LITIGATION MANAGEMENT IN A NEW YORK MINUTE

2019 EDITION

AUGUST 2, 2019 **THE CITY BAR BUILDING**

THE NETWORK TRIAL.COM

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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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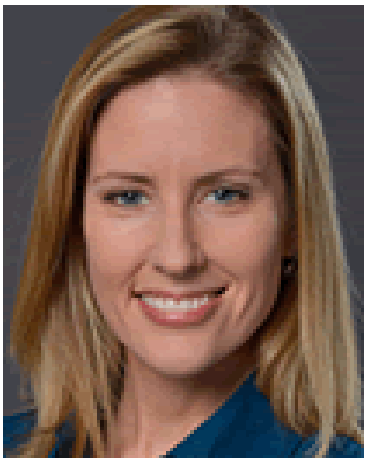

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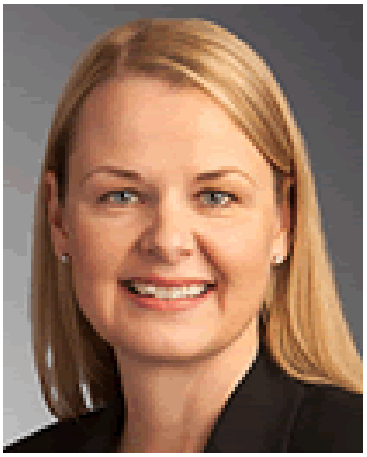

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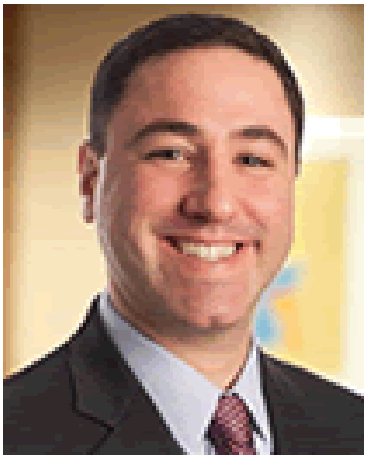

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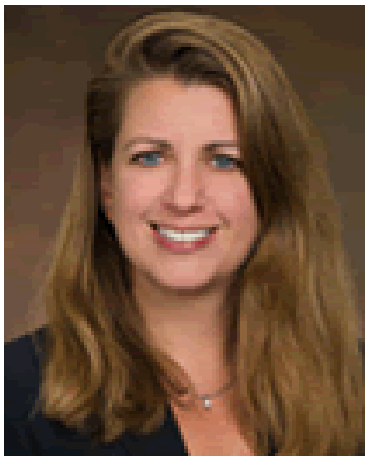

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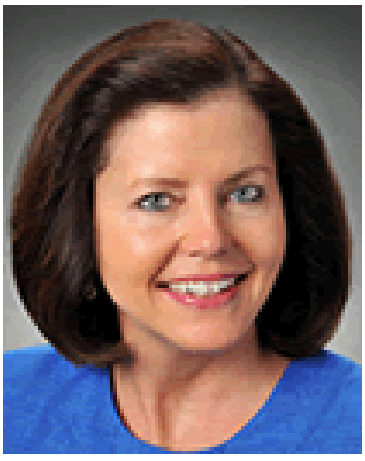

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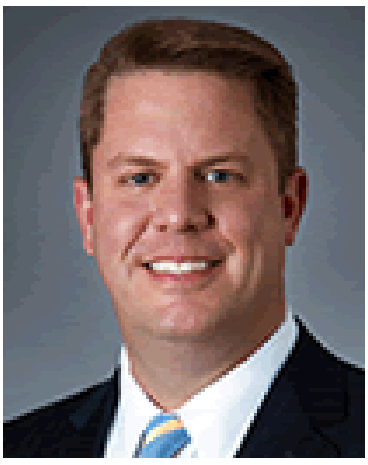

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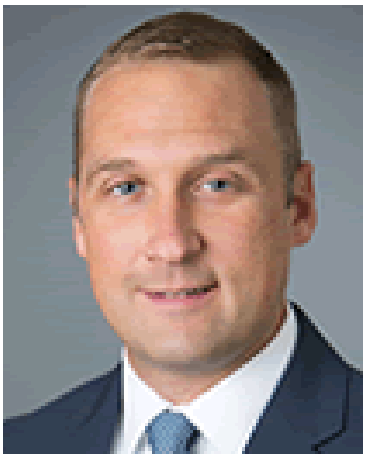

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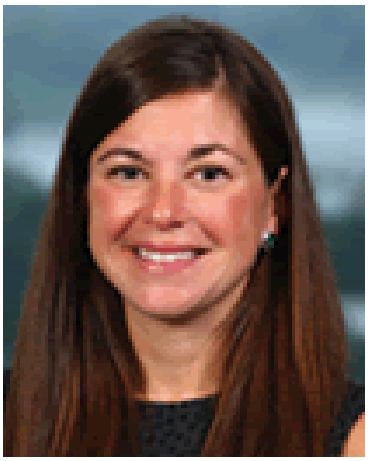

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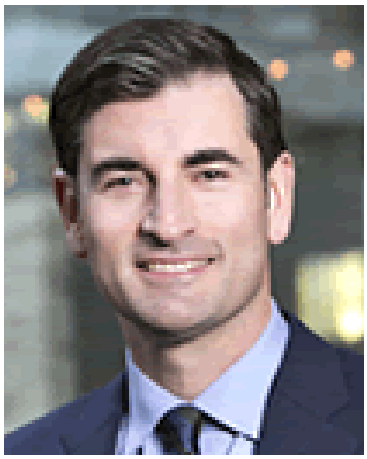

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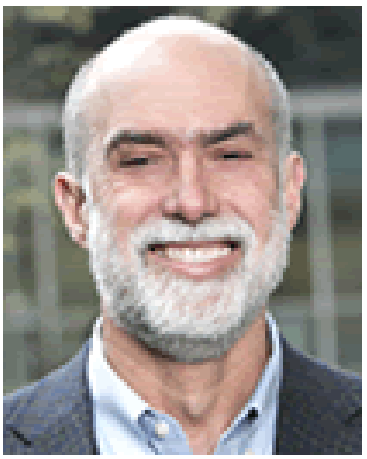

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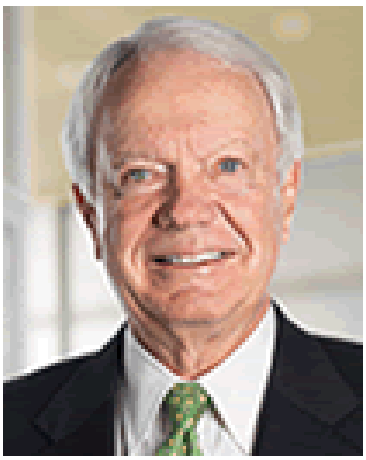

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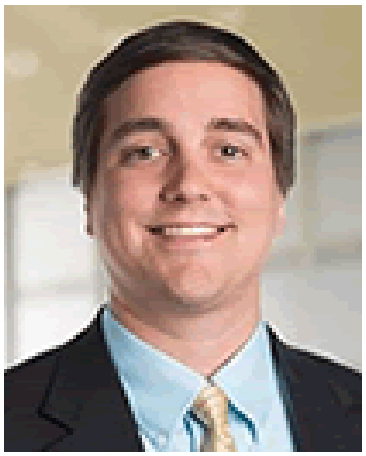

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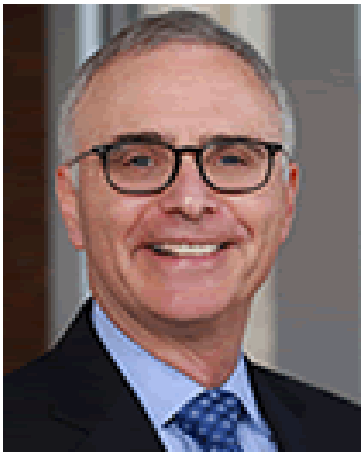

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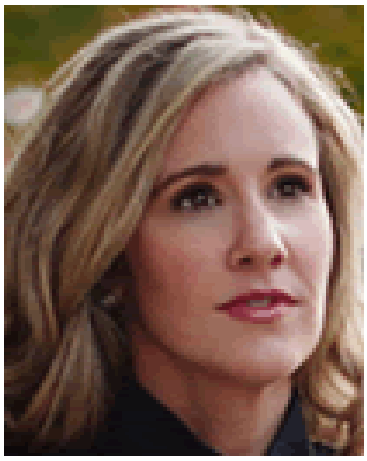

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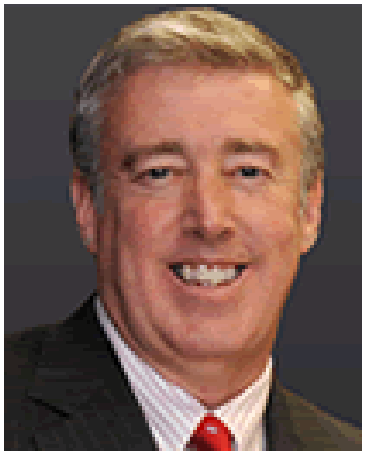

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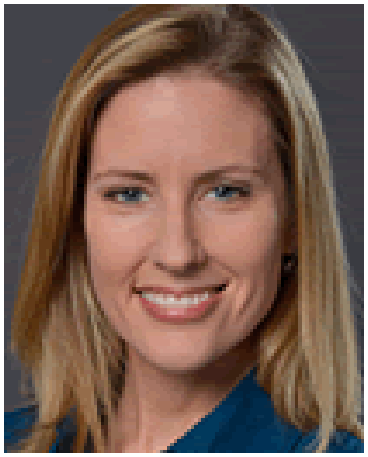

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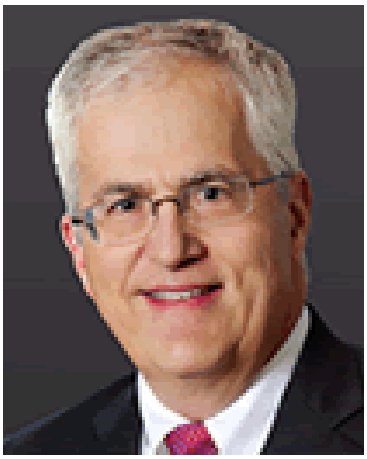

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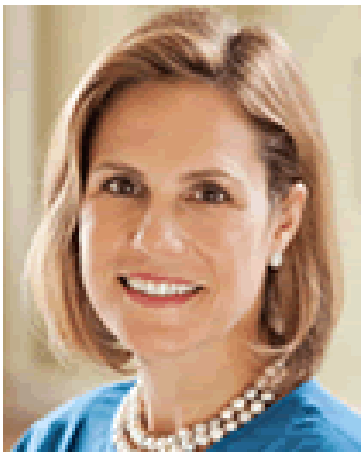

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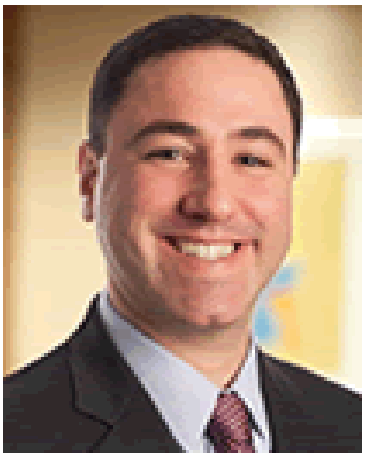

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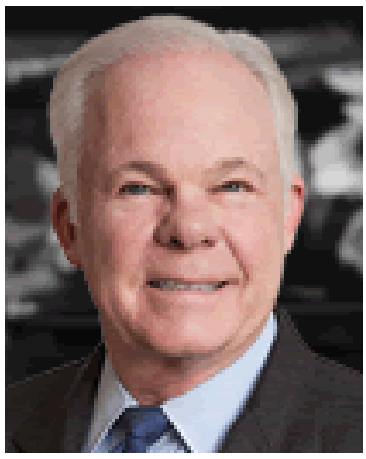

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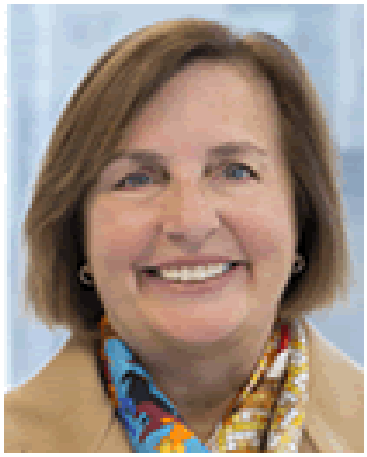

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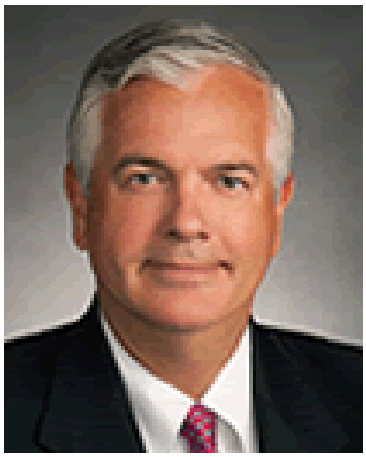

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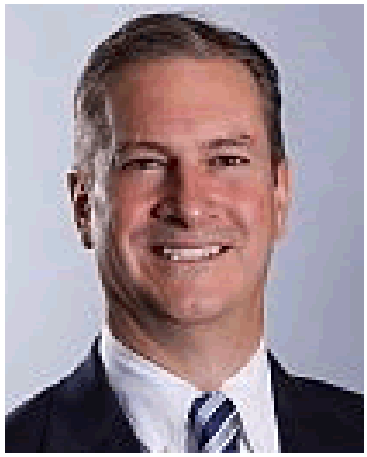

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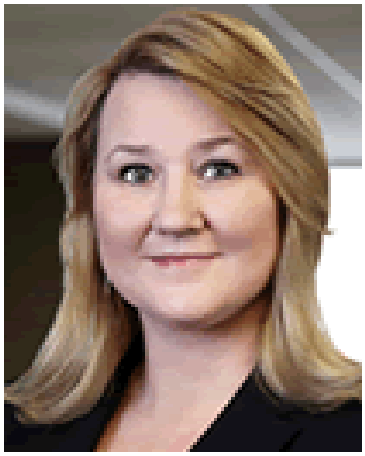

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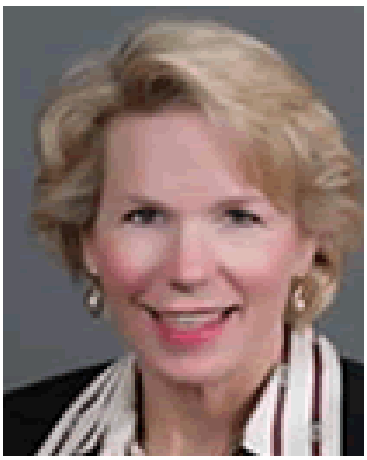

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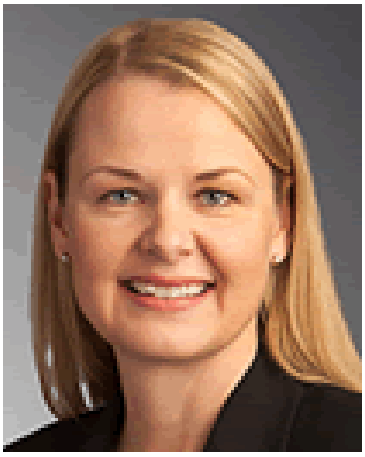

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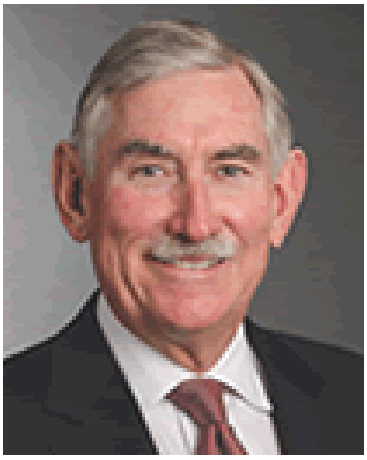

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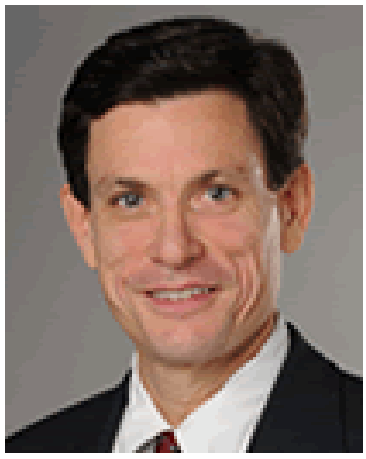

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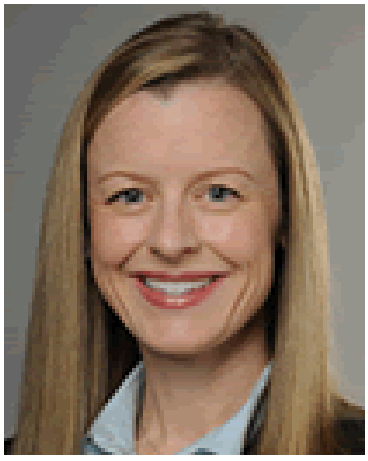

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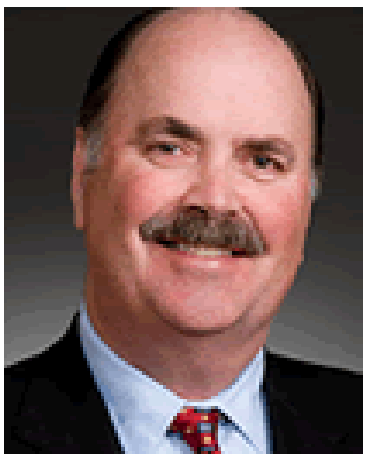

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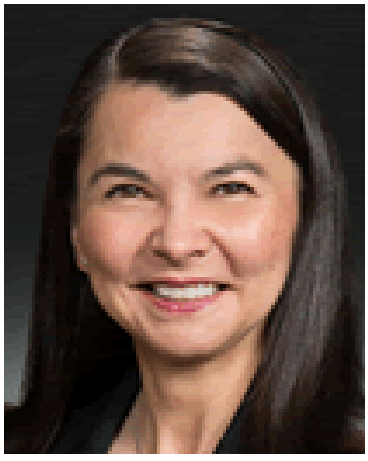

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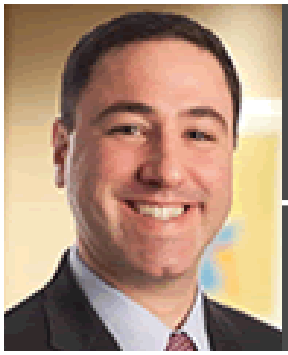

NAVIGATING INSURANCE COVERAGE DISPUTES

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Navigating Insurance Coverage Disputes: Strategies Promoting a Successful Voyage for Policyholders
David E. Suchar and Peter K. Doely

Policyholders buy insurance to protect themselves. Yet, when the time comes for reliance on their insurance, policyholders are faced with the challenges of understanding what exactly is covered, the process for getting coverage, and what to do if an insurance company refuses to honor its obligations. While this article cannot address all strategies for dealing with insurance coverage issues and disputes, there are several important steps policyholders can take to ensure they are afforded the full coverage provided by their policies.

Understanding Your Policies

In order to understand how to enforce a policyholder's rights under its insurance policies, it is necessary to understand the applicable coverage in its insurance program. When faced with a potential claim, it is crucial to discover which relevant policies may apply despite the fact that each may be voluminous and technical in describing coverage grants and requirements.

The first step is to gather the operative insurance policies, including any endorsements. This information will be key for making a determination as to whether the loss is covered and, if so, the amount of coverage. In particular, a policyholder should understand the following:

- Initial Grant of Coverage. An insurance policy will initially provide the basic scope of what is a covered loss.
- Definitions. A policy will then more specifically define terms within the policy. The definitions can have a significant impact on the scope of coverage.
- Exclusions. From the initial grant of coverage, a policy will then carve out specific types of losses which would generally be covered but for the exclusions.
- Defense. As a component of the protection afforded under liability policies, the insurer is often obligated to defend its insured. The insurer's defense obligations may be in addition to the insurer's other obligations. In some policies, the costs of defense may also reduce the amount of coverage otherwise available.
- Limits. The insurance policy will only provide coverage up to a specified amount.
- Deductibles and Self-Insurance Retentions. The insurance policy may require the insured to pay for, or otherwise be responsible for, certain amounts before the insurer is obligated to pay for a loss.

Courts across the country have developed vastly different and often opposing interpretations of the same language in standard form insurance policies, and those interpretations can be critical in assessing coverage and will vary depending on the jurisdiction. For example, whether construction defects are considered an "occurrence" under a standard Commercial General Liability policy, and are thus potentially a covered loss, is a hotly contested issue, with courts across the 50 states taking a myriad of different approaches in response to the same policy language. Experienced coverage counsel will be attuned to choice of law issues because the state substantive law will often be a question of fact in interpreting liability policies. Counsel can help explain these issues from a policy specific and state specific standpoint, but reviewing the plain language of the policy

is always the best starting point.

Notice and Sharing Information with Insurer

Sharing information with an insurer promptly is essential for a policyholder to preserve and enforce its rights under its policy (or policies). In order to do this effectively, an insured needs to recognize potentially covered losses and develop processes to make sure information is provided to the insurer.

What constitutes a covered loss is not always intuitive. For instance, the term "claim" is often defined in liability policies as a "demand for monetary or non-monetary relief." While a lawsuit would certainly fit within this definition, a variety of other types of actions may also fit within the "claim" ambit. Depending the particular policy, these circumstances may include an investigative demand,[1] subpoena,[2] or other third-party assertions that a policyholder may be liable. Employees likely to receive such claims should be trained to recognize them and consider potential insurance coverage. One potential systematic approach may be to engage in a review process within a reasonable period before policy expiration, so that any potential claims may be properly and timely reported to insurers.

Once a policyholder recognizes there may be coverage, it should provide notice to its insurer immediately. Some types of policies provide coverage on a "claims made" basis, meaning a claim against the insured is made during the policy period and notice of the claim must also be made by the policyholder to the insurer within a specified time (often no later than the end of the policy period). If the policyholder fails to provide notice, this may lead to the insurer rightfully denying all coverage.[3]

Notice can be handled by a policyholders' insurance broker, risk manager, or outside counsel. If there are directions in the policy about how and where to deliver notice, it is important to follow them. The notice does not have to be complex or cumbersome – simply attach the claim documentation to a letter requesting all available coverage (likely including a defense) under all polices.

It is also important to provide notice to all insurers whose policies may provide coverage, including excess or umbrella policies. A policyholder should not make the mistake of believing at the beginning of a dispute that it knows how the dispute will resolve or what its exposure may be. It is always preferable to notify insurers of potential losses instead of failing to provide notice and risking loss of the ability to pursue coverage later.

In addition to providing initial information to an insurer, it is important to continue to provide information as the underlying claim facts develop. Not only is this often required by a policy's cooperation clause, but it facilitates the process for the insurer making its coverage determination and the policyholder assessing how to proceed.

The policyholder should also never blindly settle or compromise a relevant underlying claim without the involvement and/or consent of the insurer that has accepted its claim. Doing so may breach the policyholder's obligations under the policy and compromise its ability to recover significant amounts from the insurer.[4] Any experienced coverage practitioner can tell horror stories about otherwise pristine claims being compromised because parties too easily settled related obligations without informing the insurer. These actions often inadvertently prejudice good corporate citizens who risk coverage by taking what they believe to be the right steps in settling out related claims, because insurers may assert that their subrogation or other rights have been harmed.

Acceptance, Reservation of Rights, Denials, and the Relationship with Insurer

Once a policyholder provides notice of the claim to a liability insurer, the insurer has three options: accept the claim, accept the claim under a reservation of rights, or deny the claim.

If the insurer accepts the claim, it has agreed that the claim is covered under the policy. Often, however, the insurer will accept the claim under a reservation of rights. A reservation of rights means that the insurer is accepting the claim for now, but is preserving its right to later assert that an element of the claim, or the claim as a whole, is not covered. Such letters are often long and technical because insurers want to preserve as many potential defenses as they can. The insurer also may deny coverage in its entirety.

Particularly if a policyholder receives a reservation of rights letter or a denial of coverage, it may want to involve experienced coverage counsel. Insurance companies often aggressively deny coverage, assert defenses, or otherwise act to preserve their rights in writing, knowing

1 ACE Am. Ins. Co. v. Ascend One Corp., 570 F. Supp. 2d 789, 795 (D. Md. 2008).

2 Syracuse Univ. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 40 Misc. 3d 1205(A), 975 N.Y.S.2d 370 (Sup. Ct.), aff'd, 112 A.D.3d 1379, 976 N.Y.S.2d 921 (2013).

3 Nat'l Union Fire Ins. Co. v. Zillow, Inc., No. C16-1461JLR, 2017 WL 1354147, at *5 (W.D. Wash. Apr. 13, 2017).

4 Ralex Servs., Inc. v. Sw. Marine & Gen. Ins. Co., 155 A.D.3d 800, 802, 65 N.Y.S.3d 49, 52 (N.Y. App. Div. 2017).

that a certain number of policyholders will fail to respond. For a relatively small expense, an attorney can analyze the policy and claim which may allow the policyholder potentially to pursue significant amounts of insurance coverage. If, upon analyzing the policy, the policyholder disagrees with the insurer's position, it is important to respond to anything but an unequivocal acceptance from the insurer and assert any contrary position. A policyholder should not acquiesce in a denial of coverage without thoroughly assessing its rights.

If an insurer accepts the claim under a reservation of rights, the relationship between the policyholder and the insured may become complicated. On the one hand, the insurer is agreeing to protect the insured for the time being. On the other hand, the insurer has reserved the right to disclaim coverage, and it has an incentive to view the claim in a manner which minimizes coverage. This common situation may create a dilemma for the defense counsel chosen by an insurer to represent the insured. Often such counsel have longstanding relationships with insurers, and many courts have questioned said counsel's allegiances, which arguably may be divided between the policyholder and the insurer. One practical import of these conflicts is that the policyholder may, in some states, be entitled to defense counsel paid for by the insurance company, but selected by the policyholder.[5] Experienced counsel can help navigate these issues and make sure the policyholder's interests are always put first.

Insurance Coverage Litigation

When necessary, coverage litigation can be an effective way to ensure the policyholder receives the protection to which it is entitled to from its insurer. Insurers may be slow to come to the table, but legislatures and courts have provided policyholders with tools to help them combat any dilatory insurers. When a policyholder successfully establishes coverage – depending on which particular state's law applies and the egregiousness of the insurer's conduct – the policyholder may be able to recover, for example: (1) its attorneys' fees incurred in pursuing coverage;[6] (2) interest on the amounts due;[7] or (3) damages in excess of the policy limits, including extracontractual penalties or punitive damages.[8]

Litigation also provides an opportunity to get information regarding the insurer's views of the scope of coverage and treatment of the claim in order to develop the policyholder's claims against the insurer. For example, in discovery a policyholder may be able to access the insurer's claim file, underwriting file, and the drafting history of the particular policy at issue. Such discovery can be a useful tool for establishing a policyholder's rights to coverage and extracontractual damages.

Mediation and Settlements

Mediation and other alternative dispute resolution processes have become standard, or even required, practice throughout the country, and most lawsuits are settled instead of tried. Particularly in large, complex cases, insurance money will often control whether those suits are able to be resolved.

In approaching a mediation or developing a settlement strategy, it is very important to engage with attorneys and mediators experienced with insurance coverage issues. This experience allows attorneys and mediators to bridge the gap between complex underlying cases and any insurance coverage issues in order to persuade insurers to help fund the underlying settlement.

Because many plaintiffs view the insurance proceeds as the likely source of recovery, insurance coverage attorneys have a unique role in the resolution process. Coverage counsel can explain to the plaintiff any coverage issues that may exist and, as a practical matter, prevent the plaintiff from having an unrealistic view of recovery. Conversely, such attorneys can explain to the insurers the potential coverage exposure and increase insurer participation in the underlying case settlement.

Insurance coverage counsel can also work together with the attorneys in the underlying case to take seemingly inconsistent positions which may advance their mutual client's interest. The attorney in the underlying case can advocate the client's position against the plaintiff; and, at the same time, the insurance coverage attorney can encourage an insurer to limit its exposure and resolve the matter. Thus, the attorneys can fulfill unique and complementary roles in the resolution process.

Conclusion

For policyholders, there are often numerous hurdles for establishing insurance coverage and convincing insurers to pay out on covered losses. Fortunately, there are steps which can be used to establish the maximum amount of insurance coverage. This overview is a starting place for navigating insurance coverage disputes and understanding basic concepts, but it is always advisable to consult with an experienced insurance coverage

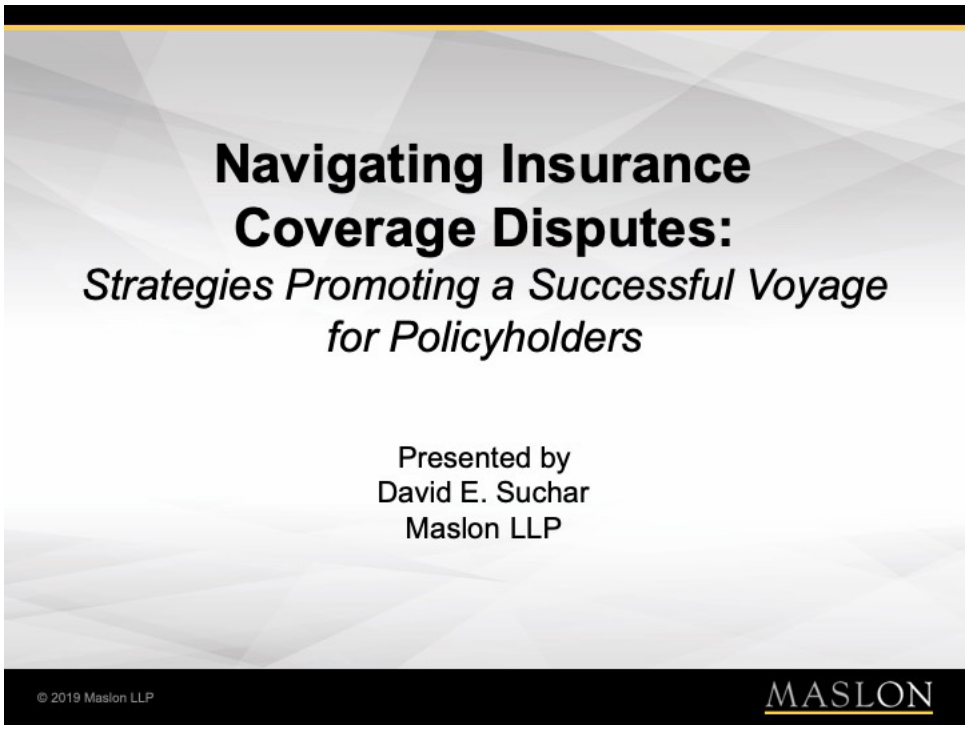
5 Alaska Stat. § 21.96.100; Cal. Civil Code §2860; Prahm v. Rupp Const. Co., 277 N.W.2d 389 (Minn. 1979); Maryland Cas. Co. v. Peppers, 355 N.E.2d 24 (Ill. 1976).

6 Nolt v. U.S. Fid. & Guar. Co., 329 Md. 52, 66, 617 A.2d 578, 584 (1993).

7 Minn. Stat. § 60A.0811.

8 Fla. Stat. § 624.155; 42 Pa. C.S.A. § 8371; MKB Constructors v. Am. Zurich Ins. Co., 711 F. App'x 834, 837 (9th Cir. 2017); Pickett v. Lloyd's, 131 N.J. 457, 474, 621 A.2d 445, 454 (1993).

counsel in assessing any loss and potential claim.



Introduction & Road Map

1. Understanding your policies
2. Notice and sharing information with insurer
3. Acceptance, reservation of rights, denials
4. Your relationship with insurer
5. Insurance coverage litigation
6. Mediation and settlement

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Anatomy of an Insurance Policy

- Declarations
- Grant of Coverage
- Definitions
- Endorsements/Exclusions

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Policy Interpretation and Choice of Law

- Construction/Insurance Coverage:
  - Under a CGL policy, can defective construction constitute an "occurrence?"
- Answer depends on state law.
  - Illinois, Wyoming - No
  - Indiana, Washington & North Dakota - Yes

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Protection under Liability Policies

- Indemnity
  - Payments for covered losses.
- Defense
  - Duty to defend policyholder.
  - Defense costs may be in addition to the policy limits, or they may reduce the policy limits.

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Notice

- Must give notice to all insurers right away.
- Common Mistakes
  - Failure to recognize a "claim."
  - Failure to provide timely notice.
  - Failure to notify excess and umbrella insurers or other potentially applicable policies.

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Failure to Provide Notice

An example: *National Union Fire Ins. Co. v. Zillow,* 2017 WL 1354147 (W.D. Wash. 2017)

Result: Zillow loses out on coverage for $8 million verdict based on failure to give notice of demand letter received during first policy period, concluding that Zillow's notice of the follow-on lawsuit during second policy period was too late.

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Notice: Suggestions

- Train key employees to recognize claims and consider them as such.
- Have an established process for how to handle potential claims and give notice.
- Resist the instinct to assume you know how a claim will evolve and resolve.

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Continued Cooperation and Communication with Insurer

- Continue providing information.
  - Obligation to cooperate.
- Compromising claims
  - Never settle a claim without insurer involvement and/or consent.
  - Doing so can prejudice ability to collect from insurer.

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Insurer Response to Notice

- Three options:
  - Accept.
  - Deny.
  - Accept with a reservation of rights.
- If you receive a denial or reservation of rights, may want to involve experience coverage counsel.

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Reservation of Rights Letters

- Respond and don't confess "no coverage."
- Develop a policy-based strategy.
- Request discussion with adjuster or claims counsel.

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Independent Counsel

- Defense counsel chosen by the insurer may have a conflict of interest.
  - Example: whether a policyholder's action was intentional (and, therefore, excluded under the policy).
- May entitle the policyholder to counsel of their choosing paid for by the insurer.

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Coverage Litigation

- Can be an effective way to protect the policyholder.
- Additional remedies may be available, including recovery of:
  - Attorneys' fees.
  - Interest.
  - Damages in excess of the policy limits.

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Discovery

- Litigation may allow policyholder insight into the insurer's view of coverage.
  - Claims file.
  - Underwriting file.
  - Drafting history.

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Role of Mediator & Coverage Counsel

- Mediation is used – or required – in almost all large, complex insurance-related cases.
- Insurance money often controls resolution.
- Experienced mediators and coverage counsel bridge the gap between the underlying case and the coverage issues to fund settlements
- Perception that role of mediators and role of coverage counsel is increasing in importance for resolution of complex cases

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Coverage Counsel and Mediator Familiar With Coverage Issues Act To Facilitate Settlement

- Explain to plaintiff:
  - Coverage issues/weaknesses.
- Explain to insurer:
  - Case exposure.
- Coverage issues can drive settlement amount.
- Potential collaboration between coverage counsel and counsel in underlying case.

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Insurers and Settlements

- Necessity of involving insurer
- Insurer may be required to settle
- Partial settlements/strategy
  - Settling just with insurers?
  - Or wait until combined mediation?

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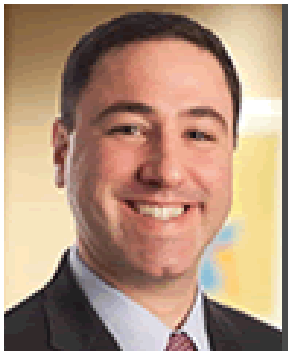

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David Suchar, a skilled trial attorney, regularly represents clients in construction and insurance coverage disputes, government and internal investigations, and a variety of commercial litigation. In the 2019 Who's Who Legal worldwide ranking of construction law "Future Leaders," David was the sole ranked practitioner from the United States, described as "an impressive trial lawyer whose practice spans the spectrum of construction matters from insurance to payment claims." The 2019 edition of Chambers USA ranks David as one of the top Minnesota construction lawyers and notes that sources describe him as "an excellent attorney with a superb grasp of construction law."

David has developed a niche national practice representing commercial policyholders in insurance coverage disputes, including on many of the largest construction projects and claims across the United States. His recent successes include multimillion-dollar recoveries for such matters in Minnesota, Florida, Louisiana, Washington, Virginia, Maryland, Massachusetts, and Utah. A frequent presenter on construction and insurance coverage issues, David draws from his experience on the Steering Committee for the ABA Forum on Construction Law's Division 7 (Insurance, Surety & Liens) and as contributing editor of The Construction Lawyer, the flagship ABA construction publication.

As a former federal prosecutor, David has also counseled and represented clients at trial and through all aspects of various government, administrative, and internal investigations. His experience includes criminal prosecutions, inquiries, and subpoenas from state and federal agencies.

David's in-court experience sets him apart from the crowd. He has acted as first-chair trial counsel for a variety of bench and jury trials in courts across the country. In addition to his work in the areas of construction and insurance coverage litigation and government and internal investigations, David has successfully litigated various high-end contract and commercial litigation matters. He serves on the Executive Committee (2019 Officer at Large) of the Network of Trial Law Firms, a network of over 5,000 attorneys in 23 separate and independent trial law firms, including Maslon.

Areas of Practice
- Business Litigation
- Construction & Real Estate Litigation
- Government & Internal Investigations
- Insurance Coverage Litigation
- Intellectual Property Litigation

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- Georgetown University Law Center - J.D., cum laude, 2002
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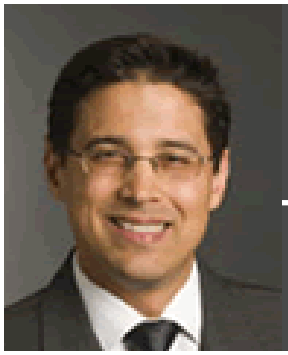

DOES BMS HARKEN AN END TO NATIONAL CLASS ACTIONS IN PLAINTIFF-FRIENDLY VENUES?

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Bristol-Myers – harkening the end of national class actions?
Greg Marshall[1] *and Claudia Stedman*[2]

Courts around the country continue to grapple with the application of Bristol-Myers to class actions,[3] which if applied to the claims of putative class members would bring about a ban on national class actions virtually everywhere plaintiffs like to file them – everywhere corporate defendants are not "at home." This article examines the growing circuit split, and takes a closer look at the battle-ground due process and federalism questions dominating the debate.

Bristol-Myers – A Brief Overview

In Bristol-Myers, 600 plaintiffs filed claims in California state court against Bristol-Myers Squibb — a company incorporated in Delaware and headquartered in New York — asserting claims based on injuries allegedly caused by the pharmaceutical company's drug Plavix. Applying settled specific jurisdiction principles, the U.S. Supreme Court held that because the nonresidents were not prescribed, did not purchase, did not ingest, nor were injured by Plavix in California, there was no "connection between the forum and the specific claims at issue." The Court explained that "[t]he mere fact that [some] plaintiffs were prescribed, obtained, and ingested Plavix in California — and allegedly sustained the same injuries as did the nonresidents — does not allow the State to assert specific jurisdiction over the nonresidents' claims." In sum, in Bristol-Myers, the U.S. Supreme Court mandated that each plaintiff must establish personal jurisdiction regardless whether it is established for another claimant in the action.

Because Bristol-Myers was decided in the "mass action" context, it does not expressly apply to class actions, as Justice Sotomayor pointedly observed in her dissent.[4] As there are reasons to distinguish mass and class actions,[5] the question has percolated in the lower courts since the Supreme Court's holding, resulting in a notable split that first developed between the Northern District of Illinois (whose judges have consistently held that Bristol-Meyers applies to class actions)[6] and the Northern District of California (whose judges have generally disagreed),[7] and the split is widening.[8] While the weight of numbers may

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3 Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco City., 137 S. Ct. 1773, 1780 (2017) ("Bristol-Myers").

4 Bristol Myers, 137 S. Ct. at 1789, n.4 (Sotomayor, J., dissenting) ("The 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.")

5 See, e.g., Fitzhenry-Russell v. Dr. Pepper Snapple Group, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017) (noting that unlike class actions, each plaintiff in mass actions like Bristol-Myers was a real party-in-interest).

6 Anderson v. Logitech Inc., 2018 WL 1184729 (N.D. Ill. March 7, 2018) (striking nationwide class claims); DeBernardis v. NBTY, Inc., No. 17 C 6125, 2018 WL 461228, at *2 (N.D. Ill. Jan. 18, 2018) (dismissing counts seeking to recover on behalf of out-of-state class members, noting "The Court believes that 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 in a form, such as in this case, where there is no general jurisdiction over the Defendants."); McDonnell v. Nature's Way Products, LLC, 2017 WL 4864910 (N.D. Ill. October 26, 2017) (one of the first decisions to apply the reasoning of Bristol-Myers to class actions) ("a state may not assert specific jurisdiction over a nonresident's claim where the connection to the state is based on the defendant's conduct in relation to a resident plaintiff."); Practice Mgmt. Support Servs., Inc., No. 14 C 2032, 2018 WL 1255021, at *18 ("Because these nonresidents' claims do not relate to defendants' contacts with Illinois, exercising specific personal jurisdiction over defendants with respect to them would violate defendants' due process rights. Thus, . . . the Court finds it appropriate to dismiss the claims of the non-Illinois-resident class members.").

7 Fitzhenry-Russell, 2017 WL 4224723; see also Broomfield v. Craft Brew Alliance, 2017 WL 3838453 (N.D. Cal. Sept. 1, 2017) (deferring consideration of personal jurisdiction arguments under Bristol-Myers until class certification).

8 Notable decisions applying Bristol Meyers to class actions: Plumbers' Local Union No. 690 Health Plan v. Apotex Corp., No.16-665 2017 WL 3129147 (E.D. Pa. July 24, 2017). Here, the court did not exercise personal jurisdiction over out-of-state-class members. The court

tip against Bristol-Myers' application to class actions, there remains strong momentum in favor of its application.[9] With none of the circuit courts yet deciding the issue, the question remains wide open.

Personal Jurisdiction – A Quick Refresher

Personal jurisdiction over a defendant must exist in one of two variants—general or specific—before a federal court can adjudicate an action in federal court.[10] General jurisdiction (or "all purpose" jurisdiction) permits courts to adjudicate claims against corporate defendants only where the defendant's "affiliations with the State are so 'continuous and systematic' as to render [the defendant] essentially at home in the forum State,"[11] but not everywhere it does business.[12] As the Daimler Court noted, "[a] corporation that operates in many places can scarcely be deemed at home in all of them."[13] "With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] ... bases for general jurisdiction'."[14] In contrast, specific personal jurisdiction is available only when the particular claim in the suit "arise[s] out of or relate[s] to" the "defendant's contacts with the forum."[15]

In either case, a court's exercise of authority over a

explained, "Only plumbers Pennsylvania claims arise out of or relate to Defendants' sales of generic drugs in Pennsylvania …. Accordingly, the court cannot exercise specific jurisdiction over the non-Pennsylvania claims…." Id. at *4. This case relied on two Northern District of Illinois cases: Demedicis v. CVS Health Corp., No. 16-CV-5973, 2017 WL 569157 (N.D. Feb. 13, 2017) and Demaria v. Nissan N. Am., Inc., No. 15c3321, 2016 WL 374145 (N.D. Ill. Feb. 1, 2016); Spratley v. FCA US LLC, No. 3:17-CV-0062, 2017 WL 4023348 (N.D.N.Y. Sept. 12, 2017). Here the court granted the defendant's 12(b)(2) motion as to the plaintiffs whose claims were unrelated to the defendant's contacts with New York. Six of the eight named plaintiffs in this case had no connection to New York, the forum state for Chrysler—they purchased and repaired their defective vehicles in other states. In this case, the court analyzed the jurisdictional issue as though it were indistinguishable from the mass action holding in Bristol-Myers; In re Dental Supplies Antitrust Litig., No. 16 CV 696, 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017). This case did not involve the exact issue in Bristol-Myers, but the court's language suggested that it would extend that holding to the class action context. "Plaintiffs attempt to side-step due process holdings in Bristol-Meyers by arguing that the case has not effect on the law in class actions because the case before the Supreme Court was not a class action. This argument is flawed . . .. Personal jurisdiction in class actions must comport with due process just the same as any other case." Id. at *9.; McDonnell v. Nature's Way Products, LLC, No. 16C5011, 2017 WL 4864910 (N.D. Ill. Oct. 23, 2017). Similarly, to Dr. Pepper (below), the plaintiffs in McDonnell claimed they were injured by deceptive advertising practices. The court reasoned that members of the class who purchased Nature's Way products in other states had "no injury arising from [the defendant's] forum-related activities in Illinois." Id. at *4.; Greene v. Mizuho Bank, 289 F. Supp. 3d 870 (N.D. Ill. 2017) where the defendant argued that the complaint did not establish that the bank had "any contacts with Illinois in connection with that plaintiff's claims." Id. at 874. The court agreed, holding that non-Illinois residents' claims did not establish jurisdiction over the bank. The plaintiffs in this case also argued that the differences presented by mass and class actions were substantial because in mass actions each plaintiff is treated as an individual. However, the court disagreed and explained that due process requirements dictate that in order to establish jurisdiction, there must be a connection "between the forum and the specific claims at issue."; Wenokur v. AZA Equitable Life Ins. Co., No. CV-17-00165-PHX-DLR, 2017 WL 4357916 (D. Ariz. Oct. 2, 2017). The court held that it lacked personal jurisdiction over the "claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class." Id. at *4.; In re Nexus 6P Products Liability Litigation, No.17-cv-02185-BLF, 2018 U.S. Dist. LEXIS 23622 (N.D. Cal. Feb. 12, 2018). In this case, the defendant, Huawei Device USA, was incorporated and had its principal place of business in Texas. The plaintiffs, however, claimed that the court had both general and specific jurisdiction over the defendant because the company had "conducted substantial business" in Northern California and had "intentionally and purposefully placed" the smartphones (the defective items complained about by the plaintiffs) "into the stream of commerce within this district and throughout the United States." Id. at *4. The court found neither general nor specific jurisdiction; DeBernardis v. NBTY, Inc., No. 17 CV 6125, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018). The DeBernardis court noted one particularly important battleground argument discussed in Bristol-Myers, giving rise to an inference that the Court's ruling would apply to class actions: federalism. The District Court held that this principal would "outlaw nationwide class actions in a form [sic] where there is no general jurisdiction over the Defendants." Id. at 6; Anderson v. Logitech, Inc., 2018 WL 1184729 (N.D. Ill. Mar. 7, 2018). The court struck the nationwide class action claims applying DeBernardis v. NBTY, Inc., No. 17 CV 6125, 2018 WL 461228 (N.D. Ill. Jan. 18, 2018) and McDonnell v. Nature's Way Products, No. 16 C 5011, WL 4864910 (N.D. Ill. Oct. 26, 2017); Practice Mgmt. Support Servs., Inc., No. 14 C 2032 WL 1255021 (N.D. Ill. Aug. 2, 2018). Here, the court explained that the "Rules Enabling Act and the Fourteenth Amendment's due process clause … precludes 'nonresident plaintiffs injured outside the forum from aggregating their claims with an in-forum resident.'" Id. at 861. The court found that Bristol-Myers applies to class actions. Id. at 862; Chavez v. Church & Dwight Co., 2018 WL 2238191 (N.D. Ill. May 16, 2018). Here, the court dismissed claims on behalf of non-Illinois putative class members holding that Bristol-Myers does extend to class actions; Garvey v. American Bankers Insurance Company of Florida, 2019 WL 2076288 (N.D. Ill. May 10, 2019). Here, the court reasoned that it lacked general jurisdiction over the defendants in this case, both of whom were Florida residents. The court likewise did not find specific jurisdiction because the parties did "not contend that the non-Illinois residents were injured in Illinois" and therefore "exercising specific jurisdiction over defendants with respect to the nonresidents' claims would violate defendants' contacts with Illinois." Id. at *2. The court struck the "class definition to the extent it asserts claims of non-residents."; Bakov v. Consolidated World Travel, Inc., 2019 WL 1294659 (N.D. Ill. Mar. 21, 2019). Here, the court refused to extend specific jurisdiction to the "proposed class members who are not Illinois residents" and would consider the "[p]aintiffs' motion for class certification only as it pertains to Illinois residents." Id. at *14. Notable decisions declining to apply Bristol Meyers to class actions: Fitzhenry-Russell v. Dr. Pepper Snapple Group, No.17-CV-00564 NC, 2017 WL 42247 (N.D. Cal. Sept. 22, 2017). Named plaintiffs, on behalf of a nationwide class, alleged that Dr. Pepper intentionally employed deceptive advertising practices. Dr. Pepper raised a 12(b)(2) motion as applied to the non-California class members. The court, however, agreed with the plaintiffs, reasoning that Bristol-Meyers did not apply because it extended only to mass actions, not class actions. The court noted that the named plaintiffs in this case were chosen to sidestep Bristol-Myers; In re Chinese-Manufactured Drywall Products Liability Litigation, No. 09-2047, 2017 WL 5971622 (E.D. La. Nov. 30, 2017). The court denied the defendant's 12(b)(2) motion to the non-resident class members, in part, citing the Dr. Pepper principle that class actions and mass actions are not one in the same. The court relied on one of the primary battleground arguments highlighted throughout the case law: differences in due process protections present in class actions that are absent in mass actions. The elaborated the distinctions further by noting the hefty requirements of certifying a class under Rule 23(b)(3); Jordan v. Bayer Corp., No. 4:17-cv-00865-AGF, 2018 U.S. Dist. LEXIS 23244 (E.D. Mo. Feb, 13, 2018). The court in this case held that the "general presence of marketing strategies and clinical trials" are too broad to satisfy the narrow requirements under Bristol-Myers to determine whether personal jurisdiction can be asserted. The court rested much of its reasoning on the fact that in this case, the plaintiffs never saw advertisement for the product in Missouri nor did they participate in the trials. Furthermore, the non-Missouri residents were "not prescribed the product in Missouri, were not injured in Missouri, and did not purchase the product in Missouri." Jordan, 2018 U.S. Dist. LEXIS 23244, at *11; Sloan v. General Motors LLC., 287 F.Supp.3d 840 (N.D. Cal. Feb. 7, 2018). Here, plaintiffs brought a class action against General Motors alleging engine defects created risk of vehicle malfunction or fires. The court held that it would exercise jurisdiction over General Motors even with respect to the claims by non-California residents. The court explained that "Bristol-Myers was animated by unique interstate federalism concerns," which were absent from this case, and therefore did not persuade the court that "such a categorial extension" was warranted. Sloan, 287 F.Supp.3d at 858.

9 See, e.g., Roy v. FedEx Ground Package System, Inc., No. 3:17-CV-30116-KAR, WL 6179504, at *4 (D. Mass. Nov. 27, 2018) ("Bristol-Myers requires that the defendant be subject to specific jurisdiction as to the claims of FLSA opt-in plaintiffs in putative collective actions. Similarity of claims, alone, is not sufficient to extend personal jurisdiction to out-of-state opt-in plaintiffs."); Maclin v. Reliable Reports of Texas, Inc., 314 F. Supp. 3d 845, 850 (S.D. Ohio Oct. 31, 2018) (dismissing non-Ohio plaintiffs where the court lacked general jurisdiction over the corporate defendant); Chavez v. Church & Dwight Co., 2018 WL 2238191, at *11 (N.D. Ill. May 16, 2018) ("The Court therefore concludes that Bristol-Myers extends to class actions, and that Chavez is therefore foreclosed from representing either a nationwide and multistate class comprising non-Illinois residents in this suit."); Am.'s Health & Res. Ctr., Ltd. v. Promologics, Inc., No. 16 C 9281, 2018 WL 3474444, at *2 (N.D. Ill. July 19, 2018) ("The Court lacks jurisdiction over the Defendants as to the claims of the nonresident, proposed class members. As such …those class members who are not Illinois residents and who allegedly received the fax outside of this state's borders may not be part of this case."); McDonnell v. Nature's Way Prod., LLC, No. 16 C 5011, 2017 WL 4864910, *5 (N.D. Ill. Oct. 26, 2017)(dismissing, for lack of personal jurisdiction, the portions of plaintiff's class action complaint that encompassed claims on behalf of out-of-state putative class members); Spratley v. FCA US LLC, 2017 U.S. Dist. LEXIS 147492 at * 18 (N.D.N.Y. September 12, 2017) (same). See also Wenokur v. AXA Equitable Life Ins. Co., No. CV-17-00165-PHX-DLR, 2017 WL 4357916 at* 4, n. 4 (D. Arizona October 2, 2017) (determining, during a dispute over venue, the impact of Bristol-Myers: "[t]he Court also notes that it lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class.").

10 See Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851 (2011).

11 BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1558 (2017) (quoting Daimler AG v. Bauman, 571 U.S. 117, 126, 134 S. Ct. 746, 754 (2014)).

12 See Daimler AG v. Bauman, 571 U.S. 117, 139, 134 S. Ct. 746, 762 (2014) (error to conclude that defendant doing extensive business in California and having multiple facilities in California was "at home" in California).

13 Id., n.20; see also Henry A. v. Willden, No. 2:10-cv-00528, 2014 WL 1809634, at *6 (D. Nev. May 7, 2014) (finding that the Supreme Court in Daimler clarified that "the reach of general jurisdiction is narrower than had been supposed in the lower courts for many years.").

14 Daimler AG, 571 U.S. at 137 (citations omitted); see also BNSF Ry. Co. v. Tyrrell, 137 S.Ct. 1549, 1558 (2017) ("The 'paradigm' forums in which a corporate defendant is 'at home,' . . . are the corporation's place of incorporation and its principal place of business."). See also, e.g., Cahen v. Toyota Motor Corp., 147 F. Supp. 3d 955, 964 (N.D. Cal. 2015), aff'd, 2017 WL 6525501 (9th Cir. Dec. 21, 2017) (no general jurisdiction over Delaware corporation with its principal place of business in Michigan).

15 Bristol-Myers, 137 S. Ct. at 1780 (2017) (quoting Daimler AG, 571 U.S. at 126-27).

defendant must comport with the constitutional due process principles ensuring that maintenance of the lawsuit in the forum does not offend "traditional notions of fair play and substantive justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal citation omitted).[16]

Those In Favor

Not long after the U.S. Supreme Court decided Bristol-Myers, the Northern District of Illinois sowed the seeds of what is now the growing split Justice Sotomayor foreshadowed in her dissent, issuing one of the first decisions applying Bristol-Myers to class actions. In McDonnell v. Nature's Way Products, LLC., the plaintiffs filed a multi-state class action against Nature's Way, claiming they had been harmed by the company's deceptive advertising practices.[17] Despite the plaintiffs' arguments that Nature's Way "purposefully chose[] to market mislabeled products in Illinois," the Northern District of Illinois concluded that it did not have "jurisdiction over McDonnell's claims related to sales of Women's Alive outside of Illinois …."[18] Relying on Bristol-Myers, the court explained that "a state may not assert specific jurisdiction over a nonresident's claim where the connection to the state is based on the defendant's conduct in relation to a resident plaintiff …."[19]

Two New York cases decided within days of one another came to the same conclusion shortly thereafter.[20] In Spratley, the Northern District of New York dismissed out-of-state class action plaintiffs' claims, citing Bristol-Meyers. And while not specifically deciding the fate of out-of-state putative class members, the court analyzed the jurisdictional question as though it were indistinguishable from the mass action context. Eight days later, the Eastern District of New York in In re Dental Supplies criticized the plaintiffs' argument that Bristol-Myers had "no effect on the law in class actions," noting that "[t]he constitutional requirements of due process does not wax and wane when the complaint is individual or on behalf of a class."[21]

Subsequent cases issuing from the Northern District of Illinois have continued the trend, albeit many of them simply citing to the decisions that have come before without adding much to the analysis. For instance, in Anderson v. Logitech, Inc., the Northern District of Illinois struck the nationwide class action claims based on established principles from precedent coming out of the same court. Likewise, in Chavez v. Church & Dwight Co., the Northern District of Illinois confirmed that "Bristol-Myers extends to class actions" and that the plaintiff was "therefore foreclosed from representing either a nationwide or multistate class comprising non-Illinois residents in this suit."[22] The trend continues in the Northern District of Illinois unabated.[23]

Those Against

Based primarily on distinctions between mass and class actions, many district courts—most notably those in California—have rejected the sea of change Bristol-Meyers's application to the claims of putative class members would bring about.[24] Mass tort plaintiffs are, after all, "a real party in interest, meaning that each plaintiff is personally named and required to effect service,"[25] whereas "[t]he class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[26] As the Northern District of Georgia once noted, "[n]othing in Rule 23 suggests that class members are deemed 'parties' … Indeed, if class members were automatically deemed parties, all class actions would be converted into massive joinders. Such a result would emasculate Rule

16 The need for personal jurisdiction over an out-of-state defendant stems from the Due Process Clause, which "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 268, 269, 100 S. Ct. 559, 567 (1980).

17 McDonnell, an Illinois resident, purchased "Women's Alive! Energy Supplements" in various Illinois pharmacies. McDonnell claimed that she relied on the company's advertisement that the supplement was made in the United States, when in actuality some of the product's ingredients were manufactured outside of the country. FTC guidelines stated that because the energy supplement contained "foreign-sourced vitamin C," Nature's Way should have qualified the "Made in the USA statement." McDonnell v. Nature's Way Products, LLC, 2017 WL 4864910, at *1 (N.D. Ill. Oct. 23, 2017).

18 Id. at *4.

19 Id.

20 Spratley v. FCA U.S., LLC, No 3:17-CV-0062, 2017 WL 4023348 (N.D.N.Y. Sept. 12, 2017); In re Dental Supplies Antitrust Litig., No. 16 CV 696, 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017).

21 In re Dental Supplies, 2017 WL 4217115, at *9; see also Wenokur v. AXA Equitable Life Ins. Co., 2017 WL 4357916, at *4, n. 4 (D. Ariz. Oct. 2, 2017) (holding that the Court lacked personal jurisdiction over the "claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class") and Plumbers' Local Union No. 690 Health Plan v. Apotex Corp., 2017 WL 3129147, at *4 (E.D. Pa. July, 24, 2017) (explaining that the Court could not exercise personal jurisdiction over out-of-state-class members because only the Pennsylvania-resident plumbers' claims "arise out of or relate to [the] [d]efendants' sales of generic drugs" within Pennsylvania).

22 Chavez v. Church & Dwight Co., No. 17-c-1948, 2018 WL 2238191, at *11 (N.D. Ill. May 16, 2018); see also In re Nexus 6P Products Liability Litigation, 2018 U.S. Dist. LEXIS 23622 (N.D. Cal. Feb. 12, 2018); Practice Mgmt. Support Servs., Inc. v. Cirque Du Soleil, Inc., 2018 WL 1255021 (N.D. Ill. Aug. 2, 2018).

23 Garvey v. American Bankers Insurance Company of Florida, 2019 WL 2076288 (N.D. Ill. May 10, 2019 and Bakov v. Consolidated World Travel, Inc., 2019 WL 1294659 (N.D. Ill. Mar. 21, 2019) (refusing to extend specific jurisdiction to the "proposed class members who are not Illinois residents" and would consider the "Plaintiffs' motion for class certification only as it pertains to Illinois residents.").

24 See, e.g., Fitzhenry-Russell v. Dr. Pepper Snapple Group, 2017 WL 42247 (N.D. Cal. Sept. 22, 2017) (declining to apply Bristol-Myers outside of the mass action, even though the named plaintiffs alleging Dr. Pepper engaged in deceptive advertising practices were chosen specifically to sidestep Bristol-Myers; see also, e.g., In re Chinese-Manufactured Drywall Products Liability Litigation, 2017 WL 5971622 (E.D. La. Nov. 30, 2017) (denying the defendant's 12(b)(2) motion to the non-resident class members, in part, citing the Dr. Pepper principle that class actions and mass actions are not one in the same).

25 Id.

26 Gen. Tel. Co., 457 U.S. at 155 ("The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'") (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).

23."[27]

Due Process

Courts on both sides of the question are chiefly concerned with due process under the Fifth Amendment.[28] The Northern District of Illinois, for example, reasoned that due process principles require that there must be a "connection between the forum and the specific claims at issue" regardless of whether the plaintiff is bringing his claim in the mass or class action context. [29] Likewise, the Eastern District of New York concluded that "… personal jurisdiction in class actions must comport with due process just the same as any other case," admonishing the plaintiffs' contrary argument as attempting to side step the Constitution.[30]

The Eastern District of Louisiana, on the other hand, noted the due process protections baked into the procedural rules for class actions.[31] Rule 23 requires that "questions of law or fact [be] common to the class," Fed. R. Civ. P. 23(a)(2), that "the claims … of the representative parties are typical of the claims … of the class," id. at (a)(3), that "questions of law or fact common to class members predominate over any questions affecting only individual members," and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Id. at (b)(3). Mass actions, on the other hand, do not—and generally cannot—meet the requirements of Rule 23, because there are typically significant variations in the plaintiffs' claims.[32]

These courts have noted that personal jurisdiction is essentially rooted in fairness to the defendant, and Rule 23 provides significant safeguards to that end. As one of Rule 23's chief objectives is to ensure relative uniformity of the claims, there is no unfairness in hailing the defendant into court to answer for it in a forum that has specific jurisdiction over the defendant based on just the representative's claim."[33] Indeed, "if due process was not offended in Shutts, a class-action in State court with absent non-resident plaintiff class members, it is not offended by a potential class-action in federal court where the plaintiff class is made up in part with non-resident members."[34]

Critics have responded that the requirements for class certification are not substantial enough to mitigate the constitutional violation of compelling a defendant to defend itself in a state in which the court lacks general jurisdiction.[35] As one court noted, the "constitutional requirements of due process do 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."[36] That is because Rule 23 "must be interpreted in keeping with Article III constraints, and the Rules Enabling Act, which instructs that the federal court rules of procedure shall not abridge, enlarge, or modify any substantive right."[37]

Indeed, Congress may not expand the jurisdiction of courts beyond the bounds established by the Constitution.[38] So, while Congress has the power to enact requirements for class certification in federal courts, these requirements cannot exceed beyond the due process limits established under the Fifth Amendment Due Process Clause.[39] In other words, the requirements for class certification under Rule 23 (i.e., numerosity, commonality, typicality, and adequacy) cannot cure the constitutional violation of forcing a defendant to defend itself against a nationwide class action in a forum that has no general jurisdiction over such defendant.

Federalism

Federalism is the other principal concern. As the U.S. Supreme Court noted in Bristol-Myers, the "'primary concern' in assessing personal jurisdiction is 'the burden on the defendant.'"[40] That is because it "encompasses

27 Wainwright v. Kraftco Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972); accord Devlin v. Scardelletti, 536 U.S. 1, 10 (2002) ("nonnamed class members cannot defeat complete diversity").

28 For instance, the Court in Molock held that the "material distinctions between a class action and a mass tort action," especially with regards to the "additional elements of a class action supply due process safeguards not applicable in the mass tort context." Molock v. Whole Foods Mkt., Inc., 297 F. Supp. 3d 114, 126 (D.D.C. 2018); but see Greene v. Mizuho Bank, 289 F. Supp. 3d 870 (N.D. Ill. 2017). In this case, the plaintiffs also postured that the differences between mass and class actions were substantial because in mass actions each plaintiff is treated as an individual. The court, however, disagreed, relying on due process grounds, like the court in Molock, to reach its contrary decision.

29 Greene, 289 F. Supp. 2d at 874. In Greene, the court agreed with the defendant's argument that it did not have any "contacts with Illinois in connection with the plaintiff's claims." Furthermore, the principles of due process apply to the question of whether the court can establish personal jurisdiction regardless of whether the suit is in the form of a mass or class action. See also Chavez v. Church & Dwight Co., 2018 WL 2238191 (N.D. Ill. May 16, 2018).

30 In re Dental Supplies Antitrust Litig., 2017 WL 42115 (E.D.N.Y. Sept. 20, 2017).

31 The court explained that what makes class actions distinguishable from mass actions comes from the requirements of Rule 23: numerosity, typicality, adequacy of representation, predominance, and superiority (citing DeBernardis v. NBTY, Inc., 2018 WL 461228, at *2 (N.D. Ill. Aug. 2, 2018)). Bristol-Myers would undercut these due process safeguards if it were applied to class actions.

32 See, e.g., Sanchez, 297 F. Supp. 3d at 1366 ("Thus, in contrast to a mass action like Bristol-Myers, which may—and likely would—present significant variations in the plaintiffs' claims, the requirements of Rule 23 class certification ensure that the defendant is presented with a unitary, coherent claim to which it need respond only with a unitary, coherent defense.").

33 Sanchez, 297 F. Supp. 3d at 1366.

34 Id. at 1367.

35 See Practice Mgmt., 301 F. Supp. 3d at 864.

36 In re Dental Supplies Antitrust Litig., 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017); see also Practice Mgmt. Support Servs., Inc., 301 F.Supp.3d 840, 864 (N.D. Ill. Mar. 12, 2018) ("Under the Rules Enabling Act, a defendant's due process interest should be the same in the class context" as in the mass action context); Chavez v. Church & Dwight Co., 2018 WL 2238191, at *10 (N.D. Ill. May 16, 2018) ("Nothing in Bristol-Myers suggests that its basic holding is inapplicable to class actions; 'rather, the Court announced a general principle—that due process requires a 'connection between the forum and the specific claims at issue.' "), quoting Greene, 2017 WL 7410565, at *4 (N.D. Ill. Dec. 11, 2017).

37 Practice Mgmt., 301 F.Supp.3d at 861 (internal quotations and citations omitted).

38 Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 491, 103 S. Ct. 1962, 1970 (1983).

39 See, e.g., Practice Mgmt., 301 F.Supp.3d at 864.

40 Bristol-Myers, 137 S. Ct. at 1776 (citing World-Wide Volkswagon Corp., 444 U.S. 286, 292 (1980)).

the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question."[41] Even if the burden on the defendant to litigate in one of these venues is slight because of its size and wealth, the interest of preserving federalism may prove to be decisive. Indeed, drawing from federalism, the Northern District of Illinois predicted that "courts will apply Bristol-Myers Squibb to outlaw nationwide class actions in a form [sic] where there is no general jurisdiction over the Defendants."[42]

California District Courts, on the other hand, have been dismissive of federalism concerns.[43] Cuing from Justice Sotomayor's dissent (the sole dissent in Bristol-Myers), they suggest that federalism is not an animating concern when it comes to large corporate defendants.[44] But this view invites the same "sliding scale" approach to jurisdiction that the Bristol-Myers Court warned against. The size, scope, and complexity of the defendant should not fade concerns of federalism.

Procedural Considerations

Corporate defendants have much to gain by making jurisdictional disputes early. In addition to the fact that jurisdictional challenges must be made at the outset or be waived, delaying their resolution subjects the parties (and the courts) to lengthy, costly, and litigious discovery into a putative nationwide class—a process that will not likely yield any facts relevant to jurisdiction. But many courts are nonetheless deferring consideration of Bristol-Myers challenges until the class certification stage, when they say the issue is riper for adjudication, and when the law may be more settled.[45] Ultimately, the decision of which stage to raise the jurisdictional challenge is best made case by case, guided strongly by how sister courts have resolved the question.

But regardless of whether moving to dismiss the class claims, or waiting until the class certification stage to raise the challenge, identifying the lack of personal jurisdiction as an affirmative defense in the first response is paramount, as defendants can learn the hard way. For example, the Southern District of California recently found a personal jurisdiction challenge under Daimler was waived because it was not preserved in the first response, concluding that Bristol-Myers was not an intervening change in the law that might justify the delay.[46]

Conclusion

While some district courts are cementing their positions for and against applying Bristol-Myers to the claims of putative class members, most district courts have not considered the question, and others are deferring to the class certification stage when the issue is riper for decision, and when the legal analysis may be better developed. As no circuit court has yet resolved the question, it remains too early to tell which side will ultimately form the majority view. For now, defendants are well-advised to preserve the issue and weigh carefully when and how to raise the challenge.

41 Bristol-Myers, 137 S. Ct. at 1776.

42 DeBernardis v. NBTY, Inc., 2018 WL 461228 (N.D. Ill. Aug. 2, 2018).

43 See, e.g., Sloan v. General Motors, LLC., 287 F. Supp. 3d 840, 853 (N.D. Cal. Feb. 7, 2018) (explaining that "Bristol-Myers was animated by unique interstate federalism concerns," which were absent from the instant case and therefore did not persuade the court that such a "categorical extension" was warranted).

44 Bristol-Myers, 137 S. Ct. at 1788 ("… I see little reason to apply such a principle in a case brought against a large corporate defendant arising out of its nationwide conduct.")

45 See, e.g., Gasser v. Kiss My Face, LLC, 2018 WL 4538729, at *2 (N.D. Cal. Sept. 21, 2018); Campbell v. Freshbev LLC, 322 F. Supp. 3d 330 (E.D.N.Y. July 3, 2018). But see Practice Mgmt. Support Servs., 301 F. Supp. 3d at 846 and Maclin v. Reliable Reports of Texas, Inc., 314 F. Supp. 3d 845, 850 (S.D. Ohio Oct. 31, 2018) (dismissing the non-resident plaintiffs' claims because the court lacked personal jurisdiction and would otherwise violate the defendant's due process rights).

46 See McCurley v. Royal Seas Cruises, Inc., 2019 WL 1383804, at *16 (S.D. Cal. Mar. 27, 2019) (after noting the split in decisions after Bristol-Myers, deciding that the court need not weigh in on the question of jurisdiction because it was not raised until class certification, noting "An untimely personal jurisdiction defense—regardless of whether it is based on Bristol-Myers—is waived at the later stages of a litigation if the defense was not timely asserted."). See also LaVigne v. First Cmty. Bancshares, Inc., 2019 WL 1075600, at *4 (D.N.M. Mar. 7, 2019) (rejecting argument asserted at the class notice stage that Bristol-Myers precluded the court from exercising personal jurisdiction over non-New Mexico class members in part because it "was not appropriately raised").

Snell & Wilmer

Bristol-Myers – Harkening the end of national class actions?

Gregory J. Marshall | Partner | Snell & Wilmer

Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco City., 137 S. Ct. 1773, 1780 (2017)

"[t]he mere fact that [some] plaintiffs were prescribed, obtained, and ingested Plavix in California — and allegedly sustained the same injuries as did the nonresidents — does not allow the State to assert specific jurisdiction over the non-residents' claims."

Cornerstone Research

The Northern District of California's Approach

- *Fitzhenry-Russell v. Dr. Pepper Snapple Group*, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017)

The Northern District of Illinois' Approach

- *McDonnell v. Nature's Way Products, LLC*, 2017 WL 4864910, at *1 (N.D. Ill. Oct. 23, 2017)
- *In re Dental Supplies Antitrust Litig.*, No. 16 CV 696, 2017 WL 4217115 (E.D.N.Y. Sept. 20, 2017)

Personal Jurisdictional – *A Quick Refresher*

Must not offend "traditional notions of fair play and substantive justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)

The Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 268, 269, 100 S. Ct. 559, 567 (1980)

General (or "All Purpose") Personal Jurisdiction

"With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] ... bases for general jurisdiction'." *BNSF Ry. Co. v. Tyrrell*, 137 S.Ct. 1549, 1558 (2017)

Error to conclude that the defendant doing extensive business in California and having multiple facilities in California was "at home" in California. *Daimler AG v. Bauman*, 571 U.S. 117, 139, 134 S. Ct. 746, 762 (2014)

Specific Personal Jurisdiction

"[A]rise[s] out of or relate[s] to" the "defendant's contacts with the forum." *Bristol-Myers,* 137 S. Ct. at 1780 (2017) (quoting *Daimler AG,* 571 U.S. at 126-27)

Court "may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985)

"Nonnamed class members ... may be parties for some purposes and not for others." *Devlin v. Scardelletti*, 536 U.S. 1, 9-10 (2002)

Due Process

"Personal jurisdiction is rooted in fairness to the defendant, and rule 23 provides significant safeguards to that end." *Allen v. ConAgra Foods, Inc.*, 2018 WL 646051, at *7 (N.D. Cal. Dec. 10, 2018)

"The class-action device was designed as an 'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,'" saving resources by permitting an issue potentially affecting every class member to be litigated in an economical fashion. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982)

"Nothing in Bristol-Myers suggests that its basic holding is inapplicable to class actions; 'rather, the Court announced a general principle—that due process requires a 'connection between the forum and the specific claims at issue.'" *Chavez v. Church & Dwight Co.*, 2018 WL 2238191, at *10 (N.D. Ill. May 16, 2018), *quoting Greene*, 2017 WL 7410565, at *4 (N.D. Ill. Dec. 11, 2017)

"Under the Rules Enabling Act, a defendant's due process interest should be the same in the class context" as in the mass action context. *Practice Mgmt. Support Servs., Inc.*, 301 F.Supp.3d 840, 864 (N.D. Ill. Mar. 12, 2018)

Federalism

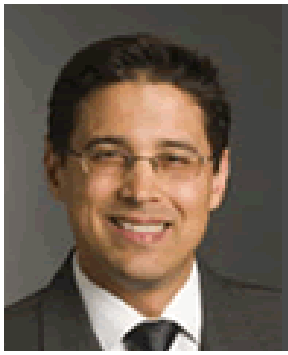
"'[P]rimary concern' in assessing personal jurisdiction is 'the burden on the defendant.'" That is because it "encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers*, 137 S. Ct. at 1776 (*citing World-Wide Volkswagon Corp.*, 444 U.S. 286, 292 (1980)

"*Bristol-Myers* was animated by unique interstate federalism concerns," which were absent from the instant case and therefore did not persuade the court that such a "categorical extension" was warranted. *Sloan v. General Motors, LLC.*, 287 F. Supp. 3d 840, 853 (N.D. Cal. Feb. 7, 2018)

Procedural Considerations

- *Gasser v. Kiss My Face, LLC*, 2018 WL 4538729, at *2 (N.D. Cal. Sept. 21, 2018)
- *Campbell v. Freshbev LLC*, 322 F. Supp. 3d 330 (E.D.N.Y. July 3, 2018)

"An untimely personal jurisdiction defense—regardless of whether it is based on *Bristol-Myers*—is waived at the later stages of a litigation if the defense was not timely asserted." *McCurley v. Royal Seas Cruises, Inc.*, 2019 WL 1383804, at *16 (S.D. Cal. Mar. 27, 2019)



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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.

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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.
- Defended several national mortgage lenders and servicers in MDL litigation involving mortgage origination claims.
- Defended mortgage originators and servicers in actions filed by government officials and entities involving mortgage origination practices.
- Defended national bank in appeal of precedent setting putative damages award.
- Defended and tried case for mortgage lender involving construction loan and allegations of deceptive practices.
- Defended and tried bad faith claims on behalf of mortgage servicer and credit life insurer.
- Managed regional defense program for mortgage servicer in consumer mortgage cases.
- Defended national mortgage lender in putative nationwide class action involving payoff fees.

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)

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)

NAVIGATING SEX, GENDER AND ORIENTATION DISCRIMINATION IN THE WORKPLACE

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Navigating Sex, Gender, and Orientation Discrimination in the Workplace
M. Cabell Clay and Sarah H. Negus

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits private employers from discriminating against an individual on the basis of sex. 42 U.S.C.A. § 2000e-2(a)(1). But how broad is the scope of "on the basis of sex"? Does Title VII's prohibition of sex discrimination prohibit discrimination on the basis of sexual orientation? What about gender identity? Different circuit courts, the Equal Employment Opportunity Commission ("EEOC"), and the Department of Justice ("DOJ") provide different answers. A number of cases currently pending before the United States Supreme Court regarding these questions may provide a resolution and give clarity to employers. Additionally, although unlikely to pass the Senate given the current legislative climate, the Equality Act, which recently passed in the House of Representatives, would amend Title VII to explicitly include protections for sexual orientation and gender identity.

The breadth of "sex discrimination" also receives attention at the state and local levels. Although state statutes widely vary when it comes to their own definition of discrimination on the basis of sex, nearly half of all states specifically prohibit discrimination based on sexual orientation and gender identity. In these jurisdictions, an employer can be found liable for discrimination based on individual's sexual orientation or gender identity, even if the employee fails to bring a Title VII claim. Further complicating the statutory framework for employers, certain counties and cities have also enacted ordinances explicitly prohibiting sexual orientation and gender identity discrimination in the employment arena.

Regardless of how the U.S. Supreme Court rules on the scope of Title VII's definition "sex", the issue will continue to garner attention. Even if the Supreme Court applies a narrow definition of "sex" under Title VII, employers can expect additional states, counties, and cities to continue to enact legislation and ordinances providing a wider array of protections. Additionally, the EEOC will likely continue to investigate charges, and perhaps bring cases, on the basis of sexual orientation and gender identity discrimination. Employers, particularly those that operate in a number of jurisdictions, are advised to review and update their anti-discrimination and anti-harassment policies and to consider providing training that addresses discrimination and harassment on the basis of sexual orientation and gender identity.

Federal Level: Supreme Court to Resolve Key LGBTQ Cases

On April 22, 2019, the United States Supreme Court agreed to hear three cases addressing whether the definition of "sex" under Title VII is broad enough to encompass discrimination based on sexual orientation and gender identity. The first two cases, Zarda v. Altitude Express, Inc. and Bostock v. Clayton County address sexual orientation discrimination. The third case, EEOC v. R.G. and G.R. Harris Funeral Homes addresses gender identity discrimination.

In Zarda, the Second Circuit held that Title VII prohibits sexual orientation discrimination. Zarda v. Altitude Express, Inc., 883 F.3d 100, 113 (2d Cir. 2018), cert. granted sub nom. Altitude Exp., Inc. v. Zarda, No. 17-1623, 2019 WL 1756678 (U.S. Apr. 22, 2019). The plaintiff in Zarda, a skydiving instructor, told a customer that he

was gay. He was then terminated after the customer said the comment made her uncomfortable. Id. at 108-109. The plaintiff argued that he was discriminated against because of his sexual orientation and that he "did not conform to the straight male macho stereotype." Id. at 109. The court agreed, and found "because sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it." Id. at 115.

In Bostock, the Eleventh Circuit held that Title VII does not prohibit sexual orientation discrimination. Bostock v. Clayton Cty. Bd. of Commissioners, 723 F. App'x 964, 965 (11th Cir. 2018), cert. granted sub nom. Bostock v. Clayton Cty., Ga., No. 17-1618, 2019 WL 1756677 (U.S. Apr. 22, 2019). The court, citing earlier cases, found no cause of action for sexual orientation discrimination to exist under Title VII and dismissed his case. Id. (citing Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1256 (11th Cir. 2017)). The Bostick plaintiff was terminated soon after persons with "significant influence" on his employer openly criticized the plaintiff's involvement in a gay recreational softball league. Bostock v. Clayton Cty., No. 1:16-CV-1460-ODE, 2017 WL 4456898, at *1 (N.D. Ga. July 21, 2017).

In Harris Funeral Homes, a transgender employee alleged she was fired after she told her employer about her intended transition from male to female. Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567-70 (6th Cir. 2018), cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C., No. 18-107, 2019 WL 1756679 (U.S. Apr. 22, 2019). Ruling in her favor, the Sixth Circuit found that discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, violates Title VII. Id. at 575-76.

These cases highlight the differing approaches to LGBTQ rights that different government agencies hold, some of which have even submitted competing briefs in the three cases. The DOJ's current position is that Title VII's prohibition of sex discrimination does not cover gender identity or sexual orientation discrimination. In the DOJ's Brief for the Federal Respondent in Opposition in the Harris Funeral Homes case, it argued for a plain meaning interpretation of the word "sex" and concludes that Title VII's definition of sex means biological sex and does not encompass gender identity. Brief for the Federal Respondent in Opposition, R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C., 2018 WL 5293597, *17 (Oct. 24, 2018). This approach echoes the DOJ's earlier amicus brief in Zarda, where it argued that Title VII does not encompass sexual orientation discrimination because "sex" refers only to membership in a class delineated by gender. Brief of the United States as Amicus Curiae, Zarda v. Altitude Express, Inc., 2017 WL 3277292, *7 (July 26, 2017).

In contrast, the EEOC's current position is that Title VII prohibits sex discrimination on the basis of both gender identity and sexual orientation. See Baldwin v. Foxx, EEOC Appeal No. 0120133080, (July 15, 2015) (holding that discrimination against an individual because of that person's sexual orientation is discrimination because of sex and, therefore, prohibited under Title VII); Macy v. Department of Justice, EEOC Appeal No. 0120120821 (April 20, 2012) (holding that gender identity discrimination, including discriminating against someone on the basis of their transgender status, is discrimination because of sex and, therefore, prohibited under Title VII).

State Level: Nearly Half of All States Already Protect Against Discrimination on the Basis of Sexual Orientation and Gender Identity.

There are currently only three states, North Carolina, Arkansas, and Tennessee that do not have any state or local statutes or ordinances protecting against sexual orientation or gender identity discrimination.[1] Twenty-three states and the District of Columbia have state statutes prohibiting private employers from discrimination on the basis of sexual orientation,[2] and more than twenty states have similar statutes prohibiting private employers from discrimination on the basis of gender identity or transgender status.[3] Many cities and counties also have enacted ordinances prohibiting discrimination on the basis of sexual orientation or gender identity.

Practical Tips for Employers:

While awaiting decisions from the U.S. Supreme Court, employers can take proactive steps to increase the likelihood that their policies and practices are in

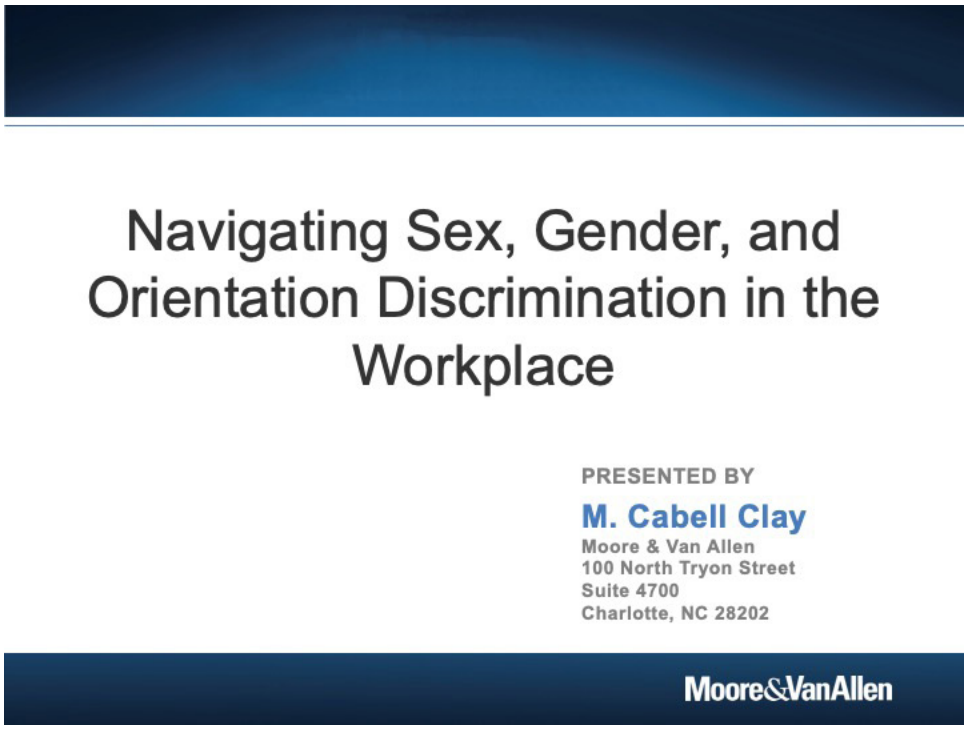
1 For reference, see http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/policies

2 See Cal. Gov't Code § 12940; Colo. Rev. Stat. § 24-34-402(1); Conn. Gen. Stat. Ann. § 46a-81c; Del. Code Ann. tit. 19, § 711; D.C. Code § 2-1402.11; Haw. Rev. Stat. § 378-2(a); 775 Ill. Comp. Stat. 5/1-103(O-1), (Q), 5/2-102(A); Iowa Code § 216.6(1); Me. Stat. tit. 5, § 4572(1); Md. Code Ann., State Gov't § 20-606; Mass. Gen. Laws ch. 151B, § 4; Mich. Comp. Laws § 37.2202 (see also Mich. Civil Rights Commission Interpretative Statement https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf); Minn. Stat. Ann § 363A.08; Nev. Rev. Stat. 613.330; N.H. Rev. Stat. Ann. § 354-A:7; N.J. Stat. Ann. 10:5-12; N.M. Stat. Ann. § 28-1-7; N.Y. Exec. Law § 296; Or. Rev. Stat. § 659A.030(1); R.I. Gen. Laws § 28-5-7; Utah Code § 34A-5-106; Vt. Stat. Ann. tit. 21, § 495; Wash. Rev. Code § 49.60.180; Wis. Stat. §§ 111.36(1)(d), 111.321, 111.322.

3 See Cal. Gov't Code § 12940; Colo. Rev. Stat. §§ 24-34-402(1), 24-34-301(7); Conn. Gen. Stat. Ann. § 46a-60; Del. Code Ann. tit. 19, § 711; D.C. Code § 2-1402.11; Haw. Rev. Stat. § 378-2(a); 775 Ill. Comp. Stat. 5/1-103(O-1), (Q), 5/2-102(A); Iowa Code § 216.6(1); Me. Stat. tit. 5, §§ 4553(9-C) and 4572(1); Md. Code Ann., State Gov't § 20-606; Mass. Gen. Laws ch. 151B, § 4; Mich. Comp. Laws § 37.2202; Minn. Stat. Ann. §§ 363A.03, 363A.08.; Nev. Rev. Stat. 613.330; N.H. Rev. Stat. Ann. § 354-A:7; N.J. Stat. Ann. 10:5-12; N.M. Stat. Ann. § 28-1-7; N.Y. Exec. Law § 296; Or. Rev. Stat. §§ 174.100(7), 659A.030(1); R.I. Gen. Laws § 28-5-7; Utah Code Ann. § 34A-5-106; Vt. Stat. Ann. tit 21, § 495; Wash. Rev. Code §§ 49.60.180, 49.60.040(26).

compliance under federal, state, and local laws. In addition to monitoring current and pending legislation, employers should frequently review and update their policy handbooks, paying particular attention to the Equal Employment Opportunity ("EEO") Statement and sections on discrimination and harassment. Employers should decide whether they want to add in terms like "gender identity" and "sexual orientation" into their EEO statement and consider adding those terms to anti-discrimination and harassment sections as well.

Employers are also advised to provide training for employees on discrimination, and it is advisable to include in the training materials information on the prevention of discrimination on the basis of sexual orientation and gender identity.



Agenda

- Background
- Federal Level:
  - *SCOTUS Pending*
  - *The Equality Act*
- State Level:
  - *Taking Matters Into Their Own Hands*
- Best Practices for Employers

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Background: "On the Basis of Sex"

- Title VII of the Civil Rights Act of 1964 prohibits private employers from discriminating against an individual *on the basis of sex.*
- What is the scope of "on the basis of sex"?
- Circuit Courts, EEOC, and DOJ all give different answers.

Moore&VanAllen

Background: Definitions

"**Sex**" and "**gender**" are often used interchangeably – but the Oxford English Dictionary now defines sex as biological and gender as social.

Moore&VanAllen

Background: Definitions

Many state laws define **gender identity** as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth."

Moore&VanAllen

Background: Definitions

"**Sexual orientation**" is generally defined as whether a person is attracted to members of the same sex, the opposite sex, or both sexes.

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Federal Level: *SCOTUS Pending*

- SCOTUS will take up three key cases next term:
  - *Zarda v. Altitude Express*
  - *Bostock v. Clayton County*
  - *EEOC v. R.G. and G.R. Harris Funeral Homes*

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Federal Level: *SCOTUS Pending*

- *Zarda v. Altitude Express*
  - Plaintiff was a skydiving instructor that told a customer he was gay; terminated after customer complained.
  - **Second Circuit held that Title VII prohibits sexual orientation discrimination.**

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Federal Level: *SCOTUS Pending*

- *Bostock v. Clayton Cty. Bd. of Commissioners*
  - Plaintiff terminated due to his involvement in a gay recreational softball league.
  - **Eleventh Circuit held that Title VII *does not* prohibit sexual orientation discrimination.**

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Federal Level: *SCOTUS Pending*

- *EEOC v. R.G. &. G.R. Harris Funeral Homes*
  - Plaintiff alleged she was fired after telling employer about her intended transition.
  - **Sixth Circuit found that discrimination because of their failure to conform to sex stereotypes violates Title VII.**

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Federal Level: *Equality Act*

- The House of Representatives recently passed the Equality Act.
- The Equality Act would amend Title VII to explicitly include “sexual orientation” and “gender identity”.
- Seems unlikely to pass the Senate.

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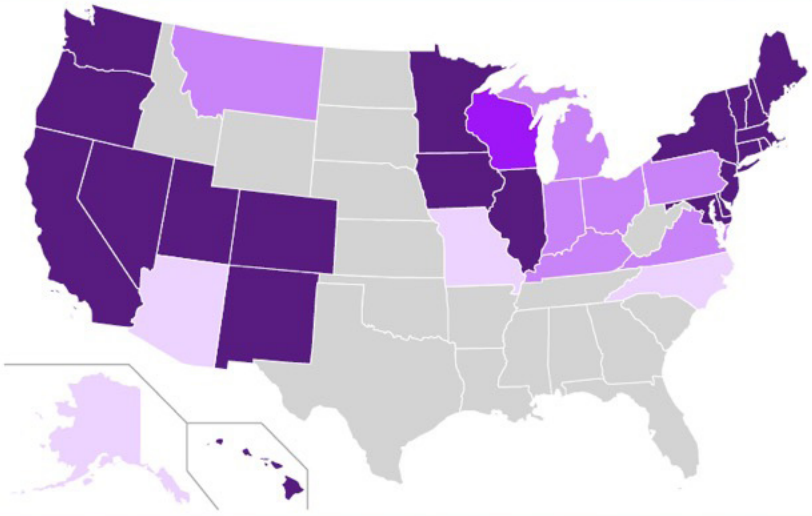
State Level: *Into Their Own Hands*



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Best Practices

- Monitor current & pending legislation in cities, counties, & states relevant jurisdictions.
- Frequently review & update policies.
- Provide training for all employees on discrimination, including sexual orientation and gender identity.

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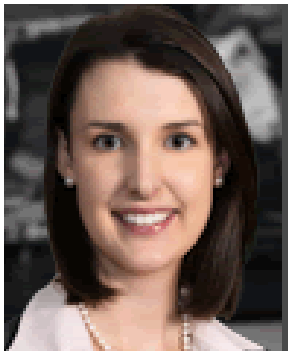

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Cabell Clay brings to her wide-ranging clients counseling and litigation experience in both employment matters and commercial disputes.

Cabell appreciates that every business is unique and believes that understanding her clients' business model, culture, and needs is crucial to successful attorney-client partnerships. Whether it involves high stakes litigation defense or review of employment practices and policies, Cabell works with clients to develop advice and strategies that align closely with their long-term goals and interests.

Cabell routinely advises clients on a variety of employment matters, including employment agreements, drafting of restrictive covenants, trade secret protections, employee discipline and terminations, severance agreements, employment handbooks and policies, ADA accommodation requests, FMLA compliance, discrimination and harassment issues, and wage & hour compliance and audits.

She also handles wide-ranging employment and commercial litigation, including trade secret misappropriation litigation, DOL investigations, restrictive covenants disputes, management representation in Title VII, ADA, ADEA, and wage & hour litigation, as well as proceedings before the EEOC and corresponding state and local agencies. Additionally, Cabell has substantial experience in handling class action defense, internal investigations, contract claims, securities and mortgage fraud defense, unfair trade practices claims, and civil appeals.

In addition to her extensive civil trial experience, Cabell spent six months on special assignment as an Assistant District Attorney in the Mecklenburg County District Attorney's Office, where she honed her trial skills by successfully prosecuting misdemeanors in both District and Superior Courts.

Practice Areas

- Class Actions & Multi-District Litigation
- Employment & ERISA Litigation
- Employment & Labor
- Employment & Noncompetition Agreements & Trade Secrets Protection
- Financial Services Litigation
- Litigation
- North Carolina Business Court Litigation
- Trade Secrets Litigation
- Wage & Hour Compliance & Litigation
- White Collar, Regulatory Defense, and Investigations

Publications

- Miller & Clay Publish "A New Litigator's Guide" - Article a top-read piece of "Expert Analyses"; Law360, July 2014
- Civil Litigators' Insights from the District Attorney's Office - North Carolina Lawyer, November 2013

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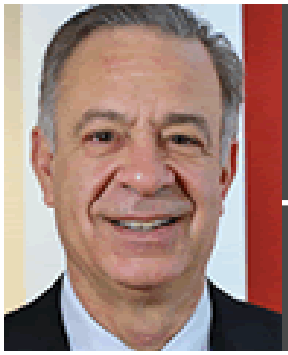

PANEL DISCUSSION: THE INTRIGUE OF INTERNAL INVESTIGATIONS

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Internal Investigations: Practical Considerations for Avoiding Pitfalls
W. Scott O'Connell[1]

Internal investigations are a necessary tool for entities to get to the root cause of institutional problems that may cause liability and reputational harm. These internal reviews, when handled correctly, can be valuable tools to identify and account for misconduct, to restore brand confidence, to help victims heal, to educate regulators on corrective action and to set the institution on a new path. When handled poorly, the investigation can cause more problems than it resolves.

Every investigation has its own context, parallel processes and impacted constituencies. Those circumstances must inform and control the internal review process. There are, however, overarching considerations that can help shape the contours of an investigation and set it on a path for success. Detailed below are practical considerations designed to identify common "traps for the unwary" that can impair or derail the investigation. Careful and thoughtful preparation, together with consistent practices by all team members, can avoid failure. Attention to these issues can be the difference-maker for a successful process.

Threshold Issues

Before undertaking the investigation, it is essential that the following questions be clearly established. Navigating through the many challenges, competing considerations and interested constituencies that often surround investigations is greatly simplified when the following ground rules guide decision making.

Who is your client?

This is a simple question that can get murky during the investigation. Public companies, private business entities, colleges and universities, churches, and other nonprofit organizations, such as health systems or charitable organizations, are run by individuals. Officers, directors, trustees and special committees all perform important roles with associated duties in the governance and/or operation of the entity. Any of these constituencies in their respective roles may feel compelled to initiate an internal investigation in furtherance of some important institutional purpose. Any of these constituencies may make contact with outside counsel to get the process started. When such contact is made, the first questions must be: "Who is the client?" "From whom do I take direction?" and "To whom do I direct the report of investigation?"

Too often in the private practice of law, it is expedient to conflate the interests, desires and goals as expressed by a senior executive who is directing a project as being co-extensive with the interests of the institution. This is not a surprising circumstance, because all entities operate through the actions of their leaders. Internal investigations bring into sharp focus the potential problems with such conflation. Because the investigation

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is focused on activities of personnel that may have diverged from the interests of the entity, it is essential that the client be identified and its interests segregated, maintained and pursued. Indeed, actions of individuals instrumental in commissioning the investigation may be part of the inquiry. The potential conflicts resulting from this dynamic are manifest and must be managed to ensure the integrity of the review.

For these reasons, the first action is to identify the client and the person or persons who are permitted to speak for the client with regard to the investigation. Often, because the internal inquiry may directly or implicitly criticize the actions of current management, good practice compels that the oversight of the investigation be vested with an outside director/trustee or a special committee of the Board of Directors/Trustees. This practice helps ensure that the inquiry is not tainted by apparent or actual influence by those who are being investigated. Once defined, these details should be documented in an engagement letter specific to the inquiry.

What is your mandate and scope?

The mandate and scope of an investigation must be defined. Misalignment between the client's expectation and the work contemplated by the investigative team can lead to material problems. Some investigations can be discrete undertakings, yet, as a result of mismanaged expectations, balloon beyond reasonable scale and cost. Other investigations, such as those involving allegations of sexual abuse, may require special considerations for privacy and victim protection. Considerable additional damage can be caused when an investigation fails to properly balance important considerations such as protecting victims while still attempting to get to the truth. The client must set the tone and the rules for what prevails when the search for the truth threatens other constituencies or threatens to cause harm to important cultural values. To paraphrase Hippocrates, on the way to doing something good, do no harm.

With the goal of doing no harm, it is helpful when the client articulates at the beginning of the engagement—as best as it can subject to learning more information as the investigation unfolds—what it wants investigated and what special considerations should prevail. This should include important information such as subject matter, time period, functional area, types of conduct, relevant individuals, documents, data and other evidence. Also, the client may wish to detail things that should be excluded from investigation. With this information, the investigative team should build a work plan and budget to address the mandate and scope identified. This exercise should quickly reveal any disconnects between the client and the investigative team concerning the invasiveness, disruption, cost and other collateral consequences resulting from the investigation. Further, the client should provide instructions on any special circumstance—such as the handling of victims—and how the investigation should yield to these important special circumstances. If the scope needs to be adjusted as the investigation proceeds, communicate that to the client and modify the work plan accordingly. In short—get aligned and stay aligned.

Who are the intended recipients of the report of investigation?

Is the report of investigation an internal confidential document not intended for disclosure and subject to privilege protections? Is the report intended for use with regulators, courts, customers or the public? Is there a possibility of a criminal proceeding, and the attendant prospect of a waiver of the attorney-client and work product privileges as a condition of a negotiated resolution?[2] All of these are relevant considerations for the logistics of the investigation.

As a practical matter, all investigations start as a privileged undertaking. Care must be taken to mark the report and all drafts with appropriate legends (i.e., "Confidential," "Attorney Client Privilege," "Attorney Work Product Prepared in Anticipation of Litigation"). If some form of disclosure is contemplated, or reasonably anticipated, it is essential that the investigative team not include in the report any confidential or privileged information that must be protected, as there would likely be a reasonable argument for waiver in that circumstance.

Often the client simply does not know as the investigation is unfolding how the report will be used. In such circumstances, it is a best practice to treat it and all drafts as confidential as well as to maintain all of the formalities of the applicable privileges. It is the client's privilege to waive. In certain circumstances, the client may determine that it needs to disclose the report or use it with regulators, courts or others. In such situations, it is critical for counsel to determine the scope of the waiver under applicable law. Because the client's decision needs to be informed by the scope of the waiver, this determination ideally should be made early, before the report is drafted, to guide discussions about disclosure. For example, a "subject matter" waiver may expose the client to the disclosure of other privileged information beyond the report of investigation. Similarly, if less than a "subject matter" waiver is permissible in the relevant jurisdiction, a clear writing from the client concerning the scope of

2 See infra at ___, "Individual Accountability for Corporate Wrongdoing," Sally Quillian Yates, Deputy Attorney General (Sept. 9, 2015) for further discussion of this issue.

the waiver should accompany the disclosure. Finally, if the risk of subject matter waiver is significant, the client may consider appropriate redactions to preserve claims of privilege. Of note, and as discussed more fully below, clients and counsel dealing with the government should not assume that selective waiver will be upheld.

If the report is intended for a third party and not the client, is the investigation team independent?

Not all internal investigations are the same. Some are prepared with the intent for use with third parties, such as regulators or courts, that will scrutinize whether the investigation was performed with sufficient safeguards of independence to bolster its credibility and reliability. Where the review and acceptance by a third party is essential, the efficacy of the investigation is only as good as its independence. Even a brilliantly executed investigation may be worthless in the eyes of these third parties if serious questions arise about the team's independence. A critical threshold issue—and one that often needs to be reexamined during the life of the project—is whether the investigation team is sufficiently independent of the client and the issues being investigated.

The contemplated benefit of the investigation for use with third parties is to get an unvarnished report of what actually occurred, the actual or potential consequences, and the suggested remedial or mitigating actions. Investigators acting out of a real or perceived conflict may diminish or erode the impact of the report. Recipients of the report who believe that its conclusions and recommendations were improperly influenced by those who might be impacted by the report may dismiss it out of hand. This is particularly problematic if the intended recipients of the report are regulators, courts or other constituencies who may question the integrity of the report.

An ongoing business relationship with the client, work performed or advice given concerning the subject being investigated, or a previously existing reporting relationship to someone at the client who is being investigated, are common examples of circumstances that can undermine a claim of independence. In such a situation, the perception of a conflict may be as damaging as an actual conflict. When such circumstances exist, or arise during the project, the investigation team must examine whether it can perform the independent investigation.

Who has the ability to edit the report before it is finalized?

Determining who will have the right to review and propose edits before the report of investigation is finalized is another important matter to consider. This is very closely related to the questions regarding defining who the client is and how the independence of the investigation can be assured. While there can be material benefits to having various constituencies, such as directors, trustees, and officers reviewing the report for accuracy, completeness and consistency with corporate values and norms, such further review may compromise the independence of the report and, therefore, its efficacy with the target audience. Depending on the scope of the investigation and the circumstances under which it arose, it may be necessary, and prudent, to restrict review and editing of the final report to a small group of decision-makers for the client. For example, if an entity is performing a new investigation because a prior one was viewed as being manipulated by the board of directors or management, to avoid the same pitfalls the new investigators should run a process that insulates the report from such repeated criticism.

Best practices require that review of the report by those whose conduct is implicated, including the direct actors as well as officers, directors, trustees, consultants, or lawyers who may have been on watch at the time of the offending conduct, should not be part of the review and finalization process except to confirm facts. Similarly, best practices suggest that those who have a direct or material stake in the report because they were victims or whistleblowers should also be managed carefully through the review and finalization process. The investigation team may believe it is necessary or advisable to have victims or whistleblowers review portions of the final report to ensure accuracy or that privacy has been protected, but input from those parties into the conclusions or recommendations can be problematic and impugn the independence of the report. Tread carefully into these turbulent areas with clear boundaries as to what is permissible and what is not.

Will the investigation require special procedures for dealing with "victims"?

Investigations often require interviewing victims of improper conduct or whistleblowers who purport to be witnesses to unlawful or improper conduct. Both categories present unique issues for the client's consideration.

With regard to victims of improper conduct—such as sexual assault—the client may want the investigation team to take special precautions during the interview process and in the final report and work papers. For example, private schools that have reported the results of investigations about past sexual assaults by faculty and administration have been accused after the fact of being insensitive to the privacy concerns of victims

and to the additional harm to the victims caused by the report of investigation. To avoid such criticisms, the use of pseudonyms to anonymize victims is a well-developed convention to protect privacy yet also report the information learned during the investigation. Unfortunately, it is not always possible to fully protect a victim by simply using a pseudonym. Other facts revealed may allow certain readers to deduce the identity of the victim(s). In such circumstances, the rehabilitation and goodwill expected from the investigative report can be diminished or overshadowed by the re-victimization of those originally harmed. Forethought, planning and clear direction from the client should help avoid such a circumstance.

Will the investigation involve interviewing and/or investigating "whistleblowers"?

Similarly, whistleblowers—individuals who disclose suspicions of unlawful, unethical or prohibited corporate conduct—present special circumstances in an internal investigation. Special handling is essential in light of the protections that a whistleblower may have. A patchwork of federal[3] and state[4] laws provide protections to bonafide whistleblowers. While there are clear differences between and among these statutes, one common principle is there can be no retaliation against whistleblowers for disclosing offending conduct. Investigators must be knowledgeable about these protections and conduct the investigation in ways that do not erode or impair these protections.

It is common during an investigation to learn that there are independent bases to take a job action against the whistleblower, unrelated to his/her disclosures. In some circumstances, the whistleblower's disclosures are nothing more than a cynical attempt to thwart an impending job action. In other circumstances, the whistleblower participated or contributed to the offending activity being investigated. Because of these complicating dynamics, the whistleblower often will have retained counsel who wants to participate in any interview with her/his whistleblower-client.[5] The protections afforded whistleblowers make

3 Federal statutes with whistleblower provisions include: Affordable Care Act (ACA), Section 1558 29 U.S.C. 218C; Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2651; Clean Air Act (CAA), 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610; Consumer Financial Protection Act of 2010 (CFPA), Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C.A. § 5567; Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087; Energy Reorganization Act (ERA), 42 U.S.C. § 5851; FDA Food Safety Modernization Act (FSMA), § 402, 21 U.S.C. 399d; Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109; Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367; International Safe Container Act (ISCA), 46 U.S.C. § 80507; Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171; National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142; Occupational Safety and Health Act (OSH Act), Section 11(c), 29 U.S.C. § 660; Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129; Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i); Sarbanes-Oxley Act (SOX), 18 U.S.C.A. § 1514A; Seaman's Protection Act (SPA), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281, 46 U.S.C. § 2114; Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105; Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121.

4 See generally, Richard A. Leiter and William S. Hein & Co., Inc., 50 STATE STATUTORY SURVEYS: EMPLOYMENT: EMPLOYEE PROTECTION, "Whistleblower Statutes," which contains the following compendium of state statutes: ALABAMA, ALA.CODE § 25-5-11.1 (1975), ALA.CODE § 25-8-57 (1975), ALA.CODE § 36-26A-1 (1975); ALASKA, ALASKA STAT. ANN. § 39.90.100 (West, Westlaw through 2017 Legis. Sess.), ALASKA STAT. ANN. § 18.60.088 (West, Westlaw through 2017 Legis. Sess.), ALASKA STAT. ANN. § 18.60.089 (West, Westlaw through 2017 Legis. Sess.), ALASKA STAT. ANN. § 18.60.095 (West, Westlaw through 2017 Legis. Sess.); ARIZONA, ARIZ. REV. STAT. ANN. § 38-531 (2011), ARIZ. REV. STAT. ANN. § 23-425 (West, Westlaw through 2017 Legis. Sess.), ARIZ. REV. STAT. ANN. § 23-418 (West, Westlaw through 2017 Legis. Sess.); ARKANSAS, ARK. CODE ANN. § 16-123-107 (West, Westlaw through 2017 Legis. Sess.), ARK. CODE ANN. § 16-123-108 (West, Westlaw through 2017 Legis. Sess.); CALIFORNIA, CAL. LAB. CODE § 1102.5 (West 2016); COLORADO, COLO. REV. STAT. ANN. § 24-50.5-101 (West 2016), COLO. REV. STAT. ANN. § 24-114-101 (West, Westlaw through 2017 Legis. Sess.); CONNECTICUT, CONN. GEN. STAT. ANN. § 4-61dd (West 2015), CONN. GEN. STAT. ANN. § 31-51m (West 2014); DELAWARE, DEL. CODE ANN. tit. 29, § 5115 (West, Westlaw through 2017 Legis. Sess.), DEL. CODE ANN. tit. 19, § 1701 (West, Westlaw through 2017 Legis. Sess.); DISTRICT OF COLUMBIA, D.C. CODE § 1-615.51 (West, Westlaw through 2017 Legis. Sess.); FLORIDA, FLA. STAT. ANN § 112.3187 (West 2002); GEORGIA, GA. CODE ANN. § 45-1-4 (West 2012); HAWAII, HAW. REV. STAT. § 378-61 (West, Westlaw through 2017 Act 34); IDAHO, IDAHO CODE ANN § 6-2101(West, Westlaw through 64th Reg. Sess.); ILLINOIS, 740 ILL. COMP. STAT. 174/10 (2004), 20 ILL. COMP. STAT. 415/19c.1 (West, Westlaw through 2017 Reg. Sess.); INDIANA, IND. CODE ANN. 4-15-10-4 (West 2012), IND. CODE ANN. 36-1-8-8 (West, Westlaw through 2017 Reg. Sess.), IND. CODE ANN. 22-5-3-3 (West 2016); IOWA, IOWA CODE ANN. § 70A.28 (West 2013), IOWA CODE ANN. § 70A.29 (West, Westlaw through 2017 Reg. Sess.); KANSAS, KAN. STAT. ANN. § 75-2973 (West, Westlaw through 2017 Reg. Sess.); KENTUCKY, KY. REV. STAT. ANN. § 61.101 (West, Westlaw through 2017 Reg. Sess.) KY. REV. STAT. ANN. § 338.121 (West 2010), KY. REV. STAT. ANN. § 338.991 (West 2010); LOUISIANA, LA. REV. STAT. ANN. § 30:2027 (West, Westlaw through 2017 First Extra. Sess.), LA. REV. STAT. ANN. § 42:1169 (2014); MAINE, ME. REV. Stat. Ann. tit. 26 § 831 (West, Westlaw through 2017 Reg. Sess.); MARYLAND, MD. CODE. ANN., STATE PERS. & PENS. § 5-301(West, Westlaw through 2017 Reg. Sess.), MD. CODE. ANN., STATE FIN. & PROC. § 11-301 (West, Westlaw through 2017 Reg. Sess.); MASSACHUSETTS, MASS. GEN. LAWS ANN. ch. 149 §185 (West, Westlaw through 2017 Ann. Sess.); MICHIGAN, MICH. COMP. LAWS. ANN. §15.361 (West, Westlaw through 2017 Reg. Sess.); MINNESOTA, MINN. STAT. ANN. § 181.931 (West 2013); MISSISSIPPI, MISS. CODE ANN. § 25-9-171 (West, Westlaw through 2017 Reg. Sess.); MISSOURI, MO. ANN. STAT. §105.055 (West 2010), MO. ANN. STAT. § 287.780 (West 2010); MONTANA, MONT. CODE ANN. § 39-2-901(West, Westlaw through Sept. 2016 amendments); NEBRASKA, NEB. REV. STAT. ANN. § 81-2701 (West, Westlaw through 2017 Reg. Sess.), NEB. REV. STAT. ANN. § 48-1114 (West, Westlaw through 2017 Reg. Sess.); NEVADA, NEV. REV. STAT. ANN. § 281.611(West, Westlaw through 2017 Reg. Sess.), NEV. REV. STAT. ANN. § 618.445 (West, 2013); NEW HAMPSHIRE, N.H. REV. STAT. ANN. § 98-E:1 (2008), N.H. REV. STAT. ANN. § 275-E:1 (2012); NEW JERSEY, N.J. STAT. ANN. § 34:19-1 (West, Westlaw through 2017 Legis. Sess.); NEW MEXICO, N.M. STAT. ANN. § 50-9-25 (West, Westlaw through 2017 Legis. Sess.); NEW YORK, N.Y. LAB. LAW § 740 (McKinney 2006), N.Y. CIV. SERV. § 75-b (McKinney 2015); NORTH CAROLINA, N.C. GEN. STAT. ANN. § 126-84 (West, Westlaw through 2017 Reg. Sess.), N.C. GEN. STAT. ANN. § 95-240 (West, Westlaw through 2017 Reg. Sess.); NORTH DAKOTA, N.D. CENT. CODE ANN. § 34-11.1-04 (West, Westlaw through 2017 Reg. Sess.), N.D. CENT. CODE ANN. § 34-11.1-07 (West, Westlaw through 2017 Reg. Sess.), N.D. CENT. CODE ANN. § 34-11.1-08 (West, Westlaw through 2017 Reg. Sess.); OHIO, OHIO. REV. CODE ANN. § 4113.52 (West, Westlaw through 2017 Reg. Sess.), OHIO. REV. CODE ANN. § 124.341 (West 2013); OKLAHOMA, OKLA. STAT. ANN. tit. 74§ 840-2.5 (West, Westlaw through 2017 Reg. Sess.), OKLA. STAT. ANN. tit. 40 § 417 (West, Westlaw through 2017 Reg. Sess.); OREGON, OR. REV. STAT. ANN. § 659A.200 (West, Westlaw through 2017 Reg. Sess.), OR. REV. STAT. ANN. § 654.062 (West, Westlaw through 2017 Reg. Sess.), OR. REV. STAT. ANN. § 659A.199 (West, Westlaw through 2017 Reg. Sess.); PENNSYLVANIA, 43 PA. CONS. STAT. § 1421 (West, Westlaw through 2017 Reg. Sess.); RHODE ISLAND, R.I. GEN. LAWS ANN. § 28-50-1 (West, Westlaw through 2017 Reg. Sess.); SOUTH CAROLINA, S.C. CODE ANN. § 8-27-10 (2015), S.C. CODE ANN. § 41-15-510 (West, Westlaw through 2017 Act No. 36), S.C. CODE ANN. § 41-15-520 (2012); SOUTH DAKOTA, S.D. CODIFIED LAWS § 20-13-26 (West, Westlaw through 2017 Reg. Sess.), S.D. CODIFIED LAWS § 60-11-17.1 (West, Westlaw through 2017 Reg. Sess.), S.D. CODIFIED LAWS § 60-12-21(West, Westlaw through 2017 Reg. Sess.); TENNESSEE, TENN. CODE ANN. § 50-1-304 (West 2014), TENN. CODE ANN. § 50-3-106 (West 2008), TENN. CODE ANN. § 50-3-409 (West 2008), TENN. CODE ANN. § 8-50-116 (West, Westlaw through 2017 Reg. Sess.); TEXAS, TEX. GOV'T CODE ANN. § 554.001 (West, Westlaw through 2017 Reg. Sess.), TEX. LAB. CODE ANN. § 21.055 (West, Westlaw through 2017 Reg. Sess.); UTAH, UTAH CODE ANN. § 67-21-1 (West, Westlaw through 2017 Gen. Sess.); VERMONT, VT. STAT. ANN. tit. 21§ 231 (West, Westlaw through 2017-2018 VT. Gen. Assembly), VT. STAT. ANN. tit. 3§ 973 (West, Westlaw through 2017-2018 VT. Gen. Assembly); VIRGINIA, VA. CODE ANN. § 40.1-51.2:1 (West, Westlaw through 2017 Reg. Sess.), VA. CODE ANN. § 40.1-51.2:2 (West, Westlaw through 2017 Reg. Sess.); WASHINGTON, WASH. REV. CODE ANN. § 42.40.010 (West, Westlaw through 2017 Reg. Sess.), WASH. REV. CODE ANN. § 49.60.210 (West 2011); WEST VIRGINIA, W. VA. CODE ANN. § 6C-1-1 (West, Westlaw through 2017 Reg. Sess.), W. VA. CODE ANN. § 21-3A-13 (West, Westlaw through 2017 Reg. Sess.); WISCONSIN, WIS. STAT. ANN. § 230.80 (West 2015); WYOMING, WYO. STAT. ANN. § 27-11-109(e) (West, Westlaw through 2017 Gen. Sess.), WYO. STAT. ANN. § 9-11-103 (West, Westlaw through 2017 Gen. Sess.).

5 On the duty to cooperate, see Merkel v. Scovill, Inc., 787 F.2d 174, 179 (6th Cir.1986) (reversing a finding by the district court that the plaintiff's non-participation in the investigation was "protected activity," holding that "discrimination against an employee for lack of participation or nonparticipation in an investigation would not be a violation of the ADEA."); Thomas v. Norbar, Inc., 822 F.2d 1089 (holding that since there was no evidence that plaintiff's supervisors had pressured him to lie or give information regarding matters about which he had no knowledge, his refusal to participate in the investigation was not protected activity.); City of Hollywood v. Witt, 939 So. 2d 315, 317 (Fla. Dist. Ct. App. 2006) (holding that the verdict on the whistle-blower claim could not stand because "the existence of reasons for termination, apart from any alleged whistle-blowing, constitutes a defense that is expressly recognized by the whistle-blower act.") On no right to counsel, see In re Carroll, 339 N.J. Super. 429, 440, 772 A.2d 45, 52 (App. Div. 2001). (Holding that "the Sixth Amendment right to counsel does not extend to internal investigations); Williams v. Pima Cty.,791 P.2d 1053 (Ct. App. 1989).(Holding

it more challenging, but not impossible, to get to the truth of the allegations and for the investigators to make appropriate remedial action recommendations, including termination of the whistleblower, if the protections have not been appropriately implicated.[6] All of these issues require careful management and particular attention to the governing law.

While the whistleblower has certain rights, the investigation team has a mandate that must be fulfilled. When confronted with these dynamics, it is important to understand the governing law and whether the whistleblower protections have been validly implicated, to disaggregate and isolate the issues investigated into those that may receive protection and those that do not, and to make specific recommendations to the client regarding these different buckets of protected and unprotected conduct.

Establishing the privilege: Upjohn warnings

The ability of an entity to conduct and preserve as privileged an internal investigation rests on certain requirements recognized by the United States Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1981)[7]. The Court recognized that an organization's attorney client privilege where: (a) the communication was made by an entity's employee, (b) to counsel for the entity acting as such, (c) at the direction of corporate superiors, (d) in order to secure legal advice from counsel, (e) concerning matters within the score of the employee's duties and (f) the employee was aware that the purpose of the questioning was so that the entity could obtain legal advice. Id. at 390-91.[8]

From these principles have sprung standard warnings for witness interviews, called Upjohn warnings or sometimes "corporate Miranda warnings," designed to ensure that the elements of the attorney-client privilege are established for the benefit of the corporation, not the individual witness. The essential information that the entity's counsel must convey includes instructing the witness that: (1) the attorney represents the entity alone and not the individual (unless a joint representation is expressly contemplated, in which case such representation should be carefully delineated); (2) the attorney is investigating facts for the purpose of providing legal advice to the entity; (3) the communication is protected by the attorney-client privilege, and that the privilege belongs to the entity alone, and not to the witness (unless a joint representation is expressly contemplated, which, again, should be carefully considered and delineated); (4) the entity may choose to waive the privilege and disclose the substance of the communication to third parties, including the government; and (5) the communication is confidential and must be kept that way by the witness and not disclosed to third parties except counsel.[9] Care should be taken to make sure that the investigation and the associated privilege belongs to the entity.[10]

Regarding confidentiality, which is distinct from privilege, counsel should be aware of limitations applicable to witness interactions. Counsel can ask a witness to keep an interview discussion confidential, and can explain the purpose and importance of doing so (including preservation of the privilege), but cannot instruct the witness that he or she is forbidden from discussing the matter, especially concerning any communications or potential communications with the government. Nor will written confidentiality agreements be enforceable if they unreasonably restrict the employee's ability to report information to the government.

that the right to counsel under the Sixth Amendment applied only to criminal proceedings, and did not confer right to counsel upon an officer being interrogated by sheriff's department during internal affairs investigation).

6 On whistleblower protections see Somers v. Digital Realty Trust Inc., 850 F.3d 1045, 1048 (9th Cir. 2017)(citing 15 U.S.C.A. § 78u-6). ("No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—(i) in providing information to the Commission in accordance with this section; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission."); Grisham v. United States, 103 F.3d 24, 26 (5th Cir. 1997). See 5 U.S.C. § 2302(b)(8). ("The Whistleblower Protection Act was enacted in 1989 to increase protections for whistleblowers by prohibiting adverse employment actions taken because a federal employee discloses information that the employee reasonably believes evidences a violation of any law or actions that pose a substantial and specific danger to public health or safety). On requirements for a whistleblower protection claim see Willis v. Dep't of Agric., 141 F.3d 1139, 1144 (Fed. Cir. 1998). (regardless of whether the adverse personnel action is taken in retaliation for a protected disclosure, or is a result of the disclosure, the whistleblower need only demonstrate that the protected disclosure was one of the factors that affected the personnel action); Hickson v. Vescom Corp., 2014 ME 27, ¶ 17, 87 A.3d 704; "To prevail on a [WPA] claim, an employee must show that (1) he engaged in activity protected by the WPA; (2) he experienced an adverse employment action; and (3) a causal connection existed between the protected activity and the adverse employment action." See Also Galouch v. Dep't of Prof'l & Fin. Regulation, 2015 ME 44, ¶ 12, 114 A.3d 988, 992; See Also Miller v. City of Millville, 2014 WL 10122644 (N.J.Super.L.), 6.("In order to establish a prima facie case of retaliation under CEPA, the plaintiff must demonstrate the following elements: 1. he reasonably believed illegal conduct was occurring; 2. he disclosed or threatened to disclose the activity to a supervisor or public body; 3. retaliatory employment action was taken against him; and 4. a causal connection exists between the whistle-blowing and the adverse employment action."); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 444 (Minn. 1983)

7 In an earlier case, Hickman v. Taylor, 329 U.S. 495 (1947), the Supreme Court recognized and defined the contours of the attorney work product doctrine, which protects against disclosure of work product prepared by or for counsel in anticipation of litigation.

8 Upjohn articulates that protections available under federal law. While many states have adopted the principles of Upjohn, others have not. The investigation team must consult the potentially applicable state law on this privilege issue and conduct the interviews accordingly.

9 Courts are split on the issue of whether the Upjohn privilege extends to former employees. A number of courts have held that Upjohn applies to communications with former employees so long as the communication relates to the former employee's conduct and knowledge gained during employment. See, e.g., Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 112 (S.D.N.Y. 2005); Peralta v. Cendant Corp., 190 F.R.D. 38, 41-42 (D. Conn. 1999); see also In re Allen, 106 F.3d 582, 605-06 (4th Cir. 1997) (holding Upjohn applies with equal force to former employees). However, not all courts have agreed. See, e.g., Clark Equip. Co. v. Lift Parts Mfg. Co., No. 82 C 4585, 1985 U.S. Dist. LEXIS 15457, 1985 WL 2917, at *5 (N.D. Ill. Oct. 1, 1985) (holding former employees are not the "client," and that "post-employment communications with former employees are not within the scope of the attorney-client privilege"), Newman v. Highland Sch. Dist. No. 203, 381 P.3d 1188 (Wash. 2016).

10 Individual claims of ownership of a corporate privilege are often analyzed under the so called Bevill factors which include: (1) the employee sought legal advice from the company's counsel; (2) in an individual rather than a representative capacity; (3) the attorney, aware of the potential conflict of interest gave the advice sought; (4) the conversation was confidential; and (5) the substance of the conversation did not involve corporate matters. In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 125 (3rd Cir. 1986). Tailoring Upjohn warnings to ensure that the witness cannot establish the Bevill factors may be appropriate in certain situations.

When an internal investigation can be undertaken for many different purposes, the availability of the privilege turns on the purpose. Many courts apply a "primary purpose test" to determine if the primary purpose of the investigation was to provide legal advice or to prepare for litigation. If so, the attorney client privilege and work product doctrine protect attorney notes, memoranda and other materials generated during the investigation.[11] If the primary purpose of the investigation was not to seek legal advice or prepare for potential litigation, however, the privilege and the work product doctrine may not apply.

Practitioners differ on whether Upjohn warnings should be provided orally or in writing and, if in writing, whether the witness should sign an acknowledgment. Some fear that overly formal warnings will chill candor from the witness. Others contend that oral warnings present proof problems if later challenged. This is a judgment call that must be made in each situation. At a minimum, counsel who elect to forgo the written acknowledgment should document in the memorandum and notes summarizing the interview that the witness received the warnings and confirmed his or her understanding. Privilege challenges from individuals who have close working associations with outside counsel are a common occurrence. In such situations, the individual often associates the outside counsel as representing her/his interests because in past circumstances there has been complete alignment between the individual and the entity. This can lead to confusion on the part of the individual that, if viewed by a court as reasonable, can put the privilege at risk. Where such a situation exists, thought should be given as to whether there is utility and net benefit for written warnings and a signed acknowledgement.

Where joint representation is contemplated, a conflict may arise between the entity and the individual regarding the waiver of the attorney-client privilege. This issue should be addressed in an engagement letter providing the entity with the sole authority to waive the privilege. If the individual is not comfortable with such a delegation, the ability to undertake a joint representation should be revisited.

Ethical requirements for dealing with witnesses

Two important ethical rules govern the investigator's conduct with regard to witnesses. Model Rule of Professional Conduct 1.13(f) details what a lawyer needs to do when dealing with an entity's directors, officers, employees, members, shareholders and other constituencies that have interests adverse to the client.[12] Specifically, in this situation, further care is required for counsel to identify that she/he represents the entity alone. This elevates one of the important aspects of Upjohn warnings to the level of an ethical violation if omitted.

Model Rule 4.3 details what an attorney must do when dealing on behalf of a client with a witness who is not represented.[13] These are particularly tricky situations because the witness often has legitimate questions about the purpose of the investigation and whether it creates jeopardy for the witness, which can risk confusion about the attorney's role vis à vis the individual. The investigating team needs to be careful not to provide legal advice to the witness. For example, if the witness asks if she/he needs representation, the investigator should not answer this question with anything other than "I cannot advise you on that question as I represent the entity and not you." It also may be appropriate to remind witnesses of their ability to consult with their own legal counsel. It is also important to communicate with the client, upfront and later as needed, regarding whether there are any witnesses for whom the client wants to provide individual counsel. Clients can pay for the costs of an employee's counsel if they so choose (or if a relevant policy, such as a director and officer liability policy, requires indemnification). Paying for counsel does not give the client any ability to direct the representation or the employee's decisions, however.

Protecting notes of witness interviews and related work product

The mental impressions, strategy and analysis of any attorney formulated during an interview of a witness are generally protected from disclosure. Facts learned from a witness, without more, are generally not protectable. As a consequence, when making notes of witness interviews, it is important that the investigator mark the work product as "Attorney Work Product". Additionally, noting that a summary or set of notes is prepared in anticipation of litigation, and for the purpose of providing legal advice to the client, is prudent. It is helpful to make sure that notes are not a running transcript of the witnesses' answers to questions, but are rather imbued with counsel's mental impressions. Work product with these features often receives protection from disclosure where mere transcripts of a witness' answers do not.

11 See In re Kellogg Brown & Root Inc., 756 F.3d 754 (D.C. Cir. 2014) and In re GM LLC Ignition Switch Litig., 80 F.Supp.3d 521 (S.D.N.Y. 2015).

12 Rule 1.13(f), Organization as Client, states:
In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

13 Rule 4.3, Dealing With Unrepresented Person, states:
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Recording interviews and creating transcripts

Recordings are seldom protected because, unlike notes, the questions and answers simply do not convey the mental impressions, strategy and analysis of counsel that would warrant opinion work product protection.[14] It is highly probable, therefore, that disclosure of recordings or transcripts may be compelled.[15] Whether such disclosure creates issues for the client is a fact-specific inquiry. Thought should be given to this issue upfront, and the implications of disclosure discussed, before recordings or transcripts of witness interviews are generated.

Other considerations may weigh against recording interviews. There is no uniform rule regarding whether counsel must inform the witness of the recording before it begins and obtain the witness's consent to record. Rather, the legality of one-party recording is an issue that must be examined on a state-by-state basis. In jurisdictions where consent must be obtained, counsel may determine that seeking consent would chill witness candor to the detriment of the interview(s), and may elect to proceed without recording.

Compelling witness participation

Employees of public or private entities are usually required to cooperate with internal investigations as a responsibility of employment. Review of the entity's policies and procedures regarding what employees are required to do, as terms of their employment, is a useful first step. Those unwilling to be interviewed may be subject to some form of progressive discipline or job action.[16] The specter of such actions is usually sufficient to secure participation.

Former employees present a different issue. Unless there are contractual requirements that survive the employee's separation from the entity, participation in an internal investigation by a departed employee is entirely voluntary. Participation can often be secured when the witness is informed that some manner of formal process may issue from the government or a potential party to litigation. Often the witness wants to know what those processes will entail and what she/he may be asked to do. When providing this information, it remains important that the entity's counsel not provide legal advice, as prohibited by the Model Rule of Professional Responsibility 4.3, and that counsel clearly define its role as counsel to the entity. Counsel also must assess whether Upjohn warnings apply. Additionally, it is prudent to recognize that former employees do not have the same job-related motivations as current employees, and may not heed counsel's request not to discuss the content of the interview.

Witness' access to counsel during the interview

Internal investigations involving private entities ordinarily do not implicate a witness' right to have counsel participate in the interview. Nevertheless, there may be special circumstances—including interviews of victims or whistleblowers—where the client may permit such participation. These are fact-specific determinations made to enhance the efficacy of the investigation. It may be that a witness simply will not cooperate at the level necessary without her/his counsel in the room. The net benefit of getting better cooperation and candor may outweigh the anticipated downsides of participation by the witness' counsel.

When permitting counsel to participate, it is often helpful to set ground rules. Among other things, counsel is there to observe and not participate in the questions and answers. It is not a deposition, there is no right to object and the counsel cannot behave is a way that disrupts the investigation. Further, the counsel needs to agree to maintain the process as confidential.

Work papers and drafts of the report of investigation

All work papers and drafts of the report should be labeled as "Confidential Attorney-Client Communications and Attorney Work Product," and also as drafts. The materials should be treated and maintained as confidential and should be shared only on a "need to know basis." Disclosure should be limited to members of the investigative team or certain select decision makers of the client. Counsel also should be mindful that disclosure of drafts to third parties may waive privilege protections. By maintaining strict formalities, the chances of sustaining the privileges and protections through challenges are increased. Conversely, lack of diligence on these issues puts the protections at risk of waiver, which, as discussed above, can vary in scope.

Circulation and control of the final report of investigation to maintain privilege

If the client wants to maintain privilege of the final report of investigation, strict precautions must be used to limit circulation. Counsel should consider issuing individually

14 In re Kellogg Brown & Root, Inc., 796 F.3d 137, 148-50 (D.C. Cir. 2015) (holding that fact work product is subject to disclosure on a showing of "substantial need" and "undue hardship" but opinion work product is subject to heightened protection); Fed. R. Civ. P. 23(b)(3)(B) (if a court orders disclosure of work product, "it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories" of counsel, which constitutes opinion work product).

15 See e.g., United States v. Nobles, 422 U.S. 225 (1975) (affirming the trial court's finding that an investigator's report containing statements by a witness were not protected by, inter alia, the work product doctrine).

16 There often are differences in what actions private entities can take over employees versus public entities. These differences may drive the strategy and tactics employed to secure participation.

numbered reports to specifically identified decision makers at the client. Express written warnings should accompany the circulation of the report and should detail the consequences of circulating the report beyond the defined audience. Presenting the report through a secure read-only platform that limits the reader's ability to copy or forward the report may be useful to control circulation to only the intended audience.

Disclosure of report of investigation and implications on privilege

If the client wants to disclose the report to a third party, careful consideration of the scope of the waiver is important. To the extent permitted by law, the investigative team should help to narrow the breadth of the waiver as much as possible. Detailing what is intended to be waived versus what is not may prove helpful if a third-party later moves to compel more information on the basis of partial waiver.

A client considering disclosing some, but not all, of its investigation report should consider that not all jurisdictions recognize selective waiver. Moreover, disclosure of some or all of the report in one proceeding can have an unintended adverse effect in a future or parallel proceeding in which it may be sought, such as a shareholder derivative suit. Care and consideration must be given to the potential effects of even limited waiver of privileged material.

Waiver of privileges through use of information in proceedings

In addition to disclosure of the actual work product, the use of information obtained through an internal investigation in defense of regulatory or civil claims can result in waiver of associated privileges. Once the material is put at issue and used for offensive purposes, courts are reluctant to maintain privilege protections. The simple reality is that privilege cannot be used both as a sword for offensive purposes and a shield to protect against disclosure. Selective disclosure seldom stands when challenged. Accordingly, if the client needs to use the information obtained during the investigation to defend against regulatory or civil claims, it should do so knowing that the privileges associated with the gathering of this information will likely be waived. This could have a direct effect in future actions, such as shareholder derivative suits, and in parallel proceedings.

Voluntary waiver of privilege to earn cooperation credit

In recent years, the United States Department of Justice ("DOJ") has put increased focus on individual accountability for corporate wrongdoing. In September 2015, the DOJ issued the so-called "Yates Memorandum," which detailed new policies and practices for dealing with the prosecutions of corporations. The memorandum emphasizes that "fighting corporate fraud and other misconduct is a top priority" of the DOJ and details "six key steps to strengthen [DOJ's] pursuit of corporate wrongdoing." These steps include: (1) to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals, as well as the company, and evaluate whether to bring suit against an individual as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

In the wake of the Yates Memorandum, cooperation credit for timely, diligent, thorough, proactive and speedy internal investigations now turns on the complete disclosure of facts learned about individuals responsible for the misconduct. Unlike past policy, the Yates Memorandum calls for disclosure of "all relevant facts" relating to individual misconduct. No longer can a corporation lean on the diffuse nature of corporate responsibility. Further, settling the corporate wrongdoing will not occur unless there is a "clear plan" to resolve cases against individuals. Taken together, this has put tremendous pressure on entities to waive privileges associated with the internal investigation in order to do a fulsome disclosure about individual malfeasance necessary to earn cooperation credit as part of the case resolution.

As a practical matter, such a disclosure pits the interests of the corporation to reach a resolution against the individuals responsible for the misconduct. In essence, the corporation is incented to root out corporate wrongdoing at the individual level and help deliver the facts supporting the individual misconduct to the DOJ. Such a dynamic often creates material conflicts between the corporation and the individuals responsible for the misconduct.

The Yates Memorandum's "all-or-nothing" approach to cooperation credit, and its mandate that the DOJ resolve corporate matters only after articulating a plan to pursue individuals, arguably dissuades corporations from cooperating in investigations. Practically, prolonged investigative effort means that corporations face longer periods of bad press, and that press is less likely to be remediated by acknowledgement of the corporation's cooperation. This complicates internal investigations, with entities and individuals fearing liability potentially assuming recalcitrant or defensive postures earlier on.

Joint defense/common interest agreements and protecting privilege

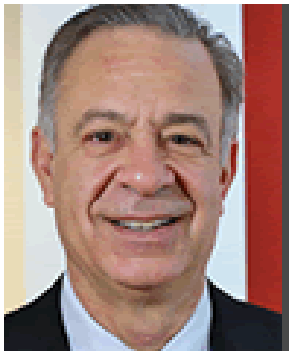
Practitioners have long used so-called joint defense or common interest agreements to share information gathered between and among counsel for the client and individuals involved in the investigation. This is a useful tool for protecting privilege when interests are aligned. When it becomes evident that interests are not aligned, the client must have a method for exiting the agreement and using its information in an unfettered way.[17]

The Yates Memorandum adds some complexion to this well-used practice. The mandated factual disclosures associated with earning cooperation credit may create tension or limitations on the nature and extend of an agreement that can be entered with counsel for individuals. Certainly, agreements with counsel for individuals responsible for the misconduct presents real issues and may impair the ability to secure cooperation credit. Care must be taken to ensure that benefits associated with such an agreement are not out-weighed by the impacts on cooperation benefits.

Conclusion

Internal investigations require careful planning, foresight and execution to avoid many and varied traps. Attention to the threshold issues, care in preserving the applicable privileges and thoughtful analysis as to when the client may need to waive these privileges to secure appropriate benefits in various proceedings are key drivers for success.

17 The nature and extent to which these joint defense/common interest agreements provide protection may be an issue of state law.



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- Labor & Employment
- Consumer Products
- Data Privacy & Cybersecurity
- Financial Services

Recognition
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- Joe is also recognized by The Legal 500 United States 2018 editorial in the areas of Dispute resolution - Product liability, mass tort and class action: Toxic tort - Defense, and Industry focus - Transport: aviation and air travel litigation; by Benchmark Litigation as a New York local litigation star; and by Martindale-Hubbell Peer Review Ratings in its highest category, AV Preeminent.\
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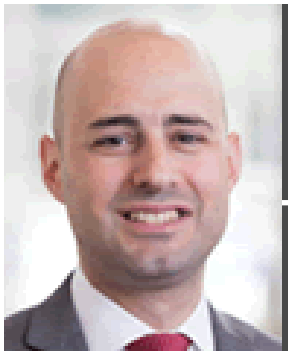

COMMUNICATING WITH FEDERAL INVESTIGATORS IN THE EARLY STAGES OF A CRIMINAL INVESTIGATION

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When The Feds Come Knocking: Tips on Communicating with Federal Investigators in the Early Stages of a Criminal Investigation
Josh Ferrentino

The most sophisticated of in-house counsel or executives can be thrown off-guard when federal agents knock on employees' doors or a grand jury subpoena arrives. This article offers one former Assistant United States Attorney's views on how to advise organizational clients to interact effectively with the authorities, while avoiding typical pitfalls, when a criminal matter first surfaces.

For some corporations, in some highly regulated industries—securities and health care, for example—the path for responding to criminal inquiries is well worn. In others, such as banking and telecommunications, responding to criminal subpoenas and search warrants related to their customers is also a matter of routine. In other sectors of the economy, companies have far less regular interaction with criminal authorities. However, such companies can easily find themselves enmeshed in federal criminal investigations involving fraud, export controls, or environmental crimes, to name but a few areas.

This article is intended as a primer for counsel who may not be criminal law specialists, but who receive a frantic call from an organizational client who is also unfamiliar with the federal criminal law process when the client receives a grand jury subpoena or—much scarier—is faced with a search warrant of its premises. After providing a brief overview of the basics of a federal white-collar criminal investigation, this article outlines three overarching goals for counsel in the early stages of a criminal inquiry.

Typical Framework for a Federal Criminal Investigation

Federal criminal charges follow one of two events: (1) a "reactive" arrest of someone who is caught in the act of breaking a federal law; or (2) following an investigation by a federal law enforcement agency, in conjunction with a prosecutor from one or more components of the Department of Justice. In the vast majority of federal criminal cases that are likely to ensnare an organization—the archetypical "white-collar" case—charges follow an investigation of some length. Most federal criminal investigation are initiated within one or more federal law enforcement agencies, ranging from well-known entities like the Federal Bureau of Investigation or the U.S. Secret Service, to lesser-known ones such as the Department of Commerce Bureau of Industry and Security or a federal agency's Office of Inspector General.[1] The case may be initiated in a myriad of ways, including by referrals from civil regulatory agencies, in response to citizen complaints, or as a result of reporting by banks or other entities about suspicious financial activity.

When an investigation is in its infancy, federal agents may undertake their work without the involvement or guidance of a federal prosecutor—reviewing publicly available information, conducting surveillance, and interviewing witnesses. Certain agencies also have the power to issue administrative subpoenas for information, though

1 The expansive nature of federal criminal authority is well documented: there are now thousands of federal offenses on the books. See, e.g., Gary Fields and John R. Emshwiller, "As Criminal Laws Proliferate, More Are Ensnared," Wall Street Journal, July 23, 2011. As of 2008, which the last time the Department of Justice conducted a census of federal law enforcement officers, there were more than 120,000 sworn federal law enforcement officers with criminal law enforcement authority, spread across 73 agencies. See Brian J. Reaves, Federal Law Enforcement Officers, 2008, Bureau of Justice Statistics, June 2012, available at https://www.bjs.gov/content/pub/pdf/fleo08.pdf.

this power is limited to certain types of cases.[2]

At some point in the investigation—and certainly before any criminal charges are brought—the agents will need to involve a federal prosecutor, most likely an Assistant United States Attorney ("AUSA") in one of 93 offices across the country, but perhaps a Trial Attorney in one of the criminal enforcement components of Main Justice. The involvement of an attorney for the government is necessary to tap the subpoena power of a federal grand jury,[3] to obtain tax return or other information from the IRS,[4] or, as a practical matter, to obtain the issuance of any court-authorized process, especially search warrants.[5]

Grand jury subpoenas are the basic building blocks for any white-collar criminal inquiry. Such subpoenas can be issued by AUSAs in the name of the grand jury, without any application or notice to a judge—or even to the grand jury itself—prior to its issuance. No showing of probable cause is required.[6] Subpoenas may of course be issued for testimony before the grand jury, but they are equally useful for commanding the production of records. While there are certain categories of information that are not available to the government by issuance of a subpoena alone, grand jury subpoenas will give investigators access to much of the information they need in a criminal case, including most categories of business records, telephone toll records, and banking and other financial information. Other forms of investigative process require that the government make an application to the court justifying their issuance. The most common orders falling in this category are search warrants, which require a showing of probable cause to a judge that a crime has occurred, and that evidence of it will be found in the place to be searched.[7] While subpoenas command compliance by the recipient to turn over certain information or provide testimony, search warrants typically authorize law enforcement officers to enter into particular physical spaces to search for evidence.[8] A search warrant is also required to access certain types of records in the custody of third parties, for example, email or other files stored with an electronic communications provider.[9] Other less common forms of court-authorized process in white-collar cases may include tracking warrants or even wiretap orders—which, though uncommonly used in white-collar cases, are not unheard of in that context.[10]

Most criminal inquiries operate with a high degree of secrecy. Grand jury proceedings are secret, and search warrant applications and other investigative filings are typically sealed by the issuing court at the request of the prosecutor to avoid jeopardizing an ongoing investigation. At some point in the investigation, however, the case is likely to become known to an organization before charges are filed—if only because the organization or one of its employees is summoned to the grand jury, or perhaps when a search warrant is executed on company premises.

The latter scenario—federal agents showing up, warrant in hand, at a company's office to seize documents and computers—is a problematic experience for any business. Fortunately, it is the exception rather than the rule in white-collar cases. Search warrants are fraught with risk for executing agents, and are time-consuming to apply for and require greater resources to execute as compared to obtaining information via subpoena. Thus, agents and prosecutors are likely to request searches of company premises where:

- The government fears targets will destroy or refuse to turn over evidence over in response to subpoena;
- The government believes it is particularly important to have forensically sound images of hard drives, cell phones, or other electronic storage media—and not just authentic copies of business records; and/or
- The government wants to make a show of force, in which case a search warrant execution is often coordinated with early-morning interviews of employees at their homes.

Though the impact on a company is likely to be much greater in the case of a search warrant than in a subpoena, company counsel's goals should be essentially the same in either situation—or even in a situation where a criminal probe comes to light through other channels: (1) establish contact with the prosecutor overseeing the case; (2) determine the role of the company in the government's eyes; and (3) avoid conduct that is or could be construed as obstructive.

2 See, e.g., 21 U.S.C. § 876 (Controlled Substances Act cases) and 18 U.S.C. § 3486 (certain health care fraud and other cases).

3 See generally Fed. R. Crim. P. 6.

4 See 26 U.S.C. 6103(i)(1) (providing for application to view confidential tax information, including tax returns, in federal criminal cases).

5 See generally Fed. R. Crim. P. 41.

6 See United States v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991) ("[T]he Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists.").

7 See Fed. R. Crim. P. 41.

8 A search warrant also allows executing agents to break down doors, force entry to containers, or even crack encrypted electronic protections to access information that is encompassed by the warrant. See generally United States v. Ross, 456 U.S. 798, 820-21 (1982) ("A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.").

9 See 18 U.S.C. § 2703. Such warrants are typically served on providers who turn over records as they would in response to a subpoena.

10 See 18 U.S.C. § 2516 (listing a large number of offenses that may be targeted using wiretap orders, including bribery and antitrust crimes).

Goal One: Establish Contact with Government Counsel

Whether served with a subpoena, or faced with the execution of a warrant, it is critically important to establish a direct line to the AUSA or other government lawyer overseeing the case as soon as possible—just as one would want to establish contact with opposing counsel when served with process in a civil matter.

Counsel should avoid the urge to negotiate or argue with law enforcement agents who come bearing process. There are two reasons for this. First, as discussed in further detail below, it is critically important to avoid giving the appearance that your client is obstructing an inquiry or interfering with the collection of evidence. Federal agents, while typically well-trained to gather evidence, are likely to take umbrage at a lawyer or other company representative who questions the scope of a subpoena or search, and may react poorly to the perception that his or her authority is in doubt. Second, the agent is likely to be simply the messenger—albeit one who should be treated at all times with courtesy—and is thus not likely have the authority or willingness to negotiate modifications to a subpoena, or receive objections to the scope of a search warrant. The AUSA, a fellow lawyer who is likely to be more accustomed to the give-and-take inherent in an adversarial legal system, is the proper place to direct your concerns about a subpoena or warrant.

If possible, your first contact with the government's counsel should be by telephone. (Typically, a subpoena will list the contact information for the AUSA requesting it; if the government counsel's name and contact information are not apparent, then a call to the U.S. Attorney's Office should allow you to establish contact with the right lawyer.) Too often as an AUSA, I saw lawyers experienced with civil practice spend their clients' money writing a detailed letter objecting to the response window or scope of a subpoena, when their concerns about the subpoena could have been resolved with a short phone call. That first phone call is also an opportunity to let the government know that your client is represented by counsel, and to establish yourself as the channel for any future requests for information (including, where permitted by the applicable Rule of Professional Conduct, for any requests to interview your client's employees). Additionally, an initial phone call is an opportunity to discover basic information about the government's inquiry that is not apparent from the face of the subpoena or warrant, including—most importantly—to find out the company's role in the investigation.

Goal Two: Find out the Company's Role in the Investigation

In your initial contacts with the AUSA, your overarching goal should be to determine the government's view of your client in the investigation. That is, you should ask if your client is a target of the investigation, merely a repository for information that the government believes is relevant, or something in between?[11]

Even in situations where a search warrant is executed at its offices, the company may not be the target or even the subject of the inquiry. Assurances from government counsel that, for example, the target of the investigation is a single employee who happens to have used the company's computers for illegal activity unrelated to his job, or that the government is seeking records about a single client who happens to have transacted business with the company, will likely ease the decision about whether or not to cooperate with the government's inquiry, or whether it is necessary to involve experienced criminal defense counsel in the matter. On the other hand, indications from the AUSA that the company or key personnel are suspected of wrongdoing in the conduct of its business may indicate that a more robust response is necessary.

Goal Three: Avoid Setting Up an Argument That Your Client or Its Employees Obstructed Justice.

We have all heard the adage that "it's not the crime, it's the cover-up." Nowhere is this truer than in the white-collar criminal context. Indeed, federal prosecutors have not hesitated to charge targets with making a false statement to investigators or obstructing justice even in matters where a person is never formally accused of an underlying offense. (Martha Stewart is perhaps the most famous such case, but more recent examples can be seen in the Special Counsel's probe of Russian interference in the 2016 election.) Additionally, obstructive conduct can become evidence of consciousness of guilt if someone is later prosecuted for a substantive crime.[12] If an agent's or prosecutor's view of a case is colored early on in the matter by conduct that looks obstructive, the government may be less willing to give the company or its employees the benefit of the doubt in making charging decisions.

How, then, do you avoid the appearance that the company is obstructing justice?

11 See Justice Manual 9-11.151. "A 'target' is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." Id. "A 'subject' of an investigation is a person whose conduct is within the scope of the grand jury's investigation." Id. A "witness" is anybody else not falling in the previous two categories.

12 See, e.g., United States v. Begay, 567 F.3d 540, 552 (9th Cir.2009) (finding evidence that defendant intimidated two government witnesses was admissible to show consciousness of guilt)

- If the company is served with a search warrant, make sure that employees do not attempt to "bar the door" or become argumentative with searching agents. Instead, employees faced with a warrant should be advised to: (1) request to see identification and to be given business cards for the executing agents; (2) request to see a copy of the warrant; and (3) comply with the instructions of the executing agents to access areas or materials called for in the warrant. If the company or its employees believe that agents have exceeded the scope of their authority, those concerns should be communicated through counsel to the AUSA overseeing the case. If necessary, defense counsel can move for the return of property that is improperly seized, items that are necessary for the company's ongoing operations, or for a protective order to avoid giving agents and prosecutors access to the company's privileged information.[13]
- Where a warrant is executed and/or agents seek to interview employees at their homes or offices, employees should be informed that while they have no obligation to volunteer information to federal investigators, if they choose to submit to an interview the company expects them to be completely truthful. Employees may also be advised that if they wish to have counsel present when interviewed, the company will provide a lawyer.
- Sometimes, when the nature of a government inquiry becomes known, well-meaning employees may gather to put together a timeline of past events, or a crisis response plan. If such discussions occur, it is imperative that counsel for the organization lead and direct them. Without the presence and involvement of counsel, it will be difficult to shield such discussions under the attorney-client privilege. Worse, if the government believes that the past conduct of certain employees is criminal, then meetings or discussions between those employees about the substance of the case after the investigation has become known to them may be cast as attempts to obstruct justice by "getting their story straight."
- As you would in any other litigation matter, you should instruct an organizational client to issue notice to employees to preserve documents and other evidence that may be relevant to the government's inquiry. Your initial call with the AUSA is a good opportunity to let the government know that your client will be issuing a litigation hold; it may even be prudent to obtain the government's input as to the scope of that hold—both to show a cooperative posture and to head off later claims that evidence was lost due to the company's failure to preserve it.

Conclusion

Responding to a criminal inquiry can be particularly fraught with anxiety for organizational clients, and with good reason. However, responding calmly with the goals outlined above can set up the company to resolve the matter on favorable terms and with a minimum of disruption to its operations.

13 See Fed. R. Crim. P. 41(g).

When the Feds Come Knocking

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Overview

- Basics of federal white-collar crime investigation
- What to do when faced with an investigation, especially a warrant on company premises

Basics: Roles of Agents and Prosecutors

- Most state prosecutions: investigating law enforcement officers pass their files to a prosecutor once the investigation is substantially completed.
- Most federal prosecutions: federal prosecutors work closely with agents to build the case.

Basics: Roles of Agents and Prosecutors

- Why are federal prosecutors so involved?
  - Federal law and Department of Justice policy leaves them with control over the investigative process
  - Charging standards are high
    - Legal standard for charging is probable cause, but under DOJ policy cases should not be charged unless evidence will secure a conviction

Basics: Building Blocks

- Public records
- Voluntary interviews
- Subpoenas
- Search Warrants
- Other court orders

Basics: Building Blocks

- In the federal system, prosecutors control many of the tools needed to build a white-collar case:
  - The Grand Jury (subpoena power)
  - Search warrants
  - Tax records
  - Other court orders, including wiretaps

When The Feds Knock

UNITED STATES DISTRICT COURT

for the

In the Matter of the Search of
(Briefly describe the property to be searched or identify the person by name and address)
Case No.

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the District of

The person or property to be searched, described above, is believed to conceal

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property.

YOU ARE COMMANDED to execute this warrant on or before

in the daytime 6:00 a.m. to 10 p.m. at any time in the day or night as I find reasonable cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to United States Magistrate Judge

(name)

I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized (check the appropriate box)
for days (not to exceed 30).
until, the facts justifying, the later specific date of

Date and time issued:

Judge's signature

City and state:

Printed name and title

The Feds Knock: What are your Goals?

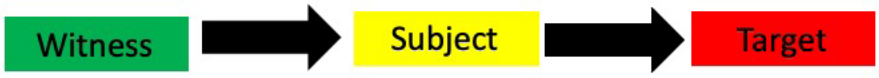
1. Make contact with government counsel
2. Understand the company's role in the investigation—is it the target?
3. Avoid making a difficult situation worse by obstruction (or the appearance of obstruction)

Goal 1: Make contact with the AUSA

- Cooperate with agents, but get in touch with the lawyer who is calling the shots
- Let the prosecutor know the company is represented by counsel

Goal 2: Determine the Role of the Company

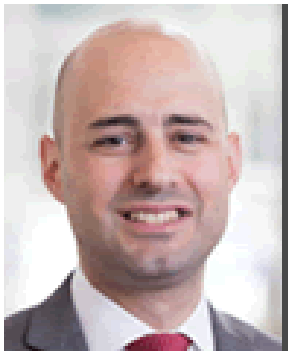
- How does the government see your client?
- There are a range of possibilities:



Goal 3: Avoid Obstruction

- Things may already be bad—don't make them worse
  - Don't interfere. Litigate return of property later.
  - Instruct employees:
    - May speak to investigators if they choose
    - If they speak, company expects them to be 100% truthful
    - Company can arrange a lawyer for them
  - Counsel should lead all crisis response discussions

Conclusion



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Josh began his legal career at WilmerHale in Washington, DC. His practice was nationwide in scope and focused on representing clients in government investigations, federal criminal litigation, and related administrative proceedings. Josh defended individuals and corporations in cases involving alleged violations of the federal securities laws, the Foreign Corrupt Practices Act, the False Claims Act and the Anti-Kickback Statute, and the Food, Drug and Cosmetic Act. While at WilmerHale, Washington DC Super Lawyers named Josh a “Rising Star” in the category of White-Collar Criminal Defense.

Featured Cases

- Prosecuted Washington methamphetamine trafficker at jury trial ending in guilty verdict.
- Obtained guilty plea of Seattle credit union employee for embezzlement of hundreds of thousands of dollars from member accounts.
- Obtained guilty verdict against violent felon at jury trial for firearms and obstruction of justice charges.
- Prosecuted drug trafficking case involving maritime smuggling of cocaine and methamphetamine worth millions of dollars from Washington to British Columbia.
- Prosecuted eleven defendants following multi-line wiretap investigation into smuggling of heroin from Guatemala.
- Prosecuted death-penalty eligible murder-for-hire conspiracy in Baltimore.
- Investigated and prosecuted violent robbery spree in Baltimore and suburbs involving 20 separate incidents.
- Defended corporate executive at contested sentencing for strict-liability misdemeanor violation of federal Food, Drug and Cosmetic Act and in administrative exclusion proceedings before Department of Health and Human Services.
- Represented global software company in successful defense of trade secret misappropriation and commercial disparagement claims in Maryland state court.
- Represented global software company in Foreign Corrupt Practices Act investigation by Department of Justice and Securities and Exchange Commission involving alleged bribery of Chinese government officials.
- Defended investment bank in securities fraud lawsuit by teachers’ pension fund.
- Represented health care technology company in grand jury inquiry and related audit committee investigation of alleged kickback scheme; no charges filed.
- Advised industrial conglomerate in cooperating with FBI investigation into scheme by employee to illegally export sensitive technology.
- Assisted investment advisory firm in internal investigation into employee misconduct.

Education

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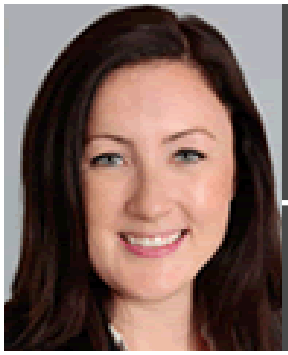

CANNABIS AND EMPLOYMENT LAW

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In the Weeds: Marijuana Legalization & Employment Laws

Rebecca Stephens

Over the last several years, attitudes towards marijuana use have rapidly changed in the United States. According to a 2018 Pew Research Survey, 62 percent of U.S. respondents said marijuana use should be legal, compared to 31 percent who supported legalization in the year 2000.[1] As of the date of this article, thirty-three states and Washington D.C. have legalized medical marijuana use, and 11 states have legalized recreational marijuana use.[2]

In this rapidly changing landscape, many employers are left wondering how marijuana legalization will impact their workplaces, including (1) whether employers can deny employment to applicants or discipline employees who test positive for marijuana, even in a state where marijuana use is legal; (2) whether employers need to modify their workplace policies to address marijuana use; or (3) whether employers have a duty to accommodate medical marijuana use, either at work or outside the workplace. This article summarizes the current, confusing framework of federal statutes, state statutes, and judicial decisions addressing employers' rights and obligations relating to marijuana use, and provides practical advice for employers in states where medical or recreational marijuana use has been legalized.

Background on Marijuana Legalization

In 1970, Congress passed the Controlled Substances Act ("CSA"), which banned or regulated certain controlled substances.[3] The CSA established five schedules of controlled substances, with Schedule I substances defined as those which have a high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision.[4] Under the CSA's classification system, cannabis remains a Schedule I drug which is illegal to possess , use, cultivate, or sell.[5]

In 1996, California became the first state to allow medical marijuana use when it passed the Compassionate Use Act.[6] Since then, 32 more states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands have passed laws allowing medical marijuana use.[7] Medical marijuana statutes vary considerably concerning requirements for medical marijuana use, including residency requirements, whether home cultivation is permitted, registration obligations, and limits on the amounts and types of marijuana products that can be used.

In 2012, Washington and Colorado became the first two

1 Hannah Hartig & Abigail Geiger, About six-in-ten Americans support marijuana legalization, Pew Research Center (October 8, 2018), available at https://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/ .

2 Lisa Nagele-Piazza, The ABCs of THC: What Employers Need to Know, SHRM.org (January 30, 2019), available at https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/what-employers-need-to-know-about-marijuana-laws--.aspx); John O'Connor, Illinois Becomes 11th State to Allow Recreational Marijuana, AP News (June 25, 2019), available at https://www.apnews.com/7b793d88f3c84417b83db0f770854960.

3 21 U.S.C. § 801, et seq.

4 21 U.S.C. § 812(b)(1).

5 See Drug Scheduling, Drug Enforcement Agency, available at https://www.dea.gov/drug-scheduling (last accessed May 21, 2019).

6 Ca. Health and Safety Code § 11362.5.

7 National Conference of State Legislatures, "State Medical Marijuana Laws," (March 25, 2019) available at http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last accessed May 21, 2019). States allowing medical marijuana use include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington, and West Virginia.

states to legalize marijuana for recreational use.[8] Since then, nine other states – including Alaska, California, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, and Vermont – and the District of Columbia have also legalized recreational marijuana use.[9]

In August 2013, amid various states' marijuana legalization efforts, the U.S. Department of Justice ("DOJ") updated its marijuana enforcement policy and announced that while marijuana remained illegal under federal law, the DOJ was "deferring its right to challenge" state marijuana legalization laws.[10] The DOJ further stated that it expected states to establish "strict regulatory schemes" in alignment with eight enforcement priorities established by the DOJ, but that the DOJ would not prioritize enforcement of the federal prohibition on marijuana beyond those eight priorities.[11] But in 2018, the DOJ reversed course and announced a further update to its marijuana enforcement policy, including "a return to the rule of law and the rescission of previous guidance documents."[12] The DOJ's 2018 memorandum specifically stated that prosecutors would continue to enforce the federal prohibition on marijuana.[13]

Employers' Ability to Refuse to Hire An Applicant Testing Positive for Cannabis

In every state, employers remain free to create and enforce drug-free workplace policies, including potential discipline or termination when a legal or illegal drug impairs an employee's job performance or creates a safety hazard. For example, when California legalized recreational marijuana use in 2018, the statute expressly provided that it was not intended to affect "[t]he rights and obligations of public and private employers to maintain a drug and alcohol free workplace" or to "require an employer to permit or accommodate" marijuana use in the workplace."[14] Other state marijuana legalization statutes contain similar provisions.[15]

No statute or court decision has required an employer to accommodate an employee's recreational marijuana use, and employers in all states remain free to terminate, discipline, or refuse to hire recreational marijuana users. In Coats v. Dish Network, LLC, the Supreme Court of Colorado analyzed whether a state statute prohibiting employers from discharging employees based on "lawful" out-of-work activities prevented employers from terminating employees for using marijuana.[16] Even though the employee's marijuana use was lawful under Colorado state law, the court found that the federal prohibition on marijuana use rendered the employee's conduct unlawful and outside the gambit of the statute at issue.[17] Thus, the court held that employers could lawfully terminate employees for marijuana use, even though such use was permitted under state law.

Whether Employers Are Required to Reasonably Accommodate Medical Marijuana Use

Notwithstanding the general rule that employers are free to not hire applicants (or to terminate employees) who test positive for cannabis, state law may require reasonable accommodation of employees who use medical marijuana outside of work hours due to a disability. For example, Arizona,[18] Connecticut,[19]

8 Washington Initiative 502: On Marijuana Reform (Wash. Nov. 6, 2012); Colorado Amendment 64: Use and Regulation of Marijuana (Colo. Nov. 6, 2012).

9 Alaska Ballot Measure 2: An Act to tax and regulate the production, sale, and use of marijuana (Alaska Nov.4, 2014); California Proposition 64: Adult Use of Marijuana Act (Cal. Nov. 8, 2016); District of Columbia Initiative 71: Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014 (D.C. Nov. 4, 2014); Maine Question 1: An Act To Legalize Marijuana (Me. Nov. 8, 2016); Massachusetts Question 4: The Regulation and Taxation of Marijuana Act (Mass. Nov. 8, 2016); Michigan Proposal 1: Michigan Regulation and Taxation of Marihuana Act (Mich. Nov. 6, 2018); Nevada Question 2: Initiative to Regulate and Tax Marijuana (Nev. Nov. 8, 2016); Oregon Measure 91: Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act (Ore. Nov. 4, 2014); and No. 86: An act related to eliminating penalties for possession of limited amounts of marijuana by adults 21 years or older, H.511 (Vt. 2017); Cannabis Regulation and Tax Act, HB 1438 (Ill. June 25, 2019).

10 Justice Department Announces Update to Marijuana Enforcement Policy, U.S. Department of Justice (Aug. 29, 2013), available at https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy .

11 Id.

12 Justice Department Issues Memo on Marijuana Enforcement U.S. Department of Justice (Jan. 4, 2018), available at https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement.

13 Id.

14 Ca. Health and Safety Code § 11362.45(f).

15 See, e.g., Alaska Ballot Measure 2: An Act to tax and regulate the production, sale, and use of marijuana (Alaska Nov.4, 2014) ("not intended to require an employer to allow marijuana use, transportation, possession, sale, growth, or transfer, or prevent an employer from prohibiting these activities"); Colorado Amendment 64: Use and Regulation of Marijuana (Colo. Nov. 6, 2012) (provisions not intended to "affect the ability of an employer to restrict the use or possession of marijuana by employees").

16 350 P. 3d 849 (2015). Though the Coats decision involved a medical marijuana user, the same analysis would presumably apply to a recreational marijuana user now that recreational marijuana use has been legalized in Colorado.

17 Id.

18 Ariz. Rev. Stat. § 36-2813 (2015) (employer may not discriminate against or refuse to hire a medical marijuana cardholder, unless failure to do so would cause the employer to lose a monetary or licensing related benefit under federal law or regulations).

19 Conn. Gen. Stat. § 21a-408p(b)(3) (2017) ("No employer may refuse to hire a person or may discharge, penalize, or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver under sections 21a-408 to 21a-408n, inclusive.").

Delaware,[20] Illinois,[21] Minnesota,[22] Nevada,[23] New York,[24] and Rhode Island[25] have statutes expressly prohibiting employers from discriminating against employees based on their status as medical marijuana patients. Recently, employers in Connecticut and Rhode Island challenged their respective state statutes, arguing that they were preempted by federal law making marijuana use illegal. Both the federal district court in Connecticut and the Rhode Island Superior Court upheld the state statutes, finding no preemption.[26]

Some states are considering adopting similar protections. For example, California's legislature is considering a bill which would require employers to reasonably accommodate medical marijuana use for the treatment of a known physical disability, mental disability, or medical condition.[27] The law would provide an exception "if hiring or failing to discharge an employee would cause the employer to lose a monetary or licensing-related benefit under federal law," and would allow employers to terminate the employment of, or take corrective action against, any employee who is impaired at work because of marijuana.[28]

Even in states lacking a statute requiring accommodation of medical marijuana cardholders, a court may determine that such an obligation exists. For example, in Barbuto v. Advantage Sales and Marketing, LLC, the Supreme Court of Massachusetts found that a medical marijuana user who was terminated for testing positive for marijuana could pursue a state-law employment discrimination claim against her employer.[29] The court rejected the employer's argument that allowing medical marijuana use was a "facially unreasonable" accommodation because it is illegal under federal law, instead holding that even where an employer's policies prohibit marijuana use, the employer would be obligated to engage in an interactive process to determine "whether there were equally effective medical alternatives … whose use would not be in violation of its policy."[30] The court further held that an employer who wishes to deny employment based solely on an applicant or employee's use of medical marijuana bears the burden of demonstrating that the medical marijuana use would impose an undue hardship.[31] The court based its analysis on Massachusetts's medical marijuana statute, which stated that medical marijuana patients shall not be denied "any right or privilege" on the basis of their marijuana use; although the statute did not expressly address employment, the court found that the phrase "right or privilege" encompassed the right to a reasonable accommodation.[32]

Adding to the confusion, courts in other states have found that employers have no obligation to reasonably accommodate medical marijuana use. For example, in Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, the Oregon Supreme Court held that because Oregon's medical marijuana statute conflicted with the federal Controlled Substances Act, an employer need not accommodate the use of medical marijuana.[33] The court found that the state and federal statutes conflicted because the Oregon statute's affirmative authorization of medical marijuana – which the federal law prohibits – "stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act."[34] Based on the Supremacy Clause, the Oregon Supreme Court found that the federal law preempted the state law, and employers had no obligation to engage in an interactive process or to otherwise accommodate medical marijuana use.[35] Courts in other states have taken a similar approach in finding that employers need not reasonably accommodate medical marijuana use.[36]

20 Del. Code. Ann. tit. 16 § 4905A(3) (2019) ("Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, an employer may not discriminate against a person in hiring, termination, or any term of condition of employment, or otherwise penalize a person" based on that person's status as a cardholder or a registered qualifying patient's positive drug test for marijuana, unless the patient used, possessed, or was impaired by marijuana at work or during work hours).

21 410 Ill. Comp. Stat. 130/40 ("No school, employer, or landlord may refuse to enroll or lease to, or otherwise penalize, a person solely for his or her status as a registered qualifying patient or a registered designated caregiver, unless failing to do so would put the school, employer, or landlord in violation of federal law or unless failing to do so would cause it to lose a monetary or licensing-related benefit under federal law or rules").

22 Minn. Stat. § 152.32 (employer cannot discriminate against a person in hiring, termination, or any term or condition of employment based on medical marijuana use unless failure to do so would violate federal law or cause employer to lose a monetary or licensing-related benefit under federal law).

23 Nev. Rev. Stat. § 453A.800 ("employer must attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of marijuana if the employee holds a valid registry identification card," provided that such reasonable accommodation would not pose a threat of harm or danger or undue hardship or prohibit the employee from fulfilling his or her responsibilities).

24 N.Y. Pub. Health Law § 3369 (being a certified medical marijuana user qualifies as having a disability under anti-discrimination laws).

25 21 R.I. Gen. Laws § 21-28.6-4(d) (2018) ("No school, employer, or landlord may refuse to enroll, employ, or lease to, or otherwise penalize, a person solely for his or her status as a cardholder.")

26 Noffsinger v. SSC Niantic Operating Co., 273 F. Supp. 3d 326 (D. Conn. 2017) (denying employer's motion to dismiss and finding that "a plaintiff who uses marijuana for medicinal purposes in compliance with Connecticut law may maintain a cause of action against an employer who refuses to employ her for that reason"); Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181(R.I. Super. May 23, 2017) (granting summary judgment in favor of plaintiff; finding that CSA did not preempt state law authorizing medical marijuana use, and employer's failure to hire the plaintiff based on her status as a medical marijuana user violated state law).

27 Medicinal cannabis: employment discrimination, California Assembly Bill 2069, California Legislative Information (2017-2018), available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2069.

28 Id.

29 477 Mass. 456 (2017).

30 Id. at 463.

31 Id.

32 Id. at 464.

33 348 Or. 159 (2010).

34 Id. at 178.

35 Id. at 190.

36 See, e.g., Garcia v. Tractor Supply Co., 154 F. Supp. 3d 1225 (D. N.M. 2016) (New Mexico's Compassionate Use Act did not require employers to accommodate medical marijuana use because it – and New Mexico's anti-discrimination law – were both preempted by the Controlled Substances Act); Swaw v. Safeway, Inc., No. C15-939 MJP, 2015 WL 7431106, at *1 (W.D. Wash. Nov. 20, 2015) ("Washington law does not require employers to accommodate the use of

Even in states where employers may be required to accommodate medical marijuana use, employers in industries subject to federal regulation can likely demonstrate that accommodating medical marijuana use would be an undue hardship. For example, transportation employers are subject to U.S. Department of Transportation ("DOT") regulations which prohibit any safety-sensitive employee subject to drug testing under DOT regulations from using marijuana.[37] Moreover, federal government contractors and recipients of federal grants are obligated to comply with the federal Drug Free Workplace Act, which requires employers to make "a good faith effort … to maintain a drug-free workplace" and prohibits employees from using controlled substances in the workplace."[38]

Finally, it is important to note that no legal authority has yet required an employer to accommodate medical marijuana use during work hours or while at work. Indeed, the Delaware statute requiring medical marijuana accommodation expressly excludes marijuana use during work hours.[39] Thus, employers in all states may continue to adopt and enforce policies prohibiting the use of marijuana while at work or during work hours.

Guidance for Employers in States Where Marijuana Use is Legal

A number of states have already passed legislation requiring employers to accommodate medical marijuana use. Although judicial precedent in several other states suggests that employers in those states need not accommodate medical marijuana use, the change in attitudes towards marijuana and growing trend towards marijuana legalization may lead to those authorities becoming overruled, whether by statute or by further judicial decision. Thus, the following guidelines are intended for employers in any state where medical or recreational marijuana use is legal:

1. Continue to enforce workplace policies preventing the use of alcohol, marijuana, and illegal drugs at work or during work hours. Ensure that these policies expressly identify marijuana as a prohibited substance, instead of referring to "illegal drugs" since that phrase may no longer encompass marijuana.
2. Determine whether any federal statute or regulation requires your organization to maintain a drug-free workplace or decline to employ any applicant testing positive for marijuana.
3. Notify prospective employees that any pre-employment drug screen may test for cannabis, and that testing positive for cannabis may disqualify the applicant from employment.
4. If a prospective or current employee notifies you of medical marijuana use, consult with counsel to determine whether a reasonable accommodation is required or feasible.

medical marijuana where they have a drug-free workplace, even if medical marijuana is being used off site to treat an employee's disabilities, and the use of marijuana for medical purposes remains unlawful under federal law."); Ross v. Ragingwire Telecommunications, Inc., 42 Cal. 4th 920, 930 (2008) ("[G]iven the Compassionate Use Act's modest objectives and the manner in which it was presented to the voters for adoption, we have no reason to conclude the voters intended to speak so broadly, … as to require employers to accommodate marijuana use."); Lambdin v. Marriott Resorts Hospitality Corp., No. 16-00004 HG-KJM, 2017 WL 4079718 (D. Haw. Sept. 14, 2017) (granting summary judgment for employer that terminated an employee who tested positive for cannabis; employer need not accommodate medical cannabis use because all cannabis use remains illegal under federal law).

37 49 CFR §§ 40.1(b), 40.11(a).

38 41 U.S.C. §§ 8102(a), 8103(a).

39 See, e.g., Del. Code. Ann. tit. 16 § 4905A(3) (2019) (prohibiting discrimination based on a person's status as a medical marijuana cardholder or a registered qualifying patient's positive drug test for marijuana, unless the patient used, possessed, or was impaired by marijuana at work or during work hours).

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In the Weeds:
Marijuana Legalization and Employment Law

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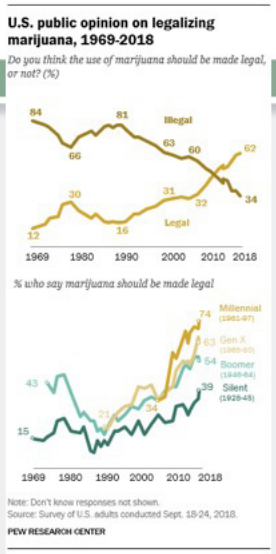
Rapidly Changing Attitudes

- 2000 Pew Research Study:
  - 31% believe marijuana use should be legal
- 2018 Pew Research Study:
  - 62% believe marijuana use should be legal



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Rapidly Changing Laws

- 33 states and Washington D.C. have legalized medical marijuana
- 11 states have legalized recreational marijuana

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Lingering Questions for Employers

- Can employers deny employment to applicants or discipline applicants who test positive for marijuana?
- Should employers modify their workplace policies to specifically address marijuana use?
- Do employers have a duty to accommodate medical marijuana use, either at work or outside the workplace?

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Marijuana Legalization Background

- 1970: Controlled Substances Act; marijuana is a Schedule I substance
- 1996: California is the first state to allow medical marijuana use
- 2012: Washington and Colorado became the first two states to legalize recreational marijuana use

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DOJ Reversals on Marijuana Enforcement

- August 2013: DOJ announces that it will "defer[] its right to challenge" state marijuana legalization laws and deprioritize enforcement of federal prohibition on marijuana
- January 2018: DOJ announces a "return to the rule of law and the rescission of previous guidance documents"

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What's an Employer to Do?

- Employers remain free to create an enforce drug-free workplace policies, including discipline when employees are impaired at work
- No statute or court decision has required an employer to allow recreational marijuana use
- *Coats v. Dish Network, LLC*, 350 P. 3d 849 (2015): state statute prohibiting termination based on "lawful" out-of-work activities did not extend to marijuana use

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Marijuana and Reasonable Accommodation

- Several states have statutes prohibiting employers from discriminating against employees based on status as medical marijuana patients
  - Arizona, Connecticut, Delaware, Illinois, Minnesota, Nevada, New York, and Rhode Island
- Employers in Connecticut and Rhode Island challenged those statutes on preemption grounds; the courts found no preemption
- California considering a similar measure

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Marijuana and Reasonable Accommodation

- Even in states lacking a statute requiring accommodation of medical marijuana use, a court may determine that such an obligation exists
- *Barbuto v. Advantage Sales and Marketing, LLC*, 477 Mass. 456 (2017): allowed medical marijuana user who was terminated for testing positive for marijuana to pursue a state-law employment discrimination claim

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Marijuana and Reasonable Accommodation

- Courts in other states have found no obligation to reasonably accommodate medical marijuana use:
  - Oregon (*Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or. 159 (2010)
  - New Mexico (*Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D. N.M. 2016)
  - Washington (*Swaw v. Safeway, Inc.*, No. C15-939 MJP, 2015 WL 7431106, at *1 (W.D. Wash. Nov. 20, 2015)
  - California (*Ross v. Ragingwire Telecommunications, Inc.*, 42 Cal. 4th 920, 930 (2008)
  - Hawaii (*Lambdin v. Marriott Resorts Hospitality Corp.*, No. 16-00004 HG-KJM, 2017 WL 4079718 (D. Haw. Sept. 14, 2017)

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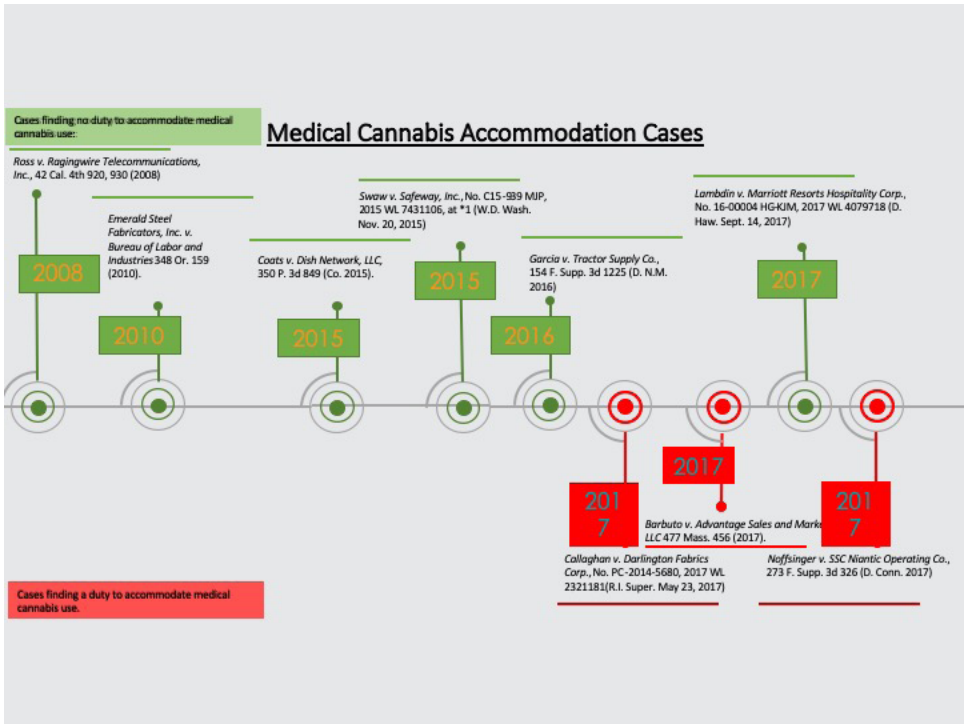

Marijuana and Reasonable Accommodation

- Importantly, no legal authority has yet required an employer to accommodate medical marijuana use during work hours or while at work

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Industry-Specific Regulations

- Transportation employers: U.S. Dept. of Transportation regulations prohibit safety-sensitive employees from using marijuana
- Federal contractors and recipients of federal grants: required to make a "good faith effort … to maintain a drug-free workplace"

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Takeaways for Employers

- Continue to enforce workplace policies preventing the use of alcohol, marijuana, and illegal drugs
- Ensure that policies expressly identify marijuana as a prohibited substance, instead of "illegal drugs"
- Determine whether any federal statute or regulation requires your organization to maintain a drug-free workplace or decline to employ applicants testing positive for marijuana

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Takeaways for Employers

- Notify prospective employees that any pre-employment drug screen may test for cannabis, and testing positive may disqualify the applicant from employment
- If a current or prospective employee notifies you of medical marijuana use, consult with counsel to determine whether reasonable accommodation is required

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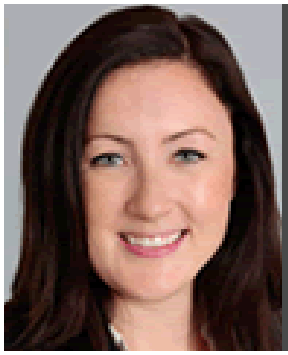

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Rebecca Stephens counsels clients on developing and implementing sound employment policies, conducting workplace investigations, and administering separations from employment. She also represents employers in a wide range of matters in both federal and state courts, including wage and hour disputes and wrongful termination, retaliation, and discrimination cases.

Rebecca's clients range from small businesses to global corporations. She advises employers on day-to-day employment matters, including challenging issues relating to accommodations and leaves of absence. She also advises clients on practices and policies related to termination, including negotiating severance and separation agreements. Rebecca takes a practical, solutions-focused approach and understands the importance of tailoring her advice to each employer's needs, goals, and culture.

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

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

Services

- Employment
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EFFECTIVE CORPORATE COMPLIANCE PROGRAMS CAN DETER CRIMINAL LIABILITY

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Use of Corporate Compliance Programs to Defend Against Criminal Liability – Lessons from Harris Corporation's Success
John Mitchell

In 2016, the U.S. Securities and Exchange Commission announced that it would not take any action against Harris Corporation even though one of its former executives allegedly helped bribe Chinese government officials with up to $1 million in gifts. This declination was the first time that a multinational corporation entirely avoided prosecution while its former executive was sanctioned in a pure Foreign Corrupt Practices Act investigation.[1] How did Harris Corporation avoid prosecution? It had an effective corporate compliance program.

Harris Corporation Inherits a Bribery Scheme

In 2011, Harris Corporation, a global communications and information technology company, purchase CareFx Corporation.[2] Included in the acquisition was a relatively small CareFx subsidiary called Hunan CareFx Information Technology, LLC. Hunan CareFx provided electronic records management software to Chinese government healthcare providers.[3] The subsidiary comprised less than .1% of Harris Corporation's gross revenue.[4] Harris conducted substantial due diligence before it completed the acquisition, and its diligence did not uncover any unlawful behavior.[5]

But Hunan CareFx's chairman and CEO, Jun Ping Zhang (a U.S. resident and citizen) allegedly authorized employees to bribe Chinese government officials at Chinese state-owned hospitals and regional Departments of Health to give business to Hunan CareFx.[6] Hunan CareFx employees allegedly submitted these "gifts" for reimbursement as "entertainment," "office expenses," or "transportation."[7] The SEC claimed that, after Harris acquired Hunan CareFx, Ping allowed between $200,000 and $1 million worth of bribes, and that the bribed officials awarded Hunan CareFx with contracts worth at least $9.6 million.[8] After Harris implemented its compliance program, it discovered the scheme, investigated, and reported it to the DOJ and SEC in August 2012. In September 2016, the SEC settled with Ping, who agreed to personally pay a civil penalty of $46,000.

Harris Corporation's Compliance Program Prevents Indictment

Even though the SEC sanctioned Harris Corporation's executive, it chose not to indict Harris Corporation itself because of "[t]he company's efforts at self-policing that led to the discovery of Ping's misconduct shortly

1 Robert Kent, Harris Corporation Obtains FCPA Declination While Former Employee Is Sanctioned, Global Compliance News (Sept. 28, 2016), https://globalcompliancenews.com/harris-corporation-obtains-fcpa-declination-former-employee-sanctioned-20160927/

2 Lillian S. Hardy, U.S. Bribery and Corruption Outlook, International Law Office (Feb. 20, 2017), https://www.internationallawoffice.com/Newsletters/White-Collar-Crime/USA/Hogan-Lovells-US-LLP/US-bribery-and-corruption-outlook.

3 Id.

4 Richard L. Cassin, Former CEO of Harris Corp. China Unit Settles FCPA Offenses with SEC, FCPA Blog (Sept. 13, 2016), http://www.fcpablog.com/blog/2016/9/13/former-ceo-of-harris-corp-china-unit-settles-fcpa-offenses-w.html.

5 Lillian S. Hardy, U.S. Bribery and Corruption Outlook, International Law Office (Feb. 20, 2017), https://www.internationallawoffice.com/Newsletters/White-Collar-Crime/USA/Hogan-Lovells-US-LLP/US-bribery-and-corruption-outlook.

6 Lillian S. Hardy, U.S. Bribery and Corruption Outlook, International Law Office (Feb. 20, 2017), https://www.internationallawoffice.com/Newsletters/White-Collar-Crime/USA/Hogan-Lovells-US-LLP/US-bribery-and-corruption-outlook.

7 Richard L. Cassin, Former CEO of Harris Corp. China Unit Settles FCPA Offenses with SEC, FCPA Blog (Sept. 13, 2016), http://www.fcpablog.com/blog/2016/9/13/former-ceo-of-harris-corp-china-unit-settles-fcpa-offenses-w.html.

8 *Id.*

after the acquisition, prompt self-reporting, thorough remediation, and exemplary cooperation with the SEC's investigation."[9] The SEC identified specific elements of Harris's compliance program that made the program effective:

- Even though Hunan CareFx represented such a small portion of Harris's total revenue, Harris did not slack off with its due diligence. It investigated Hunan CareFx as much as possible, including interviewing the executives.[10]
- After Harris acquired Hunan CareFx, it quickly implemented its corporate compliance program, including employee training and setting up a complaint hotline.[11]
- Harris's compliance program includes robust anti-corruption policies and controls.[12]
- When Harris discovered the misconduct, it conducted a thorough internal investigation and promptly (and voluntarily) disclosed its investigation to government authorities.[13]
- After its internal investigation, Harris terminated Ping and other responsible employees, updated its internal processes to prevent such misconduct in the future, and conducted additional employee training.[14]
- Harris also cooperated with the SEC and other government authorities.[15]

Take Away

The SEC's decision not to prosecute Harris Corporation highlights the critical importance of having a meaningful corporate compliance program — not merely a policy on paper with box-checking and mindless training modules. Harris Corporation's story demonstrates how thorough diligence, prompt and effective implementation, and honest and transparent internal investigations can turn a corporate compliance program into a shield from criminal liability.

9 Lillian S. Hardy, U.S. Bribery and Corruption Outlook, International Law Office (Feb. 20, 2017), https://www.internationallawoffice.com/Newsletters/White-Collar-Crime/USA/Hogan-Lovells-US-LLP/US-bribery-and-corruption-outlook.

10 Robert Kent, Harris Corporation Obtains FCPA Declination While Former Employee Is Sanctioned, Global Compliance News (Sept. 28, 2016), https://globalcompliancenews.com/harris-corporation-obtains-fcpa-declination-former-employee-sanctioned-20160927/

11 Id.

12 Id.

13 Id.

14 Id.

15 Id.

Use of Corporate Compliance Programs to Defend Against Criminal Liability

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April 2019

THOMPSON HINE

SmartPath

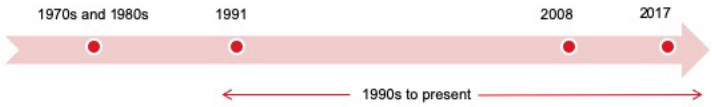
Always Innovating

History

- **1970s and 1980s –** Industry groups adopted internal policies for trying to prevent misconduct in response to a stream of corporate scandals in the U.S.
- **1991 –** U.S. Sentencing Commission amended guidelines and offered corporations reduced fines if they had an "effective compliance program"
- **1991 to present –** DOJ has issued memoranda to urge prosecutors to consider compliance programs when deciding a corporation's criminal charges

History

- **2008 –** DOJ published revised version of "Principles of Federal Prosecution of Business Organizations" to urge prosecutors to evaluate effectiveness of compliance programs, rather than just the existence of such programs
- **2017 –** DOJ published "Evaluation of Corporate Compliance Programs" to enumerate sample questions to evaluate compliance program effectiveness



Current Context

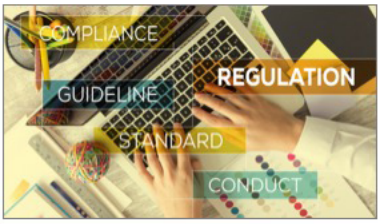
- A typical corporation loses roughly $3 million annually due to fraud, according to the Association of Certified Fraud Examiners, and close to half of these cases are never reported
- In 2013, joint report of DOJ and Dept. of Health and Human Services showed the agencies recovered over $8 billion with civil and criminal actions in 2013, and had recovered over $19.2 billion since 2009

Current Context

- In EY's 2016 Global Fraud Survey, 42% of the 3,000 executives interviewed said they could justify unethical behavior to meet financial targets
- A typical multinational corporation spends several million dollars annually on compliance programs
- A typical multinational corporation in the financial or defense industry spends tens or hundreds of millions annually on compliance

Benefits of a Compliance Program

- Deters criminal conduct by employees
- Precludes criminal prosecution of a corporation after its agent violates the law
- Impacts decisions to charge the corporation with a crime
- Mitigates penalties against a corporation after its agent violates the law, such as a lower fine
- Leads to reduced criminal sentences



U.S. Attorney Manual "Filip Factors"

- Factors that prosecutors consider when investigating a corporation and determining whether to bring charges
- Factors include "the existence and effectiveness of the corporation's pre-existing compliance program"
- Factors include the corporation's remedial efforts "to implement an effective corporate compliance program or to improve an existing one"
- Case-by-case evaluation

Federal Sentencing Guidelines – § 8C2.5 Culpability Score

- Start with 5 points and apply subsections…
- Subsection (f) Effective Compliance and Ethics Program
- If the corporation had an effective compliance program in place at the time of the offense, subtract 3 points
- But the corporation must not unreasonably delay in reporting the offense to the appropriate governmental authorities

Federal Sentencing Guidelines – § 8C2.5 Culpability Score

- Rebuttable presumption that the corporation did NOT have an effective compliance program if an individual in a high-level position of a small organization of any organization participated in, condoned, or was willfully ignorant of the offense

Federal Sentencing Guidelines – § 8C2.5 Culpability Score

- But even if someone in leadership participated in/condoned/was willfully ignorant of the offense, there's no rebuttable presumption if someone with operational responsibility for the compliance program has direct reporting obligations to the governing authority and the corporation does promptly report the offense to the governmental authorities, as long as the individual with operational responsibility for the compliance program has not participated/condoned/been willfully ignorant of the offense

Effective Compliance Program Can Lower Amount of Fines

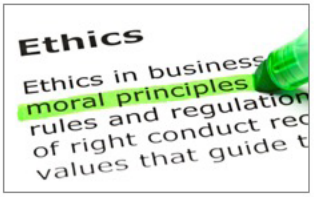
- "In determining the amount of the fine within the applicable guideline range, the court should consider…(a)(11) whether the organization failed to have, at the time of the instant offense, an effective compliance and ethics program…"

Elements of Effective Corporate Compliance Programs

- Chapter 8 of Federal Sentencing Guidelines, § 8B2.1 "Effective Compliance and Ethics Program"
  - "The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance program; and (ii) self-reporting, cooperation, or acceptance of responsibility."

Elements of Effective Corporate Compliance Programs

- To have an effective compliance program, a corporation must
  - "exercise due diligence to prevent and detect criminal conduct"
  - "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law"
  - § 8B2.1(a)



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Elements of Effective Corporate Compliance Programs

- "Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct." § 8B2.1(a)

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Elements of Effective Corporate Compliance Programs

- An effective compliance program includes, at minimum, seven elements (8B2.1(b)):

1. The corporation shall have standards and procedures to prevent and detect criminal conduct
2. The corporation's leadership (board of directors or highest-level governing body) shall be knowledgeable about the compliance program and exercise reasonable oversight over its implementation and effectiveness
3. The corporation shall use reasonable efforts to exclude from leadership individuals who the corporation should know have engaged in conduct inconsistent with the compliance program

Elements of Effective Corporate Compliance Programs

4. The corporation shall take reasonable steps to communicate its compliance program
5. The corporation shall take reasonable steps to ensure its compliance program is followed (including monitoring and audits), to evaluate the compliance program's effectiveness, and to have and publicize a system for its employees to report misconduct or seek guidance without fear of retaliation

Elements of Effective Corporate Compliance Programs

6. The corporation shall enforce its compliance program consistently throughout the corporation through both appropriate incentives to comply and appropriate disciplinary measures for misconduct. The appropriateness of the discipline is case-specific

7. The corporation shall respond appropriately to criminal conduct after it has been detected, and it shall take reasonable steps to prevent similar conduct in the future

Elements of Effective Corporate Compliance Programs

- To have an effective compliance program, a corporation must also periodically update its program. 8B2.1(c)
- The specific actions necessary to meet the seven requirements depend on the industry practice or standards provided by any applicable government regulations; the size of the corporation; and similar misconduct. (Commentary to § 8B2.1, Note 2)
  - Corporation's failure to follow industry practice or regulation standards weighs against finding the compliance program to be effective

Elements of Effective Corporate Compliance Programs

- Formality and scope of compliance program depends on size of the corporation. Larger corporations shall devote more formal operations and resources to meet the seven requirements. Smaller corporations shall show commitment to compliance but may meet the requirements with less formality and resources (such as training employees through informal staff meetings and using available personnel rather than hiring separate staff to carry out compliance program)
- If similar misconduct has occurred in the past in the corporation, doubt exists as to whether the corporation took reasonable steps to meet the seven requirements

DOJ April 2019 Guidance

- Organized around three questions
  - Is the corporation's compliance program well designed?
  - Is the program being applied earnestly and in good faith?
  - Does the corporation's compliance program work in practice?

DOJ April 2019 Guidance

- Is the corporation's compliance program well designed?
  - Risk assessment – companies should design compliance programs around the unique risks of their business and should review/update periodically
  - Policies and Procedures – companies' codes of conduct should reflect commitment to compliance with federal laws and integration into day-to-day activities; prosecutors will consider the design, comprehensiveness, accessibility, and communication of the policies.
  - Training and Communications – training should be appropriate for the size, sophistication, position, and expertise of the audience, and program should be effectively communicated to employees

DOJ April 2019 Guidance

- Is the corporation's compliance program well designed?
  - Confidential Reporting Structure and Investigation Process – Measures must be proactive and provide for timely and appropriate responses to reports of misconduct
  - Third Party Management – companies should have thorough risk-based due diligence processes to evaluate third-party partners as well as continuous monitoring and assessment
  - Mergers and Acquisitions – companies should thoroughly conduct pre-M&A due diligence and implement compliance program into acquired targets.

DOJ April 2019 Guidance

- Is the program being applied earnestly and in good faith? Is it being implemented effectively?
  - Commitment by Senior and Middle Management – high level commitment from company leadership to set the tone and culture of compliance
  - Autonomy and Resources – compliance personnel should have sufficient seniority, resources, staff, and autonomy from management, depending on the size, structure, and risks of the company
  - Incentives and Disciplinary Measures – consistently and appropriately enforced discipline as well as incentives for compliance (promotions, bonuses, etc. for improving compliance program or demonstrating ethical leadership)

DOJ April 2019 Guidance

- Does the corporation's compliance program work in practice?
  - Continuous Improvement, Periodic Testing, and Review – meaningful review and update of compliance program and proactive efforts to monitor and audit
  - Investigation of Misconduct – well-functioning and appropriately funded procedure for timely and thorough investigations, as well as documentation of company's responses and discipline
  - Analysis and Remediation of Any Underlying Misconduct – reflection on past misconduct to timely and appropriately remediate to address the root cause

Ensure the Compliance Program Is Actually Effective!

- Test the program
- Track breaches
- Gather data on rate of hotline usage
- Evidence that employees "completed" training is not good enough
- Must carefully consider implementation and how to show the program is effective

Compliance Program Success Story – Harris Corporation

- Sept. 2016: SEC and DOJ decided not to prosecute Harris Corporation even though its new subsidiary, CareFX Corp., violated FCPA
- CareFX China's CEO – bribery scheme
- Harris Corp. discovered the scheme five months after it acquired the subsidiary due to implementation of anonymous complaint hotline. Harris Corp. reported it

Compliance Program Success Story – Harris Corporation

- How its compliance program was effective
  - Did as much due diligence as possible before acquisition (even though it was small part of larger acquisition)
  - Integrated compliance program quickly after acquisition
  - Maintained robust anti-corruption policies, procedures and controls

Compliance Program Success Story – Harris Corporation

First time a multinational company completely avoided prosecution while its employee was sanctioned for FCPA violations

Compliance Program Success Story – Harris Corporation

- When Harris discovered misconduct, it internally investigated and promptly and voluntarily disclosed the investigation to the government authorities
- Remediated afterward – enhanced internal controls, conducted additional training, terminated CEO of CareFX China and other responsible employees
- Cooperated with authorities and helped SEC build case against the CEO

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John is an experienced first-chair trial lawyer who has defended companies and individuals in criminal, administrative and civil trials in state and federal courts throughout the United States. He has been recognized for his accomplishments by Chambers USA, The Best Lawyers in America® and Benchmark Litigation. John has been repeatedly named to the Ohio Super Lawyers® list and designated by Super Lawyers as one of Cleveland's top 50 lawyers and as one of Ohio's top 100 lawyers. John also is AV Preeminent® peer review rated by Martindale-Hubbell and has been selected by his peers for membership in the Litigation Counsel of America, the Federation of Defense and Corporate Counsel, and the International Association of Defense Counsel.

John has tried approximately 80 trials in his career and has extensive first-chair trial experience defending individuals facing significant criminal exposure from alleged violations of federal and state law. His criminal practice consists of traditional white-collar criminal matters, internal corporate investigations, environmental crimes, grand jury investigations and related administrative proceedings. With a comprehensive understanding of federal and state criminal laws, he also counsels public and privately held corporations and individuals facing governmental scrutiny. Many of his greatest successes are also the least publicized, especially those that resolved highly sensitive matters without criminal charges or adverse publicity.

Because of his trial experience, firm clients have retained John to defend a wide variety of civil matters, including product liability and personal injury cases, legal malpractice cases, real estate and construction litigation, workplace intentional tort matters, intellectual property disputes, breach of contract actions and other civil actions. He has been actively involved in industry-wide chemical and toxic tort litigation involving opioids, maritime asbestos, vinyl chloride, welding rods, lead paint, and other chemicals and products.

Practice Areas
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- Product Liability Litigation
- Securities & Shareholder Litigation

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- AV Preeminent® peer review rated by Martindale-Hubbell in Litigation, White Collar Crime and Criminal Law
- Selected for inclusion in The Best Lawyers in America, 2016 to 2019
- Listed as a "Litigation Star" by Benchmark Litigation, 2012-2019
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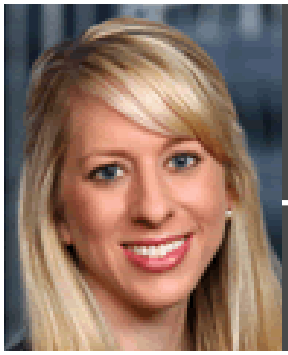
- The Ohio State University, B.A., 1992



THE EFFECT OF "#METOO" AND "TIME'S UP" IN DISCRIMINATION LITIGATION

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Strict Liability for Workplace Harassment: Is the Faragher-Ellerth Defense Dead?
W. David Harless and Lauren Fisher White

Historically, women have suffered great disparities in treatment, dating back to the right to vote and extending to workplace protections. Even when Title VII to the 1964 Civil Rights Act was enacted, protection for women was not at the forefront, but was literally "back-doored" into the Act. Southern legislators anxious to derail legislation offered to improve civil rights to blacks had included women in the Act for the express purpose of killing the bill. So, the story goes, the southerner legislators believed that northern proponents of the race-based protections would never pass legislation protecting women.[1]

The #MeToo movement has highlighted often long overlooked disparities in pay and treatment within, and outside, the workplace. It is now in the forefront of both traditional and social media. As such, it has impacted how not only our clients, but courts, perceive both the "wrong" and how the laws should correct these wrongs. Perhaps more importantly, and specific to the purposes of this presentation, #MeToo, related events culminating in #MeToo, and the loosening of evidentiary standards regarding "Me Too" evidence may result in an employer's strict vicarious liability for workplace harassment by a supervisor notwithstanding the presence and enforcement of a comprehensive workplace anti-harassment program.

The Statutory Framework Prohibiting Gender-based Treatment

Congress and the courts have long tried to discern between "boorish" workplace behavior and actionable behavior under the civil rights acts designed to end discriminatory workplace treatment. But, often, the courts have not intervened until proof of relatively high standards of outrage and longstanding conduct have been established. Further, courts have wrestled with defining the nature and quantum of proof required to support such claims.

For example, the Title VII standard for a sexually hostile environment requires proof of intimidating, offensive, abusive and/or otherwise offensive conduct going beyond rudeness or casual joking. This includes proof elements of intent, a recurring wrong, and a degree of pervasiveness such that the conduct interfered with the employee's ability to perform his or her job. This was typically coupled with a requirement of a showing of some "longstanding" duration. The rationale is that, for the "terms, conditions or privileges" of employment to be affected, and thus actionable under Title VII to the 1964 Civil Rights Act, it must not be a passing or mildly offensive intrusion. Rather, what is required is proof of conduct so pervasive that it infects the daily workplace.

According to the U.S. Supreme Court, a hostile environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[2] (This is typically the standard for

1 For several articles on the congressional machinations surrounding how women came to be included in the 1964 Civil Rights Act, see Louis Menand, How Women Got In On The Civil Rights Act, The New Yorker, July 21, 2014, https://www.newyorker.com/magazine/2014/07/21/sex-amendment; Linda Napikoski, How Women Became Part of the Civil Rights Act, ThoughtCo, March 25, 2017, https://www.thoughtco.com/women-and-the-civil-rights-act-3529477; Martha Burk, 50 Years After the Civil Rights Act, Is the Joke on Women?, HuffPost, December 6, 2017, https://www.huffingtonpost.com/martha-burk/50-years-after-the-civil_b_5497034.html.

2 Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993).

environmental type hostile environment claims. Tort-type touching and assault/sexual assault falls under different standards, where single incidents can impose liability.) Thus, to prove a hostile work environment claim under Title VII, the plaintiff must show (1) that the conduct in question was unwelcome, (2) that the harassment was based on gender, (3) that the harassment was sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment, and (4) that some basis exists for imputing liability to the employer.[3]

Further, an employer's liability under Title VII for workplace harassment depends on the status of the harasser.

> If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. [Citation omitted.] Under this framework, therefore, it matters whether a harasser is a "supervisor" or simply a co-worker. [4]

An employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.[5] A "tangible employment action" typically is associated with "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." "Supervisor" does not extend so broadly as to encompass all persons having the ability to exercise significant direction over another's daily work.[6]

The affirmative defense against imposition of vicarious liability upon an employer for a supervisor's harassing conduct is commonly known as the Faragher-Ellerth defense, named after the two cases decided by the U.S. Supreme Court in 1998 in which it recognized the defense.[7] Recognizing that "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character,"[8] the Supreme Court required that the employer undertake reasonable preventative and corrective measures, e.g., a comprehensive anti-harassment policy, periodic training of personnel on its operation, and prompt investigation and remedial action in response to a harassment complaint.

In turn, the employee is required to use the harassment policy protections by reporting harassment to the employer and thereby avoiding further harm. This requirement seemingly is based on a contributory negligence concept – "If the plaintiff unreasonably failed to avail herself of the employer's preventative or remedial apparatus, she should not recover damages that could have been avoided if she had done so…. [I]f damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided."[9]

Understandably then, under the Faragher-Ellerth defense, courts have routinely found that the passage of time since the alleged incident coupled with the employee's failure to take advantage of the employer's anti-harassment policy is unreasonable, thereby entitling an employer to exoneration from vicarious liability. Further, juries traditionally have been skeptical, at best, of charges of sexual harassment made years after the onset of the offensive conduct.

#MeToo, and all that preceded and has followed the Movement, may have changed all of this.

The Origins Of The #MeToo Movement and Associated Events

The cultural tsunami that we have come to know as #MeToo did not arise in isolation. Instead, #MeToo was fueled by earlier events that cultivated increasing social consciousness and encouraged public opposition to the reported prevalence of sexual assault and harassment in the workplace and other social settings.

- In 2006, a community organizer and civil rights activist, Tarana Burke, began using the term "Me Too" on a MySpace social networking platform to promote "empowerment though empathy" to address sexual and domestic abuse against women and girls, particularly in underprivileged communities.
- In 2008, President Barack Obama took office at a time when college and university administrations had suffered longstanding criticism for mishandling or otherwise disregarding students' complaints of

3 See, e.g., EEOC v. Central Wholesalers, Inc. 573 F.3d 167, 175 (4th Cir. 2009).

4 Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

5 Id.

6 Id. at 430–31.

7 Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

8 Ellerth, 524 U.S. at 763.

9 Faragher, 524 U.S. at 806–807; see also Ellerth, 524 U.S. at 765.

sexual violence on university campuses.

- In response, the Obama Administration issued in 2011 a "Dear Colleague Letter" in which the U.S. Department of Education's Office of Civil Rights ("OCR") outlined mandatory procedures to be followed by private and public universities in investigating and adjudicating claims of sexual violence or harassment on campus. On April 19, 2014, OCR published a series of Q&As intended to clarify the legal requirements under Title IX for campus investigations of sexual violence and associated procedures, including burden and standard of proof. The Q&As addressed specifically the fact-finding process and any hearing and decision-making protocol used to determine (1) whether or not the conduct occurred, and (2) if the conduct occurred, what actions would be undertaken to end the sexual violence, eliminate the hostile environment, and prevent its recurrence. Failure to address the problems identified by OCR would result in the institution's loss of federal funding or the referral of the matter to the U.S. Department of Justice for enforcement proceedings against the institution.[10]
- On October 7, 2016, The Washington Post published a video that captured then-presidential candidate Donald Trump speaking in lewd terms of his unwelcome contact with and behavior toward two female associates. One month later, the nation elected him President. As one commentator has observed:

  > The election of Donald Trump redefined the politics of publicly claiming sexual victimization. Now it's an unpopular president whose legitimacy is in question, one who has been caught on tape explicitly asserting that he could grab any woman by the genitals because he is a star. He did not repent. Many women were outraged by this and by the fact that charges of sexual abuse leveled against him by 22 women did not matter enough to even jar, less even derail, his candidacy or his election.[11]

- The spark that ignited the fire was Harvey Weinstein. On October 5, 2017, the New York Times published an article, entitled Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades, wherein the journalists Jodi Kantor and Megan Twohey documented Weinstein's 20-year history of sexual assaults and harassment of co-workers and actresses who worked for the Weinstein Company. The article proclaimed, "[a]n investigation by The New York Times found previously undisclosed allegations against Mr. Weinstein stretching over nearly three decades, documented through interviews with current and former employees and film industry workers, as well as legal records, emails and internal documents from the businesses he has run, Miramax and the Weinstein Company."[12]
- On October 15, 2017, Alyssa Milano, a victim of sexual abuse by Weinstein, reported her experience on a Twitter hashtag she created, #MeToo. She invited victims of sexual violence to respond if they had experienced sexual violence or harassment. The tweet went viral, and the response was overwhelming,
- Organizational/employer responses to charges of sexual violence or misconduct prompted by the #MeToo movement have resulted in the resignation or firing of many celebrities, including the following notables – U.S. Senator Al Franken, U.S. Representative John Conyers, Conductor James Levine, Political Columnist Mark Halperin, Charlie Rose, Matt Lauer, Kevin Spacey, Mario Batali, Steve Wynn, Garrison Keillor, and CBS's Leslie Moonves.[13]

Admissibility of "Me-Too" Evidence

In 2008, shortly after Tarana Burke created the "Me Too" social network, but unrelated to that initiative, the "Me Too" moniker was employed by critics of the U.S. Supreme Court's ruling in Sprint/United Management Co. v Mendelsohn.[14] In Mendelsohn, the Court addressed whether, in an employment discrimination action, the Federal Rules of Evidence require admission of testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff. The Court observed that such evidence is not per se admissible or per se inadmissible, and held that admissibility depended on "how closely the related evidence is to the plaintiff's circumstances and theory of the case."[15] Critics derided such evidence as "me too" evidence, suggesting that the "piling on" of similar circumstances in the workplace going to workplace culture was not relevant to an individual claim or was somehow less credible or worthy of belief.

Following Mendelsohn, federal courts adopted tests for "Me Too" evidence that were roughly equivalent: (1) whether the past discriminatory or retaliatory behavior

10 American College of Trial Lawyers, White Paper On Campus Sexual Assault Investigations, at 3–4, March 2017, https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/task_force_allegations_of_sexual_violence_white_paper_final.pdf.

11 Catherine A. MacKinnon, Where #MeToo Came From, and Where It's Going, The Atlantic, March 24, 2019, https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/.

12 Jodi Kantor & Megan Twohey, Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades, N.Y. TIMES, Oct. 5, 2017, https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?searchResultPosition=40.

13 Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel and Zach Wichter, #MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women, N.Y. TIMES, updated October 29, 2018, https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html.

14 552 U.S. 379 (2008).

15 Id. at 388.

is close in time to the events at issue in the case; (2) whether the same decisionmaker was involved; (3) whether the witness and plaintiff were treated in the same manner, and (4) whether the witness and plaintiff were otherwise similarly situated.[16] However, many jurisdictions have been hesitant to admit such evidence for a myriad of reasons, the most prevalent being a belief that each alleged instance of similar conduct will require the defendant to respond to each witness's claims, thereby create numerous mini-trials within the primary trial, and ultimately distract and confuse the jury.[17]

Resistance to the admissibility of "Me Too" evidence may be waning. For example, in 2016, the U.S. Fourth Circuit Court of Appeals reversed a trial court's grant of summary judgment to an employer defendant in a sex and age discrimination-based case following the district court's rejection of "Me-Too" evidence proffered by the plaintiff.[18] Despite an exhaustive analysis by the district court of why the proffered "Me Too" evidence did not meet the factors outlined above, the appeals court nonetheless reversed, explaining that the trial court "did not individually analyze each piece of other employee evidence," or "determine the relationship between the evidence and the circumstances and theory of the plaintiff's case." The appellate court also concluded that the trial court had "placed too much emphasis on its concerns with 'mini-trials,'" explaining that accommodating this "legitimate" concern in every case would tend always to result in the exclusion of such evidence.[19]

Generally, when deemed admissible in an employment discrimination case, "Me Too" evidence of the treatment by a defendant employer of employees other than the plaintiff is powerful proof of an employer's discriminatory intent. This is particularly supportive of a plaintiff's proof that the employer's proffered nondiscriminatory reason for any action against the employee is a pretext for unlawful discrimination based on the employee's protected status. Now, a recent decision by the U.S. Third Circuit Court of Appeals may broaden substantially the admissibility of "Me Too" evidence in sexual harassment cases to eviscerate effectively the Faragher-Ellerth affirmative defense.

Minarsky, #MeToo, And The Future of Faragher-Ellerth

In July of 2018, a panel of the Third Circuit rendered its decision in Minarsky v. Susquehanna County.[20] Minarsky was a part-time employee who worked alone every Friday with the alleged harasser, Yadlosky. She alleged that Yadlosky regularly attempted to kiss her on the lips, engaged in unwelcome embraces, groping, fondling, and massaging, and transmitted sexually explicit messages to Minarsky by email. However, this conduct had continued for four years unreported by Minarsky, despite her knowledge of her employer's comprehensive harassment policy that she had read and signed at the outset of her employment.

During this period, Minarsky learned that Yadlosky had engaged in similar conduct toward other female employees. Further, she learned that the employer had reprimanded Yadlosky for at least one instance of similar conduct, and that Yadlosky thereafter joked about the incident to a fellow female employee. Minarsky was unaware that Yadlosky had received a second reprimand for similar conduct. After both incidents, there was no further action or follow-up by the employer, nor were these incidents noted or reported in Yadlosky's personnel file.

Yadlosky repeatedly told Minarsky that she could not trust County administrators, or other supervisors, and warned her that she should always appear busy in their presence, or otherwise risk termination. Further, he responded harshly in response to any complaints that Minarsky made regarding her work or working conditions. Minarsky never reported Yadlosky's conduct to his supervisors or County administrators, explaining that Yadlosky's warnings, his harsh responses to her other complaints, and his past unsuccessful reprimands for his inappropriate advances toward others prevented her from reporting his misconduct.

Yadlosky was terminated ultimately for his conduct toward Minarsky after an administrator overheard Minarsky confiding to a co-employee. Minarsky resigned from employment several years later, explaining that she was uncomfortable in her role after Yadlosky was fired because her workload increased, and because her new supervisor inquired on more than one occasion about what had transpired with Yadlosky and who else she had caused to be fired.[21]

The district court awarded summary judgment to the employer against Minarsky's sexual harassment claims,

16 See, e.g., Griffin v. Finkbeiner, 689 F.3d 584, 599 (6th Cir. 2012); Hayes v. Sebelius, 806 F. Supp. 2d 141, 144–45 (D.D.C. 2011).

17 See, e.g., Hall v. Mid-State Mach. Prods., 895 F. Supp. 2d 243, 271 (D. Me. 2012) ("me too" evidence is "'too attenuated' to justify admission"); Bell v. Crowne Mgmt., LLC, 844 F. Supp. 2d 1222, 1236 (S.D. Ala. 2012); Jones v. St. Jude Med. S.C., 823 F. Supp. 2d 699, 734 (S.D. Ohio 2011) ("me too" evidence is unwelcome because it is only slightly relevant and is always highly prejudicial).

18 Calobrisi v. Booz Hamilton, Inc., 660 Fed. Appx. 207 (4th Cir. 2016).

19 Id. at 210. See also Emami v. Bolden, 241 F. Supp. 3d 673, 690 (E.D. Va. 2017).

20 895 F.3d 303 (3d Cir. 2018).

21 Id. at 306–309.

reasoning under the Faragher-Ellerth affirmative defense that Minarsky's employer had acted reasonably by maintaining an anti-harassment policy, reprimanding Yadlosky for his inappropriate conduct twice, and promptly terminating Yadlosky once his misconduct against Minarsky became known. Further, the district court found that Minarsky had acted unreasonably as a result of her "refusal or unwillingness to avail herself of the County's anti-harassment policy to bring Yadlosky's conduct to the attention of County officials."[22]

The court of appeals reversed. As to the first prong of the Faragher-Ellerth defense, the court held that a jury should have been allowed to determine whether the County's policies and actions were reasonable under the circumstances of the case. Noting that the County had knowledge that Yadlosky's behavior formed a pattern of conduct, as opposed to mere stray incidents, and that Minarsky worked alone with Yadlosky, the court questioned whether someone should have ensured that Minarsky was not being victimized. Further, the court posited that a jury could conclude Yadlosky's termination could likely be viewed as evidence of the County's exasperation with Yadlosky, rather than a reflection of the effectiveness of its harassment policies.[23]

As to the second prong of Faragher-Ellerth defense, the court noted the recent firestorm of the #MeToo movement, and how it had presented plausible explanations for why victims had plausible fear of serious adverse consequences from disclosing inappropriate sexual conduct by persons of authority exploiting their power over a victim:

> While the policy underlying Faragher-Ellerth places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee's non-reporting was understandable, perhaps even reasonable. That is, there may be certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it in this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.[24]

The court identified countervailing factors in the evidence that required the jury to decide the reasonableness of Minarsky's failure to report Yadlosky's misconduct – the particular isolated working arrangement with Yadlosky, Yadlosky's aggressive response to Minarsky when she attempted to assert herself in the workplace, Yadlosky's cultivation of mistrust in County officials, the persons to whom she would report Yadlosky's misconduct, the County's prior ineffective efforts to punish Yadlosky's behavior, and the pernicious nature of Yadlosky's conduct, and its frequency and duration.[25]

In light of Minarsky, the scope of admissible evidence under the "Me Too" analysis of Mendelsohn has expanded considerably. The reasonableness of an employer's harassment policies and its associated responses arguably may be challenged by presenting evidence of how the employer has administered such policies in response to all complaints. Further, the infrequency of harassment complaints in comparison to the size of an employer's workforce may as likely demonstrate the ineffectiveness of the employer's policies as prove that the employer has been extremely effective in policing inappropriate workplace conduct.

In 2016, the EEOC Select Task Force on the Study of Harassment in the Workplace cited in its report findings by researchers comparing multiple studies of sexual harassment and workplace-based responses to such conduct. The findings were troubling.

> Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser (33% to 75%); deny or downplay the gravity of the situation (54% to 73%); or attempt to ignore, forget or endure the behavior (44% to 70%). In many cases, therefore, targets of harassment do not complain or confront the harasser, although some certainly do.
>
> The most common response taken by women generally is to turn to family members, friends, and colleagues. One study found that 27% to 37% of women who experienced harassment discussed the situation with family members, while approximately 50% to 70% sought support from friends or trusted others.
>
> The least common response of either men or women to harassment is to take some formal action - either to report the harassment internally or file a formal legal complaint. Two studies found that approximately 30% of individuals who experienced harassment talked with a supervisor, manager, or union representative. In other words, based on those studies, approximately 70% of individuals who experienced harassment never even talked with a supervisor, manager, or union representative about the harassing conduct.[26]

22 Id. at 311.

23 Id. at 312–13.

24 Id. at 313, n.12.

25 Id. at 314–17.

26 Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, June 2016, https://www.eeoc

If these findings remotely correspond to the actual frequency of reporting of sexual harassment in the workplace, the corresponding assessment of the effectiveness of an employer's anti-harassment programs will be rigorous.

Further, under Minarsky, an employer's historical response to prior misconduct complaints, actions by a supervisor or a work culture that cultivates bona fide fear of reprisals, and the employee's subjective response to such circumstances will be relevant to assessing the reasonableness of the employee's conduct in addressing or reporting sexual misconduct.

Conclusion

The Faragher-Ellerth affirmative defense has served for more than twenty years as an effective shield to an employer's vicarious liability for a supervisor's sexual misconduct in the workplace. The Supreme Court has explained that the rationale for the defense is that a victim of unwelcome sexual misconduct will promptly complain of such conduct and seek the employer's protection to avoid further harm.

However, #MeToo, and the events occurring before and since that movement's origin in 2017, have undermined this rationale. Our society and courts are disregarding the traditional judgment that the credibility of a sexual misconduct claim is undermined by the victim's failure to report, or significant delay in reporting, such misconduct. Instead, they are advancing the presumption that a victim will not submit to the personal embarrassment, emotional strain, and ridicule associated with an inquiry into such claims unless the allegations of sexual misconduct are, in fact, true. As a result of this shift and the trend of courts to admit "Me Too" evidence from other similarly situated employees, juries increasingly will be permitted to resolve sexual harassment claims, and summary judgment will be unavailable to an employer, notwithstanding the employer's anti-harassment efforts or the employee's failure to report, or promptly report, such harassment.

Women and the Civil Rights Movement

Title VII of the Civil Rights Act of 1964

Early Developments

- 1970's: "Sexual harassment"
- 1986: *Meritor Savings Bank*
  - Title VII violation
  - "Hostile environment"
  - Employer liability

Sexual Harassment

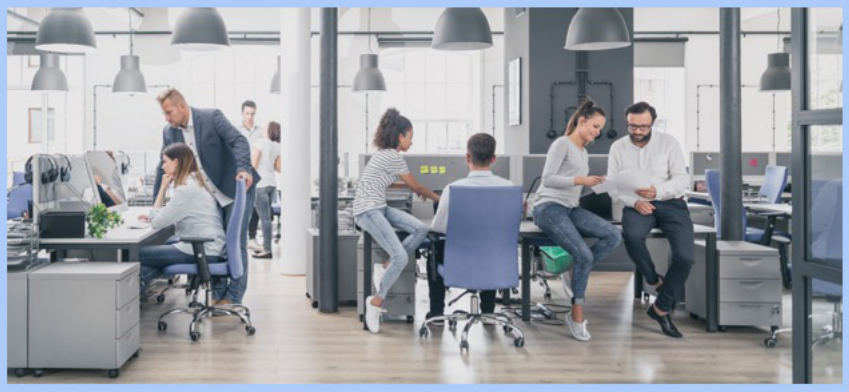
Prima Facie case:

- Unwelcome;
- Because of sex;
- Severe and/or Pervasive; and
- Employer liability.

When is the employer liable?

Vicarious Liability

Supervisor or Coworker?



The *Faragher/Ellerth* Defense for Supervisor Harassment

Was there a tangible employment action?

Yes → Strict liability

No → ***If*** Employer took reasonable care to prevent and correct harassment; ***and***

Employee unreasonably failed to take advantage; ***then***

Employer may escape liability

Faragher: "Reasonable Care"

Employer Measures:

- Published policy;
- Training/education;
- Clear reporting structure;
- Mandatory reporting;
- Investigation;
- Swift action; and
- Anti-retaliation.

How Do Victims Respond?

70% of sexual harassment victims *do not report* harassment.

Sexual Harassment in Politics and Culture

2017-2018: The #MeToo Movement

"Yes, I did offer them acting jobs in exchange for sex, but so did and still does everyone. But I never, ever forced myself on a single woman."
– Harvey Weinstein (since retracted)

Is "Me Too" Evidence Admissible?

Sprint/United Management Co. v. Mendleson, 552 U.S. 379 (2008)

Key questions:

- Is the evidence relevant; and
- What is the *purpose* of the evidence?

Case Law Developments

Test for admissibility of "Me Too" evidence:

- Close in time;
- Same bad actor or decisionmaker;
- Same treatment; and
- Similarly situated.

If #MeToo Evidence is in, is the *Faragher* Defense Out?

Minarsky v. Susquehanna County
895 F.3d 303 (3d Cir. 2018)

What is an Employer to Do?

1. Encourage reporting *and* listen to whispers;
2. Conduct trainings, *then* conduct thorough and meaningful investigations; and
3. Take "prompt and effective remedial action."

#metoo Defamation Lawsuits

Jay Asher / Larry D. Moore CC BY-SA 3.0

Confidentiality of Sexual Harassment Settlements

2018 Tax Cuts and Jobs Act

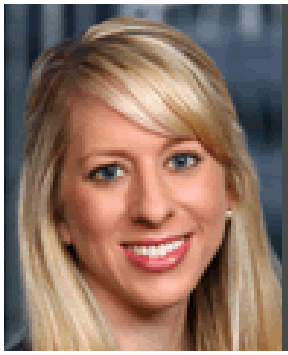
No longer business expenses:

- Settlement amount; and
- Attorneys' fees.

Executive Summary

- Sexual harassment un(der)reported;
- Employers cannot rely on policy;
- #metoo defamation concern; and
- Confidentiality is expensive.

Thank you!



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Lauren Fisher White is an associate in the firm's Labor and Employment and Litigation practice groups. She assists clients with employment and personnel matters including implementation and adherence to state and federal laws governing the workplace, and the investigation and response to harassment, discrimination, and retaliation complaints. She counsels clients on the enforceability of restrictive covenants, disciplinary decisions, and employee handbooks, and prepares employment agreements and independent contractor agreements. As part of the Litigation practice group, Mrs. Fisher White assists clients with contract and business tort disputes as well as general litigation issues.

Practice Areas

- Employment Issues and Executive Agreements
- Non-Competition and Trade Secrets
- Trials/Appeals/Alternative Dispute Resolution

Representative Matters

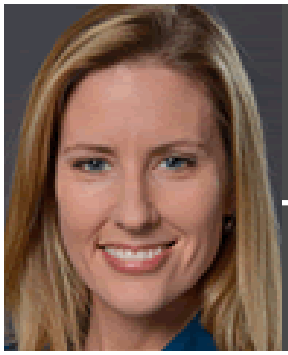
- Served as lead counsel in federal court litigation arising under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the Employee Retirement Income Security Act (ERISA).
- Represented employers before the Equal Employment Opportunity Commission, the Virginia Employment Commission, the Department of Health and Human Services Office of Civil Rights, the Department of Labor, the Office of Federal Contract Compliance Programs, and the National Labor Relations Board.
- Mediated employment law disputes before the Equal Employment Opportunity Commission, private mediators and federal magistrate judges.
- Counseled clients on the enforceability of restrictive covenants, such as non-competition, non-solicitation, confidentiality, and trade secret clauses, and represented clients in negotiation and litigation involving such covenants.
- Prepared employment agreements, independent contractor agreements, severance agreements, settlement agreements, and employment handbooks.
- Assisted clients with creation and implementation of social media and Bring Your Own Device (BYOD) policies.
- Regularly advises institutions of higher education regarding faculty, student, administrative and compliance matters, including Title IX compliance and university and faculty policies and procedures.
- Advised employers concerning the investigation of and response to data breaches.

Select Presentations

- Presenter, "Employment Law in Health Care Transactions," Virginia Bar Association's 14th Annual Health Care Practitioners' Roundtable, October 2018
- Panelist, "EEOC Investigations," Virginia Bar Association's 48th Annual Conference on Labor and Employment Law, October 2018

Education

- Washington & Lee University, J.D., 2010 - Cum Laude; Managing Editor, Journal of Civil Rights and Social Justice; Roger D. Groot Scholarship Recipient
- Vanderbilt University, B.A., English and Psychology, 2006 - Magna Cum Laude



THE DIFFERENCES BETWEEN SEX, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION

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Equal Access to Goods and Services – The Differences Between Sex, Sexual Orientation, and Gender Identity Discrimination
K. Nichole Nesbitt

Anti-discrimination laws prohibit businesses from discriminating against employees and denying access to their goods and services on the basis of sex. Under certain current federal anti-discrimination laws, the term "sex" includes gender identity, although a new proposed rule could change that. Many state anti-discrimination laws also include sexual orientation as a separate protected status. The distinction between these concepts is significant, and protecting one's business against discrimination claims requires more than just a superficial understanding of the rights and features of these groups. This paper discusses the differences of each group and the rights granted under the anti-discrimination laws.

Overview of laws forbidding discrimination on the bases of sex

A host of federal and state laws prohibit discrimination on the basis of "sex" in various contexts – public accommodations, employment, education, and health care among them. But controversy exists over whether the term "sex" is or should be broad enough to include sex-related traits like gender identity or sexual orientation. Within the area of public accommodations, all but five states[1] have laws prohibiting purveyors of any public services (hotels, restaurants, stores, and the like) from discriminating on the basis of sex. As of today, 21 of them explicitly forbid discrimination on the basis of gender identity[2] and 24 of them prohibit discrimination on the basis of sexual orientation.[3]

In the employment context, Title VII forbids an employer from discriminating against any employee "with respect to his or her compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e. The U.S. Equal Employment Opportunity Commission interprets and enforces Title VII's prohibition of sex discrimination as forbidding discrimination based on gender identity or sexual orientation. See https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm.

In the education context, Title IX prohibits discrimination on the basis of sex throughout all areas of education, including recruitment, admissions, housing, athletics, and financial assistance, among other things. 20 U.S.C. § 1681.

Section 1557 of the Affordable Care Act incorporates the existing federal civil rights laws of Titles VI, VII, and IX into the provision of health care by federally funded health programs. Thus, to the extent one of those longstanding federal anti-discrimination laws would forbid sex-based discrimination in employment or education, the same prohibition applies to health care. 42 U.S.C. § 18116. In 2016, regulations implementing Section 1557 made clear that the term "on the basis of sex" included discrimination based on gender identity (although not

1 Alabama, Georgia, Mississippi, North Carolina, and Texas have public accommodation laws prohibiting discrimination against disabled individuals, but these laws do not extend to race, ethnicity, religion, or sex.

2 California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia all prohibit discrimination on the basis of gender identity in the public accommodations context. See http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx

3 All of the above, plus Michigan, New Hampshire, and Wisconsin, have public accommodations laws prohibiting discrimination on the basis of sexual orientation. See id.

sexual orientation). But the Northern District of Texas found that gender identity should be excluded from the definition of "sex" in this context and issued an injunction against the Department of Health and Human Services ("DHHS") from enforcing Section 1557 as to the health care provider plaintiffs in that case. Baker v. Aetna Life Ins. Co. 228 F. Supp. 3d 764, 768-69 (N.D. Tex. 2017).

In recent months, DHHS promulgated a new rule that would revise the existing Section 1557 regulation so that the term "sex" does not include the concept of "gender identity." The validity of this new rule has not been established as of the writing of this article. But it does pose a practical question that many employers and providers of services must consider: If an employee or customer or patient is protected against discrimination on the basis of sex, gender identity, and/or sexual orientation, what must that employer or company do to ensure discrimination does not occur?

The distinction between sex, gender identity and sexual orientation

In order to answer that question, the employer or company or provider must understand what gender identity and sexual orientation are.

The Human Rights Campaign, "the largest national lesbian, gay, bisexual, transgender and queer civil rights organization," has developed materials designed to educate people on these concepts, which to the uninitiated may seem unclear. https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions.

"Sex" and "gender identity" are often thought of as the same characteristic, but they can be different. The conception of gender identity is that a person's assigned sex at birth – male or female – sometimes does not comport with the person's "innermost concept of self as male, female, a blend of both or neither." Id. Those whose gender identity is the same as the sex they were assigned at birth are referred to as "cisgender." Those whose gender identity is different from the sex they were assigned at birth are usually referred to as "transgender." Those who identify with neither, both, or a combination of male and female genders are "genderqueer" or "non-binary." Id.

These concepts have practical implications, inasmuch as our interactions with a person often follow customs or conventions that are based on our own perception of the person's gender rather than that person's gender identity. The use of titles and pronouns is one example. If you see a person you perceive to be female, your custom likely is to address that person with a female title (Mrs./Ms./Miss) and a female pronoun (she/her/hers). If that person does not identify as female, though, the person may find such pronouns unfitting. (More on the legal implications of this below.) Another example is the controversy around the use of public bathrooms. A person who is born male but identifies as female may feel more comfortable using a women's restroom, while cisgender women using those restrooms may feel uncomfortable with this.

Regardless of your personal or moral views on gender identity, it is useful to understand that gender identity is connected with the concept of gender and not a person's emotional, romantic, or sexual attraction to other people. The latter concept is sexual orientation.

Sexual orientation exists apart from a person's gender identity. A cisgender person can be gay. A transgender person can be straight.[4] But the concepts are different, and so are their legal consequences.

Avoiding discrimination - even the inadvertent kind

The anti-discrimination laws in general seek to ensure that people in protected groups have equal access to services or employment opportunities as those in majority groups. In conventional sex discrimination scenarios, an employer or company or healthcare provider cannot refuse employment, accommodations, or services solely on the basis of a person's sex. Put another way, if the employer, company, or health care provider would offer the employment, accommodation, or service to one sex, it must offer it to the other.

In some ways, gender identity discrimination is not that different from conventional notions of sex discrimination. Harassment, hostile environments, compensation and cost discrepancies, and the imposition of extra burdens or obligations, for example, are prohibited in either case, and the steps taken to prevent or address these wrongful practices will look similar whether the issue is sex or gender identity - or sexual orientation, for that matter.

But in other ways, gender identity introduces new variations of what constitutes equality. An employer or company may need to take extra steps to ensure that a person with a non-conforming gender identity has equal access to employment opportunities or services. For instance, the continual use of the wrong pronoun for a transgender or non-binary person can rise to the level of harassment. 4 DCMR § 808 (D.C. Municipal Regulations). Staff may need to be trained to ask questions about

4 It is true that there are associations between gender identity and sexual orientation – a survey of transgender people conducted by the National LGBTQ Task Force found that about three quarters of transgender respondents were also either homosexual, bisexual, or queer. https://www.thetaskforce.org/wonky-wednesday-trans-people-sexual-orientation/.

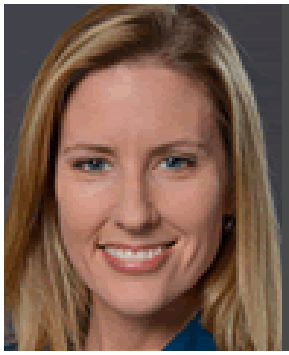
customers' or patients' preferred pronouns. Indeed, the failure to ensure that transgender employees or patrons are addressed with the proper pronoun could lead to an allegation that they transgender person did not have equal access to the employment opportunity or service.

Similarly, requiring a transgender or non-binary person to use a restroom or dressing room matching their assigned sex at birth can be considered discriminatory, which leaves a company in the position of potentially offending cisgender employees or patrons versus creating gender neutral bathrooms or dressing rooms. G.G. ex erl. Grimm v. Gloucester County School Bd., 822 F.3d 709 (4th Cir. 2016); Evancho v. Pine-Richland School District, 237 F. Supp. 3d 267 (W.D. Pa. 2017); Carcao v. McCrory, 203 F. Supp. 3d 615 (M.D.N.C. 2016).

Knowing about these concepts is important for the prevention of inadvertent discrimination.

Conclusion

Our anti-discrimination laws are in flux with regard to protections afforded to gender identity and sexual orientation. But these two categories are not treated the same in the law, and all employers, companies, and health care providers charged with the responsibility of avoiding discrimination need to appreciate the distinctions and take steps to ensure that discrimination is avoided.



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Ms. Nesbitt is a partner with the firm. Her current practice concentrates on medical malpractice defense and complex commercial litigation, as well as cases that combine the two fields. She represents several health systems in Maryland and the District of Columbia, handling complicated malpractice cases as well as credentialing, employment, and compliance-related matters. Ms. Nesbitt also handles employment matters outside of the healthcare context for employers in this region and beyond. Ms. Nesbitt's experience as a litigator provides her with insight to counsel her employment clients on drafting guidelines, policies, and agreements, in addition to defending matters that have already proceeded to litigation.

For the entirety of her 18 years at the bar, Ms. Nesbitt has worked for Goodell DeVries and has moved through the ranks from summer associate to partner. Likewise, she has enjoyed positions of leadership in the Maryland Defense Counsel, the Defense Research Institute, and in non-legal organizations such as JDRF.

Practice Areas

- Commercial and Business Tort Litigation
- Employment Litigation
- Medical Malpractice
- Medical Institutions Law
- Professional Liability
- Hospitality Law

Representative Matters

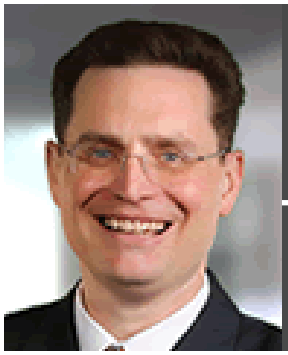
- Wilds v. MedStar Washington Hospital Center (2018), Superior Court for the District of Columbia. Obtained defense verdict for hospital and its special police officers in connection with an excessive force claim brought by a visitor. The plaintiff claimed she was wrongfully taken to the ground and handcuffed following an altercation with two special police officers, resulting in injury to her shoulders. The jury returned a verdict in favor of the hospital and the officers after a four-day trial.
- Wood v. MedStar Harbor Hospital (2017), Circuit Court for Baltimore City. Obtained defense verdict for physician accused of injuring another physician in the course of performing surgery on a patient. The plaintiff, an orthopedic surgeon, accused the defendant, also an orthopedic surgeon, of negligently striking him in the elbow with a drill while both surgeons were performing a knee replacement. The plaintiff claimed the injury was career-ending. After an eight-day trial, the jury returned with a verdict in favor of Ms. Nesbitt's client.

Honors and Awards

- Best Lawyers in America- Commerical Litigation (2016, 2018)
- Chambers- Healthcare, Maryland (2017)
- Leading Women Award from The Daily Record (2011)
- Super Lawyers Rising Stars (2009-2014)

Education

- University of Maryland - (B.A., cum laude, 1996)
- University of Maryland, School of Law - (J.D., 1999); Order of the Coif



THINK INSIDE THE BOX - MAXIMIZING MOCK TRIALS AND FOCUS GROUPS

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Think Inside The Box: Making the Most of Mock Trials & Focus Groups
John Jerry Glas and Raymond C. Lewis

Jurors are changing, and jury trials are rare. More and more, trial lawyers and their clients are turning to mock trials and jury focus groups for answers. But all mock trials and all focus groups are not created equal. The return on your investment will always depend on the choices you make months before your mock trial or focus group starts.

Every mock trial and every focus group involves a finite amount of presentation time and a finite amount of jury deliberation or interaction. Do not waste a second of that valuable time. Meet with your jury consultant and discuss your goals and options before you schedule anything. Know your options for structuring jury research. Consider the best way to layer the evidence. Limit the legal issues. Narrowly-tailor your factual questions. Eliminate unnecessary evidence and potential distractions. And minimize the risk of Lions dominating the Lambs during discussions and jury deliberations. Make sure that you get the most bang for your buck.

Here are ten (10) suggestions for making the most of your opportunity to learn: (a) what jurors think before they hear any evidence about the parties and the issues; (b) how jurors react to the evidence while it is being presented; (c) what jurors think after all the evidence has been presented; (d) what jurors will say about the evidence (and everything else) during jury deliberations; and (e) what arguments ultimately influence other jurors.

Consider Doing a Focus Group Prior to a Mock Trial.

Remember that you do not always have to choose between doing a focus group and doing a mock trial. Consider the advantages of doing a focus group before doing a mock trial. Starting with a focus group allows the jury consultant who is running the focus group to:

- Ask more detailed questions regarding each juror's prior bias and prejudice toward a client, witness, product, or specific issue;
- Solicit opinions on specific issues, evidence, and arguments--instead of hoping jurors will discuss those issues, evidence, and arguments during mock trail deliberations;
- Solicit opinions on specific demonstrative exhibits (i.e., "is this helpful?"; "what does this exhibit tell you?"; "what questions do you have about this chart?");
- Solicit opinions from all of the jurors, instead of allowing one juror to dominate the conversation or intimidate/influence other jurors (because Lions eat Lambs);
- Control the direction of jury deliberation (i.e., "let's talk more about liability"; "what do you think about the causation issue?"; "is anyone concerned about…");
- Test-drive and compare different themes and metaphors ("does that make sense?"; "do you like that metaphor better?"), instead of picking one theme for an entire mock trial and finding out after the mock trial only whether that metaphor worked; and
- Add a fact or introduce an exhibit in response to something that a juror says.

With this information, the attorneys can decide what

evidence to emphasize, what questions to answer, what demonstrative exhibits to use, and what bias to address during the subsequent mock trial. By starting with a focus group, you can learn more about streamlining and presenting your case than what you might learn from watching several mock trial deliberations. If you only have time to do two mock trials, you might be better served by doing one focus group and one mock trial.

Ideally, you should hold the focus group weeks before the mock trial to give the attorneys time to change their presentations, get answers to the questions asked by jurors, and to obtain any documents requested by the jurors. In reality, to reduce the cost of out-of-town jury research, we have often scheduled a focus group on Day 1 and a mock trial on Day 2 (after a very long night of changing PP slides). We have even done a focus group in the morning and a mock trial in the afternoon (after a very intense lunch break of changing PP slides and modifying arguments).

Consider Intentionally Skewing the Results.

We once paid for a mock trial in a case involving a nationally-recognized, truly-famous plaintiff attorney. At the end of the mock trial, approximately twenty-five (25) of the twenty-six (26) mock jurors zeroed the plaintiff. And, when the mock jurors were asked whether the "famous" plaintiff attorney's involvement would have "changed" their opinion, the jurors insisted that it would not. Reassured the case was meritless, our firm took the case to trial. After trial, the first alternate juror, who disliked the famous plaintiff attorney, told us he would have zeroed the plaintiff. The second alternate juror, who loved the famous plaintiff attorney, told us that plaintiff's counsel "didn't ask for enough money." A few hours later, the jury awarded more than $50 million dollars. After the verdict, some jurors got the plaintiff attorney's autograph, and some jurors posed for pictures with the plaintiff attorney. Lesson learned.

Since then, when we identify a (game-changing) confounding variable, we avoid hiding that confounding variable from the jury prior to their deliberation. After all, what is the point of leveling the playing field for a mock trial if the playing field will not be level during the real trial?

Instead, we consider ways of intentionally skewing the results to test the strength of our case. If we are facing a trial against a particularly charismatic plaintiff attorney or a particularly sympathetic plaintiff (or a particularly unsavory client), we consider telling the jury they were hired by plaintiff's counsel to see if the jury will still return a defense verdict. That is a much better test of our evidence and argument. When the jury is intentionally skewed toward the plaintiff's side (or against our side), will the mock jurors reach a contrary verdict? Will they swim upstream?

Before one mock trial, we did not have videotaped depositions of either parent, but we knew their testimony in their child's wrongful death case was going to be very powerful. We were able to find online an (incredibly moving) video interview of the parents talking about the loss of their child. While the video would never be admissible at the real trial, we chose to start the mock trial by playing that video because we anticipated the plaintiffs calling the parents to the stand at the start of the trial, and similarly skewing the jury in their favor. The video included a beautiful montage of their child set to haunting music, and we chose to play that video with sound because we wanted to bias and prejudice the jurors against us during the plaintiff's case. We wanted to see whether we could take a 100%/0% (Plaintiff/Defense) polling result at the end of the plaintiff's case and turn that into at least a 40%/60% (Plaintiff/Defense) polling result at the end of the defense case.

Use Mock Trials to Determine Effect of Stipulating to a Legal Element.

Jurors today know that the vast majority of cases settle before trial. Consequently, jurors often walk into the courtroom wondering why your case did not settle and asking themselves one question: who is being unreasonable? If you don't immediately answer that question for the jury, they will answer the question for themselves by the end of opening statement, and their opinion will influence how they listen to the evidence and weigh that evidence.

By stipulating to as much as humanly possible, you can answer that question for the jury. Picture the judge instructing the jury that "defendant has stipulated that they were 100% solely responsible for this accident, and you are only being asked to determine whether the accident caused any injuries." Right or wrong, jurors who hear that the defendant stipulated to responsibility will wonder what injury the plaintiffs is claiming that "probably wasn't caused by the accident." In one case, we even stipulated that our client was 100% solely responsible for causing the accident and that the accident caused all of plaintiff's orthopedic injuries, but reserved our right to challenge whether the accident also caused plaintiff's alleged traumatic brain injury. In so doing, we gained credibility with the jury, took the poison out of the trial, and focused the jury on only those factual issues we needed them to determine.

Mock trials and focus groups are the perfect opportunity to determine the likely effect of stipulating to one or more legal elements. If your client cannot decide whether to stipulate to being "100% solely responsible for an accident" and challenge only medical causation, consider holding two mock trials and stipulating to liability during the second. See for yourself whether stipulating to liability: (a) increased the amount of time the jury spent discussing medical causation; (b) changed the tone of deliberations; (c) improved the quality of the discussion regarding medical causation; and/or (d) resulted in a different finding regarding medical causation.

Exclude Any Sexy Evidence that MAY be Excluded from Trial.

The goal is not to "win" the mock trial. The goal is to learn from the mock trial so that you can "win" the actual trial. It is a rookie mistake, but some lawyers will give in to the temptation to tell the mock jury about a prior conviction or show the mock jury a devastating Facebook post without knowing whether either will be admissible at trial. Yes, that evidence is "sexy." Yes, it could affect the outcome of the trial. But do not make that mistake.

Nothing is worse than watching a mock trial jury walk into the deliberation room and proceed to talk only about the sexy evidence that may be excluded from the trial. What have you learned? Do you know whether you can win the trial without that evidence? Do you know what jurors like and dislike about your other evidence and argument? Always resist the temptation to introduce controversial evidence. You are better served to schedule the mock trial on a date after the court rules on Daubert motions. And, whenever possible, schedule the mock trial on a date after the court rules on key Motions in Limine (if the evidence is that sexy, you shouldn't be waiting until two weeks before trial to file your motion in limine.

Layer the Evidence & Start with the Least Persuasive Evidence

It is so important to layer the evidence presented to the jury from (what you think is) your least persuasive evidence to (what you think is) your most persuasive evidence. That allows you to poll the mock jury or discuss with the focus group what they think about each layer of evidence after your presentation. It may be counterintuitive, but never start by presenting the jury with your most persuasive evidence because that evidence will dominate the juror's deliberations and the focus group discussions. All you will learn is that the jury was most impressed by your most persuasive evidence (which you already knew). What you won't learn is how you could have better presented your other evidence so that evidence is also discussed during jury deliberations.

For example, let's say that you have four key categories of evidence: math, product modeling, expert testimony, & video demonstrations (in order from least to most persuasive). Never start by showing the jury the most persuasive evidence (video demonstrations) because that is all they are going to talk about during deliberations. Start with the least persuasive evidence (math) and ask the jury what they think about that evidence. Then present the third most persuasive evidence (product modeling) and ask the jury what they think about that evidence. Then present the second most persuasive evidence (expert testimony) and ask the jury what they think about that evidence. Finally, present the most persuasive evidence (video demonstrations) and enjoy the jury's discussion about that evidence. By layering the evidence, you will always learn about each layer—instead of only learning about the one or two most persuasive layers or not really knowing which layer or combination of layers really impacted the jury or focus group.

Try General Damages only to Identify "Favorable" Jurors.

Nothing is more subjective than a jury's award for general damages, and a mock trial general damages award is rarely a reliable predictor of what different jurors will award. Different jurors will always have different backgrounds, different experiences, and different opinions when it comes to general damages. Even jurors with similar backgrounds and experiences will often have very different opinions on what constitutes "a lot" of money and what constitutes "a little" money.

Ask yourself. What would a year-end bonus of two thousand dollars mean to you? What would you award for "physical pain and suffering" for five months of 8/10 cervical pain? What would you award for "physical pain and suffering" for six months of physical therapy? What would you award for "mental pain and suffering" for a concussion that lasts six months? What would you award for "physical and mental pain and suffering" for a moderate traumatic brain injury that resulted in PTSD? How much would your award increase if the plaintiff's family and friends all testified that the plaintiff was "different"? Now look at the lawyers sitting to your left and your right. Even if they look exactly like you, and even if they have the exact same job as you, what are the odds they will give the exact same answers?

All jurors can be divided into "Lions" and "Lambs," and the Lions eat the Lambs, especially during mock trials and focus groups, and especially with regard to awarding general damages. When a mock jury or focus group agrees that a defendant is liable and on the injuries, a

Lion will often propose a specific number to be written down on each line of general damages (i.e., "How about we put down $100,000 for physical pain and suffering?"); and the Lambs will agree. Sometimes, another Lion will propose a larger or smaller number, and the two (usually tired by then) Lions will reach some sort of compromise—to which the Lambs will quickly agree. Thus, the final damages award really only tells you what one or two Lions on your mock jury would award. It is not, and it should not be considered, a reliable predictor of what the Lions on the actual jury will award.

Yes, there are times when it may be beneficial to try general damages to identify favorable jurors in a specific venue. Trust your jury research consultant. Based on their jury research and experience, they may already have an idea of what jurors would be favorable for your client, but they may want venue-specific information regarding certain neighborhoods or local high schools. Ask them to make the case for trying general damages. If the reason is to identify favorable jurors, ignore their final general damage award, and focus more on identifying which jurors supported higher general damage awards and which jurors supported lower general damage awards.

Yes, there are times when your client will want you to try general damages to determine a "range of damages," despite your begging to spend that time on other elements like liability or medical causation. When that happens, discuss with jury consultant the possibility of having every juror write-down on a piece of paper what they personally would award for each category of damages before allowing the jurors to deliberate together. Polling the Lambs before they are eaten by the Lions is often the only way to discover what the Lambs really think and the best way to identify a more accurate range of possible awards for general damages.

Try Specific Factual Questions Regarding Disputed General & Special Damages.

Time is money. When possible, try only specific factual questions about disputed general and special damage awards. Do not ask jurors to also determine the value or quantify the corresponding general damage or special damage award.

If the burning question is whether the plaintiff can work, present the conflicting evidence on that issue (i.e., expert medical testimony, functional capacity evaluations, vocational rehabilitation expert testimony, etc.) and ask the mock jury to make a factual determination about whether that plaintiff can return to work and what type of work he can do. But do not ask the jury to spend additional time quantifying plaintiff's (special damages) claim for lost earnings.

If the burning question is whether the plaintiff sustained a traumatic brain injury ("TBI"), present the conflicting evidence on that issue (i.e., conflicting neurological, neuropsychological, and neuroradiology testimony) and ask the mock jury to make a factual determination about whether the plaintiff sustained a "permanent" TBI or whether the TBI "is responsible for plaintiff's current symptoms/complaints." But do not ask the jury to spend additional time quantifying plaintiff's (general damages) claim for "future mental pain and suffering."

Show Video Clips Instead of Describing Testimony

Some trial lawyers are lazy, and some trial lawyers like the sound of their own voice. Perhaps you've noticed. Not surprisingly, when given the choice between playing a video clip from an expert's deposition and simply telling the jury what that expert will say, many lawyers will choose to talk instead of stand silently. Not surprisingly, when given the choice between identifying specific start/stop times for a video clip (1:03:21-1:03:45; 1:07:23-1:08:02), and simply slapping a photo on a Power Point slide, many lawyers will conveniently decide that "jurors get bored watching videos." Always show the jury a clip of the witness. Jurors are suspicious of lawyers. When a lawyer tells jurors that Dr. Wonderful "will testify that this type of injury is impossible," jurors will wonder (see what we did there) whether the lawyer is exaggerating. Jurors need to see and hear Dr. Wonderful. And you need to know whether the jurors liked Dr. Wonderful. We are constantly surprised by the way jurors react to certain witnesses. We've had jurors dislike the tone or manner of witnesses who we thought were going to be our "star" witnesses, and we've had jurors adore witnesses who we personally disliked. Again, the purpose of a mock trial and a focus group is not to confirm what you already think about your witnesses; it is to learn what the jurors think about your witnesses. Press "play," and you will find out.

Record Prejudicial Comments During Deliberations for MILs & Closing Argument.

Some lawyers myopically focus on the verdict reached during the mock trial or focus group, and that is a mistake. Pay attention to every comment that distracts or prejudices the jury against your client. Label a page "Ideas for Voir Dire & Closing Argument," and write down every prejudicial comment during jury deliberations and focus group discussions. That way, after the mock trial/focus group, you can decide whether: (a) to file a motion in limine to prohibit opposing counsel from making those remarks; (b) to address that bias during voir dire; and/or (c) to call that bias to the jury's attention during closing

argument.

It may not be a popular trial strategy, but we have found it effective to use our closing argument to warn the Lions on the jury what they might hear other jurors say and give the Lions the soundbite they need to confront and kill that bias. During closing argument, we will warn jurors that "if a juror says 'x' during deliberations, you should say 'y." For example, to combat prejudicial remarks heard during a mock trial, we might tell jurors during closing argument: If a juror says "that's the price of doing business," that juror has stopped weighing the evidence;

- If a juror says "that's why they have insurance," that juror has stopped weighing the evidence;
- If a juror says "why wouldn't they warn about everything?" that juror has decided to ignore the judge's jury instructions on inadequate warnings;
- If a juror says "if it happened on their property, I don't care if it's their fault," that juror is ignoring the jury instruction that there is no strict liability.
- If a juror says, "this is a drop in the bucket for them," that juror has stopped weighing the evidence and stopped treating my client fairly and impartially."
- If a juror wants to talk about what another insurance company did to them once, that juror has stopped weighing the evidence and has stopped being fair and impartial.

There is always a risk/reward to addressing bias and prejudice during closing argument, and that risk/reward should always be discussed with a client, but the first step is always to figure out during mock trials what type of prejudice will rear its ugly head during jury deliberations. Toward that end, attorneys should encourage jury consultants not to "kill" prejudicial comments or "stop" tangential discussions during focus group and mock trial discussions. There's gold in 'dem hills!

For Virtual Mock Trials, Beware Telephone Tough Guys.

As virtual or online mock trials become more popular, it is important to remember the difference between talking with ten people at a dinner table and talking with ten people during a telephone conference. It's impossible to know whether somebody is finished talking. It's easy to accidentally talk "over" somebody. It's hard to know whether people agree or disagree with you. And people have a tendency to become more belligerent more quickly. The same is true for virtual trials. Whereas people sitting around a table at least try to respect each other (for a little while), telephone tough guys have no problem speaking their mind and monopolizing the jury deliberations. These Lions can intimidate Lions into not speaking up or not speaking at all.

Tame those Lions by polling all of the jurors and on every specific issue. When the virtual mock trial programs allow jurors to "raise their hands," make sure the jury consultant enforces that rule. And make sure you discuss with the moderator before jury deliberations how you want telephone tough guys to be handled (i.e., muted, called down, warned, disconnected). If you don't, your virtual mock trial will become a single-juror telephone tirade.

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John Jerry Glas is the Chair of the Civil Litigation Department. He has tried more than 70 jury trials to verdict, and serves as lead national trial counsel for the worldwide leading manufacturer of conducted electrical weapons.

Jerry represents national insurance and excess insurance companies, trucking companies, grocery and restaurant chains, and law enforcement agencies when faced with pending litigation. Over the last 18 years with the Deutsch Kerrigan, Jerry has successfully handled a number of matters involving police liability, product liability, and serious traumatic brain injury and class action lawsuits.

He has been admitted pro hac vice to handle cases around the country, including California, Connecticut, Michigan, Missouri, Nevada, and Virginia. He recently authored "Feeding Lions During Closing Argument," Chapter 19 in the ABA's 2015 peer-reviewed textbook: From The Trenches: Trial Tips From 21 of the Nation's Top Trial Lawyers.

Practices
- Commercial Transportation
- Appellate Litigation
- Aviation Litigation
- Manufacturer's Liability and Products Liability
- Premises Liability

Successes
- Stroud v. Commerce & Industry Ins. Co.
- White v. Occidental Fire & Cas. Ins. Co.
- Commercial Transportation - Crayton v. Campbell, et al
- Product Liability - Ricks v. City of Alexandria, et al,
- Product Liability - Fahy v. TASER International, Inc., et al.
- Retail Defense - Wiltz v. Meraux
- Transportation - Automobile - Grisoli v. Bradley, et al

Accolades
- AV Preeminent Martindale-Hubbell® Peer Review Rating™
- Missouri Lawyers Weekly, Largest Defense Verdicts, 2013
- 2016, 2018 "Top Lawyers" list by the New Orleans Magazine
- New Orleans CityBusiness Ones to Watch: Law, 2015, 2017
- Louisiana Super Lawyers List, 2015-2019
- Best Lawyers® in America, Personal Injury Litigation, 2012-2019
- Federal Bar Association's Camille Gravel Public Service Award, 2009
- Louisiana State Bar Association's Pro Bono Publico Award, 2009
- New Orleans CityBusiness "Leadership in Law" 2012, 2017

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- B.A., Philosophy, College of the Holy Cross, 1991

IT'S SETTLED - EFFECTIVE STRATEGIES FOR SUCCESSFULLY RESOLVING DISPUTES

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It's Settled – Five Strategies that You Need to Successfully Settle a Dispute
Steele Clayton

There are many reasons a company facing litigation may desire a resolution outside of a courtroom. Litigation is a time intensive, expensive, risky business for many companies. Media coverage of a trial can force a company into an unflattering lime light for several weeks, if not months. As a result, more and more companies are seeking out ways to settle cases rather than proceeding to trial.

Today's lawyers, whether they are trial lawyers or in-house counsel, must develop a skill set aimed at obtaining the best settlement for their client. This article shares five settlement strategies for counsel to keep in mind as they engage in settlement negotiations.

Timing is Everything

Generally, it is better to settle as early as possible to minimize the costs of litigating the case and avoid unnecessary exposure. It is, however, next to impossible to resolve a dispute without first engaging in some form of discovery, although the parties may feel that "fees spent on discovery and attorney's fees [are] better spent in settlement negotiations." Parrado v. Perfectemp Inc., No. 13-81100-CIV, 2013 WL 12152425, at *1 (S.D. Fla. Dec. 23, 2013). Engaging in some form of discovery prior to entering negotiations, while expensive, may actually facilitate settlement negotiations by clarifying and narrowing the factual issues before the court. See id. Discovery provides the parties with an opportunity to learn more about the relative strengths and weaknesses of each party's case. Counsel may choose to disclose certain materials prior to approaching the other side with an offer in an attempt to telegraph the strength of their case. On the other hand, counsel may not want to enter into settlement negotiations right away if they believe that they need to obtain documents to further support their claims or defenses. The key to successfully timing the negotiations around discovery is to balance the expense of discovery against the need for sufficient information.

Understanding the nature of your client's business, and how drawn out litigation could affect it, is another crucial aspect of determining the ideal time for settlement. If your client's company is, for example, a manufacturer, and they rely exclusively on the opposing party to provide a component part, prolonging the litigation will almost certainly result in lost revenue. In such instances, the company is likely willing to settle for a less appealing resolution to the case in exchange for a speedy return to the former status quo. If, however, your client is a large corporation, and the opposing party is not, it may be worth waiting to settle the case due to the difference in resources available to the parties.

The timing of settlement negotiations may not always be a choice for the parties. Courts, often facing overloaded dockets, have increasingly turned to alternative dispute resolution ("ADR") programs to alleviate their caseloads. Courts may encourage parties to engage in settlement negotiations, or they may affirmatively order them to do so. See, e.g. Mich. Ct. R. 2.41 ("At any time, after consultation with the parties, the court may order that a case be submitted to an appropriate ADR process."). To the extent parties can control the timing, however, they should aspire to ensure that they enter settlement

negotiations at an opportune time for their client.

Be Prepared

Before either side can engage in effective negotiations, both need to be aware of: (1) the issues that need to be resolved, and (2) the relative strengths and weaknesses of each side's case. It is not enough to enter into negotiations with a list of general demands and a rough understanding of the legal issues. Prior to entering into negotiations, counsel should be well versed in the best, worst, and most likely scenarios if the case does not settle. The client should also be aware of the risks inherent in failing to resolve the case prior to trial, and should be aware of how counsel anticipates the negotiations unfolding.

Preparation requires some amount of creativity. Every case's settlement negotiation process is unique. In preparing for a settlement negotiation, counsel should consider how the distinctive facts and personalities present in the litigation will impact how the negotiations proceed. It can be helpful to consider "what if" scenarios by anticipating the opposing side's likely reaction to certain moves. For example, if your client enters negotiations with a remarkably low offer, is that approach likely to intimidate or irritate the opposing party? On the other hand, if you make a generous offer on one issue, how is that likely to impact other issues? Will the opposing party perceive such an offer to be a sign of weakness, or will it make him or her more likely to offer a reasonable accommodation on the other issues? No settlement negotiation is going to proceed exactly according to plan, but counsel should still consider likely scenarios to ensure that he or she is capable of making strategic decisions in response to developing negotiations rather than simply reacting.

Counsel may also consider preparing for official negotiations by conferring with the other side. One common approach is to set a settlement range prior to beginning to negotiate in earnest for an exact value to resolve the dispute. This may save time during the negotiation process by avoiding needless posturing from either party. Another approach is to meet with opposing counsel and formulate an agenda for the negotiations to ensure that both parties agree on the exact issues that need to be addressed before the case can be resolved.

Choose the Correct Forum

Settlement negotiations can take many different forms. While using a third party to mediate the dispute is becoming more common, it is not the only option. In fact, some clients may prefer to have the attorneys engage in informal settlement negotiations, either over the phone or via written correspondence, to see if the case can be resolved without being forced to pay a third party to mediate the dispute.

A number of factors can determine which forum is best suited for settling a dispute. First, counsel should consider the nature of the dispute at issue. If the case at issue is an employment matter, and the plaintiff is an individual, bringing in a third-party mediator may provide the plaintiff with an opportunity to feel "heard," and may facilitate resolution more readily than a candid phone call with opposing counsel. On the other hand, if the parties are business entities, it may be possible, as well as less expensive and time consuming, to exchange written settlement proposals.

Counsel can also customize the format of the offer process. In traditional negotiations, one side offers an amount to settle the dispute to the opposing party, who will then counter with their own amount. This process can be tedious and time consuming. One alternative to this approach is to offer a range of numbers that would settle the case rather than a single value. This process is known as "bracketing." For example, one party may propose a range of $500,000 to $1,000,000. The opposing party may then counter that range by proposing a range of $100,000 to $300,000. The parties will then continue to go back and forth until they agree to an acceptable bracket of values. Once the parties agree on a bracket, they can then return to traditional negotiations to identify a single value within the bracket. Bracketing can have a number of advantages, including providing a way for the parties to signal how far they are willing to move to settle the case without making an explicit offer.

Counsel's relationship with each other can also play a role in determining the proper forum for a settlement negotiation. If counsel have a strong working relationship, and know they can engage cooperatively to resolve the dispute, there may not be a need to pay a third party to mediate the case. On the other hand, if counsels' past attempts at written or telephonic negotiations have ended in impasses, it is likely best to begin exploring alternative options. It may, for example, be worth considering an in-person meeting. While the idea can seem quaint in today's digital world, it is often easier to take a more aggressive stance in an email than it is when opposing counsel is sitting in front of you. Regardless of the approach taken, it is important that, at a minimum, counsel can engage candidly and acknowledge when one process is not working to ensure that their clients' resources are utilized in an efficient manner.

Set Reasonable Expectations

No settlement ends in both sides walking away with the "perfect" result. Counsel should aspire to obtain the best result possible for their client, but he or she should also ensure that the client is prepared to accept such a settlement if and when it is offered. As one court remarked, "[e]ven if an attorney obtains a favorable deal for a client, if he cannot convince the client to take it, then he has failed in one of his key tasks." City of Alexandria v. Cleco Corp., No. 1:05-CV-1121, 2011 WL 13128268, at *2 (W.D. La. June 27, 2011).

Client communication is key. At every stage of the settlement process, counsel should ensure that the client understands the relative strength of their case, and what they can expect to find in a realistic settlement offer. This is not to say that clients should sacrifice all of their demands to ensure that a case settles. Rather, counsel should encourage clients to prioritize their demands. What must the client receive to make a settlement worth it? What is the client willing to give up to obtain that result? These discussions may also provide an opportunity for counsel and the client to work together to formulate a creative settlement offer. For example, a manufacturing company may be willing to forego a large monetary settlement if it can obtain specific performance from a supplier.

Part of counsel's obligations in setting reasonable expectations is to ensure that their respective clients enter negotiations prepared to make a good faith attempt to settle the case. It is not uncommon for parties to seek to make an initial offer that either far over or under values the dispute at issue. This tactic is rarely effective, and may antagonize opposing counsel. To the extent that counsel can, he or she should try to encourage clients to only make offers that are likely to move the negotiations forward, and avoid making unreasonable demands.

Don't Litigate the Settlement

Counsel should not approach settlement negotiations, although technically adversarial proceedings, the same mindset as a brief or an oral argument. The goal of settlement negotiations is to ensure that you obtain the best possible result for your client. The relative strength of the client's legal case is important to these negotiations, and thus some amount of substantive discourse on the relative strengths and weaknesses of each side's case is inevitable, but it should not be the focus of the settlement discussions. Substantive debate over the merits may distract from discussing each party's demands, wasting valuable time for both parties, and it may also run the risk of irritating the other side. Counsel should be discouraged or limited from arguing the merits of the case during settlement negotiations.

One approach to ensure that the parties focus on the settlement rather than substantive arguments is to center the discourse on the interests of the parties rather than on their positions. For example, rather than discussing whether the opposing party breached a duty of care, discuss what your client needs to obtain from the opposing party to agree to a settlement. This could be a monetary amount, or it could be some form of equitable relief, whether in the form of partial performance or recession of a contract. In any event, discussing the interests of the parties avoids engaging in a counterproductive debate about their legal arguments, and has a stronger likelihood of leading to a settlement.

Conclusion

The traditional civil jury trial is becoming increasingly rare as costs of engaging in litigation continue to increase. Settlement negotiations are rapidly becoming a key aspect of civil litigation, and counsel should focus on developing a sophisticated skill set to ensure that they are able to capably represent their clients in settlement negotiations. The five settlement strategies outlined above provide a comprehensive overview of the key considerations counsel should focus on as they engage in settlement negotiations.

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Steele Clayton helps his clients resolve their business and commercial disputes. Whether negotiating or litigating a resolution, Steele believes that economic sensibility and the long term best interest of the client's business should always be in the forefront. Over the last 20 years, Steele has helped clients resolve a wide variety of business and commercial disputes in state and federal courts throughout the United States as well as in private arbitrations and mediations. Steele also serves as the vice chair of the firm's Antitrust and Trade Practices Group where he provides training and counseling to his clients as well as representing clients in private and government litigation matters.

Steele's practice involves Antitrust & Trade Practices – Advising clients with respect to the Sherman Act, the Clayton Act, the Robinson-Patman Act and state antitrust laws across a variety of industry sectors in private lawsuits and actions brought by federal and state enforcement agencies; designing, implementing and training on antitrust compliance programs; defending clients with respect to consumer class actions and other trade-specific claims; Business Disputes – Representing companies in various commercial disputes including contract disputes, fraud, misrepresentations, interference with business relations, breach of fiduciary duty, consumer protection acts, the Uniform Commercial Code, securities violations, post-merger and asset purchase disputes between buyers and sellers, trade secrets and non-compete and non-solicitation matters; counseling clients with respect to their contracts and other business documents with an eye toward litigation issues; and Internal Investigations – Conducting internal investigations for both public and private companies relating to antitrust, financial reporting, internal controls, company policies and procedures and officer and director malfeasance.

While his antitrust practice covers a wide range of industries, a significant portion of his practice is in the healthcare industry. His experience as a CPA gives him an in-depth understanding of business generally and the financial issues that are relevant in business litigation or an investigation.

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- Best Lawyers in America® — Commercial Litigation; Litigation: Antitrust (2011-2019)
- Nashville Bar Foundation — Fellow
- Certified Public Accountant (1990-1995)

Education

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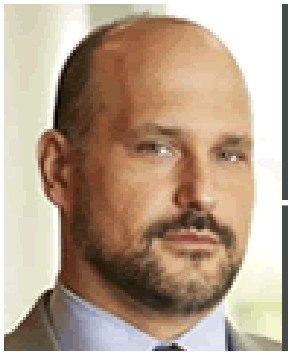
- University of Tennessee - M.Acc., 1989
- University of Tennessee - B.S., 1988



WHEN A RULING GOES WRONG: SHOULD WE SETTLE, PROCEED TO TRIAL, OR SEEK INTERLOCUTORY REVIEW

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You May Have Lost the Battle, But You Can Still Win the War: Using Motions for Reconsideration and Interlocutory Appeals to Your Client's Advantage
Moheeb Murray, Stephanie Douglas, and Brittney Kohn

It happens to the best of us. You wore your power suit and argued your strongest evidence. But sometimes rulings do not go your way. While there is always the option to accept the court's decision and buckle down for a difficult trial, the good news is that this is not the end of the road and you may have worthwhile options at your disposal to turn a negative ruling around for your client.

Motion for Reconsideration

Motions for reconsideration are generally disfavored and, because you have already lost once, the odds are necessarily stacked against you. But if the court made a clear mistake, or an intervening change in law or fact has occurred, you should consider bringing the issue to the court's attention. The Federal Rules of Civil Procedure do not expressly permit motions for reconsideration, but district courts tend to consider them when filed under Rules 59 or 60.

A. What are the Applicable Federal Rules and Requirements for a Sustainable Motion for Reconsideration?

Rule 59(e) allows a party to move to "alter or amend a judgment" within 28 days after the entry of the judgment. Rule 60(b), meanwhile, offers relief from a final order under various circumstances, including mistake, excusable neglect, newly discovered evidence, and fraud by an opposing party. Rule 60(b) also offers a catch-all circumstance of "any other reason that justifies relief," but courts rarely apply the catch-all . It is essential to not simply reiterate your prior position and ask the judge to re-decide the same matter. Instead, directly educate your judge about the reasons why reconsideration is appropriate under the circumstances of your case. And do not fail to overlook that local rules may impose limitations regarding the availability of reconsideration.

B. Think Strategically about Whether a Motion for Reconsideration is the Right Move.

The first step in deciding whether to move for reconsiderations is to reflect on whether there really is a supportable basis for requesting reconsideration. Have all federal procedural rules been met? What about application of any local rules? Any judge-specific practices or preferences? The rule requirements are usually only met if the trial court missed important facts or law, or if there has been an intervening change in the law or facts of the case. Alternatively, if the court ruled on a basis not briefed or argued by the parties, this may raise due-process concerns, which are often considered unpreserved if not presented to the trial court in a motion for reconsideration.

The next step is to consider what effect your motion for reconsideration may have on how the judge views you and your client going forward. Obviously, if the order kicks your client out of court, whether the judge will be frustrated by a motion for reconsideration matters less. But if the order keeps your client in court, or imposes oppressive discovery burdens on your client, you should be judicious with accusations that the court palpably erred. Regardless how artful your spin, the motion essentially asks the judge to review his own decision, and judges

(like anyone else) do not typically like to acknowledge mistakes. Meanwhile, the court may also invite opposing counsel to respond, thus introducing a potential array of new issues that you may have otherwise avoided in the record. The court could also issue a reconsidered opinion that "fixes" the problem with the original ruling that might have provided an appealable issue but still goes against your client. This is an especially troublesome outcome, because an order denying reconsideration is reviewed only for abuse of discretion (while the original order may have been reviewed de novo). The court could also issue a written opinion, where the original order was oral and thus unsearchable.[1]

Timing is another element to take into account. Ask yourself whether there is sufficient time to seek reconsideration rather than an interlocutory appeal if an important date, such as trial, is imminent and the trial court is unlikely to extend dates. And be careful: Not all motions for reconsideration will extend the time to file an appeal.[2] If you do move for reconsideration, and are unsuccessful, you must appeal from both the underlying order and the order denying reconsideration.

Generally, reconsideration of an interlocutory order is considered an extraordinary remedy and will be granted sparingly. This leads us to Option B—the interlocutory appeal.

Interlocutory Appeal

Some decisions are appealable on an interlocutory basis. Although interlocutory appeals are difficult to obtain if the adverse order does not fall within one of the categorical entitlements, it may be worth the time to consider that option and advise your client accordingly.

A. What Orders Qualify for an Interlocutory Appeal?

The first step is to check whether the decision qualifies for an interlocutory appeal as a matter of statutory right. In federal courts, such orders include (among other things) an order denying arbitration, 9 U.S.C. § 16, an order granting, modifying, or denying a preliminary injunction, 28 U.S.C. § 1292(a), and an order appointing a receiver, 28 U.S.C. § 1292(a).

Second, consider whether the adverse decision fits within the collateral order doctrine. Under that doctrine, a small class of collateral rulings are appropriately deemed "final," even though they do not actually end the litigation. While the categories of rulings that fit within the doctrine are limited, they include decisions that are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from the final judgment.[3]

Third, ask yourself whether a writ of mandamus is appropriate. Courts traditionally apply a multi-factor balancing test to determine whether a case presents the type of extraordinary circumstance that warrants mandamus relief.[4] Suffice it to say, mandamus will almost never be an appropriate avenue for interlocutory relief from a bad ruling.

If your adverse order does not fit into one of these categories, the federal rules also provide for discretionary interlocutory appeals. A party can ask the trial court to certify under 28 U.S.C. § 1292(b) that: (1) the adverse opinion involves a controlling question of law; (2) there is a substantial ground for a difference of opinion on the matter; and (3) an immediate appeal from the adverse order may materially advance the ultimate termination of the litigation. Importantly, Section 1292(b) certifies the entire order for interlocutory appeal—not just a particular question of law formulated by the district court.[5]

Keep in mind that timing matters. If the district court certifies the interlocutory appeal, Section 1292(b) provides a 10-day window to file a second petition, this time asking the court of appeals for permission to accept the interlocutory appeal the district court just certified.[6] The court of appeals has complete discretion as to whether to accept the appeal. Meanwhile, if the district court denies certification, the decision is not reviewable.

B. What Issues are Appropriate for Interlocutory Relief?

Some petitions for interlocutory relief are more likely to be granted than others. The standard for certification is quite high, as Congress intended that interlocutory relief be sparingly applied and used only in exceptional cases. Any petition to the district court must establish the requirements under Section 1292(b), as well as convince the court that it would be efficient to have the appellate court resolve the issue now, in a piecemeal fashion, rather than waiting until any other issues are ready to be reviewed after a final judgment. Meanwhile, by arguing to the district court that this is an issue on which there is substantial difference of opinion, you are essentially

1 See Smith v. Gen. Motors, LLC, No. 17-14146, 2019 WL 1651378 (E.D. Mich. Apr. 17, 2019).

2 See Nutraceutical Corporation v. Lambert, 139 S.Ct. 710, 717 (U.S., 2019); Gutierrez v. Johnson & Johnson, 523 F.3d 187, 194 (3d Cir. 2008); Kennedy v. City of Cleveland, 797 F.2d 297, 301 (6th Cir. 1986).

3 See Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106, 130 S. Ct. 599, 605, 175 L. Ed. 2d 458 (2009).

4 See John B. v. Goetz, 531 F.3d 448, 457 (6th Cir. 2008).

5 See In re Trump, 874 F.3d 948, 951 n.3 (6th Cir. 2017). But see, Little v. Louisville Gas & Elec. Co., 805 F.3d 695, 698–99 (6th Cir. 2015).

6 See Woods v. Baltimore & O. R. Co., 441 F.2d 407, 407-08 (6th Cir. 1971); Libertarian Party of Ohio v. Husted, 808 F.3d 279, 280 (6th Cir. 2015).

asking the court to acknowledge that its opinion might be wrong.

Some issues are more appropriate for interlocutory relief than others. For example, discovery sanctions, such as an adverse-inference instruction, dismissal of some claims, or contempt are ripe for interlocutory appeal. A bad ruling on a motion in limine, such as excluding key evidence or experts, is another common example. Denials of dispositive motions where the trial court created a new law or a new cause of action, or misinterpreted the law in a way that will make trial difficult, are sometimes contenders for interlocutory relief.

Other examples of issues that may be appropriate for interlocutory relief include:

- Orders denying motions to dismiss for lack of personal jurisdiction;
- Orders denying venue transfer;
- Orders granting or denying remand of a class action;
- Orders granting a new trial (rarely, if ever, available in federal court, but may be available in state court);
- Orders compelling or prohibiting speech; and
- Orders compelling production of privileged material, trade secrets, or burdensome discovery (although an appeal of these issues is likely moot once the party has produced discovery).

Each of these issues—assuming they involve a controlling question of law, involve a substantial ground for difference of opinion on the matter, and may materially advance the ultimate termination of the litigation—are candidates for seeking interlocutory certification from the trial court.

c: What Arguments do Appellate Courts Find Persuasive in Granting Interlocutory Review?

Once you get past district-court certification, the next hurdle is to persuade the appellate court to accept the interlocutory appeal. Certain arguments are more enticing to the court of appeals than others. Appellate courts are not persuaded that proceeding without interlocutory review will cost your client money or time. A constitutional or statutory basis for appeal should be argument number one. A novel legal issue or issue of first impression may also garner the court's attention. If, for example, in denying your dispositive motion, the trial court created a new cause of action, that could get you in the door. Explain the difficulties of proceeding forward without review for the court and the public: How will you draft jury instructions? How broadly does the ruling sweep? How accessible is it to other litigants? Does it create a split among trial-level courts in the jurisdiction that leaves other litigants and courts with insufficient guidance? Will it create a cascade of consequences beyond your case? Think bigger picture; that's what the appellate court will be thinking about.

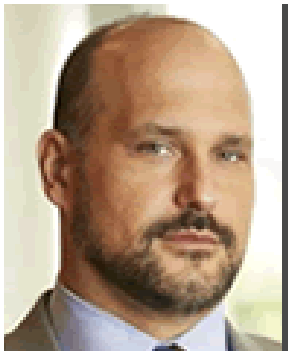
D. Don't Forget to Seek a Stay of the Trial-Court Proceedings.

Even if both courts certify the case for appeal, proceedings in the lower court will continue because the application to file an interlocutory appeal does not itself stay the trial court proceedings. The federal rules provide a means to avoid this problem. Under Federal Rule of Appellate Procedure 8(a)(1), a party must "ordinarily move first in the district court" for a stay pending appeal. If an order certified for and accepted on appeal, opposing counsel may actually stipulate to the stay to avoid the risk of re-trying the case later.

Should the district court deny the request to stay proceedings, the federal rules permit a party to seek a stay from the appellate court itself. Under Federal Rule of Appellate Procedure 8(a)(2), a party can file a motion that either shows that moving first in the district court would be impracticable or states that, a motion having been made, the district court denied the motion or failed to grant the requested relief and state any reasons given by the district court for its action. The motion must also include: (i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record. Normally, the motion under Rule (8)(a)(2) is reviewed by a panel of the court, but, in exceptional cases in which time requirements make that procedure impracticable, the motion may be made to and considered by a single judge. Again, make sure to press the urgent need for relief, the unjust result should the stay not be granted, and the inefficiencies should the lower court continue with the case.

Conclusion

Litigators know they can lose some battles, but still win the war. Strategic motions for reconsideration and interlocutory appeals can help you get there.



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He advises and represents clients from pre-litigation strategy through final verdict and on appeal. Moheeb has helped clients obtain favorable awards and outcomes at trial and in arbitrations involving claims of breach of contract, breach of warranty, construction, and design-professional malpractice. Moheeb is also a trained civil litigation mediator.

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Honors and Awards
- Inclusion in The Best Lawyers in America, Insurance Law, 2018 – present
- Leading Lawyers, 2017
- Oakland County Bar Association Distinguished Service Award, 2017
- Oakland County Executive's Elite 40 Under 40, 2015
- Michigan Super Lawyers, Rising Star, 2011-2015, Business Litigation, 2018
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LESSONS LEARNED FROM THE MICHAEL COHEN AND MICHAEL AVENATTI FIASCOS

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Tabloid Fodder That Matters: Legal Ethics Lessons from the Michael Cohen Fiasco
David Gustman

Lawyers are rarely in the news. When they are, it is usually because they are providing comments on behalf of a high-profile client. Almost like a PR representative. In these instances, the lawyers are viewed as simply doing their jobs of representing their clients. Other times, however, lawyers are in the news for bad reasons, and they are consequently not viewed well. When this happens, questions arise as to how the lawyers got into the situations they are in, what laws or ethical rules they violated, and what they could have done differently as lawyers (and as people in general) to come out for the better.

This article examines the situation of high-profile attorney Michael Cohen and the lessons learned from his legal predicaments. More specifically, this article will examine the circumstances surrounding the criminal charges against Cohen, the ethical rules involved in his conduct, and some important considerations in representing high-profile clients.

Stormy Daniels

The alleged affair between adult film actress Stormy Daniels and Donald Trump is the spark that brought Cohen to the forefront of the news. The alleged affair became national news in early 2018 when news outlets reported Cohen had allegedly paid Daniels $130,000 in October 2016, a month before the presidential election, to stop her from discussing her alleged affair with Trump in 2006. What followed was a flurry of news stories in which Cohen acknowledged paying Daniels, Daniels filed suit seeking to invalidate a non-disclosure agreement she signed related to the alleged affair, and Cohen sought a restraining order against Daniels in arbitration to bar her from disclosing information related to the non-disclosure agreement.

Michael Cohen's Federal Investigation and Conviction

Cohen was first known to be under federal investigation in April 2018 when the FBI raided his law office, home, and hotel room for emails, tax records, and business records. In August 2018, Cohen was charged with and pleaded guilty to eight federal criminal charges: five counts of tax evasion, one count of making false statements to a financial institution, and two counts related to unlawful campaign contributions. In December 2018, Cohen was sentenced to three years in federal prison and assessed with monetary penalties. Additionally, in November 2018, after being charged by the Special Counsel's office, Cohen pled guilty to providing false statements in congressional testimony and received a two-month sentence to be served concurrently with his three-year sentence.

The criminal charges for which Cohen was convicted have both legal and ethical implications. The U.S. Attorney for the Southern District of New York laid out the criminal charges against Cohen. Between 2007 and January 2017, Cohen was an attorney for the Trump Organization while holding the title "Executive Vice President" and "Special Counsel" to Trump. Cohen was ostensibly acting in the capacity of in-house counsel for the Trump Organization as well as personal counsel for Trump himself. Cohen was licensed under the New York Bar and subject to New

York's Rules of Professional Conduct, which were first adopted in 2009 and are modeled after the ABA's Model Rules of Professional Conduct.

Tax Evasion and False Statements

The counts for tax evasion and making false statements to financial institutions were, it appears, based on activity by Cohen entirely separate from his role as a lawyer for the Trump Organization or for Trump personally. Apart from his role with the Trump Organization, Cohen owned taxi medallions in New York City and Chicago as investments and leased them out to operators who would pay Cohen a portion of the operating income from the medallions. Cohen concealed millions of dollars of operating income by arranging to receive the medallion income personally instead of having the income paid to Cohen's medallion entities. Paying the medallion entities would have resulted in that income being included on Cohen's tax returns. Cohen also hid sources of income from brokering the sale of property, including a luxury handbag and consulting on real estate for an assisted living company. In total, Cohen failed to report more than $4 million in income to the IRS.

As for the false statements charge, Cohen executed promissory notes, took out lines of credit collateralized by his taxi medallions, secured mortgages, and applied for a home equity line of credit with a combination of three different banks. None of these transactions involved work as an attorney but rather involved money for his own personal use on a condominium and a summer home. Throughout this series of transactions, Cohen consistently failed to disclose to the banks his full financial picture with the other banks and allegedly obtained a home equity line of credit that a bank would not have otherwise approved had Cohen been truthful. In essence, Cohen fraudulently concealed information from different banks to maximize his personal financial status and abilities.

The lesson to be learned from Cohen's tax evasion and false statements charges is simply: you should not commit federal crimes in your personal and business dealings. But as lawyers, we know we are held to a higher standard of conduct even outside the strict bounds of our law practice. Rule 8.4 of New York's Rules of Professional Conduct mandates a lawyer shall not, among other things, engage in: (a) illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer; (b) conduct involving dishonesty, fraud, deceit, or misrepresentation; or (c) conduct that is prejudicial to the administration of justice. A reasonable person—and certainly a reasonable attorney—should understand that Cohen's conduct in evading taxes and making false statements to banks violates federal law and the Rule 8.4. Cohen engaged in blatant misconduct that no lawyer should ever entertain. Indeed, Cohen has already felt the effect, for his days of practicing law are over because lawyers face automatic disbarment for a felony conviction under New York law.

Campaign Finance Violations

Soon after Trump announced his presidential campaign in June 2015, the head of the National Enquirer, a popular tabloid magazine, coordinated with Cohen and other members of Trump's presidential campaign to help deal with negative stories about Trump's past extra-marital relationships with women. The magazine offered to advise Cohen of negative stories during the campaign, and the parties understood that Cohen, working with the magazine, would then arrange for the purchase of those negative stories so as to suppress them and prevent them from influencing the election. Two stories were purchased from Karen McDougal and Stormy Daniels to keep their stories silent, though the Karen McDougal payment was only from the magazine and not Cohen or the Trump campaign and will not be discussed here. While this was happening, Cohen was still an attorney for the Trump Organization yet also was working with, advising, and making appearances on behalf of Trump's presidential campaign.

In October 2016, Stormy Daniels informed the magazine of her story and her willingness to make public statements about an alleged affair with Trump. The magazine then informed Cohen, who then negotiated a deal to pay $130,000 of his own money to Daniels in exchange for a confidential settlement agreement. To facilitate the payment, Cohen created a shell corporation named Essential Consultants LLC. Cohen then drew money from the fraudulently obtained home equity line of credit and had the money deposited into a new bank account he opened for Essential Consultants. Cohen then wired the money from the bank account to Daniels. On the bank form to complete the wire transfer, Cohen falsely indicated the purpose of the wire was a retainer. When in reality, the purpose of the payment was to suppress the negative story about Trump. Federal election law prohibits individual campaign contributions in excess of $2,700 per election and any corporate contributions directly to candidates. Cohen pleaded guilty to violating both of these prohibitions.

Cohen coordinated with members of the campaign about the hush money payments, yet in January 2017 Cohen sought reimbursement for the payment to Daniels from the Trump Organization, not Trump's campaign. Cohen presented executives of the Trump Organization with a copy of the bank statement from the Essential Consultants

bank account showing the $130,000 payment to Daniels. Executives then arranged to have Cohen paid back in monthly installments throughout 2017 by having Cohen submit invoices that requested payment pursuant to a retainer agreement for services rendered in that particular month. The Trump Organization accounted for these payments as legal expenses, when in truth, there was no retainer agreement, and the monthly invoices Cohen submitted were not in connection with any legal services he provided in 2017.

There are clear ethical issues with Cohen's behavior in connection with the hush money payments. Rule 8.4 on general attorney misconduct and dishonest behavior is applicable. Once again, Cohen engaged in conduct that casts a negative light on his fitness to practice law. Not only did he cooperate in fraudulent legal fee payment scheme, but he violated federal election law. Cohen once again allowed his desire to serve his client to outweigh his obligation to follow legal and basic ethical guidelines.

Cohen also failed to properly identify who his client was with regards to the efforts to curtail the news stories about Trump. Was Cohen acting as counsel for Trump personally, Trump's presidential campaign, or the Trump Organization? That question alone implicates Rule 1.13 governing the situation when organizations are the client. If Cohen was representing the Trump organization, then engaging in illegal behavior for Trump personally could be inconsistent with the lawful endeavors of the Trump Organization. Moreover, in this regard Cohen clearly violated Rule 1.5(b) on proper fee arrangements that requires an attorney to communicate to a client the scope of the representation and the basis or rate of fees for which the client will be responsible. Cohen may not have communicated what the scope of his legal services would be, for whom exactly, and how he would charge fees. This conduct may also have violated Rule 1.5(d)(3) because he charged "fees" based on a fraudulent retainer agreement.

Looking at the totality of Cohen's conduct, he had ethical obligations to pump the brakes, but it appears he failed to do so. Rule 1.2(d) states a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client." Under Rule 1.2(f), a "lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal." Rule 1.4(a)(5) required Cohen to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law." Cohen was also required by the Rules to withdraw from representing any Trump entity in relation to the hush money payments because under Rule 1.16(b), an attorney shall withdraw from a representation when the attorney knows or reasonably should know the representation will result in a violation of the Rules or of the law.

Cohen may also have violated Rule 4.4(a), which provides that in representing a client, an attorney may not use means that have no substantial purpose other than to harm a third person or violate the legal rights of that person. Cohen's actions could have violated the rights of the individuals who wanted their stories heard.

Cohen has said on record, to the effect, that he acknowledges his unlawful conduct and that he engaged in that conduct as a result of loyalty to President Trump. It may sound simple, but when dealing with high-profile clients, it is not. High-profile individuals or corporations may request or suggest advice on a small component of a much larger scheme or course of actions that counsel is tasked with undertaking. The tip of the iceberg may not be illegal or unethical, but the larger picture and grander scheme may be, and the illegality may not occur or actuate until much later down the road. Nevertheless, it is ultimately the responsibility of the attorney to determine whether the request could, on its face or by implication, lead to illegal conduct or unethical actions in violation of the law or of the Rules of Professional Conduct. That is the higher standard to which all attorneys are charged.

False Statements

In 2017, the United States Senate and House of Representatives Committees on Intelligence launched investigations into Russian election interference and possible links between Russia and individuals associated with political campaigns. Congress requested information from Cohen, but Cohen provided false information. In August 2017, Cohen sent a letter to the committees addressing his efforts at the Trump Organization to pursue a Trump branded property in Moscow, Russia. In the letter, Cohen made three material and false representations: (1) the Moscow project ended in January 2016 and was not discussed extensively with others in the Trump Organization; (2) Cohen never considered traveling to Russia for the project or asking Trump to travel to Russia for the project; and (3) Cohen did not recall any Russian government response about the project.

In September 2017, in anticipation of appearing before the Senate committee, Cohen released prepared remarks to the public, stating "This was solely a real estate deal and nothing more. I was doing my job." Cohen asked that the letter he previously sent be incorporated into his

testimony. According to the Special Counsel, Cohen knew his representations about the Moscow project were false and misleading. The Special Counsel asserted Cohen made the false statements to: (1) minimize the links between the Moscow project and Trump; and (2) give the false impression that the Moscow project ended before the Iowa caucus and the first primary for the election in hopes of limiting the ongoing Russia investigation.

Cohen has pled guilty to the false statements charge. At his sentencing hearing, Cohen is quoted as saying "I made these misstatements to be consistent with [Trump's] political messaging and out of loyalty to [Trump]."

Like with Cohen's earlier charges, ethical issues abound with his false statements to Congress. Cohen arguably violated one of the staple Rules of Professional Conduct, Rule 3.3, on candor before a tribunal. That rule prohibits attorneys from knowingly making a false statement of fact to a tribunal or failing to correct a false statement of fact previously made. Arguably, the congressional committees would fall under the definition of tribunal. Cohen also may have violated Rule 4.1, which mandates that while representing a client, an attorney shall not knowingly make a false statement to a third person.

All of this could have been avoided had Cohen not blindly followed and abided by his notion of client loyalty and instead followed his ethical obligations as a lawyer.

Larger Takeaways on Representing High-Profile Clients

The Michael Cohen fiasco provides clear examples of what not to do as an attorney. Whatever the jurisdiction, whatever the type of legal employment, and whatever the type of substantive law practice, the Rules of Professional Conduct govern counsel's actions. The prospect of personal reputation and financial gain can muddy the waters and make it difficult for attorneys to say no to high-profile and profitable clients. Cohen chose on many occasions to make the wrong decisions for expediency and is now paying a steep price for doing so. He is in jail and has lost the ability to practice law. His reputation is ruined.

Not only did Cohen violate federal law and the Rules of Professional Conduct when acting as counsel, he did so when engaged in personal business transactions. Once he became the subject of a federal criminal investigation, his tax evasion and bank fraud came to light.

When serving clients, especially high-profile and wealthy clients, it is vital that counsel remembers to act within the legal and ethical boundaries. Failing to do so can result in significant personal and professional hardship. And the client you served will more than likely abandon you and blame you for crossing the ethical and legal lines.

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For over 35 years David has handled and served as lead trial counsel on a variety of complex business litigation matters involving antitrust, accounting, banking, bankruptcy, construction, finance, insurance coverage and broker disputes, real estate and securities. He is a "go to" lawyer for the Firm's most challenging and difficult cases, and is often called upon by clients to take over cases that have been previously handled by other counsel.

David provides antitrust counsel to joint ventures, trade associations, research consortiums and companies involved in mergers and acquisitions, as well as those facing antitrust claims. He has also successfully defended clients in connection with criminal antitrust investigations by the U.S. Department of Justice. He is a frequent speaker and author on various legal topics, including antitrust, class actions and mergers.

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- The Legal 500 - Leading Individual - Antitrust – Midwest for his work with Mergers, Acquisitions and Buyouts
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- Martindale-Hubbell legal ability/ethical standards rating ("A-V") - Highest possible rating - 2019 (cited in multiple years)
- Illinois Leading Lawyers - 2019 (cited in multiple years)
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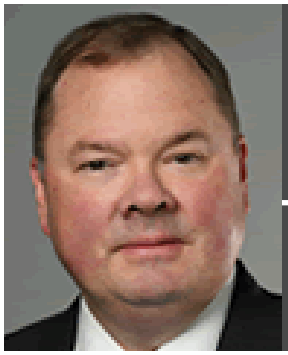

ETHICAL CONSIDERATIONS FOR DEFENSE COUNSEL, THE CLIENT AND THE INSURANCE CLIENT IN THE TRIPARTITE RELATIONSHIP

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Ethical Considerations for Defense Counsel, The Client and The Insurance Client in the Tripartite Relationship
David M. Atkinson

The majority of liability cases are defended by insurers on behalf of their insureds. When an insured tenders its defense of a liability case and the insurer agrees to provide a defense, whether unconditionally or under a reservation of rights, three parties are involved: (1) the insurer, (2) the insured, and (3) the defense lawyer. This is known as the tripartite relationship.

There has been much written about the ethical issues that arise when the insurer retains defense counsel to represent the insured, particularly when the defense is provided under a reservation of rights.[1] While some commentators have opined that there is (almost) always a conflict of interest in light of defense counsel's ongoing financial relationship with the insurer, there should be no question that the insurer and the insured share the common interests of effectively defending, defeating, or at least deflating, the claims made against the insured. Nonetheless, conflicts may arise during the defense of the case and there are not always easy answers in resolving these issues. This paper will discuss some of the most common ethical issues that can arise for defense counsel, the insured and the insurer in the defense of liability cases under the tripartite relationship.

Who is the client?

The traditional approach and the majority view adopted by most states is that defense counsel appointed by the insurer has two clients: the insured and the insurer.[2] A few jurisdictions consider the insured the "primary client," which suggests that defense counsel has a lesser obligation to the insurer.[3] A minority of jurisdictions hold that the insured is defense counsel's only client.[4] Notably, the ABA Model Rules of Professional Conduct provide little guidance and ABA ethics opinions have declined to take any position as to the identity of the client in the tripartite relationship.[5] Even if the insured is not treated as defense counsel's only or primary client, it is important for counsel not to take any action in the defense of the case that could harm the insured. There are a variety of situations in which conflicts can arise, but they can be broken down into four main categories: (1) the control of the defense; (2) reporting information that could be detrimental to coverage; (3) the cost of the defense; and (4) control of settlement.

1 One commentator described the relationship as "deeply and unavoidably vexing." Charles Silver, Does Insurance Defense Counsel Represent the Company or the Insured?, 72 Tex. L. Rev. 1583, 1587 (1994). And the Mississippi Supreme Court famously observed that "the ethical dilemma thus imposed upon the carrier-employed defense attorney would tax Socrates." Hartford Acci. & Indem. Co. v. Foster, 528 So. 2d 255, 273 (Miss. 1988).

2 Douglas R. Richmond, Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel, 73 Neb. L. Rev. 265, 270 (1994) ("The dual client doctrine reflects a widespread recognition that insurance defense counsel are deemed to have two clients in any given case: the insurer and the insured.").

3 See, e.g., Paradigm Ins. Co. v. Langerman Law Offices, P.A., 24 P.3d 593, 598 (Ariz. 2001) ("in the unique situation in which the lawyer actually represents two clients, he must give primary allegiance to one (the insured) to whom the other (the insurer) owes a duty of providing not only protection, but of doing so fairly and in good faith").

4 See Safeway Managing General Agency, Inc. v. Clark & Gamble, 985 S.W.2d 166, 168 (Tex. App.-San Antonio 1998) (no attorney-client relationship exists between an insurance carrier and the attorney it hired to defend one of the carrier's insureds); In Re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806, 814 (Mont.2000) ("We hold that under the Rules of Professional Conduct, the insured is the sole client of defense counsel."); Atlanta Int'l Ins. Co v. Bell, 475 N.W.2d 294, 297 (Mich.1991) ("the relationship between the insurer and the retained defense counsel . . . [is] less than a client-attorney relationship"); Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Cor., 730 A.2d 51, 65 (Conn.1999) ("we have long held that even when an insurer retains an attorney in order to defend a suit against an insured, the attorney's only allegiance is to the client, the insured").

5 ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-403 at 2 (1996) (refusing "to enter the debate as to whom the lawyer represents" in the tripartite relationship).

Who controls the defense?

With few exceptions, almost every liability insurance policy gives the insurance company the right to control the defense of the case.[6] In most situations, this does not present a problem, as it will be generally be in the common interest of both the insured and the insurer to successfully defeat or limit the claims presented against the insured. But what happens if the insurer is providing a defense under a reservation of rights? Many jurisdictions have held that the insured is entitled to retain "independent counsel" (at the expense of the insurer) to protect its interests when the insurer issues a reservation of rights, as there is a conflict between the interests of the insurer and the insured.[7] But even if the insured has independent counsel (whether at its own expense or at the expense of the insurer), defense counsel retained by the insurer may still be confronted with a situation where some action taken in defense of the case could impact coverage under the policy and the defense provided to the insured.

The general rule is that the insurer must defend the entire lawsuit if at least one claim pled against the insured triggers coverage under the policy.[8] Situations may arise in which a dispositive motion could eliminate the covered claim, in which case the insurer might withdraw the defense. While defense counsel should not provide advice regarding coverage issues, counsel may be aware that the insurer is providing a defense based on only one count of a multi-count complaint. In that case, should defense counsel even report that the potential for filing such a motion exists? Yet, counsel has a duty to keep the insurer informed of the defense of the case, particularly in those jurisdictions in which the insurer is a dual client. The safest course of action is to include the possibility of filing dispositive motions when reporting on the defense of the case, without commenting on any potential coverage issues. If the insured/client asks counsel whether such a motion could impact coverage, counsel should respond that they cannot comment on coverage or address coverage issues. Likewise, counsel should not engage in any discussion with the insurer regarding coverage. The situation becomes even more complicated if counsel is asked whether he or she recommends filing the motion.

There are no easy answers, nor is there clear guidance from the case law or rules of professional conduct.[9] We recommend that defense counsel follow best practices to minimize potential conflicts. We think it is prudent for defense counsel to identify the potential coverage issue(s), advise the clients to seek counsel on any perceived coverage issues and not advise either client regarding those issues. As the coverage issues unfold, defense counsel should not only continue proper joint communications, but should also seek and obtain the consent and direction of both clients regarding defense actions to be taken. At times, this could require withdrawal if the carrier persists in directing a course of action (which it may be entitled to take under its contract) to avoid coverage. Defense counsel should not undertake any action in the defense of the case that they have been directed by the insurer to pursue if the insured objects.[10]

Reporting information that could be detrimental to coverage?

Defense counsel has a duty to disclose to the insurer all information concerning the action relevant to the underlying lawsuit, and to timely inform and consult with the insurer on all matters relating to the action. A related issue can arise when the defense lawyer learns of confidential information that might impact coverage or the defense provided to the insured. As the Minnesota Supreme Court observed:

> [D]efense counsel and the insurer inevitably share information about claims. With defense counsel and the insurer in frequent contact over the details of the

6 For example, the standard Commercial General Liability (CGL) coverage form provides that the insurer has both the "right" and "duty" to defend any suit against the insured seeking damages within the policy's coverage. See, e.g.,Rx.com Inc. v. Hartford Fire Ins. Co., 426 F. Supp. 2d 546, 559 (S.D. Tex. 2006) (applying Texas law) (stating "an insurer's 'right to defend' a lawsuit encompasses 'the authority to select the attorney who will defend that claim and to make other decisions that would normally be vested in the insured as the named party in the case").

7 The leading case is the well-known Cumis decision in California, later adopted by California Civil Code §2860 (1996), which provides that a conflict of interest creates a duty for the carrier to provide independent counsel, unless the policyholder waives the right in writing. See San Diego Navy Federal Credit Union v. Cumis Ins. Society, 162 Cal.App. 3d 358, 208 Cal.Rptr. 494 (1984). Other jurisdictions follow variations of this rule. See, e.g., Travelers Indem. Co. of Ill. v. Royal Oak Enters., Inc., 344 F. Supp. 2d 1358, 1372 (M.D. Fla. 2004), aff'd, 171 Fed. Appx. 831 (11th Cir. 2006) (applying Florida law) (recognizing a sufficient conflict of interest warrants the "insured's retention of its own counsel at the expense of the insurer"). But when there is no conflict of interest, the insurer generally retains the right to select counsel and the policyholder may retain its own counsel but at its own expense. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365 (4th Cir. 2005) (applying South Carolina law) (holding where no conflict of interest exists and the policyholder does not consent to counsel chosen by the insurer, the policyholder can employ another counsel at its own cost).

8 See Windt, Insurance Claims and Disputes, §4.13 (1990).

9 Many of the decisions allowing (or articles advocating) the insured's right to insist on independent counsel seem to suggest (or at least imply) that insurance defense counsel will not always act in the best interests of the insured when forced to choose between the interests of the insured and the interests of the insurer, who might be a significant source of repeat business. See United States Fidelity & Guaranty Co. v. Louis A. Roser Co., 585 F.2d 932, 938 (8th Cir. 1978) (requiring independent counsel due to the fear that counsel retained by the insurer "would be inclined, albeit acting in good faith, to bend his efforts, however unconsciously, toward establishing that any recovery by [plaintiff] would be grounded on the theory of [the] claim which was not covered by the policy"). Other courts have rejected this view (and implicit criticism)of the ethics of defense counsel. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Bev. Co. of S.C., LP, 433 F.3d 365, 373 (4th Cir. 2005) (applying South Carolina law) (disagreeing that "the Supreme Court of South Carolina would profess so little confidence in the integrity of the members of the South Carolina Bar" and noting "[r]igorous ethical standards govern South Carolina attorneys").

10 Some courts have held that the insured is entitled to independent counsel at the insurer's expense when a dispute arises regarding defense strategy. See 69th Street and 2nd Ave. Garage Associates, L.P. v. Ticor Title Guarantee Co., 622 N.Y.S.2d 13, 14 (App. Div., 1st Dept.), appeal denied, 661 N.E.2d 999 (N.Y. 1995) (policyholder was entitled to counsel of its own choosing where the policyholder and the insurer disagreed on defense strategy, and insurer's proposed course of action could result in severe adverse consequences to the policyholder). But compare Roussos v. Allstate Insurance Co., 655 A.2d 40, 44 (Md. Ct. Spec. App.), cert. denied, 663 A.2d 73 (Md. 1995) (refusing "to extend an insurer's duty to provide independent counsel to a situation where the insured merely disagrees with the manner in which he or she is being defended").

> litigation, the insurer has ample opportunity to inform defense counsel how different approaches to the claim might affect its interests. When the interests of the insurer differ from those of the insured, defense counsel who represents both may find itself in what we have called "an exceedingly awkward position."[11]

Most courts hold that defense counsel cannot communicate information detrimental to the insured to the insurance company.[12] In that situation, defense counsel's safest course of action is to obtain the informed consent of the insured client before sharing any facts which may jeopardize coverage.[13] If a coverage-jeopardizing fact is material to the case, counsel should advise the client to seek advice from coverage counsel before taking any action.

Comment [g] to Section 51 of the Restatement of Law Governing Lawyers states:

> A lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and the insured are not in conflict…however, such a duty does not arises when it would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured.[14]

In some instances, the insurer will "split" the file, with one adjuster assigned to the defense and one to coverage. There will be times when the "defense adjuster" will learn of facts that cannot be shared with the "coverage adjuster." Because there are no clear rules regarding "splitting files" and not all insurers follow the practice, defense counsel should be clear as to the role of the claims professional to whom he or she is reporting.

The cost of the defense and defense strategy

Beyond the question of whether to file a dispositive motion that might eliminate coverage, conflicts can also arise regarding whether to pursue certain defense strategies.[15] For example, the insurer and the insured might disagree about whether to retain certain experts or pursue particular lines of discovery. Billing guidelines can also present similar challenges.[16] The insured will want the best defense possible, and may feel that the effectiveness of the defense is compromised by billing guidelines or the insurer's (understandable) desire to control defense costs. Situations do arise in which the insured becomes dissatisfied with defense counsel's lack of preparation for trial (or proposed trial strategy), and uses its own attorneys to ensure an adequate defense.[17]

Rule 2.1 of the Model Rules of Professional Conduct states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." A conflict most commonly occurs when defense counsel makes a recommendation to the insurer regarding a proposed plan of action, which the insurer refuses to approve. Where the recommended strategy or action is critical to the defense and defense counsel believes the insured would be harmed by failing to perform that act, a conflict of interest can arise. This is most critical in cases where there is potential for excess exposure.

The American Bar Association's Formal Opinion 01-421, Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions, would require defense counsel to first ask the insurer to reconsider the refusal.[18] If the insurer stands firm in its rejection of the suggested course of action, defense counsel must then inform the insured of his/her recommendation and the insurer's refusal. Counsel can then seek the insured's consent to proceed as directed by the insurer. This would necessarily require a discussion of the risks and benefits of each proposed course of action. If the insured does not consent, the ABA recommends defense counsel withdraw from the matter as he/she cannot adequately represent the interests of both parties.[19]

Effective communication is the best way for all involved to work through any potential conflicts. Defense counsel should be mindful to keep the insured and the insurer

11 Pine Island Farmer's Coop v. Erstad & Reimer, PA, 649 N.W.2d 444, 450 (Minn. 2002) (citation omitted). The Pine Island court went on to observe what it perceived as "the danger is that, if a conflict of interest does arise, the nature of the tripartite relationship makes it likely that defense counsel will tend to favor the interests of the insurer at the expense of those of the insured." Id. As noted above, we think this is an unfair and unrealistic view of the ethics of defense counsel.

12 Twin City Fire Ins. Co., 433 F2d at 373. See Windt at § 4:19.

13 Some courts have held that the insurer may not rely on confidential information, disclosed without the consent of the insured, to disclaim coverage. See Parsons v. Continental National American Group, 550 P.2d 94, 97 (Ariz. 1976) (because defense counsel breached his fiduciary duty to the insured by divulging confidential information without the insured's consent, the insurer was estopped from denying coverage based on that information).

14 Restatement 3d of the Law Governing Lawyers, § 51, Duty of Care to Certain Nonclients.

15 There is a detailed discussion of this topic in Barker & Silver, Professional Responsibilities of Insurance Defense Counsel (2017) (Chapter 11 – Adjuster Involvement in Defense Planning and Decision Making).

16 The Montana Supreme Court has held that any requirement of prior approval impermissibly interferes with a lawyer's obligation to exercise independent judgment on behalf of the policyholder. See In Re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d at 814-15.

17 Carrousel Concessions, Inc. v. Fla. Ins. Guar. Ass'n, 483 So.2d 513, 516-17 (Fla.Ct. App. 1986) (allowing insured to pursue claim to recover costs of defense incurred due to insurer's failure to provide adequate defense).

18 See American Bar Association's Formal Opinion 01-421, Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions, at pp. 5-6.

19 It is instructive to consider Comment 2 to Rule 1.7: Conflict of Interest: Current Clients, which provides:Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

informed of defense strategy and developments in the defense of the case. If a dispute arises regarding strategy, it is reasonable for defense counsel to provide their professional advice and recommendations, and counsel should not let the cost of the defense determine their proposed strategy – with the understanding that it is certainly reasonable to provide a budget. It should also be noted that with some liability policies, the available liability limits will be reduced by defense costs, and this can become another consideration in determining defense strategy.

Who controls settlement?

For defense counsel, this should be easy. Defense counsel does not decide when to settle or how much to pay, they simply evaluate the claims presented and make recommendations. Counsel should promptly report all settlement offers and keep the insurer and the insured advised regarding settlement negotiations. If a dispute arises regarding whether to settle, the defense lawyer does not make the call. But who does?

Rule 1.2 of the Model Rules of Professional Conduct states that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." As discussed above, most jurisdictions consider the insurer to be defense counsel's client, along with the insured, in the tripartite relationship. Most liability insurance policies allow the insurer to settle without the insured's consent, and there is a large body of law regarding the insurer's liability to the insured if it acts unreasonably or in bad faith in rejecting an offer to settle. These rules will govern most situations, and defense counsel should be careful to stay out of any dispute between the insured and insurer regarding settlement. For example, if the insured wants to demand that the insurer accept a settlement offer, defense counsel should not be involved in those discussions beyond communicating the insured's request (after advising the insured that it should communicate directly with the insurer or through their respective coverage counsel).

The Restatement of the Law of Liability Insurance – A Reimagining of the Tripartite Relationship

In May 2018, The American Law Institute membership approved the final draft of the Restatement of the Law of Liability Insurance ("RLLI"). The RLLI has been the subject of much criticism in the insurance industry, including objections from a number of state insurance regulators.[20] Much of this criticism has focused on the RLLI's adoption of minority or entirely new principles of law, so that it is not a "restatement" of settled common law. Among its many departures from settled law, the RLLI adopts new principles regarding the tripartite relationship.

First, Section 11 of the RLLI provides that the insurer "does not have the right to receive any information of the insured that is protected by attorney–client privilege, work-product immunity, or a defense lawyer's duty of confidentiality under rules of professional conduct, if that information could be used to benefit the insurer at the expense of the insured." In effect, defense counsel would be required to hide information from the insurer if it could harm the insured. As discussed above, the situation is already complicated enough for defense counsel. Moreover, these issues are governed by professional rules of ethics and, in some states, decisions by the courts.

Second, Section 12 provides that the insurer may be held liable for the conduct of defense counsel retained to represent the insured, as well as "negligent selection of defense counsel." Section 12 provides:

> § 12. Liability of Insurer for Conduct of Defense
>
> (1) If an insurer undertakes to select counsel to defend a legal action against the insured and fails to take reasonable care in so doing, the insurer is subject to liability for the harm caused by any subsequent negligent act or omission of the selected counsel that is within the scope of the risk that made the selection of counsel unreasonable.
>
> (2) An insurer is subject to liability for the harm caused by the negligent act or omission of counsel provided by the insurer to defend a legal action when the insurer directs the conduct of the counsel with respect to the negligent act or omission in a manner that overrides the duty of the counsel to exercise independent professional judgment.

While a number of jurisdictions have considered whether insurers may be held liable for the conduct of defense counsel, the issue is far from settled.[21] Many jurisdictions have explicitly rejected claims that the insurer could be vicariously liable for the conduct of defense counsel, reasoning that the insurer does not have the right to

20 After the 2017 draft was released, the governors of several states (Iowa, Maine, Nebraska, South Carolina, Texas and Utah) sent letters protesting the Restatement, asserting that the ALI was usurping the role of state legislatures to regulate insurance and taking positions contrary to the common law in their states. Following the approval of the restatement, the Ohio Legislature actually passed a statute specifically to prevent the adoption of the RLLI, providing that the RLLI "does not constitute the public policy of this state and is not an appropriate subject of notice." Ohio Rev. Code § 3901.82.

21 See Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co., 819 N.W.2d 602, 615 (Minn. 2012) ("The question of whether an attorney appointed to represent an insured to defend a claim is an agent for the insurer is one that has divided courts, and often turns on specific facts.").

control the attorney's professional judgment.[22] Other courts have held that the insurer may be held liable if it expressly directs the conduct of defense counsel.[23] The new approach under the RLLI would create liability on the part of the insurer if it negligently selects defense counsel to protect the insured. This goes beyond situations where the insurer oversteps its role in the defense of the case and is likely to create a great deal of conflict between the insurer and insured over the selection of defense counsel. One can imagine the insured citing the RLLI and asserting that the insurer's preferred attorney is not properly qualified to defend the case. While some policyholders negotiate the right to select defense counsel, such a right is not present in every contract of insurance. And what happens when there is a bad outcome and the insured claims, in hindsight, that the insurer was negligent in the selection of defense counsel?[24]

22 See, e.g., Ingersoll-Rand Equip. Corp. v. Transp. Ins. Co., 963 F. Supp. 452, 454 (M.D. Pa. 1997) (an attorney's ethical obligations to the insured "prevent the insurer from exercising the degree of control necessary to justify the imposition of vicarious liability"); Lifestar Response of Ala., Inc. v. Admiral Ins. Co., 17 So. 3d 200, 214-18 (Ala. 2009) (insurer not vicariously liable for defense attorney's negligence because insurer did not have the right to control the attorney's professional judgment); Feliberty v. Damon, 72 N.Y.2d 112, 527 N.E.2d 261, 265, 531 N.Y.S.2d 778 (N.Y. 1988) ("The insurer is precluded from interference with counsel's independent professional judgments in the conduct of the litigation on behalf of its client."); Merritt v. Reserve Ins. Co., 34 Cal. App. 3d 858, 110 Cal. Rptr. 511, 526 (Cal. Ct. App. 1973) ("In our view independent counsel retained to conduct litigation in the courts act in the capacity of independent contractors, responsible for the results of their conduct and not subject to the control and direction of their employer over the details and manner of their performance."). See also 1 WINDT, INSURANCE CLAIMS AND DISPUTES § 4.40, at 275 (3d ed. 1995) ("There is . . . no theoretical justification for imputing a defense counsel's negligence to the insurer.").

23 Givens v. Mullikin, 75 S.W.3d 383, 395 (Tenn. 2002) ("an insurer can be held vicariously liable for the acts or omissions of an attorney hired to represent an insured when those acts or omissions were directed, commanded, or knowingly authorized by the insurer."). However, the Givens court was careful to note that "cases in which an insurer may be held liable under an agency theory will be rare indeed" and that the plaintiff must show that the "attorney's tortious actions were taken partly at the insurer's direction or with its knowing authorization." Id. at 396.

24 A federal district court in Kansas recently rejected a claim against an insurer based on negligent retention of defense counsel, declining "to use a nonbinding Restatement as a means to overturn or expand Kansas law." Progressive Northwestern Ins. Co. v. Gant, Case . No. 15-9267-JAR-KGG, 2018 U.S. Dist. LEXIS 163624, at *16 (D. Kan. Sep. 24, 2018).

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- Appellate
- Bad Faith Litigation
- Catastrophic Injury & Wrongful Death
- Commercial Litigation
- Construction Law
- Insurance Coverage
- Premises Liability

Publications
- “The Known Loss Doctrine and Liability Insurance,” Claims Journal - Claims Journal, 02.20.2018
- “Applying the Known Loss Doctrine to Liability Insurance,” ABA Coverage Journal - ABA Coverage Journal, 07.12.2017

Awards/Recognition
- The Best Lawyers in America©, 2018 – present
- AV Preeminent® Rating, Martindale-Hubbell Peer Review
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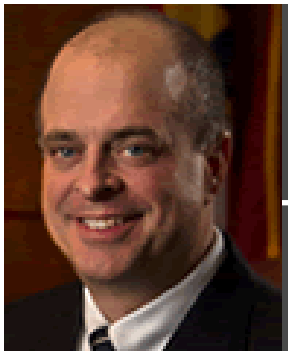

THE DEFENSE LAWYER'S IDENTITY CRISIS: UNDERSTANDING WHO YOUR CLIENT IS IN A TRIPARTITE RELATIONSHIP

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The Defense Lawyer's Identity Crisis: Dilemmas that Arise from the Tripartite Relationship Involving the Insured, Insurer and Counsel

Philip C. Graham[1] *and John S. Sandberg*[2]

Is this a dagger which I see before me, the handle toward my hand? Macbeth, Act 2, Scene 1, Shakespeare, W.

When an insurer hires an attorney to defend an insured, the contract of insurance and the attorney's relationship with the insurer creates a resulting association between the attorney, insurer, and insured called the "tripartite relationship." Although in most instances this relationship is, or at least appears to be (mostly) trouble free, the "dagger" referred to in the quote from Macbeth is an apt device, because this relationship can be fraught with danger for the unwary, and counsel must be very careful how this relationship is handled.

In some jurisdictions the insurer and the insured may both be the "client." While in others the insured is the client, and the party to who defense counsel owes the ultimate duty of loyalty in the event of a conflict, even though the insurer is paying for the defense. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1476 (1981). In yet others, counsel may have duties that run to the insurer, but the insured is counsel's only "client."In the vast majority of these cases the interests of the insurer and the insured are aligned and defense counsel navigates the tripartite relationship without issue. The insurer covers the claim and provides a defense, there is adequate coverage, and the defense proceeds smoothly. The case is settled or tried and the insurer, insured and defense counsel move on. Only a memory remains.

This relationship – while not often problematic – can become quite difficult to manage when things do not proceed according to the script. There are several common pitfalls which can create issues for counsel in determining where her duty of loyalty lies, and may give rise to either potential or actual conflicts of interest.
This paper discusses a few of the most common issues that may arise, and the implications for counsel in their management in order to avoid trouble with the client and the insurer.

Covered Claims v. Uncovered Claims

The first subset of claims in this category is intentional versus negligence acts. The intentional act is not covered, but the negligent act is. Here, the complaint alleges both types of claims either in separate counts, or interwoven with one another. Obviously the insured wants all of the claims to be covered. On the other hand, the insurer is benefited if the evidence shows the acts were intentional versus negligent, so the claim is not covered, and its defense and indemnity obligations are not implicated. Under these facts, and assuming a "one-client" jurisdiction, defense counsel must try this as a negligence case and make it clear to the insurer that counsel is bound by Rule 4-1.8, and that the representation of the insured is governed by counsel's professional judgment. The insurer should instruct

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2 Mr. Sandberg is a founding member of the firm and currently is senior counsel to the firm. He has been engaged in the litigation and trial of landmark commercial, insurance, maritime, aviation, other product liability and civil litigation for over 40 years. He is an active member of the firm's insurance law team and in addition to being a founding member, served multiple terms as managing partner of the firm.

defense counsel to defend the entire case vigorously, including both potentially uncovered claims, and not just the covered claim, since this is in the best interest of the insured (as well as the insurer). In those jurisdictions that recognize it, this circumstance may also give rise to a duty by the insurer to appoint independent or Cumis counsel.

This scenario occurred in Maryland Cas. Co. v. Peppers, 355 N.E.2d 24, 26 (Ill. 1976) where the plaintiff alleged negligent and intentional conduct by the insured. The insured's policy only covered negligent conduct and not intentional conduct. Id. at 27. The Illinois Supreme Court explained that a conflict existed between the insurer and the insured because if the insured was found liable to the plaintiff, then it would be in his interest to be found negligent, which would have placed the financial loss on the insurer—but it would be in the insurer's interest that the insured be found liable for an intentional tort, which would have placed the financial loss on the insured. Id. at 30. The court considered that to be a sufficient conflict of interest to justify the use of independent counsel. Id. In this way the interests of the insured can be protected and defense counsel will not be put into a situation where he will violate duties owed to his client.

In jurisdictions that recognize independent counsel, handling a case without independent counsel being appointed creates a potential risk of liability for defense counsel for both a bar complaint and a malpractice claim. In those jurisdictions that do not recognize the right of an insured to have independent counsel appointed, defense counsel should advise their client of its right to retain personal counsel (at its own expense) to defend potentially uncovered claims or, at a minimum, to address coverage issues with the insurer. The retention of personal counsel by the insured provides defense counsel with the best protection available in those jurisdictions that do not require the insurer to retain independent counsel for potentially uncovered claims.

The next subset of claims is contract versus tort claims. For example, assume an insured engineering company is sued for breach of contract (not covered), and for professional negligence (covered). The difficulties that can arise are almost endless. There may be a settlement demand covering both claims. What should the insurer do? What should defense counsel recommend? What if an expert is needed for the contract case but not the professional negligence claim? Will the insurer pay for the expert? Should counsel recommend that the insurer pay? The answers to these questions, and others that may arise, depends on the jurisdiction and to what extent the insurer and/or the insured, or both of them, are "clients" to which counsel owes the ultimate duty of loyalty. In jurisdictions where Cumis counsel is required, these circumstances may trigger an obligation to appoint independent counsel.

Reservation of Rights Letters

Typically, the insurer will issue a Reservation of Rights ("ROR") letter when there is a potential for uncovered claims. ROR defense situations are fertile ground for giving rise to many difficult ethical dilemmas for defense counsel. First, in those jurisdictions where the insurer has a duty to defend both covered and uncovered claims is whether defense counsel should receive a copy of the ROR, and if they do, whether counsel should read the contents. The best practice is for defense counsel to receive, read and understand the basis for the ROR. Only in this way can defense counsel understand and comply with its duty of loyalty to its client not to reveal information to the insurer that could potentially jeopardize coverage. If counsel elects not to receive the ROR, or does not read it if received, then counsel believing that he is avoiding a potential conflict, may unwittingly create one by inadvertently breaching his duty of loyalty to the client by supplying the insurer with information that will jeopardize the client's coverage, which he would not have done if he had been aware of the carrier's coverage defenses.[3]

Second, the receipt of a ROR may create a right to independent (Cumis) counsel in those jurisdictions recognizing such a right. In other jurisdictions where independent counsel are not required the ROR may permit the insured to engage in a consent judgment or other similar "rollover agreement", or other action to protect itself. Although the technical issues pertaining to Cumis counsel, and when they are required, is beyond the scope of this paper, these issues must nevertheless be considered by defense counsel when addressing the issuance of a ROR in those jurisdictions.

Inadequate Policy Limits

Another common dilemma arises whenever the insured's policy has limits of insurance that are inadequate for the claims being made and the insured is then exposed to an excess judgment. This dilemma typically (but not always) involves catastrophic injuries, with either no or only a minimal liability defense. It may also involve claims where there are multiple claimants, so that even if the claims are not catastrophic the policy limits may be exhausted. In

3 Although there are sometimes differing opinions expressed by competent counsel on this issue, with the chief concern being that if defense counsel receives and reads the ROR, then it can be argued he was complicit in working with the carrier to terminate the insured's coverage if that result occurs. Although this is a risk of receiving and reading the ROR, the authors believe that the best practice is to read the ROR letter and document carefully with the client that you will be careful to not disclose information that could jeopardize coverage and to continue to document the fact that counsel is scrupulously observing its duty of loyalty to the insured.

some jurisdictions plaintiff's counsel may be trying to "set up" the insurer for a "bad-faith" claim, and the insured may have a strong incentive to participate with the plaintiff in a "rollover agreement" in order to protect its assets. This gives rise to another actual or potential conflict for defense counsel with regard to the relationship with the insurer.

Another category of inadequate limits circumstances involves eroding or burning limits policies. A "burning limits" or "eroding limits" policy is an insurance policy where defense and investigation costs are taken out of the monetary pool available to resolve the claim. Gary D. Nelson and Maureen R. De Armond, Ethical Dilemmas Presented to Insurers and Defense Counsel They Hire: A Look at Burning Limits, Defending Multiple Insured, and Discovery, at 11 (available at: www.thefederation.org/documents/Ethical%20Dilemmas,%20G.%20Nelson.pdf); Gregory S. Munro, Defense Within Limits: The Conflicts of "Wasting" or "Cannibalizing" Insurance Policies, 62 Mont. L. Rev. 131 (2001). The problem with these policies is that the greater the defense and investigation costs, "the less money is available to make the claim go away." Nelson at 11. A burning limits policy can place the defense attorney hired by the insurer to represent the insured in a difficult position.

In the "burning limits" scenario, conflicts may arise between the insurer who decides it wants to defend a case and needs to put up a vigorous defense, which will significantly reduce the amount to settle the case or pay the loss in the event of an adverse judgment. Of course, the dilemma created for the insured is that it may be exposed to liability for defense costs and indemnity once the limits of insurance are exhausted. Defense counsel may be faced with another ethical dilemma if the limits are used up and the insurer instructs counsel to disengage, counsel may not be able to disengage from the defense of the insured without first obtaining court approval.

Also depending on the individual jurisdiction's discovery rules pertaining to insurance, defense counsel will likely be required to disclose that there are eroding limits. A good practice is to produce not only the declaration pages, but the entire insurance policy, including all riders and endorsements, so that counsel may make a full evaluation of the coverage issues. The failure to disclose eroding limits may expose defense counsel and the insurer to sanctions for failure to completely respond to the discovery requests regarding the limits of insurance.

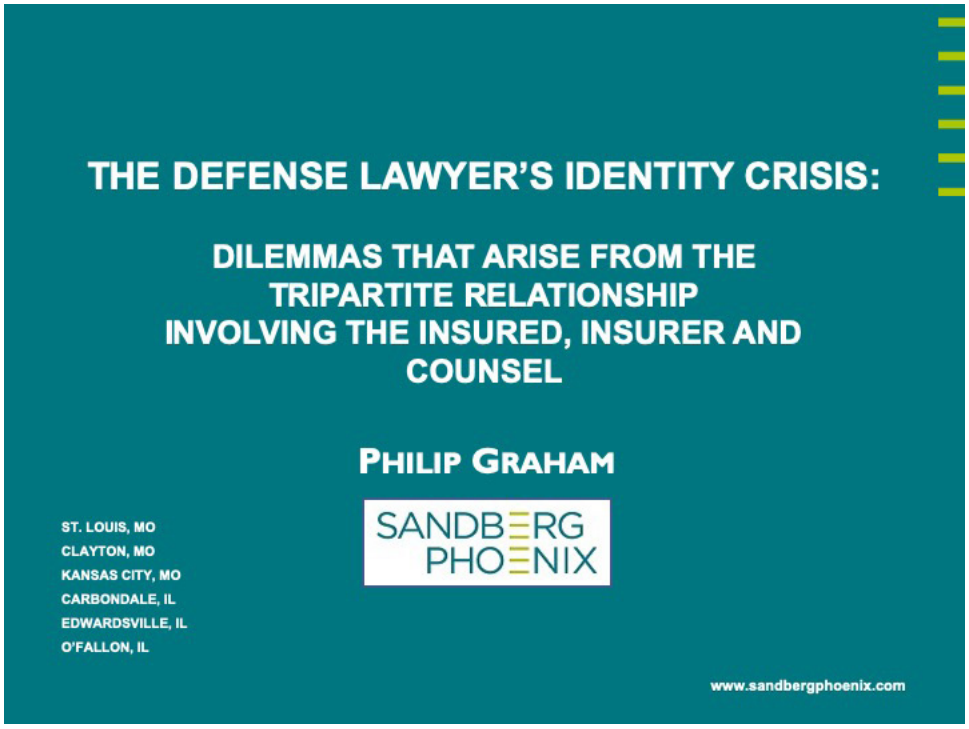
Multiple Insured Scenarios

Sometimes the plaintiff makes a policy limits demand against one, but not all, of several covered insureds. Does the insurer have a duty to defend one insured after it has utilized the policy limits in a settlement on behalf of another insured? The answer to this question is jurisdiction specific, with some jurisdictions finding that the insurer's duty to defend, at least in theory, terminates upon payment of the limits of insurance. For example, in Millers Mutual Insurance Association of Illinois v. Shell Oil Co., 959 S.W.2d 864, 870 (Mo. App. 1997) the Missouri Court of Appeals considered this issue and held that "[a]n insurer relying on unambiguous policy language may terminate its duty to defend an additional insured when the policy limits are exhausted in a good faith settlement on behalf of the named insured." Id. at 872.

Pre-Suit Investigations

A common scenario involves a pre-suit investigation assignment, with the agreement that counsel will defend the insured after the lawsuit is filed. Defense counsel should only accept the assignment if the insurer advises that it has accepted the defense of the insured without ROR. If not, and your investigation is used by the insurer to issue a ROR, counsel cannot defend the insured. Existing counsel has essentially served as coverage counsel to the insurer, and worked against the insured's best interests. Representing the insured as defense counsel in those circumstances would expose counsel to potential liability.

These are but a few of the myriad dilemmas that may arise from the tripartite relationship. Defense counsel should carefully assess each new assignment for risk associated with this common relationship. Each new file should be carefully reviewed for issues, including those pertaining to the limits of insurance, multiple claimants and insureds, and any ROR that the insurer has asserted. Not only will this serve to protect defense counsel, but also will help insure that the interests of the client are best served.



Insured is Primary Client

- The insured is the primary client to whom the attorney owes a duty of loyalty.

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1476 (1981).

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Typical case

- Insured has adequate coverage.
- Insurer/Insured are in agreement on major issues – trial v settlement, value
- Trial/settlement proceed smoothly

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When things aren't typical

- "Danger Will Robinson Danger!"

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Covered vs Uncovered Claims

- Intentional v negligence claims.
  - The Negligence Claim is covered
  - The Intentional Claim is not covered
- At trial what do you argue
  - Have to argue what the insured wants, i.e., that the accident was the result of negligence.
  - If insurer objects, independent counsel required.

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Covered vs Uncovered Claims

- During your defense of insured you learn information that could defeat coverage. Do you report to insurer?
  - Since this would affect material interest of insured you must
    - Obtain consent of insured
    - If no consent and insurer insists on report of information, then must withdraw. (You are in a conflict.)

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Contract vs Tort Claims

- Engineering Company insured is sued for a contract – not covered – claim and for a professional negligence – covered – claim.
  - Settlement demand for both claims
    - What does insurer do? What do you recommend they do?
  - Need expert for contract but not the professional negligence claim?
    - Who pays for expert
      - May depend on interrelation of claims

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Low or Inadequate Limits

- Policy limits demands are typical
  - You should consider offer before demand (duty to put insured first).
- Defending multiple insureds
  - If you get a policy limits demand as to just one, you are in a conflict
- Eroding limits - settlement $ versus attorneys fees
- Self insured retentions

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Settlements

- Insurer has the policy right to decide settlement
  - Insured says no – don't settle
- You must advise insured that it can reject policy and settlement and defend without insurance

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Helping with investigation

- Insurer hires you to investigate incident.
- Your investigation reveals some possible coverage defenses.
- Insurer issues ROR.
- You can't represent insured. You have already worked against their interests.

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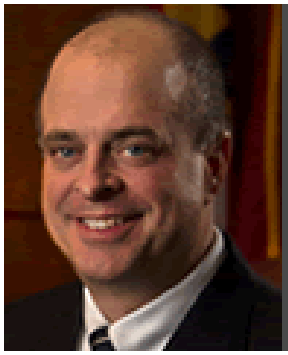

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Phil Graham has over 27 years of litigation experience. He is a member of the firm's Business Litigation and Products Liability goups. Phil is an experienced insurance coverage and "bad-faith" lawyer representing commercial insurers in complex coverage disputes involving various lines of commercial insurance. He is experienced in providing coverage opinions and litigating coverage and bad-faith cases. Phil also has expertise and experience in handling complex coverage issues and litigation involving first-party property damage claims.

Phil is also experienced in defending and counseling employers in employment discrimination and wrongful termination litigation, including EEOC and parallel state administrative matters. He also has experience and expertise counseling clients and in litigating non-compete, non-solicitation and non-disclosure agreements.

For fun, Phil enjoys running and playing the guitar. He spends most of his free time with his wife, Amy and children Matthew and Jenna. He loves watching his kids play soccer, basketball and volleyball, and reading books with his daughter. On Saturdays in the fall, you can find him rooting for the University of Missouri Tigers' football team.

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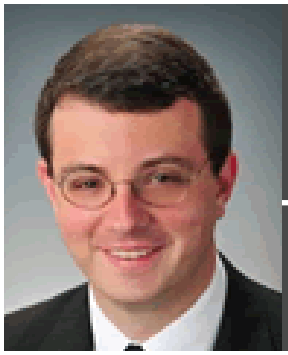

ETHICS: THE LAWYER AS A BOARD MEMBER - ETHICAL AND PRACTICAL CONSIDERATIONS

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The Lawyer as Board Member: Ethical and Practical Considerations
Tom Heywood

"Lawyers lead in America. They always have. And they always will, in large measure because of their unique qualifications and ethical standards of conduct. It is time for lawyers to share this insight more broadly with others and consider the implications of this undeniable fact – lawyers lead!"[1]

Introduction

Director. Board Member. Trustee. Whatever term is used, a board member's duties involve bigger picture governance of an organization, including oversight of the CEO, mission planning, resource procurement, management monitoring, organizational review, and board evaluation. A board member is a policy-maker, supporting the clear distinction between the policy functions of the board and the day-to-day operational functions of officers. A board member is also a fiduciary, insofar as he or she has discretionary authority over the assets of another. In sum, a board member must act in the best interests of the organization he or she leads and represents.

Lawyers who are board members have additional duties and responsibilities. An attorney has formal and legal obligations under a code of professional and ethical responsibility. These responsibilities find their source in the Model Rules of Professional Conduct, and cover such areas as conflicts of interest and confidentiality. Thus, a lawyer board member must act in the best interests of the organization he counsels and represents, and honor the ethical rules imposed upon legal professionals.

When the roles of lawyer and board member overlap, the lawyer board member must pay special attention to fulfilling the duties required of both positions. This paper discusses the ethical and practical considerations of serving an organization as both a lawyer and board member.

Ethical Considerations: Implications of the Model Rules of Professional Conduct

Rule 1.1 – Competence

A lawyer board member is likely to be considered a resource on all legal topics, not just the lawyer's specific field of expertise. In these cases, how should the lawyer board member proceed? Should she volunteer a best guess or take valuable time to dig deeper? Should she include her legal colleagues in a discussion on the issue?

This is where the short, yet broad, professional conduct rule involving competence comes into play: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation."[2]

The concept of "knowledge" encompasses substantive legal principles, basic research, procedure, court rules, and even technology[3], while "skill" encompasses drafting

1 Hardesty, David, Leading Lawyers: Lawyers in Leadership Roles, WV Lawyer, at 37 (October/December 2009).

2 Ann. Model Rules of Prof'l Conduct r. 1.1 (Am. Bar Ass'n 2015).

3 Sabis, Christopher and Daniel Webert, Understanding the "Knowledge" Requirement of Attorney Competence: A Roadmap for Novice Attorneys, 15 Geo. J. Legal Ethics 915 (2002). In 2012, language involving relevant and technology and continuing legal education was added to Rule 1.1 was added as a comment. Ann. Model Rules of Prof'l Conduct r. 1.1 cmt. 8 (Am. Bar Ass'n 2015).

and legal analysis, and "thoroughness and preparation" encompasses investigation and research and application to specific client matters.[4]

Although "the required proficiency is that of a general practitioner... [e]xpertise in a particular field of law may be required in some circumstances."[5] The Supreme Court of New Hampshire explains that Rule 1.1 "mandates that a general practitioner must identify areas in which the lawyer is not competent and acquire sufficient knowledge about the specific area of law in which the lawyer is practicing in order to avoid harm to the client."[6] In In re: Richmond's Case, New Hampshire's high court affirmed the suspension of a lawyer who lacked competence in securities law because he lacked the knowledge required to help a company in its initial public offering.[7] The Court agreed with the lawyer that "expertise in a specific area of law is not generally required," but still found the attorney violated Rule 1.1 for failing to "acquire the knowledge needed from other sources," "identify the areas beyond his expertise and bring these to the client's attention," and "pay sufficient attention to detail to avoid harm to [the client's] interests."[8] Thus, even if a lawyer board member is not an expert on the topic of the board's questions, he or she must make the effort to achieve competence and be forthright about his or her skill set.

Moreover, when a lawyer board member takes on an unfamiliar question, he or she should keep the following considerations in mind: clients may not be able to pay for excessive amounts of study or educational time[9], the lawyer board member may not have time to take on this study on top of their case load[10], the lawyer board member must obtain consent from the board before consulting colleagues about board inquiries[11], and the attorney-client privilege may attach to communications, even if the organization is not paying for the legal representation.

Today, no one can claim to be a Renaissance lawyer, even though others may expect as much. It takes self-awareness and humility to temper the expectations of others, and it takes time and care to ethically respond to board member questions in compliance with Rule 1.1.

Rule 1.6 – Confidentiality of Information and the Attorney-Client Privilege

The lawyer director or board member is obligated to observe confidentiality and the attorney-client privilege, even though similarly situated non-lawyer directors or board members do not. The ethical duty of confidentiality is a broad one, protecting disclosure of all information relating to the representation without informed consent.[12] Practically speaking, this means a lawyer board member must keep private any interaction or dialogue he has with his organization's other board members or staff that relates to legal work, quite possibly even the very existence of said work.

Attorney-client privilege protects compelled disclosure of communications between a lawyer and a client, and is governed by rules of evidence, meaning it is often asserted to bar testimony.[13] Thus, confidentiality and the attorney-client privilege are not "coextensive."[14] Nevertheless, both rules require the lawyer board member to be continuously and keenly aware of whether he or she is giving legal advice, business advice, or both.

Courts handle the application of the attorney-client privilege when legal advice overlaps with business advice in varying ways.[15] In some cases, only purely legal advice is protected, even when other parts of the communication were relevant to decision-making.[16] On the other end of the spectrum, several courts have found that when an attorney becomes a director, the privilege "evaporates."[17] Still, other courts consider what type of advice was being sought.[18]

Importantly, because a lawyer board member sits on both the lawyer and the client sides of the attorney-client privilege, the lawyer board member may have the power to waive the privilege that a non-board member would not. Moreover, the lawyer board member may have certain duties to disclose information, such as in an auditor's request, that a non-lawyer would not.

The issue is well-summarized in an American Bar Association Ethics Opinion:

> Acts of a lawyer-director and her knowledge as a

4 Ann. Model Rules of Prof'l Conduct r. 1.1 (Am. Bar Ass'n 2015).

5 Ann. Model Rules of Prof'l Conduct. r 1.1 cmt. 1 (Am. Bar Ass'n 2015).

6 In re. Richmond's Case, 872 A.2d 1023, 1028, 152 N.H. 155, 159, (2005).

7 In re. Richmond's Case, 872 A.2d 1023, 1029, 152 N.H. 155, 159, (2005).

8 In re. Richmond's Case, 872 A.2d 1023, 1028, 152 N.H. 155, 158-59, (2005).

9 In re: Estate of Larson, 694 P.2d 1052 (Wash. 1985) (en banc).

10 Davis v. Ala. State Bar, 676 So.2d 306 (Ala. 1996) (disciplining lawyers who, "in an effort to turn over a huge volume of cases, neglected their clients and . . . prevented [associates] from providing quality and competent legal services").

11 Ann. Model Rules of Prof'l Conduct. r 1.1 cmt. 6 (Am. Bar Ass'n 2015).

12 Model Rules of Prof'l Conduct r. 1.6 (Am. Bar Ass'n 2015).

13 Fed. R. Evid. 502.

14 Ann. Model Rules of Prof'l Conduct r. 1.6 (Am. Bar Ass'n 2015) (citing Spratley v. State Farm Mut. Ins. Co., 78 P.3d 603, 608 n.2 (Utah 2003)).

15 ABA Comm. On Ethics and Prof'l Responsibility, Lawyer Serving as Director of Client Corporation, Op. 98 - 410 (Feb. 27, 1998).

16 Id.

17 Id., fn 12.

18 Id., fn 13.

director may prove inseparable from the lawyer's acts and knowledge as member of a law firm. The director's fiduciary obligations as a director and her professional obligations as a lawyer cannot be placed in convenient separate boxes. The knowledge of a corporate director and officer, with respect to transactions in which she is authorized to act, is imputed to the corporation. Similarly, the knowledge of a partner in a law firm gained during confidential relationships with clients is imputed to the other partners in the law firm. There is a risk in some circumstances that the files and work processes of the law firm could become as available for discovery as are the files and records of the corporation itself.[19]

Rule 1.7 – Conflicts of Interests and Current Clients

A lawyer's service on a board of directors may create a conflict of interest for another existing client. The Model Rules of Professional Conduct prohibit representation that "will be directly adverse to another client."[20] Note that adversity for this purpose is legal adversity. Mere economic adversity does not trigger the rule.[21] However, direct adversity may exist even when the matters are wholly unrelated. For example, a lawyer who represents a real estate purchaser in one transaction may not represent the seller, even in an unrelated matter. Such situations are likely to damage the attorney-client relationship because the existing client may feel betrayed, or fear that the lawyer did not represent his or her interests to the fullest extent out of deference to the other client.

The Rules also prohibit representation when there is a "significant risk" that the representation of one client will be materially limited by the lawyer's responsibilities to another client or person, or by the lawyer's own interests.[22] This means that even when there is no direct adversity, a conflict of interest exists if there is a significant risk that the lawyer's independent professional judgment will be limited as a result of the lawyer's other responsibilities or interests. The most important consideration here is whether the representation of both clients will materially interfere with the lawyer's independent professional judgment.

For a lawyer board member with multiple clients, the lawyer may not act adversely to any of the lawyer's clients. This may require the lawyer to disqualify himself or herself from certain decisions or actions of the board. Lawyer disqualification may become necessary, even in the absence of litigation. In transactional matters, disqualification becomes required if there arises "a substantial risk that the lawyer's representation of one or more of the clients would be materially and adversely affected by the lawyer's duties to one or more of the other clients."[23]

Another consideration for lawyers serving as a board member and attorney for an organization is whether the two roles conflict. For example, if an organization asks a lawyer board member for legal advice regarding actions taken by the board, this would almost certainly create a conflict for the lawyer board member. The comments to Rule 1.7 advise that "[c]onsideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation obtaining legal advice from another lawyer in such situations."[24] As always, lawyers should prevent or eliminate the conflict as soon as they are aware of it. This may mean stepping down as a director, or ceasing to act as legal counsel, when conflicts arise.

Rule 1.13 – Organization as a Client

Although a lawyer representing an organization works directly with the members of the organization, the lawyer represents the organization itself, and not the people who make up the organization.[25] Under the entity theory of representation[26], the lawyer must take care to ensure the individual members of the organization know this and understand it. Moreover, when conflicts or potential conflicts arise between the organization and its people, the lawyer must proactively caution the individuals involved that he or she represents the organization's interests, and not the individual's interests.[27] Examples might include warning the person that communications are not protected by the attorney-client privilege and advising the person to obtain separate legal counsel.[28]

However, the delineation between the organization and its people is not always clear. Notably, the Model Rules of Professional Conduct do not prohibit dual representation of an entity and its people.[29] Further, even though the

19 Id. (internal quotations and citations omitted).

20 Model Rules of Prof'l Conduct r. 1.7(a)(1) (Am. Bar Ass'n 2015).

21 ABA Comm. On Ethics and Prof'l. Responsibility, Op. 05-434 (December 8, 2004).

22 Model Rules of Prof'l Conduct r. 1.7(a)(2) (Am. Bar Ass'n 2015).

23 Restatement (Third) of the Law Governing Lawyers, § 130 (2000).

24 Model Rules of Prof'l Conduct r. 1.7 (Am. Bar Ass'n 2015).

25 Model Code of Prof'l Conduct r. 1.13(a) (Am. Bar Ass'n 2015).

26 Restatement (Third) of the Law Governing Lawyers § 96(1) cmt. b (2000) ("The so-called 'entity' theory of organizational representation . . . is now universally recognized in American law, for purposes of determining the identity of the direct beneficiary of legal representation of corporations and other forms of organizations.")

27 Ann. Model Rules of Prof'l Conduct r. 1.13(f) (Am. Bar Ass'n 2015).

28 Ann. Model Rules of Prof'l Conduct r. 1.13 cmt. 10 (Am. Bar Ass'n 2015).

29 When it is the case that the lawyer represents both the organization and one or more of its directors, officers, employees, or other persons, ordinary conflict of interest rules still apply (e.g., the lawyer must obtain informed, written consent on behalf of the organization by an authorized person other than the individual being represented). Ann. Model Rules of Prof'l Conduct r. 1.13(g) (Am. Bar Ass'n 2015).

lawyer does not represent an organization's people, the lawyer may have authority to prevent another lawyer from communicating with the people.[30] And, while the ethical duty of confidentiality typically runs to the organization rather than the people, there can be cases where this does not seem obvious or appropriate. For instance, in Rhode Island, at the request of an unincorporated condominium association board, an attorney filed a complaint against a unit owner on behalf of the association.[31] The lawyer later sought withdrawal from representation because the board breached its contract with him and consistently failed to accept his legal advice.[32] The Rhode Island Supreme Court Ethics Advisory Panel found that the lawyer could not tell unit owners why he was seeking withdrawal, even though the lawyer had, on occasion, communicated with unit owners on matters relating to the association and believed such disclosure to unit owners would benefit the association.[33]

Building on the concept of disclosure, a lawyer also has certain obligations when he or she becomes aware that a person within an organization has acted in a way that violates their legal obligation to the organization or is likely to cause substantial injury to the organization.[34] The phrase "substantial injury" sets a high bar, which means, normally, that a lawyer must accept the decisions of board members, even if the lawyer finds "their utility or prudence is doubtful" or "entail[s] serious risk."[35]

The obligations include reporting to a higher authority, perhaps the highest authority, or (subject to some discretion) someone outside the organization.[36] Often the highest authority is, in fact, the board.[37] And when such reporting leads to being discharged or withdrawal as the organization's lawyer, the lawyer still must take actions to assure the organization's highest authority is informed of the discharge or withdrawal.[38] These latest reporting rules, amended in 2003, were partially in response to corporate scandals of the Enron[39] era.

Reporting misconduct often is not easy. Imagine a scenario where a CEO's conduct must be reported to the board. First, the attorney is put in a situation where he or she must report someone they work with on a day-to-day basis. Second, reporting this to the board could unintentionally imply to the board that they have not chosen their CEO wisely. Nor would reporting discharge or withdrawal be easy when it could impact an otherwise positive professional – or personal – relationship with a board member. Nevertheless, this rule underscores how important it is for the organization that the lawyer board member be ever attentive to whom they represent, and with whom they may (or must) share information.

Rule 2.1 – Advisor

When acting as a director, the lawyer must exercise "independent professional judgment." If the lawyer cannot do so, the lawyer should not join the board.

Independent professional judgment is steeped in both a board member's and a lawyer's fiduciary duties. A board member owes his organization a duty of care in decision-making, a duty of loyalty in governing solely in the best interests of the organization, a duty of impartiality, and a duty to avoid conflicts of interest, among other things. Likewise, a lawyer's duty to be independent stems from the ethical rules involving conflicts of interest and a parallel fiduciary duty pursuant to common law:

> Where an attorney is hired solely to represent the interests of a client, his fiduciary duty is of the highest order and he must not represent interests adverse to those of the client. It is also true that because of his professional responsibility and the confidence and trust which his client may legitimately repose in him, he must adhere to a high standard of honesty, integrity and good faith in dealing with his client. He is not permitted to take advantage of his position or superior knowledge to impose upon the client; nor to conceal facts or law, nor in any way deceive him without being held responsible therefor.[40]

For a lawyer, "independence" is also addressed in the Model Rules of Professional Conduct covering confidentiality[41], professional independence[42], and duties to former and future clients.[43]

Temptations to stray from independence may arise in

30 Ann. Model Rules of Prof'l Conduct r. 4.2 cmt. 7 (Am. Bar Ass'n 2015).

31 R.I. Ethics Op. 2003-04, Req. 865 (Sept. 11, 2003), https://www.courts.ri.gov/AttorneyResources/ethicsadvisorypanel/Opinions/2003-04.pdf.

32 Id.

33 Id.

34 Ann. Model Rules of Prof'l Conduct r. 1.13(a)-(c) (Am. Bar Ass'n 2015) (emphasis added).

35 Ann. Model Rules of Prof'l Conduct r. 1.13 cmt. 3 (Am. Bar Ass'n 2015).

36 Ann. Model Rules of Prof'l Conduct r. 1.13(a)-(c) (Am. Bar Ass'n 2015).

37 Ann. Model Rules of Prof'l Conduct r. 1.13 cmt. 5 (Am. Bar Ass'n 2015). Lawyers working for public companies may have additional obligations under the Sarbanes-Oxley Act of 2002 and Securities and Exchange Commission Regulations. Ann. Mod. Rules Prof. Cond. § 1.13 (climbing corporate ladder) (citing 15 U.S.C. § 7201; 17 C.F.R. §§ 205.1-205.7).

38 Ann. Model Rules of Prof'l Conduct r. 1.13(e) (Am. Bar Ass'n 2015).

39 Ann. Model Rules of Prof'l Conduct r. 1.13 (Am. Bar Ass'n 2015) (citing In re: Enron Corp, 235 F. Supp. 2d 549 (S.D. Tex. 2002) (finding that lawyers for Enron who co-authored financial reports could be responsible for securities violations as principal violators for misleading information given to third parties)).

40 Smoot v. Lund, 13 Utah 2d 168, 172, 369 P.2d 933, 936 (1962) (explaining that Utah recognizes legal malpractice actions based on breach of fiduciary duty).

41 Model Rules of Prof'l Conduct. r. 1.7, 1.8 (Am. Bar Ass'n 2015).

42 Model Rules of Prof'l Conduct. r. 5.4 (Am. Bar Ass'n 2015).

43 Model Rules of Prof'l Conduct. r. 1.9, 1.18 (Am. Bar Ass'n 2015).

the form of business obligations[44] or opportunities.[45] Likewise, personal loyalty interests can strain a lawyer board member's ability to be independent. For instance, the Maryland Committee on Ethics considered whether a lawyer who chaired his church's "legacy" committee to promote planned charitable giving from parishioners could also volunteer his services to prepare pro bono wills for parishioners who wanted to bequeath their property to the church.[46] The Maryland Ethics Committee explained that, certainly, the parishioners would be legal clients.[47] Further, even though it was unclear if the church was a legal client of the lawyer, the lawyer's role as a member of the church and chair of the legacy committee meant the lawyer also had fiduciary duties to the church.[48] In conclusion, while the lawyer's goals were "laudable," doing both acts would inevitably compromise his independent professional judgment in advising the parishioners.[49]

Rule 2.1 essentially requires independence from the client[50], even when independent professional judgment is to the detriment of the lawyer board member or requires he or she to be the bearer of bad news. Organizations rely on board members and lawyers alike to be candid and neutral, and to think and act without letting outside influences come into play. What is best for the organization's mission must come first.

Practical Considerations for Navigating Dual Roles

Clear communication with the organization is vital to effectively fulfill the duties of lawyer and board member. At the outset, a lawyer board member must define the scope of his or her service to the organization, and make it clear that he or she represents the board and not the board members. The lawyer board member should also provide a foundation for all opinions and statements made to the board. It should always be clear to the board when the lawyer board member is speaking as the organization's lawyer and offering legal advice, and when the lawyer board member is speaking as a board member and offering a business opinion. Finally, it is best to periodically clarify your role. If you are both legal counsel to the organization and member of the board, from time to time, point out to the board – and for the organization's records – that you are a board member and the organization's counsel, and help the other directors understand your dual role.

To prudently serve as both lawyer and board member, one must continually consider the duties imposed upon each role. As a board member, advice should be based upon business judgment. As legal counsel, it should be based upon legal judgment. As a board member, limitations on a lawyer's public statements arise from the duties imposed on board members. As legal counsel, limitations come from the attorney-client privilege and the duty of confidentiality. Finally, as a board member, potential conflicts are assessed under the duty of loyalty rule. As legal counsel, the assessment must be made under the rules of professional responsibility for lawyers.

Lawyers are in a unique position to provide both leadership and legal counseling to all types of organizations. However, because of their dual roles and obligations, lawyer board members must diligently communicate their roles to their organizations, and remain mindful of their differing duties under each role.

44 In re Harper, 571 S.E.2d 292 (S.C. 2002) (lawyer advised client to invest in realty development business he owned, even after his business partner was having financial difficulties).

45 In one high profile case, eighteen of a university's nineteen trustees were removed for violating their duties. The former president and board member of Adelphi excessive compensation package was widely criticized, which sparked an investigation by the Attorney General of New York and the New York State Board of Regents. Vacco v. Diamandopoulos, 715 N.Y.S.2d 269, 271-72 (1998). One trustee was the chair of the executive compensation committee. Id. at 274. She also owned the insurance company from whom the president purchased insurance for the university, meaning she had reason to "curry favor" with the president. Id. Another trustee's company provided marketing services for the university through an advertising agency he owned. Id. at 276. The investigations revealed that the president misled the board into thinking the advertising, as opposed to merely the trustee's services, were being provided free of charge. Id. In this scenario, the board members violated their duties of loyalty because they had divided allegiances and used their positions to put themselves – and not the organizational mission – first.

46 Md. Ethics Op. 2003-08 (2003), https://www.msba.org/ethics-opinions/may-an-attorney-who-chairs-his-churchs-legacy-committee-prepare-on-a-pro-bono-basis-wills-for-parishioners-in-the-which-the-parishioners-bequeath-property-to-the-church/.

47 Id.

48 Id.

49 Id.

50 Michels, Kevin H., Lawyer Independence: From Ideal to Viable Legal Standard, 61 Case W. Res. L. Rev. 85, 112 (2010).

The Lawyer as Board Member

Ethical and Practical Considerations

Roger G. Hanshaw

THE NETWORK TRIAL.COM

Bowles Rice ATTORNEYS AT LAW

Basic Board Duties

1. Oversight of CEO
2. Mission planning
3. Resource procurement

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Basic Board Duties

4. **Management monitoring**

5. **Organizational review**

6. **Board monitoring and evaluation**

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Recognizing Conflicts of Interest

- **The Model Rule 1.7(a)(1)** prevents representation that "will be directly adverse to another client."
  - Note: adversity for this purpose is *legal* adversity. Mere *economic* adversity does not trigger the rule. *ABA Comm. On Ethics and Prof'l. Responsibility, Op. 05-434 (December 8, 2004).*

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Recognizing Conflicts of Interest

- **For board member-attorneys with multiple clients,** the attorney may not act adversely to any of the attorney's clients.
  - This may require the attorney to disqualify himself or herself from certain decisions or actions of the board.

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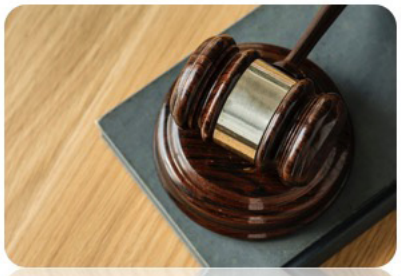
Recognizing Conflicts of Interest

- **Attorney disqualification** may become necessary even in the absence of litigation.



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Recognizing Conflicts of Interest

- **In transactional matters,** disqualification becomes required if there arises "a substantial risk that the lawyer's representation of one or more of the clients would be materially and adversely affected by the lawyer's duties to one or more of the other clients."
  - *Restatement (Third) of the Law Governing Lawyers*, § 130 (2000)

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The Model Rules and the Board

Member-Attorney

- **Rule 1.1 – Competence**
  - A board member lawyer is likely to be considered a resource on all legal topics, not just the lawyer's field of specific expertise.

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The Model Rules and the Board

Member-Attorney

- **Rule 1.6 – Confidentiality of Information**
  - The director-lawyer must observe attorney-client privilege, even though similarly situated non-lawyer directors do not.

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The Model Rules and the Board

Member-Attorney

- **Rule 1.7 – Conflicts of Interest and Current Clients**
  - The lawyer's service on the board may not create a conflict of interest for another existing client.

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The Model Rules and the Board

Member-Attorney

- **Rule 1.13 – Organization as a client**
  - When the organization is a lawyer's client, the lawyer should make it clear to board members that they *are not* the client.

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The Model Rules and the Board

Member-Attorney

- **Rule 2.1 – Advisor**
  - When acting as a director, the lawyer must exercise "independent professional judgment." If the lawyer cannot do so, the lawyer should not join the board.

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Practical Recommendations

- **Define the scope of your service**
  - Make it clear to the board that the attorney represents the board and not the board members.

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Practical Recommendations

- **Provide a foundation for your statements**
  - If your comments are meant to be legal advice, say so, and if your comments are a matter of business judgment and not legal advice, say that, too.

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Practical Recommendations

- **Periodically clarify your role**
  - From time to time, point out for the board, and for the organization's records, that you are a board member ***and*** the organization's counsel (if you are), and help the other directors understand that dual role.

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Avoiding Ethical Pitfalls

The Lawyer as a Board Member

- Advice is based on *business judgment*
- Limitations on the lawyer's public statements come only from duties imposed by the board
- Analysis of potential conflicts is done under the duty of loyalty rule

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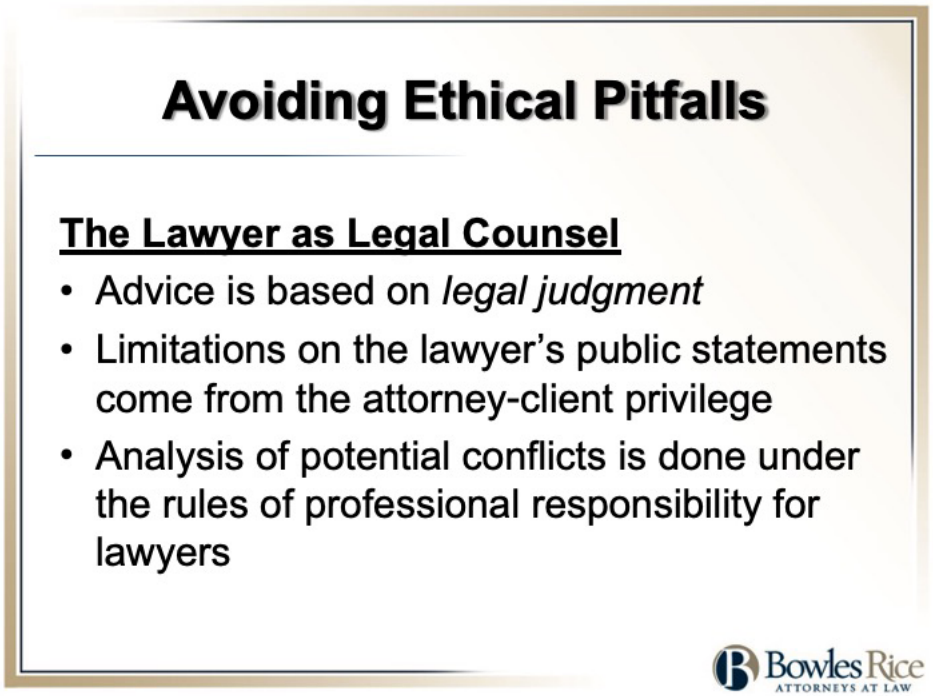
Avoiding Ethical Pitfalls
The Lawyer as Legal Counsel
• Advice is based on *legal judgment*
• Limitations on the lawyer's public statements come from the attorney-client privilege
• Analysis of potential conflicts is done under the rules of professional responsibility for lawyers
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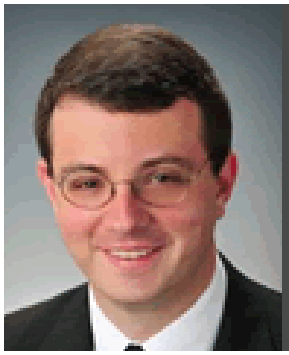
ATTORNEYS AT LAW



ROGER G. HANSHAW

Partner

BOWLES RICE (Charleston, WV)

204.347.2115 | rhanshaw@bowlesrice.com

Roger G. Hanshaw concentrates his legal practice on the environmental and technical issues that arise in business transactions, as well as regulatory compliance matters and litigation for a diverse client base.

He holds a Ph.D. in chemistry from the University of Notre Dame. This advanced science degree is critical in representing clients in the science driven field of environmental law.

Roger is a certified professional parliamentarian and regularly counsels government bodies and nonprofit organizations throughout the state and nation on meeting procedures, parliamentary law, bylaws construction and convention management. He is also a certified magistrate court mediator and board of directors member for the West Virginia Farm Bureau.

He is a member of the West Virginia House of Delegates, representing District 33 (Calhoun, Clay and Gilmer Counties).

Practice Areas

- Environmental Litigation
- Mass Tort and Toxic Tort Defense
- Oil & Gas
- Coal
- Business Litigation
- Education Law
- Corporate Governance
- Environmental and Regulatory Law

Honors

- West Virginia Manufacturers Association Champion of Industry
- Recognized by West Virginia Super Lawyers as a Rising Star, 2017-present
- West Virginia University College of Law - Recipient of CALI Awards (recognition for achieving the highest grade in a particular subject) in real estate transactions, appellate advocacy, Supreme Court advocacy and civil rights.
- University of Notre Dame - Rohm and Haas Outstanding Graduate Award; University of Notre Dame Outstanding Teaching Award
- West Virginia University - Mountain Honorary; Order of Augusta; Dennis O'Brien Award (awarded annually to the top graduate of the WVU Honors Program)

Education

- J.D., West Virginia University College of Law (2012)
- Ph. D., Chemistry, University of Notre Dame (2006)
- B.S., Biochemistry, West Virginia University (2002)

ETHICS: ENHANCING LITIGATION STRATEGY WITH CYBER / DEEP WEB INVESITIGATIONS

Deirdre Wheatley-Liss
Porzio Bromberg & Newman (Morristown, NJ)
973.889.4278 | drwheatleyliss@pbnlaw.com

Enhancing Litigation Strategy with Cyber/Deep Web Investigations: What Witnesses Don't Want You To Know
Deirdre Wheatley-Liss

Ethics Rules require counsel to be knowledgeable about technology and to understand all of the various places where electronic media may be located. Yet counsel must be cautious and refrain from engaging in certain types of conduct when ferreting out discovery that may be critical to the success of your case. In the broadest context, public information found on the Surface Web is fair game, whereas utilizing deception to secure discovery is forbidden. But in the Deep Web context, how far can you go in representing clients?

The Internet is a Mysterious Iceberg

What most people consider the "internet" is only a small fraction of cyberspace. When an average attorney does an internet search, she is looking at web-based content that can be found via major search engines, such as Google, Bing, and Yahoo - unaware that her "detailed internet search" only scratches the "Surface Web." The Surface Web is merely the tip of the iceberg. Hidden below the Surface Web is the "Deep Web", which is estimated to be 400 to 500 times larger than the Surface Web. Unlike the Surface Web, however, the Deep Web is not indexed, and Google will not navigate you there—its uncharted territory. Yet this vast unindexed repository of data may well hold the key to your litigation. The question is: How do you ethically identify and retrieve this data?

A definitional point - the "Deep Web" and "Dark Web" are often used interchangeably but are not the same thing. The Dark Web is where the more infamous, usually criminal, internet activities take place. You may be familiar with Silk Road, weapons, drugs, and trafficking site shut down by the FBI in 2013. Not only are Dark Web sites not indexed by search engines, but you need to use special software, such as The Onion Browser ("TOR") to anonymize your IP address to reach these sites. The Deep Web is much larger than the Dark Web and simply refers to sites not referenced by search engines, be they innocuous or nefarious.

Ethical Parameters

Attorneys must have a general understanding of how the Surface Web, Deep Web and Dark Web function. ABA Model Rules of Professional Conduct 1.1 (Competence) states "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Importantly, being up-to-date on technology is required to be deemed "'competent." Comment 8 to Rule 1.1 states "[t]o maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

When looking for information on any part of the Internet, attorneys cannot misrepresent themselves in their investigations. ABA Model Rules of Professional Conduct 8.4 (Misconduct) states: "It is professional misconduct for a lawyer to ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Ethical obligations extend to staff members on the attorney's team. ABA Model Rules of Professional Conduct 5.3 (Responsibilities Regarding Nonlawyer Assistants) states "With respect to a non-lawyer employed or retained by or associated with a lawyer:… (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[1]

Public Information on the Surface Web is Fair Game

As long as the attorney is not "hiding" who they are in searching the Surface Web, publically available information found on it may be used as evidence including information found on websites and social media. The subject of the search can be unrepresented or represented, and it does not matter who posts the information so long as it resides on a public domain or media source. Quite simply, a person cannot have a reasonable expectation of privacy over information that is freely put in the public domain. See e.g. Dexter v. Dexter, 2007 WL 1532084 (Ohio App. May 25, 2007); Beye v. Horizon Blue Cross Blue Shield, 2007 WL 7393489 (D.N.J. Dec. 14, 2007); Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr.3d 858 (Cal. App. April 2, 2009); Romano v. Steelcase Inc., 907 N.Y.S.2d 650 (N.Y. Sup. Sept. 21, 2010); EEOC v. Simply Storage Management, LLC, 270 F.R.D. 430 (S.D. Ind. May 11, 2010); Zimmerman v. Weis Markets, Inc., 2011 WL 2065410 (Pa. C.P. Northumberland Co. May 19, 2011); Reid v. Ingerman Smith LLP, 2012 WL 6720752 (E.D.N.Y. Dec. 27, 2012).

For example - Percy Plaintiff claims a workplace shoulder injury. Percy has a public Facebook account. If Percy posts photographs or videos of him throwing his nieces in the air in the pool that can be used as evidence of the severity of his injury or lack thereof.

With reference to the Deep Web, just because it is not "indexed" by the major search engines does not mean it is not "searchable" or available in the public domain. The policy rationale that people lack a reasonable expectation of privacy on information freely put in the public domain (i.e., no limitations or protections from public viewing) should apply equally to information found on the Deep Web. Although there is a risk that your adversary will argue that information found on the Deep Web is per-se private, counsel should be able to be overcome this argument by educating the Court on the difference between the Surface Web and Deep Web, and that the lack of "indexing" does not equate to private. The fact that Google or Bing does not "list" a publicly available website does not – and should not - create a reasonable expectation of privacy over the site.

Contacting an Unrepresented Party to See Private Information is Fair Game

As long as the attorney discloses her full name, provides her correct profile, and accurately responds to any requests for additional information, she can ask an unrepresented party to see non-public portions of the Surface Web and gain access. Just keep in mind that depending on the state, the attorney may also have to disclose the purpose for the request or identify the names of the parties and nature of the pending litigation.

States vary when looking at the question of if it is "deceitful" and a violation of RPC 8.4 to "friend" or otherwise ask permission to access information that is not readily available due to privacy settings or other gateway mechanisms. In New York, so long as the attorney uses her real name and profile in sending the "friend" or access request, no "deception" has occurred. NYCBA, Formal Op. 2010-2 (2010). Other states have a higher bar where the attorney must also identify in the "friend" request the purpose and intention of the request to avoid being "deceitful". Massachusetts', San Diego's and Philadelphia's Bar Associations have all issued ethics opinions that require the lawyer to disclose the purpose of her request. Massachusetts Bar Ass'n Comm. On Prof Ethics Op. 2014-5 (2014); San Diego County Bar Ass'n Legal Ethics Comm., Op 2011-2 (2011); Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009). New Hampshire requires the attorney to also inform the person of the lawyer's involvement in a potential litigation by introducing the lawyer as a lawyer and specifically identifying the client and the subject of the litigation. N.H. Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012).

For example - Percy Plaintiff claims a workplace shoulder injury. Percy has a private Facebook account, but it identifies Sondra as his sister. Depending upon the state's ethical rules, a paralegal at Antonia Attorney's office may be permitted to "friend" Sondra to see what is posted on her Facebook account provided Antonia complied with the disclosure requirements of the applicable state.

The same rules apply to a Deep Web search. If the

1 The Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New Your State Bar Association, updated April 29, 2019, is an excellent deeper resource on the ethical parameters.

searcher needs permission from the webmaster of the Deep Web site to enter that site, the searcher must provide their name as well as the law firm name, and where required under state ethics rules, a description of the purpose for the request.

Contacting a Represented Party to see Private Information is a No-No

If the party is represented by counsel, contact with that party is barred, including requests to access non-public areas of the person's website or social media even after full disclosure. This restriction likewise extends to the Deep Web. If the webmaster in the example above is represented, she cannot be contacted without express consent of her counsel. This restriction also extends to any agents the lawyer uses, such as a staff member or investigator, and potentially the client herself depending on the jurisdiction.

What if you don't know the party has representation? Both the Oregon and San Diego Bar Associations have opined that unless there is actual knowledge that a person is represented by counsel a request to "friend" or access that person's non-public information in permissible. Or. State Bar Comm. On Legal Ethics, Formal Op. 2013-189 (2013); San Diego County Bar Ass'n Legal Ethics Comm., Op 2011-2 (2011).

How to Find Information the Deep Web

The Deep Web is searchable, just not using your more well-known search engines like Google or Bing. Specialized search engines have been specifically designed for Deep Web searches that translate Deep Web content to more commonly used browser pages. These specialized search engines include The WWW Virtual Library, Freebase, and TechDeepWeb. In addition, there are more advanced tools that not only search these sites, but that leave no trail of your searches. While the use of these invisible tools may sound like a good way to search the Deep Web, the fact that these tools do not leave a trail of internet breadcrumbs does not relieve counsel or her agents with complying with their ethical obligations--they apply equally to Surface Web and Deep Web investigations. Further, counsel must be cognizant of the need to authenticate any data, to prove it belongs to the person you claim it does and that the data is fair and reliable for consideration by the court.

A high dose of caution and paranoia is needed when searching the Deep Web because these sites aren't indexed, they also aren't identified as potential sources of malicious phishing and/or malware attacks. Google isn't shielding you with its army of anti-malware when you dive into the Deep Web. Some practical considerations include using a single-purpose machine not connected to your network. Instead, usea VPN (Virtual Private Network) that will mask your physical IP address.

Best Practices to Incorporate Deep Web Searches into the Litigation Process

The recommended best practice is to retain the services of a Deep Web researcher with the skills and expertise to identify and cull valuable information, but who also has the technical know-how to avoid malicious sites and an understanding of the ethical constraints imposed upon such an expert. Further, your engagement letter with this researcher should specifically identify the ethical parameters of what the researcher can and cannot do to find information based on the jurisdiction in question. The expert's work product should include a summary of the process used to secure the data that can later be used to demonstrate that Deep Web data was "public" or that the appropriate disclosures were made and permissions granted for any search of "non-public" information belonging to an unrepresented party.


Enhancing Litigation Strategy with Cyber/Deep Web Investigations: What Witnesses Don't Want You to Know
Deirdre R. Wheatley-Liss
Principal
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YAHOO!
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DEEP WEB
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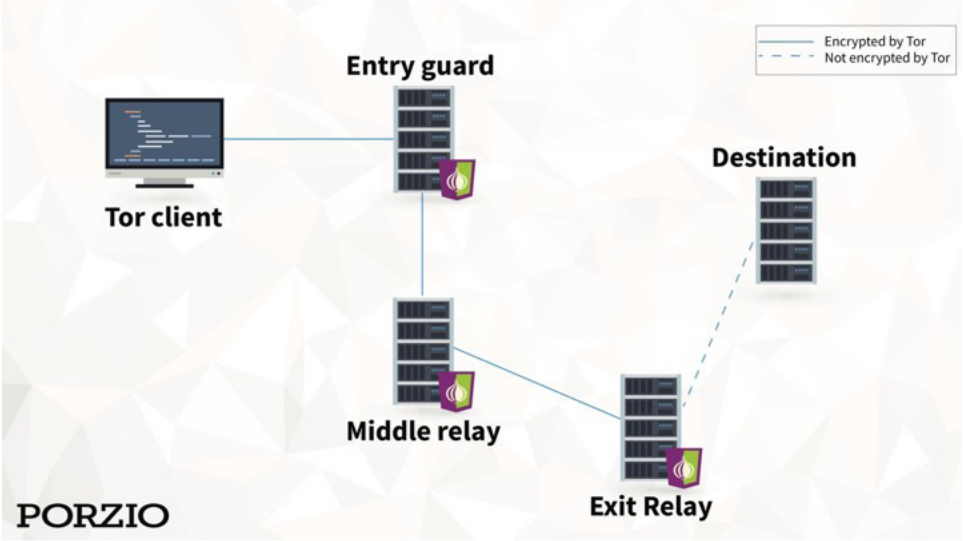
Encrypted by Tor
Not encrypted by Tor
Entry guard
Destination
Tor client
Middle relay
Exit Relay
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Professional Conduct 1.1
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"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
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Technical Competence
"[t]o maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."
PORZIO


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Is Public Information Fair Game?
Is an Unrepresented Party's Non-Public Information Fair Game?
Is a Represented Party's Non-Public Information Fair Game?
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YAHOO!
Bing
Google
DuckDuckGo
Navigating Below the Surface
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Thank You
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Deirdre R. Wheatley-Liss divides her practice between representation of business owners and their businesses, counselling individuals and families, and advising non-profit entities.

Business Owners and Business Representation - Ms. Wheatley-Liss counsels business owners on legal and structural issues related to start-up, financing, growth and exit strategy. As a tax attorney, she always keeps an eye on minimizing a business owner's "silent partner" – the IRS. She also advises on director and officer (D&O) liability issues, including business succession and break-ups. By creating the most efficient organizational structures and contractual arrangements during the infancy and growth of a business she has helped clients keep hundreds of thousands of dollars in their pockets upon the sale of the mature business. To educate both the public and the legal community about issues relating to business ownerships, Ms. Wheatley-Liss is a frequent lecturer to professionals and the public on topics related to start-up, intellectual property, employee and independent contractor issues, wealth transfer, tax minimization, business succession planning and cybersecurity.

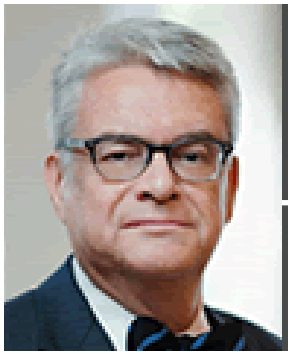
Data Privacy and Cybersecurity - Ms. Wheatley-Liss helps organizations to meet regulatory requirements by assessing current data privacy and cybersecurity policies against best practice frameworks. Deirdre provides counseling pertaining to policies and pre-incident planning, in order to minimize loss in the case of a potential breach. She is a frequent lecturer on best practices and corporate governance as related to privilege and cybersecurity.

Practice

- Asset Protection
- Bankruptcy and Financial Restructuring
- Business Disputes and Counseling
- Business Divorce
- Charitable Planning
- Corporate, Commercial and Business Law
- Data Privacy and Cybersecurity
- Dispute Resolution
- Elder Law
- Estate Planning
- Executive Wealth Management
- Guardianship
- Guardianship Litigation
- Mergers and Acquisitions
- Privately-owned Business Planning
- Probate and Trust and Estate Administration
- Trusts and Estates
- Trusts and Estates Litigation
- Wealth Preservation

Education

- New York University, New York, New York, LL.M in Taxation, 2000
- Boston College School of Law, Newton, Massachusetts, J.D.,1995
- Johns Hopkins University, Baltimore, Maryland, B.A., with honors, 1992



ETHICS: PRACTICE LESSONS FROM PUBLIC CORRUPTION

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Lightfoot Franklin & White (Birmingham, AL)
205.581.0789 | jsharman@lightfootlaw.com

Practice Lessons from Public Corruption
Jack Sharman

Indictments of lawyers are significant in ways that criminal charges against laypersons are not. Lawyers are self-governing; they benefit from privileges; they are repositories of trust. They are self-governing because they set their own admission-standards and discipline their members with almost no outside interference. Their conversations with clients and their work output are protected from disclosure – kept secret – in ways and under circumstances unthinkable in other sectors of the economy. They are trustworthy: they hold money in trust; they act as fiduciaries; and courts in many important ways rely upon their word.

On the other hand, lawyers are subject to the law, civil and criminal, just like any other citizen. Although a client may love his or her attorney, lawyers as a class are not popular. For a prosecutor, indicting a lawyer can bring public relations cachet. If the prosecutor can demonstrate that the crime-fraud exception to the attorney-client privilege applies, otherwise unavailable evidence may be produced.

Few lawyers, however hard-fought the battle or the controversy or the client, can imagine themselves being charged with a crime for – at least in their eyes – "acting as a lawyer." Indictment, though, was exactly what happened to Joel Gilbert, a young partner at a major southeastern law firm.

After clerking for the Alabama Supreme Court following his law school graduation, Joel Gilbert began working at Balch & Bingham as an associate in 2003 and was eventually promoted to equity partner. He specialized in environmental law. His colleagues testified that he was known to be a trustworthy, truthful, and law-abiding person. During the period relevant to this case – 2014, 2015, and 2016 – he represented several clients across dozens of matters and annually had about 2,400 hours of billable and non-billable time.

Indicting The Lawyers

The criminal case arose from Joel's representation of Drummond, a coal company, in connection with the EPA's efforts in Alabama. Drummond wanted to engage in community outreach and issue advocacy against the EPA's plan to take two regulatory actions related to the 35th Avenue Superfund Site in north Birmingham (the "Superfund plan"). First, the EPA proposed to list the Superfund Site on the "National Priorities List," which is reserved for the areas in the country with the most serious pollution ("the NPL Listing Proposal"). And second, the EPA proposed to expand the Superfund site to cover the City of Tarrant and the Inglenook neighborhood ("the Site Expansion Proposal"). See Indictment ¶¶ 7-9. The Indictment alleged that companies determined to be responsible for pollution within the Site "could have faced tens of millions of dollars in cleanup costs and fines." Id. at ¶ 7.

From the start, the EPA's Superfund plan was unpopular in Alabama. It was opposed not only by the local business community but also by the Governor, the Attorney General, the state legislature, and the state's environmental regulators. Indeed, in September, 2014—well before the "bribery scheme" in this case took place—the Alabama Department of Environmental Management

(ADEM) sent a letter to the EPA stating emphatically: "The State DOES NOT CONCUR in the proposed [NPL] listing for numerous reasons."

Drummond opposed the EPA's Superfund plan on scientific, economic, and policy grounds. In its view, the alleged pollution in north Birmingham had been vastly overstated by EPA and environmental activists relying on flawed scientific studies. In fact, as EPA subsequently determined, there was no harmful pollution warranting EPA action. Many local community leaders agreed, and believed the Superfund plan was an ideological crusade that ignored the interests of local residents, whose property values stood to be substantially harmed if the Superfund plan went forward.

To help advance the political and legal fight against the Superfund plan, several Drummond executives consulted with the company's outside counsel at Balch & Bingham, a Birmingham-based regional law firm. On behalf of Drummond, Balch & Bingham hired the Oliver Robinson Foundation to help educate the public about, and advocate against, the Superfund plan. Indictment ¶ 14. The Foundation was well-known in Birmingham and had prior experience in community outreach and education campaigns. It was founded by and affiliated with Oliver L. Robinson, Jr., a part-time legislator in the Alabama State House of Representatives who represented a district that did not include the Site or any of the areas being considered by EPA under the Site Expansion Proposal. Robinson was a pro-business Democrat and a natural political ally of Drummond on the Superfund issue.

The contract between Balch & Bingham and the Foundation was no different from many other agreements routinely entered into by law firms across the country to engage in vigorous issue advocacy on behalf of their clients. The Foundation was retained for, among other things, the "collection and dissemination of information" regarding the Superfund plan. Pursuant to the contract, the Foundation hired workers to engage in a public-advocacy campaign to distribute flyers, make phone calls, knock on doors, and otherwise express the view that the EPA's Superfund plan was scientifically unsound and disastrous as a policy matter. The preamble of the contract made clear that the relationship was subject to federal, state, and local laws, including the Alabama Ethics Law. The contract said nothing about Robinson taking any "official action" by using any of the powers of his office to assist Drummond in any way.

There were three defendants: Joel Gilbert, a young partner at Balch; Steve McKinney, a senior partner at Balch, head of the firm's environmental section, and former chair of the ABA's Environment and Natural Resources Section; and David Roberson, a vice-president at Drummond and the client contact with Balch. The Government used the contract as the basis for indicting the three defendants for federal "bribery" in violation of 18 U.S.C. § 1343, 1346 (honest-services bribery) and 18 U.S.C. § 666 (federal-program bribery). The prosecution claimed that hiring the Foundation to engage in issue advocacy was part of a criminal "conspiracy." In particular, the Government alleged that the Defendants gave the Foundation "monthly payments in exchange for, among other things, favorable official action by Representative Robinson in relation to the environmental issues in north Birmingham." Indictment ¶ 18.

The Indictment identified four basic categories of alleged "official action." Namely, Robinson was to:

> (1) "communicate[] . . . opposition to EPA's actions to the residents of north Birmingham" without disclosing that his Foundation was "being paid to represent the exclusive interests of Balch & Bingham and Drummond Company."
> (2) "make a public statement and pressure and advise" two state executive agencies, the Alabama Environmental Management Commission ("AEMC") and Alabama Department of Environmental Management ("ADEM"), "to take and maintain a position on behalf of the State of Alabama favorable to Balch & Bingham and Drummond Company in relation to EPA's efforts to list the 35th Avenue Superfund Site on the National Priorities List and expand the Superfund Site";
> (3) "meet with and advise EPA officials to take a position favorable to Balch & Bingham and Drummond Company in relation to EPA's efforts to list the 35th Avenue Superfund Site on the National Priorities List and expand the Superfund Site into Tarrant and Inglenook"; and
> (4) "vote as a member of the State of Alabama House of Representative's Rules Committee to send the joint resolution (SJR97) . . . to the floor of the House of Representatives for consideration by the membership of the House with the recommendation that the resolution be adopted."

Indictment ¶¶ 62, 64.

The Government's allegations under section 666 (federal-program bribery) relied on the same four categories of conduct: by paying the Foundation to engage in community education and issue advocacy, Defendants "did corruptly give, offer, and agree to give" a thing of value to Robinson, an agent of the State of Alabama, "with intent to influence and reward" him "in connection with"

some "business, transaction or series of transactions of the State of Alabama involving" something "of value of $5,000 and more." Indictment ¶ 64.

In short, the Indictment alleged that Defendants committed both forms of bribery by hiring and paying the Foundation in exchange for: (1) public advocacy to "the residents of north Birmingham" expressing the view that the Superfund plan should not proceed; (2) a public statement Robinson made to a state executive branch agency and an official in a different state executive branch entity expressing the same view; (3) a meeting with members of a federal agency on the topic; and (4) a symbolic committee vote in favor of having the full Alabama House vote on a joint resolution "urging 'the Attorney General and ADEM to combat the EPA's overreach.'" Indictment ¶¶ 38, 62, 64.

Six Takeaways

Each case has its own peculiarities, but what are the takeaways we should consider to avoid the risk of criminal prosecution or other sanction as a result of what we understand to be "practicing law"?

Let us start by brushing away a cliché: "avoid getting indicted for a crime by not committing a crime in the first place." Offenses that happen to be committed by someone who has a bar license but which otherwise stand on their own two feet – possession of child pornography, manufacture and sale of methamphetamine, being a straw purchaser for an unlawful firearm – are not our subject today. Whether or not one is a lawyer, one should avoid possessing child pornography, selling meth, or running guns. The potential offenses that concern us today are those that arise from the operation of most lawyers' daily lives: timesheets, budgets, consultants, check requests, confidentiality concerns, setting up files, and describing matters. Like almost all other white-collar crimes, these lawyer-crimes, if they exist, exist because the lawyer possessed wrongful intent when he or she took action (or failed to take action). A participant in a mock trial, a very nice older lady, once threw up her hands in exasperation at the end and exclaimed: "I just want to know whether he did it or not."

And therein lay the problem, of course. In white-collar cases, including those involving lawyers, there are rarely major disputes about the facts. A check is a check, the contract was in fact awarded, a vote on the bill was taken. In contrast, in cases involving street crime, there may be defenses (such as alibi or duress) but there is rarely a dispute that a crime has occurred: someone walked in the bank, pulled a gun, and held it up.

For that reason, it does us little good to say "don't commit the crime if you can't do the time." What might be some takeaways that will help us?

Look for public dollars. The starting point for federal or state public-corruption investigations is public money. Public funds can enter a lawyer's professional life in many ways. The client may be public (like an agency), semiprivate (like an industrial development board), or private but receiving public money (certain programs designed to encourage minority business ownership, for example).

Look for public people. In the news, it is always elected officials who are at the center of public-corruption allegations, but public officials draw upon the services of lobbyists, crisis communicators, fundraisers – and lawyers. They are subject to state and federal regulation. It is not difficult to run afoul of state ethics laws or campaign-finance rules that can serve as a jumping off point for federal charges of honest services mail and wire fraud, federal program bribery, money laundering, and other offenses.

Check the changing scope of the engagement. Almost any matter morphs from inception to conclusion. In most instances, the changing circumstances of the representation are driven by tactics, strategy, or the budget. If public money or public officials or agencies are involved in the transaction or litigation, however, it is important to keep an eye on the shifting landscape. What was permissible at the outset may look very different halfway through the engagement. At a minimum, periodic reviews and updated retention agreements may be necessary.

Seek blessing. Do not go alone. Before undertaking a matter, entering into an agreement, or making a payment that implicates public officials, agencies, or money, seek review and approval internally or externally. Many law firms, for example, have an internal general counsel charged with, among other things, ethics and compliance issues. Corporate law departments often have similar resources. Assuming that the matter can be raised "blindly," a state bar association may be willing to provide input and counsel. In all these circumstances, it is critical to provide the advisor with all the facts, not just those facts that you hope will make it more likely that the engagement or other course of action will end up getting blessed.

Update the file. Attorneys have many skills. What are some skills they lack? Correctly and precisely identifying engagements; giving full explanations for check requests; and making sure that nonlawyers – the folks in accounting, for example – have a full understanding of what we are

doing. Consider these administrative tasks in the light of how they might read three years from now in a federal courtroom at a criminal trial. It does not matter what you understand a notation on the check request to be. It only matters how the jury understands it.

Be parsimonious with privilege. Lawyers love privilege. Nobody else does – and especially prosecutors. Do what you need to do to discharge your professional obligations, but confidentiality and nondisclosure agreements with vast fields of toxic-sounding secrecy language are sure to get the attention of the prosecutor and poison the heart of your jurors.

* * *

A modest amount of common sense, caution, and extra work will go a long way towards guaranteeing that the closest you come to interacting with the American criminal justice system is something you see on Netflix.

PRACTICE LESSONS FROM PUBLIC CORRUPTION

Jack Sharman
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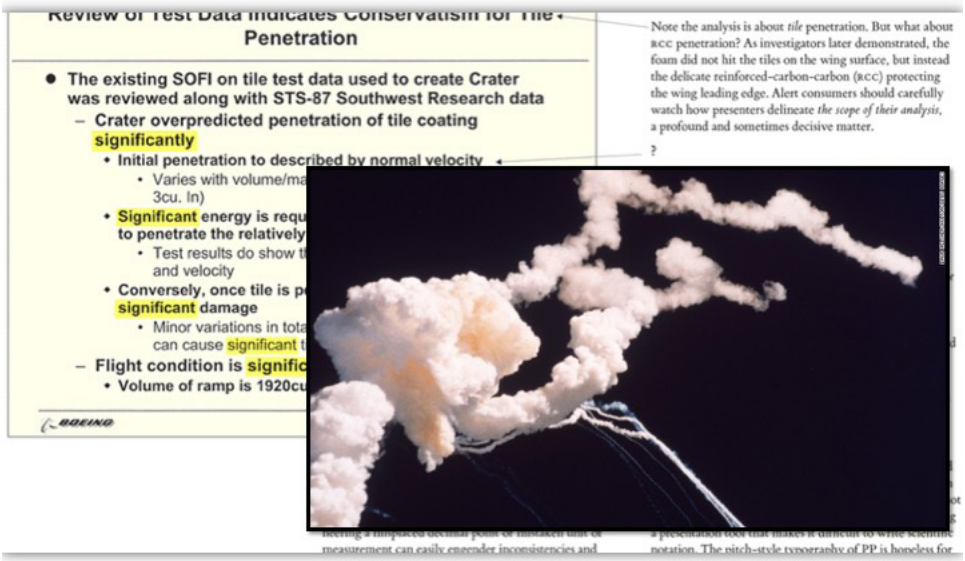
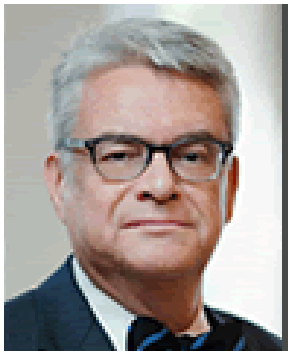
jsharman@lightfootlaw.com


METRO PICTURES CORPORATION
PRESENTS
VIOLA DANA
IN
THE OFF-SHORE PIRATE
BY F. SCOTT FITZGERALD


Penetration
The existing SOFI on tile test data used to create Crater was reviewed along with STS-87 Southwest Research data
Crater overpredicted penetration of tile coating significantly
Initial penetration to described by normal velocity
Varies with volume/ma
3cu. In)
Significant energy is requ
to penetrate the relatively
Test results do show t
and velocity
Conversely, once tile is p
significant damage
Minor variations in tota
can cause significant t
Flight condition is signific
Volume of ramp is 1920cu
BOEING
Note the analysis is about tile penetration. But what about RCC penetration? As investigators later demonstrated, the foam did not hit the tiles on the wing surface, but instead the delicate reinforced-carbon-carbon (RCC) protecting the wing leading edge. Alert consumers should carefully watch how presenters delineate the scope of their analysis, a profound and sometimes decisive matter.
?


SECRET
THIS IS A COVER SHEET
FOR CLASSIFIED INFORMATION
RESTRICTED DATA
SECRET



JACKSON R. SHARMAN, III

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When the government knocks on your door, Jack Sharman's your experienced ally.

Jack defends businesses and individuals in civil and criminal white collar cases, provides guidance during corporate internal investigations and advises on how to stay in compliance with the law. In an environment of increased enforcement, regulatory scrutiny and a skeptical public, clients rely on his informed counsel to navigate the most difficult circumstances they will likely ever face.

Jack leads the firm's White Collar Criminal Defense & Corporate Investigations practice group. He handles and takes to trial matters involving kickback allegations, government contract fraud, public corruption, the Foreign Corrupt Practices Act, congressional investigations, election contests, healthcare fraud, qui tam lawsuits, the False Claims Act, and Department of Defense or military investigations.

Clients benefit from the decades of high-profile experience that Jack brings to the table. He served as special counsel to the House Financial Services Committee for the Whitewater investigation involving President Bill Clinton. From 2016-17, Jack was special counsel to the Judiciary Committee of the Alabama House of Representatives for the impeachment investigation of Gov. Robert Bentley. Following law school, Jack clerked for Judge David B. Sentelle, U.S. Court of Appeals for the District of Columbia Circuit, and worked at a Washington, D.C.-based international law firm. He also taught law as an adjunct professor at Washington & Lee University and the University of Alabama.

Jack often updates his White Collar Wire blog and manages a Twitter account focused on white collar crime and enforcement matters.

Practice Areas

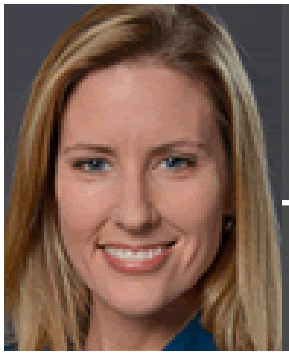
- White Collar Criminal Defense & Corporate Investigations
- Directors' & Officers' Liability
- Securities & Shareholder Disputes
- International Disputes

Awards

- Benchmark Litigation, "Local Litigation Star" — White Collar Crime (2018-19)
- The Best Lawyers in America©, "Lawyer of the Year" — Corporate Compliance Law (2019)
- The Best Lawyers in America©, "Lawyer of the Year" — Criminal Defense: White Collar (2019)
- Mid-South Super Lawyers (2017-18)

Education

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



ETHICS: WALKING THE THIN LINE BETWEEN PREPARING A WITNESS AND COACHING A WITNESS

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Walking the Thin Line Between Preparing a Witness and Coaching a Witness
K. Nichole Nesbitt

The American Bar Association's Model Rules of Professional Conduct prohibit attorneys from telling witnesses what to say, yet they permit and even encourage them to prepare their witnesses for testimony. The thin line between the two areas can be ambiguous. This session will showcase examples of proper preparation and inappropriate coaching to ensure proper conduct.

I. Rules of Professional Conduct That Encourage Witness Preparation

"Witness preparation is any communication between a lawyer and a prospective witness—client or non-client, friendly or hostile—that is intended to improve the substance or presentation of testimony to be offered at a trial or other hearing." John S. Applegate, Witness Preparation, 68 Tex. L. Rev. 277, 278–79 (1989). Witness preparation enables lawyers to present witnesses who can testify clearly about their knowledge of the subject matter. Id. Almost all American lawyers consider it a fundamental duty of representation and a basic element of effective advocacy to prepare witnesses to testify. Id.

The Preamble to the Model Rules of Professional Conduct recognizes the many roles of a lawyer, including the roles of advisor and advocate. "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." See Model Rules of Professional Conduct, Preamble para. 2. "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Id. A lawyer serves in both of these roles when preparing a client for deposition and is always serving as an advocate when preparing any witness for deposition.

Model Rule of Professional Conduct 1.1 (Competence) provides that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." (Emphasis added.) "Competent handling of a particular matter includes … adequate preparation," which is determined in part by the complexity and consequence of what is at stake. See Model Rule of Professional Conduct 1.1., Comment 5. In order to provide competent representation, a lawyer must prepare witnesses to give testimony.

Model Rule of Professional Conduct 1.2 (d) (Scope of Representation and Allocation of Authority Between Client and Lawyer) permits a lawyer to discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. A lawyer may give an honest opinion about the actual consequences that appear likely to result from a client's conduct. See Model Rule of Professional Conduct 1.2 (d), Comment 9. This Rule allows an attorney to explain the implications of the manner of presentation of the testimony to the witness.

Model Rule of Professional Conduct 1.3 (Diligence) requires a lawyer to be a diligent and zealous advocate for his client. "A lawyer should pursue a matter on behalf of a client… and take whatever lawful and ethical measures

are required to vindicate a client's cause or endeavor." Model Rule of Professional Conduct 1.3, Comment 1. Witness preparation is one of those lawful and ethical measures.

Model Rule of Professional Conduct 1.6 (a) (Confidentiality of Information) protects the information exchanged between a lawyer and client by prohibiting a lawyer from revealing information relating to the representation of a client with a few distinct exceptions. The principle of Rule 1.6(a) has become effective through the attorney-client privilege and the work product doctrine. These privileges and doctrines typically protect witness preparation from discovery. See Upjohn Co. v. United States, 449 U.S. 383; see also Hickman v. Taylor, 329 U.S. 495 (1945).

Courts have upheld the confidentiality of witness preparation. See Giordani v. Hoffmann, 278 F. Supp. 886, 892 (E.D. Pa. 1968) ("fail[ing] to see how information regarding the actions which transpired in preparing for a deposition have any relationship to the merits"); Bercow v. Kidder, Peabody & Co., 39 F.R.D. 357, 358 (S.D.N.Y. 1965) (refusing to require witness to answer questions concerning the people with whom he had met and the documents he had reviewed in preparation for a deposition); Phoenix Nat'l Corp. v. Bowater United Kingdom Paper Ltd., 98 F.R.D. 669, 671 (N.D. Ga. 1983) (noting that "insofar as defendant's question attempted to elicit from the witness specific questions that plaintiff's counsel posed to him, . . . it exceeds the permissible bounds of discovery"; Ceco Steel Prods. Corp. v. H.K. Porter Co., 31 F.R.D. 142, 144 (N.D. Ill. 1962) (asserting that "the information which defendants here seek should be readily available direct from the witnesses for the asking and not through disclosure of conversations with counsel held for purposes of discovery and trial preparation"').

While the Rules and court decisions do not provide specific "do's and don'ts" for witness preparation, The Restatement (Third) of the Law Governing Lawyers §116, Interviewing and Preparing a Prospective Witness, Comment b, provides a roadmap for the ethical preparation of a witness.

> In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact.

Restatement (Third) of the Law Governing Lawyers § 116, Comment b (2000).

II. Rules of Professional Conduct That Forbid Witness Coaching

"[A lawyer's] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know." In re Eldridge, 82 N.Y. 161, 171 (1880).

While Model Rule of Professional Conduct 1.2(d) permits a lawyer to discuss the legal consequences of particular conduct with the client, it prohibits a lawyer from "counsel[ing] a client to engage, or assist[ing] a client, in conduct that the lawyer knows is criminal or fraudulent." The Rule commentators note there is "a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." See, Model Rule of Professional Conduct 1.2, Comment 9. The latter is prohibited.

Model Rule of Professional Conduct 3.3(a)(3) (Candor Toward the Tribunal) requires that a lawyer not knowingly "offer evidence that the lawyer knows to be false." This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal and applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition (Emphasis added). See Model Rule of Professional Conduct 3.3, Comment 1. Model Rule of Professional Conduct 3.3(a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false. See, Model Rule of Professional Conduct 1.2 (d), Comment 1. The remedial measures should begin with the lawyer remonstrating with the client confidentially, advising the client of the lawyer's duty of candor to the tribunal and seeking the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. However, if such measures fail, the lawyer may need to withdraw from the representation or must make

a disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.

Model Rule of Professional Conduct 3.4(b) (Fairness to Opposing Party and Counsel) states that a lawyer must not "counsel or assist a witness to testify falsely." Fair competition in the adversary system is secured by prohibitions against… improperly influencing witnesses." Model Rule of Professional Conduct 3.4(b), Comment 1.

Model Rule of Professional Conduct 8.4(c) provides, "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Further, according to Model Rule of Professional Conduct 1.4 (a), "A lawyer shall consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law." This means that if a client intends to testify falsely or seeks advice to testify in a way that distorts or misrepresents the truth, the lawyer must communicate to the client that he is unable to engage in such conduct.

Additionally, Model Rule of Professional Conduct 5.3(c)(1) provides that "[w]ith respect to a nonlawyer employed or retained by or associated with a lawyer, a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders, or, with the knowledge of the specific conduct, ratifies the conduct involved." This means attorneys must carefully oversee any non-attorneys involved in witness preparation.
In Ibarra v. Baker, 338 F. App'x 457 (5th Cir., 2009), the Fifth Circuit held that two attorneys committed misconduct when they improperly coached witnesses. In Ibarra, the attorneys were representing the county and some of its law enforcement officers in a civil action filed after the conclusion of the criminal trial. The attorneys retained a consultant who prepared a report, and sent the consultant to meet with law enforcement officer witnesses prior to their depositions. During the meeting, the consultant provided a copy of his trial transcript and had some discussions with the witnesses about certain "terms of art" pertinent to the defense theory. These officers had already given trial testimony in the criminal case. Following the meetings with the consultant, at their depositions, the officer witnesses showed up with notes that closely tracked the consultant's report and testified in conformity with the consultant's theories.

III. The Gray Area Between Preparing a Witness and Coaching a Witness

In considering how far lawyers may go in suggesting appropriate language for witness testimony, the D.C. Bar Legal Ethics Committee has noted that a lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. See D.C. Bar Formal Op. 234 citing D.C. Bar Formal Op. 79 (1979). However, a lawyer may properly suggest language as well as the substance of testimony and should do whatever is feasible to prepare his or her witnesses for examination. Id.

The classic book and movie, "Anatomy of a Murder," provides one example of walking the tightrope between preparation and coaching. At the outset of an accused murderer's first meeting with his attorney, the lawyer gives his client "The Lecture" to inform him that the state recognizes only four legal defenses to murder, and he describes each of the them, knowing that he already believed temporary insanity to be the best defense for his client. Based on "The Lecture," the client concluded that he should plead temporary insanity, one of the four possibilities and indeed the one that becomes the successful defense.

In the classic legal drama, "The Verdict," the defendant anesthesiologist who allegedly committed medical malpractice initially responded to his lawyers' practice questions in a cold, detached, and clinical manner. However, with preparation from the lawyers, at trial he displayed more warmth and emotion and used his attorneys' words to describe events.

A real-life example involves the inadvertent discovery of a memo written by lawyers for class claimants in an asbestos litigation. In 1997, during a deposition, a 20-page memo from the firm Baron & Budd to asbestos clients entitled "Preparing for Your Deposition" was turned over to defense counsel by a young associate. The memo provided detailed information about asbestos products, set forth a list of health symptoms that may enhance damages, anticipated potential questions, and advised the clients of what they should not or "never" say.

Other common examples in civil litigation cases include informing witnesses of contradictory information from documents and testimony, or statements from another party's Answers to Interrogatories to determine how to reconcile inconsistencies.

IV. Conclusion

"An attorney enjoys extensive leeway in preparing a

witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way." See generally John S. Applegate, Witness Preparation, 68 Tex. L.Rev. 277 (1989). As lawyers, we must prepare witnesses for deposition to properly represent our clients, but we must be careful that our preparation does not lead to the falsification, distortion or suppression of the substance of the witness's testimony. Although often a gray area, a key consideration is whether the preparation has merely changed the style or presentation of the witness's truthful testimony or whether it has changed the substance of the testimony.

Not just permissible.

As to clients, it's our ethical obligation.

ABA Rules of Professional Conduct

- 1.1 Competence
- 1.2 (d) Scope of Representation and Allocation of Authority Between Client and Lawyer
- 1.3 Diligence
- 1.6 (a) Confidentiality of Information

Model Rule of Professional Conduct 1.1 (Competence)

- "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, **thoroughness and preparation** reasonably necessary for the representation."

Model Rule of Professional Conduct 1.3 (Diligence)

- "**A lawyer shall act with reasonable diligence** and promptness in representing a client."

Model Rule of Professional Conduct 1.2 (d) (Scope of Representation and Allocation of Authority Between Client and Lawyer)

- "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the **legal consequences of any proposed course of conduct with a client** and may counsel or **assist a client to make a good faith effort to determine** the validity, scope, **meaning or application of the law.**"

Model Rule of Professional Conduct 1.6 (a) (Confidentiality of Information)

- "A lawyer **shall not reveal information relating to the representation of a client** unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)."

Witness Preparation - The Basics

- What to expect
- How to behave
- How to present answers

Witness Preparation

- What it means to be under oath / importance of telling truth
- Mannerisms and attitude
- Non case-specific "Rules"
  - Don't lie
  - Don't guess
  - Don't rush
  - Answer only the question
  - Etc.

Witness Preparation

And in general avoiding looking like this:

DOYLE RAIZNER LLP
TRIAL LAWYERS

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Considered to be ethically improper

ABA Rules of Professional Conduct

- 1.2(d) Scope of Representation and Allocation of Authority
- 1.4(a)(5) Communications
- 3.3(a)(3) Candor Toward the Tribunal
- 3.4(b) Fairness to Opposing Party and Counsel
- 8.4(c) Misconduct
- 5.3(c) Responsibilities Regarding Nonlawyer Assistance

Model Rule of Professional Conduct 1.2 (d) (Scope of Representation and Allocation of Authority Between Client and Lawyer)

- "**A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent**, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

Model Rule of Professional Conduct 3.3 (a)(3) (Candor Toward the Tribunal)

- "**A lawyer shall not knowingly offer evidence that the lawyer knows to be false.** If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

Model Rule of Professional Conduct 3.4 (b) (Fairness to Opposing Party and Counsel)

- "A lawyer **shall not falsify evidence**, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

Model Rule of Professional Conduct 1.4(a)(5) (Communications)

- "A lawyer shall consult with the client about any relevant limitation on the lawyer's conduct **when the lawyer knows that the client expects assistance not permitted** by the Rules of Professional Conduct or other law."

Model Rule of Professional Conduct 5.3 (c) (Responsibilities Regarding Nonlawyer Assistance)

- A lawyer shall be responsible for misconduct of a retained or employed nonlawyer if the lawyer orders or ratifies it.

Witness Coaching

- Encouraging perjury
- Encouraging misrepresentation of facts, data or statistics
- Encourage omitting truthful testimony

Witness Coaching

"[The lawyer's] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."

In re Eldridge, 82 N.Y. 161, 171 (1880)

Current (pending) example

- Pending in U.S. District Court for the District of Maryland
- Allegation: Health care and pharmaceutical companies conducted improper experiments on unknowing Latino patients
- Discovery showed patients were asked to sign untranslated affidavits they did not understand, which contained falsehoods
- Plaintiffs' experts signed reports containing data unsupported by lab tests
- Counsel's defense: Falsehoods were inadvertent, in part due to language barrier
- Motion for sanctions pending

Model Rule of Professional Conduct 8.4 (c) (Misconduct)

- "It is professional misconduct for a lawyer to engage in conduct involving **dishonesty, fraud, deceit or misrepresentation.**"

Consequences of Witness Coaching

- **EFFECT ON YOU**
  - Disciplinary action (including potential disbarment)
  - Sanctions by the Court
  - Criminal charges
- **EFFECT ON YOUR CLIENT**
  - Exclusion of witness and/or evidence
  - Possible mistrial (depending when coaching is discovered)
- **EFFECT ON THE WITNESS**
  - Perjury charges

Tough Calls

Tough Calls

- Explaining the consequences of testimony
- Educating corporate designees
- Explaining legal theories to experts

How far can you go?

Guidance from the Bench

- ***Ibarra v. Baker***, 338 F. App'x 457 (5th Cir., 2009)
  - "An attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way."
- ***Resolution Trust Corp. v. Bright***, 6 F.3d 336 (5th Cir. 1993).
  - Attorneys who tried to convince witness to sign an affidavit containing facts the attorneys believed were true were advocating for their client and did not commit attorney misconduct.

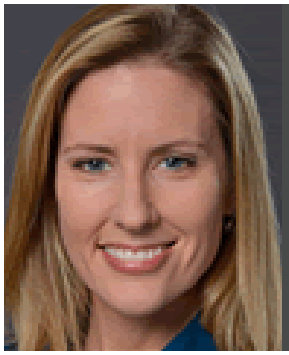
DOs

- Tell witness: "The most important rule is to tell the truth."
- Educate the witness on the relevant legal issues
- Discuss the witness's recollection or knowledge
- Review pertinent documents and evidence
- Rehearse potential questions
- Give advice on non-verbal issues

DO NOTs

- Instruct the witness to lie or make up testimony
- Instruct the witness to conceal facts
- Instruct the witness to misrepresent facts, data or statistics


Conclusion
GOODELL DEVRIES
K. Nichole Nesbitt



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Ms. Nesbitt is a partner with the firm. Her current practice concentrates on medical malpractice defense and complex commercial litigation, as well as cases that combine the two fields. She represents several health systems in Maryland and the District of Columbia, handling complicated malpractice cases as well as credentialing, employment, and compliance-related matters. Ms. Nesbitt also handles employment matters outside of the healthcare context for employers in this region and beyond. Ms. Nesbitt's experience as a litigator provides her with insight to counsel her employment clients on drafting guidelines, policies, and agreements, in addition to defending matters that have already proceeded to litigation.

For the entirety of her 18 years at the bar, Ms. Nesbitt has worked for Goodell DeVries and has moved through the ranks from summer associate to partner. Likewise, she has enjoyed positions of leadership in the Maryland Defense Counsel, the Defense Research Institute, and in non-legal organizations such as JDRF.

Practice Areas

- Commercial and Business Tort Litigation
- Employment Litigation
- Medical Malpractice
- Medical Institutions Law
- Professional Liability
- Hospitality Law

Representative Matters

- Wilds v. MedStar Washington Hospital Center (2018), Superior Court for the District of Columbia. Obtained defense verdict for hospital and its special police officers in connection with an excessive force claim brought by a visitor. The plaintiff claimed she was wrongfully taken to the ground and handcuffed following an altercation with two special police officers, resulting in injury to her shoulders. The jury returned a verdict in favor of the hospital and the officers after a four-day trial.
- Wood v. MedStar Harbor Hospital (2017), Circuit Court for Baltimore City. Obtained defense verdict for physician accused of injuring another physician in the course of performing surgery on a patient. The plaintiff, an orthopedic surgeon, accused the defendant, also an orthopedic surgeon, of negligently striking him in the elbow with a drill while both surgeons were performing a knee replacement. The plaintiff claimed the injury was career-ending. After an eight-day trial, the jury returned with a verdict in favor of Ms. Nesbitt's client.

Honors and Awards

- Best Lawyers in America- Commerical Litigation (2016, 2018)
- Chambers- Healthcare, Maryland (2017)
- Leading Women Award from The Daily Record (2011)
- Super Lawyers Rising Stars (2009-2014)

Education

- University of Maryland - (B.A., cum laude, 1996)
- University of Maryland, School of Law - (J.D., 1999); Order of the Coif

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