". . . [W]hile parties to an arbitration are generally 'permitted to keep their private undertakings from the prying eyes of others,' the 'circumstance changes when a party seeks to enforce in federal court the fruits of their private agreement to arbitrate, i.e. the arbitration award.'").

that their decision-maker must possess. Instead of having an uninformed jury or randomly selected judge decide the dispute, parties can require that the arbitrator have knowledge of and experience in the relevant industry or practice area. The conventional wisdom is that this will lead to better and more predictable results.

Finality is similarly on the short-list of arbitration's supposed advantages. Arbitration awards are typically final; the risk of a lengthy appeal process present in litigation is all but eliminated. And the statutory grounds for challenging an arbitration award are, in most jurisdictions, quite limited. Some courts, by judicial decision, have expanded the grounds to include "manifest disregard" of the law. Today, courts are mixed on whether even a manifest disregard of law is grounds to overturn an award.[11] Even when such challenges have been allowed, they are exceedingly hard to prove.[12] Some jurisdictions reject even blatant errors of law that appear on the face of the award.[13] Arbitration awards, whether factually and legally correct, are for most part final and uncontestable.

And it is here that flexibility and finality considerations become interrelated concerns. Because the friction between avoiding a bad result (by the ability to choose the decision-maker or decision-maker qualifications) and being stuck with one regardless (when the selected arbitrator gets it wrong and there is no meaningful appeal or challenge) is where the proverbial rubber meets the road.

Many businesses will willingly make this trade-off, especially in cases where the risk of an emotionally charged jury verdict is high. But the decision should not be made lightly in all types of disputes. The lack of a meaningful review system for arbitration awards can be a serious concern if even blatant errors of law cannot be challenged in court. Even where the parties have done their best to choose a qualified arbitrator, errors can and do occur. And while selecting an arbitrator with relevant industry experience can ensure better decision-maker knowledge, it also perhaps risks importing a fixed viewpoint or bias into the decision-making process.

Parties can try to mitigate these risks by providing for more than one arbitrator (typically three), thus reducing the opportunity for single arbitrator bias or error. Arbitration providers have also taken steps to address these concerns by providing a layer of appellate-type review within arbitration when permitted by the parties' agreement.[14]

But the more parties try to build these litigation-like protections into their arbitration agreement, the more costly the arbitration becomes. At some point, the supposed efficiency, cost and finality of arbitration is hard to distinguish from litigation. As one commentator has noted, arbitration today "often mutates into a private judicial system that looks and costs like the litigation it's supposed to prevent."[15] The fact that experienced practitioners and arbitration providers have over time imported litigation concepts into arbitration (e.g., appellate review, increased discovery in complex cases) demonstrates that the benefits of arbitration are not always as clear as some clients may initially suspect. As with other things in life, benefits come with costs and consequences.

Conclusion

In a given case or type of case, there may be compelling reasons to require or enforce contractual mandatory arbitration provisions.[16] But the often-touted benefits of arbitration may in many situations

11 See. e.g., Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 588, 128 S.Ct. 1396, 1405 (2008) (holding that parties, at least by contract, cannot expand the FAA's list of grounds for vacating an arbitration award, which does not expressly include errors of law); Citigroup Global Markets, Inc. v. Bacon, 562 F.3d 349, 350, 358 (5th Cir. 2009) ("In the light of the Supreme Court's clear language [in Hall Street] that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected."); Frazier v. CitiFinancial Corp., LLC, 604 F.3d 1313, 1324 (11th Cir. 2010) ("We hold that our judicially-created bases for vacatur are no longer valid in light of Hall Street. In so holding, we agree with the Fifth Circuit that the categorical language of Hall Street compels such a conclusion."); but see Comedy Club, Inc. v. Improv West Assoc., 553 F.3d 1277, 1290 (9th Cir.), cert. denied, Improv West Assoc. v. Comedy Club, Inc., 558 U.S. 824, 130 S.Ct. 145 (2009) (concluding that "after Hall Street Associates, manifest disregard of the law remains a valid ground for vacatur" because it is "shorthand for a statutory ground under the FAA, specifically 9 U.S.C. §10(a)(4)"); Stolt-Nielsen v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 n.3 (2010) ("We do not decide whether 'manifest disregard' survives our decision in Hall Street . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10).

12 Citigroup Global Markets, 562 F.3d at 358 (Explaining that when applied, "[m]anifest disregard of the law means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing principle but decides to ignore or pay no attention to it.").

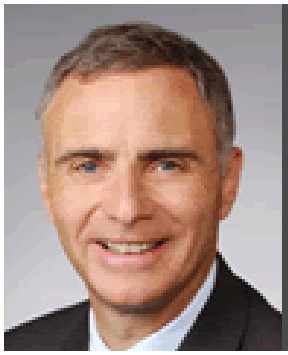
13 Moncharsh v. Heily & Blase, 3 Cal. 4th 1, 13 (1992) (a court cannot normally reject an award even where legal errors appear on the face of the award and cause "substantial injustice.").

14 JAMS Optional Arbitration Appeal Procedure (Effective June 2003). Available at: https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf ; AAA Optional Appellate Arbitration Rules (Effective Nov. 1, 2013). Available at: https://www.adr.org/sites/default/files/AAA%20ICDR%20Optional%20Appellate%20Arbitration%20Rules.pdf

15 E. Marine, supra note 2 (quoting Todd B. Carver & Albert A. Vondra, Alternative Dispute Resolution: Why It Doesn't Work and Why It Does, Harv. Bus. Rev. (May-June, 1994). https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does.)

16 For example, consumer facing companies at risk of class action litigation may always want to require FAA arbitration since class action waivers are enforceable under federal arbitration law. AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333 (2011)

come with questionable costs. Businesses should not automatically assume that arbitration will lead to more efficiency, less cost, complete confidentiality or better results. The trade-offs between arbitration and litigation should be carefully weighed in any given case of type of case.



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

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

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

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

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

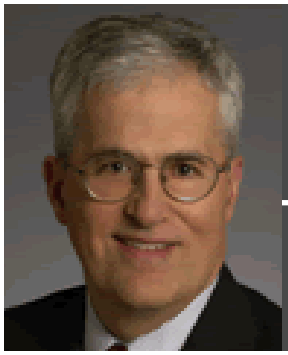
Mr. Wisoff is also experienced in the area of energy litigation, having represented California's electric grid operator in a variety of claims arising from extraordinary price volatility in the wholesale electricity markets. He is listed in The Best Lawyers in America in the area of Commercial Litigation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

Related Practices

- Antitrust
- Business Litigation
- White Collar Defense and Internal Corporate Investigations

Education

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



PROTECTING THE COMPANY'S CONFIDENTIAL INFORMATION

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Best Practices for the Protection of Trade Secrets from Misuse
Richard M. Barnes

Intellectual property (IP) can constitute more than 80% of an individual company's value. Due to misappropriation, infringement, or outright theft of IP, American companies suffer an annual loss of approximately $600 billion. This is before calculating the costs of enforcing companies' intellectual property rights in court following such losses. This figure also does not take into account revenue foregone as a result of diminished first-mover advantage, lost market-share, or otherwise by being prevented from making, using, or selling one's own invention.

In other words, protecting a company's IP has important financial consequences. Doing so effectively requires being aware of the way the law distinguishes between reasonable and not reasonable defensive measures. Taking full advantage of the array of legal protections available will not only make it less likely that value will leak from your company in the first place, but will also help to minimize losses when bad actors try to exploit your company's IP. In-house law departments should consider preparing and enforcing smart internal policies that have the twin goals of ensuring IP never leaves the control of its proper owners, and ensuring its recovery if it does.

An essential element in a trade secret case is for the owner of the trade secret to establish that the misappropriated information was acquired through improper means. This means for trade secrets, the best offense is a good defense. In-house practitioners should consider worst-case scenarios when developing trade secret protection protocols. Third parties are highly motivated to obtain competitive advantages and theft of trade secrets can be a low-cost path to innovation.

If the worst occurs and your trade secrets are misappropriated, recourse depends on whether your company had protocols in place that help to document that your employees invented the stolen information in the first place, and that the company took legally reasonable steps to maintain the information as a secret. Proving the existence of such defensive protocols not only minimizes the likelihood of misappropriation in the first place, but can go a long way to establishing that the acquisition of the information was improper. It also can minimize the expense of proving your case in court if misappropriation happens, and can maximize your ability to retrieve the stolen information in addition to damages.

Protection for trade secrets is available at the federal level, under the Defend Trade Secrets Act, as well as at the state level, under the Uniform Trade Secrets Act (UTSA), which has been adopted by 47 states, the District of Columbia, Puerto Rico, and the Virgin Islands. The UTSA defines a trade secret

in broad terms:[1]

Information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The second bullet is crucial: if your company does not make reasonable efforts to maintain its secrets, then it has waived this protection under the law. This means that even if your employees invented the idea, your company took some degree of precaution to keep it confidential, and by all rights you should own the secret, you may still be without recourse because you did not do enough to protect it.

In addition, the UTSA does not offer protection for information that is merely "confidential," but is not a fully-fledged trade secret. This is because under federal law, and in most states that have adopted the UTSA, "confidential information" is not a legally recognized type of protectible property. Labeling something "confidential" does not necessarily confer any protection, so affirmative steps must be taken to ensure that all trade secrets are maintained as actual secrets that are entitled to legal protection.

Furthermore, if your trade secrets are misappropriated, your options for recovery may be limited to the single claim of trade secret misappropriation. This is because most states that have adopted the UTSA recognize that it preempts common-law claims of misappropriation. This preemption prevents plaintiffs from stacking parallel claims that are all based in the same set of facts. In other words, when a bad actor misappropriates your trade secret, you can sue for trade secret misappropriation under the UTSA, but not for conversion, commercial theft, unjust enrichment, or any number of additional, but essentially identical claims.

Therefore, in order to warrant protection under the UTSA, in-house practitioners must be familiar with the wide array of protocols and security measures that constitute "efforts that are reasonable under the circumstances" in maintaining a trade secret. Generally speaking, what is reasonable varies case-by-case and a court will perform a cost-benefit analysis to determine whether your company "did enough" in any particular scenario. The goal, then, for an in-house practitioner, is to reduce the risk of losing trade secret protection—under any potential set of facts—by ensuring your company's protective measures legally entitle it to protection. This involves proactively identifying potential ways trade secrets can be misappropriated, and adopting and enforcing best industry practices.

Who Can Misappropriate?

First, in-house practitioners must consider who is capable of misappropriating secret information. The primary way trade secrets are stolen is not by corporate espionage or by foreign actors—although competitors and foreign actors are a major risk in many industries. Rather, most cases involve companies who purposely granted individuals access to secret information, only for those individuals to leave the company and carry those secrets to a competitor, in violation of an employment agreement or other contract. This means that employees, independent contractors, and subcontractors are the most likely culprits for this type of IP loss.

In-house counsel should first consider whether individuals in each of these categories owe a duty to your company. In the direct employment context, employees are bound by their contractual duties as well as the duty of loyalty. The duty of loyalty prevents an employee from competing with the employer, soliciting the employer's customers, clients or other employees prior to the leaving the company, or from using work time to further the employee's own interests. It also includes the duty not to misappropriate confidential information or trade secrets of the employer by sharing that information with new employers in the event that employee leaves the company. This is true even if the original employer would not be harmed by the disclosure of such information.

Contractors, on the other hand, do not have an

1 The case law makes clear that an exact definition of a trade secret is not possible and practically may be decided by a lay jury.

independent duty of loyalty. This means that their duties to your company, as the principal, are defined solely by contract. Subcontractors may owe an even more attenuated duty. As such, as in-house counsel, you should play an active role in drafting and overseeing contracts between all parties that may have access to proprietary information. Subcontractors should not be permitted to perform work on any project or have access to company trade secrets in the absence of an agreement that either binds them directly to your company, or an agreement with an intermediary that you reviewed, approved, and can enforce.

Adopt Best Industry Practices

In the trade secret context, best industry practices include: active and aware project management, regular auditing, identification, and cataloguing of your company's IP, smart drafting and enforcement of contracts, performing due diligence with new agents and third parties, identifying and reporting red flags, maintaining adequate records of documents and correspondence, controlling access to information, adopting strong security and encryption measures, and emphasizing employee training and ongoing vigilance.

Project Management

Project management begins with identifying a specific individual as the head of project management. This individual may in some cases be an attorney, but usually is an engineer or someone in product development. While upper management and your company's legal department obviously play a role in overseeing projects, the project manager and the project engineers are often the front lines charged with protecting your company's IP. Relying solely on the practical expertise of the product developers, many companies fail to consider the need to properly delegate responsibility for managing IP, and the role of "project manager" frequently does not incorporate the necessary defensive tasks. Red flags may be noted and reported, but if it is not any specific person's job to do anything about issues that arise, then the issue can be ignored, allowing IP to walk out the door. This means project management must be someone's job, and that job must specifically include managing IP.

Indeed, project management is not something that occurs only at the beginning of a project. It is ongoing and requires constant follow-up and follow-through. The purview of the project manager must include:

- Identification of IP for any project involving emerging technologies,
- Vetting of contractors and third parties,
- Managing contract compliance by employees, contractors, and subcontractors,
- Managing access to information, documents, and property, and
- Recordkeeping of meetings, events, and developments in the project, including keeping track of who contributed what ideas and when,
- Submitting record of invention to in-house counsel.

Identification and Cataloguing of IP

The project manager can designate another individual as the head of an IP protection team. All potential IP developed by employees or by contractors must be identified and reported for cataloguing, protection, and for creating a record for future patent applications. Secret IP must be treated as secret or confidential and should be stored separately from non-secret information, both physically and electronically.

Managing Contracts with Employees, Contractors, and Outside Parties

In-house counsel should review the company's employee code of conduct to ensure that employees are properly informed of their duties to behave defensively with regard to the company's proprietary information. Engineers and employees involved in product development are not attorneys and may not consider the potential legal consequences of each email or conversation they have concerning their projects. The individual in charge of legally protecting trade secrets must make sure employees are properly instructed on the need for confidentiality. Employees should therefore be required to read and sign a code of conduct and confidentiality, as well as

a non-disclosure agreement before beginning work. This should be updated on an annual basis.

In addition, a company must take similar measures regarding contractors and subcontractors, as was discussed previously. No individual may participate in a project or be exposed to any secret unless and until they have signed "sticky" contracts that bind them clearly and directly to your company. It is simply not sufficient to assume that contractors will properly police subcontractors in compliance with the agreements they have signed. You should always seek to be aware of the identity of all subcontractors, and you must endeavor to establish non-disclosure agreements directly with every single individual person that may see your IP.

In addition, contracts should have very clear delineations as to who owns pre-existing ideas. Many trade secret cases are defended on the basis of independent derivation of the ideas.

Provisions, terms, and party names must be consistent across all documents and all contracts. There can be no confusion as to who already owns what and who will be entitled to IP that derives from any collaboration. Follow up regularly with contracting parties to ensure there is ongoing mutual understanding and that no party ever is under an incorrect interpretation of its obligations or rights.

Due Diligence with Third Parties

Project managers also need to be responsible for performing due diligence regarding third parties and contractors. This may include researching and vetting potential collaborators and requiring them to disclose all prior IP that they claim to own, as well as all IP and all projects they are working on at the time of contracting. These early exchanges should be made pursuant to an NDA. Bear in mind that it is particularly difficult to police foreign entities, so it is important to recognize that laws and norms outside the United States and that international companies may operate under a different set of assumptions regarding the entitlement to property derived from collaborative work. Project managers should consider third-party research and vetting prior to permitting contractors to have access to IP. Red flags that are revealed must be reported, discussed, and cleared before proceeding.

Red Flags

Employees need to learn to recognize red flags and red flags should be reported through a specific channel to the IP Protection team. This concept should be reinforced at all stages of development, from the vetting of potential partners to taking the product to market. The IP Protection team should evaluate the threat, take action, and follow through with the reporting employee. Actions may include, at the very minimum:

- Immediately revoking access to proprietary information,
- Immediately ceasing communication with that party,
- Demanding return of any proprietary information or materials,
- Demanding cessation that they stop any related activity, maintaining records of the event, and
- If the relationship needs to continue, insist on measures protecting against independent development of the technology.

Documents and Correspondence

Document management must be consistent and a priority. Documents and emails containing or discussing proprietary information should be marked as confidential. Electronically stored confidential information should be accessible only on a need-to-know basis. Documents and correspondence related to a proprietary project should be compartmentalized and stored. This may require keeping PST files and documents beyond the term of your company's general document-retention policy. You should keep authoritative, finalized, and signed versions of contracts, statements of work, and proposals. It is also crucial to take and maintain meeting minutes related to projects and to calendar and record the dates of all important events and discoveries. Many companies employ document management software to assist in this task.

Access to Information

Proprietary information should never be openly available, and preferably should only be available

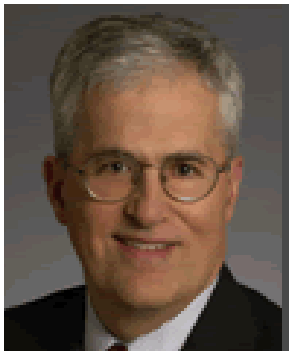
on a need-to-know basis. Consider using an encrypted cloud-based service to store proprietary electronic documents for remote access. For prototypes and other physical products, consider using secure storage like safes or locked rooms. Only after proper vetting and signing of contracts may individuals be granted access on a case-by-case basis. If an employee or contractor leaves the company or departs a project, steps must be taken to ensure that their access is revoked. After parties leave or after the project is complete, the contract should include a mechanism that requires the return of all information and property related to the project.

Security and Encryption

For data and correspondence, use encryption and multi-factor authentication to prevent infiltration or unwarranted access can be a reliable way to protect secrets. Use of a secure and encrypted backup service can ensure proprietary information is not lost. For physical products, use locks and sign-in sheets to ensure access is limited to those who need it and that the company can determine who saw what and when. Conduct regular tests and audits of electronic and physical security protocols to identify weaknesses.

Training, Communication, and Ongoing Vigilance

A company is only as valuable as its ideas, and ideas are only valuable if they are proprietary and available only to your company. Therefore, security and secrecy directly translate to value for your company. Maintaining an effective defensive posture across your entire workforce is an on-going process, and all employees must be constantly reminded that your company's value is in its technology and trade secrets. While invention hinges upon the free flow of ideas, conditions must first be established that permit ideas to flow in safe and secure circumstances.



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Mr. Barnes is a founding partner of the firm. He represents clients in complex tort, commercial, and product liability litigation. He has been recognized as a leading practitioner in these fields and most recently was awarded 2015's Leadership in Law Award from The Daily Record. During his career, he has represented a variety of clients in disputes involving pharmaceuticals, medical devices, patents, trademarks and the Lanham Act, antitrust, breach of contract, unfair trade practices, aviation, commercial torts, covenants not to compete, and state procurement laws.

Practice Areas

- Intellectual Property Litigation
- Product Liability
- Pharmaceutical and Medical Device Litigation
- Toxic Tort and Environmental Litigation
- Class Action Litigation
- Commercial and Business Tort Litigation
- General Tort Liability Litigation

Representative Matters

- Representative clients include Pfizer Inc, Wyeth, Telectronics Pacing Systems, Inc., Pacific Dunlop, Ltd., Dentsply Sirona, Danaher Corporation, Hill-Rom, Johnson & Johnson, DePuy Orthopedics, L. Perrigo Company, Nissan Motor Credit Corporation, Lafarge, ARINC, Vermont Talc, A.H. Robins Co., Gruss & Co., Correct Rx Pharmacy, and several local businesses.
- Mr. Barnes' significant representations include trials for Pfizer Inc and/or Wyeth relating to the Bjork Shiley Mechanical Heart Valve (1985-1999), Rezulin (2000-2004), the Howmedica Unicompartmental Knee (2001-2004), Diet Drugs (2003-2005), and Neurontin (2007-2011). Mr. Barnes has represented Pfizer in the hormone therapy litigation in cases in several jurisdictions. He also had significant responsibilities for preparing and presenting scientific evidence in the Celebrex, Bextra, and Chantix Litigations. He has briefed and argued several Daubert motions in pharmaceutical cases. Mr. Barnes served as national counsel to Pfizer Inc and its subsidiaries for claims and disputes arising from the manufacture and sale of the Duracon Unicompartmental Knee and over-the-counter pain relievers. In addition, he obtained a temporary restraining order and permanent injunction against the owner of a pornographic web site in Maryland for the infringement and dilution of Pfizer's "Viagra" trademark.
- Mr. Barnes served on the firm's national counsel team representing Telectronics Pacing Systems, Inc. in connection with thousands of claims arising out of the alleged failure of pacemaker leads. In this role, he was responsible for defending two national class actions, coordination of the litigation in Canada, Australia, and France, and the presentation of scientific, engineering, and regulatory evidence in various hearings for a class summary jury trial.

Education

- Western Maryland College (B.A., magna cum laude, 1977) Honors: Omicron Delta Kappa, Pi Gamma Mu
- Georgetown University Law Center (J.D., cum laude, 1981) Editor, American Criminal Law Review